

Identity, Language, and Rights: A Critical Theory Perspective

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Abstract

This paper is an attempt to fill the gap in the literature by presenting a language policy formulated according to the idea of constitutional patriotism that overcomes the charge of ineffectiveness. I will argue that the procedural character of constitutional patriotism and its emphasis on the practice of law-making is best suited to allow for a pragmatic answer to the questions of language policy-making in multicultural societies. Unlike the instrumental and intrinsic arguments, the pragmatic approach views language as the matrix of communication where the goal of engaged citizens is mutual understanding. The pragmatic approach is also more effective because unlike the principled approaches, which tend to homogenize the composition of diverse societies, it is constrained by (1) values of political culture of the society; (2.a) historical contingencies such as the founding role of national minorities; and (2.b) practical feasibilities such as size, vitality and concentration of linguistic populations.

In recent years the normative status of minority rights as a species of human rights has been widely discussed by political theorists. In this context, the issue of minority language rights is one of the most hotly contested topics in the prevailing debate over the claims of culture. Mainstream political theories approach this topic differently, depending on their view of an appropriate model of political association. Liberal egalitarians emphasize the significance of the liberal ideals of neutrality and autonomy in deciding appropriate language policy, while liberal culturalists focus on the constitutive role of language and culture for the individual's exercise of rights and liberties that translate into a language policy that ranges from recognitions and accommodation to maintenance and protection of group identity and language.

Hitherto there has been relatively little done on the question of minority language rights. A recent collection of essays, *Language Rights and Political Theory*, goes some way to overcome this lack.¹ Despite a variety

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1. See: Kymlicka and Patten, 2003.

of normative approaches in this volume, however, none of the papers approaches the issue of language right from a critical theory perspective of constitutional patriotism.¹ Given this lack, I found the theme of Mofid University's conference on Identity, Difference and Human Rights an auspicious occasion to attempt to fill the noted gap. Thus, the aim of the paper here is to examine the conditions surrounding the question of minority language rights from the normative perspective of constitutional patriotism, and propose a normative guideline sensitive to different cultural identities of a diverse society.

A knee-jerk reaction to coming at problems of identity, culture and diversity from the framework of critical theory, known as constitutional patriotism, is that such a framework is too abstract to be helpful. Hence, a commonplace criticism of constitutional patriotism, as a model of political association where the criterion of membership is the shared practice of law-making, is that such a model cannot cultivate strong feeling of allegiance necessary to hold the political community together.

I have dealt with this criticism in detail elsewhere.² Here, I would like to turn my attention to a different criticism of constitutional patriotism; namely, the charge of insensitivity to diverse groups' identity-based demands for recognition. For example, a common objection raised by liberal culturalists is that constitutional patriotism is incapable of accommodating minority language rights as a result of its abstract and universalistic thrust.³ I do not take this criticism to mean that in a pluralist society every language spoken by some members of the society should be recognized publicly for institutional use. My effort here will rather be focused on one specific claim of cultural identity, namely, language rights. I will outline a theoretical framework that will explain, in a diverse nation-state, what languages are selected for public use and why.

1. See: Coulombe, 2000: 273-93.

2. Briefly, I first argue that this criticism unnecessarily overburdens the goal of solidarity with the inflated language of "love", "friendship", "intimacy", etc. In other words, for the citizens of a constitutional state to feel connected to each other they do not need to feel like lovers or best friends, but rather it would suffice for them to feel mutual trust and respect as free and equal partners. Secondly, the criticism confuses the normative and sociological aspects of the debate. It repeatedly emphasizes the empirical fact of a pre-political "we" as the ground of political association which requires a normative valuation. However, the critical and reflective characteristics of the citizens of postconventional democracies enable them to go beyond the tradition by criticizing, revising and modifying what has been the case in favour of what should be the case. See: Payrow Shabani, 2002.

3. See: Tamir, 1993; Miller, 1995; Canovan, 1996; Margalit and Raz; 1990: 439-461; and Canovan, 2000: 413-432.

I will begin by giving a brief outline of three main versions of intrinsic/instrumental argument for the relation of language and the political community, revealing the essentialist underpinning of this relation (I). I will then outline the architectonic of constitutional patriotism as a normative model of political association sensitive to diversities found in multicultural nation-states (II). Next, I argue that the language policy of a civic nation-state should be devised pragmatically aimed at operationalizing the constitutive affect of language with its communicative power. That is to say, the traditional intrinsic/instrumental dichotomy is too restrictive for the purpose of policy making and has to be overcome by a communicative view of language as the context of mutual understanding between political subjects (III). Finally, through a discussion of the Official Languages Act in Canada I will show how this communicative approach is sensitive to, and constrained by, the political culture of the community, its historical contingencies, and practical feasibilities (IV). In conclusion I reiterate my argument that the increasing diversity in liberal-democratic societies requires us to rethink our approach to the problem of political association along the lines of constitutional patriotism (V).

