CONSTITUTIONAL CULTURAL RIGHTS

Abstract

Cultural rights along with economic and social rights have been considered within the same category as positive rights which the state is held responsible for their fulfillment. Contrary to this approach, in this paper, I argue that the cultural rights must be immune to the state interference. To this aim, I try to construct a framework to analyze whether it provides a solution to prevent governments from intervention to cultural domain and to consolidate cultural rights for both majorities and minorities. So, the main question is: What is the required strategy to avoid cultural conflicts and to reach an acceptable constitution agreed by every member of society who has different identities and cultural belongings? Thus, this paper tries to prove that there is a meaningful purpose to find a strategy to avoid conflicts by reanalyzing cultural domain through instrumental rationality.

Keywords: Cultural rights, instrumental rationality, constitution, conflicts

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ANAYASAL KÜLTÜREL HAKLAR

Öz

Kültürel haklar, ekonomik ve sosyal haklarla beraber uygulanmasından devletin sorumlu kabul edildiği pozitif haklar kategorisinde değerlendirilir. Bu yaklaşıma karşı, bu makalede, kültürel hakların devlet müdahalesinden muaf olması gerektiğini iddia edeceğim. Bu amaca binaen, devletlerin kültürel alana müdahalesini engelleyen, kültürel hakları hem çoğunluk hem de azınlıklar için daha güçlü hale getirecek bir çözümü analiz edildiği bir çerçeve oluşturmaya çalışacağım. Şu halde, asıl soru şudur: kültürel çatışmalardan uzak kalabilmek, farklı kimlik ve kültürel aydınlatmaların tasa kurabilme ve kültürel anayasal önemle sahip tüm bireylerin tasdik edebileceği bir anayasaya sahip olabilmek için gerekli strateji ne olmalıdır? Böylece, bu çalışma, çatışmalardan kurtulabilmek için kültür alanı araçsal rasyonalite ile yeniden analiz etmenin anlamlı bir amacı olduğunu göstermeye çalışmaktadır.

Anahtar kelimeler: Kültürel haklar, araçsal rasyonalite, anayasa, çatışmalar

Introduction

Each demand, each claim and each argument concerning culture and identity necessarily entangle itself with political power and power relations. Global and local dynamics show that the political aspects of culture and cultural rights cannot be easily dismissed or disregarded and they have a high rate of survival and come back. But looking culture and cultural rights with the political and legal spectacles solves as much problem about culture as it creates. We need a new approach not necessarily non-political or non-legal, but receives its legitimacy beyond these domains.

Instrumental rationality used in the fields of politics and culture poses two premises that have led to both optimistic and pessimistic predictions about actors and structures, including behavior of rational individuals. Rational actors calculate their benefits, decide and act accordingly but, most of the time the conclusion paradoxically ends up in failure almost in every field. Not only ordinary people but also politicians fail and their failures have been exacerbated by emerging conflicts at different levels. These conflicts in the end prevent political systems to deliver the commitments the politicians have made. I assume that in order to deal successfully with these failures some normative implications for behavior of the individuals are required through the investigation of constitutional framework. The issue of constitution may be seen as lying outside scope of immediate philosophical interest like culture and identity. This would be a mistake since law is not a closed system from the normative point of view and philosophy has a lot to offer to the normative aspects of the legal concepts. In addition, the basic concepts of jurisprudence such as justice, equality and impartiality are so old philosophical questions that many philosophers were caught in a bid to explain them throughout the history of philosophy (Rosenfeld, 2014:1).
In recent decades, the need to revise and to reform the policies concerning culture and cultural rights has gained urgency (Adanali, 2011). This need urges us to look for a comprehensive perspective about the relation between culture and politics and to figure out the impact of the policies on daily life of the citizens. The lack of a rationality approach towards culture, cultural rights and state institutions is the most important aspect that we need to focus on. Most liberal theories, in dealing with rights issues have emphasized their social and economic aspects. It is my belief that culture, cultural rights and their relation to political structures and institutions are the issues that require our immediate attention in terms of rational choice, decision, benefits and costs. With this in mind, I will be proposing the constitutional cultural rights as possible alternative to culture policy.

1. Culture and Constitutions

There is a twofold relationship between constitutions and cultural identity that can be drawn from the debates in political philosophy: [1] cultural identity as framework and [2] cultural identity as content of constitutions.

