

Language rights in education: a study of Hong Kong's linguistic minorities

by

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Abstract

Although the majority of Hong Kong's population is Chinese-speaking, the population also includes linguistic minorities, with children enrolled in publicly-funded schools. For minority children to be able to study effectively in the Hong Kong education system, their ability to function effectively in Chinese is of key importance.

This study examines the problems faced by linguistic minority children in the public education system in Hong Kong and discusses to what extent the Hong Kong government is fulfilling its obligations under international law to provide an education that is accessible, adaptable and acceptable to all children without discrimination. A comparative approach is taken in which legislation and case law in other jurisdictions are compared with law and policy in Hong Kong.

Hong Kong's education policies and practices were found to discriminate against linguistic minority children in the public education system by failing to ensure that they can effectively access education, in contravention of international human rights standards.

Introduction

Hong Kong is known as a predominantly Chinese-speaking city, but a small percentage of its population consists of linguistic minorities. These include expatriates and foreign domestic workers who are in Hong Kong on short-term contracts, but also include long-term and permanent residents, the less-affluent of whom send their children to local publicly-funded schools.

For linguistic minority children to be able to study effectively in the local education system, the ability to function effectively in Chinese, the main language of education in Hong Kong, is of key importance. The right to education has been described as a “multiplier right”,¹ without which the fulfilment of other rights, such as freedom of speech and freedom of occupation cannot be realised, “Education is both a human right in itself and an indispensable means of realising other human rights.”² If minority children do not have adequate proficiency in Chinese, their educational achievements are likely to be limited and their ability to take part in Hong Kong society and exercise all their fundamental rights and freedoms is likely to be impaired.

This study will argue that Hong Kong’s education policies and practices discriminate against linguistic minority children in the public education system by failing to ensure that they can effectively access education, in contravention of the relevant international standards which bind Hong Kong. These international human rights treaties include: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of Racial Discrimination (ICERD) and the Convention on the Rights of the Child (CRC).

Chapter I presents background information about language use, education policy and linguistic minorities in Hong Kong while Chapter II will outline the problems faced by linguistic minority children in the public education system. In Chapter III a comparative approach is taken, in which Hong Kong’s obligations to make education

¹ Sandra Fredman, 2008. *Human Rights Transformed*. Oxford University Press: Oxford, p. 216.

² CESCR Committee, General Comment 13, 1999, Para.1.

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accessible without discrimination under international law are discussed. Reference is also made to non-binding Declarations which reflect evolving norms in international human rights standards, and General Comments by UN Committees which provide authoritative interpretations of Covenants and Conventions. The Hong Kong judiciary has traditionally been receptive to international and comparative jurisprudence in the area of human rights, and courts often refer to case law from other domestic jurisdictions and to the decisions of the European Court of Human Rights.³ Legislation and case law from other jurisdictions is examined in Chapter III, and comparisons are made with law and policy in Hong Kong.

Chapter IV also takes a comparative approach, in which Hong Kong's obligations to make education adaptable and acceptable to linguistic minorities are discussed with reference to international human rights standards as well as legislation and case law elsewhere. In Chapter V, the Hong Kong government's fulfilment of its obligations to take positive action to promote racial equality under international law is compared with provisions in other jurisdictions.

³ Johannes Chan and C L Lim, 2009. *Basic Principles*. In J. Chan and CL Lim (eds) Hong Kong Constitutional Law (Thompson, forthcoming), p. 4.

Methodology

Current academic literature on equality, human rights and non-discrimination relevant to language rights and education was reviewed for this study. Empirical studies of the learning experiences of children from linguistic minorities in Hong Kong were also reviewed, as well as news reporting from the Hong Kong media. This study also examined reports from the Hong Kong SAR government, shadow reports by NGOs, United Nations Treaty Bodies, and Concluding Observations issued by those Treaty Bodies. Briefings, reports and other papers prepared by the Hong Kong SAR government for the Legislative Council are also referred to, as well as data from the 2006 By-Census and information from the website of the Education Bureau (EDB) of the HKSAR government.

Eight interviews were conducted for this study, between February and May 2009.⁴ Three of the interviews were conducted with linguistic minority parents of children in the public education system. One parent was referred by Unison Hong Kong,⁵ while the others were the author's personal contacts. All the parents were fluent English speakers and one was also fluent in Cantonese. The parents were from different communities: Nepali, Filipino and Pakistani. One parent was born in Hong Kong, one is a new arrival and one has lived in Hong Kong for about 15 years.

Two teachers were interviewed, both of whom held senior positions in schools admitting a significant number of minority students. Also interviewed was Dr Linda Tsung Tie-hua, an Assistant Professor in the Faculty of Education, the University of Hong Kong.⁶ Interviews were also conducted with Fermi Wong Wai-fun, social worker and Campaigns Director of Unison Hong Kong, and with a Senior Education Officer from the Education Bureau (EDB).

⁴ Notes were taken during the interview and written up immediately afterwards. Interview questions and summaries of the interviews can be found in the appendices.

⁵ *Unison Hong Kong*, founded in 2001, is an NGO providing social services and advocacy work on behalf of Hong Kong's ethnic minority residents.

⁶ Dr Tsung is directing a government-funded project to provide language support for minority students in secondary schools.

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The number of interviewees is small, and their views may not be representative, but the issues raised and points of view expressed in interviews often show a great deal of consistency, both with other interviewees and with media, NGO and government statements and reports on the education of linguistic minorities.

Chapter I

Language use in Hong Kong

Most Hong Kong people are speakers of Cantonese.⁷ However, knowledge of English and Putonghua is common, and three sociolinguistic surveys of the majority Chinese population found that the numbers claiming to understand and speak both English and Putonghua has been increasing since 1983, with the majority of respondents claiming to be able to understand and speak both languages to some extent in 2003.⁸

English and Cantonese/standard written Chinese were used in different domains in the colonial period, with English being traditionally the sole language of government and law, and in “high” social functions, in a *diglossic* language environment.⁹ Although English and Chinese had different domains of use, the two languages were accorded equal status in the Official Languages Ordinance of 1974,¹⁰ though by the promulgation of the Basic Law of the HKSAR in 1990, English seems to have been downgraded in comparison with Chinese, as an alternative official language only.¹¹ However English remains a prestige language in Hong Kong and local parents are eager to send their children to school which use English as the medium of instruction.¹²

⁷ The most recent population census identifies 95% of Hong Kong’s population as ethnic Chinese, of whom 91% are speakers of Cantonese as their “usual” language. Hong Kong SAR Government, Census and Statistics Department “2006 By-Census. Summary of results”, p.7.

⁸ John Bacon-Shone & Kingsley Bolton (2008) *Bilingualism and Multilingualism in the HKSAR: Language Surveys and Hong Kong’s changing linguistic profile*. In Kingsley Bolton & Han Yang (eds) *Language and Society in Hong Kong*. Open University of Hong Kong Press: Hong Kong, p. 36-37.

⁹ *Diglossia* refers to a stable language situation, in which two functionally differentiated languages or two varieties of a language co-exist. These two languages are differentiated into *high* variety and *low* variety. The high variety is more likely to be used in formal situations, such as in the legislature and in formal education, while the low variety is used in informal situations, such as the local marketplace, folk literature and informal instruction. See C. Ferguson, 1959. *Diglossia*. *Word*, 15 (3), 325-40, J Gumperz, 1982. *Discourse Strategies*. Cambridge: Cambridge University Press.

¹⁰ *Official Languages Ordinance* 1974 Section 3.

¹¹ *Basic Law of the Hong Kong Special Administrative Region* Article 9, “In addition to the Chinese language, the English language may be used as an official language”.

¹² See Clare Wright, 2008. *Diglossia and Multilingualism – Issues in Language Contact and Language Shift in the case of Hong Kong pre-and post-1997*. In the Annual Review of Education, Communication and Language, Vol.5, p. 263-279, p.271; Pak Sang Lai & Michael Byram, 2003. *The Politics of Bilingualism: A reproduction analysis of the policy of mother tongue education in Hong Kong after 1997* in *Compare*, Vol.33, p. 315-334, p.322.

In this study, *Chinese* will be used to refer to *spoken Cantonese*, in line with common Hong Kong usage, and to *Standard Written Chinese*, the standard form of writing the language used by speakers of different Chinese dialects.

Hong Kong's linguistic minorities

According to the Hong Kong government, 5.0% of the population consists of ethnic minorities,¹³ and this number is increasing. Patterns of migration to Hong Kong changed in the early 1990's, with increased migration to Hong Kong from South and South-East Asia. The rise in the number of Nepalese residents was particularly striking: from 340 in 1990 to 15,950 by 2006.¹⁴ Only 11.1% of ethnic minorities were born in Hong Kong and only 44.1% have lived in Hong Kong for seven years (the duration needed to become eligible to apply for permanent residency).¹⁵

Ethnic minorities and linguistic minorities are not necessarily synonymous. Overseas-born ethnic Chinese and returnees may not speak Chinese, or be literate in Chinese. But in Hong Kong, it seems that the majority of those who self-identified as ethnic minorities in the 2006 By-Census are also linguistic minorities. In the 2006 By-Census, respondents were asked to report their “usual” language, plus any other language that they speak. The term “usual language” was defined as the language that they use at home.¹⁶ Generally, those who self-identified as ethnic minorities also gave their “usual” language as a language other than Chinese or English.¹⁷ The 2006 By-Census also asked

¹³ The Second Report of the Hong Kong SAR to the UN CERD Committee, 25 June 2008, quoting data from the 2006 Population By-Census. According to the By-Census, ethnic minorities include: Filipinos (32.9%), Indonesians (25.7%), White 10.6%), Indians (6.0%), Mixed (5.3%), Nepalese (4.7%), Japanese (3.9%), Thais (3.5%), Pakistanis (3.2%), Other Asians (2.3%), Koreans (1.4%) and Others (0.6%). Hong Kong SAR Government, Census and Statistics Department *2006 By-Census. Thematic Report: Ethnic Minorities*, p.5. Available at: http://www.byensus2006.gov.hk/FileManager/EN/Content_962/06bc_em.pdf

¹⁴ Hong Kong SAR Government, Census and Statistics Department *2006 By-Census. Thematic Report: Ethnic Minorities*, p. 23, see n.13.

¹⁵ See n.13 above, p.34.

¹⁶ See n.13, above, p.126.

¹⁷ Collecting information about language use on censuses can be problematic. Respondents in the 2006 By-Census were asked to name the language they most commonly use, but this led to Filipino and Indonesian domestic workers reporting the language that they have to use every day in their employers' homes, rather than their identity language. An alternative way of collecting information about language use is to ask

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respondents about their knowledge of the “official” languages of English and Chinese, revealing that more ethnic minorities claimed to know English than Cantonese.¹⁸ These figures would be more useful if the question had differentiated between the respondents’ spoken and written proficiency in the languages and it is difficult to ascertain from the 2006 By-Census data whether the respondents’ knowledge of these languages is adequate to be educated via the medium of the language

The definition of which groups can be classified as a minority under international law has been the subject of debate. The Human Rights Committee has established a definition of minorities which, rather than resting on grounds such as ethnic, religious and linguistic characteristics, as well as self-identification as minorities, rests on numerical grounds: minorities are defined as numerically non-dominant.¹⁹

The adjective “ethnic” is also controversial. The HKSAR Government defines ethnic minorities as “persons of non-Chinese ethnicity,”²⁰ implying that those with a different skin colour and national origin from the Chinese majority possess the quality of “ethnicity”, unlike Chinese people. This terminology seems to stem from the polarisation of opposites into “self” and “other”,²¹ in which the Chinese majority is the “non-ethnic” norm, while non-Chinese are the “ethnic” other. The term “linguistic minority” is less problematic, merely describing a person whose mother-tongue is a language other than Chinese, avoiding the imprecision and value judgments implicit in the term “ethnic”. But many linguistic minority people in Hong Kong are also “ethnic” minorities, and the campaigning group HARD has documented numerous incidences of intersectional

respondents to identify their “mother tongue”. But an individual’s “mother tongue” may not be static, and may not be the same as the language spoken by their parents. Language is a fluctuating marker of identity. For more information about this topic, see Dominique Arel, 2002. *Language Categories in Censuses*. In David Kertzer & Dominique Arel (eds). *Census and Identity. The Politics of Race, Ethnicity and Language in National Censuses*. Cambridge University Press: Cambridge, p.98-102.

¹⁸ For example, 72.4% of Nepalese and 60.2% of Pakistanis claimed to know English, while only 34.1% of Nepalese and 51% of Pakistanis claimed to know Cantonese. Hong Kong SAR Government, Census and Statistics Department *See n. 13 above*, p.39.

¹⁹ Human Rights Committee, *General Comments 15 & 23*.

²⁰ *See n. 13 above*, p.118.

²¹ Sandra Fredman, 2001. *Combating Racism with Human Rights*. In S. Fredman (ed) *Discrimination and Human Rights: the Case of Racism*. Oxford University Press: Oxford, p. 11.

discrimination,²² against members of minority communities on grounds of both race and language.²³

In this study, the term “linguistic minority” will be used to describe people whose mother-tongue is not Chinese but it must be borne in mind that most of the students in the public education system who are linguistic minorities also differ from the Chinese majority in appearance, culture and national origin. The Hong Kong government uses the abbreviated form *NCS* (non-Chinese speaking) to describe students whose first language is not Chinese. However this term will not be used in this study as it is inaccurate, as many of the students do speak some Chinese, as well as discriminatory, implying a deficit and deviation from the norm rather than focusing on the positive aspect of the students’ bilingualism.²⁴

Language policy in the Hong Kong education system

In Hong Kong, all children are entitled to nine years free and compulsory education at primary and junior secondary school level in public sector schools.²⁵ Senior secondary education is not compulsory but is also provided free through public sector schools, as is an alternative system run by the Vocational Training Council.²⁶

Students have two different ways of applying for a primary or secondary school place. They can apply directly to the school of their choice during a “discretionary places

²² *Discrimination based on a combination of grounds*, Briefing Paper on Multiple and Intersectional Discrimination. Equal Opportunities Commission, UK. Available at: <http://83.137.212.42/sitearchive/eoc/Docs/MultipleDiscrimination.rtf?page=20463>. Accessed on March 28, 2009.

²³ *HARD (Hong Kong Against Racial Discrimination) Submission to the United Nations Committee on the Elimination of Racial Discrimination Regarding the Report of the Hong Kong Special Administrative Region of the People’s Republic of China*, July 2001. In course notes supplied by Vandana Rajwani, International and Regional Protection, LL.M HR, Faculty of Law, the University of Hong Kong.

²⁴ In linguistics and language education, the term “bilingual” is commonly used for people who use more than one language, whatever their proficiency. See the *Longman Dictionary of Language Teaching and Applied Linguistics* for a definition of *bilingual*.

²⁵ In the 2008/09 school year, there are 601 primary schools, 527 secondary day schools and 61 special schools.

²⁶ Information from the website of the Education Bureau. Available at: <http://www.edb.gov.hk/index.aspx?langno=1&nodeID=396>. Accessed on Feb 1 2009.

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admission” phase. Schools can reserve places under this system, to be filled at the school’s discretion. Schools may decide upon their own admission criteria, which have to be fair, educationally sound and available to the public.²⁷ Schools have no official obligation to disclose why a student’s application has been rejected though they are obliged to adhere to principles of non-discrimination in the allocation of places.²⁸ Students who do not gain a school place through the discretionary places allocation system, or who choose not to use this method, then have to apply through the central allocation system.²⁹

Language education in Hong Kong schools aims to develop biliterate competency in English and Standard Written Chinese and trilingual competency in spoken Cantonese, Putonghua and English.³⁰ Most primary schools in Hong Kong have always used spoken Cantonese and written Standard Chinese as their medium of instruction. Until 1998, the choice of medium of instruction for secondary education was left to individual schools the majority of which used English. Educationalists had advocated the use of Chinese as a medium of instruction for many years,³¹ and in 1998, the HKSAR government instituted a change in policy to mother-tongue instruction, in response to international and local research showing that most students learned more effectively via mother tongue instruction.³²

This change in policy required 307 government and aided secondary schools in Hong Kong to change from English medium of instruction (EMI) to Chinese medium of instruction (CMI). Only 114 secondary schools were allowed to continue teaching in English, after meeting certain criteria, one of which is that 85% of their student intake

²⁷ Education Bureau, *Secondary School Places Allocation System 2008/2010 (For Admission to Secondary 1 in September 2010). Frequently Asked Questions: Q3*. Available at:

[http://www.edb.gov.hk/FileManager/EN/Content_1579/faq_sspa0709\(090901\)eng.pdf](http://www.edb.gov.hk/FileManager/EN/Content_1579/faq_sspa0709(090901)eng.pdf)

²⁸ The Basic Law of the Hong Kong SAR, Article 25; The Racial Discrimination Ordinance, Articles 3& 4. The Government of the Hong Kong SAR Gazette: Ord. 29 of 2008.

²⁹ Amy Tsui, 2004. *Medium of Instruction in Hong Kong: one country, two systems, whose language?* See n. 8 above, p.436.

³⁰ Information from the website of the Education Bureau, available on <http://www.edb.gov.hk/index.aspx?nodeID=1901&langno=1> Accessed on Feb 1 2009.

³¹ See n.29.

³² See n. 30.

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must have scored in the top 40-50% of the internal primary school assessments in English, Chinese, Mathematics and General Studies.³³

In the primary school assessments, all subjects except English are examined in Chinese. The final grade for the primary assessments is arrived at by averaging the results for the four subjects. This means that primary students' ability *in Chinese* is a very important factor in determining their banding in the school assessments. Students whose Chinese is inadequate, however good their English, are likely to get a low overall result.

The results of primary school assessments can strongly influence the type of secondary school that primary students can progress to. EMI secondary schools need to ensure that most of their students have a high overall score in the primary school assessments, to ensure that they can keep their EMI status. The possibility that students' suitability to proceed to an EMI secondary school should be assessed on their ability in English alone has been explicitly rejected by the Hong Kong government.³⁴ Students scoring the highest totals will have the widest choice of places under the Secondary School Place Allocation System (SPAS), whether they choose to apply for a discretionary place or apply via the central allocation system.

The medium of instruction policy has recently been modified to allow CMI schools to teach some classes in English, so long as 85% of students in that class are in the top 40-50% of internal school assessments. Apart from that requirement, decisions on if and how to introduce EMI classes are to be left up to individual schools.³⁵ The curricula of Hong Kong schools have been criticised as being too difficult for the

³³ See n. 29 above, p. 434.

³⁴ "...an attempt to assess EMI-capability solely on the basis of English proficiency would very likely lead to over-emphasis on the subject of English Language by our primary schools and by parents, hence resulting in a lopsided development of the primary school curriculum." *Education Commission Report on Review of Medium of Instruction and Secondary School Places Allocation*, 2000, p.28-29. Available at: http://www.e-c.edu.hk/reform/resources/MOI&SSPA_report_Eng.pdf. Accessed on February 26, 2009.

³⁵ Speech by Michael M Y Suen, Secretary for Education, December 8, 2008 at the Seminar on Fine-tuning the Medium of Instruction for Secondary Schools in Hong Kong. Available at: <http://www.edb.gov.hk/index.aspx?nodeID=133&langno=1&UID=103246>. Accessed February 1, 2009.

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majority of local students,³⁶ fostering an over-competitive atmosphere.³⁷ Concerns have also been raised at the high level of ability segregation and the sense of elitism attached to an EMI education in the school system.³⁸

³⁶ Website of the Professional Teachers Union (PTU), *Fights for Educational Reforms*. Available at: <http://www.hkptu.org/engptu/history/mohtong.htm#CurRef>. Accessed on February 26, 2009.

³⁷ *United Nations Committee on the Rights of the Child, Concluding Observations: China (including Hong Kong and Macau SARs) Fortieth Session*, 2005, U.N. Doc CRC/C/CHN/CO/2, para. 76.

³⁸ *Evaluation study on the implementation of the medium of instruction guidance for secondary schools. Final Report (1999-2002)*. Hong Kong Institute of Educational Research: The Chinese University of Hong Kong, 2004, p.xvi.

Chapter II

Problems faced by linguistic minority students in the Hong Kong public education system

The total number of students from linguistic minorities in the primary and secondary public sector in 2007-8 was 8,550.³⁹ Of this number, 5583 are in primary school, with only around 3272 in secondary schools. Although educational opinion favours mother tongue medium of instruction, this does not appear practical for linguistic minorities in Hong Kong as they are geographically scattered, and even schools which take many minority students do not contain a concentration of one group.⁴⁰ A single language group may also include many different levels of oral and written proficiency in the mother tongue. This chapter will examine the language-related difficulties that minority students face in primary, secondary and post-secondary education, and will discuss the factors underlying these problems.

Access to primary education

An earlier study reported that minority students had problems in finding information about schools, and then in finding a school to accept them. Often they could only find a place in one of the few EMI schools traditionally accepting minority students.⁴¹ However in 2004 the EDB began allocating linguistic minority students to mainstream CMI primary schools⁴², and began publishing more information in different

³⁹ *Progress of Support Measures for Non-Chinese Speaking Students including Ethnic Minority Students*, Annex 2, 12 June 2008. Paper presented to the Legislative Council Panel on Education, LC Paper No. CB(2)2164/07-08(02).

⁴⁰ For example, Sir Ellis Kadoorie Secondary School, which has a large linguistic minority intake, gives a breakdown of the students by national origin: 14% of students are Pakistani, 6% Indian, 15% Filipino and 11% Nepalese. Website of the Sir Ellis Kadoorie Secondary School. Available at: <http://www.seksswk.edu.hk/ourstudent/ourstudent.htm>. Accessed on February 16, 2009

⁴¹ Fermi Wong, reported in Kelley Loper, 2004, *Race and Equality: A study of ethnic minorities in Hong Kong's education system*. Centre for Comparative and Public Law, University of Hong Kong, p.4.

⁴² Kit-tau Hau, 2008. *Tracking the Adaptation and Development of Non-Chinese Speaking Children in Mainstream Schools*. Faculty of Education, the Chinese University of Hong Kong. Available at: http://www.edb.gov.hk/FileManager/EN/Content_7065/exe_summary%20eng.pdf. Accessed on March 22, 2009.

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languages about schools,⁴³ though one newly-arrived parent still reported difficulties in finding detailed information.⁴⁴

Access to mainstream CMI primary schools

The position of the Hong Kong government is that “all children, regardless of their race, are eligible to study in a public sector school”,⁴⁵ and minority children have the same choice of schools as other students in Hong Kong.⁴⁶ The government appears to believe that it is desirable for linguistic minorities to enter mainstream CMI primary schools.⁴⁷ An increasing number of minority parents are now sending their children to such schools, particularly if they move into public housing estates far from the schools which traditionally take minority students.⁴⁸

Reportedly, if such students enter a mainstream CMI primary school, with only a few other minority students, they develop better listening and speaking skills, and integrate better with local Chinese children. However their literacy in Chinese tends to remain at a low level, as they are unable to keep up with local Chinese classmates, with little or no language support in school.⁴⁹ The son of one interviewee has been doing badly in Chinese in his mainstream CMI school and is attending a special tutorial session, but that tutorial is aimed at all students who are performing badly in their studies, and does not target the special difficulties faced by a non-native speaker of Chinese.⁵⁰

⁴³ The Education Bureau maintains a web-page on its site, in English and Chinese, which contains information about Hong Kong schools. The booklet, *Your Guide to Education in Hong Kong*, is available in English, Thai, Hindi, Nepali, Tagalog and Urdu. This webpage can be accessed through the Education Bureau’s main site at: <http://www.edb.gov.hk>

⁴⁴ Interview with Milabel Cristobal. *See* appendices.

⁴⁵ *Tenth to Thirteenth Reports of the People’s Republic of China under the International Convention on the Elimination of All Forms of Racial Discrimination - Hong Kong*. June 2008, para.176. Available at: http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Racial_Discrimination/2ndReport_en.pdf. Accessed on February 26, 2009.

⁴⁶ Interview with a Senior Education Officer (name withheld on request) from the Education Bureau, March 2009. *See* appendices.

⁴⁷ “...one should not assume that (CMI) schools are not appropriate for non-Chinese speaking students, particularly those who have started to learn Chinese at an early age.” *See* n. 45 above, para.175.

⁴⁸ Information gathered in interviews with parents Bibi Faimeena and Vikram Gurung (*see* appendices) and in an interview with a Senior Education Officer, March 2009.

⁴⁹ Interviews with Fermi Wong and Dr Linda Tsung. *See* appendices.

⁵⁰ Interview with a parent, Bibi Faimeena, *See* appendices.

