

Language Rights, Religious Freedom and Equality of Cultural Identity

1. Introduction and the Gist of My Argument

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 paper 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 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.

The Structure of the Paper

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.¹ If they are perceived as human rights, they are often categorized as second or third generation human rights.² One may observe that the

¹ 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, *Universal Human Rights in Theory and Practice* 2nd ed. (Ithaca: Cornell University Press, 2003) 1.

² For the general division of human rights into first, second, and third generations see (Carl Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Boulder, CO.: Westview Press, 1999) 13-40). 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, *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,

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.³ 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.⁴

Challenging this common perception of language rights inevitably involves an appeal to the concept of fundamental human rights. 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.⁵ 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.⁶

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 Rights" in Jean-Marc Coicaud et al. eds., *The Globalization of Human Rights* (Tokyo: United Nations 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 in the Era of Globalization, Privatization, and the Diminished Welfare State" in Daphne Barak - Erez & Aeyal M Gross eds., *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart Publishing, 2007) 1 at 4).

³ Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights and the Right to Self-Determination* (The Hague: M. Nijhoff, 2000) 155.

⁴ 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, at 4).

⁵ Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States (1982-1983) 32 *Am. U. L. Rev.* 1 at 18; Donnelly, at 28-29; Barak - Erez & Gross, *ibid.* at 1.

⁶ Donnelly, at 13-15. Robert Alexy defines fundamental rights as rights that are universal, fundamental,

In this paper I appeal to the 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 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.⁷ 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 tongue⁸ in favour of the majority language.⁹

The purpose of this paper 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.¹⁰ In this paper I assume that the argument about the intrinsic value

abstract, moral and established with priority over all other kinds of rights (Alexy, 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, at 9-10).

⁷ See C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1999) at 11; Royal Commission on Bilingualism and Biculturalism, *Report*, vol. 1 (Ottawa: Queen's Printer, 1968) at 41.

⁸ 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, *The Language of Israel: Policy, Ideology and Practice* (Clevedon, UK: Multilingual Matters, 1999) at 76).

⁹ Réaume, "The Constitutional Protection of Language", at 46-47

¹⁰ Réaume, "Intrinsic Value and the Protection of Difference", at 251; Réaume, "The Constitutional Protection of Language", 45; Réaume, "Beyond Personality", at 283. Elsewhere, I have also explored this

which underpins language rights is strong and persuasive. I also refer to it in relevant points towards my argument. Nevertheless, the intrinsic interest in language rights as protecting 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

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 (Meital Pinto, "On the Intrinsic Value of Arabic in Israel – Challenging Kymlicka on Language Rights" (2007) 20 *Can. J. Law & Juris.* 143).

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.¹¹

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 paper is to shed light on the reasons underling a narrow interpretation of comprehensive language rights or the refusal to purposively interpret minimal language rights.

2.1. 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.¹² 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

¹¹ 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).

¹² Xabier Arzo, "The Nature of Language Rights" (2007) 6 *JEMIE* 2 at 26.

question is whether the right to freedom of language can be interpreted as a positive right.¹³

This question is raised and given two different answers in the Israeli *Adalah* case that deals with the claim of Israeli Arabs for bilingual street signs in Hebrew and Arabic in mixed Arab Jewish cities.¹⁴ 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.¹⁵ 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

¹³ The roots of the familiar distinction between negative freedoms and positive rights are found in Isaiah 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).

¹⁴ *Adalah*.

¹⁵ *Ibid.* at 431-438.

the right to freedom of language. Chief Justice Barak argues that both rights 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.¹⁶

Some language rights such as the ones included in the Canadian *Charter* are already positive in their literal meaning. In *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”.¹⁷

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.¹⁸ Because positive rights oblige the government to take positive steps, so this argument goes, they are to be interpreted with caution and restraint. A purposive interpretation of positive rights will infer more duties on the state, which will impose a significant burden on the state. In *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.¹⁹

¹⁶ *Ibid.* at 414.

