Equality of Cultural Identity

by

Meital Pinto

A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science
Graduate Department of the Faculty of Law
University of Toronto

© Copyright by Meital Pinto, 2009
Equality of Cultural Identity

Doctor of Juridical Science, 2009
Meital Pinto

Graduate Department of the Faculty of Law, University of Toronto

Abstract

I address claims of offence of feelings, religious freedom and language rights, which are all justified by the intrinsic interest individuals attach to their culture. I call them ‘claims from cultural identity’. I develop a conception of substantive equality, understood as distributive justice and underpinned by dignity, for regulating claims from cultural identity in the legal system of multicultural states. I call it Equality of Cultural Identity.

It is a ‘complex equality’ model, which takes cultural identity to be a sphere in peoples’ lives. Unlike majority members, cultural minority members are usually under constant pressure to compromise their cultural identity and assimilate in the majority culture to succeed in other spheres of their lives like education and career. In accordance with Walzer’s theory of Spheres of Justice, I propose a regulative principle to determine the extent of cultural protection minority members deserve, according to which the influence of other spheres of their lives on their sphere of cultural identity should as minimal as possible.

I apply this principle to claims of offence to feeling, which I re-conceptualize as claims from integrity of cultural identity. I suggest the vulnerable identity principle: The more vulnerable a person’s cultural identity, the stronger her claim from integrity of
cultural identity. This principle enhances a just distribution of symbolic goods between majority and minority members, is based on objective evaluation standards, and avoids legal moralism. Thus, it overcomes the major liberal worries about regulating speech.

With respect to the language rights and religious freedom, I comparatively analyze them *qua* cultural rights. I argue that the right to religious freedom, which is generously interpreted by courts, bears all of the allegedly unique features of language rights that are used to support their restrained judicial interpretation. Thus, the existing arguments for their restrained interpretation are not valid. I identify a novel argument for their restrained interpretation, which is that they impose a cultural burden on majority members, but drawing on my conception of equality, I argue that it is not sound as the burden they impose is not great.
Acknowledgements

I am greatly indebted to my supervisor, Professor Lorraine Weinrib for her love, care and the special efforts she has made to fulfil my dream to pursue graduate studies in this faculty. Studying in a foreign country is a difficult experience. Lorraine has gone above and beyond to make me feel at home. I would also like to thank her for giving me the opportunity to benefit from her deep knowledge of comparative constitutional law and her rare understanding of Israeli constitutional law in particular. I thank her for sharing with me her insights and her ability to analytically analyse a legal problem from different perspectives.

I would also like to greatly thank my committee members Professor Denise Réaume and Professor Sophia Moreau. I thank Denise for giving me the rare opportunity to benefit from her great knowledge in the areas of language rights and discrimination. I am grateful for her endless patience during our profound discussions on my research. Denise gave me confidence in my intuitions, while helping me develop them with rigour. Denise has also been a faithful reader of my work and her comments have greatly shaped my thoughts and my writing. I thank Sophia for giving me the opportunity to learn about theories of social and distributive justice, for our discussions on equality and discrimination, for referring me to relevant materials, and for her valuable comments on my work.

I have been fortunate to learn from Professor Ayelet Shachar, who was the internal reader of my thesis. Her expertise in multiculturalism has challenged me to consider new aspects and possible consequences of my arguments. Ayelet has also been a constant source of personal and academic support. I am also indebted to Professor Deborah Hellman from the School of Law at The University of Maryland, who was the external reader of my thesis. Deborah provided me with detailed comments, which pressed me to clarify important parts of my arguments.

I was fortunate to receive the assistance of a group of talented doctoral students in this faculty, who helped me through dialogue and debate, research, and friendship. In this regard I am indebted to Pnina Alon, Rueban Balasubramaniam, Gillian Boyd, Lisa Foreman, Zoran Oklopcic, Martin Hevia, Ummni Khan, Jarmila Lajcakova, Yaara
Lemberger-Kenar, Derek McKee, Cathleen Powell, Kristen Rundle, Elizabeth Shilton, Kim Stanton, and Rayner Thwaites. Special thanks to Revital Goldhar for being such a kind and caring person, for her keen friendship and for constantly providing me with academic feedback.

I would like thank my family: my mother, Lea, my father Eli, and my sisters Maya and Einat who actively supported me although they were in Israel, half-way across the world. I am mostly indebted to their ongoing love and belief in my ability to fulfil my ambitious dreams. I would also like to thank Leah, Uri and Dror Miller for the ongoing love, care and support they gave me from the very first moment I entered their lives.

Importantly, the funding I have received from the following institutions was an invaluable source of support for my work: the school of Graduate Studies (SGS) and the law school at University of Toronto, the Israel Association for Canadian Studies (IACA), the Delta Kappa Gamma Society International for Key Woman Educators, the Canadian Friends of Peace Now, the Hon. Mr. Justice Warren. K. Winkler Graduate Fellowship in International Human Rights, and the Naomi Overend Fellowship in Human Rights.

Finally and most importantly, I would like to thank my loving and beloved husband, Boaz Miller who was willing to join me in this journey not long after we met. I am grateful for his love, his patience and constant support. I am indebted to his academic involvement, for helping me work out my arguments, and for his insightful comments on earlier drafts of this thesis.
Table of Contents

INTRODUCTION ........................................................................................................................................... 1
  1. BACKGROUND AND MOTIVATIONS ........................................................................................................ 1
  2. CLAIMS FROM CULTURAL IDENTITY ........................................................................................................ 3
  3. MY CONCEPTION OF EQUALITY OF CULTURAL IDENTITY – THE FRAMEWORK .................................... 6
  4. ASPIRING TO OBJECTIVITY AND NEUTRALITY BETWEEN CULTURAL NORMS .................................. 12
  5. AN OVERVIEW OF THE CHAPTERS ........................................................................................................... 16

CHAPTER 1: ................................................................................................................................................. 24
  1. INTRODUCTION .................................................................................................................................. 24
  2. INSTANCES OF CLAIMS FROM CULTURAL IDENTITY AND EQUALITY .................................................. 28
  3. SIMPLE EQUALITY MODELS OF SUBSTANTIVE EQUALITY AND THEIR PITFALLS ................................ 33
  4. WALZER’S MODEL OF COMPLEX EQUALITY ...................................................................................... 45
  5. THE PREVAILING UNIVERSAL CONCEPTION OF DIGNITY IN EQUALITY JURISPRUDENCE .................... 54
  6. A CULTURAL IDENTITY CONCEPTION OF DIGNITY ............................................................................. 63
  7. EQUALITY OF CULTURAL IDENTITY AS A MEANS OF REGULATING CLAIMS FROM CULTURAL IDENTITY .... 75
  8. CONCLUSION...................................................................................................................................... 85

CHAPTER 2: WHAT ARE OFFENCES TO FEELINGS REALLY ABOUT? A NEW
EGALITARIAN FRAMEWORK FOR THE MULTICULTURAL ERA ............................................... 89
  1. INTRODUCTION .................................................................................................................................. 89
  2. CLAIMS OF OFFENCE TO FEELINGS AND THEIR INDEPENDENT STATUS IN ISRAEL ....................... 96
  3. CLAIMS FROM INTEGRITY OF CULTURAL IDENTITY ......................................................................... 102
  4. THE VULNERABLE CULTURAL IDENTITY PRINCIPLE ........................................................................ 109
  5. THE JUSTIFICATIONS OF THE VULNERABLE CULTURAL IDENTITY PRINCIPLE: EQUALITY AND
     TOLERATION ............................................................................................................................................. 123
  6. THE CAPTIVE AUDIENCE PRINCIPLE AND ALTERNATIVE THRESHOLD TESTS .................................. 130
  7. INDICATIONS OF THE STRENGTH OR WEAKNESS OF CLAIMS FROM INTEGRITY OF CULTURAL IDENTITY ... 137
  8. THREE KINDS OF CASES OF CLAIMS FROM INTEGRITY OF CULTURAL IDENTITY ............................. 139
     8.1. The Majority is Offended by a Minority ................................................................................ 139
     8.2. A Minority is Offended by a Minority .................................................................................... 143
     8.3. A Minority is Offended by the Majority ................................................................................. 145
  9. CONCLUSION....................................................................................................................................... 148

CHAPTER 3: LANGUAGE RIGHTS, RELIGIOUS FREEDOM AND EQUALITY OF CULTURAL
IDENTITY ................................................................................................................................................... 151
  1. INTRODUCTION ................................................................................................................................1 5 1
  2. THREE ARGUMENTS SUPPORTING THE DOCTRINE OF CAUTIOUS AND RESTRAINED INTERPRETATION
     OF LANGUAGE RIGHTS .............................................................................................................................. 153
     2.4. The Positive Right Argument ................................................................................................. 158
     2.5. The Political Compromise Argument .................................................................................... 165
     2.6. The Argument from the Collective and Cultural Character of Language Rights .................. 171
  3. THE ARGUMENT ABOUT THE CULTURAL BURDEN IMPOSED BY LANGUAGE RIGHTS .................. 197
  4. CONCLUSION.................................................................................................................................... 211

CONCLUSION ............................................................................................................................................ 213

BIBLIOGRAPHY ....................................................................................................................................... 220
Introduction

1. **Background and Motivations**

Conflicts between members of different cultural communities have increasingly become common in Western liberal democracies. The legal systems in these states have increasingly faced the challenge of regulating and resolving them. Such conflicts arise in various legal contexts such as discrimination at the workplace and in the public sphere, cultural defence in criminal law, hate-speech, blasphemy, religious freedom, language rights, etc. These conflicts are usually between members of cultural groups who adhere to different cultural norms, and are often between members of the majority and minority groups.

Claims raised in such conflicts often centre on the importance of certain disputed cultural values, practices and norms to the cultural identities of the rival parties. Claims against discrimination of minority members and in favour of equality between majority and minority members also arise in such contexts. Claims for equality, of course, are not new to the legal system. However, when they arise in the context of cultural conflicts and pertain to the protection of minority members’ cultural identity, claims for equality take a different form from the familiar form they take in equality jurisprudence. They pose a new challenge to the legal system, which has not been identified yet in the legal discourse. My aim in this thesis is to identify his challenge and propose a new way to deal with it. A short exploration of the Israeli Supreme Court 2002 *Adalah* decision¹ and its social and legal background will allow me to explain this new challenge and shed light on my motivation for writing this thesis.

---

¹ HCJ 4112/99 *Adalah et al. v. The Municipality of Tel-Aviv-Jaffa et al.*, 56(5) P.D. 393 [*Adalah*].
The conflict between Israel and the Arab counties surrounding it has had profound implications for the civic and legal status of the Arab citizens of Israel. Israeli Arabs constitute twenty percent of Israel’s population. They are a cultural, religious and linguistic minority. One of the major problem Israeli Arabs face is discrimination. As I will show in Chapter 1, Israeli anti-discrimination doctrine centres on the idea of colour blindness and dignity, along with affirmative action, which all aim to remove barriers and enhance the integration of members of vulnerable groups into mainstream Jewish Israeli society. The Israeli doctrine perceives equality as derivative from the right to dignity, which is a constructional right in Israel that is entrenched in the Basic Law: Human Dignity and Freedom, 1992. This doctrine of equality has been quite successful in eliminating practices of discriminations against Israeli Arabs such as denying entrance to public facilities or denying Israeli Arabs’ opportunity to purchase land in state-supported community settlements merely because they are Arabs. In other words, the Supreme Court has been successful in demanding that Israeli Arabs be equally treated in the sense that their group affiliation alone could not provide a reason to ignore their individual capacities and needs that are relevant to the matter at hand.

It is important to state that Israeli doctrine does not prohibit the use of any group affiliation as a basis for discrimination. For instance, it is legally permissible to distinguish between drivers on the basis of age groups. In the case of Israeli Arabs, discrimination on the basis of group affiliation alone is prohibited because of its potential to perpetuate the suppression of a historically vulnerable group.

The Adalah case discusses a different kind of claim for equality. Representatives of the Arab community requested that mixed municipalities that contain Arab and Jews add

---

2 ILR, 1992; 26(2) 248-9
Arabic captions to all of the street signs in their areas. This is in spite of the fact that most Israeli Arabs in Israel are fluent in Hebrew. In this case, Israeli Arabs asked not to be treated like all other residents who speak and read Hebrew, but rather to be treated differently because of their affiliation to the Arab community. They asked for their cultural identity to be as equally protected as the cultural identity of Jews in Israel.

The majority decision in Adalah ruled in favour of the petitioners and instructed all mixed municipalities to add Arabic captions. It also ruled that other linguistic minorities, such as the Russian Jewish immigrants, are not entitled to a similar linguistic support from the government. While the majority decision relied on Israeli Arabs’ right to equality, it remains unclear how the existing equality doctrine that focuses on prohibiting group affiliation as a basis for discrimination can justify a permanent measure that distinguishes Israeli Arabs from other linguistic minorities only on the basis of their group affiliation to the Arab community. The idea that vulnerable minority groups that have been historically disadvantaged because of their cultural affiliation will want to bring up to surface their cultural differences in the name of equality seem to be at odd with the idea of universal human dignity that all individuals posses, regardless of their group affiliation. My aim in this thesis is to show that the claim that was brought in the Adalah in Israel is really about another form of discrimination. It should therefore also be addressed in terms of dignity and equality.

2. Claims From Cultural Identity

The Adalla decision focused on language rights, but there are other types of claims that pertain to the protection of cultural identity. In this dissertation, I focus on three types of claims in particular: claims of offences to feeling, claims for religious freedom, and claims
for language rights. In my view, these three claims all seek state protection of a certain cultural identity by challenging existing distributive principles of material and symbolic goods in society. I therefore suggest perceiving these three claims as claims for equality. My doctoral dissertation, then, provides new principles of social and distributive justice for dealing with such claims. The principles I suggest draw on political and legal theories of human rights, especially cultural human rights, and theories of discrimination and equality.

Claims for freedom of religion, language rights and claims of offence to feelings may be underpinned by various interests such as the importance of religion to society, the interest in communication, and the interest in not having one’s feelings hurt. In my thesis, however, I will show that the interest in securing cultural identity is the strongest interest in supporting claims for freedom of religion, language rights and claims of offence to feelings. I shall therefore call these three claims ‘claims from cultural identity’.

I use the term ‘cultural identity’ to refer to a component in an individual’s personal identity, which is defined by her or his membership in a cultural community, and that she or he perceives as bound to other components of their personal identity. Cultural communities are constituted by individuals who perceive themselves as attached to a common culture and history.

My use of the term ‘cultural identity’ is not meant to imply that all individuals who identify with a specific culture possess a single homogenous cultural identity. Even among those who identify with a particular culture there can be differences in the experience of that culture. Moreover, some individuals may belong to more than one cultural community,

---

3 I will explore the notion of cultural identity and its relation to personal identity in Chapter 1. I will also provide a more specific definition of cultural identity to which I adhere.

thus having a complex, or even multicultural cultural identity. For instance, a black, Muslim and lesbian woman may perceive herself as having a threefold cultural identity. However, the only cultural identity my arguments take into account is the one that is presented by the individuals who evoke it in their claims from cultural identity. If, for example, a gay man who also belong to a linguistic minority, raises a claim from a cultural identity that is a language rights claim, his homosexual identity would not be taken into account.

My account focuses on cultural identity because it is a significant component in our personal identities and because it is the component individuals often refer to when they evoke claims of freedom of religion, language rights and claims of offence to feelings. While there are other important components in our personal identities such as being part of our family, having a unique talent, or being good friends, cultural identity is different from other component of our personal identity in that in multicultural states, cultural identities are related to people’s equal citizenship and their relationship with the state. Some minority members are often excluded from the public sphere or perceived mostly in negative terms because of their cultural identities. Their cultural identity is less equal in terms of representation in the public sphere and the way it is perceived in larger society. Such minority members are therefore excluded or incompletely included in the general democratic citizenship of society.  

other components of our personal identity, deserve different legal treatment. The state should regulate them in a way it should not necessarily regulate professional identities and their likes.


I show that claims from cultural identity are often regulated in courts directly or indirectly by arguments of equality between the majority and different minority groups. I will argue that claims from cultural identity and equality are usually inseparable from each other, and explore in detail the relations between them. Claims from equality draw the court’s attention to the difference between the level of protection members of the majority culture receive from the state for their cultural identity, and the level of protection minority members receive. Identifying the interest in cultural identity as underpinning these three claims allows me to develop a conception of equality that is suitable to regulate such claims.

As I have indicated, among the many claims that pertain to the protection of minority members’ cultural identity, my thesis focus on three claims in particular: claims of offence to feeling, claims for religious freedom, and claims for language rights. The conception of equality I develop is applicable to other claims about protecting the cultural identity of minority members, but developing its particular forms with respect to other claims exceeds the scope of my dissertation.

Recent theorists of multiculturalism appeal to the concept of equality in order to point out the disadvantageous position of minority members relative to majority members,

---

and to justify specific measures to improve the status of cultural minorities in various areas. Prominently among them is Will Kymlicka, who argues for group specific rights, such as rights of self-government and language rights, which are pivotal in eliminating or mitigating the disadvantageous position of minority members in society. Other scholars such as Iris Young appeal to the notion of equality in order to argue for a system of political representation that will enhance the voice and power of minority members in society. Anne Phillips argues that equality requires more proportional representation of members of traditionally subordinated groups in the political process. This is because presence and active participation in politics signifies a public acknowledgement that minority members are of equal value to other members in society.

However, with the exception of Kymlicka’s theory, which I will address in the next sub-section, existing multicultural theorists who appeal to the notion of equality have not suggested general schemes of distributive justice for dealing with claims from cultural identity. Similarly, the existing literature on general schemes of distributive justice has largely neglected the importance people attach to their own culture and the asymmetry that exists between minority members and majority members.

Scholars who propose general schemes of distributive justice put forward general principles that all distributions needs to meet in order to achieve social justice between all individuals in society. That is, general principles of distributive justice provide answers to the broad question of what kind of political and economic arrangements are required if the

---

equal worth of all human beings is to be achieved. Ronald Dworkin, for instance, proposes a general scheme of distributive justice when he suggests the principle of an ‘enjoy free’ distribution of resources that leaves no person envying another person’s available resources, and compensates people only for preferences and needs that result from factors beyond their control.9 General principles of just distribution are attractive because they appeal to our basic intuitions about justice rather than suggesting ad hoc solutions to particular problems.

Not only have multicultural theorists largely refrained from engaging with general principles of distributive justice, but so have legal scholars who discuss the notion of equality with respect to multiculturalism. This is in spite of the potential contribution of general schemes of distributive justice to the legal problems and challenges of multiculturalism. This potential contribution is twofold. First, general schemes of distributive justice may help to reveal the rationales underpinning existing legal doctrines with regard to claims from cultural identity. Second, they may expose difficulties and inconsistencies in such existing doctrines when they fail to follow these rationales. In this dissertation, then, I will develop a conception of distributive justices, and examine and criticize, when necessary, exiting legal doctrines and cases through its prism.

The conception of equality I suggest is unique in that it takes seriously the intrinsic interest people attach to their own culture and incorporates it into the literature on general schemes of distributive justice. The outcome is a conception of equality that appeals to our general basic intuitions about justice and can effectively guide courts and policy makers with respect to claims from cultural identity.

In political philosophy, substantive conceptions of social and distributive justice are dividable into two camps. To the first camp belong so-called simple models of equality, which identify one encompassing aspect in people’s lives to which all other aspects are reducible, and devise general rules for just distribution of goods with respect to that aspect. For instance, if overall welfare is the encompassing aspect, a distribution of goods is just if it satisfies the different preferences of different people with regard to their welfare. By contrast, so-called complex equality models, which belong to the second camp, and to which my own conception belongs, deny the existence of one encompassing aspect. They identify different inconvertible currencies for different aspects of people lives.\(^\text{10}\)

The idea of complex equality comes from Michael Walzer’s theory of “spheres of justice”,\(^\text{11}\) which divides people’s lives into spheres that represent different aspects in life such as education, health, career and the like. In every sphere a different criterion of distribution governs. Walzer argues that society should reduce the effect of dominant goods from one sphere over other spheres. In this way, social and distributive justice is achieved because individuals are considered only by relevant criteria.

Drawing on Walzer’s theory I develop my own conception of equality. I call it \textit{Equality of Cultural Identity}. I identify cultural identity as one sphere in people’s lives and accommodation as the distributed good in it. By ‘accommodation’ I mean “a social practice in which agents absorb some of the costs of others’ behaviour, even if this behaviour is voluntary”.\(^\text{12}\) For the purpose of my thesis, the behaviour that is


accommodated relates to or stems from one’s cultural identity, and the costs of its accommodation do not necessarily involve material expenses. The term ‘costs’ refers to all kinds of burdens including symbolic ones, such as making a minority culture visible in public. Accommodation should be allocated according to the criterion of cultural needs. While the interest in securing minority members’ cultural identity substantiates claims from cultural identity, my conception of equality determines the extent of accommodation they justly deserve. The extent of accommodation is determined by comparing the extent to which the sphere of cultural identity dominates other spheres or is dominated by other spheres within members of the majority and members of the minority.

As I have mentioned, Will Kymlicka’s influential theory suggests a general principle of distributive justice, which purports to eliminate inequalities between members of minority cultures and members of the majority culture. According to Kymlicka’s general principle, cultural minority members should be given group specific rights in order to compensate them for inequalities that stem from arbitrary factors that are beyond their control, such as being born to a minority group. He argues that minority cultures enable and enhance autonomy. They provide minority members with values and norms that constitute a context of choice to which they appeal to reflect on their goals and decisions.¹³ Minority members, so Kymlicka maintains, deserve access to and protection of their own culture as a context of choice, rather than the majority culture, because they are not responsible for being minority members, and therefore should not bear the costs involved in transferring to the majority culture.¹⁴

¹³ Kymlicka, Multicultural Citizenship, supra note 6 at 82-83, 105.
¹⁴ Ibid. at 109, 113, 126.
Similarly to Kymlicka, I put forward a general principle of distributive justice that enhances the protection on minority cultures, but my conception of equality differs from Kymlicka’s in two respects. First, Kymlicka’s argument from autonomy and costs was challenged as an instrumental argument that overlooks the importance of a specific minority culture to its members. In light of the fact that there are multicultural societies that are willing to pay the costs of the transition of minority members to the majority culture, we are left with no good reason to provide group specific rights that protect minority cultures as such, while there are still good reasons to protect them. His argument is therefore not strong enough to justify the protection of minority cultures.¹⁵

The conception of equality of cultural identity I evoke is also underpinned by minority members’ interest in autonomy. However, as an alternative to the argument from cost, I appeal to the intrinsic interest of minority members in their specific cultural identity. As I will mention in Chapter 1, many minority members do not perceive their culture only in instrumental terms. They do not value their culture merely as an instrument for making choices and enhancing their autonomy, which can be replaced with the majority culture, as long as they do not bear the costs of this transition. The conception of equality I suggest does not justify protective measures of minority cultures as a means of preventing them from paying the costs of transition to the majority culture. Rather, it is the intrinsic value minority members attach to their culture as a component in their personal identity that underpins my conception.

The second respect in which my conception of equality differs from Kymlicka’s is that it does not compensate individuals only for factors that are beyond their choice. As I argue in Chapter 1, individuals may voluntarily choose their cultural affiliation, and still deserve protection for their choice.

4. Aspiring to Objectivity and Neutrality between Cultural Norms

Some current theories and doctrines recognize the interest in protecting minority cultures, but at the same time they regard existing legal frameworks, associated with traditional liberalism, as sufficient for this purpose. According to this approach, the best way to protect minority cultures is by allowing their members the negative liberty to practice their culture through traditional rights such as the rights to freedom of expression and association, and applying existing anti-discrimination laws, which are not designed to protect minority cultures as such.

There are, however, multicultural liberal scholars who support revising existing laws and giving special protection to members of cultural minorities by the state. Kymlicka for instance, supports group specific rights, which protect minority cultures, as long as these cultures do not include practices that violate liberal values. While different

---

16 Barry argues that traditional liberal rights should not be extended to include protection of cultural identities because such protection creates a dangerous fragmentation in society and diverts our attention from the real problem, which he thinks is socioeconomic inequalities (Brian Barry, Culture and Equality: An Egalitarian Critique of Multiculturalism (Cambridge, MA: Harvard University Press, 2001) 63-71).

17 Ford, for instance, argues that anti-discrimination law should not be extended to prohibit discrimination on the basis of certain cultural traits or behaviours such as language, hair-style, clothing, speech patterns, and music, which are not mutable and can be easily changed or avoided by minority members. In his view, protecting cultural traits under anti-discrimination laws amounts to cultural or racial essentialism, which enforces a particular homogenous identity on minority members regardless of their individual preferences, and therefore serve to oppress rather than liberate them. In Ford’s eyes, anti-discrimination laws should focus on real evils that marginalize and subordinate minority groups on the basis of immutable characteristics such as skin colour, which are not within the control of the potential minority member who bear them (Richard T. Ford, Racial Culture: A Critique (Princeton: Princeton University Press, 2005) 41, 91, 101, 123).

18 This is evident in Kymlicka’s distinction between legitimate external protection by the state on behalf of minority groups against the majority group, and illegitimate intervention by the state to support internal restrictions that protect a minority group from dissenters within the group. Protecting minority groups from
in many other respects, the liberal perfectionist theory, associated with Joseph Raz, also selectively protects cultural identities only inasmuch as they are compatible with liberal values.  

A major difficulty with such approaches, which my framework aspires to avoid, is that they involve moral assessment of the content of various cultural identities and comparison between liberal and illiberal cultures. These approaches ultimately lead to legal moralism, i.e. the imposition of one group’s moral principles on another group. They may also result in outcomes favourable to the majority members’ moral principles, not necessarily justifiably so. In my view, the main problem with such approaches is that they do not necessarily result in a just distribution of material and symbolic goods in society between members of different cultural groups.

My suggested normative framework is different. The framework I suggest belongs to the neutral liberal approach in the sense that it does not associate the state with one comprehensive doctrine. Similarly to other multicultural theories, it takes seriously the interest of minority members in protecting their cultural identity, but at the same time it does not involve morally assessing the content of competing cultural identities as a means of resolving cultural conflicts. It does not presuppose a set of universal values and seek to determine who is right and who is wrong according to them, but rather, it remains neutral.

dissenters violates Kymlicka’s commitment to the value of autonomy (Kymlicka, Multicultural Citizenship, supra note 6 at 35-44).

19 Raz argues that political institutions should not be neutral. They should promote conceptions of the good life that are valuable and discourage conceptions of the good life that are not valuable. The central moral principle according to which different conceptions of the good are valued is autonomy (Joseph Raz, The Morality of Freedom (Oxford: Clarendon Press, 1986) 407-417 [Raz, The Morality of Freedom]).

At the same time, it takes the liberal neutral approach one step forward by taking culture seriously and insisting on positive protection on minority members by the state. This is because state neutrality without positive protection of minority cultures amounts to a *de facto* favouring of the already dominant majority culture.

Liberals who are not committed to neutrality worry that the neutral approach will legitimate extreme cultural practices, such as female circumcision, which oppress a vulnerable minority within a minority in the name of protecting the minority culture. While addressing the problem of minorities within minorities is beyond the scope of this thesis, the regulative principles I suggest do not support or lead to the oppression of vulnerable members within minority groups by more powerful members. First, unlike extreme practices such as female circumcision, the three types of claims from cultural identity on which I focus are usually not oppressive or violent. In the relatively rare case in which a worry about oppression arises with regard to such claims, such as in the Muslim headscarf controversy that I address in Chapter 2, liberals sometimes tend to regard the relevant practices as oppressive to women, even when women genuinely and voluntarily ask to be allowed to wear a headscarf. They tend to throw out the baby with the bath water and disallow legitimate cultural practices out of the fear of oppression. Such cases, I will argue, should be construed in terms of protecting the cultural minority from the majority, and not always or necessarily as protecting weak minority members from powerful minority members.

Second, the regulative principles I suggest are committed to a basic liberal principle, according to which a culture is not more than the shared individual aims of its
members.\textsuperscript{21} That is, by my suggested principles, an oppressive cultural practice that is imposed on vulnerable minority members within the minority cannot be justified in the name of protecting a minority culture. This is because under my framework, vulnerable minority members, such as women, have as equal right to shape their cultural norms and practices as powerful minority members in their culture.

Under the framework I propose, when dealing with claims from cultural identity, rather than assessing the cultural practices in question based on their consonance with liberal values, the legal system should adopt tools that are as objective as possible to examine the extent to which the protection a certain cultural group seeks will enhance equality between members of different cultures. Rather then assessing competing cultural beliefs and norms, I examine to what extent the citizenship status of minority members is equal to majority members, and how much minority members’ cultural identity sphere is secure from the domination of other spheres in their lives. The regulative principles I suggest focus on objective parameters such as cultural minority members’ level of integration in society, particularly in the economic and political spheres, the social and civic status of their cultural identity, and the mutual influences of different cultural identities on each other.

\textsuperscript{21} That is, the principles I suggest are committed to the theory of methodological individualism. For an overview of the debate in the philosophy of social sciences about methodological individualism versus collectivism, see Joseph Heath, “Methodological Individualism”, in Edward N. Zalta ed., \textit{The Stanford Encyclopedia of Philosophy} (Spring 2005 Edition), http://plato.stanford.edu/archives/spr2005/entries/methodological-individualism/. Joseph Agassi argues that assigning interests to a group that are not reducible to the interests of its individual members is unjustified both ontologically and normatively, from a liberal point of view (Joseph Agassi, “Methodological Individualism” (1960) 11 \textit{The British Journal of Sociology} 244). For a discussion of this problem in the specific context of group rights that protect minority cultures, see Leslie Green, "Two Views of Collective Rights" (1991) 4 \textit{Canadian Journal of Law and Jurisprudence} 315 at 319-320 [Green, "Two Views of Collective Rights"].
5. **An Overview of the Chapters**

In Chapter 1, I develop a conception of equality for regulating claims from cultural identity. I begin by examining whether existing concrete models of distribution are applicable to regulating claims from cultural identity. In other words, I examine whether applying the general distributive principle they propose does justice to cultural minority members or leaves them in a disadvantageous position. I begin by looking at so-called simple equality models. Simple equality models identify one aspect such as welfare or resources as the major aspect with regard to which people should be equal, and reduce all other aspects of people’s lives to this aspect.

In particular, I concentrate on Dworkin’s model of equality of resources, and show how the application of the general principle of distribution he suggests brings about unjust outcomes for minority members. Under Dworkin’s model, minority members are required to devote more resources in order to protect their cultural identity just because there are few of them – a fact that makes the goods they need for cultural protection more expensive.

I then turn to discuss Walzer’s model of complex equality which does not identify one aspect with regard to which all people should be equal. This is because people desire goods that have different social meanings, and therefore cannot be reducible to one currency or aspect such as resources. Walzer divides people’s lives into different spheres of goods such as education, health and career. Under Walzer’s theory, each sphere should be governed by a criterion of distribution that reflects the social meaning of the good at stake. Optimal social justice is achieved when every sphere is as independent of other spheres as possible. That is, when the criterion of distribution in every sphere does not
relate to the criteria in other spheres and that one’s advantage in one sphere does not favour him or her in terms of distribution in another sphere. For example, the sphere of health care should not be dominated by the sphere of economics, thus health care should be provided according to people’s health rather than wealth.

While Walzer does not address inequalities between members of minority cultures and members of the majority culture, the list of goods he suggests that constitute spheres of justice is not exhaustive. Because minority members who insist on adhering to their cultural identity often find themselves at a disadvantage with regard to other goods such as education and career, I suggest a model in which cultural identity is a dominant good in multicultural societies, which, in accordance with Walzer’s principle, should not influence people’s position in other spheres. That is, minority members should not be pressured to adopt features of the dominant majority culture in order to enhance their prospects of success in other majority-dominated spheres of their lives, such as the economic and the political spheres. I call this model *Equality of Cultural Identity*.

The model I suggest is underpinned by Walzer’s general principle of distribution, according to which distributive spheres should be independent of each other. I argue that this principle illustrates a way of respecting the inherent dignity of all individuals – a value that many legal scholars, especially in Canada and Israel, perceive as the core justification underlying substantive equality. By incorporating the importance of cultural identity into Walzer’s model, I invoke a conception of dignity that is more attentive to cultural needs of minority members than existing conceptions of dignity that traditionally disregard cultural differences between people. Thus, my model fits nicely with a common legal interpretation
of the right to equality as underpinned by dignity. At the same time, it enhances it with a concrete regulative principle that can be applied to cases of claims from cultural identity.

In light of my conception of equality of cultural identity, Chapter 2 suggests a principle for regulating claims of offence to feelings. Legal discussions of cases involving offence to feelings have framed the debate in terms of protecting the sensitive feelings of the offended person and the right of the offender to freedom of expression. This prevailing focus leads to legal doctrines that generally dismiss claims of offence to feelings, inter alia because of the difficulty to assess the intensity of the painful feelings, which is subjective by nature, and the danger of imposing the offended person’s moral views on the offender. Such doctrines consider claims of offence to feelings only when there is a further risk of violence or a disruption of the public order.

However, I argue that a particular kind of claim of offence to feelings boils down to a struggle for equality in the public sphere between competing cultural identities. In cases involving disputes over values of a minority culture, such as the Danish cartoons affair, the primary object that needs protection is the cultural identity of the offended party and not feelings as such. I therefore suggest construing this kind of claim of offence to feelings as Claims from Integrity of Cultural Identity.

In light of my conception of equality of cultural identity I propose the Vulnerable Cultural Identity Principle, according to which the more the cultural identity of the offended persons is vulnerable, the stronger is their claim from integrity of cultural identity. The vulnerability of one’s cultural identity is measured by objective standards reflecting one’s equality, citizenship and inclusion in larger society. The more vulnerable the social and civic status of one’s cultural identity is, the stronger her claim is from
integrity of cultural identity. Typically, the cultural identity of minority members is vulnerable because the values and norms that constitute their cultural identity is constantly challenged, perceived in negative terms, and often excluded from the public sphere.

The vulnerable cultural identity principle illustrates my commitment to neutral liberalism and objective standards for regulating claims from cultural identity. Rather than assessing and comparing the content of competing cultural identities, it assesses and compares their social status of citizenship and equality by objective parameters such as cultural minority members’ level of integration in society, particularly in the economic, educational and political spheres.

Two notions underpin the vulnerable cultural identity principle: equality and toleration. The vulnerable cultural identity principle, which tends to give the upper hand to minority members, is rooted in my conception of equality of cultural identity. This is because it recognizes the asymmetrical social power relations between minority and majority members. The cultural identity of minority members is more vulnerable because their cultural identity sphere is typically invaded by other spheres in their lives, which are dominated by the majority culture. Typically, when faced with offensive acts, minority members are pressured to compromise their cultural identity, abandon their cultural values, norms and visible practices, and adopt those of the majority in order to achieve better position in other spheres of their lives. By contrast, majority members are not faced with such a dilemma. The vulnerable identity principle therefore aims to equalize the citizenship of minority members to that of majority members.

The vulnerable cultural identity principle I suggest stems also from the concept of toleration. I adopt Anna Galeotti’s conception of toleration, which perceives the quest for
toleration in terms of recognition. Under this conception, the justification of toleration is giving recognition of minority members’ cultural identity in the public sphere. Not only does toleration as recognition protect the negative freedom of minority members to express their cultural identity, it also requires that the state take positive steps to limit or prohibit offending acts that inhibit the process of inclusion and recognition of minority members’ cultural identity in society.

Claims from integrity of cultural identity are not exclusively raised by minority members. Majority members may also raise claims from integrity of cultural identity in response to acts that they perceive as offending the values and norms of their cultural identity. Moreover, claims from integrity of cultural identity that are raised by minority members may also be directed at offensive acts that were done by other minorities, and not necessarily by the majority group.

I therefore distinguish between three types of cases and show how the vulnerable cultural identity principle applies to each of them. In the first type of cases, claims from integrity of cultural identity are raised by majority members in response to offensive acts conducted by the minority members. In such cases, all other things being equal, the vulnerable cultural identity principle leads to the conclusion that the claim of majority members is weak as their cultural identity is relatively secure.

In the second type of claims, minority members of one group raise a claim from integrity of cultural identity against offensive acts conducted by members of another minority culture. In such cases, according to the vulnerable cultural identity principle, all other things being equal, members from both groups have a vulnerable cultural identity, and therefore their claims are equally strong. We should therefore appeal to additional
legal principle such as the captive audience principle in order to further evaluate the strength of the contested claims from integrity to cultural identity.

In the third type of cases, minority members raise claims from integrity of cultural identity against offensive acts conducted by majority members. Applying the vulnerable cultural identity principle to such cases leads to the conclusion that the minority members’ claim is relatively strong and can therefore not be dismissed without serious consideration.

Chapter 3 addresses two other claims from cultural identity, namely claims for language rights and claims for freedom of religion. While language rights are perceived as controversial measures to protect minority groups, which need to be handled with caution and restraint, the right to freedom of religion is usually perceived as a basic and universal right, which should be purposively interpreted by courts. My argument in this chapter refutes this view. By showing relevant similarities between language rights and the right to religious freedom, I maintain that there are no good reasons to narrowly interpret language rights.

The purpose of Chapter 3 is therefore not to argue for the importance of language rights by presenting the various human interests that underlie them. Such an account has been presented by Denise Réaume, who argues that language rights protect the intrinsic value minority members attach to their own language as a marker of cultural identity. While I endorse this intrinsic value, it is not sufficient to support purposive interpretation of language rights. This is because there are arguments that single out language rights as

---

having unique features that other rights do not bear. Such arguments call for treating language rights with caution, even if there is an intrinsic and strong interest underpinning them.

The first step I take in Chapter 3 is identifying the specific arguments that are made in order to justify a restrained approach towards language rights. I call them ‘the positive right argument’, ‘the political compromise argument’, and ‘the argument from the collective and cultural character of language rights’. Each argument is designed to distinguish language rights from other human rights by illuminating characteristics of language rights that other human rights allegedly do not bear. I refute these arguments by showing that all of the allegedly unique features that language rights bear subsist in the right to religious freedom as well.

I then identify a novel argument that may support a restrained approach toward language rights, but argue against it. According to this argument, unlike the right to religious freedom, language rights impose a cultural burden on majority members. By ‘cultural burden’ I mean obligations that language rights impose on majority members to actively use the minority language, which unavoidably cause them to associate themselves with the minority culture to some extent. In terms of equality of cultural identity, by requiring majority members to actively use the majority language, the sphere of their own cultural identity is invaded by other spheres in their lives, such as the sphere of education and the sphere of economics and career.

In the last section of this chapter I conclude that although the cultural burden argument points out a difference that singles out language rights from other rights, it still does not provide a strong reason to narrowly interpret language rights and limit their scope.
This is because in terms of my conception of cultural identity, in most cases, the cultural burden language rights impose on majority members is not as burdensome as it initially seems. This is because while the cultural identity sphere of majority members is invaded by the minority culture, it is still not dominated by it, as majority members can still succeed in other spheres of their lives such as health care, education and career, which are dominated by the majority language anyway. At most, in order to succeed in some spheres of their lives, majority members will be required to be fluent in the protected minority language, but not at the expense of fluency in their own language, or adhering to their own culture.
Chapter 1: 

My Conception of Equality of Cultural Identity

1. Introduction

Equality is one of the most controversial concepts in legal discourse. The development of conceptions of equality has coincided with social and cultural changes that have presented new challenges to the legal system. While some conceptions of equality emphasize elimination of differences, such as class differences, some scholars have pointed out the need for a new conception that preserves differences. This need arises in response to claims by minority groups such as ethnic and religious minorities who do not wish to level the playfield or erase differences between them and larger society, but rather to preserve their distinct cultural identity. While such a need has been recognized, no concrete model of just distribution of goods has yet been suggested.

By ‘concrete models’ I mean models that suggest a general principle that is relevant to all kinds of distributions. There are several examples of such models. Dworkin, for instance, suggests the principle of an ‘envy free’ distribution of resources that leaves no person envying another person’s available resources, and compensates people only for preferences and needs that result from factors beyond their control. Walzer thinks that the nature of every distributed good is inherently different and that it is therefore better to

---

23 Following John Rawls’ distinction, I will use the term ‘concept’ to refer to the right to equality, and ‘conceptions’ to refer to the different interpretations of the right to equality (see Rawls, A Theory of Justice, ibid. at 5. Rawls finds this distinction in H.L.A. Hart, The Concept of Law (London and New York: Oxford University Press, 1961) 155-59; see also Ronald Dworkin, Taking Rights Seriously (Cambridge, MA: Harvard University Press, 1978) 134-136 [Dworkin, Taking Rights Seriously]).

think of different goods as constituting different spheres in people’s lives. Walzer thinks that different distribution criteria apply to different types of goods, and that as a general rule, they need to be independent of one another. Currently, however, there is no concrete model that is attentive to the issue of protecting minority cultures. In this chapter I present such a model.

In order to develop my conception of equality, I will first clarify the conceptual relations between claims from cultural identity, the rights to which they pertain, and the notion of equality. As I will show, typically, when minority members raise a claim from cultural identity, they also invoke the right to equality explicitly or inexplicitly. Even when many multicultural states claim not to favour the majority culture over minority cultures, they in fact do that. As the legal cases I provide in this chapter illustrate, majority members’ practices and lifestyles are taken for granted and accommodated by the state and, parallel practices of minority members are not. In such cases, claims from cultural identity draw the court’s attention to differences in the distribution of particular goods between the majority and minority groups. The difference in distribution refers to the gap between the level of protection members of the majority culture receive from the state for their cultural identity, and the level of protection minority members receive. In other words, claims from cultural identity should be perceived as equality claims.