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Minority students in mainstream CMI schools tend to have a lower level of English than those attending EMI primary schools, which can make it difficult for them to enter an EMI secondary school. Yet their Chinese is unlikely to be sufficient to enable them to learn in a CMI secondary school.⁵¹ One interviewee believes that if these students start their education in a CMI kindergarten and receive adequate language support, they will be able to study effectively in Chinese, but concedes that adequate support is usually not available.⁵² An expert describing the level of Chinese of linguistic minorities has estimated there to be a four-year learning gap between the Chinese language proficiency of minority students and native speakers.⁵³

Minority students often have no-one at home who can help them with Chinese homework, and many parents cannot afford to pay for private tutors. One interviewee stated that she would not have “dared” to enroll her children in a mainstream CMI primary school if she did not have a family member able to tutor her sons in Chinese, as her children do not receive any language support at school.⁵⁴

Designated primary schools

An alternative for parents is to send their children to one of the 16 primary schools “designated” to receive extra funding to provide language support for linguistic minorities. The number of primary schools actively seeking minority students has increased over the past few years as changing demographics in Hong Kong have seen many schools suffering from falling enrolments and facing closure. Reportedly, these schools are ones that are less well-regarded by local Chinese parents, and have problems attracting students.⁵⁵ The language support funds now being allocated by the EDB to schools taking more linguistic minority students may also be attractive,⁵⁶ although in

⁵¹ See n. 49 above.

⁵² Interview with Fermi Wong, *see* appendices.

⁵³ Professor Tse Shek-kam, Associate Dean of the University of Hong Kong's Faculty of Education, quoted in Mimi Lau, February 28, 2009, *Language Legacy*. South China Morning Post.

⁵⁴ See n. 50 above.

⁵⁵ See n.52 above.

⁵⁶ In 2008-9, language support grants from the EDB ranged from HK\$300,000 to HK\$600,000 per annum per designated school. More details of the extra funds available to schools can be found on the website of

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many cases they are not sufficient to even employ one more teacher.⁵⁷ There are only 16 designated schools out of the 601 primary schools in Hong Kong,⁵⁸ and most are CMI.

The number of minority students attending designated primary schools has been rising. In 2006-7, there were 2,445 such students in the 16 designated primary schools, while in 2008-9 there were 3,959.⁵⁹ Either the total number of minority students is increasing, or these schools are increasing in popularity, perhaps as a result of students who began their studies in mainstream primary schools dropping out and moving to schools with more support.

Designated schools are free to adopt whatever model of language support they prefer. One CMI primary school removes P.2, 3 and 4 students from mainstream Chinese classes and divides them into classes according to Chinese proficiency, tailoring the teaching to their level. The school also provides extra after-school classes in Chinese for linguistic minority students, and a local NGO organises volunteers to provide homework support. However the students are in mainstream classes for other subjects, which, apart from English, are taught in Chinese.⁶⁰

A senior teacher from this school reported that all the minority students have problems with Chinese literacy, though those in P1 who have been to CMI kindergartens have fewer problems, and this negatively affects their performance in all subjects, apart from English in which they often do well.⁶¹ All students have to take the same assessments at the end of their primary education, so minority children in P.5 and P.6

the Education Bureau at: <http://www.edb.gov.hk/index.aspx?langno=1&nodeID=4734>. Accessed on February 26, 2009.

⁵⁷ Salaries vary, but an “average” secondary school teacher’s salary would be HK\$300,000 per annum at the lower salary scales for a Graduate Master/Mistress.

⁵⁸ Education Bureau website, *Useful school lists*. Available at:

http://www.edb.gov.hk/FileManager/EN/Content_3601/contact%20&%20address%20for%20linguistic%20minority%20schools_e.pdf Accessed on February 26, 2009.

⁵⁹ See n.46 above.

⁶⁰ This school is a designated government CMI school in Yaumatei, with 69 linguistic minority students out of a total enrollment of 480. The school has been enrolling minority students since 2004. Interview with a Senior Teacher at a designated CMI primary school (name of school and teacher withheld on request). See appendices.

⁶¹ See n. 60 above.

study Chinese and all other subjects, in the mainstream classes, where there is no adaptation of materials to their level. All students of the same age have to study the same curriculum at this stage, whatever their level of Chinese. One parent with a child at this school recounted that her daughter was struggling, and, in common with the other minority students in her class, performed badly in tests.⁶² Linguistic minority students do not generally do well in the primary school assessments, mainly due to their poor Chinese literacy.⁶³

Access to secondary education

The low average score of most linguistic minority students in the primary assessments makes it difficult for them to enter mainstream EMI schools, “elite” institutions which are difficult to enter for any student in Hong Kong. The change in policy on medium of instruction in secondary schools has been described as having a “disproportionate” impact on linguistic minorities, as it reduced the number of EMI schools available to minority students.⁶⁴ Most such students’ Chinese proficiency is not adequate to study in a CMI secondary school, even if they have been to a CMI primary school.⁶⁵

The EDB’s list of designated secondary schools which commonly take minority students is very short.⁶⁶ Some of these schools are CMI,⁶⁷ but the EDB allows the medium of instruction policy to be interpreted flexibly in the case of CMI schools taking large numbers of minority students, where the school feels that the best interests of the

⁶² See n.44 above.

⁶³ See n. 60 above.

⁶⁴ See n. 41, above, p.4.

⁶⁵ See n. 60 above

⁶⁶ There are six schools in total: Government and aided schools: Sir Ellis Kadoorie in Tai Kok Tsui (government) (EMI); Islamic Kasim Tuet Memorial College in Chai Wan (uses either CMI or EMI by group); and Caritas Tuen Mun Marden Foundation Secondary School in Tuen Mun (aided) (uses either CMI or EMI by group). DSS schools: Delia (Hip Wo) in Kwun Tong and Delia Broadway in Mei Foo, (both EMI) and Pak Kau College, Yuen Long (CMI).

⁶⁷ Pak Kau College, Caritas Tuen Mun Marden Foundation Secondary School and the Islamic Tuet Kasim Memorial College.

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students would be served by teaching in English,⁶⁸ and designated CMI schools generally open a separate EMI section for minority students.⁶⁹ The local Chinese students at these schools have not gained high scores in the primary school assessments and are not eligible to study in English under the medium of instruction policy. The lack of designated schools means that many minority students commute long distances for their secondary education.⁷⁰ EMI classes in designated schools often include a wide range of ability levels, as students enter these schools because of their inability to study in Chinese, rather than being streamed by ability, as the local Chinese students are. Teachers find it hard to handle different ability levels as they are not trained to do so, and classes are large, making it difficult to provide individual attention to meet different needs.⁷¹

Although the vast majority of linguistic minority students in secondary schools are studying in English, proficiency in Chinese is still essential for most jobs in Hong Kong.⁷² Previous studies have indicated that students realise the importance of learning Chinese and are eager to learn, but are likely to need considerable language support.⁷³ A senior teacher in a designated secondary school estimated his minority students to have no more than the equivalent Chinese level of a P.2 native Chinese-speaking student on average. Even the few minority students in the CMI stream in this school, who had been in CMI education from kindergarten, had weak Chinese skills in comparison with the local Chinese students.⁷⁴

⁶⁸ See n.46 above.

⁶⁹ The Islamic Tuet Kasim Memorial College; Caritas Tuen Mun Marden Foundation Secondary School.

⁷⁰ Linguistic minority students comprise over 50% of those studying at Sir Ellis Kadoorie Secondary School in Tai Kok Tsui and 24% of its students commute from the New Territories and 18% commute from Hong Kong Island. Website of the Sir Ellis Kadoorie Secondary School. Available at:

<http://www.seksswk.edu.hk/ourstudent/ourstudent.htm>. Accessed on February 16, 2009. The Islamic school in Chai Wan takes ethnic minority students from as far away as Yuen Long, for whom the school has arranged a bus to bring them to and from school, involving at least 3 hours of commuting every day for the students. Interview with a Senior Teacher from the Islamic Tuet Kasim Memorial College (see appendices).

⁷¹ See n.52 above.

⁷² Almost every job in the Hong Kong Government, the Airport Authority and the Hospital Authority requires a pass in Chinese language at HKCEE, and even those which do not require a qualification generally assume fluency in spoken Chinese. Information notes, *Requirement for Chinese proficiency in seeking education and employment*, Legislative Council Secretariat, Research and Library Services Division, IN12/06-07.

⁷³ Hok-bun Ku, Kam-wah Chan & Karamjit Kaur Sandhu, 2005. *A research report on the Education of South Asian Minorities in Hong Kong*. Hong Kong Polytechnic University & Unison Hong Kong.

⁷⁴ A senior teacher in the Islamic Tuet Kasim Memorial College.

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As well as containing different ability levels, Chinese classes for minority students in secondary schools also include students with very different levels of Chinese. This is partly due to the after-effects of the pre-2004 situation, when many minority parents, unable to find a school willing to enroll their children, sent them back to their country of origin for primary education.⁷⁵ Some of these students have now returned to Hong Kong and despite being permanent residents, share many of the characteristics of new arrivals and know no Chinese. One educator estimated that a class of 35-40 students may contain five levels or more in Chinese, meaning that the same materials and methods cannot be used for the whole class.⁷⁶

Like primary schools, designated secondary schools receive language support funds from the EDB.⁷⁷ An additional source of language support is the Chinese Language Learning Support Project, commissioned by the EDB and implemented by the Faculty of Education, Hong Kong University. This project provides after-school tutorial support for secondary students at the eight designated secondary schools and prepares students for the GCSE Chinese examination. The project is separately funded and operates separately from the mainstream curriculum, in line with the EDB's policies.⁷⁸ This policy of separation is seen as counter-productive by both the project director and a senior teacher at one of the designated secondary schools, as the teachers sent by Hong Kong University have had some training in teaching Chinese as a second language, while the school teachers are familiar with the students and their needs.⁷⁹ Both educators feel that combining their resources would be more effective than operating separately.

⁷⁵ A senior teacher in the Islamic Tuet Kasim Memorial College reported that many of the students had attended primary school in Pakistan, and the same pattern amongst the Nepali community was reported by Geeta, a worker at the Chomolangma Multi-Cultural Community Centre in Yuen Long, an organization which provides welfare services to the Nepali and Pakistani communities of Yuen Long. *See* appendices.

⁷⁶ Interview with Dr Linda Tsung, *see* appendices.

⁷⁷ This support ranged from HK\$300,000 to HK\$600,000 per annum per school in 2008-9 and in total, "designated" secondary schools received HK\$3,500,000.

⁷⁸ *See* n.76 above.

⁷⁹ *See* n.74 & n 76 above.

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The performance of linguistic minority students in Hong Kong public examinations does not match that of local Chinese students. In 2008, 316 minority students studying in public sector and DSS schools took the Hong Kong Certificate of Education Examination (HKCEE) and among these, 124 met the minimum requirements for S.6 admission.⁸⁰ This represents 39.2% of the total taking the examination, whereas for local students, 51.8% can meet the criteria for admission to S6 in the HKCEE.⁸¹ The Education Bureau has also revealed that among the 24 minority students studying in S7 of public sector and DSS schools who sat for the Hong Kong Advanced Level Examination (HKALE) in 2008, 10 received offers of tertiary places under the JUPAS.⁸² This is considerably lower than the figures for local students, 48.4% of whom receive offers under the JUPAS.⁸³ There may be many reasons for their poor performance in public examinations: motivation to study, parental attitudes and support and length of time in Hong Kong are all important factors, but it is highly likely that poor performance in Chinese is a major factor.

Post-secondary education

Tertiary education

An earlier study found that some local universities set Chinese language requirements which almost no linguistic minority students could comply with, constituting a barrier to tertiary education.⁸⁴ The EDB has clarified that from 2008, all UGC-funded institutions, whether they use EMI or CMI, will adopt a common approach to the acceptance of alternative Chinese-language qualifications for local minority students. Those applying through JUPAS, who have followed a local curriculum, have to show either that they have been educated in Hong Kong for less than 6 years, or that they

⁸⁰ Education for Non-Chinese Speaking Students LC Paper No. CB(2)579/08-09(06). Education Bureau Paper submitted to the Legislative Council Panel on Education, 12 January 2009, para. 18. Available at: <http://www.legco.gov.hk/yr08-09/english/panels/ed/papers/ed0112cb2-579-6-e.pdf>. Accessed February 22, 2009.

⁸¹ Hong Kong Unison's submission for China's Universal Periodic Review, 2008. Available on the website of Hong Kong Unison: www.unison.org.hk. Accessed on February 21, 2009.

⁸² Education Bureau Paper submitted to the Legislative Council Panel on Education, 12 January 2009, para. 19. See n. 80 above.

⁸³ See n.81 above.

⁸⁴ See n. 41 above, p.7-8.

have followed an adapted and simplified Chinese language curriculum to be eligible to apply for non-local Chinese qualifications to be accepted. Otherwise they will be required to show the same Chinese qualifications as local Chinese students.⁸⁵ At present, very few linguistic minority students receive offers for a tertiary place.⁸⁶ It seems likely that poor performance in primary school assessments and the HKCEE excludes most minority students from the possibility of entering tertiary education at an earlier stage in their school life.

Vocational education

Data from the 2006 By-Census shows that non-Chinese Asians tend to cluster in manual occupations and shop work (apart from Koreans and Japanese).⁸⁷ Reportedly, many minority students have low expectations of their prospects in life, and lack self-confidence and self-esteem.⁸⁸ Opportunities for vocational training for these students to improve their prospects are indeed very limited. Only five out of 100 courses offered by the Institute of Vocational Education (IVE) use English, and training courses conducted by the Vocational Training Council and the Employee Retraining Board are nearly all in Chinese.⁸⁹ Project *Yi-jin*, a programme designed to help those who have not done well in the school system, is only available in Chinese.⁹⁰

Few opportunities exist to learn Chinese for those who have left full-time education. There are many non-degree language courses available to local Chinese people who want to learn English but those who wish to learn Chinese are limited to a few basic

⁸⁵ Acceptance of alternative qualification(s) in Chinese Language for admission to undergraduate programmes of the University Grants Committee (UGC)-funded Institutions. Available on the website of the Education Bureau:

[http://www.edb.gov.hk/FileManager/EN/Content_6536/web%20notice%20on%20further%20flexibility%20\(r\).pdf](http://www.edb.gov.hk/FileManager/EN/Content_6536/web%20notice%20on%20further%20flexibility%20(r).pdf). Accessed on February 15, 2009.

⁸⁶ See n. 80 above.

⁸⁷ See n. 13 above, p.65.

⁸⁸ A senior teacher from the Islamic Tuet Kasim Memorial College.

⁸⁹ See n. 81 above.

⁹⁰ Project *Yi Jin*, targeting Form 5 school leavers and adult learners aged 21 or above, is a scheme to promote "lifelong learning". Students who successfully complete the programme will be awarded a full certificate which has been assessed by the Hong Kong Council for Academic Accreditation as comparable to five passes in HKCEE. The medium of instruction of Project Yi Jin courses is Cantonese. Chinese is used for course materials, assignments and examinations. Currently, no special tailor-made courses with English as the medium of instruction are provided for the ethnic minorities. See n. 72 above.

courses run by NGOs, which cannot adequately equip students with Chinese skills for the workplace.⁹¹ However the HKSAR government has rejected calls to introduce special training and employment policies for minorities, and claims to have adopted a “multi-pronged approach to promote employment on all fronts without distinction as to race, colour, or national or ethnic origin.”⁹²

The inadequacy of language support for linguistic minority students

The Hong Kong government admits that for students whose mother tongue is not a Chinese dialect, the language is a major obstacle to learning, “language is the core difficulty from which all others flow,”⁹³ and that children from linguistic minorities face many language-related difficulties in accessing education in Hong Kong.

Minority students who attend mainstream CMI schools receive little or no targeted language support, while designated schools receive extra funding from the EDB to support Chinese learning for linguistic minorities. This funding provision is a manifestation of the Hong Kong government’s stated commitment to helping minority students to thrive in the school system,⁹⁴ but the assumptions behind these policies may be counterproductive to this aim, and the measures taken are often inadequate.

Failure to devise a Chinese as a second language curriculum

The EDB’s policies rest on the assumption is that there is no need for a separate Chinese curriculum for minority students as the mainstream curriculum is “flexible and robust” enough for all students.⁹⁵ The EDB has stated that it does not intend to develop a separate curriculum for these students, using the language of equal opportunities to justify this policy:

⁹¹ See n.74 above.

⁹² See n. 45, para.159.

⁹³ *Second Report of the Hong Kong SAR under the International Covenant on Economic, Social and Cultural Rights*, 2003, para. 13.24. Available at: http://www.cmab.gov.hk/en/issues/culturalrights_report.htm

⁹⁴ See n.46 above.

⁹⁵ *Supplementary Guide to the Teaching of Chinese to Non-Chinese Speaking Students*, 2008. Curriculum Development Council: Hong Kong, p.7 & 10.

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“If we believe that the NCS (Non-Chinese speaking) children should be treated equally as other local pupils, they should be given the opportunity to study the central curriculum and sit for the same examination.”⁹⁶

This position has been criticised as unrealistic by educators who believe that, given the same conditions as local students, only a few exceptional students will be able to study through the medium of Chinese in the mainstream curriculum.⁹⁷ The government’s policy has been to encourage schools to set up their own school-based Chinese curricula for minority students, to enable them to transition to mainstream classes.⁹⁸ There is no standardised policy for curriculum development, and no standard targets that students must meet before transferring to the mainstream curriculum.

There have been calls for a systematic Chinese curriculum to be introduced from P1 to S.6.⁹⁹ Following pressure from educators and NGOs, in 2008, the Curriculum Development Council released the *Supplementary Guide to the Teaching of Chinese to Non-Chinese Speaking Students* to provide guidance for teachers of Chinese, in the absence of a centralised curriculum. The guidelines set out four possible modes of adaptation of linguistic minority students to the mainstream Chinese curriculum.¹⁰⁰ But the basic framework of the curriculum is the same for Chinese students and minority students.

The *Guide* was welcomed by activists working on minority issues, but has been criticised for failing to provide a systematic Chinese curriculum, tailored to the needs of linguistic minorities, with learning objectives, delineated key stages and assessment tools.¹⁰¹ The EDB states that under the school-based system, schools are given freedom to develop their own curriculum, tailored to their students’ needs.¹⁰² However teachers

⁹⁶ Website of the Education Bureau, Frequently Asked Questions, Qu.4. Available at: <http://www.edb.gov.hk/index.aspx?langno=1&nodeID=4741#III>. Accessed February 25, 2009.

⁹⁷ See n.74 & 76 above.

⁹⁸ HKSAR Report under ICERD, 2008. See n. 45 above, para.177.

⁹⁹ Hong Kong Unison See n. 81 above.

¹⁰⁰ See n.95 above, p. 34.

¹⁰¹ Hong Kong Unison 2008, See n.81 above.

¹⁰² See n. 46 above.

reportedly find the guidelines to be basic and insufficient, and feel that the EDB should take the lead in developing a core curriculum.¹⁰³

A lack of textbooks and materials

As well as having no core curriculum to work from, schools also lack suitable textbooks and materials for linguistic minorities.¹⁰⁴ According to the EDB, designated schools receive support in preparing materials, and it hopes that these schools will become “anchor points” in providing expertise to other schools, through seminars, and through sharing materials via a centralised database. The EDB hopes that mainstream schools with small numbers of minority students could use the experience and materials gained by the designated schools to help them support such students. Rather than producing a set of textbooks, the EDB has decided to collect materials produced through Quality Education Fund projects and make them available as a centralised resource.¹⁰⁵

However teachers report that the materials collected so far are sparse and basic. Teachers may have little expertise in preparing specialised materials for teaching Chinese as a second language. Schools are working in isolation, and materials produced in individual schools are rarely shared, as they are seen as the property of the school that produced them. Seminars and “sharing sessions” organised by the EDB provide moral support for teachers working in difficult circumstances, but rarely result in the sharing of materials.¹⁰⁶ Teachers feel that more support from the EDB in materials production is needed, as commercial publishers in Hong Kong are unlikely to be interested in producing materials for the comparatively small numbers of minority students.¹⁰⁷

Assessment

The assumption by the EDB that the same Chinese curriculum can be used for both native and non-native speakers of Chinese has already been discussed. The same assumption applies to the assessment of Chinese: the EDB has stated that in the interests

¹⁰³ See n. 60 & 74 above.

¹⁰⁴ Hong Kong Unison 2008. See n.81 above.

¹⁰⁵ *Progress of Support Measures ...* See n. 39 above, p.3.

¹⁰⁶ See n. 60 & 74 above.

¹⁰⁷ See n. 60 above.

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of equality, minority students should take the same examinations as native Chinese speaking students.¹⁰⁸ However the main public examination, the Hong Kong Certificate of Education Examination (HKCEE) paper in Chinese is designed for native speakers of Chinese and is very difficult for linguistic minorities to pass.

Educators and NGOs have promoted the British GCSE Chinese as an alternative qualification.¹⁰⁹ The EDB has requested public sector schools to accept the GCSE as an alternative Chinese language qualification for entry to senior secondary schools.¹¹⁰ However the GCSE is probably only suitable as an interim measure, as it is oriented towards a Chinese as a foreign, rather than a second language context and is rather basic, requiring students to only know 400 Chinese characters which cannot adequately reflect the Chinese proficiency that minority students in Hong Kong would need to achieve.¹¹¹ The fees which students have to pay to sit this examination are also much higher than those for the local Hong-Kong based examinations, and this additional expense has to be borne by the students themselves, despite calls to subsidise the examination to ensure that linguistic minority students do not have to pay higher examination fees than native Chinese-speaking students.¹¹²

There have been calls for an examination which can demonstrate a high level of proficiency appropriate to the level of non-native speakers of Chinese, studying and working in a Chinese society.¹¹³ Such an examination would probably have to be produced locally, and would require a considerable investment of time and expertise,

¹⁰⁸ Website of the Education Bureau, *Frequently Asked Questions*, Qu.4. Available at: <http://www.edb.gov.hk/index.aspx?langno=1&nodeID=4741#III>. Accessed February 25, 2009.

¹⁰⁹ See n. 76 above.

¹¹⁰ By February 2008, more than 80 schools had expressed their willingness to accept the GCSE. *Progress of Support Measures for Non-Chinese Speaking Students including Ethnic Minority Students*. See n. 39 above, p. 7.

¹¹¹ Fermi Wong reported the case of one student who scored A* in the GCSE but subsequently failed HKCEE as evidence that the level of the GCSE was too low to adequately test the Chinese of linguistic minorities living in Hong Kong.

¹¹² Joint Submission from Hong Kong Organisations to the United Nations Committee on the Elimination of Racial Discrimination on the Report by the Government of the Hong Kong Special Administrative Region, 16 July 2009, para.14. Available at:

http://www2.ohchr.org/english/bodies/cerd/docs/ngos/JointSubmission_China75.doc

¹¹³ Hong Kong Unison 2008. see n. 81 above. Professor Tse Shek-kam, see n. 53 above.

though there is a comparable examination used in mainland China which Hong Kong could use as a reference.¹¹⁴

The Hong Kong government had stated that it planned to create an alternative qualification by devising an easier “Syllabus A” for the HKCEE Chinese paper for minority students, as compared to the more demanding “Syllabus B” for native Chinese speakers.¹¹⁵ This used to be the practice for the English paper, for which an easier “Syllabus A” was offered, designed for CMI schools. But there were no updates on this examination,¹¹⁶ and the EDB does not now support its development, believing that this would create a second tier, lower level examination, which would limit minority students’ opportunities and perpetuate an unequal situation.¹¹⁷ In a paper presented to the Legislative Council, the EDB states that it is opposed to “confining (minority students) to a simpler Chinese language curriculum with pre-set lower benchmarks.”¹¹⁸

However introducing a public examination tailored to linguistic minorities would be likely to promote a positive backwash¹¹⁹ effect on teaching and assessment within schools. At the moment there is no standardised diagnostic test or mode of assessment to determine the Chinese level of these students or to ascertain whether their proficiency is sufficient to enable them to study in Chinese. Parents cannot gauge how well their children are doing in Chinese, and may not be equipped to make informed decisions about their children’s education.¹²⁰

Lack of trained teachers

¹¹⁴ For example the *Putonghua Shuiping Kaoshi* is widely used to assess the Chinese level of non-native speakers and to assess whether their Chinese is sufficient to study through the medium of Chinese, at a Chinese tertiary institution.

¹¹⁵ HKSAR, Second Report under the ICESCR, 2003, para. 13.31 (c). *See* n.93 above.

¹¹⁶ This proposal is not repeated in the Second Report under the ICERD. *See* n. 45 above.

¹¹⁷ *See* n.46 above.

¹¹⁸ *Progress of Support Measures ... See* n. 39 above.