With regard to [1], it is assumed that nearly every constitution is framed by a specific identity and culture of a nation. Namely, the articles of the constitutions are identity-based and expected to be compatible with the approved principles of culture and identity of a given society since the constitutions are constructed “to institutionalize the spirit of the traditions, values, institutions, and the founding revolution of a particular people” (Preuss, 1991). This framework defines citizenship as based on cultural similarities in one territory. In this sense, most people find it difficult to create a constitution for a society without determining a specific national identity, which is believed that it is necessary to unify diverse populations (Frede, 2005:170).

Aristotle’s considerations about the relation between identity and constitution can be evaluated under [1]. When he searches as to the essence of a state, he focuses on the identity of constitution. The constitution, politeia, as defined by most ancient philosophers, is the body of rules to govern a state, but not necessarily includes the rights and constraints of citizens and governments, as opposed to modern constitutions. Aristotle follows this idea of his era and claims that constitution determines the identity of state as “a way of organizing the inhabitants of a city” (1995: 1274b32). In fact, the relationship between constitution and identity is coexists for him, since while constitution design the identity of the individual, the individual is included in the community as a supporter for the continuation of the system. He notes, “a polis or state belongs to the order of ‘compounds’, in the same way as all other things which form a single ‘whole’, but a ‘whole’ composed, none the less, of a number of parts. This being the case, it clearly follows that we must inquire into the nature of the citizen [i.e. the part] before inquiring into the nature of the state. In other words, a state is a compound made up of citizens” (1995: 1274b- 1275a). In addition, if the individuals fail to follow the principles in the constitution or the principles are unsatisfactorily assembled, then the social system from individual to the government will be devastating. That is why Aristotle believes that individuals achieve their potential in the political domain. However, the standpoints of instrumental rationality in politics and Aristotelian politics differ in terms of defining politics. While Aristotle considers politics as the possibility of the highest virtue, fairness, and common good that brings eudemonia, the former regards political domain as the possibility of the conflict without fair rules.
The second relation is the culture and identity as content of constitutions [2], which I will engage mostly in this article. Including the principles of national culture and identities, constitutions rely on the capability of individuals to live and to follow these principles by generating territorial integrity as a nation. In addition, constitutions entail capacity of government to safeguard and promote these activities by allocating budget and giving technical support when it is needed. So, the inclusion of these principles in the constitutions assumes both individuals and government entails some reciprocal duties, if they want to build a nation. For some scholars, this reciprocal relation provides the following advantages: the imposition of broad obligations on government to give effect to cultural rights in its policy-making; or provision of applicants whose cultural rights are not being given effect to; or makes it clear that cultural rights and civil and political rights are of equal status and importance (Nolan, 2014: 61-93).

However, the concerns, for others, are more serious than advantages. One of them is whether this inclusion aims for a realization of a homogenous nation, which seems far from reality of today’s world. In that sense, some constitutions express themselves as formal documents to determine the constraints and practices of the institutions and identify citizens homogeneously with their social and cultural features. In other words, the modern national constitution makers suggest that as if individuals come from same ethnos pre-constitutionally in the state of nature and then decide to form a government. In fact, the homogenized constitution makers do not interested in the discussions of source of culture and identity but they just presuppose that if people form a government they have same ancestry. This kind of essentialism primarily aims to protect presupposed national characteristics and symbolic features through constitutions. However, Habermasian procedural constitution, contrary to this homogenized version, tries to overcome diversities of culture and identity through communicative actions. Habermas’ alternative view, *procedural constitution*, “does not refer to the substantive generality of a popular will that would owe its unity to a prior homogeneity of descent or form of life. The consensus fought for and achieved in an association of free and equal persons ultimately rests only on the unity of a procedure to which all consent” (Habermas, 1995:496).

All these considerations create an expectation that a fair constitution should be identified with three principles: limited government, adherence to the rule of law and to separation of powers, and protection of basic rights. While acknowledging these principles’ vitality, the following paragraphs aim to add the determination of cultural rights. However, this does not mean that we fix cultural domain through constitutional constraints, rather, there are undeniable examples that opinions differ as to appropriate behavior, or customs and cultural elements, which members of the group have achieved consensus, are subject to change over time (Roback, 1989: 665). Then the goal of this discussion is to determine the restriction on the players and the rules of the game for the distribution of power among governmental institutions and individuals fairly in cultural domain.