I. Three Models of Language Policy-Making

In a general way, there are two main orientations in approaching the role and significance of language within the political domain: 1) an instrumental argument which views language as a *medium* or *tool* that facilitates socio-political life; 2) an intrinsic argument for language that perceives it as a primary good (in the Rawlsian sense), which itself has two versions: a) an intrinsic argument based on the desire to *use* one's own language in conducting one's life where the usefulness of language is bound closely to one's idea of the good life; and b) an intrinsic argument which views language as a *human accomplishment*, a good in itself. For my purposes here, these arguments should be spelled out a bit further:

1. In living one's life in a democratic society the individual is supposed to take part in the political life of the community and to be able to plan her life as a free and equal agent. According to this view participation and self-directed life are democratic ends in themselves. In other words, democratic citizenship is valued not because it leads to some further goods but because, as an expression of freedom and belonging, it is good in itself. Liberal culturalists have taken this to mean that culture possesses an inherent worth because it is the context upon which the individual interacts with others and makes life choices. Thus, the cultural context of

choice and liberty is as intrinsically valuable as the freedom and life that it grounds. In the established discourse of multiculturalism this context is called “societal culture”.¹ It is further argued that an important aspect of culture is language, which is a necessary condition for the planning of a life. Language in this sense is not any particular language but language in general. In this general sense, language is good only in so far as it is an instrument of cultural interaction and political participation. According to this view then, language is valued as a medium of interaction among members of a culture.

The language policy that this view normatively grounds is that of linguistic convergence. The interest in language as a means of communication requires promoting convergence on a privileged public language(s) because it is conducive to greater communication, mobility, efficiency, and common identity. Thus, to view language instrumentally dictates a language policy that aims to make various languages converge onto the most privileged one in order to promote a greater democracy.

An example of such a language policy would be the status and use of French in France and English in the United States.² The notion of citizenship that accompanies this view of language and language policy is a liberal view where all individuals are to be treated equally before the law as equal members of the political community.

2.a) A second conception of language takes the instrumental character of language and argues that in so far as we talk about language in general and not about any particular language it is difficult to recognize its value in terms of its use for other ends. And in so far as we look at particular languages we realize how their value is tied to the value of the ends for which they are used. In other words, we will, then, see that those ends are meaningful only through the language in which they are pursued. Given this connection and the inherent values of democratic life,

1. In his words societal culture “provides its members with meaningful ways of life across the full range of human activities, including social, educational religious, recreational, and economic life encompassing both public and private spheres. These cultures tend to be territorially concentrated and based on a shared language.” See: Kymlicka, 1995: 76.

2. The United States has no official language in the sense that there is no such clause in the constitution or other such documents. But English is its “official” language since a minimum competence in English is a condition of eligibility for citizenship as the “Naturalization Requirement Document” published by INS states: “Applicants for naturalization must be able to read, write, speak and understand words in ordinary usage in the English language.” (http://www.usais.org/citizenship_prep.htm)

the medium of living such a life—i.e., language—is intrinsically valuable too. On this view one's language is an inseparable part of one's life.

The language policy that this view of language proposes, therefore, would be a sort of *multilingualism* where any language or languages used by the political community is granted the same official recognition. The multilingual policy, in turn, is said to accommodate various aspects of the diverse citizenry's need for communication, identity-formation, and recognition. As such, the policy of multilingualism aims to balance the interest of diverse linguistic communities against one another. On this account, treating languages equally is not to treat them equally with respect to a privileged language but to treat them equally by way of equal recognition. We see this language policy at work in countries like Belgium and Switzerland. The corresponding view of citizenship to this language policy is one based on an historical contract between the founding communities of the nation-state—French, Fleming and German communities in Belgium; and French, German, Italian, Rhaeto-Roman communities in Switzerland. The criteria of membership, thus, are defined along the lines of values found in the traditional culture of the founding communities.

2.b) Given the increasing multilingualism, however, it has been argued that the intrinsic argument for language can no longer solely be developed by way of an appeal to the intrinsic value of one's life plans, but rather, it needs to be developed by way of understanding the intrinsic value of language itself as a human achievement. On this view any language is good in itself independent of what it is used for. Language is valued as an instance of human creativity along with culture, which is viewed as involved in the process of identity-constitution of the members of a cultural group. It is argued that this constitutive aspect of language, as an inherent good, is not captured by instrumental views of language. To view language in this way is to treat language rights as a category of human rights.

Hence, the corresponding language policy to this view is a *protectionist* policy. Advocates of this policy argue that equal recognition of different languages does not necessarily entail their equal success and survival. Therefore, the goal here is not equal treatment but equal success of languages. Since language is a good in itself, the language policy should require protection and maintenance of the language(s) that would guarantee their flourishing. India perhaps comes closest to this model of

language policy since in 1956 it redrew the boundaries of its states along linguistic lines in order to accommodate people's linguistic identity.¹ The accompanying citizenship view is defined along natural ties of kinship (religious, cultural, linguistic, etc.).