¹¹⁹ The effect of testing on teaching and learning is known as “backwash”. Arthur Hughes, 1989. *Testing for Language Teachers*. Cambridge University Press: Cambridge, p.1.

¹²⁰ *See* n.44 above.

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Lack of expertise among teachers in teaching Chinese as a Second Language (CSL) has been cited as a major problem.¹²¹ Dr Tsung points out that the teaching of Chinese to native speakers and the teaching of Chinese as a Second Language are two different specialisations and draws a parallel with the teaching of English and English as a Second Language which, though related, are separate disciplines in teacher training. There are few trained CSL teachers in Hong Kong. Teachers trained only to teach Chinese to native-speakers who then have to teach minority students, struggle to do a job they have not been trained for, with no curriculum or textbooks, many levels of students and no standardised assessment. This situation would be challenging for an experienced teacher and extremely difficult for a teacher who is not trained in CSL teaching.¹²²

A recent investigation by the Ombudsman criticised the EDB for failing to ensure that teachers of children with specific learning difficulties received adequate specialised training.¹²³ The same criticism could be made with regard to the education of linguistic minorities, and educators have called for the introduction of an accredited course, leading to a professional qualification.¹²⁴ One such course, a Post-Graduate Diploma in the Teaching of Chinese as a Second Language, was offered by the University of Hong Kong, but the programme found it difficult to attract students as it did not receive a government subsidy.¹²⁵ Reportedly there was considerable interest in the course, and one interviewee stated that if such a course existed, her school would encourage at least one teacher to enroll,¹²⁶ but the high fees deterred entrants.¹²⁷ The EDB has commissioned local tertiary institutions to offer short training programmes for teachers of Chinese.¹²⁸ However these

¹²¹ *Language Legacy*, 2009. See n. 53 above.

¹²² See n.76 above.

¹²³ Office of the Ombudsman, March 2009. *Direct Investigation of Support Services for Students with Specific Learning Difficulties*, paras. 32-33. Available at: http://www.ombudsman.gov.hk/concluded/2009_03_01.doc

¹²⁴ See n. 60 & n. 76.

¹²⁵ See n. 76.

¹²⁶ See n. 60.

¹²⁷ See n. 76.

¹²⁸ The Hong Kong Institute of Education is offering an 8-week course for primary teachers of Chinese, and Hong Kong Polytechnic University is offering a 30-hour course for primary teachers of Chinese, while the University of Hong Kong is offering regular briefing sessions over the 2008-9 school year to secondary teachers of Chinese. Information supplied by EDB, March 2009. On file with the author.

courses have been criticised as being too short, not comprehensive and of varying usefulness.¹²⁹

Segregation

The Hong Kong government has stated that it follows a “policy of integration” in which it “encourages the ethnic communities to participate in the general community of Hong Kong.”¹³⁰ However government policies often work against integration. Mainstream schools offer little or no language support, and parents also worry about social isolation, racism and bullying of their children at these schools.¹³¹ It is not surprising that many minority parents choose designated primary schools. At secondary level, parents have even less choice. Their children’s poor results in primary school assessments categorise them as “Band 3” students, and they have no choice but to attend a designated school.¹³²

In designated secondary schools, minority students may be the majority of the school population. Even if they are not, they are likely to be educated in EMI classes, and may have little contact with Chinese students. Extra-curricular activities, in which minority students interact with Chinese students, can be a way of breaking down barriers between different groups and increasing understanding,¹³³ but many minority students commute long distances to school, as the choice of designated schools is so limited,¹³⁴ and this reduces the time available for extra-curricular activities in which they might mix

¹²⁹ The course has now been upgraded to a Masters in Education, and has attracted many applicants, despite still not being subsidized, but Dr Tsung points out that the course is now more theoretical, and is not now attracting what she considers to be the main target: teachers of Chinese to minority students in the public education system. *See* n. 76.

¹³⁰ HKSAR Report under ICERD, 2008. *See* n. 45 above, para.107.

¹³¹ *See* n. 52.

¹³² *Ibid.*

¹³³ In one study, minority students reported making friends with Chinese children through playing sports together. Kelley Loper, 2004. *See* n. 41 above, p.19.

¹³⁴ For example, a group of Nepali students commute from Yuen Long to Chai Wan every day to attend secondary school according to a senior teacher at the Islamic Tuet Kasim Memorial College; At Sir Ellis Kadoorie Primary School, an EMI school in Wanchai, which traditionally admits many ethnic minority pupils, out of 633 pupils, 117 commute from Kowloon, the New Territories and the Outlying Islands. Information taken from the website of the Sir Ellis Kadoorie Primary School. Available at: http://www.sekps.edu.hk/new/3_pupils/pupils/index.html. Accessed on February 26, 2009.

with Chinese students, as well as making it difficult for students to attend after-school tutorial classes in Chinese.

When a school has a large number of minority students, local Chinese parents are reportedly unwilling to send their children to that school. The proportion of Chinese students in one school has been dropping steadily since it started to take large numbers of minority students five years ago. Minority students are predicted to soon become the majority in the school.¹³⁵

A lack of planning and vision

The Hong Kong government lacks a coherent policy for the education of linguistic minorities. The educators interviewed believe that the government does not fully appreciate that there will always be linguistic minorities in Hong Kong, and that long-term planning is lacking.¹³⁶ NGOs and academics have called for a coherent “racial equality plan”, which would address questions of education for minority students.¹³⁷

This lack of coherence manifests itself in a “reality gap” between what the EDB professes and what actually happens. The EDB believes that early integration and immersion into the mainstream school system is the optimal solution,¹³⁸ but it fails to ensure that the conditions are present which could enable schools to provide an accessible education for minority students. Even the designated primary schools, with their extra funding, have difficulties in devising adequate curricula and materials for minority students, particularly as their teachers lack training in the teaching of CSL. Some interviewees believe that though there are well-meaning individuals in the EDB, they

¹³⁵ See n. 74 above.

¹³⁶ See n. 60, 74 & 76 above.

¹³⁷ Hong Kong Unison, 2008, see n 81 above; Hok-bun Ku, Kam-wah Chan & Karamjit Kaur Sandhu, 2005, see n. 73 above, p.99; Joint Submission from Hong Kong Organisations to the United Nations Committee on the Elimination of Racial Discrimination on the Report by the Government of the Hong Kong Special Administrative Region, 16 July 2009, para.4. Available at: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/JointSubmission_China75.doc

¹³⁸ See n.46.

lack expertise and experience in issues concerning the education of linguistic minorities, and that Hong Kong as a whole lacks sufficient scholarship and expertise in this area.¹³⁹

The term “immersion” is often used by the EDB and the local media to describe the placing of minority students into mainstream classes with local Chinese students.¹⁴⁰ This term was popularised in Canada in the 1960’s to describe programmes in which English-speaking students received a considerable proportion of their education through the medium of French. The Canadian experience has been very successful, but an influential proponent of immersion has cautioned against applying this model to education for minorities. He points out that in Canadian programmes, all students in the class generally share the same mother tongue (English) and all come with little or no knowledge of the language of immersion (French). This he contrasts with a situation common in the USA where minority students with varying mother tongues and levels of English are put into mainstream classes where they have to compete with mother-tongue speakers of English. This he describes as “submersion” or “the sink or swim approach” and believes is likely to lead to feelings of frustration and failure from the student.¹⁴¹

The situation for linguistic minority children in Hong Kong entering mainstream schools mirrors the situation in the US as described above, in a classic example of “submersion”, and does not in most cases result in successful learning of the target language. The EDB stresses that minority students have the same right to enter the mainstream schools as CS students,¹⁴² but allowing students to enter a school does not equate to giving them equality of access to education within that school if they are not able to understand the language in which that education is delivered.

A three-year study, tracking the progress of the first group of minority students allocated to CMI primary schools in 2004 concluded that most students benefited from

¹³⁹ See n. 76, n.52 & n.74.

¹⁴⁰ *Supplementary Guide*, 2008. See n. 95 above, p15; Will Clem, *Study of Minorities in mainstream schools ridiculed*. South China Morning Post, November 22, 2008.

¹⁴¹ Jim Cummins, 1984, *Learning Difficulties in “Immersion” Programmes*. In Colin Baker and Nancy Hornberger (eds) *An introductory reader to the writings of Jim Cummins*, 2001, Multilingual Matters: Clevedon, p.149-150.

¹⁴² See n. 46.

mainstream schooling.¹⁴³ However the study did not address why, out of the 63 students, more than half had dropped out from the study, leaving only 31 students: a sample size which has been criticised as being too small to be representative. According to Unison Hong Kong, many parents of minority children have removed their children from mainstream primary schools as they were unable to learn effectively in a CMI school.¹⁴⁴

Autonomy and freedom of choice

The EDB stresses that under a school-based system, schools have autonomy to devise whatever models of curriculum adaptation and language support they feel is appropriate for their students. In reality, schools lack the expertise to develop adequate curricula and materials. The autonomy granted to schools is quite selective. Schools are severely restricted in some ways, such as in the choice of medium of instruction, and the use they make of support measures such as Hong Kong University's Chinese Language Support Centre. In some aspects the EDB imposes rigid policies, while in others it fails to give adequate guidance. In a compact territory such as Hong Kong, there seems to be little benefit in schools working separately to develop curricula and materials and much to be gained from introducing a core curriculum for all schools. "Autonomy" seems to be an excuse for the Hong Kong government to shirk its responsibilities.

The EDB states that it encourages the integration of minority students with Chinese students, even if minority students are removed for some lessons, but cannot mandate this as schools are free to devise their own school-based learning programmes.¹⁴⁵ A circular has been issued to remind school principals to formulate policies which avoid discrimination and observe the principles of equal opportunities,¹⁴⁶ but there are no defined policies coming from the EDB to promote equality in schools and foster inclusive education. By stressing the autonomy of schools, the EDB seems to be avoiding responsibility for taking action to promote inclusion of minority students.

¹⁴³ Kit-tau Hau, 2008. *See* n. 42 above.

¹⁴⁴ Fermi Wong, quoted in Will Clem, 2008. *See* n. 140 above.

¹⁴⁵ *See* n.46 above.

¹⁴⁶ Government of the HKSAR, Education and Manpower Bureau (now known as the EDB), 8 December 2003, EDUCATION BUREAU CIRCULAR NO 33/2003, *The Principle of Equal Opportunities*. Available at: <http://www.edb.gov.hk/UtilityManager/circular/upload/embc/embc03033E.pdf>.

Transparency and accountability

The Hong Kong government is allocating funds to designated schools to be used for language support,¹⁴⁷ but the allocation of funding lacks transparency and accountability. According to the EDB, funding is provided on a “needs-driven” basis, not a per capita basis, though to receive a grant, schools must have a “critical mass” of minority students. Other criteria are the willingness of schools to share expertise, teaching materials and experience with other schools.¹⁴⁸

These criteria are not clearly elaborated and one interviewee working at a designated school believed grants were awarded solely according to the number of minority students in the school.¹⁴⁹ Another believed that the EDB has favourites, and that schools which criticise the EDB are unlikely to receive financial support.¹⁵⁰ This may explain why neither of the Senior Teachers interviewed for this study were willing to have their names included. There have been complaints that one DSS school¹⁵¹ with only a small number of minority students has received a large grant,¹⁵² while another DSS school with a large number of such students does not receive any additional funding.¹⁵³

¹⁴⁷ In 2008-9, “designated” primary schools received HK\$8,300,000 and “designated” secondary schools received HK\$3,500,000.

¹⁴⁸ See n. 46 above.

¹⁴⁹ See n.60 above.

¹⁵⁰ See n.52 above.

¹⁵¹ The DSS schools have more autonomy than government or aided schools and are fee-paying. The fees are less than those of international schools, but still represent a considerable sum for less affluent parents with several children. For example, St. Margaret’s College charges \$5000 per annum for S.1-3, \$9,500 for S.4-5 and \$14,500 for S.6-7. Pak Kau College charges HK\$1,800 per annum for S.1-3, rising to \$3,800 for S.4-5 and \$4,800 for S.6-7. Information taken from the Education Bureau, Secondary School Profiles. Available at: <http://ssp.proj.hkedcity.net/eng/parser.php?file=eng/home2008.htm> Accessed on March 22, 2009.

¹⁵² Pak Kau College in Tin Shui Wai (a DSS school) received HK\$500,000 for 2008-9 when it admits comparatively few students: 77 out of a school population of 1,100. The school seems to be reducing its intake of minority students: in 2008-9, this school has 42 such students in S.3, but only 2 in S.2 and 5 in S.1. The other “designated” schools, in contrast, have more students in S.1 and 2 than in S.3. Pak Kau College’s grant from EDB has been increased from HK\$ 300,000 in 2007-8 to HK\$500,000 in 2008-9. Data provided by EDB

¹⁵³ St. Margaret’s College, a DSS girls’ school in Central, which has 100 ethnic minority students, out of a total of 480, and like Pak Kau is a low-tuition-fee DSS school, was not awarded a grant. Mimi Lau, March 21, 2009, *Clear Guidelines Urged for Minorities Grants*. South China Morning Post.

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The monitoring of the use of funds is also problematic, and two of the interviewees believe that schools often do not use the funds responsibly for the benefit of linguistic minority students.¹⁵⁴ The Ombudsman has received similar complaints about lack of transparency of the use of funds from parents of students with specific learning difficulties, for whom the EDB applies a similar school-based support programme, and has recommended that the EDB enhance openness and transparency about funding and more closely monitor how schools use the funds.¹⁵⁵

Conclusion

The Hong Kong government has a policy of equal treatment for linguistic minority students, allowing them equal access to the public education system. However this policy is based on a concept of formal equality, in which minority students have to follow the same basic curriculum and take the same primary school assessments as native Chinese-speaking students, despite the fact that they are disadvantaged by having to study in a second language.

The EDB has introduced some measures to address the language needs of minority students but has so far failed to ensure that there is sufficient adaptation of the curriculum and assessments to enable minority students to access education without discrimination. Provision of language support in schools is inadequate. The government is allocating resources to schools but allocation of funding appears to be piecemeal, with no defined monitoring system or compliance procedures for schools in receipt of special grants. Planning and long-term vision are lacking, and there are doubts as to how effectively funds are being used. The EDB's policies have resulted in *de facto* segregation of minority students from the majority, with no overall plan or policy to facilitate their inclusion.

¹⁵⁴ See n.52 & n.76 above.

¹⁵⁵ Office of the Ombudsman, March 2009. See n. 126 above, paras. 21-32, & para.34.

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Underlying the approach to the education of linguistic minority students taken by the EDB is a failure to adequately recognise difference, despite a public statement in support of diversity, “We support the development of a diverse school system. By injecting diverse ideologies, modes of financing and curricula, we believe that learners could have more choices and multi-faceted talents could be nurtured to meet the challenges of a globalising world.”¹⁵⁶ This statement recognises that not all learners are the same, different curricula are needed to address different needs, and the purpose of education is to produce individuals with a variety of skills. But the phrase “modes of financing” betrays the fact that this statement refers to international schools, not to the public education system. Diversity and choice are apparently only for those who can afford to pay for a private education.

The Hong Kong government fails to recognise that diversity is as important to the less advantaged in society as it is to the elite whose children attend international schools. The poor Chinese of linguistic minority students is seen as the deficit that defines them, and reportedly many have low self-esteem and expectations for their future. They are not expected to develop “multi-faceted talents” through their education, but have to strive to achieve the same as the majority group, under the same conditions. Achieving substantive equality involves, “disassembling the norm,”¹⁵⁷ and finding ways of achieving equality that take account of different needs and situations. The EDB states that its aim is the integration of linguistic minority students, but an inclusive education system needs to reassess how norms and a sense of belonging are defined if linguistic minority students are to be truly integrated. Providing a “one-size fits all” model of education, does not recognise the different starting points of linguistic minority students in developing literacy in Chinese, and does not create conditions for these students to develop their potential.

¹⁵⁶ *International Education in Hong Kong – a Prospectus*. Foreword by Arthur Li, then Secretary for Education and Manpower, June 2006. Available at: http://www.edb.gov.hk/FileManager/EN/Content_4405/prospectus_final.pdf. Accessed April 19, 2009.

¹⁵⁷ Patricia Hughes, 1999 *Recognising substantive equality as a foundational constitutional principle*. The Dalhousie Law Journal, 22:5, p. 44.

Chapter III

Hong Kong's obligations to make education accessible to linguistic minorities

In this chapter, Hong Kong's obligations under international law to make education accessible to all children without discrimination will be examined, and relevant cases from other jurisdictions will also be discussed, in relation to the situation in Hong Kong.

Under the ICESCR States parties have obligations to make primary education free and compulsory, to ensure that secondary education is “available” and “accessible” to all, and higher education is “accessible”, on the basis of capacity.¹⁵⁸ The provisions in the ICESCR have been further elaborated in the ICESCR Committee's General Comment 13. The obligation to make education *accessible*¹⁵⁹ involves three categories: physical accessibility, economic accessibility, and accessibility without discrimination.¹⁶⁰

Looking at the obligation through the prism of language, *accessibility* implies that all children must be able to function in the language of instruction sufficiently to be able to benefit from their education. In fact the ICESCR includes language in its anti-discrimination provisions, which state that, “the rights enunciated in the present Covenant will be exercised without discrimination ...as to ...language.”¹⁶¹ The ICESCR Committee's General Comment 13 also states that Article 2(2) is to be interpreted in the light of both earlier and later Conventions which contain obligations for the State to adhere to principles of non-discrimination in education, which include the UNESCO Convention against Discrimination in Education.¹⁶² This Convention lists the exclusion of any person or group of persons from education at any level, as a prohibited ground of

¹⁵⁸ ICESCR Article 13.2, (a), (b) & (c).

¹⁵⁹ ICESCR Committee, *General Comment 13*, 1999, Para. 6.

¹⁶⁰ *Ibid.*, para. 6 (b).

¹⁶¹ ICESCR Article 2.2.

¹⁶² UNESCO Convention against Discrimination in Education (1960)

discrimination.¹⁶³ This implies that excluding any group from education by virtue of the fact that the language of that education is inaccessible to them, is discriminatory.

The most recent United Nations Forum on Minority Issues focused on minority education, and developed Recommendations on Minorities and the Right to Education to be reported to the Human Rights Council by the Independent Expert on Minorities.¹⁶⁴ These recommendations illustrate the direction of current thinking at the UN on minority education and expand the scope of protection for linguistic minorities in education.¹⁶⁵ The positive obligations upon States under the ICESCR to make education “available” and “accessible” are made more specific in the Recommendations, “Authorities should remove direct institutional barriers to educational access for minorities, and address cultural and linguistic barriers that may have equivalent access-denying effects.”¹⁶⁶

Prohibitions of language discrimination in education

Language is one of the prohibited grounds of discrimination in the ICCPR, CRC and the ICESCR, which all place an obligation on State Parties to “respect” and to “ensure” the rights of all those under its jurisdiction to enjoy all the other rights contained in the Covenant without discrimination on grounds of language.¹⁶⁷ The Human Rights Committee has clarified that the ICCPR also includes the concept of indirect discrimination,¹⁶⁸ and the CESCR Committee recognises the close relationship between language and racial discrimination.¹⁶⁹

¹⁶³ *Ibid*, Article 1 (a) & (b).

¹⁶⁴ The Forum convened in December 2008. Details of the Forum and its work can be found on: <http://www2.ohchr.org/english/bodies/hrcouncil/minority/docs/ConceptPaperOctober08.doc>

¹⁶⁵ *UN Recommendations on Minorities and the Right to Education*. A/HRC/FMI/2008/2 11 December 2008

¹⁶⁶ *Ibid*, Section III. 26.

¹⁶⁷ ICCPR Article 2.1; CRC Article 2; ICESCR Article 2.2.

¹⁶⁸ Human Rights Committee *General Comment 18 Non Discrimination*, para. 6.

¹⁶⁹ CESCR Committee, *Draft General Comment 20 Non-Discrimination and ESCR Rights*, E/C.12/GC/20/CRP.2, 9 September 2008, para. 18, “Discrimination on the basis of language is often closely linked to unequal treatment on the basis of race or national or ethnic origin.”

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The ICERD does not include language among its list of prohibited grounds of discrimination,¹⁷⁰ but it prohibits distinctions which have the “purpose or effect” of discrimination,¹⁷¹ and to the extent that language is a frequent marker of identity, discrimination on the basis of language, it could be argued, represents indirect discrimination on the basis of ethnicity under the ICERD.¹⁷² The most recent General Comment from the CERD Committee also states that the grounds of discrimination are extended in practice by intersectional discrimination, where discrimination takes place on two or more grounds, such as colour and language.¹⁷³

An important development under the ICERD has been the increased attention of the CERD Committee to the question of indirect discrimination, which the Committee recognises is often under-reported with States focusing on the more obvious manifestations of direct discrimination. The reference to “effect” in the ICERD has allowed the Committee to address apparently neutral measures which have a disproportionate impact on certain groups.¹⁷⁴ For example, in its Concluding Observations on the most recent report by Germany, the Committee expressed concern at indirect discrimination on grounds of ethnic origin in access to housing and at the over-representation of the children of immigrants in special schools due to their inadequate command of German.¹⁷⁵ In another example, the Committee opined that the actions of a municipal council in Slovakia, in reducing its provision of low-cost housing, indirectly discriminated against the Roma residents of that city.¹⁷⁶

Relevant cases from other jurisdictions

¹⁷⁰ ICERD, Article 1.1.

¹⁷¹ *Ibid*, Article 1.

¹⁷² Ivan Garvalov, 2008. *The United Nations CERD*. In Kristin Henrard & Robert Dunbar (eds) *Synergies in Minority Protection: European and International Law Perspectives*. Cambridge University Press: Cambridge, p.250.

¹⁷³ CERD Committee, August 2009. General Recommendation No. 32. *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, para.7.

¹⁷⁴ Ivan Garvalov, 2008, *see n.172 above*, p.259-60.

¹⁷⁵ Report of the CERD Committee to the UN General Assembly, 2008. *Concluding Observations on Germany*, paras. 204 & 210.

¹⁷⁶ CERD Committee Communication No.31/2003, *Ms. L. R. et al v Slovakia* (decision in August 2005).

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Two important cases in the US Supreme Court and the European Court concern language and access to education. In the European Court, the *Belgian Linguistics Case*,¹⁷⁷ established that children have the right to access an “effective” education, and that, though parents had no right to choose the medium of instruction of that education, the right included the right to be educated in a national language. If a State requires a child to be educated in one of the national languages, this requirement complies with Article 2, Protocol 1 of the European Convention. However if there is discrimination against a child in access to education, the Convention is violated, and differential treatment is only permissible if it can be justified as necessary and proportional.¹⁷⁸

*Lau v Nichols*¹⁷⁹ was a landmark case in which the US Supreme Court ruled that the failure of the San Francisco school system to provide adequate instruction in English for 1,800 students of Chinese ancestry meant that State education was not accessible to them in any meaningful sense, and thus constituted a form of discrimination under Title VI of the Civil Rights Act.¹⁸⁰ In the opinion of the court, “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”¹⁸¹

The disparate impact concept of discrimination had been adopted in a prior US Supreme Court decision in an employment case brought under the Civil Rights Act, *Griggs v Duke Power Co.*¹⁸² The court found that recruitment requirements, though applied to all potential employees, disproportionately excluded black applicants from all

¹⁷⁷ *Belgian Linguistics Case* [1968] 1 Yearbook of the European Convention on Human Rights 832, p.858. In this case, French-speaking parents complained that in the Flemish-speaking part of Belgium where they lived, there was inadequate provision for French-language education for their children, in violation of Article 8, Article 14 and Article 2 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁷⁸ Katherine Williams & Bernadette Rainey, 2006, *Language, Education and the European Convention on Human Rights in the 21st Century*. Legal Studies, Vol. 22:4, p.636.

¹⁷⁹ *Lau v. Nichols* 414 U.S. 563 (1974).

¹⁸⁰ Title VI of the Civil Rights Act (1964) provided that “no person...shall on the ground of race, colour or national origin be excluded from participation in or denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

¹⁸¹ See n. 179 above.

¹⁸² *Griggs v. Duke Power Co.* 401 U.S. 424 (1971).

but the lowest level of jobs, and that the company had failed to prove that these requirements were necessary.¹⁸³ The judgment in *Lau* confirmed that providing the same educational facilities to all could still lead to a discriminatory effect, if some groups were not able to take equal advantage of those facilities. The *Lau* decision established that Title VI applies not only to intentional or direct discrimination but also to acts with an adverse effect which created a “disparate impact”.

