Neus Torbisco Casals

# Group Rights as Human Rights

## A Liberal Approach to Multiculturalism

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## *A Liberal Approach to Multiculturalism*

Edited by

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Beyond the learning pleasures involved in any research project, writing this book has not always been a delight. This was not only because of periods of insecurity and misery but also because for a long time I struggled with two personal inclinations which, I often thought, were somehow incompatible: the intellectual conviction that liberal rights were valuable and defendable against critics (since I think they are key to enhancing central values such as women's equality which are far from accomplished), and my personal experience as a Catalan who often finds frustration in the deep misunderstandings and political frictions that arise from the assertion of Catalan identity and political aspirations (accusations of radical nationalism and insolidarity towards the rest of Spain, fears of secession and particularism, objections to constitutional asymmetries, etc.). From personal experience, however, I had the intuition that there should be a way to make both claims compatible. Growing up in a family with a Spanish-only speaking father (and a fan of Real Madrid!), who is an atheist and deeply attached to the South, and a hard-working and independent Catalan mother, quite feminist but also a committed Catholic, never convinced of the need to speak Spanish in Catalonia, I was always puzzled by the widespread idea, or prejudice, that diversity was a "problem". And so I ended up writing this book which, with all its limitations and flaws, shows, I hope, the deep appreciation for the lessons of tolerance and mutual understanding that I learned at home from my parents. Even if they have very little to do with this book, written in a language they can't even understand, in a sense, they have all to do with it, and I am profoundly grateful for this.

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debts and I am glad to finally have the chance to acknowledge them. First of all, thanks to my department, and especially to its current head, Jose Juan Moreso, for granting me a number of leaves to work on this project as well as for generous support. Jose Juan also read an earlier version of the manuscript and provided helpful comments.

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*For Rosa M. Casals, my mother, and Neus Gili, my grandmother, two exceptional women. And in memory of Albert Calsamiglia.*

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# INTRODUCTION

## 1. MULTICULTURALISM AND GROUP RIGHTS: THE ISSUES

The last few decades have witnessed a remarkable interest amongst political philosophers and legal theorists in the recognition of group rights to cultural minorities. There are a number of reasons that explain the growing interest in this issue, but, in general terms, the starting point of the debate lies in a more general criticism towards liberal theory. Liberalism, so the claim goes, does not grant enough attention to phenomena such as multiculturalism and nationalism, and thus it downplays the problem of how belonging to identity groups affects individual autonomy and equality. As a category different from that of individual rights, group rights are seen as an instrument legitimating a wide range of claims raised by minorities in states with high levels of cultural pluralism. Their advocates typically emphasise the limitations of democratic systems and current constitutional catalogues of civil and political rights in achieving equality between identity groups and in facing ethnocultural conflict.

The relevance of this debate is not merely theoretical. The problem is not just that only few states nowadays have a culturally homogeneous citizenship;[1] rather, the striking fact is that multicultural tensions have become a major source of political clash and violence in the world. Most conflicts of our time are internal conflicts due to ethnocultural strife, which possesses an ubiquitous character and often deteriorates into massive violations of human rights and immeasurable suffering.[2] Hence the debate on multiculturalism and group rights does not primarily revolve around whether or not diversity is, in itself, a good or a bad thing; rather, it focusses mainly on the normative conditions of social justice and democracy in contexts of ethnocultural diversity—that is, in societies in which different ethnic and cultural groups coexist.[3] Diversity is seen as a social fact that is here to stay, given the significant movements and interaction between peoples provoked by massive migrations and the process of globalisation. Moreover, the salience of identity groups appears as a predictable result of according individuals freedom of association and of the human need for mutual identification.[4]

Within the general upsurge of interest in questions related with culture and identity, the specific interest in the status of cultural minorities and their claims for recognition responds, to a great extent, to the urge to confront, and hopefully resolve, ethnocultural conflicts. This is a major challenge. When ethnic or cultural identities are highly salient, they often become the basis for conflict, especially when the fact of belonging to such groups has historically affected the status, security, well-being and self-perception of people.[5] The adversities and enduring discrimination that members of many ethnocultural groups suffer in different parts of the world not only represent



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a serious injustice but also seem to reveal the incapacity and inefficacy of existing political and legal instruments in defending human rights. The long-lasting uncertain destiny of the Kurds, the atrocities perpetrated before the eyes of the international community in Rwanda, Chechnya, East Timor, Sierra Leone, Bosnia, Kosovo or, more recently, the tragedy in Sudan, are only some of the dreadful events that have moderated the optimism about the chances of achieving peace in this new millennium. Certainly, as Steven Lukes writes, the Holocaust was not something unique; if we take into account the annual figures of human annihilation, it rather appears as an enduring phenomenon that the international community is unable to avert.[6]

Of course, those who are convinced of the existence and legitimacy of universal human rights, and of their relevance for peace and justice, will be tempted to argue that the philosophical exploration of these problems is not the most significant need. The truly urgent matter is to report and emphatically demand effective measures to implement and administrate the existing legal standards.[7] Moreover, it is often assumed that, in fact, ethnocultural conflicts occur precisely in non-democratic states with remarkably poor human rights records. Perhaps this explains the fact that a number of prominent contemporary liberal scholars have overlooked the question of cultural diversity, treating it as a negligible element when theorising political institutions.[8] Such neglect is not normally due to unawareness of the fact that states are culturally heterogeneous, but it mainly results from the idea that this is an irrelevant trait in a liberal democratic context, one that does not deserve fundamental normative attention.

Indeed, although the presence of different ethnocultural groups within the same political unit has been a pervasive feature throughout history, the assumption that diversity, in itself, does not involve a major challenge for political integration and liberal justice in democratic states has been widespread among political and legal theorists. The origin of this belief may be found in the scheme of values inherited from the Enlightenment and, also, in modernisation doctrines. As Will Kymlicka explains,[9] philosophers such as Voltaire or Condorcet predicted that cosmopolitanism would be the natural result of modernisation and individual emancipation: while people would always belong to particular identity groups, these attachments would not restrain the options of free individuals. Inheritors of the Enlightenment ideals thus believed that, once liberal education and modern means of communication linked people together across states and continents, the relevance of cultural identity would progressively vanish. This process would entail a gradual assimilation of citizens, culminating eventually in the blending of all cultures and the emergence of a single cosmopolitan society.[10] Today, globalisation is inspiring the return to similar arguments. Thus, the assurance expressed by neoliberal economists that markets will gradually weaken particularistic forms of identity bears a clear similitude to the old modernisation theories.[11] Likewise, it is not uncommon to dismiss the claims of national minorities as senseless attempts to reproduce a model of sovereignty that has become obsolete in the new globalised and interdependent world.

All this helps to explicate why most liberal theorists have been inclined to treat as insignificant the question of cultural diversity. It also partially explains the predominant ideology that has guided the work of the United Nations (UN) and other

international organisations after World War II, that, until very recently, excluded the category of minority rights from the emerging international law of human rights. Indeed, this disregard has not been motivated by ignorance of the fact of cultural diversity at the infra-state level, but because of the dominant view that this factor should be seen as largely irrelevant—or, in any case, be reduced to a minor role—once individual human rights are effectively protected.

However, it is increasingly acknowledged that such a stance was misguided, or at least based upon excessive optimism. As some political theorists during the early 1980s began to realise, neither social mobilisation inherent in modernity nor democracy resulted in a decrease in individuals' consciousness of their particular identities.[12] On the contrary, far from being in decline, the force of ethnocultural consciousness seems to increase in today's globalised world. As European Union High Representative for the Common Foreign and Security Policy, Mr. Javier Solana, declared:

> In view of this necessary globalisation, individuals want to identify themselves more than ever with their own culture, roots, and history, the language that they have learned from their parents and the traditions remaining with them from birth.[13]

Recent political events in different parts of the world seem to corroborate this perception. Democratic transformations, on the other hand, do not always help to prevent ethnocultural conflict; instead, they sometimes even foster it. An illustration might be useful: contrary to the expectations of many observers, after the fall of the Berlin Wall and the collapse of communism the establishment of democratic regimes and liberal constitutions has proved unable to avoid the appearance of identity conflicts throughout Central and Eastern Europe. National minorities that seemed to have faded away behind the Iron Curtain emerged with renewed force, hence frustrating some of the hopes that Western analysts had placed in the processes of democratic transition as a natural means for guaranteeing peace and economic progress in the region. Many current disputes focus on how membership in a cultural or ethnic minority should affect both the position of individuals in relation to the state and the distribution of powers. In other words, rather than disputing the legitimacy of individual rights and democracy, those groups call into question the established territorial borders as well as processes of nation-building that involve assimilation. Needless to say, in such a context, determining the *demos* is a complex matter.[14] The resulting uncertainty critically affects the consolidation of democracy, since democracy, in itself, requires a previous agreement over who the relevant subjects are.

One could object that this is not a good example. Perhaps what we are witnessing in Central and Eastern Europe is a *sui generis* phenomenon, so to say, an attempt to create a "democracy without democrats," as some commentators suggest. On this view, ethnocultural conflicts emerge precisely because the process of democratic transition is not yet complete. But this argument does not seem satisfactory either, especially if we take into account that a number of well-consolidated democracies have not overcome, and far less solved, the problems that diversity generates.

Indeed, although a solid democratic culture can surely help to prevent tensions from escalating into violence and dramatic break-ups, this should not lead us to conclude that the conflicts are of a distinct nature. In fact, the same struggles for

recognition underlie the dilemmas that many well-consolidated Western democracies still need to confront: from the power of minority nationalism in Scotland, Quebec, Puerto Rico or Catalonia[15] to the controversy over indigenous rights and the social integration of immigrants in both Europe and America. In all these cases, majorities and minorities struggle about questions of political autonomy, the delimitation of territorial borders, educational curricula, official language, cultural policy, the representation in international institutions and so forth. To a great extent, the debate arises because cultural minorities of various kinds strongly resist the prevalent assimilationist models of state integration. Nonetheless, rather than rebellion, symbolic protests and political mobilisation along cultural or ethnic lines is the most common form of action in a democratic context.[16]

Or consider the issue of European integration. Questions of political identity and citizenship raised by the on-going process of polity-building in Europe are intimately connected with a problem that has been largely circumvented, even amongst those who call themselves integrationists and proclaim their faith in the Union: namely, what is the best model of political integration in this multicultural setting?[17] So far, the preconditions and means for building a "closer political union between the peoples of Europe," as was first stated in the Preamble of the Treaty of Rome, remain unclear. Although the European Community was initially conceived as an association of States that could survive and grow out of economic interests, the progressive empowering of the institutions, together with the rise of a supranational legal structure, has uncovered the limits of the original configuration of powers. Certainly, in order to search for a new locus of legitimacy, steps have been taken towards the elaboration of a notion of European citizenship and, more recently, the adoption of a Constitution, both instruments of enormous symbolic relevance. However, the increasing public awareness of the will to move the political union forward is generating deep concerns and tensions within many Member States, since people fear that their membership in the European Union might adversely affect their national and subnational identities. This attitude could explain, in part, the recent failure of the constitutional treaty as well as some countries attempts to exit or renegotiate the terms of integration. Also, it might account for the scarce level of enthusiasm amongst regional parties that represent the interests of national minorities.

Clearly, the nature, circumstances and context of all these conflicts are diverse. A comprehensive account would undoubtedly require contextual research, including a comparative analysis of the evolution of the factors and policies that provided the basis for the rise of ethnocultural clash and cultural wars. The explanation would probably vary with the circumstances, history and particular characteristics of each state. Nevertheless, beyond their peculiar genesis and specific normative character, there is a common trend underlying most of the heterogeneous claims of ethnocultural minorities in multicultural states (from national minorities and indigenous peoples to ethnic or immigrant groups): namely, the idea that identity and cultural membership are morally relevant factors that should be recognised and protected through specific rights. Since, at first glance, the issues involved in this contention seem to be related with justice and equality *between groups*, rather than between individuals, the general assumption guiding those claims has been that the basic catalogues of individual human rights are insufficient to properly accommodate them. Likewise, standard dem-

ocratic decision-making mechanisms, based upon majority rule, are not perceived as sufficient to respond to cultural conflicts, since, usually, the majority in Parliament (as well as in other major institutions) broadly represents the dominant cultural group.

In short, the recognition of certain collective (or group) rights to minorities,[19] it is argued, will help to promote equality in multicultural states, thus remedying the disadvantages that minority groups currently face in preserving and developing their cultural identities and institutions. In addition, so the argument goes, these rights will contribute to diminishing the homogenising impact that globalisation exerts on cultural diversity worldwide.

To be sure, there are signs indicating an increasing tendency to attribute rights to certain groups on the basis of cultural peculiarities, more noticeably in the international legal order. Thus, the most recent evolution of the international law of human rights reflects the idea that cultural minorities need to be protected through specific rights, thus counteracting the previous reluctance to establish standards focussed explicitly on minorities. Since the beginning of the 1990s, the question ranks high on the agenda of international organisations working in the field, and several legal instruments have been adopted. Probably, the initial reason for this departure from the previous ideology—which, as indicated, was hesitant to operate with the category of "minorities" and favoured instead the building of a general human rights programme applicable to all individuals—was the major geo-political change brought about after 1989, which reactivated the minority question, especially in Europe. Thus, in 1990, the Organisation for Security and Co-operation in Europe (OSCE), in its second conference on the Human Dimension, adopted the so-called "Declaration of Copenhagen," known at the time as the European Charter for Minorities. The Declaration affirmed that respect for the rights of individuals belonging to national minorities is an essential aspect of peace, justice, stability and democracy, and that persons belonging to such groups should have, among others, the right "to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will;" and also the right "to use freely their mother tongue in private as well as in public."[20] Even though this document only included a declaration of principles (and there was not agreement on how to implement them effectively) it represented symbolic progress, since problems related with the accommodation of cultural diversity in democratic societies were at least explicitly acknowledged.[21] Later on, in 1992, the same organisation created a High Commissioner for National Minorities in order to respond to the challenge of ethnic conflict. Even though its functions are of a nature more political than legal, the High Commissioner has played a significant role in addressing difficult cases involving minorities in highly divided societies, setting minimum standards and encouraging negotiations and policy reforms.[22]

But these were not isolated initiatives. Minority protection also became a priority for other international organisations involved in the defence of human rights during the 1990s. The member states of the Council of Europe understood that guaranteeing minority rights had become urgent after the rise of ethnic conflicts and aggressive nationalism at the beginning of that decade.[23] It was argued that the European Convention for the Protection of Human Rights and Fundamental Freedoms needed

to be complemented with instruments providing normative guidelines on the status of cultural minorities. In this light, the European Charter for Regional or Minority Languages[24] was adopted in November 1992 and, in February 1995, the Framework Convention for the Protection of National Minorities[25] was opened for signature. This latter document is of special significance, for it was the first legally binding multilateral instrument dedicated to protect national minorities.

Similar arguments over the need of a body of international legal instruments focussed on the protection of minorities led to the approval by the UN in 1992 of Resolution 47/135, which contains the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. This declaration is also particularly important, not only because of its universal character, but because it involved a shift in the philosophy that had always guided the treatment of minorities by the UN. Thus, during the gestation of the Universal Declaration of Human Rights, the prevailing view, defended by France and United States, was that the problems of minorities were best solved indirectly, by guaranteeing the respect of general human rights programmes applicable universally to individuals.[26] Governments were hesitant to confer legal meaning to the category of minority, and preferred to address minority issues within the frame of individual human rights and non-discrimination. This explains why the Declaration of 1948 avoids any reference to minority rights.[27]

However, as later events show, the question was not completely abandoned within the UN. Particularly significant is the inclusion, in 1966, of Article 27 in the International Covenant for Civil and Political Rights (ICCPR), which specifically protects the right of members of ethnocultural minorities to preserve their own culture, use their language and practice their religion.[28] The same Covenant also acknowledges the right of peoples to self-determination. This is a right worded as a collective rights provision; yet it is a very controversial one,[29] its legal adjudication has not been fully devised and the units to which it applies are not clear either, as the long struggle for the extension of the decolonisation justification to indigenous peoples shows.[30] So, in fact, Article 27 has been the main general minority rights clause of universal application, enabling the UN Human Rights Committee and some national courts to provide an answer to the rising demands for action on behalf of cultural minorities. But, in spite of the expansive form in which it has been interpreted (so as to secure some protection to indigenous groups and even, occasionally, to non-citizens[31]) the limitations imposed by the circumscribed scope of this provision led to the crafting of the declaration mentioned and, also, to the Draft UN declaration on the rights of indigenous peoples,[32] completed in 1993. Although indigenous claims often resemble significantly minority claims and their recognition pose similar questions and challenges,[33] this draft conveys the specific claims of indigenous groups that can not be fully addressed through adjustment to established legal categories (think, for instance, in the claims for restitution of traditional lands, or in historically grounded entitlements concerning natural resources).

Certainly, the efficacy of these declarations and conventions in dealing with difficult issues involving minorities is far from satisfactory, since most of them are not compulsory, in a strict sense, and face systemic problems of legal instantiation and adjudication. Nevertheless, the evidence is that a rich body of legal instruments

and practice is emerging as a distinct structure that, although not yet fully articulated or coherent, incorporates a category of claims made by a wide range of vulnerable cultural groups. This could presumably reveal that the international community is increasingly accepting that human rights—and, especially, the principle of non-discrimination—call for two levels of protection, individual and collective, and that this second level requires the attribution of specific rights to minorities and other collective subjects as such.

Yet this interpretation is highly controversial. In particular, the accommodation of these new categories and norms within the classical scheme of justification and ascription of human rights remains notably blurred, which, in part, explains that the abovementioned are mostly non-binding instruments with weak implementation mechanisms.[34] Some scholars refer to new provisions including minority language rights, the right to self-determination and, in general, the right to culture as "collective human rights" or "third-generation human rights,"[35] which are characterised as "solidarity rights of communities and whole peoples rather than individuals."[36] But, in fact, most of the rules included in the referred normative texts attribute rights to the *members* of minority groups; that is, in general, the holder of the right continues to be the individual person rather than the group. For this reason, a widespread view among international scholars and legal theorists is that, conceptually, these new provisions do not symbolise a novelty that could call for a revision of traditional doctrines of human rights, or for a separate theoretical account.[37] Partly due to this discrepancy, neither the proponents nor the critics of minority rights are satisfied with those clauses. The former question the adequacy of a formula that fails to attribute the rights directly to the relevant groups.[38] The latter object that most of these international norms, as currently formulated, are superfluous, in the sense that they could also be derived from other individual human rights. Overall, the disagreements on the conceptualisation and justification of these rights have a disruptive effect, in that no further steps are taken to consider these norms as established human rights and, hence, states often resist adopting appropriate measures to implement them effectively.

It would be erroneous, however, to regard this debate as a mere terminological dispute. Critics do not merely object the use of the *language* of "group" or "collective" human rights. Rather, the underlying objection is that the *grounds* for these rights rest on assumptions opposed to, or deviating from, the project of a democratic society that is congenital to contemporary liberalism.

Certainly, most democratic states are nowadays facing a crucial challenge: how to accommodate national and ethnic minorities' interests while preserving the universal structure of individual rights, as constitutionally recognised? The liberal tradition has serious difficulties with this question. According to a widespread view, group rights and individual rights are deeply incompatible. Moreover, it is often stressed that a new category of rights is eventually unnecessary to accommodate the claims of vulnerable minorities, whether the relevant groups are culturally defined or of a different character. In this view, constitutional rights and liberties, as they stand, provide a framework that is flexible enough to ensure the peaceful coexistence of different groups in democratic societies. For one thing: the liberal doctrine of toleration, coupled with the principle of state neutrality, offers a proper frame to deal with

diversity and accommodate cultural minorities. In addition, some commentators perceive the use of the language of rights in this context as too intransigent. By framing their aspirations in terms of rights, minorities tend to assume that the fulfilment of their interests depends neither on negotiation and agreement with other groups, nor on considerations related to the common good. Since claiming "our" rights inevitably entails ascertaining some distance to others, this approach might be too intransigent, as it leaves little room for trade-offs and compromise, thereby adding more obstacles to the complexities that multicultural societies need to confront. The main concern here is that the emphasis on rights may hinder alternative discourses, such as that of responsibility and civic virtues, therefore eroding cherished values of democratic citizenship.[39] According to the critics, the recognition of cultural group rights would increase the distance that divides us as individuals, giving too little expression to our common humanity and to the aspiration of social cohesion.

To be sure, recognizing rights of particular identity groups does indeed seem to call into question some paramount political ideals. At least in the liberal democratic tradition, justice is inherently related to some form of equality and it is a widespread understanding that equality requires granting the same rights to every individual, regardless of group attachments. After all, liberalism emerged against feudalism and as an answer to religious conflict. This is why the state is required to be neutral with regard to the different backgrounds of its citizens (relegating aspects such as culture, ethnicity or religion to the private sphere), or else the individualist and universal structure of human rights would be endangered. Liberal constitutions thus attribute to all citizens a set of fundamental rights and liberties that are specially protected, and this entails that the best strategy for coping with discrimination is rendering our differences publicly invisible. The ideal of a universal citizenship is associated precisely with a homogeneous distribution of rights: assigning the same rights to all citizens is considered sufficient to guarantee the legitimate forms of diversity in a democratic society. Liberal rights thus encompass the aspiration to general recognition. With the aim of eradicating prior oppression towards certain groups, modern liberal states were built upon the rejection of special or personal rights, defining citizenship primarily in territorial terms. This is the philosophy guiding the strategy of most states and international organisations in this realm. As Iris M. Young writes:

> Ever since the bourgeoisie challenged aristocratic privileges by claiming equal political rights for citizens as such, women, workers, Jews, blacks, and others have pressed for inclusion in that citizenship status. Modern political theory asserted the equal moral worth of all persons, and social movements of the oppressed took this seriously as implying the inclusion of all persons in full citizenship status under the protection of the law. Citizenship for everyone and everyone the same qua citizen.[40]

This observation illustrates the potential risks of adopting a model of multicultural or differentiated citizenship based on asymmetrical rights. The aspiration of some groups to a different legal or political status implies, at the normative level, a trend towards a non-homogeneous ascription of rights that acknowledges, rather than transcends, difference. For this reason, the problem of cultural minorities requires us to rethink the interpretation of the basic principles and values that sustain liberal democracies.

From a philosophical perspective, the elucidation of issues related to group rights and the preservation of cultural identities was initially influenced by the debate between liberals and communitarians, which became dominant in the late 1980s and early 1990s. At first glance, the recognition of rights to certain identity groups seems to entail "endorsing the communitarian critique of liberalism, and viewing minority rights as defending cohesive and communally-minded minority groups against the encroachment of liberal individualism."[41] Surely, the emphasis on the value of community and identity arose in close connection with communitarian doctrines, which maintain that the liberal political morality is unable to properly account for group loyalty, cultural belonging and identity,[42] because it does not confer any particular value to those elements. Communitarians insist that the abstract individualism of liberal theory, its extreme form of "atomism," does not capture the reality of human experience. Thus, according to Michael Sandel, to imagine a moral self-constructed independently of its allegiances and constitutive attachments is not "to conceive an ideally free and rational agent, but a person without character, without moral depth."[43] Alasdair MacIntyre expresses a similar idea when he says that "we all approach our own circumstances as bearers of a particular social identity," so that, in defining ourselves we might say "I am someone's son or daughter," or "I belong to this clan, that tribe, this nation," since "the story of my life is always embedded in the story of those communities from which I derive my identity."[44]

The communitarian agenda does not include a theory of group rights; however, for those who think that the justification of group rights should grant an intrinsic value to communities, this doctrine may provide a bedrock for building such a theory. Clearly, the communitarian criticism of the individualist stance of liberal theories of rights is not new;[45] yet it has often been related to conservative or reactionary elements like the precedence of the group or community over the individual, or else the implicit rejection of individual autonomy. For this reason, as Michael McDonald writes, "liberal hostility to collective rights is based on a certain reading of history that identifies collective rights with a totalitarian approach."[46] Therefore, the liberal's concern "is often for the members of minority groups who will suffer at the hands of a majority invoking its alleged collective rights at the minority's expense."[47]

## 2. OUTLINE OF THE BOOK

Starting from these tensions between group rights and the liberal democratic agenda, this book intends to examine at depth, and suggest ways to overcome, the main objections against the recognition of those rights to cultural minorities. More specifically, it criticises the widespread idea that group rights, as fundamental rights, can only be justified from a communitarian perspective that assigns value to the group over the individual. In contrast, it will be argued that these rights can be articulated in a form that overcomes the apparent dichotomy with individual rights. Thus, against the dominant orthodoxy, this book ultimately claims that group rights are not inherently opposed to individual rights, but complement them in order to honour some core values that characterise liberal theories of rights. Once the background against which to test the liberal–democratic character of group rights is clarified, it will become apparent that

people cherish their belonging to particular cultures for good reason. Above all, because they intensely associate it with a sense of identity that secures dignity and self-esteem and, also, because cultural belonging is usually a precondition for a meaningful exercise of freedom. Both arguments provide the foundations for a theory of cultural rights as basic rights.

As it derives from the considerations laid down so far, the scope of the analysis is limited. The starting point is the general concern about the way in which liberal democracies should respond to the phenomenon of multiculturalism. Of course, virtually every state in the world contains cultural minorities. Yet, it is not a mere coincidence that the demands of these groups emerge more strongly in democratic states and that it is in these states that the controversy around group rights has been most prominent. By recognising civil and political individual rights, liberal constitutions provide the preconditions for debates between majorities and minorities. For this reason, the focus of this book is not so much on the legitimacy of the standards of protection that have already been achieved, but instead on whether these standards are sufficient. The approach is thus interpretative rather than foundational, since the analysis intends to be internal to a perspective that is common to most liberal theories of rights. Let me spell out a bit more the implications of this approach:

The enquiry that guides the following chapters seeks to evaluate whether the claim that "group rights are human rights" is justified. Noticeably, this task poses some difficulties. To start with, there is no undisputable theory about the understanding and justification of the idea of human rights. Rather, what we have is a series of compelling arguments about the need to protect certain fundamental interests and aspects of human existence that, over time, have materialised in a number of legal instruments that recognise them. Philosophical perspectives on human rights usually start by asking what type of criteria a right should fulfil in order to be included in this category: not all rights are necessarily human rights, but only those that represent and protect certain "fundamental" or "basic" interests or goods. The distinction between legal rights and moral rights[48] might help to elucidate this requirement. It is often assumed that the existence of a moral right justifies the demand for its recognition through legal rights.[49] In this sense, the rights discourse plays a central role in political argumentation. Demands put forward in this language are usually reserved to emphasise those basic interests that, ideally, should triumph over arguments related to the common good.[50]

Thus conceived, fundamental or human rights share with the notion of moral rights the characteristics of inalienability, inviolability and universality.[51] Universality does not necessarily mean that there should be agreement on the precise content of human rights. Most of all, it is a regulative ideal of the moral discourse, which prescribes that any attempt to justify that a right is fundamental entails the need to determine "a number of basic needs, interests, vulnerabilities, and capacities that each of us possesses – features that are common points of concern, part of our *common* humanity, part of what any society should address."[52] There are, of course, different interpretations of what those basic needs are or which interests are worthy of protection and such disagreement is certainly exacerbated with respect to cultural rights. Yet the arguments presented throughout the following chapters are meant to assess the strengths and weaknesses of different positions that, although diverging, share this

paradigm about rights.[53] This exercise thus supposes that, in principle, it is possible to deliberate with reasons about the universal validity of moral ideals and about the conformity of certain practices and norms to these ideals. I regard this assumption as implicit in most academic studies about human rights as well as in activist discourses around the world.[54]

In order to develop the main argument, Chapter I starts by tackling the problem of defining the concepts of minority and group rights, which are highly contested in legal and political scholarship. I will emphasise that, although there may be good reasons to justify liberal fears about the recognition of group rights, the dominant approach makes certain problematic assumptions that are deeply unhelpful to address the relevant normative questions involved in contemporary debates about multiculturalism. On the one hand, it is normally assumed that this debate necessarily forms part of the broader discussion about identity, value and moral agency that divides liberals and communitarians, and therefore predominant discourses on group rights often evolve into an extension of this philosophical dispute. As a result, we are faced with a competition between group rights and individual rights in terms of incommensurable values (the relation between both categories of rights being that of a zero-sum game: the more the former are accepted, the more the latter are weakened). Much of the literature about group rights confines the debate within these two antagonistic angles. But, as will become clear, this approach can offer no more than a slanted view of the complexities involved in the demands of minority cultures. On the other hand, the standard view that regards group rights as intrinsically opposed to liberal principles is also biased by certain conceptual premises that are both unnecessary and inadequate.

After identifying the main shortcomings of the dominant approach, Chapter II explores various strategies to reformulate the debate. Drawing on some recent scholarship on minority rights and multiculturalism, I discuss the merits of an alternative conception of group rights. In fact this concept is far from precise and it remains practically unexplored. The conception suggested, I claim,[55] has the virtue of avoiding many common liberal concerns while, at the same time, preserving the *ethos* of the rights discourse within the liberal tradition and the main motivations of advocates of minority rights. I contend that this modification constitutes a preliminary step, which is essential for a correct assessment of the implications of recognising group rights.

On the basis of this account, Chapter III addresses the question of which groups would initially qualify as potential beneficiaries of group rights. Here I argue that, on a correct understanding of the conflicts spurred by multiculturalism, we should take into account primarily the claims of cultural minorities, rather than those of social groups. Even though the distinction between both types of collectives is not always clear, the specific rights or policies demanded by most social groups—such as affirmative action or special legal regimes—are generally meant to revert a situation of enduring historical subordination and inequality of certain categories of persons. Hence, they are generally conceived as instrumental and temporary means to enforce and effectively implement individual rights. Although some of these demands are highly contested, in general, they should not be read as implying a substantial challenge to traditional liberal views about rights. Unlike social minorities, cultural minorities perceive themselves as having a distinctive identity and cultural markers

that they value and seek to preserve indefinitely as a public good. Group rights are thus not merely invoked as temporary measures to achieve some sort of individual equality; rather, they are intended to preserve the distinctiveness of an identity group and to achieve its public recognition as a permanent feature that will imprint a mark onto the very character of the state.

Once these conceptual issues are clarified, I will focus on some of the key normative questions that any theory of group rights needs to tackle: Which arguments support the claim that access to some cultural goods, or the preservation of individuals' particular cultural belonging, are so important as to justify the recognition of human rights for their protection? If we accept group rights, how can we ensure their beneficiaries do not use them as a cloak for mistreating a certain category of members? (after all, there are internal dissidence in every culture). And why can the interests at issue not be protected through a broader interpretation of existing catalogues of individual rights?

The rest of the book purports to offer a coherent and systematic argument in defence of group rights of cultural minorities. To this end, I try to map out and disentangle the intricate set of arguments and counter-arguments that have been put forward over the last decade, partly as a result of the revival of the debates on nationalism, cosmopolitanism and multiculturalism. Chapter IV analyses the strengths and weaknesses of what might be called "the tolerance approach." According to its proponents, this model allows accommodating the interests of cultural minorities without challenging the dominant conception of human rights as individual rights. However, drawing on the main contributions of recent scholarship to the political theory of nationalism, multiculturalism and minority rights, I conclude that this approach is unsatisfactory, for it rests on incoherent premises about the nature of the liberal state, the justification of the ideal of neutrality and the claims of minority cultures. Moreover, the attribution of group rights to cultural minorities does not necessarily conflict with state neutrality, if this ideal is correctly interpreted.

The argument in Chapter IV serves as a reply to critics of group rights for cultural minorities only insofar as the importance of the interests involved remains unchallenged. A different strategy to reject the morality of those rights disputes the legitimacy, or ultimate relevance, of the interests involved. On the one hand, some opponents to group rights tend to associate the demands related with cultural identity or cultural membership to mere secondary preferences or even expensive tastes that, strictly speaking, should not be discussed in the language of rights. On the other hand, we can read the theory of liberal nationalism as implying that, under certain conditions, assimilationist policies are justified because they provide the ground for democracy and justice to flourish. According to this position, not every policy entailing state interference in culture is morally illegitimate. This would obviously be the case of some drastic measures of suppression or cultural assimilation, which may be simply regarded as violations of individual rights. Yet it might not hold for those measures that, without resorting to extreme coercion, are merely aimed at promoting or encouraging people to assimilate into the majority culture.

This reasoning constitutes the starting point of Chapter V, which addresses the question of whether cultural belonging, and access to certain kinds of cultural goods, can be regarded as a primary interest or need for human well-being. It also elaborates

briefly on other arguments based on instrumental reasons related to the limits of global humanism as well as on criteria of compensatory justice. The goal is to stress both the instrumental and the intrinsic relevance of group rights. Ultimately, though, it is argued that an instrumental understanding does not fully capture the drive underpinning the demands of rights by cultural minorities; instead, these rights should better be grounded on moral reasons related to the value of cultural belonging. In particular, Chapter V critically examines the arguments articulated by Will Kymlicka and Charles Taylor which, as I contend, complement each other to form the basis of a theory of cultural group rights as basic rights. The implications of such an account are far-reaching: in particular, it does not allow to justify the artificial reproduction of cultures that have already been lost, or the limitation of the freedom of individual members of cultural minorities who freely choose to assimilate into the dominant culture. On the whole, the discussion will show that the enduring power of identity-groups and the perseverance of minorities in their quest for recognition are not, as often depicted, the result of an anachronistic quest against progress or modernity.

Chapter VI examines in more detail the implications of the previous arguments for two different patterns of cultural minorities—national minorities and ethnic groups—which are regarded as the main sources of multiculturalism in modern societies. This chapter also addresses the controversial issue of the limits of cultural pluralism in a liberal democratic society. To this end, the claims usually set forth by non-liberal minorities work as a test to identify different patterns of multicultural citizenship. Admittedly, group rights can enter into a dynamic of conflict with individual rights and when this occurs, not all minority claims can be easily accommodated within the account I offer here. Undoubtedly, there will always be complex cases in which the recognition of group rights will raise perplexities and, certainly, any liberal theory of group rights needs to define its stance towards illiberal groups. However, it would be a mistake to presume that the recognition of group rights of cultural minorities *always* brings such extreme difficulties with it. In most cases, cultural minorities do not demand special rights with a view to oppressing or maltreating their own members. And, on the other hand, whereas it is problematic to accord group rights to minorities that pursue cultural practices incompatible with liberal principles, denying these rights (through the coercive imposition of restrictions aimed at internally liberalising those groups) runs the risk of essentialising identities and reproducing state biases against minority cultures that pursue alternative ways of life. For this reason, this final chapter argues that modesty should be a requirement for dealing fairly and respectfully with illiberal minority cultures, and it suggests a participatory approach (which favours transformation from within rather than coercive intervention from outside) to reconciling liberal principles and respect for these groups.

## NOTES

[1] Most existing independent states contain one or more ethnic, national or linguistic politicised minority. For recent estimates, see Gurr (1993, pp. 11–12; 2000, pp. 321–336).

[2] Horowitz (1985, pp. 3–6). For an excellent study that includes analytical basis for risk assessment of ethnic wars and comparative documented evidence, see Gurr (2000).

[3] Gutmann (1993, p. 171; 2003, p. 37).

[4] Gutmann (2003, p. 4, 13).

[5] Questions about the nature of ethnic groups and how ethnic identities are construed are secondary to this book. Most of the time they will be taken as given, since the attention will be mainly focussed on exploring the implications of sharing an "enduring collective identity based on a belief in common descent and on shared experiences and cultural traits." Gurr (2000, p. 5). Nonetheless, it will become clear that ethnic identities are not primordial (in the sense that they are essential or transcendent of other identities) but socially constructed, and thus contingent.

[6] Lukes (1996, p. 60).

[7] See Bobbio (1990, pp. 17–18, p. 33).

[8] However, as Kymlicka notes (1995a, pp. 49–52) this post-war trend in contemporary liberal thinking and attitudes contrasts with the liberal tradition of the nineteenth century and between the two World Wars.

[9] The account that follows is mainly based on Kymlicka (1995a, p. 88; 2001a, pp. 203–207).

[10] Kymlicka (2001a, pp. 204–205).

[11] Keating and McGarry (2001, p. 4). For the influence of the view that modernisation leads to a lessening of ethnonational consciousness and to assimilation, see Connor (1994, pp. 28–39).

[12] For discussion, see Connor (1994, pp. 29–39).

[13] Solana (2000, p. 21), *My Translation*.

[14] See Kolstø (2001, p. 200) and Tsilevich (2001, pp. 154–155). For an analysis of the rise of ethnopolitical conflict at the end of the Cold War and of current trends in this and other regions, see Gurr (2000, pp. 27–56).

[15] On the politics of nationalism in Quebec, Catalonia and Scotland, see Keating (1996).

[16] Gurr (2000, p. 84).

[17] I have tried to address some of the dilemmas posed by this issue in Torbisco Casals (2003).

[18] In Spain, this is the case of Catalonia and the Basque Country, for instance. As the political campaign and results of the recent referendum previous to the ratification of the Treaty establishing a Constitution for Europe indicated, there is a lesser amount of enthusiasm in these regions, since many people fear that their cultural and linguistic identities will be underrepresented in a EU that privileges state actors. This preoccupation is reflected in a document on the debate on the future of the European Union promoted by the Catalan government (see Requejo, 2003).

[19] There is no commonly shared terminology to refer to these rights. In addition to the expression "group rights," some commentators refer to "collective rights," to "community rights," or even to "cultural rights." In this book, I use indistinctly the expressions "collective rights" and "group rights" in order to discuss, more specifically, the rights of minority cultures. In part, this choice follows pragmatic reasons, since both terms are widely used in the relevant literature; yet, this work will defend the categorisation of minority rights as collective (or group) rights on more substantive grounds.

[20] Also, the participating states accorded to "protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create the conditions for the promotion of that identity." The full document is available at: www.osce.org/docs/english/1990-1999/hd/cope90e.htm

[21] Likewise, the adoption by the OSCE of the *Charter for a New Europe* (Paris, November 1990) did not imply significant improvements as to the creation of specific controls. For a detailed comment on these documents, see Helgesen (1992). For an analysis of the political task that the OSCE has undertaken in this field, see Bloed (1995).

[22] For an account by Mr. Max Van der Stoel, the OSCE's first High Commissioner—since 1993 to 2001—see Stoel (1994; 2000). See also Helgesen (1992, p. 186).

[23] See the volume *The Protection of Minorities. Collected Texts of the European Commission for Democracy through Law* (Collection Science and technique of democracy, Council of Europe Press, 1994).

[24] Europ. TS No. 148. The Charter entered into force on March 1, 1998. Its Article 1 defines regional or minority languages as languages that are traditionally used by nationals of a state who form a group that is numerically smaller than the rest of the population. The dialects of official languages and languages of immigrant population are excluded. The preamble also stresses "the value of interculturalism and multilingualism," lays down principles to be respected by states and adopts measures intended to ensure the public use of minority languages (in the fields of education, courts, administrative authorities, the media and economic and social life) in conditions of equality with the dominant ones.

[25] Europ. TS No. 157. The Convention only entered into force three years later, on February 2, 1998, after the number of ratifications had reached the required twelve. On the relevance of this instrument and, more generally, on the Council of Europe and minority protection, see Gilbert (1996, pp. 160–189). For an overview of the system for protection of national minorities in Europe, see Benoit-Rohmer (1996), Thornberry and Martín Estébanez (2004).

[26] Kingsbury (2001, p. 78). On the omission of an article on minorities from the Universal Declaration of Human Rights, see Thornberry (1991, pp. 133–137).

[27] Only during the period between the two World Wars, and supported by the League of Nations, a system for the international protection of minorities developed, which was mainly intended to protect the rights of certain minority groups in Central and Eastern Europe. The President of the United States, Woodrow Wilson, wanted that states were obliged to accord to all their "racial or national minorities" within their jurisdiction the same treatment and security accorded to the "racial or national majority." But, after the pressure that countries as the United Kingdom, Australia and New Zealand exerted, the system finally adopted relied on the adoption of specific treaties in order to protect particular minorities. Treaties were concluded with Poland, Yugoslavia, Czechoslovakia, Romania and Greece and provisions on minority protection were included in various Peace treaties. The experience, however, was unsuccessful: only new states were compelled to sign those treaties which, together with the League of Nations, had already failed when World War II broke out. Commentators agree that the causes of this failure were external to the system for the protection of minorities, more linked to the whole structure built in Versailles. For two classical studies of the system prefigured during this stage, see Macartney (1934, pp. 179–423) and Azcárate (1945). On the international evolution of minority protection, see Thornberry (1991, pp. 25–54), Leuprecht (2001, pp. 111–126). For a well-documented book about the deficits in the international protection of minority rights, Rehman (2000).

[28] Article 27 provides: "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."

[29] See Crawford (2001, pp. 7–26).

[30] See for discussion, Kingsbury (2001, pp. 87–102).

[31] See Kingsbury (2001, pp. 79–80) and Leuprecht (2001, p. 121).

[32] Completed by the UN Working Group on Indigenous Populations, a subsidiary organ of the Commission on Human Rights, in 1993. Although it has not yet been adopted (mainly because the rights to self-determination and land rights are very controversial) it is playing a central role in articulating a distinct programme for indigenous groups beyond universal human rights and existing minority rights regimes.

[33] For this reason, as indicated above, this book conflates both categories. The analysis is principally focussed on exploring different justifications for claims that relate to cultural preservation and recognition. This option, however, is not meant to deny that the particular political concerns and legal aspirations of indigenous communities involve specific aspects that demand the recognition of "indigenous peoples" as a distinct legal category, as some international legal scholars claim. See Kinsgbury (2001, pp. 106–107).

[34] This is partly due to the fact that many of the covenants and declarations mentioned were hastily passed in the European context (mainly as part of the reaction to the war in Yugoslavia) and their content is limited to general declarations. To a significant extent, this imprecision reflects the lack of consensus over the meaning of the category "group rights" and of basic concepts such as "minority." See Pejic (1997).

[35] The Senegalese jurist Kéba M'Baye popularised the idea of a "third generation" of human rights in the 1970s, when he chaired the United Nations Commission on Human Rights. Today this concept is used in the broader sense pointed out below, which includes provisions concerning environmental and cultural preservation. For discussion, see Donnelly (1993).

[36] Waldron (1993, p. 5). According to this categorisation, the first generation of human rights includes civil and political individual rights (which tend to be understood as liberty rights requiring state abstention); the second generation includes economic and social rights, and the third generation would refer to collective rights based on ideals of solidarity and cultural or environmental preservation. This

classification may be useful to account for the legal consolidation of the human rights from a historical perspective; however, its suitability is controversial when used to establish priorities of relevance amongst these categories of rights, since, as some critics contend, all categories of human rights are interdependent insofar its justification derives from the same principles. For a general discussion on monist and pluralist justifications of human rights, see Jones (1994, pp. 94–119).

37 For the view that the international law protection of peoples and minorities falls short of recognising group or collective rights, see Mariño Menendez (1996). If we look at the evolution of these agreements and international declarations, this thesis seems to gain force. Many of the proposals initially submitted contained rules that accorded rights to minorities as collective entities, but in most cases those provisions were discarded in the final documents adopted, since the agreement of the parties was conditioned to the allocation of rights to individuals as members of identity groups. This is the case, for instance, of Article 27 of the ICCPR. In its earlier versions, referred to the "rights of minorities," whereas the final text makes clear that the rights belong to the individual members of these groups, thus reflecting an individualistic concept of rights. See Pejic (1997, pp. 673–674).

38 This is the position of Natan Lerner (1991, pp. 34–37) who argues in favour of a minimal catalogue of group rights in international law that would include the right of the group to exist and possess an identity, the right to political participation, the right to use its language, the right to establish its own institutions, and the right to protect and develop its culture.

39 Holmes and Sunstein (1999, p. 99, pp. 136–140). This is so, presumably, to the extent that rights are conceived as absolutes that can override all other considerations. Rights set the ground for certain duties—this is the idea embedded in the definition of rights proposed by Joseph Raz (1986, p. 166)—and a duty establishes that something *should* be done and not merely a starting point for negotiating or bargaining. For further discussion, see Waldron (1993, pp. 370–391), Glendon (1991) and Etzioni (1995, pp. 99–105).

40 Young (1989, p. 250).

41 Kymlicka (2001a, p. 19).

42 Communitarianism emerged in the 1980s with strong criticisms to the liberal project—especially to the paradigm statement of contemporary liberal theory as articulated by John Rawls in his book *A Theory of Justice* (1971)—and this discussion continues to inform a significant deal of recent theoretical debates. Four central authors whose works are often grouped together as central statements of the communitarian critique, see MacIntyre (1981), Sandel (1982), Walzer (1983) and Taylor (1989). For an introduction to the debate between liberals and communitarians, see Mulhall and Swift (1992); also, Walzer (1990, pp. 6–23).

43 Sandel (1982, p. 179).

44 MacIntyre (1981, pp. 220–221).

45 Lukes (1973, pp. 3–16) points out that in France the term "individualism" was used in a pejorative sense by the conservative doctrines prevailing during the Restoration, which rejected the principles of autonomy, liberty and equality advocated by the Enlightenment. Antirevolutionary thinkers placed great value on the society and rejected the importance of individuals defended in the eighteenth century. The purpose was, in many cases, to justify the return to feudal and ecclesiastical principles. The same conservative tendency is attributed today to communitarianism.

46 McDonald (1991, p. 227).

47 McDonald (1991, p. 227).

48 The current pre-eminence of this distinction flows from the influence of the Anglo-American tradition. In continental Europe, it is more common to use the terms "positive" and "natural" rights. See Bobbio (1990, pp. xvi–xvii). The idea underlying this dichotomy is the contraposition between two different normative systems. Legal rights are rights recognised by a legal order, whereas moral rights derive from a moral system. This difference between both categories of rights affects their main features, especially as to the degree of formalisation and substantive materialisation. The existence and knowledge of moral rights is, of course, a controversial meta-ethical problem, but this debate goes beyond the reach of this book. In what follows, I shall assume that the notion of moral rights is meaningful (see Nino, 1990), thereby leaving aside sceptical positions and accounts such as Bentham's, for whom the idea of a non-legal right is contradictory and unintelligible. For an illuminating criticism of this position, see Hart (1982, pp. 79–104). On the need to assume objectivity, see Dworkin (1996).

[49] This statement does not need to be seen as implying that the main function of law is the promotion of moral values. *Prima facie*, there is no clear correspondence between legal and moral rights. In order to simplify a very complex issue, we could say that not all moral rights have a positive counterpart. For example, we could think of the rights of a company's shareholders, or of any other right that is not justified, at least directly, for moral reasons (even if we might assume the need for a certain degree of compatibility with a moral system).

[50] This is the idea that underlies Dworkin's famous expression of "rights as trumps." See Dworkin (1977, xi, p. 193; 1984, pp. 153–167). As Francisco Laporta puts it (1987, pp. 27–28), rights emerge before action; hence, when we speak of rights we refer to the reason presented as a justification for the existence of certain norms.

[51] On the notion of human rights as moral rights, see Nino (1989, pp. 11–48). As to the idea that a central part of the political form of a constitutional democracy is substantiated through the provision of certain fundamental liberties, see Rawls (1999, p. 73). As regards, the historical link between fundamental rights and constitutional protection, see Cruz Villalón (1989).

[52] Waldron (1993, p. 169). On the requirement of "universalisability" as a regulative ideal of evaluative discourse and value-judgements, see Hare (1952, p. 129, pp. 154–155), and as a constraint of the concept of right, see Rawls (1971, p. 132).

[53] By situating the problem of group rights in this framework, I assume, with Rawls (1971), Hare (1952, 1981), Gewirth (1978) and others, that we can rationally justify our convictions of social justice and the normative principles that derive from them; also, the argument in the following chapters presupposes that there is a basic continuity between moral, political and legal philosophy in the sense that the first sets the background to assess the legitimacy of basic legal and political norms and action. Certainly, this methodological choice implies that other alternative approaches have been discarded as, for example, the so-called "cultural" approach, which questions the universal vocation of human rights. At the centre of the different variations of this approach lies a criticism of the very idea of human rights that some see as a Western ethnocentric conception to serve imperialistic purposes. This criticism is fairly familiar and deserves to be taken seriously. Nevertheless, it tends to be used to justify relativist positions of the type of "anything goes," often grounded on a discourse of tolerance and radical incommensurability. Hence it is argued that different cultural, social or religious environments give rise to equally acceptable value systems. Some discussions about the legitimacy of cultural group rights certainly take place within the framework of the debate between universalism and relativism the influence of which cannot be underestimated—see, for instance, Renteln (1990), although she argues that human rights discourses can be accommodated within a variety of cultures. As Giancarlo Rolla (1998, p. 45) points out, the prevalence of relativism constitutes one of the fundamental obstacles for the effective universalisation of human rights and the consolidation of liberal constitutionalism. However, the relativist approach has been criticised (rightly, in my view) as incoherent for different reasons. First of all, because it derives the impossibility of moral criticism (and hence the impossibility of universalising certain norms) from the empirical fact of cultural diversity. See Nino (1989, pp. 49–89) and Garzón Valdés (1993, pp. 519–540). On the other hand, applied to contemporary debates about cultural diversity, relativism fails because it often presupposes an holistic view of cultures as "internally coherent, seamless wholes" (Benhabib, 2002, p. 25) that are not able to be translated or comprehended from an external observer's perspective. Yet, as Benhabib argues (2002, p. 30), if cultures were so radically different and untranslatable the process of individuating them would be impossible because we need framework-transcending criteria of evaluation to say that "something" is another culture; otherwise, we could not account for concepts, rituals or symbols in an intelligible way.

[54] Non-Western scholars often criticise the tendency to present the current international debate on human rights as a conflict between two different perspectives, the relativist of the East and the universalistic of the West, giving rise to an unsolvable "*Clash of Civilisations*," in Huntington's famous expression (1997). This approach ignores that, within Islamic and African cultures, for instance, there are enormous pressures to advance toward stronger democratisation and respect for human rights. Additionally, to speak in such terms is an oversimplification. As Fred Halliday contends, the rise of Islamism over the past decades has put Western states on the defensive, but it remains inaccurate to present certain opinions on issues such as human rights as part of some "Islamic" or "Middle Eastern" position: "this, of course, is the aspiration of states who wish to claim a monopoly of opinion on these questions, but it has never been, and is not, the common position of all within these countries." See Halliday (1995, p. 156). For a

critique of this view of human groups and cultures with fixed boundaries as based on faulty epistemological premises and a reductionist sociology of culture, see Benhabib (2002, pp. 3–5). For further objections to the invocation of the word "culture" in order to speak of us "the West" and the others "the East," see Appiah (2005, p. 254).

[55] That is why, despite the topical character of this debate, it is difficult to find references to this expression in philosophical encyclopedias or in the theories of rights articulated by philosophers. Significant exceptions are Raz (1986, pp. 207–213), Sumner (1987, pp. 209–212) and Wellman (1995, pp. 169–177).

# CHAPTER I: CULTURAL MINORITIES AND GROUP RIGHTS: CONTESTED CONCEPTS

## 1. INTRODUCTION

The rising interest in multiculturalism and group rights in law and political philosophy is, as indicated in the introduction, closely linked to the fact that many democratic countries are currently confronted with the rise of demands for accommodation by various types of historically marginalised socio-cultural minorities. As the groundbreaking work of scholars such as Will Kymlicka, Charles Taylor or Iris M. Young has helped to elucidate, such demands typically involve the recognition of some form of differentiated citizenship in order to acknowledge the legitimacy of the struggle of minorities against unidirectional modes of belonging to multicultural polities. In this view, "members of certain groups would be incorporated into the political community, not only as individuals, but also through the group, and their rights would depend, in part, on their group membership."[1]

To many, such difference-based approach is appealing because it provides a better account of identity conflicts and group inequalities as well as the grounds for a normative theory of minority rights. One of the main aims of this book is to assess this general claim. However, for the sake of analytical clarity, it is important to begin by examining the conceptual premises of that approach. As noted in the introduction, one of the key features of the recent literature on multiculturalism is its emphasis on the need of according group rights, as human rights, to minority groups. Yet, there is still considerable uncertainty over the meaning and implications of this shift in the prevalent discourse of liberal rights, which, as indicated before, conceives them as essentially individualistic and general in scope. This is partly due to the fact that the term "group rights" has been used with substantially different connotations, and hence the implications entailed in a proposition of the type "the group X has rights" are not straightforward. Furthermore, the notion of minority is vague as well and, as a result, the characteristics of the sort of collective that is of interest for the previous discussion remain unclear.