The above sketch is not meant to be a comprehensive account of arguments for language policy. It rather is meant to provide an overview of the main positions on policy options. Despite their differences, the common thread that runs through these arguments is the belief that culture, language and political identity are intricately connected. Now, with respect to the question of policy-making, what matters most is whether this connection is understood and theorized in essentialist terms or in constructivist and more adaptable terms. For, when the question of identity is posed in a multicultural context, then the model of political association requires a more inclusive underpinning identity than that of ethnic or cultural identity. Justice requires that the problem of differentiated identity in such a context be approached and contextualized in terms of concrete social and political questions of law and policy-making within a constitutional framework that allows for deliberative negotiation based on mutual recognition. To this end, I would like to show in the following section how constitutional patriotism could present an outline of such an auspicious model of political association for differentiated rights, including minority language rights.

II. The Inclusiveness of Constitutional Patriotism

The demands of culture have increasingly forced political philosophers to rethink the boundaries and architectonic of the nation-state. For them, the historical formula of ethno nationalism has repeatedly proven incompatible with prevalent currents of multiculturalism and globalization. Among these theorists, Jürgen Habermas has forcefully argued for replacing ethno nationalism with a form of civic nationalism that he calls constitutional patriotism. Constitutional patriotism is a *normative* doctrine that draws on the civic tradition of founding a constitutional republic in Europe. The political project of modernity, namely, the nation building project, was first constructed by way of

1. This redrawing was repeated in 1960—to separate people who spoke Gujarati and those who spoke Marathi—in the State of Bombay and in 1966—to separate those who spoke Punjabi and Haryana—in the State of Punjab. Despite this, India also has pursued a convergence policy around the Hindi language which is spoken by more than a third of the population.

the projection of a nation onto the founding act of constitution-making (e.g., France). Later in the course of nineteenth century, however, this project was pursued predominantly along the lines of ethno nationalism, which stemmed from an imaginary organicity of a nation that was prior to any constitution. According to this later model, the criteria of belonging was “defined by ‘the nation’ as the expression of a *Volk*, a people with a pre-political, organic form of shared identity rooted in place, descent, and language.” (Pensky, 2001) Laws that result form the constitution of such an ethnic nation bestowed a citizenship privilege only upon those who identify with national culture as its natural members. From this perspective, political association was legitimate only in so far as constitutional laws drew their binding force from the consent of its co-nationals who felt tied to the political community by virtue of kinship. This identification and sense of allegiance, in turn, provided the system with solidarity and cohesion necessary for political unity. In this model of nation-building, the constitution formalized the supposed homogeneity that grounded national identity.

Moreover, the modern conception of nation marked a transformation from a nation of the nobility into a nation of people. This transformation, in turn, resulted in a further renovation of the early modern state into a democratic republic. The subjects of the newly formed nation-state became citizens of a polity connected together through a feeling of solidarity that arose from a sense of belonging to the nation as the pre-political people. “Thus the achievement of the nation-state consisted in solving two problems at once: it made possible a new *mode of legitimation* based on a new, more abstract form of *social integration*.” (Habermas, 1998: 111) This meant that the problem of the political authority, which used to be legitimated by appeal to God or Nature as grounding divine rights, was then justified by an appeal to the democratic institutions of the secularized state. Popular sovereignty and human rights were the two ways of satisfying the condition of the legitimacy of the modern nation-state. “However, political philosophy has never really been able to strike a balance between popular sovereignty and human rights, or between the ‘freedom of the ancient’ and the freedom of the moderns.” (Habermas, 1998: 116) This is so because, on the one hand, according to the classical model of constitutional nation-state of late eighteenth century citizens come together as free and equal agents to grant one another a system of basic rights in the form of as constitution that would govern their common life, while on the other hand,

the nation-state model of the nineteenth century contains a view of popular sovereignty that presupposes a nation that is prior to the constitution. On the first model human rights are institutionalized through positive law while on the second model positive law is subordinated to popular sovereignty.¹ For Habermas both accounts are inadequate.

Habermas contends that today the increasing diversity demands “the end of the symbiosis between the constitutional state and ‘the nation’ as a community of shared descent, and a renewal of a more abstract form of civil solidarity in the sense of a universalism sensitive to difference.” (Habermas, 2001: 84) First and in order to avoid liberals’ and republicans’ one-sided emphasis, either on human rights or on popular sovereignty, Habermas envisions co-originality between the two ideas. He suggests that the practice of constitution-making be treated as a discursive situation where private rights are justified and legitimized through democratic discourses of public deliberation. (Habermas, 2001: 117) Neither public nor private autonomy are given priority over the other so to ensure that the ideals of stability and legitimacy, facticity and validity, are brought into a working balance. The complementarity of sovereignty and individual rights, in turn, reveals an internal connection between democracy and the rule of law.² The advantage of this view is that “once we take this internal connection between democracy and the constitutional state seriously, it becomes clear that the system of rights is blind neither to unequal social conditions nor to cultural differences.” (Habermas, 2001: 208)

Secondly, modern law is viewed as a set of abstract norms that are comprised of a system of rights recognized by all citizens in the form of a constitution. Such a construct of law, while it is produced through the procedures of democratic will-formation—as the only source of postmetaphysical legitimacy—itself generates solidarity as a form of social integration. The democratic process of discursive deliberation and negotiation fosters a sense of solidarity among its participants without requiring an appeal to a unifying *ethnos*. Within a constitution, the abstract laws are not envisioned in order to homogenize different social groups and violate their autonomy. Rather, they are formulated in order to facilitate the coexistence of differences within a political community by making further negotiation possible and by endorsing individual

1. See: Habermas, 2001: 133.

2. See: Habermas, 2001: 18-115 and Habermas, 2001: 50-449.

autonomy. Accordingly, Habermas' model of constitutional patriotism is made so that the constitution reflects diversity. To this end, the practice of constitution-making aims to protect diversity through rights.

