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Forms of Liberalism*

Introduction

In my exposition, I would like to compare with each other different positions and interpretations concerning liberalism. In particular, I shall concentrate on the following authors:

Doriane Lambelet Coleman: Professor of Law at Duke Law School, Durham, North Carolina; Works: Individualizing Justice through Multiculturalism. *The Liberal's Dilemma* (Columbia Law Review, Vol. 96, No. 5, (Jun., 1996), pp. 1093-1167); *The Seattle Compromise: Multicultural Sensitivity and Americanization* (Duke Law Journal, Vol. 47, No.4, (Feb., 1998), pp. 717-783).

Will Kymlicka (1962-): Professor of Philosophy and Canada Research Chair in Political Philosophy at Queen's University at Kingston; Works: *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford 1995); *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford 1998); *Politics in the Vernacular: Nationalism, Multiculturalism, Citizenship* (Oxford 2001).

Chandran Kukathas (1957-): Teaching at the London School of Economics. Works: *Cultural Toleration* (1997); *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford 2003).

Brian Barry (1936-2009): Teaching at the Universities of Birmingham, Keele, Southampton, Essex. Works: *Theories of Justice* (Berkeley 1989); *Culture & Equality: An Egalitarian Critique of Multiculturalism* (2001).

The texts I shall take into consideration are mainly the following ones:

Barry, B., *Culture and Equality. An Egalitarian Critique of Multiculturalism*, Cambridge, UK, 2001.

Coleman, D.L., *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, in: *Columbia Law Review*, Vol. 96, No. 5 (Jun., 1996), pp. 1093-1167.

Kukathas, Ch., *Cultural Toleration*, in: *Ethnicity and Group Rights*. Edited by I. Shapiro and W. Kymlicka, New York and London 1997, pp. 69-104.

Kukathas, Ch., *The Liberal Archipelago*, Oxford, 2003.

Kymlicka, W., *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Oxford 1995.

Positions of Kymlicka: compatibility between liberalism and multiculturalism

I shall begin my exposition with the analysis of some positions of Will Kymlicka. The position of Kymlicka can give us the notion of the limits of only individual rights and can describe how group rights can be considered as an extension of individual rights.

* I am already working on this draft: therefore, up to the Congress in Lucerne I shall add modifications.

“Traditional human rights standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities: which languages should be recognized in the parliaments, bureaucracies, and courts? Should each ethnic or national group have publicly funded education in its mother tongue? Should internal boundaries (legislative districts, provinces, states) be drawn so that cultural minorities form a majority within a local region? Should governmental powers be devolved from the central level to more local or regional levels controlled by particular minorities, particularly on culturally sensitive issues of immigration, communication, and education? Should political offices be distributed in accordance with a principle of national or ethnic proportionality? Should the traditional homelands of indigenous peoples be reserved for their benefit, and so protected from encroachment by settlers and resource developers? What are the responsibilities of minorities to integrate? What degree of cultural integration can be required of immigrants and refugees before they acquire citizenship?”¹

Kymlicka points out that the tradition of the individual rights cannot help us as regards certain problems. For instance, the tradition of individual rights cannot give us any answer as to the following points:

- Recognition of languages.
- Subvention for groups.
- Making internal borders.
- Devolution of power to regions.
- Distribution of offices.
- Reservation of homelands.
- Responsibility of minorities towards integration.
- Degrees of cultural integration necessary for immigrants to become citizens.

“The problem is not that traditional human rights doctrines give us the wrong answer to these questions. It is rather that they often give no answer at all. The right to free speech does not tell us what an appropriate language policy is; the right to vote does not tell us how political boundaries should be drawn, or how powers should be distributed between levels of government; the right to mobility does not tell us what an appropriate immigration and naturalization policy is.” (5)

The right to free speech cannot give us elements in order to establish how the language policy in a country should be organized. The right to vote let us alone when it deals with establishing the drawing of political boundaries, and how powers have to be distributed between levels of government. Mobility right does not help us when it is necessary to determine an appropriate immigration and an appropriate naturalization policy.

“Special group representation rights within the political institutions of the larger society make it less likely that a national or ethnic minority will be ignored on decisions that are made on a country-wide basis.

Self-government rights devolve powers to smaller political units, so that a national minority cannot be outvoted or outbid by the majority on decisions that are of particular importance to their culture, such as issues of education, immigration, resource development, language, and family law.

¹ See “Multicultural Citizenship. A Liberal Theory of Minority Rights”, pag. 5.

Polyethnic rights protect specific religious and cultural practices which might not be adequately supported through the market (e.g. funding immigrant language programmes or arts groups), or which are disadvantaged (often unintentionally) by existing legislation (e.g. exemptions from Sunday closing legislation or dress codes that conflict with religious beliefs).²

- Representation rights conceded to a minority will hinder that a minority is not taken into consideration if the decision that are to be taken regard the minority too. Group rights are a kind of trump that minority can have in relation to majorities.
- The right to self-government a national minority from being outvoted or from being outbid by a majority when the questions to be decided regard the minority itself, such as the culture, the education, the language and so on. Here too group rights are a kind of trump that minority have in their relations with majority ant that aims at defending the minorities from the power of the majority.
- The right to specific religious and cultural practices protects the culture of determined minorities from the disadvantages that traditions of the majority could represent for the minorities.

