Israel Law Review **50**(1) 2017, pp 49–68. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2017.
doi:10.1017/S0021223716000327

Limits on Constitutional Rights: The Marginal Role of Proportionality Analysis

Richard Moon[*]

Canada is often cited as one of the principal sources of proportionality analysis – an approach to the determination of limits on constitutional rights that has been adopted in many jurisdictions. The two-step structure of constitutional rights adjudication is built on the idea that these rights are the basic conditions of individual autonomy or liberty that must be protected from the demands of collective welfare. At the first stage of the adjudication the court determines whether the restricted activity falls within the scope of the right. At the second stage the court balances the right against the competing interest advanced by the restrictive law to determine whether the restriction is justified. Yet few of these rights fit this individual liberty model and are better understood as social or relational in character, protecting different aspects of the individual's interaction or connection with others in the community. If we recognise that most constitutional rights do not simply protect individual autonomy but instead protect different aspects of human flourishing or dignity within community then two conclusions may follow. First, there can be no single generic test for limits on rights. The form or character of 'limitations' on these rights may differ in significant ways. Second, the two steps of adjudication may often be difficult to separate, or the separation may seem quite artificial. Many of the issues addressed by the courts will not fit easily into the two-step structure of analysis because the 'competing' interests are really different dimensions of a social relationship.

Keywords: proportionality analysis, balancing of rights, limits on rights

1. Introduction

Canada is often cited as one of the principal sources of proportionality analysis – an approach to the determination of limits on constitutional rights that has been adopted in a number of jurisdictions.[1] Cohen-Eliya and Porat, for example, in their recent book on proportionality analysis, describe Canada as a 'driving force in the global spread of the doctrine [of proportionality]'. They note that the Canadian proportionality jurisprudence has played a significant role in the adoption of proportionality analysis in New Zealand, South Africa, Australia, Israel and elsewhere.[2]

[*] Faculty of Law, University of Windsor, Windsor, Ontario (Canada). The author wishes to thank the editors of the *Israel Law Review* for their helpful comments. Versions of this paper were presented at the law faculties of Erasmus University, Oxford University, and the University of Toronto. rmoon@uwindsor.ca.

[1] For acknowledgement of the Canadian role in the 'global diffusion' of proportionality analysis see Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing, and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012); Grégoire CN Webber, *The Negotiable Constitution* (Cambridge University Press 2009); Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012).

[2] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013) 13–14: 'The three jurisdictions that have had the greatest impact in the global spread of proportionality [are] Germany, the ECJ, and Canada'.

Most bills of rights make provision for the limitation of rights in the form of either a general limitations provision, such as section 1 of the Canadian Charter of Rights and Freedoms (the Charter), or a limitations subsection attached to a particular provision, such as Article 9.2 of the European Convention on Human Rights.[3] In the judgment of *R v Oakes*, which was decided in 1986 shortly after the enactment of the Charter, the Supreme Court of Canada set out a four-part proportionality or balancing test for determining whether a restriction on a right is justified under section 1.[4] The *Oakes* test provides that a restriction on a right or freedom will be justified only if (i) the purpose of the restriction is substantial and pressing; (ii) the restrictive measure is effective in advancing its pressing and substantial purpose ('rational connection'); (iii) the restrictive measure limits the right or freedom no more than is necessary to advance its pressing and substantial purpose ('minimal impairment'); and (iv) the benefits of the restriction outweigh its costs to the right or freedom ('proportionality'). This multi-part test will seem familiar to those who study bills of rights in other jurisdictions.[5]

The proportionality/balancing approach has been criticised on several grounds.[6] The two most significant, or at least most familiar, criticisms of the approach are that:

- the rights or interests the courts are asked to balance or trade-off are incommensurable. In the absence of a common metric, the courts are unable to balance the competing claims or interests, but must simply choose between the two interests or rights – thus making a political choice rather than a reasoned judgment;
- the willingness to balance Charter rights against competing public or individual interests weakens the protection of these fundamental rights, removing their priority (or 'trumping' status) and reducing them to the level of ordinary interests or preferences that are subject to political trade-off.

[3] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11; European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into 3 September 1953) 213 UNTS 222 (ECHR).

[4] [1986] 1 SCR 103. This test was drawn from a number of sources, including the US Supreme Court decision in *Central Hudson Gas & Electricity Corp v Public Service Commission of New York* 447 US 557 (1980). There is some irony in this since the Canadian courts have emphasised that the inclusion of section 1 (the limitations provision) makes the Charter very different from the US Bill of Rights and means that American case law must be used cautiously in the Canadian context: *R v Keegstra* [1990] 3 SCR 697.

[5] In Europe see, for example, European Court of Human Rights (ECtHR), *The Sunday Times v United Kingdom*, App No 6538/74, 26 April 1979 and ECtHR, *MS v Sweden*, App No 74/1996/693/885. Many Canadian commentators have criticised the Supreme Court of Canada for failing to live up to the promise of the *Oakes* test and other early Charter cases in which the Court signalled its intention to carefully scrutinise limits on Charter rights and to set a high standard for their justification: see, for example, Jamie Cameron, 'Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R v. Butler*' (1992) 37 *McGill Law Journal* 1135, 1142; Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R v Keegstra*' (1991) 36 *McGill Law Journal* 1416, 1424–25.

[6] See, for example, Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights' (2011) 7 *International Journal of Constitutional Law* 468; Grégoire CN Webber, 'Proportionality, Balancing and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179 – which generated a number of responses including Madhav Kholsa, 'Proportionality: An Assault on Human Rights? A Reply' (2010) 8 *International Journal of Constitutional Law* 298; Matthias Klatt and Moritz Meister, 'Proportionality – A Benefit to Human Rights? Remarks on the I.CON Controversy' (2012) 10 *International Journal of Constitutional Law* 687.

I wish, however, to offer a different and more fundamental critique of the balancing approach or proportionality analysis, which are ordinarily understood to involve the trade-off of distinct interests. My claim is that, despite what they say they are doing, the Canadian courts do not (and cannot) generally resolve fundamental rights issues through the balancing or trade-off of competing interests. 'Balancing' plays at most a minor or marginal role in the determination of the scope and limits of constitutional rights. This is based not on any factors peculiar to Canada or any particular choices made by Canadian courts; it is instead the result of the social character of many of the rights entrenched in modern constitutions. There is good reason to think that balancing plays a limited role in other jurisdictions, even when the courts claim to be engaged in balancing or proportionality analysis in assessing limits on rights.