To a significant extent, these conceptual issues shape the different positions in the philosophical discussion about minority rights. Thus, on the one hand, criticism of the use of this very notion in the new international legal documents stems precisely from scepticism about whether it is at all possible to find satisfactory criteria to define "minority." On the other hand, as far as the notion of group rights is concerned, collectivists and individualists disagree upon whether or not a minority—or any other social group—can be said to possess moral interests, as this is commonly regarded as


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necessary to justify the attribution of human rights. This chapter addresses these questions, as assessing the substantive claims that have been advanced, and their corresponding critiques, requires, first of all, some common understanding of the concepts used. Yet the dispute over the conceptual premises is not merely terminological, as will become apparent throughout the following pages; as Steven Lukes says, words contain ideas and even theories,[2] an observation that will prove especially significant for our discussion.

## 2. A PRELIMINARY ELUCIDATION OF THE CONCEPT OF MINORITY

The term "minority" is surrounded by a significant degree of vagueness, and this explains the lack of consensus on a legal—or metalegal—definition. In a broader description, we could say that the idea of minority refers to a group of individuals which, for a variety of circumstances, find themselves in a disadvantaged position compared to the larger group with which they contingently form a society. However, the elements that are invoked to ascertain such a position are rather mixed: number, ethnic traits, religion, inferiority regarding the enjoyment of rights and so forth. The difficulty of agreeing upon a conventional definition of this concept stems, partly, from this heterogeneity.

In the legal and political domains, the term "minority" is usually connected to that of "state." Since the concept of minority has a relational component, this link indicates that the state is the political structure that is taken for granted as a framework for evaluating the inferiority or subordination of certain groups. Although we could imagine the existence of minorities beyond the state context or speak, in a plausible way, of "transnational minorities," and even of "minority states" in international society, the minority question has been tackled primarily from a domestic perspective (a fact that merely reflects the way the world is politically organised). In any event, beyond these elements usually assumed in most proposed definitions of minority—the situation of inferiority or subordination of a given group and the state framework in which the imbalance is produced—progress towards a more precise delimitation of the concept is difficult to achieve. Already in the late 1970s, Special Rapporteur Francesco Capotorti illustrated its elusiveness in his well-known *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*,[3] prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. In this study, Capotorti points to some of the more controversial questions, such as the need of requiring a minimum group size, the prerequisite of numerical inferiority, the interaction between objective and subjective criteria and the inclusion or exclusion of foreign immigrants. According to the definition he finally suggested, a minority is:

> a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[4]

Hence, Capotorti regards the term "minority" as defined by two primordial components. The first refers to objective elements: a group defined by its ethnic, religious or linguistic traits, numerically inferior, with a non-dominant position in the state

whose citizenship members of the minority possess. The second component is of a subjective or voluntaristic nature: the willingness of the group to preserve its particular identity. Since this definition has proved widely influential in the literature and in international practice (especially in the elaboration and interpretation of international legal norms protecting minorities) it is important to examine its implications in more detail.

### *2.1. Objective Elements*

The idea that the concept of minority relates to the numerical inferiority of a group in a given state might be criticised on various grounds. First of all, the quantitative element does not account for the common use of the term for oppressed or marginalised groups. This is the case, for example, of the black population in South Africa during the *apartheid* regime and of women in general. Here, the relative size of the group does not directly impinge on its dominant or subordinated position. Therefore, unless the connotations of the term "minority" are merely confined to purely numerical terms, this factor should not be seen as essential for its definition—even if, as Joseph Raz points out, numbers might be relevant in a particular conflict or for the assignment of resources.[5]

Secondly, the citizenship requirement excludes the group of aliens or resident immigrants that have not been officially granted nationality in their state of residence and, also, of narrower categories such as refugees or temporary migrant workers. Yet all these are sources of the multicultural character of contemporary societies. In view of the fact that, currently, immigration tends to be permanent rather than transient, involving the incorporation of new members into the society, a study on the minority question should also focus on the question of the human rights of aliens. In particular, if we take into account that, when the proportion of immigrants is large, their expectations towards the host state tend to be similar to those of other groups included under Capotorti's definition of minority[6]—think, for instance, of demands aimed at preserving certain cultural and religious practices or other identity aspects—and hence generate similar controversies. In short, including the notion of citizenship into the definition of minority appears unwarranted, especially if the purpose is to assess the relevance of particular claims and normative schemes.[7]

Finally, Capotorti's concept of minority highlights the relevance of linguistic, religious and ethnic features, which are prevalent in international norms on the protection of minorities, as, for example, in Article 27 of the ICCPR.[8] Although the more specific expression "national minority" is occasionally mentioned, the relevant groups are often thought of in terms of such attributes.[9] The debate on the morality of group or collective rights, on the other hand, is also primarily focussed on rights that are aimed at protecting communities with those characteristics. Prioritising their analysis is understandable, since the presence of this type of groups is often at the origin of violent conflicts and political instability.[10] However, at the theoretical level, it is important to enquire to what extent these traits ought to possess a distinct weight—in contrast to other identity traits with which people also identify deeply. In this vein, some criticise the priority that is usually attached to ethnic, religious and linguistic elements in the debates about minorities. Gays,

women or even some non-religious ideological groups—such as hippies or vegans for instance—also have ways of living and values that often differ from, or even conflict with, the majority society. For this reason, some critics argue that a definition of minority based upon those features is inconsistent with the wider meaning of this term in ordinary language.[11]

In sum, as can be seen, there is no consensus over the objective elements a group should possess so as to qualify as a minority. A conception along the lines suggested by Capotorti seems to be excessively restrictive as it entails an arbitrary exclusion of other identity groups that are relevant for our discussion because they are also a central source of cultural claims.

What follows from this discrepancy? To tackle this question, it is important to realise that the goal of doctrinal efforts such as Capotorti's is mainly to interpret a concept contained in a specific legal rule. Thus, his definition fulfilled the need, at the time, to define the scope of application of Article 27 of the ICCPR. Similarly, other attempts at clarifying the concept of minority have been related to particular international regulations or declarations on this issue.[12] In such endeavours, textual as well as political constraints play an important part. For instance, states have occasionally made their approval of international documents on minority protection conditional upon the explicit exclusion of certain categories of groups from minority status. Thus, Article 1 of the European Charter for Regional or Minority Languages emphasises that the expression "minority languages" shall not include the languages spoken by immigrants but only those traditionally used by national minorities.[13] This limitation was due to the reticence of various state representatives to recognise all minority languages in the territory; they basically feared the emergence of political tensions between the different groups as well as the obligation to fund instruction in those languages. In another example of political limitations, the above-mentioned Framework Convention for the Protection of National Minorities[14] does not include a definition of national minority because the states could not reach an agreement on this matter. As a result of this omission, some signatories of the agreement have added a reservation or declaration specifying that, according to what *they* understand by national minority, no such groups exist on their territory; or that the notion of "national minority" will be defined by the state.[15] In this sense, the obligations under the agreement remain largely at the discretion of the signing states; ultimately, they decide which sort of minorities might be entitled to protections.

In sum, the recent trend in the international practice to guarantee certain protections to minorities has not been accompanied by clear and justified criteria for identifying the relevant groups. This is due to substantive—not merely formal or terminological—disagreements about what kind of groups deserve special protection and why this should be so. Once the political and pragmatic restrictions involved in the elaboration of definitions like that of Capotorti are put aside, the single objective element that underlies the ordinary use of the term "minority" is the subordinate or non-dominant position of a group of individuals. Ultimately, this is the element common to most definitions, although it is usually expressed in different terms: as a situation of disadvantage, inferiority, inequality, etc. In this sense, a better formula that refines Capotorti's definition could be that proposed by Paolo Comanducci, according to whom minorities are:

> groups of individuals that, without being necessarily less in number than others (think of women), are for historical, economic, political or other reasons in a position of disadvantage (of subordination, inferiority in power, etc.) compared to other groups of the same society.[16]

But, according to some critics, to resort only to the element of subordination to account for the meaning of "minority" leads to ambiguities that are equally unsatisfactory. As Prieto Sanchís ironically puts it, minorities worthy of protection under that criteria can be women, children, elderly, drug addicts, ethnic minorities, ex-convicts, the unemployed and so forth, so the alleged majority might actually become a negligible minority.[17] This observation implies that, given the pervasiveness of inequality, understanding the notion of minority only in terms of disadvantage and subordination would include an overly heterogeneous array of social groups.

### *2.2. The Subjective Element*

However, Capotorti's report proposes a second element as constitutive of the idea of minority which might help to remedy the problem of overinclusiveness. Following his definition, the group should show a sense of solidarity, aimed at preserving its culture or traditions. This second component introduces a subjective or voluntaristic criterion that might help to circumvent the problems of specifying objective factors beyond the blurred element of relative subordination. For a group to qualify as a "minority" it needs to show, implicitly or explicitly, its willingness to preserve its distinctive identity.

It is interesting to note that the concept of group itself is usually associated with such a subjective element and is thus linked to the configuration of individual and collective identities. Articulating this view, Owen Fiss emphasises that a social group is something else than a mere aggregate of individuals reaching the same corner at a given time.[18] A social group, he claims, should combine two specific characteristics. On the one hand, it is an "entity," namely, it "has a distinct existence apart from its members, and also [. . .] it has an identity." Therefore, "it makes sense to talk about the group (at various points of time) and know you are talking about the same group"[19] without referring to its particular individual members at any given moment. On the other hand, Fiss refers to what he dubs the "interdependence condition," which means that

> [t]he identity and well-being of the members of the group and the identity and well-being of the group are linked. Members of the group identify themselves – explain who they are – by reference to their membership in the group; and their well-being or status is in part determined by the well-being or status of the group.[20]

More recently, the literature on minority rights has advanced considerations on the type of groups qualifying for the attribution of rights, but the central elements identified by Fiss remain basically the same. Thus, according to McDonald, a group of individuals constitutes a social group when they show "shared understandings."[21] Objective elements, such as shared heritage, language and ethnicity, only facilitate the basis for their emergence. What is truly unique about these groups, McDonald writes, is "a tendency of each group member to see herself as part of an *us* rather just than

a separate *me*."[22] Along the same lines, J. Angelo Corlett examines the notion of social group through a taxonomy of geological connotations.[23] By distinguishing between "aggregates" and "conglomerates," he stresses that only the metaphor of conglomerates points to the relevant idea of totality, to the integration of the interests of group members, as distinct from the kind of collectives that Virginia Held calls mere *collections*—that is, casual groups of individuals that are not strongly related to one another.[24]

This concept of group is thus closely linked to subjective elements, which allow distinguishing it from anonymous collections of individuals as well as from clubs or formal associations to which people choose to belong. The reference to the links between the group and the identity of its individual members is regarded as central, and relates this notion to that of "community."[25] Yet, some think that the subjective element is still too vague to delimit the concept of minority. In particular, it is the reference to quasi-psychological criteria that is criticised: if identity is not a static feature, if its formation is the fruit of a complex and dynamic process, involving an intense relationship between different groups that, in turn, are not internally homogeneous, to which extent is possible to speak about *different* collective identities and, hence, of different groups? In short, the assertion that some groups possess an identity that allows them to be identified as a "minority" remains contested. This point will be taken up in Chapter III.

## 3. MINORITIES AND GROUP RIGHTS: THE INADEQUACY OF THE DOMINANT APPROACH

As indicated, the scholarship on minority rights tends to focus first on defining the concept of minority and, as a second step, on the plausibility of assigning a catalogue of "group" or "collective" rights to the groups previously identified. Thus, it is common for contributors to think that it is necessary to clarify the type of group that should be regarded as a legitimate collective subject before approaching the problem of attributing them a number of rights. This is, so to speak, the dominant perspective in tackling the subject.

However, we have already seen the difficulties in clarifying the term "minority." Stipulative definitions such as that suggested by Capotorti are criticised because they ultimately rely on vague criteria that seem to throw the discussion back onto its original imprecision. In order to avoid this sort of conceptual misfortune, as it were, some scholars simply seek to specify the sense in which they use the term; that is, they try to single out the groups to whom their observations are addressed. But these efforts at greater precision do not entirely succeed in avoiding the confusion since, under the label "minority rights," we find allusions to a wide—and not necessarily connected—range of groups: from groups that are simply numerically inferior to marginalised social classes, national minorities, racial groups or the handicapped. According to a widespread opinion, the complexity of elucidating a comprehensive concept of minority represents a serious analytical pitfall, making it difficult to elaborate a theory of group rights as long as the issue of the potentially eligible groups remains contested. In particular, many explicitly reject the possibility of setting up a general legal framework for the attribution of group rights, since the heterogeneity of the proposed

criteria would inevitably lead to randomness in the selection of the relevant groups. The perils of arbitrariness and lack of legal certainty are, indeed, often emphasised.[26] Even some group rights defenders share the conviction that the lack of consensus over the concept of minority is a major obstacle. Consider the following observation by Javier de Lucas:

> [T]he existence of an increasingly greater awareness of the importance of the problem of minorities does not necessarily imply conceptual clarity. This is reflected, for instance, in the difficulty of elaborating a concept of minority that satisfactorily encompasses the differences between different types of minorities, from cultural ones to national ones. It is also manifest in the relative failure of all attempts to solve the problem of 'minority rights', a question that, undoubtedly, is related to the conceptual difficulty just mentioned, as the doctrinal debate itself reveals.[27]

The concern behind these words is widely shared, and this explains the amount of energy that both defenders and critics of minority rights devote to discussing the feasibility of the variety of conceptions that have been suggested. Nevertheless, the perspective that underlies this concern (namely, the idea that the question of defining "minority" is analytically previous to elaborating a theory of group rights) is, in my view, inadequate. For it is based on implausible assumptions about both the correct way of approaching the issue of minority rights and the justification of group rights itself. In addition, the dominant approach produces two pernicious effects: first, it leads to envision arguments for or against group rights as taking a stance on more profound philosophical issues. And second, it has brought to dominance a discursive structure that frames the comparative relationship between individual and group rights in terms of absolute or incommensurable values. But let me start by spelling out the reasons why the standard perspective is inadequate in the first place.

### *3.1. The Problem of Defining "Minority" Revisited*

Above all, it is worth emphasising—though it may seem trivial—that even if we could reach a consensus on the definition of minority, we would not have made much progress towards resolving the normative questions that surround the morality of group rights. For nobody claims that *all* minorities, by the mere fact of being so, should possess certain rights in the same way as individuals do merely by virtue of being persons. Rather, what advocates of group rights maintain is that these rights should be recognised to *some* minorities. Hence, in any event, we would still need to assess different types of demands raised by different kinds of minorities. In this sense, any attempt to identify the relevant groups on the basis of elements common to *all* groups, whatever they might be, appears incoherent. In other words, it would be implausible to argue that X enjoys a certain range of group rights on the grounds that "X is a group." Consequently, the argument that certain groups should enjoy special protection requires additional reasoning.

Acknowledging this point is a first step to understanding the inadequacy of the dominant approach. This approach insists on the existence of two different problems. The first, semantic in nature, concerns the meaning of the term "minority." The second refers to the justification of group rights. Solving the first problem is regarded as *sine qua non* for tackling the second one. Assuming that the relation between words

and reality is conventionally established,[28] we could say that, by inquiring into the meaning of a term—in this case, "minority"—we aim at exploring its use in a natural language. In this case, disagreements over the use of the term "minority" might be interpreted as symptoms of a lack of precision, which might be due to a problem of vagueness.

In general, vagueness is attributed to concepts that refer to one or various properties that are found in reality in different degrees, giving rise to instances where it is doubtful whether using the term at issue is accurate or appropriate. On this account, analysing the notion of minority should aim at reducing or eliminating this problem in the use of the term.[29]

According to a common view, framing the issue in terms of vagueness implies that some objects fall squarely within the limits of the usual application of a given concept. The classification is only contested for *other* objects that remain at the margins of the ordinary scope of application, since it is not clear whether they meet the relevant properties to a sufficient degree.[30] But such interpretation reflects the disputes over the concept of minority only partially. The core controversy does not just concern some marginal instances the properties of which do not entirely match those regarded as essential to the concept. Instead, the disagreements are more substantial. As seen in the earlier section, the term "minority" is also disputed with respect to various types of groups that are identified by different elements than those found in standard definitions. Precisely for this reason it is not only impossible to bring the controversy to an end through some stipulative definition, but we also face alternative, indeed competing, definitions. The problems around the definition of minority can thus be better understood through the lens of the debate about "contested concepts." The peculiarity of these concepts basically lies in their evaluative dimension; following Jeremy Waldron, an expression *P* is contestable if:

> (1) it is not implausible to regard both *something is P if it is A* and *something is P if it is B* as alternative explications of the meaning of P; and (2) there is also an element $e^*$ of evaluative or other normative force in the meaning of P; and (3) there is, as a consequence of (1) and (2), a history of using P to embody rival standards or principles such as *A is* $e^*$ and *B is* $e^*$.[31]

Waldron offers some examples of normative propositions that include contested concepts. When the U.S. Constitution forbids "cruel" and "unusual" punishments, it uses two expressions whose meanings are susceptible to different evaluations and may also differ over time. Yet this does not imply that in the process of interpretation value judgments can assume any content, since those terms incorporate a minimal descriptive meaning that sets limits to the specific scope of evaluation.[32] Beyond this minimal agreement, Waldron remarks, "the meaning of 'cruel' remains indeterminate."[33]

Now, one could think that the semantic difficulties that the problem of defining "minority" poses are analogous. Allegedly, the term has a core meaning upon which there is consensus—succinctly speaking, the idea of non-domination. Yet such agreement is insufficient, since it is based on a notion whose evaluative dimension makes it extremely controversial. Thus, when it comes to specifying in detail which elements are relevant in order to assess the relative position of a given group, deep disagreements come to the surface. As explained earlier, whether the idea of subordination or

non-domination should be understood in the numerical sense or in relation to other subjective or objective elements remains highly disputed. Ultimately, these disagreements lead to different rivalling conceptions of "minority," which, nevertheless, make sense and are *a priori* defensible. As a result, the important task is to discern the different reasons that justify these divergent conceptions.

If we raise this question, however, the debate over the definition of minority becomes closely linked to the issue of minority rights. Indeed, rather than exploring the meaning of the term "minority" *per se*, legal and political theorists are mainly interested in justifying the protection of some groups (identified by certain characteristics) over others. In this sense, by specifying certain elements as essential to the definition of minority they aim at delimiting the scope in which the normative debate over group rights should take place. In other words, in this context, the elucidation of the concept of minority beyond the abstract element of non-domination requires an additional explanation of some commonly held assumptions. The third element that, in Waldron's view, characterises contested concepts points to this idea.

These assumptions strongly permeate the debate. For example, when some international legal scholars assert that the notion of people cannot be subsumed under the idea of minority and, therefore, the right to self-determination is not a "minority right," they are not merely trying to formulate a terminological distinction. On the contrary, the underlying claim—which should thus be justified—is that the demands of self-government raised by certain groups are groundless or lack legitimacy. It is important to recall that definitions of minority such as the one proposed by Capotorti seek to influence the application of international legal norms.[34] In this context, the distinction between "minority" and "people" is relevant in order to avoid the extension of the right to self-government to certain type of groups, despite they might eventually meet the relevant criteria. Likewise, the explicit exclusion of immigrants prevents these groups from claiming the rights under Article 27 of the UN ICCPR.[35] By contrast, scholars that propose expanding, instead of restricting, the definition of minority normally defend the attribution of the special protection granted by minority rights to a wider range of groups. To this end, some even reject using the term "minority," and suggest that the notion of group is more appropriate because it makes it possible to include tribes, nations, peoples and cultural or religious minorities.[36]

However, the problem with these approaches is that they seem to place the accent on mere terminological considerations about the suitability of one word or another while the substantial object of the dispute remains somehow hidden. The central problem, instead, if to discern which type of arguments support a particular conception of minority that includes some groups (let us say, ethnic and linguistic groups) and excludes others (gays, immigrants, women). Or, alternatively, whether the special protection that group rights is supposed to provide is indeed necessary for all types of minority groups. In short, the main point here is that there is a significant link between the two questions that the dominant perspective tries to tackle separately. For the above-mentioned reasons, disentangling the definition of minority from the justification of minority rights is misleading.

Incidentally, this conclusion casts doubt on whether the pessimistic assessment often derived from the lack of agreement over *one* definition of minority is justified. In fact, the existing controversy on this point should not necessarily be seen in a

negative light. Certainly, vagueness tends to be a problem in the legal context since, ideally, the meaning of any term should be clear, and in the absence of clarity, efforts should be made to use an expression or word in a particular sense that is authoritatively or conventionally decided. Nevertheless disagreements over the concept of minority may play a positive role in the wider debate over minority rights. A way of capturing this intuition is to typify the term "minority" not only as a contested concept but also as an "essentially contested" one.[37] According to Waldron's interpretation of this notion, affirming that a concept is essentially controversial "is not merely to say that its meaning is very, very controversial. Nor is it to say merely that the disagreements which surround its meaning are intractable and irresolvable."[38] Strictly speaking, the predicate "essentially" indicates that disagreement (or contestedness) is a central part of what makes the expression at issue meaningful; namely, that the fundamental nature of the concept is to be contested, so that, as Waldron writes, "someone who does not realize that fact has not understood the way the word is used."[39]

Surely, whether to characterise a concept as "controversial" or as "essentially contested" is a matter of degree. The difference between both categories is, admittedly, obscure and hence disputed. Still, according to a widespread view, the adjective "essentially" mainly emphasises that the disagreement is somehow indispensable for the very usefulness and functionality of the term, in that the discussion over its meaning enhances the wider debate in which the contested concept is used.[40] Participants in this debate, therefore, benefit from the controversy, even if each of them defends their own position and points of view. Essentially contested concepts are thus central, "not despite their contestedness, but because of it."[41] In this vein, Marisa Iglesias adds to the characterisation of essentially contested concepts the idea that they are argumentative or dialectic (since we are not simply facing a sequence of parallel discourses about different concepts, but, rather, contending discourses that generate a competitive attitude among the participants concerning which is the best way of characterising a certain institution) and functional as well (for these are concepts that demand an active engagement in the social and deliberative practice where they are elucidated and used).[42]

The debate about contested concepts can help to illuminate the core of the dispute over the concept of minority. In particular, contrasting the different and conflicting arguments behind the competing definitions I have described might be crucial to the debate on what sort of groups, if any, might have legitimate claims to the special protection granted by rights. Similarly, from this perspective, opponents to group rights cannot justify their position merely by bringing forward the dispute over the definition of minority—just as those who oppose democracy cannot legitimately allege, as a reason against this political system, the conceptual disagreement surrounding the term. In short, the whole controversy around a contested concept, far from being undesirable, can help to guarantee a more transparent debate about the principles at stake.

### *3.2. What Conception of Group Rights?*

The dominant approach to minority rights is also inadequate for a second reason—one tied to the notion of group rights that motivates the discussion. As explained before, the difficulty of reaching consensus on a satisfactory definition of minority

need not be seen as a major obstacle to theorising group rights. The concept of minority can be categorised as a contested concept, and the identification of the type of groups it refers to is fundamentally linked to the normative discussion over the need to protect certain communities. Therefore, both issues should be tackled together.

In fact, the considerable scholarly efforts directed at clarifying the meaning of "minority" are not entirely disentangled from the normative debate, since they tend to presuppose a particular concept of group rights, if only implicitly. In order to perceive this connection, it is worth recalling that analyses of the concept of minority are usually linked to more general conceptions of groups and communities. As pointed out, nearly all concepts of minority evoke some kind of unity among the members of a group that arises from subjective elements—hence, the idea of groups as entities whose members share an identity in common suggested by Fiss, or the notion of shared understandings that McDonald defends. However, as was also shown, these elements are difficult to pin down: it is unclear what should be the precise content of those shared ideas and common identities as well as the degree to which they should be respectively accepted or recognised. Moreover, discrepancies arise as to whether people's belonging to a group is based on subjective convictions or rather on the external recognition of objective traits such as race or gender. Admittedly, although it would seem absurd to deny the existence of groups altogether, all attempts to specify their distinctive traits and trace boundaries between communities inevitably lead to paradoxes and contradictions that are difficult to resolve.[43]

There is no need to explore these problems further here, but I would like to draw attention to the reasons why this lack of precision gives rise to the significant scepticism about the possibility of theorising group rights mentioned earlier. These reasons only become apparent if we realise that group rights are most commonly defined as rights being held by a collective subject that is able to exercise moral agency.[44] That is, a right is collective insofar as it is held collectively by the group as such, and not by each of its individual members. The emphasis on complex issues of collective identity in the debate on minority rights seems, therefore, entirely appropriate. If the relevant minority groups, as well as the criterion of belonging, were not reasonably demarcated through some general standards, the indeterminacy of the rights-holder would obviously make the recognition of group rights highly problematic.

So, in general, participants in this debate have taken for granted that group rights are held by a collective subject with its own interests. In addition, these rights tend to be justified in a way analogous to that of individual rights. Oversimplifying a complex argument: supporters of individual rights begin by characterising human beings as holders of certain goods (life, physical integrity, freedom, etc.) which are intrinsically valuable; this justifies each individual's interest in their protection and respect by means of certain rules. Consequently, moral rights are assigned to them as a guarantee against the violation of those basic interests, thereby justifying the imposition of a number of duties on others.[45] Advocates of group rights proceed in a similar way. They first try to clarify what they understand by a "group," a "minority," etc.; then, they identify some central interests which, allegedly, are essential to them—typically, the interest in preserving a culture, or in maintaining a distinct identity. Finally, they justify the legitimacy of such interests and argue that they constitute the core of

certain moral rights that are held collectively. Consequently, individual and group rights would be essentially distinguished by their respective holders. Consider the following accounts, which exemplify this stance:

> With collective rights, a group is a rights-holder; hence, the group has standing in some larger moral context in which the group acts as a rights-holder in relation to various duty-bearers or obligants.[46]
>
> Collective human rights are rights the bearers of which are collectivities, which are not reducible to, but consistent with individual human rights, and the basic justification of which is the same as the basic justification of individual human rights.[47]

This notion of group or collective rights, generally assumed by both defenders and critics, strongly influences the discussion, typically leading to a debate between collectivists and individualists about the feasibility of reducing communal interests to individual ones. Indeed, defenders of group rights argue that some interests are essentially collective and can thus not be individualised, that is, reduced to the aggregate of group members' interests. Accordingly, it would make sense, for instance, to argue that a group has improved independently of the particular share in the global well-being that each individual member may have; or one could say that a group's interest in preserving a distinctive cultural heritage cannot be adequately grasped if it is reduced to an aggregation of individual interests.

Starting from this idea, to which we could refer as the *non-reducibility* or *non-transferability* thesis, many commentators conclude that group rights cannot be subsumed under the concept of individual rights.[48] In this view, only groups can have features such as socialisation processes, structures of communication or the creation of common goods, which generate the kind of legitimate collective interests that group rights aim to preserve. As a result, so the argument goes, these rights should be assigned to the group as such. The proposition "the Asháninka people has the right to self-determination" would then be irreducible to the sum of individual rights to freedom of association of the Asháninka individuals.[49] For one thing, according to the dominant view, group rights aim to protect interests that are not divisible into individual interests.[50]

This model of justifying the attribution of rights to some groups, identified by the elements mentioned above, is also linked to their alleged capacity for moral agency. In this vein, Vernon Van Dyke[51] argues that ethnic communities, like states or nations, meet the requirements for holding moral rights, and not merely of legal rights of the kind attributed to corporations and other interest groups. According to him, a group or a community is a "collective entity," which means that "it comprises one unit, one whole, with a collective right of its own—a right that cannot be reduced to the rights of individuals."[52] Likewise, Van Dyke argues that these rights reflect moral claims based on interests that cannot be derived merely from individual interests.[53]

Similar ways of presenting the non-reducibility thesis can be found in the literature on group rights, but hopefully enough has been said to clarify why this line of argument leads into difficult philosophical questions connected to the debate between communitarians and liberals. It leads, in particular, to a discussion of complex questions about group identity and groups' capacity for moral agency, and also to arguments about the relative priority of the individual or the community. For this

reason, as stressed in the introduction, it is common to assume that arguments for or against group rights are basically a function of the more general philosophical position that one is willing to adopt in those philosophical debates.[54]

Indeed, with regard to moral agency, which is seen as a fundamental condition for being a rights-holder, liberal theorists normally oppose group rights as they relate them to a dubious ontology. The argument is quite simple: moral rights are assigned to those who have certain capacities; collectives lack minds and the capacity for rational thought or for assessing courses of action; consequently, they do not meet the basic requirements for the attribution of moral rights. Only individuals are able to reason, have values and make decisions, and the decisions and actions of a group are always dependent on individual actions and decision. As Carl Wellman claims, even the more organised and active groups lack moral agency and, therefore, it is impossible for them to be right-holders.[55] Taylor eloquently describes the ultimate reason for the lack of credibility of the notion of collective moral agency in the individualist philosophical tradition and thus in all liberal theories:

> To think that society consists of something else, over and above these individual choices and actions, is to invoke some strange, mystical entity, a ghostly spirit of the collectivity, which no sober or respectable science can have any truck with. It is to wander into the Hegelian mists where all travellers must end up lost forever to reason and science.[56]

Thus, to assume the existence of collective moral agencies has far-reaching consequences for the notion of interest that grounds the idea of group rights. In order to illuminate this point, let us assume the concept of rights that Raz defends as "grounds of duties in others."[57] In order to maintain that groups have interests that are irreducible or non-transferable to those of their individual members, one must accept the possibility of those members having duties towards the group. Yet what exactly would that mean? On the one hand, it is clear that those who belong to a group may have duties towards other members. But this is not what those who argue that collectives have interests in *themselves* are trying to highlight. Precisely because these interests are inherent in the group and thus non-reducible, their protection through group rights would imply that members of the group could have duties towards the group *as such*. In other words, we should allow the possibility of groups having claims based on rights towards their members, thus raising the possibility that some, most or even all members of the group may have interests opposed to those of the group. Precisely because a coherent elucidation of this argument (and, in turn, of the irreducibility thesis upon which it is based) seems, at the very least, challenging, it is common for liberal scholars to regard the idea that collectives have moral group rights as a conceptual error.

Note that the link between methodological individualism and liberal theories of rights is evident in this dispute. The former basically means that the individual is the basic explanatory unit of social sciences. As a theory, it is firmly based on an atomist ontological tradition according to which it is always possible to account for social actions and structures in individual terms.[58] For liberals, this theory is plausible because every collective, whatever its nature, is composed of individuals, and not the other way around. And even though individuals are social beings, this condition is also considered as explicable in terms of actions and individual relationships. In

accordance with this line of thought, liberals can only understand the allusion to collective interests as a way of speaking metaphorically. Ultimately, all collective interests derive from individual ones; individuals and not groups, have interests and are, strictly speaking, potential holders of moral rights.[59] In this view, the category of group rights is either regarded as redundant or as incoherent. This well-established connection between liberalism and methodological individualism is brought out by J.L. Mackie, when, reflecting on his own views, he says:

> It may be asked whether this theory is individualist, perhaps too individualist. It is indeed individualist in that individual persons are the primary bearers of rights, and the sole bearers of fundamental rights, and one of its chief merits is that, unlike the aggregate goal-based theories, it offers a persistent defence of some interests of each individual.[60]

Yet the vigour of the liberal rejection of group rights stems not only from ontological considerations, but, principally, from fears concerning their political implications. Some argue that recognising group rights could place the group over and above the individual, thus giving preference to collective interests and, perhaps, undermining the position of the most vulnerable members of the community.[61] Others reject the concept of collective human rights on the grounds that only individuals, as human beings, have rights and that, within the area defined by human rights, the individual has a priority over social interests.[62] In short, the underlying concern is that the category of group rights poses a threat by somehow reifying the group without a clear understanding of where its independent moral value lies.

This point is particularly relevant. As Michael Hartney writes, even if we could conclude that, ontologically speaking, the existence of the group precedes that of its individual members, the normative question as to whether groups possess the sort of intrinsic moral value that justifies attributing duties (to its individual members or to other groups) would remain open.[63] Certainly, as Hartney admits,[64] notions like "good," "benefit" or "interest" are meaningfully used with respect to an assumed goal or to a teleological scheme. That is, in the same way that we say "a tree has an interest in surviving," we could say that a group has an interest in its continued existence. We may even say, in a meaningful manner, that it is "good" or "positive" that some minority linguistic groups are able to survive. But, in Hartney's view, these are irrelevant statements from a moral point of view, for any value ascribed to groups is purely instrumental to the individual well-being of its members.[65]

Many refer to this idea as *value-individualism* thesis,[66] which is analogous to the humanistic principle, as endorsed by Raz—namely, the idea that "the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality."[67] Thus, even if there were some seed of truth in social holism, the humanistic principle would hardly be compatible with the justification of group rights on the grounds of the intrinsic moral value of collectivities. In this sense, the individualism inherent in liberal theories of rights establishes a clear preference for the individual over the community. That is why it is usually assumed that communitarianism offers a better framework for justifying group rights. The link seems indeed apparent, since a recurring topic of this tradition is the critique of the liberal view of the self. As noted, philosophers such as Sandel or McIntyre try to refute the essential traits of Kantian liberalism because, in

their view, it ignores the way in which the individual is placed in a community and influenced by social relationships and roles. In contrast, the communitarian anthropology builds on the assumption that the self is not prior to its ends but constituted by them. Certainly, this thesis allows for many nuances. Yet in its strongest version, it claims that individual identity is inescapably linked to belonging to one's own community. Instead of being free agents, able to construct and revise their conceptions of the good life, human beings are strongly influenced by their belonging to particular historical communities.

Although this is a fairly simplistic way of depicting both versions of the self, the sharp contrast between them is apparent.[68] The point is, in any event, that many think that only a small bridge mediates between communitarian view of the self and the justification of group rights. If the construction of personal identity essentially depends on the interaction with a certain group—insofar as the latter provides a context for identity-formation and mutual recognition—one might argue that communities have an intrinsic value and even a certain priority over the individual. Group rights could thus be justified on the grounds that preserving the specific character of the groups in which individual identity is constructed is a significant priority. This argument underlies the stance adopted by many of those who defend the intrinsic value of cultural groups and the irreducibility of group rights to individual rights. In contrast to the idea of "value-individualism," the justification of group rights is based on a principle that some have dubbed "moral rights collectivism."[69]

To summarise, the debate over group rights seems to lead to a controversy among opposed philosophical theories of value, identity and moral agency. More specifically, the prevailing idea that a right is a "group right" because it belongs to a collective agent with interests that are irreducible to those of its individual members, provides a link with the more general debate between liberals and communitarians where substantial disagreements emerge. As a result of this link, the discourse leads to a competition between group and individual rights in terms of absolute or incommensurable values. Thus, in contrast to the universal and individual nature of human rights, critics object that group rights aimed at the preservation of cultural identity tend to have a particularistic character and to establish exclusions.

However, as the next chapter argues, both categories of rights need not be seen as conflicting in this way. Note, in addition, that this dispute is not merely academic, since the alleged incompatibility between individual and group rights has some central implications for our social and political life. Fundamentally, it would make it impossible to argue coherently that the foundations of a society should be grounded on both categories of rights. Analogously to the extreme pictures prevalent in the liberalism vs. communitarianism debate, we seem to face a choice between the model of a cosmopolitan, neutral and open society, which recognises the same rights for all individuals (regardless of whether they belong to a group), and the model of a society based on group rights of communities, which seems to succumb to a nostalgia for traditional communities grounded on rigid values where individuals maintain roles and traditions inherent in their identity—in other words, a picture of a communitarian society resisting the impulse of modernity, which regards the group as more important than the individual and is thus condemned as provincial, reactionary and even fundamentalist.

## 4. LIBERALISM VS. COMMUNITARIANISM: AN INADEQUATE FRAMEWORK

For the reasons mentioned above, a significant shortcoming of the standard approach to minority rights is the idea that the problem of defining "minority" can—and should—be disentangled from the question of whether or not it is justified to ascribe rights to certain groups. As we have also seen, the dispute about whether groups exist as collective moral agents is notably related to the way in which group rights are conceptualised. But in order to contribute to the debate over minority rights, we may not need to conclusively answer these complex questions or take a stance on the merits of the different theories of the construction of the self and the moral status of groups. Not only can group rights be conceptualised in a less controversial manner but also, as noted above, the liberal opposition to these rights is often more political than metaphysical.

The next chapter represents an attempt to develop alternative modes of understanding the notion of group rights. But first let me briefly outline what could be regarded as an external criticism of the dominant approach in this debate. It is unclear that the link between communitarianism and group rights, on the one hand, and between liberalism and individual rights, on the other, is able to account adequately for the core normative problems arising from multiculturalism. By and large, the reasons for this inadequacy have to do with the evolution of the wider debate between liberals and communitarians which, as noted, often lies behind the different positions on group rights. As pointed out, the analysis of these rights usually portrays both lines of thought as radically opposed. Yet over the last decade, the controversy has evolved remarkably, and such a picture of radical opposition is now widely seen as reductionist. On the one hand, as a body of thought, the communitarian tradition is more complex and diverse than usually described and some core communitarian critiques of liberalism also had a great impact on many liberal political theorists.[70] On this background, the above-mentioned antagonism between the liberal and communitarian pictures—the equation of liberalism with individual rights and communitarianism with group rights—oversimplifies both theories and thereby trivialises the discussion.

A brief exploration of the contributions of some influential liberal critics might help to illustrate this point. Take Taylor's view of his own work as rooted in the liberal democratic tradition. In fact, his critique of liberalism is not primarily focussed on any of the supposedly "communitarian" theses that appear so central in the conceptual debate over group rights. Instead, essays such as *The Ethics of Authenticity* (1991) seek to defend a certain way of understanding individualism that is linked to a moral ideal of authenticity (to which I will return in greater detail in Chapter V).[71] Undoubtedly, Taylor objects to certain forms of individualism which prevail in modern societies: in particular to a sort of individualism that he relates to selfishness and social fragmentation, to the lack of moral horizons other than material affluence or to the prevalence of instrumental reasoning and cost-benefit analysis as primordial parameters of success. For Taylor, this leads to what he calls "soft relativism,"[72] namely, a relativism that is not based on any refined epistemology, but rather on a pseudo-moral postulate of mutual respect such as "one ought not to challenge another's values."[73]

So, rather than defending a rigid model of society based upon authoritative values, Taylor primarily aims at highlighting some dark sides of individualism, which may have deplorable effects for human well-being and community life (such as fragmentation, isolation, the tendency to value personal self-realisation only through professional achievements, lack of solidarity and so forth). But his reflection on what he calls "the malaises of modernity"[74] is not a communitarian feature only. The current revival of the republican tradition is based, to a significant extent, on a similar concern with the perils of extreme individualism and the obliteration of civic virtues that, like solidarity, make democracy and welfare possible.[75]

Now, these critiques of modern liberal societies do not necessarily romanticise traditional forms of living. Critics such as Taylor are not, as often depicted, a faction of anti-liberal collectivists who think that the community is more important than the individual and therefore freedom and individual rights should be suppressed in order to promote some sort of a cultural pre-modern revolution.[76] On the contrary, for them the solution does not lie in abandoning ideals of individual freedom, but in discovering their social meaning beyond narcissistic or self-indulgent attitudes. This social view is thus closer to the republican tradition and its emphasis on the value of communities and associations. But, as even John Rawls claims, such an emphasis need not be seen as inherently incompatible with a liberal theory of justice as fairness,[77] since the concept of freedom can be understood not merely in negative terms, but also in positive ones: as active participation in social life and self-government.[78]

A similar reasoning applies to other so-called communitarian scholars such as Michael Walzer, who also try to offer a different interpretation of ideals of freedom and tolerance.[79] Here, too, it would be wrong to interpret Walzer as a reactionary scholar arguing against individual human rights.[80] Rather, his work can be seen as re-examining the political preconditions for the flourishing of freedom and individual rights.[81] This model may indeed diverge from dominant conceptions of liberalism, but not from some central liberal ideals related to the value of the individual.[82]

These ideas will be further explored later in this book. The main idea I wish to underline at this point is that, within the debate over group rights, the opposition between individualism and collectivism is, more often than not, overly simplistic. Although it is true that some genuine differences exist, many of the goals and perspectives are—much in contrast to what the debate might suggest—widely shared.[83] Moreover, scholars of different traditions, such as Taylor, Raz, Walzer or Kymlicka, refer to rights like the right to self-government or the right to language as minority rights, and yet their general philosophical views about value do not fit the prevailing conceptual scheme set out above.

So far, the focus has been on the normative dimension of the debate. But what about the ontological discussion that forms the other pillar of the conceptual dispute over group rights? Here, some brief considerations might be enough to reveal the sort of misunderstandings certain assumptions may cause. As noted, what makes methodological individualism somehow self-evident is the fact that societies are composed of individuals. Thus, to argue that some collective entities can be the holders of moral rights seems to imply a personification of groups that is difficult to justify. For this reason, liberals usually reject the idea of group rights as a dubious category that,

ultimately, might only be used to legitimate the domination of some members of the group over others.

However, in contemporary political and legal theory it is rather rare to find an explicit defence of collective moral agency in this sense. Even though the debate between liberals and communitarians is usually portrayed as a discussion on radically opposed views of the self,[84] the positions of most scholars are somewhere between the two extremes.[85] As Walzer claims, neither the liberal nor the communitarian theory need adhere to such extreme views of the formation of the self. Like Taylor, he acknowledges that the disagreement is less pronounced than one might initially think:

> Contemporary liberals are not committed to a presocial self, but only to a self capable of reflecting critically on the values that have governed its socialization; and communitarian critics, who are doing exactly that, can hardly go on to claim that socialization is everything.[86]

Indeed, as will become apparent in the following chapters, most contemporary liberal scholars accept that an interpretation of personal identity-formation as completely asocial exaggerates our ability to choose between different life plans and fails to acknowledge the relevance of shared social meanings.

On the other hand, even if our ontological assumptions will surely influence the value we attach to the community, this need not be linked to a belief in the existence of collective moral entities, as is often associated with communitarianism.[87] As mentioned before, the idea of collective moral agency is connected with the existence of irreducible interests: an interest is always an interest of somebody. Consequently, if the interests that justify group rights cannot be reduced to the members of the group, they *must be* interests of the group. Yet for the reasons laid out above, this conclusion is very controversial. In any event, as the next chapter will argue, what scholars such as Taylor and Raz seem to have in mind when speaking about collective or group rights is the idea of an aggregate of individual interests in *goods* that cannot be individuated. If this interpretation is correct, then the discussion about the existence of collective moral entities becomes somehow superfluous.

Finally, the dominant approach to group rights can be criticised on more pragmatic grounds. This approach, as we have seen, tends to limit the discussion to the formal characteristics of the demands at stake. But insofar as the revitalisation of the idea of group or collective rights constitutes an attempt to solve problems generated by multiculturalism, the dispute about how to define this category of rights should not distract us from the justification of the substantive demands raised by minority groups, especially if, as in the present case, conceptual disagreements that give rise to a particular discussion (between liberals and communitarians) may not represent the nature of the claims posed by most minority groups in multicultural societies.[88]

## 5. CONCLUSION

The correlation between liberalism and individual rights and communitarianism and collective or group rights that is so prevalent in the debate on minority rights is highly misleading. This analogy is not only based on dubious theoretical premises, but it

also diverts our attention from the relevant normative questions. As we have seen, the fact that minorities express their demands in terms of collective or group rights propitiates an analysis that is mainly focussed on the formal problems implicit in this category of rights, leaving the substantial normative questions unexplored. But, as Kymlicka claims—in my opinion correctly—most debates about minority rights are not "debates between a liberal majority and communitarian minorities, but debates amongst liberals about the meaning of liberalism."[89] That is, these are debates between different groups and individuals who disagree about the interpretation of liberal democratic principles in multiethnic and multicultural societies.

However, defenders of minority rights strongly emphasise the need to recognise group rights as a category of human rights. They also insist on the idea that these rights are held collectively—that they belong to the group, rather than to their members—and therefore criticise recent international conventions and declarations precisely because they fall short of ascribing minority rights to groups themselves. This emphasis is not gratuitous. It reflects the fact that the familiar catalogues of individual fundamental rights that we find in liberal democratic constitutions cannot adequately respond to the demands of minority groups. Yet, in my view, minority rights advocates are wrong in assuming that the difference between individual and group rights relates exclusively to the rights-holder. Because of the considerable attention paid to the distinction between both categories of rights, both theoretically and in the practice of human rights, the next chapter will focus on exploring an alternative, less controversial, way of conceptualising this distinction. It also examines the strengths and weaknesses of the thesis that the category of group rights is, in fact, unnecessary.

## NOTES

1. Kymlicka (2002, p. 329).
2. Lukes (1973, p. 1).
3. UN Doc. E/CN. 4/Sub.2/384/Rev. I (1979). Reprinted as UN Pub. No. E.78. XIV.1 Hereinafter: 'Capotorti's Report'.
4. Capotorti (1979, add. 1–7). Another attempt to give a precise content to this concept was the *Proposal concerning a Definition of the term 'Minority'*, by Jules Deschenes (1985), a Canadian member of the same UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, who defined "minority" as: "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law" (see UN Doc E/CN.4/Sub.2/1985/31/31/par. 181). This definition differs from that of Capotorti in minor aspects; yet, it introduces, together with the element of the will of the group to survive as a distinct group, the wish to achieve equality with the larger majority. Note, too, that Deschênes substitutes the ambiguous term "nationals" for that of "citizens."
5. See Raz (1994, p. 174).
6. As Carens argues (1987, pp. 251–273) when the proportion of immigrants is small compared to that of national citizens, they are easily absorbed by the dominant culture. Controversies increase when the number of immigrants is significant enough to incite changes in the way of life and culture of the pre-existing community.
7. And, in fact, as will be seen in following chapters, practically all recent literature on minority rights examines the moral and political questions posed by the status of immigrants.

[8] See supra Chapter I, note 28. These elements appear in other UN legal instruments, such as Article 13 of the 1966 International Covenant on Economic, Social and Cultural rights, which refers to the promotion of tolerance and mutual understanding between ethnic, religious or linguistic groups. Their relevance is also clear in the very title of the 1992 Declaration of the Rights of National, Ethnic, Religious and Linguistic minorities.

[9] In the European context, the main international legal instruments adopted within the framework of the OSCE and the Council of Europe refers to "national minorities." This term, however, is not seen as entailing a broader meaning, since it is widely interpreted as embracing the same categories of groups.

[10] Kymlicka and Shapiro (1997, p. 10).

[11] Prieto Sanchís (1995, pp. 122–123).

[12] See, for instance, the definition included in the Recommendation 1201/93 (*On an additional protocol on the rights of national minorities to the European Convention on Human Rights*) of the Parliamentarian Assembly of the Council of Europe which is aimed at influencing the interpretation of what still was, at the time, the draft of a European Convention for the Protection of Minorities.

[13] See supra Introduction, note 24.

[14] See supra Introduction, note 25.

[15] See list of declarations made with respect to Treaty No. 157 in the instruments of ratification or in "notes verbales" at http://conventions.coe.int.

[16] Comanducci (1996, p. 16). *My translation*.

[17] Prieto Sanchís (1995, p. 120).

[18] Fiss (1976, p. 148).

[19] Fiss (1976, p. 148). Van Dyke (1985, 16, pp. 134–135) makes a similar statement when he argues that groups are collective entities that exist as distinct units and not as mere aggregates of individuals.

[20] Fiss (1976, p. 148).

[21] McDonald (1991, p. 218). The same expression is used by Honoré (1987, pp. 3–4) who writes that "clearly a group is not a mere collection of individuals;" the distinctive feature of a group is a "a shared or common understanding, or a number of such understandings."

[22] McDonald (1991, p. 219).

[23] Corlett (1994, p. 238).

[24] Held (1970, pp. 472–473).

[25] Consequently, the answer to the question of determining an individual's belonging to a group will basically depend on subjective elements. Although this issue will be taken up again later on in this book, first and foremost, membership has to do with people's self-identification with the group. Moreover, as indicated, the very notion of group is linked to the idea of a collection of individuals who maintain strong bonds among themselves. In addition, membership to a group is also a matter of mutual recognition: I belong to a group when others recognise me as "one of them." As Raz (1994, p. 132) puts it, to a great extent, membership in this kind of group we are exploring is, "a matter of belonging" rather than one of achievement.

[26] In this context, it is common to recall the difficulties that precedents analogous to the recognition of rights to collective subjects face, as is the case of the right of peoples to self-determination. For instance, Makinson (1989, p. 55) asserts that "the first and most obvious problem faced by r.u.p.'s (*rights attributed universally to peoples*) is that there is no reasonably clear and agreed account of what 'peoples' are. There is no accepted workable criterion that can serve to distinguish collectivities entitled to the epithet from others." Makinson then goes on to examine the problems of indeterminacy and inconsistency arising in the interpretation and application of the norms that refer to "peoples."

[27] Lucas (1995, p. 156). *My translation*. Lucas is a leading Spanish philosopher who has worked extensively in the field of minority rights. Similarly, López Calera (2000, p. 117), Shawn (1992, pp. 1–31), Thornberry and Martín Estébanez (2004, pp. 26–27).

[28] It could be argued that, in exploring a concept, in this case the concept of "minority," we try to capture some kind of reality about a particular object or phenomenon. The aim, then, would be to offer a "real" definition of the term at hand. Yet an answer along these lines implies a commitment to the doctrine of verbal realism according to which words somehow determine their application to the objects they represent, so that the aim is to find out their "true" essence, that is, some sort of pre-existent meaning. For well-known reasons, though, this doctrine of Platonic connotations is hardly defensible. Most scholars nowadays would agree that exploring the concept of minority is not a matter of finding a category of groups that *naturally* fit this concept. I cannot explore here the difficulties of the

so-called "real definitions," specially the confusion between the analysis of things and the nominal definitions of words. See only Robinson (1962).

[29] The concept of vagueness is, in itself, ambiguous. The reference here is not to the idea of potential vagueness or, as it is commonly dubbed, to the problem of the "open texture" of language, which is unavoidable. For an accurate analysis of the different forms of indeterminacy that the idea of vagueness usually conceals, see Waldron (1994).

[30] Thus, in general, vagueness is associated with a concept's "zone of blurredness," where we doubt about whether to include particular cases or instances. This area where conceptual application to a certain case is uncertain contrasts with those areas where it is clear that the concept either applies or not applies. See, Alchourrón and Bulygin (1993, pp. 61–65). Waldron (1994, 516–521), however, warns of the dangers of explaining, in the legal context, the notion of vagueness in terms of borderlines, denoting properties that are present in different degrees.

[31] Waldron (1994, p. 513).

[32] Thus, Waldron argues that the idea of cruelty included in the XIII Amendment to the U.S. Constitution calls for an analysis that, rather than focussing on punishment in general, emphasises the degree or intensity of the suffering experienced by someone undergoing a specific punishment, and also, perhaps, on the disposition and attitude of those who inflict it. See Waldron (1994, pp. 526–529).

[33] Waldron (1994, p. 528). Along similar lines, see Dworkin's distinction between "concept" and "conception." Dworkin (1977, pp. 134–136).

[34] In the case of Capotorti, as mentioned, his study on the definition of minority was drawn up with reference to the application of Article 27 of the UN Covenant on Civil and Political Rights.

[35] For this and other exclusions implicated in the adopted definition, Thornberry (1991, pp. 7–10).

[36] See Lerner (1991, pp. 28–37), who proposes a "Decalogue of group rights" that should be applicable to all these groups.

[37] The expression dates back to a well-known article by W. B. Gallie (published in 1955 in *Proceedings of the Aristotelian Society*); I follow Waldron's interpretation of this idea in: Waldron (1994, pp. 529–534).

[38] Waldron (1994, p. 529).

[39] Waldron (1994, p. 529).

[40] See Waldron's interpretation of Gallie's view in Waldron (1994, pp. 530–531).

[41] Waldron (1994, p. 531). Illustrating this idea with concepts such as art and democracy, Waldron (1994, pp. 530–532) explains that different approaches generate rival paradigms as regards their core meaning. It is plausible to understand the meaning of the term "democracy" differently, as expressing competing political principles. For some, "democracy" refers to a system that, like in the ancient Greece, guarantees direct participation; for others, the paradigm of democracy is the modern representative system, whereas direct democracy is relegated to a mere historical step in the evolution of the concept. Some scholars seem to think that what qualifies a concept as "essentially contested" is the disagreement about its paradigmatic cases of application. However, this idea can lead to some confusion when it is understood, following Dworkin's terminology (see supra note 33), as implying that we lack, in fact, of a concept, since there is no referent to which the different conceptions allude. The idea that the paradigmatic cases are contested can therefore be interpreted in different ways. But in the case of the term "minority," and despite its vagueness, one could argue that there is a core uncontested meaning: namely, the idea of disadvantage and non-domination. The controversy is rather on determining the relevant cases to which the notion applies. Yet, interpreted this way, the distinction between contested and essentially contested concepts becomes blurred. For further discussion, see Iglesias (2000, pp. 77–104).

