REVIEW OF *DIVERSITY AND EQUALITY: THE CHANGING FRAMEWORK OF FREEDOM IN CANADA* EDITED BY AVIGAIL EISENBERG

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Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: Univ. of British Columbia Press, 2006), 224 pp.

In Canada's increasingly diverse society, with its many linguistic, cultural, and religious interests, the framework of freedom, as the title of Avigail Eisenberg's collection suggests,[1] is changing. This interdisciplinary collection, composed of contributions from scholars at the University of Victoria, attempts to address the many tensions that arise between diversity and equality as a result of the recognition of minority rights. The essays in this collection ask: how can measures to protect minority rights be reconciled with other fundamental freedoms? Indeed the relationship between equality, a fundamental freedom protected under the Canadian *Charter of Rights and Freedoms*,[2] and diversity, understood as the basic commitment to decolonization and the recognition of distinctive cultural groups, gives rise to conflicts that are likely to be enduring features of a pluralistic society. These concrete conflicts between minority and majority groups and between individuals within minorities provide the framework within which we can begin to understand, accommodate, resolve, and negotiate the tension between equality and diversity. That individuals should have equal access to a secure cultural context is for the most part uncontroversial, as the many legal and political instruments protecting minority rights in Canada and internationally indicate. How to go about securing such a cultural context for divergent minorities leads to difficult but critical discussions about such things as the limits of accommodation and the balancing of seemingly opposing values. As nations continue to diversify through immigration and the

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1 Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: University of British Columbia Press, 2006) [*Diversity and Equality*].

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

movement of refugees, the scholars in this book propose a variety of strategies for resolving conflicts that have arisen and will undoubtedly continue to arise.

Eisenberg's collection is successful because it addresses the complexity of the tension between equality and diversity. It suggests that a meaningful understanding of the multiple relationships between equality and diversity will require a nuanced approach that depends on the context in question. For example, three of the nine chapters in this book address the rights of Aboriginal peoples. Interestingly, many of the claims of Aboriginal peoples around the world are not claims of minority status based on multicultural accommodation. Rather, the claim to be recognized as "peoples" with the right to self-determination is the demand to be recognized as "equal" in status to other "peoples."[3] Thus, Aboriginal peoples' perceived struggles for accommodation based on diversity, or to be recognized as a distinct culture are, in fact, claims for equality. On the other hand, diversity and equality should not always be viewed as opposing aspirations. As Maneesha Deckha notes in her chapter,[4] feminists such as Susan Moller Okin address the tension between minority rights and the equality of women as though the two are mutually exclusive.[5] However, to be truly meaningful to the interests of minority women, feminists must find ways of responding to patriarchy and oppression within minority communities while simultaneously addressing the oppression women experience as a result of mainstream racism, imperialism, and discrimination. Thus, minority women seek recognition of diversity *and* equality, as the title of this book suggests.

This volume begins with a critical reflection by James Tully about the way in which the many struggles over recognition have developed over the past forty years. In "Reconciling Struggles over the Recognition of Minorities," Tully comments on a trend away from top-down, finality-driven orientations to reconciling recognition struggles toward what he calls a "dialogical civic freedom."[6] He describes what seem to be common-sense principles that have developed when reconciling the many interests at stake in the conflicts over the appropriate forms of recognition of minorities *vis-à-vis* individuals within groups and in relationship to other (minority and majority) groups. That is,

3 "Reconciling Struggles over the Recognition of Minorities: Towards a Dialogical Approach" in *Diversity and Equality, supra* note 1, 15 at 23 [*Tully*].

4 "Gender, Difference, and Anti-Essentialism: Towards a Feminist Response to Cultural Claims in Law" in *Diversity and Equality, supra* note 1, 114 [*Deckha*].

5 See also Susan Moller Okin, "Is Multiculturalism Bad for Women?" in Joshua Cohen, Matthew Howard & Martha C. Nussbaum, eds., *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999) 9.