After clarifying the relation between claims from cultural identity and equality I will provide a conception of distributive and social justice that best characterizes claims from cultural identity and that can guide courts in deciding the level of accommodation that minority members deserve to protect their cultural identity. I call this conception ‘equality of cultural identity’.
This chapter includes eight sections. In the next section, I will illustrate the type of claims to which my conception of equality of cultural identity applies by briefly describing legal cases that involve claims from cultural identity and equality. In section 4, I outline Dworkin’s influential conception of substantive equality as equality of resources. Dworkin’s equality of resources conception is a prominent example of a so-called ‘simple equality’ model that reduces all aspects of people’s lives to one currency such as resources. I argue that Dworkin’s simple equality model does not provide a just scheme of distribution to minority members for whom some goods are more expensive, just because there are fewer of them. Under Dworkin’s model, minority members need to pay more than majority members for the same goods. I argue that Dworkin’s conception of substantive equality is therefore insufficient to deal with claims from cultural identity.

In section 4, I articulate Michael Walzer’s conception of complex equality. Unlike simple equality models, in Walzer’s complex equality model there are different inconvertible currencies for different aspects of people’s lives. Walzer divides people’s lives into spheres. Every sphere represents a different aspect in life such as education, health, career and the like, and in every sphere a different criterion of distribution governs. Walzer argues that society should reduce the effect of dominant goods from one sphere over other spheres. In this way, social and distributive justice is achieved because individuals are considered only on relevant considerations.

I argue that Walzer’s spheres of justice scheme does not aim to eliminate dominance in society, but rather to illustrate what protecting people’s dignity means. People’s dignity is protected when they are considered for the purpose of distribution of goods in each sphere only by relevant considerations that reflect who they really are.
In section 5, I explicate the conception of dignity as it is currently perceived in the Canadian and Israeli legal systems as underpinning the idea of substantive equality. I argue that dignity is mostly understood as a universal conception, which is underpinned by autonomy. I argue that this universal conception is insensitive to cultural differences between people because it concentrates mostly on individual capacities and merits. I argue that because the universal conception of dignity does not pay special attention to cultural differences, it does not fully capture the notion of human dignity.

In section 6, I develop a more inclusive conception of dignity, which I call ‘the cultural identity conception of dignity’. It accommodates cultural differences and is sensitive to people’s needs that stem from their cultural identity. I argue that the cultural identity conception of dignity better enhances people’s autonomy because it gives people, and minority members in particular, the option to be authentic, i.e., to reflect and deliberate about their own cultural values and act in accordance with them as much as possible.

Having argued for complex equality and explored the rationale that underpins it, in section 7, I present my conception of equality of cultural identity. I recognize cultural identity as one sphere in people’s lives and argue that accommodation is the distributed good in it. Accommodation should be allocated according to the criterion of cultural needs. I go back to cases of claims from cultural identity to illustrate how my conception of equality of cultural identity can determine the extent of accommodation that minority members deserve in each case. The extent of accommodation is determined by comparing the extent to which the sphere of cultural identity dominates other spheres or is dominated by other spheres within members of the majority and members of the minority. While claims from cultural identity substantiate the cultural need for accommodation, my
conception of equality of cultural identity determines the extent to which such accommodation is needed.

2. **Instances of Claims from Cultural Identity and Equality**

I would now like to illustrate the type of claims to which my conception of equality of cultural identity applies by referring to instances in which claims from cultural identity and equality are raised. The cases I will present involve the three types of claims on which I focus in this thesis: claims of offence to feelings, claims for language rights and claims for freedom of religion. My concern is not the particular reasoning in every legal decision that was made in these cases. Rather, I invoke these instances in order to motivate my conception of equality of cultural identity by illustrating the kinds of conflicts it applies to, and the kinds of arguments that are made in these conflicts. Both demonstrate the challenges my conception of equality needs to meet in order to regulate claims from cultural identity.

The claims that were raised against the Danish cartoons are good examples of claims of offence to feelings. On 30 September 2005, the Danish newspaper *Jyllands-Posten* published twelve cartoons of the Prophet Mohammad in addition to an article that criticized the alleged self-censorship within the Muslim community with respect to Muslim traditions and Islam. Some of the cartoons associate the Prophet, Islam and Muslims with terrorism, by showing Mohammad with a turban in the shape of a bomb and by portraying the Prophet in Paradise, saying ‘Stop, Stop. We ran out of virgins’ to a long line of suicide bombers.

The cartoons provoked anger among many Muslims living in Western countries. Muslims have argued that these cartoons desecrate their deeply cherished religious
values and offend their religious feelings. Some claims within the public and academic debate that erupted after the affair invoke the issue of equality, suggesting that the cartoons discriminate against Muslims in western democracies, oppress them, and inhibit their integration into larger society.

Different but related claims from cultural identity are language rights claims. Linguistic minorities in multicultural states such as Israel and Canada claim that their language should appear in the media, on street signs, or be used in courts. They support their claims by evoking the right to equality, suggesting that they have a right to have equal status to that of majority members whose language is actively used by official service-providing bodies, the general media and the private market. Underlying such claims is the assumption that a minority language requires the protection of the state because it is intrinsically valuable to its speakers and cannot be replaced by the majority language.

In Israel, not only is the right to equality used to support language rights claims, it also serves as a substitute which purports to fill the absence of comprehensive language

---


26 The Danish cartoon affair was recently debated in Canada as well. Canada negotiated the controversy over the publication of the Danish cartoons when the media voluntarily decided not to publish these cartoons and was praised for doing so by both Canada’s Prime Minister and its Foreign Affairs Minister. Canada’s foreign affairs Minister Peter Mackay declared that “The publication of cartoons of the Prophet Muhammad has caused offence to Muslims and non-Muslims around the world and in Canada. Freedom of expression is a legally enshrined principle in Canada, but it must be exercised responsibly. We commend those Canadians who have acted appropriately…This sensitive issue highlights the need for a better understanding of Islam and of Muslim communities. Respect for cultural diversity and freedom of religion is a fundamental principle in Canada”… (in Kent Roach, “National Security, Multiculturalism and Muslim Minorities” (2006) Singapore J. Legal Stud. 405 at 434).


28 A comprehensive account of language rights and the intrinsic value of one’s own language will be provided in Chapter 3.
rights legislation. For example, in the Adalah Israeli Supreme Court case\textsuperscript{29} the appellants requested that municipalities of mixed cities, in which Jews and Arabs live together, add Arabic captions to existing Hebrew street signs. Chief Justice Barak argued that the right to equality should be broadly interpreted as a guarantee not merely of equal formal access to state services, but also of equal use, or equal benefit from them. In Barak C.J.’s own words:

\begin{quote}
[T]he municipality has to ensure equal use of its services. In a place where part of the municipal public cannot understand municipal signs its right to equal benefit from the municipal services is injured.\textsuperscript{30}
\end{quote}

The broad interpretation of the right to equality allows C.J. Barak to derive a positive duty of the municipalities to add Arabic captions to street signs. By this interpretation C.J. Barak overcomes the lack of a comprehensive statute that regulates the issue of language rights in Israel.

Related but distinguishable claims are claims of religious freedom, in which people demand their negative right to exercise their religion without state interference as well as their positive right to receive adequate resources from the state to support their religious culture. An example involving the negative right to religious freedom and the right to equality is the American Supreme Court Case of Goldman.\textsuperscript{31} Goldman was an Orthodox Jew and ordained rabbi who served in the American Air Force. For many years he always wore a yarmulke on duty, without incident. At some point, Goldman's commander ordered him not to wear his yarmulke while on duty. In response to his resistance, Goldman received a letter of reprimand, a recommendation against extending his term of service, and a threat of court-martial proceedings. Goldman sued the Secretary of Defense and

\begin{footnotes}
\item[29] Adalah, supra note 1.
\item[30] Ibid. at 414 (my translation).
\end{footnotes}
others, claiming that preventing him from wearing his yarmulke in these circumstances, or
punishing him for doing so, violated his right of religious liberty.

The Supreme Court majority judges rejected Goldman’s claim without addressing
issues of equality. It accepted the Air Force’s position according to which uniformity of
dress was very important to its mission. Uniformity of dress “encourages the subordination
of personal preferences and identities in favour of the overall group mission”.32 The
majority therefore concluded that … “the rule that is challenged in this case is based on a
neutral, completely objective standard -- visibility …. An exception for yarmulkes would
represent a fundamental departure from the true principle of uniformity that supports that
rule”.33

In his dissenting opinion, Justice Brennan explained why a lack of accommodation
of Goldman’s religious identity amounted to discrimination:

“Uniformity” of treatment under the Air Force dress code is illusory. Real equality
cannot be attained by such a flat and highly general rule for deviations as
“nonvisibility”. That rule permits only individuals whose outer garments and
grooming are indistinguishable from those of mainstream Christians to fulfill their
religious duties. . . . The practical effect …. is that, under the guise of neutrality and
evenhandedness, majority religions are favoured over distinctive minority faiths.34

An example involving the positive right to religious freedom is the Adler case,35 in
which the appellants have claimed that the provincial government in Ontario, Canada
should equally support Jewish, Muslim and non-Catholic Christian religious private
schools in Ontario in the same manner it funds Roman Catholic public schools. However,
the Canadian Supreme Court rejected the appellants’ claim. The majority in Adler found
that the funding of Roman Catholic schools was required by s. 93(1) of the Constitution,

32 Ibid. at 1313.
33 Ibid. at 1316.
34 Ibid. at 1320.
and that since s. 29 of the Charter explicitly exempts from Charter challenge all rights and privileges guaranteed under the Constitution in respect of denominational, separate or dissentient schools, the claimant did not have standing to allege a violation of their right to equality.\footnote{The \textit{Adler} case was discussed by the Human Rights Committee in 1999 (CCPR/C/67/D/694 \textit{Waldman v. Canada}). The Human Rights Committee decided that the government of Ontario discriminates against Jews because it does not subsidize Jewish schools as it subsidizes Roman Catholic schools. The Human Rights Committee mentioned that the distinction that was made in the Canadian constitution in 1867 was made to protect the Roman Catholics in Ontario. However, the Committee stated that “the material before the Committee does not show that members of the Roman Catholic community… are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools” (section 10.4 of the decision). Following that decision, so Cote and Gunn indicate, the Ontario government proposed to modify its laws to include a new tax credit for parents of children of religious minorities that were not included within the constitutional protection (Pauline Cote & Jeremy T. Gunn, “The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Canada” (2005) 19 \textit{Emory Int'l L. Rev.} 685 at 691).}

After reviewing some claims from cultural identity, we can ask: What do the rights in questions have to do with equality? In other words, if the claimants’ interests are already protected by rights, such as the right to religious freedom, what additional work does the appeal to the right to equality do? Or viewed from the opposite side, if the claimants have successfully shown that they were discriminated against, why should they additionally invoke other rights? Why can’t they appeal only to the right to equality?

I will argue that claims from cultural identity and equality are usually inseparable and explore in detail the connection between them. In essence, claims from cultural identity not only refer to the rights they are based on, but also point at a difference between the levels of accommodation members of the majority culture and members of minority cultures receive. That is, claims from cultural identity should be regarded as equality claims.

Substantive equality is the concept that is relevant to these claims and should regulate the level of accommodation minority members deserve. Before I suggest my own
conception of substantive equality, which, to my mind, is most suitable for regulating claims from cultural identity, I will first discuss in the next section the difference between the philosophical and the legal discourse of the concepts of equality and substantive equality. I will then discuss one kind of substantive equality model, namely simple equality models, and explain their shortcomings.

3. **Simple Equality Models of Substantive Equality and Their Pitfalls**

Generally speaking, a distinction may be drawn between two relatively separate discourses of equality nowadays: the philosophical discourse and the legal discourse. Philosophically oriented equality scholarship aims at developing general schemes of equality that put forward a general normative principle, which all just distributions of goods in society should meet.\(^{37}\) By contrast, legal scholars and judges usually do not assume that courts are institutionally qualified to make judgments about the most appropriate general distributive principles, which apply to all kinds of distributions in society, or that they have the mandate to do so.\(^{38}\) Courts perceive their task as interpreting equality rights, and this is therefore what legally oriented equality scholarship usually focuses on.\(^{39}\) Another issue dealt with by legally oriented scholarship is the human interests or values that underpin the right to equality and justify it. Within this legal terrain, one view identifies human dignity as the core notion justifying the right to equality.\(^{40}\)

---


38 Ibid.

39 Ibid.

While judges do not assume that they are qualified to make judgments about
general distributive principles that apply to all kinds of distributions in society, they often
make judgments about specific distributive principles or policies.\textsuperscript{41} Judgments about
distributions of specific goods that are challenged in courts have an important influence on
the distribution of other goods in society. Consider a judgment in which the court decides
that the government does not discriminate when it gives citizens under 30 from reduced
social security benefits.\textsuperscript{42} Such a decision involves a judgment about the proper
distributive principle of a specific good – social security benefits, which obviously affects
distributions of other goods in society such as jobs, food, education and the like. In light of
this fact, the philosophical literature that deals with the mutual effects of distributive
decisions with respect to different kinds of goods on each other and examines them
through general principles of distributive justice seems relevant to making and
understanding legal decisions in the issue of equality. My dissertation brings the legally
oriented and the philosophically oriented scholarships together.\textsuperscript{43} Going beyond the current
legal literature on the issue, the legal conception of the right to equality I suggest


\textsuperscript{41} As Réaume observes “Any account of the right to equality must be about the proper distribution of
something -- respect, power, opportunity, freedom from need, or something else to be distributed” (Denise G.
Supreme Court decisions that concern distributive principles see Susan Luft, “Supreme Court Upholds
Constitutionality of Alberta School Funding Scheme” (2001-2002) 11 \textit{Educ. & L.J.} 275; William F. Foster &
William J. Smith, “Equal Opportunity and the School House: Part II-Access to and Benefit from Education
S.C.R. 624 [\textit{Eldridge}] for a case about redistribution of goods (a sign language interpreter). Mark Rush
observes that “the Canadian Court is bound to uphold a Charter that embodies distributive principles.” (Mark
E. Rush, “Judicial Supervision of the Political Process: Canadian and American Responses to Homosexual
Rights Challenges,” in Patrick James et al. eds., \textit{The Myth of the Sacred: The Charter, the Courts, and the
92).


\textsuperscript{43} This is in spite of the fact that philosophically oriented literature and legal literature in the issue of equality
are usually detached from each other (see Moreau, "The Wrongs of Unequal Treatment", \textit{supra} note 37 for
an exceptional article that integrates these two scholarships).
incorporates philosophical accounts of equality and shows how they may be applied to legal cases involving claims from cultural identity.

In this chapter I develop a conception of substantive equality. Let us therefore first look at the way the notion of substantive equality is conceived in the legal and philosophical discourses. When most lawyers, judges and legal scholars discuss the term ‘substantive equality’ they mean to contrast it with the formal equality approach, which adopts the Aristotelian principle according to which like cases should be treated alike and unlike cases should be treated differently. Under the formal equality approach, when deciding whether there has been discrimination, a judge should make sure that similar cases are treated equally. For example, if two candidates for a position are similar with regard to a specific criterion, they should have an equal chance of getting the position.

In legal scholarship, substantive equality has evolved as a critique of formal equality. Lawyers who support substantive equality claim that formal equality does not specify the criteria used for deciding which cases are alike. Since formal equality does not provide any criterion for determining which cases are alike, there is a danger that any chosen criterion will comply with the principle of formal equality, as long as it is seemingly relevant to the distributed good at hand. Such criteria may merely perpetuate prevailing stereotypes in society. For example, the state may adopt a criterion, according to which only men have the required capacities to serve as combat pilots in the army. This criterion takes the relevant criterion of capacities, but treat gender as a proxy for certain capacities in a way that perpetuates common stereotypes with regard to men and women.

---

Even when the chosen criterion does not reflect stereotypes, it may still *de facto* favour a section of the population that meets this criterion because of a prior advantage, and thus *de facto* lead to unjust outcomes. For instance, the criterion for serving in an elite unit may be a prior familiarity with firearms. While this criterion is relevant and does not single out women as less capable than men, it in fact favours men, who usually have more familiarity with firearms than women. As a result, judges and lawyers who adopt formal equality end up adopting the dominant criteria in society, rather than challenging them. They end up perpetuating existing discrimination against ‘different’ people and ignoring ‘irrelevant’ considerations, rather than questioning their difference and irrelevancy.

By contrast to formal equality, substantive equality fleshes out the category of ‘like cases’ in order to allow greater equality for members of different groups. It therefore aims to achieve “equality of opportunity and of result, not just similar treatment for those similarly situated”.

Contrary to lawyers, philosophers’ discussion of equality focuses on general principles for the distribution of resources that should guide legislatures in the design of particular policies. In its formal form, the right to equality is understood by philosophically oriented scholars as requiring equal consideration of people’s claims. Dworkin suggests a principle according to which all people should be treated with equal concern and respect.

---

47 According to Dworkin, all people should be treated with concern because individuals are “capable of suffering and frustration”, and with respect because they are “capable of forming and acting on intelligent conceptions of how their lives should be lived” (Dworkin, *Taking Rights Seriously*, supra note 23 at 180-183,
That is, the state “must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern”\textsuperscript{48}. As Thomas Scanlon argues, Dworkin’s principle of equal concern and equal respect captures the conception of formal equality.\textsuperscript{49} According to Dworkin’s principle, different individuals’ comparable claims should be first taken equally into consideration and then given an equal weight.\textsuperscript{50} Formal equality is therefore a procedural notion which is not committed to a specific outcome.

Substantive conceptions of equality ask what it means for the government to treat its citizens with equal concern and respect. All substantive conceptions of equality assume that equal concern and respect means equal distributions of some goods in society.\textsuperscript{51} Each one of them identify one good or aspect the fair distribution of which will bring equal concern and respect for all. In other words, taken in its substantive form, the right to equality is goal-oriented. It specifies a way in which equal concern and respect are achieved by identifying one aspect or more in which people ought to be equal.\textsuperscript{52} It aims to assure what Scanlon calls ‘substantively egalitarian consequences’.\textsuperscript{53}

That is to say, when philosophers employ the term ‘substantive equality’, they do so in order to point out specific inequalities that should be eliminated. Therefore, if we are to talk about substantive equality we first need to identify a specific type of inequality which the right to equality aims to repair. In other words, we need to identify a specific

\textsuperscript{48} Ibid. at 273.
\textsuperscript{49} Thomas Scanlon, \textit{The Diversity of Objections to Inequality} (Lawrence, KS: Dept. of Philosophy, University of Kansas, 1997) at 1.
\textsuperscript{50} Ibid.
\textsuperscript{53} Ibid.
aspect in people’s lives, such as income or overall welfare, in which they should be equal. Under substantive equality conceptions, when we think of allocations of benefits, rights, opportunities and the like, we think about them in terms of equalizing the aspect we have identified. The implied assumption is that the aspect we have identified is essential for people’s lives. If people are not equal with regard to it, they are not substantively equal.

Some scholars identify the object of welfare as the prime object of substantive equality. Other scholars, such as Dworkin, take it to be resources. My dissertation focuses on an object that has been overlooked in equality discourse, which is cultural identity. I therefore call my conception of substantive equality ‘equality of cultural identity’. As I will show, the object of cultural identity is different in important ways from traditional objects of substantive equality such as welfare or resources. In order to show these differences, I will first explore Dworkin’s influential theory of equality in resources.

Dworkin contrasts his theory with what he calls “conceptions of equality of welfare”. According to Dworkin, all conceptions of equality of welfare assume that every person has different preferences, and the overall welfare of every person depends on the satisfaction of his or her specific preferences. If we see overall welfare as the aspect we wish to promote, we will perceive a distribution of goods as just if it satisfies the different preferences of different people. That is, if at the end of the day all people’s preferences are equally satisfied, the distribution of goods is just.

54 Ibid.
55 Dworkin calls this conception of equality in welfare “equality of successes” (Dworkin, Sovereign Virtue, supra note 9 at 16-17).
Dworkin criticizes equality in overall welfare for failing to consider people’s responsibility for their own preferences.\textsuperscript{57} Complete adherence to equality in welfare would require a great deal of goods to be distributed for the sake of satisfying people who have preferences for luxuries such as gourmet food or expensive activities such as skiing and diving. Assuming that resources are limited, and that people with cheap preferences contribute an equal amount of goods to the general pool, it is unjust to satisfy the preferences of people with expensive tastes at the expense of people with less expensive tastes. In addition, equality in welfare fails to take into consideration people’s responsibility for their careless actions. People should not be compensated for the outcome of actions such as gambling which they know may affect their welfare.

Dworkin’s equality of resources aims to solve the problem of responsibility that arises from equality in welfare. Dworkin’s model reflects the idea that people are and should be responsible for their own choices. Under Dworkin’s model, the amount of welfare individuals derive from the resources that are available to them reflects the responsibility each of them took or failed to take for their own choices and preferences.\textsuperscript{58}

According to Dworkin, thinking about a hypothetical auction can help us to understand the features of a just model of distribution. In this auction, all people receive the same amount of means to bid on what they consider to be valuable goods. The price of every good is determined by its relative attractiveness for other people. As more and more people desire a specific good, its price is higher. Coveted goods that most people perceive as valuable will therefore require large amounts of resources. The auction is run a number

\textsuperscript{57} Dworkin, \textit{Sovereign Virtue}, supra note 9 at 49-49, 59; Miller, “Equality”, \textit{ibid.} at 85.
\textsuperscript{58} Dworkin, \textit{Sovereign Virtue}, \textit{ibid.} at 74; Miller, “Equality”, \textit{ibid.} at 88.
of times. It ends when all people are satisfied with the bundle of goods they possess.\textsuperscript{59} Dworkin suggests thinking about satisfaction in terms of envy. All people are satisfied with their bundle of goods when they do not envy other people. That is, the auction ends when all people know that they could not acquire a better bundle of goods with the fixed amount of means they were given.\textsuperscript{60}

From this point, people will be responsible for their own choices. People who have expensive preferences will consume more goods from the bundle they have, but would not be compensated if they have a deficit in goods only because of their expensive preferences.\textsuperscript{61} This scheme assumes that people take responsibility for their own choices and encourages them to do so.\textsuperscript{62} It requires one to pay the price of his or her specific preferences.

Dworkin acknowledges that there are expensive preferences for which people cannot be responsible. He draws a distinction between brute luck and option luck. Society should compensate for preferences that are the result of brute luck but not for preferences that are the result of option luck. Brute luck is luck for which no one is responsible. Option luck, on the contrary, is luck for which people are responsible by choosing to expose themselves to it. A good example of brute luck is a childhood disease with which someone is born. A good example of option luck is gambling – a practice for which people are usually responsible.\textsuperscript{63} The general idea that underpins the distinction between brute luck

\begin{footnotesize}
\begin{enumerate}
\item Dworkin, \textit{Sovereign Virtue}, \textit{ibid.} at 68.
\item \textit{Ibid.} at 67.
\item \textit{Ibid.} at 73.
\item Miller, “Equality”, \textit{supra} note 56 at 88.
\item Dworkin, \textit{Sovereign Virtue}, \textit{supra} note 55 at 73-82, 287.
\end{enumerate}
\end{footnotesize}
and option luck is “that if my fortune in life is to reflect my choices and not my circumstances, the effects of those circumstances must be cancelled”. 64

At first blush, it seems that Dworkin’s model overcomes the problem of responsibility for choice that equality in welfare raises. However, as David Miller argues, this is not the case. Dworkin’s model also fails to overcome the problem of responsibility for choices. Miller notes that prices of goods in Dworkin’s model are determined by their relative attractiveness to all people. Goods that many people desire are expensive, whereas goods that only a small number of people desire are cheap.

Miller asks us to think about shifts in the general subjective preferences of the public. Suppose that when the goods were sold, beer was the most popular drink. People who wanted to profit from producing beer bought the essential goods that are required for beer production. These goods were expensive because they were very popular among people. However, as times go by, beer ceases to be popular. Wine has become the most popular drink. The people who paid a lot for beer producing equipment are left with little or no resources to buy other goods that are required for producing wine. This situation is not just because it does not result from a shift in the preferences of the people who bought beer production equipment but rather it results from a shift in the preferences of the general public. The preferences of the people who bought beer production equipment have remained making money, and they are not responsible for the change in other people’s preferences. The situation does not result from the shift in the particular preferences of the

people who bid on these goods in the first place. They therefore should be compensated for this shift because they are not responsible for it.\textsuperscript{65}

At this point you might think that another auction is necessary. It would erase unfair differences in people’s resources that resulted from the general shift in other people’s preferences. But, as Miller argues, Dworkin’s model, which was supposed to overcome the problem of people’s responsibility for their own preferences fails exactly at this point. A new auction will let the people who shifted their preferences from beer to wine a new opportunity to bid on wine with the new means they have received. By letting them have what they prefer now (wine), the new auction does not hold them responsible for having changed their preferences.\textsuperscript{66}

Miller suggests that the problem of responsibility can be solved by moving from Dworkin’s simple model of equality to a complex model of equality, which I will discuss in the next section. However, before moving to discuss complex equality, I would like to point out another problem with simple equality models, that is, the problem of minority participatory goods.

Think about a linguistic minority’s preferences to receive education in the minority language. Note that education is a participatory good. Unlike other resources, it cannot be consumed individually.\textsuperscript{67} Education costs money. Maintaining educational institutions is expensive. In the case of the majority group, the cost is divided between many members, whereas in the case of minorities, it is divided between few people. Therefore, it is more expensive for minority members to receive education in their own language. If a minority

\textsuperscript{65} Miller, “Equality”, \textit{supra} note 56 at 89.
\textsuperscript{66} \textit{Ibid.} at 88.
\textsuperscript{67} Denise G. Réaume, "Individuals, Groups and Rights to Public Goods" (1988) \textit{U.T.L.J.} 1 at 3 [Réaume, "Individuals, Groups and Rights to Public Goods"]. Education is a public good and Dworkin’s model does not deal with public goods (\textit{ibid.} at 88; Dworkin, \textit{Sovereign Virtue}, \textit{supra} note 55 at 65).
member wishes to receive education in her own language, she must do it at the expense of her other preferences.

Is this situation just? At first blush, this seems just. Under Dworkin’s model, minority members are responsible for their preferences for education in their language, just as they may be responsible for having other expensive taste preferences. However, the high price of education in a minority language is not a result of an expensive taste. Rather, it is because minority members happen to be a minority. If there were more people who wanted education in the minority language, its price would be lower. Therefore, minority members are unjustifiably required to pay more than majority members for the same good, namely education in their own language.

If linguistic minorities just happen to be minorities in a specific state, one may argue that Dworkin’s model may compensate minority members because the minority language they happen to speak could be perceived as a brute luck for which they are not responsible. This seems to be one of the principles underlying Kymlicka’s argument for group specific rights, when he indicates that inequalities in cultural membership are “unchosen inequalities” that are “present from birth”. 68

However, as I will explain it section 6, a cultural identity should not be viewed as a forced condition that is beyond the control of minority members. In many cases, minority members are free to reflect and revise their cultural identity or transfer to the majority culture. Minority members who choose not to do so value their culture as an intrinsic part

68 Kymlicka, Multicultural Citizenship, supra note 6 at 109, 113, 126. Kymlicka argues that in some cases minority members are responsible for their preferences. The state should not support the language of immigrant minorities because they chose to immigrate, and therefore are responsible for their preference of education in their own language (Kymlicka, Multicultural Citizenship, supra note 6 at 79, 113-114). Elsewhere, I criticize this argument and suggest an alternative criterion for deciding which minority members are most deserving of state support for their culture (Meital Pinto, “On the Intrinsic Value of Arabic in Israel – Challenging Kymlicka on Language Rights” (2007) 20 Can. J. Law & Juris. 143).
of their personal identity. Speaking a minority language is very different from classic examples of preferences that are the result of brute luck such as childhood disease. As I will show in Chapter 3, a minority member may choose to adhere to her language not because she does not have the ability to speak the majority language and there is nothing she can do about it, but rather because she perceives her language as a marker of her cultural identity. In sum, the problem of inequality between majority and minority members is neither a matter of expensive taste nor brute luck. Rather, it is that minority and majority members need to pay different prices for the same types of goods.

As I see it, the problem of responsibility for choices and the problem of goods that only minorities desire in Dworkin’s model result from its pretence to reduce all aspects in people’s lives to one currency. It seeks to unify all aspects of life into one notion either at the level of realization, when Dworkin examines the option of equality in welfare, or at the level of potential, when he puts forward his theory of equality in resources. For this reason, equality in welfare and equality in resources are called ‘simple equality’ models.69

The problem is that Dworkin’s model assumes that an object such as resources is convertible to all other goods one may desire, without taking into consideration factors such as the social meaning of each good and the way it is perceived in society. For instance, even if the state gives minority members more resources in order to get education in their minority language, when larger society conducts its affairs mainly in the majority language, minority members are still required to compromised their cultural identity and language, which they value, while majority members are not required to make such a sacrifice. That is, even when they have more resources, minority members will be pushed not to use them to advance their culture, which they value, because the social

69 Walzer, Spheres of Justice, supra note 11 at 13-17; Miller, “Equality”, supra note 56 at 82.
circumstances are not hospitable to using their resources in this way. Therefore, an allocation of more resources in this case does not solve the problem of inequality.

A notion of substantive equality that mitigates or eliminates this problem by separating different aspects in people’s lives is Michael Walzer’s complex equality model of Spheres of Justice. As I will argue later on, Walzer’s model coincides with our moral and legal intuitions about the right justification for any robust theory of equality, namely respecting all people’s dignity. It can also guide courts in determining the extent of accommodation that minority members deserve. In the next section, I will present Walzer’s model.

4. Walzer’s Model of Complex Equality

The model of complex equality is not devoted to just distributions of goods with regard to one aspect in people’s lives such as welfare or resources. Instead, it identifies a number of aspects that are all crucial to people’s lives such as economy, education and health. Walzer perceives each aspect as a sphere in one’s life.

According to Walzer’s theory, there are various different social goods in society. Every social good or set of goods, such as money, health, education and the like, constitutes a different sphere. In every sphere a unique and different criterion is defined for the distribution of goods that belong to that sphere. The question whether a distribution is just or not is determined by the social meaning of the good at stake. For instance, in the case of the good of health care, the criterion of its distribution is need. This is an important point. Unlike Dworkin, Walzer does not try to suggest universal criteria such as

---

70 Walzer, Spheres of Justice, ibid. at 18.
71 Ibid. at 10.
72 Ibid. at 9.
73 Ibid. at 84.
preference and envy according to which all goods in society should be distributed. On the contrary, Walzer stresses that there is no single standard for distribution which applies to all spheres of justice, but rather there are standards for every social good and every distributive sphere in every particular society.  

In addition to thinking about criteria that apply to each sphere, Walzer suggests thinking about the relation between the spheres. As he rightly notes, it is usually the case that what happens in one distributive sphere affects what happens in others. For example, the rich get better health care than the poor, even when they are not in greater need of it than the poor. The distributive standards in every sphere are often violated, the spheres are invaded and the goods are usurped by powerful people in other spheres.

Walzer argues that states should limit as much as possible situations in which some group of men and women – class, caste, or social formation – come to monopolize a dominant good. As Walzer defines it, a dominant good is a good that is “more or less systematically converted into all sorts of other things – opportunities, powers, and reputations”. The way to limit or prevent such monopolizations is to reduce the effect of dominant goods on other goods. States should narrow the range within which particular goods from one sphere of justice are convertible to different goods from other spheres of justice. For instance, a state can reduce the dominance of money by deciding that money is not convertible to better health care. By creating a system of only public health care for

---

everyone, rich people would not be able to buy private health care services which put them in an advantageous position with respect to the poor.

The result of such a complex equality scheme may be the existence of many small inequalities, but inequalities are not multiplied through the conversion process. Complex equality therefore means that “no citizen’s standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good.”

What is the aim of Walzer’s theory? What does it illustrate? One possibility is that the notion that underlies Walzer’s theory is compensation. People may score differently in every sphere but an equal distribution is achieved when their high score in one sphere compensates for their low scores in a different sphere. The talent for writing which makes someone an acknowledged writer compensates for his scoring low in the sphere of wealth. In other words, Walzer’s theory illustrates that equal distribution is achieved when the existence of one good from one sphere balances the absence or deficit of a different good from another sphere.

As Miller argues, this interpretation does not accord with Walzer’s basic presupposition that goods which belong to different spheres are fundamentally different in kind. This means that every good in each sphere has an incommensurable value that should not be assessed relatively to goods from other spheres. If we compare between the different values of different goods and say that one’s lack of talent for writing is

81 Ibid.
82 Ibid. at 19.
83 Miller, “Equality”, supra note 56 at 94.
84 As Walzer emphasizes: “[T]he principles appropriate to the different spheres are not harmonious with one another; nor are the patterns of conduct and feelings they generate. Welfare systems and markets, offices and families, schools and states are run on different principles: so they should be” (Walzer, Spheres of Justice, supra note 11 at 318).
compensated by the great amount of money he has, then we assume the commensurability of goods and allow the dominance of one good over other goods.  

Another suggestion is to identify Iris Young’s principle of preventing domination of powerful groups over weak groups as underlying Walzer’s theory. It is true that both Young and Walzer indicate they wish to prevent domination in society, but they mean two different kinds of domination. Young criticizes distributive models of equality such as equality of welfare or resources for their focus only on distributions of material goods and ignorance of the roots of the problems of inequality which are depicted by Young as social oppression and domination mechanisms. Young argues that many equality claims demand not only distributions of material goods but also elimination of social structures and institutions of domination and oppression. In sum, Young’s argument is about preventing any situation in which one group is more successful than another group, whereas, as I will show, Walzer is not committed to this outcome.

Like Young, Walzer stresses that the ideal social model he suggests is just because it prevents domination in society. Similarly to Young, he also brings social structure and institutional context under evaluation and not only distributions of material goods. However, unlike Young, I argue that the aim of Walzer’s theory is not preventing any situation of domination. Rather, according to my interpretation, Walzer uses the idea of

85 Miller, “Equality”, supra note 56 at 94.
86 See Young, Justice and the Politics of Difference, supra note 7 at 18-39. Moreau indicates that as opposed to political theorists, most philosophers do not deal directly with inequality in the distribution of political and social power (Moreau, “The Wrongs of Unequal Treatment”, supra note 37 at 292).
87 Young, Justice and the Politics of Difference, ibid. at 20, 37.
88 In the preface to his book, Walzer states that “The aim of political egalitarianism is a society free from domination … My purpose in this book is to describe a society where no social good serves or can serve as a means of domination” (Walzer, Spheres of Justice, supra note 11 at xiii-xiv).
89 Young defines institutional context as “any structure or practices, the rules and norms that guide them, and the language and symbols that mediate social interactions within them, in institutions of state, family, and civil society, as well as the work-place” (Young, Justice and the Politics of Difference, supra note 7 at 22). Walzer’s model, which refers to the spheres of economy, health and education, therefore takes into consideration institutional context.
domination as a tool to illustrate his way of understanding what respecting equality means. As I will explain later on, Walzer’s understanding of equality, which is illustrated by the idea of eliminating domination, accords with the prevailing legal understanding of equality, according to which respecting equality means respecting the human dignity of all individuals.

Walzer argues that his model prevents domination because it does not allow an advantage in one sphere to be converted to an advantage in another sphere. Walzer’s model prevents the domination of goods in one sphere over goods in other spheres in one’s personal life. However, it does not prevent a situation in which people are generally more dominant in society than others, which is what Young would like to prevent. Think about a person who scores highly in every dimension of her life: she is very intelligent, she is rich, she is good looking and she is also a great politician. Now let us think about a person who is not very bright, ugly looking, poor and lacks political skills. In general, some people may be independently successful in every sphere while others may not be. At the end of the day, people who succeed in all spheres of life have dominance over people who do not. Walzer’s theory neither prevents nor aims to prevent such a situation and rightly so.

I argue that Walzer’s theory aims to explain and illustrate what human dignity is. Under Walzer’s theory, people are treated as having an equal status in one sphere despite their inequality in other spheres. It means that people are assessed only by relevant considerations to the distributed good at hand. Their application to a position, for example,

---

90 Miller, “Equality”, supra note 56 at 95.
91 Miller also mentions that Walzer’s framework allows inequalities in the distributions of specific goods and therefore does not alleviate general social inequalities. Large differences in income, for instance, “will almost inevitably create a segregated society in which people live very different styles of life and associate socially almost entirely with those on similar incomes.” (David Miller, “What Kind of Equality Should the Left Pursue?” in Jane Franklin ed., Equality (London: IPPR, 1997) 83 at 96).
92 Miller, “Equality”, supra note 56 at 95; Miller, “What Kind of Equality Should the Left Pursue?” ibid. at 95.
should be assessed only by considerations that are relevant to that job: talent and competence to perform it.\textsuperscript{93} No other considerations such as the applicant’s monetary status should be taken into account. As Miller stresses:

The appeal of an egalitarian society, the reason why social equality is widely valued, is that it aspires to be a society in which people deal with one another simply as individuals, taking account only of personal capacities, needs, achievements, etc without the blocking effect of status differences.\textsuperscript{94}

The principle of taking account of only relevant considerations is a manifestation of the principle of human dignity. Distributions of goods that take into account irrelevant considerations fail to respect people’s dignity. We will come to this conclusion if we think about two common ways of denying people’s dignity: prejudice and stereotype.\textsuperscript{95}

By ‘prejudice’ and ‘stereotype’ I mean imposing a trait or a characteristic on an individual only because he or she belongs to a group – not because he or she actually possesses them. When a trait or characteristic is imposed on a person by other people only because of her group affiliation, regardless her individual capacities and needs, her autonomy to present herself according to her specific and unique individual capacities and abilities, hence her dignity, is violated. The general definition I have just provided fits two forms of stereotype and prejudice. In the first form, the fact that a person belongs to a group serves as a proxy, as an indicator that he or she is likely to have a specific character that is relevant to the distinction at hand. When men are assigned to combat positions in the army and women are assigned to administrative positions, gender serves as a proxy for capacities to perform a position in the army. The assumption is that women are physically

\textsuperscript{93} Walzer, \textit{Spheres of Justice}, \textit{supra} note 11 at 136-137.
\textsuperscript{94} \textit{Ibid.} at 93.
\textsuperscript{95} Réaume, “Discrimination and Dignity”, \textit{supra} note 40 at 679-686.
weaker than men and less suitable for combat positions. This is in spite of the fact that some individual women have the capacities that are required for combat position.

Under the second form of stereotype and prejudice, distinctions between individuals are also made on the basis of their group affiliation. However, their group affiliation does not serve as a proxy for a characteristic or a trait that they allegedly possess, but rather as an irrelevant consideration for the matter at hand. A paradigmatic claim against this form of stereotype was brought in the Brown case.96 The decision that was challenged in Brown not to allow blacks to study in the same school with whites was based on an irrelevant consideration, namely race revealed by skin colour. Skin colour, in this case, was not used as a proxy for some other trait relating to education, but this is still a stereotype because all black people were thought to have something in common, which justified separating them of white people. In fact, however, the government failed to show any necessary connection between skin colour and education.

In cases such as Brown, the government should have disregarded the irrelevant consideration of skin colour. Skin colour is a person’s characteristic but it has nothing to do with his or her other characteristics such as educational capacity, social capacity and the like. The Brown case is similar to Walzer’s example of the unnecessary connection between the characteristic of one’s monetary status and the characteristic of one’s capacity to perform a certain job. A law or a practice that considers job applications on the basis of monetary status harms people’s ability to define themselves with regard to their capacity to perform a job by linking this capacity to a characteristic that is irrelevant to their capacity to perform a job – their monetary status.97 Taking this irrelevant characteristic into

96 Essert, supra note 40 at 412.
97 The Brown case and Walzer’s example differ in one particular aspect. In Brown, the equality claim was not
consideration amounts to a harm to their dignity because it does not consider them for who they really are.

Walzer’s principle of taking only relevant factors into consideration does not amount to a formal conception of equality in the legal sense. While formal equality requires that like cases be treated alike, it does not specify any way in which we can distinguish irrelevant factors from relevant factors that make people alike. Walzer’s model, on the other hand, provides a way to distinguish relevant factors or criteria from irrelevant factors. Under Walzer’s model, a person’s high standing in one sphere is an irrelevant factor for a distribution in another sphere.

While in Brown the claim for equality asked for group affiliation (race) to be ignored, other claims for equality demand group affiliation to be taken into account, even when this character is seemingly irrelevant. I argue that they should be considered similarly to claims for equality, such as the one that was raised in Brown, which are justified by the principle of dignity. For example, the Canadian case of Edwards Books\(^9^8\) discusses a claim raised by Jewish and other Saturday observers to be exempted from Sunday closing laws in Ontario, which prohibited all citizens from opening their businesses on Sunday – the Christian day of rest. Their claim was that the Sunday closing legislation pressured them to keep their business open on Shabbat in order to be able to based on a material harm. The argument was that even if separate schools for blacks were equal to white schools in terms of quality of education, discrimination would have still taken place. This is because a law that differentiates between whites and blacks with no reason expresses the message that black students are less worthy than white students. The harm that was done to black students in Brown is an ‘expressive harm’ (Ron Levy, “Expressive Harms and the Strands of Charter Equality: Drawing out Parallel Coherent Approaches to Discrimination” (2002) 40 Alberta L. Rev. 393 at 399-400; Essert, ibid. at 412). Walzer’s example on the contrary involves the material harm of losing a job. However, the shared element between them is still valid because both cases are a result of taking irrelevant considerations into account. For this purpose it therefore does not matter if the resulted harm to the discriminated people is material or not.

equally compete with other businesses. Put differently, they claimed that their interest in practicing their religion by observing Shabbat was important to them and it should not compete with their interest in making a living. Using Walzer’s terms, the claimants in Edwards Books identified religious identity as a dominant sphere that invades the sphere of economic prosperity. When Sunday closing laws are permitted, one’s standing in the sphere of economic prosperity is undercut by his standing in the sphere of cultural identity. An individual’s standing as a member of a cultural minority should not undercut his ability to participate in the economic sphere.