[42] See Iglesias (2000, pp. 83–91).

[43] Obviously, the attribution of legal personality to certain political associations, particularly states, helps to clarify the criteria for individual belonging that shapes the background of the unity of the group. Nevertheless, problems arise even in these cases. Many states have experienced processes either of disintegration or unification that often lead to a revival of the interest for both the origin of the groups and the rules for belonging. The current process of European integration, which runs parallel to the questioning of the unity of some of its member states, is also an example. Some classical essays on the origin and functioning of groups can be found at Stapleton (1995).

[44] Even though the problem of a group's identity and that of the existence of a collective moral agency are different, both are often linked in the objections raised against group rights. Thus, one main source of scepticism is the belief that the difficulties in determining who the members of the group are with

some precision makes it extremely difficult to regard groups as agents capable of being subjects of rights. For an illuminating discussion on the question of group agency and group rights, see Nickel (1997, pp. 235–256).

[45] This way of describing this process of justification implies endorsing a theory of rights based upon the idea of "interests," instead of a more voluntaristic conception that emphasises the idea of "choice." Very briefly, this option is justified because the latter has difficulties in fitting the ordinary use of the language of human rights, since it makes it difficult to speak about the rights of children, for example, insofar they lack the capacity to make choices or exercise their rights. Voluntaristic theories, in addition, often focus on legal rights as institutionalised rights and tend to place the accent on their guarantees as a condition of existence. Yet given that the rights discourse also operates in other normative discourses (typically, in moral and political ones) they have limitations to account for these uses. Interest theories, by contrast, allow us to avoid the problem of confining the meaning of interests to the role that rights play in protecting them. In general, these theories go beyond the Hohfeldian analysis, pointing out that interests justify rights and rights, subsequently, are grounds for duties. A version of this interest theory of rights has been theorised by Raz (1986, pp. 165–192). On the reasons to choose this type of theory, see MacCormick (1982, pp. 154–166). For a defence of the voluntaristic theory, see Sumner (1987).

[46] McDonald (1991, p. 220).

[47] Freeman (1995, p. 38). Similarly, Garet (1983), Johnston (1989), Ramcharan (1993), Corlett (1994), López Calera (2000, p. 119).

[48] See supra note 47.

[49] The Asháninka is a people of the Central Rain Forest in Peru that has struggled for self-government and political organisation, after being a victim of a history of colonisation that has caused the continued loss of their traditional land and suffering from extreme violence from both the Sendero Luminoso guerrilla and the Peruvian military.

[50] McDonald (1992, 218). Similarly, Van Dyke (1985, 16, pp. 213–215).

[51] See, for instance, Van Dyke (1977, pp. 343–369; 1985, 24, 31).

[52] Van Dyke (1985, p. 207).

[53] Van Dyke (1985, p. 208).

[54] For a discussion about conceptions of individual and group rights that takes place within this framework, see the works included in Kymlicka (1995b, part IV).

[55] Wellman (1995, pp. 157–176).

[56] Taylor (1995, pp. 129–130).

[57] Raz (1986, p. 167).

[58] Taylor (1995, p. 181).

[59] Narveson (1991, pp. 333–334). See also Gewirth (1982) or Hartney (1991, pp. 293–314).

[60] Mackie (1984, p. 179).

[61] Narveson (1991, pp. 344–345); Barry (2001, p. 125); Okin (1999, 11, pp. 17–20).

[62] See Donnelly (1989, pp. 19–21; 143–146). Although Donnelly admits that individuals may have certain duties towards society, and also that society may legitimately restrict the exercise of some individual rights, he argues that here the conflict should be seen as one between individual rights and duties.

[63] Hartney (1991, p. 299).

[64] Hartney (1991, p. 300).

[65] Hartney (1991, pp. 297–298).

[66] Hartney (1991, p. 299); Kymlicka (1989a, p. 140) also claims that this thesis is one of the main reasons for the liberal opposition to collective rights.

[67] Raz (1986, p. 194).

[68] For a detailed discussion, see Nino (1989, pp. 129–142).

[69] See Corlett (1994, p. 242); Hartney (1991, p. 297).

[70] See for discussion, Kymlicka (2002, pp. 208–283); Nino (1989, pp. 142–157).

[71] Taylor (1991, pp. 13–22).

[72] Taylor (1991, p. 17).

[73] Taylor (1991, pp. 13–14).

[74] Taylor (1991, p. 1).

[75] For general theories of what particular virtues, dispositions and attitudes responsible citizens of democratic societies should ideally possess, see Dagger (1997), Macedo (1990) and Galston (1991). For

a general overview of the impact of the debate on citizenship for different views of liberalism, see Kymlicka (2002, pp. 284–326).

76 The common association between communitarianism and moral relativism is also unnecessary. Although this point cannot be analysed in detail, it is worth noting that a number of communitarian scholars assume that we can provide meaningful reasons in support of different moral ideals that can make a difference, thus rejecting radical subjectivism. See Taylor (1991, pp. 36–41), who also explicitly claims (1991, pp. 55–70) that we retain a significant degree of freedom to comprehend and revise the "moral sources of our civilisation," thus rejecting the more radical idea that individual autonomy is not meaningful and that people's ends are somehow fixed and beyond transformation.

77 Rawls (1999, p. 469).

78 Note that in the republican tradition, from Rousseau to Arendt, the value of the community greatly resides in its role of enhancing the true dignity and freedom of citizens, since they only become autonomous through the participation in public affairs.

79 In his book *On Toleration*, Walzer (1997) explores different historical political regimes in the light of their fulfilment of the ideal of tolerance, and argues that, in modern democracies, this ideal needs certain corrections to encourage the peaceful coexistence between different cultural groups.

80 The presupposed link between communitarianism and conservatism is not always correct either. In fact, Walzer himself is a co-editor of Dissent, a prestigious journal of the American left.

81 For a similar conclusion, see Sandel (1996). In this work Sandel defends a version of the republican model that differs from what he sees as the predominant liberal conception based on rights and public neutrality. He then compares his model with the republican ideals that he regards as predominant in the earliest age of constitutionalism in America.

82 Although this problem will be further explored in following chapters, it is worth anticipating some central ideas: as outlined, the liberal doctrine to which they oppose might be called "neutrality liberalism," as developed by Dworkin or Ackerman. Both Taylor and Sandel think, although for different reasons, that the emphasis of this doctrine on individual rights as trumps against the collective will hinders the debate over value and public goods. This, in turn, undermines the relevance of participation in institutions. From this perspective, public institutions are no longer identified with the role of promoting some shared conception of the common good, but, instead, become purely instrumental to the protection of individual liberties. Here, citizens' role is primarily to claim their individual rights (rather than, for instance, deliberating on public issues of general interest). What these authors are questioning is, to put it briefly, the compatibility between this form of liberalism and the high degree of civic participation that a genuine democracy requires. So, there are indeed important differences between these theories. Still, to a great extent, the dispute focuses on the meaning of some commonly shared ideals. On the differences and similarities between republicanism and liberalism, Sunstein (1993), Pettit (1997, pp. 8–9), Habermas (1996, pp. 99–100).

83 See for an elucidation of this view, Taylor (1995, pp. 181–203).

84 While for the liberals the self precedes any ends, communitarians understand that such anthropology is sociologically *naïve*, as they think that the self is constituted by its ends. The idea is that there are ends that we do not choose but rather we *discover* as part of our own context. This thesis, which Sandel defended in the 1980s, remains perhaps as the most important objection to liberalism. See Sandel (1982, pp. 57–59, 150–151). In case we accept it, the role that liberals grant to freedom of choice would become unwarranted. However, this idea suffers from serious ambiguities. At times, communitarians refer to a self that is only partially constituted with fixed ends while, on other occasions, they argue that there is a genuine identity between the self and its ends. Kymlicka (1989a, pp. 47–73) has criticised—rightly, in my opinion—the most radical version of the communitarian argument as incoherent and concludes that the thin version of the communitarian argument is complementary with liberal positions.

85 Taylor (1995, p. 182).

86 Walzer (1990, p. 21).

87 I am not suggesting that the ontological view one endorses can support any normative claim. As Taylor (1995, pp. 182–185) remarks, the failure to distinguish the ontological and normative levels remains as an important source of obscurity in the debate between liberals and communitarians.

88 Kymlicka (2001a, p. 20) has recently put forward this argument. He argues that the widespread view that the debate over group rights is analogous to the dispute between liberals and communitarians

is unfortunate. In his view, this framework is not well-suited to analysing the claims of most cultural minorities, since only a few of these groups in liberal societies demand rights in order to remain indifferent or untouched by modernity.

[89] Kymlicka (2001a, p. 21).

# CHAPTER II: TOWARDS AN ALTERNATIVE NOTION OF GROUP RIGHTS

## 1. INTRODUCTION

The progressive recognition that the dominant perspective in the debate about minority rights is faulty has given rise to different strategies for assessing the legitimacy of the demands in question that avoid resorting to premises as controversial as the ones explored in Chapter I. The first strategy simply reconceives the demands posed by minorities in terms of individual rights; the second involves a more radical variation of the prevailing discourse, as it questions the very need to use the language of rights on various grounds.

This chapter elucidates these strategies and tries to show that they are inadequate. A more productive approach, it is claimed, is the reformulation of the notion of group rights. The alternative conception that will be suggested defines these rights independently from the nature of their holder. Instead, a first central element is the character of the protected good; a second element characterises the category of group rights, especifically applied to minorities, by a certain rationale, namely, group rights, are defined as special rights that individuals have by virtue of their belonging to particular, identifiable groups. This conception combines the elements of different alternatives views on group rights developed by some contemporary theorists of multiculturalism and group rights. It most obvious virtue is that it may help to overcome some of the main liberal objections to the idea of group rights: The recognition of collective moral agents and the violation of the humanistic principle or *value-individualism*. As will become clear, in the conception suggested the rights-holder can be the individual, and individual interests are the ones that are ultimately valued.

## 2. GROUP RIGHTS: AN UNNECESSARY CONCEPT?

### *2.1. The Reductionist Strategy*

Some theorists seek to counter the problems posed by the notion of group rights in the following way: acknowledging that the existence of 'these rights, as moral rights,' can be consistently rejected (on the grounds examined in Chapter I), they insist that the recognition of minority rights might be legitimate only as long as it is formulated and understood in terms of individual rights. Thus, for instance, the special representation of a linguistic minority in parliament, although legally attributed to the group as such, would be ultimately founded on the individual right of all citizens to political participation. Or, to take another example, the exclusive right to fishing in



*N. Torbisco Casals, Group Rights as Human Rights: A Liberal Approach to Multiculturalism,* 43–64.
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certain waters accorded to the members of a tribe might be legally expressed in collective terms, but this right can only be understood as protecting individual interests. In short, this line of reasoning emphasises that there is no need to divide rights (and demands of rights) analytically into two categories—individual and collective. It takes for granted that the only relevant moral unit, and the ultimate source of moral value, is the individual and treats the way in which the demands of minorities are legally conceptualised as irrelevant or secondary.

Certainly, the reductionist strategy has played an important role in the recent evolution of international law, as it has helped to achieve consensus in the preparation of treaties and declarations aimed at protecting minorities. As pointed out in the introduction, the resulting rights have rarely been formulated in collective terms. In order to circumvent the objections previously explored, rights have usually been assigned to the individual as a member of the group. Significantly, such a tendency can also be observed in the writings of some of the leading representatives of the so-called "liberal nationalism."[1] We could understand the adoption of this line of thought as an attempt at avoiding the liberal-communitarian controversy or at side-stepping the more formal aspects that preoccupy legal theorists. Thus, for instance, Yael Tamir argues that the right to national self-determination can be understood as an individual right of people belonging to a national minority and "willing to give public expression to this affiliation."[2] Moreover, in an article unambiguously entitled *Against Collective Rights*,[3] Tamir seeks to discard the use of this language altogether and focuses instead on articulating the demands of minorities in terms of individual rights.[4] Kymlicka, on the other hand, chooses a different terminology, "group-differentiated rights"[5] and, more recently, he simply uses the general term "minority rights."[6] Yet he argues that the form, individual or collective, of these rights is of scarce relevance and that, in any event, the term "collective rights" is misleading.[7]

From the perspective of advocates of specific measures to protect minorities, the reductionist strategy would probably appear useful, given the progress it has helped achieve on the international human rights agenda. However, it has significant shortcomings that need to be taken into account. Above all, it could lead to think that, in fact, we are confronted with a mere pseudo-problem. In the following sense: reconceptualising all claims for collective or group rights as individual rights seems to provide a comprehensive argument for their justification. Yet, if this perception was to prevail, it could become counterproductive to the principles that the liberals themselves want to preserve. Pointing out to the paradox of this situation, Bauböck argues that, contrary to the common belief, only if we assume that the demands posed by minorities are demands to collective rights, can we argue in favour of a general priority of individual rights and freedoms:

> Affirming the existence and potential justifiability of collective rights is thus not necessarily a plea for their proliferation but may, on the contrary, provide better arguments for constraints on such rights within an overall framework of equal individual citizenship.[8]

Indeed, the priority of individual rights, as will be explained, is generally accepted by a number of proponents of group rights. For the moment, let it be granted that the reductionist argument implies that the only reason for liberals to reject minority rights is somehow a secondary one, referring merely to the way those rights are

formally conceptualised. Therefore, one could argue that, rather than rejecting the legitimacy of the demands of minorities, the main problem is their representation as group or collective rights.

But to perceive the problem in these terms is simply wrong. As will be substantiated from Chapter IV onwards, there are other, more substantive, reasons that justify the caution of many liberals when it comes to recognising minority rights.

### *2.2. Questioning the Need for the Language of Rights*

A radically different alternative to circumvent the problems surrounding the discourse of group rights might look more promising at first sight. The idea is to relinquish the language of rights altogether and, instead, speak of the *interests* of the different groups coexisting in multicultural societies, and about the possible *policies* to accommodate them. This position was briefly mentioned in the introduction and it is now worth exploring further. If it proved to be convincing, the core of this proposal would imply a preliminary objection to the starting point of this book. It is thus important to unfold the main arguments that support this approach and clarify the reasons why it has been discarded.

Generally speaking, defenders of this position think that the language of rights is far too strict and leaves no room for cooperation, thus potentially producing counterproductive results, such as aggravating the conflicts that multicultural states need to confront. In this view, when demands are put forward in terms of rights, there is a tendency to assume that the response depends neither on dialogue and conciliation with other groups nor on considerations related to the common good, since rights have what is often described as an "adversarial" character.[9] More specifically, in order to avoid the powerful implications of the liberal vision of rights as trumps, some people prefer to speak about "aspirations" to be realised through the mechanisms of debate that characterise contemporary democracies. Albert Calsamiglia is among those who support this view. Calsamiglia examines whether cultural rights are constitutional rights and eventually comes to a negative answer.[10] In line with the argument above, he points out that "the kingdom of rights is very strong because it prevails over the majority" and that "the world of conflict resolution cannot be reduced to the system of rights."[11] Even though he starts by establishing a difference between legal and moral rights (so as to make clear that his argument falls into the first category), he seems to suggest that, at bottom, only civil and political rights are genuine rights, i.e., susceptible of being invoked as vetoes against the will of the majority. Social and cultural rights should be understood as legitimate aspirations of certain groups, the implementation of which is left to the domain of democracy. In this realm, he says, the primary goal is not to determine who is right, but to find a consensual solution to the conflict that is able to balance the claims and interests at stake.[12] Calsamiglia puts forward several reasons to justify this position:

Above all, the so-called social and cultural rights cannot be rights *stricto sensu* because in most legal orders they do not enjoy the same guarantees as civil and political individual rights. Constitutions that provide for social rights tend not to grant them the same binding character and protection as classical human rights. Social rights appear as guiding statements that constrain the state only indirectly: the

legislator should take into account some minimum requirements but, beyond that, violations of social rights cannot be directly invoked before the constitutional court. In this sense, social rights do not represent public subjective rights or do so only in a very limited way.[13] However, these structural differences between the various categories of rights within the legal domain cannot form valid reasons at the normative level, where the question to be explored is whether social and cultural rights *should* enjoy the same degree of protection and identical guarantees as civil and political rights. Moreover, the debate about the morality of the demands of minorities arises precisely because these aspirations are not commonly regarded as legal rights.[14]

As to the question of whether it is desirable for social and cultural rights to have the same protection as individual rights—a matter that is more relevant for the present discussion—Calsamiglia also answers negatively. He does so basically for two reasons: first, effective guarantees for these rights will depend on the assignment of economic resources, which, in circumstances of public scarcity, cannot be demanded from the state (and this, according to Calsamiglia, is what distinguishes *real* rights);[15] second, as the number of legal rights increases, the possibilities of conflict increase too. As a result, individuals suffer from a significant loss of legal certainty, since their rights can no longer be recognised in an unqualified or complete form.[16] In other words, if group rights were recognised in the same way as individual rights, we would have many rights on the same level, which, ultimately, the state would be unable to guarantee, thereby diminishing people's confidence in the rule of law. Moreover, Calsamiglia says, decisions about relative priorities would have to be made either by judges or by the legislators. In the first case, there would be a substantial increase in the judicial power that could become detrimental to the majority will since "public policies should not be monopolized by the judiciary." [17] In the latter, the idea of rights as constraints that define the framework of public policies would need to be redefined. In conclusion, according to this argument, recognising social and cultural rights as constitutional (or human) rights could have a negative impact on individuals' confidence in the kind of firm protection and intransigence associated to this kind of legal guarantee.[18]

This argument can be connected to a more general criticism of what some regard as an abusive use of the language of rights in contemporary political discourses. Extending the number of rights, so the argument goes, is a product of trivialisation and could undermine the pillars of democracy. Calsamiglia himself observes that due to the tendency to express *any* interest of individuals and groups in these terms, we face an inflation of rights that results in the loss of the original strength and meaning of this language.[19] Likewise, Francisco Laporta argues that multiplying the number of human rights will undermine the strength of moral and legal demands; in order to maintain this strength, the list of these rights has to be kept limited.[20] Mary Ann Glendon summarises the argument as follows:

> A rapidly expanding catalogue of rights – extending to trees, animals, smokers, non-smokers, consumers, and so on – not only multiplies the occasions for collisions, but it risks trivializing core democratic values. A tendency to frame nearly every social controversy in terms of a clash of rights [. . .] impedes compromise, mutual understanding, and the discovery of common ground [. . .] promotes unrealistic expectations and ignores both social costs and the rights of others.[21]

In light of the first part of Glendon's statement, the critique of expanding the catalogue of human rights appears to be closely linked to the view that the aspirations to be protected through new rights are less valuable than those already recognised (basically, civil and political rights). Such a view is certainly reflected in the writings of other critics,[22] and also finds expression in contemporary constitutional theory.[23]

However, the objection to the expansion of human rights is not exclusively linked to the idea that the sort of goods that the "new" rights would eventually protect are less valuable. In fact, as becomes apparent from the second part of the citation from Glendon, the critique contains a second element, one that we can interpret in a more communitarian sense as part of a general criticism of liberal theories of rights. Thus, according to this view, the use of the language of rights leads to distance people from each other; it announces, to rephrase Waldron, "an opening of hostilities."[24] The emphasis on rights restricts alternative discourses—such as those on responsibility, duties or on civic virtues—that form the basis of a civil society held together by bonds of affection, respect and tolerance, which are more solid and even more laudable from an ethical point of view.[25]

Applied to our subject, the argument would go as follows: if we have democratic spaces in which social problems can be raised and discussed, why not trust them? or why should we ground our social relations on an impersonal institution such as rights that tends to increase the barriers between those who advance conflicting demands? As can be seen, in any of its versions, this critique would see it as a mistake to depict the demands of minorities in terms of rights. Instead, they should be regarded as mere aspirations to be satisfied, as far as possible, in the realm of the political. Of course, multiple trade-offs may be needed in this area, where competing social values of sufficient significance can be validly invoked. The problem of multiculturalism and minority rights, then, would fall into the domain of democracy, where all parties have to be flexible and discuss or negotiate their positions so as to reach political agreements that generate social stability.

Even though there may be some core truth in this criticism, I think, this perspective can be consistently rejected when it comes to confront the problems involved in the debate that concerns us here. In particular, as regards the abuse of the language of rights, it is unclear in which sense the inclusion of group rights into the catalogues of human rights would lead to their trivialisation. Admittedly, according to a common view, the so-called second- and third-generation rights are based on needs and goods that are "not fundamental enough" to warrant their denomination as human rights. Yet this view is normally justified on pragmatic grounds. It is said, for instance, that we are still today faced with the vital task of eradicating oppressive practices in democratic societies and that the most fundamental human rights such as the right to live are far from being universally protected. This contention, however, seems to imply that our capacity for moral concern is limited, so that intensifying our interest in issues like the rights of minority cultures, animal welfare and so forth would necessarily diminish the concern for individual rights. Although it is not possible here to develop these objections further, I agree with Peter Singer in that this ethical picture is far from self-evident.[26] It is not possible, in any case, to claim that the kind of ethical problems underlying the demands of minority cultures are less important without thorough analysis. And, as Holmes and Sunstein

suggest, in general, the rights talk can be interpreted as a response to "moral breakdown" and as an incentive to engage in social communication.[27]

Opponents of group rights also argue that there is far less agreement on the value of the interests or needs underlying these rights than there is for individual rights.[28] This is undoubtedly true. But it is precisely this deficit that activists and theorists seek to overcome by means of argumentation, thereby discussing what could become the core of a new consensus about rights. This observation leads to an objection of principle to the argument above. To state that there are certain conventions that define the scope for the principles of justice or for rights does not imply that this scope has been fully established once and for all. Any conventional formulation of those rights should be taken as provisional in the sense that it does not hinder the possibility of revising its foundations, or to justify the inclusion of new instances previously excluded. Also, such formulations often need a specification, which can take the form of new rights.[29] Moreover, discerning a right beyond the predominant interpretation of a particular clause might be the only way to expose the limits and inconsistencies of prevailing social conventions.[30]

In any event, to avoid using the term "rights" with respect to the subject that concerns us here would imply to distort the nature of the claims conceived in these terms. As I argued before, by and large, the use of the language of group (or collective) rights is not a mere *façon de parler*. Instead, this language seeks to emphasise that the legitimacy of the kind of interests at stake is based on reasons and principles analogous to the ones that justify individual rights and hence existing catalogues of human rights are insufficient.[31] According to their proponents, group rights, just as other typical human rights, are a form of acknowledging people's dignity as well as their potential for self-realisation and freedom, so that their legal recognition would add new limits to the discretionary powers of the state. Consequently, for purposes of theoretical analysis, it is important to start from the assumption that the term "rights" is used in its proper sense and not arbitrarily.

If the former analysis is correct, then it is necessary to examine whether there are, indeed, reasons for extending our normative schemes beyond current conventions. To present and evaluate the arguments that would support such an extension is, in fact, a central purpose of the rest of this book. But, before, it is important to comment on some additional objections to the idea of group rights that are central to the arguments of Calsamiglia and other critics.

As regards the problem of conflicts of rights, it seems obvious that the potential for conflict increases with the number of rights recognised. On this ground, critics fear that a significant increase would obviate all efforts at guaranteeing and protecting human rights in an absolute way, as Calsamiglia puts it. But, on the one hand, this is an argument that could also be opposed against the recognition of individual rights. And, on the other, it is not clear that the idea of "absolute protection" is indeed part of the concept of human rights. This is, in any case, a controversial question. As Waldron and others maintain, common conceptions of rights hardly ever provide a basis for trust in the possibility of absolute protection or prevalence. In particular, it is unlikely that an idea of rights based on interests could avoid a potential conflict of these interests.[32] Likewise, Laporta finds it implausible to categorically affirm the absolute character of human rights. He instead claims that all rights have

a *prima facie* character.[33] Waldron develops this argument from his version of rights as generators of successive "waves of duties."[34] In his view, obligations may not always be fully realisable and so the balance between them may sometimes be inevitable, but this does not entail that a specific right is sacrificed or that it simply disappears.[35] The point of speaking about rights is precisely to overcome the shortcomings of utilitarianism.[36] Therefore, if the demands of cultural minorities could justifiably be called "rights," the adoption of measures to satisfy them would no longer depend on the convenience or interests of the majority at a given moment.

Acknowledging the possibility of conflicts of rights has significant repercussions for the interpretation of the absolute character that is often attributed to human rights. A theory of rights specifies certain interests, which are to enjoy precedence not only over the common good (or the social calculus of aggregate interests) but also over moral considerations that are not based on rights. It is only in this sense that rights are "absolutes," insofar they constitute *ultimate* moral demands that, in case of conflict, take precedence over other reasons of a moral, prudential or legal character.[37] Obviously, this approach raises extremely complex questions concerning the criteria for adjudicating rights in conflict, which are beyond the scope of this book. The main point I wish to extract from the previous observations is the appropriateness of starting from the theoretical premise that demands of minorities might adequately be expressed in terms of rights, at least as long as the substantive arguments that justify the use of such language are not dispelled as insignificant. But this conclusion cannot be simply presupposed without further reasoning.

One additional implication of the preliminary objection raised above has to do with the positive dimension of group rights. Since ensuring these rights would require granting resources that, in the real world, are limited, their legal recognition should be taken with caution and might be better left to the realm of policy. This argument, however, is misleading because it wrongly assumes that we can trace a clear division between positive and negative rights. Somehow, the implementation of all rights—also the traditional civil and political rights—depends on the investment of public resources.[38] Even if rights are seen as reflecting merely a general duty of non-interference with the freedom of others, guaranteeing the implementation of this duty of omission requires positive action by the state. Moreover, as Denise Réaume contends, it is difficult to establish *a priori* that the cost of maintaining the private goods associated with individual rights is lower than that of providing the public goods group rights seek to ensure. Thus, the actual interest of individuals in the latter kind of goods might in fact provide them with a significant reason to spontaneously participate in their production.[39] In the same vein, Waldron points out that many first-generation rights require the establishment of institutions and other far-reaching costs (given the limited resources at the disposal of any society). To take an obvious example, nobody would consider that the right to vote is ensured merely through granting the freedom of ticking the name of our candidate or favourite political party when and how we want: "To demand the right to vote", as Waldron rightly writes, "is to demand that there be a political system in which the exercise of that power is rendered effective along with its similar exercise by millions of other individuals."[40]

In sum, *any* system of rights requires an investment of resources to protect them effectively.[41] It is in part for this reason that we should be suspicious of arguments

based on an alleged impracticality of *some* of these systems, and particularly on that of cultural group rights. In addition, though, the alleged impossibility of protecting these new rights often presupposes that the existing distribution of wealth is unalterable. This point is fundamental as it draws into doubt objections based on a lack of resources when it comes to demands for rights to housing, health, minimum income, the protection of languages, etc. It seems to follow from these objections that we should give up our aspirations to a more comprehensive system of rights. But, in fact, we can rather reconsider the fairness of our current distribution of social resources so as to guarantee more rights. In my view, there are enough reasons to reject the first alternative, not only because it hinders alternative discourses, but mainly because it can produce perverse effects. In particular, when underlying situations of injustice are portrayed as the result of fate or bad luck that cannot be remedied due to a shortage of material resources.[42] As Judith Shklar contends, the line that separates injustice from bad luck is extremely thin.[43]

In any case, even if, indeed, social and cultural rights pose an important challenge to our conceptions of the distribution of wealth, both domestically and globally, this is not yet a good argument to deny the existence of these rights as such (just as from the fact that there is a more or less inevitable level of crime or discrimination, it does not follow that there are no rights to security or to equality[44]). On the other hand, as Waldron also argues, the difficulties for adequately safeguarding certain rights that flow from the lack of resources only arise once we take into account *all* demands for rights. Taken in isolation, each right can probably satisfy what Waldron calls "the practicability test."[45] Reducing the number of rights certainly means using fewer resources and, perhaps, frustrating fewer expectations. Yet again it does not follow from this that we can decide *a priori* that only some interests (i.e., those underlying civil and political rights) are relevant, or should take priority over others (i.e., those at the basis of cultural and socio-economic rights).

Lastly, surely, some critics of rights in general correctly stress that we should not think of justice or rights as the primary links that form our social relationships, thus replacing affection, respect, generosity or other virtues. However, personal relations (and group relations) can fail, as unfortunately we witness every day, and, in this case, we need to have guarantees beyond the mere confidence in good faith, altruism or the like.[46]

In conclusion, the mere concern about an increase in the number of moral or legal rights is not a valid argument for limiting the scope of the normative theory. To the extent that is possible to argue that certain hitherto underestimated human interests are fundamental, we might have reasons to claim their recognition as rights.

## 3. TWO COMPLEMENTARY CONCEPTIONS OF GROUP RIGHTS

For the reasons suggested earlier, the best strategy to counter the various objections described in Chapter I is to formulate a less controversial concept of collective or group rights and to seek a broader consensus on it. This section explores two more

plausible (and complementary) ways of understanding these rights. The first is based on the notion elucidated by Raz; the second derives from Kymlicka's understanding of minority rights.[47]

### *3.1. Group Rights as Rights to Public Goods*

In *The Morality of Freedom* Raz includes a reference to the notion of collective right as a "right to a collective good."[48] Although Raz does not specifically address the problem of minority rights, his general approach allows to account for the elements that inform the type of demands minority groups usually raise. To understand the scope of Raz's idea of collective rights, it might be useful to bear in mind his general concept of rights. According to Raz, X has a right,

> if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.[49]

This definition, as can be seen, stresses the interest in goods that are important for the well-being of the individual as the basis for rights. Moreover, it emphasises that rights do not correlate with duties, but that they lay the foundation for those duties, so that it leaves room for the thesis that not all duties necessarily derive from rights. It is a notion, in short, that accentuates the dynamic aspect of rights, namely their capacity to generate duties.

Raz is a liberal perfectionist and this position determines to a significant extent what kind of human interests are regarded as sufficiently important to justify the existence of a right. Respect for freedom, in his view, is grounded on the constitutive role of this ideal for the pursuit of the good life. For Raz, the idea of well-being is not a mere abstraction of purely subjective content; instead, he thinks that the ultimate justification for freedom and rights is based on a specific conception of what this idea means. As Avishai Margalit says, Raz is not a philosopher of life but a philosopher of the *good life*,[50] Indeed, his approach to the concept of well-being is essentially objectivist, even though it does not entirely rule out the subjective aspirations of individuals. It is important to explain this point briefly. Raz insists that our lives be guided by objectives worthy of being pursued, and by "life," he means not merely the force stemming from existence in itself but, instead, he refers to what we make of it. His main thesis is that our well-being is determined not by who we are but by our conscious choices about what is worth pursuing.[51] To a large extent, then, both the evaluation of our own life (or certain periods of it) and the judgements we make about the life of others are based on the kind of actions that we or they undertake. Any option can be good—hence the margin for subjectivity—and lead to well-being, if we wholeheartedly decide to pursue it because we believe it is worthwhile. The choice of our activities, therefore, requires an individual value judgement; no activity is intrinsically better or worse on the basis of any other criteria.

This judgement, the reasons for which we do things, is central. For it imposes an objective condition that should not be underestimated: I cannot lead a good life through activities that I prefer for the wrong reasons. That is, my life is not good if I make important decisions without respecting my own concept of what

is worthwhile. For example, the author of a brilliant doctoral thesis could hate herself for having dedicated too much time writing it instead of using that time for family and friends, for travelling or for working for a humanitarian cause—things she actually thought were more worthwhile pursuing.[52] In fact, what Raz's view of well-being seems to exclude is precisely self-alienation or self-rejection. Therefore, this theory demands that decisions should not only be taken freely but should be based on reasons related to their intrinsic value, even though the definition of what counts as valuable might ultimately be subjective in the sense that it does not depend on any objective social or cultural criteria for success or self-realisation.[53]

This idea of well-being is central to understanding Raz's justification of rights in general as well as his idea of collective rights. First of all, the central value he attributes to well-being determines his conception of a good society. Thus, a good society is one that guarantees to everybody equally the *possibility* of success in this enterprise; i.e., one that creates the conditions that allow individuals to pursue the type of goals that are crucial to their well-being. In this sense, in Raz's view, we all have duties towards the well-being of others. The relationship between the individual and the collectivity is always dialectical. That is why the idea of the public good is of singular importance to his theory. Raz understands it not as the sum of individual goods but as the goods that serve the well-being of the people in a given community in a way that is neither exclusive nor excluding and free of conflict.[54] This role of the public (common) goods for the promotion of individual well-being leads him to question the widespread view of rights as "trumps," in the sense that they prevail over considerations based on social interests.[55] Instead, he claims that some central civil and political rights protected by modern constitutions are justified, to a large extent, by the fact that they contribute to the common good.[56] Without the existence of the public good, the right would be meaningless. In this sense, while due respect for others means giving adequate weight to their interests, he thinks that the reasons for this respect are not only linked to individual interests, but that by protecting individual rights "one protects the common good and is thus serving the interest of the majority."[57]

Although this duality in the justification of rights can be ambiguous, it should not be confused with a utilitarian justification. Raz's theory of rights defines certain interests on the basis of their relevance for personal well-being. However, humanism is consistent with the assertion that what matters is not only individualised goods but that other kinds of goods, like public goods, are also precious for individual self-realisation and well-being. Raz's conception of collective rights is, actually, an attempt to specifically account for this type of interests, usually overlooked by liberal theories of rights. A collective right exist when the following requirements are met:

> First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.[58]

Collective rights, therefore, are typically rights to public goods. These goods should be of importance to the well-being of a group of individuals—hence the reference to the group. The emphasis, in the third requirement, that the interest of no particular member justifies in itself the assertion of a duty could intuitively be related to the irreducibility thesis mentioned earlier. Yet, arguably, such association would be wrong. What Raz actually seems to stress is that the interests protected by collective rights are *shared* among the members of the group. In other words, collective rights require a set of convergent individual interests.[59]

Now, one could argue that it is misleading to speak about collective rights when in fact we are thinking about individual interests; yet it is important to stress that the basis of these rights is not just one individual interest but a *set* of them. This point becomes clearer in a comment by Raz to the right of self-determination:

> Self-determination is not merely a public good but a collective one, and people's interest in it arises out of the fact that they are members of the group. [. . .] though many individuals have an interest in the self-determination of their community, the interest of any one of them is an inadequate ground for holding others to be duty-bound to satisfy that interest. The right rests on the cumulative interests of many individuals.[60]

Hence, Raz admits that numbers do count for the justification of collective rights. An interest must be shared by a group of individuals—in the case of the right to self-determination, this would be an interest in living in a community, which allows people to express in public and freely develop those aspects that are linked to their identity as members.[61] This is the first important criterion of distinction between collective and individual rights. Of course, some individual rights—like the right of association—also require a group. But in this case, this is mostly a condition for their exercise rather than the justification of their *existence*. In the case of collective rights, Raz emphasises that the requirement of an aggregate of individual interests is due to the special nature of the good these rights are meant to protect.

Indeed, the second characteristic element of collective rights is that the individual interests in question are interests in public goods. Although this element is central to his definition of collective rights, Raz refers to these goods in various terms, and this fact may create confusion.[62] In particular, the differences between the expressions "common good," "public good" and "collective good" are not apparent. Sometimes it seems as if these terms are used interchangeably; yet the paragraph on self-determination quoted above might indicate otherwise. In particular, the distinction between "public goods" and "collective goods" is worth exploring.

Raz defines public goods as goods of non-rival and non-exclusive enjoyment or consumption, but whose production is not necessarily collective.[63] However, before defining the concept of collective rights, he seeks to identify a category of public goods that are "inherently collective", providing "general benefits to society:"

> General beneficial features of a society are inherently public goods. It is a public good, and inherently so, that this society is a tolerant society, that it is an educated society, that it is infused with a sense of respect for human beings, etc. Living in a society with these characteristics is generally of benefit to individuals.[64]

Raz then calls such public goods as "collective goods."[65] Above all, these are eminently social goods because their distribution (and its benefits) cannot be controlled. Raz thus claims that people benefit in various ways from the fact of living in a tolerant, civilised or

free society, but this benefit is somehow diffuse or vague, since it largely depends on the interests and dispositions of each individual and, in any case, it is not possible to directly control its use or distribution.[66] Instead, in the case of public goods—in Raz's terms, "contingent" public goods—it is possible to think of establishing control mechanisms.

So far, the difference between the two types of goods is fairly clear. However, Raz suggests elsewhere that, unlike public goods, collective goods are "intrinsically valuable."[67] This turns out to be more problematic, since, by making such a statement, Raz could seem to betray his own humanistic principle (even if he explicitly says that this is not the case). For, at first glance, it seems inconsistent to assert that all goods derive their importance from their contribution to individual well-being and, at the same time, that some goods are *intrinsically* valuable.

To make both assertions compatible, it is important to bear in mind the context of Raz's discussion of collective goods. As indicated, one of his main aims is to criticise rights-based moral theories for not recognising the value of collective goods (hence, the discrepancies with the Dworkinian justification of individual rights). By introducing the idea of collective rights—as rights to collective goods—Raz reveals his disagreement with what he calls the "individualism" of those theories. It is here, though, that misunderstandings might arise. For one thing, against what this objection might suggest, Raz also accepts that the individual, and not the group, should be at the centre of rights-based theories. What he argues, instead, is that most theories of rights often ignore or underestimate the importance of a class of public goods that are *irreducible* to individual goods. In short, Raz's criticism is directed against those theories that consider all goods as individualisable (i.e., reducible to a series of individual goods). But, by expressing this idea in terms of value—stating that collective goods are "intrinsically valuable" and that individualistic moralities are problematic because they hold that this type of goods are only instrumentally valuable[68]—leads to confusion. In a way, Raz also argues that all types of goods are only instrumentally important, in that their value depends on their contribution to individual well-being. This is why he emphasises that this argument is compatible with the humanistic principle.[69]

If this interpretation is correct, the objection to the individualism of liberal theories of rights raised by Raz is mainly related to their ignorance of the importance of a type of public goods that cannot be reduced to individual ones. But we still need to gain a better understanding of the justification of this assertion. Raz, however, only offers a few examples of social goods whose generation and distribution are remarkably different from those of general public goods.[70]

The issue of the irreducibility of certain public goods has been tackled by other theorists interested in the idea of group rights, and although the terms they use vary, the main idea remains the same. Leslie Green, for instance, refers to "shared goods,"[71] Réaume speaks of language as a "participative good"[72] and Waldron alludes to certain non-individualisable goods as "communal goods."[73] All them emphasise that these are goods whose public nature is more profound than that of public goods in an economic sense, in that they are produced or consumed only through collective action and their intelligibility is thus lost if we reduce them to individual goods. Moreover, their value lies in their collective production and enjoyment, more than in obtaining any particular result.

In his article *Irreducibly Public Goods*,[74] Taylor sheds some more light on the decisive reasons for the irreducibility of this kind of collective goods. Although this piece mainly aims at criticising utilitarianism and some forms of liberalism,[75] the argument helps to further clarify our question. Taylor's analysis begins by positing that the basic premise of those defending the thesis that all public and social goods are reducible to individual goods is an atomistic view of society. I have mentioned atomism and its relation with methodological individualism briefly in Chapter I in order to argue that it seems plausible to think about collectivities in terms of the individuals that are part of them. *A priori*, this reasoning seems to apply to the question of collective goods too: their reducibility to individual ones seems self-evident if we accept that there is no other *locus* of events than the minds of individuals. That is, if there are such things as statutes, roles or social and cultural institutions, it is because there are individuals who think, take decisions and act.[76] What prevents us, then, from asserting that every essential good in our social life can be explained in terms of individual goods?

Taylor argues that, by reducing the specific type of public goods mentioned by Raz (tolerance, solidarity, education and so on) to an aggregate of individual goods, we fail to capture the collective dimension of the meaning of our thoughts and experiences. These are goods that shape the character of a particular culture (culture is understood here as a group of institutions, practices or shared meanings in a given society[77]). And although, as individuals, we can experience them in isolation, the reductionism of this reasoning would ultimately make them incomprehensible because social goods are unintelligible without a background language that provides them with their concrete, shared meaning.[78] Thus, Taylor insists—rightly, in my view—that if we ignore the difference between mere public goods and social goods, an important dimension of the social life of human beings is lost.[79]

Returning to our main interest, we could define collective or group rights as rights that protect individual interests in irreducible public goods of the kind mentioned (social goods, in Taylor's terms; collective goods, according to Raz). Let me use one example to illustrate that this adequately characterises Raz's interpretation of collective rights. Raz might regard Oxford, the city where he often lives, as a beautiful city in which urban planning has conserved the ancient buildings and the charm of its streets; also, by living in Oxford, Raz, apart from lecturing and writing books, can enjoy a rich cultural life, attend concerts, seminars and other activities made possible by a rich and diverse cultural environment. On the whole, to live in a culturally stimulating society is probably an important good for his personal well-being.[80]

Now, suppose that we want to argue that it is important to recognise a right to this good. Why could not we do it in terms of an individual right to live in a culturally rich society? Reformulating the argument, Raz might probably object that conceiving of his particular interest in this way would be inadequate for two reasons: first, it is difficult to see how the desire of a single person could justify the imposition of the duty to provide this good on the rest; second, it seems more than likely that Raz would consider it unjustified to impose all these activities on others merely because he would feel miserable without them. This is why, in the case of collective rights, duties are imposed only insofar as they protect a shared interest of the members of a group.

Yet one could still point out that most individual rights also protect shared individual interests. Therefore, the second element becomes essential: collective rights protect goods that are irreducible to a set of individual interests. Whether or not Raz can achieve his ideal of well-being depends on whether there are enough people that share his interests—philosophers, students, musicians, photographers, novelists—and a society that regards cultural activities and institutions as necessary. Only all these elements together can provide the good. The collective conception of rights is important because it accounts for the fact that some interests could not even exist as independent interests of an individual; these interests are necessarily socially interdependent. And this is perfectly consistent with the notion that, ultimately, they derive their moral relevance from their function in promoting the well-being and prosperity of individual human beings.[81]

In conclusion, it would not only be impossible to protect the good "culture" for the enjoyment of a single individual, but culture is also constituted and given meaning only through a combination of activities, institutions, roles, etc. Its value, therefore, cannot be instrumental—it is not exhausted by an aggregate of particular individual satisfactions that would hardly account for its overall meaning and for the collective facet of the process by which it is created. To be the good it is, culture requires a set of shared meanings that shape its generation as well as its consumption. Collective goods, as Réaume remarks, are public goods in a special sense; they are participative goods by nature and this, the publicity of production itself, is what it is precisely valued.[82] The language of collective (or group) rights acquires its full meaning, then, when it comes to the protection of the shared interest of a group of people in a good of this nature. On this basis, it is possible to account for a conception of collective rights such as Raz's. Certainly, this concept is not intended to justify the attribution of such rights specifically to minorities. Even so, the recognition that there are individual interests in irreducible social goods constitutes an important step forward in understanding the particular nature of some of the demands of these groups. This point will be explored in Chapter III. Before, however, let me outline a second conception of collective rights that may likewise capture some of that particularity.

### *3.2. Group Rights as Special Rights*

Conceptualising the kind of rights typically claimed by minorities as "special rights" is an attempt to abstract a common core from all the demands posed by these groups in multicultural states. On the one hand, the term "special" emphasises that such rights would give minorities a status different from that of the majority. It does not, however, determine whether the holder of the rights should be the individual or the group; the interests protected may well be those of individuals, and the right may be held by members of the group, rather than by the group itself. The specific form that the right takes is, initially, irrelevant. Rather, it is the reference to the group or community that is essential, as it captures the central reason for the recognition of the right. On the other hand, the term "special" could be also interpreted as a characteristic of group rights that sets them apart from first-generation human rights. Thus,

the latter are aimed at generality and deemed to be based on needs and interests common to humanity as a whole; whether an individual belongs to a specific group (ethnic, religious, cultural, national or the like) is irrelevant. In fact, it is part of the very ideal behind these rights that they exist independently from any such ties: for me to be able to assert my right to life, to dignity or to physical integrity, nothing more is necessary than my being a person. In contrast, for the justification of collective rights, group membership is central.

Note that this latter feature does not necessarily threaten the humanistic principle: individuals can still regard their ties to a group as instrumentally valuable for their well-being. Nor does it question the ideal of universality, at least to the extent we recognise that any human being belonging to the relevant sort of group has a morally significant interest in the type of good that is generated through this interaction. Suppose, for instance, that in a country where the Catholic tradition is dominant like Spain, where Sunday is the official holiday, a minority of Jewish citizens claim their right to rest on Saturday, their Sabbath. If this right is indeed justifiable (let me leave aside here the various possible arguments for this claim) it could perfectly take the standard form of an individual right designed to make the religious freedom of Jews effective. However, individuals would possess this right only by virtue of their belonging to a minority group, and this is fundamental. In fact, only members of this religion could legitimately claim the right in question. In such cases, using the vocabulary of collective or group rights helps to emphasise this trait.

Obviously, one could object that this would merely constitute an extension of the individual right to religious freedom or of the principle of non-discrimination, understood beyond is mere negative implications. But even accepting this,[83] the language of collective rights is analytically useful in this case, since it allow us to distinguish between, on the one hand, rights that depend on an individual's belonging to a group or community, and, on the other, individual rights common to all human beings. In particular, if the group in question is, as in our example, a minority in a given state, the idea of specialty would give expression to this asymmetry within the common regime of rights.

A conception of group rights along these lines has been advanced by Kymlicka. The main problem of minority rights, he thinks, consists in justifying the attribution of special rights (or a status distinct from that of the majority) to non-dominant groups in multicultural states. Such recognition would lead to an asymmetrical distribution of rights for individuals by virtue of their belonging to different groups.[84] However, Kymlicka is ambivalent about using the term "collective rights" to refer to minority rights, as mentioned, although his reluctance is mainly due to the misunderstandings about the ideological implications that many people see in this vocabulary. Already in his book *Liberalism*, *Community and Culture*, Kymlicka argued that the term "collective rights" is over-inclusive and lacks explanatory force.[85] For it is often used in domains completely unrelated to minority rights like, for example, to describe the rights of corporations or those rights that all individuals have to public goods (environment, education and so forth). Besides, Kymlicka also thinks that this term suggests a false dichotomy between individual and collective rights[86] and, more recently, he refers to group-differentiated rights or, simply, to minority rights.[87]

In fact, by definition, if there is something that group or collective rights are not, it is individual rights. Yet Kymlicka is mainly concerned about the reductionism of some widespread interpretations of the term. Thus, as we already saw, collective rights are widely conceived as held and exercised collectively and thus perceived as distinct from—and perhaps in conflict with—individual rights. But this criterion fails in adequately accounting for the distinction. On the one hand, some rights that are attributable to and exercised by individuals can be better seen as group rights because their recognition cannot be explained without reference to the group. Recall the Sabbath example above; or consider, for instance, the right to the official use of a minority language. The right of francophone Canadian representatives to use French in the federal institutions could be interpreted as an individual right, since it is, in fact, exercised individually. However, it would not exist were it not for reasons related to their membership to a cultural group, and its legitimate interest in using a minority language in the public sphere. Otherwise, Quebecois representatives could be required to use English, given that bilingualism is quite common. On the other hand, there are other rights, such as the right to self-determination, that cannot sensibly be individually attributed and exercised, not because they are based on any collectivistic theory, but because the production and value of the good protected through them depends on the existence of shared individual interests in the sense described in Section 3.1.

Finally, following Kymlicka's suggestion and using an alternative term in order to avoid the controversy that surrounds the definition of collective rights is, in my opinion, neither necessary nor advisable. We can avoid the problem of over-inclusiveness by clarifying that this category of rights, in the case of minorities, is not distinguishable by any formal characteristic but, instead, by a common rationale. It can include a set of rights properly so called, but also exemptions, special statutes or even specific constitutional provisions, reflecting the individual needs and interests that derive from membership in particular groups. Hence, the reference to the group is central. Kymlicka's objection to the term is an attempt to circumvent the dominant debate between individualists and collectivists over these rights, which, he says, has had "a disastrous effect on the philosophical and popular debate."[88] The shortcomings of the dominant conception have already been explained in Chapter I. But it is precisely because of these deficiencies that we can argue that the alternative conception suggested is more adequate than the standard one. In addition, it is worth insisting that using the language of group/collective rights offers the additional advantage that has already been mentioned: it draws attention to the fact that some rights primarily aim at guaranteeing certain individual interests in social or collective goods that have been traditionally ignored in the justification of human rights.

## 4. CONCLUSION

This chapter has focussed on some of the most common strategies to overcome the difficulties that the dominant approach to the problem of collective rights of minorities, as outlined in Chapter I, poses from a liberal perspective. I have argued that both the reductionist strategy and the proposal to avoid the language of

rights face serious difficulties in reflecting the importance of the challenge that the demands of minorities pose. Hence, I have sought to explore the possibility of a distinct notion of collective or group rights that, while accounting for this challenge, avoids violating the basic principles that uphold liberal theories of rights, such as value-individualism.

Although the two conceptions examined are different, they should not be interpreted as mutually exclusive but, rather, as incorporating complementary criteria that need to be taken into consideration in the debate about minority rights. Raz's conception is more general in scope, encompassing the rights of groups, whether majoritarian or minoritarian, whereas the one by Kymlicka seeks to account for the particular structure of minority rights within the general framework of human rights. Thus, Raz's analysis is based on a comprehensive theory of rights. His main concern is to discard the fallacy that rights protect individuals *against* the common good. In this context, collective rights are meant to reflect the interest of any group or community in the protection of those public goods that are irreducible to individual ones for reasons examined. These rights thus presuppose a set of individuals with shared interests in these goods. The question of who is the rights-holder is of secondary importance.

The idea of group rights as special rights, on the other hand, brings out an essential characteristic of the rights that minority groups demand. To understand it, we need to bear in mind the typical structure of existent human rights catalogues and contrast it with the *plus* claimed by minorities, namely, with what they demand in addition to the common regime. Hence, by referring to the notion of special status or regime, Kymlicka is not primarily concerned with the formal aspect of these demands, but with their specific rationality and structural repercussions; after all, "collective rights," or "group-differentiated rights" are only labels that encompass substantially different demands, the legitimacy of which needs to be individually examined. But, once again, the criteria to distinguish between individual and collective or group rights are not primarily related to the question of who is the rights-holder or who exercises the rights. Minority rights are collective rights because the reference to the group is essential for their full intelligibility. Their recognition entails, in a given society, a non-homogeneous distribution of rights.

Despite their differences, then, both concepts share something in common. They both contain a reference to specific groups or communities, although the goods protected by collective rights derive their value, in both approaches, from the shared individual interests. Hence, as individual rights, they serve to protect important interests of individual persons. For the aims of this book, the second criterion to define group rights is of more immediate use, as it allows to formally illustrate the distinctiveness of minority demands in multicultural states. The aim of minority rights is precisely to protect certain distinctive cultural elements of these groups as a collective good, or so it will be argued. But, before entering into this central discussion, Chapter III draws the attention to an issue that has been left open so far: the identification of the type of minorities that, initially, should be taken into account in the debate over multiculturalism and group rights.

## NOTES

1 Chapters IV and V explore the liberal nationalist argument and the works of its main proponents.

2 Tamir (1993, pp. 72–73). Similarly, Walzer (1992b).

3 Tamir (1999).

4 Tamir (1999, p. 159) provides several reasons for her reluctance to accept the idea of collective rights, including the danger for individual liberties of the weakest members of the group. This argument will be examined later in this book. Tamir (1999, p. 164) also assumes that the defining characteristic of collective rights has to do with a collective holder.

5 Kymlicka (1995a, p. 7, pp. 34–35).

6 Kymlicka (2001a, pp. 17–66).

7 See Kymlicka (1995a, pp. 45–48).

8 Bauböck (1999, p. 138).

9 As Gewirth (1996, pp. 6–7) explains, this adversarial conception perceives the claims of rights as egoistic, causing the atomisation of society and leaving no room for a relation of mutual support between community and rights. In contrast, Gewirth's project is one of conciliating this apparent opposition.

