WHO IS AFRAID OF LANGUAGE RIGHTS IN ISRAEL?

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1. Introduction

The issue of language rights illustrates, and sometimes takes to the extreme, the complexity of the multicultural existence in Israel. Granting language rights to the Israeli Arab minority is perceived by many Israeli Jews as a controversial political matter that Israeli courts should refrain from discussing. Significant legal support for this common view has recently been given by Cheshin J. in his minority opinion in the *Adalah* Israeli Supreme Court case, which discusses the need for bilingual street signs in mixed Arab Jewish cities.[1]

Justice Cheshin raises three major problems with the rights the petitioners ask. I identify these claims with three allegedly distinctive features that language rights bear in comparison with other rights. The first dimension is their collective nature, which means that they legally protect groups rather than individuals. The second dimension is their positive nature, which not only requires a state not to interfere with a person's will to speak a minority language, but also requires that the state take active measures to support this language. The third dimension is their selective nature, which means that unlike general rights such as the right to freedom of expression, language rights protect the language of certain minority groups and not others.

By analysing *Adalah* and comparing it to previous linguistic legal cases in Israel, I observe that the common fear of language rights is mostly invoked in what I call 'multidimensional linguistic cases.' In such cases, demands for language rights involve at least two of the above dimensions and sometimes all of them. The more dimensions such cases involve, the more reluctant the court is to address them.

I then argue that many other well acknowledged rights in Israel involve at least one of the dimensions I have identified. I conclude therefore that

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the difference between language rights and other well-acknowledged rights in Israel is a difference in degree and not kind. If so, Justice Cheshin's reservation about dealing with language rights is unjustified. It seems to me that the general reluctance of courts to deal with language rights lies elsewhere. Many Israeli Jews fear that granting language rights to the Arab minority will damage the Jewish character of Israel. This fear is associated with the fourth distinctive feature language rights may bare — the public dimension.

This paper consists of four parts. In section II, I depict the facts of the *Adalah* case and analyse Barak C. J.'s majority opinion and Cheshin J.'s minority opinion. Setting out their arguments side by side will allow me to identify the challenge that language rights pose for courts. In section III, I provide a definition of language rights. I also analyse two different interests language rights may protect: instrumental and intrinsic interests. In section IV, I argue that language rights may manifest themselves in legal cases within three different dimensions. In section V, I show that other rights that are well-acknowledged by the Israeli legal system involve at least one of the dimensions I have identified. I conclude that the common fear of language rights is greatly unjustified as the difference between language rights and other well-acknowledged minority rights in Israel, is a difference in degree and not kind. The fear of language rights lies in their fourth distinctive feature — their public dimension, which brings Arab culture into the Israeli public sphere.

2. The *Adalah* Decision

The case of *Adalah* raises one of the most difficult questions in Israeli legal discourse with regard to language rights. Its special circumstances created new arguments, which had not been addressed by Israeli courts before. The petitioners in *Adalah* argued that in a municipality with an Arab-minority population, municipal signs should be bilingual, rather than in Hebrew only. The term 'municipal signs' refers to all kinds of signs that are published by the municipality: warning and guidance signs on roads and sidewalks and signs marking street names.

The petitioners' argument is based on constitutional principles as well as statutory interpretation. The constitutional part of their argument is based on discrimination and human dignity. The statutory part of their argument is based on Article 82 of the Palestine-Order-in Council, 1922,[2] which states as follows:

> 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 government 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.

The majority of the Supreme Court (Barak C.J. and Dorner J.) accept the petition, and require the respondent municipalities to ensure that municipal signs in their areas be in both Hebrew and Arabic. Justice Dorner bases her decision on art. 82. In her opinion, street signs are part of what is referred to in art. 82 as 'official notices' and therefore should be published in the two official languages, i.e., Hebrew and Arabic.[3]

Chief Justice Barak points out the ambiguity and weakness of art. 82 by noting that there is no way to know whether municipal signs are included in the legal term 'official notices' in art. 82.[4] Barak then concludes that the fact that Arabic is an official language does not oblige all the respondent municipalities to mark all municipal signs in Arabic as well.

Consequently, Barak C.J. provides other arguments on behalf of the municipalities' duty to add Arabic captions to street signs. According to Barak, the duty of the respondent municipalities is determined by balancing several considerations. First, municipal signs should include Arabic captions so the Arab residents of the municipalities will be able to find their way within the borders of their city, receive information and be warned from traffic hazards and the like. As, Barak puts it: "Municipal signs are designated to 'talk' to the residents of the city and therefore should be published in a language that they understand."[5]

Chief Justice Barak refers to other considerations, which he calls 'general purposes' of interpretation. The first consideration is the right of an individual to freedom of language. The second consideration is the right to equality. The right to equality is broadly interpreted by Barak C.J. as a guarantee not merely of equal formal access to state services, but also of equal use, or equal benefit from them. In Barak's own words:

> ...the municipality has to ensure equal use of its services. In a place where part of the municipal public cannot understand municipal signs its right to equal benefit from the municipal services is injured.[6]

Barak's equality argument is that Arab citizens are entitled to equal municipal services, and in order for them to enjoy these services they should be able to understand the language of signs. This argument is relatively weak in a case where an Israeli Arab is fluent in Hebrew. This is where

the freedom of language argument comes into play. An Arab Israeli citizen has a right to fully live his life in Arabic even if he is capable of conducting some of it in Hebrew. That is to say, Arab citizens are entitled to live their lives in Arabic because this is the language to which their cultural identity is deeply attached.

The broad interpretation of the rights to freedom of language and equality allows Barak to deduce the positive duty of the municipalities to add Arabic captions to street signs. Thus, Barak C.J. overcomes the ambiguous language of art. 82 which allegedly imposes positive duties, but does not make clear what are the 'official notices' that should be bilingual.