The aim of starting from abstract principles in constitutional patriotism is to allow separating the unitary demand of the majority culture from the demands of minority cultures for recognition by fostering a political culture that includes both. Habermas explains this as follows,

The majority culture, supposing itself to be identical with the national cultures as such, has to free itself from its historical identification with a general political culture, if all citizens are to be able to identify on equal terms with the political culture of their own country. To the degree that this decoupling of political culture from majority culture succeeds, the solidarity of citizens is shifted onto the more abstract foundation of a 'constitutional patriotism.' (Habermas, 2001: 74)

This uncoupling takes the form of an open-ended process of discursive procedures, in which political actors deliberate in light of their concrete histories. The result is a civic patriotism where political values such as stability and political legitimacy emerge from citizens' communicative understanding of a shared polity as opposed to a shared national identity. The communicative practices of political deliberation are open to citizens of every background, without enclosing them into the uniformity of a homogeneous community. The open-ended and inclusive character of such a civic bond transforms different feelings of individual identities into a sense of solidarity of co-patriots without erasing the diversity. Thus, a political culture fostered along the lines of constitutional patriotism can accommodate the inclusion of the other and the freedom of the difference.

III. Constitutional Patriotism and Language Policy

Habermas' concept of political culture here is analogous to Kymlicka's notion of "societal culture" in so far as it similarly involves a common language and social institutions, rather than common religion beliefs, family customs, or personal lifestyles." (Kymlicka, 2001: 164) *Contra* traditional grounding of national consciousness, such an understanding of political culture allows for a greater inclusion and elasticity.¹

1. Kymlicka states that the government of liberal democratic states in their project of "nation-building" may promote two or more societal cultures. See: Kymlicka, 2001: 165.

For Kymlicka, however, the sufficient condition for political unity and social cohesion is a shared sense of national identity, which is owed to citizens' shared history and a common language.¹ According to him, citizens' conflicting interests can be adjudicated only if these commonalities are present. In this way, Kymlicka distinguishes his view from civic patriotism when he insists that mere shared principles are not enough to hold members of a political community together. However, such a commonplace criticism² of civic patriotism is mistaken since it ignores the binding power of common practices of law-making.

As I suggested earlier, we need to contextualize the question of identity and solidarity according to specific questions of political association and policy-making. And if we do that, we realize that a common political bond can be obtained and then maintained when the cohabitants of the political community recognize each other as sharing a political life through participation, deliberation and law-making. That should simply suffice because citizenship is increasingly about what one does and not who one is.³ It used to be that the cohabitants of a homogeneous society were related with many natural ties. Today's increasing diversity, hybridity, and speed has weakened and in some places dissolved those close ties. Hence, in order to identify with a person or a group as one's compatriots one ought not need to feel a strong sense of love or intimacy characteristic of general kinship ties in a family or a clan. In fact, one does not necessarily need a common history (as the average of 200,000 newcomers to Canada every year seems to show). Rather, one needs to identify with the particular political negotiation in which one is engaged. Of course, if there is love, friendship, common history, and homogeneity so much the better. But under the condition of diversity the minimum requirement is the recognition of the fact that we live together, and as such have the status of free and equal partners in governing our common life. Hence, the trust needed for this negotiation to succeed is the trust between free and equal partners and not the trust of the lovers, best friends, or family members. "A free and democratic society will be legitimate even though its rules of recognition harbor elements of injustice and non-consensus if the citizens are always free to

1. See: Kymlicka, 2001: 311-313; also see chapter five of Kymlicka, 1995.

2. See: Canovan, 2000: 413-432; Yack, 1996: 193-211; Mertens, 1996: 328-347; also W. Böckenförd, 1995; Scruton, 1990.

3. See: Benhaib, 2002: 170.

enter into processes of contestation and negotiation of the rules of recognition.” (Tully, 2000: 477) Here, a sense of belonging arises out of identifying with a set of institutions and practices as a reference point that expresses the polity of the original law, which reflects the will of citizens as its authors. And it is within this framework that issues of public policy including language policy needs to be addressed.

The model relies on the public deliberation and negotiation of the citizens of the political community that is not bound by any a priori and fixed notion of identity and rights. Citizens or their representatives make laws and policies that in turn govern and affect them. This construct of law and policy-making is equipped with the procedural openness to allow for differentiated rights based on the changing and crisscrossing identities. In this way, laws and policies can reflect differentiated rights that encompass a variety of rights from special representation rights to self-government rights, including language rights. The realization of differentiated identity rights based on an overarching principle of association in constitutional law would imply that policies concerning linguistic rights of national minorities and immigrant groups cannot and should not be decided based on a unitary view of the dominant language. Instead, such policies should be approached pragmatically with respect to a specific set of political problems that they are trying to address.