¹⁷ *Ford v. A.G. Quebec*, (1988) 2 S.C.R. 712 at para. 43.

¹⁸ 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 *Language Policy* 261 at 270-271).

¹⁹ *Mahe*, 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.²⁰ 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.²¹ 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. There is also no definite and generally accepted way to distinguish between them.²² 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.²³

²⁰ Frank B. Cross, "The Error of Positive Rights" (2001) 48 *UCLA L. Rev.* 857 at 865. Onora O'Neill suggests a similar test to distinguish between positive rights and negative freedoms (Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996) 130).

²¹ See for instance David P. Currie, "Positive and Negative Constitutional Rights" (1986) 53 *UCHILR* 864; Cass R. Sunstein "Lochner's Legacy" (1987) 87 *Colum. L. Rev.* 873 at 889; Stephen Holmes & Cass R. Sunstein, *The Cost of Rights* (New York : W.W. Norton, 1999) 43; Patrick Macklem, "Aboriginal Rights and State Obligations" (1997) 36 *Alberta. L. Rev.* 97 at 100-102; Ran Hirschl, "Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order" (2000) 22 *Human Rights Quarterly* 1060 at 1072-1073).

²² 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. .

²³ 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, at 871).

At this point one may suggest a more consistent argument against a 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.²⁴ 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.²⁵

I do not wish to contribute a counter argument that supports judicial activism as this debate deviates from the purpose of my paper. 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

²⁴ 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.

²⁵ MacNaughton, *ibid.* at 778.

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.²⁶ 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 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.²⁷

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

²⁶ *Eldridge*.

²⁷ *Ibid.* at para. 77.

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.²⁸

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.

2.2. 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

²⁸ *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 365 [*Mahe*].

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.²⁹ 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,³⁰ 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.³¹ Such respect allegedly requires the judges not to deviate from the status quo by giving a broad interpretation of language rights.

²⁹ 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, *Multicultural Citizenship*, at 107). Joseph Carens makes this claim with specific reference to language rights (Joseph H. Carens, "Liberalism and Culture" (1997) 4(1) *Constellations* 35 at 40).

³⁰ *MacDonald v. Montreal* (City of), [1986] 1 S.C.R. 460; *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549 [*MacDonald*]; *Bilodeau v. Manitoba* (A.G.), [1986] 1 S.C.R. 449.

³¹ Denise G. Réaume, "Beaulac and the Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 *McGill L.J.* 593 at 611 [Réaume, "The Demise of the

Following this perception, when the Canadian Supreme Court in *MacDonald* interprets s. 133 of the *British North American Act* that entails the right to use either official languages 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 a right of the litigant to freely use one of the languages in court.³² 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.³³

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*.³⁴ 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.

Political Compromise Doctrine”].

³² *MacDonald*, at para. 17, *Société des Acadiens* at para. 63, *Bilodeau* at para. 11.

³³ *MacDonald*, *ibid.*

³⁴ 1 L.S.I. 7 at 9.

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.³⁵ 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.³⁶ Since the establishment of Israel, apart from the cancellation of English as an official language, there were no changes to Article 82.³⁷

The political compromise argument was raised by Cheshin J. in his minority opinion in *Adalah*.³⁸ 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.³⁹ 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.

³⁵ Avigdor Saltoun, "Official Language in Israel" (1967) 23 *Hapraklit* 387 [Hebrew]; Mala Tabory, "Language Rights in Israel" (1981) 11 *Israel Yearbook on Human Rights* 272 at 280.

³⁶ Muhammad Hasan Amara & Abd Al-Rahman Mar'i, *Language Education Policy: The Arab Minority in Israel* (Dordrecht: Kluwer Academic Publishers, 2002) 8.

³⁷ David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder, CO: Westview Press, 1990) at 165.

³⁸ *Adalah*.

³⁹ *Ibid.* at 464-467.

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 *R. v. Beaulac*,⁴⁰ Bastarache J. rejects the first assumption underlying the political compromise argument. The assumption is that most rights included in the *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 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.⁴¹ 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.⁴²

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.⁴³ 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-

⁴⁰ *R. v. Beaulac*, [1999] 1 S.C.R. 768 [*Beaulac*].