After dealing with the positive dimension, Barak C. J. asks whether the positive dimension of the rights to freedom of language and equality should guarantee the right of every minority language in Israel to be added to street signs. In other words, Barak C.J. asks what distinguishes the Arabic language, and why is its status different from that of other languages — apart from Hebrew — that Israelis speak? Chief Justice Barak provides the following answer that justifies the selective application of the positive aspects of the rights to freedom of language and equality by pointing to the fact that:

> ...Arabic is the language of the largest minority in Israel, which has lived in Israel since far far in time [...] This is the language of citizens who, notwithstanding the Arab-Israeli conflict, wish to live in Israel as loyal citizens with equal rights, amid respect for their language and culture.[7]

Justice Cheshin, in a minority opinion, holds that the petition should be dismissed for several different but connected reasons.[8] According to Cheshin J., the requirement to add Arabic captions to street signs is not capable of being deduced from the right to freedom of language, which guarantees every individual's liberty to speak his or her language, but does not impose a duty on the governing authorities to act in this regard.[9] In Cheshin's view, this requirement also does not arise from the principles of international law, which also focus solely on the negative dimension of the right to freedom of language.[10]

In addition, Cheshin J. states that the petition lacks a minimal factual foundation because the petitioners do not show, even with minimal proof, that there are Arab residents who do not know Hebrew and are therefore injured as a result of the lack of street signs in Arabic.[11] Justice Cheshin also argues that there is no reason to provide bilingual municipal signs only in mixed cities because the life of Arab citizens in Israel are not confined to their home town. Many Arab citizens live in one city and work in another.[12]

Justice Cheshin also argues that the petitioners ask the court to recognize collective rights that aim to promote the collective culture of the Arab minority in Israel. However, according to Cheshin, Israeli courts have never acknowledged collective rights. Legal rights in Israel in general concern only individuals, not collectives.[13]

Justice Cheshin's central claim is that the court should not acknowledge language rights that protect the Arabic language because the question whether to recognize them or not is a political question. In Cheshin J.'s view, it is improper for the court to create a new right that independently strengthens Israeli Arabs' cultural and national identity. Such a decision should be left to the political arena. Therefore, the political authorities, and not the court, have the authority to formulate such rights. As long as the petitioners' ideological aspirations are not translated into a statute by the Knesset, the court is unable to assist them, and it is improper for the court to decide an issue that does not lie within its domain.[14]

Before delving into the definition of language rights, the different interests they protect and their distinctive features I would first like to counter Cheshin J.'s claim about the political character of the petition. It may be inferred from Cheshin J.'s view that when a controversial political matter is brought to the court, and there is no specific statute that regulates it, this matter is not justiciable. Let us assume that Cheshin's observation is true, and that the question whether to place bilingual signs in mixed cities does indeed have serious political implications. Has the Israeli Supreme Court refrained from deciding a case only because this case has serious political implications? The answer is negative.

From looking at the decision history of the Israeli Supreme Court, it becomes clear that it has very often made decisions on politically charged issues without hesitation.[15] Yaacov Ben-Shemesh reminds us that it was Cheshin J. himself who said that the fact that an issue is political does not prevent the court from dealing with it.[16]

Lorraine Weinrib locates Israeli courts within a specific value framework which is common among other liberal states such as Canada, Germany, and South Africa. Weinrib points out that courts' tendency to deal with political issues is rooted in a comprehensive normative framework which she calls "the post World War Two paradigm." As a court that operates in what Weinrib calls "a constitutional state," the Supreme Court of Israel has been committed to promoting constitutional liberal norms, such as liberty and equality.[17] These liberal norms govern and are superior to interests that are preferred by the majority.[18] In my view, the most important feature of the constitutional state is its commitment to the interests of all members

in the political community: to the interests of those who are part of the majority, and most significantly, to the interests of those who belong to weak groups.[19]

While the general commitment of the Israeli Supreme Court to defend minority rights is rooted in the normative framework in which the court operates, it lacks the comprehensive doctrine of language rights that allows the court to deal with the challenge they face. In *Adalah*, Barak C.J. tries to cope with these challenges, while Dorner J. avoids dealing with them and Cheshin J. identifies them but wrongly argues that the court should refrain from dealing with them. In section III, I use Barak C. J.'s and Cheshin J.'s opinions to analyse three distinct dimensions in which language rights may manifest themselves in legal cases. Before delving into the four distinctive dimensions, I wish to provide a legal definition of the term 'language rights' and to discuss the two different interests they protect: the instrumental and the intrinsic interests.

3. What are Language Rights?

None of the Judges in *Adalah* uses the term 'language rights'. Nevertheless, the petitioners' claim is a claim for language 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.[20] Language rights are regarded as minority rights because in a heterogeneous linguistic society, members of minority groups usually need their language to be legally protected. As opposed to members of majority communities, whose languages enjoy strong status without needing special legal protection, members of minority groups are usually under constant pressure to abandon their mother tongue[21] in favour of the majority language.[22]

According to Joseph Raz, the right to X exists if and only if some person's interest constitutes a sufficient reason for holding others to be under a duty to provide or secure X.[23] Following Raz's definition we ought to identify one or more interests in protecting particular languages that might be thought important enough to justify imposing duties on others. The following discussion of interests in language will focus on the interests in using a particular language, which may require protection, rather than on human interests in having language in the first place. In the same manner, I will not discuss the importance of language as a human enterprise for human culture in general.[24]

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

One may think of several instrumental interests in protecting a particular minority language. First, language is a person's main form of communication. It allows people to conduct their every day life, to exchange information with other people. People have an interest in communicating via their own mother tongue language because they are less comfortable using other languages in their communication activities.[25] Therefore, people's own language is the best means for them to accomplish the object of communication. However, since minorities can communicate in the majority language as well after they learn it, the mere interest in comfort does not seem to justify legal protection.

Second, one may appeal to some social good, such as peace and security, which society in general gains as a result of protecting minority languages.[26] However, language rights are only one of the means of mitigating conflicts between majority and minority groups. It is not the only means and, among available means, it is not a necessary means to achieve peace and security in a multilingual society.[27]

Third, one may embrace Will Kymlicka's argument of language as a context of choice. According to Kymlicka, people are deeply connected to their own culture in the sense that their culture enables them to make meaningful choices when they are confronted with questions about personal values and projects. People's capacity to form and revise their conception of the good is intimately tied to their membership in their own culture, since the process of deciding how to lead their lives is a matter of exploring the possibilities made available by their own culture.[28] Therefore, if individuals are entitled to protection of their ability to make meaningful choices, then their culture and the specific language that is attached to it[29] — the context that makes this choice possible — deserves protection. Kymlicka emphasises the difficulty of learning a foreign language. However, once one overcomes this difficulty by integrating into a new culture, one does not need one's original language in order to make meaningful choices. The newly acquired foreign language serves as an alternative means for achieving the goal of making meaningful choices.[30]