### 2- Cultural rights in the international documents

After briefly reviewing the relationship between culture and constitution, I would like to emphasize on international documents as one of the main framework of national constitutions. Cultural rights are taken for granted in international documents as positive rights similar to social and economic rights. The classification of rights as negative and positive is one of the
most commonly debated topics in the modern political philosophy; but rather than getting into this debate, I focus on Berlin’s dichotomy of positive and negative rights with cultural rights in mind. The philosophical basis of negative rights view denies the state the permission to limit individual rights, and the view has its roots in the natural rights theory of the medieval ages. According to the natural rights theory, the individuals, independently of the space, time, and social relations or status, have rights that are universal and unchanging. The basic assumption of the negative rights is the idea that each person knows his or her interests best, and the state should not determine what rights and liberties the individuals have. Those who support the negative rights view argue that the scope of individual liberty decreases when the space of the individual preferences narrows (Barry, 1989:225-232). We find a similar definition of negative rights in Frederic Bastiat’s classical book *The Law*. He notes, “it is not true that the function of law is to regulate our consciences, our ideas, our wills, our education, our opinions, our work, our trade, our talents, or our pleasures. The function of law is to protect the free exercise of these rights, and to prevent any person from interfering with the free exercise of these same rights by any other person” (1998: 68). Then the negative rights theory claims that the natural rights precede the formation of state, and that the state cannot interfere with these rights; the best it can do is to recognize them and take necessary measures for their protection and proper application. No reason or explanation can be provided by the state to justify the removal of the natural rights. The sole responsibility of the state is to guarantee negative rights and freedoms, and prepare the conditions in which these rights were cherished by the citizens. The state is expected and held responsible to solve the contradictions and conflicts that may arise from the exercise of these rights. Thus, while the individual has an unlimited negative status freedom, the state interference is limited and open to scrutiny.

However, I believe that there is a deeper problem that underlies the classical negative-positive rights division; it is the state interference that is accepted as legitimate with regard to positive rights. It is not realistic to argue that the state should interfere with rights. But, to give priority to positive rights, particularly during the economically and financially difficult times would imply that the biggest obstacle in front of the cultural rights is economic. This open the way a series of problems that emerge in the domain of rights such as political bargaining, free riding, political failure, and so on. There is no reason why similar problems should not arise in the domain of culture and cultural rights if the state is given the right to interfere and it is seen as the guardian of the cultural rights. Therefore, starting from the classification of Berlin, if we consider cultural rights as the positive ones, we allow all kinds of the state intervention for the fulfillment of attain these rights. In brief, the pervasive tendency has been to classify economic, social and cultural rights along with positive rights, rather than with negative ones. According to this understanding, it is the responsibility of the state to regulate rights, positive or negative, and to promote public good through their proper application. This is just the theoretical framework that leads to think cultural rights as positive ones; but this is not the only reason. I think international documents and conventions encourage states to classify cultural rights with social and economic rights. Therefore, an explanation why cultural rights are categorized along with the positive rights is that the confusion and ambiguity that inflict the concepts culture and cultural rights have not be clarified to the satisfaction of all in the international legal documents and laws that are drafted in accordance with these documents.

Universal Declaration of Human Rights is perhaps the most important document that makes reference to culture and cultural rights (UDHR, 1948), along with International Covenant
on Economic, Social and Cultural Rights (ICESCR, 1966), and International Covenant on Civil and Political Rights (ICCPR, 1966). Of course, no one denies that these documents that are the subject matter of international law and international relations have important political and social consequences. It is also true that the organizations or institutes that have been formed within the framework of United Nations and European Consul have been instrumental in creating an international awareness with regard to these rights and their implementation. The international law that was formulated around these documents has become a powerful institution that limits the absolute power of the states. In other words, membership in the international institutions and ratification of the international legal documents are signs of self-restrain by the states over a number of areas.

Nevertheless, the conceptual complexity of the terms culture and cultural rights in these international documents indicate that confusions still persist at the level of the states, and national and international organizations. This complexity and confusion provides us an opportunity for questioning whether these international documents and covenants are able to meet their promises with regard to eradicating conflicts and ameliorating injustices in the sphere of rights. For example, according to the article 27 of the UDHR which include both positive and negative rights, the rights of the individuals can be listed as follows:

[i] Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

[ii] Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

[iii] Everyone has a right to participate freely in the cultural life of the society, enjoy art and share the benefits of scientific progress and its advantages.

