

# On the Intrinsic Value of Arabic in Israel—Challenging Kymlicka on Language Rights

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## I. Introduction

In the postcolonial era, we have witnessed waves of mass immigration. Consequently, many states are no longer associated with just one or two national languages. Newly formed immigrant minorities raise demands for language rights, alongside national minorities, who raise similar demands.

Language rights are commonly defined as rights that protect the use of particular languages, namely one's mother tongue or native language.<sup>1</sup> Language rights are regarded as minority rights because in a heterogeneous linguistic society, it is only the minority groups whose language requires legal protection. As opposed to members of majority communities, whose languages enjoy strong status without needing special legal protection, members of minority groups are usually under constant pressure to abandon their mother tongue in favour of the majority language.<sup>2</sup>

Language rights have a strong positive dimension.<sup>3</sup> If a minority language is to flourish, it should be spoken by the government and not only by members of the minority group, and it should be a language of elementary and higher education. Moreover, minority members should be able to speak their language when communicating with the government. Therefore, the state should employ workers who are fluent in this minority language so that they can communicate with minority members in their language. That is to say, comprehensive legal protection of

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1. For a definition of language rights see C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto, ON: University of Toronto Press, 1998) at 11; Royal Commission on Bilingualism and Biculturalism, Report, vol. 1 (Ottawa, ON: Queen's Printer, 1968) at 41.
2. Denise G. Réaume, "The Constitutional Protection of Language: Survival or Security?" in David Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc: Éditions Yvon Blais, 1991) 37 at 46-47 [Réaume, "The Constitutional Protection of Language"].
3. The roots of the familiar distinction between negative and positive rights are found in Isaiah Berlin's well-known distinction between negative and positive freedom (Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (London: Oxford University Press, 1969) 118 at 121-72). Simply put, the term 'negative rights' refers to rights that create the duty of the state not to interfere with the freedom of the citizen to do whatever he or she desires. The term 'positive rights' refers to rights that impose positive obligations on the state, i.e., actions that the state is obliged to take if it is to take these rights seriously. However, the distinction between negative and positive rights has been rightly criticized as elusive. Some scholars argue that all rights, even the most allegedly negative rights, impose certain obligations on the state (See Patrick Macklem, "Aboriginal Rights and State Obligations" (1997) 36 *Alberta L. Rev.* 97 at 100-02). Therefore, I prefer to use Patrick Macklem's distinction between 'rights with positive dimensions' and 'rights with negative dimensions' and to describe language rights as rights with more positive than negative dimensions.

a specific minority language requires the state to put significant resources into supporting this language.

In the absence of unlimited economic resources in most multilingual states, the positive dimension of language rights is inherently connected to another distinctive characteristic of language rights, which I will call 'the selective nature of language rights'. Most countries can only provide comprehensive legal protection for a few minority languages. A multilingual state has to 'choose' one or two minority languages to which it offers strong legal protection such as access to state services, governmental and municipal publications, public education and the like.

My paper addresses the normative criteria for selecting the minority languages most deserving of comprehensive protection by the state. This normative issue is frequently raised in domestic and international constitutional debates about language rights.<sup>4</sup> The question was also recently discussed by the Israeli Supreme Court decision in the controversial case of *Adalah*.<sup>5</sup>

When addressing the normative problem of minority languages most deserving of protection, Will Kymlicka distinguishes between national and immigrant minorities. Many scholars challenge Kymlicka's distinction on empirical, normative and methodological grounds. However, none of them have suggested different criteria for distinguishing minority languages that are entitled to protection from minority languages that are less entitled to protection. In this paper, I suggest an alternative distinction between linguistic minorities, which is based on Denise Réaume's account of the intrinsic interest in language as a marker of cultural identity.

Using Joseph Raz's interest theory of rights, I claim that we should comparatively evaluate the interests of different linguistic minorities in protecting their languages. In the absence of unlimited resources, the minority that possesses the strongest interest in its language deserves the strongest protection. Language rights should therefore protect first minority languages whose speakers have the strongest interest in their language as a marker of cultural identity.

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4. Canada's public policy has always distinguished between linguistic minorities by promoting multiculturalism on the one hand and bilingualism on the other hand. The prominent bases for preferring French and English over other languages in Canada are the historical reality of these two founding nations and their numerical and geographical concentration. However, there is a constant debate over protecting only these two linguistic communities (see Terrence Meyerhoff, "Notes and Comment: Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity" (1994) 9 Am. U.J. Int'l L. & Pol'y 913; Pierre A. Coulombe, "Citizenship and Official Bilingualism in Canada" in Will Kymlicka & Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 273). This debate reached its climax in the public deliberation over the Meech Lake (1987) and Charlottetown (1992) Accords. The bilingual character of Canada and the proposed 'distinct society clause' gave the French minority a preferable status over other minorities. Ethnic minorities and Aboriginal Peoples rejected the accords, *inter alia*, because they did not extend language rights to ethnic minorities, but instead, they maintained the disparity between minority groups (Meyerhoff, at 993-95). For other reasons for rejecting the accords see Joel Baken & Michael Smith, "Rights, Nationalism, and Social Movements in Canadian Constitutional Politics" in David Schneiderman & Kate Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 218.

5. H.C. 4112/99 *Adalah et al. v. The Municipality of Tel-Aviv-Jafa et al.*, 56(5) P.D. 393 at 441-42 [*Adalah*].

Israel serves as a linguistic ‘test case’ for my normative distinction. Israel presents a complex case of a country consisting of a national Jewish majority, a national Arab minority, and a large Jewish Russian immigrant minority, which tends to adhere to its Russian culture and language. However, Israel has only two official languages: Hebrew and Arabic. Is this legal state of affairs normatively justified? Applying the theoretical framework I have developed, I compare the interest of the Arab minority in protecting Arabic with the interest of the Russian linguistic minority in protecting Russian. I argue that the interest of the Arab minority is stronger, because Arabic is its exclusive marker of cultural identity, whereas both Hebrew and Russian may serve as markers of cultural identity for the Jewish Russian minority.

One may argue that Israel presents an unusually complex case of language rights that cannot be found in other multilingual states. Therefore, so the argument goes, we should be satisfied with Kymlicka’s distinction. We do not need to appeal to an alternative normative criterion which distinguishes between linguistic minorities that deserve language protection. However, when one thinks about complicated multicultural situations in other states in the world one may discover similar complexities. One can think of such similar complexity in Canada which declares only French and English as official languages although there are other languages, such as Chinese, which are spoken by large communities of people in Canada.<sup>6</sup>

## II. Kymlicka’s Distinction between National and Immigrant Minorities

Kymlicka’s core thesis is that people have an important interest in access to their culture because it constitutes their context of meaningful choice.<sup>7</sup> Kymlicka thinks that individual rights are not enough to ensure protection of minority cultures. Therefore, cultural minorities should be accorded group-specific rights.<sup>8</sup> For Kymlicka, group-specific rights include three forms of rights which protect minorities’ access to their culture to different extents: self-government rights, representation rights, and polyethnic rights.

Representation rights purport to make it possible for the minority group’s views and interests to be effectively represented.<sup>9</sup> They include affirmative action rights, and rights to allocations of budgets and cultural assets such as language rights and state symbols.<sup>10</sup> Polyethnic rights protect a minority culture to a much lesser extent.

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6. See Alan Patten, “Who Should Have Official Language Rights?” in André Braën, Pierre Foucher & Yves Le Bouthillier, eds., *Languages, Constitutionalism and Minorities* (Markham, ON: LexisNexis Butterworths, 2006) 235 at 236. In contrast to Canada and Israel, India does not give any superior legal status to the Urdu language over other minority languages that are recognized as ‘scheduled languages’, i.e. official languages which are not transnational languages, and are not equal in status to the transnational Hindi and English. This is even though Urdu is used by the largest minority in India—the Muslim (see Ayelet Harel-Shalev, “The Status of Minority Languages in Deeply Divided Societies: Urdu in India and Arabic in Israel—A Comparative Perspective” (2006) 21(2) *Israel Studies Forum* 28 at 34-38).

7. I will elaborate on Kymlicka’s core thesis in section VI of this paper.

8. Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) at 27 [Kymlicka, *Multicultural Citizenship*].

9. *Ibid.* at 32.

10. Kymlicka discusses self-government and representation rights under the same title of ‘group-differentiated rights’ (*ibid.* at 109). He sees group-differentiated rights as instruments that alleviate

They aim to challenge the assumption that cultural minorities should completely abandon all aspects of their ethnic heritage and assimilate to existing cultural norms and customs.<sup>11</sup> The negative dimensions of polyethnic rights include the right of cultural minority members to freely express their particularity without fear of prejudice or discrimination and the right to association.<sup>12</sup> The positive dimensions of polyethnic rights include steps that aim to eradicate discrimination and prejudice such as anti-racism policies, and public funding of minorities' cultural practices.<sup>13</sup>

In Kymlicka's eyes, polyethnic rights are to be accorded to immigrant minorities—cultural groups whose members emigrated from their origin state to a new state, whereas representation rights should be given to national minorities—groups whose homeland has been incorporated into a new state through conquest, colonization, or federation.<sup>14</sup>

Where does the entitlement to language protection fit into Kymlicka's scheme? The way to recognize national minorities' languages is to ensure that all national groups have the opportunity to maintain themselves as distinct cultures.<sup>15</sup> Thus, national minorities should be accorded language rights, which belong to Kymlicka's category of representation rights. In contrast, the accommodation of immigrant minorities takes only the form of providing language training,<sup>16</sup> which will enable immigrants to learn the language of the new country. In terms of linguistic integration, the goal should be that the immigrants will learn the dominant language of their new state, but there is no requirement for them to abandon their mother tongue.

Kymlicka suggests two arguments in order to justify his hierarchical distinction between ethnic immigrants and national minorities: the 'sociological argument' and the 'consent argument'.<sup>17</sup> Within the sociological argument, Kymlicka observes that it is usually the culture of national minorities that takes the form of a societal culture. In Kymlicka's own words:

At the time of their incorporation, each group constituted an ongoing societal culture [...] They did not have to re-create their culture in a new land, since their language and historical narratives were already embodied in a full set of social practices and institutions, encompassing all aspects of social life. These practices and institutions defined the range of socially meaningful options for their members.<sup>18</sup>

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the vulnerability of the minority to economic and political decisions made by the majority (*ibid.*), for they allow the availability of meaningful options by providing access for members of minority groups to their societal cultures. Kymlicka defines group-differentiated rights as "external protections [that] ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority" (*ibid.*).

11. *Ibid.* at 30.

12. *Ibid.*

13. *Ibid.* at 31.

14. *Ibid.* at 79.

15. *Ibid.* at 113.

16. *Ibid.* at 114.