Since instrumental interests are relatively weak, I will turn to discuss the intrinsic interest in protecting a particular minority language. Denise Réaume provides an elaborate account of the intrinsic interest language

rights may protect by stressing the link between language and identity. She argues that language has an intrinsic value as it can constitute a marker of personal identity. One's identity is derived from one's culture. Culture is a marker of identity and language as a central part of culture is itself a marker of identity.[31]

We can find support for Réaume's observation in current sociolinguistic and anthropological theories, which highlight three interconnected ways in which language constitutes a marker of identity. First, a specific language is an embodiment of cultural concepts. The language of a particular culture is best able to express the interests, values, and world-views of that culture. No language but the one that has been most historically and intimately associated with a given culture is as capable of expressing the particular artefacts and concerns of that culture.[32] An expression in a language refers to a concept in a culture and encapsulates a specific meaning that is grounded in a specific cultural context. 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.[33]

Second, components of a particular culture such as songs, prayers, laws, and proverbs are written and expressed by the language associated with that culture.[34] In other words, language is not only a repository of conceptual building blocks for the mind, it is also the medium used to produce cultural texts from building blocks. People therefore value their language which allows distinctive texts that express the uniqueness of their culture.[35]

The third aspect combines the first and the second aspects of language as a marker of cultural identity. When a specific language is embedded with distinctive cultural concepts and serves as a cultural text in itself, it is only natural that persons who speak this language view it as an object of cultural identification. Language has a strong symbolic meaning for people as an expression of their culture. It symbolically represents the particular culture of the people who speak it.[36]

Justice Cheshin refuses to discuss the intrinsic interest in Arabic because he perceives it as a political issue. In contrast, Cheshin J. perceives the instrumental interest as less problematic. Under the instrumental view, courts protect the minority culture and language not for their own sake but for the sake of other aims such as communication. I believe that the reason for it is that the instrumental aim of promoting communication between people is not a controversial aim as opposed to protecting and promoting the minority culture.

In contrast to Cheshin J., Barak C. J. does not concentrate solely on the instrumental value of Arabic as a means of communication, but also

on its intrinsic value as a marker of cultural identity. Barak uses the *Re'em* decision[37] to stress the important role of language, which is not a mere tool of communication, but also an expression of cultural and group identity. As Barak puts it:

> [L]anguage is also a culture, history, mode of thinking; it is the soul of a person[38]...[V]ia language we express ourselves, our uniqueness and our societal identity. Take a person's own language and you take himself from him... Language has a special importance when it belongs to a minority...[39]

Up to *Re'em* and *Adalah*, the Israeli Supreme Court has ruled in favour of language rights only in cases in which the claimants proved lack of knowledge in Hebrew.[40] Chief Justice Barak's statement in *Adalah* reflects a new attitude towards the right to freedom of language (which is part of the right to freedom of expression). Traditionally, the right to freedom of language has been understood as protecting individuals' interest to freely express themselves. Chief Justice Barak gives new content to the right to freedom of language as protecting the intrinsic interest in culture. In sum, Barak C.J's opinion in *Adalah* is a pivotal point in Israeli ruling as it acknowledges the intrinsic interest in language rights. However, as we have seen, it is still countered by Cheshin J.'s dissenting opinion. As I will show in the next section, in addition to the fact that the intrinsic interest in language rights is viewed as a politically problematic matter, language rights may bare three distinctive dimensions which are also perceived as problematic.

4. Three Distinctive Dimensions

The Participatory Dimension of Language Rights

Justice Cheshin argues in *Adalah* that the petitioners ask the court to recognize collective rights that aim to promote the collective culture of the Arab minority in Israel. However, according to Cheshin, courts in Israel have never acknowledged collective rights. Rights in Israel concern only individuals, not collectives. I argue that Cheshin J.'s view is wrong. First, language rights protect the interest of individuals and not of collectives. Second, when the collective dimension of language rights is properly understood, it becomes clear that other rights with collective dimensions have already been acknowledged by the Israeli Supreme Court.

There is an abundance of literature about the definition of collective rights that are also called 'group rights'.[41] Two competing conceptions regarding the definition of group rights are articulated in the literature. Under the first conception, a right might be considered to be a group right because it is the group, acting through its leadership, which has the legal power to invoke or waive the right. For example, a group's right to its land may be considered a group right because only the group acting through its leadership has the power to make decisions about the disposition of that land.

Under the second conception, a right is a group right when the interests it protects are collective or shared by a group of individuals. These two conceptions are respectively called "rights of collective agents" and "rights to collective goods".[42] The former is distinguished by the agent who holds the rights, while the latter is distinguished by the good it protects.[43] In my view, the "rights to collective goods" conception best captures the collective nature of language rights. Moreover, the "rights to collective goods" conception is preferable for two reasons. First, in order to argue that a right is a group right under the "rights of collective agents" conception we have to show that the group holds the right as a collective. This right therefore 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 the 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. In most cases, such a holistic approach towards a group of people seems somewhat implausible.[44]

Second, groups are usually unable to play an active role in exercising, interpreting, and defending their rights. Groups often lack effective agency and clear identity. Unlike individuals, groups are often internally divided, unorganized, unclear in their boundaries, and are therefore unable to engage in actions as groups.[45]

The second conception of group rights, namely "rights to collective goods," requires that we observe the character of the object or the interest the right protects in order to decide whether the right is a group right. Denise Réaume argues that a right is 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.[46] It is the participatory character of the good that makes the right irreducible to the individual.

Language rights protect the interest of people in speaking their own language. Language is a participatory good. First, language requires many to produce it. The use of language has a social dimension in the sense that 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. Second, as indicated above, a person's own language is a marker of his identity. As Réaume puts it: "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".[47] These others must speak the same language as this person. Together they constitute a linguistic community.[48]

Language Rights' Positive Dimension

As Justice Cheshin and Barak C. J. stress, the petitioners in *Adalah* do not ask for the negative liberty of Israeli Arabs to speak Arabic. They ask the state to do a positive act — to communicate with them in Arabic. The *Adalah* case demonstrates the positive dimension that language rights may bare, which requires the state to actively associate itself with the protection of minority language (Arabic in this case). Justice Cheshin claims that there is no legal basis for their claim. Freedom of language, which is part of freedom of expression, does not impose any positive duty on the state. In order to challenge Cheshin's claim I will first discuss the distinction between negative and positive rights.