According to the Declaration, the states are responsible for providing certain opportunities that facilitate the participation of the society in cultural life, to put the new technologies to the service of the citizens, to provide financial support for the cultural and artistic activities and programs. The fact that the states are held responsible by the Declaration for these tasks is a clear indication that the document considers these rights as positive rights. But the tasks that are placed on the states also legitimize the interference with regard to cultural rights.

Furthermore, it is not clear what “to participate in the cultural life” as a right means. The article does not also make it clear whether everyone has a right to participate in the cultural life of his or her own community or in a homogeneous culture which is open to everyone. Moreover, the article 27 mentioned above disregards the fact that an individual has also a right not to participate in the majority culture. In short, the Declaration assumes an outdated division which I believe invalid with regard to rights discourse, and at the same time, it does not clarify the concepts that it makes reference to in way that would avoid misunderstanding (Künnemann, 1995:323-342).

Another international document that makes reference to the cultural rights is the ICESCR. This document has a similar approach to the rights as UHRD did. According to the article 15, the countries that ratify the covenant recognize “the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. The countries that are party to the covenant are
responsible to put the necessary steps to protect the culture” (O’Keefe, 1998:907). The document however is silent on what these necessary steps are. In any case, it is clear that the document sees cultures within the domain of positive rights by holding states responsible for their protection, preservation and giving permission for interference as the states see it fit.

Another international document is the ICCPR differs from other documents in its emphasis on the rights of minorities. According to the article 27 of the agreement, “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” This article emphasizes securing the group rights rather than the cultural rights of the individuals, and at first sight seems that it differs from the other two documents mentioned above in its treatment of rights at the level of the individual (Dyke,1980:2). This can be seen from the rest of the article that makes a reference to the cultural rights as more personal or individual level: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The new documents and further developments, however, did not prevent a series of discussions around the complexity and ambiguity the documents creates (Künnemann,1995:328). It remains today one of the thorny questions in academic debates whether culture is to be considered as group or individual right.

The main problem with the international agreements is the tacit assumption of a political structure for rights and freedoms within the framework of positive rights and to think that these rights can only be realized by the state and that they cannot exist prior to or outside of the state. This view may be extended to the economic and social rights that are generally included among the positive rights; such political structure which is assumed by these documents, however, may open the door to a theory of state whose roots goes back to Aristotle as in the sense of [1]. The same understanding tax the state with an infinite number of duties ranging from protecting its citizens, guiding them towards good and useful ends, to rewarding and punishing them.

Another important shortcoming which is implicit in these documents concerning the state and positive rights is pointed out by Ayn Rand. According to Rand, to demand positive rights from the state implies that the state must reallocate by force the resources of a specific group to other groups. The redistribution of resources by force, according to her, disturbs a very basic value of rights, that is, the lack of coercion. Hayek following a similar line arguments that liberty is to act freely without being coerced by others. He believes that the state is the means to serve to protect freedom, not to create insurmountable difficulties concerning the enjoyment of rights. Any interference on behalf of the state to the cultural domain will provide further support to a policy for a homogenizing culture. Though homogeneous culture is not a necessary result of the state interference, homogenous cultural policies are preferred because of their instrumental value for facilitating the governance and for strengthening the political power. However, as Dembour argues that state intervention serves the opposite of its aims: it disenfranchises the individuals from their basic human rights and freedoms. For example, it is left to the state entirely to decide whether a person is an economic immigrant or a political asylum seeker. Also left to the state is the right to interpret how the rules and regulations will be applied to the political asylum seekers. It is safe to say that human rights are thought to be applicable within the limits of criteria that each state determines (Baumann, 1999:5-15). All these problems stem
from the misplacing cultural rights along with positive rights. So my conclusion is that in order to avoid the problems, it would be better to consider cultural rights as negative rights in constitutions, differing from the traditional understanding.

3- Costs of culture and identity

Before presenting my framework for the constitutional cultural rights, I have to focus on what individuals, groups, and government have to pay for culture and identity from the perspective of instrumental rationality; since it provides a more realistic picture of the cultural domain we face. Although it is certainly worth noting that shared culture and identity bring benefits such as satisfaction motivation, feeling safe and secure communication, the costs, as neglected aspect of cultural domain, are need to be analyzed to explain cultural behaviors correctly.