17. I borrowed the terms 'hierarchical distinction', 'sociological argument', and 'consent argument' from Sujit Choudhry (Sujit Choudhry, "National Minorities and Ethnic Immigrants: Liberalism's Political Sociology" (2002) 10(1) J. Pol. Phil. 54 at 60-61, 65).

18. Kymlicka, *Multicultural Citizenship*, *supra* note 8 at 79.

In contrast to national minorities, which form societal cultures, members of immigrant minorities are part of subcultures, i.e. cultures that lack the range of activity and institutions that characterize societal cultures.<sup>19</sup> Kymlicka therefore refers to members of immigrant minorities as persons who:

[B]ring their language and historical narratives with them. But they have left behind the set of institutionalized practices, conducted in their mother tongue, which actually provided culturally significant ways of life to people in their original homeland. They bring with them a 'shared vocabulary of tradition and convention', but they have uprooted themselves from the social practices which this vocabulary originally referred to and made sense of.<sup>20</sup>

In Kymlicka's view, if a minority culture is to survive the majority culture pressure, it should be a societal culture, which tends to be synonymous with national culture. Only nations have the capacity and motivation to form and maintain such a distinct culture,<sup>21</sup> whereas immigrants typically do not, since they instead integrate into, and thereby enrich, the culture of the larger society.<sup>22</sup>

Kymlicka's consent argument is a moral observation regarding the motivation of immigrant minorities to leave their country of origin for a new state. According to Kymlicka, immigrants freely and voluntarily choose to leave their society and join another existing society.<sup>23</sup> Therefore, if they had the option to stay in their country of origin, but they decided not to do so, immigrant minorities should not expect to be given representation rights. Rather, they should expect to be given polyethnic rights that do not stand in the way of their integration into mainstream society. In Kymlicka's own words:

After all, most immigrants (as distinct from refugees) choose to leave their own culture. They have uprooted themselves, and they know when they come that their success, and that of their children, depends on integrating into the institutions of English-speaking society. The expectation of integration is not unjust, I believe, so long as immigrants had the option to stay in their original culture.<sup>24</sup>

Kymlicka's distinction between immigrant and national minorities may seem very appealing in the legal context of language rights. Kymlicka's consent argument in particular has great force as it accords with most people's moral intuition. A somewhat similar version of Kymlicka's distinction was implemented by Barak C.J. in an important and controversial case in Israel—the *Adalah* case.<sup>25</sup> The legal analysis of the *Adalah* decision, which I will provide in the next section, maps

19. Choudhry refers to these two differences as the difference of scope and the difference of institutional embodiment (Choudhry, *supra* note 17 at 73).

20. Kymlicka, *Multicultural Citizenship*, *supra* note 8 at 77.

21. *Ibid.* at 80.

22. *Ibid.* at 94.

23. *Ibid.* at 95.

24. *Ibid.* at 95-96.

25. *Supra* note 5. Due to the similarities between the two distinctions, some scholars actually attribute the distinction that was made by Barak C.J. to the one that was made by Kymlicka (see Ilan Saban & Muhammad Amara, "The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change" (2002) 36(2) *Isr. L. Rev.* 5, at 33).

Kymlicka's theoretical arguments onto a particular legal case. It also illuminates the weakness of Kymlicka's distinction in complex multilingual contexts, such as the Israeli society.

### III. The Israeli Supreme Court Case of *Adalah*

The case of *Adalah*, which was delivered by the Supreme Court of Israel three years ago, raises one of the most difficult questions in legal discourse about language rights in general and language rights specifically within the Israeli legal context. The facts and the special circumstances of *Adalah* created the need to provide a criterion to serve as the basis for addressing the normative question of which linguistic minority is most deserving of legal protection. This question has never been addressed by the Israeli Supreme Court before.<sup>26</sup>

The petitioners in *Adalah* argued that in a municipality with an Arab-minority population, municipal signs should be in Arabic in addition to Hebrew, not only in Hebrew.<sup>27</sup> The petitioners' argument was based on constitutional principles as well as statutory interpretation. The statutory part focused on Article 82 of the Palestine Order-in-Council, 1922, which states that official notices and forms of the government and local authorities and municipalities "in areas to be prescribed by order of the government shall be published in Arabic and Hebrew".<sup>28</sup>

The majority of the Supreme Court (Barak C.J. and Dorner J.) accepted the petition, and required the respondent municipalities to ensure that municipal signs in their communities be in both Hebrew and Arabic.<sup>29</sup> Barak C.J. decided that there

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26. Early Israeli Supreme Court decisions on the issue of language rights addressed only specific complaints of Israeli Arabs who were injured due to lack of publication of public notices in Arabic (for analysis of these Supreme Court decisions see Mala Tabory, "Language Rights in Israel" (1981) 11 Israel Y. B. on Human Rights 272; Yuval Merin, "The Case against Official Monolingualism: The Idiosyncrasies of Minority Language Rights in Israel and the United States" (1999) 6 ILSA J. Int'l & Comp. Law 1 at 15-16; Saban & Amara, *supra* note 25 at 26). The Supreme Court decision in the *Re'em* case (C.A. 105/92 *Re'em Engineers and Contractors Ltd. v. Municipality of Upper Nazareth*, P.D. 47(5) 189) addressed the general question of the right of private companies to publish advertisements only in Arabic. However, the *Re'em* decision was based on the general right of all linguistic minorities to 'speak' their language in the private sphere, rather than on the Arab minority selective right to do so. For a profound discussion of *Re'em* see Merin, *ibid.* at 7, 39-41; Saban & Amara, *ibid.* at 24, 28.

27. The term 'municipal signs' refers to all kinds of signs that are published by the municipality: warning and guidance signs on roads and sidewalks and signs that mark street names.

28. Drayton (1934) 3 Laws of Palestine 2569, 2588 [Article 82]. Article 82 is the statute that declares Hebrew and Arabic to be the official languages of Israel. It was incorporated into Israeli legislation from British Mandatory Legislation. (The accurate history of art. 82 can be found in the following articles: Tabory, *supra* note 26; Merin, *supra* note 26; Saban & Amara, *supra* note 25). Judicial decisions that deal with the issue of the Arabic language in Israel are rare. Although all of them discuss the use of Arabic, most of them are not based on the legal status of Arabic as an official language under art. 82.

29. Justice Cheshin's minority opinion is beyond the scope of this paper. In short, Cheshin J. claims that the court should not acknowledge language rights that protect the Arabic language because the question whether to recognize them or not is a political question. In Cheshin J.'s view, it is improper for the court to create a new right that strengthens the cultural and national identity of Israeli Arabs independently. As long as the ideological aspirations of the petitioners are not translated into statute by the Knesset, the court is unable to assist them, and it would be improper for the court to decide an issue that does not lie within its domain (*Adalah*, *supra* note 5 at 456-

is no way to know whether municipal signs are included in the legal term ‘official notices’ in art. 82.<sup>30</sup> Barak C.J. therefore concluded that the case could not be resolved by a mere reference to art. 82.<sup>31</sup>

According to Barak C.J., the duty of the respondent municipalities is determined by balancing several considerations. According to the first consideration,<sup>32</sup> municipal signs should include Arabic captions so Arab residents are able to find their way within their city, to receive information and to be warned of traffic hazards and the like.<sup>33</sup> Barak C.J. points out that this consideration is not very persuasive as other residents of the cities, who are not Arabs and speak other languages, may find it difficult to understand municipal signs in Hebrew rather than in their mother tongue.<sup>34</sup>

Barak C.J. then appeals to the positive dimension of the right to freedom of language and the right to equality and changes them from general rights, which impose a duty to protect all linguistic minorities in Israel, to what I have called ‘selective’ rights—rights which mainly protect one linguistic minority but not others. Barak C.J. performs this change by raising a distinctive argument on behalf of the Arab minority. In Barak C.J.’s own words:

Against this background the following question may arise: what distinguishes the Arabic language, and why is its status different from that of other languages—in addition to Hebrew—that Israelis speak? Does our approach not imply that residents of different towns in which there are minority groups of speakers of various languages, will now be able to demand that the signs in their towns will be in their language as well? My response is negative, since none of those languages is the same as Arabic. The uniqueness of the Arabic language is twofold. First, Arabic is the language of the largest minority in Israel, which has lived in Israel since far far in time. This is a language that is linked to cultural, historical, and religious attributes of the Arab minority group in Israel. *This is the language of citizens who, notwithstanding the Arab-Israeli conflict, wish to live in Israel as loyal citizens with equal rights, amid respect for their language and culture.* The desire to ensure dignified coexistence between the descendants of our forefather Abraham, in mutual tolerance and equality, justifies recognizing the use of the Arabic language in urban signs—in those cities

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60). In addition, Cheshin J. ruled that the petition lacks a minimal factual foundation because the petitioners did not show that Arab residents were indeed injured as a result of the lack of street signs in Arabic, and that the routine daily life of these citizens requires the addition of Arabic to the signs (441–46). Justice Cheshin’s latter view is not consistent with the intrinsic interest that underpins language rights (as I will analyze in section VI of this paper).

30. *Adalah*, *supra* note 5 at 411.

31. You may ask why the legal status of Arabic is defined by an old British mandatory rule and why the democratic machinery in Israel failed to comprehensively protect the Arabic language. The answer is complex and therefore beyond the scope of this paper. In short, on the one hand most Knesset members do not want to abolish the official status of Arabic which has mainly a symbolic importance. On the other hand, comprehensive support for the Arabic language is viewed by the majority of Knesset members as derogating from the status of Hebrew, thus jeopardizing the Jewish national character of Israel. The argument is that supporting bilingualism means supporting bi-nationalism (see discussion in Saban & Amara, *supra* note 25 at 37).

32. Or the “functional value of a language” in Barak C.J.’s term (*Adalah*, *supra* note 5 at 412–13).

33. As Barak C.J. puts it: “Municipal signs are designated to ‘talk’ to the residences of the city and therefore should be published in a language that they understand” (*ibid.* at 412).

34. *Ibid.*

in which there is a substantial Arab minority (6%-19% of the population)—alongside its senior sister, Hebrew ...<sup>35</sup>

Chief Justice Barak's distinction between the Arab minority which has lived in Israel "far far in time" and other linguistic minorities which have not, addresses the important problem of the linguistic minority most deserving of protection in Israel. I will use the *Adalah* decision as a springboard to discuss a nationwide topic that the court did not address. Is the philosophical argument for bilingual street signs strong enough to expand the rule to all relevant areas of governmental communication in the country even though the *Adalah* decision was limited to mixed cities with Arab and Jewish residents?<sup>36</sup> It is not hard to imagine different dimensions of this problem which are likely to be raised in Israeli courts in the future. Suppose, for instance, a city which consists only of Hebrew-speaking residents. In which language should the city signs be written? Hebrew alone, or Hebrew and Arabic? Or, let us think, for instance, about nationwide communication of the government with all Israeli citizens. In which language should it be conducted? Hebrew alone, or Hebrew and Arabic? What about mixed cities which consist of Jewish residents who speak Hebrew and Jewish immigrants from the former Soviet Union? In which language should the city signs be written? Hebrew alone, or Hebrew and Russian? The question is whether in such situations the argument about the priority of Arabic as the language of the Arab national minority that has long existed in Israel is relevant or sufficient to justify the duty of the authorities to 'speak' bilingually in Hebrew as well as in Arabic, but not in another language such as Russian.