All these forms of rights do constitute trumps in favour of the minority: they aim at the protection and the promotion of minorities in their relations to the majorities. At the same time, they constitute an extension of individual rights, since the individual belonging to a minority can be protected in his own interest, that is, in his own cultural interests through these rights against the traditions and the power of the majorities. In other words, group rights are not only rights for the group as such: they serve to the protection too of some rights constituting the culture and the tradition of the individual qua individual. The serve to the protection of the way of living in which the individual has grown up and in which lives. It would be wrong, therefore, to relegate these rights as being only rights for the groups; they are right for the individual too, protecting his autonomy based on his life form. They work both against the forced assimilation of groups and the forced assimilation of individuals.

Kymlicka is aware of the dangers connected to the recognition of minority rights:

“Recognizing minority rights has obvious dangers. The language of minority rights has been used and abused not only by the Nazis, but also by apologists for racial segregation and apartheid. It has also been used by intolerant and belligerent nationalists and fundamentalists throughout the world to justify the domination of people outside their group, and the suppression of dissenters within the group. A liberal theory of minority rights, therefore, must explain how minority rights coexist with human rights, and how minority rights are limited by principles of individual liberty, democracy, and social justice.”³ (6)

The duty of a liberal theory of minority rights is to explain how minority rights can coexist with human rights. At the same time theorists of any liberal theory of minority rights should explain how minority rights find their limits in the principles of individual liberty, democracy and social justice.

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² See “Multicultural Citizenship. A Liberal Theory of Minority Rights”, pp. 37-38.

³ See “Multicultural Citizenship. A Liberal Theory of Minority Rights”, pag. 6.

their group, and the suppression of dissenters within the group. A liberal theory of minority rights, therefore, must explain how minority rights coexist with human rights, and how minority rights are limited by principles of individual liberty, democracy, and social justice.”⁴ (6)

“Each of these three forms of group-differentiated rights helps reduce the vulnerability of minority groups to the economic pressure and political decision of the larger society. Some national and ethnic minorities seek group-differentiated rights solely for this sort of external protection. Such groups are concerned with ensuring that the larger society does not deprive them of the conditions necessary for their survival, not with controlling the extent to which their own members engage in untraditional or unorthodox practices.”⁵

“Again, the precise connection between equality and minority rights was rarely spelled out. But the general idea was clear enough. A multinational state which accords universal individual rights to all its citizens, regardless of group membership, may appear to be ‘neutral’ between the various national groups. But in fact, it can (and often does) systematically privilege the majority nation in certain fundamental ways – for example, the drawing of internal boundaries; the language of schools, courts, and government services; the choice of public holidays; and the division of legislative power between central and local governments. All of these decisions can dramatically reduce the political power and cultural viability of a national minority, while enhancing that of the majority culture. Group-specific rights regarding education, local autonomy, and language help ensure that national minorities are not disadvantaged in these decisions, thereby enabling the minority, like the majority, to sustain ‘a life of its own’”⁶

- A multinational state according universal individual rights seems to be neutral between the different national groups belonging to the multinational state.
- At the same time, the multinational state can privilege the majority group in different ways: drawing of boundaries, language in the schools and in the courts; the relationships between legislative power and the local governments.
- These factors can reduce the position of a national minority.
- Only the presence of group-specific rights regarding education, local autonomy, language ensures that the national minorities present in a multinational state be not damaged by the decision of the majority.

Group-rights are a kind of defence of the minority towards the danger of the dictatorship of the majority. Kymlicka’s condition for a liberal theory of minority rights is that within the group there is freedom between the members of the group and that as to the relationships between minority and majority the equality holds.

“a liberal view requires freedom within the minority group, and equality between the minority and the majority group.” (152)

⁴ See “Multicultural Citizenship. A Liberal Theory of Minority Rights”, pag. 6.

⁵ See “Multicultural Citizenship. A Liberal Theory of Minority Rights”, pag. 38.

⁶ See “Multicultural Citizenship. A Liberal Theory of Minority Rights”, pag. 52.

“First, a multicultural state involves the repudiation of the older idea that the state is a possession of a single national group. Instead, the state must be seen as belonging equally to all citizens. Second, as a consequence, a multicultural state repudiates any nation-building policies that assimilate or exclude members of minority or non-dominant groups. Instead, it accepts that individuals should be able to access state institutions, and to act as full and equal citizens in political life, without having to hide or deny their ethnocultural identity. The state accepts an obligation to accord recognition and accommodation to the history, language, and culture of non-dominant groups, as it does for the dominant group. Third, a multicultural state acknowledges the historic injustice that was done to minority/non-dominant groups by these policies of assimilation and exclusion, and manifests a willingness to offer some sort of remedy or rectification for them. These three interconnected ideas – repudiating the idea of the state as belonging to the dominant group; replacing assimilationist and exclusionary nation-building policies with policies of recognition and accommodation; and acknowledging historic injustice and offering amends for it – are common to virtually all real-world struggles for ‘multiculturalism’”⁷

- Within a multicultural state the state is not the possession of a single group.
- The state belongs to all the citizens.
- The multicultural state refuses every form of nation-building policies excluding members of minorities.
- Citizens can have access to state institution without having to conceal their own identities.
- The state ought to accept history, language and culture of minorities.
- A multicultural state acknowledges the injustices caused by assimilation attempts against minorities.

“The adoption of liberal multiculturalism has been both inspired and constrained by human rights ideals. Indeed, the trend towards liberal multiculturalism can only be understood as a new stage in the gradual working out of the logic of human rights, and in particular the logic of the idea of the inherent equality of human beings, both as individuals and as peoples.”⁸ (88-89)

Positions of Kukathas

The contrast I would like to introduce now is the contrast between liberalism as tolerance and liberalism as autonomy, since the two models of liberalism can produce societies with completely different organizations. It could be said that these two kinds of liberalism do not have any kind of relationships with each other. In order to show the contents of a particular interpretation of liberalism of tolerance I will take into consideration some ideas expressed by Kukathas in his essay “Cultural toleration”. The central point of Kukathas thesis as regards the construction of his interpretation of toleration is the denial that there is a “We” beyond and besides the different individuals and the different groups forming a society. There is no “We” over and above groups and individuals that can decide what is right or what is wrong in the life organizations of groups and of individuals.