The Jews and other Saturday observers in this case allegedly had two valid options. Namely, the option to adhere to their religious practice and make less profit, or the option to abandon their religious practice and enjoy the same opportunity to make profit as members of the Christian majority. In the case of Brown, in contrast, the black students might be indifferent to their skin colour but their environment was not. There was nothing that the black students could personally do in order to improve their situation. The only thing that they could do is to ask that their irrelevant characteristic, i.e. their skin color not be taken into account. Nevertheless, although Saturday observers in Edwards Books unlike the black pupils in Brown, had an alternative option of action, I argue that expecting them to make a choice between their religion and their income infringes their right to equality.

In the remains of this chapter I will argue that claims similar to the one that was raised in Edwards Books should also be perceived as equality claims. This is because the rationale behind them is the same rationale that underpins prevailing claims for equality, that is, the interest in protecting people’s dignity by eliminating unjust discrimination. As I have shown, Walzer’s theory of equality provides one way of understanding what human
dignity is. I will later argue that cases such as the Edwards Books case fit nicely into Walzer’s framework in two ways. First, in such cases there is a clear domination of one sphere over another. Second, the claims in such cases appeal to the notion of preventing harm to people’s dignity.

On the whole, the conception of dignity that underpins claims from cultural identity in such cases is largely consonant with the prevailing conception of dignity as it is reflected in current equality jurisprudence. However, it also deviates from it in important ways. In order to show this, I will first depict the prevailing conception of dignity and stress the important role that the component of personal and cultural identity plays in it. Then I will suggest a conception of dignity that underlies claims from cultural identity.

5. The Prevailing Universal Conception of Dignity in Equality Jurisprudence

In Canada and Israel the principle of human dignity is perceived as underpinning equality.

99 Dignity is acknowledged by the Supreme Court of Canada as underpinning substantive equality.100 The following excerpt from Iacobucci J.’s judgment in the Law case101 captures a broad conception of dignity that in my view can be read in two different but related ways:

---

100 The Canadian Supreme Court first adopted the substantive notion of equality in the Andrews case. The court neglected the formal equality conception of treating like cases alike and moved towards the substantive equality conception that challenges the category of ‘like’ by taking into account the impact of the legislation on the people who are not included in the like category (Andrews, supra note 46 at 174). A few years later the Supreme Court acknowledged the concept of dignity as underpinning the right to equality in s. 15 of the Charter (Miron v. Trudel, [1995] 2 S.C.R. 418 at 486, 488-489, 492, 494 [Miron v. Trudel]).
The equality guarantee in s. 15(1) [of the Canadian Charter] is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.102

Justice Iacobucci defines human dignity in terms of autonomy and self-determination. Protecting dignity means protecting every individual’s capacity to define himself and to exercise his autonomy.103 I identify two components of dignity as autonomy that emerge from Iacobucci J.’s definition. The first is sensitive to individuals’ different capacities and merits, whereas the second is sensitive to individuals’ different needs.

The first component of dignity as autonomy, namely capacities and merits, underpins what I will call ‘the universal conception’ of equality. It is developed in current legal literature and is recognized as underlying equality claims, as I will now show. The second component of dignity, namely needs, is usually invoked in the context of equality claims that pertain to basic material needs which should be provided to all individuals, such as food, shelter or basic social needs such as education. I argue that the second component of dignity, namely needs, also underlies claims from cultural identity and underpins what I will call ‘equality of cultural identity’. It is underdeveloped and is not usually recognized as underlying equality claims. After discussing the first component and

102 Ibid. at 23-24.
its manifestation in equality jurisprudence in Canada and Israel, I will develop the second component and explain why it should be invoked in cases concerning claims from cultural identity that are also about equality, usually between the majority and minority groups.

The capacities and merits component of dignity is very useful for addressing equality claims about discriminations on the basis of stereotypes or prejudices. A good example of a case that applies the merits and capacities component of dignity is the Canadian *Miron* case, which challenged the Insurance Act. The Act allowed only married spouses to be compensated for the loss of income of their partners due to a car accident and denied this benefit to common law partners. Justice McLachlin rules that the distinction between common law partners and married couples with regard to the Insurance Act is an unjust discrimination. Justice McLachlin ignores the irrelevant factor of marital status and focuses only on the capacities of common law partners. If compensation is given to married couples on the assumption that they function as a stable economic unit that is seriously impaired when one of the adults in the unit loses his or her ability to support his or her family, it should also be given to common law partners because they exhibit the same capacities.

The Israeli case of *Danilovitch* similarly illustrates the capacities component of dignity. *Danilovitch* deals with homosexuals’ right to equal treatment. El-Al, Israel’s national airline had a policy of providing free flight tickets to employees’ common law

---

104 *Miron v. Trudel*, supra note 100.
105 *Ibid.* at paragraph LI. A similar conception of dignity is drawn by L'Heureux-Dubé J. in her dissenting opinion in *Egan*: “Equality, as that concept is enshrined as a fundamental human right within s. 15 of the Charter, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity”. (*Egan v. A-G. Canada*, [1995] 2 S.C.R. 513 at 543 (emphasis added)).
heterosexual partners or spouses, but not to same-sex common law partners. El-Al asked to overturn a decision of the National Labour Court that obliged El-Al to equally provide free flight tickets to all employees’ common law partners, including same-sex partners.

Justice Barak emphasizes that the distinction between homosexual common law partners and heterosexual common law partners is based on stereotypes and not on relevant considerations because homosexual partners live together and have joint households just as heterosexual partners do. Justice Barak invoked a dignity conception that ignores differences between people such as sexual orientation and concentrates only on individuals’ merits and capacities such as the capacity to have a meaningful and stable relationship with a partner.

The same conception of dignity that concentrates on individuals’ merits and capacities is adopted by the Israeli Supreme Court decision in Miller. Alice Miller had challenged a practice in the Israeli Defense Forces (IDF) according to which women were not admitted to its combat-pilot course. Miller’s request to volunteer for the course was rejected although she met the basic criteria for admission. It was rejected mainly because of what the army called ‘logistic reasons’. Since in Israel women can put an end to their military service when they become pregnant, or when they get married, all the resources that are invested in their training in the combat pilot course can be in vain. Miller turned to

107 Ibid. at 764.
108 For the neutral approach that Barak J. adopts in Danilovitch, which disregards differences such as sexual orientation see Raday, “Social Science in the Law”, supra note 46 at 405-407. Alon Harel rightly observes that the neutral approach was so dominant in Barak J.’s analysis that “one scarcely notices that the decision is a gay discrimination case” (Alon Harel, "Gay Rights in Israel - a New Era?" (1996) 2 International Journal of Discrimination and the Law 261).
109 HCJ 4541/94 Alice Miller v. Minister of Defense 49(4) P.D. 103 [Alice Miller].
the Supreme Court of Israel, claiming that IDF’s decision not to admit her to the pilot-combat course infringed her equality rights.\textsuperscript{110}

Justice Maza states that the IDF cannot argue that women are disqualified from serving as combat pilots only because they are women. In Maza J.’s eyes, the argument according to which the training of women to be combat pilots is not worthy in spite of the fact that they possess the relevant qualifications, is a strident argument.\textsuperscript{111} Justice Dorner stresses the role of stereotypes in sending degrading messages about members of vulnerable groups by ignoring their individual merits and capacities. Justice Dorner therefore concentrates on capacities and merits and ignores irrelevant characteristic of individuals such as gender. She supports this approach by quoting Justice Brennan in the American Supreme Court decision in the case of \textit{Frontiero v. Richardson}\textsuperscript{112}:

Sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth….The sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.\textsuperscript{113}

It may be argued that the expense involved in training women to be combat pilots are relevant to the case and therefore justify the distinction between women and men. While these considerations are relevant to the case, they are not relevant to Miller’s personal characteristics. Miller may wish to raise children and to be a combat-pilot at the same time, or not to have children at all. Assuming that all women have children and are


\textsuperscript{111} Alice Miller, \textit{supra} note 109 at 115-116.

\textsuperscript{112} 411 U.S. 677 at 686-687 (1973).

\textsuperscript{113} Alice Miller, \textit{supra} note 109 at 133-134.
their primary caretakers is a stereotype which does not take seriously Miller’s characteristic and capacities as an autonomous individual..

The theoretical literature articulates how stereotypes and prejudices such as the ones that were used in the cases above amount to harming people’s autonomy and dignity. Distinctions that are based on prejudice and stereotype usually establish rules that exclude members who belong to certain minority groups. They are based on prejudices and stereotypes about a minority group that impose a specific trait or characteristic on its members, merely because of their membership in or affiliation to this group. The image or the character that is imposed neither fits the actual capacities of the specific individuals nor is irrelevant to the matter at hand.114 Such generalizations assume, for instance, that all women are weak, or that all gays are incapable of having meaningful relationships with their spouses. They therefore also deny people’s ability to present themselves and be respected according to who they really are, i.e. their own unique individual characteristics.115 Stereotypes about an individual are not derived from his or her own attempt at self definition but rather adopted by others in order to avoid an individualized investigation into his or her particular abilities or circumstances.116

I call this conception the universal conception of dignity. It is universal because it considers all people as having equal worth and therefore should be considered as such. It does not depend on any criteria, but being human and it applies to all individuals, regardless of their sex, race, religion, ethnic origin or any other affiliation. The universal conception of dignity has originated from Immanuel Kant who argues that unlike all other objects in the world, all humans have the potential to engage in deliberation about their

---

114 Réaume, “Discrimination and Dignity”, supra note 40 at 682-683.
115 Ibid. at 677.
choices and actions. This potential, which is shared only by humans, endows all humans with dignity. The term ‘dignity’ captures all humans’ intrinsic moral worth which cannot be taken from them.\footnote{117} Kant is commonly understood as arguing that humans cannot be treated only as means of achieving other ends because such a treatment derogates from their dignity, their absolute moral worth. Persons cannot be perceived as means without being perceived at the same time as ends.\footnote{118} The principle of treating all humans as ends entails recognizing the autonomy of all humans, i.e. their ability to have their own choices and preferences and act in accordance with them.\footnote{119}

In the aftermath of World War II, the universal conception of dignity became the foundation of all rights in modern constitutional states such as Canada, Germany and Israel.\footnote{120} In light of the racism and atrocities of WWII, it reconfigured the relationships between the individual and the state. Fidelity to dignity-based rights guarantees has become the new legitimation of the democratic state.\footnote{121}

A conception of equality that is underpinned by the interests in protecting all people’s dignity applies to all humans only because they are human.\footnote{122} The universal

\footnotesize

\footnote{117} Immanuel Kant, \textit{Groundwork of the Metaphysics of Morals}, trans. By Mary J. Gregor (Cambridge: Cambridge University Press, 1998) 43; Réaume, “Discrimination and Dignity”, \textit{supra} note 40 at 676; Hill, \textit{Dignity and Practical Reason}, \textit{supra} note 103 at 47-48; George Fletcher points to the similarities between Kant’s idea about universal humanity and reasoning in Genesis, according to which all humans have equal worth as all of them are created in the image of God. In his view, Kant secularized the image of God by capturing the idea in his notion of universal humanity (George P. Fletcher, “In God's Image: The Religious Imperative of Equality under Law” (1999) 99 \textit{Colum. L. Rev.} 1608 at 1619, 1624); See also Starck, \textit{supra} note 103 at 180; Izhak Englard, “Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework” (2000) 21 \textit{Cardozo L. Rev} 1903.


\footnote{119} \textit{Ibid.} at 492.


\footnote{121} \textit{Ibid.} at 330.

\footnote{122} Fletcher, \textit{supra} note 117 at 1611; Réaume, “Discrimination and Dignity”, \textit{supra} note 40 at 675.
conception of dignity entails equal treatment of all humans as human, regardless of religion, culture, race, gender and the like.\textsuperscript{123}

The universal conception of dignity is helpful in cases such as \textit{Brown}, \textit{Miron}, \textit{Miller} and \textit{Danilovitch}. In this kind of cases, the individuals who claim to be discriminated against argue that differentiating them from other individuals because of their affiliation to a specific group (blacks, common law partners, women, and gays) amounts to a wrongful discrimination. The wrongful discriminations in all of these cases were based on stereotypes that make generalizing assumptions about individuals based on their affiliation to minority groups.

However, society cannot avoid all kinds of generalization. When the law prohibits individuals from driving under a certain age, it makes a distinction on the basis of age-group affiliation. It assumes that all people under a certain age are not responsible enough to drive a car. This is in spite of the fact that there might be young people, whose individual capacities do not fit this image.

Our basic intuition tells us that the distinction in the driving licence case is permissible, while the distinctions in cases such as \textit{Brown}, \textit{Miron}, \textit{Miller} and \textit{Danilovitch} constitute wrongful discrimination. A closer look at the driving licence case, however, reveals that young persons’ dignity is nevertheless violated, at least to some extent, when their individual capacities to drive are not considered and an image of irresponsible persons is imposed on them. In a utopian society with unlimited resources, we would prefer to check every person’s individual capacities to drive responsibly, regardless of his

or her age. This is the most morally desirable scenario, but it is usually unachievable due to pragmatic constraints.

We usually justify age-based discrimination, such as the one in the driving licence case, by appealing to pragmatic constraints. By contrast, we do not similarly justify the generalizations in Brown, Miron, Miller and Danilovitch even when the state can point out legitimate pragmatic considerations. This is because in Brown, Miron, Miller and Danilovitch, the discrimination targeted members of vulnerable minority groups. Distinctions on the basis of individuals’ affiliation to a vulnerable group are likely to express a demeaning message towards them, which violates the principle of treating all people with dignity. A demeaning message is likely to be conveyed by such distinctions because they replicate familiar forms of discrimination towards members of vulnerable group that have put them in a disadvantageous position in the past.\textsuperscript{124} It is the history of racism and segregation towards blacks in the U.S. that makes the distinction between blacks and whites demeaning in the Brown case, and the history of subordinating women that makes the distinction between men and women demeaning in Miller.

However, the universal conception of dignity is insufficient to deal with cases in which differences between individuals, such as religious and cultural affiliation, should serve as a basis for distinguishing them from other individuals. The universal conception of dignity has been criticized for being too individualistic, and for abstracting away from group characteristics such as religion, culture and gender, which may have a crucial influence on individuals’ personal identities. Such characteristics influence the way people

\textsuperscript{124} Deborah Hellman, \textit{When is Discrimination Wrong}? (Cambridge, MA: Harvard University Press, 2008) 21-25
perceive and present themselves to others.\footnote{A good example of this view is manifested in the cultural feminist theory which celebrates the influence of gender on identity. It argues that because women are the primary caretakers of young children, their empathy to others is built into their definition of self. They define their identity through relationships of intimacy and care and therefore become more caring, loving and responsible to others than men (see Robin West, "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1 at 14-28).} Group differences that are part of individuals’ personal identities should not always be ignored. Moreover, as we have seen in the \textit{Edwards Books} case, laws that allegedly do not differentiate between people based on group affiliation are not always such. They often reflect and respond to the characteristics of the majority group, and impose them on minority groups.\footnote{This criticism was heard from feminist scholars with regard to laws that are allegedly neutral but in fact reflect and represent only men. According to this criticism, the universal liberal perception of dignity (as I have now depicted it in short) defeats the purpose of achieving equality between man and women (see for example, Drucilla Cornell, \textit{At the Heart of Freedom: Feminism, Sex, & Equality} (Princeton: Princeton University Press, 1998) 16; Carole Pateman, \textit{The Sexual Contract} (Stanford, CA: Stanford University Press, 1988) 42). This is also Charles Taylor’s view with regard to allegedly neutral laws. According to Taylor, such laws not only harm the identity of minority members by forcing them into an homogeneous culture that is untrue to them, but also discriminate against minority members by forcing them to integrate into the majority culture that such ‘neutral’ laws actually represent (Charles Taylor, “The Politics of Recognition” in \textit{Philosophical Arguments} (Cambridge, MA: Harvard University Press, 1997) 225 at 236-237 [Taylor, “The Politics of Recognition”]).}

In other words, the universal conception of dignity ignores important differences between individuals that pertain to their cultural identity. I will argue that cases such as \textit{Edwards Books} reveal a need to explicate a conception of dignity that takes cultural differences between individuals as permissible grounds for distinction and underpins equality claims.

6. \textbf{A Cultural Identity Conception of Dignity}

In the previous section I have distinguished between two components of dignity. The first is sensitive to individuals’ capacities and merits and insensitive to individuals’ cultural background. I have called it ‘the universal conception of dignity’. The second component of dignity focuses on individuals’ particular needs. When legal scholars discuss needs in the context of dignity, they usually refer to basic material needs such as food, shelter and
the like.\textsuperscript{127} Satisfying these basic needs is assumed to be part of respecting people’s dignity. Basic needs such as food and shelter are indeed important. However, when I discuss the second component of dignity, namely the needs components, I refer to individuals’ cultural identity based needs. I will therefore call it ‘the cultural identity conception of dignity’. In the reminder of this section I will develop this conception of dignity and explore the notion of cultural identity that underpins it.

The cultural identity conception of dignity should be invoked against ‘one size fits all’ rules that unfairly exclude vulnerable groups.\textsuperscript{128} These rules impose the same standards on the majority and minority groups, e.g. a uniform dress code, without acknowledging their different cultural needs, e.g. wearing religious symbols. ‘One size fits all’ laws diminish people’s autonomy, mostly that of minority members, in a way that is different from but also related to the way that autonomy and dignity are diminished by exclusion rules. The way in which autonomy and dignity are diminished by ‘one size fits all’ laws is underdeveloped in the literature. Whereas exclusion laws such as the ones in Brown, Danilovitch and Miller, are analyzed in terms of equality and dignity, cases involving claims from cultural identity like the Edwards Books case are usually not analyzed in terms of equality and dignity. In this section I argue that claims from cultural identity should also be included under the umbrella of equality and dignity.

Individuals have different needs that have to be taken into account because they have different cultural identities. When these needs are not taken into account, people’s autonomy and dignity are harmed. While the universal conception of dignity, which is


\textsuperscript{128} Réaume, “Discrimination and Dignity”, ibid. at 669.
sensitive to capacities and merits, ignores irrelevant differences and applies universal standards to all people, claims that point at different cultural needs are legal claims for accommodation. Seana Shiffrin defines accommodation as “a social practice in which agents absorb some of the costs of others’ behaviour, even if this behaviour is voluntary”. In other words, accommodation is a practice that places a burden on some people, typically the majority, to meet the needs of other people, typically minority groups.

Shiffrin refers to various kinds of accommodation that are very common in western democracies. Her examples vary from exemptions of conscience to the military draft in the U.S, to employment-related accommodations such as exemptions from working on Saturdays. Shiffrin also mentions accommodations around child, parent and spousal care practices by formal means such as the Family and Medical Leave Act in the U.S. which allows workers to take up to twelve weeks of unpaid leave to care for a newly born child, or an ill spouse.

Accommodation is given in two kinds of cases. In the first kind, the people who need accommodation are not responsible for their special needs. For example, people who were born disabled. In the second kind, the people who need accommodation are prima facie responsible for their special needs because they voluntarily choose to be involved in practices, such as religious rituals, that place a burden on others.

The second kind of accommodation practices, namely the existing accommodation practices to which Shiffrin alludes, and cases such as Edwards Books, pose a challenge to theories of equality. As I have mentioned in section 4 under simple theories of equality,

---

129 Shiffrin, supra note 12 at 275.
130 Ibid. at 275-277.
132 Shiffrin, supra note 12 at 277 fn.10.
the distribution of goods does not compensate people for choices for which they are responsible. They do not compensate people for harms caused by practices to which they voluntarily wish to adhere.\footnote{Anderson argues that dominant theories of equality concentrate on distributions of privately enjoyed goods. They are therefore detached from egalitarian problems of recognition and accommodation of minority groups, which are politically and culturally disadvantaged. Anderson maintains that this problem stems from the fact that most theories of equality perceive the fundamental aim of equality as compensating people for their undeserving bad luck (Anderson, “What Is the Point of Equality?”, \textit{supra} note 24).}

If in \textit{Edwards Books} the people discriminated against can be better off by choosing the option of giving up their religious practice, in \textit{Brown} the people discriminated against can do nothing to avoid discrimination. Cases like \textit{Brown} therefore fit most people’s egalitarian intuitions of compensating people for their brute luck, i.e. harms that are not the result of their own choices, which simple equality models try to capture.\footnote{Dworkin, \textit{Sovereign Virtue}, \textit{supra} note 55 at 73-82, 287. On brute luck see also \textit{supra} note 62.}

Religious affiliation may be perceived as brute luck – as something that people do not choose but are rather born into. However, as Shiffrin argues, adults sometimes choose whether or not to practice their religion and sometimes also convert to other religions during their lives. Most adults are competent “to assess whether they endorse the beliefs to which they were acculturated and whether they wish to continue to practice”.\footnote{Shiffrin, \textit{supra} note 12 at 281. See also Anna E. Galeotti, \textit{Toleration as Recognition} (Cambridge: Cambridge University Press, 2002) 65.} Moreover, many people adhere to religious practices for social reasons or because of customs, culture and tradition. Their adherence is motivated by voluntary actions rather than compulsion.\footnote{Shiffrin, \textit{ibid.} at 281. For an argument along this line see also Anne Phillips, \textit{Multiculturalism without Culture} (Princeton: Princeton University Press, 2007) 108-114.} Shiffrin therefore argues that accommodation is not justified by compensating for brute luck. Alternatively, she suggests that accommodation is justified by protecting people’s autonomy. This includes protecting their ability to make voluntary choices even when they are costly to others.
As I have said, dignity is commonly perceived in terms of autonomy. The ultimate justification for accommodation is therefore dignity. For most modern thinkers, autonomy refers to people’s capacity to govern themselves. An individual lives an autonomous life if she leads her life according to her chosen plan. Joseph Raz sees personal autonomy as “the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives”. According to Raz’s perception, our self worth is based on being self-directed effective agencies in the world.

As we can see, the common definition for autonomy includes the notion of self. Without having a sense of self we cannot develop any capacity for being self directed – for living our life as affective agents. Autonomy therefore includes the freedom to form and express our personal identity. Our choices become meaningful in light of the personal identity we develop in the course of our lives. Personal identity is therefore a necessary basis for making meaningful choices which in turn contribute further to the development of our personal identity. Autonomy cannot exist without personal identity.

Identity defines needs. Different identities define different needs. A conception of dignity that emphasizes people’s different needs, as opposed to merits and capacities, and justifies legal practices of accommodation, therefore pays special attention to the notion of identity. This is the place to distinguish between personal identity and cultural identity. For

---

140 Raz, The Morality of Freedom, supra note 19 at 369.
142 As Raz nicely puts it: “Evidently the autonomous life calls for a certain degree of self-awareness” (Raz, The Morality of Freedom, supra note 19 at 371).
the purpose of this thesis I adopt the following definition of personal identity: “the set of characteristics each person has that makes her the person she is”.145 Personal identity is a set of properties that consist of “the way you see or define yourself, or the network of values and convictions that structure your life”.146 I define cultural identity as a subset of the properties that consist of a person’s personal identity and come from her culture. They may include beliefs, values, dispositions to act in certain ways, etc.

The definition of cultural identity I adopt is influenced by a theory of the relation between culture and identity. Charles Taylor claims that an individual’s personal identity is intimately connected to the cultural group to which he or she belongs. According to Taylor, identity is “who we are”, “where we’re coming from”.147 It is the definition of ourselves to us and to others.148 We define ourselves by telling us and others the things that are important to us, the things that set us apart from others.149 In other words, personal identity includes the norms and beliefs about our world and ourselves that we adopt for ourselves and present to others.

We learn what good is by learning all the things that are considered as good in our specific culture.150 From this point, we can create our own conception of what is good which can deviate from, or interact with, the general conception. Things therefore take on importance for people only against a general background.151 Taylor calls this general background ‘a moral space’.

---

148 Ibid. at 35.
149 Ibid.
150 Taylor, Sources of the Self, supra note 143 at 28.
151 Taylor, The Ethics of Authenticity, supra note 147 at 37.
The term ‘moral space’ refers to “a space in which questions arise about what is good or bad, what is worth doing and what is not, what has meaning and importance, and what is trivial and secondary”.152 In other words, a moral space is an imaginary space that serves as a basis for making important moral decisions about our moral positions, our way of life, the goals we want to achieve and the like.153 It is the source that makes the norms and beliefs available for adoption. Personal identity is therefore defined by Taylor as our stand, our orientation in a moral space.154

In Taylor’s eyes, we take a stand in the moral space through a constant dialogue with society that surrounds us.155 As Taylor explains, the question “who are you?” already assumes that an individual places herself as a potential interlocutor in a society of interlocutors.156 In the ongoing process of dialogue we shape our personal identity and we aim at getting recognition for it by society.157

Accommodation therefore may be seen as a form of recognition. It expresses respect for people’s choices and willingness to bear the costs for them. Recognition and accommodation are an integral part of dignity, understood in terms of needs. As Thomas Hill argues, the principle of dignity entails respecting not only people’s material needs but also their need for full recognition as persons.158 All humans are respected not merely for

---

152 Ibid.
153 Taylor’s notion of a moral space is somewhat similar to Will Kymlicka’s idea of ‘context of choices’. However, later on in this chapter I will argue that there is a fundamental difference between Kymlicka’s account of context of choices and Taylor’s notion of identity.
154 Taylor, Sources of the Self, supra note 143 at 28. Taylor suggests that by orienting ourselves in a moral space we differentiate ourselves from others. As Mellissa Lane nicely puts it: “The suggestion is that just as being surrounded by space requires us to orient ourselves as physical beings in relation to points in it, so being surrounded by other human beings requires us to orient ourselves as interlocutors in relation to them […] Plurality forces us to stand in moral space just as depth forces us to stand in physical space” (Melissa Lane, “God or Orienteering? A Critical Study of Taylor’s Sources of the Self” (1992) 5 Ratio 46 at 50).
155 Taylor, Sources of the Self, ibid. at 36.
156 Ibid. at 29.
157 Ibid.
the general capacities and rights they share with others, but also for their particular identities that are bound up with particular attachments and traditions. If the moral idea of dignity requires us to respect humans as sources of value, and if humans come to form values in light of different cultural contexts, then by adopting the idea of dignity we are also committed to accommodating the cultural diversity of humans.

A prevailing justification for accommodation practices is the argument from cost. In my view, however, the cultural identity conception of dignity does a better job in justifying accommodation practices than the argument from cost. According to the argument from cost, the justification for accommodation is preventing the unjust personal costs people need to pay if their needs are not accommodated. For example, Will Kymlicka argues that accommodation is justified by minority members’ important interest in access to their culture because it constitutes their context of meaningful choice. Kymlicka asks why members of cultural minorities need access to their own culture and not just access to any culture, such as the majority culture. Kymlicka’s answer is the costs involved in moving from one culture to another. Kymlicka maintains that “there is a question whether people should be required to pay those costs unless they voluntarily choose to do so”.

The argument from costs has its strengths, but it does not provide full justification for the practice of accommodation in situations in which the majority is willing to bear the costs that are involved in transferring minority members to the majority culture. In such

---

159 Ibid. at 79.
160 Ibid. at 87.
161 Kymlicka, Multicultural Citizenship, supra note 6 at 82-83, 105.
162 Ibid. at 85.
163 Ibid.
situations we are allegedly left with no justification for accommodation practices. However, the cultural identity conception of dignity, which I am developing in this section, provides full justification for accommodation.

Kymlicka’s answer lacks the component of authenticity, which is necessary for autonomy, i.e. the ability to reflect on one’s own values with an appropriate background. The only appropriate background for deliberating about one’s own values is one’s own culture because one’s own culture is the source for these values in the first place. Only if we recognize the importance of such deliberation, can we justify the requirement to protect one’s own culture.

Autonomy is the freedom to independently act, reflect and choose without coercion. There are therefore two conditions for autonomy: competence, namely the ability to act freely and rationally, and authenticity. In Taylor’s view, under the ideal of authenticity, each individual is thought to have a unique personal identity, an original way of being human, to which she or he strives to be true. Authentic individuals are true to their distinctive personal identity. By acting authentically we first seek recognition from our selves. However, since the development of personal identity is a dialogical process, we

---

164 Perhaps, for this reason Kymlicka also mentions that people are deeply attached to their culture “because of the role of cultural membership in people’s self-identity”. Cultural membership affects how “others perceive and respond to us, which in turn shapes our self-identity” (Kymlicka, Multicultural Citizenship, supra note 6 at 89). However, Kymlicka does not fully articulate the argument from identity.


166 Christman & Anderson “Introduction”, ibid.

further seek recognition from other people. In other words, being authentic means allowing our inner self to govern our outer space.\textsuperscript{168}

Shiffrin articulates the relation between autonomy, authenticity and accommodation of individuals’ cultural identities. Shiffrin argues that what underlies accommodation is not merely preventing unjustified costs, but protecting autonomy. Without accommodation one cannot freely choose to adhere to one’s own culture because she worries about the negative implications her choice will have for herself and others. This knowledge prevents her from making the right decision for herself. It clouds her judgment by forcing her to consider irrelevant considerations, that is, factors that do not concern her wish to adhere to her culture.\textsuperscript{169} Accommodation relieves these negative implications, thus allowing free choice.

Shiffrin claims that accommodation of cultural and religious practices prevents decisions that are taken in an unauthentic manner.\textsuperscript{170} Merely having more options to choose from is not always sufficient for full autonomy. The actual choices that are open to people are important. These choices should be made after people have been allowed access to their own cultural background through accommodation. This is why merely relieving people of the costs involved in transferring to the majority culture does not give them true autonomy. If one’s essential venue of choices is restricted, the fact that there are other venues does not always compensate for that. Due to the centrality of cultural identity in the lives of many individuals, the ability to be authentic should be protected as much as

\textsuperscript{168} Ibid. at 81.
\textsuperscript{169} Shiffrin, supra note 12 at 289-290.
\textsuperscript{170} Ibid. at 291.
possible.\(^{171}\) Accommodation should be understood as protecting our ability to be authentic.\(^{172}\)

The universal conception of dignity assumes that all humans share a universal potential for being humans that deserves equal respect. The idea of cultural identity on the other hand seems particularistic because it stresses the differences between individuals and cultures. But as Taylor argues, the idea of cultural identity also relates to the universal potential all humans share. Every individual has the potential to develop his or her authentic cultural identity that will receive recognition from society. This potential that all humans share therefore deserves equal respect.\(^{173}\) Equal acknowledgment of the cultural identity of all people is about recognizing the product that different persons have actually generated out of their common potential as human beings.\(^{174}\)

Although they are both considered under the legal umbrella of substantive equality, the relation between the universal conception of dignity and the cultural identity conception of dignity is similar to the relation between formal and substantive equality as the analytic philosophers perceive them. The universal conception of dignity tells us to treat all people as equals, but it does not say in which aspect all people are to be considered as equal. It only requires us to ignore irrelevant characteristics to the matter at hand. The cultural identity conception of dignity fleshes out the universal conception because it requires us to treat all people as equals by equally protecting one important aspect in their lives – their cultural identity.

\(^{171}\) Ibid.
\(^{172}\) Ibid. at 271.
\(^{174}\) Ibid. Along this line, the conception of dignity in German constitutional law is understood as protecting not an isolated, disembodied, unattached and autonomous individual, but rather as protecting individuals flourishing within identity communities (Weinrib, “Human Dignity as a Rights-Protecting Principle”, supra note 120 at 339).
The cultural identity conception of dignity protects people’s cultural identity by stressing the essential part of authenticity in autonomy. But it should not be understood as an essentialist conception according to which there is one true and fixed cultural identity which people with a shared history and ancestry hold in common. That is, the cultural identity conception does not necessarily compel people not to change their tradition or stray from it. It is not about a fixed product that people with the same background have to reveal and sustain. The formation of cultural identity is done through a dialogue with others, it never stops evolving and acquiring different shapes. Cultural Identity is a matter of ‘becoming’ as well as ‘being’. It is not something that already exists and only needs to be discovered, but rather something that is always in process.

As Yael Tamir rightly argues, there is no ‘right’ way to practice a culture or to belong to it. People should feel free to treat the practices of their cultural context not as frozen but rather as dynamic which may change from time to time. However, such changes are brought about in light of the values that their culture already offers them. Such a picture of authenticity “portrays individuals not as free of context, but as free within a context”.

Taylor’s theory purports to make sure that if a change in a minority member’s cultural identity is to be made, it is not coerced, but done only after she has had the ability

---

175 As Stuart Hall rightly argues, instead of thinking of identity as an already accomplished fact, which cultural practices represent, we should think of cultural identity as a production which is never complete, always in process, and always constituted within, not outside, representation (Stuart Hall, “Cultural Identity and Diaspora” in Jonathan Rutherford ed., *Identity: Community, Culture, Difference* (London: Lawrence & Wishart) 222.
176 Ibid. at 225.
to reflect and deliberate on the values of their culture in an as uninterrupted way as possible. Taylor’s account of authenticity therefore seems to underpin Shiffrin’s idea of autonomy through accommodation.

While autonomy is essential, nobody enjoys maximal autonomy. We can never do everything we wish. In particular, we do not always receive recognition of our choices and actions. This is because as Taylor notes, recognition is achieved through a dialogue with society. It is a struggle and it can also fail.\textsuperscript{179} People may come from different moral backgrounds or have formed different moral outlooks and views, which may be incompatible with those of other people. People do not receive recognition from society for every life choice.

Since autonomy is not unlimited, and it is obvious that people cannot be accommodated for every choice they make, there should be guidelines that will help courts to decide when to accommodate and to what extent. In the next section I argue that the notion of equality provides these guidelines.

7. **Equality of Cultural Identity as a Means of Regulating Claims from Cultural Identity**

It is not by accident that equality has been recognized as a strong component within the right to religious freedom.\textsuperscript{180} But on the other hand, one may say that almost every right or entitlement can be described in terms of equality because all individuals who are qualified

\textsuperscript{179} Taylor, *The Ethics of Authenticity*, supra note 147 at 48.

\textsuperscript{180} As Lorraine Weinrib notes with regard to the *Big M* decision (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295), in which the constitutionality of Sunday closing laws in Ontario was challenged, “of particular significance was the strong equality component recognized within the guarantee of freedom of religion” (Lorraine E. Weinrib, “‘Do Justice to Us!’ Jews and the Constitution of Canada” in Daniel J. Elazar, Michael Brown and Ira Robinson eds., *Not Written in Stone: Jews, Constitutions, and Constitutionalism in Canada* (Ottawa: University of Ottawa Press, 2003) 33 at 47).
for them have an equal right to them.\footnote{Raz, \textit{The Morality of Freedom}, \textit{supra} note 19 at 228.} We frequently read about the right to equal concern and respect,\footnote{\textit{Ibid.} at 228. The right to equal concern and respect is perceived by Ronald Dworkin as the most important one (Dworkin, \textit{Taking Rights Seriously}, \textit{supra} note 23 at 272-273).} or the equal right of all to freedom of expression, to security and so on. This reality may create confusion with regard to the role of equality. It may even create the impression that equality is redundant or an empty idea.\footnote{Raz, \textit{The Morality of Freedom}, \textit{ibid.} About the allegedly empty idea of equality, see Peter Westen, “The Empty Idea of Equality” (1982) 95 \textsl{Harvard Law Review} 537.} I would therefore like to clarify the role that the concept of equality plays when it accompanies claims from cultural identity.

As I have shown, the universal conception of dignity cannot fully justify legal practices of accommodation that stand at the basis of claims from cultural identity. In contrast, the cultural identity conception of dignity, which respects people’s needs that stem from their cultural identity and enables them to act authentically, justifies accommodation. The cultural identity conception of dignity underpins the complex equality model I would now like to suggest - Equality of Cultural Identity. It illustrates why claims from cultural identity are claims about equality. It also points at the extent of accommodation minority members deserve.

As you recall, Walzer claims that states should limit as much as possible situations in which some group – class, caste, or social formation – comes to monopolize a dominant good.\footnote{Walzer, \textit{Spheres of Justice}, \textit{supra} note 11 at 12.} The way to limit or prevent such monopolizations is to reduce the effect of dominant goods.\footnote{\textit{Ibid.} at 17.} States should narrow the range within which particular goods from one sphere of justice are convertible to different goods from other spheres of justice.\footnote{\textit{Ibid.}}

\begin{thebibliography}{99}
\bibitem{note181} Raz, \textit{The Morality of Freedom}, \textit{supra} note 19 at 228.
\bibitem{note182} \textit{Ibid.} at 228. The right to equal concern and respect is perceived by Ronald Dworkin as the most important one (Dworkin, \textit{Taking Rights Seriously}, \textit{supra} note 23 at 272-273).
\bibitem{note184} Walzer, \textit{Spheres of Justice}, \textit{supra} note 11 at 12.
\bibitem{note185} \textit{Ibid.} at 17.
\bibitem{note186} \textit{Ibid.}
\end{thebibliography}
Walzer does not include cultural identity among the spheres of justice. But, he notes that “goods have different meanings in different societies”\textsuperscript{187} and that the “means of domination are differently constituted in different societies”.\textsuperscript{188} In other words, Walzer’s list of goods such as birth, blood, and landed wealth is not exhaustive. In fact, Walzer invites us to think about other kinds of spheres.\textsuperscript{189}

The goods that constitute spheres in Walzer’s theory are examples of means of dominations.\textsuperscript{190} For Walzer, identifying the actual means of domination in a specific society is a social investigation and interpretation of shared understandings about social goods and their boundaries in a particular culture.\textsuperscript{191} Means of dominations are therefore created by a community’s culture, which is “the story its members tell so as to make sense of all the different pieces of their social life”.\textsuperscript{192}

The examples of cases I have provided in the first section show that in some societies, cultural identity is a central means of domination of the majority cultural group over cultural minorities. I therefore propose to view cultural identity as a sphere of justice in the lives of individuals, especially in minority members’ lives. Under my suggestion, the good which is distributed in the sphere of cultural identity is accommodation.

In the following I will give examples of the way the sphere of cultural identity is invaded by other spheres, especially when it comes to individuals who are minority members. I will show that because of this invasion people need to choose whether to adhere to their distinctive cultural identity or to give up on it in order to succeed in other

\textsuperscript{187} Ibid. at 7.
\textsuperscript{188} Ibid. at xiii.
\textsuperscript{190} Walzer, Spheres of Justice, supra note 11 at xiii.
\textsuperscript{192} Walzer, Spheres of Justice, supra note 11 at 319.
spheres of their lives. By examining harms to minority members’ cultural identities from the point of view of the spheres of justice model, we can understand that these harms can be mitigated or even prevented if the dominant good of majority culture, religion and language would not be convertible to other goods, such as money, education and career, which belong to other spheres of justice.

I suggest that comparing the extent to which minority members’ sphere of cultural identity is threatened or invaded by other spheres in their lives to the extent to which majority members’ sphere of cultural identity is invaded or threatened by other spheres in their lives, points at the extent of accommodation that minority members deserve. This is why we need the notion of equality to accompany claims from cultural identity. Merely pointing at the relevant legal right, such as the right to freedom of religion, does not give us a specific answer with regard to the extent of protection one deserves under this right.

There are two possible ways to think about the relation between equality and the rights underpinning claims from cultural identity. The first one is to perceive equality as part and parcel of the rights in question. Under this view, for example, the right to freedom of religion is the equal right of all individuals to freedom of religion. The second option is to perceive equality as an independent right that supplements other rights with an additional component of equality they do not include.193

My characterization the role of equality in relation to claims from cultural identity is consistent with both views. Regardless of which side one takes in this debate, there is still the question of what an equal protection by a right entails. My conception of equality of cultural identity answers this question in the case of claims from cultural identity. As I have indicated, it determines the extent of protection one deserves when one invokes a

193 For these two option see Raz, The Morality of Freedom, supra note 19 at 227-229.
claim from cultural identity. Under my conception of equality of cultural identity, when a minority member raises a claim from cultural identity, she points out the extent to which her cultural identity sphere is invaded by other spheres in her life. The extent of accommodation that will rectify this situation is determined by the extent to which majority members’ sphere of cultural identity is invaded by other spheres in their lives. Accommodation should be given to the extent to which it rectifies the gap between the extent to which the majority members’ cultural identity is secured and the extent to which minority members’ sphere of cultural identity is secured.

In other words, claims from cultural identity are claims for equality, whether equality is perceived as part of the relevant right, or whether it is invoked as an independent right. The appeal to equality enables us to compare the level of protection one individual or group receives under a given right to the level of protection another individual or group receives under the same circumstances. The gap between the level of protection points at the extent to which such protection should be given to the disadvantaged individual or group. The conception of equality of cultural identity identifies the level of protection individuals ought to receive under the same right by examining the extent to which spheres in their lives invade one another.

An example involving language rights will illustrate my suggestion. All persons grow up and develop in a cultural context. Let us think about an Arab individual in Israel who has developed his coherent cultural identity according to the core values his Arab culture offered him. The Israeli education system provides him with elementary and high school education in Arabic. An Arab person therefore internalizes the concepts and modes of thought that his language and culture provide him. These are building blocks that
constitute the fundamental elements of his cultural identity. Now he wishes to take actions and fulfil his aspirations, such as pursuing academic studies and developing his own career.

Yet, there is no university in Israel which provides higher education in Arabic. Such a reality forces Arab minority members who wish to take part in academic life in Israel to do so in Hebrew – a language that offers different building blocks and values. In other words, they are compelled to compromise their cultural identity for their wish to acquire academic education. Such a situation arguably harms their capability of being authentic. If they wish to pursue higher education, they are forced to adopt a language that belongs to the majority culture without having a free opportunity to deliberate and reflect on their own cultural values within the sphere of education.

The dominance of the majority language over the sphere of education violates the principles set by Walzer. Language should not be a dominant good which is convertible to dominance in other spheres of life such as the economic and political spheres. The sphere of cultural identity should not be threatened by other spheres, such as the sphere of education. Such a state of affairs creates inequality between minority and majority members (I elaborate more on this point in Chapter 3 of this thesis.).

