



RECODE WORKING PAPER SERIES

Online Working Paper No. 03 (2012)

The Languages of the Social Contract

Ayelet Banai

This paper can be downloaded without charge from:
<http://www.recode.fi/publications>

ISSN 2242-3559

RECODE – Responding to Complex Diversity in Europe and Canada

ONLINE WORKING PAPER SERIES

RECODE, a research networking programme financed through the European Science Foundation (ESF), is intended to explore to what extent the processes of transnationalisation, migration, religious mobilisation and cultural differentiation entail a new configuration of social conflict in post-industrial societies - a possible new constellation labelled *complex diversity*.

RECODE brings together scholars from across Europe and Canada in a series of scientific activities. More information about the programme and the working papers series is available via the RECODE websites:

www.recode.fi
www.esf.org/recode

Series Editor: Peter A. Kraus
Editorial Assistant: Daniel Moran

Section 1, Workshop 1:
Linguistic Diversity and the Changing Dynamics of Political Integration

Title: The Languages of the Social Contract
Author: Ayelet Banai
Working Paper No. 03
Publication Date of this Version: February 2012
Webpage: <http://www.recode.fi/publications>

© RECODE, 2012
Helsinki, Finland
<http://www.recode.fi>

© 2012 by Ayelet Banai
*All rights reserved.
Short sections of text, not to exceed
two paragraphs, may be quoted without
explicit permission provided that full credit
is given to the source.*

*The views expressed in this paper do not
necessarily reflect those of the RECODE
Research Networking Programme or the
European Science Foundation.*

Ayelet Banai
Goethe University, Frankfurt
banai@soz.uni-frankfurt.de

ISSN 2242-3559



Standing Committee for the Social Sciences (SCSS)
Standing Committee for the Humanities (SCH)

The Languages of the Social Contract

Ayelet Banai¹

Ayelet Banai is a Research Fellow at the Centre for Advanced Studies “Justitia Amplificata”, at the University of Frankfurt, Germany. She holds a Ph.D. in Political Theory from the University of Oxford and received her MA in Political Science from the Hebrew University of Jerusalem. Her research and publications are in international political theory, including the right to self-determination, theories of freedom, multiculturalism and diversity. She is co-editor of the volume *Social Justice, Global Dynamics: Theoretical and Empirical Perspectives* (Routledge 2011).

Abstract

The paper examines the distinction between migrants and traditional minority languages, for the purpose of their recognition as official languages in Europe. The distinction grants priority to ‘traditional’ over migrants’ minority languages. Specifically, I focus in the paper on the ‘legitimate interests argument’ (of the receiving society) developed by Alan Patten in support of the distinction, in the context of the Canadian debate about official language rights. I argue that in the context of Europe’s linguistic diversity, the legitimate interests argument applies to some cases but does not cover the whole range of relevant cases. Thus, I propose a social contract approach to official language recognition that supports the distinction between national minorities and migrant languages in Europe in most, but not all, cases and which confers obligations of inclusion on the receiving societies.

The European Charter for Regional or Minority Languages (1992) (ECRML) makes two interrelated distinctions between kinds of minority languages. Firstly, it distinguishes between ‘traditional’ minority languages and ‘immigrant’ minority languages; and it stipulates protection provisions for the former but not for the latter. Secondly, it distinguishes between languages traditional to a territory (within Europe) and other minority languages; and it stipulates protection provisions for the former but not the latter (ECRML: Art. 1).² Thus, for example in view of the first distinction, Danish is a protected minority language in Germany, but Turkish is not, and in view of the second distinction Arabic is a protected minority language in one region of Spain (Ceuta) but not anywhere else in Europe, say Brussels or Paris – where much larger communities of Arabic speakers live. Both distinctions are controversial. The purpose of this paper is to defend (a version of) the first, by introducing an approach to language rights that I shall call a social contract approach.³ While the social contract approach defends *in principle* a distinction between ‘traditional’ and ‘immigrant’ languages and a territorial delimitation of language rights, it

¹ Goethe University, Frankfurt | Email: banai@soz.uni-frankfurt.de

² The text of the charter is available at: <<http://conventions.coe.int/treaty/en/Treaties/Html/148.htm>>

³ For provisions for Arabic (and all other languages under the Charter), see *Database for the European Charter for Regional or Minority Languages* (online). For a defence of the territorial delimitation of language recognition see Alcock (2000) and Van Parijs (2009).

does not automatically approve all cases of the application of the two distinctions in current policy of official language recognition, and may bring into view reasons to reconsider the status of currently unrecognized languages – e.g. Arabic outside of Ceuta and Turkish. Being a public language would mean that schooling, public services, political participation and economic activity in that language should be made possible. It does not necessarily require legislating specific language(s) as the official language(s) of the polity (Pool 1991: 498).