⁴¹ *Ibid.* at para. 24. For the same argument see also *Reference re Secession of Quebec*, [1998] 1 S.C.R. 768 at para. 79.

⁴² *Beaulac*, *ibid.* at para. 24.

⁴³ 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., *Toleration in Enlightenment Europe* (Cambridge: Cambridge University Press, 2000) 86.

section), but rather that they are not the only reason and historically not the main reason for its adoption in many jurisdictions.⁴⁴ 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.

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

⁴⁴ 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, Modernity, and the Emancipation of Man 1670-1752* (Oxford: Oxford University Press, 2006) 135-136. 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, at 34-134).

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,⁴⁵ 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.⁴⁶ Other suggested criteria may be that comprehensive language rights should be accorded on the basis of numbers and geographical concentrations of linguistic minorities.⁴⁷

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 *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.⁴⁸ The existence of the right to property in most democratic constitutions and the omission of it from the Canadian *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

⁴⁵ Kymlicka, *Multicultural Citizenship*, at 76-80, 113-114.

⁴⁶ Pinto.

⁴⁷ Ruth Rubio – Marin, “Exploring the Boundaries of Language Rights: Insiders, Newcomers, and Natives” in Stephen Macedo & Allen Buchanan. eds., *Secession and Self-Determination* (New York: New York University Press, 2003) 136 at 144-146.

⁴⁸ Green & Réaume, at 582.

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.

2.3. 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 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.⁴⁹ They think that acknowledging group rights may risk or compromise liberalism and bring about coercion of the group on its individual members.⁵⁰ 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

⁴⁹ For an articulation of this view see Alexandra Xanthaki, “Collective Rights: The Case of Indigenous Peoples” in Burton M. Leiser & Tom D. Campbell eds. *Human Rights in Philosophy and Practice* (Aldershot: Ashgate, 2001) 303 at 304.

⁵⁰ 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, at 164).

goods”.⁵¹ The former is distinguished by the agent who holds the rights, while the latter is distinguished by the good it protects.⁵² 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 its chosen leadership. For 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.⁵³ 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.⁵⁴

⁵¹ Green, "Two Views of Collective Rights". 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 Press, 1997) 235; Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993) 42.

⁵² Green, "Two Views of Collective Rights", *ibid.* at 320.

⁵³ *Ibid.* at 319.

⁵⁴ 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.

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.⁵⁵

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.⁵⁶ However, as I will show later in this section, other well recognized rights, such as the right to religious freedom, constitute group

⁵⁵ Réaume, "Individuals, Groups and Rights to Public Goods", at 10.

⁵⁶ *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.

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".⁵⁷ At the same time, language rights do not require that a relevant group unite and choose 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.⁵⁸ What value underpins language rights and what does it have to do with culture?

⁵⁷ Réaume, "The Constitutional Protection of Language", at 48.

⁵⁸ Raz, *The Morality of Freedom*, at 166. There are other accounts of rights. One of them is the will (or the

Réaume argues that language has an intrinsic value as it constitutes a marker of cultural identity.⁵⁹ Culture is a marker of identity and language as a central part of culture is itself a marker of identity.⁶⁰

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.⁶¹ 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.⁶² Second, components of a particular culture such as songs, prayers, laws, and

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 paper I am indifferent to the question of which theory best captures the nature of rights.

⁵⁹ 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", at 45; for other instrumental interests see Pinto, at 159-162).

⁶⁰ Réaume, "Intrinsic Value and the Protection of Difference", at 251; Green, "Are Language Rights Fundamental?", *ibid.* at 659; Réaume, "The Constitutional Protection of Language", *ibid.* at 45; Réaume, "Beyond Personality", at 283.

⁶¹ See Joshua A. Fishman, *Reversing Language Shift* (Clevedon: Multilingual Matters, 1991) at 21.