In comparison, members of the Jewish majority in Israel do not face such a dilemma. Hebrew is the teaching language in almost all academic institutions in Israel. Hebrew speakers’ sphere of cultural identity is therefore not invaded by the sphere of education. This comparison helps us see the extent of accommodation that is needed. If we recognize cultural identity and education as important spheres which should not invade one another, and see that members of the Hebrew speaking majority need not choose between
the two, we reach the conclusion that higher education in Arabic is required. Higher education in Arabic should not necessarily take the form of Arabic speaking universities that are separated from Hebrew speaking universities. Other options such as bilingual academic education may also minimize the influence of the majority language as a dominant good on minority members’ sphere of cultural identity.

Is there any other option to mitigate the influence of the sphere of cultural identity on the sphere of opportunity and to advance in life other than protecting and accommodating minority languages? In states like Israel or Canada, for instance, the government can decide that all linguistic communities will need to learn Esperanto, which will be the official and major language of the state. As opposed to Hebrew, Arabic, English or French, Esperanto is not associated with a particular culture. This way, Canada could easily avoid linguistic clashes between Francophones, Anglophones and other linguistic minorities. Israel would avoid clashes between Arabs and Jews. In such a case, equality between minority and majority members is achieved.

Is this solution just? From an essential egalitarian perspective, as long as there is no gap between people in terms of the benefits and goods that are available to them, this solution is morally just. In other words, Arabs cannot raise claims for accommodation merely on the basis of equality. However, independently of the right to equality, both majority and minority members prima facie have a strong claim for their own language protection when Esperanto is the only language that is protected by the state. They have a

194 Essential egalitarian policies attribute intrinsic value to the aim of eliminating gaps between people with regard to specific goods such as resources (Scanlon, supra note 49 at 2). Raz calls the principles behind essential egalitarian policies ‘strictly egalitarian principles’ because they are designed to promote equality as such. According to strictly egalitarian principles, people are entitled to a specific good only if other people already have this good. Strictly egalitarian principles “reflect the view that it is wrong or unjust for some Fs to have G while others have not”. Such inequality can be remedied either by giving G to all other Fs, or by depriving G from the Fs who have them (Raz, The Morality of Freedom, supra note 19 at 226-227).
claim according to which the state does not give them an option to adhere to their cultural identity by speaking their original language.

Minority members have a strong claim to equality and a strong claim for language rights once the majority receives language rights. Once majority members can freely conduct their lives in their language, whether they receive official language rights as in Canada, or whether their language is the *de facto* dominant language, while minority members cannot, equality can be used to compare the extent of autonomy majority members can exercise with the lesser extent of autonomy that minority members can exercise. In such a case, minority members can raise a claim for language rights, which should be regulated by the notion of equality.

Let us now think about the *Edwards Books* case. Let us imagine that there were no Sunday closing laws. Instead, the government creates Tuesday closing laws. On Tuesday, no citizens are allowed to work. Saturday and Sunday observers would not have any claim to freedom of religion. They are not prevented from observing their own Sabbath. Saturday and Sunday observers do not have a claim for equality as well. Assuming that there are no atheist citizens or citizens who observe other days, Saturday and Sunday observers are equally disadvantaged.

Saturday observers have a claim for freedom of religion and equality once they are disadvantaged in comparison to Sunday observers. Once it is decided that Sunday is a Sabbath day and not Saturday, Saturday observers can claim that they are discriminated against. If Jewish business owners for instance wish to adhere to their religion, then they can only work five days a week and not six like most of their Christian competitors.195

---

My analysis shows that cases such as *Edwards Books* cannot be decided based on the right to freedom of religion alone, without reference to equality considerations. As Dickson C. J. explains in the *Big M* case, which also concerns Sunday closing acts, “in proclaiming the standards of the Christian faith, the [Sunday closing] acts create a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians”.

Let us now think about another claim for freedom of religion in terms of Walzer’s theory. In the *Adler* case, members of the Jewish community claimed that the state should equally support Jewish, Muslim and non-Catholic Christian religious private schools in Ontario in the same manner it funds Roman Catholic public schools. However, the Canadian Supreme Court rejected the appellants’ claim. The majority in *Adler* found that the funding of Roman Catholic schools was required by s. 93(1) of the Constitution, and that since s. 29 of the Charter explicitly exempts from Charter challenge all rights and privileges guaranteed under the Constitution in respect of denominational, separate or dissentient schools, the claimants did not have standing to allege a violation of their right to equality.

Although s. 29 exempts from Charter challenge all rights and privileges guaranteed under the Constitution in respect of denominational schools, the appellants did not question

---

196 *Big M*, supra note 180 at 337.
197 *Adler*, supra note 35.
198 The *Adler* case was discussed by the Human Rights Committee in 1999 (CCPR/C/67/D/694 *Waldman v. Canada*). The Human Rights Committee decided that the government of Ontario discriminates against Jews because it does not subsidize Jewish schools as it subsidizes Roman Catholic schools. The Human Rights Committee mentioned that the distinction that was made in the Canadian Constitution in 1867 was made to protect the Roman Catholics in Ontario. However, the Committee stated that “the material before the Committee does not show that members of the Roman Catholic community… are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools” (section 10.4 of the decision). Following that decision, so Cote and Gunn indicate, the Ontario government proposed to modify its laws to include a new tax credit for parents of children of religious minorities that were not included within the constitutional protection. (Pauline Cote & Jeremy T. Gunn, “The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Canada” (2005) 19 Emory Int’l L. Rev. 685 at 691).
the constitutionality of subsidizing Catholic denominational schools. Rather, the appellants asked to receive equal subsidies for all denominations. By not subsidizing all denominational schools, the government inflicts harm on the cultural and religious identity of non-Catholics in Ontario. The practice of the government turns money into a good that is convertible to other goods, such as religious identity and education. The sphere of education should be governed by principles of distinctive identities: people who wish to adhere to their distinctive religious identities should have the opportunity to decide which school to send their children to according to their cultural and religious preferences. When the sphere of education and cultural identity is invaded by the sphere of money, wealthy parents are able to choose a desirable school for their children, which accommodates their distinctive religious identities, whereas poor parents need to choose between the good of cultural identity and the good of money. If people prefer the good of money, their religious identity is harmed and equality of cultural identity is not achieved.

One may argue that the government fulfills its duty by subsidizing secular public education, which is allegedly neutral. Along this line, McLachlin J., who considered the application of s. 15(1), argues that the discrimination is justified under s. 1 because of the government's aim to promote a multicultural society, which is best encouraged through a public education system.199

This argument would have some force if the state did not recognize the interest of one minority, namely the Roman Catholic minority, in religious education. But in any case, this argument is generally questionable. In my view, there is no such a thing as a neutral system of education. All systems of education carry with them values which are associated with some cultural identities. Secular systems of education thus carry with them the values

199 Adler, supra note 35 at 458-359.
of modern secular society. Therefore, when the state does not subsidize religious systems of education it basically compromises minority members’ access to their cultural identity.

The Adler case demonstrates another aspect of my conception of equality of cultural identity. Some object to putting claims for recognition in terms of equality. They argue that putting claims for recognition in terms of equality distracts society from problems of distribution, which should be the focus of equality. Nancy Fraser calls this “the displacement of socioeconomic redistribution by cultural recognition”. However, if we adopt the equality of cultural identity conception, the tension between recognition and distribution is mitigated. The conception of equality of cultural identity creates a unified theory for the politics of recognition and distribution of goods instead of viewing them as separate issues. Recognition of minority members’ different identities is an essential means of achieving a specific kind of economic equality. The framework I put forward translates claims for recognition to distribution of material goods. It shows how resources should be allocated to equally support all people’s interests in their cultural identity.

8. Conclusion

In this chapter I have dealt with the connection of claims from cultural identity to the right to equality. I have presented several examples of Canadian, Israeli and American legal

---

200 Along these lines L'Heureux-Dubé J., in a minority opinion, agreed with the claims of the appellants and suggested that the government of Ontario must provide at least partial funding to private Jewish schools (Adler, ibid. at 424).


202 For recognition as a means to achieve economic equality, see Iris M. Young, “Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory” (1997) 222 New Left Review 147. Young gives the example of discrimination of gays and lesbians that takes place in the economic sphere. When the legitimacy of homosexual or lesbian identity is recognized, less discrimination occurs in the sphere of economics. Young develops this argument in response to Fraser’s suggestion to distinguish between socioeconomic redistribution and the debate on cultural recognition in order to highlight tension between the two. In Young eyes, there is continuity and mutual reinforcement between the economic sphere and the cultural sphere (see also Phillips, supra note 24 at 147).
cases involving claims from cultural identity and shown that they also invoke the right to equality.

I have then addressed the following questions. What is the relation in such cases between the rights in question, e.g. the right to religious freedom, and the right to equality? Or, in other words, what work does each right do in establishing a legal claim from cultural identity? What conception of substantive equality best applies to claims from cultural identity? What is the normative justification of this conception of equality? How can this conception guide courts in determining the extent of required accommodation in a legal case involving a claim from cultural identity?

To answer these questions, I have brought together legally oriented and philosophically oriented equality scholarships. I have discussed current philosophical conceptions of substantive equality such as Dworkin’s equality in resources, which are characterized as ‘simple equality’ models. Expanding Miller’s critique of Dworkin’s model, I have argued that equality in resources fails to justly distribute resources to members of cultural minorities, because it makes them pay more than majority members for cultural goods such as education, not because they have expensive preferences, but rather because they are socially disadvantaged. Moreover, as Shiffrin notes, simple equality models fail to account for existing legal practices, which accommodate people not only for their brute luck, but for their voluntary choices, such as adhering to their culture.

I have therefore argued that we should adopt Michael Walzer’s “spheres of justice” conception. This conception is characterized as a ‘complex equality’ model, because it does not reduce all aspects in people’s lives to one aspect such as welfare or resources. Rather, it argues that each aspect, or sphere, should be separately dealt with. Walzer argues
for reducing the effect of dominant goods in society in order to eliminate dependence between different spheres. When the spheres are independent, every distributive decision in one sphere is considered only by considerations relevant to this sphere, thus equality is achieved.

I have argued that the notion that underlies Walzer’s theory of justice is not compensating people in one sphere for their lack of success in another sphere, or preventing a situation in which some people are generally more dominant or successful than others. Rather, what underpins Walzer’s model is human dignity. This is because dignity is protected when people are considered only by reference to relevant considerations that reflect their individual characteristics.

I have identified and distinguished between two conceptions of dignity: the universal conception, which is more developed in the legal literature, and the cultural identity conception, which is less developed. I have depicted the current perception of substantive equality in the Canadian and Israeli jurisprudence, as underpinned by the universal conception of dignity, under which the state should ignore irrelevant characteristics between individuals and concentrate only on their own capacities and merits, thus enhancing their autonomy. I have argued that while this approach can account for cases of stereotypes and prejudices, it is not helpful in regulating cases which deal with claims from cultural identity. These cases ask that differences such as religion and culture be taken into consideration rather than ignored.

Drawing on Taylor, Hill and Shiffrin, I have suggested another conception of dignity which I have called ‘the cultural identity conception of dignity’. This conception stresses the importance of authenticity and recognition of autonomy and therefore of
dignity. An autonomous person is a person who has the ability to act authentically in line with his cultural identity, that is to say the opportunity to deliberate and reflect as much as possible upon the values of his own culture without being interfered. I have identified this conception as the rationale for objecting to ‘one size fits all’ laws. Drawing on Shiffrin, I have argued that enhancing people’s autonomy by enabling them to act authentically best justifies legal practices of accommodation. This means that the cultural identity conception of dignity is the justification for accommodation, rather than elimination of individual costs, as Kymlicka maintains. However, I have noted that since autonomy is never infinite, a regulative principle that determines the just extent of accommodation that minority members deserve is required.

Having set out this foundation, I presented my own model of equality of cultural identity. I have identified cultural identity as a sphere in Walzer’s model. I have argued that the good distributed in it is accommodation according to the criterion of cultural needs. I have suggested that my conception be applied to legal cases involving claims from cultural identity. I have argued that by comparing the extent to which the sphere of cultural identity is invaded by, or invades, other spheres within minority members’ lives, the court can determine the extent of accommodation needed to protect minority members’ cultural identity. I have therefore argued that in such cases, the right in question, e.g. the right to religious freedom, establishes the entitlement to cultural accommodation, while the right to equality, as understood in my model, determines the required extent of the accommodation. Lastly, I have argued that my model dissolves the tension that has developed in equality scholarship between attentiveness to claims for distribution and attentiveness to claims for recognition.
Chapter 2:

What Are Offences to Feelings Really about?

A New Egalitarian Framework for the Multicultural Era

1. Introduction

In the last chapter I have articulated my conception of equality of cultural identity. I have argued that it provides a suitable basis for regulating claims from cultural identity. That is, the application of my conception provides a basis for determining the strength of claims from cultural identity in various cases, and the extent of accommodation that minority members, who typically raise these claims, deserve to protect their cultural identity. This chapter focuses on a particular kind of claims from cultural identity – claims of offence to feelings. I will show how my conception of equality provides a basis from which a regulative principle for claims of offence to feelings emerges. Before I suggest this regulative principle, I will briefly present recent examples of a particular kind of claims of offence to feelings that will motivate my account, and argue that they should be understood as claims from cultural identity.

In November 2006, ultra religious members of a Hasidic Jewish synagogue in the Outremont neighbourhood in Montreal complained that female exercisers who dressed immodestly could be seen from a neighbouring YMCA exercise room facing the synagogue. They claimed that the visibility of these women in the synagogue offended their religious values. They asked their neighbouring YMCA to install frosted windows in the exercise room facing the synagogue, and offered to cover the expenses. However, female exercisers at the YMCA regarded the request to install frosted windows as humiliating, saying that: ‘We represent evil to them.’ YMCA officials asserted that frosted...
windows seemed to be a reasonable accommodation of the Hasidic community’s religious needs.\(^{203}\)

Though the particularities of the above-depicted case are unique to the complex cultural context of Montreal, such problems are of a global nature. For example, the Danish cartoons, which I have mentioned in Chapter 1, associated Islam with terrorism and provoked anger among many Muslims now living in Western countries. Muslims have argued that these cartoons desecrate their deeply cherished religious values and offend their religious feelings.

Claims of offence to feelings were also raised in the recent controversy over the gay pride parade in Jerusalem. In this case, representatives of the three major monotheistic religions have argued that having such a parade in the holy city of Jerusalem offends their religious feelings and their right to religious freedom. In response, members of the gay community argued that the value of expressing the gay lifestyle in public was very important to their identity. Preventing them from expressing their lifestyle in public because their conduct offends the feelings of others offends their deepest feelings as well.

What dominated the debate in these affairs was the right to freedom of expression. In the case of the Danish cartoons for instance, Muslims’ arguments about their offended religious feelings were largely dismissed as sentimental claims, which have no independent legal status and in any case cannot outweigh the interest in freedom of expression. In Dworkin’s words: “in a democracy no one, however powerful or important, can have a

---

right not to be insulted or offended”. According to Dworkin’s line of reasoning, there should be no legal protection from mere insult to feelings be they related to sacred values as they may. In a similar vein, Cass Sunstein argues that no speech should be regulated just because people are offended by the ideas it contains. The state should consider the regulation of speech only in cases of hate speech against racial, ethnic or religious minorities in which there is a high probability that the speech will cause a real harm of violence and exclusion.

In this chapter, I provide a positive account for protecting people from offensive acts, independently of other considerations such as emotional or physical harm. I suggest a normative framework that takes seriously the interests people have in protecting their cultural identity. My framework determines when people are entitled to raise claims for such protection and the magnitude of their claims. The merits of my framework are twofold. First, it does not violate the neutral liberal principle according to which the state should remain as neutral as possible with respect to competing moral views that exist in society. Second, it provides the court with objective criteria for determining the severity of claims against offensive acts, and does not require the court to assess the extent of emotional pain the offensive acts arguably cause, which is subjective by nature.

---

204 This was Dworkin’s reply to the argument that the cartoon should be banned because it is abusive and insulting to Muslim groups in Western countries (Ronald Dworkin, “The Right to Ridicule” (March 2006) 53(5) The New York Review of Books 44).
205 This may be a simplistic account of Dworkin’s claim that the law should not interfere with harm to feelings. Dworkin provides a more detailed argument elsewhere. He explains that mere insult to feelings does not suffice as a moral reason for prohibiting a given practice by law (Dworkin, Taking Rights Seriously, supra note 23 at 250). In the rest of this chapter I will argue that the matter at stake in the Danish cartoons affair and other cases is not about mere insult to feelings as such but rather about offence to people’s integrity of cultural identity. My argument therefore aims to provide a substantive moral reason for involving the law in the regulation of offence against feelings, which is protecting people’s cultural identity, especially when they possess vulnerable cultural identity to begin with.
In section 2 I show that in Israel, the independent status of claims of offence to feelings is well-established. The Israeli doctrine clearly indicates that there is no need to show a physical harm of violence or emotional pain in order for a claim of offence to feelings to be legally considered. However, the theory that underpins this doctrine has not yet been established. Since my theory relies on general principles, it may call for re-evaluating current legal doctrines in other states with respect to not recognizing the independent legal status of claims of offence to feelings.

In section 3, I show that liberal scholars such as John S. Mill, H. L. A. Hart, and Joel Feinberg allude to the harm to one’s cultural identity that is caused by offensive expressions or practices that violate one’s cherished cultural values. These liberal scholars think about such offences to feelings as mediated by cultural values and norms. This means that the starting point of any theory about offence to feelings of this sort should be cultural values and norms that are central to people’s personal identities, rather than unpleasant feelings as such. When dealing with such claims, I therefore suggest that we use the term ‘claims from integrity of cultural identity’ instead of the term ‘claims of offence to feelings’.

In section 4 I present the vulnerable cultural identity principle for evaluating the severity of offences to people’s integrity of cultural identity, as they appear in a variety of legal cases. According to my suggested principle, the more people’s cultural identity is vulnerable, the more severe is the offence to the integrity of their cultural identity.

The vulnerable cultural identity principle appeals to the social status of the cultural identity at stake, not to its specific content. In other words, it does not require the court to delve into or morally evaluate the values and norms that constitute the offended cultural
identity. It therefore allows courts to be more objective. It allows them to acknowledge legal claims from offence to integrity of cultural identity and resolve disputes about them without comparing contested moral values that are brought by the two sides. It also does not require courts to declare one system of values as preferable to another.

The vulnerability of people’s identities is objectively measured according to their relative status in different spheres of their lives. For example, the more people are discriminated in the job market because of their religious affiliation or sexual orientation, and the more they have low achievements in the sphere of education, the more their cultural identity is vulnerable. That is, I perceive vulnerability of cultural identity not in subjective terms of the extent to which people feel offended, but in terms of the extent to which their equal status in society is harmed.

As I show in section 5, the vulnerable cultural identity principle stems from my cultural identity conception of substantive equality, which I have articulated in Chapter 1. It is underpinned by Michael Walzer’s conception of social justice in *Spheres of Justice*.207 This is because according to Walzer, substantive equality is achieved when the domination of one sphere in people’s lives over another sphere is minimized as much as possible. I identify cultural identity as an important sphere in people’s lives, and argue that individuals possess vulnerable cultural identity when other spheres, such as economic prosperity, dominate their cultural identity sphere. That is, when they are under constant pressure to compromise or abandon their cultural identity in order to achieve inclusion in general society and enhance their prospects of success in other spheres of their lives. These are typically the cases in which people deserve protection against offensive acts.

---

207 Walzer, *Spheres of Justice*, supra note 11.
The vulnerable cultural identity principle is also rooted in the concept of toleration. I draw on Anna E. Galeotti’s conception of *Toleration as Recognition*.\(^\text{208}\) Galeotti accepts the value of equal respect to all people, which is endorsed by scholars such as John Rawls and Martha Nussbaum as underpinning toleration. However, as opposed to Rawls and Nussbaum, Galeotti argues that in order for this notion to be realized, the state should not only guarantee its citizens’ negative freedom of expression, but also protect them from offensive acts that may compromise the equal respect they deserve. This includes protecting minority members from offensive hate speech acts for they may deter minority members from adhering to their culture and presenting their cultural identity in the public sphere.

In this chapter, I take Galeotti’s conception of toleration one step further. Galeotti takes her conception to entail only protection against hate crimes, whereas I hold that in general, every individual has a *prima facie* right to be protected from all acts that offend the integrity of his or her cultural identity. In particular, minority members with vulnerable identities require state protection from offensive acts if substantive equality is to be achieved.

The vulnerable cultural identity principle’s role is to help assess the severity of the alleged offence and the strength of claims from integrity of cultural identity. It does not serve as a threshold test that claims from integrity of cultural identity need to meet in order to be acknowledged as legal claims by courts. In section 6 I therefore discuss possible threshold tests. One such test, which I reject, is the moral responsibility principle. It entails that only people who are not morally responsible for being offended are eligible to raise legal claims from integrity of cultural identity. I argue that the moral responsibility test is

\(^\text{208}\) Galeotti, *supra* note 135.
too permissive as a threshold test. Alternatively, I suggest three cumulative threshold tests: the public sphere test, the trifles test and the cultural identity credibility test.

After having suggested a threshold test, I return in section 7 to the vulnerable cultural identity principle and discuss several factors, such as the socio-economic status of the cultural identity at stake, which may help to evaluate the severity of offences to integrity of cultural identity. Then, in section 8, I demonstrate how the vulnerable cultural identity principle can help evaluate the severity of offences to integrity of cultural identity in three types of cases. The first type of cases is ‘minority against minority’, namely minority members’ claims about offensive acts committed by members of another minority, e.g. the Jerusalem gay pride parade and the Montreal YMCA affair. In this case, according to the vulnerable cultural identity principle, all other things being equal, members from both groups have a vulnerable cultural identity, and therefore their claims are equally strong. In such a case, we should apply principles such as the captive audience principle in order to further evaluate the strength of the contested claims from integrity to cultural identity.

The second type of cases is ‘majority against minority’ e.g. the Muslim headscarf controversy in Europe. In such a case, typically, members of the majority possess a strong cultural identity, thus their claim from integrity of cultural identity is relatively weak. The third type is the opposite case of ‘minority against majority’, e.g. the Danish cartoon affair. In such a case, typically members of the minority possess a vulnerable cultural identity, thus their claim from integrity of cultural identity is relatively strong. The vulnerable cultural identity principle provides courts with a potent tool for assessing the severity of claims from integrity of cultural identity in various legal contexts. Combined with the
relevant legal doctrines as they appear in different legal contexts, the vulnerable cultural identity principle can help courts resolve such cases.

Thus, in this chapter I present a new legal framework for dealing with so-called offences to feelings. I identify the relevant offence as an offence to people’s integrity of cultural identity. I suggest the vulnerable cultural identity principle as an objective measure for determining the magnitude of people’s claim from integrity of cultural identity that does not require the court to engage in legal moralism. I show that the vulnerable cultural identity principle is rooted in my conceptions of equality of cultural identity and toleration, and demonstrate how it applies to three types of legal cases.

2. Claims of Offence to Feelings and Their Independent Status in Israel

Claims of offence to feelings may emerge in almost all areas of law. Let us start with criminal law. Some legal systems include the criminal offences of blasphemy and hate crimes that *inter alia* aim to protect religious persons from offence to their religious feelings by others. 209 It is worth mentioning that these offences are rarely prosecuted for a

---

209 Daniel Statman argues that blasphemy offences are a remnant of a period in which morality was equated with religion. Such a perception does not seem compatible with the common liberal perception of democratic states today. The new justification that is offered nowadays to blasphemy offences is that they aim to protect the religious feelings of believers (Daniel Statman, “Hurting Religious Feelings” (2000) 3 Democratic Culture 199 at 212 [Statman 2000]). Along this line Peter Jones argues that blasphemy offences in Britain were originally aimed at protecting Christianity. Later on they were interpreted as protecting the religious feelings of Christianity’s believers (Peter Jones, “Blasphemy, Offensiveness and Law” (1980) 10 B. J. Pol. S. 129 at 134 [Jones, “Blasphemy, Offensiveness and Law”]). For the development of the crime of blasphemy in Britain see also Robert C. Post, “Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment” (1988) 76 Calif. L. Rev. 297 at 305-314; for the blasphemy offence in Canada see The Criminal Code of Canada, 1985, sec. 296; for the development of the crime of blasphemy in Ireland see Kathryn A. O'Brien, “Ireland's Secular Revolution: The Waning Influence of the Catholic Church and the Future of Ireland's Blasphemy Law” (2002) 18 Conn. J. Int'l L. 395; on the criminal prohibition of speech that offends religious feelings in Israel see Mordechai Kremnitzer, Shachar Goldman and Eran Tamir, Religious Feelings, Freedom of Expression and Criminal Law (Jerusalem: The Israeli Democratic Institute, 2003) [Hebrew]. For hate speech in Canada see Wayne Sumner, The Hateful and the Obscene: Studies in the Limits of Free Expression (Toronto: University of Toronto Press, 2004) 52-70.
variety of reasons such as a high burden of proof, and that some blasphemy offences protect only the Christian community and not other religious communities.

Claims of offence to feelings also emerge in constitutional law, sometimes as independent claims, and sometimes as claims for religious freedom or claims on behalf of maintaining the public order. In the U.S., for instance, claims of offence to religious feelings have worked their way into current religion clause jurisprudence. American courts interpret the Establishment Clause as prohibiting governmental endorsement of religion, and the prohibition against endorsement is interpreted by some judges as protecting the sensibilities of non-adherents that may feel like outsiders as a result of endorsements of a religion.

In the case of Allegheny for instance, the respondents claimed that the display of a creche and a Chanukah menorah in government buildings by the petitioners violated the Establishment Clause as the displays had the effect of endorsing religion. Justice Stevens agreed with the respondents and asserted that there is always a risk that public display of religious symbols “will offend non-members of the faith being advertised as well as adherents who consider the particular advertisement disrespectful.” Other claims of offence to religious feelings that were brought under the Establishment Clause concern public school curricula. Claimants have argued that certain public school curricula requirements violate the students’ right to freedom of religion by mandating readings that

---

210 See Kremnitzer et al, ibid. at 120.
211 I am referring here mostly to the blasphemy offence in Britain (see Jones, “Blasphemy, Offensiveness and Law” supra note 209 at 130); Many Muslims in Britain argued with regard to the Rushdie affair that the law of blasphemy which protected only the Anglican Church should be extended to other religions as well (Bhikhu Parekh, “The Rushdie Affair: Research Agenda for Political Philosophy” (1990) 38 Political Studies 695 at 700).
214 Ibid. at 3131.
are ostensibly antagonistic to the claimants’ religious principles and therefore offend the
students’ religious feelings.\textsuperscript{215}

Claims of offence to feelings may also emerge in private law disputes. Such may be, for instance, a religious landlord who refuses to rent his apartment to unmarried couples because such an act will cause him emotional distress.\textsuperscript{216} Claims of offence to feelings may also be raised in tort law disputes that concern racial insults between individuals,\textsuperscript{217} or moral nuisances.\textsuperscript{218}


\textsuperscript{216} See for instance, the American case of Jasniowski v. Rushing 678 N.E.2d 743 (Ill. App. Ct. 1994). This case deals with a landlord who claimed that his religious beliefs against non-marital sexual relations prevented him from renting his place to unmarried couples. A claim of offence to feelings also echoes in Justice Scalia’s dissenting opinion in the American case of Romer v. Evans 116 S. Ct. 1620 (1996). The case deals with a constitutional amendment in Colorado that was adopted in 1992. The amendment forbade the state and its agencies to enforce any statute or policy whereby sexual orientation would be the basis of a claim of discrimination. Homosexual persons and municipalities, whose ordinances were invalidated, commenced litigation to declare the amendment invalid in light of the Equal Protection clause. The majority opinion decided that the amendment violates the equal protection clause and is therefore invalid. The dissent opinion that was delivered by Justice Scalia, Chief Justice Rehnquist and Justice Thomas, supported the constitutionality of the amendment as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual morals against the efforts of a politically powerful minority to revise those mores through the use of the laws” (Romer v. Evans, at 1629). Strong rightly observes that although the issue of offence to feelings did not figure largely in the Romer dissent, it very well could have provided the implicit foundation for the legislators' actions. For example, the state claimed that the amendment was intended to act as a means by which employers and landlords who opposed homosexuality on religious or other grounds could discriminate against gays and lesbians (see S.I. Strong, “Romer v. Evans and the Permissibility of Morality Legislation” (1997) 39 Ariz. L. Rev. 1259 at 1308). For claims of offence to feelings that emerge in private law disputes in Canada see Brockie v. Brillinger (No. 2) (2002), 222 D.L.R. (4th) 174 (Ont. Sup. Ct. Div. Ct.), (a printing company denied services to the Canadian Lesbian and Gay Archives because their material were contrary to the owner’s religious belief) and Smith and Chymysyn v. Knights of Columbus and Hauser and Lazar, 2005 BCHRT 544 (a male Catholic organization called The Knights of Columbus refused to allow a lesbian couple to hold their wedding reception in it’s hall).

\textsuperscript{217} For examples of American cases that deal with racial insults between individuals see Richard Delgado, “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling” (1982) 17 HARV. C.R.-C.L. L. Rev. 133.

\textsuperscript{218} In 1990 Teri Powers and Glen Mark, a married couple, purchased a house in Oregon, U.S.A. Their house was bordered on all sides by a Wildlife Area that attracted thousands of nude sunbathers who enjoyed the beach. The couple was repulsed by the sight of public sexual activity and embarrassed to entertain their guests in the presence of nude sunbathers. They sued and claimed that the activities associated with the nude beach constituted a nuisance (Mark v. Oregon State Dep’t of Fish and Wildlife, 974 P.2d 716, 718 (Or. Ct. App. 1999); see also John Copeland Nagle, “Moral Nuisances” (2001) 50 Emory L.J. 265).
Although the arena of the legal cases at hand may change from public law to private law, the first legal question we ought to ask remains the same: Should the law regulate acts that offend individuals when they do not cause any physical or emotional harm? How can we balance between claims of offence to feelings and counter claims (mainly, but not only, on behalf of the right to freedom of expression)?

The American legal system tends to dismiss mere claims of offence to feelings that do not concern “concrete” harms such as financial loss, emotional stress or violence.\footnote{The American “fighting words” doctrine, which was declared in \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568 (1942) [\textit{Chaplinsky}] only bans speech that would lead the listener to respond violently. The recent American Supreme Court decision in \textit{Virginia v. Black} 538 U.S. 343 (2003) has banned cross burning, but it applies only to cross burning that intimidates others, and not to other kinds of offences to feeling.} Under the common view in the U.S., acknowledging the independent status of claims of offence to feelings undermines the bedrock principle that underpins freedom of expression. In the U.S. Supreme Court’s words:

\begin{quote}
If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.\footnote{\textit{Texas v. Johnson}, 491 U.S. 397 at 414 (1989).}
\end{quote}

By contrast to the American legal system, which dismisses mere claims of offence to feelings and puts forward an absolutist freedom of expression position, the Israeli legal system seems to be much more sensitive to claims of offences to feelings, even when such claims intend to limit the right to freedom of expression because of offences that are not proven to cause any physical or emotional harm. In other words, offensiveness \textit{per se} is a sufficient justification for the intervention of the law in Israel.\footnote{Ilan Saban, “Offensiveness Analyzed: Lessons for Comparative Analysis of Free Speech Doctrines” (2002) 2 \textit{The Journal of International and Comparative Law at Chicago-Kent} 60.}

I will now provide two examples of Israeli cases which involve independent claims of offence to feelings, i.e., claims that cannot be reduced to another legal claim, and do not
appeal to the violation of rights or values, such as freedom of religion or preserving the public order. The case of Solodkin deals with prohibiting the sale of pork in mixed cities in Israel that consist of religious and secular Jews. In this case, Barak C.J. considers the pork sellers’ claim for their right to freedom of occupation against the religious residents’ claim about their offended religious feelings by the act of selling pork in their cities. Chief Justice Barak considers the religious Jews’ offended feelings as an independent claim because there was no other claim, such as a claim about infringement of religious freedom. That is to say that Barak C.J. acknowledges the independent status of claims of offence to feelings.

In the case of Bakri, the Israel Film Council refused to approve the screening of the petitioner’s movie in commercial cinemas in Israel. The Council claimed that the movie, which filmed the responses of local Palestinians after IDF operations against the terror infrastructure in Jenin in 2002, should be censored because “it is a film which severely offends the feelings of the public which may mistakenly think that IDF soldiers regularly and systematically commit war crimes, and this is completely at odds with the truth and the facts uncovered by investigations of the IDF and international bodies”.

Justice A. Procaccia stated that the petitioner’s right to freedom of expression should be balanced against the value of protecting the offended feelings of the soldiers who participated in the operation, the bereaved families who lost those dear to them in battle, and large parts of the Israeli public, who identify with the feelings of the Israeli side.

---

223 Ibid. at 612.  
224 HCJ 316/03 Bakri v. Israel Film Council et al., P.D. 58(1) 49 (2003). This decision can be found in English in the Israeli Supreme Court web-site: http://elyon1.court.gov.il/files_eng/03/160/003/115/03003160.115.htm.  
225 Ibid. at 258 (section 4 of Dorner J’s decision).
regarding the battle in Jenin, the portrayal of the IDF, and the loss of soldiers in combat.\textsuperscript{226}

The offence is caused by the claim that the army engaged in inhumane military activities, which points an accusing finger directly at the moral and ideological image of most of the Israeli public.\textsuperscript{227}

Justice Procaccia goes further and explains that a claim of offence to feelings is based on the interest in the integrity of the offended person’s identity. She puts the value of protecting one’s cultural and moral values on a par with the value of protecting one’s body and property:

Protecting sensitivities is as necessary as protecting persons or property. It protects one’s spiritual property, one’s cultural and moral values, against harm. It is intended to protect one from the desecration of all that is dear to him.\textsuperscript{228}

Then Procaccia J. explicitly recognizes the independent status of a claim of offence to feelings when she says that “protecting the sensitivities of the public is important, even if the offence causes no more than pain or anger”.\textsuperscript{229}

In other words, Procaccia J. views the infringement of the interest of the bereaved families and the Israeli public in the integrity of their identity as a sufficient ground for acknowledging their independent claim of offence to feelings. However, although Procaccia J. recognized the independent status of the claim of offence to feelings, she ruled that the interest in protecting the petitioner’s freedom of expression outweighed the interest in not offending the feelings of the respondent and the general Israeli public.\textsuperscript{230} The final result is therefore that Bakri’s controversial movie is not prohibited from being screened in commercial cinemas in Israel.

\textsuperscript{226} Ibid. at 274 (section 7 of Procaccia J’s decision).
\textsuperscript{227} Ibid. at 274 (section 8 of Procaccia J’s decision).
\textsuperscript{228} Ibid. at 278 (section 12 of Procaccia J’s decision).
\textsuperscript{229} Ibid.
\textsuperscript{230} Ibid. at 284 (section 19 of Procaccia J’s decision).
3. **Claims from Integrity of Cultural Identity**

Let us leave for a moment the final result of the *Bakri* decision and focus on trying to justify the independent status that the Israeli Supreme Court gives to claims of offence to feelings. What is the connection between offence to feelings and integrity of identity? In order to answer this question, I will first delve into existing accounts of offence in general, and offence to feelings in particular. Claims of offences to feelings were discussed by liberals such as John Stuart Mill and H. L. A. Hart. Although both of them are reluctant to regulate or prohibit offences to feelings (I will address their reservations later on), their accounts will help me to show what offences to feelings are really about.

Claims of offences to feelings usually call for the intervention of the state to disallow, limit or regulate offensive acts by some sort of coercion. John Stuart Mill’s core principle is that coercion may be justifiably used only to prevent harms to others.\(^{231}\) Mill illustrates a particular harm by asking us to think about Muslims who are offended by Christians who eat pork – a practice from which religious Muslims abstain and which they find appalling.\(^{232}\) Mill notes that this practice disgusts Muslims and provokes feelings of anger among them.\(^{233}\) Mill contends that we cannot explain why Muslims are disgusted by this practice by appealing to the harm it does to their religion. This is because their religion also prohibits them from drinking wine, but they are not disgusted by Christians who drink wine.\(^{234}\) How are we to understand this harm then?

Is it possible that Muslims are offended by Christians who eat pork but not by Christians who drink wine because the norm of not eating pork is more central to their

---


\(^{233}\) *Ibid.*

religious identity than the norm of not drinking wine? It seems to me that this is what Mill suggests. We can find support for this line of reasoning in more recent liberal writing.

H. L. A. Hart discusses an offence that is caused as a result of controversial religious practices and labels it an offence to ‘religious feelings’. He considers a persuasive claim in favour of a law against the practice of bigamy, according to which:

[in a country where deep religious significance is attached to monogamous marriage and to the act of solemnizing it, the law against bigamy should be accepted as an attempt to protect religious feelings from offence by a public act desecrating the ceremony.]

The importance of Hart’s claim is twofold. First, one’s offended feelings are mediated by salient values to which one is attached, and second, one may feel offended when such values are desecrated. Offended feelings express one’s strong attachment to the values and institutions that are central to his or her personal identity and are desecrated by others. One may raise painful feelings in a religious person by insulting her values or beliefs. It is because the practice of monogamous marriage has paramount value in the eyes of some people, because they regard it as sacred, that they feel bad when other people desecrate this practice.

If we follow this line of reasoning, when dealing with offences to religious feelings we ought to appeal first and foremost to the values that are central to the offended person’s religious identity. In other cases, in which the offended individuals are not religious, such as the women in the YMCA club in Montreal and the gays and lesbians in the pride parade in Jerusalem, their offended feelings are mediated by values and norms that are central to their cultural identity. Their painful feelings are merely a result or a side effect of the offence to the central values of their cultural identity.

---

Offended feelings of this sort are unpleasant mental states that people may feel as a result of an expression or a practice that they do not like. Mill and Hart provide examples of practices that some people dislike because they perceive them as violating norms and values that are central to their religious or cultural identity. But not all unpleasant mental states are mediated by values, and not all the feelings that are mediated by values and norms are central to the offended individual’s cultural identity. Joel Feinberg provides examples of different unpleasant mental states. For the purpose of this chapter, I will divide them to three categories: first, unpleasant mental states that are mediated by values and norms that are central to the offended person’s cultural identity; second, unpleasant mental states that are mediated by values and norms that are not central to the offended person’s cultural identity; and third, unpleasant mental states that are not mediated by values and norms at all.

Let us start with the third category. Joel Feinberg calls offences that cause the unpleasant mental states under the third category ‘offences to senses’. He includes in the category of offences to senses acts or practices such as bad smells or loud noises that people may find offensive because they irritate them. He explains that offences to senses resemble the offences in the first and second categories I have identified, but are also different from them. Like offences in the first and second categories, offences to senses are unpleasant to the person who experiences them. However, unlike offences of the first and second categories, offences to senses are usually not mediated by values and norms. We can have many reasons for disliking certain smells. Some of them relate to common practices we know, or to the specific culture in which we are situated. For instance, some people who are not accustomed to Chinese food regard its smell as irritating. Other people,
who are used to Chinese food and love it, perceive its smell as good. The smell of a dirty toilet probably irritates most people in the world. This means that offences to senses are sometimes more mediated by our cultural environment and habits and sometimes less.\textsuperscript{236}

Let us now consider the first and the second categories of unpleasant mental states. They are both mediated by beliefs and moral views.\textsuperscript{237} As Feinberg argues, a person who wears a shirt with a cartoon of Christ and the cross accompanied with the text “Hang in there, baby!” will generate painful feelings amongst Christians “not simply because the abused object is recognized as a wooden object in the shape of a cross, but because of the conventional symbolism of such shapes, and a whole complex of religious convictions, commitment, and emotions directed to the object symbolized”.\textsuperscript{238}

But are all beliefs and moral values alike? In my view, the answer is negative. Some beliefs and moral values are part of the offended individual’s \textit{personal identity}, and some are specific to her \textit{cultural identity}. Consider the following examples. One may be offended from seeing an unflattering picture of himself but believe it is legitimate to take such a picture. Some Jews may be distressed by hearing German spoken without thinking it is illegitimate to speak German. In both of these examples, the painful feelings are mediated by beliefs and values. In the first instance, it is one’s self perception and personal beliefs about his appearance that generate his painful feelings. In the second example, it is the Jewish collective memory of the holocaust that disturbs the individuals who hear the German language. That is, the painful feelings in the first instance are mediated by one’s


\textsuperscript{237} Feinberg, \textit{ibid}. at 16.

\textsuperscript{238} \textit{Ibid}. 

- 105 -
personal identity, whereas the second are mediated by one’s religious or cultural identity.²³⁹

Now consider Feinberg’s example of the “Hang in there, baby!” shirt. In this example, one experiences painful feelings that are mediated by his religious or cultural values just as in the example of the Jews hearing German. However, unlike the example of the Jews and German, in Feinberg’s example, the offended person thinks that it is wrong to wear a “Hang in there, baby!” shirt. That is, not only does one have painful feelings that are mediated by his cultural identity, but he also thinks that the act that generates his painful feelings is illegitimate. My argument in this chapter only applies to instances such as the “Hang in there, baby!” shirt, i.e., controversial acts of which one side approves and the other side disapproves because he or she perceives them as violating values that are central to his or her cultural identity.

Let us now look more closely at the notions of personal and cultural identity. As you recall, in the first chapter I have adopted the following definition of personal identity: “the set of characteristics each person has that makes her the person she is”.

²⁴⁰ Personal identity is a set of properties that consist of “the way you see or define yourself, or the network of values and convictions that structure your life”.²⁴¹ I have defined cultural identity as a subset of the properties that consist of a person’s personal identity and come from her culture. They may include beliefs, values, dispositions to act in certain ways, etc.