10 Calsamiglia (2000, pp. 135–150).

11 Calsamiglia (2000, p. 137). *My translation*.

12 Calsamiglia (2000, p. 147).

13 Against this view, see Abramovich and Courtis (2002, pp. 19–64).

14 As indicated, Calsamiglia's remarks are mainly aimed at discussing legal rights. Yet, in the realm of morality, the distinction between rights and expectations may overlap, since the term "moral right" can be understood as nothing else than a legitimate expectation in the sense mentioned above. Nevertheless, the core of the distinction can be preserved if we focus on the degree of relevance of the background reasons for justifying moral expectations. Thus, bare expectations would be those that are not linked to interests that are basic or relevant enough to justify moral rights. Obviously, the question of determining whether a certain interest is relevant enough remains open to discussion.

15 Calsamiglia (2000, pp. 142–143, p. 146).

16 Calsamiglia (2000, p. 147).

17 Calsamiglia (2000, p. 145).

18 As Holmes and Sunstein (1999, p. 99) put it, for many, rights are "a matter of principle, demanding a kind of clinched, unblinking intransigence," in the sense that arguments related to the public good cannot be alleged as a sort of trade-off.

19 Calsamiglia (2000, p. 128).

20 Laporta (1987). For a critique of this argument, Holmes and Sunstein (1999, pp. 99–112).

21 Glendon (1991, p. xi).

22 Both Calsamiglia (2000, p. 139) and Laporta (1987) stress the problem of trivialisation, which they see as derived from the increasing proliferation of rights legally recognised as such. They use the term "inflation" to refer to this trend, which, in contrast with words such as "expansion" or "extension," normally involves a negative connotation.

23 The influence of this view is reflected, for example, in the objection posed to the expansion of fundamental rights by means of extensive interpretations so as to make the most abstract constitutional clauses meaningful. For a critical analysis of this objection, see Ferreres (1997, pp. 126–132).

24 Waldron (1993, p. 373).

25 This is the central argument that Glendon (1991) also defends. For a similar view, Etzioni (1995, pp. 99–105). Against this view, Waldron (1993, pp. 371–391) and Holmes and Sunstein (1999, pp. 135–171).

26 Singer (1975, pp. 219–222) extensively discusses the deficiencies of this picture as well as other factors that often ground the objections against animal liberation, a discussion that, by and large, applies here.

27 Holmes and Sunstein (1999, pp. 158–160,162–168); similarly, Gewirth (1996, pp. 6–8) who outlines the basis for a view that conciliates rights and community in a non-adversarial way.

28 See Calsamiglia (2000, p. 142) and Glendon (1991, p. 16).

29 On the relation between the criticisms of "rights-inflation" and the problem of specification, see Gewirth (1996, pp. 101–105).

30 This idea underlies Dworkin's distinction between "concept" and "conception" (see supra, Chapter I, note 33). Although there are paradigmatic cases of, say, unequal treatment that violates equality rights,

we often disagree when new instances that are not covered by current conventions emerge, or when we confront competing views on what conducts are consistent with the general principle. As a result of these disagreements, new paradigms come to be accepted, and old ones are rejected.

31 Kymlicka, (1995a, pp. 4–6).

32 Waldron (1993, p. 203). According to Waldron, a theory like Nozick's might avoid the problem of rights in conflict, but at the cost of taking rights as mere side-constraints.

33 Laporta, (1987, p. 40). Does this imply that, after all, rights cannot be adequately represented as trumps over the common good? In other words, if we admit the possibility of genuine conflicts, are we not reopening the door to the utilitarian calculus that we had put aside before by assuming the Dworkinian notion of rights as trumps? In my view, not necessarily. As Waldron rightly argues, the sorts of trade-offs involved in utilitarian theory are different from the trade-offs that might be adopted as a solution to conflicts of rights. In the utilitarian calculus, important individual interests may be traded off against considerations that derive their weight only from numbers, even if they are intrinsically less important. For instance, "a minority's interest in political freedom may be traded off against the satisfaction of the desires of a majority to be free from discomfort and irritation" (1993, p. 210). Although it is inevitable that individual interests that are on the basis of rights need sometimes to be balanced against one another, it follows from this reasoning that conflicts between rights can be resolved through criteria other than the utilitarian calculus. On the inescapability of trade-offs between rights, see also Holmes and Sunstein (1999, pp. 118–132).

34 Waldron (1993, p. 25, pp. 211–215).

35 Waldron (1993, pp. 212–213).

36 For a detailed elucidation of this argument, see Dworkin (1984, pp. 153–167).

37 Laporta (1987, p. 39).

38 In this sense, Waldron (1993, p. 213). See also Shue (1980, pp. 37–40). For a different conceptualisation of the distinction that includes a mixed category, see Gewirth (1996, pp. 33–38).

39 Réaume (1988, pp. 23–26).

40 Waldron (1993, p. 24).

41 See, for general discussion, Holmes and Sunstein (1999), Shue (1980) and Nino (1989, pp. 314–355).

42 For a detailed discussion of different objections to the idea that human rights can be seen as positive rights (in that they involve waves of correlative duties that require something else that refraining from interfering with other persons' freedom), see Gewirth (1996, pp. 44–70).

43 Shklar (1990, p. 55).

44 As for the implications of socio-economic human rights at the international level, in order to object to the claim that economic security is a human right, it is not enough to show that certain states cannot make this provision for their citizens (and hence this right cannot be universalised). As Waldron (1993, pp. 23–24) writes "[J]ust as civil and political rights call in question imperial and geopolitical structures that sustain tyranny and oppression, so economic rights call in question the present global distribution of resources." In a similar vein, Pogge (1992, p. 56) argues, rightly in my view, that the basic rules of economy that rule our global economic system bear a huge impact on the life of human beings that are victims of an institutional design, which produces immense poverty, malnutrition and hunger.

45 Waldron (1993, pp. 207–208).

46 Waldron (1993, pp. 370–391). Also, rights are one of the few social instruments at our disposal to generate an awareness of the oppressive situation in which some people, or groups, live.

47 I have suggested these alternative conceptions of group rights in Torbisco Casals (2001).

48 Raz (1986, p. 208).

49 Raz (1986, p. 166).

50 Margalit (1998, p. 98).

51 Raz (1986, pp. 316–317, p. 345).

52 Raz uses the term goals in a broad sense, to cover projects, plans, relationships, commitments, etc., which guide a person's action. See Raz (1986, p. 291).

53 For a comprehensive defence of this general argument, see Raz (1986, pp. 288–320).

54 Raz (1986, p. 199).

55 Raz (1986, pp. 186–187; 1992, pp. 127–142).

56 Raz (1986, pp. 188–189,250–63).

57 Raz (1992, p. 136).

58 Raz (1986, p. 208).

[59] For this reason, Jones (1999a, pp. 356–361) dubs this conception of group rights "collective" because the moral standing is held by several individuals that belong to the group; in contrast, the conception that he calls "corporate" assumes that rights are group rights because they are ascribed to the group as a single entity with moral standing *per se*. See also Jones (1999b, pp. 81–83), where he examines the significance of these two conceptions for the question of whether group rights can be seen as human rights.

[60] Raz (1986, p. 209).

[61] Raz (1986, p. 207).

[62] Some theorists (Réaume, 1988, pp. 9–11; Jones, 1999a, pp. 358–359) seem to think that Raz's understanding of collective rights is too generous because it is mainly based on the subject (i.e., on the existence of a group of people with shared interests) rather than on the object. Yet, in my view, Raz's conception does not imply that any aggregate of individuals that share common interests may be accorded a group right since the object of these rights, as the next pages try to show, is also restricted to a certain type of groups.

[63] Raz (1986, pp. 198–199). A public good is thus a good that, as long as it is available to one person, it is, for reasons relating to its generation, available to all. This is the case for goods such as a clean environment or street lighting. Some public goods may also produce diffuse benefits—i.e., unlike clean air (which everybody breathes), a motorway that ensures faster and safer travel between two cities do not allow for an *a priori* identification of their beneficiaries.

[64] Raz (1986, p. 199). These benefits, Raz immediately adds, should not be confused with the benefit of having friends who are tolerant, educated, etc. For one thing, individual persons (our friends) "can voluntarily control the distribution of the benefits of their friendship."

[65] Raz (1986, p. 199).

[66] Raz (1986, p. 199).

[67] Raz (1986, p. 201).

[68] Raz (1986, p. 198).

[69] Raz (1986, p. 201).

[70] See Raz (1986, pp. 198–203).

[71] Green (1991, p. 321).

[72] Réaume (1994, p. 120).

[73] Waldron (1993, p. 346).

[74] Included in Taylor's *Philosophical Arguments* (1995, pp. 127–145). The references that follow refer to this volume.

[75] Like Raz, Taylor thinks that the fundamental reason for the widespread indifference to collective goods is the consideration that, strictly speaking, they do not exist, since it is normally assumed that any collective or public good can be reduced to individual goods. In his view, this assumption is mistaken, and this is one of the reasons that explain the frailty of the utilitarian philosophy. see Taylor (1995, 127-145)

[76] Taylor (1995, p. 131).

[77] See Taylor (1995, pp. 136–137).

[78] Taylor (1995, pp. 131–132).

[79] Taylor (1995, p. 132). By general public goods Taylor refers to goods such as the national defence. Taylor (1995, p. 129) says that, even though this is a good that usually provides security to all citizens of a state and could be divisible into an aggregate of individual goods, its production does not require the participation of the whole collective of beneficiaries and the benefit could theoretically be controlled.

[80] Raz (1992, p. 135). Although he insists that living in such an environment could conflict with other interests that one might have, of course.

[81] In my view, scholars like López Calera (2000, p. 76) misinterpret Raz's conception of collective rights because they understand it as derivative from the notion of individual rights. Certainly, Raz's insistence on that both categories of rights are grounded upon individual's well-being may lead to this perception. But, as I have tried to show, in his account, collective (or group) rights do not merely derive from individual rights.

[82] Réaume (1988, p. 10).

[83] Although I cannot explore this question further, it is important to point out that the traditional interpretation of the non-discrimination principle as the cornerstone in the application of equality rights suffers from serious constraints to justify group rights. As Fiss (1976, pp. 107–177) argues, the most

common legal interpretation of this principle reduces equality to equal treatment. But this is usually understood in individualistic terms that lead to ignore the social dimension of discriminatory practices as well as to disregard the legitimate interests of minorities.

[84] See Kymlicka (1995a, pp. 34–48).

[85] Kymlicka (1989a, pp. 138–139).

[86] Kymlicka (1995a, pp. 45–46).

[87] Kymlicka (1995a, p. 34). See also, Kymlicka (2001a).

[88] Kymlicka (1995a, p. 46); and he adds "Because they view the debate in terms of collective rights, many people assume that the debate over group-differentiated citizenship is essentially equivalent to the debate between individualists and collectivists over the relative priority of the individual and the community;" yet, according to Kymlicka (1995a, p. 47), "[t]his debate over the reducibility of community interests to individual interests dominates the literature on collective rights. But it is irrelevant to most group-differentiated rights issues in liberal democracies."

# CHAPTER III: UNDERSTANDING MULTICULTURALISM: WHICH GROUPS QUALIFY?

## 1. INTRODUCTION

A deeply divisive issue in the debate about minority rights is which type of groups should be regarded as relevant in the discussion. As seen in Chapter I, none of the efforts at specifying the criteria for minority status have led to consensus. For this reason, sceptics fear that those rights become a sort of Pandora's box for claims from all kinds of groups. To a significant extent, this scepticism is linked to the widespread idea that group rights are held by a collective subject that needs to be clearly identified. However, as shown in the previous chapters, this approach is unnecessary, not only because group rights can be conceptualised through other criteria, but also because the problem of defining "minority" is substantially linked to the central normative questions in the debate about minority rights. For the reasons explained, the discussion about the properties that make a particular group a rights-candidate mainly reveals the background disagreement about the kind of communities that deserve special protection and the reasons for this protection.

Accordingly, the idea that the disagreements surrounding the concept of minority are of a merely semantic nature is inaccurate. And the fear that group rights could become a "Pandora's box" is not entirely justified either. Starting from the conception of group rights offered in the preceding chapter, the primary candidates for them should be those minorities whose claims go beyond the kind of individual human rights typically recognised in modern constitutions, and thus cannot be satisfied by such rights. In this chapter, I will argue that, on the basis of this approach, social groups will usually not qualify and that cultural minorities will have to be the main focus of attention.

## 2. SOCIAL MINORITIES

The expression "social minorities" generally refers to groups suffering from social disadvantages, mistreatment or discrimination mainly due to historically prejudices deeply rooted in the practices, beliefs and conventions of the mainstream society. Members of these minorities are, in some cases, easily identified by their externally visible characteristics such as gender, race or disability. In other instances, as with foreigners, members of particular religions or gays, those features are not immediately perceptible.

The notion of social minority is not necessarily related to the numerical factor. Although prejudices, negative stereotypes or hostility towards certain categories of


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people often result from their numerical inferiority vis-à-vis the majority, this is not always the case, as is most obvious in the discrimination of women. While the gap between men and women in their status in society has been decreasing in all regions of the globe for some time now, gender equality remains elusive.[1] The same holds true for other historically marginalised groups defined by characteristics such as race, class or sexual orientation. The list could be extended to include other social groups suffering significant inequalities as a result of a diminished status substantially linked to their *identities*. Partly because of this connection, traits such as race or sex become constitutive of the personality of members of those groups; that is, they come to represent central elements in their self-definition, generally informing their interests, dispositions and commitments. This is why it is widely accepted that to single out social groups by such characteristics as gender or ethnicity—instead of, for instance, size or eye colour—makes sense for purposes of inquiring about social justice.[2] For there are grounds to believe that, in spite of the formal recognition of values of freedom and non-discrimination by the constitutional orders of democratic states, the possession of those attributes significantly conditions people's freedom and well-being.

Indeed, women, blacks and other social groups experience multiple forms of exclusion in various existential domains, in a pattern that reveals the existence of what Young, among others, describe as *structural* or *systemic inequality*.[3] Structural inequalities involuntarily determine the status of people in society on the basis of their belonging to a group, constraining the options of some more than those of others who enjoy a position of privilege. To a great extent, this is due to the historical configuration of social institutions, practices and policies that reinforce one another, thus reproducing the relevance of an unfair delimitation between categories of people. Hence it is not merely that women, for instance, have been historically mistreated as a group; rather, the main problem is that the *effects* of historical discrimination persist in the present, still pervading institutions and practices, even if the procedures and norms that formally rule them no longer confer explicit relevance to ascriptive identities and statuses.[3] For instance, notwithstanding the assumption of difference-blindness embedded in the formal structure of anti-discrimination principles, cultural hegemony and social arrangements strongly influence who participates in the public space and in law-making processes. As Fiss notes, history counts mainly as a normative reason in theories of compensatory or corrective justice, whereas for the structuralist approach "history is solely factual."[4] That is, particular histories of discrimination are seen, not only as reasons for compensation and remedy, but mainly as providing the "causal dynamic that produced the social structure that needs to be remedied."[5]

Thus, a set of reproduced social dynamics leads to the perseverance of subordinating structures and disadvantaging outcomes for members of certain social groups, even in the absence of discriminatory motivations. Not only do most of them end up marginalised and deprived, but these patterns of discrimination seriously damage their self-esteem and the capacity for self-realisation. In part, this is so because, as Taylor writes, our identity is partly shaped by recognition of others; thus "a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back a confining or demeaning or contemptible picture of themselves."[6]

Following Young, we can distinguish different types of oppression that social minorities face through the analysis of five problems that systematically affect them:

exploitation, marginalisation, poverty, cultural imperialism and violence.[7] In line with other feminist critics, she defends the relevance of using the term "oppression," as it accounts more adequately for the structures that boost social tyranny of some groups over others. Such a connotation of the term "oppression" is important since it refers to the injustices and disadvantages that people suffer, not because of the explicit tyranny of the political power "but because of the everyday practices of a well-intentioned liberal society."[8] As outlined above, this is distinct from transitory, fortuitous disadvantages that may be the product of pure bad luck or simply attributable to individual poor choices. As Young indicates, structural inequality primarily involves "a set of reproduced social processes that reinforce one another to enable or constrain individual actions in many ways."[9] It thus generates constraints in the freedom and well-being of certain categories of people that occupy certain social positions.[10] Indeed, the notion of social structure refers to a complex layering of elements (including legal institutions, occupational and property systems, the organisation of family and sexuality and the division of labour) in which individuals find themselves in a given *position*. This position, as Young argues, strongly influences their self-perceptions and the way they operate in the social world. This occurs, not because structures exist as fixed entities immune to the action of individual agents, but because these agents normally act from their relationally constituted positions according to rules and premises that are incorporated in pre-existing structures.[11] In so acting, they recurrently reproduce social systems, including patterns of oppression and disadvantage.

Hence, group inequalities tend to be institutionally embedded, so that individuals acting within this framework reinforce and perpetuate existing patterns of disadvantage, often unintentionally. Moreover, members of marginalised or subordinated groups often play a central part in reproducing the patterns that contribute to their own systematic disadvantage. They normally do so by unreflectively internalising the negative connotations that incessantly degrade and stigmatise their identities, which is precisely what increases their vulnerability to oppression. This is surely one of the reasons why the strikingly high figures of gendered violence contrast sharply with a very low rate of reporting of the crimes.[12] This pattern shows that preferences of victims of discrimination have often been ill-formed as a way of adaptation to unfair social circumstances, which tend to persist unless correctives are introduced.[13]

Some scholars refer to social minorities that are marginalised and suffer discrimination as minorities *by force*. At first glance, the term seems suitable, since it accounts for the fact that these groups are regularly categorised as "minorities" against the will of their members.[14] However, the expression is unfortunate in so far as it might suggest that members of these groups are somehow forced to carry their—visible or invisible—traits, since they lack the option of transforming them. This might perhaps be generally true of traits such as race, gender or disability, or even, arguably, of religion or sexual orientation in some cases. Yet, the distinction is quite unsuitable to discuss issues of social equality, especially if we accept that the reasons against discrimination are not principally based on the fact that most people lack the option to change certain—innate or not—personal features and, hence, it would be unfair to penalise them for having them. Rather, the point is that there is nothing harmful or diminishing in those traits, and that, under conditions of social equality, they would indeed be seen as irrelevant. In this sense, groups like women or blacks are

social groups because they share a sense of identity which is not primarily based on skin colour or gender but rather on shared experiences of marginalisation, disadvantage and prejudice.[15] Thus, as Iris Young and others have argued at length, being a member of a marginalised group usually yields a perception of institutions, practices and legal rules that is not promptly available to individuals that lack this experience. This enhances the mutual identification of people as members of the same differentiated group with similar interests, although it does not mean that they cannot transcend their own identities or reject this attributed identification.[16]

An increasingly common way of responding to concerns arising from the phenomenon of structural inequality is to suggest that some form of differentiated citizenship should be recognised.[17] The difference approach starts from a compelling critique of the traditional view of citizenship as entailing difference-blind institutions and homogeneity in the distribution of rights. The development of the modern states, it is argued, did not ignore identity trends. In spite of the proclaimed liberal aspirations to neutrality, impartiality and universalist inclusion, diversity was deliberatively stifled by the dominant model of the "normal" citizen, which was typically based on the attributes of white, heterosexual, able-bodied and patriotic males.[18] Hence, historically, citizenship has not been neutrally defined as a way of transcending all sorts of particularisms, as the liberal democratic rhetoric often contends. In depicting a model of citizenship shaped by primordial identities—sex, colour—which are very difficult or indeed impossible to appropriate by everyone, most democratic states generated systematic exclusions. Thus, women, black and gay identities were silenced, marginalised from the public sphere, even criminalised under the pretext of some natural constitutive inferiority that should be rectified or else repressed.

In short, the entrenchment of restrictive conceptions of citizenship played out as a powerful exclusionary device, institutionally privileging some groups over others. In part, what distinguishes the reform movement that is currently discussed under labels such as the "politics of difference" or "identity politics" is the concern with the capacity of liberal–democratic doctrines to respond to claims of accommodation made by various types of identity-groups. So far, this literature has helped to unwrap the principles, policies and dynamics that produced oppressive effects, leading to the formation of structural disadvantages for certain categories of persons. In some way or other, proponents of the difference-approach argue that equality requires something more than restating the commitment to difference-blindness. For aspects such as gender have *already* been taken into account, remaining deeply embedded in roles and positions that have been structured in biased ways. This produces profoundly unequal results for a number of groups, which cannot be reversed through mere anti-discrimination statutes that take for granted (a) that neutrality is the norm and (b) that every citizen is equally able to exercise her legal rights. Group-differentiated forms of citizenship are required, so the argument goes, in order to acknowledge the legitimacy of the struggle of minorities for equality.

To a great extent, the appeal of a group-conscious approach lies in that it provides a better understanding of the relationship between identity conflicts and structural inequalities. One of the key strengths of this model is that it emphasises a focus on

social processes and structures rather than on particular actions and norms, on history and tradition rather than on particular events, to comprehend the status and demands of minorities. And, indeed, one of the main explanations for the deprived state in which most marginalised groups find themselves can be found in the social processes and cultural practices that define their status and shape their choices. The difference approach focusses on providing a group-conscious framework to overcome the resulting discriminations, taking into account the relative position and social status of different identity-groups.

However, social minorities hardly ever pose their demands in terms of cultural (group) rights or appeal to "multiculturalism" to justify their claims, although some groups, like gays or the deaf, have increasingly shifted their own self-perceptions from mere statistical groups to communities or pseudo-cultural groups that provide an identity and shape the ways of life of their members.[19] Whereas the need to create and maintain separate institutions is a central feature of the demands of cultural minorities, what this type of social disadvantaged identity-groups primarily ask for is the effective application of already existing constitutional rights—like equality of opportunity and non-discrimination on grounds such as race or sex. The main target here is the enduring social racism, sexism, homophobia or xenophobia, and the long-term purpose is that socio-political institutions remain really neutral towards this kind of diversity. Above all, then, social minorities seek to ensure that their interests and perspectives are taken into consideration *within* the main political institutions of the larger society.[20] Women, blacks, gays and even members of uprooted cultural groups typically demand a higher level of intra-group equality; they usually want to participate and be recognised as full members of society, instead of being included just as second-class citizens. Accordingly, the special protections they seek are against the impact of long-standing social practices and prejudices that seriously disadvantage them.

The rhetoric of group rights does not, therefore, describe these claims accurately. Nevertheless, this does not mean that social minorities are satisfied with the formal recognition of basic individual rights in the constitution, since this might not lead to significant transformations in firmly rooted prejudices and social behaviours that provoke their vulnerability to discrimination. Real equality is not equivalent to formal identity of treatment, but may instead require the institutionalisation of differences.[21] Social minorities, therefore, demand the adoption of special measures or policies to overcome persisting forms of *de facto* inequality. This may involve specific educational policies, public campaigns against discrimination and so forth. But it may also require the adoption of more drastic measures such as affirmative action or special political representation.[22]

A closer examination of these and other means for overcoming structural inequalities exceeds the scope of this chapter. Nevertheless, these latter two measures deserve some comments as they could call into question the idea that I am trying to articulate—namely, that the language of group rights is unnecessary to account for the aspirations of social minorities.

Let us briefly consider the implications of affirmative action programmes that aim at increasing the presence of members of marginalised groups in the main social

and political institutions. Usually, these are programmes that either fix a given quota or provide members of these groups with some sort of preference (for instance, they establish that, wherever applicants are equally qualified to access certain jobs in sectors from which certain social groups have been traditionally excluded, members of these groups should be preferred). It would thus seem as if the structure of such measure largely corresponds to that of group rights, as rights ascribed to an individual by virtue of her group-belonging. Moreover, the full intelligibility of such a rule depends, to a great extent, on assuming that certain minorities face a situation of systemic vulnerability; otherwise, the decision to explicitly benefit members of particular groups in detriment of the wider majority would be hard to justify.[23]

However, to characterise affirmative action as a group right would be inappropriate. On the one hand, although this measure requires a group approach to inequality, the kind of interests at issue are reducible to those that are already protected by individual rights. The aim is mainly to achieve real equality for all persons, and an equal enjoyment of basic civil and political rights, independently of group membership. Precisely for this reason, measures of affirmative action and other institutional solutions for overcoming structural inequalities are intended, on the other hand, as provisional remedies, for so long as the inequalities persists. In other words, they tend to be justified as *transitory* means to achieve justice. Here difference consciousness (colour, gender and so forth) plays out as a strategy intended not merely to compensate past wrongs or to institutionalise the moral significance of diversity, but, more crucially, to improve the position of a group as a whole. In the end, the goal is to render irrelevant these differences of status, which have been unfairly created on the basis of false beliefs. The ideal is a truly non-sexist, non-racist, non-homophobic society: a "community of equals," borrowing Fiss' expression.[24] By saying that affirmative action makes "a small but determined contribution to *eliminating* the caste structure"[25]—that is, at removing unfair differences that constitute the sources of vulnerability, and not merely at compensating for such a result—Fiss assumes that this is the crucial meaning of equality. Likewise, the UN Convention for the Elimination of All Forms of Racial Discrimination (1965) and that for the Elimination of All forms of Discrimination against Women (1979) allow for affirmative action measures established only as provisional. Thus, Article 4 of the latter convention establishes that

> Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separated standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.[26]

Admittedly, affirmative action tends to be controversial because some people think that equality is a matter of equality of treatment and, therefore, giving preference to women or racial minorities is as reprehensible as favouring white heterosexual men. This measure, therefore, would only institutionalise a new form of inequality. Others dispute the extent to which affirmative action programmes have indeed contributed to the eradication of social discrimination and structural inequalities.[27]

Notwithstanding these important discrepancies, the point that matters for our present purposes is that both proponents and detractors of affirmative action tend to assume that equal citizenship and the anti-discrimination principle require, *prima facie*, a homogeneous distribution of rights.

As regards the idea of special political representation for under-represented groups, this measure is even more controversial, although, in my view, a similar reasoning applies. It is a widespread opinion that conceiving the parliament as a platform for the representation of different social groups would require the modification of some central elements involved in representative democracy. Some argue that greater political inclusion call for special measures to encourage or even grant the participation of under-represented, structurally disadvantaged social groups.[28] Yet, as Anne Phillips contends, if legislative institutions were to become a microcosm where all social groups or communities needed to be proportionally represented, there would be no need for celebrating elections. Representatives could be elected within each group or even by a lottery system.[29] Also, as she observes, taken to the extreme, this theory implies that only women can represent women, or only blacks can represent blacks and so forth, thus assuming some form of unified essentialist identities that can also generate exclusions.[30]

Yet, leaving aside now the complexities that surround the debate about democracy and difference,[31] it is important to realise that most models of group-specific representation are not usually proposed as a general theory of political representation.[32] As with affirmative action, special political representation of social minorities can be seen as a measure that is temporarily necessary in order to overcome the deficits of current systems of representation in contexts of structural inequality which lead to the systematic under-representation of certain social groups. Structural inequalities are troublesome for democracy, it is argued, because, against a social background of group discrimination and historically subordinated statuses, the standard "aggregative" or "vote-centric" conception that draws upon ideas of formal equality of opportunity and aggregation of preferences cannot fulfil the underpinning normative commitments that confer legitimacy on public decisions.[33] In many cases, moreover, the establishment of political institutions and decision-making processes that are blind to those social conditions is likely to reinforce existing patterns of domination.[34] Even if overt discrimination in the form of a denial of political rights is proscribed, there are other equally compelling constraints to empowerment and autonomy that arise from the invidious hierarchy of status typically generated by structural inequality.[35] These constraints make it very difficult for members of subordinated groups to exert influence in the public sphere and exercise their political agency.[36] Consequently, both equality of opportunity and democracy become a chimera if the state does not attempt to breakdown—and not merely compensate for—those hierarchies.[37]

In any event, those who subscribe to this view argue that we must come to understand that the basic normative values underpinning the idea of democracy demand certain forms of political affirmative action in order to level group inequalities, which substantially undermine representation and trust. Special representation is intended as a direct and effective measure to strengthen the real opportunities of

influence of marginalised social groups in the mainstream political process.[38] The democratic character of societies shaped by structural inequalities, it is argued, very much depends upon what Phillips calls a "politics of presence."[39]

Certainly, it could be argued that the need to protect social minorities can be achieved through less controversial mechanisms.[40] But, thus far, it is important to emphasise the central idea that special representation and similar mechanisms are eventually justified as temporary constraints on the general principle of rights-homogeneity in order to overcome structural injustices, rather than as a permanent feature of liberal democracies. So, rather than posing a challenge to the dominant view of equal citizenship, proponents of those measures normally regard them as necessary to attain this ideal.

## 3. CULTURAL MINORITIES

The expression "cultural minorities" usually refers to groups whose members see themselves as carriers of a cultural identity that is distinct from that of the majority in a given state; an identity that they value and hence wish to preserve. Accordingly, the classification of a collective as a cultural minority depends, on the one hand, on our understandings of "culture" and "cultural identity" and, on the other, on the self-perception and values of members of the group.

The notion of culture has attained ubiquity and it is certainly controversial. The problem is not merely one of lack of definition; rather, "culture" is a word the use—and abuse—of which in different contexts makes it multifaceted. Historians and sociologists often use the term to describe customs and ways of life or thinking of entire civilisations or of a particular epoch. They also refer to the prestige of certain cultures—Rome, Greece—whose achievements and progress in specific fields progressively spread around the world. But the term is also used colloquially nowadays as a synonym of mere tastes and lifestyles characteristic of particular regions or social groups. Thus, we speak of the "wine culture," the "hippie culture" or the "yuppie culture." Raymond Williams regards the concept of culture as very difficult to define due to its intricate historical evolution in different European languages and also because the term is used in many intellectual disciplines.[41] Although I won't try to rehearse this complex genealogy here, it is customary to refer to the contrast that emerged during the Romantic period between the German notion of *Kultur*, which Herder emphasised in the plural, with each form containing an irreducible uniqueness, with that of *Civilisation*, that embodied the French universal ideals or values that do not reflect individuality or authenticity. As Joppke and Lukes explain, for the Post-Kantian nineteenth-century German intellectuals, "the particularity of national *Kultur* was a weapon against the rootless cosmopolitanism of the French Enlightenment."[42]

For the purposes of the present analysis, the notion of culture will be explored in the context of its role in the political theory debates on multiculturalism and group rights. Culture emerges here as a notion that provokes ardent political and legal controversy but, as Seyla Benhabib writes, the term has become "a ubiquitous synonym for *identity*"[43] that now grounds the demands for recognition and reallocation of public resources. The sharp contrast that is often drawn between culture and civilisation has, in some way, become obsolete, if only because the prevailing discourse is widely

shaped by the comprehensive notion of *cultures*, in the plural. This is typical of modern anthropology that attempts to depict "the particular life form of a collectivity against the life forms of other collectivities,"[44] thus democratising the concept and discarding *a priori* ideas of inferiority or superiority of particular forms of living as a critical reaction against West ethnocentric understandings of civilisation.[45]

Indeed, the idea of culture that theorists of multiculturalism like Kymlicka, Margalit, Raz or Taylor have in mind is, on the one hand, more restricted than the notion of "civilisation" (which could encompass different cultures without reflecting its individuality or particularities) and, on the other, wider than terms such as "fashion" or "lifestyle" (that corrupt the comprehensive meaning of "culture" through reducing it to superficial forms of collective experience that lack durability). In order to further specify this notion, Kymlicka stresses that his interest lies in what he calls "societal cultures."[46] These are the cultures of territorially concentrated groups based on common languages and on certain social institutions, rather than on particular religious beliefs, customs or lifestyles. They are cultures, which provide its members "with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both the public and private spheres."[47] Kymlicka insists in that by adopting the term "societal culture," he wants to designate groups that include "not just shared memories or values, but also common institutions and practices."[48]

Likewise, Margalit and Raz refer as "encompassing cultures" to the cultures of groups that are defined on the basis of features similar to those highlighted by Kymlicka. Such groups, they say, have "a common character and a common culture that encompass many, varied and important aspects of life, a culture that defines or marks a variety of forms and styles of life, types of activity, occupations, pursuits and relationships."[49] These are according to them, pervasive cultures that have a deep and far-reaching influence on people's identities. Hence, membership in such groups has a "high social profile," which means that it is one of the primary factors through which we identify others, and "one of the primary clues for people generally in interpreting the conduct of others,"[50] too.

As can be seen, these definitions of the term "culture" focus mainly on the sort of public goods that shape primary individual identifications and patterns of behaviour. I shall come back to the merits of such an approach in subsequent chapters. The point for now is that these definitions aim at identifying the relevant traits of the kind of groups that raise demands of rights on cultural grounds. Thus, the elements of territorial concentration, common language or institutionalisation included in Kymlicka's notion of societal culture play a role as prerequisites for the generation of cultural goods that are particularly valuable. Both concepts are "thin," so to say, in that they primarily convey institutional and linguistic elements, rather than shared beliefs and values. This helps avoid essentialism, since it allows to account for the unavoidably pluralistic and constantly evolving character of the type of dynamic cultures that usually flourish in democratic settings. As follows from Margalit and Raz's observations above, what ultimately matters is people's self-perception and identification as members of a cultural group, which they help build and transform collectively. Such membership provides them with meaningful ways for interpreting and acting in the social world.[51]

Now, understood in this way, the notion of cultural minority allows for the inclusion of a large number of groups, eventually subsuming notions such as "nation," "national minority" or "people."[52] Further delimitation of the characteristics and contours of a culture is difficult because, in a sense, all cultures are constructed through change. Yet we do not need to claim or show that a culture is defined by an existing essence immune to transformation in order to assert its reality and, especially, the reality of cultural identities and identity-groups, which is central to the on-going political struggles for recognition and redistribution in diverse democracies.[53] Admittedly, in these societies, courts, the media and policy-makers assume, more often than not, some sort of holistic view of cultures that risks reifying them as established structures with coherent fixed meanings. In general, the desire for coherence and continuity in the collective—both external and internal—narratives of particular cultures often gestures towards what Benhabib calls a "reductionist sociology of culture,"[54] which is based on flawed epistemological premises that risk "overemphasising their boundedness and distinctness,"[55] their purity rather than hybridity, *melànge* or *mestizaje*.

But, of course, anti-essentialism and deconstructivism can lead us to the other extreme; that is, to deny the existence of all social phenomenology, thereby contradicting our common practices and ways of depicting and understanding the world. For this reason, I agree with the perspective that Tariq Modood adopts when he writes:

> In individuating cultures and peoples, our most basic and helpful guide is not the idea of an essence, but the possibility of making historical connections, of being able to see change and resemblance. If we trace a historical connection between the language of Shakespeare, Charles Dickens, and Winston Churchill, we call that language by a single name. We say that it is the same language, though we may be aware of the differences between the three languages and of how the changes are due to various influences."[56]

By conceiving group diversity in relational rather than in substantial or primordial terms (based on common essences or historical character) we can in fact retain descriptions of differentiation without reifying identities.[57] I think Modood is right in pointing out that identities (based on culture, gender, race and so forth) are not mere fictions that we should be ready to discard altogether. People identify themselves as members of identity-groups with specific features and those categories are thus useful to analyse the dynamics of subordination as well as the reasons for the emergence of particular social conflicts and demands. Sometimes, as in the case of indigenous peoples, the identities asserted are no more than a product of a long tradition of resistance to cultural imperialism and, also, of a shared experience of colonialism that led groups with diverse traditions and languages to vindicate group rights. The charge of essentialism against some modes of describing identity-groups is generally not meant to deny the meaning of these struggles for recognition, or the relevance of cultural narratives in explaining human action.[58] Rather, it is mainly intended to avoid accounts that misrepresent, oversimplifying, those descriptions and these narratives. Especially when we take the closer look of the insider, as when we zoom in on a photograph, we get an increasingly blurred and contested picture that should not be obliterated. But, again, the fact that group-identities are not perfectly defined, and

have been created and recreated through multiple influences in permanent evolution does not mean that identity in general or identity claims are unimportant concepts. As Waldron says:

> [W]hen a person talks of his identity as a Maori, or a Sunni Muslim, or a Jew, or a Scot, he is relating himself not just to a set of dances, costumes, recipes or incantations, but to a distinct set of practices in which his people (. . .) have historically addressed and settled upon solutions to the serious problems of human life in society.[59]

In any event, it is worth noting that the reductionist account has been rendered implausible and therefore rejected by most contemporary theorists of multiculturalism and minority rights.[60] In general, recent literature focusses less on conceptualising cultural identity in the abstract and more on distinguishing between different types of groups, classifying their demands and examining the normative questions involved. That is, it focusses on exploring why cultural identity matters, if it matters at all, whatever the origin of the subjective self-identification may be. It is therefore assumed that to explore the impact of cultural identities on the lives of human beings makes sense for the purposes of inquiring about justice and rights in multicultural societies. The main interest thus lies in analysing the role that the concept of cultural identity plays in this context.

In short, the concept of cultural identity is taken as a key concept to examine contemporary struggles for recognition and the claims of rights by minorities. Of course, the fight against the structural inequalities that affect social minorities is central, too. Nevertheless, the claims posed by cultural minorities seem to clash more deeply with some liberal principles.[61] For one thing, as indicated before, these groups are not simply fighting for effective regulations against discrimination that can allow them to fully enjoy their citizenship. They feel entitled to explicit forms of recognition, a plus that is often linked to some form of differentiated citizenship that may entail the recognition of group rights. While this is obvious in the case of national minorities and indigenous peoples, it is also progressively true of immigrant communities.

Indeed, in general, all these groups aspire not merely to neutralise their diversity, nor to achieve equal treatment regardless of their difference with the majority, but to maintain and develop what they regard as a distinctive cultural identity, often through separate institutions or jurisdictions. Hence the use of the expression "minorities by will,"[62] which aims at reflecting this trait. Although the degree of willingness varies (and so does the substance of the particular claims), the language of group rights acquires its full meaning in this context. For cultural minorities do not seek the recognition of a special temporary status, but of a permanent one based upon the assignment of specific rights to their members precisely by virtue of this membership. The recognition of group rights thus leads to an asymmetrical distribution of rights, which is precisely what poses difficulties for liberal theories.

The specific content of the claims advanced under the term "group rights" varies enormously, depending on the type of group, the particular history of relations with the state and the mainstream society, on its present circumstances and future prospects. The normative assessment of particular demands should take into account these factors or else the analysis will lack rigour, as when we speak of the justification of a politics of "multiculturalism" as if all groups were similar, posed the same

demands or faced the same difficulties. Yet, taking into account this reservation, Jacob Levy offers a useful taxonomy of the main demands that are currently discussed under the label of group rights[63] that might be useful to briefly reproduce as a guide to the following discussion:

First, exemptions from norms prohibiting or restricting certain actions that form part of the cultural practices of minority groups. These demands aim at allowing practices that may contrast with those of the majority or even infringe upon legal rules. Think, for instance, of the demands of some orthodox Jews or Muslim women that want to dress their traditional attires while working in public institutions, infringing the dress codes that are often required in order to work, say, in the police or the military.[64] Other examples of exemption claims, not necessarily religiously based, are the demands of an indigenous people for the right to fishing in areas where this activity has been banned, or to smoke forbidden substances while conducting their traditional ceremonies.

Levy mentions "assistance" as a second category of claims of cultural rights. Contrarily to the purpose of exemption rights ("which seek to allow minorities to engage in practices different from those of the majority culture"[65]), assistance rights seek "help in overcoming the obstacles to engage in common practices."[66] Language rights, for instance, can fit in this category when they suppose a cost to the members of the dominant group. Also, public funding or subsidies for ethnic festivals and artistic development and even preferential policies for members of cultural minorities to be employed in public institutions.

Within the category of "self-government," Levy includes the demands of federation, autonomy or separation raised by national minorities and indigenous peoples as the most visible types of demands of group rights.[67] Note that this category covers a wide range of claims, from partial autonomy to decide on cultural affairs, which may include the control of public education, of the historical patrimony and so forth, to full secession and the creation of a new state. To a great extent, the distinctiveness of these claims lies in that they raise particularly complex issues of borders and territory.[68]

The label "external rules" refers to the claims of rights that are intended to restrict the freedom of non-members and are seen as necessary for the sake of cultural preservation. Levy is thinking here of restrictions on immigration, or on the freedom of non-members to educate their children in a given language or to acquire property.[69]

The fifth category—"recognition/enforcement"[70]—refers to claims of cultural communities that seek the recognition of their traditional legal codes as valid law, even if they conflict with state law. An example could be the recognition of the peculiarities of the family law that forms part of the traditions of a cultural minority as binding or optional for the members of this group. For instance, legal standing might be accorded to a particular ceremony as a valid method of performing a marriage or to other customary rules of a cultural minority. As Levy indicates, most objections to this type of claims are based on the idea that the existence of various legal codes applicable to different groups of people within the same state constitutes the very essence of discrimination.[71] Arguments in defence of these demands usually invoke, also, rights to self-government, but they can also appear merely as demands

for recognition of certain traditions or values against those that configure the mainstream society. Think, for example, of immigrant groups that request the revision of primary education programmes so as to incorporate their historical and cultural specificities. This type of demands is discussed in the United States, Australia or Canada as "multiculturalism policies."[72]

Levy also refers to the "internal rules" of cultural groups as a distinct category; these rules are not necessarily elevated to the category of "law" but refer mainly to "expectations about how a member should behave" (for example, in their family life, ways of dressing, etc.) if she wants to avoid a sanction. Different problems emerge from these internal rules. In particular, Levy discusses whether it is legitimate for a group to impose such restrictions on its members even if we think that a liberal state cannot legitimately oblige to comply with these rules.[73]

In the category of "representation," Levy includes the demands for a special and permanent presence of cultural minorities in central institutional bodies, with a view to guaranteeing that their interests are taken into account in decision-making processes. For example, three out of the nine members of the Canadian Supreme Court are reserved to francophone judges from Quebec. Likewise, the Maoris enjoy some special representation in New Zealand's parliament.[74]

Lastly, "symbolic demands" are often relevant in debates over group rights.[75] This category comprises all remaining claims or disputes over the need of reforming symbols that only reflect the history and institutions of the cultural majority (flags, holidays, national anthems and so forth). Although symbolic demands might only indirectly impinge on power asymmetries and the ability of everyone to participate and develop their own culture, members of minority groups often attach to them an important value.

Obviously, each one of these categories involves a particular set of normative issues that are important to identify in analysing particular cases. Yet the purpose of the following chapters is to articulate the philosophical grounds for an account of group rights that could be the basis to examine the morality of the demands and practices described. As will become apparent, the discussion essentially revolves around the implications of these demands for the ideals of freedom, equality and state neutrality; here, some widespread assumptions about the general scope of citizenship rights tend to preclude a justification of special legal regimes as a way of recognising group rights to cultural minorities. The categories and examples suggested so far are mainly intended to illustrate the main demands that are discussed within this debate, since the focus of the subsequent chapters is on assessing the legitimacy of the assumptions that most cultural minorities share in common when formulating their demands for group rights. Only by starting from this abstract level will we be able to realise the general challenge posed by such demands and bring to light the principles that should guide the assessment of each particular claim.

## 4. AGAINST GROUP RIGHTS? SOME PROVISIONAL CONCLUSIONS

Thus far, I have focussed mainly on the inadequacy of the dominant approach to the problem of minority rights, and on the need for a theoretical framework based on different presuppositions in both conceptual and substantive terms. It has been asserted

that this change in perspective constitutes an essential preliminary step towards a better understanding of what recognising these rights would imply. If it has been regarded as appropriate to examine the prevailing approach—instead of ruling it out *ab initio*—this is because this approach is largely responsible for the popularity of the thesis that group rights and liberalism are incompatible. Proving the lack of weight of the premises of this thesis is therefore crucial for overcoming a central obstacle to the justification of those rights. Let me recapitulate the main stages of the argument elaborated so far:

Both supporters and opponents of minority rights usually assume, often implicitly, that the best way of guaranteeing a special protection for these groups is through a different category of rights. This idea results from the common perception that the kind of moral and political interests that underlie the demands at stake cannot—or should not, according some versions—be subsumed under the familiar catalogues of individual rights constitutionally recognised in most Western democracies. However, this approach generally rests upon two problematic assumptions. The first concerns the idea that existing disagreement on the notion of "minority" presents a significant obstacle to the justification of group rights. From this standpoint, resolving the semantic issue is seen as crucial to adequately account for the normative issues involved in the debate. Moreover, as we saw, this approach also employs a reasoning analogous to that usually guiding the justification of individual rights. This explains why the absence of a widely accepted definition of "minority" is regarded as a major obstacle to justifying group rights and it is usually perceived as an impediment for the progress of the entire debate.

But, for the reasons laid out above, this conclusion is incorrect: basically, because it starts from an argumentative strategy which, as I have tried to show, insists in the separate examination of two issues—semantic and normative—that, in this context, are inevitably connected. It is wrong to attribute the indeterminacy of the concept of minority to mere terminological disagreements. Rather, the discrepancies over the meaning of this notion are symptomatic of profound disagreements about the kind of groups that should be the focus of the normative debate on collective rights. I have thus argued that the difficulties regarding the definition of "minority" are better understood if we conceive this concept as "contested" or "interpretative," so as to stress the evaluative dimension of the semantic problem that we face. In particular, by proposing a certain legal conception of minority we inevitably endorse a position on central issues in the normative debate. In other words, the different meanings of the word "minority" reflect different theories on the kind of groups that deserve the special protection granted by rights. It is therefore pointless to separate the issue of defining "minority" from the problem of justifying the rights of minorities. In this sense, the existence of semantic disagreements is an invalid reason for rejecting the idea of group rights.

The second problematic assumption concerns the commonly endorsed notion of group rights. As indicated above, both proponents and critics often define them as rights belonging to a collective entity, and this interpretation has been greatly influential in the literature. The extent of this influence is reflected in the common view that the ideal framework for approaching the problem of group rights is the debate between liberals and communitarians. As a result of this connection, the discussion

leads to a controversy between individualists and collectivists concerning the nature of moral agency, the relative priority of the community or the individual, and the possibility of reducing group interests to individual ones. However, one of the main arguments defended so far is that, rather than presenting a suitable framework for assessing the idea of group rights, the liberal versus communitarian debate is a source of confusion. The focus on it has contributed to a simplistic interpretation of the challenge that the claims of cultural minorities represent for liberalism. To begin with, it is doubtful whether the philosophical debate between liberals and communitarians indeed warrants the conclusions that are often drawn from it with respect to the legitimacy of group rights. Moreover, this approach is misleading, to the extent that prevents us from developing a structured normative account that would identify the substantive reasons that underlie the claims involved and analyse their legitimacy according to certain parameters of justice.

This critique of the prevailing approach is reinforced by several other reasons that are worth outlining at this point:

First, in the way it is usually conceived, the category of group rights turns out to be a mixed bag that includes any group claim aimed at preserving some kind of collective interest. As a result, the theoretical analysis tends to focus either on complex philosophical issues about the nature of individuals and groups or on a set of formal issues with the purpose of testing the suitability of different criteria for categorising rights. Yet, contrary to what this approach might suggest, the opposition to group rights arises, as we have seen, mainly because of moral or political considerations, rather than metaphysical or formal ones. Some think that the interests at stake are morally irrelevant and thus regard it as a mistake to discuss them in terms of rights. Others, however, while accepting the relevance of those interests, oppose group rights either because they are concerned with their potential illegitimate use—as an instrument for a group to reduce or even suppress the individual liberties of its members with impunity—or because they fear that their recognition may open the gates to a proliferation of demands by all sorts of groups.

Despite the fact that this common position against group rights is based on a number of different arguments, this variety is hardly appreciable in the debate. Moreover, the relation between group rights and individual rights is repeatedly pictured as a zero-sum game: the more the former are recognised, the more the latter are weakened. But these assumptions conceal the fact that liberal opposition to group rights can be reconceived as based on a number of substantially different reasons. While it is commonly assumed that a favourable stance towards these rights implies a departure from the individualist and universal structure of the rights discourse in the liberal tradition, I will argue in the following chapters that it is essential to fully appreciate the different lines of reasoning behind the opposition to group rights, since their implications for this debate might be entirely divergent.

Secondly, under the dominant approach, the demands of illiberal minorities tend to be conceived as paradigmatic of claims for group rights. Thus, it is common to cite the demands of particular religious or ethnic groups which aim at acquiring a level of autonomy on the edges of the state, so that their ways of life remain unaltered, immune to the effects of modernity, so to speak. An even more recurrent theme is the invocation, as typical for group rights' claims, of what Levy calls "exemptions,"

mostly in order to legitimise actions of non-compliance with civil or criminal legislation regarded as incompatible with the cultural identity of a group. Think, for instance, of polygamy or female genital mutilation that some minorities desire to practice while living in Western liberal societies.[76] But this is a biased selection. Of course, taking as a model the stereotype of a traditional illiberal community fits better with the communitarian ideals that, for the reasons set out above, are often employed to justify group rights. In addition, such examples surely allow to emphasise (and caution) that group rights can serve as a cover for a number of dubious practices only because they are part of what some groups regard as their *essential* traditions. In other words, the goal of protecting cultural diversity can lead, in practice, to tacitly give some groups *carte blanche* to mistreat certain categories of members. This illustrates the potential risks of adopting a model of multicultural citizenship that recognises group rights to minorities. It is what Ayelet Shachar calls the "paradox of multicultural vulnerability."[77]

But the former is not yet a conclusive argument to reject the legitimacy of group rights altogether. As seen, the debate covers a wider range of demands raised by groups that are often not illiberal in nature. Moreover, pointing to the claims of illiberal minorities would clearly be insufficient to account for the challenge that multiculturalism represents in most democratic states. This point is worth emphasising. Majorities and minorities clash over issues of territorial and political borders, over the traits of political systems of representation and linguistic regimes, over education curricula and public subsidies for cultural activities and religious schools, the choice of state symbols and holidays, etc. The dominant approach fails to account for, and offer a coherent reply to, these questions that are also raised in terms of group rights.

In sum, the debate is trapped between two antagonistic angles whose explanatory force is limited. By ignoring the origin and the nature of many of the actual disagreements, this approach can offer no more than a slanted vision of the complexity of the dilemmas that must be faced. In particular, the usual line of conceptualisation and justification of group rights does not provide any guideline for establishing distinctions between legitimate and illegitimate demands according to some parameter of justice. This leads to a distortion of the debate, which often focusses on secondary problems, rather than offering answers to the truly relevant ones. This outcome, in itself, provides enough reasons to start from a new, more satisfactory, starting point, capable of avoiding the objections mentioned. The first proposal along this line has been to explore an alternative conception of group rights. The notion suggested represents an attempt to coherently articulate the structural and substantive elements that are common to the heterogeneous claims of cultural minorities without renouncing the individualist and universal traits central to contemporary human rights discourse. It therefore helps to avoid the main liberal objections against group rights, especially the violation of the humanistic principle. In this sense, it would be premature to affirm that the tendency to entrench minority group rights in international law and some recent constitutions is symptomatic of a crisis of human rights as the common legal heritage of all democratic states.[78]

Once these central conceptual problems have been clarified, the following chapters assume that it makes sense to think about the morality of group rights *within* the liberal tradition—in other words, without succumbing to the most extreme version of

communitarianism or adopting a critical stance towards the value-individualism that characterises liberal theories of rights. However, by choosing this approach over the conventional one, I am not trying to prejudge the possible answers to the question of whether group rights are legitimate and, if yes, whether they are compatible with individual rights. Indeed, there may be nothing morally valuable in the interest that most persons show in the preservation of the cultures to which they belong. Yet this conclusion must be reached through theoretical assessment. So far, the main idea I have sought to advance is that the discussion about group rights needs to review the dominant approach. Hence, the main question—the justification of group rights—remains open, but we need to face it through a different lens.

With this last point, I seek to emphasise again that the debate about group rights is not a pseudo-debate, namely, a debate the relevance of which disappears once the disagreements concerning the use of the relevant terms has been clarified. Contrary to what some conceptual discussions might initially suggest, the disagreements are substantive in nature. As will become apparent throughout the following chapters, it is not possible to explore the legitimacy of the demands of cultural minorities without revisiting the traditional interpretation of some of the main pillars of liberal democracies. The recent evolution of the academic debate provides the best evidence for this. Thus, a new current of thought—especially in political theory, but also in philosophy and legal studies—is emerging, dedicated to discussing issues such as the status of ethnocultural groups, the legitimacy of nationalism, and, generally speaking, the moral relevance of cultural belonging. The recent works of scholars such as David Miller, Will Kymlicka, Joseph Raz, Charles Taylor, Yael Tamir, James Tully or Michael Walzer among others, typically criticise liberalism because of the scarce attention paid to these issues. The repercussion of this wave of thinking is important. While it struggles to offer some plausible tools for dealing with many of the claims by cultural minorities within the classical human rights scheme, it vindicates the liberal imprint of group rights by striving for a deeper level of pluralism and equality in multicultural states.