Chief Justice Barak's argument resonates with Kymlicka's distinction between national minorities and immigrant minorities.<sup>37</sup> Some Israeli scholars emphasised the similarities between the two arguments and the general applicability of Kymlicka's distinction to the Israeli context. Based on Kymlicka's distinction, they advocated demands for comprehensive language rights which protect the Arabic language.<sup>38</sup> I shall therefore discuss defects in Kymlicka's distinction in order to evaluate Barak C.J.'s stance and suggest an alternative rationale for such demands which will be applicable in the Israeli context.

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35. The translation of this paragraph is taken from Saban & Amara, *supra* note 25 at 32 (emphasis added).

36. The fact that the decision was limited to street signs in mixed cities was emphasized in the decision of Justice Maza who refused the request of the respondents to a further hearing (see H.C.F.H. 7260/02 *The Municipality of Ramleh v. Adalah et al.* [2003] (The decision was not published)).

37. More precisely, in my view, the distinction that was drawn by Barak C.J. is only partly similar to Kymlicka's distinction. The part describing the Arab minority as existing in Israel for a long time characterized it as a national minority in Kymlicka's terms. The other considerations relate more to the interest of maintaining a peaceful society in Israel and correspond to the correlating instrumental interest that will be discussed in section VI of this paper.

38. See Saban & Amara, *supra* note 25 at 33; Hassan Jabareen, "The Future of Arab Citizens in Israel: Jewish-Zionist in a Place with Palestinian Memory" (2001) *Mishpat Umimshal* (Law and Government) 53 (Hebrew).

#### IV. Kymlicka's Distinction—Empirical, Normative & Methodological Flaws

In this section, I will present specific criticisms regarding Kymlicka's empirical and normative accounts, which stand at the basis of his sociological and consent arguments. With respect to Kymlicka's sociological argument, the prominent empirical difficulty concerns Kymlicka's categorical distinction between national minorities, which have their own societal culture and wish to maintain it, and immigrant minorities, which do not have a societal culture and seek integration with greater society. In practice, there are many groups that do not fit into either category. These groups lie somewhere on a continuum that stretches from Kymlicka's notion of national minorities to his notion of ethnic minorities.<sup>39</sup> Therefore, from the empirical perspective, Kymlicka's sociological distinction between national and ethnic groups is grounded on an oversimplified account of reality that does not take into consideration the complexity and variety of national and immigrant minority groups.

Similar reservations were made by scholars with regard to the empirical basis of Kymlicka's consent argument. For example, Iris Young disputes one of Kymlicka's fundamental premises, arguing that it is not always the case that immigrant groups voluntarily choose to leave their home culture and assimilate to a new one. It is often the case that immigrants from poor countries are forced or compelled to leave their homeland in order to improve their economic standard of living. This does not necessarily mean that they wish to abandon their old culture.<sup>40</sup> Kymlicka also fails to distinguish between inclusion in economic opportunity and decision-making, and inclusion in the dominant national culture. Many immigrant minorities welcome the former while rejecting the latter.<sup>41</sup>

On the normative level, Kymlicka's distinction between different kinds of rights is based on his distinction between national and ethnic minorities. In other words, Kymlicka's categorical distinction between national and ethnic minorities establishes a normative bias and prejudice regarding the type of rights every group should enjoy.<sup>42</sup>

Furthermore, it is not clear from Kymlicka's consent argument how polyethnic rights can be justified in the first place. We cannot assume that immigrants have consented to a less extensive scheme of cultural rights, for this assumption contradicts the liberal tradition, which holds that persons are only held responsible for states of affairs that arise from choices that are made freely.<sup>43</sup> Because many people immigrate in search of economic opportunity, the argument that immigrant minorities have waived their right to live in accordance with their own cultures through

39. See Choudhry, *supra* note 17 at 74; Seyla Benhabib, "The Liberal Imagination and the Four Dogmas of Multiculturalism" (1999) 12(2) *Yale J. Criticism* 401 at 407.

40. Iris Marion Young, "A Multicultural Continuum: A Critique of Will Kymlicka's Ethnic-Nation Dichotomy" (1997) 4(1) *Constellations* 48 at 50.

41. *Ibid.* at 52.

42. In light of this, Joseph Carens suggests that the term 'recognition rights' be used instead of 'polyethnic rights', because it draws attention to what it is about the rights, as opposed to who exercises them, that distinguishes them from self-government rights, while leaving open the empirical and normative questions about who does and who ought to exercise such rights (Joseph H. Carens, "Liberalism and Culture" (1997) 4(1) *Constellations* 35 at 36-37).

43. Choudhry, *supra* note 17 at 63.

their decision to immigrate is a weak argument.<sup>44</sup> In my view, while Kymlicka's consent argument may be weak with regard to extreme economic circumstances that lead to immigration, it may be stronger when immigrants look for a higher standard of living in a new state.

Sujit Choudhry points out the second problematic aspect in Kymlicka's argument of consent. It does not in itself specify the terms of polyethnic rights that immigrant minorities allegedly consent to. This is because polyethnic rights were not part of the implied agreement between immigrant minorities and their new state. On the contrary, immigrant minorities have 'consented' to total assimilation policies, not only to waive their rights to group rights. In other words, from a historical point of view, it is very clear that immigration to a new country leads to total cultural assimilation.<sup>45</sup>

Even if we assume that immigrants have given their implied consent to waive their right to live in accordance with their own culture, the same assumption will not necessarily be true with regard to their descendents. Children of immigrants should not be disadvantaged because of consent that their parents have allegedly given.<sup>46</sup>

In my view, the main problem with Kymlicka's distinction is its methodology, namely the way in which Kymlicka infers general normative conclusions from specific empirical facts. Kymlicka's theory suggests a general framework for all liberal multilingual democracies.<sup>47</sup> This problem is typical of a particular kind of a political theory which presents itself as trying to address universal and abiding matters which are true anywhere and anytime.<sup>48</sup> Such an attitude leads to 'perfecting classroom visions' and abstraction, which are not successful in addressing the complexity of real life cases.<sup>49</sup> A better way to write political theory is first to recognize the particularities of the cases at hand, rather than obscuring them, and second, to construct a more general whole out of the details, paying special attention to the similarities and dissimilarities between different cases, thus arriving at valid generalizations and moral arguments.<sup>50</sup>

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44. *Ibid.*

45. *Ibid.* at 64-65.

46. Ruth Rubio-Marin, "Exploring the Boundaries of Language Rights: Insiders, Newcomers, and Natives" in Stephen Macedo & Allen Buchanan, eds., *Secession and Self-Determination* (New York: New York University Press, 2003) 136 at 139.

47. Adrian Favell argues that while relying empirically on the situation in his homeland Canada, Kymlicka develops a general philosophical framework which is supposed to have a universal normative applicability. Adrian Favell, "Applied Political Philosophy at the Rubicon: Will Kymlicka's *Multicultural Citizenship*" (1998) 1(2) *Ethical Theory and Moral Practice* 255 at 268-72. Favell uses two main examples to illustrate his point. In France, cultural minorities are not recognized as such in the public political discourse. Problems regarding minorities' rights are addressed in purely individualistic terms as problems concerning cultural pluralism and French citizenship (258-59). In Britain, some ethnic groups do enjoy certain rights, but the rationales for granting them—keeping the public order and maintaining a peaceful society—are very different from Kymlicka's ones, which are culture as a context of choice for the individual (261-62).

48. Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton: Princeton University Press, 2000) at 218-19 [Geertz, *Available Light*].

49. *Ibid.* at 250.

50. *Ibid.* at 226.

Choudhry raises another difficulty with the way in which Kymlicka derives normative conclusions from empirical facts. Kymlicka takes the insufficient institutional capacities of immigrant groups as factual givens and bases his argument of polyethnic rights around them. Kymlicka does so without taking into consideration that these institutional capacities may reflect the political disadvantage of immigrant minorities.<sup>51</sup> In other words, an argument on behalf of polyethnic rights to immigrant minorities cannot be justified by sociological facts alone as institutions are a function of rights, not the other way around.<sup>52</sup>

In the following sections I will use the Israeli linguistic case to demonstrate flaws in Kymlicka's distinction and its irrelevance to the Israeli context. From the specifics of the Israeli linguistic case, a better normative distinction between linguistic minorities will emerge.

## V. Is Kymlicka's Distinction Relevant to Israeli Linguistic Minorities?

Chief Justice Barak's distinction between the status of Arabic and other languages that Israelis speak besides Hebrew was drawn in the *Adalah* decision in light of the Israeli language context. In this context, there are two main linguistic minorities: the Arab and the Russian minority. In the following sub-section, I will depict the community life and linguistic practice of the Russian linguistic minority in Israel.

### (i) *The Russian Linguistic Minority in Israel—General Survey*

Since its establishment, the state of Israel has conducted an 'open door' policy regarding immigration for all Jews in the Diasporas who wish to immigrate to Israel<sup>53</sup> (or, in Hebrew, to make an 'aliya'). With the declaration of Independence in 1948, tens of thousands of new immigrants began pouring into Israel. In the very first years of the new state, most immigrant Jews came from Eastern and Western Europe and from Arab states such as Libya, Yemen, Iraq, Morocco, Egypt and others.<sup>54</sup> In 1950, the Israeli legislature enacted the Law of Return, which gives every Jew the privilege of immigrating to Israel by stating that every Jew is entitled to come to Israel.<sup>55</sup> The policy of free immigration intends to encourage Jews, wherever they are, to carry out the historic dream of gathering all Jewish Diasporas in Israel.<sup>56</sup>

The first meaningful large scale Jewish immigration from the former Soviet Union started in 1971.<sup>57</sup> A second and greater Jewish immigration wave took place

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51. Choudhry, *supra* note 17 at 69.

52. *Ibid.*

53. See Yehuda Dominitz, "Israel's Immigration Policy and the Dropout Phenomenon" in Noah Lewin-Epstein, Yaacov Ro'i and Paul Ritterband, eds., *Russian Jews on Three Continents: Migration and Resettlement* (London: Frank Cass, 1997) 113.

54. *Ibid.* at 114. The Jews that emigrated from Europe are called 'Ashkenazi' Jews and the ones who came from Arab states are called 'Sephardic' Jews.

55. *Ibid.* at 114.

56. *Ibid.* at 115.