The roots of the familiar distinction between negative and positive rights are found in Isaiah Berlin's well-known distinction between negative and positive freedoms.[49] 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.[50] For instance, the right to religious freedom entails the negative freedom of every person to practice his or her religion without interference from the state. However, one may argue that a religion cannot thrive without any financial support from the government. The right to religious freedom therefore may also entail positive steps that the government should take, such as allocating resources for building and maintaining religious institutions.[51]

In some cases the court employs this distinction in order to deny positive rights, but many times it uses this distinction in order to grant positive

rights. In section V I will give examples from cases in which courts interpret the rights to freedom of expression as a positive right. These examples will refute Cheshin J.'s claim according to which the right to freedom of language does not impose any positive obligation on the state.

The Selective Dimension of Language Rights

The petitioners in *Adalah* ask the court to instruct public authorities to speak their specific language (Arabic). In the absence of unlimited economic resources in most multilingual states, the positive dimension of language rights is inherently connected to another distinctive characteristic of language rights, which I will call 'the selective nature of language rights'. Most countries can only provide comprehensive legal protection for few minority languages. Because of pragmatic reasons, the state cannot provide comprehensive support for every language that happens to be spoken by one of its citizens. It needs to choose which languages it supports and which it does not. A multilingual state has to 'choose' one or two minority languages to which it offers strong legal protection such as access to state services, governmental and municipal publications, public education and the like.[52]

As Joseph Carens observes:

> There are certain issues on which the state cannot avoid making decisions that have a significant impact in culture, and, if the polity contains people from different cultures, that advantage some and disadvantage others. The most obvious and important example is that of language.[53]

In this sense, *Adalah* had to address the selective dimension of language rights, and the right to freedom of language, which generally applies to all individuals, could not suffice it.[54]

The task of selecting the minority languages most deserving of comprehensive protection by the state, which is inevitable because of pragmatic reasons, such as limited resources, requires a complex normative decision that privileges one linguistic minority over others. In *Adalah*, Barak C.J. chooses to protect the Arabic language over other minority languages in Israel such as Russian. In order to justify his decision Barak C.J. raises a distinctive argument in favour of the Arab minority, which I have already mentioned. Chief Justice Barak stresses that the Arab minority has lived in Israel since long ago and stayed in Israel as loyal citizens in spite of the Arab-Israeli conflict.[55]

As Ilan Saban argues, Chief Justice Barak's argument about the Arab national minority which has lived for a long time in Israel, as opposed to other immigrant linguistic minorities such as the Jewish Russian minority, echoes Will Kymlicka's famous distinction between national minorities and immigrant minorities.[56] In a nutshell, Kymlicka argues that in light of pragmatic limitations on multicultural states, comprehensive language rights should be granted to national minorities, whereas immigrant minorities are to be accorded weaker language rights.[57]

Elsewhere I have critically discussed Kymlickas's distinction extensively. I have argued that Kymlicka's empirical, normative and methodological assumptions are very problematic.[58] I have suggested an alternative criterion for distinguishing between linguistic minorities, according to which the interests of different linguistic minorities in protecting their languages should be comparatively evaluated. In the absence of unlimited resources, the minority that possesses the strongest interest in its language deserves the strongest protection. Language rights should therefore protect first minority members who have the strongest interest in their language as their exclusive marker of cultural identity. I have argued that in the Israeli case, the Arab linguistic minority has a stronger interest in the protection of Arabic than that of the Russian linguistic minority, because Arabic constitutes Israeli Arabs' exclusive marker of identity.[59]

For now, it is important to stress that the selective dimension of language rights in cases such as *Adalah* requires the state or the court to make a difficult normative decision about the 'chosen' linguistic minority. This normative distinction makes language rights in multidimensional cases more complex because the state not only identifies with one linguistic minority (in the case of *Adalah* with the Arab minority), but also prefers it over other linguistic minorities, such as the Jewish Russian linguistic minority, which may raise similar linguistic demands in its struggle for cultural recognition.[60] Such a decision always involves stereotypes, political interests in response to cultural and ethnic conflicts and the like. It is therefore the most problematic dimension of language rights, as it will always be subjected to criticism and challenges.

Cases that involve all of the above three characters of language rights, namely, their participatory nature, their positive dimension and their selective nature, constitute 'multidimensional linguistic cases'. As I will argue in the next section, multidimensional linguistic cases are more complex only because they deal with language rights that bear all these three distinctive dimensions. I will show that there are other rights which courts in Israel have already acknowledged, that bear one or two

of these dimensions but do not bear all of them. The difference between language rights in multidimensional cases and other rights is therefore only a difference in degree, not a difference in kind.

5. A Difference in Degree but Not in Kind

Let us consider the right to freedom of religion. Gidon Sapir distinguishes between two interests that the right to freedom of religion protects. The first and the most common one is the interest in freedom of conscience.[61] The second interest that underpins the right to freedom of religion which Sapir identifies is the interest in protecting religion as a culture.[62] Religion is not just a belief system, it is more fundamentally a way of life, a normative system,[63] an encompassing culture.[64] As Sapir rightly argues, people in general, and minority members in specific, have a strong interest in the protection of their culture because it serves as their context of choice and as a marker of their identity.[65]

The main difference between the two goods that the right to freedom of religion protects is that the first one — the good of conscience — is an individual good, whereas the second good — the good of religious culture — is a collective good. Conscience is a good that belongs to individuals, but culture is a participatory good that can only be produced and exercised by a group of people. An alleged injury to an individual conscience therefore requires us to examine the individual soul and practice, whereas an alleged injury to culture requires us to examine the social reality, norms and beliefs that exist in a given religious community.[66]

The Supreme Court has acknowledged minority members' participatory interest in their religious culture. The decision in *Avitan*[67] deals with a Jewish petitioner who wanted to purchase a highly subsidized piece of land in an area in the south of Israel that was designed to be populated by Bedouins. The Supreme Court rejected the petition on the grounds that the selectivity of the program was justified as a compensatory measure, providing resettlement for Bedouin nomadic tribal groups, who had been moved off nomadic land areas and wished to sustain their unique lifestyle, religion and culture.[68]

In the case of *Kaadan*,[69] the same participatory interest in religious culture is acknowledged again. In this case, the application of an Israeli Arab family to reside as members in Katzir, a residential community, is refused. The Supreme Court holds that the residents of Katzir cannot refuse to accept membership applications merely because the applicants are not Jews,[70] but

the court is careful not to close the door on all practices of private exclusion based on different criteria, such as unique cultural affinities.[71] The exception the court creates acknowledges the need for legal protection of the interest in the participatory good of a unique culture.