Kukathas compares in his works two concepts of liberalism with each other:

- Liberalism as a complex of values and moral standards.

⁷ See “Multicultural Citizenship. A Liberal Theory of Minority Rights”, pp. 65-66.

⁸ See “Multicultural Citizenship. A Liberal Theory of Minority Rights”, pag. 88-89.

- Liberalism as a principle through which different moral standards coexist.

Kukathas adopts the second conceptions of liberalism: Liberalism is not, in his opinion, a system of values; liberalism is an organization based on the reciprocal tolerance between the different components of the whole community. It is not important, in the opinion of Kukathas, that the different components have reciprocal respect towards each other. Respect is irrelevant. The only relevant thing is that the different components of the society accept the coexistence between each other. The image of the archipelago explains the general conception of Kukathas: a society is constituted by different components; these different components are independent from each other; they form islands. Moreover, there is no superior system over and above the archipelago. There is no superior instance, no superior authority which may impose values. All the relationships between the parts of the archipelago are tolerance and nothing else.

“I want to suggest, however, that the problem should be approached differently – in a way which does not presuppose the existence or the authority of the state. That is to say, I want to begin without presuming that it is already established that there is a „we“ who are faced with the problem of determining how far to tolerate particular groups in “our” midst.”⁹

Kukathas does not resort to the authority of the state in order to found tolerance and to establish what can be tolerated and what cannot be tolerated. There is no “We” who judged the extent and the limits of toleration. There is not something that leads the public space and that determines how the public space has to be organized. The state is not a further group synthetizing and organizing the other groups. The state is exclusively here in order to enable and ensure the coexistence between the different groups. The state has no right to give the moral address to the different groups. It seems that in Kukathas’ opinion the state has only the function of keeper, of preserver, of maintainer of the public order. The state is not anything more than a keeper of the public order. Kukathas proceeds then to expose his concept of toleration:

“At this point two questions arise: first, why should we be concerned if there is no independent value attached to toleration; and second, can there be a defines of toleration which does not subordinate it to some other value and, thereby, undermine it?”¹⁰

Toleration is in Kukathas’ opinion not subordinated to some other value. Tolerance is not subordinated to another value like for instance autonomy. Tolerance is the conception itself of liberalism in the opinion of Kukathas. Tolerance has no limits in an end that is superordinate to tolerance itself. Kukathas regards tolerance as being a value for itself. Kukathas does not evaluate tolerance as a positive factor up to the point and only up to the point in which tolerance promotes the autonomy of the individuals; tolerance does not become a negative factor in the opinion of Kukathas if tolerance does not contribute to the promotion of the autonomy of individuals. Tolerance is not something having value only under certain condition and under certain circumstances. Tolerance ought to have always validity; the other values of a society have to be subordinated to tolerance, not tolerance to the other values of a society. Tolerance is the measure.

⁹ See “Cultural Toleration”, pag. 71.

¹⁰ See “Cultural Toleration”, pag. 78.

“Toleration is important, in part, because it checks or counters moral certitude. If we are convinced beyond doubt of the correctness of our beliefs or about the immorality of the practices of others, there is less reason to tolerate those whose beliefs or practices differ from our own. Yet if there is any possibility of doubt or uncertainty about the correctness or reliability of our judgment, then there is some reason to tolerate.”¹¹

Kukathas sees tolerance as an independent value: tolerance is a kind of inspection of the moral certitude. If we have doubts concerning our judgment on certain questions, there is a space for tolerance. A point of great interest in Kukathas’ meditation is his way of interpreting the public realm. Public realm is not a space in which there is an established standpoint of morality. Public realm is for Kukathas an area of convergence of different moral practices.

“Rather than conceive of the public realm as embodying an established standpoint of morality which reflects a desirable level of stability and social unity, we should think of the public realm as an area of convergence of different moral practices. All societies, to varying degrees, harbor a variety of religions, languages, ethnicities, and cultural practices and, so, a variety of moral ideals. The public realm is the product of interaction among these various ways. Indeed, it is a kind of settlement reflecting the need of people of different ways to develop some common standards by which to regulate their interaction – given that interaction is unavoidable.”¹²

- Public realm does not contain an already established standpoint of morality.
- Public realm is an area of convergence of different moral practices.
- All societies contain in themselves a plurality of religion, of languages, of ethnicities, of cultural practices, and of moral ideals.
- Public realm is exclusively the interaction of these different pluralities.
- Public realm is only the space in which the rules for the interaction between the different elements of plurality are established.
- Public realm is not, therefore, something which stands over and above the different elements of pluralities and establishes what is right and what is wrong with the elements of plurality. It is only a space in which the way of interaction between the elements of plurality is established.

Kukathas expresses a denial as regards the right of the state to intervention in case that in some groups there is evidence of terrible practices.

“Even in cases where there is clear evidence of terrible practices, however, there is good reason not to give established authority the right to intervene. First, persuasion is always preferable to force, morally speaking, so it would be better to allow the effects of interaction between peoples and communities of different moral outlook to work towards the elimination of dubious customs. Just as missionaries sought to convert other people to Christianity, there is no reason why individuals should not seek to convert people away from customs they regard

¹¹ See “Cultural Toleration”, pag. 79.