6 *Tully, supra* note 3 at 16.

when attempting to reconcile conflicts over recognition, an approach that will garner legitimacy is that which involves a dialogue among those who are subject to the contested norm. It may seem obvious but, sadly, it is far from ubiquitous that "having a say"[7] over ruling norms is a crucial first step to reconciliation. More profound, but perhaps less digestible, is Tully's comment that a definitive solution to minority struggles over recognition is both impossible and undesirable. Despite attempts to build consensus using ideal procedures, some element of "reasonable disagreement or dissent"[8] will usually remain. Thus, dialogical civic freedom, as the right to challenge a prevailing norm, is correlated with the duty to listen and respond — that is, to enter an open dialogue. The hope is that this dialogue will generate among minority groups "an attachment to the larger association, precisely because it allows them to engage in this second-order free and democratic activity from time to time."[9] That democratic dissent and effective dialogue will decrease the turn to violence is also an advantage. Tully's chapter, in its helpful theoretical review of the transformation of minority struggles, sets the stage for the new approaches and analyses that follow.

In her chapter "Reasoning about Identity,"[10] Avigail Eisenberg examines the unavoidable assessment of identity claims that occurs within public institutions. She argues that the objections directed against the assessment of identity claims in public institutions such as courts and legislatures sometimes exaggerate or mischaracterize the problems associated with framing identity-based conflicts. One objection to assessing identity claims is that the interests raised are not amenable to assessment using the ordinary evidentiary standards. Eisenberg, however, notes that diverse individuals and groups, such as Jews and Muslims defending the right to slaughter animals according to religious law, have been able to explain the role of a particular practice to their culture with no shortage of evidence to justify the claim. A normative objection to the assessment of identity claims that has been raised by Jeremy Waldron is that minorities must convince others not only of the importance of a practice, but of its desirability as well.[11] Eisenberg suggests that, in fact, minorities are unlikely to argue that a particular practice is good *per se*, but that it has an importance to their community and that it does not harm others. The

7 *Ibid.* at 21.

8 *Ibid.* at 24.

9 *Ibid.* at 28.

10 "Reasoning about Identity: Canada's Distinctive Cultural Test" in *Diversity and Equality, supra* note 1, 34 [*Eisenberg*].

11 See Jeremy Waldron, "Cultural Identity and Civic Responsibility" in Will Kymlicka & Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 155.

concern of essentialism, that minorities will have to embrace a static rather than dynamic self-understanding, is equally put to rest with the reminder that often the only alternative to protecting minority practices is to opt for an essentialized notion of the state as homogenous, with laws that apply to all citizens in the same way. With respect to the objection that identity claims will heighten social conflict, Eisenberg notes that such claims are often amenable to compromise and may indeed heighten mutual recognition.

Eisenberg acknowledges the many flaws associated with the distinctive culture test created in *R. v. Van der Peet* (a case that plays a central role in various chapters in the volume). In *Van der Peet*, the Supreme Court of Canada interpreted section 35 of the Constitution, which protects Aboriginal rights, in order to assess whether Dorothy Van der Peet's conviction for selling salmon without a license was contrary to her Aboriginal right. The Court ultimately found against Van der Peet, claiming that the exchange of fish was not central to Sto:lo culture.[12] However, Eisenberg suggests, optimistically, that a benefit to assessing identity claims is that while one avenue for recognition may foreclose some opportunities, it may provide fodder for opening other opportunities. In the case of Aboriginal peoples, Eisenberg notes that participation in negotiation processes have led to successful self-government agreements. While she draws out several normative principles for the assessment of minority groups' identity claims using the distinctive culture test, she rightly concedes that Western courts and legal tests "do not provide a fair context in which the requirements of Aboriginal identity can be discussed in an equitable manner."[13]

Shauna McRanor takes perhaps the most radical approach to Aboriginal rights presented in this collection. In "The Imperative of 'Culture' in a Colonial and *de facto* Polity,"[14] McRanor confronts Will Kymlicka's contention that Aboriginal peoples are entitled to the rights of self-government but only within the liberal order.[15] This assertion, which is reflected in Canadian case law on Aboriginal rights and also implicitly in Eisenberg's chapter defending the assessment of identity based-claims, assumes, problematically, that the liberalism exemplified by the white settler state, its sovereignty, and its constitutional rights is a legitimate limit on indigenous struggles. McRanor argues that the relations of power between Canadian settlers and indigenous

12 [1996] 2 S.C.R. 507 [*Van der Peet*].