⁶² 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).

proverbs are written and expressed by the language associated with that culture.⁶³ 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 uniqueness of their culture.⁶⁴ 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.⁶⁵

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

⁶³ Stephen May, "Uncommon Languages: The Challenges and Possibilities of Minority Language Rights" (2000) 21(5) *Journal of Multilingual and Multicultural Development* 366 at 374.

⁶⁴ The verbal components of a culture, which are expressed in a specific language, embody unique characteristics of a culture that will be lost if expressed by other languages (see Nancy C. Dorian, "Choices and Values in Language Shift and Its Study" (1994) 110 *Int'l. J. Soc. Lang.* 113 at 115).

⁶⁵ Réaume, "Intrinsic Value and the Protection of Difference", at 251; May, *ibid.*

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.

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.⁶⁶ 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.⁶⁷ 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,

⁶⁶ Eliezer Ben-Rafael, *Language, Identity, and Social Division: The Case of Israel* (Oxford: Clarendon Press, 1994) 12.

⁶⁷ Adeno Addis, "Cultural Integrity and Political Unity: The Politics of Language in Multilingual States" (2001) 33 *Ariz. St. L.J.* 719.

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.⁶⁸

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.⁶⁹ 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.⁷⁰ 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.⁷¹

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

⁶⁸ Joel E. Oestreich, "Liberal Theory and Minority Group Rights" (1999) 21 *Human Rights Quarterly* 108 at 113.

⁶⁹ Alan Patten & Will Kymlicka, "Language Rights and Political Theory: Context, Issues, and Approaches", in Will Kymlicka & Alan Patten eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003) 1 at 42 [Patten & Kymlicka].

⁷⁰ Yuval Merin, "The Case against Official Monolingualism: The Idiosyncrasies of Minority Language Rights in Israel and the United States" (1999) 6 *ILSA J. Int'l & Comp. L.* 1 at 4; Deutch, at 270.

⁷¹ Allon Gideon, "Proposed Bill: Hebrew-Only in the Knesset", *Ha'aretz Daily Newspaper* (Israel), October 10, 1996, at 7; Shahar Ilan, "MKs: Make Hebrew the Only Official Language", *Ha'aretz Daily Newspaper* (Israel), May 19, 2008 <http://www.haaretz.com/hasen/pages/984654.html>; Merin, *ibid.* at 25-26.

amounts to taking Israel's soul.⁷² 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 Israel.⁷³ 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.⁷⁴ 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.⁷⁵

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

⁷² 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*, at 415.

⁷³ This is mainly because Arabic is perceived as a national symbol of Arab nationality (Deutch, at 272).

⁷⁴ *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)*, 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).

⁷⁵ *Adalah, ibid.*, at 456 – 460.

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 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.⁷⁶

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.⁷⁷ 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.⁷⁸

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

⁷⁶ Eyal Benvenisti, "National Courts and the Protection of National Minorities" (2003) 3 *Alei Mishpat (The Law Review of the Academic College of Law)* 462 at 493 [Hebrew].

⁷⁷ Jack Citrin et al., "The 'Official English' Movement and the Symbolic Politics of Language in the United States" (1990) 43 *The Western Political Quarterly* 535 at 539-540.

⁷⁸ *Ibid.* at 548-556.

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.⁷⁹ 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 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”.⁸⁰

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.⁸¹ My aim in this paper, 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

⁷⁹ Patten & Kymlicka, at 5.

⁸⁰ Quoted in Paul C. Weiler, “Rights and Judges in A Democracy: A New Canadian Version” (1984) 18 *U. Mich. J. L. Reform* 51 at 56-57.

⁸¹ Alon Harel for instance rightly argues that there is no need to balance the protection of Arabic against the protection of Hebrew as “[I]t 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).

interpreted purposively in a way that maximizes the protection of the interest it protects.⁸²

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.⁸³ Because language rights are perceived in terms of the right to culture, pointing 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

⁸² See for instance, *Big M*, at paras. 115-117.