¹² See “Cultural Toleration”, pag. 84.

as barbarous. This would be preferable to imposing the moral principles of the dominant society – even if those principles are the product of sustained reflection on one’s considered judgments.”¹³

We can see the following points in this passage:

- Persuasion is better than force.
- Moral principles ought not to be imposed.

Kukathas does not like any procedure of enforcement of rights and of defence of rights; direct intervention with force by public authorities is something extraneous to his way of thinking:

“conversion through persuasion is not as damaging to or dislocating of group life as invasion by an external power. Now this may well leave within the wider society a number of cohesive but oppressive communities: islands of tyranny in a sea of indifference. Against this, however, I would maintain that the decentralization of tyranny is to be preferred. One reason to prefer it is that while all power tends to corrupt, absolute power corrupts absolutely”¹⁴

- Persuasion is better than invasion by an external power, every time it is being dealt with convictions of some groups present in a society.
- It can be that in a society there are islands of tyranny represented by some groups.
- Kukathas notwithstanding likes better a decentralization of tyranny than a condition in which there is a central tyranny.
- Power tends to corrupt, whereas absolute power corrupts absolutely. That is, the presence of tyrannical groups is in Kukathas’ opinion less dangerous than the presence of a central institution that can behave with absolute tyranny in relation to the whole society.

The question is that the presence of an ultimate authority determining what is right and what is wrong would mean the end of liberalism. Kukathas believes that in a liberal society there is a plurality of authorities establishing different ways of life. This is compatible with liberalism as tolerance. If on the contrary there is an ultimate authority establishing for every person what is wrong and what is right, there is no more space for tolerance, so that liberalism as tolerance is lost.

“In a liberal society (...) there are many authorities governing a multitude of practices or ways of life – many of them competing alternatives. Such authorities are needed if those ways are to be lived without endless debate. If there is an ultimate authority, however, that determines what ways are morally acceptable, liberalism is lost.”¹⁵

The alternative posed by Kukathas is extremely clear: Liberalism as tolerance excludes the presence of a central authority establishing moral points. If there is such an authority, liberalism disappears. Tolerance is not an optional in liberalism, so that in order to maintain liberalism tolerance of different views must be ensured, even though these views imply tyrannical structures in some groups belonging to the public realm.

¹³ See “Cultural Toleration”, pag. 89.

¹⁴ See “Cultural Toleration”, pag. 89.

¹⁵ See “Cultural Toleration”, pag. 92.

“This brings us to the final objection: that such an understanding of toleration weakens political society. It is all very well to tolerate minorities, but unless certain minimal moral standards are enforced, there cannot exist a single polity. There will be only a patchwork of interdependent communities rather than a unified political order. This objection is well founded. The greater the diversity of cultural groups with independent moral traditions with a polity, the less the extent of social unity within that political society. If the moral coherence of a political society is to be preserved, greater social conformity will be required.”¹⁶

The objection that can be expressed against Kukathas’ view is that Kukathas’ interpretation of tolerance weakens the stability of a society. Since within the interpretation of tolerance offered by Kukathas the different groups of the public realm are completely independent of each other, there is actually no uniform political organization. We have only a sum of communities having of course contacts with each other but remaining substantially strange to each other.

“For, as I have said at the outset, there is no reason to begin by assuming that there is an established „we“ in the form of the state which possesses the authority to determine how far to tolerate dissenting groups within its midst. (...) It is not for the state to determine what forms – or form – the associations which comprise it will take. The state is a political settlement which encompasses these diverse associations; but it is not their creator or their shaper. This holds all the more strongly if the state is claimed to be a liberal state. The liberal state does not take as its concern the way of life of its members but accepts that there is in society a diversity of ends – and of ways in which people pursue them. It does not make judgments about whether those ways are good or bad, liberal or illiberal.”¹⁷

Kukathas is consequent as to his assertions:

- The state is for Kukathas only a sum of mutually independently aggregations and mutually independently groups.
- The state is nothing over and above aggregations and groups.
- There is no We over and above the aggregations determining the values of the aggregations.
- Therefore, the state has not right to determine where tolerance can begin and where tolerance must end.
- If tolerance is assumed to be the principle of a state, tolerance is valid always and without any exception.
- The state accepts the diversity of ends present in a state.
- The state does not express judgments on the goodness or badness of the different groups and organizations present in a society.

The image of the state as an archipelago, which is developed in “The liberal archipelago”, serves to explain the following points:

- Area of sea containing many small islands.
- Islands are different communities or different jurisdictions.
- The relationships between the different islands are inspired by mutual toleration.
- Society is not a single body.

¹⁶ See “Cultural Toleration”, pag. 93.

¹⁷ See “Cultural Toleration”, pag. 94.

- Society is not piloted by a seaman.
- Society is not a single island.
- Society is a not clearly bounded structure.
- There is no single authority leading the different islands.