The concept of disparate impact or indirect discrimination has been widely accepted in international legal standards, such as the ICERD, and has been adopted in other jurisdictions but is increasingly under threat in the US.¹⁸⁴ There have been a number of challenges to the *Lau* decision. The assumption that Title VI addresses both direct and indirect discrimination has been undercut in *Guardians Ass’n v Civil Service Commission* which held that Title VI authorises compensation only for direct and not indirect discrimination, while in *Alexander v Sandoval* the Supreme Court ruled that private plaintiffs have no right to sue under Title VI in cases of indirect discrimination.¹⁸⁵ The Supreme Court has retreated from its earlier use of the concept of disparate impact, and this concept has not been used to interpret the US Constitution.¹⁸⁶

The *Belgian Linguistics Case* established that ECHR Article 14 is not a free-standing right against discrimination and a complaint of discrimination can only be sustained if the complaint falls within the ambit of one of the other provisions of the Convention. However the judgment of the Court in *Thlimmenos v Greece*¹⁸⁷ placed a positive obligation upon States under Article 14 to treat individuals differently according to their circumstances.¹⁸⁸ From being based on a formal conception of equality, some

¹⁸³ Rosemary Hunter & Elaine Shoben, 1998. *Disparate Impact: American Oddity or Internationally Accepted Concept?* 19, Berkeley Journal of Employment and Labor Law 108.

¹⁸⁴ Rachel Moran 2005. *The uncertain legacy of Lau v. Nichols*. Berkeley La Raza Law Journal, Vol.16.1, p.6.

¹⁸⁵ *Ibid.*

¹⁸⁶ See n. 183 above.

¹⁸⁷ *Thlimmenos v Greece* CEDH 2000-iv p.263 (2001) 31 EHRR 411. The Court decided that a conviction for conscientious objection to military service should be regarded differently from a conviction for a felony, and should not be a bar to entrance to the accountancy profession.

¹⁸⁸ Alistair Mowbray, 2004. *The Development of Positive Obligations under the ECHR by the ECtHR*. Hart Publishing: Oxford, p.202-3.

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recent cases dealing with discrimination in education have seen the European Court's jurisprudence continuing to develop a more substantive concept of equality.¹⁸⁹

In *D.H. and others v the Czech Republic*,¹⁹⁰ the Czech government was found to have indirectly discriminated against Roma children who had been assigned to special schools for children with learning difficulties, on the basis of tests which were linguistically and culturally unsuited to them, resulting in equal treatment leading to unequal impact.¹⁹¹ The special schools followed a more basic curriculum than the mainstream, which, the applicants argued, limited their future educational and career opportunities, amounting to a denial of their right to education. The Court concluded that while differential treatment might be justified if there was an objective and reasonable justification, in this case there was no such justification.¹⁹² In *Sampanis v Greece*,¹⁹³ the European Court ruled that it was unacceptable for the authorities to use language as an excuse for segregating Roma children from the main school. The placing of Roma children in a separate building was judged to be discriminatory. In both cases, the respondents were found to be in violation of Article 14 and Article 2 of Protocol 1 of the European Convention.

These cases established that indirect discrimination, in the form of *de facto* educational segregation of a minority, is unlawful under the European Convention, and that when a presumption of indirect discrimination has been established, the burden of proof shifts to the government to show that the difference in treatment is not justified.¹⁹⁴ Although these two cases have provided a more substantive model of equality for the European system, as well as clarifying the rules on indirect discrimination under Article 14,¹⁹⁵ the jurisprudence under Article 2, Protocol 1 has not developed significantly in

¹⁸⁹ Rory O'Connell, 2009. *Commentary: Substantive Equality in the European Court of Human Rights*. 107 Michigan Law Review First Impressions 129.

¹⁹⁰ *D.H. And Others v The Czech Republic*, Application no. 57325/00, 2007, para.189.

¹⁹¹ *Ibid*, para.199-201.

¹⁹² *Ibid*, para.196-8.

¹⁹³ *Sampanis v Greece*, Application no.32526/05, 2008.

¹⁹⁴ *See n. 190 above*, para.189.

¹⁹⁵ *See n. 189 above*.

relation to language in education issues.¹⁹⁶ The European Court's judgment in *Cyprus v Turkey*¹⁹⁷ concluded that the failure of the Turkish authorities in Northern Cyprus to provide Greek language secondary schooling for the Greek Cypriot minority was a denial "in substance" of the right to education. However in a later case, *Skender v the Former Yugoslav Republic of Macedonia*,¹⁹⁸ the Court affirmed the position taken in the *Belgian Linguistics* case, moving away from any recognition of the right to education in any language other than an official language of the State.

Hong Kong's obligations under international law to ensure that education is accessible to linguistic minorities

The Hong Kong Bill of Rights (BORO) incorporates the ICCPR into Hong Kong's domestic legislation, and includes protection from discrimination on the same grounds as those included in the ICCPR,¹⁹⁹ while the Basic Law of Hong Kong contains an equality provision.²⁰⁰ The anti-discrimination provisions in the HKBORO include indirect as well as direct discrimination. The HKBORO binds the government and all public authorities, and any person or organisation acting on their behalf,²⁰¹ provisions which would presumably include government, aided and direct subsidy schools in Hong Kong.²⁰² The HKBORO does not include economic, social and cultural rights, mainly because the drafters at the time believed that such rights were inherently non-justiciable and not subject to immediate realisation,²⁰³ a belief which is not now current.²⁰⁴ Despite the

¹⁹⁶ Kristin Henrard, 2008. *A Patchwork of 'successful' and 'missed' synergies*. In Kristin Henrard & Robert Dunbar (eds) *Synergies in Minority Protection: European and International Law Perspectives*. Cambridge University Press: Cambridge, p. 338.

¹⁹⁷ *Cyprus v. Turkey*, Application No.25781/94, 2001.

¹⁹⁸ *Skender v. the Former Yugoslav Republic of Macedonia*, Application No. 62059/00, 2005.

¹⁹⁹ *HKBORO*, Articles 1& 22 and *ICCPR* Articles 2 & 26 both include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", as prohibited grounds of discrimination.

²⁰⁰ *Basic Law Article 25* "All Hong Kong residents shall be equal before the law".

²⁰¹ *HKBORO* Part 1,7, 1)This Ordinance binds only- (a) the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority. (2) In this section-- "person" includes any body of persons, corporate or unincorporate.

²⁰² The judgment in *R. v. Hong Kong Polytechnic, ex parte Jenny Chua Yee-yen* held that the Hong Kong Polytechnic was a public authority under the BORO.

²⁰³ Andrew Byrnes, 2000. *And some have Bills of Rights thrust upon them: the experience of Hong Kong's Bill of Rights*. In P. Alston (ed), *Promoting Human Rights through Bills of Rights*. Oxford University Press: Oxford, p.333.

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ESCR Committee urging the Hong Kong government to incorporate the rights in the ICESCR into domestic legislation,²⁰⁵ the government has declined to do so, stating that the provisions of the ICESCR are already incorporated into domestic law via the Basic Law and various ordinances which adequately protect these rights.²⁰⁶

This failure to incorporate the ICESCR is unfortunate as the discrimination suffered by linguistic minorities in the Hong Kong public education system involves access to education: an economic, social and cultural right. Provision of educational services to linguistic minority children in Hong Kong fails to meet the criterion of accessibility established in CESCR General Comment 13. Minority students have physical and economic access to education, in that they can enter public schools, and are not required to pay school fees beyond the relatively affordable fees that all Hong Kong students need to pay beyond S.3 level. However their ability to benefit from their education is impaired by the fact that their Chinese is often not adequate to study through the medium of Chinese. In this respect, education in Hong Kong is inaccessible to many linguistic minority students.

Hong Kong is a State Party to the ICERD but despite the introduction of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance in 1996, and the Family Status Discrimination Ordinance in 1997, it consistently refused to expand the scope of anti-discrimination protection by incorporating the ICERD into domestic law. However, a variety of factors, including persuasive evidence of racial discrimination gathered by NGOs and the government,²⁰⁷ and pressure from the CERD Committee,²⁰⁸ led the government to enact legislation in 2008.²⁰⁹

²⁰⁴ See *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997; Beth Lyon, 2002. *A post-colonial agenda for the United Nations Committee on Economic Social and Cultural Rights*. 10 American University Journal of Gender, Social Policy & the Law 535.

²⁰⁵ CESR Committee, *Concluding Observations on Hong Kong*, May 2001, para. 15.

²⁰⁶ Hong Kong Second Report under the ICESCR, 2003, *see n. 93 above*, para. 2.3.

²⁰⁷ The NGO *HARD (Hong Kong Against Racial Discrimination)* and a government body, the *Race Relations Unit*, uncovered numerous cases of discrimination. Carole Petersen, 2002, *The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong*. 32 Hong Kong Law Journal 103.

²⁰⁸ *Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, China*, U.N. Doc. A/56/18, 2001 para. 247.

²⁰⁹ The Racial Discrimination Ordinance, Ord. No. 29 of 2008.

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Legislation against racial discrimination had been eagerly awaited but the Racial Discrimination Ordinance (RDO) is a disappointment. Of particular concern is its weak definition of indirect discrimination. The RDO prohibits both direct and indirect discrimination,²¹⁰ but the provisions on indirect discrimination are based on the corresponding sections of the DDO and SDO, taken from UK legislation²¹¹ which has since been amended to address weaknesses in the definition and conform to European law.²¹² In its Concluding Observations on the section concerning the Hong Kong SAR in the most recent report to the CERD Committee submitted by the Peoples Republic of China, the Committee expressed concern that the RDO did not clearly define indirect discrimination with regard to language and recommended that this deficiency be addressed.²¹³

One of the weaknesses of the original UK legislation was that courts tended to interpret the “requirement or condition” clause as meaning that a policy existed which acted as an absolute bar to the individual claiming discrimination. It was generally difficult for an individual to prove that such a barrier existed,²¹⁴ and the amended UK law now uses the term “provision, criteria or practice” which allows for much broader interpretation of indirect discrimination, which could include informal as well as formal practices.²¹⁵ The word “proportion” in the original UK Act is also problematic as it necessitates the plaintiff provide statistical enumeration of the discrimination, which is often not possible. However the RDO has included the outdated UK definition of indirect discrimination.

²¹⁰ *Ibid*, Clause 4.

²¹¹ The UK Sex Discrimination Act, 1975; The Race Relations Act, 1976.

²¹² Kelley Loper, 2008. *One step forward, two steps back? The dilemma of Hong Kong's draft race discrimination legislation*. 38 Hong Kong Law Journal p.15-31.

²¹³ *Concluding Observations of the CERD Committee*, The Peoples Republic of China, Hong Kong SAR, 28 August 2009, para.27.

²¹⁴ Carole Petersen, June 2007. *Hong Kong's Race Discrimination Bill. A Critique and Comparison with The Sex Discrimination and Disability Discrimination Ordinances*. Submission to the Hong Kong Legislative Council's Bills Committee to study the Race Discrimination Bill. Paper presented at the Centre for Comparative and Public Law, University of Hong Kong Conference on Hong Kong's Race Discrimination Bill held on 31 March 2007, p.10.

²¹⁵ Kelley Loper, 2004. *See* n. 41 above.

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If the indirect discrimination clause is applied to the situation of linguistic minorities in the public education system in Hong Kong, its weakness becomes apparent. One example is the requirement that minority students have to perform well in primary school assessments in both English and Chinese in order to have the same chance of entering the better EMI schools as native Chinese-speaking students. This is understood to be the case in Hong Kong, though no school officially publishes its admission requirements. A much smaller number of minority students than native Chinese-speaking students can comply with this requirement. In order to justify that this requirement is not unlawful under the RDO, the discriminator would have to show that high proficiency in Chinese is necessary for success in an EMI secondary school. However, schools are under no obligation to disclose their reasons for rejecting students' application and it would be difficult for complainants to find concrete evidence to prove that a school's admissions policy was an absolute barrier to entry.

The Hong Kong government has relied heavily on UK law in its drafting of anti-discrimination ordinances. The European Race Directive is an indicator of current trends in anti-discrimination law, and has resulted in important changes in anti-discrimination law in the UK. The definitions of both direct and indirect discrimination in the Directive both reduce the burden of proof on the complainant. Direct discrimination is prohibited when a complainant "has been or *would be*" treated less favourably on grounds of race. Indirect discrimination is defined as occurring "where an apparently neutral provision, criterion or practice *would* put persons of a racial or ethnic origin at a particular disadvantage" (my italics).²¹⁶ If the RDO had adopted this progressive definition, minority students could argue that the primary school assessments indirectly discriminate against them without having to provide statistical evidence, which would be hard to extract from educational institutions.

The RDO provides that a "requirement or condition" may be "justifiable" if it has a "legitimate objective" and if the requirement or condition has a "rational and

²¹⁶ *Council Directive* 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2.2.

proportionate connection to the objective”.²¹⁷ The European Race Directive also includes the “legitimate aim” concept but provides that the means to achieve that aim must be “appropriate and necessary”.²¹⁸ If this more progressive definition had been included in the RDO, it would be possible to argue that although the aim of comparing the educational attainment of all primary students in Hong Kong is “legitimate”, it is neither “appropriate” nor “necessary” to require an equivalent standard of written Chinese for minority students to enter a mainstream EMI school.

The provisions on indirect discrimination in the RDO are restrictive and place an undue burden of proof on individuals facing indirect discrimination. In this respect, Hong Kong has moved in the opposite direction to recent developments in anti-discrimination legislation, such as the European Race Directive, which have adopted more progressive provisions.

Traditionally Hong Kong has been highly influenced by developments in UK law. A comprehensive Equality Bill is now being proposed in the UK, which would combine all current UK anti-discrimination legislation and extend it to cover age, transgender issues and religion.²¹⁹ One of the advantages of comprehensive legislation would be that it could better handle the kind of intersectional discrimination on grounds of race and language which minorities in Hong Kong commonly face. An equality bill was proposed by a former Legislative Councillor in 1994,²²⁰ but this approach was rejected by the Hong Kong government, which has continued to adopt a policy of separate Ordinances, rather than the more current comprehensive approach.

Hong Kong cases with relevance to language discrimination in education

²¹⁷ RDO Article 4.2.

²¹⁸ See n. 216 above, Article 2.2.b.

²¹⁹ See the Progress Chart for updates on the Bill. At the time of writing the Bill had not yet had its First Reading in the House. Available at: <http://www.commonleader.gov.uk/output/page2373.asp> Accessed on March 22, 2009

²²⁰ The Human Rights and Equal Opportunities Bill was circulated for public consultation by Anna Wu in 1994, but was never introduced into the Legislative Council. This Bill included a proposal to give the EOC enforcement powers over the HKBORO. See Carole Petersen, 2002, *The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong*. 32 Hong Kong Law Journal 103.

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Two recent cases, involving indirect discrimination on grounds of sexual orientation are encouraging in the progressive attitude taken by the Hong Kong courts. There is no explicit protection against discrimination on grounds of sexual orientation in the BORO, unlike the protection that race and language receive, but the court held that “fundamental rights and freedoms are to be interpreted generously”²²¹

In the case of *Leung v Secretary for Justice*,²²² a young man appealed against a law which imposed a higher age of consent for gay men than for heterosexual couples. It did so by making 21 the age of consent for anal intercourse or buggery, while for vaginal intercourse the age of consent is 16. The court decided that the minimum age restriction for buggery, which applied to both men and women, was discriminatory in that although on the face of it, heterosexuals and gay men were being treated equally, in fact anal intercourse was the only form of intercourse available to gay men, while heterosexuals had the choice of vaginal or anal intercourse, “denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory”.²²³ The court found that imposing a higher age of consent for buggery than vaginal intercourse was not justified, and that a margin of appreciation could not be accorded to the legislature in cases where the role of the court is to protect a minority from the excesses of a majority.²²⁴

This case is significant in that it reiterated that indirect discrimination, in which an apparently neutral provision disproportionately affects a particular group, is unlawful. Courts in Hong Kong often allow a margin of appreciation to the legislature, a concept borrowed from European jurisprudence, where it is intended to give the different European countries flexibility to adapt European legislation to the different needs and conditions of their countries. The concept would appear thus to have no place in domestic law but has been used in Hong Kong to defer to the legislature on the grounds that it has

²²¹ *Leung v. Secretary for Justice* [2006] 4 HKLRD 211, para. 35.

²²² *Ibid.*

²²³ *Ibid.*, para. 48.

²²⁴ *Ibid.*, para. 11.

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more information and better grasp of policy.²²⁵ It has been pointed out that if unchecked this principle could easily act as a brake to progressive interpretations.²²⁶ It is encouraging that the judgment in *Leung* clearly states the necessity to protect minority interests takes precedence over deferring to the legislature. This might strengthen any future litigation against the government involving language rights in education for minorities.

In both *Leung* and a more recent case, *Secretary for Justice v Yau Yuk Lung & Another*,²²⁷ the court stated that it would “scrutinise with intensity” any breach of rights based on race, sex or sexual orientation. The Court held that although, “the starting point is identical treatment”, there is “no requirement of literal equality in the sense of unrelentingly identical treatment always...but... any difference has to be recognised by “sensible and fair minded people” and be “rational” and “proportionate”.²²⁸ Again the court refers to indirect discrimination, to find that Section 118F(1) of the Hong Kong Criminal Code was discriminatory in that it only criminalised homosexual, but not heterosexual buggery in a public place, dismissing the governments’ appeal.

It is interesting that in the two preceding cases, the courts were prepared to defend the rights of a sexual minority against indirect discrimination, when that minority is not even explicitly protected in the BORO. Race and language are protected under the BORO, but in the US and the European Court, language discrimination has not been accorded the same level of scrutiny as discrimination on grounds of race, in the US at least because it is considered to be a mutable, and not an inherent characteristic. It is arguable how mutable language is in reality and for linguistic minorities in Hong Kong discrimination on grounds of language and race impact them in ways that are not easily separable.²²⁹ The

²²⁵ Johannes Chan & C L Lim, 2009. *Basic Principles*. In J. Chan & C L Lim (eds) Hong Kong Constitutional Law (Thompson, forthcoming), p. 17.

²²⁶ *Ibid.*

²²⁷ *Secretary for Justice v. Yau Yuk Lung & Another* [2007] HKEC 1278.

²²⁸ *Ibid.*, para. 37.

²²⁹ Two examples show the intersectional nature of discrimination against linguistic minorities: 1. An ethnic Indian woman phoned a family after seeing an advertisement for a tutor in English. She was invited for interview, but when she met the family, she was told that they preferred someone with blond hair and blue eyes to teach their child. Despite speaking fluent and unaccented English, the woman was directly discriminated against on grounds of race. Hong Kong Against Racial Discrimination, *Summary of Case*

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decisions in the two sexual orientation cases suggest that the Hong Kong courts might take a progressive approach to discrimination on grounds of language in the future.

There have been attempts to cite the ICESCR in a few cases in Hong Kong but the courts have not been receptive. In *Chan Mei Yee*,²³⁰ one of the applicants sought to reverse a deportation order to allow her to stay in Hong Kong to take care of her young daughter, a permanent resident with a chronic illness, and cited the ICESCR²³¹ in support of her case. The ICESCR, unlike the ICCPR, does not have a reservation on its application to immigration matters in Hong Kong.

However the application was unsuccessful, mainly because the judge ruled that though the ICESCR provided protection for the family, the Covenant is promotional in nature, and accordingly could only be invoked as a “framework” in which government decisions could be made and could not be the basis for “legitimate expectation.”²³² The decision in a later immigration case also failed to recognise the ICESCR as a source of enforceable rights.²³³ This is in spite of the fact that in both cases the applicant sought only the quashing of a removal order and not benefits involving the expenditure of resources.

In a later case, *Ho Choi Wan v Hong Kong Housing Authority*,²³⁴ Justice Bokhary in a dissenting judgment stated that the ICESCR was relevant to the case and was a powerful aid in construing the duty of the Housing Ordinance to provide affordable

Studies, presented in a submission to the CERD Committee, July 2001; 2. A young man of Pakistani origin, who spoke fluent Cantonese and could read and write basic Chinese applied for a job as a messenger. He was offered the job after a phone interview. However when he turned up for work, he was told that the company needed someone who could also speak Putonghua and read simplified characters. This was for a simple delivery job based in Hong Kong. An apparently neutral language requirement – the ability to speak Putonghua – was employed to exclude him from the job, as a proxy for direct discrimination on grounds of race. Presentation by Vandana Rajwani, Conference on Hong Kong's Race Discrimination Bill, 31 March 2007.

²³⁰ *Chan Mei Yee and another v. Director of Immigration* HCAL77/1999 Date of judgment 13 July 2000

²³¹ ICESCR Article 10 provides that “The widest possible protection and assistance should be accorded to the family...particularly while it is responsible for the care and education of dependent children.”

²³² *Ibid*, para.46

²³³ *Chan To Foon v. Director of Immigration*, HKCAL 58/1998 Date of Judgment 11 April 2001.

²³⁴ *Ho Choi Wan v. Hong Kong Housing Authority* [2005] 4 HKLRD 706; (2005) 8 HKCFAR 628.

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housing,²³⁵ though in no part of his comments did he challenge the notion that the ICESCR is merely a promotional document. Justice Bokhary's comments appeared to have been partly influenced by the fact the economic, social and cultural rights are not included in the BORO, and thus not incorporated in Hong Kong's domestic legislation, yet the Hong Kong government has submitted to the ESCR Committee that there is no need to include these rights in the BORO as they are already fully incorporated in domestic law.²³⁶

In *Catholic Diocese of Hong Kong v Secretary for Justice*,²³⁷ an attempt to invoke the ICESCR²³⁸ to defend the autonomy of Catholic schools was rejected, but the court seemed to assume that the Covenant was applicable to Hong Kong via Article 39 of the Basic Law.²³⁹ Despite the ICESCR not being incorporated into domestic law in the same way as the ICCPR, this judgment suggest that the ICESCR should be applied to interpret domestic law, giving rise to justiciable obligations, in line with the comments of the ESCR Committee.²⁴⁰

Cases which have attempted to invoke the ICESCR have been less successful than cases which have invoked the non-discrimination provisions of the BORO. Hong Kong courts are perhaps not as familiar with the ICESCR as they are with the ICCPR, via its incorporation into the BORO, and appear to be under a misconception that it is a promotional document only. However the ICESCR has been so far invoked mainly in sensitive immigration cases, which are perhaps not the most appropriate cases to test its justiciability in Hong Kong. In *Catholic Diocese of Hong Kong*, the court at least

²³⁵ *Ibid*, para. 68.

²³⁶ This irony was pointed out in Carole Petersen, 2005 *Embracing "Updated" universal standards? The role of human rights treaties and interpretative materials in Hong Kong's constitutional jurisprudence*. Paper presented at the conference: Interpretations and Beyond. University of Hong Kong, 25 November 2005.p.16

²³⁷ *Catholic Diocese of Hong Kong v. Secretary for Justice* HCAL 157/2005 [2007] 4 HKLRD 483.

²³⁸ ICESCR Article 13. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of the children in conformity with their own convictions.

²³⁹ See n. 237 above, para. 34-5.

²⁴⁰ See n. 225 above, p. 6.

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accepted that the ICESCR was applicable to Hong Kong via Article 39 of the Basic Law, which may indicate further potential for using the Covenant in future cases.

Chapter IV

Hong Kong's obligations towards to make education adaptable and acceptable for linguistic minorities

This chapter will examine Hong Kong's obligations under international law to make education adaptable and acceptable to linguistic minority children and will also discuss relevant cases from other jurisdictions in relation to the situation in Hong Kong.

The right to education without discrimination: adaptability

Adaptability is another key concept in the CESCR Committee's definition of State obligations in respect of the right to education, "education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings"²⁴¹ States are to adopt "appropriate means"²⁴² to realise the right to education, which is interpreted as an obligation to adopt "flexible curricula"²⁴³ and "varied and innovative approaches"²⁴⁴ to education.

There is a consensus amongst educators that a child learns most effectively when taught through the medium of the mother tongue.²⁴⁵ Yet although the child's mother tongue may be the ideal medium of instruction, many factors may not make the use of mother tongue education for all children possible, as is the case in Hong Kong.²⁴⁶ Even when a linguistic minority is sufficiently large and concentrated to justify mother tongue education, a child whose mother tongue is not the national language, still needs to learn a

²⁴¹ CESCR Committee, *General Comment 13*, 1999, Para. 6 (d).

²⁴² ICESCR Article 13. 2(b).

²⁴³ See n. 241 above, para. 12.

²⁴⁴ See n. 241 above, para. 13.