57. *Ibid.* at 118.

between 1989 and 1995 when more than half a million Jews immigrated to Israel. The opportunity to immigrate became possible after years in which the immigration to Israel was limited by the Soviet anti-Zionist policy.<sup>58</sup>

From a cultural point of view, much like the Sephardic immigrants who came to Israel in the 1950s,<sup>59</sup> the Russian Jewish immigrants are depicted as having a close contact with the Russian culture.<sup>60</sup> In the 1950s a melting pot ideology ruled the cape in Israeli society. In contrast, in the 1990s, a more tolerant and multicultural ideology prevailed. Therefore, unlike the Sephardic immigrants who were encouraged to integrate into Israel's dominant Ashkenazi society by learning Hebrew and forgetting their linguistic roots,<sup>61</sup> though the Russian immigrants were expected to become fluent in Hebrew, they insisted on preserving their culture and language and were also partly encouraged to do so by Israeli policy.<sup>62</sup>

The sociolinguistic literature mentions three prominent causes explaining the preservation of Russian in Israel. First, for generations, before they immigrated to Israel, the Jewish Russians had been deeply integrated into the social life of the former Soviet Union. This means that they acquired, internalized and identified with Russian culture.<sup>63</sup> It was therefore only natural for them to preserve Russian language and culture in Israel too.

Second, the motivation of most of the Russian immigrants was economic or social pressure rather than adherence to Jewish values or culture.<sup>64</sup> They chose to leave the former Soviet Union because of economic and social insecurity, caused by the changing regime in the former Soviet Union and the unstable state of affairs in the post-Soviet economy. They also feared the growing anti-Semitism and the rise of ultra-nationalistic groups in Russian politics.<sup>65</sup>

Moreover, many Russian immigrants chose to immigrate to Israel because they were prevented from immigrating to the United States or to Western Europe.<sup>66</sup> The option of 'dropping out' in a European state, which had been available to Russian Jews who gained a visa to Israel but preferred the option of living in Europe, was no longer open to them.<sup>67</sup> As for the United States, at the time of mass immigration

58. Bernard Spolsky & Elana Shohamy, *The Languages of Israel: Policy, Ideology and Practice* (Clevedon, UK/Buffalo/Toronto/Sydney: Multilingual Matters, 1999) at 235 [Spolsky & Shohamy].

59. The Sephardic Jewish immigrants were very traditional and close to Judaism as opposed to Russian immigrants that tend to be more secular (Eliezer Ben-Rafael, Elite Olshtain & Idit Geijst, "Identity and Language: The Social Insertion of Soviet Jews in Israel" in Noah Lewin-Epstein et al., eds., *Russian Jews on Three Continents: Migration and Resettlement* (London: Frank Cass, 1997) 364 at 384-85 [Ben-Rafael et al., "Identity and Language"]).

60. *Ibid.*

61. As observed by Spolsky and Shohamy, the central idea of Zionist ideology was the creation of the identity for the 'new' Israeli Jew who speaks Hebrew as opposed to the 'old' Jew who spoke the languages of the Diaspora (Spolsky & Shohamy, *supra* note 58 at 71).

62. *Ibid.* at 236.

63. Ben-Rafael et al., "Identity and Language", *supra* note 59 at 382-83.

64. Unlike the earlier immigrants from the area, who came to Israel before its establishment (during the periods which are called first, second and third 'Aliya') and were ideological Zionists.

65. Dina Siegel, *The Great Immigration: Russian Jews in Israel* (New York: Berghahn Books, 1998) at 20.

66. Ben-Rafael et al., "Identity and Language", *supra* note 59 at 382.

67. Dominitz mentions the 'dropout' Phenomenon which describes Jewish Russian immigrants who left the Soviet Union with an Israeli entry visa and while on their way to Israel dropped out and

of Jews from the former Soviet Union to Israel, the American authorities decided not to grant entry permission to Russian Jews who had received Israeli entry visas. Only a very limited number of Russian Jews could apply for direct immigration to the United States; others had no choice but to go to Israel. Many Russian Jews were very disappointed because they feared the political instability in Israel and the continued military threat posed by the violent conflict with Israel's Arab neighbouring countries.<sup>68</sup>

The main reasons for the mass Jewish Russian immigration may be depicted as pragmatic rather than ideological. The Russian immigrants did not leave the Soviet Union in order to abandon their Russian cultural heritage. Therefore, on the face of it, they had no particular reason to embrace Israeli culture as a substitute for their own.<sup>69</sup>

Third, the massive numbers of Russian immigrants allow the community to be resilient towards linguistic and cultural shift, in particular where there is a density of population as it occurs in a number of towns such as Be'er-Sheva, Ashdod, Rishon LeZion, Bat-Yam and Haifa.<sup>70</sup> Their massive numbers allow the Russian immigrants to keep their Russian linguistic and cultural environment alive in Israel.

Due to the above three reasons, Russian immigrants tend not to reject their Russian identity, which is expressed by the high status they attribute to the Russian language.<sup>71</sup> They want to integrate into Israeli society and they willingly learn Hebrew, but they treat the Israeli culture as a distinct culture and tend to view the Russian culture as a precious culture that should be preserved.<sup>72</sup> A sociolinguistic study that was conducted in 1992 shows that although Russian immigrants greatly appreciate the Hebrew language, they express a greater cultural appreciation for the Russian language.<sup>73</sup> Therefore, there is a continued use of the Russian language, which supports the maintenance of Russian culture and economic life in Israel.

The use of the Russian language in Israel is supported by special efforts that aim to secure its constant use. Russian newspapers,<sup>74</sup> television channels, shops,

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stayed at a transit station (Vienna in Austria or Italy) waiting for immigration to another country (Dominitz, *supra* note 53 at 118). Siegel mentions that "[f]or many Soviet Jews Vienna was a symbol of the free choice of destination" (Siegel, *supra* note 65 at 15). However, Dominitz indicates that this free choice no longer existed during the mass immigration of the 1990s because the travel to Israel was done mostly by direct flights without using transit centres in other countries (Dominitz, *supra* note 53 at 124).

68. Siegel, *ibid.* at 14.

69. Shepherd indicates that the Jewish Russians in Israel today did not leave Russia primarily because of anti-Semitism. Therefore, they can revisit Russia and find intellectual stimulus in the culture existing in Russia today (Naomi Shepherd, *The Russians in Israel: The Ordeal of Freedom* (London: Simon & Schuster, 1993) at 184).

70. In these towns Russian is the normal language heard on the streets, to the extent it can be wrongly assumed that Russian is the second official language of Israel and not Arabic (*ibid.* at 181).

71. Spolsky & Shohamy, *supra* note 58 at 236. For a discussion of Israeli ruling which addresses claims for the protection of Russian see Meital Pinto, "Language Rights, Immigration and Minorities in Israel" (2006) 10(1) *Mishpat Umimshal* (Law and Government) 223 at 236 (Hebrew).

72. Ben-Rafael et al., "Identity and Language", *supra* note 59 at 383.

73. *Ibid.* at 371.

74. As observed by Spolsky and Shohamy, in 1989 there was one daily newspaper published in Russian in Israel. By 1996, there were five local daily newspapers, several weeklies, and more than a dozen magazines in Russian (Spolsky & Shohamy, *supra* note 58 at 237).

theatres, tailors and teachers<sup>75</sup> are good examples of efforts of Russian language maintenance undertaken by the Russian linguistic minority. Russian immigrants maintain their language by reading newspapers and books because they can import these materials from the former Soviet Union and because they enjoy developing media in their language.<sup>76</sup>

Banks and cellular phone companies, which are very dominant in the Israeli economy, that advertise their services in Russian are good examples of support of the Russian language, the source of which is outside the Russian linguistic minority. The Israeli government also responds to the cultural needs of the Russian immigrants by supporting access to their language. For example, health funds and other governmental offices, which deal directly with Russian immigrants, recruit Russian speaking employees because they found a significant increase in efficiency by doing so.<sup>77</sup> The fact that the Yellow Pages directory in Russian has been published annually since 1991<sup>78</sup> is perhaps the most prominent example of external public support that the Russian immigrants have received.

All of this suggests that there is a strong support system for those Russians who choose to continue to use Russian.<sup>79</sup> In the private sector, it is easy to understand why commercial companies make efforts to learn their customers' language, but in public and governmental institutions there are generally no customers and the functionaries often feel no obligation to ease other Jewish immigrants' access to government services.<sup>80</sup> Therefore, when public institutions make such efforts, these efforts should not be depicted only as efforts to ease the access of immigrants to public institutions. They are more accurately depicted as an indication of strong and positive support for language access policies, whether they are formally adhered to or not.

In conclusion, Russian immigrants tend to preserve their culture and to exercise their language in both the private and public spheres. Moreover, it seems that the maintenance of the Russian language in Israel is not a transitional phenomenon because research shows that Russian immigrants' children continue using Russian when coming in contact with their counterparts, and remain in close contact with the Russian culture in the former Soviet Union.<sup>81</sup>

Therefore, although the word 'minority' is not commonly used in Israel with regard to the immigrants that came from the former Soviet Union, the language culture of Israel clearly proves that the Russian immigrants constitute a linguistic minority. As indicated by Bernard Spolsky and Elana Shohamy, Russian is known as the first or additional language spoken by more than a million Israelis, which makes it the second largest minority language in Israel after Arabic.<sup>82</sup>

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75. Shepherd, *supra* note 68 at 181-86.

76. Ben-Rafael et al., "Identity and Language", *supra* note 59 at 374.

77. Spolsky & Shohamy, *supra* note 58 at 237.

78. *Ibid.*

79. *Ibid.*

80. Bernard Spolsky, *Language Policy* (Cambridge: Cambridge University Press, 2004) at 52.

81. Ben-Rafael et al., "Identity and Language", *supra* note 59 at 376.

82. Spolsky & Shohamy, *supra* note 58 at 234. For Israeli legal decisions that emphasise the problematic superior status of Arabic over Russian given the equal numbers of Russian and Arabic speakers in Israel see Meital Pinto, *supra* note 71 at 236 (Hebrew).

**(ii) *Specific Problems with Kymlicka's Distinction in the Israeli Linguistic Context***

On an empirical level, Kymlicka assumes that most exiting ethnic groups of immigrants are dispersed, assimilated and integrated,<sup>83</sup> whereas most national minorities constitute comprehensive societal cultures. Moreover, within the consent element of his empirical argument, Kymlicka describes the process of immigration mostly as a process which resulted from individual and familial free choices to leave their former society and to join a new society. In my view, neither of Kymlicka's two empirical arguments is applicable in the Israeli linguistic context.

As opposed to other kinds of immigrants that are described in Kymlicka's work, the sociological data that was discussed in the former sub-section suggests that Russian immigrants constitute a quasi-societal culture. Russian immigrants cannot be described as separate individuals or families that come to Israel with the intention of fully integrating into Israeli culture, but rather they can be better described as a group with a strong loyalty to their culture of origin, including to their native language. Most of them are willing to learn Hebrew but not to forget or abandon their language. Therefore, the Russian linguistic minority lies in the grey area of immigrant groups<sup>84</sup> and constitutes a distinctive illustration of the validity of the continuum argument against Kymlicka's distinction.