As I have explained, this definition of cultural identity is inspired to a large extent by Charles Taylor’s theory of the relation between culture and personal identity. Taylor

²³⁹ I thank Alon Harel for providing these examples and pressing me to clarify the meaning of the terms ‘personal identity’ and ‘cultural identity’ as I use them. .
²⁴⁰ Schechtman, supra note 145 at 74.
argues that people define themselves by telling themselves and others the things that are important to them, the things that set them apart from others.\textsuperscript{242} Under Taylor’s theory, an important part of one’s personal identity stems from the identifications and constant dialogue with cultural values and norms which provide the frame or horizon within which people determine from case to case what is good and what is bad, what to endorse or oppose.\textsuperscript{243} We learn what good is by learning all the things that are considered as good in our culture.

We shape our cultural identity in the process of dialogue, and we aim at getting recognition for it from society. This process of dialogue is also a process of struggle for recognition. In other words, we do not simply receive recognition for the way we form our cultural identity. We have to win it through exchange.\textsuperscript{244} This process can also fail.\textsuperscript{245} People do not receive recognition from society for every life choice.

Our cultural identity therefore may be undermined. When we fail to get recognition, sometimes we cannot fully realize our self-interests.\textsuperscript{246} In case of disharmony between our values and the values of society, we may not be able to fully realize our goals with our own cultural identity. If we do not refuse to conform, we may need to abandon some values and norms that we cherish and trade them with those of general society.

So far I have argued that in many cases of offence to feelings, the generated painful or disturbing feelings are mediated by one’s cultural identity and one’s need for recognition of it. Such painful feelings are only a by-product. According to Joel Feinberg’s

\textsuperscript{242} Taylor, \textit{The Ethics of Authenticity}, supra note 147 at 35.
\textsuperscript{243} Taylor, \textit{Sources of the Self}, supra note 143 at 27.
\textsuperscript{244} \textit{Ibid.} at 48.
\textsuperscript{245} \textit{Ibid.}
‘offence principle’, an offence is established only when a disliked mental state is caused by right violating conduct of others. Under Feinberg’s account, a person has a legitimate expectation that her feelings would not be offended only when her offended feelings are a result of a violation of at least one of her rights. If my above analysis is right, and in many cases what explains the disliked mental states are the desecrated values or norms which are part of one’s cultural identity, then the right in question is not about protecting a person against having painful feelings as such. A question then arises, what right is violated in cases of claims of offence to feelings of the sort on which I have focused?

I argue that the right that is violated when painful feelings of this sort are generated is one’s right to the integrity of his or her cultural identity. As I have shown, cultural identity that is constituted of cherished values and norms is not the same as disliked mental states or painful feelings. Painful feelings are secondary to the desecrated values, but the desecrated values explain the existence of the painful feelings. Because the offences to feelings on which I focus are mediated by the values and norms that constitute one’s cultural identity, I suggest abandoning the term ‘claims of offence to feelings’, with regard to these kind of offences, and replacing it with claims from integrity of cultural identity.

What is the way to regulate claims from integrity of cultural identity? How can we evaluate the severity of an offence to one’s integrity of cultural identity and the strength of the legal claim that he or she puts forward because of it? Should we compare between different moral values and norms that are held by different cultural groups in order to solve disputes that involve claims from integrity of cultural identity? I argue that the answer is

---

247 Feinberg, supra note 236 at 2.
negative. The vulnerable cultural identity principle I will suggest in the next section provides an alternative way, which does not include assessing the content of contested moral values that are presented before the court or comparing between them. Rather, it mainly requires thinking about the social status of the cultural identities at stake.

4. **The Vulnerable Cultural Identity Principle**

Do all claims from integrity of cultural identity have an equal weight? How can we distinguish strong claims from weak claims? What I call ‘the vulnerable cultural identity principle’ suggests that people who possess a vulnerable cultural identity have a stronger case for raising claims from integrity of cultural identity than people who possess a strong cultural identity. The weaker one’s cultural identity is, the stronger her claim from integrity of cultural identity.

Sociological studies show that the vulnerability of one’s personal identity correlates with the social stability or instability of one’s cultural identity in society. Majority members’ cultural identity is typically secure. This is because the values and norms that are part of their cultural identity are shared by other people and are not challenged by them. In contrast, minority members’ cultural identity is usually not secure because their values and beliefs are constantly challenged and questioned. Being part of the majority, majority members tend to regard their values and norms as normal and natural, and the minority's norms as strange and deviant. Majority members often oppose minority members’ practices and customs, especially when they are conducted in the public sphere, as they do not conform to the way majority members believe things should be done. ²⁴⁹

²⁴⁹ For sociological and psychological studies on the correlation between the vulnerability of one’s personal identity with the social stability or instability of one’s cultural identity in society See Kenneth B. Clark & Mamie P. Clark, “Racial Identification and Preference in Negro Children” in Theodore M. Newcomb & Eugene L. Hartley eds., *Readings in Social Psychology* (New York: Henry Holt, 1947) 169; Dorwin
Such a constant conflict, in which minority members are usually in a disadvantageous position, makes their cultural identity more vulnerable. When your beliefs and norms are constantly challenged, your cultural identity is less secure. In such circumstances, when your cultural identity is vulnerable and not secure, any grief or offence to your most cherished values has truly a destructive potential to the integrity of your cultural identity. These are the circumstances in which you should be legally entitled to have it defended. In contrast, typically when you are part of the majority you can sustain acts that offend your values and norms without threatening the integrity of your cultural identity.250 Hence my suggestion that the weaker your cultural identity is, the stronger and more legitimate your expectation not to have the integrity of your cultural identity offended.

Sociologists have focused on the relation between self esteem of members of cultural groups and the social status of their cultural identity. They have argued that there is a correlation between the two. Although I endorse their findings, it is not required for my

---

250 In the same manner, Galeotti argues that minority members’ self esteem and self confidence is weaker than those of majority members. She therefore suggests forbidding insults to minority members while tolerating similar insults to majority members (Galeotti, supra note 135 at 138).
argument that individuals’ self esteem be necessarily diminished as a result of practices and expressions that challenge their cultural values. Rather, I regard such findings as an indication of the fact that their cultural identity is less equal in terms of representation in the public sphere and the way it is perceived in larger society. That is, the extent to which one’s cultural identity is vulnerable is measured by the criteria of one’s citizenship in, belonging to, and inclusion in larger society. Some minority cultural identities are often excluded from the public sphere or perceived mostly in negative terms. Their members are therefore excluded or incompletely included in the general democratic citizenship of society.

In many societies citizenship is associated with the majority culture or is wrongly perceived as a neutral concept that is not attached to a particular culture. Either way renders minority members who adhere to their culture the ‘cultural others’ in society. That is, citizens who are less equal in terms of belonging to the society in which they live. By giving a better standing to offended minority members, the vulnerable cultural identity principle allows the courts to secure their sense of belonging to society. I will continue to discuss this issue in section 5.

I now wish to distinguish my vulnerable cultural identity principle from Feinberg’s alternative principle. Feinberg identifies two factors which are relevant to determining the severity of an offending act. The first is the extent of the offence which is measured by the

---

251 I thank Ariel Katz for drawing my attention to the distinction between self esteem and equal representation that although relate both to the issue of cultural identity are nevertheless very different.

252 On the idea of citizenship and belonging with regard to cultural differences see Shachar, “Whose Republic?”, supra note 5; Parekh, Rethinking Multiculturalism, supra note 5 at 196, 224, 237; Shafir & Peled, supra note 5 at 22-23, 125-135 (focusing on the relation between citizenship and cultural identity with regard to the Arab minority in Israel); Volpp, supra note 5 at 480-481; Kostakopoulou, supra note 5 at 85-86; Bosniak, “Varieties of Citizenship”, supra note 5; Wiles, supra note 5.


number of people who are offended. The second is the intensity of the offence which is indicated by the amount of pain that the offending act inflicts on an offended individual. When deciding the severity of the offending act and whether to restrict it or not we should weigh these two factors together. The more people are offended, the more we should restrict the offending act. However, if the intensity of the offence is immense but only a part of the population – a certain minority for instance – is offended by it, the intensity of the offence may compensate for its limited extent. We may therefore restrict such an act as well.

My suggestion differs from Feinberg’s. Consider a case in which the same offending caricature which depicts the prophet Muhammad in a negative context appears in a newspaper in Egypt and in a newspaper in Denmark. Let us assume that in both cases, the intensity of the painful feelings felt by religious Muslims is the same. As the number of Muslims in Egypt is greater than the number of Muslims in Denmark, the extent of the painful feelings in the Egyptian case is greater. Therefore, according to Feinberg, we should tend to restrict more the publication of the offending cartoon in Egypt than in Denmark. However, my criterion leads to the opposite outcome. As Muslims in Egypt are the majority, their religious identity is strong. Therefore, they can better sustain an offence to their religious values. In contrast, since Muslims in Denmark are the minority, the social status of their cultural identity is weaker and more vulnerable. They can therefore less easily sustain an offence to their cultural identity. Under my vulnerable cultural identity principle we would tend to restrict the publication of the cartoon more in Denmark than in Egypt.

255 Feinberg, supra note 236 at 30.
What are the advantages of my vulnerable cultural identity principle over Feinberg’s principle? First, the vulnerable cultural identity principle concentrates on the values and norms that cause one’s painful feelings, rather than on the painful feelings themselves. This way, we can abstain from the unhelpful discussion about whose painful feelings are greater or more intensive.\(^{256}\)

Second, we can be assured of not falling into what Mill was most afraid of – the tyranny of the majority’s views over the minority’s views.\(^{257}\) If we consider, as Feinberg suggests, the factor of the extent of the offence we would tend to apply more restrictions on offending acts done by minorities whose views stand in contrast to the majority’s views. However, guaranteeing freedom of expression may be more important in cases in which one challenges the majority views and goes against the majority, rather than when one says what most people already believe.

One (let us assume she adheres to political liberalism) may argue that in spite of these advantages, offences to integrity of cultural identity should not be regulated at all because the state should remain neutral. It should not limit or regulate the freedom of some people only because others disapprove their moral values. By staying neutral, the state protects what Dworkin calls ‘the right to moral independence’. That is the right of all people not to be interfered with just because others don't like the choices people make about how they live. In Dworkin’s eyes, the state should “be neutral on what might be called the question of the good life and thus political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life.”\(^{258}\)

\(^{256}\) Statman is therefore right to conclude that the discussion about the painful feelings themselves is not productive (Statman 2000, supra note 209 at 207-208).

\(^{257}\) Mill, supra note 231 at 73.

\(^{258}\) Ronald Dworkin, “Do We Have a Right to Pornography?” in Dworkin, A Matter of Principle, supra note
Under Dworkin’s theory, this argument is strong especially when the state limits or regulates freedom of expression because such limitations rest at least in part on a negative judgment about the worth of the content of the expression. In the case of the Danish cartoon for example, the state should not limit people’s freedom of expression to depict the prophet Mohammad as a terrorist only because some Muslims think it is immoral to do so.

Other liberal scholars raise similar concerns when they explain their reluctance to regulate claims of offence to feelings. Mill, for instance, indicates that “there are many who consider as an injury to themselves any conduct which they have distaste for, and resent it as an outrage to their feelings”. For this reason Mill is reluctant to allow the use of law in order to prevent injuries to people’s cultural identities. For Mill, using the law for this purpose amounts to enforcing “some people’s opinion of what is good or bad for other people”.

Mill illustrates his claim by asking us to think again about the practice of eating pork, only this time it is performed by a minority of Christians in a Muslim state. In Mill’s view, Muslims should not use the law in order to prevent Christians from eating pork, although it raises painful feelings amongst them, because if they do so they interfere with the personal taste of Christians who eat pork and it is not their business to do so.

Along this line, Hart contends that imposing restrictions on conduct and speech because of offence to feelings is a violation of the most sacred liberal principle of

20335 at 353-354.
259 Mill, supra note 231 at 152.
260 Ibid.
261 Ibid. at 154.
individual freedom. If the state imposes restrictions on people in the private sphere, it imposes on them a certain moral view that is associated with the offended people.\textsuperscript{262}

Feinberg suggests that we should be careful when we deal with the issue of offence to feelings \textit{inter alia} because many people may be offended by acts only because they hold “bigoted prejudices”.\textsuperscript{263} One of the instances that Feinberg provides in order to support his fear from bigoted prejudices is the repugnance some people may feel when they see “interracial couples strolling hand in hand down the main street of a town in the deep South”.\textsuperscript{264} Later Feinberg says that “we surely don’t want our offense principle applied to justify preventive coercion on that ground”.\textsuperscript{265}

The claim that freedom should not be limited because some people’s moral convictions disapprove of others’ moral convocations prevails in the First Amendment doctrine in the U.S. where courts present the government as neutral with respect to different moral convictions and community lives. Under this doctrine, the government is forbidden from confining speech in the name of the dominant moral values and norms of a single community. Such an act will inevitably privilege a specific community over other communities in the state.\textsuperscript{266}

In a nutshell, the claim is that offences to integrity of cultural identity should not be regulated because such regulation amounts to legal moralism, i.e. using the law to prohibit

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{262} Hart, \textit{supra} note 235 at 46-48. I will deal with the distinction between the private and the public sphere with regard to offences to integrity of cultural identity in section 5. In a nutshell, I agree with Hart that acts performed only in the private sphere should not be subjected to legal regulation (even if they offend one’s cultural values), but not for the reason he suggests.
\item \textsuperscript{263} Feinberg, \textit{supra} note 236 at 25.
\item \textsuperscript{264} \textit{Ibid}.
\item \textsuperscript{265} \textit{Ibid.} at 27.
\end{enumerate}
\end{footnotesize}
or regulate acts of some individuals merely on the ground that they are inherently immoral in the eyes of other individuals.

My answer to this claim is the following. By reconstructing claims of offence to feelings as claims from integrity of cultural identity, and by suggesting the vulnerable cultural identity principle, I avoid legal moralism as much as possible. Under the framework I suggest, when the law regulates or prohibits specific acts because they offend individuals’ cultural identity, it does not declare the specific content of these acts as wrong and the specific content of the claimer’s cultural identity as right. By not delving into the content of a given controversial act, but rather into the social status of the offended people’s cultural identity, my reconstruction of claims of offence to feelings as claims from integrity of cultural identity and my vulnerable cultural identity principle try to be as neutral as possible. They do not enforce specific moral views, except the moral view according to which it is wrong to infringe people’s integrity of cultural identity, especially when they have vulnerable cultural identity to begin with.

In this way the state and the court avoid legal moralism\(^{267}\) because they are not required to perform the impossible and morally undesirable task of comparing between the moral views that are held by the claimer and the opposing moral views that are held by the offender. When courts are not required to compare between different moral views and to decide which ones are right and which are wrong, the liberal state can remain neutral on different conceptions of the good life. Because the main task of the court is to evaluate the social status of cultural identities, its final decision on the matter at hand does not legitimize one of the parties’ contested moral values over another and as a result does not

\(^{267}\) The task of avoiding legal moralism is arguably accomplished by Feinberg’s principles of weighing the severity of the offence (for this argument see Larry Alexander, “Harm, Offense, and Morality” (1994) 7 Can. J.L. & Juris. 199).
render one group’s moral views as superior to another. If we follow my suggested framework, the only moral value that the state will enforce is that it is wrong to offend an individual’s integrity of cultural identity, especially when his or her cultural identity is vulnerable.

At this stage, one may argue that the reconstructed legal framework I suggest allows neutrality and avoids legal moralism, but it fails to treat people as equals because it takes into account what Dworkin calls ‘external preferences’. Dworkin distinguishes between two types of preferences about state policies that people may have: personal preferences and external preferences. People’s personal preferences are about state policies that directly influence their own conduct. By contrast, people’s external preferences are about state policies that influence other people’s conduct. For example, when a homosexual supports a policy that allows the freedom to engage in homosexual acts, he states a personal preference. When a heterosexual supports or objects to such a policy, he states an external preference.268

According to Dworkin, a public policy that is based on counting all people’s personal and external preferences for and against it may violate the principle of treating people with equal concern and respect. Dworkin illustrates his argument by asking us to suppose that many members of a community disapprove of homosexual acts on moral grounds. They prefer not only that they themselves not participate in these activities, but that no one else participate in them either. These are external preferences and if they are taken into account to justify a constraint on sexual liberty, then the people whose liberty is constrained suffer, “not simply because their personal preferences have lost in a competition for scarce resources with the personal preferences of others, but precisely

268 Dworkin, Taking Rights Seriously, supra note 23 at 275.
because their conception of a proper or desirable form of life is despised by others”. In other words, according to Dworkin, any policy or preference that regards other people’s forms of lives as less valuable does not treat people with equal concern and respect.

I will adopt Hart’s response to Dworkin’s argument in order to address the concern, according to which the reconstructed legal framework I suggest fails to treat people as equals because it takes external preferences into account. Hart argues that Dworkin fails to show that taking people’s external preferences into account violates the principle of treating people with equal concern and respect. If Hart is right, then Dworkin’s criticism does not apply to the legal framework I suggest for dealing with claims from integrity of cultural identity. Hart argues that the problem Dworkin’s example illustrates is not with externality of preferences as such.

Hart asks us to suppose again that all external preferences about homosexual acts are taken into account. Only this time it was heterosexuals’ external preferences that homosexuals should have the freedom to perform homosexual acts that tipped the balance against other heterosexuals’ external preferences for denial of this freedom to homosexuals. In this case, no one can complain that the procedure, though counting all people’s external preferences, has failed to treat all persons as equals.

Dworkin may argue at this point that what he means to suggest is that only hostile preferences should not be counted because they deny freedom in the name of moral beliefs that despise others and do not treat them as equals. However, Hart argues that even the last interpretation does not explain why it is wrong to take into account external preferences as such. The problem here, Hart maintains, is not with taking into account hostile external

---

269 Ibid. at 275-276.
271 Ibid.
preferences, but rather with the fact that policies which result from utilitarian majority procedures will always be in favour of the majority. This is even if the majority’s preferences are ill-formed. The message that minority members receive from utilitarian procedures is therefore not, as Dworkin suggests, “You and your views are inferior, not entitled to equal concern and respect”, but “You and your supporters are few…Increase your numbers and then your views may win out”.272

Hart’s criticism of Dworkin’s external preferences principle shows exactly the advantage of my vulnerable cultural identity principle over Feinberg’s principle. While both take into account people’s external preferences, my principle is not utilitarian. It does not justify limiting liberty by showing that the majority of people’s preferences against a certain act outweighs the minority preferences in favour of it. Such a procedure, which is very similar to Feinberg’s principle that takes into account the extent of the offence, i.e., it’s influence on all people, will tend to be in favour of the majority. My vulnerable cultural identity principle is not utilitarian in this sense and therefore does not make a calculation of all people’s preferences. Rather, it is based on people’s right to integrity of cultural identity. Minority members’ preferences may trump the majority’s preferences because their cultural identity is of a lower social status.

Because my vulnerable cultural identity principle does not favour the majority’s preferences, it does not enforce the majority’s morality, or society’s morality on people. My principle should therefore not be confused with theories, suggested by scholars such as Lord Devlin, which perceive the law as enforcing the state or the majority of society’s morality on all citizens.273

272 Ibid. at 843.
273 Devlin suggests that the state has a role as a moral tutor. If, for instance, the majority members in a given
My vulnerable cultural identity principle gives more weight to claims that are raised by people with vulnerable cultural identities. Typically, these people are minority members. But, it is important to bear in mind that sometimes majority members may also have vulnerable cultural identities. Majority members can undergo experiences that make their cultural identity insecure. Take the example of parents who belong to the majority group and lost their child in a war. This naturally makes their cultural identity vulnerable, especially if the war was controversial. Consider people of a country that has recently suffered a major terrorist attack, such as the attacks on the underground trains of Madrid in March 2004 and London in July 2005. In such cases, members of the majority can also feel insecure in their cultural identity – that their values, norms and way of life are being threatened. Such circumstances may therefore strengthen claims from integrity of cultural identity that are raised by majority members.

The vulnerable cultural identity principle is very different from the other two principles that are commonly mentioned in the context of cases of offences to feelings – the principle of maintaining of the public order and the “fighting words principle”. If we adopt these two principles, a claim from integrity of cultural identity can trump other rights or interests, such as the right to freedom of expression, only if the act that caused the state think that homosexual acts are immoral, the state should use the law to enforce the majority morality and prohibit it (Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965)).

274 For the role that the public order consideration plays in Israeli legal cases about offences to feelings, see Raphael Cohen-Almagor, *The Scope of Tolerance: Studies on the Cost of Free Expression and the Freedom of the Press* (London: Routledge, 2006) at 87-92 [Cohen-Almagor, *The Scope of Tolerance*]. Peter Jones observes that maintaining the public order is perceived by many if not all as an uncontroversial end that the government is entitled to pursue even when it comes at the cost of limiting freedom of expression (Peter Jones, “Respecting Beliefs and Rebuking Rushdie” (1990) 20 B. J. Pol. S 415 at 435 [Jones, “Respecting Beliefs and Rebuking Rushdie”]).

275 Fighting words are defined in the American jurisdiction as words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace (*Chaplinsky*, *supra* note 219 at 572).
offence to integrity of cultural identity has also the potential to cause great physical harm, such as disrupting the public order by causing fear of violence.

There are two notions that may underpin these two principles. The first treats the aim of preventing the disruption of the public order as intrinsically valuable. This means that a claim from integrity of cultural identity can trump other claims only if it is likely that the offending act will cause a disruption of the public order. If not, then there is no reason to prevent harms to integrity of cultural identity. The second notion treats the result of disruption to the public order as an indication of the extent to which one’s integrity of cultural identity is harmed. That is, if an act has great potential to disrupt the public order, it must mean that the offence it causes to one’s integrity of cultural identity is really substantial. If it does not have the potential to disrupt the public order, it must mean that it causes only a minor offence to one’s integrity of cultural identity.

The first notion does not accord with my previously established view that claims from integrity of cultural identity have standing on their own and are not parasitic on concerns such as maintaining the public order.\(^{276}\) The second notion that treats disruption of the public order as an indication of the extent of the offence to one’s feelings is also problematic. Under my account, painful feelings are merely a possible side effect of the real offence, which is the offence to one’s integrity of cultural identity. The right place therefore to look for an indication of the extent of the offence is to look at the vulnerability of the offended person’s cultural identity. The more the cultural identity of the offended person is vulnerable, the greater the offence is.

\(^{276}\) As Jones persuasively argues: “if the law should intervene only because and to the extent that public order is threatened, then it has no concern with the prevention of offence as such” (Jones, “Blasphemy, Offensiveness and Law”, supra note 209 at 144).
In addition, one of the major moral and pragmatic problems with the principle of restricting offensive acts in order to maintain the public order is that this principle encourages the offending people to disrupt the public order in order to have their claim recognized.\textsuperscript{277} It also favours claimants who cry louder because their feelings are more painful.\textsuperscript{278} The advantage of my suggested vulnerable cultural identity principle is that it assesses the strength of the relevant cultural identity in general, regardless of the extent of the offended people’s reaction to the offensive act. In this way, there is no need to delve into the question of whether the subjective feelings of an individual who raises a claim from integrity of cultural identity are really offended or not and to what extent.\textsuperscript{279}

Another possible rationale that may underpin the principle of maintaining the public order is that it does not aim to protect the integrity of cultural identities at all. Rather, it aims to protect the public order in and of itself. Disruption of the public order may be a synonym for emotional distress, sadness and anger. Such painful feelings are also mediated by people’s moral convictions.\textsuperscript{280}

\textsuperscript{277} Ibid.
\textsuperscript{278} It is indeed unfair to give a better starting point to some people just because they cry louder (see Jones, “Respecting Beliefs and Rebuking Rushdie”, supra note 274 at 425; Statman 2000, supra note 209 at 207-208).
\textsuperscript{279} Cohen-Almagor acknowledges that feelings are subjective. In order to overcome the problem of subjectivity he suggests that in each case of offence to feelings psychologists will assess whether the claimer’s feelings were offended and to what extent (Cohen-Almagor, The Scope of Tolerance, supra note 274 at 77, 114-115.) However, historians of psychology persuasively argue that dominant social values and norms are embedded within psychological theories themselves. What is considered to be normal and rational is not detached from the cultural values with which psychologists operate, typically associated with the majority culture. Therefore, when claiming that some things are genuinely offensive to their subjects and some things are not, psychologists also indirectly morally evaluate values and norms according to their own values and norms as they appear in psychological theories (see Kurt Danziger, “The Historical Formation of Selves” in Richard D. Ashmore & Lee J. Jussim eds. Self and Identity: Fundamental Issues (New York: Oxford University Press, 1997) 137 at 146; Nikolas Rose, Inventing Our Selves: Psychology, Power, and Personhood (Cambridge: Cambridge University Press, 1998)). I thank Boaz Miller for bringing this literature to my attention.
\textsuperscript{280} I thank Hila Shamir and Ori Aronson for pressing me on this point.
However, as I see it, the term ‘public order’ implies that the public as a whole is disrupted by an offensive act. This means that the public as a whole, or at least the vast majority of the public, disapproves the offensive acts on the basis of uncontroversial moral grounds and suffer emotional harms as a result of it. Such uncontroversial moral grounds may include objections to gambling, prostitution, and images, or portrayal of extreme violence, blood, corpses, nudity, rape and the like.\footnote{This was probably the original rational of the public order principle, which dates back to the early days of common law.} It seems to me that it does not make sense to consider controversial moral grounds that are shared only by the majority group or minority groups under the principle of public order. My argument about reconstructing claims of offence to feelings as claims from integrity of cultural identity, and the vulnerable cultural identity principle should not therefore apply to acts that are challenged because of uncontroversial moral grounds. But this is not to say that such offensive acts should be ignored or dismissed for they may still have an important role in other legal contexts.

5. **The Justifications of the Vulnerable Cultural Identity Principle: Equality and Toleration**

The vulnerable cultural identity principle stems from my conception of equality of cultural identity. As I have indicated in Chapter 1, what explains my conception of equality of cultural identity, which is based on Walzer’s theory of spheres of justice, is dignity. People’s dignity is violated when they are discriminated against by exclusion rules that

\footnote{I don’t think that pornography should be included under this category. This is because many people think pornography should be disallowed or limited on the basis of controversial moral convictions that associate pornography with women’s oppression (for such a view see Catharine A. MacKinnon, \textit{Feminism Unmodified: Discourses on Life and Law} (Cambridge: Harvard University Press, 1987) 163).}

\footnote{For a definition of the term ‘public order’ that accords with my interpretation see George H. Dession & Harold D. Lasswell, “Public Order under Law: The Role of The Advisor-Draftsman in The Formation of Code or Constitution” (1955) 65 \textit{Yale L. J.} 174 at 185-188.}
deny them of benefits because of arbitrary considerations that are not relevant to the matter at hand and do not reflect who they really are. Such discriminatory practices result in a relative disadvantage for the people who are discriminated against in different spheres of justice in their lives such as the spheres of career, health, politics and education. I have argued that individuals’ dignity is also violated by rules that fail to take into consideration cultural differences between individuals. Namely, when rules are designed as ‘one size fit all’, they are *de facto* based on the cultural needs of majority members and fail to take into consideration the different cultural needs of minority members.

Such discriminatory rules render the cultural identity of minority members to be dominated by other spheres in their lives such as career and education, which are governed by the majority culture. That is to say, such discrimination practices render the cultural identity of minority members vulnerable. Because the cultural identity of minority members is vulnerable, acts that offend their cultural values are severe. By contrast, acts that offend the majority cultural values are less severe because the values that constitute their cultural identity are less disputable and challenges and the social status of their cultural identity is stronger.\(^{283}\)

The vulnerability of their cultural identity can be measured according to their relative disadvantage in different spheres of their lives. The more minority members are discriminated against in the job market, have low achievements in the sphere of education and the like, and the more they are pushed to relinquish their cultural identity in order to....

\(^{283}\) One may argue that the vulnerability of one’s integrity of cultural identity is not always correlated with the social status of his or her culture in larger society. This may be true for cultural groups such as the Amish and the Hutterites in North America. These sectarian groups do not integrate into larger society and the integrity of their cultural identity is usually not influenced or threatened by the way it is perceived by people who do not belong to their group. My answer is that to a large extent, my argument in this chapter is not relevant to such cultural groups. Because they do not integrate into larger society and are not influenced by the way their cultural identity is socially perceived, they typically do not raise claims from integrity of cultural identity.
succeed in other spheres in their lives, the more their cultural identity is vulnerable. The values that constitute their cultural identity are constantly challenged and mocked, and they are not perceived as equal in terms of citizenship and inclusion in society. Minority members therefore deserve protection against acts that offend their cultural identity more than majority members. Thus we arrive at the vulnerable cultural identity principle.

The vulnerable cultural identity principle is rooted not only in the idea of equality, but also in the idea of toleration. The general concept of toleration entails the freedom of individuals or groups to express themselves or engage in practices in spite of the fact that they might be perceived as controversial by others. As Martha Minow puts it: "Tolerance, at minimum, means forbearance: the restraint against expressing or enacting disapproval of another".

Different conceptions give different meanings to the general concept of toleration. I adhere to the equality conception of toleration that explains toleration in terms of equality between different moral views in multicultural societies. The equality conception of toleration assumes that first, different individuals or groups hold different moral values and norms that are important to them for various reasons, and second that these moral values may come into conflict. Once the state does not discriminate between different conceptions of the good, all individuals and groups are allowed to express and practice their different moral values, and equality between the rights of every individual to hold a different conception of the good in society is achieved. When all conceptions of the good are

---

284 Horton, supra note 4 at 3.
286 In other words, the assumption is that all persons have a conception of their good. This capacity, which all human beings possess, (together with a basic sense of justice) constitutes what Rawls calls ‘the capacity for moral personality’ (Rawls, A Theory of Justice, supra note 20 at 505).
287 This equality explanation (which I draw on in order to develop my equality framework of toleration) belongs to a more general conception of neutral liberalism. Neutral liberals argue that political institutions
allowed to be presented in public, all individuals are treated as equals despite their differences.

Under my framework, the reason for being tolerant in the first place is not equality per se, but rather respecting others’ right to integrity of cultural identity.\(^{288}\) A tolerant person may perceive the opinions, values and norms of others as inferior to hers, but when she acts with forbearance towards them, she does so because she equally respects their right to integrity of cultural identity. But if the right to integrity of cultural identity underpins toleration, why do we need to talk about equality at all? The answer is that when deciding between competing claims from integrity of cultural identity, the right to equality helps evaluate who has a stronger claim – the person with the more vulnerable cultural identity is more entitled to protection.

The equality conception of toleration is divided to an equal opportunity oriented approach and an equal results oriented approach. The equal opportunity approach emphasises the idea of the state’s neutrality between different conceptions of the good because it perceives any support of a particular conception of the good as violating the principle of equal respect to all individuals. The equal opportunity approach articulates

---

\(^{288}\) Yossi Nehushtan argues that if we look for the justifications for toleration they always serve another value and not equality per se. I agree with this argument, but while Nehushtan ultimately appeals to one’s right to autonomy as underpinning toleration, I appeal to one’s right to her or his integrity of cultural identity (see Yossi Nehushtan, “Secular and Religious Conscientious Exemptions: Between Tolerating and Equality” in Peter Cane et al., *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 243 at 252, 259-263).
toleration mostly in terms of the negative freedom of all individuals and groups to express and practice their different moral values.\textsuperscript{289}

Ana Galeotti presents an equal results oriented conception of toleration, which she develops out of her criticism of the equal opportunities conception. She argues that the equal opportunity approach is insufficient for dealing with discrimination in what she calls “the real world of contemporary democracy”.\textsuperscript{290} Real world problems require the state not only to allow minority members the freedom of expression, but also “counter the advantages or disadvantages that have accumulated over a long period of discrimination”.\textsuperscript{291} The disadvantages Galeotti refers to are the \textit{de facto} exclusion of the minority cultural identity from the public sphere, in comparison to the wide presence of the majority cultural identity. Galeotti’s equal result oriented approach, which from now on I will call ‘the cultural equality approach of toleration’, is motivated by the ideas of citizenship and belonging. That is, her equality approach of toleration stresses the unjust burden that minority members typically bear, in terms of efforts and undesirable consequences in their lives, in order to have their cultural identity visible in the public sphere.\textsuperscript{292}

The cultural identity burden that minorities are to bear cannot be alleviated by redistribution of material goods alone,\textsuperscript{293} although, as I have mentioned, relative disadvantage in material goods is usually an indication of a similar disadvantage in the visibility of a cultural identity in the public sphere. Rather than concentrating on material means alone, the cultural equality conception of toleration emphasizes symbolic

\textsuperscript{289} Galeotti, \textit{supra} note 135 at 59.
\textsuperscript{290} \textit{Ibid.}
\textsuperscript{291} \textit{Ibid.}
\textsuperscript{292} \textit{Ibid.}
\textsuperscript{293} \textit{Ibid.} at 61.
representation of minority cultures in the public sphere as an additional tool for repairing
injustice between minority and majority members.\textsuperscript{294}

Galeotti argues that the cultural equality approach of toleration does not only
require a shift in our understanding of toleration from equality in opportunity oriented
practice to an equality in results oriented practice, but also requires a shift in the way in
which toleration is justified. According to Galeotti, repairing inequalities of cultural
groups’ representation in the public sphere cannot be satisfied solely by a ‘negative’
justification of toleration, according to which toleration is a good practice because there are
no convincing reasons to disallow a specific act in the public sphere, even if it is perceived
as controversial by some people.\textsuperscript{295}

Galeotti asserts that the negative justification of toleration fails to provide a
convincing reason for practicing toleration mainly because it does not recognize the
intrinsic value individuals attach to their cultural identity.\textsuperscript{296} She puts forward a ‘positive’
justification for toleration, namely recognition. In Galeotti’s eyes, minority groups’
demands for toleration are demands for recognition. That is, demands for symbolic
representation of minority cultures in the public sphere. In her words, toleration concerns
“not only people’s endowments and entitlements, but also the way they are viewed and
considered by others and by political institutions”.\textsuperscript{297} Galeotti’s idea of toleration as
recognition is therefore first and foremost about inclusion of minority identities in the
public sphere. Understood as a project of recognition and inclusion, toleration will

\textsuperscript{294} Ibid. at 66-67.
\textsuperscript{295} Ibid. at 102.
\textsuperscript{296} Ibid.
\textsuperscript{297} Ibid. at 114.
hopefully bring more social justice between majority members who bear a mainstream cultural identity and minority members who bear a disadvantaged cultural identity.

Galeotti’s justification of toleration shifts our attention from the expressions and practices that are the objects of toleration to the individual subjects who perform them. In other words, Galeotti’s approach applies what David Heyd calls the ‘perceptual’ conception that “treats toleration as involving a perceptual shift: from beliefs to the subject holding them, or from actions to their agent”.  

The tolerator tolerates the agent’s view not because these views have an intrinsic value as such, but because he or she acknowledges and respects the agent’s intrinsic attachment to these values.

Galeotti also acknowledges that minority members ask for toleration not only when they wish for public acceptance of their controversial identities but also when they request the banning of acts that they perceive as offensive. Offensive acts that are done by majority members and directed toward minority members are likely to inhibit or prevent minority members’ inclusion into wider society by excluding their cultural identity from the public sphere. When minority members seek protection against offensive behaviour they also seek recognition and inclusion of their cultural identity in the public sphere.

Galeotti illustrates her argument by exploring racist expressions that constitute hate speech, and concludes that there is room to limit such expressions. She indicates that the fact that racism is widely perceived as morally wrong makes racist hate speech expressions


\[299\] Ibid. at 13.

\[300\] These claims are usually presented as claims for limiting toleration. Nevertheless, as Galeotti argues, claims for banning offensive acts actually develop previous ‘classic’ toleration claims to allow controversial or offensive acts in the public sphere (Galeotti, supra note 135 at 109).

\[301\] Ibid. at 110-112, 137-138.

\[302\] Ibid. at 116, 137-138.

\[303\] Ibid. at 155-160.
an easy example to illustrate her argument. At the same time, she recognizes the importance of freedom of expression and mentions that its level of protection varies from one (liberal) political and legal culture to another. She does not draw a principled distinction between offensive acts that should be prohibited and offensive acts that should not, thus it seems that she leaves the door open to have other forms of offensive acts that do not constitute racist hate speech regulated.

Because Galeotti’s rationales for limiting racist hate speech in the name of toleration apply to other forms of offensive acts towards minorities, I take her account to support my vulnerable cultural identity principle. According to my account, every individual has a prima facie right to be protected from all forms of offensive acts to his or her cultural identity. All other things being equal, minority members with vulnerable cultural identities require more protection against offensive acts in general if equality is to be achieved.

6. The Captive Audience Principle and Alternative Threshold Tests

Is every claim from integrity of cultural identity to be acknowledged by courts as a valid legal claim? My answer is negative. Thus, a need arises for a threshold test for recognizing a claim from integrity of cultural identity. The most popular principle that is used to limit protection of sensibilities is what Chaim Gans calls ‘the moral responsibility principle’. I will discuss it and reject it in favour of other ways of drawing the boundaries of claims from integrity of cultural identity.

---

304 Ibid. at 139.
305 Ibid. at 147-150.
If we take the moral responsibility principle as a threshold test, an individual has a valid moral claim only if he was not morally responsible for putting himself in a situation in which he should have expected that his feelings would be offended. In other words, it is necessary that one not knowingly or voluntarily put himself in a situation in which the integrity of his cultural identity might be offended in order to recognize his claims from integrity of cultural identity as legally valid. For instance, a religious person who goes to a well-known gay neighbourhood, although he knows that he has a good chance of seeing acts that he might perceive as harming the integrity of his cultural identity, cannot claim that these acts should be limited or prohibited. This is because this religious person is responsible for putting himself in a situation in which the moral values that constitute his religious identity are likely to be desecrated. He could have easily escaped this situation without causing any harm to his religious cultural identity.

The rationale of the moral responsibility principle underpins the ‘captive audience’ principle that is commonly used by courts in order to limit the right to freedom of expression in certain circumstances. If we adopt the captive audience principle as a threshold test, a person has a claim for restricting an act only if she suffers harm that she

---

307 Gans suggests this principle with regard to the moral responsibility of people for having sensibilities in the first place. In Gans’ view, a necessary condition for people to raise a claim of offence to their sensitive feelings is not being morally responsible for having sensitivities (Gans, ibid. at 107-108). Daniel Statman extends Gans’ moral responsibility principle also to people’s moral responsibility for putting themselves in a situation in which they should have expected that their feelings would be offended (Statman 1998, supra note 248 at 152-153).

308 The same necessary condition can be reached out of a non-paternalistic motivation. Wayne Sumner argues that if we are to limit some kind of expressions according to Mill’s harm principle, without being paternalistic, our first burden is to show that the harm is done to “parties other than those who are voluntary consumers” of the expression (Sumner, supra note 209 at 33; 209, footnote 42).

could not easily avoid, i.e., only if she is trapped in a situation in which her feelings are offended and it is unfair that she should pay the cost of the inconvenience that is required to escape it.\textsuperscript{310} The rationale that underpins the captive audience principle therefore is that a person in a captive audience cannot be held morally responsible for her feelings being offended.

In my view, while the moral responsibility principle may work as a threshold test in cases involving offences to physiological senses, it will not do for offences to integrity of cultural identity. Arguably, the moral responsibility principle works as a threshold test for claims of offences to senses because acts that offend senses do not negatively affect people when they are not exposed to these acts, i.e., when they do not smell, hear or see them. As a threshold test, the moral responsibility principle assumes that people should reasonably try to evade offensive acts to their senses. If they have done so, but they still feel the offensive act through their senses, they are not morally responsible for being offended.

However, as I have shown in section 3, claims from integrity of cultural identity are different from claims about other offences. Whereas offences such as bad smells, loud noises or unpleasant sights are mediated by our physiological senses, alleged offences to the integrity of cultural identity are mediated by moral values. That is to say, a person does not necessarily have to be present at the moment of the acts for his values to be undermined. He can also learn about such acts without being physically present when they occur. For example, a person may happen to learn that his neighbour is unfaithful to his wife and this knowledge will upset him because he believes in marital fidelity. He need not be present when his neighbour commits the unfaithful act to be upset. Since people may

\textsuperscript{310} Feinberg, \textit{supra} note at 5. According to Feinberg, people who are not morally responsible for putting themselves in an offending situation are a captive audience because the offence is enforced on them from the outside when they would much prefer to be doing something else (Feinberg, \textit{supra} note 236 at 23).
accidentally learn about all kinds of such upsetting acts from various sources and cannot shield themselves from learning them, they cannot be held morally responsible for their knowledge. Pragmatically speaking, the moral responsibility test cannot serve as a threshold test because courts cannot deal with a possibly overwhelming number of cases in which people ask to restrict the behaviour of others simply because they learn something that upset them about their behaviour. In addition, normatively speaking, as I will later show in this section, the moral responsibility threshold test does not draw the right demarcation criterion between acts that constitute an offence to integrity of cultural identity, such as acts that have a symbolic influence in the public sphere and those that do not.

Instead of applying the moral responsibility principle I suggest three cumulative threshold tests. A claim from integrity of cultural identity has to meet them all if it is to be acknowledged as a valid legal claim. The first is the public sphere test, according to which claims from integrity of cultural identity that wish to limit or prohibit offending acts that take place only in the private sphere would not be acknowledged as valid legal claims. In light of the intimate connection between integrity of cultural identity and social status, integrity of cultural identity is mainly affected by acts that appear in the public sphere. Acts that take place in the private sphere tend to have a lower effect on the social status of cultural identity in society. 311 Public acts such as gay pride parades in contrast have a great impact on the social sphere. The aim of such an act is to raise awareness of the cultural identity of gays and lesbians and receive public recognition for it. 312 By contrast, a person who indulges in homosexual acts in his private apartment does not affect the social status

311 Galeotti, supra note 135 at 72.
312 Ibid. at 173-174.
of his religious neighbour in the same way. Since the social status of the offended cultural identity is an important factor in raising claims from integrity of cultural identity and estimating their strength, there is no point in acknowledging such claims when they are made against acts in the private sphere.