The two-step structure of Charter adjudication (Has a protected interest been violated? If so, is the violation justified?) is built on the idea that the fundamental rights protected by the Charter are the basic conditions of individual autonomy or liberty that must be protected from the demands of collective welfare. This view of Charter rights, as the protection of individual liberty from external interference, is described by Justice Wilson in *R v Morgentaler*:[7]

> The Charter is predicated on a particular conception of the individual in society. … [T]he rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

Yet it is accepted that these rights may sometimes conflict with the rights or interests of others; so in exceptional situations they may be subject to limits – based on the relative 'weight' of the competing claim (although why or how a liberty or autonomy-based right may conflict with other important interests is not always clear). The two-step structure assumes that there is a clear distinction between the protected right or interest of the individual (for example, in expression) and the conflicting interests or rights of other individuals or of the collective (for example, in being free from manipulation or free from racial hatred). At the first stage of the adjudication the court determines whether the restricted activity falls within the scope of the right (whether the activity is valuable). At the second stage, the court balances the right against the competing interest advanced by the restrictive law, to determine whether the restriction of the right is justified (whether the restriction prevents a significant harm). The general limitations test introduced by the Supreme Court of Canada in *R v Oakes* rests on the idea that the rights protected in the Charter have the same basic structure: each right representing a zone of individual privacy or independence that should not be interfered with by the state except in very special circumstances.

Very few of the Charter rights fit this individual liberty model and are better understood as social or relational in character – protecting different aspects of the individual's interaction or

[7] [1988] 1 SCR 30, 164.

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

connection with others in the community.[8] If we recognise that most Charter rights do not simply protect individual autonomy (freedom from external interference in private or personal matters) but instead protect different aspects of human flourishing or dignity within community, then two conclusions may follow:

(1) There can be no single generic test for limits on rights, such as the *Oakes* test. If the rights protected by the Charter are diverse in character, representing various aspects of human flourishing or dignity within community, then the form or character of 'limitations' on these rights may differ in significant ways.[9] A limit on freedom of expression may be very different from a limit on the right to equality. Or, better perhaps, the issues and questions that must be addressed in the adjudication of a freedom of expression claim may be different from those that must be addressed in an equality rights case. This may account for the malleable character of the limitations test in practice.

(2) The two steps of Charter rights adjudication – (i) the determination of the scope of the right, and whether a protected interest or valued activity has been restricted; and (ii) the justification of the limit or restriction on the right – may often be difficult to separate, or the separation may seem quite artificial. Many of the Charter issues addressed by the courts will not fit easily into the two-step structure of analysis, because the 'competing' interests or claims raised are really different dimensions of (or perspectives on) a social relationship. While the Charter establishes a two-step approach to the resolution of rights issues (the determination of the value of the activity and the assessment of its harm), in practice the Court's judgment about the relative value (and harm) of a particular activity such as expression, or its judgment about the accommodation of religious activity, occurs at one stage of the two-step adjudicative process. In its freedom of expression cases, for example, the Supreme Court of Canada is quick to find a breach (restriction) of the right – leaving its significant analysis to the section 1 stage (the justification of the limit on the right). In contrast, in the Court's equality rights cases all of the analysis seems to occur at the section 15 stage (the definition of the scope of the right) with little left to be decided under section 1. If the law breaches section 15, a court is very unlikely to uphold it under section 1.[10] The analysis occurs at one stage of the process – either at the first stage (has the state interfered with a protected interest?), or at the second (is the interference or restriction justified?) – because the determination of the scope and the limits of these rights are not, in fact, distinct issues. The court in these cases is addressing a single

[8] As I hope will become clear in the discussion that follows, when I describe a right as 'social' or 'relational' I do not mean simply that the protection of a right involves the imposition of duties on others. Instead, I am claiming that the right protects an activity that is social in character and that the value of the right is based on the social character of the individual: Richard Moon, *The Constitutional Protection of Freedom of Expression* (University of Toronto Press 2000).

[9] Richard Moon, 'Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights' (2002) 40 *Osgoode Hall Law Journal* 337, 357.

[10] There are a few cases in which a court has found that a breach of section 15 is justified under section 1: see, for example, *Newfoundland (Treasury Board) v NAPE* 2004 SCC 66 – although the circumstances of the case are exceptional and the result troubling.

complex issue, about which I will say more shortly. Of course, the court's resolution of this issue may be affected by the structure of its analysis: whether it chooses to address the issue as a question of the proper scope of the right or the justified limits on the right.

I will illustrate the claim that the courts are not generally engaged in the balancing or trade-off of distinct interests when they assess 'limits' on Charter rights by looking at some of the leading constitutional rights cases from Canada, the jurisdiction with which I am most familiar, and which is said to have played a central role in the development of the proportionality/balancing approach to the limitation of rights. Once again, there is good reason to think that the same occurs in other jurisdictions in which the courts claim to engage in the balancing or trade-off of competing interests when resolving fundamental rights issues. My focus will be on two of the Charter's fundamental freedoms – freedom of expression (section 2(b)) and freedom of religion (section 2(a)) – since these are often viewed as paradigmatic liberal rights and because many of the leading section 1 judgments of the Supreme Court of Canada involve limits on these rights.

2. FREEDOM OF EXPRESSION

In the leading Canadian freedom of expression cases the issue for the courts is not the correct or reasonable balance between separate but competing interests.[11] The harm and value of expression are not competing interests that are assessed separately and then balanced against each other; they are instead two sides of the same complex issue.[12] When determining the limits of freedom of expression, the courts must make a judgement – a single complex judgment – about the relative value/harm of a social practice.

2.1. THE VALUE AND HARM OF EXPRESSION

To make this argument, though, I need to say a little about freedom of expression – about its value or character. Freedom of expression does not simply protect individual liberty from state interference. Rather, it protects the individual's freedom to communicate with others. The right of the individual is to participate in an activity that is social in character and involves

[11] Some American commentators have argued that the courts should not engage in any form of balancing in free speech cases and should strike down laws only when they restrict speech for certain kinds of reasons: for example, Jed Rubenfeld, 'The First Amendment's Purpose (2001) 53 *Stanford Law Review* 767 (drawing on the writing of Thomas Scanlon, argues that the First Amendment should preclude the state from restricting speech in order to prevent the audience from hearing certain views. In Rubenfeld's view, laws that pursue other purposes should not be seen as breaching the right of free speech). For a similar argument see Richard H Pildes, 'The Structural Conception of Rights and Judicial Balancing' (2002) 6 *Review of Constitutional Studies* 179.