Contrary to Kymlicka's observation, although constituting an ethnic minority, the Russian minority receives *de facto* public language recognition. As indicated in the former sub-section, the private and public markets in Israel respond to the loyalty of Russian immigrants to their culture by accommodating the Russian language. These modifications deviate from the modifications towards immigrant minorities that are described by Kymlicka.<sup>85</sup> The major modification carried out in Israel for the Russian immigrants has been the profound change in the linguistic policy of the public sector in Israel, which was depicted above. Not only does it aim to enable Russian immigrants to maintain their heritage without interference from the state, but it also involves positive support for the maintenance of their culture and language. It seems that these modifications purport to support a quasi-societal culture based on the immigrants' mother tongue, rather than only accommodating their ethnic differences. The important thing is that they involve, to some extent, the acknowledgment of the Russian language in the public sphere of Israel.

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83. Kymlicka, *Multicultural Citizenship*, *supra* note 8 at 96.

84. As Kymlicka indicated himself, there is no magical formula that will cover all national and immigrant minorities (Kymlicka, *Multicultural Citizenship*, *supra* note 8 at 101). Elsewhere, Kymlicka and Raphael Cohen-Almagor wrote that the distinction between immigrant groups and national minorities remains remarkably unexplored at the level of normative liberal democratic theory. As a result there is no "adequate theory of the moral justification for, or the moral limitations on ethnocultural rights" (Will Kymlicka & Raphael Cohen-Almagor, "Democracy and Multiculturalism" in Raphael Cohen-Almagor, ed., *Challenges to Democracy: Essays In Honour and Memory of Isaiah Berlin* (Aldershot: Dartmouth, 2000) 89 at 111).

85. Kymlicka argues that modifications towards immigrant minorities involve "reforming the public institutions of the dominant culture so as to provide some recognition or accommodation of their heritage. But it has not involved the establishment of distinct and institutionally complete social cultures alongside the anglophone society" (Kymlicka, *Multicultural Citizenship*, *supra* note 8 at 78).

As it was depicted above, the choice of Russian Jews to immigrate to Israel was not an entirely free decision. Many Russians would have preferred to immigrate to the United States or not to immigrate at all. It was the social and economic environment in the former Soviet Union that forced many of them to immigrate in the first place, and it was the closed doors of other democratic countries that caused many of them to immigrate to Israel.

However, because most choices are made under existing economic and social conditions, and because most important decisions are not entirely free, Kymlicka's consent argument about immigrants who freely choose to leave their country of origin and come to a new state is not entirely irrelevant to the Russian linguistic minority. I will therefore argue that because many immigrants preferred to immigrate to other states but were unable to do so, Kymlicka's consent argument is of limited relevance to the Jewish immigrants from the former Soviet Union. The more limited the range of options one has when choosing to immigrate to a new country, the weaker Kymlicka's consent argument is as a moral justification for asking immigrants to relinquish their language.

As for Choudhry's observation that from an historical point of view immigrant minorities should expect to totally assimilate to their new countries, in the Israeli context, it is hard to determine whether the Russian immigrants were expected to totally assimilate to Israeli society or not. On the one hand, Israeli history proved that Sephardic Jewish immigrants from Asia and Africa have been expected to assimilate into Ashkenazi majority culture.<sup>86</sup> On the other hand, when the mass Russian immigration took place in the 1990s, the criticism of the Sephardic 'melting pot' assimilation policy was at its peak.<sup>87</sup>

In conclusion, Kymlicka's theory does not provide an adequate normative basis for deciding which cultural groups in Israel should be accorded language rights. The following sections will provide an alternative account to Kymlicka's which will respond to the specific conditions in Israel, based on Denise Réaume's theory of the intrinsic value of language and Joseph Raz's theory of constituent intrinsic goods. This argument will provide a solid criterion that can be practically used in any other legal system.

## VI. The Intrinsic Interests in Protecting One's Own Language

According to Joseph Raz, the right to X exists only if some person's interest constitutes a sufficient reason for holding others to be under a duty to provide or to secure X.<sup>88</sup> Following Raz's definition we ought to identify one or more interests in protecting particular languages that might be thought important enough to justify

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86. Ben-Rafael et al., "Identity and Language", *supra* note 59 at 369.

87. The attitude of the Israeli government towards the Russian language is depicted by scholars as a pluralistic attitude as opposed to the anti-pluralistic attitude that characterized the attitude of the government towards the cultures and the languages of the Sephardic Jews who immigrated to Israel in the 1950s and 1960s (*ibid.* at 366 and 369).

88. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 166.

imposing duties on others.<sup>89</sup> In this paper, I focus more on the intrinsic interest in one's own language rather than on instrumental interests. I will therefore briefly discuss the instrumental account of the value of one's mother tongue. This discussion will point at the importance of the intrinsic interest, which will be the basis for the distinction I will suggest between linguistic minorities in section VII.

Viewed instrumentally, the use of a particular language is regarded as valuable because it is a tool, an instrument to achieve valuable human objectives. Viewed as a matter of intrinsic value, the use of a particular language is regarded as valuable on its own account and not because it promotes other valuable ends.

The obvious account of the instrumental interest in a specific language concentrates on the mundane and common practical value of any language which is a person's main form of communication. From an instrumental point of view, we should protect a specific language because people are less comfortable using other languages in their communication activities.<sup>90</sup>

A different account of the instrumental interest in a specific language is Kymlicka's argument of language as a context of choice. According to Kymlicka, people are deeply connected to their own culture in the sense that their culture enables them to make meaningful choices when they are confronted with questions about personal values and projects. People's capacity to form and revise their conception of the good is intimately tied to their membership in their own culture, since the process of deciding how to lead their lives is a matter of exploring the

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89. I will not discuss the aesthetic or the beneficial values of language as a human enterprise for human culture in general. Under these accounts, each particular language is compared to a rare piece of art (Alan Patten & Will Kymlicka, "Introduction: Language Rights and Political Theory: Context, Issues, and Approaches", in Will Kymlicka & Alan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003) 1 at 44 [Patten & Kymlicka]). For a discussion of this approach, see David F. Marshall & Roseann D. Gonzalez, "Why We Should Be Concerned about Language Rights: Language Rights as Human Rights from an Ecological Perspective" in David Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Qc: Éditions Yvon Blais, 1991) 289 at 296-302; Douglas A. Kibbee, "Language Policy and Linguistic Theory", in Jacques Maurais & Michael A. Morris, eds., *Languages in a Globalising World* (Cambridge: Cambridge University Press, 2003) 47 at 51-55; Ken Hale, "On Endangered Languages and the Importance of Linguistic Diversity" in Lenore A. Grenoble & Lindsay J. Whaley, eds., *Endangered Languages: Language Loss and Community Response* (Cambridge: Cambridge University Press, 1998) at 192; Idil Boran, "Global Linguistic Diversity, Public Goods, and the Principle of Fairness" in Will Kymlicka & Alan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003) 189. Réaume points out that although these interests may be very important, they emphasize the value of a particular language to human kind in general, and not its value to its particular speakers. Therefore, since they do not point out specific people who hold interests in a specific language they are too general to justify language rights (Réaume, "The Constitutional Protection of Language", *supra* note 2 at 41). Following Réaume, I will leave aside those interests that pertain to language in general and confine my discussion in this paper to the interests of people in practicing their own particular language.

90. Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 639 at 658-659 [Green, "Are Language Rights Fundamental?"]; Réaume, "The Constitutional Protection of Language", *supra* note 2 at 45. Learning a new language is always and invariably a costly matter. It is quite an onerous task, almost like learning a new trade or profession (Eerik Lagerspetz, "On Language Rights" (1998) 1 Ethical Theory and Moral Practice 181 at 184). For an in-depth analysis of Israeli legal decisions prior to the *Adalah* case that rely solely on the instrumental interest in protecting Arabic due to Israeli Arabs' difficulties in using Hebrew in various communication activities see Meital Pinto, *supra* note 71 at 243-45 (Hebrew).

possibilities made available by their own culture.<sup>91</sup> Therefore, if individuals are entitled to protection of their ability to make meaningful choices, their culture and the specific language that is attached to it,<sup>92</sup> the context that makes this choice possible, deserves protection.<sup>93</sup>

Réaume rightly indicates that Kymlicka relies on the instrumental connection between the use of a particular language and the achievement of human ends, rather than on intrinsic connection.<sup>94</sup> It is not that it is impossible for an individual to achieve these ends using a language other than his or her own, it is just harder for him or her to achieve them. In other words, one's own language is simply a better tool for accomplishing one's own independent objectives.

Some scholars tend to overlook the instrumental character of Kymlicka's argument. Delving into the philosophical distinction between intrinsic and instrumental values will help us grasp the importance and the complexities of the intrinsic interest in a particular language. Under Raz's definitions, calling something an 'intrinsic good' indicates one's view that the matter in question has value not in terms of its consequences but in itself.<sup>95</sup> Raz discusses a particular kind of intrinsic goods—constituent goods. These are intrinsic goods that are elements of something that is an intrinsic good in itself. However, constituent goods have their value without regard to consequences or the existence of other things; they are part of the general class of intrinsic goods not a means to it; the relationship is not causal, it is internal. Raz gives the example of the constituent intrinsic value of works of art. When one thinks of "life with art" as an intrinsic good, one thinks of the existence of an artwork as a constituent part of such good. The value of the artwork is thus not as a thing having its value as an instrument to something else.<sup>96</sup>

It is important not to confuse constituent goods with instrumental goods. It may seem that both constituent intrinsic goods and instrumental goods are important components of other intrinsic goods. If we go back to Kymlicka's argument, practicing

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91. Kymlicka, *Multicultural Citizenship*, *supra* note 8 at 82-83, 105. According to Geertz, culture is a system of symbols of human life and for it. It is of life in the sense that it is used by human beings to represent their lives in a meaningful way, and for life in the sense that it offers effective models for action (Geertz stresses that this framework is one's particular culture and not culture in general). The second sense is similar to Kymlicka's idea of culture as a framework which enables meaningful choice (Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) at 93).

92. Kymlicka's argument refers to what he labels 'societal culture'. A societal culture is a culture that involves "a common language and societal institutions, rather than common religious beliefs, family customs, or personal lifestyles" (Kymlicka, *Multicultural Citizenship*, *ibid.* at 76). Because under Kymlicka's account a culture is attached to a particular language, Kymlicka's argument regarding the importance of one's own culture can be rephrased with regard to one's own language as his or her context of choice.

93. A similar argument is that the protection of a specific cultural membership is necessary for the fulfillment of individual autonomy (see Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993) at 36).