In Europe, the question whether, why and how a distinction between languages of national minorities and of immigrants should be drawn is not merely that of a theoretical-academic concern, but a problem pertinent to language policy of the European Union and its member states. Not only are language policies a matter of public controversy, but also the EU's own legal resources seem to support more than one approach to the question. Whereas the ECRML adheres to the distinction between 'traditional' and 'immigrant' languages, the Charter on Fundamental Rights of the European Union (2000) may deny it. It includes two clauses in its chapter on equality, which are applicable to minority languages in general, with no evident distinction between 'traditional' and 'immigrant' languages. Article 22 of the Charter reads: "The Union will respect cultural, linguistic and religious diversity."⁴ Which linguistic diversity is meant in this clause? According to legal scholar Xabier Arzoz (2008: 153):

Hypothetically, Article 22 could refer: (a) to the 23 "languages of the Treaties"/"languages of the Constitution" only, as defined in Articles 314 EC, 53 EU and III-128 and IV-448(1) of the Constitutional Treaty; (b) or, apart from them, also to any other languages which enjoy official status in all or part of the Member States' territory, in the sense of Article IV-448(2) of the Constitutional Treaty; (c) or, apart from the above-mentioned, also to the so-called minority and regional languages spoken within the European Union, irrespective of their legal status; or (d) to any language actually spoken within the borders of the European Union, including the languages of immigrant groups.

Arzoz considers possibility (d) to be the appropriate interpretation of the scope of diversity under Article 22. "[T]he Charter" he writes "does not contain any evidence coming in support of a restriction of the scope of protection. A protection provision cannot be restrictively interpreted. On the contrary, the general terms used by the Charter advocate the extension of the protection to any cultural, linguistic and religious minority present on the European territory" (2008: 156). Additional evidence in support of this interpretation and against the ECRML's distinction is offered by legal scholars in view of the context of Article 22, as a part of the Charter's chapter on equality and following its Article on non-discrimination. The provision against discrimination on a linguistic basis could provide a further case against the distinction, suggesting that it is implausible to allow protection for some minority languages ('traditional') but not equally for other languages ('immigrant') (de Witte 2008, Burch Elias 2010).

To help assess the options – from a normative point of view that seeks political equality and inclusion of migrants as well as recognition of the legitimate claims to self-determination of the receiving societies – this paper proposes a social contract approach to official-language policies.⁵ I proceed as follows: firstly, I discuss Will Kymlicka's

⁴ What exactly is or should be the status of the Charter on Fundamental Rights of the European Union, in respect to other standards on individual rights in the member-states, is a problem that I cannot discuss here, see e.g. Bogdandy (2003) and Menéndez (2000).

⁵ This paper limits itself to a few normative considerations about official language rights – there may well be other relevant considerations for language policy, which would need to be taken into account in practice.

influential defense of the distinction and its shortcomings (section 2). Secondly, I then go on to introduce a more persuasive argument in support of the distinction, developed by Alan Patten (2006) for official language rights in Canada, called the legitimate interests argument (Section 3). Thirdly, I identify two difficulties in the application of the legitimate interests argument to the European context (section 4). Finally, I outline the social contract approach and explain how it complements the legitimate interests argument by addressing the aforementioned difficulties (Section 5).

Language Rights of Migrants and of National Minorities: Why is Societal Culture Not the Answer?

Will Kymlicka's influential theory of minority rights in liberal democracies supports a well-known distinction between the rights of national minorities and of immigrant communities, granting far more extensive differentiated rights to the former in comparison to the latter.⁶ According to Kymlicka's argument, national minorities constitute societal cultures and, hence, have a valid claim to differentiated rights including political representation and language protection. In contrast, immigrants' communities do not possess the full characteristics of a societal culture and, thus, their valid claims hold for a far more limited scope of differentiated rights, which do not include protection of their languages in the long run (1995: 95–100). This distinction has drawn criticism from democratic theorists, arguing that it violates the values of democratic inclusion and equality (Benhabib 2002: 59–67). The distinction has been further challenged by arguments in liberal theories of language rights, according to which the value of neutrality requires that states shall not promote nor protect any specific languages, let alone protect some languages but not others (Kukathas 2003: 241–244; Barry 1998; Brighouse 1996). In the course of ongoing debate about language rights in liberal democratic theory, both challenges have been addressed, and to an important extent have been met or doubted (Kymlicka 1995; Van Parijs 2000, 2003; Patten 2003; Kraus 2008). Thus the purpose of this section is not to repeat what is already known, but to pinpoint some of the issues that remain in need of attention and further consideration.

To meet the liberal neutrality challenge, it has been persuasively argued that political and public institutions (as well as the economy) are irreducibly lingual operations. Thus, where there is more than one linguistic group within a polity, neutrality requires equal institutional recognition of their languages (Moore 2001: 66, 119–123; Patten 2003). Official recognition of no language in such contexts does not constitute neutrality, but it rather means granting an unwarranted advantage to a majority language and its speakers over other citizens in the public and political (and often economic) spheres. While I take this response to the neutrality objection to be sound, the question remains open as to *which languages* should be given equal institutional recognition in a given polity? In regard to this question Kymlicka's answer – that the languages of societal cultures (i.e. national minorities) should be recognized, but not the languages of immigrant communities – is unpersuasive. Its weakness lies in a twofold misconception in Kymlicka's theory of minority rights, of (a) the relationship between individuals and their languages (between individuals and their societal cultures in general); and (b) of the most pertinent reason for official recognition of languages.

⁶ By 'differentiated rights' I mean the rights in schooling, languages, funding for culture and media, political representation – as habitually defended by proponents of multiculturalism and of the 'politics of difference'. See overview Kenny (2004) and Kymlicka (2007: Ch.3). In a historical perspective, it is interesting to note that not so long ago this bundle of rights for national minorities was conceptualized as 'non-discrimination' rather than differentiated group rights; see discussion in Bajpai (2008) and Banai (2011).