Obviously, the fact that this trend seems to be on the rise does not mean that the legitimacy of group rights is unproblematic. Traditional human rights doctrines lack specific arguments to justify these rights, as mentioned at the beginning of this book. This gap is not fortuitous: liberalism has been the main driving force of human rights, and liberal theorists tend to think that individual membership in particular identity-groups is irrelevant. Hence, the recognition of group rights poses genuine dilemmas that go far beyond the mere resistance to a particular terminology. According to a widespread view, any measure aimed at preserving particular identities or cultural goods, even if grounded in individual interests, would involve renouncing some of the values that are at the core of the liberal tradition, such as equality and state neutrality. For others, even if people's interests in cultural goods and cultural belonging might be perfectly legitimate, these are secondary interests, the satisfaction of which lacks the priority or relevance that is commonly associated with the notion of human rights.[79]

These considerations raise additional questions. In particular, is there any reason why cultural goods, or the development of one's cultural identity, are so important as to justify the recognition of collective human rights? In other words, taking up Raz's

idea of rights, why should belonging to a cultural group be regarded as a fundamental interest for people's well-being? Likewise, in the event that group rights of cultural minorities were recognised, how can we prevent that they are used by these groups to treat some of their members unfairly? In the end, every culture contains its own internal dissidence. Finally, should we really assume, as we have done so far, that the interests at stake are not already protected through the familiar constitutional catalogues of civil and political rights?

These are some of the crucial questions that a theory of group rights must address. Their articulation in the following chapters will allow identifying the main strategies and arguments behind the opposition to group rights. I will draw upon this basis in order to elucidate possible answers to the main problems identified so far. In my opinion, the objections outlined above do not involve insurmountable obstacles. I think that group rights are justified on the basis of the very principles that underpin liberal philosophy, even though defending this thesis certainly requires questioning certain interpretations of these principles. Ultimately, the analysis seeks to demonstrate that certain conceptions of liberalism situate cultural minorities in an unfair position and that group rights can help to solve this injustice. As I will also try to show, a theory that integrates both individual and group rights can eventually provide a better account for many of the policies and institutions that, as a matter of fact, already exist in many multinational and multiethnic states. At the same time, it allows to accommodate within the framework of human rights the growing tendency to protect cultural minorities in the international legal order.

## NOTES

1 Today, women represent 60 per cent of the world's 550 million working poor—persons unable to raise themselves and their families above USD 1 per day. Source: International Labour Organisation (ILO)—Press release Women's Day March 2004.

2 For a recent account that relates judgements of inequality with social groups, Young (2001, pp. 1–18).

3 Young (2001, p. 2). See also Fiss (1997, pp. 37–38; 1999).

4 Fiss (1997, p. 38).

5 Fiss (1997, p. 38).

6 Taylor (1992, p. 25). I spell out this idea in detail in Chapter V.

7 Young (1990, pp. 48–63).

8 Young (1990, p. 41).

9 Young (2001, p. 2).

10 Young (2001, p. 15).

11 Young (2001, pp. 12–15). I have analysed this view and, in particular, the problems that structural inequality poses for democracy in Torbisco Casals (2005).

12 Or, as John H. Ely (1980, pp. 164–165) argues, the lack of interest in public life that women and other disadvantaged groups show is often due to deeply rooted prejudices and social forms of discrimination that the victims have internalised and hence accepted as justified.

13 On the notion of "adaptive preferences" as an unconscious process of adjustments of wants to possibilities in order to avoid the frustration in having aspirations that cannot be satisfied, see Elster (1983, p. 25, pp. 109–140). Contemporary psychology confirms this observation. Referring to what she calls "moral harassment," Marie-France Hirigoyen argues that the situation of subordination plunges victims of discrimination or violence into a confusion that leads to chronic anxiety and depression. Such mental conditions result not so much from the aggression as such, but mainly from the fact that the person feels responsible for the prejudice and even guilty of provoking the aggression, which explains, in part, the lack of reaction and attitudes of submission. See Hirigoyen (1998).

[14] Thus, Comanducci (1994, pp. 41–43) distinguishes between "minorities by force" and "minorities by will." Similarly, Pizzorusso (1993, pp. 52–55) refers to *minoranze discriminate* and *minoranze volontarie*.

[15] Young (1990, pp. 44–45).

[16] Young (1990, p. 46). Young mentions as an example Jews that are seen as such and discriminated against on these grounds, even if they have been completely assimilated.

[17] For an account of the so-called "difference-approach," see Añon (2001, pp. 217–270), Baumeister (2000) and Kymlicka (2002, pp. 326–336).

[18] As Habermas (1996, pp. 494–496) maintains, the status of citizen involves, on the one hand, a legal position defined in terms of civil rights, and, on the other, it amounts to the recognition of a previous, pre-political membership in a cultural group, or nation.

[19] For discussion, see Kymlicka (1998b, pp. 91–102).

[20] This is clearly reflected in the debate about gay marriage. For instance, the law passed by the Spanish Parliament in 2005 (*Ley 13/2005 de 1 de julio*) that reforms the Civil Code to extend the right to marry to gay couples is seen as a victory by the main gay and lesbian associations, especially because the conservative party in the opposition pressed to formalise these unions under another name, so they could enjoy the same benefits that the law attributes to married couples but through a separate institution.

[21] On the distinction between formal and substantive equality, see Calsamiglia (1989).

[22] I call these measures "drastic" because they aim at shortening the time that it would probably take for the members of these groups to have full access to sectors from which they have been traditionally excluded.

[23] On the problems that measures of preferential treatment such as affirmative action raise if the equality principle is merely interpreted as non-discrimination, see Fiss (1976, pp. 129–146; 1997).

[24] Fiss (1999).

[25] Fiss (1997, p. 37). Emphasis added.

[26] UN Doc. E/CN.4/NGO/231 (1979).

[27] For an excellent discussion of the problems that surround affirmative action and its compatibility with different theories of justice and equality, see Rosenfeld (1991).

[28] See for discussion, Young (2000, pp. 121–153). On the problems of classical models of representation to ensure full representation of all social groups in the legislature, see also Gargarella (1998, pp. 260–280).

[29] Phillips (1995, p. 46).

[30] This is why this system of group representation is known as mirror representation. For an extended discussion about proposals of group representation, see Phillips (1996, pp. 139–152).

[31] For a volume that contains important contributions to this debate, see Benhabib (1996).

[32] Kymlicka (1995a, p. 141).

[33] Kymlicka (2002, p. 290).

[34] Young (1989, p. 257).

[35] It is important to clarify that hierarchies of status are not reducible to economic disparities, wherein social positions are rooted in the economic structure of society, creating class-related collectives defined by a distinctive relation to the means of production or to the market. See Fraser (2000, pp. 107–120). Instead, as Nancy Fraser argues, status hierarchies are based in social patterns of representation, interpretation and communication that generate cultural domination, non-recognition and disrespect. Certainly, some groups are affected by both economic and status vulnerability—indigenous peoples, for example—but this is not always the case. As Kymlicka (2002, pp. 332–334) points out, gays in Western societies have similar per capita levels of income as heterosexuals, but suffer from demeaning forms of homophobia which often leads them to live a double life. On this last point, see Kenji Yoshino (2002, p. 772, 812). Similarly, most women are constrained by gendered expectations and disrespect for their priorities and traditional roles, even if they enjoy similar levels of wealth and education as men. In any event, the point here is that these patterns express an imbalance of status that cannot be surmounted only by means of economic restructuring.

[36] On the links between structural inequalities and group representation, see Melissa Williams (1998).

[37] On the relevance of adopting measures of "political" affirmative action to ensure the participation of women not only for reasons of justice but also to live up to the democratic ideals, see Silvina Álvarez (2003, pp. 533–546). I have also tried to justify this thesis in Torbisco Casals (2005). The reasoning is basically the following: the persistence of the effects of structural inequality constitutes an obstacle for representative democracy because it provokes the permanent under-inclusion of marginalised groups

in terms of real power and influence in society. The alienation from the political process stems from the fact that members of these groups do not actively participate (and are often invisible) in processes of political-decision making and in the formation of public opinion and thus lack the opportunity to shape the outcome of those processes. As Phillips (1995), Young (2000, pp. 139–141) and others argue, there are significant differences of experience attached to being member of an identity-group (being male or female, for instance) and there is a relationship between people's experiences in their ordinary lives and their judgements, commitments and understandings of political issues. If this is so, it becomes implausible to claim that all groups are *equally* represented, especially when bodies of representation are largely composed by members of the group that rank high in the social hierarchy. Moreover, when effective representation fails, the chances of members of marginalised groups of contributing to shape the society in which they live significantly diminish. This, in itself, amounts to an unfair restriction to a central dimension of individual autonomy, which ultimately weakens the democratic legitimacy of the outcomes of political processes.

[38] Although a detailed exploration of this topic is beyond our present interests, supporters of special representation—or descriptive representation, in Jane Mansbridge's terms (2000, p. 99)—argue that this is a good strategy to target structural inequalities for various reasons such as (a) in settings of historically subordinated statuses and infra-representation of certain identity-groups, it serves as a mechanism to promote effective representation through removing the obstacles to adequate communication between representatives and constituents; (b) special representation is also seen as a form of equalising certain outcomes (political representation, in this case), a goal which is justified when the presumption is that the opportunities are not equal for members of all groups. This is a way of acknowledging that disparities arising from overt forms of legal discrimination are not significantly different from disparities that emerge out of structural constraints, as Phillips (2004, p. 7) emphasises; (b), introducing descriptive representation can help to restore the sort of trust between groups that makes it possible to speak of a unified constituency reflecting a common political culture (see Rosenkrantz, 2005). Finally, descriptive representation offers the affected groups the opportunity of transforming the negative representations linked to their identities, since access to power provides the means of struggling against the false beliefs that are on the basis of degrading stereotypes that subordinate certain groups. Certainly, the mere presence in democratic institutions may do nothing to shape the outcomes of decision-making processes. If decision making is majoritarian, there is nothing that prevents more numerous participants from ignoring the voices of the minority. For this reason, the effectiveness of group-representation mechanisms depends importantly upon promoting the deliberative character of democracy (see Gargarella, 1998, pp. 269–274). Theorists of deliberative democracy have discussed extensively the preconditions that need to be satisfied for this model to deliver its promising benefits. See Elster (1998) and Dryzek (2000). For a critical analysis of the relation between group representation and deliberative democracy, see Williams (2000).

[39] Phillips (1995).

[40] For example, some constitutional law scholars suggest that the control of the constitutionality of the legislation by constitutional or supreme courts should have a higher degree of scrutiny in contexts of social inequality, especially if the law singles out criteria of distinction that happen to coincide with the traits of some vulnerable minority or will make a significant impact on this group. Ferreres (1997, pp. 250–254) even argues that, in such cases, the burden of proof should be imposed on those who defend the constitutionality of the law.

[41] Williams (1976, p. 76). According to Williams (1976, pp. 77–79), "culture" as an independent noun, and abstract process or its result only gained importance at the end of the nineteenth century, mainly to represent the European art and literature that were regarded as the highest expression of human development. In this sense, it has been suggested that the relevance of the concept of "culture" emerged as the product of European colonialism, coupled with the predominance of bourgeoisie masculine values progressively embedded in industrialised societies.

[42] Joppke and Lukes (1999, p. 3).

[43] Benhabib (2002, p. 1).

[44] Joppke and Lukes (1999, p. 4).

[45] For discussion, see Joppke and Lukes (1999, pp. 3–8) and Benhabib (2002, pp. 1–11).

[46] Kymlicka (1995a, p. 76).

[47] Kymlicka (1995a, p. 76).

[48] Kymlicka (1995a, p. 76).

[49] Margalit and Raz (1990, pp. 443–444).
[50] Margalit and Raz (1990, p. 446).
[51] See also Geertz (1973, p. 5), who refers to the webs of significance that human beings themselves help to create as "culture" and not merely to mere patterns of behavioural events.
[52] For a defence of this interpretation see, too, Tamir (1993, p. 8).
[53] As with social minorities suffering from structural inequalities, the claims of cultural minorities involve both redistribution and recognition. In this vein, Bhikhu Parekh (2004, pp. 199–213) argues that recognition and redistribution, as described by Fraser (see supra note 35), are complementary discourses in the pursuit for equality. Parekh convincingly argues that economic improvement is often dependent on self-respect and collective pride.
[54] Benhabib (2002, p. 4).
[55] Benhabib (2002, p. 4).
[56] Modood (1998, p. 382).
[57] See, in a similar sense, Young (2000, p. 89).
[58] Benhabib (2002, p. 7) herself shares this view. Thus, the anti-essentialist approach she defends as part of her "sociological constructivism" is compatible with conceiving differences as fictions. Her reaction is mostly directed towards what she calls "strong or mosaic multiculturalism," as the view that "human groups and cultures are clearly delineated and identifiable entities that coexist, while maintaining firm boundaries." Benhabib (2002, p. 8). Although this is a common picture of multiculturalism in the political praxis, I think it is not easy to find proponents of this theory in the literature (see below note 60).
[59] Waldron (2000, p. 161).
[60] See Kymlicka (1995a, pp. 101–105), Levy (2000, pp. 6–7), Tully (1995, p. 11), Parekh (2000, p. 157) and Young (2000, pp. 87–89). Chapters V and VI take up the implications of this point in more detail.
[61] One could object that, in both cases, the problem is one of discrimination and, therefore, it is unnecessary to distinguish between social and cultural minorities, or between problems of discrimination and problems of recognition. Moreover, in some cases, their corresponding features overlap. For instance, immigrants might primarily aim at achieving equality of opportunity within the mainstream society, since they have to deal with the effects of different types of discriminations. Yet I think that the distinction remains relevant for analytic purposes, as the rest of this book tries to show.
[62] See supra note 14. Comanducci (1994, p. 42) describes cultural minorities as "minorities by will" because they wish to distinguish themselves from the majority, and their claims are not limited to the mere protection against discrimination, but they reject the homogenisation or assimilation into the cultural model of the majority.
[63] Levy (1997, pp. 22–66; or see 2000, pp. 125–175). Levy's method of categorisation is not based on the type of group but on different kinds of demands (that sometimes are raised by different types of groups). Kymlicka, instead, classifies the demands according to the type of group, but this leads him to distinguish unnecessarily between similar claims. See Kymlicka (1995a, pp. 37–38).
[64] Initially, this type of demands might not seem to raise significant problems, since the exemptions could be granted as part of the protection of freedom of religion. Yet this argument is contested as the recent controversy over the *foulard* in France and other European countries show. This debate will be taken up in Chapter VI. Also, the Supreme Court of the United States decided that Jews do not have the right to have the weekly holiday on Saturdays on the grounds that other citizens' preferences deserve the same respect, even if they are not founded on religious reasons. And yet, this same court had granted the Amish certain exemptions from the compulsory education of their children, which shows the complexity of finding a way to deal with this issue in a consistent manner. For discussion of these and other examples, see Levy (1997, pp. 25–29).
[65] Levy (1997, p. 29).
[66] Levy (1997, p. 29).
[67] Levy (1997, pp. 32–34).
[68] Levy (1997, p. 33).
[69] Examples are the claims related with land rights and membership control by American Indian groups through restrictions on property and mobility rights. See Levy (1997, pp. 34–36).
[70] Levy (1997, p. 36).
[71] Levy (1997, p. 37). And, of course, this category raises the fears about the potential incompatibility of group rights with individual human rights.
[72] See Kymlicka (1998b, pp. 15–17).

73 Levy (1997, pp. 41–42).
74 Levy (1997, p. 43).
75 Levy (1997, pp. 46–49).
76 This is indeed a central theme in Okin's critique of multiculturalism in Okin (1999, pp. 9–24).
77 Shachar (1999, p. 87).
78 As mentioned in the introduction, it is not uncommon to interpret this recent trend as reflecting a change of paradigm in the philosophical justification of human rights, which challenges their universal validity.
79 Indeed, it is an essential part of the notion of human rights that these rights are called upon to protect basic needs or goods. Hence, the imposition of duties on others derived from these rights is only justified with the aim of guaranteeing our most urgent interests. See supra note 53 of the Introduction.

# CHAPTER IV: TOLERANCE, NEUTRALITY AND GROUP RIGHTS

## 1. INTRODUCTION

One key element of the modern liberal state is neutrality: the obligation to refrain from intervening to promote particular life plans or conceptions of the good, while ensuring equal opportunities for all citizens to pursue their particular ends. The liberal tradition (historical and recent) offers several weighty arguments to justify such a constraint, which shapes the realm of liberal politics by defining the grounds for political legitimacy.

It is often argued that neutrality, as a normative standard, makes it impossible to use group rights as a means of confronting multiculturalism. In order to respect neutrality, it is claimed, we should rather draw on ideas of mutual tolerance to articulate a model that can consistently guarantee the fair coexistence between different cultural groups without jeopardising the traditional role of the state within the liberal tradition. This chapter explores the normative grounds and implications of what may be called "the tolerance approach," as an alternative strategy to deal with the conflicts posed by multiculturalism. Critics of group rights who endorse this approach stress the potential of tolerance, as a political virtue, to accommodate cultural minorities and other group-based identities. This contention will be developed and scrutinised in the following pages, in order to assess to which extent it is justified. As will become apparent, the theoretical premises underlying the tolerance model differ substantially from the starting points and lines of reasoning of most advocates of group rights, thereby offering a different account of how liberal democracies should deal with these groups. Yet, it is important to note that *both* approaches acknowledge the legitimacy—at least *prima facie*—of the interests of cultural minorities and thus open an avenue for their accommodation.

In what follows, the main focus will be a critical examination of the tolerance approach that different strands of contemporary liberal thought regard as a key answer to challenges of cultural diversity. As I will explain, there is a great deal of disparity in the form this answer takes, for not all liberal theorists that share this approach see its foundations in the same set of values or moral commitments. Nonetheless, all these variations involve a similar challenge to liberal multiculturalists and their defence of group rights.

The aim of the following sections is to show that, despite the initial appeal of the tolerance approach, there are several shortcomings in the formulation of tolerance and neutrality that underlie its different versions, and that these shortcomings lead to


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an inadequate view of the role of the state in multicultural settings. More precisely, proponents of this approach tend to assume an interpretation of neutrality that distorts the distinctive meaning of this ideal within the liberal tradition, while others misinterpret the point of the claims at stake and, as a result, propose institutional solutions that conceal cultural privilege and political exclusion. Contrary to what has become commonplace among critics, a more detailed analysis will prove that not only are group rights compatible with state neutrality but that, additionally, they can serve a crucial function in fully realising this central feature of the liberal tradition. On this understanding, I shall ultimately conclude that, in contexts of cultural diversity, the tolerance approach lacks a strong foundation for a normative theory of citizenship that embodies the ideals of freedom and equal respect. Moreover, applied to the legal domain, it promotes constitutional principles that are misleading and do not match with existing practices in most Western democratic countries.

In order to develop this argument, the following section starts by examining the connection between neutrality, tolerance and cultural pluralism. To elucidate this link is important, since it is commonly supposed that these three stand together in opposition to the view that justice in multicultural societies requires the recognition of group rights. I will analyse how that connection is construed and clarify in which sense critics hold that endorsing group rights requires abandoning the characteristic role of the liberal state. Section 3 questions the plausibility of a view that identifies liberalism with a "hands-off" approach to culture, as is usually suggested by proponents of the tolerance model. In fact, cultural intervention and nation-building have been strong elements of the liberal tradition, both theoretically and historically, and I will sketch this connection based on insights from the recent literature on nationalism. Section 4 shows that the link between liberalism and cultural intervention is not confined to history but continues into the present. Hinting at arguments I will develop in following chapters, I will argue, along the lines of liberal multiculturalism, that mere abstention from the cultural sphere is impossible for the modern state. Finally, in Section 5, I seek to demonstrate that the tolerance approach does not exhaust the ideal of neutrality in liberal thought. Even under the dominant understanding of this ideal—as justificatory, rather than consequential, neutrality—group rights are not necessarily in conflict with the idea of a neutral state, but can, on the contrary, help to fully realise it. Beyond this claim, however, and insofar as liberal states have always been involved in the promotion of particular cultures, the idea of consequential neutrality allow us to capture the importance of recognising group rights as an element of—*prima facie*—equal respect for different ways of life, worldviews and conceptions of the good.

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Before entering into a more detailed discussion of neutrality and tolerance in their different forms, however, it is important to clarify the scope and limitations of this framework for the discussion on group rights. Two points are central in this respect:

Firstly, it is important to note that, as an objection to group rights, neutrality is not always properly invoked. As indicated earlier, some authors claim that affording rights to cultural minorities will lead to the violation of the freedom and individual rights of their members and therefore to the neglect of state neutrality. This is, for example, the position of Comanducci, who rejects what he names "positive cultural rights" on

these grounds.[1] Garzón Valdés also argues that public recognition for ethnocultural identities is ethically unacceptable, as it puts individual autonomy at risk.[2]

But framing the problem in this way, these authors cannot appeal to "neutrality" in any meaningful sense. Instead, they should argue that the type of interests underlying group rights—i.e., the relevance of cultural belonging, the recognition of identity, the preservation of culture—are incompatible with freedom and, therefore, the state is *not* compelled to remain neutral.[3] For one thing, as will become apparent throughout this chapter, the central role accorded to neutrality in the liberal tradition is mainly motivated by an optimistic view concerning the possibility of reaching a consensus on the principles that should govern political institutions, notwithstanding the different, opposed, and even incompatible values, interests and conceptions of the good existing in society.[4] Such pluralism should be respected through a policy of neutrality precisely because it is a precondition for—and a result of—freedom, and liberals have traditionally understood that protecting freedom constitutes the best way of respecting individuals. This justification defines the scope of neutrality, or so I will argue.

There are, of course, different interpretations of what protecting freedom requires. From a conception of liberalism based on autonomy, which Garzón Valdés and Comanducci defend, state neutrality would be unjustified whenever group rights were to threaten the autonomy of members of cultural minorities, since it would be inconsistent to say that public institutions should refrain from intervening when the very value that justifies this policy is disputed. Yet not all proponents of the tolerance approach equate freedom with autonomy—as we will see, theorists like Kukathas defend a rather minimalist conception that takes state indifference much further. In any event, the relevant point here is that state neutrality applies as long as the underlying values that justify this principle are not breached.

Secondly, some authors see the common claims of cultural minorities as mere preferences or wishes, insufficiently important to justify the use of the language of rights. On this understanding, while people may have an interest in belonging to their own culture, or are willing to see their distinctive cultural features represented in the public space, strictly speaking, these interests are not eligible as grounds for rights. As Waldron affirms, respect for people is not a demand without limits and it is generally understood that the language of rights does not exhaust the normative universe.[5] It is possible for the government to deal in different ways with preferences that lack the necessary moral urgency that is associated with rights, including asking citizens to give up their demands when satisfaction becomes too costly. It might also be that some of these preferences are simply a matter of taste, whereas rights must be reserved for what we truly regard as basic needs for human well-being. That is why the idea of primary goods plays a central role in Rawls' distributive model, even though it has non-neutral effects in all life plans.[6]

Following this logic, it could be argued that, by demanding group rights, cultural minorities unreasonably expect the state to meet their "expensive tastes." This reasoning implies that the interests underlying the kind of claims at issue are not basic or fundamental enough to be taken into account when assessing the fairness of a particular distributive scheme. This argument seems to inform the position adopted by those who oppose group rights, but see no problem in a scenario in which cultural minorities

simply pay for what they want.[7] A similar line of reasoning admits that cultural structures may possess an independent value, but this is a merely aesthetic one. Thus, Catalans might worry about the disappearance of the Catalan language for the same reason that they felt that they had lost something of irreplaceable value when the Liceo in Barcelona succumbed to flames. While this sentiment of loss is understandable, it nonetheless falls short of justifying something like a "group right to culture."

But, once again, if we lean towards one of these avenues to oppose group rights, the argument from neutrality is pointless; for defenders of a conception of liberalism based on neutrality do not claim that the state should be neutral in relation to *all* interests, nor that a theory of group rights should accommodate all types of cultural preferences. In general, a theory of rights does not aim to incorporate secondary preferences or wishes that are not linked to essential human interests or needs. Obviously, to determine what these interests and needs are is not an easy task and, as will become clear, there is much contestation over this central issue. For the moment, the main point I wish to stress is that, as an objection to group rights, the argument from neutrality is significant only if the legitimacy of the interests at stake (and their general compatibility with freedom) is, at least to some extent, presumed. As we will see, although it starts from a different conception of liberalism, the tolerance approach also needs to assume this, even if its defenders find group rights unnecessary for managing cultural diversity.

## 2. THE TOLERANCE APPROACH AND THE QUESTION OF GROUP RIGHTS

### *2.1. Tolerance and Neutrality in Liberal Thought*

The centrality of state neutrality is a feature common to some of the most influential contemporary liberal theories.[8] Scholars such as Ronald Dworkin, John Rawls or Bruce Ackerman invoke this principle as a standard to assess the legitimacy of political and legal decisions. Unlike truthfulness or generosity, neutrality is a political virtue: while it is not incorrect for a person to favour a certain conception of the good life, this preference is inappropriate if this person acts as a political agent undertaking a public function.[9] It is important to note that, although the use of the term "neutrality" only acquires prominence in modern political theory, the germ of this principle has deep roots in liberal thinking. In particular, its source can be traced to the earlier concern for religious tolerance which led, in the sixteenth and seventeenth centuries, to the separation of the church and the state. Thus, famous essays such as John Stuart Mill's *On Liberty* can be regarded as philosophical attempts to discern the limits of the state's or society's legitimate interference in the private sphere.[10] At the time, the most frequent political reaction toward groups that dissented from predominant religious beliefs and social values was repression. For this reason, Mill was convinced that to establish and preserve limits to the interference of the state was a task as essential as preventing political despotism.[11] Thus, he argued for an irreducible sphere of individual self-determination in which the state should refrain from intrusion:

> There is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself. (. . .) This, then, is the appropriate region of human

> liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.[12]

Hence, since its inception, liberalism was characterised by the adoption of a certain stance on the requirements that state coercion and state institutions must satisfy to be considered legitimate. The ideal of tolerance, implying equal respect for different conceptions of the good, attained a remarkable consensus among liberal theorists and can be seen as an important embodiment of the idea that persons should be treated as free moral agents, and as equal sources of valid ends. On this assumption, it seems plausible to claim that liberal states are not allowed to intervene in the realm of individual freedom, unless interference (aimed at imposing or inducing a person, or a group, to change her views on their conceptions of the good) is precisely intended to preserve a system of equal liberties for all.[13] In sum, liberals consider freedom as an essential human interest that, as long as it does not offend or threaten the equal liberty of others, cannot be overridden simply by considerations of the social good.

The principle of state neutrality, in its modern formulation, follows from this reasoning. Initially, it demands non-intervention or, to use an alternative expression, states a duty of non-involvement. As I will explain shortly, for some scholars, the importance of this standard derives from one particular aspect of individual freedom, namely freedom of conscience. From this perspective, liberal states are supposed to use their coercive power only to safeguard the individual right to associate with others in pursuit of common goals (including the right to dissociate, to exit from a group), but not to align or orient their policies towards helping or hindering some particular groups and their collective ends.[14] In the predominant contemporary conception of liberalism—that grounded in individual autonomy—the basic idea of non-interference has been essentially the same, but, in this version, the interpretation of the limits of tolerance tend to be stricter in order to preserve the value of autonomy comprehensively.

In any case, this model of political legitimacy played a crucial role in connecting liberalism with pluralism. Above all, the liberal commitment to freedom delineated the grounds of a certain approach to diversity—originally, the diversity arising from religious differences that resulted from the internal division of Christianity[15]—based on tolerance. The prevalence of this perspective, however, does not mean that pluralism was historically regarded as valuable *per se*. In an interesting account of how different political regimes have institutionalised diversity, Walzer draws attention to the fact that, historically, the request for tolerance was neither closely related to a celebration of pluralism, nor to any enthusiastic encouragement of freedom of choice. Rather, he notes, the argument was that respect for the existing plurality of religious values and practices was instrumentally crucial to preserve the stability of the political order as well as social peace.[16] Today, the configuration of constitutional arrangements capable of surviving in the face of pluralism subsists as a recurrent concern, although it is the emergence of various forms of recognition of cultural identities that is primarily viewed as a threat to the liberal order and, also, to the ties that bind people together under common political institutions. And, like in the past, a common answer to the perceived dangers is to pass over diversity by emphasising the value of

political tolerance. As James Tully puts it, the frequent solution is "to transcend, rather than recognise and affirm, cultural diversity."[17]

In short, contemporary liberal theorists associate the old principle of tolerance with public neutrality, with the idea of a non-virtuous state that respects the diversity of world views and conceptions of the good, which, in itself, is instrumentally important for honouring individual freedom. According to the prevailing view, a liberal state should neither promote a particular conception of the good life nor indoctrinate its citizens in accordance with a certain pattern or ideal of morality. In other words, the state must not judge which beliefs about value deserve greater respect nor must it support certain ways of life over others. On the contrary, one of its main functions consists in securing the preconditions that enable all individuals to form and lead a complete life without any discrimination.

It has become a familiar assumption that this view of political morality ought to be enforced by means of fostering an "impartial" public framework, one that allows the different comprehensive ethical or religious doctrines that shape an individual's moral identity to arise and develop.[18] As Dworkin contends, liberalism requires the government (and legislators) to be neutral with regard to competing conceptions of the good life. Moreover, he argues, this is the main element that distinguishes liberalism from conservatism and different forms of socialism.[19] Similarly, in Ackerman's version of the liberal state, neutrality is understood as an essential constraint on the kind of reasons that are acceptable in politics. "No reason is a good reason," Ackerman writes, "if it requires the power holder to assert (. . .) that his conception of the good is better than that asserted by any of his fellow citizens."[20] As we will see in more detail below, this is also Rawls' contention when he argues that a distinctive feature of political liberalism is that it gives precedence to the right over the good.[21]

Besides the arguments of individual freedom and social peace, the quest for neutrality is also justified on the grounds that it is required in order to respect the equality between persons and groups. Dworkin has been keen to emphasise this point. Since citizens differ in their values and conceptions of the good life, "the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior or because one is held by the more numerous or more powerful group."[22] Respecting this principle requires, according to a widespread opinion, a homogeneous constitutional scheme of individual rights and liberties. Thus, it is a common view, particularly among legal scholars, that endowing all citizens with the same set of civil and political rights, regardless of their religious, ethnic or cultural differences, is the best means to achieve equality. Both equality before the law and non-discrimination are generally understood as equivalent to a homogeneous legal status for all citizens.[23]

In sum, contemporary liberal theory regards the ideal of tolerance as closely linked to different values: to the commitment to state neutrality, to the promotion of individual freedom and equal concern and to the preservation of social unity and peace. The idea of a uniform content of citizenship, together with a robust account of state impartiality and non-interference, are considered to provide the best foundation for satisfying those requirements. Liberal citizenship is largely defined in terms of inclusion into the political community. As far as the legal status is concerned, it denotes a unique, reciprocal and direct political relationship between the individual

and the state.[24] Since all citizens stand in the same relationship to the state, they should have the same fundamental rights and entitlements. Furthermore, it is generally assumed that the universal incorporation of citizens into the state entails, by definition, a single legal system that must operate within each political jurisdiction. Because one central purpose of the rule of law in a constitutional state is that of instituting and upholding universal human rights and liberties, any explicit form of differentiated citizenship is regarded as suspicious. Admittedly, asymmetries and exemptions do exist in today's democracies that may be explained or even justified by pragmatic considerations applicable to particular contexts. Yet they tend to be conceived as deviations from, or inconsistencies with, the vision of the political community that is congenital to liberalism; that is, they are often regarded as a potential threat to liberalism's constitutive aims and principles or justified for reasons of security and peace, not of justice. For this reason, Tully argues that modern constitutionalism can be defined as requiring a uniform constitution, in contrast with ancient constitutions that incorporated a variety of local customs and legal statuses.[25]

### *2.2. Neutrality and its Tension with Group Rights*

As indicated, a strand of contemporary liberal thought—which is mainly represented by Kymlicka's influential work—has responded to the problem of diversity by advocating group rights for particular cultural minorities. Implicit in this response is a rejection of the idea that the state should take a "hands-off" approach to issues of culture and thus avoid recognising particular identities, loyalties or ethnicities. However, for critics, only the latter approach can plausibly ground a liberal perspective on diversity, for it remains consistent with the traditional views on tolerance and neutrality that are at the centre of this tradition. The reluctance to accept the idea of group rights is deeply connected to this legacy. More specifically, liberal commentators often question the compatibility of group rights with the commitment to state neutrality. After all, advocates of group rights generally presuppose that cultural membership can generate some kind of legal and political differentiation, an asymmetrical regime. This would entail, critics contend, the salience of ethnicity in public life and the fragmentation of society, for the state would act to privilege certain groups as well as their members' loyalties and conceptions about value. This active involvement in the preservation of diversity, it is argued, has the potential to threaten equal membership in the state and to erode the significance of common citizenship embedded in liberalism. In short, the idea that liberal democratic values call for a constitutional regime that incorporates group rights as fundamental rights is regarded as incoherent. On the contrary, according to opponents, those values would be threatened by efforts at legitimising cultural identities and attachments through granting minorities public support and explicit recognition. Moreover, in Brian Barry's view, multiculturalism (understood as a normative policy implying the recognition of identity groups) is only a "formula for manufacturing conflict, because it rewards the groups that can most effectively mobilize or make claims on the polity."[26]

Yet this conclusion, it is often remarked, does not necessarily lead to an underestimation of diversity. Nor does it imply a denial of the legitimacy of the interests minority cultures wish to see protected. Exponents of the tolerance approach typically

maintain that the rejection of group rights does not amount to generally denying the value of communities and of people's attachments to their own cultures. For them, privatising all ways of life and conceptions of the good remains the best way to accommodate diversity and protect minorities against discrimination. Chandran Kukathas and William A. Galston are among the recent exponents of such a view:[27] despite substantial differences in their arguments, they both reject the necessity of group rights and oppose a revision of liberalism that would grant public recognition to cultural identities. Yet they do acknowledge the magnitude of the challenge of diversity and try to be sensitive to the demands at stake; and it is for this reason that their stance is worth exploring further.

Their central thesis is that justice in multicultural states demands, today more than ever, taking tolerance seriously and maintaining the strong detachment between the public and the private realms characteristic of the liberal tradition. The argument runs roughly as follows. Given the complexity of contemporary conditions of multicultural coexistence and deep pluralism, it becomes crucial that the state does not appear as an entity that takes sides in the clash between majorities and minorities, encouraging or promoting particular cultures or ways of life. The attribution of rights to cultural groups would be a deviation from equal treatment. In this sense, it would not only require, as some advocates maintain, a more subtle understanding of the meaning of liberal principles. Rather, it would involve relinquishing these liberal principles altogether, through undermining the state's position and downplaying the significance of common citizenship.

Within this general line of thinking, Kukathas has developed a distinctive position.[28] It is a basic contention of his work that the fundamental value in a liberal society marked by cultural diversity is toleration. Moreover, for Kukathas, the most plausible account of liberalism is rooted in a respect for this value which, in itself, is ultimately embedded in a respect for liberty of conscience: "It is the value of liberty of conscience which lies at the core of the liberal ideal of toleration."[29] This is so because the central feature of human nature and conduct, he claims, is an attachment to the demands of conscience.[30] Thus, nobody can be forced to act against his or her inner conscience. Toleration, however, does not require appreciation or respect for difference, or the will to engage in dialogue with the other, the dissenter; Kukathas defends a rather undemanding conception of toleration, requiring no more than indifference towards the forms of life or practices that are tolerated.[31]

These philosophical premises underlie Kukathas' account of a free society as made up of "a collection of individuals (and, so, authorities) associated under laws which recognize the freedom of individuals to associate as, and with whom, they wish."[32] This account is one in which freedom of association is the fundamental principle, for it is crucial in allowing the variability of human arrangements and institutions that, in the view of Kukathas, is central to the existence of a free, open, society.[33] Moreover, in this view, the state is conceived as an association of associations, as a political agreement that includes them all:

> 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 judgements about whether those ways are good or bad, liberal or illiberal.[34]

If, conversely, public authorities act as a kind of ultimate authority that determines what is morally acceptable, then "liberalism is lost."[35]

The conclusions that Kukathas draws from all of this are well characterised in the metaphor of the good political society as a "liberal archipelago," described as a society composed of different societies or communities "which is neither the creation nor the object of control of any single authority." Authorities in this model "function under laws which are themselves beyond the reach of any singular power."[36] In this regard, it should be emphasised that, in Kukathas' view, an important feature of a liberal polity is that it must be able to accommodate multiple authorities, the legitimacy of which comes from the acquiescence of their respective subjects.[37] But, because individuals should not be coerced to act against their conscience, a liberal society should provide them with the means to resist and repudiate authority. This can be done, according to Kukathas, simply by allowing them to situate themselves under an alternative authority or even by establishing a new one—instead of through state interference in the internal affairs of associations in order to impose certain substantive standards of justice.[38]

This important thesis will be taken up in a moment. Before, it is important to highlight some of the features that make this position a *sui generis* one within contemporary liberalism,[39] to be better able to grasp its particular implications for the problems that concern us here. It might be useful, to this end, to contrast the argument sketched with the views on tolerance and state neutrality defended by liberal philosophers that operate within a Rawlsian framework. By and large, the argument of Kukathas is at odds with this framework in at least three important ways. First, Kukathas endorses a conception of the state and of society with fuzzy boundaries, namely, an open society with a multiplicity of authorities that are regarded as legitimate as long as they are able to obtain the acquiescence of their members. In his view, a good society is not a unified entity circumscribed by fixed boundaries and, hence, social unity plays a minor role.[40] In this picture, the state is a "much diminished entity,"[41] it needs to accept the jurisdictional independence of other authorities and refrain from establishing and imposing common standards to those who are not inclined to accept them.[42]

Secondly, Kukathas defends a kind of political liberalism which, he claims, avoids appealing to particular moral commitments linked to a comprehensive conception of justice.[43] The problem is that a comprehensive liberalism cannot succeed in commanding the acceptance of all, and hence a political order that aims at accommodating diversity cannot be based on such a conception.[44] That is why the state, in this picture, should refrain from acting in order to secure some substantive moral conception, for the good society is not one governed by a shared conception of justice. According to Kukathas, the principle of liberty of conscience, which is fundamental to toleration, identifies the basis from which different moral conceptions are allowed to coexist; in his view, it differs from other theories about how to manage diversity that are built upon the Rawlsian framework of justice which is rooted in the value of autonomy, thus excluding those who disagree with this moral standard.[45]

Finally, it is also important to stress that Kukathas is mainly concerned with the question of the legitimacy of authority, rather than with that of justice. This is a major difference with mainstream contemporary political theory, as he himself acknowledges.[46] Kukathas offers different reasons to justify this approach, the main one is that, for him, the main question in political philosophy "is not about justice or rights but about power."[47] Leaving aside this complex debate, for our present concerns the relevant point to be noted is that, as a result of this position, the theory that Kukathas offers merely seeks to provide the grounds for a transitory "modus vivendi," and not a "modus credendi,"[48] that secures civility. The only agreement that we can hope for in a free society is not an agreement on substantive moral truths but "an agreement to abide by norms which tolerate disagreement."[49] People can rightly dissent in their judgements of what is good and we should give up trying to reconcile or dissolve this pluralism.

In a similar vein, Galston calls for an account of liberalism that takes diversity seriously. The commitment to what he dubs "the Diversity State" entails "a strong system of tolerance," which has as a key component "a cultural disestablishment, parallel to religious disestablishment."[50] According to this view, the crucial strategy for the historical development of liberalism has been the acceptance of difference through a regime of mutual tolerance. Galston distinguishes between two concepts of liberalism on this ground and claims that, "properly understood, liberalism is about the protection of diversity, not the valorisation of choice,"[51] even if the latter is dominant in contemporary formulations of liberalism.

However, the theoretical premises of Galston differ substantially from those that support Kukathas' theory, even if both may lead to similar conclusions as to the best political response to demands of culture. On the one hand, Galston affirms the compatibility of state unity and diversity, as well as the need to enforce the basics that sustain a civil order and its constitution,[52] whereas, as mentioned, Kukathas insists on the insignificance of social unity, a perspective that even leads to allow dissident groups to reject the authority of the state. On the other hand, it is the protection of diversity, as the main manifestation of what he calls "expressive liberty,"[53] that lies at the core of Galston's theory;[54] in contrast, Kukathas explicitly rejects the idea of diversity as a value in itself.[55]

In any event, to support a version of liberalism that is not concerned with the enhancement of autonomy, but gives priority to other values such as freedom of conscience or diversity has important implications for the limits of tolerance. More attention will be drawn to this issue in Chapter VI. For the moment, it is important to note that the intuitive appeal of this line of argument derives from the analogy with religious tolerance[56] and, more precisely, from the idea, already worked out in the eighteenth century, that freedom of religion should be accorded to all individuals in order to prevent discrimination.[57] After all, liberal states partly emerged as a reaction to feudalism and as an answer to religious wars. With the aim of eradicating the repression suffered by certain groups and integrating them into social and political life, the building of modern states progressively swept away particular regimes of rights and special privileges and introduced a system of uniform rights. The democratic trend that followed liberal revolutions incorporated this inclination toward legal homogeneity.

If we agree that the tolerance model, in some of its variants, sets out a strong case for managing diversity, why would liberals wish to drastically modify their theory by adding a component—group rights—that might distort its core values? What we need instead, it could be argued, is to fully exploit the potential of this old strategy. As Prieto Sanchís stresses, equality today requires extending the meaning of laicism beyond the religious sphere, encompassing the cultural realm.[58] Endorsing the same idea, José Antonio Aguilar Rivera complains that the potential of tolerance is generally underestimated in debates about minority rights for the sake of what he sees as a radical revisionism of liberalism. It is regrettable, Aguilar Rivera says, that Locke's natural heirs have underrated the power of the tolerance approach, whose intrinsic value must be restored.[59]

In short, the argument is that the basic pillars of liberalism offer a foundation on which diverse cultures can be built and coexist and therefore, where individual rights are firmly protected, group rights are unnecessary. To assign the same rights to all citizens—freedom of association, religion, speech and so on—constitutes the best strategy to guarantee, indirectly, the legitimate forms of diversity in a democratic society. In the context of group relationships, the merely negative version of tolerance ("live and let live") requires the majority to abstain from interfering with the beliefs, world views or lifestyles of minorities. Certain deviations from this standard are sometimes justified, but only in order to grant its full efficacy. Thus, certain group-based measures, such as compensatory policies or affirmative action in relation to education and jobs, are not *prima facie* ruled out. But the case for these measures tends to be made in contexts where the duty of state neutrality (understood as non-interference) has been previously breached; for example, when a government has been actively involved in practices of oppression of certain groups and the effects of these practices still pervade their relations.[60] However compelling this argument may be, we already saw that there is a crucial difference between granting group rights to cultural minorities on a permanent basis and approving group-based programmes aimed at removing systematic inequalities suffered by their members. In the second case, the ultimate aim is not to challenge the ideal of difference-blindness, which, in this context, means that the state reacts to cultural diversity with "benign neglect"[61] or, in Kukathas terms with a "politics of indifference."[62]

There are some important connotations in this way of looking at the relation between liberalism and diversity. First of all, an underlying assumption in most formulations of the tolerance approach is that, as with religions, the diverse cultural practices will have an equal opportunity to flourish and prove their capacity to attract supporters in civil society. For this reason, against communitarian critics who regard liberal views as too individualistic, its proponents usually invoke freedom of association as a crucial value,[63] not necessarily subordinated to a higher one, such as autonomy; for this reason, non-state organisations often play a central role in this model.

The scope of this strategy may be limited, however. Above all, it does not guarantee the integrity or survival of minority cultures over time. Only their members' perseverance in making co-operative efforts to preserve and transmit the meaning of practices, values and traditions to successive generations, together with the capacity of associations to attract new supporters, can ensure this end. The vitality of cultures, and cultural diversity in itself, will therefore depend on the strength of the

associations. Yet, for proponents of this approach (especially those advocating the centrality of choice), this constraint should not be seen as a flaw: just as it is stated that social inequality arising from voluntary transactions between the holders of the same rights is fair, so too is cultural inequality derived from competition in the "cultural market."[64] In exercising her basic freedoms, every person must be able to choose the option that she considers most attractive. We may regret that the result of multiple choices made by individuals over time has led to the decay or disappearance of some cultures or ways of life. But to the extent that this consequence results from individual preferences, it cannot be seen as unfair.[65]

Still, the principle of tolerance seems to leave ample room for a broad accommodation of the claims of cultural minorities, especially if we adhere to a version of liberalism that prioritises the values of liberty of conscience and diversity. As explained, in this account, the concern is with the most extensive accommodation of diverse values, and, therefore, its exponents are inclined to admit that a case can be made for illiberal groups that uphold values that conflict with the cultivation of autonomy. Thus, assuming that, to a certain extent, the likelihood of intra-group injustice is unavoidable in a model of a free society where no associations or particular moralities are privileged from a political point of view, neither Galston nor Kukathas are particularly troubled by the fact that the internal structure of groups may reflect illiberal values.[66] On the contrary, they argue that, if they are to be consistent with their own principles, liberals must accept this potential outcome. In principle, the assumption is that non-liberal ways of life should enjoy the same rights and chances of surviving.

Note that, to a more limited extent, this perspective could also be seen as compatible with autonomy-based conceptions of freedom provided that we accept the argument that the state's intrusive attitude into illiberal ways of life would breach the premise that the individual is the author of her own life.[67] Put another way, a meaningful exercise of autonomy can lead to loss of freedom. Thus, some people voluntarily accept membership in associations or communities that incorporate internal rules that restrict the exercise of freedom (for instance, life in a monastery often implies severe codes of conduct; or, in general, belonging to a church carries severe restrictions on the choice of forms of marriage, education of children, etc.). In this case, we might say that it is not the duty of the state to prevent people from adopting an illiberal way of life. The idea of non-interference in the internal organisation of religious orders is justified by a respect for the consent or submission of their adherents, unless it could be proved—as has been the case with some religious sects—that their methods of recruitment involve forms of coercion.

In general, proponents of the tolerance approach accept that the Millian constraint on liberty, harm to others, would presumably be satisfied by ensuring the *right to exit* the group, which plays a central role in this theory. Thus, Kukathas emphasises the significance of freedom of association to accommodate diversity but, at the same time, he claims that the corollary of this principle is freedom to dissociate from the group.[68] Although, in his opinion, the more the different associations that compose the society tolerate difference and dissent, the more they can be called "liberal" associations, Kukathas is convinced that his archipelago can still count as a liberal one even if the associations that compose it are internally illiberal.[69] For this to be so, the

only necessary condition is that individuals enjoy the right to leave the group, which also includes the possibility of dissenters to join some other association or to create a new one, so nobody is obliged to remain in associations in which they are not tolerated and live according to terms that are at odds with their conscience.[70]

Therefore, while the state has no duty to enhance a substantive conception of autonomy within associations, it must guarantee that dissident members have the chance to leave the group. This solution seems to reconcile diversity—including illiberal ways of life—with liberty, as long as the freedom of exiting is publicly safeguarded. Certainly, there are thinner and thicker conceptions, as it were, of the right to exit. In particular, Kukathas understanding of it is, in my view, extremely thin, for the idea that people are free to leave is not accompanied by measures to diminish the costs and risks of exit that, according to him, should be borne by those who exercise this right.[71] But there are other, more robust, understandings of this right. Thus Galston argues that "exit rights must be more than formal,"[72] acknowledging the problem of internal coercion (including parental despotism) as well as the transitional difficulties in trying to integrate into the mainstream society, Galston theory is more open to allow state protections to secure this right, since a liberal pluralist order must defend its core principles.[73]

I shall go back to these different conceptions of exit rights later in this chapter. For now, it is important to note that, even if its formulation varies substantially, the right to exit is seen as sufficient to mitigate the eventual possibility that certain cultural groups become "islands of tyranny in a sea of indifference."[74]

To summarise, proponents of some form of the tolerance approach commonly agree in that affording group rights to cultural minorities would imply putting some central liberal values at risk. This argument connects the ideas of tolerance and neutrality with a certain picture of the liberal state: a state that refrains from acting towards enhancing or promoting a particular culture or cultures. The revival of this approach thus emerges as a formula for respecting difference without invoking group rights or any other form of public recognition of diversity. In this sense, it rejects the claim that liberal theory is incapable of dealing with the conflicts arising from multiculturalism. Moreover, some of its advocates even insist that this approach has the merit of respecting cultural diversity to a greater degree than arguments for group rights which, like that of Kymlicka, rely on a thick conception of autonomy.[75] Since everyone is free to participate in the creation and recreation of their identity and traditions, the diverse cultural groups can subsist if they are able to transmit their values to future generations. Culture and politics—like religion and politics—must be kept separate.

## 3. THE CULTURAL DIMENSION OF POLITICS: LIBERALISM, NATIONALISM AND NATION-BUILDING

It is widely held that civic nationalism can be distinguished from ethnic nationalism precisely by its emphasis on the tolerance approach. In contrast to ethnic nations, civic nations are neutral concerning their citizens' ethnocultural identities, defining national belonging only in terms of adherence to democratic principles and values.[76] Both culture and religion are relegated to the private realm, where everyone is free to

pursue her own faith, traditions or ways of life, and constitutional agreements and legal rules are conceived as beyond the pre-political ethnos. Thus, while civic nations show an inclusive vocation, ethnic nations tend to exclude those who do not share the dominant culture or belong to the prevalent ethnic group. The Habermasian notion of constitutional patriotism might be particularly apt in accounting for the civic version of nationalism.[77]

This taxonomy is frequently used to account for the tensions involving ethnocultural groups in Central and Eastern Europe since the fall of the Berlin Wall and the collapse of communist regimes. Even though the transition to democracy was initially contemplated with optimism, post-communist Europe has proved to be a fertile soil for the upsurge of nationalism, especially of minority nationalism. Contrary to some widespread expectations, far from diminishing the relevance of group identities the newly established democracies are faced with an increasing visibility and public assertiveness of identity groups that seemed to have faded away under the communist regimes. Current cultural disputes tend to focus on how membership of an ethnonational group should affect the political articulation and distribution of powers in the newly created states. For democratisation and economic development have not helped to "liberate" individuals from fixed identities, as many predicted.[78]

In analysing this situation, it is not uncommon to conclude that, unless those particular loyalties and identities are abandoned in favour of a wider, more encompassing, civic identity, the prospects for progress in the region will vanish. Furthermore, it is usually stressed that both the politics of identity and the language of nationalism are likely to result in the "balkanisation" of society and perhaps cause civil war in multinational and multiethnic states such as Ukraine, Albania or Romania. Along the lines of the tolerance approach, these countries should presumably struggle to dismantle all anachronistic connections of existing identities with public institutions so as to prevent this backlash. Typically, the assumption behind this judgement is that the political achievements in the West are based on the success of state neutrality, which entails an inclusive model of polity building that is not perceived as culturally or ethnically biased.