[12] I will acknowledge that in some familiar freedom of expression cases – most obviously those involving 'time, place, and manner restrictions' – the courts must strike a reasonable or fair balance between competing interests. In the case of a noise bylaw, for example, the court must balance or reconcile the expression interests of some with the interests of others in peace and quiet. This balancing, though, will often take account of systemic factors such as the alternative times and places available to the individual to communicate her or his message, with the result that the competing interest (in peace and quiet) will often prevail.

the use of socially created languages.[13] We become individuals, capable of thought and judgment, and we flourish as rational and feeling persons when we join in conversion with others and participate in the life of the community. The established accounts of the value of this freedom, which emphasise the contribution of free expression to truth, democracy and self-realisation, all rest on a recognition that human autonomy or agency is deeply social in its realisation and expression. The individual's ideas and feelings take shape in the social process of expression.[14] When we speak we bring to explicit awareness, to consciousness, something of which we had only an implicit sense before.[15] In this way our knowledge of self and the world emerges in the public articulation and interpretation of experience.[16] The individual reflects upon her ideas and feelings by giving them symbolic form and putting them before herself and others as part of an ongoing discourse. She understands her articulated ideas and feelings in light of the reactions of others. At the same time, the views of the listener are reshaped in the process of understanding and reacting to the speaker's words. The activities of speaking and listening are part of a process and a relationship. This relationship is valuable because individual agency emerges and develops in the joint activity of creating meaning.

The established accounts of the value of freedom of expression are generally described as either instrumental or intrinsic. Some accounts see freedom of expression as valuable in itself – as intrinsically valuable – because it permits free and rational beings to express their ideas and feelings.[17] Intrinsic accounts assume that freedom of expression, like other rights, is an aspect of the individual fundamental liberty or autonomy which should be insulated from the demands of collective welfare. Yet any account that regards freedom of expression as a liberty (as a right of the individual to be free from external interference) seems unable to explain the social or community-oriented character of the protected activity of expression – of individuals speaking and listening to others – and the special protection that is given to expression over other forms of voluntary human action.

Other accounts see freedom of expression as important because it contributes to a valued state of affairs. Freedom of expression is instrumental to the realisation of social goods such as public knowledge or democratic government. Instrumental accounts of freedom of expression recognise that the freedom protects a social activity and so must be concerned with something more than respect for individual autonomy or the liberty of the individual to do more than simply vent emotions or express thoughts. They assume that the freedom must be concerned with social goals (such as truth and democracy) that are in some way separate from, or beyond, the individual

[13] For a fuller account see Moon (n 8) 21–26.

[14] '[W]e become individuals', Clifford Geertz observes, 'under the guidance of cultural patterns, historically created systems of meaning in terms of which we give form, order, point, and direction to our lives': Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 52.

[15] Charles Taylor, *Human Agency and Language* (Cambridge University Press 1985) 256–57. The general account of expression in this section draws heavily on Taylor's writing.

[16] At the same time, individuals adapt the symbolic forms of language to their needs in particular communicative contexts and is so doing recreate, extend, alter and reshape the language: ibid 97.

[17] The intrinsic/instrumental distinction, as well as the distinction between listener and speaker-centred theories, is discussed in Moon (n 8) 24.

and his or her communicative actions. Yet, if freedom of expression is an instrumental right, its fundamental character seems less obvious. Its value is contingent on its contribution to the goals of truth and democracy, and there is no shortage of arguments that freedom of expression does not (always) advance these goals.

The value (and potential harm) of expression will remain unclear as long as discussion about freedom of expression is locked into the intrinsic/instrumental dichotomy, in which the freedom is concerned with either the good of the community or the right of the individual. The value of freedom of expression rests on the social nature of individuals and the constitutive character of public discourse. Once we recognise that individual agency and identity emerge in the social relationship of communication, the traditional split between intrinsic and instrumental accounts (or individual and social accounts) of the value of freedom of expression dissolves. Expression connects the individual (as speaker or listener) with others and, in doing so, contributes to his or her capacity for understanding and judgment, engagement in community life and participation in a shared culture and collective governance.

The arguments described as instrumental focus on the contribution of speech to the collective goals of truth and democracy. However, we value truth not as an abstract social achievement but rather as something that is consciously realised by members of the community, individually and collectively, in the process of public discussion.[18] Similarly, freedom of expression is not simply a tool or instrument that contributes to democratic government. We value freedom of expression not simply because it provides individuals with useful political information, but more fundamentally because it is the way in which citizens participate in collective self-governance. There is no way to separate the goal from the process or the individual good from the public good. In a similar way, attaching the label 'intrinsic' to autonomy or self-realisation based accounts of the freedom seems to misconstrue the value at stake. Communication is a joint or public process, in which the individual participants realise their human capacities and personal identities. The individual does not simply gain satisfaction from expressing his or her pre-existing views on matters. Those views and, more broadly, the individual's judgment and identity take shape in the communicative process.

Recognition that individual agency and identity emerge in communicative interaction is crucial for understanding not only the value of expression but also its potential for harm. Our dependence on expression means that words can sometimes harass, intimidate, deceive, manipulate or denigrate the individual. Expression is valuable because individual agency and identity are shaped by what we say and by what others say to us and about us – but it can also be harmful for the same reason. Expression can create a distorted image of the individual (or group) or undermine his or her standing in the community, particularly in conditions of unequal communicative power. Similarly, while expression is important as a source of knowledge and understanding, it

[18] Even Mill thought it was important that the individual should participate in the truth, in the sense of being able to distinguish truth from falsehood, and knowing the grounds for his or her opinion: John Stuart Mill, *On Liberty* (first published 1859, Penguin 1985) 97.

can also serve to deceive or manipulate its audience. Speech is never simply a cause that acts upon its audience, but nor is it ever entirely rational and transparent in its meaning and impact.

At issue in many of the debates about protection of free speech is whether a particular form of expression engages the audience and encourages independent judgment or whether instead it intimidates, harasses or manipulates the audience.[19] The judgment that expression is valuable and worthy of protection, or is instead harmful and appropriately subject to restriction, is of a relative nature and will depend on a number of factors, including the form of the expression and the context in which it occurs. The determination that speech is harassing or intimidating and not simply uncivil or confrontational, or that it is manipulative (leading audience members to think and/or act in a particular way without realising the intent behind the speech or the implications of acting on its claims) rather than informative involves a judgment about the character of the communicative engagement. When speech seems intended to harass, deceive or intimidate its audience, it may no longer be viewed as communicative engagement – as part of discourse and entitled to constitutional protection.