Kukathas expresses the following observations as regards the connection between liberalism and tolerance:

“The value which is fundamental to liberalism is toleration. A society of community is a liberal one if, or to the extent that, it is tolerant. What it tolerates as a liberal society or community is dissent or difference (which is a kind of dissent insofar as living or believing differently involves an implicit repudiation of the norms or standards embraced by the majority, or by the dominant institutions of society). Toleration, in the sense in which it is used here, is an undemanding virtue, since it requires little more than indifference to those who are, or that which is, tolerated. It may, on occasion, require a measure of forbearance; but it does not require respect or empathy or admiration or even much concern for others. It certainly does not require taking the tolerated individuals or groups seriously; and it is perfectly consistent with a contempt for everything for which they stand, as well as with an unwillingness to engage them in rational dialogue, or even to understand them. Tolerators need not sit down with the tolerated; but they will stand them.”¹⁸

The essential point is that there is no authority deciding and leading moral values. There is no unity and there ought to be no unity, there has to be no attempt at unification, since this would violate the fundamental principle of this interpretation of liberalism, which is tolerance. Tolerance implies that there are no leading values, no imposition of leading values, no politics of leading values, and no interference of a supreme authority with the principles of the different associations. It seems to be a manifesto for the parallel societies. That is, parallel associations not only exist, but they should exist without being disturbed by any authority of the state. State is here only in order to guarantee the pacific coexistence of the different components. Kukathas does not give a particular importance to the social unity. This is the greatest difference between Kukathas’ and other interpretations of liberalism.

“While ‘liberalism’ is most properly used to describe societies (at least when it is predicated of forms of association), the theory being propounded here suggests that it might be used to describe a greater variety of associations, from firms to empires. A firm or a society or an empire is liberal to the extent that it is tolerant of difference or dissent, and illiberal to the extent that it does not. What this means, however, is that larger associations may be characterized as liberal even if they contain smaller ones which may not. A liberal empire may contain illiberal societies; a liberal society may contain illiberal communities; a liberal community may contain numerous illiberal associations. In the most liberal community we may find family structures which are highly illiberal. In all cases, however, the ‘liberalness’ of the association is determined by the extent of toleration.

On this account a society might be described as more deeply liberal if the communities or associations within it are themselves tolerant of difference of dissent. In other words, it would be a more liberal society if it were a society made up of similarly liberal associations. Yet, in principle, it might still be describable as (minimally) liberal even if all the associations within it were intolerant of dissenters within their ranks, that is, if these

¹⁸ See “The Liberal Archipelago”, pag. 23.

associations were themselves illiberal. However, for this to be so it would also have to be the case that dissenters were not obliged to remain in associations which refused to tolerate them. There must be, at least in principle, the possibility of individual exit from illiberal communities or associations. For this to be so, it is necessary, first, that dissenters have somewhere to go – other associations which will accept them; and, second, that the authority of their associations to deny them the right of exit *not* be recognized by the legal and political institutions of the wider society.”¹⁹

The problem with this interpretation of liberalism is, in my opinion, that it does not seem to take into consideration possible contrasts between the different associations: what should the state do in case of a contrast between associations? Tolerance seems to be too little, since the contrast could be such that it can be solved only with the inspiration or with the referring to determinate values.

Moreover, it seems that the protection of the laws in relation to the individuals is a fundamental principle of the liberal state; what should the state do in case that in an association or in more associations composing the state the equal protection of the law is not respected? Toleration of violation of the equal protection of the laws is not compatible with the liberal state. The point is that the liberal configuration cannot base on one only principle, in spite of the fact that this principle can be very important. Kukathas is anyway aware of the problem of dissent in the community; he expresses the following considerations:

“Fundamental to the liberal standpoint is the conviction that individuals should not be forced to act against conscience – to act in ways they consider wrong. It is the value of liberty of conscience which lies at the core of the liberal ideal of toleration.

In this regard, a society is a liberal one if individuals are at liberty to reject the authority of one association in order to place themselves under the authority of another; and to the extent that individuals are at liberty to repudiate the authority of the wider society in placing themselves under the authority of some other association. They may even, in all this, place themselves under another authority by constituting a new authority for themselves.”²⁰

The limitations of the intervention of the public authority are, however, recurrent in Kukathas:

“Where the society imagined in this book is radically different, however, is in its willingness to accept the implications of jurisdictional independence. First, it would mean that the state would be a much diminished entity, a good deal less capable of establishing and imposing common standards for the nation – unless they be standards the other jurisdiction are inclined to accept. Second, and consequently, it would be quite impossible for subsidiary authorities or jurisdictions to be ruled according to quite illiberal principles – perhaps even so much so that, say, minority discrimination was not merely allowed but encouraged. If a province, for example, discriminated against homosexuals by declaring same-sex unions criminal, the federal government would not have the authority to override its laws on the grounds that they were illiberal. Within the province, liberals would resist such laws as intolerant and suppressive of dissenting views – that is, as illiberal. But liberals generally, according to the view

¹⁹ See “The Liberal Archipelago”, pp. 24-25

²⁰ See “The Liberal Archipelago”, pag. 25.

defended in these pages, would have to resist the idea that the dissenting province should have its laws overturned or suppressed by a higher power.”²¹

In this passage too is the policy of not-intervention a fixed point.

Coleman

In order to better analyse the question of the cultural defences, I would like to take into consideration some of the subjects expressed in the article of Doriane Lambelet Coleman “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”.

The title of the article introduces us into the main problem that multiculturalists are confronted with: if as liberals multiculturalists certain group rights are to be conceded, which consequences are to be expected in the jurisprudential environment? Is for instance Justice to be administered with regard of the cultural differences? Coleman offers us some elements of reflection:

“Individualizing Justice: The phrase describes the *process* by which criminal and constitutional law doctrine affords defendants a subjective evaluation of their moral culpability.”²²

To individualize justice means that the moral culpability can be subjectively evaluated with regard for the cultural provenience of the person having committed certain crimes.