In regard to (a) it has been pointed out that the connection between individuals and their native and inherited societal cultures is overly deterministic. Taken that Kymlicka is right to underline the importance of access to and membership in an intact societal culture for individual well-being and autonomy, it is much less clear that this societal culture must be the one into which a person was born and of which her parents and ancestors beforehand were members (Forst 1997: 66; Patten 2006: 107–108). Moreover, there is a sense of determinism in the way the relationship between a person's cultural identity and her social and political affiliations and project is described in Kymlicka's theory. It suggests that the cultural should strongly pre-condition and pre-determine the political. Joseph Carens points out that

...the concept of societal culture rests upon an understanding of the relationship between politics and culture that impedes rather than contributes to a multicultural conception of citizenship. The deepest problem—and the greatest irony—of Kymlicka's concept of societal culture is that it is much better suited to a *monocultural* conception of citizenship than to a multicultural one (2000: 65).

Indeed, Kymlicka's own view that immigrants can successfully integrate into new countries, over a generation or two – corroborated by the experience of hundreds of millions of migrants in modern times – is suggestive. They too left behind a societal culture in which they were members, and became native members of other societal cultures. In regard to (b), from the point of view of political theory, the most relevant issue in language maintenance is not the cultivation of cultural tastes and heritages, but the ability to conduct one's public, political, social, economic and legal life in one's native language(s).

Thus, for a theory that in general supports the principle of equal institutional recognition of linguistic communities within a polity, a sounder answer to the question: "of which languages?" is required. A sounder answer will be such that can explain why and when individuals have a valid claim or a right for their language to be institutionally recognized even if they and their linguistic communities *could* successfully change over time. Alan Patten's considerations on this question (2006), take us important steps towards a sounder answer of this kind. Still, in order to meet ensuing objections, they require amendments that the social contract approach provides. Let me briefly recapitulate Patten's position and highlight its contribution and limits.

The Legitimate Interests Argument

Patten writes against the background of the dichotomic distinction between national minorities' and immigrants' languages in Canada. Like the ECRML, the Canadian Constitution extends equal recognition to a national minority language (French), but does not grant the same standing to the immigrant minority languages, regardless of how widely spoken they are (Patten, 2006: 102). Thus, the question is raised "[w]hy is it not morally arbitrary to extend one form of treatment to our national languages and a different and symbolically diminished form of treatment to immigrant languages?" (Patten 2006: 102) As Patten notes, one dominant answer to this question that does not appear strong enough is the consent argument – namely, the view that immigrants chose to come, so they have 'waived' their claim on the receiving society to make demanding adjustments to accommodate them. Not only in is it far from being clear in practice that migration is always voluntary, and it is clear that children of immigrants did not chose to migrate; but also in theory the pertinent question is what migrants *can legitimately be expected to consent to*.

Thus, for a more persuasive argument for the dichotomy between national minority and immigrant minority languages, Patten draws on “the legitimate rights and interests of members of the receiving society” (Patten 2006: 104) – weighed against the legitimate rights and interests of the immigrants – which render it legitimate to expect migrants to ‘waive’ their claim to official language recognition, in exchange for inclusion in the receiving society’s democracy. I will call this position the legitimate interests argument (or LIA). Patten appeals to two such interests of the receiving society: interest in a well-functioning democracy and interest in the maintenance of one’s own language (and by that one’s societal culture). The ensuing position that the two interests render it legitimate to expect immigrants to waive their claim to official language recognition is informed by two empirical conjectures, that (a) the official recognition of too many languages would pose a serious strain on the functioning of democracy; and (b) the official recognition of numerous minority languages would make it harder for each of them to compete with the dominant language, thus harder to maintain themselves in a meaningful way (Patten 2006: 110).

The legitimate rights and interests of immigrants on this matter do not, according to LIA, override those of the receiving society. How so? The interest in a well-functioning democracy is shared by the immigrants; avoiding serious strains on the functioning of democracy in their receiving country fulfils immigrants’ interests too, as much as it does for the receiving society. The immigrants’ interest in maintaining their own language(s) is unlikely to be protected and fulfilled under a policy that expects them to waive their linguistic claims. However, given that a choice of *some* languages over others must be made (in the interest of democracy), a receiving society’s decision to prefer its own already established languages over those of newcomers is (arguably) an exercise of legitimate partiality in regard to one-self. Insofar as “otherwise impartialist ethics” should allow “at least some space...for a self-regarding prerogative”, favouring the receiving society’s languages may be considered a legitimate exercise of this self-regarding prerogative (2006: 113). The immigrants will gain access to the receiving society’s languages and societal cultures, and their fundamental interest in having access to *a* societal culture is thus protected.

Applying the Legitimate Interests Argument in Europe: Two Problems

I will not challenge the overall plausibility of Patten’s legitimate interests argument; however, three important difficulties remain. *Firstly*, there is a problem with the application of the Canada-based position in a European context: the empirical conjecture that a multiplicity of official languages is a likely strain on the functioning of democracy has different implications when it comes to Europe. The relevant legitimate interests of member states, when conceived as separate receiving societies diverge on this question from the legitimate interests of the European polity as a receiving society. How so? To the extent that the multiplicity of official languages indeed burdens democracy and makes it harder for minority languages to maintain themselves, it is not a plausible option for the *European polity* to deal with this obstacle by strong restrictions on the number of official languages – say keeping the number of official languages down to two like in Canada and Belgium or even four like Switzerland. The levels of linguistic diversity in the European polity – where already some twenty languages enjoy an official status (as the languages of the treaties, or languages of the constitution) and possibly more – has more in common with South Africa or India than with Canada; it requires a different way of thinking about multilingualism and language maintenance (i.e. Kraus 2008: Ch.4; Van Parijs 2009). In this context, adding one or two additional recognized minority languages of immigrants – according to criteria of