2.2. MANIPULATION AND INCITEMENT

A commitment to freedom of expression means that we should not censor speech simply because we object to its message, either because we think the message is wrong or even because we are concerned that some in the audience may agree with the message and act in an anti-social or harmful way. The individual must be free to speak but also to hear what others may say without interference from the state. The answer to bad or erroneous speech is said to be more and better speech.[20] Importantly the listener, and not the speaker, is seen as responsible (as an independent agent) for his or her actions, including harmful actions, whether these actions occur because the listener agrees or disagrees with the speaker's message. Underlying this commitment to freedom of expression (and the refusal to treat speech as a 'cause' of subsequent harm) is a belief that humans are substantially rational beings, capable of evaluating factual and other claims, and an assumption that public discourse is open to a wide range of competing views that may be assessed by the audience.

The courts recognise that these assumptions about agency and independent judgment may not always hold. Freedom of expression doctrine has always permitted the restriction of expression that 'incites' or 'manipulates' – that occurs in a form and/or context that limits or discourages independent and informed judgment by the audience. For example, in *On Liberty* Mill thought that the authorities would be justified in preventing a fiery speech given near the home of a corn merchant to a crowd of farmers angry about crop prices. A heated speech delivered to a 'mob' appeals to passion and prejudice and might lead to impulsive and harmful actions.[21] Speech, such as the address to the farmers, is described as incitement when the time and

[19] Moon (n 9) 4–6.
[20] *Whitney v California* 274 US 357(1927) 375 (Brandeis J).
[21] Mill (n 18) 119.

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

(reflective) space between the speech and the action is so limited that the speaker may be viewed as leading the audience into action and not simply as appealing to them to take action. In American free speech jurisprudence the classic example of a failure in the conditions of ordinary rational discourse comes from a judgment of Mr Justice Holmes, who said that '[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic'.[22] The false yell of fire in a crowded theatre represents an identifiable deviation from the conditions of ordinary discourse. The theatre audience in such a case would not have the time to stop and think carefully before acting on the communicated message. The panic that would follow the shout of fire in these circumstances would be likely to result in injury.

The examples given by Mill and Holmes involve circumstances that limit the ability of the audience to carefully or dispassionately assess the communicated message. The assumption is that ordinarily in communicating, the individual makes some form of conscious, non-manipulative, appeal to the audience. Even when it is confrontational and uncivil, speech may still engage its audience. In exceptional circumstances, however, an individual's speech may appeal to passions, prejudices and fears, and may encourage unreflective action. Speech may be treated as a 'cause' of audience action and subject to restriction when the time and space for independent judgment are compressed, or when emotions are running so high that audience members are less likely to stop and reflect on the claims being made. The line between rational appeal and manipulation or incitement may not always be easy to draw (and, indeed, is a relative matter) and different people may choose to draw the line in different places. Where the line is drawn, though, will depend not on a balancing of competing interests or claims (the value of expression against its harm) but instead on a judgment about the character or quality of the communicative relationship. In both cases – the fiery speech and the yell of fire – the 'speech' may be restricted because it does not appeal to, or engage, its audience in a way that justifies its protection.

2.3. The Line between Audience Engagement and Manipulation

This recognition of the constraints on independent judgment and the limits of communicative engagement may help us to better understand the decision of the Supreme Court of Canada in *Irwin Toy v Quebec (AG)*, the Court's first significant freedom of expression case. In this case the Court considered the constitutionality of a Quebec law that restricted advertising directed at children under the age of 13.[23] The Court found that the restricted advertising was protected expression under section 2(b) of the Charter as it 'attempts to convey meaning', and therefore that the law breached the section. However, the Court went on to find that under section 1 the law was a justified restriction on the right of freedom of expression because it protects children, a particularly susceptible group, from the manipulative influence of advertising. The justification for the restriction was that advertising directed at children seeks to influence their behaviour,

[22] *Schenck v United States* 249 US 47 (1919) 52.
[23] [1989] 1 SCR 927.

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

while bypassing or discouraging reflection and judgment. Freedom of expression doctrine ordinarily requires that a willing audience be permitted to receive and assess ideas and information without interference from the state. However, a group such as children, whose reasoning capacities are not yet fully developed, should be protected from deception or manipulation.[24]

In deciding that the restriction was justified under section 1, the Court said that the restricted advertising was less valuable than other forms of expression (and so had less weight in the balancing process) because it was manipulative. Yet, at the same time, manipulation was also the harm of the expression that the Court purported to weigh against its (limited) value in the section 1 balancing process. In other words, the Court took into account the same concern – manipulation – in assessing both the value and the harm of the expression at the section 1 stage of the analysis. This apparent 'double counting' of the manipulative impact of the advertising is easier to understand if we recognise that freedom of expression is a relational right: it protects the relationship of communication between speaker and listener. When the Court assesses the 'manipulative' impact of expression, it is not simply balancing the distinct interests of separate individuals: the interest in communicating information and ideas against the interest in not being manipulated or deceived. The Court is instead making a contextual judgment about the character or value of the communicative relationship – of the speaker's engagement with his or her audience. In *Irwin Toy* the 'value' of the expression and the 'harm' of the expression are not distinct issues, but rather two sides of a single complex issue – and that is whether the speech seeks to influence the audience in a way that should be protected.

In other significant freedom of expression decisions of the Supreme Court of Canada – involving state restrictions on labour picketing, tobacco advertising, hate promotion, election spending and degrading sexual imagery – the Court has said that the restriction is justified because the expression creates a risk of harm to members of the community: it might, for example, lead individuals to start or to continue smoking or to adopt hateful views and engage in acts of discrimination or violence against members of a racial or religious minority group.[25]

As noted earlier, under most accounts of freedom of expression, the speaker does not 'cause' (is not legally responsible for) the audience's actions simply because he or she may have persuaded the audience to act in a harmful way or to adopt erroneous or undesirable opinions. The state is not justified in restricting speech to prevent these 'harms'. (Of course, it is difficult to determine the potential impact of expression on the attitudes and actions of audience members – human agents – who may understand and react to the communication in different ways based on their personal values and experiences). The listener must be free to hear what others may have

[24] The Court relied on empirical studies, which suggested that advertising had a detrimental or manipulative impact on children. When these studies proved inadequate to make the case in a clear way (particularly regarding children between the ages of 9 and 13), the Court decided to show deference to the legislature's judgment that the activity is manipulative.