Admittedly, the distinction between the public and the private spheres is not clear-cut. In the context of this chapter, the term ‘acts in the public sphere’ encompasses all acts that have a substantive public significance. That is, acts which are likely to influence the social status and perception of cultural identities in society. Communication between two, three or four private individuals (who are not public figures) that takes place in public is not likely to have such an influence. Similar communication that takes place in the workplace is a borderline case. Its classification as an act in the private sphere or as an act in the public sphere depends on factors such as whether the speaker is an employee or employer, the size of the workplace and the role it plays in greater society.

The distinction between the private and the public sphere should not be confused with the moral responsibility principle. People can be morally responsible for being offended not only by acts that take place in the public sphere, but also by acts that take place in the private sphere. Along this line, David Conway argues that the public-private distinction does not always coincide with the distinction between an unwilling and a willing audience. People may be an unwilling audience to a private act not only as participants in it (active participants or passive observers), but by merely unwillingly knowing about this act.313 For instance, a religious person may be unwillingly occupied with thoughts about homosexual acts that are done in his neighbour’s apartment after a friend of his accidentally tells him that he saw his next door neighbour indulging in

homosexual actions. The concern that he may raise about the integrity of his religious identity meets the moral responsibility test because he is not morally responsible for putting himself in a situation in which his religious identity might be offended, i.e., he did not wish to know what was happening in his neighbour’s apartment.

Because claims from integrity of cultural identity are not about unpleasant personal feelings of distress and anger, but about the social status of the relevant cultural identity and the way it is perceived in greater society, there is no reason to acknowledge a claim that is made with regard to acts in the private sphere, even when the offended claimants are not morally responsible for knowing about the private act that causes them distress and anger.

The second is the trifles test, which is borrowed from Nuisance law. The idea is that the law does not concern itself with trifles that do not have a real potential to offend the victim’s interest or rights.\footnote{Feinberg, supra note 236 at 7-8.} In cases of offences to the integrity of cultural identities, the law should concern itself only with acts that have a potential to substantially affect the social status of cultural identities in society. For instance, a man (who is not a public figure) who stands at a public place and preaches against a minority group may have an influence on some individuals who happen to witness his expression, but he does have a substantial influence on the way that the minority cultural identity is perceived in society. That is, it does not have a substantive potential to affect the social status of the minority’s cultural identity. This is also the case when a group of 10 people or so convey a similar message against minority cultural values. The case is different when several small groups express their disapproval of a minority’s cultural identity while operating in different

\footnote{Feinberg, supra note 236 at 7-8.}
places in a state. In this case, their acts have a greater influence on the way the minority cultural identity is perceived in public.

Similarly to the public sphere test, the trifles test is about the potential of public acts to influence the way cultural identities are perceived in greater society. For this matter, the size of the group that perform the offending act may not be relevant if the medium they use for communication is very influential. These days, one person who speaks in the public media or sends an email to a large group of people has a better chance to offend cultural identities than a group of people who perform an offensive act in a public place.

The third test is about the credibility of the cultural identities at hand. A culture is a participatory good that is produced and enjoyed by a group of people. Norms and values are considered a culture when they govern some institutions. A person, or even a group of people, should prove, at least to a minimal extent, the existence of the cultural identity they claim to be offended. Evidence with regard to one or more of the following should suffice: Individuals who share cultural and educational institutions, language, unique practices, common history, the fact that their cultural identity is largely regarded as distinctive from the mainstream cultural group, or the fact that their cultural identity is in a constant dialogue or struggle with other cultural group. Of course, fully developing sufficient conditions a cultural identity needs to meet in order to count as credible exceeds the scope of this chapter. The point here is that for recognizing a claim as a claim from the integrity of one’s cultural identity, we should make sure that we are dealing with culture in the first place.

Let us now move from the issue of threshold tests for claims from integrity of cultural identity, to considerations which may weaken or strengthen one’s claim from

---

315 Réaume, "Individuals, Groups and Rights to Public Goods", supra note 67 at 10.
integrity of cultural identity. The factors I will suggest in the following section do not exhaust all possible considerations for evaluating the strength or weakness of a claim from integrity of cultural identity. They are to be taken not as absolute, but rather as constituting a continuum evaluation test for the strength or weakness of a claim from integrity of cultural identity.

7. Indications of the Strength or Weakness of Claims from Integrity of Cultural Identity

In order to evaluate claims from integrity of cultural identity we need to examine the extent to which the offended person’s cultural identity is vulnerable. As I have argued, minority members’ cultural identity tends to be more vulnerable than majority members’ cultural identity. However, this is only true in general. In order to evaluate specific claims, we need to evaluate the strength of the specific cultural identity in question. The strength of the cultural identity at hand is intimately connected with the justification for protecting vulnerable identities in the first place, namely equality.

While minority members tend to be in a vulnerable social position because their norms and practices are constantly challenged by the majority, the relative social vulnerability of the cultural identity of minority members may vary from one case to another. When examining claims from integrity of cultural identity we are therefore obliged to examine various factors. For example, we should look at the level of integration of the relevant minority group in the political and economic life of the majority. The more representation minority members have in political and economic life, the less their norms and practices are marginalized. Their voice is heard in the public discourse and there is more chance that their norms and practices will receive legitimacy.
Another important factor which affects the social vulnerability of minority members is their inner group cohesion. The cohesion of a cultural group is typically manifested in the existence of cultural, religious and educational institutions and their strength. For example, if a religious community has strong religious institutions, its members can better sustain offences to the integrity of their cultural identity without undermining their cultural identity.

The socio-economic status of minority groups is another important consideration for assessing the social vulnerability of the cultural identity of minority members. This status includes things such as levels of employment and poverty. Educational status should also be examined. We should ask for example whether members of the minority do worse in elementary and secondary schools than members of the majority and what is their relative representation in universities.

Finally, the general attitude and level of tolerance of the majority towards the minority should also be examined. We should ask whether the minority members are represented in the popular media. When they are represented, are they portrayed positively, or negatively and stereotypically? The attitude of the majority is also manifested in the number of incidents of verbal and physical violence by members of the majority against members of the minority. It is important to stress that these factors usually work together. For example, the more one is represented in the political sphere, the more one's voice is heard in the media, the more economic power minority members have, and the stronger their institutions are etc.
8. Three Kinds of Cases of Claims From Integrity of Cultural Identity

There are typically three cases in which claims from integrity of cultural identity are involved: the majority is offended by a minority; a minority is offended by the majority, and a minority is offended by another minority. I will apply the threshold test and the vulnerable cultural identity principle I have suggested to these three cases.

8.1. The Majority is Offended by a Minority

Let us think about the recent debate in Europe with regard to the headscarf in terms of claims from integrity of cultural identity. Recently, there has been controversy in several countries such as France, Germany, the Netherlands, Britain, Switzerland and Turkey about whether to prohibit Muslim women from wearing the traditional headscarf, especially in public institutions such as public schools and work places.316 The European Monitoring Centre on Racism and Xenophobia Report on Discrimination of Muslims and Islamophobia in Europe317 (the Report on Islamophobia) points at two claims against the wearing of headscarves by Muslim women. First, it is argued that the headscarf is used by Muslim men as a means of oppressing women. Muslim women are forced to wear headscarves by their family and peers if they are to be allowed to leave home.318 However, while the Report on Islamophobia suggests that some Muslim women wear headscarves because of coercion, it also indicates that some Muslim women “wear the headscarf as an assertion of Muslim identity, which may be rooted in a number of factors, both personal or

---

318 Ibid. at 40.
political, of which the wearing of a headscarf may be only one expression. Others may wear the headscarf, because they consider it as their religious duty”.

The claim is that even when worn with a free will, the headscarf is still a symbol of female oppression and gender inequality. In other words, the wearing of a headscarf offends the liberal values of equality and freedom which are cherished by the majority of Europeans. The argument from oppression and gender inequality is prominent in the Dahlab case that was delivered by the European Court of Human Rights Court. The applicant, a primary school teacher in Geneva, had converted to Islam and began wearing an Islamic headscarf. This appeared to the authorities to be in violation of the Public Education Act, which provides that the public education system shall ensure that the political and religious beliefs of pupils and parents are respected. After she was formally requested to cease wearing a headscarf when on duty, Dahlab failed to have that decision annulled by the Swiss courts. The European Court of Human Rights refused to consider that this resulted in a violation Dahlab’s freedom of religion. The Court stated that the

---

319 Discrimination and Islamophobia Report, supra note 317 at 40; Ward, supra note 316 at 316. Some Muslim women in the Western world claim that wearing a headscarf allows them to protest against what they perceive as oppressive colonialism (Norma C. Moruzzi, “A Problem with Headscarves: Contemporary Complexities of Political and Social Identity” (1994) 22 Political Theory 653 at 663; Ward, supra note 316 at 331). For Muslim women's contribution in transmitting and manifesting Muslim cultural identity, see Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights (Cambridge: Cambridge University Press, 2001) at 45-62 [Shachar, Multicultural Jurisdictions]. For the particular role of the headscarf in transmitting and manifesting Muslim cultural identity, see Ayelet Shachar, “Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies” (2005) 50 McGill L.J. 49 at 51 [Shachar, “Religion, State, and the Problem of Gender”].

320 Ward, ibid. at 334. Along these lines, the respondent in the SB case argued before the Court of Appeal of England and Wales that the headscarf frightens pupils who perceive this form of dress to be associated with extreme views (see para. 51. in Brooke L. J.’s judgment in The Queen on the Application of SB v. Headteacher and Governors of Denbigh High School, [2005] EWCA (Civ) 199, 2005 2 All E.R. 396 (EWCA (Civ)) (Eng.) (see Ward, ibid. at 318).

321 The headscarf is a classic example of what Galeotti calls “differences that are regarded by the cultural majority as unfamiliar and strange”. The public visibility of the headscarf “produces a general feeling of uneasiness among the majority”. Such uneasiness occurs because the headscarf is perceived as incompatible with liberal principles (Galeotti, supra note 135 at 85-87).
headscarf is a powerful “external symbol” which “appeared to be imposed on women by religious precept that was hard to reconcile with the principle of gender equality”.  

In my view, the claim at stake here is a claim from integrity of cultural identity. It seems that the argument, according to which headscarves should be banned because of their “problematic” symbolic meaning, are liberal attempts to have one’s cake and eat it too. Although the wearing of headscarves is protected by both the right to religious freedom and the right to freedom of expression, liberals still think that it should be prohibited because it symbolizes the oppression of women. The key question is therefore, for whom is it a symbol? The answer is that the headscarf carries this symbolic meaning for members of the majority who believe in liberal values. To put it differently, it offends the integrity of their cultural identity to see a woman wearing a headscarf because in their eyes the headscarf mocks the values of equality and freedom in which they believe. However, while this claim is basically a claim from integrity of cultural identity, liberals argue that there is no space for arguments from integrity of cultural identity, or offence to feelings, as they call it. There is only space for arguments of “real” rights. Therefore, they disguise their claims as claims about violations of universal values such as equality and freedom although claims from integrity of cultural identity are more relevant to some headscarf cases in which the alleged violation of the values of equality and freedom is only

---

322 Dahlab v. Switzerland, ECtHR 15 Feb. 2001, Application No 42393/98, ECHR 2001-V. There are other international cases on the other hand, such as the Ludin case in Germany, which state that women wear headscarf for a variety of reasons and that the headscarf is not necessary a symbol of oppression and inequality of women (Ludin BverG, 2 BvR 1436/02 (24 September; decision delivered by the German Federal Constitutional Court); see also Matthias Mahlmann, “Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court’s Decision in the Headscarf Case” (2003) 11 German Law Journal 1099). In the Sahin case, Tulkens J., in a minority opinion, stated that there is no reason to assume that Muslim women are forced to wear headscarves or that the headscarf symbolises oppression in inequality of women (Leyla Sahin v. Turkey, ECtHR 10 Nov. 2005 Application No. 44774/98 para. 12 of Tulkens J.’ judgment).
symbolic, i.e. cases in which women choose to wear headscarves and are not coerced to do so.

Can claims from integrity of cultural identity justify limiting or prohibiting headscarves? Considering the criteria I have laid out, the answer to this question is negative. If we consider the vulnerable cultural identity principle, the conclusion is that although the majority might be truly offended, no substantial harm is done to their cultural identity. It is important to remember that the civil and liberal values underpinning the majority claims from integrity of cultural identity are associated with all European states. They are considered the norm. While wearing a headscarf may offend people’s feelings, it does not threaten their cultural identity – its values are still cherished by the majority and constitute the norm and not a deviation from it.

As for the moral responsibility principle, it can indeed be argued that members of the majority who must attend public schools, which Muslim women attend as well, constitute a captive audience because they cannot choose whether or not to be exposed to the offending headscarves or not. However, since those members of the majority do not possess a vulnerable cultural identity, their claim from integrity of cultural identity is relatively weak to begin with.

Another example of a case of a claim from integrity of cultural identity of a majority versus a minority is the Gay News British legal case.\(^\text{323}\) The Gay News magazine published a poem, which depicted Jesus as a homosexual and acts of necrophilia upon his body after his death. The magazine was successfully prosecuted, under the criminal offence of blasphemy, for offending the feelings of Christians.\(^\text{324}\) By accepting the claim of

\(^{323}\) Whitehouse v. Lemon [1979] AC 617.

offence to feelings, the House of Lords upheld the conviction against the magazine, (three
to two)\textsuperscript{325} which had also been accepted by the European Commission on Human
Rights.\textsuperscript{326}

Under my vulnerable cultural identity principle, the \textit{Gay News} decision is wrong. It
is a clear case of a majority against a minority. The cultural identity of gays in Britain is
much more vulnerable than the cultural identity of the common Christian believer. Gays
usually suffer from misrecognition that renders their cultural identity inferior.\textsuperscript{327}

8.2. \textit{A Minority is Offended by a Minority}

The recent debate about the gay pride parade in Jerusalem is a good example of a case that
brings into conflict claims from integrity of cultural identity of one minority group with
those of another minority group. Jerusalem is a city in which there is a large population of
religious Jews. Some of the Jewish neighbourhoods consist of a religious population and in
some of them there is a mix of religious and secular Jews. In addition, in Jerusalem, and in
Israel in general, there is a thriving gay community. In 2006, members of the Jerusalem
gay community organized a pride parade that was supposed to pass through the central
streets of Jerusalem. This parade was opposed by the leadership of religious Jews in
Jerusalem (as well as these of religious Muslims and Christians). After a long debate, a
settlement was reached to hold a big event in one of Jerusalem’s sport stadiums.

\textsuperscript{214.}
\textsuperscript{325} \textit{Whitehouse v. Lemon}, \textit{supra} note 323.
\textsuperscript{326} \textit{Gay News v. United Kingdom} (1983) 5EHRR 123 (Comm.).
\textsuperscript{327} For the cultural misrecognition that gays and lesbians suffer (as opposed to their relative success in the
economic sphere) see Nancy Fraser, “Social Justice in the Age of Identity Politics: Redistribution,
Recognition and Participation” in Nancy Fraser & Axel Honneth, \textit{Redistribution or Recognition?: A
Political-Philosophical Exchange} (New York: Verso, 2003) 25. Fraser stresses that most (if not all)
subordinated groups suffer from problems of redistribution and problems of recognition, but the gay and
lesbian group suffers more from lack of recognition than lack of redistribution.
On the one hand, religious groups in Jerusalem argue that the gay pride parade offends their religious feelings. This is because of the holy status they attribute to the city of Jerusalem. On the other hand, the gay community argues that the value of expressing the gay lifestyle in public is very important to their cultural identity. Preventing them from expressing their lifestyle in public because their conduct offends the feelings of others may offend their deep feelings as well.

The problem is that both groups are minority groups whose values are typically not shared and sympathized with by the larger Israeli society. Prima facie, they both raise strong claims from integrity of cultural identity, but their claims are in conflict with one another. How should the strength of their claims be evaluated under the vulnerable cultural identity principle?

It seems to me that in this case since both parties have strong claims from integrity of cultural identity, their claims have equal weight. When deciding whether to have the gay parade in Jerusalem or not, the vulnerable identity principle does not favour one side over another and we should therefore look at other factors. For instance, we can follow the moral responsibility principle where it is relevant. There are different levels of moral responsibility, which can strengthen or weaken claims from integrity of cultural identity. For instance, in cases of a vulnerable identity versus another vulnerable identity, the person or the group who is offended by an act because they constitute a captive audience, has a stronger claim from integrity of cultural identity against the offender. If we apply the captive audience principle to the gay pride parade it can be argued that the parade should

---

328 Along this line Bruce MacDougall argues that condemnation of homosexual practices amounts to a condemnation of homosexual identity (see Bruce MacDougall, “The Separation of Church and Date: Destabilizing Traditional Religion-Based Legal Norms of Sexuality” (2003) U.B.C Law Review 1 at 10-11).

329 For an argument along this line see ibid. at 21.
not pass through Jerusalem’s religious neighbourhood because if it passes through them, the religious people who live there become a captive audience. However, in the rest of the city, the parade should be allowed. In a mixed neighbourhood, it can be argued that the religious inhabitants have greater moral responsibility because they have chosen to live in a neighbourhood in which there are secular people who have a different life style.

Along those lines, in June 2007, the Israeli Supreme Court decided that the police were right to allow the gay pride parade to go through the major streets of Jerusalem. The judges stressed that because the parade would not go through religious neighbourhoods, religious people were not a captive audience. They could easily avoid the parade that may offend their religious values. In addition, the gay and lesbian community has promised to conduct a restrained parade, rather than an extravagant one.

The Israeli Supreme Court also stressed that the offended feelings of the religious minority should be balanced against the gay and lesbians’ freedom of expression that is mostly important for them as a minority group. In this statement, I believe the Supreme Court comes very close to the vulnerable identity principle. As minority members who possess a vulnerable cultural identity, it is harder for gays and lesbians to cope with offences to their cultural identity and limitations on their freedom of expression.

8.3. A Minority is Offended by the Majority

Let us consider the Danish cartoon affair. On September, 30 2005 Jyllands-Posten, a Danish newspaper, published a series of cartoons of Prophet Muhammad. The text accompanying the cartoon said the following: “some Muslims reject modern, secular

---

330 HCJ 5277/07 Marzel v. The Police Commander of Jerusalem District.
331 Ibid. at Provision 6 to Beinish C.J.’s decision.
332 Ibid. at Provision 7 to Beinish C.J.’s decision.
333 Discrimination and Islamophobia Report, supra note 317 at 42.
society. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with secular democracy and freedom of expression where one has to be ready to put up with scorn, mockery and ridicule”.

The publication triggered protests, some of which were violent, by Muslims in Europe and elsewhere in the world. While the Danish newspaper, which initially refused to apologize, retracted its position and apologized for the publication, other newspapers in Europe reprinted the cartoon in the name of freedom of expression. As the caption accompanying the cartoons says, the cartoons were published in order to convey a message about the importance of freedom of expression, even when it protects contents that may offend minority groups because it mocks values that they hold sacred.

In the Danish cartoon affair therefore the two competing claims were a claim from integrity of cultural identity by the Muslim minority on the one hand, and a claim for the right to freedom of expression on the other hand. Let us apply the criteria I have set out in order to assess whether the claim from integrity of cultural identity in this case is relatively strong or weak. The cartoons were initially published in a major newspaper in Denmark and were reprinted in other major newspapers throughout Europe. That is, the cartoons occupied a central place in the public sphere. They therefore had a great impact on the social status of Muslim cultural identity in Western countries. Cartoons that associate the prophet Muhammad with terror for instance, tend to reduce the social status of Muslim identity as they enforce a negative stigma, according to which terror is part and parcel of Islam. The reduced social status of Muslim cultural identity, which is already low in most

334 Ibid.
335 Ibid. at 42-43.
Western countries, is an indication that the claim from integrity of cultural identity at hand is a powerful one that should be recognized as a valid legal claim.

Unfortunately, members of the Muslim minority in Europe and Denmark in particular, suffer major disadvantages. As the Report on Islamophobia indicates, Muslims suffer from discrimination in employment. When they are hired, it is usually to relatively low ranking positions, even when their qualifications are higher.\(^{336}\) Moreover, their work environment is often non-tolerant of their religious customs and practices. In Denmark for example, the Danish Supreme Court decided that the dismissal of a supermarket employee for having worn a headscarf for religious reasons did not amount to discrimination.\(^{337}\) Furthermore, Muslim pupils’ achievements in European schools are lower than those of the majority members and their dropout rates are higher.\(^{338}\) While various reasons such as different socio-economic backgrounds account for these differences, the Report on Islamophobia suggests that discriminatory practices play a significant role as well.\(^{339}\) In the area of housing, Muslims suffer from higher levels of homelessness, poorer quality housing conditions, poorer residential neighbourhoods, and greater vulnerability in their housing status.\(^{340}\) In addition, in Denmark in particular, Muslims are discriminated against by private house owners.\(^{341}\) Finally, Muslims are often subjected to racist violence and crimes that specifically target Muslims.\(^{342}\)

These data suggest that Muslims in Europe suffer not only from socio-economic differences that are the lot of immigrants in general, but also from an Islamophobic

\(^{336}\) \textit{Ibid.} at 44-46.
\(^{337}\) \textit{Ibid.} at 47 (Supreme Court UfR 2005. 1265H).
\(^{338}\) \textit{Ibid.} at 50.
\(^{339}\) \textit{Ibid.} at 51.
\(^{340}\) \textit{Ibid.} at 54.
\(^{341}\) \textit{Ibid.} at 56.
\(^{342}\) \textit{Ibid.} at 62-63. See details of the violent incidents in Denmark in page 67-69 and in other European countries in \textit{ibid.} at 69-89.
reaction, which negatively influences their cultural identity, life style and beliefs, which are different from those of the Christian or the secular majority.

If we return to the vulnerable cultural identity principle, this data suggests that the cultural identity of the Muslim minority is much more likely to be in a vulnerable position. Generally speaking, the values and beliefs of Muslims in Europe are constantly threatened and they are under constant pressure to abandon their cultural identity and conform with or assimilate into greater society in order to improve their life conditions. This sheds a rather new light on the remarks of the editor of Jyllands-Posten that the publication of the cartoon facilitates the integration of Muslims in Europe as they are also subjected to criticism like any other individual in Europe. Rather, it seems that the publication of the cartoons constitutes part of the pressure that is put on Muslims to assimilate into European society by giving up their cultural identity. It imposes on them a particular conception according to which liberal values of freedom of expression are more sacred than their religious values. It also conveys the message that they must accept these values in order to integrate within the economic and social life of the majority.

9. **Conclusion**

From the Danish cartoon affair to the religious controversy over the Jerusalem gay pride parade, liberal democracies face a challenge in responding to claims, usually on behalf of minority groups, that some acts or speech should be forbidden because they offend some people’s feelings. In most countries, with the exception of Israel, claims of offence to feelings do not have an independent legal status. They are not recognized in courts as such and treated, if any, in terms of freedom of religion, freedom of expression or preserving the public order.
In this chapter, I have suggested re-conceptualizing claims of offence to feelings as claims from offence to integrity of cultural identity. The importance of this re-conceptualization is threefold. First, it helps us see what really is at stake when dealing with claims of offence to feelings. Namely, the offence is about violating the cherished values that constitute an important part of one’s cultural identity and about the potential of this violation to threaten the social status of his or her cultural identity. I have shown that this rationale is consistent with Mill, Hart and Feinberg’s analysis of offensive acts. The distress or anger one may feel as a result of it is only the side effect of the offence to integrity of one’s cultural identity.

Second, the emphasis on cultural identity points the way to regulating claims from integrity of cultural identity. I have suggested that the vulnerable cultural identity principle be used in courts to assist in deciding cases involving claims from integrity of cultural identity. According to the vulnerable cultural identity principle, members of minority groups who have a more vulnerable cultural identity have a stronger claim from integrity of cultural identity. I have shown that the vulnerable identity principle avoids the liberal worries about legal moralism and coercion of the majority moral values on minority members. By evaluating claims from integrity of cultural identity by objective socioeconomic parameters, the vulnerable cultural identity principle also avoids the problem of measuring painful feelings which are subjective by nature.

Third, I have argued that understanding claims of offence to feelings as claims from integrity of cultural identity shows the necessity in giving them an independent legal status. Drawing on my conception of equality of cultural identity and on Galeotti’s theory of toleration, according to which the value of equality underpins the notion of toleration, I
have argued that not acknowledging the independent legal status of claims from integrity of cultural identity typically amounts to infringing minority members’ right to equality. This is because typically, when faced with offensive acts, minority members are pressured to abandon their own cultural values, norms and visible practices, and adopt those of the majority in order to achieve better inclusion in society. Majority members are not faced with such a dilemma.
Chapter 3:

Language Rights, Religious Freedom and Equality of Cultural Identity

1. Introduction

In the previous chapters I have laid down my conception of equality of cultural identity and shown how it applies to claims from integrity of cultural identity. I have argued that claims from integrity of cultural identity should have an independent legal status and suggested the vulnerable identity principle to regulate them. Claims from integrity of cultural identity however, are not the only claims from cultural identity whose legal status is contested. Although they appear in many constitutional documents, language rights are commonly perceived as special rights that are distinctively different from fundamental human rights. Under this perception, fundamental human rights are to be interpreted by the court with generosity, whereas language rights are to be interpreted with restraint.

There are several claims that have been made to justify a restrained approach towards language rights. All of these claims try to identify allegedly unique features of language rights that justify their restrained interpretation. In this chapter I argue that all of the claims that have been raised so far are ill founded by showing that all of the allegedly unique features of language rights subsist in the right to religious freedom as well. Because

Jeremy Waldron and Brian Barry for instance argue that language rights are not liberal rights in the strict sense. They object to the protection of minority languages on the grounds that such protection interferes with the free choice of minority members to integrate into the majority language, which better advances their general integration in society (Barry, supra note 17 at 75; Waldron, supra note 139 at 93, 97). James Nickel argues that language rights, like other group rights, are not human rights in the standard sense because they attribute right to members of specific groups rather than to all individuals as humans. Nickel however does not deny that group rights can be justified by reference to the same sorts of considerations that justify human rights (James Nickel, Making Sense of Human Rights (Blackwell Publishing, 2007) 164). Highlighting these sorts of considerations with regard to language rights is the central aim of this chapter.
the right to religious freedom is perceived as a fundamental human right, which is interpreted generously despite its having these features, language rights can be generously interpreted as well.

After having shown that these claims are ill founded, I identify a new possible claim for justifying the restrained approach towards language rights, which is that unlike the right to religious freedom, language rights impose a cultural burden on majority members. The term ‘cultural burden’ refers to the requirement imposed on majority members to actively use the minority language, which unavoidably causes them to associate themselves with the minority culture to some extent. In terms of equality of cultural identity, by requiring majority members to actively use the majority language, the sphere of their own cultural identity is invaded by other spheres in their lives, such as the sphere of education and the sphere of economics and career.

However, I argue that the burden language rights impose on majority members is not as burdensome as it may initially seem. In most cases, language rights require majority members to learn, speak, and associate themselves to some extent with the minority culture, but they do not require them to neglect their culture in favour of the minority culture. That is, in most cases, language rights do not require majority members to compromise the cultural identity sphere in their lives in favour of success in other spheres of their lives such as health care, education and career, which are dominated by the majority language anyway.

Section 2 identifies three main arguments about features that are allegedly peculiar to language rights, make them fundamentally different from human rights, and in turn justify interpreting them with caution and restraint. I call them ‘the positive right
argument’, ‘the political compromise argument’, and ‘the argument from the collective and cultural characters of language rights’. Each argument is designed to create a distinction between language rights and other human rights by illuminating characteristics of language rights that other human rights do not bear. I will address these three arguments and maintain that none of them is salient. That is, none of them points out a unique character of language rights, which may account for the restrained approach towards them. In particular, by drawing a comparison between language rights and the right to religious freedom, I will argue that the collective and cultural characters of language rights also subsist in the right to religious freedom. This comparison will be drawn at the conceptual level by analysing the values that these rights protect, as well as by analysing legal decisions in which the collective and cultural characters of the right to religious freedom are prominent.

In section 3, I will identify a unique feature of language rights, namely the cultural burden they impose on majority members, which may account for the reluctance to interpret them generously. I will show that in the rare cases in which the right to religious freedom imposes a cultural burden on majority members it is also interpreted with restraint. Nevertheless, relying on my conception of equality of cultural identity, I will argue that the cultural burden language rights impose on majority members does not amount to a strong enough argument for treating them with caution and restraint.

2. Three Arguments Supporting the Doctrine of Cautious and Restrained Interpretation of Language Rights

Language rights are enshrined in constitutional documents such as the Canadian Charter of Rights and Freedoms in Canada and art. 82 of the Palestine-Order-in Council in Israel. In
spite of that, language rights are commonly excluded from the prestigious category of
fundamental human rights.\textsuperscript{344} If they are perceived as human rights, they are often
categorized as second or third generation human rights.\textsuperscript{345} One may observe that the
questions whether language rights fall into the category of fundamental human rights has
little practical implications, especially when they are included in international and
constitutional binding legal text.\textsuperscript{346} But, this observation does not take into account the
message that is conveyed by excluding language rights from the category of fundamental
human rights or relegating them to the category of second or third generation human rights.
The message is that language rights are less important, or less fundamental than other
rights, and are therefore more prone to restrained judicial interpretation.\textsuperscript{347}

\textsuperscript{344} I use the term ‘prestigious’ because charges of human rights violations are perceived as the “strongest
complaints that can be made”, at least when it comes to international law (Jack Donnelly, \textit{Universal Human
\textsuperscript{345} For the general division of human rights into first, second, and third generations see (Carl Wellman, \textit{The
The term ‘generation’ may merely constitute an historic observation, according to which political and civil
rights have been recognized as human rights earlier than social and cultural rights. This is the reason for
including the first under the category of first generation human rights, while including the latter under the
category of second and third generation human rights (Matthew Craven, \textit{The International Covenant on
Economic, Social and Cultural Rights: Perspective on Its Development} (Oxford: Oxford University Press,
1998) 8). But the term ‘generation’ usually also implies a normative hierarchy of human rights (Donnelly, \textit{ibid}. at 41, 144). The historic hierarchy translated most clearly into a normative hierarchy when the Universal
Declaration of Human Rights from 1948 has translated into two separate treaties in 1966: The International
Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural
Rights (Ruth Gavison, “On the Relationship between Civil and Political Rights and Social and Economic
University Press, 2003) 23) and when the United Nations established a supervision mechanism system for the
civil and political rights treaty that is better developed than the one established for the social and cultural
rights treaty (Daphne Barak - Erez & Aeyal M Gross, “Introduction: Do We Need Social Rights? Questions
1 at 4).
\textsuperscript{346} Kristin Henrard, \textit{Devising an Adequate System of Minority Protection: Individual Human Rights and the
\textsuperscript{347} Until recently this has been the fate of social rights. The message that social rights are secondary to
fundamental human rights (i.e., civil and political rights) permeated to international and national legal
institutions that regarded social rights with suspicion and restraint (Barak - Erez & Gross, \textit{supra} note 345 at 4).
Challenging this common perception of language rights inevitably involves an appeal to the concept of fundamental human rights. Borrowing Robert Alexy’s distinction, it possible to challenge the concept of fundamental human rights by appealing to two different but related levels. The first one is the formal level, according to which rights are fundamental if they are legally acknowledged as fundamental by constitutional institutions, such as a constitution or a bill of rights.\textsuperscript{348} The second is the substantive level, according to which rights are fundamental if the content or the values they protect meet specific criteria.\textsuperscript{349} These criteria, however, are highly contested. The idea of human rights in international law began as an idea about natural rights that are inherent to all humans, inalienable and cannot be given or taken away by the state.\textsuperscript{350} These days, human nature and human needs are perceived as the source of human rights, but not as their ultimate ends. Most scholars agree that human rights constitute a moral statement that point beyond the way people are to the way they might become, but they disagree on their exact moral content and ends.\textsuperscript{351}

In this chapter I appeal to the substantive level discourse of human rights, not in order to suggest my own conception of fundamental human rights but rather in order to negate three arguments against a purposive and broad interpretation of language rights that have been made at the substantive level of human rights discourse. I argue that they are not

\textsuperscript{349} Ibid. at 16.
\textsuperscript{351} Donnelly, supra note 344 at 13-15. Alexy defines fundamental rights as rights that are universal, fundamental, abstract, moral and established with priority over all other kinds of rights (Alexy, supra note 348 at 18). Other scholars such as James Nickel, conceptualize human rights as rights that set minimum moral standards to all individuals, rather than an ideal social and political world (Nickel, supra note 343 at 9-10).
convincing mainly because they do not point out features or problems that do not exist with regard to other human rights.

Language rights are defined in the legal and philosophical literature as rights that protect the use of particular languages, namely one's mother tongue or native language.\textsuperscript{352} Language rights are regarded as minority rights because 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\textsuperscript{353} in favour of the majority language.\textsuperscript{354}

The purpose of this chapter is not to present a full blown positive argument for the importance of language rights. Such a positive case for language rights was presented by Réaume, who argues that language rights are justified first and foremost because they protect the intrinsic value minority members attach to their language as a marker of their cultural identity.\textsuperscript{355} Elsewhere, I have also explored this intrinsic value and argued that it should be the main criterion by which the state should decide which minority members are most deserving of language rights protection.\textsuperscript{356}

In this chapter I will assume that the argument about the intrinsic value which underpins language rights is strong and persuasive. I will also refer to it in relevant points towards my argument. Nevertheless, the intrinsic interest in language rights as protecting


\textsuperscript{353} As Spolsky and Shohamy observe, the term 'mother tongue' and the concept behind it are both somewhat questionable. In any case, there is a common underlying assumption that whatever language a mother chooses to speak to her children will be stronger and form a better basis for later education (Bernard Spolsky & Elana Shohamy, \textit{The Language of Israel: Policy, Ideology and Practice} (Clevedon, UK: Multilingual Matters, 1999) at 76).

\textsuperscript{354} Réaume, "The Constitutional Protection of Language", \textit{supra} note 22 at 46-47

\textsuperscript{355} Réaume, "Intrinsic Value and the Protection of Difference", \textit{supra} note 15 at 251; Réaume, "The Constitutional Protection of Language", \textit{supra} note 22 at 45; Réaume, "Beyond Personality", \textit{supra} note 22 at 283.

\textsuperscript{356} Pinto, \textit{supra} note 68.
minority members’ cultural identity is not sufficient to support a purposive interpretation of language rights. This is because there are arguments against a purposive interpretation of language rights, which single them out as bearing unique features that other rights do not bear, and thus should be treated with caution, even if the interest underpinning them is intrinsic and strong. My purpose in this section is to refute these arguments.

Language rights may vary along different forms of legislation. At the one end of the continuum, there are minimal language rights that protect the right of all people to talk and use their language in private communication, namely communication that does not involve the government. The right to freedom of language that protects these activities and is enumerated in several international law treaties is an example for such a minimal language right. Generous language rights, which we can find on the other end of the continuum, require the state to take positive steps to ensure the use of a particular language in communication with state bodies such as the court, the parliament, municipalities etc. I call this kind of rights ‘comprehensive language rights’. Sections 16 to 23 of the Canadian Charter of Rights and Freedoms are good examples of such legislation. They declare French as an official language that is equal to English, the majority language. They also impose, for instance, a duty on the provinces to provide education in French where the numbers of Francophones warrant it, and a duty to provide bilingual governmental services in English and French. In the middle of this continuum we may place art.82 of the Palestine-Order-in-Council, which declares Arabic as an official language in Israel, and impose some limited duties on municipalities, the government and the legislature to
communicate in it, but does not explicitly determine whether Arabic has an equal status to Hebrew, the majority language. Like all other rights, language rights may be subjected to a process of judicial review that may strengthen or lessen them. Language rights that started in a comprehensive shape may be narrowed by judicial interpretation to their very basic literal meaning in a specific legislation. Language rights that started in a minimal form may be purposively interpreted by courts to a comprehensive shape. The purpose of this chapter is to shed light on the reasons underlying a narrow interpretation of comprehensive language rights or the refusal to purposively interpret minimal language rights.

2.4. The Positive Right Argument

The right to freedom of language, which is enumerated in international and constitutional legal documents such as the Universal Declaration of Human Rights and Israel's Declaration of Independence, is perceived as a fundamental and universal human right. It is a language right because it allows the freedom of all people, including minority members, to speak any language they wish to speak. The question is whether it can be generously interpreted not only as a minimal language right that assures the negative freedom of all people to speak their language, but also as a more comprehensive language right that requires the state to take active measures to support this language. That is, the question is whether the right to freedom of language can be interpreted as a positive right.

357 Article 82 of The Palestine Order-in-Council of 1922 stipulates that: "All ordinances, official notices and official forms of the government and all official notices of local authorities and municipalities in areas to be prescribed by order of the High Commissioner shall be published in Arabic and Hebrew. The two languages may be used, subject to any regulations to be made from time to time, in the Government offices and the Law Courts" (Drayton (1934) 3 Laws of Palestine 2569, 2588).
359 The roots of the familiar distinction between negative freedoms and positive rights are found in Isaiah
This question is raised and given two different answers in the Israeli Adalah case, which was briefly mentioned in Chapter 1. Adalah deals with the claim of Israeli Arabs for bilingual street signs in Hebrew and Arabic in mixed Arab Jewish cities. Justice Cheshin and Barak C. J. stress that the petitioners in Adalah do not ask for the negative liberty of Israeli Arabs to speak Arabic. They ask the state to take a positive measure – to communicate with them in Arabic. The Adalah case demonstrates the positive dimension that comprehensive language rights bear, which requires the state to actively associate itself with the protection of minority language, Arabic in this case.

Justice Cheshin claims in his minority opinion that there is no legal basis for the Arab minority’s claim. Freedom of language does not impose any positive duty on the state. That is, Cheshin J. refuses to broadly interpret the right to freedom of language in order to turn it from a minimal language right that does not impose positive duties on the state to protect the Arabic language to a comprehensive language right that imposes such duties. Chief Justice Barak, on the other hand, in his majority opinion argues that the right to freedom of language should be interpreted not only as a negative freedom but also as a positive right that imposes positive duties on the state. He deduces the municipalities' duty to add Arabic captions to street signs from the right to equality and the right to freedom of language. Chief Justice Barak argues that both rights should be broadly interpreted as a

---

Berlin's distinction between negative and positive freedoms (Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969) 118 at 121-172). Crudely speaking, the term ‘negative rights’ refers to rights that create the duty of the state not to interfere with a citizen’s freedom 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 do, if it is to take these rights seriously (John William Salmond, *Jurisprudence*, 11th edition (London: Sweet and Maxwell, limited, 1957) 269-270).

360 *Adalah, supra* note 1..
guarantee not merely of equal formal access to state services, but also of equal use, or equal benefit from them.\footnote{Ibid. at 414.}

Some language rights such as the ones included in the Canadian \textit{Charter} are already positive in their literal meaning. In \textit{Ford}, the Canadian Supreme Court distinguished them from negative freedoms when it described them as “more akin to rights, properly understood, than freedoms” because “they pertain to governmental institutions and for the most part they oblige the government to provide for, or at least tolerate, the use of both official languages”.\footnote{\textit{Ford v. A.G. Quebec}, (1988) 2 S.C.R. 712 at para. 43.}

But even when there is no controversy that specific language rights are positive, a normative claim is raised against their broad interpretation by courts. The claim is that the fulfilment of positive rights is costly.\footnote{In Israel for instance, it is claimed that the entire Official Gazette of the government is no longer translated to Arabic because of monetary problems (Yocheved Deutch, “Language Law in Israel” (2005) 4 \textit{Language Policy} 261 at 270-271).} Because positive rights oblige the government to take positive steps, so this argument goes, they are to be interpreted with caution and restraint. A liberal and purposive interpretation of positive rights will infer more duties on the state, which will impose a significant burden on the state. In \textit{Mahe}, the Canadian Supreme Court applies this argument when it describes language rights as “quite different from the type of legal rights which courts have traditionally dealt with”. Their distinctiveness characteristic “places positive obligations on government” and therefore provides good reason for the court to be careful in interpreting them.\footnote{\textit{Mahe}, supra note 377 at 365.}

Are language rights distinctive in their positive nature? The answer is negative. A proposed demarcation criterion between positive rights and negative freedoms is to ask if
there was no government in existence, would the right in question be automatically fulfilled. If the answer is yes, then it is a negative freedom, and if the answer is no, it is a positive right. However, the problem with this test is that it begs the question. It assumes that people already agree on what is necessary in order to realize the value a given right protects. If we do not agree on this point we can always argue that a sharp distinction between a negative and a positive right cannot be drawn because the object of any right cannot be truly protected without minimal positive steps that are taken by the state in order to protect it. In fact, it is almost impossible to distinguish positive rights from negative rights because all rights stand on a continuum of entailing only negative freedoms on the one end and imposing only positive obligation on the other end. We will perceive most rights as negative rights only if we are insensitive to the fact that some of the values underpinning them may require active protection by the state – not only passive action of non-interference.

Think, for instance, about fundamental rights such as the right to vote and the right to a fair trial that exist in every democratic jurisdiction. They are often perceived as entailing only negative freedoms, but this perception is wrong. After all, the right to vote can be fully realized only if the government establishes an expensive electoral system.