94. Denise G. Réaume, "Official-Language Rights: Intrinsic Value and the Protection of Difference" in Will Kymlicka & Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 245 at 247 [Réaume, "Intrinsic Value and the Protection of Difference"].

95. Raz refers to 'goods that have intrinsic value' instead of referring to 'intrinsic interests'. However, intrinsic good is almost a synonym for intrinsic interest because goods that have an intrinsic value for us are goods that we have an intrinsic interest in protecting (*supra* note 88 at 199).

96. *Ibid.* at 200-01.

one's own language may seem to be a constituent intrinsic value of the ability to make meaningful choices, which is an intrinsic good.

Because of this possible confusion, I argue that Raz's categories should be refined in order to identify the intrinsic values of protecting specific languages and distinguish them from instrumental ones. Following Réaume's argument, I suggest refining Raz's definition of intrinsic goods as things that cannot be substituted for others. In particular, intrinsic constituent goods are things the replacement of which with other goods will result in a reduction or loss of the value of things that are valuable in themselves.<sup>97</sup> In other words, a constituent good is a type of intrinsic good in so far as it contributes an internal feature (rather than a cause) of a good which is intrinsically valuable.

According to this refined definition, in the context of language, the argument regarding the intrinsic value of a particular language may be phrased as follows: the intrinsic good of a specific culture will be less valued, or perhaps not valued at all, if it does not have one of its basic (i.e., constituent) elements, which is a particular language that is deeply attached to it.

Let us apply my suggested refined definition on the two instrumental values of language, which were discussed so far. Let us start from the first value, which is one's mother tongue as one's best means of communication. It may be argued that once one becomes fluent in a foreign language, the new foreign language may replace one's mother tongue as a means of communication. Since under this analysis, one's mother tongue is a good replaceable by another good, such as a foreign language, the interest in protecting one's mother tongue as one's best means of communication is an instrumental interest.

Let us turn back to Kymlicka's argument about language as a context of meaningful choice. Kymlicka emphasises the difficulty of learning a foreign language. However, once one overcomes this difficulty by integrating into a new culture, one does not need one's original language in order to make meaningful choice. The

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97. Drawing on Raz's definition of intrinsic constituent good, Andrei Marmor distinguishes between two sub-categories of constituent intrinsic goods. The first sub-category consists of concrete constituent intrinsic goods that instantiate general intrinsic goods that are valuable in themselves. Marmor provides the example of friendship: "If friendship is of intrinsic value, then my friendship with Sarah is a constituent good in this sense". The second sub-category consists of constituent intrinsic goods which are essential ingredients of intrinsic goods that are valuable in themselves. In my view, only the latter is the type of constituent intrinsic good which accurately characterises the intrinsic nature of the protection of a specific language. According to Marmor, only the second sub-category of intrinsic constituent goods can be distinguished from instrumental goods by the 'irreplaceably test'. That is to say, constituent goods that instantiate intrinsic goods have an intrinsic value although they can be replaced by other goods without reducing the value of the intrinsic goods they instantiate (Andrei Marmor, "The Intrinsic Value of Economic Equality" in Lukas H. Meyer, Stanley L. Paulson & Thomas W. Pogge, eds., *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003) 127 at 138). In my view, goods that instantiate intrinsic goods (Marmor's first sub-category) should not be considered as having constituent intrinsic value, but rather as intrinsic goods that are valuable in themselves. As I see it, when people ascribe intrinsic value to their particular friends, they do not necessarily ascribe intrinsic value to friendship as such. Similarly, parents ascribe intrinsic value to their own children, but not necessarily to having children in general. In the case of language, it seems that both speaking a language in general and speaking one's mother tongue have an independently intrinsic value for him or her.

newly acquired foreign language serves as an alternative means for achieving the goal of making meaningful choices. Therefore, Kymlicka actually ascribes an instrumental value to one's mother tongue language and not an intrinsic value.

The refined definition of intrinsic good, which I have drawn from Raz's theory and Réaume's argument, allows us to identify other accounts of the instrumental interest in protecting a specific minority language. Such accounts may pertain to some social goods, such as peace and security,<sup>98</sup> which society in general gains as a result of protecting minority languages. The refinement I have suggested to Raz's distinctions emphasises the instrumental character of such accounts, since under them a specific language is replaceable by other means of achieving the same goal. In the same manner that language rights can be replaced by other means that makes it easier for a person to shift to another culture, language rights are only one of the means that can mitigate conflicts between majority and minority groups. It is not the only means and, among available means, it is not a necessary means to achieve peace and security in a multilingual society.<sup>99</sup>

The problem with instrumental interests in a particular language is that they merely point out the cost involved in transferring from one language to another or in using other means in place of language rights.<sup>100</sup> Once we eliminate these costs, the interest in using a particular language becomes weak.<sup>101</sup> This leads us to the following analysis of the intrinsic value of a particular language.

Réaume stresses the link between language and identity. She argues that language has an intrinsic value as it can constitute a marker of personal identity. One's identity is derived from one's culture. Culture is a marker of identity and language as a central part of culture is itself a marker of identity. Or, to put it in Réaume's words:

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98. According to Jacob Levy, providing minorities with language rights contributes to the formation of cross-culture frameworks that can mitigate the conflicts that result from interactions between ethnic or cultural minority groups and majority groups in multilingual societies (Jacob T. Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000) at 40-41). Similarly, James Tully argues that recognizing minority cultures may strengthen minorities' allegiance to, sense of belonging to and identification with their state (James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 197-198). Joseph Magnet raises a very similar argument, according to which the main justification for language rights is that they manage conflicts between Canada's linguistic communities (Joseph Eliot Magnet, *Official Languages of Canada: Perspectives from Law, Policy and the Future* (Cowansville, Qc: Éditions Yvon Blais, 1995) at 83, 250).
99. Other means can mitigate harsh conflicts between minority groups and majority groups such as temporary economic support or affirmative action, which seek to put the minority and the majority at the same level.
100. Kymlicka himself argued that the process of transferring from one culture to another is a "costly process" (Kymlicka, *Multicultural Citizenship*, *supra* note 91 at 85-86; see also Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2nd ed. (Oxford: Oxford University Press, 2002) at 340).
101. The way to eliminate the costs of transferring from one language to another is to put efforts into the process of integrating people who speak a particular language with people who speak a different language. If this process is successful and the people who previously spoke only their first language become fluent in a different language, we are left with no reason to protect the original language of these people. However, such a system of integration may not necessarily exist. Therefore, in some cases, instrumental reasons may be strong enough to justify language rights. It would be wrong to dismiss instrumental interests altogether, as they may prove valuable in some cases. However, in other cases, the instrumental interests are not strong enough to justify language rights.

Most people value their language not only instrumentally, as a tool, but also intrinsically, as a cultural inheritance and as a marker of identity as a participant in the way of life it represents. Their language is a repository of the traditions and cultural accomplishments of their community as well as being a kind of cultural accomplishment itself. It is the vehicle through which a community creates a way of life for itself and is intrinsically bound up with that way of life.<sup>102</sup>

We can find support for Réaume's observation in current sociolinguistic and anthropological theories, which highlight three interconnected ways in which language constitutes a marker of identity. First, a specific language is an embodiment of cultural concepts. The language of a particular culture is best able to express the interests, values, and world-views of that culture. No language but the one that has been most historically and intimately associated with a given culture is as capable of expressing the particular artefacts and concerns of that culture.<sup>103</sup> An expression in a language refers to a concept in a culture and encapsulates a specific meaning that is grounded in a specific cultural context. It would be more difficult to denote this specific concept in other languages in a way that transfers the entire context and complexity of the original word. Therefore, due to the intimate link between culture and identity, it is difficult for people of a certain culture to truly experience and express their identity in another language.<sup>104</sup>

It is not hard to think of examples of words from particular languages, which reflect cultural concepts and are very difficult to translate. For example, the word

102. Réaume, "Intrinsic Value and the Protection of Difference", *supra* note 94 at 251. See also Green, "Are Language Rights Fundamental?", *supra* note 90 at 659; Réaume, "The Constitutional Protection of Language", *supra* note 2 at 45; Denise G. Réaume, "Beyond Personality: The Territorial and Personal Principles of Language Policy Reconsidered" in Will Kymlicka & Alan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003) 271 at 283.

103. See Joshua A. Fishman, *Reversing Language Shift: Theoretical and Empirical Foundations of Assistance to Threatened Languages* (Clevedon: Multilingual Matters, 1991) at 21.

104. This understanding of the connection between language and culture is supported by the work of the American anthropologist Benjamin Whorf, who argues that the perception of the world changes from one language to another. What is referred to as Whorf's 'weak hypothesis' emphasizes the role of a particular language as reflecting the concepts of the culture it is associated with, rather than determining these concepts. You may know Whorf's hypothesis from his famous example that Eskimo language has many words for snow, because the discrimination between different kinds of snow plays a significant role in Eskimo culture. For a detailed account of Whorf's argument see Benjamin Lee Whorf, *Language, Thought and Reality: Selected Writings of Benjamin Lee Whorf*, ed. by John B. Carroll (Cambridge, MA: M.I.T. Press, 1964). Since my normative argument is based on Whorf's hypothesis, it is useful to discuss its status in the different disciplines. In political and legal theory, Whorf's hypothesis is regarded as a strong argument for justifying language rights. (See the discussion about Whorf's hypothesis in the context of the connection between language and cultural identity in Daniel Bell, *Communitarianism and Its Critics* (Oxford: Clarendon Press, 1993) at 158-65). Albert Chen also refers to Whorf as a normative source for justifying language rights. Chen compares Whorf's view to the view of Gadamer, who phrases a similar idea that every language is a world view, shaped by the historical tradition embodied in that language. Charles Taylor views language as a basis which makes different social lives possible. Accordingly, the role of a social scientist, such as a political philosopher, is to give meaningful interpretations of these social realities (Charles Taylor, "Interpretation and the Sciences of Man" in Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) 15 at 32-40). In anthropology, the status of Whorf's hypothesis is pretty well established, and it is also associated with the work of anthropologists Edward Sapir and Franz Boas. There are specific anthropological studies that point

‘shivaa’ in Hebrew encompasses a wide variety of Jewish mourning rituals after death (which are practiced by secular Jews as well). This word originally comes from the Mishnah (oral Jewish laws) and is part of Jewish religious law (Halacha). When translated to English, this word literally means ‘seven’. It takes another few sentences to articulate the correct meaning of the word.<sup>105</sup>

Although every individual phrase can be translated to other languages, the overall complex structure of the language with the intertextual relations between concepts is rooted in a specific cultural context and cannot be translated to another language without a significant part of it being lost. Thus, losing language may mean losing cultural concepts.<sup>106</sup>

The second way in which a specific language serves as marker of cultural identity is that it serves as the medium of the verbal components of a culture. The connection