[25] *BCGEU v BC (AG)* [1988] 2 SCR 214 and *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573 (labour picketing); *RJR Macdonald Inc v Canada (AG)* [1995] 3 SCR 199 and *Canada (AG) v JTI-Macdonald Corp* 2007 SCC 30 (tobacco advertising); *R v Keegstra* [1990] 3 SCR 697 and *Saskatchewan (HRC) v Whatcott* 2013 SCC 11 (hate speech); *Libman v Quebec (AG)* [1997] 3 SCR 569 and *Harper v Canada (AG)* [2004] 1 SCR 827 (election spending); *R v Butler* [1992] 1 SCR 452 (pornography).

to say and to make his or her own judgments about its merits. Yet again, as noted earlier, the assumptions that underlie our commitment to freedom of expression do not always hold (and indeed never hold perfectly). Prohibitions on false or misleading product claims have been supported because advertisers have overwhelming power in the 'marketplace' of ideas and information (so that others have limited opportunities to correct misleading adverts) and because so much commercial advertising is non-rational or manipulative in its appeal. Similarly, the restriction of defamatory speech rests on a recognition that false claims made about an individual are not easily corrected through 'more speech'. The harm of defamatory speech may persist, because the audience is not always in a position to assess the false and damaging claims and the correcting speech may not spread as effectively as the original defamation.

In each of these freedom of expression cases about advertising, hate speech, pornography and so on, the state is justified in restricting the 'expressive' activity not simply because of the harm it causes but also, and more importantly, because of how it causes that harm. While the focus of the Court's concern in these cases is on the harm that may result if the audience is 'persuaded' by the expression, the justification for restriction is based significantly on the way in which the expression influences or impacts upon the audience. The Court upholds the state restriction on expression, at least in part, because the expression takes a particular form or occurs in a particular social context that limits or discourages audience reflection or judgment. The Court has been willing to treat speech as a 'cause' of the harm (as the cause of the audience's behaviour) of smoking or engaging in acts of racial discrimination or acts of sexual violence, because of the character and context of the speech. The Court upheld a ban on lifestyle tobacco advertising (but not informational advertising), because the adverts are manipulative. In *JTI Macdonald*, Justice McLachlin notes that lifestyle advertising 'evokes emotions and images' and may 'subliminally connect a tobacco product with a lifestyle'.[26] In deciding that the state was justified in restricting hate speech, the Supreme Court of Canada agreed with the Cohen Commission (which had recommended the criminalisation of hate speech) that 'individuals can be persuaded to believe almost anything if the information or ideas are communicated using the right technique and in the proper circumstances'.[27] The Court accepts that the audience may be less critical of speech that makes a visceral appeal, seeks to stir anger, and provides a channel for fear and resentment. In a number of early decisions the Court supported injunctions against (secondary) picket lines in labour disputes, because a picket line is a 'barrier' and the refusal to cross a line (at least in the case of unionised workers) is 'Pavlovian'.[28] In each of these cases the justification for restriction is formally based on the seriousness of the harm that may occur if the audience takes up the speaker's message, but is also, and perhaps more significantly, based on the way in which the expression influences the thoughts and actions of the audience.

[26] *JTI-Macdonald Corp* (n 25) para 110; see also *RJR Macdonald* (n 25).
[27] *Report of the Special Committee on Hate Propaganda in Canada* (Queen's Printer 1966). Dickson CJ in *Keegstra* (n 25) 763: We should not 'overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas'.
[28] *BCGEU v BC (AG)* (n 25) and *RWDSU v Dolphin Delivery Ltd* (n 25).

The Court, in these cases, is not balancing or trading off the distinct interests of separate individuals. It is instead addressing the single but complex question of whether the expression appeals to audience judgment or whether instead it aims to manipulate or to influence the audience at a non-cognitive level. The Court is marking the point (drawing the line) at which speech ceases to appeal to independent judgment or conscious reflection – the point at which speech no longer seeks to persuade or engage the audience. Realistically, where the Court draws the line between protected speech about sex and unprotected pornography or protected speech about tobacco products and unprotected lifestyle advertising will be affected by the seriousness of the harm that may occur if the audience is influenced by the 'speech'; nevertheless, the Court's task in these cases is not to balance competing interests but rather to determine whether the 'speech' manipulates, incites or otherwise appeals to the irrational and is therefore not worthy of protection. The Court must make a relative judgment about the character of the communicative engagement between speaker and audience. Whether expression is more likely to contribute to understanding and judgment or instead to manipulate and lead to an unreflective response will depend on its form (visceral and non-rational in appeal) and on the social and economic circumstances in which it occurs – on systemic factors such as the overwhelming presence in public discourse of degrading sexual imagery, racist stereotypes and lifestyle product associations.

3. Freedom of Religion

According to the Supreme Court of Canada, section 2(a) of the Charter (freedom of conscience and religion) requires the state to remain neutral in matters of religion. The state must not support or prefer the practices of one religious group over those of another, or religious practices over non-religious practices, and vice versa (religion or religious contest should be excluded from politics), and it must not restrict the practices of a religious group, unless this is necessary to protect a compelling public interest (religion should be insulated from politics).[29] The freedom then has two elements or branches: (i) freedom from state-compelled or supported religious practices, and (ii) the freedom to practise religion without state interference. Freedom of religion, on this account, is a form of equality right: a right to equal treatment or equal respect by the state without discrimination based on religious practice or association. The neutrality requirement rests on the idea of religion as a cultural identity – on a recognition that religious belief orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for individual actions. Religious commitment, on this view, ties the individual to a community of believers and is often the central and defining association in his or her life. The individual believer participates in a shared system of practices and values which may in some cases be described as 'a way of life'. A judgment by the state that the spiritual beliefs and practices of one group are less important or less true than those of another will be experienced by

[29] *Mouvement laïque québécois v Saguenay (City)* 2015 SCC 16.

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

individual group members as a form of exclusion: as a denial of their equal worth or standing in the political community and as the marginalisation of their spiritual community.[30]

In the most general terms, the issue in the Canadian freedom of religion cases is the line between the sphere of politics – the secular state – from which religion is excluded and the sphere of personal or collective religious practice, which should be protected from state interference. I have argued elsewhere that this line is unstable and porous.[31] Nevertheless, the task for the courts in section 2(a) cases is to mark the boundary between these two spheres – the civic and the spiritual.