---


368 Cross admits that a strong interpretive case can be made for implying some positive rights in the U.S. constitution, but that such an interpretation would be a distinct departure from the particular constitutional history and current understanding of constitutional rights in the U.S. (Cross, supra note 366 at 871).
Similarly, a fair trial cannot take place if the state does not establish a judicial system.\footnote{Leslie Green & Denise Réaume, “Second-Class Rights? Principle and Compromise in the Charter” (1990) 13 The Dalhousie Law Journal 564 at 592; Alastair Mowbray’s central argument is that political and civil rights wrongly perceived as negative freedoms because they have dominant positive dimensions as well (Alastair Mowbray, The Development of Positive Obligations on Human Rights by the European Court of Human Rights (Oxford: Hart, 2004)).}

These examples illustrate that there is no easy way to distinguish positive rights from negative rights. There is also no definite and generally accepted way to distinguish between them.\footnote{Yoram Rabin & Yuval Shany, “The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?” (2003-2004) 37 Isr. L. Rev. 299 at 305.}

At this point one may suggest a more consistent argument against a liberal and generous interpretation of language rights. One may agree that language rights are not the only positive rights, but he may nevertheless suggest that all rights that bear positive dimensions should be interpreted by the court with caution and restraint. This argument belongs to a broad debate about judicial activism. It assumes that courts do not have the sufficient knowledge and skills to deal with issues of resource allocation and public policy that are inherently related to judicial interpretation of positive rights.\footnote{Martha Jackman, “What’s Wrong With Social and Economic Rights” (1999-2000) 11 Nat’l J. Const. L. 235 at 239-240; Jenna MacNaughton, “Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune” (2001) U. Pa. J. Const. L. 750 at 776-777.} It also assumes that formulating new public policies is not part of courts’ mandate in a democratic regime where there is a balance of power between the executives, the legislature and the courts. The Courts’ mandate is limited to filling gaps in public policy that was originally initiated, designed and formulated by the legislature and the executives.\footnote{MacNaughton, ibid. at 778.}

Some scholars provide a counter argument by maintaining that in most democratic countries many public policy decisions and resource allocations are not done by legislatures. Government departments and administrative agencies are responsible for...
initiating, designing and formulating many decisions. This is in spite of the fact that the persons who work in these departments and agencies are usually not elected by the people. Moreover, when courts are involved in the process of public policy by judicial review of positive rights, they have a significant contribution as “an avenue for challenges to the anti-democratic behaviour of Parliament and its delegates”. Courts therefore may even increase the accountability of governmental agencies when they are addressing positive rights claims.

I do not wish to contribute a new argument to the judicial activism debate as it deviates from the purpose of my dissertation. As I see it, most judges and scholars who advocate a cautious judicial review in language rights cases do not make the same argument with regard to other positive rights. Most of them are advocating limited judicial review of language rights while advocating liberal and generous judicial review of other positive rights. All things being equal, my purpose in this section is only to show that this policy is inconsistent.

A good example concerns s.15 of the Canadian Charter that is applied to cases of discrimination. The Supreme Court of Canada has not treated s.15 with caution and restraint although in some cases its implementation required the government to take positive steps and allocate financial resources in order to amend different forms of discrimination. Take the Eldridge case for instance. The appellants in Eldridge were born deaf and their preferred means of communication was sign language. They claimed that the absence of interpreters impairs their ability to communicate with their doctors and other health care providers, and thus increases the risk of misdiagnosis and ineffective

373 Jackman, supra note 371 at 244.
374 MacNaughton, supra note 371 at 780-781.
375 Eldridge, supra note 41.
treatment. However, both the federal government and the province of British Columbia province, which share the responsibility for their health care, do not pay for sign language interpretation of medical services for the deaf. The appellants’ request was based on s. 15. They claimed that the government and the province discriminate against them because they deprive them of the benefit of proper communication with their health care providers, which is available to all other citizens.

Alleviating the inequality between the appellants and other citizens requires the federal government and the province to take positive steps to allocate costly resources. Yet, the court granted the appeal and did not mention that positive rights should be interpreted with restraint. On the contrary, the court explicitly declares that s.15 is not only about the negative freedom not to be discriminated against in cases of unequal burdens between citizens, but also about the positive right not to be discriminated against in case of an unequal distribution of benefits, especially when it disadvantages vulnerable groups.376

Such a generous spirit with regard to language rights has not been shown in the Canadian Supreme Court’s decisions until R. v. Beaulac, which was a focal point in language rights jurisprudence. Until Beaulac, the dominant approach was interpreting language rights with restraint *inter alia* because of their positive nature. Although the Canadian Supreme Court in *Mahe* has not denied the possibility of “breathing life” into language rights provisions, it insisted on language rights being special kind of rights because of the positive obligation they impose on the state.377

So far I have shown that advocating a limited judicial review of language rights because of their positive nature is a sound and consistent argument only if the scholars and

---

judges who hold it are also advocating a limited judicial review of cases that involve any right with a positive dimension. I have shown that this can hardly be the case as many rights which are usually perceived only as negative freedoms also bear strong positive dimensions. I would now like to refute the second argument on behalf of a limited interpretation of language rights – the political compromise argument.

2.5. The Political Compromise Argument

Comprehensive language rights are commonly perceived by some judges and legal scholars as constitutional rights that are the result of a specific political compromise between the majority and a specific minority group. As such, so the argument goes, language rights are essentially different from human rights that are based on fundamental principles. Language rights on the other hand, have been adopted only for political reasons that were meant to privilege a particular minority group in a political agreement at one point in history. Because language rights have been given because of political reasons, courts should interpret them with restraint.

The political compromise argument alludes to what I call ‘the selective character’ of language rights. Comprehensive language rights usually require the state to take costly positive steps to ensure the protection of a minority language. The selective character of language rights amounts to an empirical rule, according to which because of the limited amount of material resources, most states cannot provide comprehensive support for every language that happens to be spoken by one of its citizens. A multilingual state typically ‘chooses’ at most 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.\textsuperscript{378} Under the political compromise argument, the selective feature is employed in order to depict more vividly the political dimension of language rights as an achievement of some groups that had political power at some point in history, when others did not.

The political compromise perception of language rights has prevailed in judicial reasoning in Canada until recently. In a trilogy of decisions,\textsuperscript{379} the Canadian Supreme Court stressed that language rights merely reflect the historical result of a political struggle between the Anglophone majority and the Francophone minority. The underlying normative assumption is that there is no fundamental moral wrong in imposing the majority language on the minority. The only reason to protect the minority language is to respect the political compromise that was achieved after years of struggles between the Anglophones and Francophones.\textsuperscript{380} Such respect allegedly requires the judges not to deviate from the status quo by giving a liberal and broad interpretation of language rights.

Following this perception, when the Canadian Supreme Court in \textit{MacDonald} interprets s. 133 of the \textit{British North American Act} that entails the right to use either official language before the court, it declines to generously interpret this right as imposing a duty on the court to positively ‘talk’ to the litigant in the official language he or she chooses. Rather, the Supreme Court prefers to stick to the political compromise doctrine and to narrowly interpret the right to use either official language before the court merely as

\textsuperscript{378} As Kymlicka mentions, "Not all interests can be satisfied in a world of conflicting interests and scarce resources. Protecting one person's cultural membership has costs for other people and other interests, and we need to determine when these trade-offs are justified" (Kymlicka, \textit{Multicultural Citizenship, supra} note 6 at 107). Joseph Carens makes this claim with specific reference to language rights (Joseph H. Carens, "Liberalism and Culture" (1997) 4(1) \textit{Constellations} 35 at 40).


a right of the litigant to freely use one of the languages in court. Justice Beetz stresses that such a narrow interpretation is justified because s. 133 constitutes a language right that is “based on a political compromise rather than on principle” and remains peculiar to Canada.

The situation in Israel is not very different. Although Arabic is declared by Article 82 of the *Palestine-Order-in-Council* as the second official language of Israel, many merely perceive it as a political compromise. Back before the establishment of Israel, the Mandatory British government declared English, Hebrew and Arabic as the official languages of Palestine. The first act enacted by the state of Israel after its establishment in 1948 was the *Law and Administration Ordinance, 1948*. Article 82 was incorporated into the Israeli legal system by the *Law and Administration Ordinance* along with most of the Mandatory acts, but it was altered by s. 15(b) of the *Ordinance*, which stipulates that any provision in the law requiring the use of English is repealed. Section 15(b) therefore cancelled the status of English as an official language.

The status of Arabic as an official language in Israel was not cancelled. Some see this fact as an indication of a conscious decision on the part of the Israeli legislature to retain the status of Arabic as an official language. Many perceive this conscious decision as a politically motivated act of retaining the official status of Arabic because Israel did not want to give the international community an excuse to claim that the new Jewish state wanted to eradicate the language of the Arab local community. Since the

---

382 *MacDonald*, ibid.
383 1 L.S.I. 7 at 9.
establishment of Israel, apart from the cancellation of English as an official language, there were no changes to Article 82.\textsuperscript{386}

The political compromise argument was raised by Cheshin J. in his minority opinion in \textit{Adalah}.\textsuperscript{387} Article 82 states that all official notices of the government and municipalities shall be published in Arabic and Hebrew. As mentioned above, Barak C.J., in the majority opinion, appeals to the rights to freedom of language and equality in order to strengthen art. 82. Justice Cheshin, in his minority opinion, rejects the option to appeal to other rights in order to broadly interpret art. 82. He does so by relying on the Canadian cases that treat language rights as a political compromise that should be interpreted with restraint by courts.\textsuperscript{388} Justice Cheshin’s argument about language rights as a political compromise was not addressed by the majority decisions of Barak C.J. or Dorner J. That is, no satisfactory answer was given to refute Cheshin J.’s political compromise argument. However, this does not mean that the political compromise argument is sound or that it cannot be refuted.

In Canada, by contrast to Israel, not only was the political argument rejected by the Supreme Court, but it was also refuted. In a majority opinion in \textit{R. v. Beaulac},\textsuperscript{389} Bastarache J. rejects the first assumption underlying the political compromise argument. The assumption is that most rights included in the \textit{Charter} are not a result of political compromise and therefore should be interpreted with generosity, whereas other rights, which are the result of a political compromise, and are usually scarce, should be interpreted with restraint. Justice Bastarache reminds us that language rights are not the only

\begin{footnotesize}
\textsuperscript{386} David Kretzmer, \textit{The Legal Status of the Arabs in Israel} (Boulder, CO: Westview Press, 1990) at 165.
\textsuperscript{387} \textit{Adalah}, supra note 1..
\textsuperscript{388} Ibid. at 464-467.
\end{footnotesize}
constitutional rights resulting from a political compromise. This is not a characteristic that
uniquely applies to such rights because a political compromise also led to the adoption of s.
7 of the Charter, which declares the right to security and s. 15 of the Charter, which
declares the right to equality. Justice Bastarache therefore concludes that there is no
reason to hold that language rights should be narrowly interpreted by courts. They should
be interpreted purposively in all cases.

In order to support Bastarache J.’s conclusion, I will briefly refer to the right to
religious freedom that is also the result of an historical political compromise, but does not
receive the same negative treatment. It is perceived as a well acknowledged universal
human right all over the world, although it is rooted in various political compromises
which aimed to prevent religious wars and enhance the ability of the state to govern
different religious populations. This is not to say that there are no moral principles
underpinning the right to religious freedom (they will be discussed in the next sub-section),
but rather that they are not the only reason and historically not the main reason for its
adoption in many jurisdictions. The same is true for language rights. As I will show in
the next sub-section, they are underpinned by the intrinsic moral justification, according to
which language is a marker of cultural identity. The fact that they were adopted as a result
of a political compromise does not make them less fundamental than other human rights.

390 Ibid. at para. 24. For the same argument see also Reference re Secession of Quebec, [1998] 1 S.C.R. 768
at para. 79.
391 Beaulac, ibid. at para. 24.
392 Ole Peter Grell & Roy Porter, “Toleration in Enlightenment Europe” in Ole Peter Grell & Roy Porter eds.,
Toleration in Enlightenment Europe (Cambridge: Cambridge University Press, 2000) 1 at 4-5, 15, 18;
Sylvana Tomaselli, “Intolerance, the Virtue of Princes and Radicals” in Ole Peter Grell & Roy Porter eds.,
393 This is Gill’s main argument (Anthony Gill, The Political Origins of Religious Liberty (Cambridge:
Cambridge University Press, 2008)). See also Jonathan Israel, Enlightenment Contested: Philosophy,
Martha Nussbaum explains and justifies religious freedom in the U.S. by illuminating the history of religious
wars from which the right to religious freedom emerged, and the body of knowledge that justifies it in moral
principled terms (Nussbaum, supra note 34-134).
The fact that other rights which are considered fundamental are also the result of a political compromise is a sound argument. However, the political compromise argument includes other assumptions which I will now refute. One may appeal to the formal level to argue that other rights which are perceived as fundamental, such as freedom of religion, were initially a result of a political compromise, but these days they bear a universal character as they appear in most liberal constitutions. Language rights, by contrast, so the argument goes, appear only in few constitutions in the world. This fact allegedly makes them more political than other originally political rights.

This argument is not sound for two reasons. First, the fact that some linguistic minorities in the world have not had sufficient political power to ensure constitutional protection in the form of language rights that protect their languages, while other minorities such as the Francophone minority in Canada have, does not constitute a normative argument for treating language rights as second class rights. In theory and in practice, the question about which linguistic community should be more accommodated than others need not be determined by the question of which linguistic minority has more political power than others. It can be decided by principled criteria that distinguish for instance, linguistic immigrant minorities from linguistic national minorities, or distinguish, as I have argued elsewhere, linguistic minorities that value their language as an exclusive marker of identity from linguistic minorities whose language does not constitute an exclusive marker of cultural identity. Other suggested criteria may be that

395 Pinto, *supra* note 68.
comprehensive language rights should be accorded on the basis of numbers and geographical concentrations of linguistic minorities.\textsuperscript{396}

Second, indeed, language rights are not found in every jurisdiction in the democratic world, but neither are other fundamental rights. In this regard, Leslie Green and Denise Réaume mention that s. 11(g) of the Canadian \textit{Charter}, which articulates the right not to be found guilty on account of any act or omission unless the act or omission constituted an offence under Canadian or international law, is also peculiar to Canada and does not exist in other democratic constitutions.\textsuperscript{397} The existence of the right to property in most democratic constitutions and the omission of it from the Canadian \textit{Charter} is another example of a right that does not exist in all democratic constitutions.

So far I have shown that the argument from positive rights and the argument from political compromise are not convincing because they are not distinctive to language rights as such. Therefore, they cannot serve as the rationales behind the restrained and cautious interpretation doctrine. The political compromise argument, however, alludes to a broader political issue that language rights raise. This is that they are cultural and collective rights and that granting them, or broadly interpreting them, enhances cultural conflicts, and undermines civic unity and solidarity, as well as the national identity of the state. I will now attend to this issue.

2.6. \textit{The Argument from the Collective and Cultural Character of Language Rights}

Language rights are commonly perceived as group rights or collective rights. In addition, language rights are cultural rights because they protect a minority culture. Both of these


\textsuperscript{397} Green & Réaume, \textit{supra} note 369 at 582.
features of language rights are perceived as problematic and used to support the claim that
they should be judicially interpreted with restraint. In this section I will explore these
features and explain how they are used to support this claim.

Let us start with language rights being collective rights. The concept of group rights
tends to create reluctance amongst liberals who think of human rights as rights that
individuals and only individuals hold against the state. They think that acknowledging

group rights may risk or compromise liberalism and bring about coercion of the group on
its individual members. Because language rights are collective rights, so this argument
goes, they should be judicially interpreted with restraint.

To better understand this worry, we need to examine in what way language rights
constitute collective or group rights. Generally speaking, there are two alternative
conceptions of group rights: “rights of collective agents” and “rights to collective

goods”. The former is distinguished by the agent who holds the rights, while the latter is
distinguished by the good it protects. Under the “rights of collective agents” conception,
a right is a group right when a group as a collective agent, acting through its leadership,
has the legal power to invoke or waive the right. Under this conception, the right does not
protect an individual against the state, but a collective through it chosen leadership. For

398 For an articulation of this view see Alexandra Xanthaki, “Collective Rights: The Case of Indigenous
399 For the discussion of such arguments see Dwight G. Newman, “Collective Interests and Collective
Rights” (2004) 49 Am. J. Juris. 127 at 141-145. James Nickel argues that group rights are not human rights in
the standard sense because they attribute right to members of specific groups rather than to all individuals as
humans (Nickel, supra note 343 at 164).
400 Green, “Two Views of Collective Rights”, supra note 21. See also Michael McDonald, "Questions about
Collective Rights" in David Schneiderman ed., Language and the State: The Law and Politics of Identity
(Cowansville, Québec: Editions Yvon Blais, 1991) 3; to refer here to the volume of the Canadian Journal of
Law and Jurisprudence (1994) that was dedicated to this issue; James W. Nickel, "Group Agency and Group
Rights" in Ian Shapiro & Will Kymlicka eds., Ethnicity and Group Rights (New York: New York University
401 Green, "Two Views of Collective Rights", ibid. at 320.
example, a group's right to its land is a group right under this conception because only the group acting through its leadership has the power to make decisions about the disposition of that land.

Note that liberals will tend to deem the “rights of collective agents” conception as problematic. This is because under this conception, the right must amount to something more than the sum of the rights of its individual members. We must assume that there exists a collective whole that is irreducible to its members in the sense that its welfare is independent from the welfare of each of its members. If we cannot point out such a distinction between a group and its members, then the right is in fact an individual right as it relates to the separate well-being of every individual in the group.402 If we can point out such a difference, there arises a worry that the interests of the individuals in the groups will be suppressed in the name of the collective interest.403

Under the “rights to collective goods” conception, a right is a group right when it protects a good or goods that are collectively shared by the group’s individual members. That is to say, each member of the group holds the right individually, and the object of the right is collective. As not all collective goods constitute a base for a group right, Réaume defines a right as a group right only if it protects a participatory good. There are two characteristics of a participatory good. First, a participatory good involves activities that require many in order to produce it. Second, a participatory good is valuable only because of the joint involvement of many in it.404

402 Ibid. at 319.
403 Joseph Agassi argues that assigning interests to a group that are not reducible to the interests of its individual members is unjustified both ontologically and normatively, from a liberal point of view (Joseph Agassi, “Methodological Individualism” (1960) 11 The British Journal of Sociology 244). For a discussion of this problem in the specific context of group rights, see Green, "Two Views of Collective Rights", ibid. at 319-320.
404 Réaume, "Individuals, Groups and Rights to Public Goods", supra note 67 at 10.
Note that liberals should be less worried about this conception of group rights, as the right holders are individuals and not collectives. This conception does not immediately raise the problem of coercion on the individual in the name of the group to which she belongs. One may argue that in practice, the different conceptualizations of group rights are not significant, as problems of realizing the individual interests that are protected by the group right may still come at the expense of other individual interests group members may have. For example, in the context of education, parents who belong to a linguistic minority may wish to educate their children in the majority language to enhance their opportunities for economic prosperity and integration, while other members of the minority may see education in the majority language as a possible threat to continued survival of the minority culture. 405 However, as I will show later in this section, other well recognized rights, such as the right to religious freedom, constitute group rights under this conception and bring about similar problems, with which courts often deal.

Which of the two conceptions of group rights is better applicable to language rights? Language rights protect a language, which is a participatory good produced and enjoyed by many. Individuals learn to use their language from others, they use it to communicate with others, and by using it they express their affiliation with others. Therefore, "the point of the interest in using one’s mother tongue lies in sharing it, and the culture it embodies, with others. This interest cannot be satisfied for an individual in isolation from other speakers; it can only be enjoyed through participation with others". 406 At the same time, language rights do not require that a relevant group unite and choose

---

405 Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238. Gosselin deals with a demand on behalf of Francophones in Quebec to receive education in English, which is the majority language in Canada. Although Francophones make up the majority in Quebec, they are also part of a larger minority group within Canada.


- 174 -
some leadership that will represent it against the state. Thus, they naturally fall under the second conception of rights to collective goods. Language rights are collective rights because their object makes them so.

The object of language rights, i.e. the language they protect, turns our attention to their second feature that is used to justify a claim for their restrictive interpretation, which is their being cultural rights. Language is a central part of culture. Therefore, protecting one’s language entails protecting one’s culture. Language rights are rights to culture.

In order to understand the argument about the restrained interpretation due to language rights being cultural rights, we need to understand the conceptual relations between language rights and culture. According to Joseph Raz, different kinds of rights protect different kinds of values. These values in turn justify the duties the rights impose. Réaume argues that language has an intrinsic value as it constitutes a marker of cultural

---

407 Raz, The Morality of Freedom, supra note 19 at 166. There are other accounts of rights. One of them is the will (or the choice) theory that is associated with H. L. A. Hart and perceived as competing with Raz’s interest theory of rights (see, for instance, Jules Coleman, “Introduction” in Jules Coleman ed., Rights and Their Foundations, v. 3 of Philosophy of Law: A Five-Volume Anthology of Scholarly Articles (New York: Garland Pub., 1994) ix: Alon Harel, “Theories of Rights” in Martin P. Golding & William Edmundson eds., Blackwell Guide to the Philosophy of Law and Legal Theory (Malden, MA: Blackwell Publishing, 2005) 191 at 195. As Harel notes, both theories explain what it means for a right to be possessed by somebody, and for a duty to be owed to somebody. I appeal to Raz’s rights theory for the purpose of highlighting the different values that different rights protect. In this thesis I am indifferent to the question of which theory best captures the nature of rights.
identity. Culture is a marker of identity and language as a central part of culture is itself a marker of identity.

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. Due to the intimate link between culture and identity, it is difficult for people of a certain culture to truly express their identity in another language. Second, components of a particular culture such as songs, prayers, laws, and proverbs are written and expressed by the language associated with that culture. That is, people value their own language not only as a repository of conceptual building blocks for the mind, but also as the medium used to produce distinctive cultural texts that express the

---

408 Language being a marker of cultural identity is an intrinsic value underpinning language rights. Viewed as a matter of intrinsic value, the use of a particular language is regarded as valuable on its own account and not as promoting other valuable ends. There are also several instrumental interests, which are often put forward in judicial decisions, in protecting a particular minority language, which entail relatively weak protection. Viewed instrumentally, the use of a particular language is regarded as valuable because it is an instrument to achieve valuable human objectives, such as communication (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 22 at 45; for other instrumental interests see Pinto, supra note 68 at 159-162).

409 Réaume, "Intrinsic Value and the Protection of Difference", supra note 15 at 251; Green, "Are Language Rights Fundamental?", ibid. at 659; Réaume, "The Constitutional Protection of Language", ibid. at 45; Réaume, "Beyond Personality", supra note 22 at 283.


411 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: MIT. Press, 1964).

The third way, which combines the first and second, is that language constitutes an object of cultural identification and pride. 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 will identify with and take pride in it.\footnote{Réaume, "Intrinsic Value and the Protection of Difference", supra note 15 at 251; May, \textit{ibid}.}

The intrinsic justification of language rights, namely language being part of culture and especially the third aspect of culture being an object of identification, motivate one version of the claim that they should be interpreted with caution and restraint. According to this claim, if the purpose of language rights is to promote the intrinsic value minority members attach to their language as a marker of their cultural identity, then language rights encourage minority members to set themselves apart from the dominant majority culture. This, so this argument goes, enhances separatism and fragmentation within greater society.

It is important to stress that this worry arises only with respect to the intrinsic interest in language as a marker of cultural identity and not with respect to instrumental interests in language, such as supporting minority languages as minority members’ best means of communication. For example, a worry about separatism and fragmentation does not arise with respect to simultaneous translation in courts for minority members who are genuinely not fluent in the majority language, or with respect to translation of university lectures and television programs to sign language for individuals with impaired hearing. This is because such measures are perceived as mere instruments, and not as empowering a minority culture within the state.

\footnote{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 \textit{Int’l. J. Soc. Lang.} 113 at 115).}
Linguists and sociologists observe that the desire for cultural empowerment within minority groups is firstly marked by language that perpetuates a sense of ‘groupness’, difference from, and possible hostility towards other groups.\textsuperscript{415} Thus, in multicultural states, language rights conflicts are never just debates about language. Language becomes a central factor in the struggle of linguistic minorities for the survival of their cultures.\textsuperscript{416} This struggle may encourage separatism and undermine civic unity. Because of these possible negative consequences, so this argument goes, language rights should be judicially interpreted with caution.

This emphasis on cultural identity may also be perceived as being in tension with the universalistic and individualistic tendencies that underpin the doctrine of fundamental human rights. The reluctance to acknowledge protection of minority cultures may have been the result of the view that overemphasizing cultural and national identities and highlighting differences between cultural groups was a contributing cause of nationalism in Europe, in particular the rise of Nazi racial doctrines and World War II. The special protections that were given to national minority groups after World War I encouraged groups to define themselves in opposition to others. The alternative to that approach, which was adopted after World War II, in the Universal Declaration of Human Rights, was to establish a general set of international human rights norms, based on a Western and liberal philosophy that emphasized the political over the economic, social, and cultural rights, and the essential equality of individuals, not groups.\textsuperscript{417}

\begin{thebibliography}{99}
\end{thebibliography}
The worry of cultural conflicts between groups as a result of language rights takes a somewhat different form in national states because of the critical role a national language plays as an instrument for building a nation. The majority members in national states, who take a national language to be a central character in the process of the development of nationhood, tend to perceive the minority language as a possible threat to their national identity.418 Israel is a good example of such a nation state. Since its establishment, there has been a growing concern in Israel regarding nation building and the relationship between language policy and national identity.419 For example, while Arabic is an official language, Knesset members occasionally propose to remove Arabic from the list of the country's official languages as they perceive it as undermining the national Jewish identity of the state.420

This perception of the national role of language is prominent in Israeli legal decisions as well. In several judicial decisions, Barak C.J. emphasises that language in general expresses national unity, and that in particular, taking Hebrew from Israel amounts to taking Israel’s soul.421 Not only is Hebrew perceived as an important national symbol of Israel, but strengthening the status of Arabic is perceived as a step that may derogate from the primary status of Hebrew as the main language and the central national symbol of

421 C.A. 105/92 Re'em Engineers and Contractors Ltd. v. Municipality of Upper Nazareth, P.D. 47(5) 189 at 208. Chief Justice Barak expressed similar remarks about the connection between Hebrew and Jewish nationalism in Adalah, supra note 1. at 415.
Israel. In *Adalah*, Barak C.J. states the possible threat to the status of the Hebrew language as a general concern that needs to be considered before the court can grant state support to Arabic. Chief Justice Barak concludes, however, that it is not severe in this particular case. On the other hand, in the minority opinion, Cheshin J. finds this threat a strong enough reason to justify the court’s refraining from generously interpreting language rights provisions. According to Cheshin J., it is improper for the court to create a new right that independently strengthens Israeli Arabs’ cultural and national identity. As long as the petitioners’ national ideological aspirations are not translated into a statute that clearly spells out the state’s duties to support Arabic in this case, it is improper for the court to decide on this issue.

In a similar vein, Eyal Benvenisti argues that the majority decision in *Adalah* was wrong because it artificially forces the Jewish majority in Israel to use Arabic, which is a national Arab symbol, and to give it a place in the Israeli public sphere. In Benvenisti’s eyes, courts should not be actively involved in conflicts between the majority and minority groups with regard to official languages. Such conflicts usually arise when national minorities demand to take part in designing the common public symbols of their multinational state, but the majority denies their right to participate and makes no room for their national symbols. In such cases, so Benvenisti argues, the court may declare its opinion about a proper way to respond to the minorities’ demands, but it should not enforce it. Enforcing collaboration between the majority and minority groups with regard

---

422 This is mainly because Arabic is perceived as a national symbol of Arab nationality (Deutch, *supra* note 364 at 272).
423 *Adalah, ibid.* at 415. Justice Barak draws the same balance between the protection of Hebrew and the protection in Arabic in *Re’em* (*Re’em, supra* note, at 209). Only after Barak J. concluded that supporting the Arabic language will not risk the already established high status of Hebrew, did he decide to grant this support (Deutch, *ibid.* at 277).
424 *Adalah, ibid.* at 456 – 460.
to designing the public symbols of a state will never succeed if the majority does not really understand the need for such collaboration and wish for its success.\textsuperscript{425}

In the U.S., which is not officially a nation state, debates about language rights are nevertheless connected to the American national identity. In the U.S. there is a public controversy about whether to make English the official language and how much the state should support bilingual education of immigrants’ children. While some states have legislated English to be their only official language, in other states, official English bills failed to pass.\textsuperscript{426} Analysis of public polls suggests that among several factors, feelings relating to American nationality are the most important factor affecting positive or negative attitudes towards such bills. In other words, supporting minority language rights are most prominently perceived in terms of a possible threat to the national American identity.\textsuperscript{427}

So far I have laid out the arguments for a restrained interpretation of language rights provisions that rely on their being collective and cultural rights. I would like to mention that I do not find them especially strong. These arguments have their counter arguments. In the same manner they can be argued to bring about conflicts, language rights may become a positive symbol of recognition that mitigates cultural conflicts between groups over language. Linguistic minorities may take language rights as a step towards a partnership between their culture and the majority culture within a single state.\textsuperscript{428} In the Canadian Charter, language rights were measures aiming to eliminate the threat to Canadian unity posed by the coexistence of two linguistically separate Canadas, the French

\textsuperscript{427} Ibid. at 548-556.
\textsuperscript{428} Patten & Kymlicka, supra note 418 at 5.
in Quebec and the English everywhere else. As former Prime Minister Pierre Trudeau has argued, “only if effective legal guarantees against unfriendly provincial governments solidify the precarious situation of the French language outside Quebec will the Quebecois be able to consider all of Canada their homeland, throughout which they can travel and live with confidence in governmental support of their linguistic and cultural heritage”. 429

Similarly, there is no doubt that Hebrew is an important national symbol of Israel. But it is doubtful whether protecting the Arabic language conflicts with protecting Hebrew as a national symbol. 430 My aim in this chapter, though, is not to refute these claims, which draw a line between cultural rights and cultural conflicts. Rather, I wish to show that these features and concerns are not unique to language rights in any way, but arise with regards to other basic human rights, particularly the right to religious freedom. If these rights should not be interpreted with caution because of these concerns, neither should language rights.

The right to freedom of religion is generously interpreted by the judiciary and perceived as a fundamental human right. The general attitude is that it should be interpreted purposively in a way that maximizes the protection of the interest it protects. 431 The right to religious freedom is commonly perceived in terms of the right to freedom of conscience. Some scholars perceive it also as a religious manifestation of the right to culture. 432 Because language rights are perceived in terms of the right to culture, pointing

430 Alon Harel for instance rightly argues that there is no need to balance the protection of Arabic against the protection of Hebrew as “[It is difficult to see why the use of Arabic on urban road signs would harm, even slightly, the value of “national unity” (Alon Harel, “Skeptical Reflections On Justice Aharon Barak’s Optimism” (2006) 39 Isr. L. Rev. 262 at 282).
431 See for instance, Big M, supra note 180 at paras. 115-117.
432 The latter perception is put forward most sharply be Gideon Sapir (Gidon Sapir, “Religion and State--A Fresh Theoretical Start” (1999) 75 Notre Dame L. Rev. 579 at 625-641 [Sapir, “Religion and State”]). In this
at the manifestation of the right to freedom of religion as a collective and cultural right and illustrating it via judicial decisions will then allow me to argue that the third argument about the allegedly unique cultural and collective characters of language rights is not persuasive.

Traditionally, the right to religious freedom is understood as an individual right. The picture we have in mind is of individuals who wish to practice their religion and ask the state to allow them to do so without interference. In the Canadian Supreme Court’s words: “The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination”.


433 Big M, supra note 180 at 336-337.
Recall, that a right is defined and justified by the good it protects. Conceptually, when viewed individualistically, the good that is protected by the right to religious freedom is conscience. Conscience is taken as a core component of our personal identity, which is comprised of our moral values and beliefs. That is, the right to religious freedom allows us to adhere to our religious identity. We become full persons when our core beliefs become embodied in our acting. Acting on our core beliefs “is central to what makes us persons”. Under the right of freedom of conscience, every person is entitled not to be forced to act against his or her deepest values and beliefs. This is especially important with regard to religious minorities that need protection from the majority members who might seek, for example, to benefit their faith by prescribing prayers in public schools or by shutting down businesses on Sundays.

434 As Christian Smith argues, “[o]ur believings are what create the conditions and shape of our very perceptions, identity, agency, orientation, purpose -in short, our selves, our lives, and our worlds as we know them” (Christian Smith, Moral, Believing Animals: Human Personhood and Culture (Oxford University Press, 2003) 57).


437 Ibid.


439 Ibid; Lorraine Weinrib argues that Sunday closing acts were based on the assumption that Christianity was an embedded component of Canadian law. The Christian majority thought that it was entitled to arrange daily life to suit only its religious precepts. It did not think about religious precepts of religious minorities such as the Jewish community (Weinrib, "Do Justice to Us! Jews and the Constitution of Canada", supra note 180 at 32).
Conscience is commonly understood as an individual good. While an individual draws on values and norms that his culture and society in general offers him, his conscience is thought about as consisting of his personal beliefs that he forms on his own. My own conscience is produced only be me, and I do not share it as such with others. It exists in my mind. While I can articulate it to others, and other can articulate their conscience to me, we do not produce it together. The right to conscience protects my ability to act upon my deeply cherished personal beliefs. The Canadian Supreme Court articulated this perception when it describes freedom of religion as “the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be”, 440 “to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials”. 441 Conscience is therefore thought of as an individual good, not a participatory collective good.

Although it is the dominant one, the individualistic perception of the right to religious freedom does not give us the full picture. The right to religious freedom is also a collective right and a cultural right. 442 I will show this in two ways. First, I will present a conceptual analysis of the right to religious freedom as a collective and cultural right that protects the participatory good of culture. I will draw conceptual analogies between it and

440 Big M, supra note 180 at 351.
442 Ayelet Shachar observes that as a matter of fact, the individualistic perception of the right to religious freedom is more dominant as ”freedom of religion has stronger legal protection than ”freedom of culture”. The commitment to freedom of conscience, religion, and belief is established in the most fundamental international law documents, as well as in the domestic laws and constitutions of the majority of the world's countries” (Shachar, “Religion, State, and the Problem of Gender”, supra note 319 at fn 17).
language rights. Second, I will analyse legal cases which illustrate the collective and cultural features of the right to religious freedom, i.e., cases in which the protection the right to freedom of religion entails cannot be understood in individualistic terms alone.

Let us start with the conceptual analysis. Recall, that a right is a collective right if it protects a participatory good that is produced and enjoyed by a group of individuals. As Gidon Sapir argues, in some cases, the right to religious freedom protects a religious culture and thus cannot be understood in individualistic terms of conscience alone. It should therefore be understood in terms of the right to culture.\footnote{Sapir, “Religion and State”, supra note 432 at 625-641.} Religion is a participatory good. It is regarded in anthropological literature as the example par excellence of an encompassing culture. It is a system of public symbols that, similarly to language, is produced and enjoyed by many.\footnote{For a detailed account see Clifford Geertz, “Religion as a Cultural System” in The Interpretation of Cultures (New York: Basic Books, 1973) 87-125.} It is not just an individualistic belief system, but more fundamentally a way of life that many people produce and share together.\footnote{Alvin J. Esau, “‘Islands of Exclusivity’: Religious Organizations and Employment Discrimination” (2000) 33 U.B.C Law Rev. 719 at 727; Peter G. Danchin, “Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law” (2008) 33 Yale J. Int'l L. 1 at 47.} Therefore the right to religious freedom is a collective right.\footnote{Barak Medina, “Enhancing Freedom of Religion through Public Provision of Religious Services” (2006) 39 Isr. L. Rev. 127 at 137 (“The right to religious freedom has important characteristics of a collective right, which ascribe to religion as a culture”).}

Acknowledging the participatory feature of the right to religious freedom is explicit in the European Commission of Human Rights’ decision in X v. The United Kingdom.\footnote{X v. the United Kingdom, App. No. 81760/78, 22 Eur. Comm’n H. R. Dec. & Rep. 27, 33 (1981).} According to article 9 (1) of The European Convention on Human Rights, an individual has a right to practice his religion ‘alone or in a community with others’. The question was whether the article guarantees a Muslim teacher’s right to pray in a mosque with others when he is also able to do so in a separate room in his school. The European Commission
interpreted article 9(1) as protecting both the right to practice religion individually, and the right to practice religion collectively and not just one of the two. According to Carolyn Evans, this interpretation expresses the Commission’s view that “the religions of some people may require a level of communal worship”. Later on I will discuss other legal cases that implicitly acknowledge the participatory feature of religious freedom that in some cases turns it into a collective right.

As different rights protect different values that in turn justify the obligations they impose, what is the value freedom of religion, understood as the right to culture, protects? Similarly to language rights, the right to religious freedom does not protect religion as such. It protects the values individuals attach to their religion as part of their identity. People in general, and minority members in particular, have a strong interest in the protection of their religion, inter alia because the specific religion in which some people are embedded constitutes their marker of identity. As Amy Gutmann observes, due to

---

449 For arguments about the importance of religion qua religion that stress its importance to society as a whole see Devlin, *supra* note 273 at 25; Hall, *supra* note 432 at 548; Galston, *supra* note 432 at 264-265; Marty, *supra* note 432 at 17; Harold J. Berman, “Religious Freedom and the Challenge of the Modern State” (1990) 39 *Emory L.J.* 149 at 152. Similarly to other scholars, I do not think that freedom of religion can be justified by the view that religion in a good thing in general (Weinrib, “The Religion Clauses”, *supra* note 432 at 515). Even if religion can contribute moral values to society, it can, and has surely contributed, controversial moral values to society with regard to women, homosexuals and other minorities (Sapir & Statman, “Why Freedom of Religion Does not include Freedom from Religion”, *supra* note 432 at 471). For concerns regarding women’s subordination within religious groups when states award jurisdictional powers to religious groups in the family law arena, see Ayelet Shachar, ”Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation” (1998) 6 *Int'l J. Pol. Phil.* 285; Shachar, *Multicultural Jurisdictions, supra* note 319 at 45-62; For general concerns regarding the oppressive power of religious groups over their members see Levi, *supra* note 432 at 51-62; Benhabib, *supra* note 432 at 82-104. Lorraine Weinrib rightly observes that “[a] singular constitutional commitment to freedom of religion does not rest on acceptance of religion as a good thing” (Weinrib, “The Religion Clauses”, *supra* note 432 at 515).
450 Sapir does not use the term “marker of identity”, but refers to Will Kymlicka’s argument about the intrinsic value minorities attach to their own cultures, even when integration with the majority culture can be easily achieved (Sapir, “Religion and State”, *supra* note 432 at 627). I borrow the term “marker of identity” from Denise Réaume who suggests a more developed account of culture as a marker of identity (Réaume, "Intrinsic Value and the Protection of Difference", *supra* note 15 at 251; Réaume, "Beyond Personality", *supra* note 22 at 283).
religious conflicts in history, Western perceptions of the right to religious freedom have emphasised the separation of church and states, but in fact, in its essence, the right to religious freedom is about religious group identity, which is not unique in comparison to other group identities.\textsuperscript{451} In this sense, the right to freedom of religion is a manifestation of the right to culture.

In the same manner that language rights protect a linguistic minority from the majority, religious minorities need the legal protection of the right to culture because they are prone to hate and discrimination by people who belong to the majority religion. Majority members tend to feel alien to the cultural components of the minority’s religious habits, rituals, and values. They therefore may use political power to favour themselves and disfavour religious minorities.\textsuperscript{452}

The potential scope of the right to religious freedom understood as the right to culture seems greater than its scope when it is understood as a right to conscience. While a person can argue that her freedom of conscience is undermined because other people do not act in accordance with her own conscience,\textsuperscript{453} it will not get her far in terms of legal means to stop the other persons. This is because, typically, the other person is entitled to his autonomy or his right to conscience. This is a fundamental principle of liberalism. It seems that forcing somebody to act against his conscience is a more serious offence than allowing others to violate his beliefs. For example, there is a difference between forcing a vegetarian to eat meat and allowing others to consume meat in spite of his moral objection

\begin{itemize}
\end{itemize}

- 188 -
to that. Participatory goods, on the other hand, seem to give more protection as they require cooperation and obligation of a group of people to produce and enjoy the good together. Thus, when it comes to a participatory good, a person can more convincingly argue that when a member of a group obstructs the joint production of the participatory good in which other people in the group are interested, he violates the right of culture of members of the group. This difference in the scope of legal protection between the right to culture and the right to conscience will be illustrated in the following legal cases bellow.

Sapir provides the Bar-Ilan case\textsuperscript{454} in Israel as an example that illustrates the right to culture and its extent. In this case, members of the Jewish religious community in Jerusalem asked the Supreme Court to stop the traffic on the Bar-Ilan road during Shabbat. The Bar-Ilan road goes through an ultra religious neighbourhood. The Jewish residents argued \textit{inter alia} that the traffic violated their freedom of religion and offended their religious feelings because the Jewish religion does not allow Jews to drive during Shabbat. Chief Justice Barak rejected their claim for freedom of religion, arguing that the passing traffic did not personally prevent them from practicing their religion, namely praying and refraining from driving during Shabbat.\textsuperscript{455} Chief Justice Barak, then, understood the right to religious freedom in terms of the right to conscience and therefore decided that its scope of legal protection was insufficient to grant the residents’ claim. Chief Justice Barak did accept the residents’ claim of offence to their religious feelings.\textsuperscript{456}

Sapir provides an alternative analysis of the case in terms of the right to culture. According to Sapir, the traffic violates the Jewish residents’ right to freedom of religion, understood as the right to culture, and that this right better supports the Jewish residents’

\textsuperscript{454} HCJ 5016/96 \textit{Horev v. Minister of Transportation} 51(4) P.D. 1.

\textsuperscript{455} \textit{Horev}, \textit{ibid.} at section 73 of C.J. Barak’s decision.