In the *Kabel* case[72] Cheshin J. said that "we agree that ultra-orthodox Jews are eligible and entitled, if they wish, that we will do the best we can to allocate distinctive accommodations for them, in order to allow them to keep their lifestyle."[73] In the *Am Hofshi* case[74] Beinisch J. explicitly says that:

> the acknowledgment of the possibility to allocate lands and allow separate accommodation to groups which have unique characteristics, according to their needs and aspirations, goes in accordance with the approach that allows minorities to preserve their uniqueness; This is an approach that represents a common attitude amongst lawyers, philosophers and people in the educational system, according to which the individual is also entitled — among his other rights — to realize his affiliation to his community and its unique culture as part of his right to autonomy.[75]

So far I have shown that the Supreme Court has acknowledged the participatory dimension of other rights. It is therefore not distinctive to language rights as such. Let us now consider the positive dimension of language rights. Do Israeli courts interpret other allegedly negative freedoms as positive rights? The answer is positive. Take, for instance, the right to freedom of expression. The Supreme Court in Israel has acknowledged that there are three rationales underpinning the right to freedom of expression: the truth rationale, the autonomy rationale, and the democratic rationale. The truth rationale refers to the good of seeking and attaining truth, which is better realized by protecting freedom of expression. According to the autonomy rationale, we become individuals capable of developing our thinking and identity when we participate in conversation with others.[76] The negative right to freedom of expression mostly refers to the freedom of individuals to express themselves without being interfered with by the state. This view emphasizes the autonomy rationale underpinning the right to freedom of expression, which concentrates on the individual as the spokesman, rather than on the audience.[77]

However, according to the third rationale that underpins the right to freedom of expression — the democratic rationale — public discourse should be open for the free flow of information about governmental acts, in a way that allows citizens to pass their will to their representatives.[78] Public discourse has to be based on three principles: information, participation

and rationalism. The relevant principle to this paper is the principle of information.

Receiving information about governmental acts is a pivotal condition for the existence of true democracy.[79] The right of citizens to receive information is acknowledged in the Israeli legal system as part of the democratic argument.[80] The information requirement is not satisfied by the fact that the state does not interrupt individuals' access to information. It is satisfied only when the state holds its obligation to positively assure individuals' access to information.

The right to freedom of language is part of the right to freedom of expression. By appealing to the democratic argument, one may refute Cheshin J.'s argument with regard to the right to freedom of language in *Adalah*. Under the democratic argument, the state is not only obliged to allow every person to speak the language he or she chooses, as Cheshin J. understands, but also to provide recourses to support this language. For instance, the government should provide public information in the minority language if it is to ensure free access to this information for minority members. This line of reasoning may suggest that a democratic state is obliged to regulate the press by enacting legislation to prevent the press from becoming the captive of majority interests. In the context of language, the argument that may be drawn is that the state has a duty to regulate public television and radio broadcasting in a manner that includes the linguistic interests of minority groups. Justice Cheshin's claim that the right to freedom of language does not impose positive obligations on the state is therefore false.

What about the selective dimension of language rights? Has the court acknowledged the selectiveness of other rights in Israel? The answer again is affirmative. There are other Israeli legal decisions that acknowledge the selective dimensions of the participatory interest in protecting a culture. Think about the decisions of *Avitan*, *Am Hofshi* and *Kabel*, which I have discussed above. All of them acknowledge that participatory interest in a unique culture may require legal protection. However, when they discuss unique cultures they refer only to religious cultures. It seems to me that the chance for a secular group to be regarded as having a unique lifestyle that deserves legal protection is pretty low. The Supreme Court's recent decision in *Hasolelim*[81] indicates so. *Hasolelim* dealt with a secular Jewish settlement that refused to admit an Arab couple as residents. After The Land Authority of Israel overturned the settlement's decision, the settlement's members asked the Supreme Court to acknowledge their right as a small Jewish

secular settlement not to admit Arabs and ultra orthodox Jews into their settlement because such an admission would change the lifestyle of their community. Justice D. Cheshin rejected the petition and refused to discuss the petitioners' claim about the danger to their communal lifestyle. Because the land that the Arab couple had asked to buy was the last land to sell, the court decided that the danger the petitioners were predicting was far from being realized.[82]

In summary, as I have shown, all the three dimensions of language rights in multidimensional cases are not peculiar to language rights. They are acknowledged with regard to other rights. Justice Cheshin's argument that the claim of the petitioners in *Adalah* was fundamentally different from other claims the court has accepted before is therefore false. The only difference between the language rights the petitioners asked the court to acknowledge and other rights that have been acknowledged before is a difference in degree and not in kind. The fact that *Adalah* was a multidimensional case of language rights that bore all three of the dimensions makes this case more complex than other cases.

But Cheshin J. is well-known for his breakthrough decisions in complex cases. Take for instance the case of Israeli Women's Network (IWN) in 1998.[83] In this case, a feminist NGO won a suit against the Minister of Labour and Social Affairs following the appointment of a male as a deputy director general of the National Insurance Institute, in violation of fair representation for women. In the absence of any statutory or contractual provision for the fair representation for women, Cheshin J. accepted the petition by ruling "a ground-breaking precedent,"[84] according to which the principle of affirmative action applies even when there is no official requirement for affirmative action in any specific statutory provision. The express requirement for fair representation of women in statutes concerning other public bodies was sufficient for Cheshin J. to establish a doctrine of fair representation going beyond specific statutory provisions.[85]

Just in the same manner Cheshin J. infers a general doctrine from affirmative action statutes, he could have concluded in *Adalah* that the great number of laws that require public authorities to publish information in Arabic[86] along with art. 82 create a general doctrine imposing the duty of public authorities to "speak" Arabic even when there are no official statutes that require it.