⁸³ The latter perception is put forward most sharply by 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 paper I will concentrate on justifications of the right to religious freedom that stress the importance of religion to individuals rather than to society as a whole (for arguments about the importance of religion to society as a whole, which stress the importance of religion *qua* religion see Devlin, at 25; Timothy L. Hall, "Omnibus Protections of Religious Liberty and the Establishment Clause" (1999) 21 *Cardozo L. Rev.* 539 at 548; William A. Galston, *Liberal Purposes: Goods, Virtues and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991) 264-265; Martin E. Marty, "The 1988 Overton A. Currie Lecture in Law and Religion: On a Medial Moraine: Religious Dimensions of American Constitutionalism" (1990) 39 *Emory L.J.* 9 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 find the value of religion to society as a whole persuasive (Lorraine Weinrib observes that commitment to freedom of religion does not rest on acceptance of religion as a good thing (Lorraine E. Weinrib, "The Religion Clauses: Reading the Lesson" (1986) 8 *S.C.L.R.* 507 at 515 [Weinrib, "The Religion Clauses"]]). 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 (See Gidon Sapir & Daniel Statman, "Why Freedom of Religion Does not include Freedom from Religion" (2005) 24 *Law and Philosophy* 467 at 471 [Sapir & Statman, "Why Freedom of Religion Does not include Freedom from Religion"]). 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*, at 45-62; For general concerns regarding the oppressive power of religious groups over their members see Jacob. T. Levi, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000) 51-62; Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002) 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" at 515).

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”.⁸⁴

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.⁸⁵ That is, the right to religious freedom allows us to adhere to our religious identity.⁸⁶ We become full persons when our core beliefs become embodied in our acting.⁸⁷ Acting on our core beliefs “is central to what makes us persons”.⁸⁸ 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.⁸⁹ This is especially important with regard to religious minorities that need protection from the

⁸⁴ *Big M*, at 336-337.

⁸⁵ 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).

⁸⁶ As well as to adhere to our non-religious identity. Although non-religious individuals usually do not perceive their moral views and values as authoritative commands, they may perceive their moral values as crucial to their identity formation (William A. Galston, “Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience” (2003) 48 *Am. J. Juris.* 149 at 175-76; Steven D. Smith, “What Does Religion Have to Do With Freedom of Conscience?” (2005) 76 *University of Colorado Law Review* 911 at 936-937; Sapir & Statman, “Why Freedom of Religion Does Not Include Freedom from Religion”, at 474-478; *R v. Morgentaler* [1988] 1 S.C.R. 30, at 179; Brad A. Elberg & Mark C. Power, “Freedom of Conscience and Religion” in Gérald A. Beaudoin & Errol Mendes eds., *Canadian Charter of Rights and Freedoms* (4th edition) (Markham, ON. : LexisNexis Butterworths, 2005) 219 at 230). For a different view which ascribes a higher value to religious conscience, see Michael M. McConnell, “The Origins and Historical Understanding of Free Exercise of Religion” (1990) 103 *Harv. L. Rev.* 1409 at 1497; John H. Garvey, *What Are Freedoms For?* (Cambridge: Harvard University Press, 1996) Chapter 3; Michael Stokes Paulsen, “Book Review: God is Great, Garvey is Good: Making Sense of Religious Freedom” (1997) 72 *Notre Dame L. Rev.* 1597 at 1622).

⁸⁷ Steven D. Smith, “What Does Religion Have to Do With Freedom of Conscience?” (2005) 76 *U. Colo. L. Rev.* 911 at 934.

⁸⁸ *Ibid.*

⁸⁹ Noah Feldman, “The Intellectual Origins of the Establishment Cause” (2002) 77 *N.Y.U.L. Rev.* 346 at 424-425.

majority members who might seek, for example, to benefit their faith by prescribing prayers in public schools or by shutting down businesses on Sundays.⁹⁰

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 by me, and I do not share it as such with others. It exists in my mind. While I can articulate it to others, and others 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”,⁹¹ “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”.⁹² 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

⁹⁰ *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", at 32).