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at a similar conclusion to Whorf’s ‘weak hypothesis’. For instance, Lutz studies the Ifaluk tribe in Micronesia, and concludes that there are emotions, which are experienced by the Ifaluk and are denoted by words that are not translatable to other languages due to their special cultural context (Catherine A. Lutz, *Unnatural Emotions: Everyday Sentiments on a Micronesian Atoll & Their Challenge to Western Theory* (Chicago, IL: University of Chicago Press, 1988)). Geertz describes a similar notion with regard to Javanese culture and emotions relating to mourning (Geertz, *The Interpretation of Cultures*, *supra* note 91 at 153). However, there is an anthropological outlook which contends that languages differ from each other in forms and structures but not in the ideas they express (see Eliezer Ben-Rafael, *Language, Identity, and Social Division: The Case of Israel* (Oxford: Clarendon Press, 1994) at 8). In analytic philosophy, a thorough philosophical investigation of the ability of different languages to offer different representations of the world is undertaken by Quine in his discussion of radical translation, which is similar to Whorf’s hypothesis (Willard Van Orman Quine, *World and Object* (Cambridge, MA: M.I.T. Press, 1965) at 51-57). In linguistics, the status of Whorf’s hypothesis is complex. In recent years, Noam Chomsky’s theory of a universal grammar, which is common to all languages, has gained dominance. Chomsky’s theory stands in contradiction to Whorf’s trend of highlighting the particular characteristics of every language. In addition, although there is an overall consensus among linguists on Whorf’s general claim about the connection between language and consciousness, there is disagreement about the validity of Whorf’s empirical findings, on which he based his claims (for a summary of the major positions in this debate see George Fletcher, “The Case for Linguistic Self-Defense” in Robert McKim & Jeff McMahan, eds., *The Morality of Nationalism* (Oxford: Oxford University Press, 1997) 324 at 328).

105. Other phrases in Hebrew such as “kit bag question” are taken from the Israeli army experience and are a part of the Hebrew language. Everyone in Israel knows that a “kit bag question” is a question which should not be asked because it necessarily leads to bad consequences for the one who raises it. (In Israeli military training every soldier has a personal kit bag. One of the training disciplines is running from one place to another in a short period of time. The phrase relates to the situation where a soldier is ordered to run and asks the commander: “with the kit bag”? The only possible answer is: “yes, with the kit bag” and a kit bag is usually very heavy...).
106. This fact may sometimes have serious implications. For example, there are complex interactions such as legal interaction, which often involve cultural concepts. Based on the American case of *People v. Kimura*, (*People v. Fumiko Kimura*, No. A-091133 (L.A. City Super. Ct. filed Apr. 24, 1985)). This case involved a Japanese woman in Los Angeles who tried to commit parent-child suicide after abuse by her husband. Deborah Woo indicates that there are Japanese words such as ‘Oyaku-shinju’ (parent-child suicide), which are very difficult to translate into English and English words such as ‘insanity’ which are very difficult to translate into Japanese because of their specific cultural context (Deborah Woo, “The People v. Fumiko Kimura: But Which People?” (1989) 17 Int’l J. Soc. L. 403 at 407-13). For examples of difficulties in translation in Israeli courts see Irus Braverman, “The Place of Translation in Jerusalem’s Criminal Trial Court” Buff. Crim. L. Rev. [forthcoming in 2007]. Richard Hyland indicates that every law is embedded in a particular cultural tradition. Thus, no particular legal system is universal for it cannot overcome the particularity of the language in which it is formulated (Richard Hyland, “Babel: A She’ur” (1990) 11 Cardozo L. Rev. 1585 at 1597). According to Hyland, the features of a culture’s language and its legal system tend to mirror each other (*ibid.* at 1603-08).

between language and cultural concepts is closely related to a second aspect of language as a marker of identity: components of a particular culture such as songs, prayers, laws, and proverbs are written and expressed by the language associated with that culture.<sup>107</sup>

In other words, language is not only a repository of conceptual building blocks for the mind, it is also the medium used to produce cultural texts from building blocks. People therefore value their language which allows distinctive texts that express the uniqueness of their culture.<sup>108</sup>

The third aspect combines the first and the second aspects of language as a marker of cultural identity. When a specific language is embedded with distinctive cultural concepts and serves as a cultural text in itself, it is only natural that persons who speak this language view it as an object of cultural identification. Language has a strong symbolic meaning for people as an expression of their culture. It symbolically represents the particular culture of the people who speak it.<sup>109</sup>

The three aspects of language as a marker of identity work together. Language enables the individual to articulate her private feelings and thoughts and to connect them with shared cultural concepts. In this manner, her feelings and thoughts can be understood by members of her cultural community and thus meaningful social interactions can occur. Cultural texts in a specific language such as literature, songs, and rituals use shared concepts to express more complex and dense ideas. The fact that language reflects its speakers' unique cultural point of view and that it is, in turn, used by them to create texts and rituals is what makes language symbolically important to its speakers and makes it their object of identification.

Up until now I have argued that the interest underpinning language rights is the constituent intrinsic interest in protecting a specific language as a marker of cultural identity of its speakers. However, as I have mentioned, in multilingual states there are several linguistic minorities. All of them may assert that their language is their marker of cultural identity and therefore deserves legal protection of language rights.

In the absence of unlimited resources, the state has to make a moral decision about the minority languages it selects for positive protection. What should be the normative basis for such a decision? How can the state make a distinction between linguistic minorities? In light of Kymlicka's distinction and its critics, I will suggest in the following section an alternative distinction between linguistic minorities based on the constituent intrinsic interest in language as a marker of cultural identity.

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107. Stephen May, "Uncommon Languages: The Challenges and Possibilities of Minority Language Rights" (2000) 21(5) *J. Multilingual and Multicultural Development* 366 at 374.

108. For example, prayers in the Jewish religion and other religious texts, such as the Haggadah (tales for Passover night) are written in Hebrew and publicly read in ceremonies and rituals. Secular Jews consider these texts as part of their culture as well. In fact, almost all the cultural creation in Israel is done in Hebrew: popular music, academic and popular literature, movies, and plays. The verbal components of a culture, which are expressed in a specific language, embody unique characteristics of a culture that will be lost if expressed by other languages (see Nancy C. Dorian, "Choices and Values in Language Shift and Its Study" (1994) 110 *Int'l. J. Soc. Lang.* 113 at 115).

109. Réaume, "Intrinsic Value and the Protection of Difference", *supra* note 94 at 251; May, *supra* note 107 at 374. For an in-depth analysis of Israeli legal decisions that implicitly recognise the three aspects of the intrinsic interest in protecting Arabic see Meital Pinto, *supra* note 71 at 255-57 (Hebrew).

## VII. Exclusive Marker of Identity

### *(i) The Theoretical Framework of the Exclusive Marker of Identity Argument*

When two linguistic minorities such as the Arab and the Russian minorities compete for the same limited public resources, the state has to make the right moral choice between them. I argue that this decision must be made according to the criterion of the strength of the minority's interest in language as a marker of cultural identity. In the context of limited resources, my argument in this section will thus suggest that the Arab minority has a stronger interest in Arabic as their marker of cultural identity which justifies more protection than the interest of the Russian linguistic minority in Russian as the marker of their cultural identity.

It is important to stress that I do not claim that the Russian minority has no interest in Russian as its marker of cultural identity, or even that it has a weak interest in it. On the contrary, I argue that both linguistic minorities have a very strong interest in their language as a marker of their cultural identity. This is what makes the Israeli linguistic context so intricate and interesting. The question that I will address, in the context of two linguistic minorities with a strong interest in their language, is which language should be supported when there are only enough resources to provide comprehensive support for one minority language? I use the limited resources as an *a priori* hypothetical assumption, but I leave it open whether such a scenario is desirable or justified in the first place.<sup>110</sup>

In order to make my argument, I will use the basis of Raz's theory that emphasizes the strength of human interest as justifying legal rights.<sup>111</sup> The focus on the strength of human interests allows Raz's theory to serve as a basis for awarding language rights on a selective basis. Such basis does not deal with the question of who is entitled to language rights and who is not, but rather who has a stronger case for claiming these rights.

Raz explains that "[t]he interests are part of the justification of the rights which are part of the justification of the duties".<sup>112</sup> Rights are therefore not identical to duties.<sup>113</sup> A right is only a "ground of a duty, a ground which, if not counteracted by conflicting considerations, justifies holding that other person to have a duty".<sup>114</sup> Considerations that conflict strongly with the interest that justifies a right can show that this right does not exist because its basis is very weak. According to Raz, most conflicting considerations are not strong enough to show that the right does not exist, but they are strong enough to show that the right "successfully grounds duties only for some of the actions which could promote the interest on which it is based".<sup>115</sup>

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110. This means that if there are unlimited resources, in my view there is no reason for Israel not to support the Russian language in an equal manner to the support it gives for the Arabic language.

111. See Raz, *supra* note 88 at 166.

112. Joseph Raz, "On the Nature of Rights" in Morton E. Winston, ed., *The Philosophy of Human Rights* (Belmont, CA: Wadsworth, 1989) 44 at 55.

113. *Ibid.* at 48.

114. *Ibid.* at 48-49.

115. *Ibid.* at 57.

Raz's philosophy of rights inherently assumes that there are interests that are stronger and others that are weaker. At the same time, there are also counter considerations which might be strong or weak. I perceive limited resources for supporting all minorities' languages in Israel as considerations that conflict with language rights that are justified by the interest of Jewish immigrants from the former Soviet Union in protecting Russian, and as considerations that conflict with language rights that are justified by the interest of the Arab minority in protecting Arabic.

Where there is a competition between human interests because of limited resources, the stronger interests are the ones that are capable of justifying legal rights which impose more duties on others. The weaker interests are the ones which are less capable of justifying legal rights. Such rights will therefore successfully ground duties only for some of the actions which could promote the interests on which they are based.

In the remainder of this paper I will draw a distinction, on the basis of their strength, between the intrinsic interest of the Arab minority in Arabic as their marker of cultural identity, and the intrinsic interest of the Russian linguistic minority in Russian as a marker of their cultural identity. Because it is based on Réaume's marker of identity interest rather than on Kymlicka's argument of context of choice, my argument will suggest a concrete regulation of language rights in Israel, rather than an obscure resolution. In other words, for the purpose of regulating language rights, it is better to suggest a marker of identity argument, which is based on an interest external to freedom, rather than relying on Kymlicka's freedom-based argument.

As Chaim Gans rightly argues: "freedom, in and of itself, cannot initially serve as a basis for people's interest in their own specific national culture".<sup>116</sup> Although the marker of identity interest does play a role in Kymlicka's argument, it plays an 'auxiliary' role to the freedom-based argument, i.e., the context of choice argument, rather than an independent role. By contrast, Réaume's argument is based on the independent interest in language as a marker of identity. The marker of identity argument therefore allows a discussion of the concrete desirable regulation of language rights in Israel. One of the prominent concrete issues that should be addressed in almost every discussion about language rights is the members of which cultural groups are to be accorded language rights. As I have explained above, this decision is inherent to the selective nature of language rights.