3.1. STATE SUPPORT FOR RELIGIOUS PRACTICE

The Canadian courts have held that section 2(a) (freedom of conscience and religion) precludes the state from preferring or supporting the practices or beliefs of one religion over those of another or religious belief over non-religious belief (and vice versa).[32] In *Big M Drug Mart* the Supreme Court of Canada struck down the federal Lord's Day Act, which prohibited various commercial activities on Sundays (in effect requiring members of the general community to honour the Sunday Sabbath).[33] It is 'constitutionally incompetent', said the Court, 'for the federal Parliament to provide legislative preference for any one religion at the expense of another religious persuasion'.[34] In subsequent decisions the Canadian courts have held that the recitation of the Lord's Prayer at the opening of the public school day,[35] the inclusion of bible lessons in the public school curriculum,[36] the recitation of the Lord's Prayer at the opening of a town council meeting,[37] and the recitation of an ecumenical prayer at a town council meeting[38] violated the Charter. According to the courts, when the state supports the practices of the historically dominant religious group, it sends a message of exclusion to those outside the group. It says that they are less than full members of the political community.[39]

In those cases in which the Canadian courts found that the state had breached section 2(a) because it supported or favoured a particular religious practice, the courts also found that the state action (the breach) could not be justified under section 1. The courts held, in each of these cases, that the purpose of the law is to support a religious practice, and that such a purpose cannot be regarded as compelling and substantial. The restrictive law then fails the very first – or

[30] Richard Moon, *Freedom of Conscience and Religion* (Irwin Law 2014) 23, argues that religion is viewed as both a cultural practice that should (sometimes) be excluded and insulated from politics and a personal commitment to a set of claims about truth and right that cannot simply be removed from politics.
[31] Richard Moon, 'Freedom of Religion under the Charter of Rights: The Limits of State Neutrality' (2012) 45 *University of British Columbia Law Review* 495.
[32] *Mouvement laïque* (n 29) para 72.
[33] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.
[34] ibid para 134.
[35] *Zylberberg v Sudbury Board of Education* (1988) 65 OR (2d) 641.
[36] *Canadian Civil Liberties Association v Ontario (Minister of Education)* (1988) 71 OR (2d) 341.
[37] *Freitag v Penetanguishene (Town)* (1999) 47 OR (3d) 301.
[38] *Mouvement laïque* (n 29).
[39] *Freitag* (n 37) para 36.

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

threshold – element of the limitations test, making it unnecessary to address the other elements of the test and to engage in any balancing of competing interests.[40] Section 1 therefore appears to have no meaningful role in those section 2(a) cases in which the breach is based on state compulsion of, or support for, religion. Once it has been decided that the state has supported or preferred a religious practice, and therefore breached section 2(a), the case is at an end. There are no competing interests to be balanced, and so there is no possibility that the breach will be justified under section 1.

There may be debate about what counts as state support or preference for religion – about where to draw the line between religion and politics – but this debate takes place entirely at the first stage of the adjudication (whether there has been a breach or restriction of section 2(a)) and not at the second stage (whether a restriction – or exception – is justified under section 1). The Canadian courts, for example, have recognised that religious practices have shaped the traditions or customs of the community and so they cannot always be erased from the public sphere. According to the Supreme Court of Canada, 'the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage'.[41] The courts, then, have not demanded that governments (literally or metaphorically) sandblast religious symbols and practices from physical and social structures, some of which were constructed long ago.[42] Secondly, the courts have recognised that religion is important in the private and communal lives of citizens. If a large part of the population is Christian, it is difficult to see how the state could not take the practices of this group into account in, for example, selecting statutory holidays or establishing a 'pause day' from work. As long as religion remains part of private life, it is bound to affect the shape of public action.

3.2. State Restriction of Religious Practice

On the other hand, in cases involving the restriction of a religious practice, section 1 (the limitations provision) appears to have a major role. Indeed, all of the main judicial analysis in these cases seems to occur at the limitations stage.

According to the Supreme Court of Canada, section 2(a) is breached any time the state restricts a religious practice in a non-trivial way. The Supreme Court has said that a practice will fall within the scope of section 2(a) if it is spiritually significant to the individual.[43] In

[40] *Big M Drug Mart* (n 33) 353.
[41] *Mouvement laïque* (n 29) para 113.
[42] However, it may often be difficult to determine when the use of religious symbols or practices by the state is simply an acknowledgement of the country's religious history, and when it amounts to a present affirmation of the truth of a particular religious belief system. This point is made in *Mouvement laïque* (n 29) para 87: '[T]he Canadian cultural landscape includes many traditional and heritage practices that are religious in nature. Although it is clear that not all of these cultural expressions are in breach of the state's duty of neutrality, there is also no doubt that the state may not consciously make a profession of faith or act so as to adopt or favour one religious view at the expense of all others'.
[43] In *Syndicat Northcrest v Amselem* 2004 SCC 47, para 46, the Supreme Court says that freedom of religion protects practices or activities that have for the individual 'a nexus with religion' or 'connect' her 'with the divine' or

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

various decisions, the courts have said that freedom of religion protects forms of worship or observance (including dress and diet requirements), spiritual ways of life (such as living in an agrarian collective or living 'separate and apart' from mainstream society), and proselytisation activities (the teaching or promoting of one's faith to others). It protects also the collective dimension of religious practice – the joining with others in worship or in advancing shared religious purposes.[44] Even when a law advances a legitimate public purpose, such as the prevention of drug use or cruelty to animals or violence in the schoolyard, the state must justify, under section 1 of the Charter, the law's non-trivial interference with a religious practice. This is said to involve a balancing of competing interests: the individual's freedom to practice his or her religion weighed against the state's ability to advance what it understands to be the public good. In *Alberta v Hutterian Brethren of Wilson Colony*, Chief Justice McLachlin, writing for a majority of the Supreme Court of Canada, said that a law that restricts a religious practice will be upheld only if it satisfies the various elements of the *Oakes* test, including the proportionality requirements.[45]

Yet, despite its formal commitment to 'proportionality' in the resolution of freedom of religion cases, the Supreme Court of Canada has been willing to uphold the legal restriction of a religious practice as long as the restriction has a legitimate objective (that is, an objective other than the suppression of an erroneous religious practice) that would be compromised in any way if an exception were made to its application. In other words, the Court has adopted in practice a very weak standard of justification under section 1 so that the right protects only a limited form of liberty, with no requirement that the state compromise its policy to take account of religious practices.[46]

Multani v Commission scolaire Marguerite-Bourgeoys is one of the few cases in which the Supreme Court of Canada found that a state restriction on religious practice was not justified. In that case the Court held that the decision by a public school authority to prohibit a Sikh student from wearing a kirpan to school breached section 2(a) and was not justified under section 1.[47] The school did not dispute that the student had a sincere belief in the spiritual significance of the kirpan and, indeed, that he considered himself bound to wear it at all times. The position of the school was that the kirpan was a weapon and so was caught by the school's general ban on weapons. According to the majority judgment of Justice Charron, the school had a duty to make reasonable accommodation for the religious practices of minorities and so could ban the kirpan only

stem from her spiritual faith. These practices do not have to be part of an established belief system; nor is it necessary that the individual or group understands them to be mandatory.