²⁴⁵ "It is axiomatic that the best medium for teaching a child is his mother tongue. Psychologically it is the system of meaningful signs that in his mind works automatically for expression and understanding. Sociologically, it is a means of identification among the members of the community to which he belongs. Educationally, he learns more quickly through it than through an unfamiliar linguistic medium"

The Use of Vernacular Languages in Education. UNESCO Monographs on Fundamental Education, 1953, p.11. Available at: <http://unesdoc.unesco.org/images/0000/000028/002897EB.pdf>

²⁴⁶ *Ibid*, p.12.

second language.²⁴⁷ In fact the UNESCO Convention against Discrimination in Education stresses that any educational provision using the mother tongue of linguistic minorities should not be at the expense of minority children learning the national language.²⁴⁸ UNESCO has stressed the need to develop “graded materials in the national language” to enable minority students to gradually acquire the skills in the second language that they need to learn effectively in the school system.²⁴⁹

The use of “special measures”

The obligation to adapt education to diverse needs implies that identical treatment for all is often not sufficient and that special measures may be necessary to assist disadvantaged groups to attain substantive equality.²⁵⁰ General Comments from the Human Rights Committee and the ESCR Committee recognise that special measures may be needed to redress disadvantage,²⁵¹ but the ICERD provides stronger support, in that it is the only international treaty which requires States to take special measures to ensure the adequate development of disadvantaged racial groups.²⁵² The CERD Committee has recently issued a General Comment which offers further clarification of special measures within the meaning of articles 1(4) and 2(2) of the Convention.²⁵³

The Committee distinguishes between “special measures” and broader “positive duties” which oblige States to take action to secure the possibility of exercising rights and to promote equality for all.²⁵⁴ The terms “positive duty”, “positive actions”, “positive

²⁴⁷ *Ibid* p.13.

²⁴⁸ See n. 162 above, Article 1.c(i)

²⁴⁹ See n. 245 above, p.64.

²⁵⁰ Asbjorn Eide, 2001, *Economic, Social and Cultural Rights as Human Rights*. In Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights* (2nd Edition). Kluwer: The Hague, 9-28, p.19.

²⁵¹ Human Rights Committee *General Comment 18 Non Discrimination*, para. 8; CESCR Committee, *General Comment 13*, 1999, Para. 32; CESCR Committee, *General Comment 20 Non-Discrimination and ESCR Rights*.

²⁵² ICERD Article 2.2; CERD Committee, August 2009. General Recommendation No. 32. *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination Para.11*.

²⁵³ CERD Committee, August 2009. General Recommendation No. 32. *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*.

²⁵⁴ Kristin Henrard, 2007, *Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination*. European Union Directorate for Employment, Social Affairs and Equal Opportunities, p.6; Sandra Fredman, 2008, *Human Rights transformed: Positive Rights and Positive Duties*. Oxford University Press: Oxford, p. 3.

measures” and “special measures” are all used in discussions in the literature on equality and non-discrimination and sometimes the distinction between these concepts is not clear, but the CERD Committee defines “special measures” as *one component* of the positive actions which a State may employ to eliminate racial discrimination.²⁵⁵ Special measures involve “measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms”,²⁵⁶ and should be temporary, in line with principles of fairness and proportionality and be grounded in a realistic appraisal of the situations of the groups and individuals concerned, which requires the gathering of accurate disaggregated data.²⁵⁷

An increasing recognition of the rights of groups

The adoption of special measures involves recognising that certain groups are in need of special treatment. Yet recognition of group rights for minorities in international law has been problematic, perhaps because of the difficulties involved in identifying who would be the rights holders.²⁵⁸ Even the UN Declaration on Minorities avoids any reference to group rights, referring to the rights of “persons belonging to minorities” and not to the rights of minority groups.²⁵⁹

The difficulties in defining what constitutes a “minority” under international law, also apply to the definition of a group. A useful working definition characterises groups as “spontaneous”, in that they are not planned or artificially created entities, “permanent”, and involving self-identification and sense of a unity with the group by the individual members.²⁶⁰ Lerner identifies three categories of groups: 1. ethnic or racial groups 2. religious groups 3. linguistic or cultural groups, but concedes that both religion and

²⁵⁵ See n.252, para.14.

²⁵⁶ *Ibid*, para.11.

²⁵⁷ *Ibid*, para.16-18.

²⁵⁸ Nigel Rodley, 1995. *Conceptual Problems in the Protection of Minorities: International Legal Developments*. Human Rights Quarterly Vol.17 48-71, p.64.

²⁵⁹ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. UNGA Resolution 47/135 of 18 December 1992.

²⁶⁰ Natan Lerner, 2003, *Group Rights and Discrimination in International Law*. Kluwer Law International: The Hague, p. 36-37.

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language may be subject to change by voluntary acts of the individual and may thus lack absolute permanency.²⁶¹

There has been a gradual move in international law from the perception that minority groups are in need of protection, to the notion that specific groups possess inherent rights.²⁶² The Human Rights Committee has stated that the rights protected under ICCPR Article 27 are individual rights and not group rights, but has conceded that the fulfilment of these individual rights may depend on minorities being able to speak their language “in community with the other members of the group”, which may necessitate the State taking special measures to ensure the protection of the group and its rights.²⁶³ In the most recent General Comments from both the CESCR and CERD Committees, there is an increased recognition that some groups suffer from entrenched and systemic discrimination, and positive measures are needed to redress discrimination against such groups.²⁶⁴

Two recent communications to the CERD Committee reflect this increased attention to the rights of groups. In a recent case, the author claimed that trainees of non-Danish origin at a vocational training school were discriminated against in that the school did not assign them traineeships to companies which requested to have only trainees of Danish origin, thus reducing the total number of traineeships for trainees of non-Danish origin. The Committee held that although the complainant had not himself been directly discriminated against, as a member of the group of non-Danish trainees, he had been subject to *de facto* discrimination and was entitled to compensation.²⁶⁵ In *The Jewish Community of Oslo & Ors.*, the Committee considered the case admissible, even though three of the authors of the complaint were organisations, not individuals, stating that even

²⁶¹ *Ibid*, p. 36-37.

²⁶² *Ibid*, p. 16.

²⁶³ Human Rights Committee *General Comment 23*, para. 6.2.

²⁶⁴ CESCR Committee, General Comment 20, June 2009. *Non-Discrimination and ESCR Right*, paras. 8, 10, 12; CERD Committee, August 2009. General Recommendation No. 32. *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, para.22.

²⁶⁵ Opinion of the CERD Committee under Article 14 of the ICERD on Communication No.40/2007, submitted to the Committee on the Elimination of Racial Discrimination on behalf of Mr. Murat Er, August 2007, para. 7.3

though not every individual in each organisation had been personally subjected to discrimination, they belonged to a group which had the potential to become victims.²⁶⁶

The right to education without discrimination: acceptability

The obligation to provide an *acceptable* education, “of good quality” is another key component in the CESCR Committee’s interpretation of State obligations in respect of the right to education.²⁶⁷ Viewed from the perspective of linguistic minorities, an *acceptable* education, would be one in which the language needs of minorities were met, without discrimination, enabling minorities to “participate effectively in a free society” and to promoting “understanding, tolerance and friendship among all nations and racial, ethnic or religious groups.”²⁶⁸ The most recent UN documents on the rights of minorities stress their right to learn about and participate in the wider society in which they live.²⁶⁹

This implies that the education of linguistic minorities should not be of an inferior standard to that of the majority, a requirement made explicit in the UNESCO Convention against Discrimination in Education,²⁷⁰ and that minorities should not be separated from the majority for their education. International human rights law prohibits policies which encourage segregation of minorities. Under the ICERD, States have an obligation to discourage the strengthening of racial divisions and encourage integration,²⁷¹ and the CERD Committee has expressed concern about segregation of minority children in its Concluding Observations.²⁷² The UN Recommendations on Minorities and the Right to

²⁶⁶ CERD Committee Communication No. 30/2003, *The Jewish community of Oslo; the Jewish community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt*, para.7.3 & 7.4, August 2005.

²⁶⁷ See n. 241 above, para. 6 (c).

²⁶⁸ ICESCR Article 13.1.

²⁶⁹ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. UNGA Resolution 47/135 of 18 December 1992, Articles 4.4 & 4.5; *UN Recommendations on Minorities and the Right to Education*. A/HRC/FMI/2008/2 11 December 2008, II. 9.

²⁷⁰ See n. 162 above, Article 1 (a) & (b).

²⁷¹ ICERD, Article 2.2.

²⁷² The CERD Committee has expressed concern at the persistence of *de facto* racial segregation in US schools and about segregation of children from ethnic minorities in special remedial classes in the Russian Federation. Report of the CERD Committee to the UN General Assembly, 2008. *Concluding Observations on the USA*, para. 488, *Concluding Observations on the Russian Federation*, para. 377.

Education strongly discourages policies which result in educational segregation or overrepresentation of minority pupils in schools.²⁷³

Relevant cases from other jurisdictions

Special protection for vulnerable groups

US courts accept the principle that the existence of widespread and historic discrimination against a minority in society indicates that courts and policy makers need to pay special attention to claims of discrimination. In *Castaneda v Pickard*,²⁷⁴ a US case brought by a group of Mexican-American parents, unhappy with the language provisions for their children, the Court of Appeal stated that “if the district's history reveals a story of unremedied discrimination...then the courts must scrutinise the effects of ability grouping with punctilious care”. In fact the US Courts classify the level of scrutiny in discrimination cases as “high”, “intermediate” and “low”. Cases involving groups defined as “suspect classes” receive a much higher degree of judicial scrutiny than other discrimination cases. Groups considered to be “suspect classes” are those which form a “discrete” or “insular” minority,²⁷⁵ who possess an immutable trait, share a history of discrimination, and are powerless to protect themselves via the political process. According to the US definition of a “suspect class”, cases of discrimination involving racial minorities qualify for heightened judicial scrutiny, as this group possesses “immutable” characteristics, but although language discrimination is often a proxy for discrimination on grounds of national origin, the Supreme Court has not defined language as a suspect class.²⁷⁶

²⁷³ UN Recommendations on Minorities and the Right to Education. A/HRC/FMI/2008/2 11 December 2008, III. 21.

²⁷⁴ *Castaneda v. Pickard*, US Court of Appeals, Fifth Circuit. UNIT A 648 F.2d 989; 1981 U.S. A Texas case brought by a group of Mexican-American parents, unhappy with the language provision for their children in their school district.

²⁷⁵ *United States v. Carolene Products Company*, 304 U.S. 144 (1938), Footnote Four proposed that a higher level of judicial scrutiny was appropriate in cases involving certain groups, one of which was “discrete and insular minorities.”

²⁷⁶ James Crawford, 2007 *Loose Ends in a Tattered Fabric: The Inconsistency of Language Rights in the United States*. In J. Magnet, (ed), *Language Rights in Comparative Perspective*, Markham, Ont.: Butterworths.

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The European Court judgment in *D.H. and others v the Czech Republic*, identified the Roma as a disadvantaged and vulnerable minority in special need of protection.²⁷⁷ However in another case involving Roma students in schools being educated in separate classes, *Orsus and Others v Croatia*,²⁷⁸ the court stated that while in *D.H. and others*, the difference in treatment is based on race, which requires “the strictest scrutiny”, difference in treatment based on language allows for a wider margin of appreciation.²⁷⁹ The existence of what seems to be a hierarchy of rights in the judgments of both the European Court and the US Courts may mean that cases that invoke discrimination on grounds of language alone may be less successful than those which invoke racial or national origin discrimination.

Special measures for linguistic minorities

Despite the later dilution of the concepts of disparate impact and individual right of redress in the *Lau* decision, this judgment triggered important policy changes in education in the US. The San Francisco school district was required to take special measures to remedy the language barrier faced by non-English speaking students though no particular educational program was specified: the “Lau Remedies”.²⁸⁰ However the main legal source concerning language discrimination in education in the US today is the Equal Educational Opportunities Act (EEOA),²⁸¹ which specifies that “failure to take appropriate action to overcome language barriers that impede equal participation by students in its instructional programs,” is prohibited.

Although the duty to take action is mandated, no particular approach is specified in the EEOA but in *Castaneda v Pickard*,²⁸² the court developed a 3-part test to determine whether “appropriate” action has been taken. The programme developed must be based on sound educational theories, and must effectively implement those theories, and be able

²⁷⁷ See n. 190 above, para.182.

²⁷⁸ *Orsus and Others v Croatia*, Application no. 15766/03, 17 July 2008.

²⁷⁹ *Ibid*, para. 66.

²⁸⁰ The official title of this policy document was *Task Force Findings Specifying Remedies Available for Eliminating Unlawful Discrimination Under Lau v. Nichol*.

²⁸¹ Equal Education Opportunity Act 1974 (20 USC Sec. 1703), (d) & (f).

²⁸² See n. 274 above.

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to show over time that the language barrier is actually being overcome.²⁸³ This interpretation had a great impact on many subsequent court decisions and the test was adopted as the basis for guidelines for school districts by the Department of Education's Office of Civil Rights.²⁸⁴

The guidelines do not specify how language barriers should be overcome, leaving freedom of choice to school districts to develop programmes suitable for the local context. This may involve bilingual education, intensive training in English or a combination of both. But there is a requirement for compliance with the three areas of the test, and States have been taken to court for failing to adequately monitor the language provisions in their school districts.²⁸⁵ In the European system there have been important developments in the obligation of member States to take positive action against discrimination with the introduction of the European Race Directive²⁸⁶ which permits, though it does not require, the use of special measures as part of a positive equality duty.

Special measures and segregation

Segregation is prohibited in international law,²⁸⁷ as is the provision of an education of inferior quality to a particular group. *Brown v Board of Education* established that even if the physical facilities of a school are the same in quality, the act of segregation denies black children the equal protection of the law and has damaging effects. In the US, the EEOA prohibits segregation on grounds of race, colour or national origin²⁸⁸ both among and within schools. However implementing special measures for language support often necessitates removing one group of students from the mainstream and educating them separately, setting up a tension between the need to avoid segregation,

²⁸³ *Ibid*, para. 1008-1010.

²⁸⁴ Marie C. Scott, 2008. *Resegregation, language and educational opportunity: The influx of Latino students into North Carolina public schools*. 11 Harvard Latino Law Review 123, p.5-6.

²⁸⁵ *United States of America et. al Plaintiff, and G.I. Forum and LULAC, Plaintiff-Intervenors v. The State of Texas et. al Defendants*. Civil Action No. 6:71-CV-5281-WWJ, August 2006. This case was brought against Texas for failing to comply with its own monitoring procedures to ensure the quality and efficacy of language programs.

²⁸⁶ *Race and Ethnic Discrimination Directive* 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,

²⁸⁷ ICERD Article 3

²⁸⁸ See n. 281 Sec. 1703, (a).

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and the need to provide targeted language support to allow meaningful access to education.

Removing a linguistic minority group from mainstream classes may be necessary to provide appropriate language support, but students often feel isolated from the wider society and have little chance to practice the language they are learning in natural social contexts. This was the case among students in a special programme in a high school in Vermont, USA.²⁸⁹ In the USA, “re-segregation” is said to be occurring in areas such as North Carolina, which has seen an influx of Spanish speakers, as students are separated into different streams for language support.²⁹⁰

The court in *Castaneda v Pickard* recognised that it may be necessary to stream students according to language ability, thus separating them from the rest of the school, “language grouping is ...an unobjectionable practice...” but warned that “a practice which actually groups children on the basis of their language ability and then identifies these groups not by a description of their language ability but with a general ability label is, we think, highly suspect”.²⁹¹ A suspect practice of this nature was identified in *D.H. and others v the Czech Republic*. Roma children were given tests that were linguistically and culturally not suited to them, and on the basis of those tests were assigned to special schools for children with learning difficulties.²⁹² In *Sampanis*,²⁹³ the government claimed that the Roma children were enrolled in a preparatory class, to help them transition to mainstream schooling. The court found that there was no clear educational criterion for judging whether the Roma children needed to be in a special class, and although the classes were meant to be preparatory, no evidence had been produced to show that they actually were. In *Sampanis*, the lack of criteria for determining whether Roma children needed to be in special classes, and the lack of a plan for their transition to the mainstream, were determining factors in the court’s decision.

²⁸⁹ Ginger Thompson, March 15 2009. *Where education and assimilation collide*. New York Times.

²⁹⁰ See n.284, p.8.

²⁹¹ See n. 274 above, para. 21.

²⁹² See n. 190 above, para.199-201.

²⁹³ See n. 193 above.

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In both the US and the European Courts it seems that for the separation of linguistic minority children from the mainstream to be acceptable, it must be clearly done on the basis of language, and language ability should not be used as an indicator of other abilities. Separating students to provide language support is also assumed to be a temporary provision, and may be one of the “special measures” designed to redress disadvantage by providing extra help to linguistic minorities.

The court in *Castaneda* stated that segregation for language support was acceptable so long as the goal was to integrate students into the mainstream as soon as possible.²⁹⁴ In *Orsus*,²⁹⁵ the Court found that Roma children had the right of access to a recognised form of education,²⁹⁶ placing students in separate classes did not result in students receiving a reduced curriculum, and transfer to mixed classes was common.²⁹⁷ The Court felt that allocating some students to Roma-only classes was a positive measure to address their inadequate Croatian language skills, and did not constitute discrimination,²⁹⁸ and the Croatian authorities were not in breach of Article 2 Protocol 1. The fact that transfer to mainstream classes was possible, and indeed common, seems to have influenced the court’s decision.

Hong Kong’s obligations under international law to provide an education that is adaptable and acceptable to linguistic minorities

It is questionable whether the education provided to minority students in Hong Kong can be described as sufficiently adapted or acceptable. There is little adaptation to meet their needs and the quality of education provided to minority students is likely to be inferior to that provided to native Chinese-speaking students. The provision of an inferior education, with inadequate instruction in Chinese, may deny linguistic minorities opportunities to participate in the wider social, economic and cultural life of Hong Kong.

Medium of instruction

²⁹⁴ See n. 274 above, para. 21

²⁹⁵ See n. 278 above.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*, para.59-60.

²⁹⁸ *Ibid.*, para.68.

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The provisions on medium of instruction in the RDO are not helpful in resolving the problems faced in education by linguistic minorities. The RDO states that it binds the government and, though this blanket formulation excludes certain government acts,²⁹⁹ the ordinance includes education as one of the areas covered. The provisions on education make it unlawful for educational bodies to directly discriminate by refusing to admit access to an institution or to any of its benefits and services on the ground of race.³⁰⁰ However the same clause also states that, “Nothing in subsection(1) is to be construed as requiring the responsible body for an educational establishment to modify for persons of any racial group arrangements ...regarding medium of instruction; or to make different arrangements ...regarding medium of instruction for persons of any racial group”.³⁰¹ The same formulation is repeated in the provisions on vocational training.³⁰² This has been described ironically as a “Hong Kong innovation” in anti-discrimination law as no other jurisdiction includes such a clause in its legislation.³⁰³

It has already been argued that language policies in the Hong Kong education system have a disproportionate, negative impact on students from linguistic minorities, most of whom are also ethnic minorities. These clauses exempt educational and vocational institutions from any requirement to mitigate the negative impact of the medium of instruction policy on minority students, for example by providing language support or developing an alternative Chinese curriculum for such students. The RDO is supposed to implement the ICERD, but this formulation is contrary to the letter and spirit of ICERD which, though it makes no explicit reference to medium of instruction, provides that, “States Parties shall ... take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups ... for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms,”³⁰⁴ thus imposing a positive duty upon States to take action to ensure equality for disadvantaged groups.

²⁹⁹ One example of this is law enforcement functions. Kelley Loper, 2008. *See* n. 212 above.

³⁰⁰ The *Racial Discrimination Ordinance*, Ord. No. 29 of 2008, Clause 26.1.

³⁰¹ *Ibid.* Clause 26.2.

³⁰² *Ibid.* Clause 20.

³⁰³ *See* n. 52.

³⁰⁴ ICERD Article 2.2.

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Although special measures to address disadvantage and promote equality are not unlawful under the Ordinance,³⁰⁵ the explicit statement that no adjustments in the medium of instruction are required has led to criticism that the Ordinance clarifies in what circumstances educational institutions are allowed to discriminate, instead of promoting equality. In practice, schools take measures to deal with language problems, for example by separating minority students into a different stream. But by doing this schools risk the charge that they are discriminating under the RDO by “segregating” students on grounds of race.³⁰⁶ It is unfortunate that the government’s policy on education for minority children provides inadequate direction for educational institutions on how to avoid racial discrimination.

In its justification for exempting educational institutions from any requirements to take special measures to cater for linguistic minority students, the Hong Kong government made the odd statement that “Language is not a ground of race”.³⁰⁷ Language is not included as a prohibited ground of discrimination in the RDO but this assertion misses the point that discrimination on grounds of language is prohibited under the ICERD and many of the other international human treaties that Hong Kong is bound by, and ignores the intersectional nature of discrimination on grounds of language and race affecting Hong Kong’s linguistic minorities.³⁰⁸ The government stated that it considered the most effective way of addressing the medium of instruction issue was through “enhanced support in education” via a “school-based support scheme for non-Chinese-speaking students,”³⁰⁹ but by failing to making such measures enforceable under the RDO it sends a message to schools and to the community that taking measures to avoid indirect discrimination are not important, which runs counter to the important educational role of anti-discrimination law.³¹⁰ The Hong Kong government also has a responsibility

³⁰⁵ The Racial Discrimination Ordinance, Ord. No. 29 of 2008. Clause 40.

³⁰⁶ *Ibid.* Clause 4.3.

³⁰⁷ Bills Committee on the Race Discrimination Bill. *The Administration’s further response to major issues raised by the Bills Committee*, March 2008. Legislative Council Paper No. CB(2)1292/07-08(01), para.12.

³⁰⁸ For a full explanation of intersectional discrimination, see Sandra Fredman, 2002. *The Future of Equality in Britain*. Working Paper Series No.5, UK Equal Opportunities Commission, p.25.

³⁰⁹ See n. 307 above, para.13.

³¹⁰ Kelley Loper, 2008. See n. 212 above.

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to collect disaggregated data about minority groups under the ICERD,³¹¹ but despite improvements in data collection in the 2006 By-Census, the government is still failing to collect sufficiently detailed data about the Chinese and English proficiency of linguistic minorities.

Issues of segregation

Segregation in education is prohibited in the ICERD and the RDO. However, education policies in Hong Kong have the effect of concentrating most linguistic minority students in a small number of designated schools, where they have few chances to mix with local Chinese students. If the designated school is CMI, minority students are likely to be in a separate stream. The jurisprudence of the US and the European systems cases suggests that such separation may not be discriminatory if streaming for language ability does not imply labelling for other abilities, and if such separation is temporary, with a plan in place to move students into mainstream classes once their language abilities have reached an adequate level.

But in Hong Kong the use of the same Chinese test in the primary assessments for both native Chinese speakers and linguistic minority students tends to result in minority students gaining lower scores, and thus being labelled as less academically able due to their limited proficiency in written Chinese.³¹² This means that the better-regarded schools are not available to them, which may result in them receiving inferior quality education. Once students enter what is seen as a poor school, it is very difficult for them to transfer to a better one. There is also no plan for transition to the mainstream, based on an objective assessment of language level. It seems that in primary schools at least, students are transferred to mainstream classes taking the primary assessments according to their age, and not according to whether their Chinese has reached the required level.

The EDB argues that parents of linguistic minority students have a wide choice of schools and the freedom to choose what they see as the most suitable form of education

³¹¹ See n. 252, para.16-18.

³¹² See n. 52 above.

for their child, and some prefer to send their children to schools with large numbers of minority students.³¹³ All parents in Hong Kong have the right to seek alternative education outside the State system in line with the provisions in the ICESCR,³¹⁴ but these provisions do not imply public funding of such education. Only the affluent can afford to pay for good-quality private education, and private schools which are affordable for minority parents may not meet minimum educational standards.³¹⁵ Allowing minorities the “choice” of setting up their own schools is really no choice at all, and involves an abdication of State responsibilities and an unequal economic burden on the minority group.³¹⁶

Mainstream schools are free but most primary schools use Chinese as the medium of instruction and do not provide adequate language support for linguistic minority students. The change of medium of instruction to Chinese in secondary schools, while it may be valid on pedagogical grounds for the majority, has greatly reduced the choice of EMI schools for minority students. Linguistic minority parents may be forced to make decisions about their children’s education on the basis of social or economic constraints which prevent them from making a genuine choice.³¹⁷ For many minority students, the designated schools are the only schools which provide an accessible education for them, yet the over-representation of such students in a few schools contravenes the RDO and Hong Kong’s international obligations under the ICERD.

The obligation to take special measures

In order to comply with its obligations under ICERD³¹⁸, the Hong Kong government needs to take special measures to ensure that the school curriculum is

³¹³ See n.46.

³¹⁴ ICESCR Articles 13.3 & 4.