The second advantage of my argument is that it does not share the methodological flaws of Kymlicka's argument, as on the one hand, it refers specifically to the particularities of the Israeli case, but on the other hand, it does not use the prevailing empirical account as an established basis for deriving a normative argument. Thus,

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116. Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003) at 42. Gans supports his argument with the example of the right to private property. If this right is to be justified by a freedom-based interest, it is hard to resolve issues concerning its concrete regulation. This is because a person may claim a lot of claims to property that will enhance her freedom. The freedom-based interest does not help to decide which of these claims is justified (*ibid.* at 41).

the fact that my normative argument is not based on the particular features of the case at hand suggests that it may have general applicability outside the Israeli linguistic context.

***(ii) The Competing Values of Hebrew and Russian with regard to the Russian Minority***

I will begin my argument with the value of Russian to the members of the Russian linguistic minority in Israel. In order to examine the issue of language rights with regard to the Russian immigrants in Israel, it is useful to examine what stands at the basis of their right to immigrate and what implications this may have on their possible language and cultural rights. When Kymlicka discusses immigration, he refers to a case in which people from one country immigrate to another country with a different culture than their own to form an ethnic minority there. The case of the Russian immigrants in Israel is different: they belong to a Diaspora of a nation and immigrate to their historic homeland.<sup>117</sup>

My argument is that both Hebrew and Russian can potentially serve as objects of identification for the Russian minority. Russian may serve as their object of identification because it is their mother tongue language; Hebrew may serve as their object of identity because it is the historic language of the national and the religious group to which they belong. In other words, both languages may serve as markers of the Russian minority cultural identity. The Russian language serves as a marker of certain aspects of their cultural identity, whereas Hebrew serves as a marker of other aspects of their cultural identity. Hebrew is intimately linked to their Jewish aspects of cultural identity, such as religion, shared history, and most important to their collective national consciousness. Although it is not actively practiced by them in the Diaspora, Hebrew is not an alien language to the Russian Jewish immigrants.

In his well-known book *Imagined Communities*,<sup>118</sup> Benedict Anderson argues that a nation is an imagined community because “the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion”.<sup>119</sup> These communities are tied by collective memories, symbols, and usually a language.

In the case of the Jewish nation, there is no common spoken language which is shared by all the Jews in the world. However, Jews all over the world still imagine themselves as belonging to one community and culture, which includes a common

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117. This kind of immigration is not included in Kymlicka's perception of immigrant minorities. Recent work of Kymlicka shows that he focuses on the North American and British context of immigration (Will Kymlicka, “Immigration, Citizenship, Multiculturalism: Exploring the Links” in Sarah Spencer, ed., *The Politics of Migration: Managing Opportunity, Conflict and Change* (Oxford: Blackwell, 2003) 195). This context is very different from Jewish immigration to Israel. As Ben-Rafael and others argue, the Jewish immigration to Israel represents a special kind of immigrant population that most literature on immigration in the world ignores. This is an immigration of ‘returning diasporas’ (Ben-Rafael et al., “Identity and Language”, *supra* note 59 at 364). For a normative discussion of this kind of immigration see Gans, *ibid.* at ch. 5.

118. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 2nd ed. (London/New York: Verso, 1991).

119. *Ibid.* at 6.

history, traditions and religion. This does not suggest that it is a homogenous culture. On the contrary, there is a lot of diversity within the Jewish culture in the different Diasporas, which includes different variations of religious practices, folklore, costumes, etc. Almost every Jewish community in the world tells the common narratives about the origin and history of the Jewish people. But, in addition, every community has its own narratives about its own particular history. That is to say that the cultural identity of a Jewish person consists of common components with other Jews all over the world, and particular components of his or her specific Jewish community.<sup>120</sup>

In Anderson's terms, Jews all over the world form an imagined community since they regard themselves as belonging to one people although they do not know each other personally. The Hebrew language is not actively used by Jews in the Diasporas but it belongs to the collective heritage of the Jewish people around which Jews imagine themselves as one community.

Some scholars question the assumption that members of different Diasporas in different states and members of the national homeland state share, at least to some extent, one common identity. To put it in David Miller's words: "National identities are not cast in stone".<sup>121</sup> In the context of this paper, the argument is that members of different Diasporas, for example Jews in Egypt and Jews in Russia, do not have much in common and therefore, it is not possible to talk about a single language that may constitute their marker of cultural identity.

In the context of language rights, this argument may be rephrased as the following question: To what extent does a national identity unite people from different Diasporas? And is national identity strong enough to justify the imposition of the national language on members of different Diasporas in their national homeland? Gans' reply to this difficulty is that although the content of the identity may differ in different countries, for example the different Jewish identities in Eastern Europe and North Africa, this identity is commonly regarded, both by members of the group and by members of other groups, as one continuous national identity which is distinct from any other national identity.<sup>122</sup> The fact that Jewish national identity is commonly regarded as one continuous national identity which is distinct from any other national identity, leads to the conclusion that Russian immigrants may value two languages as their marker of cultural identity: Russian and Hebrew.

Gans' reply goes hand in hand with the Jewish ways of generating a collective memory. Throughout history, the usual way in which Jewish communities all over the world perpetuated their own historical events, was to incorporate these events into existing mourning days and holidays of the Jewish people. In their collective memory, they regarded these events as part of a general historical pattern of persecution and salvation, which characterized the history of the entire Jewish people in the world.<sup>123</sup> Though the emergence of the Zionist movement was accompanied

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120. See Yosef Hayim Yerushalmi, *Zakhor: Jewish History and Jewish Memory* (Seattle: University of Washington Press, 1982).

121. David Miller, *On Nationality* (Oxford: Clarendon Press, 1995) at 127, in Gans, *supra* note 116 at 132.

122. *Ibid.*

123. Yerushalmi, *supra* note 120.

by an attempt to create a new uniting national identity and collective memory, the original components of the Jewish identity continued to exist and to play a significant role within the new Zionist Jewish identity.<sup>124</sup>

This brings me to the point of one's own language as one's own exclusive marker of identity. In general, when dealing with cultural identity claims, the basic assumption is that people do not choose the culture into which they are born. The intrinsic view of culture, as opposed to the instrumental context of choice view, assumes that people are not really able to choose the culture to which they belong and value as their own culture. Usually, this assumption serves to strengthen their interest in their own culture and particularly in their own language.

However, in the Russian immigrants' case, the fact that they share common cultural components with the dominant Jewish Hebrew-speaking community in Israel, in contrast to the Arab minority, which, as I will argue in the next sub-section, does not share any of these components, weakens their claim to Russian language recognition, at least in comparison to a similar claim by the Arab minority. Or, to put this in short, Arabic is an exclusive marker of identity for the Arab minority, whereas for the Russian minority Russian is not.

My argument should not be viewed as deducing a normative conclusion from empirical data. Rather, this argument appeals to the basis of all human rights—the strength of the interests that justify them. This means that the Russian language should not only not be viewed as an exclusive marker of identity of the Russian immigrants because empirically speaking this is not the case, but because normatively speaking, since the Russian immigrants belong to the Jewish nation, the interest in language as a marker of identity can be at least partly fulfilled by the Hebrew language. This factor weakens the Russian immigrants' interest in support of the Russian language by the Israeli state.

### ***(iii) The Exclusive Marker of Identity of the Arabic Language for the Arab Minority in Israel***

The Arab minority in Israel was formed as a result of the Independence War in 1948. Arab and Jewish citizens have been living in co-existence in Israel since its establishment as a Jewish state. Jews and Arabs regard themselves, and wish to continue regarding themselves, as belonging to different national, cultural and religious groups. In light of the fact that many Arab citizens in Israel perceive themselves as an occupied population in their own homeland, and in light of the ongoing violent conflict between Israel and its Arab neighbours, it is not plausible or possible for the Arab minority to regard Hebrew as their marker of cultural identity. In addition, the fact that Hebrew is also associated with the Zionist movement makes it even harder, or maybe impossible, for the Arabs to identify with Hebrew as their marker of identity. In other words, for them, Arabic is and should be an exclusive marker of identity.

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124. *Ibid.* at 99-101.

Returning now to Raz's rights philosophy, it seems that the interest of the Arab minority in protecting their language is much stronger than the Russian minority interest. Because Arabic expresses an exclusive marker of identity of Israeli Arabs, the interest of Arabs in receiving positive protection for their language is stronger than the interest of Russian Jewish immigrants in receiving the same support for the Russian language.

It is important to stress that the argument of the exclusive marker of identity is not a variation of Kymlicka's consent argument. It does not deal with the wishes of people to protect their cultural identity. The significance of cultural identity and the human interest to preserve it are presupposed. I do not argue that by immigrating to Israel the Russian immigrants have expressed an implied consent to totally assimilate in the Israeli culture. Rather, I analyze the different components and modes of associations within their given cultural identity in order to determine the strength of their interest in the Russian language in comparison to the interest of the Arab minority in Arabic. The fact that the Hebrew language is an already existing part of their cultural identity, though dormant, makes it possible for it to serve as their object of cultural identification. This conclusion is irrelevant to the question whether by immigrating to Israel they have expressed consent to abandon their Russian identity.

Therefore, if, due to limited resources, language rights have to be selectively applied in Israel, Arabic is the first language that should be comprehensively supported because the interest in supporting it is the strongest one.

### VIII. Conclusion

In this paper I have discussed Kymlicka's account of the minority languages that should be selected for protection by language rights. After discussing the similarities between Barak C.J.'s distinction in *Adalah* and Kymlicka's distinction I have claimed that Kymlicka's distinction between immigrant and national minorities has many empirical, moral and methodological flaws.

I have used the specifics of the Israeli linguistic case to demonstrate the problems in Kymlicka's distinction and draw an alternative distinction. In the specific Israeli context, in which the Russian minority constitutes a linguistic minority that forms a semi-societal culture and has a strong connection to its language, Kymlicka's distinction is not relevant.

I have analyzed the instrumental and intrinsic interests that underpin language rights. I have argued that the intrinsic interest in one's own language as one's own marker of cultural identity is the strongest interest that justifies legal rights to protect a particular minority language. I have pointed out the selective character of language rights that in the absence of unlimited resources can only protect certain minority languages.

I have suggested a different distinction that is based on the strength of the intrinsic interest of minority members in their language as a marker of their cultural identity. I have applied this distinction in the Israeli context and argued that because Arabic

constitutes an exclusive marker of the cultural identity of Arab citizens in Israel, their interest in receiving positive support for their language from the Israeli government is stronger than the interest of Russian immigrants to receive the same support. Since it is based on the intrinsic value of language as a marker of cultural identity, I believe that my distinction, or variations of it, may prove useful in analysing similar dilemmas in other cases as well.