In my view, Cheshin J.'s real problem with the petition was its public character. The problem was not the peculiarity of the language rights the petitioners were asking for, but rather that they were asking for the Arabic

language to be visible in the public sphere. While other minority rights such as the right to freedom of religion and the right to education are interpreted in Israel as imposing positive duties on the state such as to establish Muslim tribunals[87] and Arab schools, such tribunals and schools do not occupy a public space in the full sense as language rights do.

As Carens accurately puts it, language rights may go beyond the internal realm of the minority culture. Carens demonstrates his argument through the bilingual arrangements in Canada, which apply to all Canadians in their contact with public authorities and in their everyday life when they buy products with bilingual captions, apply for jobs, etc.[88]

It is true that Muslim tribunals and Arab schools are not invisible, but they do not occupy the same public space as language rights do. A Jewish Israeli who lives in Ra'anana or Herzliah (non-mixed cities in Israel that consist mostly of Jewish citizens) will not encounter Muslim tribunals or Arab schools if he or she does not wish to do so. In fact, if language rights are not taken seriously by the state, as has been the state of affairs in Israel until recently, most Jewish citizens in Israel will hardly ever encounter Arabic at all.

The language rights the petitioners in *Adalah* asked for therefore have a deep influence on the public character of Israel. Why is this deep influence so problematic? There is of course no problem with the visibility of the majority Jewish culture or religion. Such publicity does not seem to threaten most Israeli Jews. But the visibility of the Arab minority culture is perceived as a serious threat.

Many people in Israel, including scholars and judges, think that the visibility of Arabic may weaken the high status of Hebrew.[89] Some think that a state that gives equal status to two languages is not only a bilingual state but also a bi-national state.[90] Others think that the status of Hebrew is not threatened by the public visibility of Arabic.[91] Moreover, some of them also point out that a state can be bilingual but not bi-national.[92]

I tend to agree with the latter view. This is neither the time nor the place to elaborate on this point. I believe it is important to put this problem on the table. Justice Cheshin cannot hide behind legal terms such as 'collective rights' or 'positive rights' in order to justify his position. His vague argument about the political character of the petition is also not sufficiently developed.[93] As I have shown, the unique aspects of language rights that Cheshin J. discusses in *Adalah* as political are not unique to language rights, but common to other well recognized legal rights in Israel. The most political aspect of *Adalah* is actually not addressed in it at all.

6. Conclusion

This paper focuses on the common fear of language rights. This fear is manifested in Cheshin J.'s minority decision in *Adalah*. I have analysed the *Adalah* decision and observed that the common fear of language rights is mostly invoked in what I call 'multidimensional linguistic cases'. In such cases, demands for language rights involve at least two of the following dimensions: the participatory dimension, the positive dimension and the selective dimension. The more dimensions such cases involve, the more reluctant the court is to address them.

I have then argued that many other well acknowledged rights in Israel involve at least one of the dimensions I have identified. I therefore conclude that the difference between language rights and other well-acknowledged rights in Israel is a difference in degree and not kind.

Justice Cheshin's reservation about dealing with language rights is unjustified. It seems to me that the general reluctance of courts to deal with language rights lies elsewhere. Many Israeli Jews fear that granting language rights to the Arab minority will damage the Jewish character of Israel. This fear is associated with the fourth distinctive feature language rights may bare — the public dimension.

NOTES

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1 H.C. J. 4112/99 *Adalah et al. v. The Municipality of Tel-Aviv-Jafa et al.*, 56(5) P.D. 393.

2 Drayton (1934) 3 Laws of Palestine 2569, 2588.

3 *Adalah, supra* note 1 at 478.

4 *Ibid*, p. 411.

5 *Ibid*, p. 412.

6 *Ibid*, p. 414 (my translation).

7 *Ibid*, pp. 417–418.

8 Amongst other things, Cheshin J. rightly argues that art. 82 of the Order-in-Council of 1922 does not establish the duty of the respondent municipalities to add Arabic text on all signs within their jurisdiction (*ibid*, at 425–431).

9 *Ibid*, pp. 431–436.

10 *Ibid*, pp. 431–438.

11 *Ibid*, pp. 441–446.

12 *Ibid*, pp. 447–448.

13 *Ibid*, p. 456.

14 *Ibid*, pp. 456–460.

15 See for example, the following legal decisions: H.C.J. 5100/94, 4045/95 *Public Committee against Torture in Israel v. State of Israel* 53(4) P.D. 817, which challenges the torture investigatory method of the General Security Service (the English version of this decision can be found on the Supreme Court's website — www.court.gov.il); H.C.J. 3267/97 *Rubinstein et al. v. The Minister of Defence*, 52(5) P.D. 481, that deals with a very controversial issue in Israeli society — the question of mandatory military service for ultra-Orthodox Jewish Yeshiva students (the English version of this decision can be found on the Supreme Court's website — www.court.gov.il); H.C.J. 6698/95 *Ka'adan v. Israel Land Authority*, 54(1) P.D. 258, which deals with the question of allocation of lands to Israeli Arab citizens in non-mixed cities. For a discussion about the judicial activism of the Israeli Supreme Court in these decisions see Suzie Navot, "More of the Same: Judicial Activism in Israel," *European Public Law* 7(3) (2001): 355.

16 H.C.J. 715/98. *Amnon Rubinstein and others v. Minister of Defence* (1998) 52(5) P.D. 481 at 533–534; Yaacov Ben-Shemesh, State Neutrality and the Right to Language," *Mishpat Umimshal* 8 (2005): 347. (Hebrew)

17 Lorraine E. Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State," *Isr. L. Rev.* 33 (1999): 24; Lorraine E. Weinrib, "The Postwar Paradigm and American Exceptionality" in Sujit Choudhry ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006), p. 84.

18 L. Weinrib, "From Legislative to Constitutional State," *ibid*, p. 24.

19 *Ibid*.

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

21 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), p. 76).

22 Denise G. Réaume, "The Constitutional Protection of Language: Survival or Security?" in David Schneiderman ed., *Language and the State: The Law and Politics of*

Identity (Cowansville, Québec: Editions Yvon Blais, 1991), pp. 46–47 [Réaume, "The Constitutional Protection of Language"].

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

24 This account focuses on the aesthetic or beneficial value of a particular language for humankind as a whole. Under the aesthetic account, each particular language is compared to a rare piece of art or to an endangered biological species that makes the world more colourful, interesting, and dynamic. According to the aesthetic account, every language enriches the human experience by providing different ways of talking about the world and therefore should be preserved (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), p. 44).