³¹⁵ The Poinsettia Primary School in Yuen Long exemplifies this problem. This low-cost English-medium private school is located in a decaying disused shopping centre and has minimal facilities. Its students are mainly drawn from the Nepalese community, many of whom feel that their children’s language level is not adequate to learn effectively in CMI primary schools. See Timothy Chui, *Nepalese School at an Impasse*. Hong Kong Standard, Tuesday January 2, 2007; Timothy Chui, *Minorities held back in Schooling*. Hong Kong Standard, Thursday January 4, 2007.

³¹⁶ Sandra Fredman, 2008. See n. 1 above, p.15.

³¹⁷ *Ibid*, p.14.

³¹⁸ ICERD Article 2.2.

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adapted to cater for the language needs of minority students, and that a variety of teaching methods are used to enable diverse groups to benefit from education. The definition of racial discrimination in model legislation drawn up by the UN includes any “omission” which has the effect of “nullifying or impairing, directly or indirectly” the equal enjoyment of rights.³¹⁹ An earlier study pointed out that in the Hong Kong context, “omission” could include the failure to provide adequate Chinese language support to linguistic minority students to enable them to access education.³²⁰ In a paper on affirmative action, the Hong Kong government stated that it would “encourage” special measures to be taken to promote equality in education, but would not make them mandatory in the RDO.³²¹ But the latest General Recommendation by the CERD Committee clarifies that States are required to adopt temporary special measures where circumstances warrant.³²²

The Hong Kong government has made some efforts to address the language issues faced by minority students but if we apply the test developed by the US Court of Appeal in *Castaneda v Pickard*³²³ to the special measures taken by the EDB, Hong Kong does not perform well. There is no evidence that there is any particular educational theory underpinning the Hong Kong government’s provision for Chinese language support for linguistic minorities in schools. Teachers are not trained in appropriate methodologies for teaching Chinese as a second language. There is no policy or programme, merely piecemeal measures, which consume quite large sums of money, and yet do not appear to be adequately monitored for effectiveness. Whether these measures can overcome language barriers over time has yet to be demonstrated, but the EDB does not appear to

³¹⁹ United Nations Secretary General, *Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination, third decade to combat racism and racial discrimination* (1993-2003). The United Nations Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination was produced to guide governments by providing a model which combines examples of best practice in a wide range of jurisdictions, based on evolving international norms.

³²⁰ Kelley Loper, 2004. *See* n.41 above.

³²¹ Legislative Council Bills Committee *Affirmative Action*, 28 February 2007.LC Paper No. CB(2)1152/06-07(01).

³²² *See* n.252, para.11.

³²³ The 3-part test was used to determine whether “appropriate” action has been taken to overcome language barriers in education for linguistic minorities. The programme developed must be based on sound educational theories, must effectively implement those theories, and be able to show over time that the language barrier is actually being overcome. *See* n. 274 above.

have plans for a longitudinal study which would provide such data. The only such commissioned research so far has focused on linguistic minority students in mainstream primary schools, which do not provide focused language support, and the methodology and conclusions from this study are not reliable.³²⁴

Relevant Hong Kong cases

Two Hong Kong cases support arguments for departures from identical treatment according to different circumstances. Justice Bokhary's definition of the right to non-discrimination under the BORO in *Man Wai Keung* concluded that departures from identical treatment might be necessary when there are differences in the circumstances of those affected, thus supporting a position that special measures may be necessary when policies have a disproportionate impact on different groups.³²⁵ In the *Expatriate Civil Servants* case, Justice Keith accepted Justice Bokhary's test, but rejected the argument that a requirement of proficiency in Chinese discriminated against expatriate officials who wished to transfer to local terms, arguing that differential treatment was justifiable and related to job nature, as such officials would have to stand in for local colleagues from time to time.³²⁶

At first glance Justice Keith's opinion does not seem to support arguments for differential treatment for linguistic minorities, such as allowing them to take different examinations in Chinese from the majority to qualify for entry to secondary and tertiary education. But during the colonial period, expatriate civil servants were given language training in Chinese, with a tailored curriculum, specialised teachers and textbooks,³²⁷ while the situation for linguistic minority students is rather different. There is no curriculum adaptation to meet their needs, few trained teachers in the teaching of Chinese as a Second Language, and a lack of suitable materials, textbooks and assessment tools in

³²⁴ See n. 42 above.

³²⁵ "Clearly there is no requirement of literal equality in the sense of unrelentingly identical treatment always...in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment." In *R. v. Man Wai Keung* (No.2) (1992) 2 HKPLR 164; [1992] 2 HKCLR 207, para. 217.

³²⁶ *R. v. Secretary for the Civil Service, ex parte Association of Expatriate Civil Servants of Hong Kong* (1995) 5 HKPLR 490; [1996] 6 HKPLR 333.

³²⁷ Peter Mann, retired expatriate civil servant, personal communication with the author. See Appendices.

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schools. There would appear to be a strong case for arguing that special measures are needed to redress the disadvantages in education faced by linguistic minorities.

Chapter V

Hong Kong's positive duties to make education available without discrimination for linguistic minorities

Traditionally, obligations of the State with regard to human rights have been divided into obligations of restraint or non-interference imposed by the civil and political rights protected in the ICCPR, and obligations to take positive action, involving the use of resources, protected in the ICESCR. However, this dichotomy between rights of restraint and positive duties is now seen as unfounded, as State obligations with regard to both sets of rights share many similarities,³²⁸ and there is increasing recognition that all rights give rise to a range of duties and obligations by the State.³²⁹ The realisation of civil and political rights, such as the right to fair trial, often involves positive duties and State resources, while ESC rights, such as the right to education, includes the duty for the State to refrain from interference with the freedom of individuals and bodies to establish their own educational institutions.³³⁰

The non-discrimination provisions in the ICCPR and ICESCR apply to all the rights protected in those covenants and as these rights may give rise to a range of positive duties as well as obligations of restraint, it seems reasonable to assume the prohibitions of discrimination on grounds of language also oblige States to take positive measures to fulfil the rights. Civil and political rights and economic, social and cultural rights are also interdependent: the right to freedom of speech cannot be fully realised without the right to education. The Vienna Declaration and the Maastricht Guidelines reiterate that human rights are indivisible, interdependent, interrelated and of equal importance for human dignity.³³¹

³²⁸ See n. 250 above, p.10.

³²⁹ See n. 1 above, p.1-3.

³³⁰ ICESCR Article 13.4.

³³¹ World Conference on Human Rights: *Vienna Declaration and Programme of Action*, 1993, UN doc A/CONG.157/23, Part 1, para.5; *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997, para.4.

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The positive duties of State Parties to the ICESCR have been broken down into three categories: to respect, protect and fulfil.³³² The first is the responsibility of the State to refrain from interfering with the enjoyment of the rights. The second involves the responsibility to protect against interference with those rights by third parties, while the third carries the responsibility for States to take appropriate measures to achieve the full realisation of ESC rights. State obligations regarding ESC rights can thus be expressed as both rights of restraint, and rights which involve positive duties.³³³ The ICERD also obliges States to take positive action to review and if necessary rescind policies which perpetuate racial discrimination in education,³³⁴ and the obligation covers indirect, as well as direct discrimination.

Although State obligations under the ICESCR are subject to progressive realisation depending upon the availability of resources, this does not in any way negate the legally binding nature of the duty on the State to use its “maximum resources”³³⁵ to fulfil the rights protected under the Covenant.³³⁶ The provision on progressive realisation also does not apply to the principle of non-discrimination, which is immediately realisable,³³⁷ obliging States to ensure that all can access education “in law and fact”, without discrimination.³³⁸

The Maastricht Guidelines state that the responsibility to respect, protect and fulfil also involves obligations of conduct and result, by which a State must take action to realise the enjoyment of a right, achieving specific targets to achieve a measurable standard.³³⁹ The “margin of discretion” allowed to States to allow for flexibility in

³³² See the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. II.6.; CESCR Committee *General Comment 12 The Right to Food* Para. 15; Asbjorn Eide, 2001, *see n. 250 above*, p.23.

³³³ *See n. 1 above*, p. 216.

³³⁴ ICERD Article 2.1(c) & Article 5 (e) (v).

³³⁵ ICESCR Article 2.1.

³³⁶ *See n. 250 above*, p.22.

³³⁷ *See n.213 above*, para. 31, “the prohibition against discrimination ... is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.” CESCR General Comment No. 20 *Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*. May 2009, para. 7.

³³⁸ *Ibid*, para. 6(b).

³³⁹ *Maastricht Guidelines ... See n. 332 above*, para. II.7

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selecting the means for implementing the right does not alter the fact that States have an obligation to realise the rights in the ICESCR.³⁴⁰ Even though States may lack the resources to fully realise a right in the short-term, they are obliged to “take steps” towards the realisation of that right.³⁴¹ The Convention on the Rights of the Child (CRC) echoes the provisions in the ICESCR, with all the provisions in the CRC being subject to immediate realisation.³⁴² Provisions in the ICESCR and the CRC thus place the Hong Kong government under immediate obligation to take steps to ensure that its existing education provision is available to all children under its jurisdiction without discrimination.

The fulfilment of State obligation of ESC rights does not necessarily have to involve massive commitment of resources. The “respect” aspect involves avoiding interference with the freedom of the individual to take care of him or herself, while the “protect” aspect, involves protection against interference by third parties. Realising the third level, to “fulfil” ESC rights, may involve facilitation rather than direct provision.³⁴³ The obligation to “take steps” could involve setting a plan of action designed to achieve the full realisation of a right in defined and measurable stages, or could involve redistribution of existing resources.

However in General Comment 20, the CESCR Committee distinguishes between an *immediate* obligation on States to develop “policies, plans and strategies” to ensure that there is no direct discrimination in the fulfilment of ESC rights, and a *progressive* obligation to ensure that “steps are taken” to eliminate indirect discrimination and to address systemic discrimination against disadvantaged groups.³⁴⁴ The same distinction is made in the Limburg Principles.³⁴⁵

It has been claimed that a major difference between economic, social and cultural, and civil and political rights is that the former are inherently non-justiciable and incapable of

³⁴⁰ *Ibid.*, para. II.8.

³⁴¹ CESCR Committee *General Comment 3 The nature of States parties obligations*, para. 2.

³⁴² CRC Article 28.

³⁴³ See n. 250 above, p.24.

³⁴⁴ CESCR Committee *General Comment 20 Non-Discrimination and ESCR Rights*, E/C.12/GC/20/CRP.2, 9 September 2008, paras. 34-35.

³⁴⁵ Limburg Principles, para.38 & 38.

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being invoked by courts.³⁴⁶ The weak international monitoring mechanism for ESC rights has made enforcement problematic, and there has not developed an equivalent authoritative international body of case law for ESC rights as there is for civil and political rights in the decisions of the Human Rights Committee.³⁴⁷ So far international cases concerning ESC rights have generally been brought under the complaints procedures of the ICCPR. For example, in two cases related to social security payments to married women, the Human Rights Committee found that discrimination had occurred under ICCPR Article 26.³⁴⁸

However the right to education is already included in two regional rights mechanisms and is enforceable in the relevant courts. This right is included in the 1st Protocol to the European Convention, and can thus be enforced in the European Court.³⁴⁹ The right to education is also one of the economic, social and cultural rights included in the protocol to the American Convention on Human Rights, which allows the right of individual petition, under Article 19, and enforcement in the Inter-American Court.³⁵⁰

Case law from other jurisdictions

Courts in a variety of national and regional jurisdictions have issued decisions which have clarified the obligations of States as regards resource allocation. In *Grootboom*³⁵¹ the Constitutional Court found that the government had failed to take reasonable measures to realise the right to housing, under s.26 of the South African Constitution. This judgment established the justiciability of the obligation to progressively realise human rights, while a case in the Constitutional Court in Peru ruled

³⁴⁶ Martin Scheinin, 2001. *Economic and Social Rights as Legal Rights*. In Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights* (2nd Edition). Kluwer: The Hague, p. 29.

³⁴⁷ *Ibid*, p. 31.

³⁴⁸ *Broeks v the Netherlands*, Communication 172/1984; *Zwaan de Vries v the Netherlands* Communication No 182/1984. *Ibid*, p. 32.

³⁴⁹ The European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, 1954, Article 2.

³⁵⁰ Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights, 1999, Article 13.

³⁵¹ *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169

that the State had not fulfilled its legal obligation to take concrete measures to progressively realise the right to health.³⁵²

Another South African case established the right to access to healthcare without discrimination, in a case where initially only a selected group of HIV-positive expectant mothers were to be supplied by the authorities with anti-retroviral drugs.³⁵³ In *Tandy*, the House of Lords established that under s.298 of the UK Education Act, educational considerations, rather than availability of resources, should be the deciding factor in the provision of home tuition for sick children.³⁵⁴ A recent case in the Inter-American Court ruled that the Dominican Republic was obliged to give Haitian children resident in the country access to education without discrimination on grounds of nationality.³⁵⁵

Although courts can play an important role in initiating or reinforcing protection of the right to education without discrimination, enforcement of decisions in the end relies on governments and statutory bodies. For example, in *Grootboom*, the eponymous Irene Grootboom died in poverty, still waiting to be rehoused.³⁵⁶ Some commentators have highlighted the potential dangers of the judiciary taking the lead in mainstreaming economic, social and cultural rights, as has been the case in South Africa, stating that such decisions are essentially political and should be made by a publicly accountable legislative body.³⁵⁷

Developments in law and policy

Anti-discrimination legislation and policies in Europe have gone beyond protection against discrimination to the development of positive duties on public

³⁵² *Azanca Alhelí Meza García*, Expte. N.º 2945-2003-AA/TC.

³⁵³ *Minister of Health v Treatment Action Campaign* (TAC) (2002) 5 SA 721.

³⁵⁴ *R v East Sussex ex parte. Tandy* Cited as: [1998] AC 714, [1998] 2 All ER 769, [1998] 2 WLR 884, [1998] 2 FCR 221.

³⁵⁵ *Case of the Yean and Bosico Children v. The Dominican Republic*. Inter-American Court of Human Rights, September 8, 2005.

³⁵⁶ Pearlie Joubert, August 8, 2008 *Grootboom dies homeless and penniless*. In the Mail & Guardian Online. Available at: <http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>

³⁵⁷ Yash Ghai, 2004. *The Role of the Courts in Implementing Economic, Social and Cultural Rights*. In Yash Ghai and Jill Cottrell (eds) *Economic, Social and Cultural Rights in Practice*: Interights p.89.

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authorities to promote equality.³⁵⁸ The European Race Directive³⁵⁹ is a wide-ranging instrument, which seeks to ensure equal treatment for all, irrespective of race or national origin, and its scope of application extends to direct and indirect discrimination in employment, education, housing and social protection.³⁶⁰ The Directive imposes an equality duty on public authorities and Member States are expected to amend national laws to comply with its provisions.

In recent developments in anti-discrimination law in the UK, Northern Ireland has acted as a “pilot zone” for the introduction of positive equality duties.³⁶¹ The Northern Ireland Act of 1998 introduced a duty on all public authorities to mainstream equality by reviewing current policies and drawing up equality schemes.³⁶² This process involves impact assessments, requiring policy makers to seek the views of those most likely to be affected, replacing a reactive approach to discrimination with an anticipatory approach, in which discrimination is avoided.³⁶³ Reportedly, there have been significant social and attitudinal changes towards equality and non-discrimination since the introduction of these equality provisions.³⁶⁴ However, “consultation fatigue” has been a problem, where small organisations with limited capacity have been overwhelmed with demands for participation.³⁶⁵ The system has also been criticised as being process, rather than outcome oriented, resulting in a “tickbox” mentality among policy makers, and excessive bureaucracy.³⁶⁶

³⁵⁸ Bob Hepple, 2006. *The European Legacy of Brown v Board of Education*. University of Illinois Law Review 605.

³⁵⁹ *Race and Ethnic Discrimination Directive* 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,

³⁶⁰ Bruno de Witte & Eniko Horvath, 2008. *The many faces of minority policy in the EU*. In Kristin Henrard & Robert Dunbar (eds) *Synergies in Minority Protection: European and International Law Perspectives*. Cambridge University Press: Cambridge, p. 370.

³⁶¹ Eithne McLaughlin, 2007. *From Negative to Positive Equality Duties*. *Social Policy and Society*, 6:1, 111-121, p.115.

³⁶² *Northern Ireland Act* 1998, s.47.

³⁶³ Christopher McCrudden, 2005. *Mainstreaming Human Rights*. In Colin Harvey (ed.) *Human Rights in the Community: Rights as Agents for Change*, p.21.

³⁶⁴ *See* n. 361 above, p.118.

³⁶⁵ *See* n.3630 above,p.23.

³⁶⁶ *See* n. 361 above, p.118.

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The UK Race Relations (Amendment) Act of 2000 (which does not apply to Northern Ireland), also places statutory duties upon public authorities, including schools, to “eliminate unlawful racial discrimination” and to “promote equality of opportunity and good relations between persons of different racial groups”³⁶⁷ Schools are required to draw up a race equality policy, and these policies must be assessed and monitored, in particular for their impact on the attainment level of pupils from different racial groups.³⁶⁸ Schools are given considerable discretion to devise their own policy, but the duty is enforceable via the complaints mechanism of the Equality and Human Rights Commission.

As in Northern Ireland, there are concerns that there is too much focus on procedures, rather than outcomes.³⁶⁹ Reportedly some public authorities are promoting and enforcing their duties efficiently but others are failing to comply with the legislation.³⁷⁰ Unlike in Northern Ireland, there is no obligation to perform impact assessments, and to consult widely, although authorities are free to adopt such measures,³⁷¹ and there have been criticisms that the positive obligations are weak, in that authorities are required to demonstrate that they have paid “due regard” to equality, but not to show that this actually influenced their decision making.³⁷²

In the Northern Ireland model of mainstreaming equality into public policy, the regulatory regime to enforce compliance avoids the courts, with complaints first going to the Equality Commission and finally to the Secretary of State,³⁷³ while in the UK, in contrast, the Equality and Human Rights Commission can litigate against recalcitrant

³⁶⁷ *Race Relations (Amendment) Act* of 2000, Section 71(1).

³⁶⁸ *Commission for Racial Equality assessment Template for Race Equality Policies in England and Wales Schools*, September 2005. Available at:

<http://www.equalityhumanrights.com/Documents/Race/Education/Assessment%20template%20for%20race%20equality%20policies%20schools%20in%20England%20and%20Wales.doc>

³⁶⁹ Elaine Kennedy-Dubourdieu, 2006. *Affirmative Action in Britain*. In E. Kennedy-Dubourdieu (ed) *Race and Inequality: World Perspectives on Affirmative Action*. Ashgate: Aldershot, p, 97; Bob Hepple, 2006. *The European Legacy of Brown v Board of Education*. University of Illinois Law Review 605.

³⁷⁰ Elaine Kennedy-Dubourdieu, 2006. See n. 369 above, p, 97.

³⁷¹ R.D. Osbourne, 2003. *Progressing the Equality Agenda in Northern Ireland*. *Journal of Social Policy*, July 2003:32, p.355.

³⁷² See n.361 above, p.119.

³⁷³ See n. 363 above, p.23

authorities as a last resort.³⁷⁴ The comparative advantages of these approaches have not yet been adequately tested. Past experience suggests that in cases of discrimination against linguistic minorities, the European Court is likely to extend a wide margin of appreciation to States which have a defined policy in language and education, even if the policy is controversial and flawed.³⁷⁵

The responsibility of the Hong Kong government to take positive action in planning and policy making

Hong Kong's RDO would have provided an opportunity for the government to introduce a requirement that government departments monitor and review their policies to ensure that they comply with anti-discrimination law and promote equality, a point made by several Hong Kong NGOs.³⁷⁶ An equality plan for Hong Kong has been suggested, but the government has not taken up this proposal.³⁷⁷ Government departments have been criticised for being willing to waste resources on fighting discrimination cases against the EOC when the money would be better spent on reviewing their own policies to ensure that they are not discriminatory, and it has been suggested that the Hong Kong government should be more proactive in requiring government departments to ensure that they follow the law.³⁷⁸

Following the introduction of the RDO, the Hong Kong Government has drawn up Draft Administrative Guidelines for government bureaux, departments and relevant public authorities to guide them in promoting racial equality and ensuring that racial equality is taken into account in the formulation of policy.³⁷⁹ The Law Society of Hong Kong has compared these guidelines unfavourably with the UK Code of Practice on the

³⁷⁴ See n. 370 above, p, 96.

³⁷⁵ See n. 178 above, p.636. See also *Orsus and Others v Croatia*, para.68.

³⁷⁶ See *Joint Submission to the Legislative Council Bills Committee on Race Discrimination Bill on Mainstreaming Racial Equality Through Racial Equality Plan*. Unison and Hong Kong Human Rights Monitor, 23 May 2008; Hong Kong Unison's 2008 submission for China's UPR; Hong Kong Update – Flawed Race Discrimination Bill Passed through Legislation -- A submission from Hong Kong NGOs to the CERD Committee, August 2008.

³⁷⁷ Hong Kong Unison 2008. See n. 81 above.

³⁷⁸ Carole Petersen, 2002. See n. 207 above.

³⁷⁹ Legislative Panel on Constitutional Affairs: *Administrative Guidelines on Promotion of Racial Equality*. LC Paper No.CB (2)2064/09-09(01). June 2009.

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Duty to Promote Race Equality, which uses mandatory language such as “must,” and “will”, in its provisions while the Draft Administrative Guidelines merely “encourage” government bodies to “consider taking appropriate steps”.³⁸⁰ All the guidelines are couched in similar vague and non-directive terms, which make it clear that there is no obligation upon these bodies to take action. There is evidence to suggest that individual government departments, in reviewing the draft RDO, took an active role in drafting exemptions which reduced their responsibility to end discrimination. It would be interesting to know if the same is true for the Draft Administrative Guidelines. The language of the guidelines in English is hedged to the extent of being hard to read, and the Chinese version is reported to be equally opaque.³⁸¹ For example, in the English version, one provision states:

“If the assessment shows that a policy or measure *may indeed* have an adverse impact on racial equality or public services the Bureaux, Departments or public authorities concerned *should consider whether and how* changes are to be made to the policy or measure. The following questions *may* be relevant.”(my italics)³⁸²

One of the criticisms of education policy in Hong Kong towards linguistic minority students is that it lacks planning and vision. A robustly-worded Code of Practice for the EDB to formulate an equality policy and devise steps to implement that policy could have provided a framework to enable long-term planning, but the draft guidelines fail to deliver any element of compulsion. Educators working within the schools have expressed a desire for more guidance and support from the EDB. However the EDB has cited the autonomy of individual schools, under the “school-based system,” as a reason for not developing a comprehensive policy with obligations to provide language support

³⁸⁰ The Law Society of Hong Kong. Submissions: Draft Administrative Guidelines on Promotion of Racial Equality, 18 August 2009.

³⁸¹ Joint Submission by Hong Kong Human Rights Monitor and Unison Hong Kong on the Draft Administrative Guidelines for the Promotion of Racial Equality, July 7, 2009, para.10. Available at: http://74.125.153.132/search?q=cache:MqMpuN2rya4J:www.hkhrm.org.hk/resource/Submission_to_LegC_o_on_draft_admin_guidelines_for_racial_mainstreaming_20090707.doc+hong+kong+draft+administrative+guidelines+racial+equality&cd=3&hl=en&ct=clnk

³⁸² See n. 379, para.4.8.

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for linguistic minorities. These weak and ineffective Guidelines, if they are adopted as drafted, will not put any pressure on the EDB to develop adequate policies to guide educators to support linguistic minority children. The Guidelines neither give incentives, in the form of resources, for public bodies or departments to implement racial equality law, nor do they stipulate disciplinary procedures for failure to do so. Compliance is voluntary and unrewarded.³⁸³

The Law Society of Hong Kong regrets that the Guidelines do not mandate transparency in the publication of the results of policies, as is the case in the UK Code of Practice.³⁸⁴ Problems of accountability and transparency in the way grants are allocated to designated schools in Hong Kong and in the way schools use these funds have been described earlier in this study. It is unfortunate that the Guidelines also fail to address this issue. The CESCR and CERD Committees have been critical of Hong Kong's failure to provide disaggregated socio-economic data in its reports in the past.³⁸⁵ However the Draft Administrative Guidelines do not require the collection of accurate data by government departments, as mandated under international law.³⁸⁶

The robust statutory duties which have been introduced in Northern Ireland and the rest of the UK have been criticised for being excessively bureaucratic, but do seem to be accompanied by changes in attitude, at least in Northern Ireland. Whatever the operational difficulties in the UK and Northern Ireland models, positive developments towards substantive equality in education are better served by legislation such as the UK Race Relations (Amendment) Act of 2000, which places statutory duties upon public authorities, including schools, to end discrimination and promote equality,³⁸⁷ and a strong code of practice, rather than Hong Kong's RDO, which exempts educational institutions from any responsibility to address the disproportionate impact of the use of CMI on linguistic minorities, and the weak and ineffective proposed Guidelines, which confirm

³⁸³ *Ibid*, para. 2, 3, 4 & 14.