On this model, language is the communicative medium of deliberation, which entails that a common language is important because it can facilitate the political interaction and deliberation of the political actors for the purpose of their common life. Thus, the political happens through language. While from various perspectives language may be viewed as a good in itself, from the political perspective it is good for something else, namely, allowing the political actors to take part in common practices of communication, deliberation and law-making. Intrinsic arguments for the value of a language are tenable only from the internal standpoint of the culture hosting the language. And since that would be the case for people belonging to different cultural groups in all multicultural and multilingual societies, the question of official language there cannot be decided by way of appeal to intrinsic arguments for a language.

Thus, the communicative view of language is not based on pure intrinsic arguments as a human achievement. However, this should not be seen as endorsing the instrumental approach either, not because it doesn't value language as a means of communication among citizens to their political end, but because unlike instrumental actions the guiding

principle here is understanding and not success or domination. Language is the context of reaching mutual understanding with the others. This communicative sense of language is qualitatively different from the instrumental sense of language. Hence from the viewpoint of constitutional patriotism, the argument for language policy is neither instrumental nor intrinsic. It is rather a communicative or pragmatic argument. The adjective “pragmatic” here should not be understood as a general political sense. Rather, pragmatic character of communicative view of language refers to Habermas’ “transcendental pragmatic argument”, which uncovers the presuppositions of rules of argumentation at the rhetorical level of process that is capable of hosting an ethical content: “In argumentative speech we see the structures of speech situation immune to *repression* and *inequality* in a particular way: it presents itself as a form of communication that adequately approximates ideal conditions.” (Habermas, 1990: 88) This point needs to be accompanied with a second clarification about what kind of rights are language rights.

As mentioned in the first section of this paper, some liberal nationalists argue for the intrinsic value of language demanding full recognition and protection of the language.¹ When it comes down to deciding what language(s) is to be granted official status, however, they argue that only those languages with considerable size and vitality are to be recognized. This seems to indicate a reversal in their reasoning. For, while the size and vitality of linguistic community is very important with respect to the status of a language, they plainly contradict the intrinsic argument for language. That is to say, if something is inherently good then, philosophically speaking, its size or any other empirical consideration of it should not matter. Conversely, if contingent and empirical elements are a part of the argument, then the argument cannot be an intrinsic one.

Hence, it looks as if what these theorists have in mind might be a political understanding of the intrinsic argument, which would imply that, as a good, language is to be regarded as a collective practice and not an individual activity—a view similar to the communicative argument for language. In this sense, then, language, as a constitutive element of people’s identity, requires a certain size and vitality to satisfy the symbolic needs and expectations of the community’s members. But it is exactly in

1. See: Réaume, 2000: 254-272.

this sense that language rights are not a type of human rights. This is so because while torturing an individual would amount to a violation of that individual's human rights, not offering Japanese language services to Japanese tourists in Canada is not violation of their human rights.¹ "Language rights, to be human rights, must be universal or else they are not rights at all" (MacMillan, 1998: 105) but this should not be taken to mean that language rights are entirely different species of right. As long as constitutional patriotism entails a universalistic understanding of the rule of law and democracy that allows us to normatively separate unjust language rights from just ones, language rights too have some universalist strands in them. This clarification suggests that language rights are a sub-species of human rights that require different treatment.

So far we have established that from the view point of constitutional patriotism the role of language should be viewed pragmatically as a communicative medium aimed at mutual understanding between political actors, and that language rights are not pure human rights. Now, as for the way in which this insight is supposed to guide the processes of opinion and will-formation in the deliberative democracy model with respect to minority rights in general and language right in particular, we not only have to emphasize the *inclusive* character of this model, which "makes it particularly attractive to the concerns of excluded minorities", (Benhabib, 2002: 134) but also its *empowering* character that results from the insistence on the consent of all those affected by the acquired laws as the ground of its legitimacy. The discourse principle, as the consensus of all those affected by the discursive norm, has been criticized for being overly ambitious and exclusive. But as James Bohman and Jorge Valadez have argued, this principle need not be seen as requiring identical reasons for the agreed upon norms but rather as what entails "moral compromise" where "the parties do not modify the framework to achieve unanimity, although they may when conflicts are not so deep. Rather, they modify their conflicting interpretations of the framework so that each can recognize the other's moral values and standards as part of it." (Bohman, 1996: 91; Valadez, 2001: 59-66) The practices of law-making then results from the process of discursive public deliberation whose outcome in a multicultural context is characterized by moral compromise. Or "As the Supreme Court of Canada has put it, a free and democratic society rests

1. For a discussion of this distinction, See: MacMillan, 1998: 10-22.

not on a set of rules immune to criticism but on a “continuous process of discussion’ involving the right of dissent, the duty to acknowledge dissenting voices, and the corresponding amendments of the rules of the democracy over time.” (Tully, 2000: 474) This attitude is most consonant with the spirit of constitutional patriotism, which is why in the next section I will take Canada as a model for constitutional patriotism. This convergence, however, is not to suggest that the politicians and policy makers in Canada adopted and employed this theoretical model but to find the ideas and practices that I describe here at work in the Canadian system . Indeed, the constitution-making of 1982 along with its charter of rights and provisions of bilingualism and multiculturalism aimed at governing a diverse society based on liberal democratic values anticipated the theoretical articulation of this model in Habermas.