25 Leslie Green, "Are Language Rights Fundamental?," *Osgoode Hall L. J.* 25 (1987): 658–659 [Green, "Are Language Rights Fundamental?"]; Réaume, "The Constitutional Protection of Language," *supra* note 22 at 45.

26 According to Jacob Levy, providing minorities with language rights contributes to the formation of cross-culture frameworks that can mitigate the conflicts that result from interactions between ethnic or cultural minority groups and majority groups in multilingual societies (Jacob T. Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000), p. 40–41). Similarly, James Tully argues that recognizing minority cultures may strengthen minorities' allegiance to, sense of belonging to and identification with, their state (James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), pp. 197–198). Joseph Magnet raises a very similar argument, according to which the main justification for language rights is that they mitigate conflicts between Canada's linguistic communities (Joseph E. Magnet, *Official Languages of Canada: Perspectives from Law, Policy and the Future* (Cowansville, Quebec: Éditions Y. Blais, 1995), pp. 83, 250).

27 Other means can mitigate harsh conflicts between minority groups and majority groups, such as temporary economic support or affirmative action, which seek to put the minority and the majority at the same level.

28 Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), pp. 82–83, 105.

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

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

31 Réaume, "Intrinsic Value and the Protection of Difference," *ibid,* at 251; Green, "Are Language Rights Fundamental?," *supra* note 25 at 659; Réaume, "The Constitutional Protection of Language," *supra* note 22 at 45; Denise G. Réaume, "Beyond Personality: The Territorial and Personal Principles of Language Policy Reconsidered" in Will Kymlicka & Alan Patten eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003), p. 283 [Réaume, "Beyond Personality"].

32 See Joshua A. Fishman, *Reversing Language Shift* (Clevedon, UK: Multilingual Matters, 1991), p. 21.

33 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. John B. Carroll (Cambridge, MA: MIT Press, 1964).

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

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

36 Réaume, "Intrinsic Value and the Protection of Difference," *supra* note 30 at 251; May, *ibid,* p. 374.

37 *Adalah, supra* note 1 at 413; C.A. 105/92 *Re'em Engineers and Contractors Ltd. v. Municipality of Upper Nazareth,* P.D. 47(5) 189.

38 This phrase is taken from Justice Cheshin's decision in H.C. 2316/95 *Ganimat v. The State of Israel* 49(4) P.D. 589 at 640.

39 *Adalah, supra* note 1, p. 413.

40 See Meital Pinto, "Language Rights, Immigration and Minorities in Israel," *Mishpat Umimshal* 10 (2006): 242–244 [Hebrew].

41 See, for example, 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), p. 3; 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), p. 235; Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993), p. 42.

42 Leslie Green, "Two Views of Collective Rights," *Canadian Journal of Law and Jurisprudence* 4 (1991): 315.

43 *Ibid*, p. 320.

44 *Ibid*, p. 319.

45 This argument is also called the deficiency thesis, according to which many groups and particularly ethnic groups are deficient as right holders (Nickel, *supra* note 41, p. 235–237).

46 Denise G. Réaume, "Individuals, Groups and Rights to Public Goods," *U. of T. L. J.* 1 (1988): 10 [Réaume, "Public Goods"].

47 Réaume, "The Constitutional Protection of Language," *supra* note 22, p. 48.

48 *Ibid*, at 49.

49 Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), pp. 121–172.

50 John William Salmond, *Jurisprudence*, 11th edition (London: Sweet and Maxwell, 1957), pp. 269–270.

51 The distinction between negative and positive rights has been rightly criticized as elusive. Some scholars argue that a sharp distinction between a negative and 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 (See Patrick Macklem, "Aboriginal Rights and State Obligations," *Alberta. L. Rev.* 36 (1997): 100–102; Ran Hirschl, "Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order," *Human Rights Quarterly* 22 (2000): 1072–1073). Although the distinction between negative and positive rights was rightly criticized by scholars as illusive, the Israeli Supreme Court still employs this distinction (Hirschl, p. 1073).

52 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*, *supra* note 28, p. 107).

53 Joseph H. Carens, "Liberalism and Culture," *Constellations* 4(1) (1997): 40.

54 Most scholars prefer the term 'universal rights' over 'general rights'. However, I am influenced by scholars who think that there are no universal rights. Joseph Raz, for instance, thinks that different people have different interests. It is therefore not accurate to talk about universal rights that protect the interests of all people. Raz thinks that the term 'universal rights' does not describe the nature of the right, but rather denotes the rejection of certain false distinctions between rights that are based on race, sex and the like (Joseph Raz, *Value, Respect and Attachment* (Cambridge: Cambridge University Press, 2001), pp. 54–58). Other scholars think that the term 'universal rights' implies that there are values that should be protected in every

legal system. Such approach may be paternalistic as it aims to enforce Western moral values on societies that hold different values (Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000); William J. Talbott, *Which Rights Should Be Universal?* (Oxford: Oxford University Press, 2005). I therefore prefer the term 'general rights' over 'universal rights'. Justice Barak emphasized the general application of the rights to freedom of expression in *Re'em* by saying that a democratic society should allow individuals to express themselves in their chosen language, whether it is Arabic, Amhari or Russian (*Re'em*, *supra* note 37, p. 209).

55 Adalah, *supra* note 1 at 413.

56 Ilan Saban, "A Lone (Bilingual) Cry in the Dark?," *Tel-Aviv Law Review* 27 (2003): 121 [Hebrew]; Ilan Saban & Muhammad Amara, "The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change," *Isr. L. Rev.* 36 (2002): 33.

57 Kymlicka justifies this distinction by claiming first, that it is usually the culture of national minorities that takes the form of a societal culture whereas members of immigrant minorities are part of subcultures, i.e. cultures that lack the range of activity and institutions that characterize societal cultures (Kymlicka, *Multicultural Citizenship*, *supra* note 28, pp. 77–94). Second, Kymlicka argues that immigrants freely and voluntarily choose to leave their society and join another existing society. Therefore, if they had the option to stay in their country of origin, but they decided not to do so, immigrant minorities should not expect to be given comprehensive language rights (Kymlicka, *Multicultural Citizenship*, pp. 95–96).