⁹¹ *Big M*, at 351.

⁹² *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 46 [*Amselem*].

collective right and a cultural right.⁹³ 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 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.⁹⁴ 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.⁹⁵ It is not just an individualistic belief system, but more fundamentally a way of life that many people produce and share together.⁹⁶ Therefore the right to religious freedom is a collective right.⁹⁷

⁹³ 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”, at fn 17).

⁹⁴ Sapir, “Religion and State”, at 625-641.

⁹⁵ For a detailed account see Clifford Geertz, “Religion as a Cultural System” in *The Interpretation of Cultures* (New York: Basic Books, 1973) 87-125.

⁹⁶ 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.

⁹⁷ 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*.⁹⁸ 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".⁹⁹ 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.¹⁰⁰ It protects the values individuals attach to their religion as part of their identity.

⁹⁸ *X v. the United Kingdom*, App. No. 81760/78, 22 Eur. Comm'n H. R. Dec. & Rep. 27, 33 (1981).

⁹⁹ Carolyn Evans, *Freedom of Religion under the European Convention on Human Right* (New-York: Oxford University Press, 2001) 104.

¹⁰⁰ For arguments about the importance of religion *qua* religion that stress its importance to society as a whole see Devlin, at 25; Hall, at 548; Galston, at 264-265; Marty, 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 is a good thing in general (Weinrib, "The Religion Clauses", 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", 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*, at 45-62; For general concerns regarding the oppressive power of religious groups over their members see Levi, at 51-62; Benhabib, at 82-104. Lorraine Weinrib rightly observes that "[a] singular constitutional commitment to freedom of religion does not rest

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.¹⁰¹ As Amy Gutmann observes, due to 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.¹⁰² 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.¹⁰³

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,¹⁰⁴ it will not get her far in terms of legal

on acceptance of religion as a good thing" (Weinrib, "The Religion Clauses", at 515).

¹⁰¹ 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", 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", at 251; Réaume, "Beyond Personality", at 283).

¹⁰² Amy Gutmann, *Identity in Democracy* (Princeton, Princeton University Press, 2003) 151-153.

¹⁰³ Christopher L. Eisgruber & Lawrence G. Sager, "Equal Regard" in Stephen M. Feldman ed., *Law & Religion: A Critical Anthology* (New York: New York University Press, 2000) 200 at 204.

¹⁰⁴ Daniel Statman & Gidon Sapir, "Freedom of Religion, Freedom from Religion, and Respect for Religious Feelings" 21 *Bar-Ilan Law Studies* 5 at 24 (Hebrew) [Statman & Sapir, "'Freedom of Religion,

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 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 below.

Sapir provides the *Bar-Ilan* case¹⁰⁵ 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 *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

Freedom from Religion, and Respect for Religious Feelings”].

¹⁰⁵ HCJ 5016/96 *Horev v. Minister of Transportation* 51(4) P.D. 1.

praying and refraining from driving during Shabbat.¹⁰⁶ 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.¹⁰⁷

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' 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.¹⁰⁸ 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.¹⁰⁹

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

¹⁰⁶ *Horev, ibid.* at section 73 of C.J. Barak's decision.

¹⁰⁷ *Ibid.*

¹⁰⁸ 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", at 54-56).

¹⁰⁹ *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, at 210).

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 *de facto* the right to culture in a religious context is the *Trinity Western University* case.¹¹⁰ 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.¹¹¹ It refused to accredit the teachers' education program of Trinity Western University, a private 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.¹¹² 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

¹¹⁰ *Trinity Western University v. College of Teachers (Br. Columbia)*, [2001] 1 S.C.R. 772 [Trinity].

¹¹¹ *The Teaching Profession Act* RSBC 1996, c. 449.

¹¹² *Trinity Western University v. College of Teachers (BC)* (1997), 41 B.C.L.R. (3d) 158.

teachers' education program in Trinity Western University was discriminatory.¹¹³ 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.¹¹⁴ Namely, it claimed that future graduates of Trinity Western University were 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”.¹¹⁵ 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”.¹¹⁶ 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

¹¹³ *Trinity*.