size and viability⁷ – does not seem to make a substantive difference for the functioning of democracy, or to the ability of other minority languages to maintain themselves. At the level of individual member-states, however, the nature of linguistic diversity is different from the European polity. Here we are back in a more Canada-like situation: national politics either takes place in one dominant language, or there is a clear territorial division of linguistic operation (for example in the cases of Catalonia or Belgium). In this context, an additional minority language is more likely to mean a substantive transformation in the democratic life of the country. Therefore, to assess the validity of the legitimate interests argument for official languages in Europe, we first need to decide whether the pertinent sites for linguist policies are the member-states or the European polity as a whole – namely, the legitimate interest of which receiving society (or societies) needs to be taken into account. It appears that member states, as receiving societies, have different legitimate interests than the European polity as a receiving society. The question of whose legitimate interests should be given priority is not one for me to address here. I would like rather to point out that it could be argued that legitimate interests diverge in respect to the distinction, and therefore if the Union were to recognize migrants' languages as official languages and then ask member-states to follow suit, the latter may have valid objections.

Secondly, Patten's argument from legitimate interests in support of the distinction between national minority languages and immigrant minority languages does not cover the whole range of relevant cases. The argument addresses cases with a time sequence between the recognition of the language of a national minority and the claims to recognition of immigrant languages. Namely, cases in which a national minority language had long been recognized by the time immigrants join in and may wish to claim recognition for their languages too. In such cases it could indeed be argued, as does Patten, that the receiving democracy is already up and running in certain languages, and thus the citizens and residents of the receiving country have a legitimate expectation to carry on with their personal, social and political projects in these languages (2006: 112–113). However, in some cases in the European context, claims to recognition on behalf of national minorities' and immigrants' languages are simultaneous. The ECRML and the Framework Convention for the Protection of National Minorities (1995) were created in the presence of migrants' minority languages, and not prior to their arrival. The protection of national and regional minority languages as stipulated in the Charter and the Convention constitute a *change* in language policy, at least in some of the countries that signed them. France, for instance, signed but did not ratify the ECRML because the transformation of language policy that it involved was deemed unconstitutional.⁸ The Framework Convention was also created and signed in a time of general constitutional transformations in countries of Central and Eastern Europe, following the dissolution of the Soviet Union.

Thirdly, it is therefore not clear that the time sequence pre-supposed in the LIA always applies to the evolution of language recognition in European countries. Thus, two new and interrelated questions emerge: first, where the recognition of regional or national minority languages is not already in place, would the interest in democracy argument be a valid reason against the recognition of a national minority language too? After all, democracy in France and in the UK have been up and running in French and English respectively for a while now. Could this be a reason to keep denying recognition to regional languages? Second, is it legitimate to make a distinction between national minority languages and immigrant minority languages, and to give priority to the former over the latter, in case of *change and renewal* of a country's policies of language recognition? The legitimate interests argument could yield an affirmative answer to the second question and support the distinction even in a situation of simultaneous claims in the following way. It

⁷ See discussion in Section 4 on viability of languages.

⁸ Conseil Constitutionnel, Décision n° 99-412 DC, from June 15th, 1999.

would point out that immigrants have hypothetically waived their claims to language recognition upon arrival and entry to their receiving societies. Thus, the argument would go, even when a polity decides to extend official recognition to additional national minority languages, immigrant communities are not in a position to make claims to recognition of their languages because the immigrants had (hypothetically) waived their right to make such claims upon arrival. Typically, however, claims to recognition of immigrant languages are not made by the immigrants, but on behalf of their descendents of second, third and further generations to immigration.

Thus, to uphold the distinction, it would need to be explained why the claim-waiving by immigrants is valid for subsequent generations and applies to descendents of immigrants as well. Whereas any such argument would meet strong objections from consent theorists, I do not think that it is altogether impossible to argue that *some* political obligations – including waiving the claim to language recognition – pass from one generation to the next (see discussion e.g. in Horton 1992 and Simmons 1996). After all, we obviously seem to think – and for very good reasons – that we have a birthright to the citizenship of our parents, which, at least in the countries considered here, comes with a bundle of rights and entitlements. It is not altogether implausible to think that with this bundle of rights, some obligations come too (Shachar 2009).

However, even if such a view can be defended in respect to the intergenerational nature of some linguistic obligations, the following doubt remains: the more generations pass from the time of migration, the more obscure the classification between immigrants and traditional languages becomes. In fact, liberal and republican theories of citizenship and its acquisition by migrants like to think that within a generation or two immigrants and their descendents can become native (e.g. Kymlicka 1995: 181; Miller 1995: 124–130) – shouldn't their languages then be considered native too? After how many generations and in what circumstances does a language cease to be a language of immigrants and becomes a language 'traditionally' spoken in the territory? Does it still make sense today to consider Spanish in Catalonia an immigrant language (Kloss 1971: 258; Woolard 1985: 97–99)? In which point would such a classification become a statement of organic nationalism and an expression of a romantic and untenable notion of indigeneity? In the European context, this is a politically crucial question in view of the appropriation by populist far-right parties of the notions 'native' European cultures and values in the service of outright xenophobic politics (Mudde 2007: 158–183; Banai 2012). A plausible reference point of time or circumstances is required to keep the categories of immigrants and traditional languages in place beyond the time of the arrival of immigrants.