In such a context language policy is open and inclusive; and as a compromise it is constrained by (1) values of a liberal the *political culture*—that includes civility, mutual recognition, equal respect, tolerance, etc., (2.a) *historical contingencies* such as the historical role of the founding communities, and (2.b) *practical feasibilities* such as size and vitality of contending languages. The first criterion of political culture has priority over the next two since it is the pre-condition for any liberal-democratic contestation to take place. The next two criteria are on the par and none has priority over the other. This is important since it implies that the language policy drawn from these criteria is not static and remains open to change based on future changes in practical feasibilities such as size and vitality. As for the justification for the importance of these criteria, the democratic values of a liberal political culture is the pre-condition upon which any genuine contestation and negotiation can take place. Historical contingencies are normatively important since they separate the claims of the founding communities in terms of a specific historical development, a criterion that, for example, separates the linguistic demands of Anglophone, Francophone and Aboriginal people in Canada, as founding communities, from those of Italian immigrant community in Toronto or the Ukrainian immigrant community in Alberta. The reason for the normative weight of these kinds of claims is that “They are claims to nationhood based on historical priority, on the fact that they were present at the creation of the state, and that the state’s very legitimacy on their collective consent.” (Ignatieff, 2001: 67) Finally,

practical feasibilities matter since policy-making is always constrained by limited resources, which, in turn, make considerations of size, viability, vitality, efficiency, etc. very relevant.

In a multicultural and constitutional state, then, there will not be as many official languages as there are diverse groups, but a language or small number of languages which, together with a shared practice of political participation, would ensure that no citizen is left out of the democratic process of law-making as a result of the lack of knowledge of an official language. Now, depending on whether one or more languages in a specific context perform that service the question of official language needs to be decided differently. It should be clear, hence, that the aim of a normative language policy, with respect to accommodating the democratic ideal of transparency, is not to promote linguistic homogeneity but to serve the communicative goal of political deliberation.

IV. Canada and the Normative Model of Language Policy

In this section I would like to show how Canada's practice of law and policy-making with respect to the question of official language policy approximates the normative model of constitutional patriotism, which I have been advancing here. From this perspective Canada's language policy can be seen as a civic achievement that involves a deliberative compromise between two (of the three) founding nations of Canada (I will address the absence of the Aboriginal People from this negotiation at the end).

Recalling the above mentioned criterion for devising a language policy, we can say that, with respect to principle (1), Canada's political culture of liberal democracy is the matrix upon which the discursive deliberation concerning official language(s) has taken place. The Official Languages Act in Canada is set to deal with the obligations of federal institutions regarding service to the public and language of work, and sets out the government's commitments in the area of equitable participation of its citizens.¹ Regarding condition (2.a), the Act is divided into two parts: Official languages and Minority Language Educational Rights, as reflected in sections 16 and 23 of the Charter of Rights respectively.² The first part, reflecting the founding role of the English and French national minorities as the original settler groups—the contingent element of the

1. See: Government of Canada, *The Official Languages Act*, Available At:www.gc.ca.

2. See: Charter at http://www.patrimonecanadien.gc.ca/charter-anniversary/part-1_e.cfm.

Canadian history—states that “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada”.¹ This suggests that not any minority group can have a claim to official language status for their language, which means that only national minorities, as groups historically grounded in the political community, can make that claim. “Since immigrant groups are not national minorities, they are not accorded similar language rights”. (Kymlicka, 1998: 46) The historical role of language communities makes the language rights in Canada “compromise rights of fundamental sort”. (Green, 1987: 669) The second part of the Act, reflecting the condition of practical feasibilities (2.b) based on population concentration, geography, resources, etc., states that Canadians who constitute a linguistic minority—either French or English—in their province are entitled to “have their children receive primary and secondary school instruction in that language in that province.” (Green, 1987: 669) The spirit of these three criteria is captured in a statement made by the Human Rights Commission of Prince Edward Island, during a meeting of the Task Force on Canadian Unity:

Language and language-of-education rights should be protected, not because they are “basic or fundamental human rights” but because they have acquired a “special and powerful status” in the life of the country, and because they “may be integral to the existence or survival of a culture, which some citizens may regard as tied to the existence or survival of a culture, which some citizens may regard as tied to their own identity.” In that context they would be ‘constitutional rights’ only. (Task Force on Canadian Unity, 1979: 265)

The Canadian official-language regime includes the use of either official languages -English or French- in the federal courts, federal legislators, in the publication of statutes, in communicating with federal government agencies, and in minority-language education. The official bilingualism policy took the historical founding role of the English and French people seriously in adopting both languages as official languages of Canada. Yet, since after the original settler groups more peoples have been involved in building this nation, further elaboration of this historical compromise was required. Hence, shortly after bilingualism policy, the

1. See: Charter at http://www.patrimonecanadien.gc.ca/charter-anniversary/part-1_e.cfm.

official policy of multiculturalism¹ was adopted as an attempt to acknowledge the significance of the role and contribution of the other ethnic groups in constituting Canada.