[44] For a discussion of these cases see Moon (n 30) Ch 3.

[45] 2009 SCC 37.

[46] This is a standard that is not very different perhaps from that adopted by the US Supreme Court in *Employment Division v Smith* 494 US 872 (1990). The differences between the US and Canadian approaches may simply reflect structural differences between the two bills of rights – specifically the inclusion of a separate limitations provision in the Canadian document. As described by Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001) 134, the approach of the ECtHR to art 9 ECHR may be similar.

[47] 2006 SCC 6. The council of school commissioners interpreted the ban on weapons in its code of conduct as excluding the kirpan.

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

if it represented a threat to school safety. Justice Charron observed that 'while the kirpan undeniably has the characteristics of a bladed weapon capable of wounding or killing a person … for orthodox Sikhs [it] is above all a religious symbol'.[48] She rejected the school authority's claim that 'kirpans are inherently dangerous' and noted that there were no recorded incidents in Canada of a Sikh student drawing his kirpan in a public school.[49] Finally, she thought that if the kirpan was sewn into the student's clothes (to which his family and the school administration had previously agreed), there would be little risk of it falling out or being taken by anyone else and used as a weapon. She concluded that the safety of the school would not be compromised in any way if the student was permitted to wear the kirpan. In other words, the Court held that the kirpan should be exempted from the weapons ban only after determining that it was a weapon in form only and presented no actual risk to others.

Where there is concern that a religious exemption will compromise the purpose of the law (public policy) in an identifiable way, the Court has determined that the restriction – the state's refusal to exempt the religious practice – is justified under section 1. The case of *Alberta v Hutterian Brethren of Wilson Colony* involved a challenge to the regulations in Alberta dealing with driver's licences, which had been amended in 2003 to require that all licence holders be photographed.[50] The licence holder's photograph would appear on the licence and be included in a facial recognition data bank maintained by the province. Members of the Hutterian Brethren of Wilson Colony, who believed that the Second Commandment (Exodus, 20:4) prohibited the making of photographic images, argued that the requirement for a photograph breached their section 2(a) Charter right and could not be justified under section 1. They claimed that no one from the colony would be able to obtain a driver's licence and that this would affect the colony's ability to purchase goods and sell produce, activities that were necessary for the maintenance of their agrarian and communal way of life. The majority judgment of Chief Justice McLachlin accepted that the photograph requirement breached the section 2(a) rights of the Wilson Colony members but found that the breach was justified under section 1. The Chief Justice found that the purpose behind the requirement (to reduce the risk of identity theft by ensuring the integrity of the driver's licence system) is pressing and substantial and that exempting the colony members from the requirement would detract from that purpose. Chief Justice McLachlin rejected the claim for an exemption from the requirement for a photograph because it would compromise the law's purpose – which, of course, any exception must do, unless it is not truly an exception. She also found that the impact of the restriction on the colony was not significant on the ground that driving was a privilege and colony members could hire others to do their necessary driving.

[48] ibid para 37. The kirpan could, of course, be both a weapon and a religious symbol in the sense that its symbolic role is tied to its history or character as a weapon. The issue in this case, though, was whether it was being carried as a weapon.

[49] ibid para 67. Charron J further observed that in contrast to an aircraft or a court house, where a ban on the kirpan might be justified, the school had an ongoing relationship with its students and could therefore monitor their actions and assess the risk of violent behaviour: see *Hothi v R* [1985] 3 WWR 256 (Man QB) (affirmed [1986] 3 WWR 671 (Man CA)) (kirpans banned in the courts); *Nijjar v Canada 3000 Airlines Ltd* (1999) 36 CHRR D/76 (HRT) (kirpans banned in aircraft).

[50] *Wilson Colony* (n 45).

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

In rejecting the colony members' claim for exemption from the photograph requirement Chief Justice McLachlin made what is sometimes referred to as a 'floodgates' argument: if the courts recognise a particular claim, they may be opening the floodgates to an overwhelming number of additional claims and may, as a consequence, undermine the effectiveness or predictability of the law. She expressed concern that accommodating every religious claim 'could seriously undermine the universality of many regulatory programs'.[51] Yet there were very few claimants in this case, as Justice Abella noted in her dissenting judgment. Had they been granted an exemption, the impact on government policy would have been minor. Chief Justice McLachlin, though, seemed concerned about the possibility of more claimants coming forward later. It is unreasonable, said the Chief Justice, to expect the state (when it is seeking to advance the public interest through law) to respond to, or anticipate, every possible claim for exemption on religious grounds. However, on this reasoning no exemption could ever be given, because it might significantly undermine the law's purpose if additional claimants were to come forward at some future time. Or, as in *Multani*, an exception could be made only if it was not truly an exception in the sense that its recognition (regardless of how many people sought 'exemption') would not undermine the purpose of the law in any real way.

3.3. MAKING SPACE FOR RELIGION

The *Multani* and *Wilson Colony* decisions, and other religious 'accommodation' cases (which appear to have resulted in no actual accommodation) are understandable once we recognise that the task for the courts is not to balance or trade off competing state (public) and personal/communal (private) interests but instead is to determine the boundary (locate the line) between the civic/public sphere and the religious/private sphere. Law and religious practice can conflict in several ways. This conflict may be described as indirect when the religious practice conflicts with the means chosen to advance a public purpose and not with the purpose itself;[52] for example, the government may have decided on a particular route for a new highway only to discover that its preferred route runs through an area that is sacred to an Aboriginal group.[53] In such a case it may be possible for the state to advance its purpose as, or almost as, effectively in a different way, through different means, so that it does not interfere with the religious practice or interest. Of course, even in the case of what might be described as an indirect conflict between law and religion, the adoption of different means will often detract to some extent from the ability of the law to advance a particular policy. In the example given, an alternative highway route may add to construction costs or detract from ideal road conditions. The issue for the court is whether the state can pursue its objective as, or almost as, effectively in another way which does not interfere to the same extent with the religious practice. In these cases

[51] ibid para 36.