“In these cases, the defense presented, and the prosecutor or court accepted, cultural evidence as an excuse for the otherwise criminal conduct of immigrant defendants. These official decisions appear to reflect the notion that moral culpability of an immigrant defendant should be judged according to his or her own cultural standards, rather than those of the relevant jurisdiction. Although no state has formally recognized the use of exonerating cultural evidence, some commentators and judges have labelled this strategy the “cultural defense”.”²³

Individual cultural influences are used in order to find particular grounds for the criminal behaviour of the person having committed a crime. Of course, these grounds are all grounds limiting the culpability of the person. The court decision have the common characteristic that the moral culpability of certain person must be judged on the basis of her own cultural standards: these cultural standards limit in a certain measure the objective jurisdiction. The strategy lying at the basis of the cultural defence is in general that the culpability of a person depends on the cultural environment from which a person comes. It is not, in other words, only a question of the law system that should establish the judgment on the behaviour of a person.

“The cultural defense (and the issues it raises about the rights of immigrants to retain aspects of their cultures when they come to the United States) is an important part of the larger debate about multiculturalism which currently is prominent in academic, social, and political circles. In particular, this larger debate concerns whether there is and

²¹ See “The Liberal Archipelago”, pag. 31.

²² See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

²³ See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

should be a unifying American culture that guides our institutions, including the justice system, or whether the United States is and should be a culturally pluralistic nation in all respect, including in the law.”²⁴

The theme of the cultural defence is part of the debate on multiculturalism: applied to the particular case of the law system, the question is whether multiculturalism should involve the legal system too. Coleman discusses the problem with reference to the United States, but the question can regard every country: should the law system be interpreted in a pluralistic way or not?

“The introductory illustrations exemplify this debate in the legal arena with an unusual clarity, because they pit foreign customs and cultural practices directly against essential elements of contemporary American legal culture, including the antidiscrimination principle that is central to equal protection doctrine and related principles of universal rights that are at the foundation of feminist legal doctrine.”²⁵

The problem is that if elements coming from other cultures are taken in by the American law system, this procedure can bring to violations of the doctrine of the equal protection clause expressed in the 14th amendment of the American constitution, on the basis of which all citizens ought to receive the same protection from the laws. If certain cultural influences are taken into consideration with reference to the culpability of the persons, a situation in the law system comes about in which the victim does not receive the same protection from the law. At the same time if certain mitigating circumstances are conceded on the basis of the influences of a culture, the defendant is not being treated as other defendants having committed the same crime but not belonging to the same culture, so that they cannot receive the mitigating circumstances cause by the belonging to a culture. Coleman clearly expresses the conviction that, if the strategy of the cultural defences is accepted, the Equal Protection Clause²⁶ is not respected.

Coleman adds to her analysis the following points:

“For legal scholars and practitioners who believe in a progressive civil and human rights agenda, these illustrations also raise an important question: What happens to the victims – almost always minority women and children – when multiculturalism and individualized justice are advanced by dispositive cultural evidence? The answer, both in theory and in practice, is stark: They are denied the protection of the criminal laws because their assailants generally go free, either immediately or within a relatively brief period of time. More importantly, victims and potential victims in such circumstances have no hope of relief in the future, either individually or as a group, because when cultural evidence is permitted to excuse otherwise criminal conduct, the system effectively is choosing to adopt a different, discriminatory standard of criminality for immigrant defendants, and hence, a different and discriminatory level of protection for victims who are members of the culture in question. This

²⁴ See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

²⁵ See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

²⁶ The text of the EPC is the following one: “**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

different standard may defeat the deterrent effect of the law, and it may become precedent, both for future cases with similar facts, and for the broader position that race- or national origin-based applications of the criminal law are appropriate. Thus, the use of cultural defenses is anathema to another fundamental goal of the progressive agenda, namely the expansion of legal protections for some of the least powerful members of the American society: women and children.”²⁷

- What does happen with the victims if the conception of the individualized justice is to be accepted?
- Women and children, who are in the majority of cases the victims of the cultural defences, is refused the protection of the laws.
- Victims have no hope that the condition changes since the acceptance of the cultural defences exercises an influence also regarding the future ways of behaving.
- The law cannot exercises his deterrence power.
- The strategy of the cultural defences can produce a series of precedents, which will endanger the effectivity of the law.
- The cultural defences are a danger for the expansion of the protection of women and children.

The greatest danger is perhaps the coming about of a discriminatory attitude through the assimilation of values regarding women and children as being inferior. Coleman expresses many a time in her study the opposite conception of “choosing rights over culture”. Rights must always have the precedence in comparison to the cultural influences. She speaks with reference to the acceptance of the cultural defences of a balkanization of the criminal law:

“(…) the use of cultural evidence risks a dangerous balkanization of the criminal law, where non-immigrant Americans are subject to one set of laws and immigrant American to another. This is a prospect that is inconsistent not only with one of the law’s most fundamental objectives, the protection of society and *all* of ist members from harm, but also with the important human and civil rights doctrines embodied in the Equal Protection Clause. Thus, society as a whole is best served by a balance that avoids the use of discriminatory cultural evidence.”²⁸

- The results of the introduction of the cultural defences would be that non-immigrated Americans would be judged on the basis of a law system and immigrants would be judged on the basis of a different law system.
- Cultural defences are incompatible with the aim of the laws consisting in protecting the members of a society from damages. They are incompatible too with the Equal Protection Clause of the American constitution.

“someone raised in a foreign culture should not be held fully accountable for conduct that violates United States law... [if that conduct] would be acceptable in his or her native culture”.

²⁷ See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

²⁸ See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

“... the focus in this phase is on the degree of moral culpability of the defendant, rather than on the threshold question of whether he was responsible for the crime with which he was charged.”

The whole system of the culpability of the defendant is being objected to through the strategy of the cultural defences.