However, a rigid distinction between civic and ethnic nationalism requires an ahistorical account of liberalism and democracy. For it is not true that the incidence of ethnocultural factors has been rare in the building of Western democracies. Far from being relegated to a secondary role, these characteristics have played, and continue to play, a central role in the political praxis. Liberal states, therefore, have not adopted the kind of "hands-off" approach to culture and identity that the model of tolerance recommends.[79]

This observation points to a crucial weakness of this approach—a weakness that, has been stressed and illuminated by contemporary legal and political theorists such as Kymlicka, Margalit, Miller, Raz, Tamir and Taylor, among others.[80] Their works—which, borrowing Kymlicka's term, I will refer to as "liberal culturalism"[81]—have yielded genuine insights into the centrality of a number of factors generally downplayed by the dominant approach to cultural diversity in liberal theory. In particular, these scholars claim that, despite dominant interpretations and myths, all liberal states have been historically involved in projects of nation-building mostly aimed at promoting the dissemination and hegemony of a single culture—generally the majority

culture. The liberal tradition, in contrast, has tended to neglect this feature, which points to important shortcomings in some of its central premises. Examples of these shortcomings are the implicit assumption that states are nation-states with a homogeneous culture and a common language; the idea that the principles of justice that govern international relations differ from those that should inform state policies; the premise that citizenship in liberal states is not a matter of choice; the notion that the social state primarily distributes the available resources amongst its own citizens or the belief that it is legitimate for a constitution to establish differences in treatment between nationals and foreigners.[82] As Tamir writes, all this strengthens the idea of the modern liberal democratic state as something other than a contingent association connected by a formal contract whereby the citizens can freely join or leave the union. On the contrary, most people have deep links with their countries and both law and politics are instrumentally important to consecrate their legitimacy.[83]

Liberal culturalists criticise the failure of traditional doctrines of liberalism to explore in depth the nature of these links. In particular, they argue that key questions such as the normative legitimation of different self-governing states and the role of nationalism in this process have been marginalised. Emphasising the need to deal with these issues, which have remained on the "hidden agenda" of liberalism, in Tamir's expression,[84] this strand of thought aims to show that the relationships between liberalism and nationalism are far more intricate than is commonly recognised. A central thesis, in this respect, is that the pretended cultural essence of states has been key in delimiting and defending the legitimacy of political borders. Keen to avoid the questioning of their sovereignty over a territory, both liberal and non-liberal states have sought to be identified as nations through the diffusion of a single language and culture, that is, of a particular "societal culture."[85] According to Tamir, the need of a public space that will enable the reproduction of the cultural aspects of a certain national lifestyle thereby constitutes the essence of the right to self-determination.[86] Thus, the widespread claim that nationalism and liberal democracy are incompatible simply neglects the original link between them. Emphasising the relevance of this connection, liberal culturalism criticises the neglect of the problem of the *demos* in dominant theories of justice and democracy and allows questioning the coherence of the tolerance approach. In the following, I will examine some of the central arguments of this critique.

### *3.1. "E Pluribus Unum:" The Historical Link between Nationalism and Liberalism*

Liberal culturalism insists that, in the past, ideas of nation and nationalism were bound to the consciousness of the value of self-government.[87] Supporters of the French and American revolutions linked the concept of "people" to that of "nation." Because republicans insisted that all political power originates from the people, it was necessary to delimit the elements that form the relevant focus of collective self-identification. No one suggested that a random set of individuals coincidentally living side by side could aspire to self-government. As Ernest Gellner explains, the notion of nationhood satisfied the need for a deeper group identification and mutual recognition, which over time would eventually replace the loyalty to local and religious communities as a focus of mutual recognition.[88] The existence of an empirical substratum

(a common origin, language, history) before the state was invoked when liberals began to question the legitimacy of the dominant political structures in the *ancien régime*. Thus, in France, Abbot Sieyès, in his celebrated pamphlet *Qu'est-ce que le Tiers Etat*, wrote:

> La nation existe avant tout, elle est l'origine de tout. Sa volonté est toujours légale, elle est la loi elle-mème (. . .) Il serait ridicule de supposer la nation liée elle-même par les formalités ou par la constitution auxquelles elle a assujetti ses mandataires. S'il lui avait fallu attendre, pour devenir une nation, une manière d'etre positive, elle n'aurait jamais été. La nation se forme par le seul droit naturel.[89]

Similarly, when John Jay approached in *The Federalist Papers* the critical issue of whether it was more convenient to build in America a single nation under a federal government or to divide the State into different confederations or sovereignties, he appealed to the natural, cultural and historical bonds which united all Americans on the same territory as grounds to support the first option:

> Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs. (. . .) This country and this people seem to have been made for each other.[90]

Thus, the founding fathers of America saw themselves as belonging to a nation and resorted to this idea to justify the struggle for an independent government. This new form of shared belonging provided the platform from which to demand a radical change in the source of legitimacy of political institutions. Individuals progressively acquired the conviction that they were citizens of a single political community. As Habermas argues,[91] the ideas of nation and national consciousness provided a bedrock for cultural integration and the emergence of the constitutional state; in his view, "national consciousness is a specifically modern manifestation of cultural integration."[92]

Nationalism can thus be seen as a genuinely modern idea. This, however, does not mean that a radically new way of thinking emerged. In fact, different studies on nationalism show that its constitutive elements are present in pre-modern cultures. For instance, already in ancient Greece and Rome, there was a distinction between compatriots and foreigners, and the idea that each people belong to a territory would occasionally be invoked in the arena of politics. Nevertheless, it is generally acknowledged that, strictly speaking, "national consciousness" cannot be traced back to that period.[93] Nor can it be traced to the Middle Ages, when individuals saw themselves as primarily linked to a province, region or city without wider subjective links, except for religious ones. For this reason, most scholars of nationalism place the emergence of national consciousness in the eighteenth century.[94]

Gellner has developed an interesting functional account to explain this shift. Nationalism, in his view, is not the result of emotional excess or ideological aberration; rather, it is firmly rooted in the different structural demands of modern industrial society. Nationalism constitutes an external sign, as it were, of a deeper transformation in the relations between government and culture that were actually required by the process of industrialisation.[95] Gellner reaches this conclusion after an exhaustive

analysis of the evolution of agricultural societies towards industrialism. Very succinctly, the argument goes as follows:

The stability of the structure of social operations in agricultural and pre-industrial societies is incompatible with that of a modern industrialised society. In the latter, changes are of a radical and continuous nature, which requires occupational mobility from individuals. The division of labour and the evolution of technology both call for a rapid adjustment to changes and the development of some common skills. For this reason, the basic educational training promoted in an industrialised society tends to be generic and not directly linked to a particular professional activity as in an agricultural society. While the industrialised society is a society of skilled workers, the division between them is not so wide. People develop the type of general abilities that are needed to carry out other professional activities.[96] Education, therefore, becomes a fundamental element in these societies; yet, it needs to be standardised and can thus not be provided by local units or the family, only "by something resembling a modern 'national' educational system."[97] For this reason, Gellner thinks that the shift to industrialism was linked to be the era of nationalism, a period of readjustment where the political borders would tend to coincide with the cultural ones. In his view, it is not so much the fact that nationalism imposes homogeneity, but that nationalism reflects the objective need for homogeneity.[98] He recalls that feudalism in agricultural societies was not overly concerned with cultural and religious diversity as long as the taxes were paid. In contrast, the viability of a modern industrial state requires a highly standardised and centralised culture. To achieve this, education must become a central function of the state, instead of remaining in private hands. This, Gellner argues, is a precondition for the dissemination of a nearly official culture which, eventually, will be seen as a natural trustee of political legitimacy. It is only under these circumstances that—he claims—any challenge made to the territorial borders of political units that are seen as nations constitutes an outrage.[99]

This approach to nationalism helps to clarify why the building of modern states could not ignore culture. It also explains the need for a certain degree of cultural homogeneity without resorting to emotional or natural sources as the main roots of nationalism. Certainly, although nationalism worked as a catalyst in the liberal revolutions, the effective penetration of the national consciousness into the system of individual values did not take place overnight. Likewise, the term "nation" did not arise in the period of liberal revolutions either. A more lengthy analysis would be needed to capture the complex transformations that the meaning of this term has undergone throughout history, and this is a matter I shall not pursue here.[100] In any event, it is not so much the invention of a new word that is noteworthy, but the transformation of its meaning to encompass a political principle. What was new, in Miller's words, "was the belief that nations could be regarded as active political agents, the bearers of the ultimate powers of sovereignty."[101] When the universal democratic ideals blended with this emerging national ideology the seed was sown for the political order that revolutionary liberals envisaged. But, at the same time, the conceptual distinction between nation and state became progressively blurred, and this eventually influenced both post-revolutionary political habits and modern political thought.

As usually noted, a visible outcome of the historical link between nationalism and liberalism is the way in which the terms "nation" and "state" are often used synonymously. This practice has persisted until the present day, despite the distinction made in dictionaries and the awareness of many of their differing connotations. Thus, we speak of "nationality" in relation to belonging to a state, or of "international law" and of the "United Nations" with reference to institutions and organisations created by states. In the light of the historical connection between nationalism and liberalism, this terminological slackness should not raise any perplexity. Liberal revolutionaries understood that nations were the natural candidates for political self-government. The state was simply seen as the institutional representation of the will of a people. Hence, nationality acquired a distinctly ideological connotation.[102] Although sovereignty over a territory is a key element which distinguishes the state from other human associations (in addition, of course, to its particular objectives and the means used to achieve them, in the classical definition of Max Weber), it was inferred that its members were united by ethnocultural ties—a "brotherhood," in the expressive word used by Jay in the quotation above. Consequently, the legitimacy of the state came to be derived from its function of offering institutional support to the nation, which symbolised the loyalty, solidarity and fraternity among all the citizens of a political unit.

In sum, the wide acceptance that "sovereignty resides essentially in the nation"—as Article 3 of the French *Déclaration des Droits de l'Homme et du Citoyen* proclaimed—brought about a new political discourse that promoted equivalence between the "nation" and the "people belonging to a state," and between "nationalism" and "patriotism." This evolution, which was to radically change the structures of power that had previously existed, turned into what Habermas refers to as a double face of the notion of citizenship: the status of citizen amounts to recognising a previous, pre-political membership in the nation while, at the same time, it is a legal position defined by civil rights.[103] As regards territorial borders, their importance would continue to grow as the state's activity affected the ordinary life of its citizens. As a result, the nation-state was consolidated as the main political entity. Of course, the link between nationalism and popular sovereignty did not initially mean that "the people" should directly rule. Democracy and citizens' rights would only be gained after a long struggle against the privileges of the upper social classes—a struggle that is not yet over.

### *3.2. The Politics of Nation-Building*

As pointed out, the effective permeation of a "national consciousness" into the system of individual beliefs and values took time to happen. But what were the defining elements of the entity which, according to liberals, was destined to be the primary subject of political legitimacy? Albeit, etymologically, the term "nation" related to common origins, ethnocultural relations and affinity, as well as territorial integration, the transformation of nationality into a political principle led to the progressive loss of relevance of those objective characteristics in favour of subjective beliefs. Nations existed, as it were, when its members mutually recognised themselves as compatriots. While a common history, language, religion, ethnicity or territory were potentially

significant elements, none of them was indispensable. As Benedict Anderson famously put it, nations are "imagined communities."[104] According to Miller (whose concept of nation brings together the main elements identified by other leading theorists of nationalism), a nation is a historical community constituted by shared beliefs and mutual commitment among its members, connected to a particular territory and distinguished from other communities by a distinct public culture. Yet the *crux* of the matter, Miller says, has to be placed in the subjective notion of belief.[105] Similarly, Connor claims that what is essential in assessing whether a given group of individuals constitutes a "nation" "is not *what it is* but *what people believe is*."[106] Likewise, for Tamir, the crucial factor is the existence of a "national conscience."[107]

However, the return of nationalism to contemporary political theory does not consist of recuperating the ethnocentric concept of nation, but of assessing the civic version associated with the figure of Ernest Renan. Renan also stressed the relevance of subjective factors, showing that it was possible to find counterexamples for each of the objective criteria that were normally used to prove the existence of a nation (race, language, religion, community of interests, geography and so forth).[108] He then concluded that a nation is a soul, an spiritual principle ("une âme, un principe spirituel"[109]) shaped by a legacy of historical memories together with a present desire of continuing shared lives. Its nature is still intangible; one that is based upon the psychological ties which at the same time unite a people and differentiate it, according to the conviction of its members, from the rest of humankind. And since the most tangible element in this elusive picture is the consent of the present members, Renan famously formulated that a nation is "un plébiscite de tous les jours."[110]

In contrast to this view, the picture that the revolutionary liberals sought to project was mainly focussed upon objective connotations that lacked empirical support. Complex and multifaceted realities were obliterated for the sake of the artificial, and often coercive, recreation of the desired social unity. Thus, it is patently false that genuine ethnocultural homogeneity existed in America or France at the time of the liberal revolutions, as Jay, Hamilton or Sieyès tried to assert (they could only do so by ignoring a massive part of the population, such as blacks, indigenous peoples, linguistic minorities and so on). Nor is it true that territorial borders coincided with the existing cultural groups. As Kymlicka and others explain, in the case of the United States, the English settlers and their descendants constituted less than half of the population at the time of the revolution; and they were certainly not spread over the geographical territory of the present-day United States. While they were indeed dominant in the first thirteen colonies that formed the federation, a decision was made not to accept any other territory as a state unless non-Anglo-Saxon groups were outnumbered.[111] This goal was usually accomplished through drastic means, such as redrawing the political borders of the territory or enacting highly coercive policies of assimilation. For instance, following the occupation of Puerto Rico in 1898, forms of cultural suppression were undertaken by the new American authorities. English came to be, *de facto*, the official language of the island, to the extent that it was the only language used by the military and civil administration. Although a law recognising the co-official status of both Spanish and English was passed in 1902, rapid assimilation was a central goal for the colonial administration for a long time.[112] Needless to say, these measures placed serious limitations on the status and rights of citizens who did not speak English.

Similar policies were adopted to incorporate new conquered regions into the Union.[113] In relation to indigenous peoples, the means of cultural assimilation were too often extremely coercive and brutal. The frustration arising from the resistance and slow pace of assimilation led the authorities to take further measures "to civilise" the perceived enemy. The Indian Peace Commission, created in 1868, concluded that the best way was to accelerate the process of linguistic assimilation on the basis that, through language, customs and thoughts would be similarly moulded.

Given the successive waves of migration to North America over the centuries, it would be obviously incongruous to define the current national groups in the United States or Canada on the basis of race or common descent. For this reason, contemporary defenders of liberal nationalism emphasise that the nation cannot be defined in these terms.[114] In fact, empirical realities were never seen by the state as an impediment in the process of enhancing the unity of traditions, languages and cultures and in adopting assimilationist policies. *E pluribus unum* was the motto. Despite the different models of integration adopted by France and the United States, which function at the rhetorical level, the political practice shows that the goals of the "melting-pot" were not as opposed to those of the republican model as it is commonly assumed.[115] In contrast to the dominant version of the spontaneous mixing of all cultures, "the 'pot' into which everybody has been supposed to melt is white, Anglo-Saxon, protestant, male."[116] *Ethnos* and *demos* have thus never been radically separated, not even in countries such as France or the United States, where this division is part of the official history.

As for the geographical and social circumstances before the emergence of the nation-states in Europe, the conclusion would be similar. Any rigorous historical investigation into the formation of the European nations during the nineteenth century would surely show that, as in North America, pre-existing ethnocultural diversity was deliberately ignored in favour of different policies of nation-building aimed at fostering an essentialist form of the national identity; hence, national consciousness was, for the most part, based on myths and arbitrary conventions. Probably the French model of republicanism has been more influential in Europe, especially if we contrast it with the ethnic model of the German *Kulturnation*. Nevertheless, even here the official discourses masked the ambivalence between the proclamation of universalism and a concept of national belonging that, in reality, involved a rather chauvinistic idea of what it meant to be French. Undoubtedly, the drafters of the *Déclaration des Droits de l'Homme et du Citoyen* must have known that "the people" from which they derived political legitimacy comprised not only the French, but also the Alsatians, Basques, Bretons, Catalans and Occitants. In fact, at the time of the Revolution, the French language was used by a rather small proportion of the individuals that were about to be incorporated into *la nation*.[117] As Eugen Weber notes, the Jacobin logic led to the official imposition of a certain model of "civilisation" that predominated over the cultures of the different regions and colonies.[118]

A brief précis of the voluntary component in the linguistic factor itself might be illuminating. It is normally observed that, in general, it is not possible to speak accurately of choosing an official language until well into the nineteenth century. In previous centuries, as Latin began to decline, the successive establishment of the

different vernacular languages in Europe was a slow and gradual process that took place more or less unconsciously. This was certainly not a product of self-conscious language policies, such as those pursued later. It was official nationalism that shaped the conviction that languages were something like the property and instrument of identity of specific groups, which were somehow bound to hold a singular position, and a crucial authority, in the political arrangements. As Stephen May explains, "the requirement of speaking a common language is unique to nation-states and a relatively recent historical phenomenon,"[119] so the establishment of national languages was an artificial process "driven by the politics of state-making."[120] Thus, the emergence of the nation-state was characterised by both a lexicographic revolution and the implementation of a system of public education that, as Gellner explains, performed the function of including all citizens into a homogenised nation.[121] Civic education then masked what, in fact, was a national education. The liberal revolutionaries thought that a basic purpose of public education in one official language was to create a sense of patriotism and dedication to the nation.[122]

Subsequent European history can be viewed in the light of the spread of the revolutionary dogma that "sovereignty essentially resides in the nation." National sentiments were invoked in order to carry out the struggle for the unification of peoples divided under the imperial domains, as in the case of Germany and Italy, and the independence of others, such as Greece, Hungary, Cyprus or Malta. The new states were created in the image of the old ones and, like them, tried to impose a certain reading of their own history, traditions and customs, and to foster the myth of a glorious past and the illusion of a collective destiny.[123] Not only was the diffusion of a single language and culture crucial to achieving this goal, but a certain degree of collective amnesia was also necessary. Forgetfulness, Renan also wrote, is essential in the creation of a nation: it is necessary that all citizens share some things in common and have forgotten many others.[124] He argued, as an example, that every French citizen should forget episodes such as the Massacre of St. Bartholomew's Eve.[125] Anderson draws attention to the expression used by Renan (*doit avoir oublié*) denoting a deliberate absent-mindedness rather than a spontaneous one. For while it was certainly unnecessary to narrate to the public what had happened on St. Bartholomew's Eve, it was assumed that these incidents of fratricide could not be featured as essential elements of the national identity. Hence, Anderson points out that "having to 'have already forgotten' tragedies of which one needs unceasingly to be 'reminded' turns out to be a characteristic device in the later construction of national genealogies."[126]

This apparent paradox in Renan's argument illuminates vividly the state's systematic campaigns to construct a particular collective biography. Of course, this process is not peculiarly French: it has taken place along similar lines in all states. Thus, for example, a public educational system works day after day to teach young Spaniards to remember—and forget at the same time—the civil war. If, in general, the citizenry in Spain knows little of its Muslim and Jewish past, despite the dominating influence of these cultures over hundreds of years, it is because the Muslims were defeated in the "Reconquista" and the Jews were definitively expelled in 1492. According to the official myth, after this period, "there were no Jews in Spain" and,

henceforth, the popular tradition in Spain highlights myths and legends of heroes that symbolise the crucial role of Catholicism in Spanish national identity.[127]

In sum, despite existing diversity, all states have tried to promote the identification of its citizens with a single official language and culture, often through extremely coercive means. The following passage of Tamir's *Liberal Nationalism* captures the essence of the discussion so far:

> The concern with the deliberate creation of a nation is guided by a certain idea of what a nation is supposed to be. The inherent contradiction between the claim that nations are natural communities shaped by history and fate and the concept of nation-building is immediately apparent. In order to mask this tension, nation-builders compulsively search for 'ancestral origins' to which the new nation might 'return', cling to even the faintest testimony of historical continuity, and advance patently false claims locating the nation's roots in a distant past.[128]

### *3.3 The Liberal Justification of Nationalism*

It could be argued that, even if the common official versions of the history of the distinct nation-states are biased, there are solid reasons to recreate the past so that the illusion of unity prevails over divergence, to accentuate the positive episodes, relegating into collective amnesia the shameful ones. In the recent history of Spain, for instance, it is possible that the suspension of the memory of a civil war and of forty years of dictatorship were indispensable in order to begin the democratic path with some assurance. In France, once World War II was over, De Gaulle restored the nation through the myth of the resistance. In some way, the Vichy period became a component of the unmentionable. Everybody had been part of the resistance; nobody had collaborated with the Nazis, nor had wanted Jews in French territory to be deported to Auschwitz. In her novel, *Memoires d'Hadrien*, Marguerite Yourcenar makes Emperor Hadrian express the following in relation to his origins:

> La fiction officielle veut qu'un empereur romain naisse à Rome, mais c'est à Italica que je suis né; (. . .). La fiction a du bon: elle prouve que les décisions de l'esprit et de la volonté priment les circonstances.[129]

Insofar as there is truth in the claim that fictions have a positive side, it would be premature to reject nationalism merely on the grounds that the processes of nation-building are incapable of resisting rational scrutiny. This idea, it seems to me, underlies the views of many contemporary defenders of liberal nationalism who argue that attempts to foster a sense of unity through nation-building policies were mainly driven by the interest of fostering other values, including democratic ones. According to this theory, two widely held convictions played a major role: the idea that a free government is only viable under conditions of cultural homogeneity; and the view that, where a choice has to be made, free individuals would prefer to live in their own cultural communities. In relation to the first statement, many liberals accepted, more or less explicitly, that two or more different cultural groups could not coexist within a single polity. As Hannah Arendt writes, "the breakdown of the feudal order had given rise to the new revolutionary concept of equality, according to which a 'nation within the nation' could no longer be tolerated."[130] On the one hand, political self-expression

was seen as a key concomitant of cultural self-consciousness. On the other, the nation-state was regarded as the best political structure to support democracy and prevent despotism by the majority. In his *Considerations on Representative Government*, Mill approached the problem of the relationship between freedom and nationality, maintaining that an essential condition of free institutions is that the borders of the state coincide with those of nationality:

> Where the sentiment of nationality exists in any force, there is a prima facie case for uniting all the members of the nationality under the same government (. . .). Free institutions are next to impossible in a country made up of different nationalities. Among a people without a fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.[131]

Mill argued that antipathy and rivalry between nationalities would create distrust towards the government. He was also concerned that, in a multinational state, the army could not perform its function effectively, since soldiers who consider part of the population as foreigners would have no scruples in fighting against them, as if they were the enemy.[132]

Therefore, on this account, nation-states are preferable because they provide a stronger bedrock for freedom. The reappraisal of this line of thought, and its importance within the liberal tradition, is among the main merits of liberal culturalism. Mill's argument cannot be considered as merely anecdotal. On the contrary, as Kymlicka explains in detail, other liberal philosophers during the nineteenth century and the first part of the twentieth century shared this perspective.[133] Hence, even with all its misconceptions and prejudices, the tendency in the liberal tradition has not been to relegate the cultural question to the private realm. Quite the opposite: the alleged need of cultural homogeneity was invoked to justify policies of assimilation of cultural minorities into the dominant national culture. Leaving aside the degree of coercion used to achieve this end (which hardly anyone would nowadays justify) commentators emphasise that the centrality acquired by the nation-state fulfilled a central function in the consolidation of democracy and progress in terms of social justice that should not be overlooked.

Indeed, Miller, Habermas and Taylor coincide in stressing that the nation-state made possible a new, more abstract, form of social integration, which became the foundation for a secularised model of political legitimacy.[134] Nationality provided a wider focus of modern self-identification for emancipated subjects, replacing feudal corporative links with ties of solidarity. Some repercussions of this transformation were positive. Above all, Miller writes, invented or not, "the historic national community is a community of obligation."[135] The identification with a nation facilitated the expansion of the boundaries within which individuals acknowledge special obligations towards other human beings. People came to perceive themselves as part of a long-term cooperation scheme that extended beyond their family, clan or region to include strangers—as long as they shared the same nationality. In this way, nationalism had the virtue of transforming the self-perception of individuals, linking essential aspects of freedom and personal well-being to the existence and prosperity of a national community.[136]

Nationalism also helped to advance modernisation and equality of opportunities. Recall that, in Gellner's view, mass literacy was a requisite for industrialisation, which

depended upon the availability of a labour force endowed with the level of technical training that only a general and standardised education could provide. Whatever the reasons were for adopting it, inclusive systems of public education contributed to lessening inequalities and made people more aware of their position in society and of their rights.

Other positive effects of the emergence of nationalism have been noted. As Tamir argues, however uncomfortable it might be for intellectuals to account for the importance of emotions in the reasons for action (not the *irrational* but the *non-rational*, as Connor rightly specifies[137]), their influence is crucial to making sense of some common practices in all states. Referring, in particular, to the role that the commemoration and worship of the dead plays in political life, she stresses that the willingness to risk one's own life for the state in moments of crisis conflicts with the powerful human interest in survival. In Tamir's view, this conflict can only be resolved by portraying the political community as a national community in which there are deep bonds that lead individuals to accept such demanding duties.[138] Recourse to the idea of an ancestral community that must be loved and deserves to be preserved, may be the only way of lessening people's natural fear of death.[139] Liberal morality, however, lacks a coherent account for situations in which individuals are ready to sacrifice basic goods. But Tamir claims that nationalism should be seen not as "the pathology infecting modern liberal states but as an answer to their legitimate needs of self-defence."[140]

The problem of individual self-sacrifice in extreme circumstances invites further elucidation. Take, for instance, democratic participation. Waldron has argued that each citizen has a duty of civic participation, which consists largely of the duty of ensuring that people "come to terms with one another, and set up, maintain, and operate the legal frameworks that are necessary to secure peace, resolve conflicts, do justice, avoid great harms, and provide the basis for improving the conditions of life."[141] Moreover, in relation to the extent of the demands involved, Waldron insists that this is not merely "a duty to do x," but a duty to do it *responsibly*. Participation, he argues, must be undertaken in such a way that it pays attention to the interests, needs and opinions of others and must not diminish, as a result, existing prospects of agreement and peace.[142]

This far we may agree with the argument. But what makes Waldron think that, as a matter of fact, individuals are willing to fulfil this duty of responsible participation? Put differently, what are the incentives for people in today's democracies to commit themselves to their fellow citizens and take their interests and opinions seriously? Liberal nationalists answer that some form of close attachment and feeling of belonging such as that provided by national sentiments is the precondition for exercising those duties. Similarly, the practicability of the deliberative aspects of democracy requires that participants in the public debate understand each other and this, in turn, requires a common language. Reflecting on this issue, Kymlicka and Straehle argue that national democratic forums normally ensure a more inclusive framework for participation and deliberation than international forums, as only a few people—usually elites—are sufficiently fluent in a second or third language.[143] Moreover, for Kymlicka, "democratic politics is politics in the vernacular."[144]

As regards social justice, it is also affirmed that the establishment and preservation of a welfare state requires a high degree of trust and solidarity among citizens: the broad co-operation necessary to implement social schemes depends very much upon them. Trust, as Annette Baier argues, implies granting another person discretion to affect our interests, which opens the risk of abuses from the recipient of the conferred power and, therefore, situate us in a position of special vulnerability.[145] That is why, generally speaking, we tend to trust our family or friends more than we trust strangers. Likewise, it could be argued that, at the collective level, trust tends to be guaranteed through ideas of national belonging. These are often essential for the fulfilment of many of the duties involved in welfare states, provided that most people make sacrifices on the basis of the expectation that others will act reciprocally in the future—for example, paying taxes to preserve a social security system.[146]

Based on these considerations, Miller argues that, in the modern world, democratic welfare states depend upon the kind of political unity created by a national identity.[147] Tamir also explains that, in the welfare state, the need to justify shared responsibilities and to create the necessary support for redistribution seems to require a community that shares "an ethos of a common past and a collective future."[148] Civic commitment, as a precondition to sharing goods and to committing to political life, is more likely to appear in cohesive societies where social relationships are built upon trust. So far, nationality has been a key element in extending the circle of solidarity to more abstract levels, thereby providing the basis for the specific types of relationships needed to preserve certain cherished values, democracy and social justice among them. This is the reason why nationality is often seen as the organising and mobilising principle of the modern state over the last two centuries. This reasoning can help to provide an understandable explanation for the centrality of nationalism even in an age of globalisation[149] as well as to account for some of the difficulties faced by proposals to supersede the national framework in an effort to expand social justice and eradicate huge problems such as hunger and malnutrition.

To the extent that the study of the nature of the relationship between nationalism and liberalism could bring a better understanding of these patterns, its relevance has been seriously underestimated in post-war political theory. Liberal nationalists attempt to remedy this shortcoming. For them, liberalism and nationalism are not only historically linked, but also more capable of being harmonised, against the common perception. Sharing a national identity, they claim, is relevant to the process of making some fundamental liberal values—such as equality and freedom—effective. Unfortunately, it is the xenophobic or violent face of nationalism that is often publicly revealed, making the headline news around the world. However, nationalism need not be driven by such inherently debased or anti-liberal forces. The stance set out above does not amount to a blind defence of nationalism; instead, it is possible to distinguish between more and less defensible versions of this phenomenon (in the same way that there exist defensible and indefensible versions of any other ideology). Although the virulence of some ethnic conflicts highlights the most negative aspects of nationalism, it should be recalled, as Anderson stresses, that nationality has also been able to generate love and sacrifice, providing the social ground in which both ethical and cultural values and goods relevant to democrats may take root.[150]

To recap, as the recent literature on liberal nationalism shows, culture and identity have been key elements in the construction of liberal democracies and in the works of major liberal thinkers. Ethnocultural factors have played a central role in the political praxis and, in general, liberal states have not adopted the "hands-off" attitude to culture and identity that underlies the tolerance approach.

### *3.4. The Awakening of Minorities*

The formation of democratic states has been historically linked to the ideal of nationality, which was identified with a common cultural substratum; as explained above, where cultural homogeneity did not exist, it was actively fostered through a standardised education, public symbols and also different degrees of public coercion. Official nation-building programmes were mostly designed to assimilate cultural minorities, either territorially concentrated or not. To be sure, the options most commonly envisioned were either assimilation or the redrawing of borders, rather than the recognition of any type of special status for these groups. This appears as a natural derivation of the previous reasoning and, faced with the dilemma, most states tried to foster unity through encouraging a common national consciousness, since the rearrangement of borders was not always feasible or wanted. This required, in practice, some tangible elements. The greater the cultural diversity, the greater was the perseverance in propagating a picture of homogenous history and culture (in order to establish the "existence" of the nation). The goal was to generate among citizens a feeling of self-identification with certain public emblems and to foster a common vernacular language.

Mill himself was aware of the fact that perfect congruency between state and nationality was difficult, especially where different national groups were mixed or simply geographically distributed within a territory.[151] His argument for assimilation, however, was overtly paternalistic and ethnocentric. Like many other thinkers of his time, Mill differentiated between "great nations" (such as France, Italy, England, Spain or Russia), which he saw as "more civilised," and "small nationalities" (Basques, Galicians, Bretons, Scottish, etc.) which he considered to be inferior and backward. For this reason, he argued that it was undoubtedly best for the latter to assimilate and become part of the former.[152] This sort of prejudices led other nineteenth-century liberals to support the political independence of what they considered "great nations." Usually, the moral case for the domination of one culture over "inferior" others also resorts to the existence of certain universal values which all groups have the duty to uphold. This discourse, as Luis Villoro says, covered colonialism with a mantle of benevolence. As reflected in Mill's writings, the dominant is portrayed as the bearer of a "universal" message whose revelation to other peoples constitutes an undeniable good that justifies the usurpation of power.[153]

Needless to say, most minority cultures did not share these views. Nation-building programmes did not always succeed in obliterating diversity. In many states, territorially concentrated minorities strongly resisted the pressures toward assimilation into the dominant culture blessed as "official." As Kymlicka explains, these were typically national minorities that had historically exercised some sort of self-government, but were forcibly integrated into the state as a result of conquest,

colonisation or because of the division of territories among different empires.[154] Many of these groups slowly became politically mobilised along lines similar to those that had legitimised the emergence of the nation-states, largely because the appeal to the principle of nationality was seen as the appropriate way to succeed in their demands of autonomy and self-determination.

Political sociologists typically discern several stages in the awakening of a "national consciousness" in cultural minorities. Initially, the contrast between their identities and the institutionally propagated one produces discontent. Thus, against what is sometimes assumed, the increase in the contacts between groups does not necessarily lead to a perception of the factors that unite them, but to the confirmation of their differences and, eventually, to the awareness of both exclusions and privileges. While self-consciousness is a key prerequisite of ideas of nation and nationality, this subjective component is more likely to arise when there is a clear perception of difference. As Connor puts it, "the conception of being unique or different requires a referent, that is, the idea of *us* requires a *them*."[155] The more a group suffers from progressive marginalisation in the decision-making processes and institutional representation, or through lack of security or the economic deterioration of their region, the more uneasiness increases. Montserrat Guibernau argues that, typically, the expansion of a national consciousness commences with the activities of small groups of intellectuals who fight to restore or maintain their language and culture.[156] This phase is distinguished by the fact that the activities conducted by the elites have few possibilities of being successful and are usually carried out secretly, on the outer limits of legality. Nevertheless, a form of "nationalism of resistance" emerges that attempts to pursue simultaneously their own nation-building project in order to seek some sort of communal autonomy on the basis of a power-sharing arrangement. The existence of competing forms of nation-building expressed in political terms creates tensions, especially since the majority perceives cultural minorities as disloyal and threatening. Faced with this reaction, these groups progressively come to perceive themselves as "nations without a state," and engage in the enterprise of "liberation," a struggle aimed at obtaining, or regaining, their own political institutions or even to seek secession. This road is often a difficult one and, irrespective of the outcome, it involves exclusion and intolerance, and normally represents a loss in terms of status and respect. In any event, as a result of minority nationalism, the traditional identification of states with nation-states becomes controversial.

Along these lines, it can be argued that violent disputes concerning nationalities such as those in the Basque Country and Northern Ireland can be seen as a delayed consequence of processes of nation-building that led to historical exclusions.[157] Tamir sees the rise of minority nationalism as a rather inevitable phenomenon, given that the links between universalist democratic ideals and the national ideology only reflected the socio-political powers of the time.[158] Veit Bader uses the term "chauvinistic universalism" to refer to this ideological strategy consisting of universalising the particular.[159] In this situation, cultural minorities face a dilemma: they either assimilate and lose their own identity and culture (gaining, perhaps, higher consideration and influence in the political sphere); or they mobilise and struggle to seek some form of recognition of the rights and powers associated with autonomy and self-government (but remain marginalised from the major institutions of society in the meantime). We could

find examples of both strategies. In France and Italy, for instance, policies of assimilation had quite successful results. But in other European countries, such as the United Kingdom, Spain or Belgium, a number of minorities strongly resisted nation-building policies. In North America, a similar response occurred in Quebec and Puerto Rico, as well as with the indigenous tribes subsisting in the continent.

The case of immigration raises specific issues that will be taken up with more detail in Chapter VI. Generally, though, most immigrants seem inclined to integrate (and should integrate, according to some opinions) into the predominant culture of the host society, especially to the extent that the decision to migrate has been adopted voluntarily.[160] Yet it is unclear whether the situation of most migrants can be understood in this voluntarist pattern, and, in any event, there are significant exceptions to it, such as refugees and African Americans that, as Kymlicka notes, normally strongly object to assimilation into another culture.[161] As a matter of fact, the geographic dispersion of immigrants of the same origin in their new country makes it difficult to formulate claims with nationalistic undertones. Besides, the most recent immigrants do not have the resources and organisation to mobilise along political lines. Even if this is possible, they are usually more interested in fighting against discrimination, poverty and social subordination, rather than in seeking more radical forms of identity recognition and autonomy. As a result, the debate on the rights of ethnic minorities does not generally revolve around building separate institutions or political autonomy. Rather, the dispute is largely focussed on the demands of recognition of different ethnic origins, cultures and backgrounds *within* the common political institutions.

In short, the politicisation of ethnic minorities has primarily to do with their opposition to a certain model of integration, namely pure assimilation, rather than to integration *per se*.[162] The increasing scale of immigration in Europe makes it likely that demands which to-date have been associated with societies that had historically experienced high percentages of immigration (such as Canada, the United States or Australia), will now raise similar controversies in the Old World. These controversies can thus no longer be considered part of the "American exceptionalism," to borrow Walzer's expression.[163] In countries like Spain and France, where the majority has traditionally set high standards for inclusion through assimilation—aiming at bringing in immigrants without incorporating their cultural differences—the transformation of the society is already having a huge impact on the conventional forms of envisaging education, religion, commitment to the state and toleration.

As mentioned, immigrant patterns of mobilisation and claims will be addressed in more detail later on in this book. For present purposes, it is relevant to note that it seems logical that the triumph of a monopolistic idea of the State that bestows universality only to one nation and denies political identity to other culturally discrete groups, would inevitably lead, as it did, to political mobilisation by those who suffered the burdens imposed by this idea. And yet, as indicated in the introduction, the idea that cultural diversity involves no significant challenges for integration and justice in democratic states has been a widespread, even if implicit, supposition. This is, in part, the reason why the Western political tradition has been, until very recently, silent on issues related to minority rights. As Kymlicka notes, contemporary liberal thinkers such as Dworkin and Rawls commonly assume an ideal model of the *polis* in which states are nation-states with an homogeneous culture and citizens share a

common descent and language.[164] This is the reason why he shares Tamir's view[165] that most liberals are, in fact, liberal nationalists.[166]

However, this predominant model of the *polis* obscures some forms of discrimination involved in the domination usually exercised by the cultural majority. This is a central point also emphasised in recent literature on liberal nationalism, which argues that the progressive spreading of a liberal political culture is not sufficient to bring about the kind of social and political integration required in a multicultural polity. Pointing to this fact, Margaret Moore has explored some of the main misconceptions inherent in the Enlightenment tradition and what she calls its "dream of a cosmopolitan global culture."[167] In particular, Moore stresses that the reemergence of minority nationalism is not the product of an irrational quest to counteract the globalisation of the economy and the slow erosion of certain conceptions of absolute sovereignty and the nation-state model in the post-modern era. Rather, recent transformations have opened up new political spaces in which national minorities and other non-territorial identity groups can operate and flourish. For instance, Catalonia and Scotland could then progressively become less dependent on their host states than on new developments in the supra-state sphere, and this might renew the vitality of minority nationalism.[168] Indeed, minorities now seek new forms of recognition as self-governing units within international political institutions. Perhaps secessionist claims will become gradually meaningless in a context where states have already lost many of the responsibilities that traditionally justified their very existence. Nevertheless, the present age opens the door to new forms of managing ethnocultural conflict and accommodating national minorities within emerging international regimes with more complex and fragmented systems of authority.[169]

It is not possible to discuss here the relative strengths and weaknesses of the argument outlined. But, hopefully, enough has been said to support the general point that there are several elements of the tolerance approach to diversity that can be seriously disputed; key among them is the claim that state neutrality, or "benign neglect," has historically been a central feature in liberal theory and practice. Even if this approach has been present in political rhetoric and in some philosophical works primarily concerned with freedom of religion, the practice of nation-building shows a clear involvement of liberal states in the realm of culture. This fact is crucial for understanding the roots of contemporary struggles for self-government and recognition.[170] In what follows, I will seek to draw some lessons from the discussion so far as regards the coherence of the tolerance model.

## 4. ILLUSIONS OF NEUTRALITY AND THE TOLERANCE MODEL

### *4.1. State Interference and Cultural Domination: Past and Present*

Faced with minority nationalism and the demands of other non-territorial cultural groups, most states (democratic and non-democratic) have reacted similarly. They have attempted to dismantle these movements and promote the assimilation into the dominant culture in order to conflate the nation and the state.[171] A cursory glance at political developments over the last few centuries shows that the construction of the nation-state involved substantial inconsistencies of far-reaching effects. For example,

there was a contradiction between the doctrine of equal freedom and practices like women discrimination or school segregation. In relation to national minorities, some European countries such as France or Great Britain were ready, in the later stages of the colonial period, to grant some of their colonies independence, but, in general, governments were not inclined to allow a democratic process of self-determination within their territories.[172] Moreover, some leaders of the so-called "liberation movements," once they had seen their aspirations to independence fulfilled, adopted the same nation-building patterns to assimilate their own internal minorities. This inconsistency can be observed in the history of the new African and Asian countries after the decolonisation phase, and more recently in Eastern Europe where many of the new governments have tried to eradicate any aspirations to autonomy or independence by minority groups.[173]

Of course, the means and the underlying public justifications have changed over time. In the past, state coercive policies imposed on minorities were justified through openly ethnocentric and paternalistic arguments; today, most citizens in democratic states would reject both those policies and this justification. Increasing awareness of the value of human rights as well as of the binding nature of democratic constitutions imposes severe restrictions on homogenising campaigns. To the extent that states want to discourage cultural minorities from pursuing their political aspirations, they cannot do so by simply restricting their members' rights and freedoms. Hence, many of the old coercive strategies based on arbitrary force would now be regarded as anti-democratic and unconstitutional. Nevertheless, the pattern described in the earlier section cannot be merely regarded as part of a contingent political praxis. As was pointed out, some of the most influential liberal philosophers of the nineteenth century supported those policies. And the cultural essence of states was key in delimiting and defending the legitimacy of political borders. The voluntarist aspect that, according to Renan, defines a civic idea of nation has thus been relatively absent in the building of today's democracies.

This conclusion allows for a first criticism of the tolerance approach: namely, that this approach requires an understanding of liberalism in ahistorical terms, one which ignores the fact that nation-building and not "neutrality" has been the rule in the past. Against this objection, defenders could respond that the process of nation-building belongs to history and that, regardless of the relative achievements or failures in the promotion of cultural homogeneity, this goal no longer represents a priority for present-day democracies.[174] But this claim would be largely groundless, as most states continue to accord fundamental importance to the cultural realm. This is reflected in the political discourses that justify legislation in matters of immigration and naturalisation, education curricula, official language and other policies such as financial support for preserving the cultural heritage (which is frequently referred to as the "national" heritage). Similarly, the power of symbols (flags, monuments, "national" anthems and holidays) should not be underestimated; through them, cultural forms are invested with an inter-subjectively shared meaning. Thus, politicians strategically resort to them with the aim of managing processes of social interaction, transmitting the message that states are historical communities, not merely voluntary associations. As Geertz emphasises, symbolic structures have a cognitive dimension in that they contribute to structuring the way people think about social life.[175] Some

of these public symbols representing the state's history can become tokens for perpetuating the domination of cultural majorities. In this case, conflict is likely to arise as minorities disturb or question their worthiness or meaning.

The opinion of culturally discrete minorities will have little influence on decisions concerning the cultural sphere. In a democracy, except for individual rights, the majority decides on all matters of public relevance. For this reason, minority nationalism has evolved in an essentially defensive form.[176] Demands for group rights are generally intended to counter the bias in the cultural aspects of government policies. Under such circumstances, the lack of identification with the state, and the perception of it as an alien institution, often facilitates the growth of a strong sense of community and solidarity among the members of minorities who oppose strategies of cultural hegemony. These links strengthen different forms of minority nationalism aimed at a redistribution of political agency.[177] As I will emphasise in the next section, these movements often bring cultural imperialism and majority domination to a halt, introducing more egalitarian relations between the different nations coexisting within a state. This has certainly been the aspiration of the nationalists in Quebec, Catalonia, Flanders and Scotland where nationalism is linked neither to the preservation of essentialist pre-modern values, nor to the ethnocentric affirmation of their superiority over other cultures. As Taylor explains in the case of Quebec, the new nationalism that emerged in the 1960s aimed neither to isolate this Canadian province, nor to defend a civilisation based on the primordial value of the French language and Catholicism. The chief purpose was to restore the central role of the Quebecois in the transformation of their society, since, at the time, economic, linguistic and legal rules were being established by the English-speaking community, which was both financially and politically dominant. French–Canadians were thus disadvantaged; they were in a similar position as immigrants, which are expected to master another language and conform to another way of living, forgetting their own background, if they want to succeed.[178]

The same explanation applies, *mutatis mutandis*, to the other groups that have been mentioned in the United Kingdom, Belgium and Spain. In the New World, the historical claims of Mexicans in the South West of the United States have been also primarily aimed at averting the impact of the Anglo-Saxon cultural and financial imperialism, which has made these minorities feel like "foreigners in their own country."[179] Like the Quebecois, they have alleged that, historically, the "immigrants" were in fact the North Americans. More recently, the debate on the political status of Puerto Rico provides a further exhibition of the extent to which "Americanisation" through language is still an essential objective in the United States.[180] Leaving aside the complexities related to the division of Puerto Rican society on this issue, the linguistic factor is regarded as essential in this controversy. From the United States' perspective, Puerto Ricans should give up Spanish if they wish to integrate as a full member of the Union, while on the island the predominance of this language is largely regarded as non-negotiable.[181] Granting special linguistic rights or revising the terms of the federation in order to accommodate this diversity seems to be out of the question. Moreover, the decision to admit a culturally different state into the federation seem to be as important for the United States as for Puerto Rico, since the admission of new states has always been guided by an express or tacit condition related to English as the common language.[182]

One could argue that, in situations such as the one described, the official interest in cultural homogeneity has been largely expressed through attempts at linguistic assimilation, and language is only a means of communication; so, to pursue an official language policy unsupportive of linguistic pluralism does not necessarily lead to cultural assimilation, since people could still use their native languages in the private sphere. But this is an implausible statement. As a number of socio-linguists and political theorists have persuasively argued, cultural survival in modern societies strongly depends upon whether the language that can transmit it is used in the public domain. A key determinant in this sense is, as Kymlicka puts it, whether a culture's language "is the language of government," and, especially, the language of public education, since this will guarantee "the passing on of the language and its associated traditions and conventions to the next generation."[183] Since the regulation of the public sphere has an inevitable linguistic dimension, a duty of non-interference by the state cannot be the answer to accommodating the interests of minorities. In other words, it is not sufficient—as some sort of linguistic *laissez-faire* derived from the tolerance model might suggest—to oppose state intervention in the use of minority languages in the streets, homes, in private correspondence, in names and surnames or in civic associations. As Stephen May compellingly argues, apolitical and ahistorical approaches to language often take the "state" languages (as the "official languages") as a given, without questioning how they came to be accepted as dominant and legitimate nor addressing complex issues related with the advantages that members of the dominant language group enjoy in crucial areas of administration, politics or the economy.[184]

Linguistic claims thus raise far more complex problems than whether or not people should have certain linguistic rights derived from their individual rights to, namely, privacy or freedom of speech.[185] In addition, most people value their mother tongue not only instrumentally, as a tool for communication or as a means for political participation, but also intrinsically, in Réaume's words, "as a marker of identity as a participant in the way of life it represents."[186] Languages represent for people "a repository of the traditions and cultural accomplishments of their community."[187] In fact, the reason why most states have given prominence to their linguistic policies is that they have understood that language, rather than being just another cultural element, carries and structures thought: "it is through language that we experience the world and [have] the simple pleasure to be [ourselves]."[188]

In short, the impact of decisions aimed at suppressing linguistic pluralism from the public sphere should not be underestimated. Language, culture and law have deep reciprocal relations. Because of its potential to impinge on the institutions of cultural minorities and debilitate them, most states accord great importance to linguistic policies. Of course, there are other more coercive and direct means to influence the consolidation of a particular culture. Some states promote the settlement of members of the majority culture—or new immigrants—in the geographic area that has been traditionally occupied by a national minority, as indicated earlier. This and other policies—such as redrawing internal constituency boundaries to provoke the division and disempowerment of ethnocultural groups[189]—have been deliberately used in order to weaken the organisation and structure of the group, reducing it to a minority in their own traditional territory.[190]

As the discussion so far has hopefully made plain, the tolerance approach fails to recognise both the historical trends and the present practices of various liberal democratic states in relation to nation-building. Perhaps recent political developments point to a modest reversal of traditional assimilationist policies; especially, if we take into account that some of the demands of both national minorities and immigrants are being increasingly recognised in some states. Thus, Spain, Belgium and the United Kingdom, among others, have adopted federal formulas with the specific purpose of accommodating diversity and granting some form of territorial autonomy to their national minorities.[191] Both as a theory and as an institutional arrangement federalism implies the territorial allocation of power.[192] Given the internal pluralism of those states, the redistribution of political agency is emerging as the best way to make compatible the common aspirations of the state and the preservation of the interests of minority cultures. This increasing trend towards the adoption of federal or quasi-federal forms of government could thus be interpreted as a sign of the increasing acceptance that cultural diversity should be accommodated rather than suppressed.

In relation to linguistic pluralism, the increasing valuation and public recognition of minority languages is worth noting as well. In fact, official multilingualism is now the rule in most democracies. In Europe, even Italy has opened the door to the use in pre-primary and primary schools and, in some cases, in deliberation of local assemblies (city councils) of eleven languages other than Italian.[193] The European Union and its institutions are also seeking to transmit the image of an inclusive multilingual supranational polity that supports and sustains multiple languages and identities, since its legitimacy depends very much on its inclusiveness in terms of enhancing a multitude of attachments and identities.[194]

But even if a trend toward the recognition of cultural diversity (at both the domestic and the international level) can be perceived, it remains unclear whether this evolution marks a substantial change of perspective concerning ethnocultural justice. It could simply be interpreted as a modification due to increasing pragmatism, rather than a sign of the progressive recognition of the unfairness of previous ways of managing diversity. In any event, this is a difficult issue that I shall not pursue further. However, note that, if the more realistic account was correct, the recent evolution would not necessarily show the increasing acceptance of the legitimacy of cultural claims or, generally, of group rights. It could simply mean that, since states cannot resort to the old means of cultural suppression (due, above all, to the constraints imposed by basic standards on human rights) a pragmatic approach needs to be adopted for the sake of peace or security, rather than to honour certain ideals of justice.

### *4.2. Beyond History: The Tolerance Approach as an Ideal?*

Despite the evidence that liberal states in general have not been, nor are, neutral with respect to culture, supporters of the tolerance model could still argue that this claim does not impinge on the moral ideal that is at stake: while historical experience and current practices show that liberal states do interfere in the cultural realm, they *should* avoid this intervention. The policies and practices described so far would thus be simply unjustified. The question remains, consequently, as to whether, from a liberal

perspective, tolerance still provides the best basis for designing political institutions in multicultural states.

The answer, I think, is negative; especially if we take the tolerance model as implying the idea that, in principle, the state should adopt a "hands-off" approach to culture. Let me spell out the main arguments in support of this thesis. First, it is important to realise that the link between liberal government and intervention in the cultural realm is not merely contingent but necessary, as it is impossible for the modern state not to make decisions in this sphere. Kymlicka puts particular emphasis on this point that, as will become clearer in the next chapter, occupies a central place in his theory.[195] If we assume this, then the analogy between religion and culture, so often invoked by defenders of the tolerance approach in their call for state abstention in cultural matters, is particularly unfortunate. For while it is possible to imagine a completely secular state, no political structure can be entirely "acultural":

> [M]any liberals say that just as the state should not recognise, endorse, or support any particular church, so it should not recognize, endorse, or support any particular cultural group or identity. (. . .) But the analogy does not work. It is quite possible for a state not to have an established church. But the state cannot help but give at least partial establishment to a culture when it decides which language is to be used in public schooling, or in the provision of state services. The state can (and should) replace religious oaths in courts with secular oaths but it cannot replace the use of English in courts with no language.[196]

Decisions, indeed, must be made concerning the content of education, the language that must be taught in schools and used by the government and the public media, the policies of immigration and citizenship, the distribution of electoral boundaries, public holidays and symbols, etc. Whenever the criterion is in the majority's interest—which will normally be the case given the pressures for it to be so—minorities will probably end up being largely ignored. In addition, as indicated above, cultural and linguistic habits always require, in order to survive in the modern world, institutional presence and therefore, defenders of the tolerance approach—especially those who, like Galston, stress the value of diversity—should be concerned with the outcome of the strategy that they defend.

Hence, the view that members of cultural minorities ought to be able to develop their interests in a context where the state plays a passive role is a rather implausible one. This is, above all, because modern states can hardly be portrayed (as in Kukathas' theory) as mere associations performing basic regulatory powers that do not need to affect cultural communities choosing to remain at the margins of society. Liberal democracies today play a strong role in the distribution of social goods.[197] The state is no longer a police state; instead, it intervenes by making key decisions in the economic and cultural realms. Hence, to picture the coexistence of different identity groups in multicultural states in terms of voluntary associations, as the tolerance model tends to do, involves high costs for cultural minorities that have no influence in the political sphere and, more generally, in the configuration of the public realm. Even if *laissez faire*, instead of cultural assimilation, became the explicit policy as regards cultural minorities, this could still lead to a *de facto* assimilation of members of these groups or to their progressive marginalisation. After all, state laws, practices, symbols and institutions have been shaped by the historical dominance of the

cultural majority, and this inevitably results in the perception that they are the property of this group. Thus, an analysis that takes no account of how particular states and cultural groupings have been formed is misplaced, leaving unanswered fundamental questions of legitimacy.[198]

A variation of the tolerance approach could endorse this argument but still insist that the duty to realise the interests of cultural minorities rests with the communities themselves, as free associations—that is, minorities could pay for what they want and the state should refrain from interfering with their preferences, as Comanducci suggested. Even if we acknowledge the brutality of the coercive policies intended to assimilate cultural minorities that were adopted in the past, the situation today in most liberal democracies—say, for instance, of predominance of one language—cannot be attributed to an *explicit* intention of discriminating minorities. Hence, in this view, members of minority cultures are free to choose between preserving their cultures and languages and integrating in the wider culture, and the state should remain neutral in this respect—i.e., without interfering through helping those who prefer retaining their cultural identities. Thus, for example, minority language speakers should have the real opportunity of learning the majority language or else remain attached to their languages at their own cost. This cost would include possible constraints on social mobility and market disadvantages.