¹¹⁴ *Ibid.* at 31.

¹¹⁵ *Ibid.* at 30.

¹¹⁶ *Ibid.* at 29, 32.

in the context of a pluralistic society”.¹¹⁷ 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”.¹¹⁸

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.¹¹⁹ 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 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.

¹¹⁷ *Ibid.* at 26.

¹¹⁸ *Ibid.* at 28.

¹¹⁹ *Ibid.*

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.¹²⁰ 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.¹²¹

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

¹²⁰ *Caldwell v. St. Thomas Aquinas High School* [1984], 15 D.L.R. (4th) 1.

¹²¹ *Ibid.* at 7.

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.¹²²

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 of 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

¹²² *Ibid.* at 21-22.

culture and wrongly arrived at the conclusion that it could entail coercion on others.¹²³ 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 *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 *a priori* that language rights are problematic only because they bear collective and cultural characteristics.

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.¹²⁴ There have been many cases in history where religious wars were

¹²³ 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 be also applied at the national level see Frances Raday, "Culture, Religion and Gender" (2003) 1 *Int'l J. Const. L.* 663; Frances Raday, "Traditionalist Religious and Cultural Challenges – International and Constitutional Human Rights Response" (2008) 41 *Isr. L. Rev.* 596.

¹²⁴ HCJ 6698/95 *Ka'adan v. Israel Land Authority*, 54(1) P.D. 258 at 281; my translation (emphasis added).

also national wars and *vice versa*, and religion has been a major factor in stimulating national conflicts in the second half of the 20th century.¹²⁵ 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

¹²⁵ Jonathan Fox, "The Rise of Religious Nationalism and Conflict: Ethnic Conflicts and Revolutionary Wars, 1945-2001" 41 *Journal of Peace Research* 715.

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.¹²⁶ 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

¹²⁶ Réaume, "The Demise of the Political Compromise Doctrine", at 613.

participation of minority members without sacrificing their intrinsic interest in their cultural identity.¹²⁷ 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.¹²⁸ In nation states, where the majority language is perceived by majority 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,¹²⁹ give minority members opportunities to take part in a public life in their language.¹³⁰ 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

¹²⁷ *Ibid.* at 613; Michel Bastarache, "Introduction" in Michel Bastarache ed., *Language Rights in Canada*, 2nd ed. (Cowanville, Québec: Éditions Yvon Blais, 2004) 3 at 7.

¹²⁸ H. Baetens Beardsmore, "Who's Afraid of Bilingualism?" in Jean-Marc Dewaele et al. eds., *Bilingualism: Beyond Basic Principles* (Clevedon, Buffalo: Multilingual Matters, 2003) 10 at 21.

¹²⁹ Réaume, "The Demise of the Political Compromise Doctrine", at 604.

¹³⁰ Christine Ruest, "Constitutional Guarantees for Official Languages in the Legislative Process" in Joseph Eliot Magnet ed., *Official Languages of Canada: New Essays* (Markham, ON.: LexisNexis Canada, 2008) 207 at 232.

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.¹³¹

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 *Beaulac* decision for instance. The question was whether s. 530 of the *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 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,¹³² government counsel speaking the official language selected by the accused,¹³³ and a court reporter who is able to understand the

¹³¹ 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 x may be an official language in a region in which there are majority members of culture 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, at 29).

¹³² 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*, at 543-544).

¹³³ See Alyssa Tomkins, "Does *Beaulac* Reorient Judicial Bilingualism" in Joseph Eliot Magnet ed., *Official Languages of Canada: New Essays* (Markham, Ont.: LexisNexis Canada, 2008) 171 at 202.

accused's chosen language. All these requirements are very costly and inconvenient.¹³⁴ 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.¹³⁵ 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 Canadian *Charter*.¹³⁶ 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

¹³⁴ According to Bastarache J. in *Beaulac*, these requirements should be met even when they cause administrative inconvenience (*Beaulac*, at para. 39).