58 Meital Pinto, "On the Intrinsic Value of Arabic in Israel — Challenging Kymlicka on Language Rights," *The Canadian Journal of Law and Jurisprudence* 20 (2007): 143.

59 *Ibid.*

60 For Jewish Russians' claims for recognition see Meital Pinto, "Language Rights, Immigration and Minorities in Israel," *supra* note 40, p. 236, fn 42.

61 Gidon Sapir, "Religion and State — A Fresh Theoretical Start," *Notre Dame L. Rev.* 75: 644

62 Sapir, *ibid*, pp. 625–632.

63 Alvin J. Esau, "'Islands of Exclusivity': Religious Organizations and Employment Discrimination," *U.B.C Law Review* 33 (2000): 727.

64 Esau, *ibid.*; Clifford Geertz, "Religion as a Cultural System" in *The Interpretation of Cultures* (New York: Basic Books, 1973), pp. 87–125.

65 Sapir borrows Kymlicka's argument about culture as a context of choices, which I have discussed in section 3. Sapir does not use the term "marker of identity," but refers to 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, *supra* note 61, p. 627). I borrow the term "marker of identity" from Denise Réaume, who suggests a more developed account of culture as a marker of identity (Réaume, "Intrinsic Value and the Protection of Difference," *supra* note 30, p. 247). I have discussed her account in section 3.

66 Sapir, *ibid*, pp. 625–632

67 H.C.J. 88/528 *Eliezer Avitan v. Israel Lands' Authority et al.* (1989) 43(4) P.D. 297.

68 *Avitan, ibid*, pp. 303–304.

69 *Kaadan, supra* note 15.

70 *Ibid.*

71 *Ibid*, pp. 279–280.

72 H.C.J. 1/98 *Eitan Kabel v. Israeli Prime Minister* (1999) 53(2) PD 241.

73 *Ibid*, pp. 258–259 (my translation).

74 H.C.J. 4906/98 *Am Hofshi Association v. Ministry of Construction and Housing* (1998) 52(2) P.D. 503.

75 *Ibid*, provision 3.

76 Richard Moon, *Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000), p. 4.

77 For the autonomic rationale of the right to freedom of expression, see for example, H.C.J. 73/53 *Kol Ha'am v. Minister of the Interior* 7 P.D. 871 at 878.

78 For the democratic rationale of the right to freedom of expression, see for example, H.C.J. 399/85 *Kahane v. The Board of the Broadcasting Authority*, 41(3) P.D. 255 at 267.

79 As observed by Emerson in the very beginning of his book: "A system of freedom of expression, operating in modern democratic society, is a complex mechanism. At its core is a group of rights assured to individual members of society. This set of rights, which makes up our present-day concept of free expression, includes the right to form and hold beliefs and opinions on any subject, to communicate ideas, in any medium — in speech, writing, music, art or in other ways. To some extent it involves the right to remain silent. From the adverse side it includes the right to hear the views of others and to listen to their version of the facts. It encompasses the right to inquire and, to a degree, the right of access to information" (Thomas I. Emerson, *The System of Freedom of Expression* (New York: New York Random House, 1970), p. 3).

80 See H.C.J. 1601/90 *Shalit v. Peres* [1991] 45(3) P.D. 353 at 360–364.

81 H.C.J. 7574/06 *Hasolelim v. The Land Authority of Israel* (2007). The case was not published.

82 Section 7 to Cheshin D. J's decision. Their request for a further hearing was denied (see H.C.J.F.H. 1107/07 *Hasolelim v. The Land Authority of Israel* (2007).

83 H.C.J. 2761/98 *IWN v. Minister of Labor* (1998) 52(3) P.D. 630.

84 See Frances Raday, "Social Science in The Law: The Israeli Supreme Court: Social Science Insights: On Equality — Judicial Profiles," *Isr. L. Rev.* 35 (2001): 435. See also Meital Pinto & Hillel Sommer, "The Role of the Judiciary in Affirmative Action" in Anat Maor ed., *Affirmative Action in Israel — Policy, Application, Challenges* (Tel Aviv: Ramot Tel Aviv University Press, 2004), pp. 200–202 [Hebrew].

85 *IWN v. Minister of Labor* (1998) 52(3) P.D. 630 at 662.

86 Meital Pinto, "Language Rights, Immigration and Minorities in Israel," *supra* note 40, p. 227, fn 6.

87 The origin of the duty of the state to support religious tribunals is found in the Ottoman law. The Ottoman Empire recognized the religious laws of the Muslims, Jews and Christians according to the Millet System under which considerable autonomy was accorded to non-Islamic religious groups treated as 'nations'. This autonomy included the maintenance of the independent legal system with prescribed jurisdiction for each of the recognized religious communities (Izhak Englard, *Religious Law in the Israel Legal System* (Jerusalem: Alpha Press, 1975), p. 13); Asher Maoz, "Constitutional Law" in Itzhak Zamir & Sylviane Colombo eds., *The Law of Israel: General Surveys* (Jerusalem: The Harry Michael Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem, 1995), p. 29).

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

89 In *Re'em* and *Adalah* Barak C.J. balanced the value of freedom of language with the value of Hebrew as the major language in Israel (*Re'em, supra* note 37, p. 207; Gad Barzilai, *Communities and Law* (Ann Arbor: The University of Michigan Press, 2003), pp. 112–113; *Adalah, supra* note 1, p. 412).

90 Ilan Saban calls this argument "the slippery slope argument," according to which acknowledging the Arab culture in the Israeli public sphere will gradually turn Israel into a bi-national state (Saban, "A Lone (Bilingual) Cry in the Dark?," *supra* note 56, pp. 123–125).

91 See Alon Harel, "Book Review: The Judge in Democratic Society, by Aharon Barak," *Isr. L. Rev.* 39 (2006): 282; (Saban, *ibid*, p. 130).

92 Ilan Saban rightly argues that bi-national state is a state in which there is equal partnership between two national communities. Israel is far from that (Saban, *ibid*, p. 124)

93 For more developed arguments about the political character of *Adalah* see Gershon Gontovnik, "The Right to Culture in a Liberal Society and in the State of Israel," *Tel-Aviv University Law Review* 27: 67–70. (Hebrew); Eyal Benvenisti, "National Courts and the Protection of National Minorities," *Alei Mishpat* 3: 493–494. (Hebrew)