While at first glance there might seem to be a tension in introducing a policy of multiculturalism into a bilingual framework, a closer look would reveal a political insight that can accommodate greater diversity and enhanced inclusion. In *Finding Our Way*², Will Kymlicka makes the point that the policy of multiculturalism within a bilingual framework has served to separate language from lifestyle and ethnic descent. He argues that to acknowledge two public languages because of their historical role over other languages is not the same as valuing the English and French lifestyle and ethnic interests over others:

In other words, the promotion of English and French as dominant languages need no longer be associated with the promotion of the lifestyles of citizens of English and French descent. Multiculturalism is thus seen as a means of integrating immigrants into one of the two societal cultures in Canada: francophone or anglophone. Each is characterized by its language and social institutions, but neither of them imposes common religious beliefs and specific lifestyle. (Coulombe, 2000: 286)

A language policy devised along these lines reflects a civic commitment to ideals of justice and inclusion, which are pursued by the constitutional norms aimed at accommodating cultural diversity. James Tully calls these norms constitutional conventions of mutual recognition, consent and continuity.³ Such forms of law-making are the result of the

1. See Canada adopted its multiculturalism policy in 1971 and in 1988 formally enshrined the policy in legislation with the Canadian Multiculturalism Act¹, which in parts read as follows:

3.(1) It is hereby declared to be the policy of the Government of Canada to

(a) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage;

(b) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future;

(c) promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation. (Canadian Heritage, "Canadian Multiculturalism Act", Available at: www.multiculturalism.pch.gc.ca)

2. See: Kymlicka, 1998.

3. See: Tully, 1995.

recognition of the fact that “The individual’s existential dependence on inter subjectively shared traditions and identity-forming communities [which] explains why the integrity of the legal person cannot be secured without equal cultural rights in culturally differentiated societies.” (Habermas, 2001: 74)

In Canada legal recognition of the individual’s cultural rights has proceeded in the form of continuous negotiation marked by a bargaining character necessitated by deep diversity of the Canadian society. Indeed, the jurisprudence of the Canadian Supreme Court has viewed the official language rights as a political compromise between the two founding nations of French and English Canadians. This can be seen in the Courts ruling in *MacDonald v. City of Montreal* and *La Société des Acadiens du Nouveau Brunswick v. Minority Language School Board*.¹ In the first case MacDonald claimed that under section 133 he had the right to be served a traffic offence summons in the official language of his choice. The court ruled that the right in section 133 of the Constitution Act 1867 was that of speakers and not of addressees of the communication, meaning that the government official could use her own language regardless of whether that was the same as the language of MacDonald’s choice or not.² Similarly in hearing the case of *La Société des Acadiens du Nouveau Brunswick* where the appellant claimed that they were entitled under section 19 of the Charter of Rights to a judge capable of understanding their official language, the court ruled that the right was to be understood as a negative liberty of the speaker and was not meant to impose any positive obligation on the recipient of the speech.³ In both cases the Court characterized its decision as being “based on a political compromise rather than on principle.” (Supreme Court of Canada, 1986: 1-500)

1. See: Supreme Court of Canada, *McDonald v. City of Montreal*, 1986 at www.lexum.umontreal.ca/csc-scc/en/pub/1986/vol1/html/1986scr1_0460.html; *La Société des Acadiens de Nouveau Brunswick v. Minority Language School Board*, No. 50, 1986, Available at: www.lexum.umontreal.ca/csc-scc/en/pup/1986/vol1/html/1986scr1_0549.html.

2. See: section 133 reads, “Either the English or the French language may be used by any person in the debates of the House of the Parliament of Canada and of the Houses of Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either languages may be used by any person or in any pleading or process in or issuing from any courts of Canada established under this act, and in or from all or any of the courts of Quebec”, Available at: http://laws.justice.gc.ca/en/const/c1867_e.html.

3. See: section 19 of the Charter reads, “Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick”, Available at: www.patrimoinecanadien.gc.ca/charter-anniversary/section-16-22_e.cfm.

The position of the Court was widely criticized as being too instrumentalistic, failing to see the intrinsic value of using one's language. Given the Court's tendency to apply restrictive interpretation of the right to use French or English in courts, in 1987 Bill C-72 was introduced as revisions to the Official Language Act.¹

Prior to the Bill the Commissioner of Official Languages had recommended to the Parliament that the language rights be *personalized* with respect to one's "right to be served in either language that would complement the existing institutional obligation to provide the service," and with respect to "the formal recognition of the right of federal employees to carry out their duties in official language of their choice, subject to certain conditions." (Commissioner of Official Languages, 11 February 1986) The recommendations were incorporated into the Bill.