13 *Eisenberg, supra* note 8 at 50.

14 In *Diversity and Equality, supra* note 1, 54.

15 See, in particular, Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001).

people are fundamentally colonial and, thus, illegitimate. In this context (and as Vallance also contends in his chapter),[16] culture frustrates rather than facilitates indigenous freedom because it exercises a colonial imperative that marks minorities as normatively different – read inferior. The liberal commitment to the recognition of difference for Aboriginal peoples, she argues, in effect works towards the assimilation and misrecognition of those seeking emancipation. Liberal calls for cultural rights become implicated in the structures of oppression. The strength of McRanor's chapter is its potent disclosure of the unlawful existence of our polity, our complicity in this *de facto* state of being, the consequent discomfort and embarrassment it conjures and, hopefully, the possibility that it opens up for alternative Aboriginal futures.

In "Culture as a Basic Human Right,"[17] Cindy Holder proposes that understanding cultural rights as protecting and promoting an activity, as they are under international human rights norms, is more appropriate than the approach taken by multicultural theorists, whereby cultural rights have been understood as securing or maintaining a resource or good. Holder convincingly points to some problems with the latter approach to cultural rights by suggesting that, in treating culture as some *thing*, one encounters the requirement of clearly defining what a culture is. In fact, cultures may not be so easily definable; they may not have "stability, persistence of identity across time, or distinctness from other social factors that one needs to establish the requisite empirical link between a culture's persistence and individual members' consumption of the good."[18] Holder suggests that Kymlicka's definition of societal cultures and their attendant institutional and territorial conditions looks more like a justification for political rather than cultural rights. Indeed, under Kymlicka's theory, polyethnic groups do not get cultural rights per se, but rather rights to equal participation and non-discrimination.

By contrast, Holder argues that international human rights norms treat cultural rights as the rights to produce, to develop, and to participate in institutions that express or reflect the culture of one's people.[19] Claims to a specific institution are derivative of the basic right *to do something*. Thus, cultural rights are essential not because they secure the right to achieve something but because they promote participation in a shared process or activity. The international human rights approach not only ensures that cultures can continue

16 See Neil Vallance, "The Misuse of 'Culture' by the Supreme Court of Canada" in *Diversity and Equality*, *supra* note 1, 97 [*Vallance*].

17 In *Diversity and Equality*, *ibid.*, 78.

18 *Ibid.* at 87.

19 *Ibid.* at 89.

to change and evolve in significant ways, but also that cultural activities are considered fundamental irrespective of any contribution they may make. This chapter, which makes strong and novel arguments for thinking about cultural rights using an international human rights framework, provides multicultural rights theorists with much food for thought.

In "The Misuse of 'Culture' by the Supreme Court of Canada,"[20] Neil Vallance provides a very interesting analysis of how the same word — culture — can simultaneously be used to provide an expansive interpretation to a right guaranteed in the *Charter* and dramatically diminish the content of another enshrined right in a different context. The Supreme Court of Canada's decision in *Mahe v. Alberta*,[21] which interprets minority language rights in section 23 of the *Charter*, is touted worldwide for the progressive link it makes between language and cultural preservation and development. Vallance notes that although the word culture is never mentioned in section 23, the Court uses the term to "breathe life" into the section. A different approach to culture is followed in the context of section 35 of the *Constitution Act, 1982*, which states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[22] In *Van der Peet*, the Supreme Court used culture — despite the fact that there is no reference to the term in that section either — to detract from Aboriginal rights. With the "distinctive culture test," Aboriginal communities are required to prove the existence of a particular practice in their culture as a prerequisite for entitlement to rights. By contrast, in the context of minority language education, it is assumed that francophone parents seeking a separate francophone school board are naturally securing their cultural integrity. Vallance warns that an uncritical, indeed undefined, approach to the use of the term culture will contribute to further injustices.