“In those cases where cultural evidence is accepted as dispositive, the state effectively scraps conventional assault, battery, murder, and abuse analysis – all of which should result in a finding that the defendant had the requisite specific intent to commit the crime at issue – and is guided instead by a relative standard that denies moral culpability to some significant intent.”²⁹

In case that the conception of the cultural defence is accepted, the state refuses that the defendant be morally responsible.

“Indeed, permitting cultural evidence to be dispositive in criminal cases violates both the fundamental principle that society has a right to government protection against crime, and the equal protection doctrine that holds that whatever protections are provided by government must be provided to all equally, without regard to race, gender, or national origin. (...) In fact, advocating the use of the cultural defense is problematic precisely because it focuses exclusively on the rights of the defendant, and thus fails entirely to consider the primary function of the criminal law, that is, the protection of victims and the public generally from criminal conduct. It is axiomatic that a principal purpose of government is to protect the people from criminal acts. Implementation of the criminal code in a way that denies some individuals its protection subverts this purpose. For example, we do nothing to further a general interest in life and liberty (both terms read literally rather than constitutionally) for *all* (including immigrants) when we exclude premeditated but culturally-motivated killings from the definition of murder; or when we exclude premeditated but culturally-motivated „captures“ from the definition of kidnappings; or when we exclude premeditated but culturally-motivated forced intercourse and sexual mutilation from the definitions of rape and battery.”³⁰

There are further points that Coleman criticizes as regards the strategy of the cultural defences.

- The fundamental principle that the society has a right to government protection against crime is violated.
- The equal protection clause on the basis of which every individual has the right to protection from the crime in equal way as every other citizen.
- The strategy of the cultural defences is exclusively concentrated on the defence of the defendant and forgets that the first function of the criminal law is the protection of the victims.
- The interest in life and liberty is not being furthered if killings are excluded that are considered as being culturally motivated or if other crimes are excluded from being considered as crimes since they are culturally motivated.

²⁹ See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

³⁰ See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

“The message is sent that if you are an immigrant, you are not guaranteed the right to choose to escape those aspects of your culture (or those stereotypes about your culture) that collide with the criminal law.”³¹

The problem for Coleman is a question of the message that is being sent if the strategy of the cultural defences is accepted, that is, if a person is an immigrant, she can think that she is not guaranteed in her protection from the laws in all cases which can be interested by the strategy of the cultural defences.

Barry

Barry represents the position of acknowledgment of rights for individuals qua individuals. Rights belong to individuals qua individuals without consideration of their belonging to groups. Rights belong to individual qua individual, not to individual since they are members of determined groups. Barry clearly expresses his own position as a position speaking in favour of social rights to individuals. Social rights constitute in the opinion of Barry the integration of civil rights.

Brian Barry is rather sceptical as regards the compatibility between multiculturalism and individual rights. Barry concentrates his attention on all the positions that considers multiculturalism in the form of acknowledgment and concession of rights for groups and not only for individual a continuation of liberalism and of enlightenment. Barry aims at a criticism of all multiculturalists that refuse universal principles concerning individual rights. Moreover, Barry criticizes all theorists that, like Kymlicka, believe in a compatibility of a liberal multiculturalism with the liberal conception of individual rights. Barry particularly criticizes all theorists considering multiculturalism as the continuation, enlargement and integration of liberalism.

Barry differentiates in his essay between conceptions of liberalism, that is,

- Liberalism as autonomy and
- Liberalism as tolerance.

Liberalism is not for Barry:

- Indifferentism.
- Tolerance of any model of life and of organization of groups.
- Relativism of value.

Positively, Barry considers liberalism to be:

- Affirmation and defence of civil rights and social rights.
- Autonomy of individuals and defence of this autonomy. This implies that the state has the precise duty to defend this autonomy.

As a consequence, exclusively ways of life and organizations can be accepted within a liberal perspective that accept autonomy of individuals and respect this autonomy. Liberalism is not tolerance in relation to theories and

³¹ See “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma”, pag. .

ways of life that endanger the autonomy of individuals and that refuse the autonomy of individuals. In other words, autonomy of individuals is the measure of judgment in order to evaluate whether a theory is a liberal theory or not. Without doubt is Barry's approach the approach convincing me as regards the interpretation of liberalism.

Barry believes that the concession of rights for groups compromises the equality of the citizens. If a group certain rights are conceded that another group does not have, the result is that the equality between citizens is undermined. Barry is nonetheless of the opinion that certain rights can be conceded to underprivileged groups. These rights should be eliminated, though, when the inequality and the disadvantages that these rights should solve are eliminated. These rights should become, in other words, superfluous. These rights are not rights that are conceded to the group qua group, that is, with reference to the culture of the group and with the aim to protect the culture of the group. These rights are conceded in order that a determined group being in a difficult economic condition can be helped economically and socially. It is a kind of compensation. These rights are therefore conceded in order that the disadvantaged group can obtain that kind of equality that constitutes the ground principle of liberalism. Liberalism is affirmation and promotion of equality, when this equality is not present.

Barry is sceptical as to the resorting or assuming of the concept of culture in the conception of rights, since culture is used in order to limit the protection of the law.

Barry is aware of existing differences. The point is that the differences between groups may not influence the affirmation of universal individual rights. Barry's egalitarian liberalism does not aim at the destruction of the cultural differences which can be present in a country. This kind of liberalism does not want to accept that determined groups have privileges because of their difference from other groups.