³⁸⁴ *See n.* 380.

³⁸⁵ *Concluding observations of the Committee on Economic, Social and Cultural Rights : China.* 13/05/2005. E/C.12/Add.107. Paras. 98 & 99; *Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, China*, U.N. Doc. A/56/18, paras. 231-255 (2001), para.250.

³⁸⁶ *See n.* 381, para.15.

³⁸⁷ *Race Relations (Amendment) Act* of 2000, Section 71(1).

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that no action is mandated to ensure equality and non-discrimination by public authorities.³⁸⁸

³⁸⁸ Northern Ireland, another small, developed territory with a common-law legal system, provides an interesting example of how mainstreaming equality could work in practice although its social and historical context is quite different from Hong Kong. A missed opportunity for Hong Kong to learn from the Northern Ireland experience was the termination of the appointment of Patrick Yu Chung-yin as Director of Operations of Hong Kong's Equal Opportunities Commission in 2003, before he had even taken up the post. Patrick Yu is active in the human rights field in Northern Ireland and is now Director of the Northern Ireland Council for Ethnic Minorities and has been awarded the CBE for services to the community.

Conclusion

The international human rights standards that bind Hong Kong oblige the government to provide an education that is accessible, adaptable and acceptable to all children without discrimination. However the lack of adequate Chinese language support in the policies and practice of the EDB have resulted in a system where linguistic minority students suffer discrimination in access to education and *de facto* segregation from the majority in schools.

Hong Kong promotes itself internationally as a cosmopolitan “world city”, open to influences from all over the world, and taking the best from East and West.³⁸⁹ Traditionally, the Hong Kong judiciary has been receptive to international and comparative human rights jurisprudence. But in its formulation of the RDO, the Hong Kong government has failed to take account of progressive developments in other jurisdictions, resulting in a narrow and ungenerous Ordinance, which is out of step with current trends.

It is unfortunate that when it drafted the RDO, the Hong Kong government failed to include statutory duties on public authorities to devise equality plans. Statutory equality duties can be problematic, and do not represent a quick-fix solution, but including such duties in the RDO might have impelled the EDB to initiate the planning process needed to find long-term solutions. The Draft Administrative Guidelines are vaguely-worded, weak, include no element of compulsion on authorities and are unlikely, in their present formulation, to initiate change. The CERD Committee has recommended that, as well as amending the RDO to include indirect discrimination on grounds of language, the Hong Kong government adopt a race equality plan, and develop policies for teaching Chinese to linguistic minority children.³⁹⁰

³⁸⁹ This is one of many government sites conveying this message:
<http://www.info.gov.hk/info/sar5/easia.htm>

³⁹⁰ See n.252, paras. 27, 28 & 31

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Putting such policies into place might well involve the use of temporary “special measures”, as part of a broader race equality plan, which would have resource implications. Such measures are required when necessary under the ICERD, and the government is also obligated under the ICESCR to immediately realise the right to education without discrimination. Linguistic minority children in the Hong Kong public education system would appear to fit the characterisation of a “disadvantaged group” who do not “enjoy the full and equal enjoyment of human rights” as a result of indirect discrimination.³⁹¹ The CERD Committee has clarified that under these conditions, States are obliged to take special measures to redress disadvantage.³⁹²

The government is already allocating funds for language support, but with questionable effectiveness. An effective language policy would involve developing a long-term plan for the provision of language support to linguistic minority students and for their integration into mainstream education: the EDB has admitted that the present system lacks coherence.³⁹³ A lack of planning and vision, rather than a lack of funding, seems to be the major obstacle to developing an effective policy for language support.

Another important aspect of planning is data collection. The Hong Kong government has provided some disaggregated data on ethnic minorities in the 2006 By-Census but more detailed statistics are needed and more research needs to be undertaken. This small-scale qualitative study suggests that there is a need for larger longitudinal studies of the experiences and performance of minority students in the public education system, incorporating quantitative as well as qualitative methods.

Recent decisions by the judiciary in the *Leung* and *Yau* cases are encouraging signs that the Hong Kong courts take indirect discrimination against minority groups seriously.³⁹⁴ Hong Kong courts may take a progressive and generous approach to any future litigation on the language and education rights of linguistic minority students, but

³⁹¹ *Ibid.*, paras. 7, 8 & 11.

³⁹² *Ibid.*, para. 11.

³⁹³ See n. 46 above.

³⁹⁴ See n. 225 above.

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long-term decisions about education policy and the distribution of resources need to be made via the legislative process. Litigation is an expensive and time-consuming process, and devising coherent policies and systems to provide adequate support for linguistic minority students might be more cost-effective in the long-run for the government than fighting cases through the courts, as well as being more desirable on moral and ethical grounds.

The legislature in Hong Kong is dominated by an elite group through the functional constituency system, so that the government is able to ensure that any bills it proposes can be passed, despite strong opposition.³⁹⁵ Notwithstanding this, the government likes to promote Hong Kong as an open international city, with a sophisticated and educated populace, enjoying fundamental rights and freedoms under the rule of law. In its most recent Concluding Observations, the CERD Committee has been highly critical of Hong Kong's RDO and has singled out the education of linguistic minority children as an area of particular concern.³⁹⁶ It would be counter-productive for the image of Hong Kong, as well as contrary to international law, for the government to ignore its obligations to ensure equal access to education for some of Hong Kong's most disadvantaged children.

³⁹⁵ *Ibid.*

³⁹⁶ Concluding Observation of the CERD Committee on the People's Republic of China (Hong Kong SAR), 28 August 2009. CERD/C/CHN/CO/10-13.

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Appendices

Interview procedures: Interviewees were sent a letter outlining the study and a list of questions beforehand. They were also given a consent form and asked to indicate if they were willing for their name to be used (completed consent forms on file with the author). The two teachers and the official from the EDB were not willing to have their names revealed. The author made notes during the interview and wrote up the notes afterwards.

Note on terminology: The term “Non-Chinese speaking” (NCS) students, instead of “linguistic minority students” is used in the interview questions and the write-ups of the responses. As this term is commonly understood and used in Hong Kong, I initially used it in this study, but later rejected it as being too negative in its implications. In the appendices, the term *NCS student* is synonymous with *linguistic minority student*.

Interview with a Senior Education Officer from the EDB

1. What do you see as the major language problems that Non-Chinese Speaking (NCS) students have in adapting to the HK education system?

Speaking Chinese is the main problem, but if students start early enough they can learn and in some cases reach the same level as local students. It is very important that NCS students attend a Chinese-speaking kindergarten. NCS students have the same choice of schools as other students, they are equal to local students, and given early enough provision of Chinese they can achieve the same results. EDB believes that early integration and immersion into the local system is the best way for NCS students to progress.

2. Would these problems be solved if NCS students were all allocated places in EMI primary and secondary schools?

The choice of school is up to the parents. They can apply for whatever school they like, in whatever medium. Many parents prefer to send their children to the “traditional” EMI schools taking NCS students, though this is changing. But students need to learn some Chinese to survive in society – and not all NCS students are good at English.

3. Do you have any information about how many NCS students are allocated to CMI primary schools, via the Central Allocation System (CAS)?

Around 500 students apply for P1 each year, and the majority get the school they want. Only a minority have to go through the CAS. Even through the CAS, parents could request an EMI primary school.

4. There has been an increase in support services for Chinese language teaching in primary schools. According to EDB’s website, these are “school-based” services. How does the system work? Is there any coordination by EDB to ensure consistency in the provision of appropriate Chinese language instruction to NCS students?

There are regular inspections and reports. The schools have to meet certain standards to retain the grant. However schools have autonomy to decide how they want to run things, in a “school-based” system. The Chinese curriculum is flexible enough to be adapted to the needs of NCS students and the Supplementary Guidelines set out 4 possible modes of adaptation. But the basic framework of the curriculum is suitable for all students.

The EDB supports “designated schools” in preparing materials and adapting the curriculum for NCS students, and it hopes that these schools will become “anchor points” in providing expertise to other schools, through seminars and through sharing materials via a centralised database in EDB. While it is unrealistic to expect all schools with NCS students to offer focused support, EDB hopes that schools with small numbers of NCS students could use the experience and materials gained by the designated schools to help them support NCS students. At the moment there are not standardised assessments of NCS students to determine, for example, what mode of instruction is needed for a particular students and whether they are able to enter mainstream Chinese classes. EDB is against creating an easier Chinese examination for NCS students as it is now felt that this would create a second tier, lower level examination, which would limit NCS students’ opportunities. EDB feels that this would create an unequal situation for NCS students.

5. The government is now putting more resources into provisions for NCS students? Is this likely to increase in the future? How does EDB prioritise the provision of resources?

Provision is needs-driven, although budget constraints means that EDB has to make choices based on their assessment of what was the optimal solution, given resource constraints. The EDB consults with stakeholders – parents, students, teachers, NGOs, academics, community groups.

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6. The EDB website lists a support network for schools with large numbers of NCS students. How does this network function?

There are 60 schools in the network, and they hold seminars and “sharing sessions”

7. There is a project run by the University of Hong Kong to provide support services in 5 designated secondary schools in the provision of Chinese to NCS students. What is the role of the EDB in this project? How does this compare with the support offered to primary schools by EDB?

EDB officials are directly involved with the primary schools. EDB monitors the HKU project.

8. Is there any policy on offering minority languages e.g. Urdu, Hindi, Nepali, as school subjects, and is there any person in EDB responsible for coordinating the provision of language teaching for languages other than Chinese and English in schools?

Chinese and English are stressed – other languages are not really a concern for EDB though schools were free to offer them. EDB encourages schools to provide French German, or Hindi and Urdu at Senior Secondary level. But this is not a priority.

9. A lot of the provision for NCS students seems to be school-based, or provided by NGOs or HKU. Are there any plans to set up a more comprehensive, centralised system?

She stressed the autonomy of schools under the “school-based system” in Hong Kong but admitted that provision is not always coherent. After-school provision e.g. of tutorial classes, is provided by a different division of EDB and she knows little about it. But she stressed that EDB needs to draw on expertise from academics and NGOs to ensure effective provision of services to NCS students.

10. Does EDB have any plans to introduce a Code of Practice for schools to guide their approach to NCS students, similar to the Equal Opportunities Commission Code of Practice for disabled students?

This would not be EDB’s job – it would be the Equal Opportunities Commission’s job and they have no immediate plans to do this.

Other comments: She stresses that EDB’s provision for NCS students is not linked to the progress of anti-race discrimination legislation. She talked about the need to change “mindsets” – one being the perception of minority parents that they could only send their children to traditionally NCS-receiving schools, and the other being the perception of local people that schools accepting a lot of NCS students were not good schools, and therefore being unwilling to send their children to that school.

Regarding the “fine-tuning” of the medium of instruction, she said that when it came to NCS students, the EDB was flexible in its approach to medium of instruction. If a school wanted to open an EMI class for NCS students and felt it was the best solution for those students, EDB would not require strict adherence to the requirements of the “fine-tuning” policy.

Interview with Fermi Wong Wai-fun, Campaigns Director of the NGO UNISON Hong Kong

1. What do you see as the major language problems that Non-Chinese Speaking (NCS) students have in adapting to the Hong Kong education system?

Lack of adequate Chinese is the main problem. If students can start learning early enough, say in a CMI kindergarten, and if they get proper language support at school, they can learn good Chinese. But there is usually not enough support for students.

2. Do you think NCS students have sufficient choice of schools at 1. Primary; 2. Secondary level?

No, they have a very limited choice. If they enter a mainstream primary school they have great difficulty in coping with written Chinese as there is no support provided and there may be no-one at home to help with Chinese homework. Students attending such schools often have good listening and speaking skills, but cannot match the literacy of Chinese students. Their English is often poor too.

Then at the end of P. 6, all students take exams in four subjects: English, Chinese, Mathematics and General Studies. All except English are in Chinese and NCS students generally do badly because of language difficulties. However the results of the four subjects are added together and averaged, so whatever their underlying academic ability, these students go to a school for Band 3 students (i.e. less academically able students). Those who have been to a designated primary school may have better English and be able to cope in English in a designated secondary school – but those who have been to a mainstream school may have poor English and Chinese, and not be able to cope well in either EMI or CMI.

3. What is your opinion of the quality of education offered by the schools listed on EDB's website as catering for many NCS students?

These schools generally started to cater for NCS students because they had difficulty surviving because of the changing demographics in Hong Kong. The schools were already considered to be poor by local parents. Some have made great efforts to cater for NCS students and some have not.

Pak Kau school in Tin Shui Wai is particularly bad. The school was a village school in Yuen Long, struggling to survive. It managed to get a brand new site and school buildings in Tin Shui Wai by presenting itself as a school which was catering for minorities. But once the school moved into a new building it managed to attract more local Chinese students. So now it actively discourages ethnic minority pupils by providing no language support for them. For those already there (44 students in Form 3 in an EMI class), the school is not providing EMI classes after Form 3, so that they will have to leave. Yet they have received a large grant this year.

The EDB does not monitor the schools closely enough and seems to have “favourites” who get grants (generally schools that criticise the EDB are not supported). For example, St Margaret's in Central takes a lot of minority students and should get a grant – but doesn't.

Another problem is that the designated schools have a big mix of ability levels so in the EMI classes, there will be a great variety, whereas other local schools stream students according to ability, and HK teachers are used to teaching classes of similar ability. Schools' use of the money they get is also not monitored properly.

4. How far do you think the recent changes in government policies in providing more Chinese language support to schools, are helping NCS students?

It is not the right kind of support. The problem is that there is no special curriculum for them. They cannot follow the same curriculum in Chinese as local Chinese students. They need something tailored, to take them through step-by-step, so that they can start from their own level and remain motivated. If it is too

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difficult they will give up. One problem is that as well as lacking a specialised curriculum, there is also a lack of training courses in teaching Chinese as a Second Language.

5. How feasible is it for NCS students to enter tertiary or vocational education in Hong Kong?

It's difficult – only 6 entered last year (10 received offers), and that is the most since Fermi started working with ethnic minorities. There are almost no courses in VTC that use English – there is one in hospitality and one in business but Fermi had to fundraise 1 million dollars to pay for these. Project *Yijin* is only in Chinese.

6. What impact does language have on the ability of NCS students to find jobs?

It makes it very difficult, especially due to their lack of written Chinese. 80% of employers in Hong Kong are Small and Medium-Sized Enterprises (SMEs), in which English is not used and all writing is in Chinese. But Fermi believes that, while it might not be possible for many of the current students to learn good enough Chinese, given the right support from kindergarten onwards, NCS students can learn good enough Chinese. She also notes that these students' written English is often not good either.

7. Can you identify other action that you think the government should take to ensure equality of access to education in Hong Kong for NCS students?

They need a proper long term language policy and planning for minority students. At the moment they don't even know what they want – they say their policy is integration but in fact it is assimilation. The problem is that to do integration properly needs money – it is cheaper to just put students into the mainstream but then they can't learn effectively.

There needs to be more accountability and transparency in allocation of funding and EDB should monitor schools more closely. The schools need more guidelines. The government needs to train teachers – both in teaching Chinese as a Second Language and in racial sensitivity. One reason why some ethnic minority parents do not want to send their children to mainstream schools is fear of isolation, bullying and racism – teachers need to know how to handle these issues with students. Introducing small-class learning would help – teachers could give more attention to students and help them with their individual problems.

The introduction of the GCSE Chinese is good as it will give more students the chance to enter university but the exam is really very easy and does not test students' Chinese adequately. For example, one Nepali student who scored an A+ on the GCSE got an F on the HKCEE Chinese language paper.

8. What do you think about the lack of direction on medium of instruction in the Race Discrimination Ordinance (RDO)? Should the RDO have issued specific directives on medium of instruction?

It is discriminatory and examples of this kind of clause cannot be found in any other country. Hong Kong is very innovative!

Interview with a Senior Teacher at a designated CMI Government Primary School

1. How many Non-Chinese Speaking (NCS) students attend your school?

There are 69 NCS students out of a total of 480. The school has been taking large numbers of NCS students for a few years.

2. What do you see as the major language problems that NCS students have in adapting to the HK education system?

Chinese, particularly written Chinese. This is particularly true of students who enter the school after Primary 1. The P1 entrants start from scratch, but have more time to learn. If they have been to CMI kindergarten, they are even better. But in general the students' poor level of Chinese means that they study poorly in all subjects except English, in which many of them do well.

3. What special provisions do you make to teach them Chinese?

P1 students learn together in the same class, and all students learn together for Maths, English and Liberal Studies. P.5 and P.6 learn together for all subjects as they are being prepared for the primary school assessments which determine which secondary school they will go to, and they will take the same examinations as the local students. P.2,3 & 4 are separated into 3 levels for Chinese: upper, intermediate and lower. They have a tailor-made curriculum. As well as this type of support, they also have after-school "remedial" tutorials in Chinese (taught by their own teachers) and Maths (taught by a tutorial school). The NGO Christian Action also provides help with homework on a volunteer basis. They have 1 teaching assistant who speaks Urdu and Hindi.

4. Has your status as a "designated" school for government support for NCS students helped you to make better provisions for these students? How?

The school receives money, but not enough to pay for a full-time teacher. They have employed an extra teacher but the money has to come from somewhere else to make up the salary. My interviewee believed that the grant from EDB was allocated according to the number of NCS children in the school.

5. Are you provided with sufficient financial resources to support NCS students?

See above. If they had more money, they could do more of course.

6. Have your teachers been given additional training to enable them to support NCS students?

No-one has been trained to teach Chinese as a Second Language (CSL). They have attended some short courses but these are piecemeal and cannot provide comprehensive training. If there was a proper, structured course available the school would certainly send a teacher as they need at least one trained CSL teacher. My interviewee wonders why there is no such course when there is such a need.

7. Have you had to make many changes in the organisation of the school to accommodate NCS students?

The school has to write all the circulars in English as well as Chinese.

8. Do you find the EDB's *Supplementary Guide to the Chinese-language Curriculum for Non-Chinese Speaking Students* helpful?

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They have done their best but it is very basic, and not sufficient. Each school needs to develop their own curriculum as there is no centralised curriculum and no platform for sharing materials. The teachers need to develop everything themselves, which is a lot of work. They try to find materials from Singapore and China ... the workload is huge.

9. Do NCS students graduating from your school usually go to EMI or CMI secondary schools?

They nearly all choose EMI – usually the “traditional” designated schools which have always taken many NCS students.

10. Do you think your NCS students will be able to learn effectively through the medium of Chinese in a CMI secondary school?

No, they would have many difficulties. There is a big jump in the level of Chinese when students start secondary school.

11. How does the support network for schools with many NCS students work?

There have been a few “sharing sessions”. It’s good to realise that other schools have the same problems. But schools work largely on their own. There is a problem of “authorisation” – materials produced are seen as “belonging” to the individual school.

12. Can you identify any further support from EDB or other government departments that would be helpful in your work?

EDB should contract a university to develop a systematic curriculum. Schools need more help with producing materials (textbooks would be good but would be expensive – a publisher is unlikely to be interested). There needs to be some centralised planning and a structured curriculum.

Interview with a Senior Teacher at the Islamic Kasim Tuet Memorial College, Chai Wan

This school is a designated CMI secondary school, which also has an EMI section for the NCS students. The school was founded by the Chinese Muslim Association.

1. How many Non-Chinese Speaking (NCS) students attend your school?

There are 300 (out of a total enrolment of 700). The school has been admitting large numbers of NCS students for 5 years. Many NCS students are of Pakistani origin, attracted by the fact that it is an Islamic school. In 2007-8, 65.05% of students were Chinese and 30.12% were Pakistani. The rest were of Nepali, Indian, Filipino, Thai, Sudanese, Australian and Indonesian nationality.

2. What do you see as the major language problems that NCS students have in adapting to the HK education system?

Chinese reading and writing. The NCS students' level is not good enough to study through the medium of Chinese so NCS students have to be educated separately from Chinese students. There are a few NCS in the CMI stream (students who have been in CMI education from kindergarten level) but even their Chinese is weak in comparison with the local Chinese students. The school takes in Band 3 students, who have weak English skills and whose scores in primary assessments are not high enough for the school to be allowed to open an EMI class admitting local Chinese students under the medium of instruction policy.

Although there are Chinese and NCS students in the same school, and relations are "harmonious" in that they don't fight, there is little contact – and little chance for the NCS students to speak Chinese with them. PE and Home Economics are mixed, and sport, principally football, is one forum for mixing. But even preferences in sport differ – the boys and girls cricket teams contain only South Asian NCS students. Students can be seen in social groups according to language, with many students of Pakistani origin speaking Urdu together. Lack of integration between the two groups is a major problem which the school hasn't been able to solve.

Many students went to the "traditional" EMI primary schools taking in many NCS students, where Chinese was not given much attention, which is not the case now when Chinese is given more importance. Although most of the students are Hong Kong permanent residents, often born in the SAR, many were sent back to their countries of origin for their primary education. So when the students enter the Hong Kong education system at a later stage, their Chinese is poor or non-existent and their knowledge of Hong Kong and local culture is very limited. They are in virtually the same position as new arrivals. The reason for this, he ascribes to the difficulties the parents then had in finding a primary school place for their child. Now he admits it is much easier for parents as falling enrolments mean that many primary schools now welcome NCS students.

3. What special provisions do you make to teach them Chinese and/or English?

The school is part of the project run by HKU Faculty of Education, which has set up an after school support centre. But there are several problems with this. The Senior Teacher does not see that having a separate system from the school is really helpful. He welcomes the input of experts from the universities, but would prefer to have some teacher release so that teachers from the school can prepare materials for the NCS students.

A major problem is that teachers at the school do not have the time to adapt the curriculum for NCS students – which involves producing appropriate and attractive materials at the students' level, and is extremely time-consuming. There is no available textbook suitable for their level in Chinese. They have recently started using a textbook from China, which is available in traditional characters, but the subject matter is Beijing-based and thus not appropriate.

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The funding and reporting mechanisms for the project are too restrictive, as they mandate a separate system for the support from HKU and it would be better if the HKU project team were permitted to work more closely with the school teachers, who know the students and their needs better. An after-school tutorial system is not really suitable for secondary students with a heavy workload – often they are tired, and create discipline problems. Some also cannot stay as they live far away. There is a large group of Nepali students who travel from Yuen Long every day and have to leave on the school bus as soon as lessons finish.

The school has introduced a paired reading scheme to try and integrate the student body more, and to help students improve their English and Chinese. NCS students work with local Chinese to help each other. Initially this was a lunchtime club, but was then incorporated into the curriculum, to make sure it was taken seriously. However there is only time for one period a week to be devoted to this. The scheme helps students academically, as well as promoting friendship between the two groups, but it still cannot give NCS students enough chances to use Chinese.

The school places great emphasis on improving students' Chinese and in 2007-8 introduced GCSE Chinese, which the universities are allowing NCS students to use as the Chinese qualification for entry. But this exam is not really suitable for Hong Kong NCS students: the context is the UK, and the examination is very easy (he estimates it is at Primary 3 level), and believes that a more appropriate localised examination is needed.

The school hires teaching assistants who speak the language of new arrivals to help out new arrivals in junior forms, and has organised an after-school tutorial class in English for new arrivals. Many holidays are celebrated in schools – Muslim holidays, but also Songkran (Thai festival), and Mid-Autumn Festival.

NCS students tend to be strong in spoken English, compared to local students though their writing is often not very strong. Female NCS students tend to be stronger than boys in both English and Chinese.

4. For the teaching of Chinese, do you find the EDB's *Supplementary Guide to the Chinese-language Curriculum for Non-Chinese Speaking Students* helpful? (Have you followed their pattern of 4 modes of teaching?)

It is not helpful. It provides general guidelines only, when what is needed is a proper curriculum for NCS students, with standardised assessments which can give information about students' proficiency at different levels to allow employers and universities to assess whether they have an adequate level of Chinese for the job. The *Putonghua Shuiping Kaoshi*, an examination used in the mainland to test the Chinese of non-native speakers, including the national minorities, might be a possible route to follow.

The plan to introduce a "syllabus A", and easier version of syllabus B of HKCEE has been blocked, and there are now no plans to introduce such an examination. He sees a major problem as being the attitude of the EDB, who persist in their idea that the mainstream curriculum can be adapted to NCS students, which he believes is unrealistic given their low level of Chinese. He feels that teachers are being unfairly left to cope on their own, with little support, when the government should be taking the lead in developing a proper curriculum and standardised assessment. The lack of many scholars, and a body of research in Hong Kong, on teaching Chinese to NCS students is also a problem.