It is generally assumed that culture and identity, as sources of both private and collective goods, produce satisfaction to individuals who pay for it. What people have to pay for this satisfaction? The challenge in answering to this question is to find a Pareto optimum strategy; that is, one player can be better off without worsening other players (Roback, 1989:662). Before facing this challenge, I would like to explain more specifically what the costs of culture and identity that all rational actors have to pay to a certain extent. With this aim, I will mention some examples of costs arising from the following type of relations individual-group, individual-government, individual-individual, group-group and government itself.

First of all, almost all individuals start to pay for culture and identity from the moment they are born. They are supposed to obey cultural norms and rules if they want to build social networks or if they choose living in a familiar environment. This can be named cost of avoiding social alienation. This is the significant cost that individuals are supposed to pay in accordance with their choices, since a pre-existing model not only provides easily accessible alternatives but also strictly limits them. How this pre-existing nature of culture encompasses is evident in the following quote:

It structures and shapes the individual’s personality and gives it content or identity. Culture embeds an individual within, and makes him or her identify with, a particular group of people… In addition, every culture is also a system of regulation. It approves or disapproves of certain forms of behavior and ways of life, prescribes rules and norms governing human relations and activities, and enforces these by means of reward and punishment (Parekh, 2000:156).

If culture and identity, pre-existing and determined, are promoted and embarked on individuals by governments through constitutions, then the costs would be heavy for them. Labeling as rebellious among the others would not be hard unless one does follow the determined principles of the constitution. In other words, “those who fell on the wrong side of the identity boundary were in perpetual danger of being invaded, expelled, enslaved, carpet-bombed, or exterminated in camps” (Isiksel, 2010). This kind of constitution mostly is created by modern states to reflect the specific characteristics, aspirations, and homogeneity of the society. Hannah Arendt describes the situation “as conquest of the state by the nation,” (Arendt, 1946:138-141) since, for her, while a nation is a closed society, state is an open society in terms.
of nationalities of citizens. Whoever wants to live on soil of state, its legal order is open to them (Beiner, 2002: 44-62).

Not only discriminatory constitutional rules forced by governments but also cultural discriminations between individuals are costly behaviors (Ulusoy, 2016: 318). Usually people believe that if they do not contact with “strangers,” they would be gainers in terms of security. Becker exemplifies this as following: “An employer may refuse to hire Negroes solely because he erroneously underestimates their economic efficiency. His behavior is discriminatory not because he is prejudiced against them but because he is ignorant of their true efficiency” (Becker, 1971: 16). However, if the members of society trust and cooperate each other, social and economic relations will operate efficiently and individuals will exchange their benefits with a broad group of people to make more. Otherwise, the exchange and transactions will be more costly since additional effort need to be made to ensure safety.

Further, governments pay costs for their decisions regarding culture and identity. First, recognizing cultural autonomous of minorities at governmental level is costly, because the existence of different identities in a nation cause limitations to develop a uniform and common identity to control majorities. If these recognized cultural groups support the ruling party, governance in multicultural nations will be more difficult. Specifically, since the party prepares its program to reward its supporters, this brings a considerable confusion about the performances of government. Affirmative action policy, for disadvantaged groups and minorities, is another difficulty for governance, even if this policy is strongly supported by major decision-making mechanisms. Recognizing other ethnic and cultural groups also requires compromise from other members of the society, because it limits some projects and policies that can be beneficial for all, i.e. developing intercultural dialogue may seem risky for small cultural groups. Mostly these attempts are precluded by minorities on the grounds that they have risk of losing their characteristics (Preiss, 2011:143). Second, at the level of majority, implementing a national cultural policy documents cause overspending of government for cultural activities instead of private sectors. In these documents, governments commit themselves to facilitate cultural developments and promote national heritage, tourism, art, craft and other cultural activities through national or local activities for majority. All these commitments aim for building a nation around one culture and identity. Governments allocate a certain budget increasingly to officers, ministries, NGO’s and private sectors every year. If these commitments are implemented in a multicultural society, then the difficulty of providing common goods for all keeps increasing.

Here I have briefly mentioned different types of costs caused by cultural actors. These costs can be classified as micro level costs. But the risk of tyranny of majority as cost of the cultural domain is more complicated. Instrumental rationality in politics demonstrates us there is a risk of tyranny of the majority, resulting from the failure of converting individual’s rational preferences to collective decisions even in democratic governances.