These provisions significantly expanded the scope of the meaning of a right to a trial in either official language. They also specifically corrected the restrictive interpretation of language rights in courts as developed by the Supreme Court ... The individual to a proceeding became the holders of the right and controlled the decision regarding the language of court proceeding. (MacMillan, 1998: 83)

Consequently, the revisions allowed the Court to revisit the issue and confront this criticism in 1999 in the case of *R v. Beaulac*.² The appellant, Jean Victor Beaulac, charged with first degree murder, requested for a "trial before a judge and jury who speak both official languages of Canada pursuant to s. 530 of the *Criminal Code*."³ The Court ruled in favour of the appellant, arguing that "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada." And referring to the previous ruling it stated that "To the extent that *Société des Acadiens* stands for a restrictive interpretation of language rights, it is to be rejected." Despite this revision, however, the Court's characterization of the interpretation as "purposive" suggests that "language rights be

1. See: House of Commons, Bill C-72, *An Act respecting the status and use of the official languages of Canada*, 2nd session, 33rd Parliament (first reading, 25 June 1987, passed 7 July 1988).

2. See: *R v. Beaulac*, Available at www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol1/html/1999scr1_0768.html.

3. See: *R v. Beaulac*, Available at www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol1/html/1999scr1_0768.html.

interpreted as a fundamental tool for the preservation and development of official language communities.” That is because, the Court argued, “Language rights are a particular kind of right, distinct from the principles of fundamental justice.”¹

The Court, through its ruling, indeed upheld a distinction between constitutional rights grounded in principle and language rights based on the political history of the two founding national groups. This distinction mirrors the subtle distinction between human rights and language rights that was pointed out earlier. Language policy in the context of deep diversity of the founding groups is marked by a normative negotiation aimed at obtaining a workable compromise. Of course, arriving at such compromise in the constitution still leaves the question of the language used for constitutional deliberation untouched. However, given the recognition of the differences and the need for coexistence by the diverse groups compels their elites who are usually bilingual or multilingual to carry out the negotiation. Such negotiation in turn impregnates the constitutional law regarding language rights with the practical impression of the society’s bilingual or multilingual makeup. The allegiance to such a law would be guaranteed since the citizens see the signature of their character imprinted on the law.

The discussion of the Canadian case would not be complete without saying something about the question of Aboriginal claims for linguistic equality. Advocates of these claims express their demand by appealing to various forms of intrinsic argument for the value of language. They argue that the threat of extinction of Aboriginal languages that results from lack of recognition is a source of social inequalities. Kymlicka voices this worry in the following way,

Aboriginal fears about the fate of their cultural structure, however, are not paranoia—there are real threats. The English and French in Canada rarely have to worry about the fate of their cultural structure. They get for free what Aboriginal people have to pay for: secure cultural membership. This is an important inequality, and if it is ignored, it becomes an important injustice. (Kymlicka, 1989: 190)

How can such claims for equality of status and demands for recognition be assessed? To apply the three guiding principles of values of

1. See: *R v. Beaulac*, Available at www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol1/html/1999scr1_0768.html.

political culture, the significance of historical role of Aboriginal peoples, and the consideration of practical feasibility to these claims would reveal a tentative answer.

In so far as the liberal values of tolerance, recognition, equality of treatment and respect go, some form of recognition should be granted to Aboriginal languages. This recognition is buttressed by the historical role of Aboriginal communities as one of the founding people in Canada. However, it is with respect to the consideration of the third principle that Aboriginal demands for linguistic equality are challenged. According to census of 1981 and 1991 the size of Aboriginal community of languages collectively adds up to 0.5 percent of the population. This small population is scattered across the country without a sizable concentration. Furthermore, this small percentage of population represents the speakers of, not one native language, but of multiple languages, each spoken by a smaller number of people. More importantly still, these languages are not widely used in their communities. Given these factual considerations the demand for equal status of Aboriginal languages with the official language of Canada are not justifiable.

This conclusion, however, should not mean that there should be no recognition for these languages. Their demand for recognition can be accommodated by addressing their more fundamental demand for self-government and at local levels of regional or provincial policy-making. For instance, in 1988 the Northwest Territories Official Languages Act was amended to include Chipewyan, Cree, Dogrib, Gwich'in, Inuktitut, and Slavey as official languages of the region along with English and French. Similarly, Quebec government's language law known as Bill 101 exempts Cree, Inuktitut, and Naskapi from its applications in the Aboriginal communities. In these communities the right of people to use their languages and for their school boards to educate the Aboriginal children in these languages is recognized by law.

V. Conclusion

Our contemporary world confronts us with an unprecedented degree of diversity, hybridity, and speed. These changes require that we rethink our approach to problem of political association. Questions of membership, belonging and recognition of diversity can no longer be answered from an ethno national view but has to be addressed based on a common practice of democratic law-making crystallized in a constitution. The procedural character of this practice while beginning from abstract principles of

human rights, democracy, and justice, get further filled in by the specific content of a political culture of a concrete country. Policy questions, such as language policy, in diverse societies are best approached from this flexible model of constitutional patriotism where allegiances are formed around the democratic practice of law-making.

In conclusion, I would hope that my discussion of such difference-sensitive law-making and policy-making have demonstrated the capacity of the normative framework of constitutional patriotism to approach the goals of justice and inclusion with a degree of procedural flexibility and open-endedness appropriate for democracies that exhibit deep diversities.



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