There are several problems with this position. Most obviously, there is a problem of consistency and double standards. As May rightly points out, in discussions over minority languages and other cultural claims, it is common to picture them as grounded on an irrational preference (based on sentimental reasons) of preserving traditions and cultures, even if this represents an obstacle to social progress and mobility. Instead, majority languages and cultures are accorded an instrumental value, since they provide individuals with greater opportunities. Therefore, "if minority language speakers are 'sensible' they will apply a version of rational choice theory and opt for mobility and modernity via the majority language."[199] If, on the contrary, they choose to keep their own languages they can only be regarded as "happy slaves."[200] Brian Barry, who can also be counted as an associationist liberal,[201] makes an argument along these lines when he discusses the issue of language. Throughout his work, the predominance of certain languages as official ones seems to be taken as an inevitable and unproblematic fact (omitting the historical processes that have led to the hegemony of certain languages) and praised for its instrumental value, since mastering the official language is a condition for full access to employment and public services. In contrast, when it comes to assess the case of the Welsh language, he is sympathetic to the complaints of English-speaking parents that oppose compulsory instruction of Welsh in schools. In his opinion, the labour market advantages created by local authorities for those who have educational qualifications in Welsh discriminates English-only speakers.[202]

But in addition to the problem of consistency, this account suffers from two other weaknesses. On the one hand, it wrongly construes the position of minorities as if they wanted a *plus* that the majority does not already enjoy: in the Welsh example, the right and capacity to live and work in their own language. But here, the state cannot be neutral merely by avoiding to endorse demands of group rights of minorities, for it is already involved in promoting the cultural rights of the dominant group in its

public policies (policies, by the way, that are normally partly funded through the contributions of cultural minorities). In this way, from a liberal egalitarian perspective, the previous account is also misguided because it overlooks the fact that cultural minorities face a singular disadvantage not shared by the majority. As Taylor argues with regard to the case of language, if a society has an official language "that is, a state-sponsored, -inculcated and -defined language and culture" in which both the economy and the state function then this is an enormous gain for the native speakers of this language and the culture associated with it. Hence, "[s]peakers of other languages are at a distinct disadvantage."[203] For this reason, the idea of resolving the demands of minorities in the private realm is unsatisfactory. If we accept that, in our contemporary world the separation of state (or law) and culture is unfeasible, then the requirements of a "free cultural market" would not be met, given that not all languages would compete under equal conditions.

Moreover, in an instrumental account of the relevance of languages and cultures, such as the one that defenders of the perspective just sketched seem to accept, the more consistent conclusion should be to reject entirely the morality of state official languages in the increasingly globalised world that is ours. Think of the EU context, for instance. According to the argument above, the fact that most Italians only learn Italian or most Spaniards Spanish represents an obstacle for their mobility and occupational prospects. So, for the same reason, shouldn't we recommend that Catalans learn English instead of Spanish as their main language (given that their range of opportunities will surely increase)? Unfortunately, opponents of group rights almost always assume as unproblematic state borders and cultural and linguistic hegemonies as historical *faits accomplis*, and hence they stop short of answering these complex questions.[204]

On the other hand, the problem of disentangling past and present and depicting the options of minorities in oppositional terms—in the case of language, as a choice between education in either the minority or the majority language[205]—obscures the existence of alternatives, such as rethinking the state in a more pluralistic way through the facilitation of multilingualism by recognising language rights[206] (or, more generally, adopting multicultural policies). This has been the pattern adopted, among other countries, in Spain or Canada, and bilingualism has become widespread in Catalonia or Quebec.

Finally, the tolerance approach ignores two other fundamental aspects. First and foremost, most cultural and ethnic minorities do not merely protest against restrictions of their "negative" freedom, which prevent them from developing their interests in the private sphere; rather, they complain that "they ought not to be seen as special, narrow and private interests while the culture and the ethnic affiliation of the majority is viewed implicitly or explicitly as representing the general interest."[207] As should become clear in the following chapters, the issue is not whether an immigrant of Arab origin in Spain should be allowed to dress her daughter in traditional clothes, sing songs in Arabic, or attempt to keep their original language at home. The relevant questions are whether her child may wear a *foulard* in public schools, whether she will be entitled to receive part of her education in her mother tongue, etc. Analogously, for national minorities, the problem is not whether their members can be allowed to fund private institutions to teach their history, language, traditions and culture in

order to pass them on to the next generation. The real challenge is whether public education, access to state institutions, or certain control of the media should be guaranteed also in their particular languages; whether they should have the right to choose their own public symbols (names of streets, flags, monuments) in their traditional territories, etc. In short, tensions arise when individuals wish to see their cultures reflected in the *public* domain, a fact that the tolerance model, with its emphasis on the privatisation of culture, tends to neglect. In this sense, this model cannot appear as a solution to accommodate the demands of cultural minorities.

This perspective—namely, that many cultural minorities are not isolationist groups but want to contribute to shaping public institutions as well as the public sphere of their own society—also raises serious problems for the central corollary of the freedom of association that most proponents of the tolerance approach see as central: the right to exit. Only few groups want secession from the state (a strategy that is often adopted as a last resort), but most would instead prefer to be recognised as equally able to contribute to common public institutions, so that these institutions would cease being the patrimony of the cultural majority and start reflecting the plurality of groups and cultures that underlie the superstructure we call "state."[208]

Secondly, it is important to note that the idea of choice plays only a marginal role in membership in the type of groups we are discussing, and this points to another shortcoming of most versions of the tolerance model. Contrary to what its advocates often assume, national and ethnic identities are not commonly chosen: normally they are acquired at birth and kept throughout all life. This is why Margalit and Raz contend that "membership [in these groups] is, in part, a matter of mutual recognition;"[209] it is "a matter of belonging, not of achievement."[210] This is another reason why confronting the conflicts of multiculturalism through the prism of freedom of association is problematic. To be sure, this is acknowledged by some proponents of the tolerance approach, but, in general, they are inclined to answer that if exit rights are guaranteed, an individual's remaining in the group should be regarded as voluntary.[211] Certainly, collective and individual identities are not unchangeable and some people (and entire groups) are able to reassess and revise their cultural ties;[212] yet usually this choice involves immense personal effort and adjustment. Moreover, assimilation into another culture not only depends upon one's own will or personal achievement, but its success often requires recognition by others (and there are no pre-established rules about how to achieve it). Indeed, even if a person expresses her preference to be British, meets all the formal requirements necessary to acquire British nationality, renounces her first nationality, speaks perfect English with the right accent and adopts local habits, there is still the chance that she will be regarded as a foreigner. In other words, even if we think she "deserves" to be identified as "one of them," perhaps "they" will never be able to see her in this way. Similarly, even if Hispanics in the U.S. choose to fully integrate into the mainstream society ("dissolving" their associations and giving up on their linguistic claims), this does not guarantee them that they will not continue being perceived as second-class citizens. The main point, however, it that, even in case they succeed, this still does not permit the conclusion that there is nothing wrong in forcing cultural minorities to make this difficult choice (even if indirectly, by not providing them with the same resources that the majority has to develop their own culture). After all, it would be unfair to force

people to pay the cost of changing circumstances that they have not chosen voluntarily.

Summing up, law and politics both have an intrinsic cultural dimension that should be acknowledged.[213] Terms such as "non-intervention" or "benign neglect" are thus misleading: they reinforce the illusion that, if only neutrality was strictly applied through a strategy of privatisation of cultural conflict, cultural minorities would be able to survive at the state's margins. Surely, if this were the case, there would be no need for a theory of group rights, or for a model of multicultural citizenship. But, for the reasons described, a general principle of non-interference by the state in the cultural realm is untenable in the modern world and can only lead, by omission, to privileging a *status quo* that, in most cases, only reinforces the privileges of the dominant group. If this is accepted, proponents of the different versions of the tolerance approach analysed before should be equally troubled by the results of their argument.

## 5. GROUP RIGHTS AND NEUTRALITY

Thus far, I have argued that the tolerance approach is unsatisfactory and suffers from flaws that are difficult to overcome. In addition, confronting the problem of cultural diversity in this way is an inadequate interpretation of the liberal tradition itself. I will develop this thesis more fully in the chapters to come, but before that, it is important to clarify that the rejection of the tolerance approach does not necessarily lead to a critique of the idea of state neutrality as such, but only to that of one particular understanding of what neutrality requires in the realm of culture. This section tries to recapture a different conception of this principle, and it seeks to show that, if interpreted this way, neutrality does not have to be at odds with group rights. In order to clarify the basis of my argument, I will start by examining in some greater depth the grounds for neutrality and its implications as regards state action.

### *5.1. Consequential and Justificatory Neutrality*

As I have stated before, neutrality is concerned with establishing the basis of the relationship between the individual and the state, and it thereby shapes the sphere of liberal politics. Liberals strongly insist that a central tenet of a liberal state consists in an entitlement of its people to a neutral concern from their government—that is, public institutions should treat individuals equally, regardless of their diverse conceptions of the good. Surely, liberals have supported neutrality for a variety of motives that are mostly linked to different understandings of the liberal state. Yet, in general, the emphasis on neutrality is motivated by an optimistic view about the possibility of agreement on the principles that should govern political institutions, notwithstanding the different, opposed, and even incompatible values, interests and conceptions of the good existing in society.[214] Such pluralism should be respected through a policy of neutrality precisely because it is a precondition for—and a result of—freedom, and, as will be made plain in this section, liberals have traditionally understood that protecting freedom constitutes the best way of respecting individuals. For this reason, in a liberal society, individual freedom prevails, even if some ways of life or ideas of the

good do not conform to, or are incompatible with, the predominant social morality.[215] From this derives a trait—anti-perfectionism—that becomes decisive in developing a theory of justice such as Rawls', that has the purpose of conceptualising a "well-ordered democratic society"[216] and of distinguishing it from a mere association of individuals. A liberal society is a complete order, Rawls says, in the sense that "it is self-sufficient and has a place for all the main purposes of human life."[217]

But beyond this common standpoint on political legitimacy, the implications of liberal neutrality are not straightforward (in part because, as we have seen, there are strong disagreements within liberalism as to how freedom should be interpreted). In politics, the clash between personal moral values or commitments is present in everyday disagreements and so the question arises as to what sort of restraints are appropriate in order for public institutions to fulfil their aspiration of equal respect. Confronting this issue, Raz points to a number of ambiguities that are often obscured in the debate.[218] In his view, a distinction should be drawn between at least two ways of conceiving the doctrine of neutrality. The first relates to the exclusion of ideals in the reasons for action. State neutrality allows individuals to act freely when realising their particular conceptions of the good in the private sphere, but only as long as they can do so without resorting to political means. Hence, the anti-perfectionist principle implies that the state should refrain from adopting legislative measures specifically aimed at favouring certain plans of life. This standard of impartiality precludes appeals to the truth or to the authoritative weight of particular conceptions of the good for justifying the adoption of public policy:

> Excluding conceptions of the good from politics means, at its simplest and most comprehensive, that the fact that some conception of the good is true or valid or sound or reasonable, etc., should never serve as a reason for any political action. (. . .) The doctrine of the exclusion of ideals claims that government action should be blind to all ideals of the good life, that implementation and promotion of ideals of good life, though worthy in itself, is not a legitimate object of governmental action.[219]

Raz ascribes this version of neutrality to Nozick,[220] but, as our previous discussion has made plain, Ackerman, Galston and Kukathas also seem to share this conception (even if for different reasons).

The second way of understanding neutrality is that of a "neutral political concern", where acting neutrally means, in Raz's words, "to do one's best to help or to hinder the various parties in an equal degree."[221] The basis for this conception is the understanding that, even if the constitutional framework is neutral—in the sense of granting all citizens an equal opportunity to pursue and revise their own ends in the private domain—the law does not require a complete exclusion of substantive moral ideals. On this understanding, ethical conceptions can be integrated into the wide range of reasons that are part of political and legal argument. Consequently, contemporary legal systems, and the realisation of their constitutional principles, are "the expression of a particular form of life, and not merely a reflection of the universal content of basic rights."[222] Nevertheless, neutral concern is satisfied to the extent that the appeal to moral beliefs or ideals by the government does not amount to favouring certain conceptions of the good life to the detriment of others. In other words, rather than requiring the exclusion of ideals from the justification of public

policies, the decisive point here is that these policies should not lead to endangering, or discriminating against, competing world views or life projects.

Following Kymlicka's terminology, we can call these two conceptions "justificatory neutrality" and "consequential neutrality" respectively.[223] An example may help to illustrate the different implications of both accounts. Suppose that a government is considering the legal reform of a statute in family law making it impossible for same-sex couples to marry and adopt children. The deliberation leads to a broader discussion about whether there are compelling reasons for upholding this and other longstanding laws targeting homosexuality. Justificatory neutrality would require that, regardless of the final decision, the grounds for making it do not hinge on comprehensive ethical or religious ideals that are claimed to be true. For instance, the reason underlying the government's interest in circumscribing personal choice should neither be the fact that homosexual conduct is socially condemned as immoral, nor that it is incompatible with the Christian tradition. Rather, public justification should be somehow connected to the kind of criteria related to what Rawls calls "political correctness" which, in general, lies behind the configuration of civil and political rights. The extent to which the resulting legislation can qualify as "liberal" will thus depend on a certain rationale, since contributions to the public debate ought to satisfy certain constraints.

Admittedly, this restriction can occasionally be vague and to make sense of it would require a deeper analysis that I cannot undertake here. However, the central idea is that we should move beyond our personal standpoints when looking at matters involving moral beliefs and convictions, assessing the issues involved through the filter of certain principles or premises upon whose correctness we rationally converge. Hence, the state regulation on these matters cannot be decided on the grounds of "I (we) believe this is right or this is wrong."[224] Thus, returning to the previous example, those who argue against the restrictions imposed by family law on gays could do so on the grounds that there are substantial reasons why these unions are entitled to the same formal recognition under the law; or they could hold that the Constitution confers a fundamental right to marriage that the government cannot legitimately restrict to certain categories of subjects. Similarly, as far as adoption is concerned, the legal restraint here could not be defended on the grounds that the state ought to enforce some kind of personal morality—for instance, through preserving the traditional role that women and men have played in rearing and bringing up their children.

In sum, in order for the state to qualify as a *liberal* state, public reasoning must be subjected to restrictions. This first conception of neutrality defines the terms of the public discourse and excludes justifications for policies based on particular religious beliefs, ethical doctrines and ideas of the good, so that none of them becomes privileged as compared with the others.

If what it is intended is, instead, to attain consequential neutrality, such restrictions will operate differently. In such case, the political debate concerning the appropriateness of a certain legislative amendment on an issue involving controversial moral or religious conceptions could legitimately include arguments regarding their value. Moreover, it is assumed that public resources can be distributed in such a way as to enhance them. For example, a political campaign aimed at encouraging marriage by means of, say, a more favourable tax system, can be justified on the belief of

the intrinsic moral worth of this life option. Similarly, state funding might be given to denominational schools that carry out religious activities because these are considered important in reinforcing certain personal virtues. Yet, according to this conception, the outcome of such policies should not hinder or undermine the opportunities to undertake alternative ways of life that reflect different conceptions of the good, religious beliefs, etc. In this case, the state should try to balance out this situation by supporting the values shared by other groups to the same degree. Recall that consequential neutrality consists of helping or hindering the parties in an equal degree when a conflict exists between them.

According to Raz, liberals normally fail to distinguish between both conceptions of neutrality.[225] Still, he claims that the key notion is the second one, which he calls "comprehensive neutrality."[226] In his view, its appeal in grounding political legitimacy resides in the fact that there can be no theory of justice that completely excludes moral conceptions from its own premises. Raz argues that even Rawls's theory of justice faces this difficulty,[227] concluding that the only postulate that can be advocated coherently is that of a neutral political concern.

But this conclusion is controversial. Although some isolated passages in Rawls' work might suggest otherwise, the central elements of his theory indicate that the picture of liberalism that he has in mind does not presuppose the consequentialist version of neutrality.[228] Thus, on the one hand, Rawls strongly endorses the priority of constitutional civil and political liberties, despite the fact that this precedence would not necessarily have neutral consequences on certain ways of life. As Kymlicka writes, "since individuals are free to choose between competing visions of the good life, civil liberties have non-neutral consequences – they create a marketplace of ideas, as it were, and how well a way of life does in this market depends on the kinds of goods it can offer to prospective adherents."[229] So, even if it is likely that, under conditions of freedom, the least valuable or unsatisfactory ways of life tend to disappear, Rawls does neither regret nor attempt to mitigate this effect.

On the other hand, consequential neutrality also seems inconsistent with the role that Rawls assigns to primary goods. To a large extent, the justification of their value lies in the fact that individuals need access to these goods as a means to develop their different aims. But equality in the distribution of resources does not necessarily have neutral effects on every way of life: those people whose lifestyles are costly will not enjoy the same range of facilities as those with more modest ways of living. And yet, again, Rawls accepts this outcome and relieves the state of the responsibility of satisfying expensive tastes or preferences; for him "[i]t is not by itself an objection to the use of primary goods that it does not accommodate those with expensive tastes."[230] This view relies on people's capacity to assume responsibility for their own ends, which, according to Rawls, "is part of the moral power to form, to revise, and rationally to pursue a conception of the good."[231] In short, Rawls' anti-perfectionism could be more plausibly based upon the exclusion of ideals.[232]

A different question is whether Raz is right in arguing that it is impossible to comply with the requirement of the exclusion of ideals, mainly because the very presuppositions of Rawls' theory of justice already incorporate a certain *ethos*, more precisely, the idea of equal liberty.[233] Nagel made a similar observation shortly after the publication of the *Theory of Justice*, stressing that both the situation of social

choice and the idea of primary goods as defined by Rawls are biased towards a particular conception of the good: Rawls' society seems to be made up of individuals whose main purpose in life is to maximise their shared social resources and material welfare instead of, for instance, achieving spiritual or collective goals.[234] This complex problem exceeds our main interest here, which is to assess the compatibility of group rights with both conceptions of neutrality. Nevertheless, a few observations are important for our discussion.

Certainly, Rawls' second major work, *Political Liberalism*, can be seen as an attempt to address this critique, which can affect one of the main virtues that liberalism claims for itself, namely, its defence of political institutions that allow the coexistence of different ways of life, moral values and beliefs. Thus, Rawls reformulated his first conception of justice in an attempt at freeing it from the commitment to comprehensive values such as autonomy. The political order he then envisaged aims at being more inclusive and, hence, at achieving an overlapping consensus among the diverse groups that compose the society.[235] But leaving aside whether this revision succeeds in refuting the critique, the important point to be made here is that, within the liberal tradition, neutrality (in both its justificatory and consequentialist versions), has not been regarded as a value *per se*, but as an instrument in order to achieve other—more fundamental—values. In fact, as we saw earlier in this chapter, disagreements over the reason for this constraint on state action tend to reflect different understandings of liberalism as a political doctrine and of the liberal state, too.[236]

Indeed, it is important to bear in mind the different lines of argument present in that discussion. On the one hand, some find the basis for adopting a neutral standpoint between different beliefs and conceptions of the good in some form of moral scepticism or relativism, even though Rawls and other leading contemporary scholars have explicitly argued that neutrality does not rely on such scepticism.[237]

On the other hand, neutrality can also be grounded on prudential reasons such as, for instance, the need to avert the risk of social fragmentation or alienation of minority groups. Although, as explained, this argument plays a role in both classical and recent formulations of tolerance, it will fail to be fully persuasive to the moral objectivist. For it is unclear why somebody will agree to abide by standards of neutrality when this means relinquishing the possibility of being governed by the principles that she sees as truthful. So, as a motivation for accepting that the state should refrain from enhancing partial or sectarian values that are believed to be true, the appeal to social unity seems quite weak.[238]

A third position claims that neutrality enhances the value of pluralism. As explained, this seemed to be the view of Galston and it also drives the thought of authors such as John Gray.[239] But here, I agree with Kukathas[240] that diversity is a fact of life (one that generates the kind of conflicts and problems that liberalism tries to confront) and not the ultimate value that liberalism pursues. Actually, this has been the starting point of this book, although the epilogue will try to open the door to rethinking this claim.

Finally, and this is the line of argument favoured in the analysis so far, one can see the basis of political neutrality in liberty. Although this is not always made explicit (mainly because freedom is so deeply rooted in liberalism that its value is taken for

granted[241]), in my view, most contemporary liberal scholars can be seen as upholding this logic, although, as explained, there are significant differences depending on what aspect of freedom is regarded as basic. In Rawls' theory, it is equal freedom which constitutes the decisive premise and, in this sense, it cannot be seen as a procedural version of liberalism. Rawls himself makes this point in order to distinguish his theory from certain accounts of neutrality, in particular, from the idea of neutral principles, as principles that could be endorsed by any person, regardless of her particular comprehensive conception of the good. Justice as fairness, Rawls clarifies, is not neutral in this sense: it does not give equal weight to *any* conception of the good that happens to be affirmed in society, but rather purports to ensure equality of opportunity to "any reasonable conception,"[242] namely those that are not incompatible with the basic principles of justice.[243] This is, in fact, the main reason why Rawls avoids using the term "neutrality" and prefers the expression "priority of the right over the good."[244] Hence, in order to reach a public consensus in matters of political justice, a partial similarity between these doctrines will be necessary. Rawls admits that the plausibility of some central notions in his theory, such as the notion of primary goods and the conception of the person,[245] depends upon the existence of such a similarity in relationship to certain basic moral premises. Only this convergence has the potential to lead to an agreement over the basic institutions of society and therefore, ultimately, "the right and the good are complementary."[246]

In short, neutrality is instrumental insofar as liberalism does not aim at adopting a neutral stance as regards some central values.[247] Of course, if this account is correct, one might ask whether liberalism (especially the form of liberalism defended by Rawls) is too demanding as a doctrine to be able to accommodate diversity.[248] This concern is obviously present in the works of people who, like Kukathas, argue that the liberal tradition is characterised by a link to freedom of conscience, rather than to autonomy. Yet, this is still another form of understanding freedom as a basic value. For the moment, let us provisionally accept that, although liberalism cannot be a doctrine that states that *any* value is acceptable, there are still significant differences between a perfectionist state and a liberal one. Whether it is understood as a comprehensive philosophical doctrine or only as a political theory, liberalism has a substantial advantage over other alternative theories as regards the level of tolerance.[249] Liberalism is less divisive than its rivals in that it is based on a narrower conception of the good which allows for greater inclusiveness and a less oppressive use of state power.

### *5.2. The Compatibility of Group Rights and Neutrality*

The remarks made so far will hopefully be sufficient to reassess the compatibility of group rights with liberal neutrality (on both its justificatory and consequentialist versions), which is the central question that concerns us here. Critics of group rights who endorse the tolerance approach stress the potential of neutrality as a political virtue to accommodate cultural minorities and other group-based identities. But we are now in a better position to see why, regardless of the conception of neutrality preferred, this contention is unjustified.

Above all, as we have seen, the state *must* necessarily take decisions affecting the cultural realm and has taken them in the past. Hence, group rights could be justified

as a way of ensuring that members of minority cultures do not suffer a disadvantage in this regard; that is, neutrality could simply consist in guaranteeing the greatest possible impartiality in contexts where the cultural majority is politically decisive. This is the basic idea underlying the notion of consequential neutrality. If the majority has an interest in controlling immigration, in ensuring that education and other public services are provided in their language, in regulating the contents of education, in the designation of public holidays, or in choosing the national symbols, why should minorities be denied access to the same instruments in promulgating their cultures? We could say, along with Kymlicka, that this is a paradigmatic case in which equality requires a different treatment, so that minorities enjoy the same opportunities as the majority to maintain themselves as distinct cultures.[250] The burden of proof then falls upon those who oppose group rights. For, as Isaiah Berlin argues, equality does not need reasons, only inequality requires them.[251]

Yet, one could still wonder why the state should be neutral as regards to cultural identities, equalising the means for cultural reproduction. The answer here has to do with the role that culture exercises upon individual well-being. Chapters V and VI discuss this thesis in more detail. As far as the morality of nation-building is concerned, this is not grounded upon the degree of truthfulness of history, myths and traditions originating in this process, but on the *form* in which it is conducted. I agree with Miller that, even if no cultural or national identity were ever pure, there is a considerable difference between national cultures or identities that evolve as a result of open processes of dialogue and discussion (in which all citizens are seen as potential participants, also as members of cultural groups), and those that are imposed authoritatively through indoctrination, repression or political demagogy.[252] Put differently: it is one thing to encourage or promote a belief and a very different one to impose it by force. In this sense, as Anderson puts it, nations differ from each other "not by their falsity/genuineness, but by the style in which they are imagined,"[253] and this can be applied to any other form of cultural production and reproduction. Unless we maintain that cultures have a value in themselves, which individuals should contribute to preserve (and this is an argument which has been put aside so far in this book), what appears as morally wrong is not cultural assimilation in itself, but forceful assimilation. Yet force does not necessarily mean outright coercion: the realisation of freedom goes beyond the dichotomy between positive and negative freedom and implies, above all, the duty to prevent domination of some groups over others.[254] In the case of cultural minorities, domination can occur even without direct intrusion, as explained above. Here, preventing the tyranny of the majority may require the recognition of group rights, and not merely abstention and non-interference.

It is worth emphasising that this argument is not based upon an ascription of value to the survival of a culture as such, although this is often invoked by minority cultures themselves; rather, it is grounded on the individual interests in belonging to and maintaining their own cultures.[255] Thus, when we say that this or that culture no longer exists, what we are really saying is that there are no more speakers of a certain language, nor people whose existence revolves around certain social conventions, traditions or ways of life associated to that culture. This does not imply that a culture disappears if a number of its specific elements change: conventions can be transformed, habits changed, and thus the culture evolves towards new forms of

expression. All cultures are in fact subject to a process of continuous transformation; none is static. The same we could say of people. The point is that a spontaneous transformation seems different from an imposed one. Most of us evolve throughout our lives, reviewing and modifying beliefs, customs and ways of life. But we do not cease being ourselves only for this reason. In the same way that we, as individuals, have an interest in steering this process autonomously, as members of a culture, we should also be free to change collectively the aspects we no longer consider attractive or justified. Therefore, what should matter is not the disappearance of a culture *per se*, but the nature of the process that leads to its disappearance. It is one thing to guarantee the non-oppression of certain groups and another, very different one, to guarantee the indefinite preservation of cultures as they are in a given moment. Dworkin's thoughts on the issue of preservation of animal species can help to clarify the point: "few people believe the world would be worse if there had always been fewer species of birds," what matters, "is not that there be any particular number of species but that a species that now exists not be extinguished by us."[256]

Group rights of cultural minorities can thus be justified in order to compensate for this asymmetrical relationship between the majority and minority as regards access to the necessary resources to build and develop a cultural community, achieving, at least, some form of consequential neutrality. For the reasons explained above, the rejection of this instrument of accommodation of minorities implicitly entails upholding the morality of assimilation, thus denigrating the interests of those people for whom belonging to their own culture constitutes some form of value.[257]

However, group rights are not necessarily linked to consequential neutrality; they may also have a place in a framework of justificatory neutrality. Here the following question arises: if we accept that the state cannot help but intervene in the cultural sphere, should we then concede that neutrality, understood as an exclusion of ideals, is unachievable in this context? In my view, not necessarily. An assumption commonly accepted by those who invoke the principle of neutrality as an argument against group rights consists of equating state intervention in the cultural realm with the promotion of some conception of the good. But this assumption is wrong—otherwise, no state in the world could meet the conditions demanded by liberalism. Multicultural conflicts are not always appropriately portrayed as disputes concerning the nature of the good life, in which neither the majority nor the minority (or minorities) wish to give up their own conceptions. Certainly, this factor may be important for assessing the demands of non-liberal groups that tend to isolate themselves, as with certain religious sects, but nevertheless claim public assistance to preserve their particular traditions or ways of life.[258] Yet this framework portrays inadequately the interests of many other cultural minorities in achieving a fair distribution of resources, or a certain degree of self-government, with the intention of preserving what Kymlicka calls their "cultural structures." In other words, the fact that individuals belong to a culture does not necessarily imply a blind adherence to its predominant particular character at a given time.[259] Cultural communities continue to exist even if its members decide to change those elements that make them different. Most demands of cultural minorities in liberal democratic states are not directed at obtaining public support in order to preserve the particular *character* of their cultures, but rather to preserve the framework or *structure* which allows them to take these decisions autonomously.

As Kymlicka and Taylor explain with regard to the "Quiet Revolution" in Quebec, even despite a fundamental internal transformation of the society, nobody doubted the existence of a French-Canadian cultural community.[260] Admittedly, the dividing line between the structure and the character of a culture can be vague, but it is a difference that corresponds with our ordinary understanding of the world and ourselves. In the same way that I think of my identity as a person over time, I think of the identity of my culture, with all its internal pluralism and hybridism and regardless of the changes I have both witnessed and contributed to throughout my life. Its existence depends upon the existence of a group of individuals who identify with a certain language, habits, meanings and lifestyles—all of which, for them, make sense. Dead cultures only exist in museums because they no longer have any instantiation in the present lives of human communities.

If this reasoning is correct, then the type of dispute raised by multiculturalism is not necessarily that of a "clash of civilisations," in Huntington's term[261]—that is, a clash between irreconcilable world views that cannot be translated into the language of social justice, equal opportunities, people's dignity and freedom of choice.[262] The problem is, as Kymlicka shows, that liberal theorists tend to assume that cultural conflict emerges from the existence of diverse conceptions of the good. That is why they focus upon the philosophical, religious and ethnic diversity of a single culture, without recognising the existence of multinational states with a plurality of cultures within the society.[263] Yet disputes on language rights, on political autonomy or in the location where historical documents have to be preserved and accessed are not necessarily based on different conceptions of the good.

In conclusion, justificatory neutrality—the conception of neutrality as an exclusion of ideals—does not in itself rule out the legitimacy of group rights either. This is because not all cultural intervention implies the adoption of a policy concerning the common good; on the contrary, the promotion of the structure that allows for the individual exercise of freedom remains on the level of a conception of the right, and group rights can be a means for such promotion. Yet if we accept that neutrality is best understood as the exclusion of ideals in the reasons for political action, the case for group rights will be subject to restrictions. For instance, arguments based on the need to preserve the integrity of a culture, or a particular conception of the good that it represents, would be inadmissible. On the other hand, from the perspective of consequential neutrality, group rights can perform an important function in balancing state intervention in the realm of culture, which usually tends to favour dominant cultures. In that sense, far from jeopardising neutrality, group rights are central to realising it.

## 6. CONCLUSION

This chapter has examined the tolerance approach to cultural diversity that seeks to exclude interventions of the liberal state in the sphere of culture and thus regards group rights as problematic. As we have seen, there are several shortcomings in the formulation of neutrality that underlies this approach, and those lead to an inadequate view of the role of the state in multicultural settings. To start with, liberalism and nationalism have historically been closely linked. Furthermore, it is doubtful

whether the construction of democratic states would have succeeded without the resort to pre-political identifications, such as cultural and ethnic ties. The abstract dichotomy between civic nationalism and ethnic nationalism must thus be overcome as "all civic and democratic cultures are inevitably embedded into specific ethnic-national histories."[264] Yet at the same time, liberalism has underrated the importance of particular communities and identities and has been reluctant to attach any independent moral status to minorities' claims within multiethnic or multinational states.

However, I have argued the orthodox liberal approach to this problem, based on the doctrine of religious tolerance, is incoherent. Modern liberal states must necessarily take political decisions that will affect the cultural sphere. The ideal of "benign neglect," or cultural *laissez faire*, cannot be realised. For this reason, confining individual interests in cultural membership to the private sphere results in discrimination against minorities. A liberal state will thus recognise certain forms of group rights for minorities with the aim of including all the existing groups into the political community under conditions of equality. It is thus untenable to identify liberal states on the grounds of cultural neutrality interpreted as non-intervention; rather, liberal states would be those which promote cultural fairness, trying to implement means for measuring the impact of their policies on the cultural realm and, more specifically, on the position of cultural minorities. This is a more appropriate version of neutrality, one that implies moving beyond the common understanding of the ideal of universal citizenship as an equivalent to uniform legal status, since this interpretation has too often served to legitimise the dominance of certain groups over others. Consequently, the effective implementation of liberal principles—in particular, of equality—may require a type of constitutional arrangement that establishes different legal systems in different territories or a special personal status for members of certain groups. Still, as the last section has argued, this is not necessarily in conflict with justificatory neutrality rightly understood.

However, at the beginning of this chapter I have suggested that resort to the ideal of neutrality as an objection to minority rights only makes sense if one presumes, as the supporters of the tolerance approach do, the importance of individual interests related to cultural belonging. If we question this premise, the basis for a requirement of neutrality as regards culture becomes thin. And indeed, as already mentioned, some authors regard demands related to cultural identity or cultural membership as mere preferences or arbitrary wishes, which strictly speaking, cannot be granted through the recognition of rights. Likewise, from the perspective of liberal nationalism assimilationist policies can be justified because they constitute an essential instrument in making certain basic principles of justice effective. On this view, not all the policies concerning state interference in culture should be seen as illegitimate. It would obviously be the case with the more drastic measures of suppression or cultural assimilation generally considered as simple violations of individual rights—genocide, taking children away from their parents, prohibiting members of minorities from using their own languages in the private sphere, in newspapers or other publications, etc. It would not be as obvious with other activities aimed at promoting or encouraging people to assimilate into the majority culture, even though the encouragement is done in a passive way. Examples of this are the recognition of only one official language, one exclusive standardised education and a democratic system

without special representation for any group. As explained in the preceding chapter, liberal scholars such as Rawls do not see the state as neutral in relation to the preconditions of fair social co-operation. If it turns out that one of these requirements is cultural homogeneity, why should this not become a legitimate aim?

All this leads us to a greater realisation of the need for additional arguments in favour of group rights for cultural minorities. According to what has been argued, these rights would only be justified if it were possible to contend that moral reasons demand state impartiality in the area of culture. Otherwise, the majority could still decide to accommodate the demands of minorities; but this would be an act of deference or courtesy, rather than a matter of justice. Yet I argue that it is an obligation of justice, and it is to the basis for this contention that I turn now.

## NOTES

[1] Comanducci (1994, pp. 45–46; 1998, pp. 242–243).

[2] Garzón Valdés (1994).

[3] The reasons that might support this conclusion are rarely explored in detail. This may be due to the influence of the dominant notion of group rights (as rights held by the group) tacitly endorsed by many legal theorists, which has been criticised earlier in this book. Indeed, for some commentators (see Comanducci, 1994, pp. 45–46), the aim of group rights is the preservation of the particular character of a cultural identity, rather than the protection of certain interests of group members. This perspective suggests that the support of group rights entails the promotion of a particular conception of the good. But this conclusion is unnecessary, as this chapter tries to show.

[4] This is an important assumption within the Rawlsian framework both in *A Theory of Justice* and in *Political Liberalism*.

[5] Waldron (1993, pp. 11–12; 2000, p. 159).

[6] While Rawls acknowledges that people with expensive tastes will probably be negatively affected by this criterion (at least as compared with those who have more modest life plans or styles), he does not regret this effect, nor he thinks of it as a valid objection to the idea of primary goods. Since secondary preferences are not left out of an individual's control, people must assume the responsibility of adapting or modifying them if required. See Rawls (1999, p. 369).

[7] Comanducci (1996, p. 26).

[8] Kymlicka (2002, pp. 217–218).

[9] Waldron (1993, p. 154).

[10] This is also the case of John Locke's *Letter Concerning Toleration*, although the political argument against interference with a person's beliefs or practices made by Locke has a content and structure that differs substantially from the arguments of Mill. It is also unclear whether this argument, which is very much based on the irrationality of persecution, succeeds in isolating the wrong involved in intolerance, as some commentators have criticised. For a debate on Locke's writings on tolerance, see Horton and Mendus (1991).

[11] Mill (1991, p. 9).

[12] Mill (1991, p. 16).

[13] As it is well known, Mill's limit of harm to others plays out as a limit to this sphere of individual liberty. Although this key exception raises complex issues as to what types of activities or actions can be regarded as harmful, I will leave this problem aside for the moment. It is important to note, however, that the prevalence of freedom does not lead to a blind presumption in favour of state indifference within the liberal tradition. In the case of children, the insane and, in general, people whose faculties are impaired—temporarily or permanently—state intervention is generally accepted as valid in order to guarantee certain goods. A typical example is the obligation imposed on children to reach a certain level of education. The hope is that this imposition will allow them to develop the basic faculties and skills that are necessary to exercise their freedom appropriately as they enter adulthood. Certainly, other cases involving similar impositions are far more challenging, since the question of determining when there is an absence of the required capacities is a much contested one. Thus, Mill himself (1991)

argued that despotism was a legitimate form of government in some circumstances, particularly relating to "barbarian peoples." Without going as far, Garzón Valdés (1993, pp. 371–372) also thinks that state paternalism is justified in cases of what he calls "basic incompetence," when it is legitimate for a state to intervene to prevent people from making decisions that will lead to undermining or even eliminating their capacity to exercise freedom in a meaningful way. Yet, again, it is not at all apparent what "basic incompetence" means, as we will see in the discussion about the legitimacy of the claims of illiberal minorities in Chapter VI. In any event, this discussion points to the difficulties of delimiting the scope of neutrality, while assuming that this should be the aspiration in normal circumstances.

14 This is the position defended, among others, by Kukathas (1997, 2003).

15 On the connection between liberalism and pluralism through the notion of tolerance, see Lukes (1991, pp. 17–18).

16 Walzer (1997, 10, pp. 14–19) argues that this was the premise behind the version of tolerance that characterised the political arrangements in the old multinational empires of Persia or Rome.

17 Tully (1995, p. 44).

18 The notion of "comprehensive doctrines" usually refers to religious or ethical conceptions that tend to be general; that is, that tend to provide a scheme of thought within which all recognised values and virtues are articulated. These are doctrines that apply to the most extensive set of subjects, including conceptions of what is good and valuable in human life as well as ideals of virtue and the like, thereby informing both the personal and the political. On this notion and why it cannot provide an acceptable basis for a political conception of justice, see Rawls (1999, pp. 424–425).

19 Dworkin (1985, pp. 191–192).

20 Ackerman (1980, p. 11).

21 Rawls (1999, p. 449). Nagel (1987, pp. 223–227) interprets most contemporary versions of liberalism in this sense—that is, as linked to the principle of tolerance and to state impartiality among the different conceptions of the good.

22 Dworkin (1985, p. 191).

23 Raz (1994, p. 173).

24 See Brubaker (1992, pp. 35–50).

25 Tully (1995, p. 66).

26 Barry (2001, p. 21). Similarly, Sartory (2001, p. 84) says that a state that is difference sensitive, instead of difference-blind, divides its citizens.

27 Kukathas (1997, 2003); Galston (1995, 2002). See also Aguilar Rivera (2000).

28 The following remarks are mainly based on Kukathas's recent book, *The Liberal Archipelago*, which builds on the main arguments he had developed in earlier works, especially in Kukathas (1992, 1997, 1998).

29 Kukathas (2003, p. 25).

30 Kukathas defends this account against others based on rationality, affection or self-interest. He also argues that the idea that the central source of human motivation is conscience is the best interpretation of Hume's account of human nature. For a justification of these claims, see Kukathas (2003, Chapter 2).

31 Kukathas (2003, p. 23). See also Kukathas (1998).

32 Kukathas (2003, p. 19).

33 See Kukathas (2003, p. 17).

34 Kukathas (1997, p. 94).

35 Kukathas (1997, p. 92).

36 Kukathas (2003, p. 8, 22).

37 Kukathas (2003, p. 25).

38 Kukathas (2003, p. 25).

39 Galston (1995, p. 525) calls this position "reformation liberalism."

40 Kukathas expressly argues that it is important to avoid the Rawlsian framework and not begin with the assumption of a close society; this assumption, he thinks, begs the question of how diverse peoples can live together in conditions of freedom. See Kukathas (2003, p. 6). As he puts it (2003, p. 8), social unity "is not nearly as important as has been intimated. On the contrary, the good society is not something confined by the boundaries needed to make it one."

41 Kukathas (2003, p. 31).

42 See Kukathas (2003, p. 31, 32).

[43] Kukathas (2003, pp. 16–17).

[44] However, Kukathas questions the typical distinction between "comprehensive" and "political" liberalism which, he says, "cannot plausibly be one between moral and non-moral theories" (Kukathas, 2003, p. 16) since every political theory contain some basic moral assumptions. Instead, Kukathas argues that what distinguishes both versions of liberalism is that the second one has a minimalist aspiration. In other words, the distinction would rather be one of degree. See Kukathas (2003, pp. 16–17).

[45] That is why, according to Kukathas (2003, p. 16, 36), Kymlicka's theory offers a version of "comprehensive liberalism" because of its connection with autonomy. This contrast will become clear in the following chapter. However, in my opinion, it is unclear why defending liberty of conscience, as the basic value, should not be seen as another form of moral commitment that can also lead to exclusions.

[46] Kukathas (2003, p. 5).

[47] Kukathas (2003, p. 7). On the other hand, Kukathas thinks that the problem with the answer that insists on a conception of justice shared by diverse groups in a plural society is that this challenge can never be met, unless the conception of justice proposed is "stripped of too much of its substantive content" and "ceases to a be a theory of justice at all." See Kukathas (2003, p. 6).

[48] Kukathas (2003, p. 100).

[49] Kukathas (2003, p. 100).

[50] Galston (1995, p. 524, 528).

[51] Galston (1995, p. 523).

[52] For this reason, a central feature of Galston theory is the emphasis on the need of some form of civic education that, while limited to accommodate a variety of beliefs and creeds, aims at preserving the core principles that the constitution contains, thus providing the ground for unity and other civic goals in a liberal pluralist state. In his view, beyond civil order, these principles include justice and the basics of human development that the state must enforce, if necessary through coercion. See Galston (2002, p. 10, 121). He also argues (1995, p. 528) that a pluralist state should be committed to a system of civic education that teaches tolerance.

[53] By "expressive liberty," Galston means (2002, p. 28) "absence of constraints, imposed by some individuals on others, that make it impossible (or significantly more difficult) for the affected individuals to live their lives in ways that express their deepest beliefs about what gives meaning or value to life."

[54] See for discussion Galston (2002, pp. 15–38).

[55] See Kukathas (2003, p. 29, 32).

[56] Galston tries to identify the historical roots of the dispute between autonomy and diversity (as competing theoretical conceptions of liberalism). In his view, liberal autonomy is linked to the Enlightenment idea of "liberation through reason," where reason is understood as superior to other sources of authority or reasons for action (such as tradition, etc.). Instead, Galston links liberal diversity to what he calls "the post-Reformation project," that is "the effort to deal with the political consequences of religious differences in the wake of divisions within Christendom." This second form of liberalism, he concludes, gives rises to the idea of managing diversity through tolerance. See Galston (2002, pp. 24–25).

[57] Along these lines, Waldron (1995, p. 100) compares the right to culture with the right to religious freedom, suggesting that both issues should be similarly addressed.

[58] Prieto Sanchís (1995, pp. 125–127).

[59] Aguilar Rivera (2000, p. 224).

[60] As indicated in the preceding chapter, liberal egalitarians often see affirmative action, as well as other instruments of special treatment, as an exceptional and transitory regime.

[61] Kymlicka (1995a, p. 3). As Kymlicka explains, in United States, the famous judgement of the Supreme Court in Brown v. Board of Education, which dismantled the system of racial segregation in schools, had a decisive influence on the expansion of this doctrine. The model of racial justice embedded in this judgement was invoked in other cases involving national minorities and indigenous peoples on the basis that establishing separate institutions for these groups was not distinct from racial segregation. On this point, see Kymlicka (1995a, pp. 58–59).

[62] Kukathas (2003, p. 15).

[63] Kukathas (1992, pp. 116–117; 2003, p. 5, 75–77, 95); Galston (1995, pp. 531–533; 2002, pp. 9–110); Aguilar Rivera (2000, p. 230).

[64] This is not the view of scholars such as Kukathas, who take a sceptical stance on the issue of equality both between persons and between groups. Kukathas argues that the very complexity of the structure

of diversity poses strong limitations to the pursuit of equality. In his view, equality is unattainable without sacrificing diversity and, hence, "if diversity is to be accepted, then equality must be abandoned." Kukathas (2003, p. 229). Once again, it is important to stress the peculiarity that the question of justice is not a central one in this theory, but it remains important for most proponents of the tolerance model.

[65] This is, indeed, what Habermas (1994, p. 130) seems to maintain by arguing that: "The constitutional state can make this hermeneutic achievement of the cultural reproduction of life-worlds possible, but it cannot guarantee it. For to guarantee survival would necessarily rob the members of the very freedom to say yes or no." This reasoning leads him to be sceptical of the notion of collective rights, even if he accepts the legitimacy of the demands for recognition made by cultural minorities.

[66] Galston (2002, p. 29, 56); Kukathas (2003, pp. 24–25; p. 93) It is worth to remind that, in the case of Kukathas, this conclusion derives from the defence of liberty of conscience, rather than from an appreciation for diversity. Also, Kukathas insists that his theory represents a "political" liberalism that does not rely on a shared conception of social justice.

[67] Galston (1995, p. 533).

[68] Kukathas (1992, 1997, pp. 87–89; 2003, p. 75, 93).

[69] Kukathas (2003, p. 25).

[70] Kukathas (2003, p. 93, 96).

[71] See Kukathas (2003, pp. 107–109). This is a major objection against Kukathas' theory, as I explain below.

[72] Galston (2002, p. 104).

[73] See Galston (2002, pp. 122–123). Similarly, Brian Barry argues that freedom of association is a fundamental right, but he clearly states that a legitimate concern of public institutions is to ensure that members of associations have "real exit rights," which means that "excessive costs" should be reduced. See Barry (2001, pp. 148–151). Aguilar Rivera's position on this point is different. On the one hand, alongside Kukathas and Galston, he emphasises the relevance of the notion of tolerance in this debate; yet, on the other hand, he supports the idea that the individual rights of the members of cultural groups should be strictly protected, which means that tolerance should also be enforced *within* the group. See Aguilar Rivera (2000, p. 240, pp. 243–246).

[74] Kukathas (1997, p. 89).

[75] Kukathas (1997, p. 78, 99). As will become apparent in the following chapters, Kymlicka's theory poses several limits to the sort of groups that can legitimately claim minority rights.

[76] For an account of how civic or liberal nationalism differs from illiberal forms of nationalism, see Kymlicka (2001a, pp. 39–41); Nielsen (1999). Some theorists of nationalism refer to a similar typology in terms of territorial versus ethnic nationalisms (Smith, 1991, pp. 82–83).

[77] Habermas (1996, pp. 499–500).

[78] For an account of the Soviet legacy and the demands of minority rights in Post-Soviet States, see Kolstø (2001). As Keating and McGarry (2001, p. 4) observe, the confidence expressed by neoliberal economists that markets will gradually weaken particularistic forms of identity bears a resemblance to old modernisation theories.

[79] Hence, the categorisation is highly misleading as an analytic tool to explain the problems that beset multicultural societies in Eastern Europe. On the relevance of both types of nationalism to modern forms of patriotism, see Hobsbawm (1991, pp. 80–100).

[80] See Margalit and Raz (1990); Tamir (1993); Taylor (1993, 1997); Miller (1995), Kymlicka (1995a). Since the publication of these central works in the mid-1990s, several edited books and symposia have been devoted to discussing nationalism from different perspectives. As far as its ethical justification is concerned, see McKim and McMahan (1997) and the special volume of the journal *Ethical Theory and Moral Practice* (1998, Vol. 1/2). For a more recent contribution to this literature, see Gans (2003).

[81] Kymlicka has condensed in this label two recent streams of thought within contemporary liberal scholarship, which he sees as the focus of an emerging consensus among political theorists: liberal nationalism and liberal multiculturalism. "Liberal nationalists" assert that it is a legitimate function of the state to protect and promote national cultures and languages existing within its borders. This form of nationalism is defined by a set of constraints to which I will refer later. "Liberal multiculturalism" accepts that other non-national or non-cultural groups such as refugees, immigrants or gays have a legitimate claim to an explicit accommodation, recognition and representation of their identities within the institutions of the larger society (Kymlicka, 2001a, pp. 37–42).

[82] See, on these premises, Tamir (1993, p. 121).
[83] Tamir (1993, p. 121).
[84] Tamir (1993, p. 117).
[85] Kymlicka (1995a, p. 76; 1997a, p. 28).
[86] According to Tamir (1993, pp. 69–73), at the heart of this right there is often a cultural rather than a political claim and, therefore, it has to be distinguished from the right of individual autonomy and participation in democratic and free elections. Similarly, Margalit and Raz (1990, pp. 455–456); against this view, see De-Shalit (1996).
[87] See, for instance, Taylor (1993, p. 41); Miller (1995, pp. 29–30).
[88] Gellner (1983, pp. 39–50).
[89] Sieyès (1989, pp. 67–68).
[90] Madison *et al*. (1987, p. 91).
[91] Habermas (1996, pp. 492–496).
[92] Habermas (1996, p. 493).
[93] As Renan (1997, p. 10) emphasised in 1882, there were republics, municipal kingdoms and even empires in classical antiquity, but not nations properly speaking. Similarly, Miller (1995, p. 30), Smith (1991, p. 8).
[94] See on this point, Connor (1994, pp. 210–213). Other influential social theorists of nationalism also situate the emergence of nation-states and nationalism at the end of the seventeenth or the beginning of the eighteenth century. For a discussion of this problem, Smith (1991, pp. 84–85); Guibernau (1996, p. 62).
[95] Gellner (1983, pp. 34–35, p. 48).
[96] Gellner (1983, pp. 32–33).
[97] Gellner (1983, p. 34).
[98] Gellner (1983, p. 40, 46).
[99] Gellner (1983, p. 55).
[100] On this point, see Connor (1994, pp. 92–100); Williams (1976, pp. 178–180). On the ethnic basis of the nation and its overlap with other concepts such as "ethnicity" and "race," see Smith (1991, pp. 19–42).
[101] Miller (1995, 31). Ernest Barker eloquently expressed the idea: "The self-consciousness of nations is a product of the nineteenth century," nations "were already there; they had indeed been there for centuries. But it is not the things which are simply 'there' that matter in human life. What really and finally matters is the thing, which is apprehended as an idea, and, as an idea, is vested with emotion until it becomes a cause and a spring for action." Quoted in Connor (1994, p. 4).
[102] For this reason, Gellner (1983, p. 1) defines nationalism as a political principle that "holds that the political and the national unit should be congruent."
[103] Habermas (1996, pp. 494–496).
[104] Anderson (1983, p. 6).
[105] Miller (1995, p. 27); along the same lines, see Calsamiglia (2000, pp. 100–107). However, the territorial element is challenged by claims to nationhood by outcast and widely dispersed minorities like the Roma, although this is an exceptional case. For an analysis of the territorial dimension of self-determination, see Moore (1998).
[106] Connor (1994, p. 93).
[107] Tamir (1993, p. 65).
[108] Renan (1997, pp. 19–30). Renan was particularly concerned with the common confusion of nation and race, which led to a definition of nationality in terms of ethnic belonging.
[109] Renan (1997, p. 31).
[110] Renan (1997, p. 32)
[111] Kymlicka (1995a, pp. 28–29). In fact, Louisiana was the only state admitted into the Federation at a time when the majority of the population did not speak English. The acquisition of this territory in 1803 doubled the territory of the United States as well as its Francophone population. Napoleon agreed to sell Louisiana under the condition that its inhabitants would enjoy the rights and privileges of all American citizens. However, the Constitution did not offer any guidance as to the status of the annexed territories and the treaty lacked any executive means of implementation. Furthermore, according to Crawford (1992, pp. 42–43), even as Jefferson signed the treaty, he expressed the view that the new citizens were still not capable of self-government and, soon, a governor was nominated who was unable to speak French. Local elections were suspended indefinitely and a series of plans were

adopted in order to promote linguistic and cultural assimilation. Moreover, from 1807, the government promoted the settlement of white Anglo-Americans in the newly acquired territory. By 1840 the use of French had begun to decline as Francophones were reduced to less than half of the population and they progressively used English to avoid being marginalised. When in 1912 Louisiana joined the Union, the Congress insisted that all laws and official acts were published only in English and that the French Civil Code was replaced by the common law. On this process, see also Perea (1995, pp. 978–981).