5. Do you think your NCS students would be able to learn effectively through the medium of Chinese? What level of language support would be needed to enable them to study in Chinese?

Very few students have a higher level than Primary 2 in Chinese. This is insufficient to study through the medium of Chinese at secondary level. They would need a considerable amount of school language support (and support outside the classroom) to be able to do that. Many of his students' mothers do not speak Chinese or English, and there is no home support. He observes that the few NCS students in the Chinese stream are poor in writing, even though their spoken Chinese is good enough to survive. A few exceptional students will, he believes, be able to study through the medium of Chinese, but most will not.

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6. How does the support network for schools with many NCS students work?

It is at a nascent stage and very few resources have been produced.

7. Is your school given any extra resources to provide Chinese language support for NCS students? Do you have sufficient resources to cater for the needs of NCS students?

The HKU project has already been discussed. If the school had more resources it would hire an extra staff member to allow teachers time to produce materials for teaching Chinese.

8. Do you have any plans to offer classes in other languages such as for Hindi, Urdu or Nepali?

The school offers GCSE Urdu but only devotes 2 periods a week to that, so it is designed for students who have received a lot of their education in Pakistan, who just need some extra coaching for the examination. Mr Yu sees it as a valuable link to the students' culture and former school life, plus an easy extra qualification, but cannot devote much time in a packed schedule to the language.

9. Can you identify other support from EDB or other government departments that would be helpful in your work?

Most have already been mentioned. He would like to see classes offered in Chinese, outside the school system, for those who have failed to learn. He believes that there are many non-Chinese speaking residents, who are at a severe disadvantage in the job market, who should be offered classes at appropriate levels. He compares the case of a Chinese person who wants to learn English, who has a wide choice of courses, with non-Chinese learners of Cantonese, who can only attend a few basic courses run by NGOs. He is doubtful about the wisdom of contracting out education services to NGOs, whose expertise is in the provision of social services, not the provision of education, which he feels should be undertaken by professionals.

He believes that the government should take the lead in devising a curriculum and appropriate assessment for NCS students. He knows that this will be expensive, but believes that society as a whole will benefit from this by becoming more stable and harmonious. He claims that non-Chinese residents have a higher per capita crime rate than Chinese residents, and there are also a higher proportion of them on welfare. This he ascribes to lack of opportunities in society for them, which the education system should be redressing. He characterises himself as pragmatic and realistic in his approach, with little interest in what he sees as academic concerns about equality. He is simply interested in his students being able to receive an education and develop their potential as far as possible. He feels the NCS students have low self-expectations, and the school takes them on trips to universities, and to attend seminars, to encourage them to aim higher in their careers. The school also tries to improve the students' Chinese and to give NCS students chances to compete in areas where they can excel – e.g. in English speech and drama competitions and in cricket – to boost their self-esteem and confidence.

Interview with Dr Linda Tsung Tie-hua

Dr Tsung is an Assistant Professor in the Faculty of Education, the University of Hong Kong and the director of the EDB-funded Chinese language support project for secondary schools.

1. What do you see as main problems that Non-Chinese Speaking (NCS) students have in adapting to the HK education system?

The Chinese language. NCS students at secondary level do not have good enough Chinese to allow them to study through the medium of that language. Perhaps if NCS students start in CMI kindergarten and then go to a mainstream primary school they would be able to cope, but still the school would need to provide specialised support to make up for the lack of Chinese at home. Dr Tsung is not confident in the ability of CMI primary schools to provide such support, and fears that students would be able to speak good Chinese, but have a lower level of Chinese than local Chinese, but would have poor English.

She sees proficiency in English as a major strength of NCS students, and believes that EMI education, with a strong emphasis on the learning of Chinese as a subject is best for them, to allow them to learn knowledge as well as language. Although not all NCS students are good at English, Dr Tsung believes that the alphabetic writing system of English makes literacy in English much easier to achieve than literacy in Chinese for NCS students.

Dr Tsung sees the lack of properly trained teachers in teaching Chinese as a Second Language as a major problem. She points out that the teaching of Chinese to native speakers and the teaching of Chinese as a Second Language are two different specialisations and draws a parallel with the teaching of English and English as a Second Language which, though related, are separate disciplines in teacher training. Dr Tsung says that there is a great shortage of Chinese as a Second Language (CSL) teachers in Hong Kong, and most schools have no-one who is trained to teach CSL.

At the moment the teachers of NCS students struggle to do a job they have not been trained for, with no curriculum or textbooks and no standardised assessment. Additionally, their NCS classes may contain up to 5 levels or more in Chinese, meaning that the same materials and methods cannot be used for the whole class. This is challenging for an experienced teacher and extremely difficult for a teacher who is not trained in CSL.

Some schools do not have a responsible attitude to NCS students. Dr Tsung wonders what they spend their grant on, as it is generally not enough to pay for another teacher and for the secondary schools, the EDB funds her project. Dr Tsung mentioned Pak Kau College in Tin Shui Wai as a school which obtained a sought-after site and government funding to build a new campus partly because of its stated commitment to take more NCS students.

2. Your project involves supporting designated secondary schools in the provision of Chinese to NCS students. What exactly does this support involve?

The current project with EDB focuses on providing after-school tutorial support for secondary students at 8 designated secondary schools. HKU trains teachers in CSL and they prepare students for GCSE Chinese. Many students are well-motivated and want to learn. In any case, attendance is voluntary. But students in secondary schools are busy and find it difficult to fit in the tutorial with their other commitments. Some also travel a long distance to school and have to return home at a set time on the school bus. They cannot stay at school for the tutorials.

3. How would you evaluate the success of the project so far?

The results for the GCSE have been very good with 100% pass rate in one school. But the examination is comparatively low-level and only 400 characters need to be known. It would be more effective if the project teachers could work more closely with the school, particularly as they have all received training in

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TCSL, and help the teachers to prepare materials within the mainstream curriculum. It does not make sense to have a separate after school system, but this is EDB policy as they do not want to allow the project teacher to do what they see as exclusively the job of the secondary teachers.

They have recently started a School Support Program in which team members observe lessons, give suggestions and help teachers prepare materials. This seems to be more promising but it is too soon to assess its effectiveness.

4. Can you identify other action that you think the government should take to support Chinese-language education in Hong Kong for NCS students?

Dr Tsung feels that the government is already spending quite a lot of money on NCS students, but the problem is that it is not being spent in an effective way. Her feeling is that there are some sincere people in EDB but they do not know how to help. They do not have the expertise or experience, and they adopt limited and ineffective solutions.

She sees a major problem as being the EDB's attitude that the NCS students should be able to follow the same curriculum as local students, with some adaptation. She believes this is not possible with the current secondary NCS students, and is unlikely to be possible in the future. She questions why, when local Chinese students do not follow the same English curriculum as native speakers, and are assessed differently, there should be an expectation that NCS students should be given the same materials and undergo the same assessment as native speakers of Chinese.

Dr Tsung believes that a separate curriculum, special textbooks and a locally-based examination are needed, to replace the Chinese GCSE which she sees as an interim measure, not a long-term solution. She feels that the money given to schools would be better spent on developing a tailor-made program. One problem is that there is a lack of local research and expertise in Hong Kong to develop such programs.

She feels that the Hong Kong government lacks a long-term plan. They have not considered that they will always have NCS students in the school system, who will need help, and they have no long-term strategy for developing the teaching of CSL. Their solutions are short-term and piecemeal. Dr Tsung questions the giving of grants to schools as the system is not transparent and she herself cannot see what they will spend the money on as it is often not enough to provide another teacher, which is what they need. In any case, there are very few trained teachers available.

She cites the provision of workshops and short courses as an example of the government's lack of a long-term plan. The EDB funds many of these, contracting out the work to Hong Kong Polytechnic University, Hong Kong University and Hong Kong Institute of Education. The courses are short, with the longest being 30-hours, and thus cannot provide comprehensive training in TCSL. She feels it is difficult to monitor such workshops for quality, and cites her experience in offering a series of workshops, where participants feel no particular pressure to attend all of the sessions, or indeed to attend at all. Workshops she feels cannot take the place of an accredited course leading to a professional qualification.

HKU offered a Post-Graduate Diploma in the TCSL but the program did not receive government subsidies, and so, despite a lot of interest, the program had difficulty in recruiting sufficient students once those applying realised how much money they would have to pay. The course has now been upgraded to a Masters in Education but is still not subsidised (provisional course fees for 2009-10 are HK\$82,000 for the programme).

There are many applicants for the MEd course but though the course descriptions explicitly state that it targets teachers from mainstream and DSS schools with large numbers of NCS students, most applicants are teachers of Chinese in international schools (of which there are 52 in Hong Kong, and many of which are expanding their teaching of Chinese), and those intending to teach Chinese overseas (The Faculty of Education interviews their M.Ed. applicants so Dr Tsung has been able to find this out). Dr Tsung regrets that the course will not really serve local Hong Kong schools. She also feels that an MEd has a much more

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theoretical content and attracts a different type of teacher. To target local teachers working in local schools, a subsidised PG Diploma would be more suitable.

Dr Tsung believes that it is not a good idea for NCS students to be scattered in different schools at the moment. If there are just one or two of them in a school, they will feel very isolated and the school will probably not be able to provide targeted support. She feels that it is unrealistic to expect a school to make special arrangements for just a few students. However, if a number of primary schools in one area had just a few NCS students, they could form “clusters” and a “cluster teacher” could be based in one school but travel to the other schools to provide language support. This approach has been used successfully in Australia. But this depends upon having trained teachers and a plan in place from EDB. Otherwise, she feels that it is necessary to have enough NCS students to fill one class at each level, in order for schools to be able to use resources efficiently on language support. Ideally she thinks that each school with a “critical mass” of NCS students should have at least one teacher who has been trained in TCSL.

Although Dr Tsung is a supporter of mother-tongue education for minorities in the Chinese mainland, she does not feel that this is practical in Hong Kong.

Parents: Interview with Bibi Faimeena

Bibi is of Pakistani origin and was born in Hong Kong. She has three children: two sons of primary school age and a 3-year old daughter. Bibi speaks English and Cantonese, plus Urdu as her mother tongue. Her family holds HKSAR passports and regard Hong Kong as their home.

1. Which school does your child attend? Is this school CMI or EMI?

Her two sons attend a mainstream CMI Primary school in Wong Tai Sin, while her daughter attends a CMI kindergarten.

2. Ideally, would you prefer to send your child to a CMI or EMI school?

The eldest son went to an EMI primary school for three years, but then Bibi's brother persuaded her to move him to a mainstream CMI school, and to put the other children into mainstream CMI education.

Her brother went to an EMI secondary school and left in Form 3. He has found his poor Chinese to be a major limiting factor in his life and has worked hard, with the help of his Chinese girlfriend, to learn to read and write Chinese, to the level where he can now read a newspaper. Bibi feels that it is better to send her children to CMI primary schools so that they can learn good Chinese, integrate with local students and gain better marks in the primary school assessments, so that they have a chance of entering a good EMI secondary school. She believes that her children will have a much wider choice of better quality schools, if they go to a CMI primary school. She has a strong desire for her sons and particularly her daughter to have a better education than she had (she was educated in Hong Kong but left school after P.6., as her parents were not happy with her having to wear what they considered to be an immodest school uniform, and did not believe much education was necessary for a girl. She has no qualifications).

3. Have you experienced any difficulties in finding information about schools and in finding a school place for your child?

Bibi has not experienced any difficulties as she knows the local context, can speak Chinese and read English. However she knows that many minority families and new arrivals find it difficult to access information about schools, and has helped out members of her community on occasions.

4. Are you happy with the quality of education provided by the school?

Bibi feels that the school is good but she complains about the frequent changes in education policy, referring to the recent "fine-tuning" of the medium of instruction policy, as she says it makes it difficult for parents to know what decisions to make about their children's education.

5. Does your child have a good relationship with teachers and other classmates in school?

The school has been welcoming and her sons get on well with other classmates. There are only three other NCS students in the school as far as she knows, though she says there may be more. Her younger son had some conflict with teachers for being "too active" but that situation is now resolved and the Principal has been very helpful and taken special care of the boy.

6. Has your child been given adequate instruction in Chinese to be able to communicate with classmates and other Chinese speakers?

The children speak Cantonese, but that is due to the efforts of family members. One of Bibi's brothers always speaks to them in Cantonese only, and the family all know the language. They can communicate orally with no difficulty.

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7. Has your child been given adequate instruction in Chinese to be able to study through the medium of Chinese?

This is the main problem. The children struggle to learn through the medium of Chinese. The elder boy had to work very hard to catch up as the first 3 years of his education were in EMI. Bibi says that he is now getting passing grades in Chinese, but needs to do better. There is no extra help such as tutorial classes for him and Bibi's brother spends many hours tutoring him in Chinese. The younger son has been doing badly in Chinese and has attended a special tutorial session at the school, but that tutorial is aimed at students who are performing badly in their studies, and does not target the special difficulties faced by linguistic minorities.

8. Could the school have made any changes that could have improved your child's abilities in Chinese?

The school could provide a tutorial class to help them. Bibi would like them to receive an hour of extra tuition in Chinese every day. She feels strongly that her children should go to a local school with Chinese children, but believes that the Hong Kong education system, where she feels the emphasis is on keeping up with the syllabus, not on the development of the child's potential, is not conducive to them receiving the best education. She feels that the government should recognise that the NCS students need more help with Chinese, and should have some kind of plan or policy to help them. She says that she would not have been able to send her children to a CMI school if her brother had not been able to help tutor them, and most linguistic minorities do not have a family member with high enough literacy in Chinese to help out.

9. Has your child had the opportunity to receive any teaching in his/her mother tongue in the local school system?

The elder boy learned the Urdu alphabet in his original EMI primary school. Bibi says that the chance to learn Urdu would be welcome, but their priority is Chinese, and then English, as the children will learn Urdu anyhow through the family. She mentioned that to her it was unimportant whether the children spoke Chinese, Urdu or English together – the most crucial aspect of their culture she feels is religion, and language is much less important. Bibi was told by a nurse at kindergarten that her daughter's slow speech development is due to her being exposed to two languages, and has advised Bibi not to speak Urdu but only to speak Cantonese to the child.

Parents: Interview with Milabel Cristobal

Milabel works as the director of the Hong Kong branch of an international NGO, and has been in Hong Kong for two and a half years. She has two daughters of primary school age.

1. Which schools do your children attend? Are these schools CMI or EMI?

Her eldest daughter attends an EMI primary school, Li Cheng Uk (this school has an intake of mainly ethnic minority students). Her youngest daughter attends a CMI primary school (Jordan Road Government Primary School). There are 4 NCS students in her class, and overall NCS students are a minority in the school.

2. Ideally, would you prefer to send your child to a CMI or EMI school?

She would have preferred to send both children to EMI but could not find a place for her youngest child in a nearby school. She expects both girls to attend EMI secondary schools.

3. Did your child/children attend an initiation program? How effective was that program? Could it bring your child's Chinese up to the level where he/she could function in a CMI school?

Both girls attended an initiation program at the Portuguese Community School. It was good but 6 months was too short and could not bring the girls' standard of Chinese up to the level where they could study effectively through the medium of Chinese. Milabel mentioned that the Principal was aware of this and was trying to get the program extended to one year. Milabel appreciated the extra-curricular activities and said that the girls had made friends with some Chinese new arrivals from the mainland during the program (an experience which has not been repeated in subsequent schools).

4. Have you experienced any difficulties in finding information about schools and in finding a school place for your child?

Milabel has experienced great difficulties in finding information about schools, and has needed to do a lot of internet research. She mentioned the difficulty of finding out quite basic information about local schools, such as whether they were DSS schools. She has found the counsellor at Li Chung Uk helpful in advising her about secondary school places for her eldest daughter. Jordan Road was welcoming and explained the curriculum very clearly.

5. Is there any information that would have been helpful to you in choosing a school for your child?

More general background information and more about extra-curricular activities.

6. Are you happy with the quality of education provided by the school?

The curriculum is limited in comparison with the girls' school in Manila, and the English lessons are very basic.

7. Does your child have a good relationship with teachers and other classmates in school?

Li Cheng Uk: her eldest daughter gets on well with the other students (who are mainly ethnic minorities) but sometimes feels that the teachers discriminate against non-Chinese students.

Jordan Road: the teachers do not discriminate but she has little contact with Chinese classmates, as her Chinese is not good enough for meaningful communication and the other children do not have good English. She plays sport but some extra-curricular activities are divided e.g. Chinese Dance for NCS students.

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8. Has your child been given adequate instruction in Chinese to be able to communicate with classmates and other Chinese speakers?

Her daughters can function in Chinese for survival e.g. buying things in shops, but do not really have social interaction with Chinese classmates.

9. Has your child been given adequate instruction in Chinese to be able to study through the medium of Chinese?

No. The youngest daughter struggles with the language and, together with the other NCS students, consistently performs poorly in tests. Milabel is not sure what level her daughter is in Chinese. She does not speak Chinese herself and there seem to be no defining targets or key learning stages for minority children learning Chinese. She is not aware of what standard is expected, such as the number of Chinese characters her daughter should know.

10. Could the school have made any changes that could have improved your child's abilities in Chinese?

They could provide some kind of learning plan for the NCS students. Milabel also feels that there should be a special Chinese class for NCS students to help them to adapt to the curriculum, and which is tailored to their needs. Language support is provided by an NGO (Christian Action) which provides an after-school program in Chinese for one hour per day. Milabel feels that there needs to be more help with Chinese, and that it should be part of the students' education, not an add-on from an NGO. She feels that the educational needs of linguistic minorities are seen as a welfare issue, rather than an education issue. She feels that this is a mindset problem, which needs to be changed.

11. Has your child had the opportunity to receive any teaching in his/her mother tongue in the local school system?

No.

Parents: Interview with Vikram Gurung

Vikram's wife, Geeta, and their son Surabindra (age 19) were also at the interview, which took place at the Chomolangma Multi-Cultural Centre, in Yuen Long, where Geeta works. Neither parent speaks Chinese but both speak English well. The family came to Hong Kong when Surabindra was almost the age to enter Primary One. Vikram is an English teacher at an international school and Geeta works with the Nepali community in an NGO, the Chomolangma Multi-Cultural Centre. Yuen Long is close to the former British Army base at Sek Kong, where many Nepali Gurkha soldiers lived. The family have many contacts among the Nepalese community, due in part to Vikram's former role as an English teacher for the Gurkha soldiers in the British Army. The Chomolangma Centre, funded by Yuen Long District Council, works with the Nepali and Pakistani communities, providing interpretation services and advice.

1. Which school did your child attend? Is this school CMI or EMI?

He is now studying part-time at HKU Space but attended Delia Primary School (Mei Foo) and then HKMA David Li Kwok-Po Secondary School (both EMI and DSS).

2. Ideally, would you prefer to send your child to a CMI or EMI school?

EMI. Geeta said that the Nepali community in Yuen Long are generally not willing to send their children to mainstream CMI schools, fearing difficulties and isolation for their children – and also fearing that they will become “too Chinese”. There is still also a strong perception among the community that they can only go to the schools that traditionally take ethnic minority students and not the mainstream schools.

However more and more Nepalis are moving away from Yuen Long, to be closer to work (from being mainly construction workers, many young Nepalis are now working in the food and beverage industry in Central/TST), and also to move into public housing (actively encouraged by the Chomolangma Centre, who help them to fill in the forms), and are sending their children to mainstream schools. Geeta cited examples of children going to such schools who spoke Cantonese together, had poor Nepali and also poor English. She felt these children were becoming isolated from the Nepali community and that their poor English would disadvantage them. English is a high status language among the Nepali community and a good command of English is prized.

3. Did your child/children attend an initiation program? How effective was that program? Could it bring your child's Chinese up to the level where he/she could function in a CMI school?

No – such programs did not exist at that time

4. Have you experienced any difficulties in finding information about schools and in finding a school place for your child?

They had difficulty initially. They got information they mainly from friends, who were aware that there were “designated schools” for ethnic minorities. They went to Yaumatei Kaifong Government Primary School and Li Cheng Uk. The schools promised to call them, but they heard nothing for more than one month. Worried about finding a place for their son, they went to the Education Bureau (then EMB) who advised them to wait. At the same time they approached Delia, where their son was offered a place. As they were worried that he would not be able to find a school, they took that place. Later one of the schools offered a place, but by then their son had started at Delia and they did not want to move him, though they would have preferred to send him to a government school, rather than a more expensive DSS school.

Geeta mentioned that older children in particular had great problems finding a school in Hong Kong, citing a case of two 15-year old twin sisters who, have been unable to find a place in an EMI secondary school, despite having good grades from their Nepali school. Chomolangma is now trying to help the girls to find school places.

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5. Were you happy with the quality of education provided by the school?

Yes, generally happy in both schools. But they felt discipline was not always good at Delia, which was why they did not want their son to go to the Delia Secondary Section.

6. Does your child have a good relationship with teachers and other classmates in school?

At primary school, many of the children were from ethnic minorities, and the Chinese children at the school were willing to speak English to them, so everyone mixed. Relationships with teachers were good and Subrindra was head prefect at primary school. At secondary school, all the NCS students were put in the same class, with some returnee Chinese children, and although most students in the school were local Chinese, English was the lingua franca in his class, and classmates got along well, using English. Relationships with teachers were also good, though more distant and strict than in Delia (something the parents approved of, as they felt that Delia was a little lax).

7. Has your child been given adequate instruction in Chinese to be able to communicate with classmates and other Chinese speakers?

8. Has your child been given adequate instruction in Chinese to be able to study through the medium of Chinese?

Subrindra has had almost no instruction in Chinese and can hardly speak a word of the language. French and not Chinese was offered to NCS students in both his schools. In S.2, the NCS students learnt Chinese for one year (40 minutes a week) but the lessons were not a success. The students did not take the classes seriously, seeing Chinese as having no relevance to their lives, and the classes were discontinued after one year. Subrindra now regrets not learning Chinese, and his parents would have liked him to have been taught Chinese. They believe French is not useful in Hong Kong, while lack of Chinese severely limits their son's job prospects. At the time Subrindra admitted that he and his peers lived in a "separate little world" where Chinese was not important to them, and he also feels that the language teaching was offered too late, and for insufficient time.

Now both he and his parents believe that his only chance of success in Hong Kong is to study hard and get a university degree, as with no Chinese, he has no chance of getting a lower-level job. He has not been able to even find summer or part-time work due to his lack of Chinese. He is studying at HKU SPACE to improve his qualifications with the hope of going to university. The family believes that for most Nepalese, Chinese is essential to compete in the job market for "ordinary" jobs, as prospects are very limited without it, and while knowledge of English is important, many local people also know some English. They believe that for Nepalese people who do not know Chinese, the only route to success is to get a university degree.

9. Could the school have made any changes that could have improved your child's abilities in Chinese?

They could have offered Chinese instead of French.

10. Has your child had the opportunity to receive any teaching in his/her mother tongue in the local school system?

No, but they have heard that some schools now offer Nepali as a subject. Given the choice, they would have preferred their son to learn Nepali rather than French if Chinese was not offered.

Chinese language training for expatriate officials in the colonial civil service

Peter Mann, retired expatriate civil servant (by email)

When I first joined the Royal Hong Kong Police in 1976, the Police Training School course (6 months) had around two hours of Cantonese lessons a day with maybe 5 or 6 full-time local Cantonese teachers. The standard Government textbook was by Sydney Lau and came in three different levels: elementary, intermediate and advanced. It was full of really old Cantonese expressions which used to make younger locals laugh: e.g. (in Romanized form) saam goh woh seung mo sui sik - three monks will never drink water - one or two can carry but three will argue. Another - m gin gwoon choi m lok ngan lui - a man will not cry till he sees his own coffin!!

When I joined the administrative service in 1979, we were sent on full-time Cantonese courses. One I attended with the then Governor's wife (Pamela Youde). Private sector people also were allowed to join these courses which lasted for a month or so. The Government also paid us a sum of money for each level reached. A good incentive.

The best form of language training was the old pre-war 'total immersion' where cadet officers were sent to Canton for a few months. As no English was spoken it was a case of sink or swim. In the last years of British rule, this sort of Cantonese training was revived (there was also a movement to make civil servants learn Mandarin as the language of the future, but Cantonese, as Hong Kong's vernacular, was still given preference). In 1996, a number of senior civil servants and police were sent to the University of Science and Technology for a 2 month full-time course in Cantonese and then to Zhongshan University in Guangzhou (Canton) for a month to be taught Chinese Government and Administration by local professors.

Hope this is helpful.

Best wishes,

Peter