¹³⁵ Réaume, "The Demise of the Political Compromise Doctrine", at 618-619.

¹³⁶ See *R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395 at para. 56 (Ont. C. A.); *Big M*, at para. 99.

requirements”.¹³⁷ 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,¹³⁸ or to tolerate minority members who wear headscarves, turbans,¹³⁹ 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,¹⁴⁰ or allowing Jews to build succahs on their balconies as in the *Amsalem* case,¹⁴¹ 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 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

¹³⁷ *Ibid.*

¹³⁸ See *Ontario H.R.C & Theresa O'Malley (Vincent) v. Simpsons –Sears*, [1985] 2 S.C.R. 536.

¹³⁹ See *Bhinder v. CN*, [1985] 2 S.C.R. 561.

¹⁴⁰ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256; (2006), 264 D.L.R. (4th) 577.

¹⁴¹ *Amsalem*.

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.¹⁴² 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.¹⁴³

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.¹⁴⁴ 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 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.

¹⁴² Ayelet Shachar, *Multicultural Jurisdictions*, at 80.

¹⁴³ Medina, at 138-139.

¹⁴⁴ Ayelet Shachar, *Multicultural Jurisdictions*, at 81-85.

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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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.

¹⁴⁵ Vanessa Gruben, "Language Rights in Canada: A Theoretical Approach" in Joseph Eliot Magnet ed., *Official Languages of Canada: New Essays* (Markham, ON.: LexisNexis Canada, 2008) 91.

¹⁴⁶ Joseph. H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000) 67-68.

¹⁴⁷ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710.

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."¹⁴⁸ 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

¹⁴⁸ *Ibid.* at para. Of McLachlin C.J.'s decision.

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.¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ 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 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

¹⁴⁹ *Trinity*, at 810.

¹⁵⁰ *Ibid.* at 812.

¹⁵¹ *Ibid.* at 814.

evidence of harm before a limitation on religious freedom and no such evidence was shown in this case.¹⁵² 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.¹⁵³ 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.¹⁵⁴

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

¹⁵² *Ibid.* at 811, 814.

¹⁵³ Richard Moon, "Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on *Trinity Western University v. B.C. College of Teachers* and *Chamberlain v. Surrey School Board District 36*" (2003) 8 *Review of Constit. Studies* 228 at 276; David M. Brown, "Reconciling Equality and Other Rights: Paradigm Lost" (2003) 15 *Nat'l J. Const. L.* 1 at 16; Geoffrey Trotter, "The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants--A Response to Professor Bruce MacDougall" (2007) 70 *Sask. L. Rev.* 365 at 392.

¹⁵⁴ Brown, *ibid.*

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.

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. Cultural identity is a sphere in people's lives, just like other spheres, such as the sphere of education, health care, economics and politics. Social and distributive 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.¹⁵⁵ 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.¹⁵⁶ But comprehensive language rights do not come without their price. While they protect minority members, they impose a cultural burden on majority members.

¹⁵⁵ My conception of equality of cultural identity draws on Michael Walzer's complex equality account of "spheres of justice" (Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

¹⁵⁶ Such an ideal model of language rights belongs to what Bauböck calls a strong case for conservation policies of minority languages. They aim to change a given social context that usually privilege the majority language and pushes minority members to assimilate into the majority language (Rainer Bauböck, "Cultural Citizenship, Minority Rights, and Self-Government" in T. Alexander Aleinikoff & Douglas Klusmeyer, eds., *Citizenship Today: Global Perspectives and Practices* (Washington, D.C.: Carnegie Endowment for International Peace, 2001) 319 at 331).

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.¹⁵⁷ 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”.¹⁵⁸ 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.

4. Conclusion

In this paper I have argued that existing arguments supporting their restrained judicial interpretation in courts are ill founded. I have done so by analyzing the value that

¹⁵⁷ Beardsmore, at 13-17.

¹⁵⁸ *Ibid.* at 16.

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 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.