To sum up: once we take into consideration two relevant facts – that (a) claims to recognition of immigrant languages are typically made on behalf of descendents of immigrants; and (b) recognition of national minority languages often constitutes a *change* in language policy that requires an adjustment of a country's democratic institutions – a new challenge to the distinction between 'traditional' and immigrant minority languages arises. This challenge is twofold: (a) a plausible account of the classification between traditional and immigrant languages is required; and (b), a plausible account is required for whether and why 'traditional' languages should be recognized even when a challenge to democracy could ensue. I argue below that the social contract approach helps meet both challenges and give guidelines for when and how 'immigrant' languages become traditional.

The Social Contract and Language Rights

The social contract approach to official language recognition draws on a longstanding tradition in liberal and republican thought that uses the idea of the social contract as a philosophical tool to help evaluate the governing rules and principles of a polity. One

prominent standard of evaluation in the social contract tradition is an ideal of (equal) freedom (Rousseau 1968: 60; Kant 1991: 73–86; Rawls 1981; Ripstein 2009: 4–6, 30–40). Namely, a polity is positively evaluated when it guarantees the equal liberties of its members – when it safeguards political equality (often taken to involve measures against socio-economic inequality). According to a recent and influential formulation by philosopher John Rawls, the principle of equal liberty is respected when a polity guarantees for each of its members the “most extensive scheme of equal liberties compatible with a similar scheme of liberties for others” (Rawls 1999: 53). Social contract theorists emphasize these criteria because – it is reckoned – a polity that lives up to them can expect the (hypothetical) consent of its members to live under its laws, and therefore it constitutes a legitimate political authority. I will not defend here the (contested) view that equal liberty is an appropriate criterion for social contract theory, nor the (contested) position that Rawls’s interpretation of the social contract is a legitimate heir of the social contract tradition(s). Instead I move on to address the question: if endorsed as an appropriate analytical framework, what does a Rawlsian social contract approach involve for official language recognition? More specifically: what does a principle of equal liberty mean when applied to language policy? Which guidelines to language policy should be followed in the social contract, if it is to meet the standard of political equality and equal liberties?

I submit that the following guidelines for official language recognition in a social contract are appropriate, from the perspective of equal liberty:

- (a) Among individuals included in the polity at the time of its founding constitutional arrangement – namely the initial social contract – speakers of each viable language have equally valid claims that their language would become a public language in the polity.
- (b) The claim extends to speakers of languages that at the time of the polity’s constitution were no longer viable due to deliberate oppression of the language in living memory.
- (c) Once the polity and its public language(s) are established, the claim does not extend to newcomers. Rather, members of the polity have a legitimate expectation that newcomers would join the polity on the terms of the already existing social contract in respect to language.

Proposal (a)-(c) is accompanied by the following specifications: to general rule (c) concerning newcomers, two clarifications are in order. First, newcomers have a valid claim that it *will be made reasonably possible for them* to join on the terms of the already existing social contract, for example by funding for language training, or by creating equal opportunity in language learning through public education. Second, the founding constitutional documents – representing the initial social contract – are expected to be long-lasting, but they are not meant to remain unchanged forever. In addition to standard procedures of amendment of constitutions, large scale and fundamental constitutional changes – that generate and regenerate the polity itself – are possible, as suggested for example in the theory of constitutional moments, even if they are rare (Ackerman 1998, Choudhry 2008). Thus, the position defended here does not preclude the possibility that the terms of the social contract in respect to language would change; only it emphasizes that such a change would be the exception and not the rule and that it should be understood for what it is – a change in the polity’s basic rules and principles.

To the general rule (a) concerning the participants in the initial social contract one clarification is important. Being included in membership in the polity at the moment of its establishment is not meant in a historical descriptive way – e.g. what was in fact included – but has a normative element too – e.g. who should have been included. The relevant

criterion on this question is everyone in the territory. So if, for example, indigenous peoples or national minorities were not recognized in historical fact as members of their polities when these were established, this historical fact cannot take away their claim to language recognition at a later time, because they *should have been* recognized as members.

Finally, it is necessary to clarify what viability of languages means and why is it so important. One common general approach to the question of language protection appeals to the intrinsic value of diversity, coupled with the preservation of cultural heritage (see discussion in Réaume 2000). For instance, it is one of the considerations specified in the ECRML's preamble that

[T]he protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions (ECRML Preamble).

The explanatory report that accompanies the charter emphasizes the orientations towards cultural diversity:

As is made clear in the preamble, the charter's overriding purpose is cultural. It is designed to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage (Council of Europe, Explanatory Report Art. 10).