Maneesha Deckha's "Gender, Difference, and Anti-Essentialism"[23] provides an excellent overview of the different feminist approaches to the use of cultural claims in the law. Deckha begins by distinguishing between three approaches to the use of the term culture in the law: the universalist, the post-colonial, and the differentiated. The universalist approach represents the view that cultural rights in the law should be renounced because they are dangerous to women. The post-colonial approach tolerates "cultural claims that do not essentialize, quell internal dissent, or otherwise silence internal cultural sub-

20 *Vallance, supra* note 16.
21 [1990] 1 S.C.R. 342.
22 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
23 *Supra* note 4.

alterns."[24] The differentiated approach permits legal claims based on culture so long as they do not violate the principle of anti-subordination. Relying on Drucilla Cornell's definition of "ethical feminism,"[25] a multilayered approach to equality that recognizes social actors as embodied and connected agents, Deckha argues that an intersectionalist feminist should favour a differentiated approach to cultural claims because it is the approach that permits the use of culture without enacting violence (physical or epistemic) on others. With this thoughtful beginning, Deckha tackles the difficult question of whether people who care about social justice should work to abolish "culture talk,"[26] or the use of legal claims founded on cultural equality, simply because of inevitable essentialisms that will result. In particular, the post-colonial approach is concerned with the false conceptualization of culture and its potentially dangerous consequences of encouraging only one type of behaviour. She suggests that while the post-colonial concern and its attendant consequences are important, equally important is attentiveness to political consequences such as a more egalitarian social order. Deckha's sophisticated analysis considers the many concerns associated with cultural claims in the law, but ultimately concludes that certain trade-offs may be necessary because culture, understood as a fluid concept, matters to people. Deckha sensibly argues that a little essentialism for some political gain is appropriate so long as subordination is not the result. The analysis in this chapter will undoubtedly prove useful to theorists and practitioners interested in furthering the claims of marginalized cultural groups and individuals within those groups.

In "Interpreting the Identity Claims of Young Children,"[27] Colin Macleod cautions against assuming that the accommodation of minority rights for adults will necessarily be compatible with the distinct interests of children. Macleod attempts to disrupt the commonly held assumption that the identity interests of children necessarily flow from the identity of children's parents. Indeed, after articulating a useful taxonomy of identity and non-identity related interests, Macleod comes to the conclusion that the identity-related interests of very young children are quite few. With the exception of given identity factors such as biological ancestry and genetics, infants begin life without an identity. Thus, the identity factors of religion, culture, and language are precisely the factors one cannot directly attribute to young children as they lack the capacity necessary to embrace, reject, or even appreciate such

24 *Ibid.* at 115.

25 See, *e.g.*, Drucilla Cornell, "The Doubly-Prized World: Myth, Allegory and the Feminine" (1990) 75 Cornell Law Rev. 644.

26 *Supra* note 4 at 114.

27 In *Diversity and Equality, supra* note 1, 134.

identity interests. Macleod rightly notes that we have reason to guard against the unqualified conflation of young children's and adults' identity interests, particularly when the enormous authority adults wield over children has the potential of stunting both the moral development of children and their health and welfare. Indeed, the same caution can be given to any adult interest that conflicts with those of children, such as the criminal law defence in section 43 of the *Criminal Code*,[28] which protects parents who assault their children for the purpose of correction. While Macleod remains sensitive to the claim that children may have to a *particular* environment conducive to the creation of specific cultural, religious, or linguistic identities, it is clear that the outcome of the delicate balancing of adult versus children's interests will, in some instances, be neither evident nor uncontroversial.