One case would be that individuals having similar cultural identity may prefer to behave in a similar way to avoid the costs of social alienation. Even if instrumental rationality obliges the utility maximization and defection for individuals rather than cooperation, people may choose to collaborate for their self-interest by experiencing iterative games. They may consider that collective action generates more benefits that may not be provided by atomic individuals’ acts. If those people constitute majority and decide to behave in a similar way as a block, for
example in an election, in order to shape political structure according to their desires, then this may create a threat of *majority rule* in divided opinions as clarified by Elster.

They are complicated, however, by another basic fact of political life: Even when groups act to promote their interest, they tend to argue publicly in terms of impartial values. When large parties argue for majority voting, they do not refer to the interests of large parties but to the interest of the country in having a stable government. Conversely, small parties arguing for proportional elections do not refer to the interests of small parties but to the values of democracy and broad representation. Parties with a strong presidential candidate regularly argue in terms of the country’s need for a strong executive. Other parties refer instead to the dangers of a strong executive (Elster, 1995:365).

In this quote, Elster draws attention to another neglected point, that is, the intertwining nature of having status of majority and using public good argument to keep power. Although, in the literature of culture and identity, minorities and cultural groups are accepted as the main controversial issues and the debates are revolves around how minorities and groups are managed or how they integrated, our discussion shows that the problematic issue is the majority which carries a possible threat to democracy. This threat requires an explanation about which is owner of the cultural rights: collectivities or individuals.

The common view suggests that cultural rights are group rights by declaring that only members of cultural groups possess cultural rights. In other words, this view implies that cultural rights can be obtained and identities can be sustained only through the activities of cultural groups. Today, national and international institutions seem more akin to this view and open to negotiate the rights with groups and their representatives. In addition, under the name of freedom, multiculturalism and diversity, cultural groups are encouraged to get their autonomy, presupposing all individuals in the group commit themselves to same principles forever. Or, governments are supposed to exempt autonomous groups from certain laws and to provide them funds for their cultural activities (Preiss, 2011:142). However, when we ask philosophically what the sources of these rights are and what are the normative justifications to assume cultural rights as group rights, it is not easy to find answer.

One approach argues that individuals identify themselves with a group and its norms voluntarily, because of their inclination to socialization. Accordingly, they choose to live together to feel safe. Cultural groups, in this regard, are inseparable parts of society through which individuals are socialized and associated. But, this approach still fails to give answer we are looking for, since it is not convincing about the reason why we have to accept a kind of rights, namely cultural rights, as a group right. Unfortunately, the anthropological and sociological literature as to culture and identity is not so helpful too. The researchers of the literature provide detailed singular cases to understand the diverse societies and different ways of life. However, while they interpret particular cases, they avoid introducing general explanations from a singular instance to the set of instances (Lichbach & Zuckerman, 1997:7). So, they fail to satisfy for giving reasons to explain why cultural rights are accepted as group rights.

When we look from perspective of philosophy to the issue, two problems appear; one is irrationality and the other is in/out discriminations. The first problem arises from irrationality of considering cultural rights as inseparable from collectivities. Although people act individually
rational, the collective outcomes subject to be irrational without appropriate rules and constraints. That is, the idea “that individual interest equals collective action or that collective action necessarily produces a collective good” is just a myth (Levi, 1997: 20). The second problem of considering cultural rights as group rights brings out two different kinds of discriminations: in-group and out-group. In-group discriminations can empirically be exampled as discriminatory behaviors against those who do not want to follow cultural principles of the group even if they are members, or against women those who are traditionally situated at the low-level positions, or against children etc. What makes these examples controversial is that the tendency of thinking that everything in the culture is valuable and worth preserving for next generations. In the case of women circumcision, for example, defending this practice as a cultural norm and ensure its continuity by safeguarding measures need to be examined in terms of individual rights not group rights (Bicchieri & Marini, 2015).

Out-group discriminations are more obvious than in-group, since when a cultural group obtains its autonomy with rights and privileges, the world turns into black vs white, or us vs. other for the group. The group constitutes itself in opposition to the other. Thus, while giving cultural rights to a group aspires to pave the way for freedom of expression and democracy, it ends up with discrimination. This situation is increasingly sharpened by the fact that if a group wins its cultural rights after a negotiation process. Further, if the process succeeds and after a while if this group achieves to be majority and deserves to build a nation, then probably it will use various governmental tools to support, enhance and promote cultural practices of majority in line with the supposedly “desire of majority.” As long as the majority is increasingly supported, other groups will be restricted and outlawed, pushing them to be unwelcome minorities.