Different to this orientation, the social contract approach – much like other liberal and republican views – takes the freedom of the speakers of a given language as the primary consideration for language protection and recognition. Thus, if a language is too rarely spoken to allow for full participation in economic, social, legal and cultural life in it, preserving it as an official language might pose a burden and a limitation on the freedom of its speakers – if they are not proficient in an additional language (see e.g. Stilz 2009; Paten 2003). Being viable in this sense is a condition for recognition of a language as official in the social contract approach.⁹

Before addressing the philosophical objections that my proposal is likely to prompt, let me give two examples of the results it would yield if it were to be applied in two randomly selected European countries: France and Finland. According to the French constitution today, French (and French alone) is the language of the republic, and as mentioned above, the recognition of regional languages according to the guideline of the ECRML was found unconstitutional. The European Bureau for Lesser Used Languages¹⁰ lists ten regional languages in France, three of which would clearly hold a claim to be recognized as official in view of the general principles of the social contract approach: Breton, Occitan and Alsatian. These are the three languages that meet the criteria for official recognition postulated above: at the time of the creation of the present French polity in the French revolution, speakers of the three languages claimed regional-linguistic autonomy, which from the point of view of political equality there was no valid reason to deny. Other regional languages in France would not meet the criteria for full official recognition for one of the two following reasons: (a) they are not widely spoken enough today to be considered viable in the relevant sense, nor were they widely spoken enough to this effect in a relevant point of time in the past (e.g. Basque and Corsican); (b) they do not

⁹ With two exceptions: First, languages of oral societies clearly require different kinds of considerations to assess their viability. They are not common in Europe, and hence do not directly concern the discussion here. Second, restitution of historical injustices may give rise to valid claims by no-longer viable languages, which became non-viable due to deliberate suppression.

¹⁰ http://ec.europa.eu/education/languages/archive/languages/langmin/ebllul_en.html

clearly constitute separate languages, but may rather be classified as French dialects. Though Corsican and Basque nationalists would probably find this proposal enraging, they would still have a case to make for protection of their languages as public provision for cultural activities – i.e. by support for local media or teaching of their languages. Since one of the worries in France about the recognition of regional or minority rights was the high numbers of potential languages for recognition, bringing in such additional criteria for limiting the number of pertinent languages could be useful.

In contrast to France, Finland's constitution potentially allows for a broad recognition of official languages. While the constitution clearly recognizes Finnish and Swedish as official languages, it guarantees to other groups "the right to maintain and develop their own language and culture" (section 17). The social contract approach would recommend that Finnish and Swedish, the two viable languages at the time of Finland's declaration of independence in 1917 would be recognized as official languages, and that this official recognition would partly extend to the Sami languages that were not, but should have been recognized at that time. This result is in agreement with the current situation of official language recognition in Finland. The social contract approach would recommend against extending official recognition to additional languages. The social contract approach grants two interrelated grounds for the recognition of Swedish as an official language: the liberty of Swedish speakers (which made for some 10% of the population at the time, and were a dominant language group at least in one geographical area of the country). Second, the recognition of Swedish as an official language by the then newly independent Finland was a meaningful element in the self-definition of the Finnish polity. It was a statement about the kind of polity that Finland considered itself to be – namely, an act of self-determination. Additional minority languages, however, even of the groups that were initially included in the polity – for example Russian speakers, would not have a claim to official language recognition, due to the non-viability of their languages in Finland at that time. They could nevertheless claim some support for cultural activities in their languages – as publicly funded private associations. Later migrants from Russia make for an interesting case: on the one hand their language was present at time of the founding time of the polity; on the other hand it would have not qualified for official recognition due to the small number of speakers. Could a later increase in the numbers of Russian speakers be a reason to change the status of their language? The social contract approach would suggest against such a change, and would rather emphasize the legitimate expectation of Finns that newcomers from Russia would recognize the already existing linguistic state of affairs in Finland; in particular in view of the failure by Russia for many centuries to respect the independence of Finland.

Having sketched how the social contract approach may be applied, I now turn to defend two steps in the approach that call for explanation. Firstly, why treat constitutional arrangements, documents and moments as the relevant instantiations of the social contract(s)? Secondly, why is it appropriate, from the point of view of impartial ethics – namely that consider the equal liberty of each and every individual equally important – to entrench the languages of public institutions in a long-term constitutional item? In other words, what grants legitimacy to the expectation that, as a rule, newcomers will endorse already established languages, under the social contract approach that seeks to grant equal liberties to all?

Why A Social Contract?

The view that founding constitutional arrangements, moments and documents can be seen as the relevant instantiations of the social contract draws more on legal and sociological observation than on philosophical argument – namely that we tend to think of constitutions, founding moments of polities and founding constitutional documents (even in the lack of

formal constitutions) as places and times in which the principles for the operation of the polity in the future are being articulated, and that have symbolic and normative value as regulating principles of the political life in the future (Walker 2004a; Walker 2004b; Habermas 2001). It makes sense, then, to think of constitutional arrangements as setting the parameters of the polity's legal and political life, and therefore as constituting the relevant instantiation of the social contract metaphor – that hypothetical 'document' in which the citizens of the polity agree on the foundational rules and principles that will govern their shared political life.

From the point of view of liberal and republican theory, applying the social contract metaphor to the constitution is in one sense trivial but in another sense controversial. It is trivial in the sense that prominent social contract theorists indeed use this tool to stipulate few and basic underlying principles for the operation of the polity and do not apply the social contract metaphor directly as a means to evaluate each and every action and decision of public institutions. For example, John Rawls famously formulates two principles of justice using the social contract as a philosophical tool, which are meant to regulate the 'basic structure' of society including the political constitution (Rawls 1999: §2 p.6–7).¹¹

The controversial element of my proposal to apply the social contract metaphor to constitutions is the suggestion that in order to evaluate what the equal liberties of citizens in regard to language policy require *today*, we should take into account the question of what did the equal liberties of citizens require at the time of the self-proclamation, foundation or original constitutional contract of the polity. For those in the habit of deriving the terms of the social contract (namely by asking what could free and equal citizens reasonably agree to as basic terms of operation of their polity), my suggestion to apply the social contract to constitutions would mean that figuring out what citizens could consent to today involves the question of what individuals should have consented to at the time of the original constitutional contract of the polity; for a number of (but not all) European countries the relevant point in time dates back to the nineteenth or early twentieth century, when a country was internationally recognized as an independent state. For other countries in Europe, which have existed much longer as independent political entities, the relevant point in time may be the moment they proclaimed its transformation into a democratic state – through a revolution, a new constitution, first elections with popular vote etc. The relevant point in time cannot be a national myth about a time immemorial in which the nation was purportedly founded.