[52] In the discussion that follows I have drawn a distinction between indirect and direct restrictions on religious practice. I recognise, though, that these two categories are sometimes difficult to distinguish and might, more accurately, be viewed as part of a continuum.

[53] Such a claim, though, was rejected in the US Supreme Court judgment of *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988).

https://doi.org/10.1017/S0021223716000327 Published online by Cambridge University Press

the courts do not engage in anything that could properly be described as the 'balancing' of competing public and religious interests (in which the state's objectives might sometimes be subordinated to the claims of a religious community). The court, though, may require the state to compromise, in a minor way, its pursuit of a particular objective to make space for a religious practice, and so in such cases there may be some trading-off of competing claims.

Sometimes the conflict between law and religious practice is more direct in the sense that the law is pursuing a policy (a public value) which is directly at odds with a particular practice. In such a case the conflict between the law and the religious practice cannot be avoided or reduced by the state simply adjusting the means it has chosen to advance its civic purpose. Yet the court's task in these cases is not to decide the proper balance or trade-off between these distinct and competing interests or claims. After all, the court has no way by which to attach a specific value or weight to the religious practice. From a secular or public perspective, such a practice has no intrinsic value; indeed, it is said that the court should take no position concerning its value. The practice matters only because it is important to the individual; but there is no way to balance this 'value' against the purpose or value of the restrictive law. The court's task, instead, is to determine whether a religious individual or group should be exempted from the law – whether space should be made for a different normative system – and the court will do this only if the exception will have no real impact on others in the community.

The issue in the 'religious accommodation' cases, then, is not the balance between competing religious and public interests, but instead the location of the line between the political sphere (of government action) and the private sphere (of religious belief and practice). The courts may create some space for religious practice – such as for an alternative normative system or way of life – only if this can be done without directly challenging the state's authority to govern in the public interest and to establish public norms. In other words, a religious practice will be accommodated only if it will have little or no impact on the rights and interests of others.

There are several reasons why the state may be asked to make space for religious practice and community. There may be concern that the exclusion or marginalisation of a religious group will negatively affect the social standing of its members and their tie to the larger community – their sense of belonging. More positively, it may be seen as important that space be preserved for religious community because it is a source of value and meaning for community members. The courts have sometimes sought to create space for religious practices at the margins of law by adjusting the boundary between 'private' liberty (the sphere of religious life) and civic or public action (the sphere of politics). The court will require the state to exempt (accommodate) a religious individual or group from the law only if the exempted activity is 'self-regarding' (for example, the refusal to wear a motorcycle helmet for religious reasons), or is part of the internal operation of a religious association and so will have no significant impact on others in the community.[54] In such a case the practice will

[54] Even so, in *R v Badesha* 2008 ONCJ 94 (upheld in *R v Badesha* 2011 ONCA 601) the Ontario Superior Court rejected a Sikh man's claim to be exempted from a provincial motorcycle helmet requirement. The Court noted that if the rider were seriously injured, the public health care system would be detrimentally affected, as would his family and his employer.

be treated as personal to the individual or internal to the group and insulated from the application of the law.

4. CONCLUSION

The structure of Charter adjudication is built on the idea that entrenched rights protect different aspects of individual liberty from state interference. The courts' task, on this account, is first to define the scope of the protected right, and then to determine whether the state has interfered with the exercise of that right. Since these rights may sometimes conflict with other valuable interests (that are advanced by law), the court must also determine (as a separate issue at the second stage of analysis) the proper and just balance between these competing interests. The *Oakes* test provides the framework for this judicial balancing. That, at least, is the standard view.

Yet many or most Charter rights do not fall easily into this individual liberty model. Freedom of expression, for example, does not simply protect individual autonomy (understood as independence from others). Instead, it protects the individual's freedom to interact with others – to communicate. Understood in this way, freedom of expression fits awkwardly within the two-step adjudicative process. In the leading freedom of expression cases, the Supreme Court of Canada does not simply balance separate interests and give priority to one interest or claim over another, or trade them off in some way. Instead, the Court in these cases is required to make a complex judgment about the realisation of individual agency and identity in community life. The Court's task is to distinguish between expression that appeals to autonomous judgment (which is protected) and expression that seeks to manipulate (which is not protected).

In section 2(a) religious accommodation cases, the courts have been quick to find a breach of the right. Any non-trivial restriction on a religious practice will amount to a breach of the section. Yet, at the section 1 stage the standard of justification in these cases seems to be very weak. The courts do not *balance* competing civic and religious interests. Instead, their role is to draw a line separating the sphere of personal and collective religious life (the personal practice of religious traditions or the internal operations of a religious association) from the sphere of civic life or politics.

Other constitutional rights may also be seen as relational or social in character, protecting a particular dimension of the individual's interaction or connection with others, and so may not fit well into the formal model of constitutional rights adjudication. While the significant analysis by the courts in section 2(b) (freedom of expression) cases and section 2(a) (religious accommodation) cases takes place at the section 1 (limitations) stage, the focus of the courts' analysis in section 15 (equality rights) cases (and in section 2(a) (state support) cases) is, at the first stage of the adjudication, the issue of whether the right has been breached. At the section 1 stage of equality rights adjudication, the court seldom offers more than a perfunctory restatement of the factors that led it to decide that the right had been breached. In the case of each of these rights (section 2(b), section 2(a) and section 15) the analysis takes place at one stage of the adjudication because the court is addressing a single complex question about the individual's connection with

the community, and is not simply balancing separate and competing interests, as contemplated by the two-step structure of adjudication.[55]

If the rights protected by the Charter are diverse in character, representing different aspects of human flourishing or dignity within community, then the form or character of limitation on these rights may differ in significant ways. It also means that when adjudicating rights claims, the courts are generally not engaged in the balancing of distinct and competing claims, but are instead required to determine the relative value/harm of a particular activity (such as expression) in the social/economic context in which it occurs, or (in the case of religious freedom) to define the sphere of religious life or religious community in the larger social/civic context. The judgments that the courts are asked to make are complex and must take account of a range of factors, although this is something quite different from the balancing or trading off of distinct and competing values or interests.

[55] The right to equality rests on the social character of individual identity – on a recognition that the individual's sense of self and place in the world is significantly affected by how he or she (and a group with which the individual identifies) is regarded and treated relative to others in the community. The Canadian courts have interpreted the section 15 prohibition on discrimination to include both intentional (or direct) discrimination and effects (or constructive) discrimination: see, eg, *Andrews v The Law Society of British Columbia* [1989] 1 SCR 143.