As a result, there is a need to inspect the cultural domain to be consistent that requires us to recognize cultural rights without in-group or out-group discriminations. Further, it also is required that given cultural rights have to contribute equilibrium among different members, identities and cultures to avoid danger of majority’ potential irrationality. So, a constitutional intervention to restrain these kinds of practices cannot be called as disobeying cultural rights. Rather, there are good reasons to consider constraints for cultural behaviors of actors.

4- **Constitutional Cultural Rights: A Framework**

Now I will outline the main principles of the theory of constitutional cultural rights within the light of what we have been discussing so far in terms of the instrumental rationality and cultural rights. The theory of constitutional cultural rights should be based on the following features:

**[i]** *Each individual has cultural rights*, since culture is a right as an integral part of his or her identity and personhood. To say that a person has a right is to claim that he or she is a moral, responsible person with a capacity to make preferences convenient for herself.

**[ii]** *Cultural rights are individual rights* and they are justified on the basis of individual interests and preferences. Despite some arguments to the effect that individual rights can only be realized within a group or society, I insist that a space of freedom,
individual rational decision making, free will are as necessary as a cultural context in which the individuals can exercise their cultural rights (Oestreich, 1999:117).

[iii] Cultural rights should be classified along with the negative rights and can only be restricted with the rules upon which there is a consensus. Rules determine the sphere of the individual rights and freedoms in social life thereby prevents the state violating this sphere. Culture and cultural rights must be set clearly in a framework against the violation of the individual rights and interests.

[iv] Culture is not something that has a specific fixed essence that is unchangeable, outside the space and time. On the contrary, culture and cultural identity are historically constructed social realities that undergo continual change in accordance with individuals’ choices. Since cultural identities are socially constructed, and individually chosen and adopted, the demands concerning the cultural rights cannot be suppressed or ignored with the intention of creating a homogenous society.

[v] The state as a matter of principle must restrain itself from interfering in the cultural space as it was the case with the negative rights, and it should accept cultural rights within the category of negative rights. I do not argue, however, that culture and cultural rights have a universal and unchanging content. What I believe is that culture and cultural rights should be a matter of preference at the level of individual rationality and liberty and that political structures are responsible for preparing the ground on which the individuals make rational and free preferences.

[vi] Above considerations imply taking some measures through constitutions to prevent politicization of culture and identity. The following measures included in the constitutions are supposed to accept voluntarily by all members (Kyriacou, 2005: 23-42).

- Decentralization of collective decision making,
- Regulating the redistribution from one cultural group to the poorer groups,
- Providing access for all members of society to resources and markets,
- Reducing cultural conflicts.

Conclusion

In this paper my overall aim was to develop a comprehensive and rational theoretical model to the issue of cultural rights which can be applicable to policy making. To this aim, I proposed that the individual decision making processes and instrumental rationality with regard to cultural rights need to be closely studied and analyzed in order to understand the cultural domain and its conflicts as political processes. Without the proper understanding of the individual needs and behaviors which underlie the social and political processes, the suggested solutions would only be temporary. For this reason, first the state must take a neutral stance with regard to cultural rights and assume the role of a mediator; only then, it can bring the representatives of all sides over a communicative platform where the dynamics of the conflicts can be analyzed and overcome. We can only hope afterwards that at the end of this process, the
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deep causes of the cultural conflicts can be understood, and redefined, and the image of the other as the enemy may be rehabilitated, and finally the mutual trust can be rebuild.

I also argued that majority of the collective or group rights that the national and international documents include can be seen as rights that the members of the group can participate in or rights that represent the interest of their members rather than rights that belongs directly and specifically to the group itself. And in that sense, cultural rights are not totally different than the individual rights. Rather, it is more appropriate to interpret identity, culture and cultural rights as the product of the individual preferences. Otherwise, the feeling and fear of alienation, not having a social status, not having a voice, being unable to influence the common decision making processes and common destiny, not being able to produce a new socio-cultural production would make people incline towards specific political and legal regulations. These inclinations and demands are political in essence and create conflicts difficult to solve. Therefore, overall, I assumed that the relations between individuals, states, and institutions in terms of cultural rights should be revised in a constitutional base.

REFERENCES