Why bring in this historical dimension? A full answer to this question would appeal to the right to self-determination and would require a discussion that the space left here does not permit. However, a short consideration about the nature of political institutions may suffice to make my suggestion *prima facie* plausible. When the political institutions of a polity are being founded, they are normally expected to be long-lasting. It does not mean that they are intended to last unalterable for eternity, but it is one of their important purposes to provide continuity and stability over time. Creating political institutions under the assumption that they should be re-invented in every generation is analogous to urban planning that intends to dismantle and rebuild the entire city with the construction of each new neighbourhood. It is ill-devised. Now, there are often reasons of

¹¹ Kant draws a distinction between the social contract that establishes a civil constitution or the commonwealth itself, which he calls the 'original contract', and the decisions and laws subsequently made by the legislature that had been founded in the original contract (Kant 1991: 73–79). For the terms stipulated in the original contract, that instantiate the social contract metaphor, a (hypothetical) unanimous agreement of free and equal citizens is required (Kant 1991: 77–78). But the legislature founded in this original contract may then take decisions by a majority of voters or their delegates (as long as they do not violate certain conditions of the freedom and equality of citizens) (Kant 1991: 79–80).

justice, equality and liberty to alter and reform political institutions, and their stability function cannot possibly immune them from such necessary transformations. As far as language policies are concerned, granted that it was a permissible decision of a polity to set up and run its democratic institutions at the time of their creation in specific languages, the expectation is legitimate that this would be a long-lasting arrangement, and thus that newcomers would endorse the local languages as their own over time. This expectation confers obligations on the receiving society to take active measures to include newcomers and their descendents as full members.

Conclusion

In this paper I explored the distinction between migrants and traditional minority languages, in the context of claims for recognition of languages as official in Europe. Support for the distinction means that traditional minority languages should be officially recognized, but migrants' minority languages need not be officially recognized. Specifically, I focused on the 'legitimate interests argument' (of the receiving society) developed by Alan Patten in support of the distinction, against the background of the Canadian debate about official language rights to national minorities and migrants' communities. I argued that in the context of Europe's linguistic diversity, the legitimate interests argument applies to some cases but does not cover the whole range of relevant cases. The cases not covered are the following. Firstly, the legitimate interests argument supposes a time sequence between the official recognition of the languages of national minorities and the claim to recognition of migrants' languages. In some European countries claims by traditional and migrants' minority languages over the past decades have sometimes been made simultaneously. Is there then nevertheless a ground to give priority to 'traditional' over migrants' minority languages? Secondly, due to the different natures of linguistic diversity in member states (typically limited diversity) and in the European polity (high level of diversity), the member states as receiving societies and the European polity as a receiving society may well have different legitimate interests in regard to language recognition of migrants. Whereas the legitimate interests of members states may support the distinction and give priority to the languages of traditional minorities, this is less clearly the case in the European polity as a whole, where the levels of linguistic diversity are much higher from the outset. Thirdly, the classification to 'traditional' and 'migrant' languages, is not always clear – especially when moving away from the conceptual world of romantic nationalism and indigeneity.

I argued further that in view of the three problems above, amendments to the legitimate interests argument are required in the European context. To this end, I proposed the social contract approach to official language rights, which takes the founding moment of the polity as the relevant point in time for considerations about official language recognition. For most European countries this point of time is in the nineteenth or early twentieth century, when the country was self-proclaimed or recognized as sovereign and self-determining; or when previously independent polities first proclaimed their commitment to the values of democracy. Seen from this perspective, national minorities that were present in the country's territory at that time have a valid claim for their language to be recognized as official – if it fulfills the condition of viability. Later arrivals do not, as a rule, hold a similar valid claim to the same type of official recognition, though there are exceptions to the rule. At the European level, the social contract approach suggests, the widely spoken and well-established migrants' minority languages (for example, Arabic) may have a claim for official recognition too.