In "Protecting Confessions of Faith and Securing Equality of Treatment for Religious Minorities in Education,"[29] John McLaren examines the increasingly tense relationship between law and religion in the context of education. He traces the historic difficulty Canada has had in accommodating the beliefs and practices of minority religious communities, beginning in the pre-Charter era with the Mennonites, Hutterites, and Doukhobors, and continuing with the Jehovah's Witnesses. Despite the advent of the *Charter* and the entrenchment of freedom of religion in section 2(a), the author argues convincingly that an emphasis on the primacy of secular values has detracted from the broad promises of freedom of religion in the Supreme Court of Canada's seminal case *R. v. Big M Drug Mart Ltd.*, [30] which struck down Sunday-closing laws in the *Lord's Day Act* as a violation of section 2(a) of the *Charter*. Rather than extending to other religious minorities the constitutional right to funded religious education that is provided to Roman Catholics by section 93 of the *Constitution Act, 1867*,[31] the Supreme Court in *Adler v. Ontario*[32] simply described the exceptional, historic, and non-extendable nature of section 93. This decision has been criticized even by the United Nations Human Rights Committee in the *Waldman* decision,[33] wherein individuals from the Sikh, Hindu, Muslim and Jewish faiths challenged the provisions of full funding for religious schools exclusively to Roman Catholics, thereby discriminating

28 R.S.C. 1985, c. C-46, s. 43.

29 John McLaren, "Protecting Confessions of Faith and Securing Equality of Treatment for Religious Minorities in Education" in *Diversity and Equality, supra* note 1, 153.

30 [1985] 1 S.C.R. 295.

31 (U.K.), 30 & 31 Vict., c. 3, s. 93, reprinted in R.S.C. 1985, App. II, No. 5.

32 [1996] 3 S.C.R. 609.

33 *Waldman v. Canada*, Communication No 694/1996, 3 November 1999, CCPR/C/67/D/694/1996.

against all other faiths. The Committee noted that Canada had violated its international obligation to protect religious minorities per the *International Convenant on Civil and Political Rights*.[34] McLaren is attentive to the diminished vision of religion that is promoted with the Supreme Court's pronouncement that education is a purely secular benefit. Indeed, he appropriately questions the view that a secular viewpoint is a neutral one. While conscious of some of the risks associated with acknowledging religious diversity in education, this chapter is important for its contribution to the literature encouraging Canadians to take the rights of religious minorities seriously and to accept that religion can be a source of social justice and humanitarianism.

Also addressing freedom of religion, Jeremy Webber's "The Irreducibly Religious Content of Religious Freedom"[35] explores the problems inherent in a secularized definition of freedom of religion. Webber explains that "the state cannot be indifferent to the value of religious commitment without departing substantially from the very idea of protecting religious freedom."[36] Webber cogently supports an emphasis on *religion* — rather than *freedom* — in the concept "freedom of religion." In particular, he argues that the distinctive value of religious belief makes it impossible to treat religious and secular beliefs identically because freedom of religion is not simply about the general capacity to choose. Webber's arguments are in stark contrast to the views put forth by such liberal theorists as Amy Gutmann, who responds negatively to the question: "Is religious identity special?"[37] Webber provokes one to think differently about religion, about neutrality, and about difference. He does not offer any conclusive answers, which he sees as impossible because religious beliefs are often inaccessible to non-believers, embedded within cultural discourses, and so heterogeneous both within and between religious groups. However, he wisely indicates that the extension of respect will involve a dynamic process where "conclusions . . . are always subject to future reconsideration, rejection, and refinement."[38]

The contribution of this collection is manifold. It presents specific Canadian conflicts concerning minority rights with sensitivity and particularity such that one can abstract broad, valuable principles as well as lessons for further theoretical and practical work in this area, locally and globally. While being committed to the importance of religious, linguistic, cultural,

34 (19 December 1966), 999 U.N.T.S. 171, 1976 Can. T.S. No. 47.

35 In *Diversity and Equality*, *supra* note 1, 178 [*Webber*].

36 *Ibid.*

37 Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003) at 151.

38 *Webber*, *supra* note 35 at 193.

and other minority rights, the scholars in this collection complicate but do not confuse the difficult, seemingly inconsistent, and undoubtedly variegated terrain of multiculturalism. Equality and diversity are flexibly understood as concepts that are sometimes in opposition, that sometimes overlap, and that sometimes find agreement. This book does not offer easy solutions to convoluted and arduous issues upon which disagreement is certain. Often, however, it offers strategies or methods of inquiry to approach the intricate balancing that must occur in a pluralistic society such as ours. It is these considered attempts at embarking upon these tricky matters, while remaining sensitive to the concerns of marginalized groups and vulnerable individuals that must be celebrated.