\textsuperscript{456} \textit{Ibid.}
claim than the claim of offence to religious feelings. Sapir holds that the major issue in this case is the right to culture, and not the right to freedom of conscience.\textsuperscript{457} This is because the traffic on the Bar-Ilan road during Shabbat did not force the religious residents of the neighbourhood to act in breach of their cherished values. Therefore, the religious residents did not have a strong claim about the violation of their freedom of conscience. However, the traffic did disturb the holy atmosphere of the Bar-Ilan neighbourhood during Shabbat, thus violating the residents’ right to preserve their religious culture.\textsuperscript{458}

In my view, Sapir is right to point out that the right to culture provides a better framework for understanding what was at stake at the Bar-Ilan case. I will now turn to similar cases in Canada, which were analysed by the court in terms of the right to freedom of religion. As I will show, the invocation of the right to freedom of religion in these cases is best understood in terms of the right to culture. My aim is not to justify these decisions, but to expose the rationale underlying them. Pointing out these examples will allow me to show that by contrast to linguistic instances of the right to culture, in religious instances courts do not interpret the right to culture with caution and restraint.

The first example of a decision in which the court recognized \textit{de facto} the right to culture in a religious context is the \textit{Trinity Western University} case.\textsuperscript{459} The British Columbia College of Teachers is a provincial body which is empowered by law to establish standards students need to meet in order to become schoolteachers.\textsuperscript{460} It refused to accredit the teachers’ education program of Trinity Western University, a private

\textsuperscript{457} According to Sapir, the major issue was also not offence to religious feelings, although this is what the Supreme Court focused on (Statman & Sapir, ““Freedom of Religion, Freedom from Religion, and Respect for Religious Feelings”, supra note 453 at 54-56).

\textsuperscript{458} \textit{Ibid.} In Daniel Statman’s words, the religious Jews in the Bar-Ilan neighbourhood have “an understandable desire to shape the face of their areas of residence in a way that will reflect and enhance their values and beliefs” (Statman 2000, supra note 209 at 210).

\textsuperscript{459} \textit{Trinity Western University v. College of Teachers (Br. Columbia)}, [2001] 1 S.C.R. 772 [Trinity].

\textsuperscript{460} \textit{The Teaching Profession Act} RSBC 1996, c. 449.
university with a Christian-based curriculum, because it perceived this program as discriminatory against homosexuals. This is because all students, faculty and staff in Trinity Western University were required to subscribe to a code of conduct which included an obligation to refrain from “practices that are biblically condemned”, including homosexual behaviour. The British Columbia College of Teachers’ primary concern was that public school teachers who were educated at Trinity Western University would internalize the negative attitude towards homosexuality and discriminate against their gay students.

The decision of the British Columbia College of Teachers was upheld on appeal to the College’s Council, but was overturned by the B.C. Supreme Court.\(^{461}\) The B.C. Court of Appeal found that the decision of the British Columbia College of Teachers was unreasonable because there was no reasonable foundation for the finding that the teachers’ education program in Trinity Western University was discriminatory.\(^{462}\) The majority of judges in the Supreme Court of Canada upheld the decision of the B.C. Court of Appeal.

Trinity Western University claimed that requiring its students and teachers not to be involved in homosexual activities is protected by the right to religious freedom. The British Columbia College of Teachers claimed that they did not deny the right of students in Trinity Western University to hold particular religious views. Their only concern was that the anti-homosexual views, which were manifested in the conduct code, would limit the ability of graduates as future teachers to accommodate homosexual students in public schools.\(^{463}\) Namely, it claimed that future graduates of Trinity Western University were

\(^{461}\) Trinity Western University v. College of Teachers (BC) (1997), 41 B.C.L.R. (3d) 158.

\(^{462}\) Trinity, supra note 459.

\(^{463}\) Ibid, at 31.
likely to discriminate against homosexual students once they became teachers in public schools.

The majority of judges in the *Trinity Western University* case stated that “the issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend Trinity Western University with the equality concerns of students in the B.C.’s public system”.\(^\text{464}\) The majority opinion concluded that “the Council of the B.C. College of Teachers was required to take into account not only the right to equality of homosexuals, but also the right of freedom of religion of the respondents”.\(^\text{465}\) However, it failed to do this because it was “not particularly well equipped to determine the scope of freedom of religion and conscience and to weigh these rights against the right to equality in the context of a pluralistic society”.\(^\text{466}\) In the eyes of the majority judges in Trinity “to state that the voluntary adoption of conduct based on a person’s own religious belief, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality”.\(^\text{467}\)

The majority of judges thought that the B.C. College’s decision in fact prevented students in Trinity Western University from expressing their religious beliefs and putting them into practice.\(^\text{468}\) I argue that the right to freedom of religion, understood only in terms of the right to freedom of conscience, is not sufficient to justify the Supreme Court’s decision. Trinity Western University did not only ask to freely express disapproval of homosexuality, but to require all members of their community to refrain from homosexual acts. The B.C. College’s decision did not prevent students and teachers from condemning

\(^{465}\) *Ibid.* at 29, 32.
\(^{467}\) *Ibid.* at 28.
\(^{468}\) *Ibid.*
homosexuality and discussing (even in a doctrinal manner) their religious beliefs regarding homosexual behaviour in classes. Teachers and students in Trinity Western University could freely express their negative opinion regarding homosexuals without requiring all students and teachers in the University to commit themselves to refraining from homosexual behaviour. The issue at stake was not the right of teachers and students at Trinity Western to express their views and act on them. That was not put to question. Rather, it was their requirement that all their colleagues and students act upon their views as well. The right to freedom of conscience alone is not strong enough to support such an extreme claim. Therefore, when the court invoked the right of teachers and students at Trinity Western to their religious freedom it understood it as the right to culture.

If we look at this case through the prism of the right to culture, the B.C. College’s decision arguably violated the students and the teachers’ right to religious culture because had it been accepted, Western University could not have set its own religious rules for accepting students and teachers and collectively practicing their religion in the way they see fit. The result would have been accepting students and teachers who are not committed to religious values and rules, thus arguably violating the religious community standards and atmosphere at Trinity Western University. Similarly to the residents of the Bar-Ilan neighbourhood, who required the existence of a certain atmosphere to maintain their religion, so did the teachers and the students at Trinity Western.

The second example is the Caldwell decision that was delivered by the Supreme Court of Canada. Caldwell was a baptized Catholic and a teacher at the Catholic St. Thomas Aquinas High School in Vancouver. She was dismissed because she married a divorced Methodist in a civil ceremony outside the Church. In other words, she was

---

dismissed because she did not meet the Catholic lifestyle requirements from Catholic teachers in the school. One of the arguments that was raised by the school was that if the decision to dismiss the teacher was contrary to anti-discrimination provisions in the Human Rights Code, those provisions are *ultra vires* because they violate the right to freedom of religion.⁴⁷⁰

The Supreme Court found that the code guaranteed a right to equality of opportunity subject to *bona fide* qualifications in respect of employment. The court ruled that because of the special nature of Roman Catholic schools and the unique role of teachers who worked there, the *bona fide* qualifications of a Catholic teacher included willingness to observe the practice of the Church because in that way the achievement of the objectives of the school are assured. The court decided that because the teacher’s marriage was contrary to the Church’s rules, she deprived herself of a *bona fide* qualification for employment. The court therefore found that the anti-discrimination provision in the code was not contravened. The court also stated that the exemption provision in the code, which allowed religious groups to prefer their members in employment, protected the right to freedom of religion of Roman Catholic schools in any event.⁴⁷¹

I argue that when the Supreme Court referred to the right to freedom of religion of the Roman Catholic schools it appealed mainly to the right to religious culture – not only to the right to freedom of conscience. The question was not whether as individuals, members of the school were free to practice their religion and maintain their beliefs. Rather, it was whether the school as a community had a right to exclude a member who in

---

the community’s view was not committed in her life style to the shared values and life style that its members cherished. It therefore makes sense to understand freedom of religion in this case in terms of the right to culture. The Supreme Court in this case protected the Roman Catholic schools’ right to culture by allowing them to dismiss a member that does not obey the community’s religious rule. The court protected the religious atmosphere of the Roman Catholic schools more than the individual freedom of conscience of every member in the schools.

One may argue that the cases on which my analysis relies are problematic because the court wrongly understood the right to religious freedom in terms of the right to culture and wrongly arrived at the conclusion that it could entail coercion on others.\textsuperscript{472} If this is the case, so the argument goes, I cannot rely on these cases in order to show that the right to religious freedom is a collective and cultural right. My aim however, is not to justify the court decisions, but rather to point out an existing legal reality with regard to religious freedom that shows its collective and cultural characters and therefore militates against singling out language rights as unique. Moreover, there are cases, like \textit{X v. the United Kingdom}, in which the collective and cultural characteristic of religious freedom do not entail coercion on others, as well as most cases of language rights that do not entail coercion. Therefore, whether to employ restrained judicial interpretation is better decided on a case by case basis. There is no reason to decide \textit{a priori} that language rights are problematic only because they bear collective and cultural characteristics.

\textsuperscript{472} For an argument suggesting that international courts do not put the right to religious culture on par with other human rights, especially when it comes to suppressing minorities within minorities, and that this asymmetry should also be applied at the national level see Frances Raday, “Culture, Religion and Gender” (2003) 1 \textit{Int’l J. Const. L.} 663; Frances Raday, “Traditionalist Religious and Cultural Challenges – International and Constitutional Human Rights Response” (2008) 41 \textit{Isr. L. Rev.} 596.
Last, I would like to point out that the right to religious freedom is not only similar to language rights in that it is understood by courts in some cases as the right to culture, but that it is similar to language rights with respect to nationality as well. Recall, that the claim that language rights may provoke national tensions and undermine the national or civic unity of the state is used in arguments in support of their restrained interpretation. However, religion is as tied up to nationality as language. In Israel, for example, in the case of Ka'adan Barak C. J. includes both the Hebrew language and Jewish religious holidays under the category of items that symbolize the Jewish national character of Israel.\footnote{HCJ 6698/95 Ka'adan v. Israel Land Authority, 54(1) P.D. 258 at 281; my translation (emphasis added).} There have been many cases in history were religious wars were also national wars and vice versa, and religion has been a major factor in stimulating national conflicts in the second half of the 20\textsuperscript{th} century.\footnote{Jonathan Fox, “The Rise of Religious Nationalism and Conflict: Ethnic Conflicts and Revolutionary Wars, 1945-2001” 41 Journal of Peace Research 715.} Moreover, social cleavages within states are often both linguistic and religious. For example, in Israel, the Arabic-speaking linguistic minority is also a religious minority, and in Canada most Francophones belongs to the Catholic religious minority. Despite this, when it comes to the protection of religious minorities we do not hear a call for a restrained interpretation of the right to religious freedom in order to prevent tensions between religious groups, as justified as these worries may be.

In this sub-section I have shown that similarly to language rights, at least in some cases, the right to religious freedom is a collective and a cultural right. This refutes the third argument against the purposive interpretation of language rights because it does not establish that language rights are the only rights that bear collective and cultural characteristics. If language rights are to be interpreted with restraint because they are collective and cultural rights, so should the right to religious freedom. However, the right
to religious freedom is not interpreted with restraint and the claim for its restrained interpretation does not commonly arise. Therefore, it should not arise with regard to language rights as well. A question therefore arises: Why are language rights commonly treated with more restraint than the right to religious freedom? The next section aims to address a fourth claim against purposive interpretation of language rights, namely the cultural burden they impose on the majority culture. This claim is novel and has not yet been put forward. In order to address it, I will appeal again to the right to religious freedom. However, this time analysing the right to religious freedom will illustrate the difference between the two rights. That is, it will highlight the cultural burden as a distinctive feature of language rights.

3. **The Argument about the Cultural Burden Imposed by Language Rights**

In this section I will identify a unique feature of language rights, especially comprehensive language rights, i.e. bilingualism. As opposed to other collective and cultural rights such as the right to religious freedom, language rights usually impose a cultural burden on majority members. When the state accords comprehensive language rights, majority members need to learn and become competent, at least to some extent, in the minority language. Thus, majority members unavoidably associate themselves with the minority culture, which is not their own.

I will now provide a generous outline of the cultural burden argument, but only to eventually argue against it. Towards the end of this section, I will argue that while the cultural burden language rights impose is distinctive to language rights, it does not provide a strong reason for their restrictive interpretation.
The cultural burden is intimately connected with the intrinsic value of language as a marker of cultural identity. If the state acknowledges only the instrumental value of minority languages as a means of communication, it can do so by making sure that the minority is fluent with the majority language and not vice versa. For example, minority members can be taught the majority language or provided interpreters in courts, municipalities and other administrative institutions.\textsuperscript{475} However, if the state acknowledges the intrinsic value of the minority language as a marker of cultural identity, it provides an infrastructure, facilitated by language rights, which enables public participation of minority members without sacrificing their intrinsic interest in their cultural identity.\textsuperscript{476} This infrastructure imposes a cultural burden on majority members.

What is the nature of the cultural burden comprehensive language rights impose on majority members? As I have indicated in the former section, comprehensive language rights, which support a specific minority culture, create a cultural tension between the majority and the minority groups. The demand from majority members to learn and speak the minority language may be perceived by majority members as a cultural and political triumph of the minority culture over their own culture. A member of the majority might resent the fact that he needs to learn the minority language in his own country in which most people speak and identify with the majority language. Members of the majority may therefore regard the demand to learn, speak and be associated with the minority language as unjustified.\textsuperscript{477} In nation states, where the majority language is perceived by majority

\textsuperscript{475} Réaume, "The Demise of the Political Compromise Doctrine", \textit{supra} note 380 at 613.
members as central to the national identity of the state, majority members may regard this demand as particularly unjustified and burdensome.

The cultural burden language rights impose should not be confused with their positive character. Comprehensive language rights require that public institutions such as courts, the legislature and municipalities,\textsuperscript{478} give minority members opportunities to take part in a public life in their language.\textsuperscript{479} Participation of minority members in the public sphere cannot be achieved without special efforts of majority members. These efforts include not only mere allocation of monetary resources to support an infrastructure in the minority language, as the positive character of language rights entails, but also a requirement that majority members learn the minority language, and use it in public. The point is that monetary support by the state is not enough. Rather, some members of the majority need to take upon themselves the active use of the minority language.\textsuperscript{480}

If we take comprehensive language rights and bilingualism seriously, then the extent of linguistic support is wide and so is the cultural burden on majority members. Take the \textit{Beaulac} decision for instance. The question was whether s. 530 of the \textit{Criminal Code} in Canada, which establishes the right of the accused to choose between English and French as the language of trial, is to be generously interpreted as entailing the right of the

\textsuperscript{478} Réaume, "The Demise of the Political Compromise Doctrine", \textit{supra} note 380 at 604.
\textsuperscript{480} My argument about the cultural burden language rights impose is true only where there is a personality regime of language rights, as opposed to places in which the territorial regime governs. Under a territorial regime, language rights vary from region to region according to the needs of the population in each region. That is, language \textit{x} may be an official language in a region in which there are majority members of culture \textit{x}, but may not be an official language in a region where such members do not exist or do not constitute a significant part of the population. Belgium and Switzerland are good examples of states that follow territorial regimes of language rights. According to the personality regime in contrast, citizens enjoy the same regime of language rights in all regions of the state. That is, language rights follow persons and not territories. Canada is a good example of a state that follows the personality regime of language rights (Patten & Kymlicka, \textit{supra} note 418 at 29).
accused to speak, understand and be understood in one of the languages he or she chooses, or narrowly interpreted as entailing merely the accused’s negative freedom to speak the official language he or she chooses in trial, followed by interpretation. The option of generous interpretation requires judges who are willing and able to fulfill the accused’s right to be understood in his or her language, officers who are able to issue a summon in the accused’s chosen language,\textsuperscript{481} government counsel speaking the official language selected by the accused,\textsuperscript{482} and a court reporter who is able to understand the accused’s chosen language. All these requirements are very costly and inconvenient.\textsuperscript{483} But, most importantly, they are all directed towards majority members who are required to interact, speak, understand, accept and endorse the minority language. When majority members speak the minority language, they become participants in the minority culture.\textsuperscript{484} When they use the minority language during their work, the minority language and the culture to which it belongs becomes an integral part of their daily routine. It has an intrusive element.

In a way, at least when it concerns public institutions, majority members become a captive audience. They cannot avoid the minority language in their daily lives and it becomes part of them too. In this sense, language rights impose a cultural burden on majority members.

The cultural burden on majority members is a distinctive character of language rights. It is largely absent from the right to religious freedom. Because religion is an important part of many cultures, Canadian courts interpret the right to religious freedom as inherently connected to Canada’s multicultural heritage, which is manifested in s. 27 of the

\textsuperscript{481} In the Canadian Supreme Court of MacDonald Wilson J. suggests a compromise according to which the summonses be offered in only one language, but will be accompanied by an offer of translation on request (MacDonald, supra note 379 at 543-544).


\textsuperscript{483} According to Bastarache J. in Beaulac, these requirements should be met even when they cause administrative inconvenience (Beaulac, supra note 389 at para. 39).

\textsuperscript{484} Réaume, “The Demise of the Political Compromise Doctrine”, supra note 380 at 618-619.
Canadian Charter.\textsuperscript{485} This interpretation implies that a commitment to multiculturalism entails a commitment to religious diversity, and such diversity is achieved by a strong protection and a purposive interpretation of the right to religious freedom. As the Ontario Court of Appeal emphasizes in the case of Videoflicks, supporting freedom of religion means that the majority group bears only “small inconveniences” as a result of permitting exceptions to otherwise justifiable homogenous requirements”.\textsuperscript{486} These small inconveniences, however, do not amount to a cultural burden on majority members.

Such inconveniences are the requirement from majority members to adjust their schedule to accommodate religious employees who observe Saturday as a day of rest,\textsuperscript{487} or to tolerate minority members who wear headscarves, turbans,\textsuperscript{488} or yarmulkes in the public sphere. Allowing Sikh children attending public schools to carry ceremonial daggers (kirpans) in the classroom as in the Multani case,\textsuperscript{489} or allowing Jews to build succahs on their balconies as in the Amselem case,\textsuperscript{490} although the regulations in their condominium forbid them to do so, are further examples of such inconveniences.

As opposed to requiring that majority members learn, speak and associate with the minority language, allowing kirpans in public schools and building succahs do not constitute a cultural burden imposed on the majority members. That is, majority members are not required to wear headscarves, turbans and yarmulkes and to build succahs in order to allow freedom of religion for minority members. In states with a majority of Christians and a minority of Muslims, Christians might need to tolerate the existence and visibility of

\textsuperscript{485} See R. v. Videoflicks Ltd. (1984), 48 O.R. (2d) 395 at para. 56 (Ont. C. A.); Big M, supra note 180 at para. 99.
\textsuperscript{486} Ibid.
\textsuperscript{488} See Bhinder v. CN, [1985] 2 S.C.R. 561.
\textsuperscript{490} Amselem, supra note 441.
a mosque and to hear the calls of the muezzin, but they are not required to enter the mosque and practice Islam. This is not the case with language rights that require majority members to use the minority language in their daily lives. If language is a marker of cultural identity, then the cultural burden requires them to associate themselves to some extent with the minority culture and not only tolerate its existence in the public sphere side to side with their own culture.

Another reason language rights impose a cultural burden, whereas religious freedom largely does not is the following. In many cases in which the state grants extensive collective rights to religious minorities, majority members can simply disassociate themselves from the minority culture. The state can give minority members the autonomy to handle their own religious practices without majority members’ taking an active part in the minority culture. In Israel, for instance, the state allocates resources to every religious community for maintaining religious tribunals which have an exclusive legal power over matters of marriage and divorce. The state also allocates resources to non-Jewish religious communities so their members will be able to conduct their religious practices in sites they perceive as holy. It does it in a way that gives them almost full autonomy, without taking an active part in the administration of these sites.

Such extensive collective rights are criticized for putting at risk group members such as women and children by subjecting them to the exclusive authority of their group leaders. However, harmful they may be for the minority group’s vulnerable members, they do not have any substantial cultural influence on the lives of majority members. Majority members are not influenced by the minority’s religious tribunals, and they are not

492 Medina, *supra* note 446 at 138-139.
required to take any role in them or in administrating the religious minorities’ holy sites. When religious minorities have autonomy to handle their internal religious affairs, their actions do not leave any substantial mark on the public sphere and they hardly affect the daily lives of majority members.

Comprehensive language rights, on the other hand, leave a more substantial mark on the public sphere and have an effect on the daily lives of many majority members. Comprehensive language rights make it difficult for majority members to disassociate themselves from the minority culture. Language rights promote linguistic duality in the public sphere. They go beyond the internal realm of a minority culture. Bilingual arrangements in Canada, for instance, apply to all Canadians, including majority members, in their contact with public authorities and in their everyday life when they buy products with bilingual captions, apply for jobs, send their children to school, work as a municipal and governmental employees etc. In this way, the majority members become actively associated to some extent with the minority culture.

So far I have argued that language rights are different from the right to religious freedom in that they impose a cultural burden on majority members. There are however exceptional and rare cases in which the right to religious freedom has the potential to impose a cultural burden on majority members. Chamberlain is one of them. I will show the cultural burden and suggest that it might have caused the court to narrowly interpret the right to religious freedom in this case. Because the right to religious freedom rarely imposes a cultural burden on majority members, whereas language rights usually do, the

---

cultural burden features should still be considered distinctive to language rights. Pointing out a case in which the right to religious freedom had the potential to impose a cultural burden on majority members suggests that when a cultural burden is involved it constitutes a reason for a narrow interpretation of cultural rights.

In *Chamberlain*, the Supreme Court of Canada reviewed a resolution of the Surrey school board refusing to authorize three books for classroom instruction that depicted same-sex parented families. The board’s decision was taken after a group of religious parents complained about the controversial content of these books. The majority of judges in the Supreme Court decided to dismiss the board’s resolution. The court declared the resolution as unreasonable because it let “the religious views of a certain part of the community trump the need to show equal respect for the values of other members of the community.” The court also ruled that public schools are allowed to take religious views into consideration but should stay neutral and refrain from favouring one moral view over another.

The court in *Chamberlain* had two options. The first option was to broadly interpret the religious parents’ right to religious freedom and affirm the resolution to disallow the books. The second option, which the court chose, was to narrowly interpret the right to religious freedom, dismiss the resolution and allow the books. By narrowly interpreting the right to religious freedom, the court’s decision prevented an influence of the minority religious culture on the majority group. In this case, granting the religious parents’ request would have had a major influence on the way children of majority members are educated.

Compare this to the above mentioned *Trinity Western University* case, in which the court chose a generous interpretation of the right to religious freedom. Similarly to the...
judges in *Chamberlain*, the judges in *Trinity Western University* focused on reconciling the right to religious freedom with the right to equality. In *Trinity Western University* the court reconciled the religious freedom of individuals wishing to attend Trinity Western University with the right to equality of gay and lesbian students in British Columbia’s public schools system, who might be discriminated against by future graduates of Trinity Western University.\(^498\) The majority of judges in the Canadian Supreme Court ruled that the British Columbia College of Teachers’ decision should be overturned. Bastarache and Iacobucci JJ. strongly interpreted the right to religious freedom and concluded that the British Columbia College of Teachers’ decision prevented a particular religious minority from freely expressing its religious beliefs and putting them into practice.\(^499\) In Bastarache and Iacobucci JJ.’s eyes, the British Columbia College of Teachers’ decision means that students in Trinity Western University must abandon their religious beliefs if they are to participate in public life by being teachers in the public school system, and such a decision therefore does not respect their religious freedom.\(^500\) By contrast to *Chamberlain*, then, in *Trinity Western University* the right to religious freedom was strongly interpreted by the court.

What might explain the difference in the interpretation of the right to religious freedom between *Chamberlain* and *Trinity Western University*? I suggest that it is the cultural burden imposed by the right to religious freedom on majority members. Unlike the *Chamberlain* case, in which a strong interpretation of the right to religious freedom would have amounted to a direct undesirable influence of minority religious views on homosexuality on the majority culture, in *Trinity Western University*, there was no real

---

\(^{498}\) *Trinity*, *supra* note 459 at 810.

\(^{499}\) *Ibid.* at 812.

\(^{500}\) *Ibid.* at 814.
danger of such an undesirable influence. That is, in *Chamberlain*, there was a danger of imposing a religious cultural burden on the majority, while in *Trinity Western University* the danger was minimal. Bastarache and Iacobucci JJ. stressed that there must be evidence of harm before a limitation on religious freedom and no such evidence was shown in this case.\(^{501}\) It is possible that Bastarache and Iacobucci JJ. were willing to strongly interpret the right to religious freedom mainly because such an interpretation did not cause an undesirable influence of the minority religious culture on the lives of majority members in public schools. Had there been a real danger of a religious influence on the majority secular sphere, the judges in *Trinity Western University* might have arrived at a decision that is much less in favour of the right to religious freedom.

Note that in both cases there were grave implications for the religious freedom of minority members, but nevertheless they were highlighted in *Trinity Western University* and marginalized in *Chamberlain*. In *Chamberlain*, the decision that schools should not favour one moral perspective over another in their teaching and remain allegedly neutral on moral and religious views practically means that minority religious cultures will be integrated to the majority culture only if their culture does not influence the majority culture with contradictory views.\(^{502}\) In other words, the limited interpretation of the right to religious freedom in *Chamberlain*, which respects the majority secular views, comes at the expense of respecting the values and practices of the religious minority members.\(^{503}\)


\(^{503}\) Brown, *ibid.*
In both Chamberlain and Trinity Western University, then, there are serious and parallel concerns on both sides. My aim here is not to endorse or criticize either of those decisions but to highlight the relevant difference between them, namely the imposition of a cultural burden on majority members, which, in my view, best explains the difference in outcome between them.

Until now I have compared language rights with the right to religious freedom and argued that it is only the cultural burden which language rights impose on majority members that is distinctive to language rights and may justify their limited interpretation. In addition, I have shown that the right to religious freedom also has the potential of imposing a cultural burden on majority members. However, this potential is rarely realized, and I have suggested that when it exists it may provide a reason for a narrow interpretation of the right to religious freedom. Because the cultural burden is more pervasive in language rights cases, I suggest regarding it as a distinctive characteristic of language rights.

The question I would now like to address is whether the cultural burden provides a strong reason to narrowly interpret language rights. In the remainder of this section I will argue that while the cultural burden argument is distinctive to language rights, it can be used only as a limited justification for their restrained interpretation. In most cases, the burden language rights impose on majority members is not as burdensome as it may initially seem. I will illustrate this argument via my conception of equality of cultural identity that I have articulated in Chapter 1.

Under my equality of cultural identity conception, a claim for language rights is a claim from a cultural identity. It is a claim for more social and distributive equality
between majority and minority members. I have identified cultural identity as a sphere in people’s lives, among other spheres, such as the sphere of education, health care, economics and politics. Social and distributives justice is optimally achieved when the spheres are independent of one another, and each sphere is governed by different and relevant distributive criteria. That is, social and distributive justice is achieved when the sphere of cultural identity is not governed, or is governed as little as possible, by other spheres. This is usually not the case with minority members who are unwillingly pressured to adopt features of the dominant majority culture in order to enhance their prospects of success in other majority-dominated spheres of their lives, such as the economic and the political spheres. Optimal social and distributive justice exists when the cultural identity sphere is governed by criteria relevant to the need to protect it, and minority cultural members have no incentives to give up their identity in order to enhance their prospects of success in other spheres.

Comprehensive language rights promote social justice between majority and minority members. They protect a minority language and allow its members to adhere to it in their workplace, in educational institutions, in courts, and when contacting governmental and municipal authorities. An ideal model of language rights will allow minority members to enhance their prospects of success in all spheres of their lives without compromising their cultural identity by relinquishing their language in favour of the majority language.\(^\text{504}\)

But comprehensive language rights do not come without their price. While they protect minority members, they impose a cultural burden on majority members.

How can we understand the cultural burden in terms of my conception of equality of cultural identity? The cultural burden refers to the requirement from majority members to actively use the minority language, to interact with the minority culture and to unavoidably associate themselves with the minority culture. In terms of equality of cultural identity, by requiring majority members to actively use the majority language, the sphere of their own cultural identity is invaded by other spheres in their lives such as the spheres of education, economics and career. For example, Anglophone government employees in Canada may resent the fact they have to learn French, a language of a culture that is not part of their identity, in order to be qualified for a government position.

I argue that the burden language rights impose on majority members is not as burdensome as it may initially seem. In most cases, language rights require majority members to learn, speak, and associate to some extent with the minority culture, but they do not require them to neglect their culture in favour of the minority culture. That is, in most cases, language rights do not require majority members to compromise their cultural identity sphere in favour of success in other spheres of their lives such as health care, education and career. First, there is no requirement from the majority members to relinquish their language in favour of the minority language. Second, the reality is that most public and private institutions are dominated by the majority language anyway. An Anglophone government employee may be required to learn French, but this does not come at the expense of his own language. Namely, he is not required to relinquish his language for the minority language. The dominant language in his life is still the majority
language. That is, he may conduct his private and cultural life in the majority language, and as a citizen of the state he is entitled to receive services in the majority language. That is to say, while he is required to be competent in French in order to get a position in the government, English still has a strong hold in all other spheres of his life.

Moreover, the cultural burden argument works both ways. Namely, lack of comprehensive language rights imposes a major cultural burden on minority members. When there are no significant language rights, members of the minority are required to learn, speak and associate with the majority language if they are to succeed in all other spheres of their lives, which are dominated by the majority language. The requirement from minority members to live their lives mostly in the majority language may significantly harm their cultural identity. For instance, studies show that parents whose children are educated in a language other than their mother tongue fear that their children will absorb the values and norms of that culture rather than their own. This fear is intensified when these values and norms contradict the values and norms of their own culture.\textsuperscript{505} Some scholars go as far as saying that in some cases “without maintenance of the mother tongue and culture there is a risk of conflict of identity, ruthlessness, marginality and alienation”.\textsuperscript{506} There is a glaring asymmetry in terms of equality in the cultural burden imposed on minority and majority groups. While a requirement to operate in another language is burdensome, it is typically more burdensome in cases of linguistic minorities than in cases of linguistic majorities whose language and cultural identity is generally secure in all spheres of their lives.

\textsuperscript{505} Beardsmore, \textit{supra} note 477 at 13-17.
\textsuperscript{506} \textit{Ibid.} at 16.
4. **Conclusion**

In this dissertation, I have developed regulative principles for dealing with claims from cultural identity. I have argued that the interest in protecting the claimants’ cultural identity unites three types of claims: claims of offence to feelings, language rights claims and claims for freedom of religion. In this chapter, I have concentrated on language rights and argued that existing arguments supporting their restrained judicial interpretation in courts are ill founded. I have done so by analyzing the value that stands at the base of language rights, by drawing a comparison between them and the right to religious freedom, which is justified by the same value, and by analyzing the way judges understand and interpret religious freedom. I have shown that all the features that are allegedly unique to language rights, i.e. their positive, political, collective and cultural characteristics, subsist in other rights, especially in the right to religious freedom, and therefore cannot be invoked to justify a restrained interpretation of language rights.

While existing arguments for a restrained judicial interpretation of language rights fail to identify a unique character of language rights, my conception of equality of cultural identity for distributive and social justice allows me to identify a unique characteristic of language rights – which is the cultural burden they impose on majority members to learn, speak, and associate themselves with the minority culture. I have shown that in the rare and exceptional cases in which the right to religious freedom also bears this feature, courts tend to narrowly interpret it and refrain from imposing minority religious values on majority members. In the same manner, the judicial restraint with respect to language rights is best explained by the cultural burden they impose on majority members.
Nevertheless, I have argued that while the cultural burden argument cannot be easily dismissed, it still does not amount to a robust claim for a restrained judicial interpretation of language rights. This is because, viewed from the prism of equality of cultural identity, while the cultural identity sphere of majority members is invaded by other spheres of their lives because they are required to use the minority language, the majority language and culture is still dominant. The cultural identity sphere of majority members is therefore relatively secure, especially in comparison to the cultural identity sphere of minority members.
Conclusion

The legal system in multicultural states increasingly faces claims on behalf of minority members to accommodate their cultural identity. These claims often implicitly or explicitly appeal to the notion of equality by pointing out a glaring asymmetry between the different level of protection majority and minority members receive from the state for their cultural needs. Thus, a question arises: What does equality mean in these cases, what role does it play, and what extent of accommodation, if any, does it entail?

In many cases, the state protects the majority members’ cultural needs and values by enacting relevant statutes of accommodation, and these accommodations are largely perceived as natural and unproblematic. Throughout my thesis, we have seen many examples for that. In Ontario, where Christians are the majority, Sunday, the Christian day of rest, was enacted as the mandatory business closing day. In Israel, although both Arabic and Hebrew are official languages, state services are provided almost exclusively in Hebrew – the language of the Jewish majority – and there is no university level education system in Arabic. In the United Kingdom, the criminal code protects Christianity, the majority religion, against blasphemy.

Only when minority members raise claims for similar accommodations to protect their culture, are these claims problematized and resisted. That is, only when Canadian Saturday-observing business owners want to open their businesses on Sunday while closing them on Saturday, when linguistic minorities ask for comprehensive state services in their language, or when religious minorities such as Muslims in Europe ask to restrict offensive speech against their religion, are they faced with reluctance by the legal system.
As we have seen, such claims on behalf of cultural members arise in a variety of legal contexts, such as constitutional and criminal law, and take a variety of forms. Three common forms they take, on which I have focused in this thesis, are as claims of offence to feelings, claims for religious freedom and claims for language rights. As a first step in developing my framework, I have unified them under one notion. I have identified the interest in one’s cultural identity as the main interest underpinning these three types of claims. I have therefore called them ‘claims from cultural identity’, and argued that they need to be recognized as such in the various legal contexts in which they arise.

I have also argued that claims from cultural identity are equality claims. They therefore involve two components. The first is pointing out the interest in protecting the cultural identity, and the second is a claim for substantive equality between minority and majority members. I have offered a theoretical analysis of the relation between them, and I have shown that neither component alone is usually sufficient to substantiate a claim from cultural identity. For example, in the case of Sunday closing laws, the interest in freedom of religion does not entail Saturday-observing business owners’ right to open their businesses on Sunday and close them instead on Saturday, and neither does equality alone. Only because the state has enacted the closing law in a way that unequally accommodates the religious practices of the Christian majority, but not the Saturday observing minorities, does their claim become justified.

If substantive equality plays an essential role in claims from cultural identity, what principle underpins it, and what conception of equality best characterizes such claims? Human dignity is commonly perceived as the notion underpinning substantive equality. I have distinguished between two conceptions of dignity. The first is a universal conception
of dignity which focuses on what all human beings have in common for which they deserve respect and not to be discriminated against by arbitrary considerations. The second is a needs conception of dignity, which focuses on what sets different people apart, namely their unique needs, including cultural needs, for which they deserve accommodation.

I have suggested my conception of equality of cultural identity, which captures the distributive principle that claims from cultural identity seek to implement. My conception is a ‘complex equality’ model in the spirit of Walzer’s theory of spheres of justice, which, as I have argued, is most suitable for dealing with claims form cultural identity. Unlike simple equality models, such as Dworkin’s equality of resources, my model does not reduce all aspects in persons’ lives to one aspect or one currency and does not try to devise a general distribution scheme for it. Rather, I identify cultural identity as a sphere in persons’ lives and accommodation as the good that is distributed in it. I have argued that in claims from cultural identity, courts and other decision makers should try to minimize as much as possible the dominance of other spheres such as education and career over minority members’ sphere of cultural identity. This is because in a comparative perspective, typically, majority members’ sphere of cultural identity is not dominated by other spheres.

After having laid out my conception, I have illustrated it with a particular kind of claim from cultural identity. I have shown the concrete form my conception of equality of identity takes as a regulative principle when it is applied to claims of offence to feelings, and explored its merits over alternative principles and frameworks that have been suggested for dealing with such claims. To do so, I have first re-conceptualized claims about offence to religious feelings and cultural values as claims from integrity of cultural
identity. I have argued that these claims are not about the painful feeling as such, but the integrity of the offended person’s cultural identity.

Then I presented the vulnerable cultural identity principle, according to which the more vulnerable a person’s cultural identity in terms of citizenship, recognition by and inclusion in larger society, the stronger his or her claim from integrity of cultural identity. As typically, cultural minority members possess a more vulnerable cultural identity, they typically have a stronger claim from cultural identity, all other things being equal. As offensive acts against minority members’ culture put pressure on them to conform to the majority culture, relinquish their cultural identity or conceal it in public in order to better integrate in society, they constitute an invasion of other spheres in their lives into their sphere of cultural identity. Majority members typically do not face such pressure. Thus, the vulnerable cultural identity principle is a concrete manifestation of my model of equality of cultural identity in the case of claims from integrity of cultural identity. Similar manifestations will apply to other types of claims from cultural identity.

Using the vulnerable cultural identity principle, I explored the main merits of my suggested framework over to other frameworks, which are twofold. First, the vulnerable cultural identity principle, and by extension equality of cultural identity, lead to better outcomes in terms of distributive justice than other frameworks. As opposed to other frameworks, my framework does not automatically favour the majority over the minority. Liberal perfectionist frameworks are willing to support minority demands only to the extent that they are consistent with the liberal doctrine. Thus, in cases involving offensive expressions by the liberal majority toward a cultural minority, such as the Muhammad cartoons affair, they will tend to side with the liberal majority’s right to freedom of
expression, which they highly value. In cases in which the majority is offended by the minority, such as the headscarf controversy, they will tend to prohibit the minority’s acts, which they regard as symbols of oppression. Similarly, Feinberg’s principle sums and minimizes the amount of painful feelings that individuals experience. Since the majority is greater in numbers than the minority, they experience more painful feelings in total, thus Feinberg’s principle will always tend to give the majority the upper hand. My framework, on the other hand, aims at remedying and equalizing the gap between majority and minority members, and will therefore tend to support the minority, which is typically more disadvantageous in terms of recognition and citizenship. Thus, it leads to more just outcomes.

This leads me to the second factor that distinguishes my framework from other frameworks, such as perfectionist liberalism and Kymlicka’s liberal multiculturalism. As opposed to these frameworks, my framework does not evaluate claims from cultural identity based on their content and consonance with specific moral views or comprehensive doctrine. Thus, it does not associate the state with a comprehensive doctrine or moral outlook. Rather, it evaluates claims based on objective standards, such as socioeconomic parameters that reflect the claimant’s level of integration, citizenship and inclusion in society. My framework is established within neutral liberalism, which, in my view, gives all citizens a truly equal chance to present their culture and seek recognition for it in the public sphere.

My appeal to objectivity has several merits. First, my framework fulfils a major general desideratum for law, which is that law should be based on objective standards. Second, in the case of offences to feeling, my vulnerable cultural identity principle avoids
the two major worries about regulating expression, which are common even among scholars who are generally sympathetic to the idea. The first worry relates to the difficulty in assessing the intensity of painful feelings, which is subjective by nature. The second is problems of legal moralism, and the court’s imposing the moral view of one group on another group. As my suggested principle is based on objective parameters, and does not involve morally assessing competing doctrines, it avoids these problems, and can help courts deal with claims from cultural identity in a way that leads to just outcomes.

After having demonstrated my conception and its merit through the prism of claims from integrity of cultural identity, I turned to discuss claims for language rights and claims for the right to religious freedom. My aim in this case was to discuss the common reluctance in courts to generously interpret language rights provisions, and generally treat them as second generation rights, which are not on a par with fundamental human rights such as the right to religious freedom.

Having conceptualized both claims for language rights and claims for religious freedom as claims from cultural identity, I refuted the common arguments against treating language rights with more caution than other rights, by showing that the right to religious freedom bears all of the allegedly unique characteristics of language rights that are used in arguing for their restrained judicial interpretation. I have identified a novel argument that might support treating language rights with more caution. I have argued that unlike other rights, language rights impose a cultural burden on minority members to actively use the minority language and associate with the minority culture. Relying on my conception of equality of cultural identity, however, I argued that this is a relatively weak argument,
since this cultural burden does not seriously undermine majority members’ status in terms of equality of cultural identity.

In sum, I have presented a new conception of substantive equality, which captures the role of equality in claims for cultural identity. I have demonstrated how it can be put in the form of a concrete regulative principle, which is objective, for dealing with claims from integrity of cultural identity. I have also demonstrated how it can be put to use to expose the shortages of existing regulative practices, such as the judicial interpretation of language rights provisions, and how it can be used to remedy them both in terms of addressing the real interest at stake, namely the interest in cultural identity, and in terms of achieving more just distributive outcomes.
Bibliography

Papers and Monographs


Lane, Melissa. “God or Orienteering? A Critical Study of Taylor’s Sources of the Self” (1992) 5 Ratio 46.


Marshall, William P. “‘We Know It When We See It’: The Supreme Court and Establishment” (1986) 59 Southern California Law Review 495.


Scanlon, Thomas. The Diversity of Objections to Inequality (Lawrence, KS: Dept. of Philosophy, University of Kansas, 1997).


**Legal Cases**


Gay News v. United Kingdom (1983) 5EHRR 123 (Comm.).


H.C.J. 5277/07 Marzel v. The Police Commander of Jerusalem District.

HCJ 316/03 Bakri v. Israel Film Council et al., P.D. 58(1) 49 (2003).

HCJ 4112/99 Adalah et al. v. The Municipality of Tel-Aviv-Jaffa et al., 56(5) P.D. 393.

HCJ 4541/94 Alice Miller v. Minister of Defense 49(4) P.D. 103.

HCJ 5016/96 Horev v. Minister of Transportation 51(4) P.D. 1.

HCJ 6698/95 Ka'adan v. Israel Land Authority, 54(1) P.D. 258.


Ludin BverfG, 2 BvR 1436/02 (24 September; decision delivered by the German Federal Constitutional Court).
Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).
The Queen on the Application of SB v. Headteacher and Governors of Denbigh High School, [2005] EWCA (Civ) 199, 2005 2 All E.R. 396 (EWCA (Civ)) (Eng.)
Trinity Western University v. College of Teachers (BC) (1997), 41 B.C.L.R. (3d) 158.