"The core of this conception of citizenship, already worked out in the eighteenth century, is that there should be only one status of citizen (no estates or castes), so that everybody enjoys the same legal and political rights. These rights should be assigned to individual citizens, with no special rights (or disabilities) accorded to some and not others on the basis of group membership. In the course of the nineteenth century, the limitations of this conception of equality came under fire with increasing intensity from 'new liberals' and socialists. In response, liberal citizenship has, especially in this century, one to be supplemented by the addition of social and economic elements. Universalism (categorical entitlements and social insurance) replaced the old poor law, which targeted only those with no other means of support; and the removal of legal prohibitions on occupational advancement was supplemented by a more positive ideal of 'equality of opportunity'."³²

- Barry supports only a status of citizens (individuals as individuals and not individuals as belonging to groups).
- There should not be rights accorded on the basis of group membership.
- Social and economic rights have integrated civil rights.

"(...) the universal civil and political rights of citizens envisaged (if far from completely instantiated) by the French and American Revolutions were indeed insufficient, and need to be supplemented by universalistic social and

³² See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, pag. 7.

economic rights. This line of thought, which does not denigrate universal civil and political rights but seeks to build on them, is in my view a development within the tradition of Enlightenment.”³³

Civil rights have been integrated by universalistic social and economic rights. The integration of civil and political rights through social and economic rights constitutes in the opinion of Barry a development happening within the tradition of the enlightenment.

“As long as ‘disadvantage’ is defined in universal terms – as the lack of things (resources and opportunities) whose possession would generally be agreed to be advantageous – this too is a potential way of realizing the values of the Enlightenment. This is not to say that group-based programmes are in any particular set of circumstances a good idea. It is simply to say that the question is not to be foreclosed by saying that any such programmes are contrary to basic liberal principles. It follows that we have to qualify the statement that classical or ‘difference-blind’ liberalism cannot countenance any deviation from universal rights. For there may be cases in which a system of group-based rights for those suffering from systematic disadvantage will be a way of helping to meet the egalitarian demand that people should not have fewer resources and opportunities than others when this inequality has arisen out of circumstances that they had no responsibility for bringing about. However, special treatment for members of disadvantaged groups is justifiable only for as long as the inequality persists. We may say, therefore, that the objective of special treatment for members of disadvantaged groups is to make the need for that special treatment disappear as rapidly as possible.”

- Barry admits that there can be cases in which a group of persons suffering from disadvantages can be helped to reach the equality of position with the non-disadvantaged persons.
- It belongs to the egalitarian way of thinking that people should have the same opportunities.
- Notwithstanding the special treatment for a group should be suppressed when the inequality has disappeared.
- Special treatment should therefore disappear as early as possible, since the inequality bringing to the necessity of helping measures should be suppressed as early as possible.

On the other hand, Barry strongly opposes every resorting to culture made in order to give rights to some special group:

“Let us begin, then, with the assumption that the appeal to ‘culture’ constitutes some sort of justification in and of itself. In order to appreciate its peculiarity, let us think for a moment about the way in which people usually defend their actions when challenged to do so. Suppose you are asked to justify some action that you have performed. Your response will normally be to explain why you did it by calling attention to features of the action that made it the right thing to do in the circumstances. An outside observer may choose to say that you are appealing to your culture, in the rather banal sense that you have made use of your stock of ideas about what makes actions right or wrong, that you almost certainly share them with some other people, and that you were quite probably brought up with at least some of them. But this outside observation – by, perhaps a visiting anthropologist – has no bearing on the logical structure of your defence of your action. What you are saying is that your action was right for such-

³³ See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, pag. 9.

and-such reasons. Since you offered reasons, the person who challenged you to justify yourself can argue with you about whether they are good reasons or not. You can attempt to rebut his objections, of course, but what you cannot do without changing the subject is fall back on the claim that doing the action was part of your culture. There is nothing to prevent you from saying it, but when you do so you have ceased to engage in moral discourse and switched to the perspective of the anthropologist.”³⁴

“The defining feature of liberalism is, I maintain, the principles of equal freedom that underwrite basic liberal institutions: civic equality, freedom of speech and religion, non-discrimination, equal opportunity, and so on.”³⁵

Barry considers the following characteristics as the basis characteristics for liberalism:

- Civil equality.
- Freedom of speech.
- Freedom of religion.
- Non-discrimination.
- Equal opportunity.

“(…) liberal principles limit the power of groups over their members. (...) while a liberal state allows a good deal of discretion to parents in bringing up their children, that power must again be limited. Children need to be protected against parents who would inflict physical harm on them, even if this is prescribed by the parents’ belief or customs. A familiar example is that of parents whose religious beliefs would lead them to withhold life-saving medical treatment from their children. Another well-publicized example is the practice, or more precisely set of practices, often referred to under the names of female circumcision or clitoridectomy but more comprehensively and accurately described as female genital mutilation. There is nothing specifically liberal about the view that the state should override the wishes of the parents in such cases. Any doctrine that gives the state the duty to prevent physical injury and death from being inflicted on its inhabitants will have the implication that the state should intervene. All that has to be said is that a liberal state is such a state.”³⁶

Liberal principles constitute a limitation of groups on the members.

The power of parents in bringing up their children has to be limited too.

The state has to override the parents when parents do not respect the autonomy of children.

A liberal state is a state in which the state has the duty to prevent physical injury and death from being inflicted on its inhabitants. The state must intervene.

“The defining feature of a liberal is, I suggest, that it is someone who holds that there are certain rights against oppression, exploitation and injury to which every single human being is entitled to lay claim, and that appeals to ‘cultural diversity’ and pluralism under no circumstances trump the value of basic liberal rights.”³⁷

³⁴ See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, pag. 253.

³⁵ See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, pag.

³⁶ See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*.

³⁷ See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, pag. 132

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