References

- Ackerman, Bruce. 1998. *We the People: Transformations*. Cambridge, MA: Harvard University Press.
- Alcock, Antony. 2000. *A History of the Protection of Cultural Regional Minorities in Europe*. Basingstoke: Macmillan.
- Arzoz, Xabier. 2008. *Respecting Linguistic Diversity in the European Union*. Amsterdam: John Benjamins.
- Bajpai, Rochna. 2008. "Minority Representation and the Making of the Indian Constitution." Pp. 354–391 in *Politics and Ethics of the Indian Constitution*, edited by R. Bhargava. Oxford: Oxford University Press.
- Banai, Ayelet. 2012. "Europe of the Regions' and the Problem of Boundaries in Liberal-Democratic Theory." *The Journal of Political Ideologies*, forthcoming.
- . 2011. "Diversity and Minority Rights: Two Models." *Heidelberg Papers in South Asian and Comparative Politics* 59: 104–119.
- Barry, Brian. 1998. "The Limits of Cultural Politics", *Review of International Studies* 24: 307–319.
- Benhabib, Seyla. 2002. *The Claims of Cultures: Equality and Diversity in the Global Era*, Princeton NJ: Princeton University Press.
- Brighouse, Harry. 1996 "Against Nationalism" in *Canadian Journal of Philosophy*, Supp. 22: 365–405.
- Burch Elias, Stella. 2010. "Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe." *Berkeley Journal of International Law* 28(1): 261–312.
- Carens, Joseph. 2000. *Culture, Citizenship and Community*. Oxford: Oxford University Press.
- Choudhry, Sujit. 2008. "Ackerman's higher lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures?" *International Journal of Constitutional Law* 6 (2): 193–230.
- De Witte, Bruno. 2008. "The Protection of Linguistic Diversity through Provisions of the EU Charter other than Article 22". Pp. 175–90 in *Respecting Linguistic Diversity in the European Union*, edited by X. Arzoz. Amsterdam: John Benjamins.
- Forst, Rainer. 1997. "Foundations of a Theory of Multicultural Justice." *Constellations* 4(1): 63–71.
- Habermas, Jürgen. 2001. *So Why Does Europe Need a Constitution?* European University Institute.
- Horton, John. 1992. *Political Obligation*, London: Macmillan.
- Kant, Emmanuel. 1991. *Political Writings*. Cambridge: Cambridge University Press.
- Kenny, Michael. 2004. *The Politics of Identity*. Cambridge: Polity Press.
- Kloss, Heinz. 1971. "Language Rights of Immigrants Groups" *International Migration Review* 5(2): 250–68.
- Kraus, Peter A. 2008. *A Union of Diversity: Language, Identity and Polity Building in Europe*. Cambridge: Cambridge University Press.
- Kukathas, Chandran. 2003. *The Liberal Archipelago: A Theory of Diversity and Freedom*, Oxford: Oxford University Press.
- Kymlicka, Will. 2007. *Multicultural Odysseys: Navigating the New International Politics of Diversity*. Oxford: Oxford University Press. Ch. 3.
- . 1995. *Multicultural Citizenship*. Oxford: Oxford University Press.
- Menéndez, Augustin J. 2002. "Chartering Europe: Legal Status and Policy Implications of the Charter on Fundamental Rights of the European Union." *Journal of Common Market Studies* 40: 471–490.
- Miller, David. 1995. *On Nationality*. Oxford: Oxford University Press.
- Moore, Margaret. 2001. *The Ethics of Nationalism*. Oxford: Oxford University Press.

- Mudde, Cas. 2007. *Populist Radical Right Parties in Europe*. Cambridge: Cambridge University Press.
- Patten, Alan. 2006. "Who Should Have Official Language Rights?" *Supreme Court Law Review* 31: 101–115.
- . 2003. "Liberal Neutrality and Language Policy." *Philosophy & Public Affairs* 31(4): 356–386.
- Pool, Jonathan. 1991. "The Official Language Problem." *The American Political Science Review*, 85(2): 495–514.
- Rawls, John. 1999. *A Theory of Justice*. Cambridge MA: Harvard University Press.
- . 1981. "The Basic Liberties and Their Priority." *The Tanner Lectures on Human Values*. Salt Lake City: University of Utah.
- Réaume, Denise. 2000. "Official Language Rights: Intrinsic Value and the Protection of Difference." Pp. 245–271 in *Citizenship in Diverse Societies*, edited by W. Kymlicka and W. Norman. Oxford: Oxford University Press.
- Ripstein, Arthur. 2009. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge MA: Harvard University Press.
- Rousseau, Jean Jacques. 1960. *The Social Contract*. London: Penguin Books.
- Shachar, Ayelet. (2009). *The Birthright Lottery*. Cambridge, MA: Harvard University Press.
- Simmons, John A. "Associative Political Obligations." *Ethics* 106(2): 247–273.
- Stilz, Anna. 2009. "Civic Nationalism and Language Policy." *Philosophy and Public Affairs* 37(3): 257–292.
- Van Parijs, Philippe. 2009. "Grab a Territory! How Equal Linguistic Dignity Can Be Reconciled with English Dominance in the European Union." Pp. 155–172 in *Ties that Bind: Accommodating Diversity in Canada and the European Union*, edited by J. Poirier, J. E. Fossum and P. Magnett. Bern: Peter Lang.
- . 2003. "Linguistic Justice." Pp. 153–168 in *Language Rights and Political Theory*, edited by W. Kymlicka and A. Patten. Oxford: Oxford University Press.
- . 2000. "Must Europe be Belgian? On Democratic Citizenship in Multilingual Polities." Pp. 235–253 in *The Demands of Citizenship*, edited by C. McKinnon and I. Hampsher-Monk. New York: Continuum.
- Von Bogdandy, Armin. 2000. "The European Union as a Human Rights Organization?" *Common Market Law Review*, 37: 1307–1338.
- Walker, Neil. Walker, Neil. 2004a. *The EU as a Constitutional Project*. London: Federal Trust.
- . 2004b. "The Legacy of Europe's Constitutional Moment." *Constellations* 11(3): 368–392.
- Woolard, Kathryn. 1985. "Catalonia: The Dilemma of Language Rights". Pp. 91–109 in *Languages of Inequality*, edited by N. Wolfson and J. Manes. Berlin: Gruyter.