[112] Yet, as is well known, Puerto Rico is among the exceptional cases where highly coercive assimilationist policies failed. For an excellent account of the colonialist policies adopted, the legal ideology behind the expansionist drive, and the judicial and social legacy of this process, see Rivera Ramos (2001). For a focus on linguistic policies, see Álvarez González (2001).

[113] For instance, after the war with Mexico in 1848 massive emigration was officially promoted to the new regions conquered, together with policies aimed at removing Hispanic traits from the public realm. The admission of Hawaii into the Federation was postponed until the influence of the Anglophones was indisputable. The Federal Act of 1910 that gave the status of state to Arizona and New Mexico was particularly explicit: it required all public schools to operate in English. Additionally, officials and legislators were required to have enough knowledge of English in order to speak, write, read and understand this language. The German presence in Pennsylvania was also a source of concern for Benjamin Franklin who, alarmed to see the proliferation of newspapers, schools and signs in German, is reported to have asked "why should Pennsylvania, founded by the English, become a Colony of Aliens, who will shortly be so numerous as to Germanise us instead of our Anglifying them, and will never adopt our Language and Customs, any more than they acquire our Complexion," quoted in Crawford (1992, p. 37). For a detailed account of this and other similar measures of cultural and institutional suppression adopted in other states, see also Crawford (1992).

[114] See Kymlicka (1995a, pp. 22–23).

[115] For a comparative analysis of these models of incorporation, Schain (1999). On the plausibility of the common distinction between the republican—French—and democratic—American—models of integration, see also Fassin (1999).

[116] Bader (1997, p. 774).

[117] According to the report prepared by Abbot Gregoire for the Revolutionary Convention, 12 million people (more than half of the population at that time) could not speak French and 3 million who spoke it did so without fluency. Despite this, in July of 1794, a Law imposed the use of French in all the territory and banned dialects. For an account of linguistic assimilation policies in France from the time of the Revolution, see Sadat Wexler (1996).

[118] Weber (1976, p. 7).

[119] May (2003, p. 127). See, also, Anderson (1983, pp. 42–46).

[120] May (2003, p. 128).

[121] Gellner (1983, pp. 33–35, 54–58).

[122] On the purposes of education at the time of liberal revolutions and beyond, see Tamir (1993, xx–xxii). For an account of the central importance of the linguistic factor throughout the nineteenth century and the appearance of the idea of "official languages," see Anderson (1983, pp. 67–82); May (2003, pp. 125–132).

[123] In a chapter entitled "Nation-Building or Nation-Destroying?", Connor (1994, pp. 29–66) emphasises this double face that characterised the rise of the nation-state. Connor argues that the promotion of a common sense of nationhood came at the price of destroying cultural pluralism.

[124] In his words: "L'oubli, et je dirai même l'erreur historique, sont un factor essentiel de la création d'une nation et c'est ainsi que le progrés des études historiques est souvent pour la nationalité un danger (. . .). [L']essence d'une nation est que tous individus aient beaucoup de choses en commun, et aussi que tous aient oublié bien des choses." Renan (1997, p. 13, 15).

[125] Renan (1997, p. 15).

[126] Anderson (1983, p. 201).

[127] For an account of the period of Muslim domination in Spain as an age of multicultural coexistence and tolerance, see Paris (1995).

[128] Tamir (1993, pp. 63–64).

[129] Yourcenar (1974, p. 43).

[130] Arendt (1973, p. 11).

[131] Mill (1991, p. 428).
[132] Mill (1991, p. 429). Mill reached this conclusion after examining historical examples of multinational empires, such as that of the Austro-Hungarian Empire, where the government either had favoured one particular nation to the detriment of the other (or others), or tried to manipulate people in a more subtle form in order to ensure its own absolutism.
[133] Kymlicka (1995a, pp. 49–74).
[134] Habermas (1996, pp. 492–500); Taylor (1993, pp. 41–45). See also Miller (1995, pp. 17–47).
[135] Miller (1995, p. 23).
[136] See Margalit and Raz (1990, pp. 447–452); Kymlicka and Straehle (1999, pp. 70–72).
[137] Connor (1994, pp. 196–208).
[138] Tamir (1997, pp. 227–228).
[139] Tamir (1997, p. 231).
[140] Tamir (1997, p. 229).
[141] Waldron (2000, p. 155).
[142] Waldron (2000, p. 156).
[143] Kymlicka and Straehle (1999, p. 70).
[144] Kymlicka (2001a, p. 213).
[145] Baier (1986, pp. 237–238).
[146] Even Rawls invokes mutual trust as a necessary requirement for social co-operation. Moreover, he contends that steps taken by a constitutional regime to foster the virtue of mutual trust do not necessarily involve a perfectionist hint; rather, the state is only "taking reasonable measures to strengthen the forms of thought and feeling that sustain fair social cooperation between its citizens regarded as free and equal." Rawls (1999, p. 461). So at least certain forms of nation-building—those directed at strengthening those "forms of feeling" that contribute to social co-operation—could be regarded as legitimate since, according to Rawls (1999, p. 460), justice as fairness includes an account of social co-operation as a central political virtue.
[147] Miller (1995, pp. 70–73, 83–85). In a more recent paper, Miller (2004, pp. 13–30) discusses the thesis that multiculturalism is a threat for social justice because diverse cultural groups are generally unable to reach an agreement on what justice requires. This and other works that discuss extensively the potential tension between cultural diversity and economic solidarity and distributive justice can be found in Van Parijs (2004b).
[148] Tamir (1993, p. 148).
[149] Guibernau (1996*,* pp. 117–119); Keating (2001a); Calsamiglia (2000, p. 89).
[150] Anderson (1983, p. 141).
[151] Mill (1991, pp. 430–431).
[152] Thus, Mill wrote (1991, p. 431): "Nobody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilised and cultivated people—to be a member of the French nationality, admitted in equal terms to all the privileges of French citizenship, sharing the advantages of French protection, and the dignity and prestige of French power—than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world. The same remark applies to the Welshman, or to the Scottish Highlander, as members of the British nation."
[153] Villoro (2000, p. 171).
[154] According to Kymlicka, a "nation" is "a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture." Both national minorities and indigenous peoples can be included under this definition (Kymlicka, 1995a, p. 11).
[155] Connor (1994, p. 48).
[156] Guibernau (1996, pp. 117–122). However, this is a contested generalisation. In contrast to this view, Walzer (1995, p. 141) explains that, in the old multinational empires, the elites of conquered nations were the ones that tried to assimilate more rapidly: they children were educated in the language of their conquerors and soon started to regard their own traditional culture and language as primitive and inferior. Ordinary citizens were often the ones that fought to maintain their ethnic and national loyalties.
[157] Habermas (2001, pp. 71–72). For a summary of the roots of these and other conflicts involving national minorities, see Keating (2001b, pp. 33–53).
[158] Tamir (1993, p. xxvi).

159 Bader (1997, p. 779).
160 See Kymlicka (1995a, pp. 10–11); Connor (1994, pp. 49–50).
161 Kymlicka (1995a, pp. 24–25).
162 Kymlicka (1995a, pp. 61–69); Young (1990, pp. 173–183).
163 On the keys to interpreting this "exceptionalism," see Walzer (1995, pp. 142–144). For an account of the progressive overcoming of these differences, see Fassin (1999). For a criticism of the usual differences established between the Old World and the New World in terms of patterns of cultural diversity, see Kymlicka (1995a, pp. 20–23).
164 Kymlicka (1989a, p. 166; 1995a, p. 2).
165 Tamir (1993, p. 139).
166 See Kymlicka (2001a, p. 229).
167 Moore (2001, p. 44).
168 Moore (2001, pp. 46–49).
169 As Keating (2001a, pp. 28–33) argues, other forms of self-government, short of classical statehood, now seem feasible because of the reduced significance of territorial borders.
170 Certainly, the phenomenon of minority nationalism also poses troubling questions to contemporary liberal nationalists who, while being more sensitive to cultural factors, support the instrumental legitimacy of nation-building projects. In particular, what should be done in those states that contain one or more groups that see themselves as nations and have adopted nation-building programmes that compete with each other? Even if we endorse the idea that cultural homogeneity resulting from these programmes will provide a better foundation for liberal values, there is still no clear answer to what should be done in these cases. These questions will be addressed in the next chapter.
171 Kymlicka (1997a, p. 28).
172 A significant exception is Canada. Quebec has held a referendum on sovereignty (with the purpose of secession) on two occasions (in 1980 and in 1995). However, the option promoted by the Parti Québecóis, failed. For a concise summary of these processes, see Keating (2001b, pp. 89–98).
173 Thus, for example, Georgia revoked the autonomy of Abkhasia and Ossetia and Serbia the autonomy of Kosovo. In other cases, the demands for restoration of historical forms of self-government or regional autonomy were rejected. For a discussion of the minority rights regimes in Eastern Europe and whether Western models could be applied to deal with cultural diversity, see the works included in Kymlicka and Opalski (2001).
174 Note that if this argument were tenable, the attribution of group rights to cultural minorities could eventually play a corrective role, but not a distributive one. In other words, it might be conceived as a remedy to rectify, where possible, past injustices (for instance to compensate the descendants of those who suffered coercive measures adopted by the state in the past). In fact, this is an argument of compensatory justice to which many national minorities have resorted in order to justify their claims.
175 For an excellent account of the way symbols influence human interaction, see Geertz (1973, pp. 89–91).
176 Some commentators distinguish between "nationalism of resistance" and "nationalism of exclusion." In the latter, a dominant group within an established state seeks to maintain its own identity through either enforcing uniformity on different groups within its boundaries or by preventing outsiders from entering and gaining the status of citizenship. In contrast, "nationalism of resistance" refers to the case where a dominated group within a state territory seeks to preserve its identity, which separates it from the other members of the political constituency. See on this distinction, Feinberg (1997, 69–72).
177 Kymlicka (1997a, pp. 37–39).
178 Taylor (1993, p. 11). Kymlicka (1997a, pp. 37–38) offers a similar account of Quebec's "Quiet Revolution," underlying the ties of minority nationalism with liberalisation and secularism.
179 Crawford explains that a Mexican minister used the expression "foreigners in one's own country" after their defeat in 1848. Nicholas Trist, appointed as the head of the peace delegation sent by the United States, reported that apart from giving up their territory, Mexico's main concern was the conditions that the approximately 75,000 inhabitants of the transferred territories would face. As a result, the Treaty of Guadalupe Hidalgo established certain guarantees for the new Spanish-speaking American citizens comparable to those that the French had previously achieved in Louisiana. However, Mexicans rarely enjoyed linguistic rights, much less a special political status, and the issue disappeared from the agenda once the Anglo-Americans became the majority in the territory. This "tyranny of the majority," in Crawford's terms, was consummated in the Constitutional Convention of California in 1978–79 to which, from among the 153 delegates, no representative from

the Spanish-speaking minority of Mexican origin was appointed. In addition to abolishing the requirement to translate laws into Spanish, the convention approved a new regulation, which established that all the laws and official documents of the State of California, as well as judicial proceedings would be published and conducted in the English language. Thus, California became one of the first states to have a constitutional provision concerning official language. Needless to say, as in many other cases, certain stereotypes and prejudices linked to the "primitivism" of "hispanos" significantly contributed to justifying such policies. See Crawford (1992, pp. 63–89) and Perea (1995, pp. 985–986) for further details.

180 This is a relatively underreported case in the literature, partly because of the common assumption that spontaneous mixing and the "melting-pot" are the forms of inclusion at work here. So let us report these events briefly: In March 1998, the House of Representatives of the United States approved—with a vote of 209 for and 208 against—a proposed law that would allow Puerto Rico to hold a referendum over its political status. Since 1952, Puerto Rico has held the status of "Estado libre asociado" and so the referendum was designed to ask citizens whether they would wish to have independence or prefer to maintain the links with the United States under their current status. During the debates in the American Congress it became clear that the main resistance to the referendum did not stem from fear that Puerto Ricans might vote in favour of independence, but rather from the possibility that a political entity composed of 3.8 million Spanish-speaking citizens (only 25% speak English) might choose full integration in the United States. Thus, some representatives tried to require, as a precondition for allowing this latter option, that English be declared the official language of the United States. In this way, the political integration of Puerto Rico as the fifty-first state of the Union would involve the linguistic assimilation of its population. While the Congress rejected this proposal on the grounds that the Constitution lacks an official language clause, linguistic assimilation was strongly recommended to the Puerto Ricans. Although the proposal was, in the end, fruitless (since the Senate refused to consider it) the option of becoming a fully integrated state was rejected in a referendum that was later held at the initiative of the Puerto Rico government. On Puerto Rican movement for independence and American federalism, see Thornburgh (2001).

181 It might be important to recall that the predominance of the Spanish language in Puerto Rico is almost absolute, even more widespread than, for instance, Catalan is in Catalonia or French in Quebec. While both Spanish and English are official languages in Puerto Rico, the society is mainly monolinguistic and, according to recent polls, only 25% of the population state that their English is "good." See on the political and legal status of Puerto Rico and the relevance of the linguistic dimension, Álvarez González (2001).

182 As an American senator explicitly admitted in the early 1990s, the reluctance of the Congress to admit a plebiscite in Puerto Rico "is mainly due to the question of whether Puerto Rico should have the choice to decide on their nationality while still keeping Spanish as the official language." Quoted in Álvarez González (2001, p. 281).

183 Kymlicka (1995a, p. 111). Similarly, Taylor (1997, p. 34).

184 May (2003, pp. 126–127). Diachronic analyses of language rights, which provide a historical account of national language formation, are therefore important; in May's words (2003, p. 128), precisely because the "establishment of so-called national languages was inevitably an arbitrary and artificial process, driven by the politics of state making, is also worthy of critical historical interrogation."

185 For a volume that offers a detailed discussion of these problems, see Kymlicka and Patten (2003). The challenge of language policies and language rights for liberal values such as freedom of choice or political participation is nowadays widely acknowledged. For an account of some of these tensions, see Boran (2003b). For a liberal democratic approach to the question of linguistic justice, see Laitin and Reich (2003).

186 Réaume (2000, p. 251).

187 Réaume (2000, p. 251).

188 Appeal on the future of the French language in *Le Monde* 1992, quoted in Sadat Wexler (1996, p. 315).

189 France, for instance, employed this strategy during the post-revolutionary period: French territory was divided in 83 "departments," partly with the purpose of subdividing the historical regions settled by Basques, Bretons and Corsicans.

190 On this and other mechanisms used to undermine the interests of minority communities, Kymlicka (2001a, pp. 73–82).

[191] Certainly, the classical arguments invoked to justify American federalism had nothing to do with the need to guarantee distinct national cultures. Madison and Hamilton saw in this political arrangement both a way to prevent the degeneration of democracy into tyranny and a means of decentralisation of political power that would bring the centres of government closer to citizens, thereby facilitating the experimentation of social, economic and political reforms (Howard, 1996). Taking into account the different aims that might be eventually achieved through federal arrangements, Kymlicka (2001a, pp. 92–93; 2001b, pp. 29–31) distinguishes between "territorial federalism" (i.e., Germany, United States) and "multinational federalism" (i.e., Canada, Spain). Yet the adoption of federal arrangements is not necessarily synonymous with the recognition of minority rights to self-government, since the boundaries of the federal units could be drawn so as to the disempowerment of minority nationalism. On the adequacy of federalism to accommodate national minorities, see also Requejo (1999); for a philosophical account of federalism, see Norman (1994).

[192] Typically, federal agreements allow a minority to become a majority in a territorial sub-unit within which it exercises a number of powers. By and large, this has been a constructive solution in the states mentioned, although it has not altogether removed the issue of secession from the agenda of some nationalist political parties. However, when explicit efforts have been made to accommodate the aspirations of national minorities, the option of secession usually loses popular support. For a classical study on the morality of secession, see Buchanan (1991); for a critical account of different normative theories of secession and their institutional implications, Norman (1998).

[193] The regulations grant different levels of public use of the following languages in the regions where there is a substantial minority that speaks them: Albanian, Catalan, French-Provençal, Friulian, German, Greek, Croatian, Ladin, Occitan, Sardinian and Slovene. Before the implementation of the Law 482/99 recognising these languages, only German, Slovene and French-Provençal minorities were especially protected.

[194] The Treaty on the European Union transferred to the EU institutions various responsibilities in the area of culture and cultural policy. Article 128 explicitly states that "[t]he Community shall contribute to the flowering of cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." Article 22 of the Union's Charter on Fundamental Rights also provides that "The Union shall respect cultural, religious and linguistic diversity." In addition, the Commission, along with a coalition of regionalist allies, has fostered the Committee of Regions, with the same status as the Economic and Social Committee. It consists of a hybrid amalgam of representatives, from regional autonomies in Spain and Belgium, the German *Länder*, French departments and English counties. It is also important to recall that when the EEC was established in 1958, a decision was made that all the main languages of the member states would be represented and used in the work and political interactions of the common institutions. Today, the EU is not committed to a common language but to the protection of linguistic diversity. In addition, it supports the *European Bureau of Lesser Used Languages* (EBLUL), which is an independent NGO funded by the EU which represents almost 40 million citizens who speak an autochthonous language other than the main official languages. As a result, the resources of many regional languages have been substantially strengthened. See on these policies, Laitin (2001, p. 99).

[195] Kymlicka (1995a, pp. 107–112).

[196] Kymlicka (1995a, p. 111). Similarly, Tamir (1993, pp. 146–148).

[197] For this reason, the theory of Kukathas is mostly compatible with a libertarian view that does not take as its main concern the question of social justice.

[198] Let me remind, however, that Kukathas' theory does not aim at resolving these questions (which are our main concern here) since, as explained, he is mainly interested in the problem of authority.

[199] May (2003, p. 135).

[200] Laitin and Reich (2003, p. 83).

[201] Barry thinks that what he calls "the strategy of privatisation," or the "depolitisation of difference" as the model of citizenship developed as a response to the wars of religion not only can work out for coping with cultural diversity today but it is the only position compatible with liberal egalitarianism. Yet Barry's views on exit rights and neutrality are far from those defended by Kukathas. See Barry (2001, especially Chapter 2).

[202] Barry (2001, pp. 106–107). Nevertheless, Barry at least acknowledges that the state cannot take a neutral stance concerning language, although he asserts his preference for struggling against economic inequality rather than for linguistic justice.

203 Taylor (1997, p. 34).

204 And also this general argument confuses cause and effect, as May notes referring to the case of Hispanic mobility in the U.S. and the predominance of English (May, 2003, p. 136). It is clear that English is the predominant language and that a lack of knowledge will limit the opportunities of those who do not speak it; yet this argument overlooks the fact that this occurs because there is a general political preference (historically and in the present) for asserting that English is a language key for social mobility, instead of a preference for attaching value to bilingual workers.

205 For a clear adoption of this stance, see Pogge (2003).

206 May (2003, p. 132).

207 Addis (1997, p. 125).

208 The same argument could be used to criticise the right to exit as the solution for individual dissidents within illiberal communities. This issue will be taken up in Chapter VI.

209 Margalit and Raz (1990, p. 445).

210 Margalit and Raz (1990, p. 446).

211 Although as explained, there are thinner and more robust ways of understanding what the right to exit means. Compare Kukathas (2003, p. 96, pp. 103–106) with Galston (2002, p. 123).

212 Tamir (1993, p. 33, 49); Kymlicka (1995a, pp. 92–93); Raz (1994, pp. 178–183).

213 Tamir (1993, p. 148); Kymlicka (1995a, p. 111).

214 Rawls (1999, pp. 360–361).

215 This argument presupposes the rejection of pluralism (or diversity) as a paramount liberal value, along the lines suggested by Galston (2002).

216 Rawls (1993, pp. 35–40).

217 Rawls (1993, p. 40).

218 See Raz (1986, pp. 110–162).

219 Raz (1986, p. 136).

220 Raz (1986, p. 116).

221 Raz, (1986, p. 113).

222 Habermas (1994, p. 124).

223 Kymlicka (1989b, p. 884). In a similar vein, Susan Mendus refers to two conceptions of neutrality, which she terms "causal" and "of results." See Mendus (1989, pp. 12–13).

224 This conception of neutrality does not need to rest on a sceptical epistemological view. Rawls, Nagel and other leading contemporary philosophers have put forward alternative versions for the basis of neutrality that make sense of the impersonal standpoint that is required in political arguments.

225 Raz criticises both Nozick and Dworkin on the grounds that the first confuses and the second overlooks the two conceptions of neutrality. On this point, see Raz (1986, pp. 115–117; p. 134).

226 Raz (1986, p. 122).

227 See on this criticism, Raz (1986, pp. 124–130).

228 In this sense, see Kymlicka (1989b, pp. 884–886), who defends the view that the main exponents of the neutrality doctrine can be interpreted as favouring a conception of "justificatory neutrality." In a similar vein, see Waldron (1993, p. 151).

229 Kymlicka (1989b, p. 884).

230 Rawls (1999, p. 369).

231 Rawls (1999, p. 369).

232 In an article originally published in 1988, Rawls himself rejected the interpretation of his theory as an instance of "consequential neutrality," assuming that "it is surely impossible for the basic structure of a just constitutional regime not to have effects and influence on which comprehensive doctrines endure and gain adherents over time, and it is futile to try to counteract these effects and influences." Rawls (1999, p. 460). In fact, some of his predecessors, such as John Locke, also seem to adopt this view. Thus, concerning the sacrifice of animals for the sake of religious worship, Locke thought that this type of sacrifice could not be prohibited because the state ought to refrain from interfering in the beliefs of its citizens: "the magistrate's power extends not to establishing of any articles of faith, or forms of worship, by the force of his laws" (Locke, 1991, p. 19); and, similarly, "[t]he part of the magistrate is only to care that the commonwealth receive no prejudice, and that there be no injury done to any man, either in life or state" (Locke, 1991, p. 36). Nonetheless, to the extent that social reasons, such as the safeguarding of public health, required stopping this activity, a legal ban would be justified, even if it affected some specific religious group. "In this case," Locke writes (1991, p. 37) "the law is not made

about a religious, but a political matter: nor is the sacrifice, but the slaughter of calves thereby prohibited."

233 As is well known, Rawls regards the principles of justice as "neutral" insofar as they have been chosen through a procedure designed to be blind to the place that people occupy in society, as well as to their religions, beliefs, lifestyles and conceptions of the good. To the extent that the state grants the maximum amount of resources and liberties to citizens, which will allow them to pursue their disparate ends, the neutrality requirement is satisfied. But, according to Raz, Rawls deviates from his purpose when he demands equal prospects to pursue conceptions of the good, since "that ability depends on the principle of equal liberty" (Raz, 1986, p. 117).

234 Nagel (1975, pp. 9–10). Nagel concludes that this theory of human motivation presupposes an individualism which is not neutral among all ethical visions.

235 Rawls (1993).

236 See Waldron (1993, p. 143).

237 Rawls (1971, pp. 214–215). A weakness in this approach is that the defence of neutrality already seems to presuppose an axiological commitment with this ideal. For this reason, Waldron criticises the position of liberal scholars who maintain that it is possible, and indeed desirable, to remain indifferent as to which of the different justifications of neutrality is more adequate. Waldron (1993, p. 152). For an analysis of the link between neutrality and scepticism, see Barry (1992, pp. 219–232).

238 This line of argument could still be pursued in a slightly different fashion to take account of those projects that seek to define a purely *political or procedural* conception of liberalism. This aim is often attributed to Rawls in *Political Liberalism*, where he concedes (see Rawls, 1993, xviii–xix) that some of the main ideas elucidated in his first book could lead to the oppression of reasonable dissent in a pluralistic society. This is also the motivation underlying some projects for reducing liberalism to a thinner, purely procedural, doctrine that would include only a commitment to the processes that ensure formal equality. In its more rigorous form, this view relegates the state's agency to a mere instrument of co-ordination to ensure that all citizens have the opportunity to pursue their aims, whatever these are. A difficulty with this stance is that it remains unclear why a society where the majority agrees on the intrinsic value of certain communal goals would choose instead to be committed to a weaker political compromise. In my view, despite what some of his later writings might suggest, Rawls does not subscribe to this model. Instead, he (1999, 459) explicitly claims that "[j]ustice as fairness is not, without important qualifications, procedurally neutral. Clearly, its principles of justice are substantive and express far more than procedural values."

239 Gray (2000).

240 Kukathas (2003, p. 29). And, in fact, scholars like Gray (2000), who adopt this stance, assume that, by doing it, they are rejecting the liberal doctrine altogether.

241 For an extended discussion, see Kymlicka (2002, pp. 141–145); Waldron (1993, pp. 161–163).

242 Rawls (1999, p. 459).

243 Rawls (1999, pp. 459–460).

244 Rawls (1999, p. 458). The priority of the right over the good implies, on the one hand, that the aspiration to neutrality rests upon a certain base, constituted by the set of comprehensive acceptable moral or religious doctrines. On the other, it indicates that the basic institutions and public policies are not particularly designed with the specific aim of favouring certain comprehensive doctrines.

245 Related to this conception, perhaps the pre-eminent argument against perfectionism is that the capacity of individuals to decide for themselves should be *prima facie* trusted. This kind of trust underlies the representation of the parties in the original position. They are portrayed as rational beings possessing two moral powers whose development constitutes their highest interest: the capacity to act according to a sense of justice, and the capacity to form and pursue a conception of the good. See Rawls (1999, pp. 312–313, 331). This idea of the moral person, defined according to a capacity for self-determination, ultimately leads to the justification of state neutrality. This is not just because individuals are always in a better position to judge for themselves what their best interests are, nor because the state may also make mistakes, but mainly because it is presumed that individuals are capable of making these judgements for themselves. Indeed, persons are defined by this capacity.

246 Rawls (1999, p. 450).

247 Waldron (1993, p. 166) is right when he points out that the relevant question is not whether liberalism is committed to certain substantive values, but rather whether such a commitment is justified. In his view, the influence and moral power of liberalism stems, precisely, from the appeal of these substantive values.

[248] A stronger accommodation of pluralism is, as I emphasised, a central goal of Rawls' political liberalism. He aims to build a theory for political institutions that could be accepted in a society deeply divided along moral, religious and philosophical lines (see Rawls, 1993, p. xviii). Put differently, he envisages a theory that cannot be reasonably rejected *from within* each conception of the good. This is the central idea behind the notion of *overlapping consensus*. This consensus, according to Rawls, has to be reached over a number of principles capable of standing on their own merits (*freestanding*). In the initial contractual strategy, these principles arise from the original position, while the current presentation of the theory seems to depend more on the idea of the "reflexive equilibrium" and on the notion of "public reason." Nevertheless, independently of how this change of strategy should be assessed—a matter that I shall not pursue here—Rawls' predisposition to take account of pluralism is still a logical corollary of the basic value of individual freedom. His distinction between simple pluralism and reasonable pluralism, and the purpose of accommodating the *reasonable* comprehensive doctrines within the theory of justice as equality, make sense in this light. See Rawls (1993, pp. 63–66).

[249] Callan (1997, pp. 17–19).

[250] Kymlicka (1995a, p. 113). As will be explained in the following chapter, Kymlicka has strongly emphasised the relevance of arguments of fairness and equality in this debate. Ultimately, he thinks that group-differentiated rights, such as territorial autonomy or language rights can be justified on these grounds.

[251] Berlin (1981, p. 151).

[252] Miller (1995, p. 40).

[253] Anderson (1983, p. 6).

[254] Pettit (1997); also Young (1990, 2000).

[255] One could argue that if minority nations, when faced with the state's failure to recognise their demands, sometimes adopt fundamentalist attitudes as to the need of preserving the character of their culture (even to the extent of reinventing traditions and reviving languages that are not used any more), this is because they are often forced by mainstream society to prove almost ontologically their "existence" as a "nation," a challenge that the majority nation does not face, insofar as it is internationally recognised as the "owner" of the state.

[256] Dworkin (1993, p. 75).

[257] In this sense, the present liberal defence of nationalism is characterised by the rejection of the ethnocentrist version of this ideology. What they advocate is not the ethnic superiority of "great nations," nor the right to political self-determination of some nations only, but the equal respect for all nations. This characteristic comes from the universal structure of the rights accepted by liberals: if the feeling of identification with the community and the desire to have our own political institutions is important for the members of my nation, we should assume that it is equally important for the members of other nations. See Tamir (1993, p. 9).

[258] Chapter VI examines this controversy in more detail.

[259] On this distinction, which is at the heart of Kymlicka's conception of culture, see Kymlicka (1989a, pp. 166–167; 1995a, pp. 87–88, 104–105, 184–185). As will be explained in the next chapter, Kymlicka justifies the rights of minority cultures to the extent that their object is to safeguard the structure of a culture, and not to impose restrictions on its members that are meant to preserve its particular idiosyncrasy.

[260] See supra note 178.

[261] Huntington (1997).

[262] In this sense, Lucas (1995, pp. 161–165).

[263] Kymlicka (1995a, p. 124, 128).

[264] Bader (1997, p. 779).

# CHAPTER V: ON THE RELEVANCE OF CULTURAL BELONGING: GROUP RIGHTS AS INSTRUMENTAL RIGHTS AND AS FUNDAMENTAL RIGHTS

## 1. INTRODUCTION

For the reasons set out so far, the justification of group rights as fundamental rights should ultimately be based on substantial reasons for affirming that individual membership in a certain type of identity group is an especially relevant moral interest. The aim of this chapter is to address the issue of whether cultural belonging possesses the intrinsic moral value that might arguably require the recognition of certain group rights. Rather than analysing this core question through the prism of conflicting philosophical or methodological paradigms, I will instead primarily conceive it as a test to sieve the reach, and relative priority, of some central liberal-democratic principles. Thus, broadly understood, the following discussion is grounded in a certain type of normative justification that has a particular bearing on values such as freedom, equality and human rights, commonly regarded as hegemonic tenets, or foundational commitments, of liberal democracies.

Political and legal philosophers and international public law scholars who focus on group rights usually examine these on the basis of certain ideals of citizenship and justice that they see as embedded in both the constitutional design of democratic states and the international regime of human rights. They argue, for example, that linguistic rights are—or are not—required by the very constitutional principles that justify other basic rights whose legal implementation and state protection are seen as defining features of a fair society; or they maintain that there are reasons of coherence to claim that such rights ought—or ought not—to be incorporated into the scheme of rules governing emerging supra-state regimes and international institutions.

Drawing on this background is usually central to any attempt to discuss the morality of the rights and policies that cultural minorities typically claim. Despite the ambivalences that some theories exhibit in relation to this subject, both proponents and critics of these rights can be seen as making assessments about the core claims involved in light of such values. This approach, which I take to be central in the present debate, provides the most fruitful realm in which to look for answers to the question of whether a positive case can be made for group rights. For one thing, it has helped to transcend the constraining dichotomies of individualism vs. collectivism that found their main expression in the liberal-communitarian debate that became dominant during the 1980s. As I have argued earlier in this book, the tendency to associate individual rights with liberalism and group rights with communitarianism,


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together with the assumption that both categories of rights are mutually exclusive, ultimately leads to a misunderstanding of the many problems that lie beneath the subject of the status of cultural minorities. Similarly, this way of framing the discussion obscures the fact that competing theories of political justice (including rival accounts of rights) often share the same concerns and objectives; at least they all seek to refine, rather than to replace, a set of concepts and principles that are relevant to dealing with some specific problems. Obviously, the arguments influencing the variety of perspectives on the issue that concerns us here are manifold and a comprehensive picture of the debate must acknowledge the existence of deep disagreements about the significance of group rights. Yet this does not necessarily add up to a neglect of the role of the underlying common grounds; rather, it merely reveals how elusive and contested the nature of moral and political concepts is.

Bearing in mind this general approach, most of the following inquiry focuses on a detailed analysis of the major contributions on the subject by two philosophers, Will Kymlicka and Charles Taylor, who in my view have offered the most powerful lines of argument in support of group rights for cultural minorities. Kymlicka's theory, articulated over the last decade in various pieces, most significantly in his books *Liberalism, Community and Culture* and *Multicultural Citizenship*,[1] is widely acknowledged as the most influential liberal defence of the rights of cultural minorities.[2] Although the roots of Taylor's defence of a "politics of recognition"[3] for distinct cultural identities lie in sources very different to those of Kymlicka's, its appeal also rests in the invocation of certain foundational liberal-democratic values. An exploration of the nature of this contrast will allow us to discern the different reasons that play a role in jurisprudential and political debates over the status of cultural minorities. It will also help us to outline the main elements of a comprehensive account of group rights. The ideas developed from these sources, particularly in relation to the relevance of cultural belonging, will be then tested and refined by assessing the force of some additional arguments by other theorists of multiculturalism as well as key objections and criticisms that have been put forward against them. Overall, we should gain a better understanding of the strengths and weaknesses of different lines of justification of group rights, an issue that might remain overlooked in a debate too often dominated by rigid dichotomies of individual vs. collective rights that are unhelpful to deal with the complexities at issue.

By adopting this particular approach, I am not denying that the grounds for justifying group rights could as well be found elsewhere. Above all, this stance should not lead to a neglect of the reasonableness of alternative ways of approaching this problem. In particular, the role of instrumental reasons cannot be easily dismissed, especially when the main purpose is not to articulate a theory of group rights as basic rights, but rather to convey a more contextual argument grounded, for instance, in some conception of compensatory justice. This perspective places a significant weight on normative claims whose strength as reasons is historically or culturally related, and which therefore do not claim universal significance. Thus, group rights could be only transitorily or contextually required to achieve other ideals—or to avoid jeopardising certain values or communal ends—and, if so, they could be better understood as derivative rights or instrumental rights. It is useful to bear in mind the two general layers of justification, since they call to mind the shortcomings of monolithic strands of moral reasoning. To clarify this idea further, Section 2 focuses on setting out various arguments based on reasons of this type.

One last reminder might be useful. A detailed articulation of the legal and institutional implications of the following arguments is beyond the scope of this book, which, as stated at the outset, primarily seeks to spell out the philosophical arguments that should form the starting point of any further inquiry about the legal steps that should be taken to accommodate minority cultures. For this reason, the empirical examples that will be put forward are largely intended to provide a sense of what the theoretical arguments should require in practice. These examples should thus be regarded as attempts to illustrate, and eventually question, the lines of reasoning developed in the theoretical discussion.

## 2. THE INSTRUMENTAL JUSTIFICATION OF GROUP RIGHTS

### *2.1. The Limits of Global Humanism*

Let us assume that there are reasons to believe that individual membership in a particular culture, and cultural diversity in itself, lack an intrinsic moral value, and that human well-being does not require identification with, or attachment to, a specific national, ethnic or linguistic community. Let us also assume that the very idea of having special duties towards the members of certain identity groups to which we happen to belong, often by mere chance, is indefensible. Accordingly, we endorse, as the moral ideal *par excellence*, some form of "global humanism."[4] In contrast to the perception of social life as being defined primarily by small-scale personal relations among individual agents belonging to particular groups (tribe, family, nation) to whom we have distinctive responsibilities—a picture that is deeply embedded in what Scheffler calls "common-sense morality"[5]— global humanism questions the traditional place that borders and communal ties have in delimiting our moral rights and obligations of justice. Within the renewed debate on global justice we find different lines of reasoning in support of this general approach: from the reconsideration of the role of causal responsibility in an extremely interconnected world,[6] to arguments in support of extending redistributive concerns and standards of compensation for involuntary social contingencies beyond the state, to the global scale.[7]

Although I cannot explore the arguments in detail here, generally speaking, global humanists share the view that attention should not be paid (or, at least, not principally) to the types of differences that nationalists think of as having major relevance.[8] Admittedly, it is commonly accepted, even among strong proponents of the impersonal point of view required by impartiality, that there are some basic individual attachments and emotional ties (with one's intimates, such as family and close friends) that generate special or priority duties.[9] Nonetheless, the global humanist often understands this argument as a legitimate constraint to the fundamental standpoint that we are all part of a common humanity.[10] Hence, she can still argue that no ethical difference should be made on "patriotic" or "national" grounds since, beyond the narrow circle of our personal relations with those whom we regard as significant others, the rest of the world has an equal moral standing. A stranger is a stranger, whether or not he or she is a co-national, a compatriot or a member of my ethnic group. Put differently, despite accepting some restrictions derived from the respect of the value of our closest attachments, the global humanist claims that appeals to

personal ties have a limit in that only those primary attachments can count as an exception to the general concern each of us owes to every other human being.

However, as explained in Chapter IV, there are two different accounts to be recounted about nationalism. One is primarily related to particularist, even racist, ideas of ethnic superiority, to the subjugation of certain groups that are regarded as "primitive" or "inferior," to hostility and to hatred. The other story is linked to ideals of liberty and equality. Both groups of elements have been successively intermixed in the processes of formation and transformation of today's democratic states. Although civic republicanism rejects, *prima facie*, the nation–ethnicity equation, some structural elements such as exclusive belonging to the polity and the centrality of the loyalty to the state remain central components of this doctrine. Admittedly, while the fundamental premises of liberalism aspire to be universal—regarded as equally appropriate and valid for all human beings in any context—liberal theories of justice and legitimacy have also tended to remain state-centred. For they regularly consider the state as the basic political unit and address the claims and needs of individuals in terms of their status as *citizens* of particular countries. One of the merits of the recent liberal defence of nationalism is precisely the elucidation of the links between nationalism and liberalism, which has contributed to overcome the failure of the liberal tradition to acknowledge these links explicitly. Nationalism, as explained, has historically played a decisive part in the generation of the proper illusions of unity and homogeneity, helping to neutralise the lack of solidarity and distrust among strangers. In this sense, the national ideology has been a powerful strategy in altering the self-image of individuals and preparing the ground on which democracy and welfare can take hold and be cultivated. For this reason, liberal nationalists argue that nations remain the appropriate candidates for preserving these values.[11]

Yet insofar as it is assumed that nations are only instrumentally valuable and that feelings of national unity and belonging were deliberately promoted through nation-building policies, and given that at present the state system is being progressively superseded by other forms of governance, can the same processes be replicated at the supranational, ultimately global, level? In an imaginative way, one could think about strategies and policies designed to enhance and extend the mutual identification of individuals as "world citizens." Already the Internet and other means of communication bring individuals together, in virtual and in real ways, from almost all points of the globe. This is a new phenomenon that may prove to be crucial in expanding the awareness of ecological catastrophes, poverty and other crucial problems affecting areas and people far from where we live. Perhaps the adoption of a single lingua franca would be sufficient to achieve mass assimilation in the long term through the progressive deterioration of vernacular languages and discrete linguistic and cultural communities.[12] This result, while regrettable in terms of cultural pluralism, could nonetheless be justified as a necessary sacrifice in order to expand human rights and social justice beyond the narrow borders of the states. At present, most European or American citizens assume that their governments do not have positive obligations towards citizens of less fortunate states—except, perhaps, in cases of emergency. For instance, the fact that the Canadian government has long championed increased international aid to Africa is largely seen as a charitable act worthy of praise; and so many people would argue that such a campaign is founded on what may be called a

"good samaritarian spirit," rather than on genuine obligations of justice. The same reasoning could also be applied to a number of ethically troubling issues such as the status of illegal immigrants in affluent countries and the passivity of these countries in adopting effective measures to counter the growth of extreme poverty beyond their borders. Assuming, with Beitz, Goodin, Pogge, Iglesias and others,[13] that the current political apathy in facing these problems of a global scale is deeply problematic from the point of view of justice, such a "global building" strategy based on patterns of cultural assimilation could be defended as providing a new basis for reinforcing an individual's self-identification of belonging to the same worldwide community. To the extent that this type of identification could provide the grounds for the kind of constitutive commitments and motivational dispositions necessary to permit mutual obligations to flourish, it seems that, in principle, even liberal nationalists should endorse the proposal.[14]

This line of reasoning raises important questions as to what kind of international institutions and policies could best serve those goals and the pursuit of global justice. These are complex matters that will not be dealt with here.[15] Instead, the main point I wish to emphasise is a theoretical one: supposing we had the tools to undertake a large-scale campaign of cultural assimilation at the global level designed to spread a single language that could facilitate, over time, the expansion of a single culture and, with it, the identification of each individual with humanity as a whole, rather than solely with other fellow nationals, why not use them? Not only the purpose seems praiseworthy but, in addition, the worst demons that nationalism has produced, even as unintended side effects, could be avoided. According to this view, the necessary infusion of a single culture into some hypothetical global political institutions would be a minor problem, provided that we agree that neither a culture nor a person's belonging to a particular one has an intrinsic moral value. Moreover, nothing prevents us from recognising the central role that nationalism has played in building democratic states. Nevertheless, the question is whether the time has come—even for liberal nationalists—to move beyond this type of identification in favour of more encompassing forms of supranational identities.

Despite their considerable appeal, ideas of global humanism need to confront certain objections, which are not easy to overcome. Perhaps the most obvious problems relate to the implementation of such an approach. To start with, as noted in Chapter IV, different forms of assimilation require different levels of coercion. This is an important factor that cannot be ignored. Any possible scheme designed to provide the ground on which global humanism can flourish will presumably need to respect basic individual rights. Meeting this requirement would not be undemanding: for example, any method intended to spread a single language universally (say English) would most probably reproduce the same injustices that the choice of a single official language has caused within multilingual states to those people who do not speak the selected language as their mother tongue. Hence, people with different mother tongues would be at a disadvantage in various facets of their lives and, particularly, in their abilities to exercise, on an equal basis, their rights of political participation.[16] This problem cannot be easily circumvented by underlining its temporary nature (it would disappear once everybody is fully competent in the chosen language), for such a response tacitly assumes that individuals should agree to make a sacrifice for the

benefit of future generations, even to the extent of putting the exercise of their individual rights at risk.

Some could object, however, that this tension could be resolved by seeking the approval of more vulnerable communities, which could then provide the grounds for political legitimacy. Although a solution that relies on consent is obviously more appropriate, the lesson we can draw from the historical analysis in Chapter IV is that, as a general rule, linguistic and cultural assimilation have only been achieved through highly coercive measures. Even when substantial economic and other incentives exist, many national minorities have struggled against cultural assimilation attempts by the state.[17] Immigrant groups may somehow be regarded as a counterexample; but, as explained, assimilation is usually rejected by these groups as well. Since nothing indicates that this pattern has changed, the practical difficulties of implementing global humanism should not be underestimated, however laudable this endeavour might appear.

One might still think, as an alternative less coercive measure, that educational policies could be adopted at the domestic level with the aim of encouraging citizens to support a "world democracy" or, at least, a number of international political institutions capable of enhancing justice efficiently on a global level. However, here again, the feasibility of any proposal for cosmopolitan democracy that brings with it cultural homogenisation is problematic; and, for the reasons put forward by liberal nationalists, without a certain degree of cultural homogeneity supranational political integration has many limitations.[18]

Consider the apparently more practicable approach defended by Martha Nussbaum in her essay *Patriotism and Cosmopolitanism*.[19] Rejecting the emphasis on patriotism and national identity that she sees as dominant in moral and political deliberations in the United States, Nussbaum contends that people should be taught that they are, primarily, "citizens of a world of human beings."[20] Referring to the cosmopolitan arguments of the Stoics, Nussbaum shares with them the view of a "world citizenship," which implies that our fundamental allegiance is due, first and foremost, to "the moral community made up by the humanity of all human beings."[21] She argues that, in educative terms, this approach requires teaching students to learn about the problems of the larger humanity, such as hunger and pollution, so that they come to understand that their identities are primarily linked to world citizenship.[22] Pointing to the familiar metaphor of concentric circles, Nussbaum also claims that, as citizens of the world, our task is to attract the largest of these circles (humanity as a whole) towards the centre. For this, she recommends an education that pays special attention to this abstract form of identification, as constitutive of human beings. Students, therefore, should regard themselves as not only defined by their most immediate circles—those related to family, religious, ethnic or national identity—but they should also "learn to recognise humanity whenever they encounter it."[23] Thus, she concludes, this knowledge becomes crucial to recognising the common aims and values embedded in the diverse existing cultures.[24]

The scholarly debate surrounding Nussbaum's essay shows, however, that both the substance and implementation of the moral position she defends are extremely controversial. While most of Nussbaum's critics share the view that some aspirations and values are indeed universal, they emphasise the weakness of the humanist idea as

she conceives it. On the one hand, some argue that a more precise description of the means to expand the circles of solidarity is needed. As Benjamin R. Barber stresses, the cosmopolitan proposal does not rise to the level of stimulating human imagination since "no one actually lives 'in the world of which the cosmopolitan wishes us to be good citizens.'"[25] Along the same lines, Elaine Scarry objects that the human capacity for imagining others—and the suffering of others—is far more limited than is generally thought and that, consequently, we should not rely on it to improve justice. This point is important because, as Scarry herself indicates, rather than favouring a world government, most cosmopolitans seem to rely on emotional generosity to expand individual commitments beyond the closest circles of affection.[26] On the other hand, Sissela Bok questions the wisdom of determining priorities—and teaching them to children—among the circles that are envisioned in the classical metaphor used by Nussbaum.[27] For both particularism and universalism have solid reasons in support of their views and none of them can be discarded *a priori* as irrelevant; in Bok's opinion, it is legitimate for people to have multiple identities and commitments.[28]

As can be seen, in general, these commentators are concerned with the corollary of the cosmopolitan view that all adherence or loyalty to a particular religious, national or ethnic group is morally irrelevant, and that we owe the most fundamental loyalty to the remotest circle of affection—both are themes that also inform the perspective of other commentators of Nussbaum's essay.[29] In fact, Nussbaum explicitly admits that to identify oneself as a citizen of the world is a solitary enterprise. She indeed refers to Marcus Aurelius, for example, as an heroic figure with whom, precisely because of that, most people would be unable to identify with, as some critics contend.[30] Cosmopolitanism, in short, seems to contain some sort of disembodied qualities that are incompatible with the basic needs and affections of ordinary people who experience life locally. But this, to the extent that invalidates these more confined loyalties, fails to provide an accurate view of humanity and incentives for action.

As can be seen, most of the precious observations are intended to emphasise the necessity for local links and affections before proceeding to expand the circle of solidarity. It seems difficult to articulate the roots of people's identification as "citizens of the world," especially since this is an identity based on a normative prescription that undervalues local identifications. Moreover, the possibility remains that suppressing existing parochial boundaries might not produce the desired result of an expansion of the empathetic affections towards others, nor a broader vision of the reach of the moral responsibility of individuals. Instead, it might lead to the obliteration of those links that nationalism has been able to promote in the modern world beyond the most immediate of our circles of affection. Hence, Miller might be right in saying that:

> The welfare state – and, indeed programmes to protect minority rights – have always been *national* projects, justified on the basis that members of a community must protect one another and guarantee one another equal respect. If national identities begin to dissolve, ordinary people will have less reason to be active citizens, and political élites will have a freer hand in dismantling those institutions that currently counteract the global market to some degree[31]

In short, questions of motivation and feasibility pose significant problems for the cosmopolitan approach. For, as Rawls writes, "however attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it."[32]

Another line of criticism to the global humanism project goes as follows: bearing in mind the idea that global humanism requires some form of democratic world order, it is unclear how the institutional design of a potential "world state" will face the risk of the alienation of citizens from their representative institutions. Consider again the linguistic question. It is not sufficient to refute the connection between language and identity in order to disprove the relevance of linguistic rights within the framework of cosmopolitan (global) governance. The mere participatory dimension of language might be sufficient to justify the instrumental relevance of these rights, especially to avoid privileging élites who are fluent in more than one language as well as people whose mother tongue happens to be the official lingua franca. As Kymlicka puts it, "democratic politics is politics in the vernacular."[33] Similarly, any proposal of global democracy has to confront the challenge of how to make democracy work at this level.[34] Liberal convictions about the inadequacy of the old view that dignity, honour and rights were benefits restricted to certain classes, demand that equality of opportunity to participate in the formation of political decisions be ensured. More precisely, the practicability of any form of deliberative democracy requires that different voices be heard in the public debate, and this inclusive aspiration might be better secured through national democratic forums.[35]

All these observations are familiar enough in recent discussions of cosmopolitanism and global justice and will not be developed further here. For our present purposes, the important point to be drawn of this debate is that any model of global governance will have to acknowledge the need to face the claims of cultural pluralism and will have to provide a common ground on which liberal democratic principles can take hold. So far, it is unclear how those interests can be balanced within an institutionally feasible model. Since assimilationist projects often involve coercive policies that create substantial inequalities between groups, attempts at fostering a "global identity" related to a particular language or culture will probably be a target of objections from the perspective of liberal justice. This will be especially the case where the emergence of international institutions or some forms of global democracy tends to recreate the same assimilatory features that in the past characterised the emergence of old nation-states.

In addition, for those who face the challenge of devising fairer international institutions, the problem remains as to whether it is really possible to foster progress in this realm without removing existing obstacles to the self-identification of citizens. This is probably the reason why only a few theorists of liberalism have ventured into designing in detail a model of cosmopolitan democracy. Those who have explored this intricate terrain (scholars such as Held, Beitz and Pogge) have not, in fact, suggested a conception of a world government—something that might only contribute to worsening democracy and inequalities by imposing high standards for political participation and lessen barriers to the accumulation of capital. Instead, they envisage the establishment of a global distribution of responsibilities of justice through a scheme that continues to grant a central role to states.[36] Thus, the available research

focuses primarily on the development of theories of fairness in a world of increasing interdependence and interaction between states, more than on the future prospects of global governance. Given that nowadays the state system is being increasingly superseded by other forms of governance, one would expect those theories to deal with the problem of granting social unity and solidarity—as preconditions of social cooperation—at this level. However, we still lack such a model, partly because this problem is often disregarded in views such as Nussbaum's.[37]

Summing up the observations made thus far, the prospect of achieving the ideal of global humanism through cultural homogenisation is questionable in terms of both justification and implementation. On the one hand, if experiencing local links and attachments is indeed necessary for the formation of our moral self, a model such as that proposed by Nussbaum would encounter difficulties of motivation that are not merely contingent. On the other hand, world governance could eventually reproduce, and even exacerbate, the same injustices that can be observed at the domestic level. Although it might be possible to provide an account of global democracy based on strong vertical decentralisation and accountability, the experience with international organisations so far shows that control of transnational cooperation by the citizenry is most uncommon.[38] So, even for those who think that cultural belonging has no intrinsic value, that there is a failure of rationality inherent in particularism, and that, ideally, we should commit ourselves to humanity as a whole, our ordinary morality and capacities call for small political units capable of providing the preconditions for justice and democracy to take hold and flourish. Accordingly, the global humanism model could be rejected as too demanding, and it could still be argued that nationhood and statehood remain the most adequate instruments to satisfy certain demands of justice.

The limitations outlined above also provide some of the most compelling reasons for justifying the cultural group rights on instrumental grounds: protecting cultural belonging could be regarded as key to achieving the level of cooperation necessary for the implementation of democracy and justice. Group rights could be understood as instrumental or derivative rights, given that their justification would not rest on the relevance of cultural belonging *per se*. Admittedly, this line of justification accords some significance to the particularist approach that might be seen as incompatible with the view of universal rights so far endorsed in our argumentation. But this potential weakness could be countered by contending that the existence of universal rights does not imply that each individual has a general duty towards the rest of the human race. As Robert Goodin and others have argued, the need for a moral division of labour could justify attributing special responsibilities to our fellow citizens, co-nationals, etc. "merely as an administrative device for discharging our general duties more efficiently."[39] Efficiency plays an appropriate role in an approach that does not seek to argue, at the normative level, that values are essentially relative or that some attachments are more significant than others.

### *2.2. Compensatory Justice Arguments*

The justification for cultural group rights can also rest on reasons related to compensatory or remedial justice for past wrongs or oppression. This is a recurrent argument, especially in debates about the rights of national minorities and indigenous peoples,

for these groups often place a central importance to maltreatment suffered in the past to justify their claims. As noted earlier, the nationalism of these groups is nowadays mostly defensive in character, an outcome of the arbitrary processes of nation-building that were contemptuous of minority cultures and which, in many cases, forcefully integrated them into the state. Among those who suffered most from the violence of these practices are numerous indigenous peoples in the Americas who were deprived of their lands and self-governing powers as well as being submitted to highly humiliating and coercive assimilationist programmes. Their histories are only some of the many that could be used to explore the question of whether group rights can be helpful in handling the grievances resulting from past oppression. Hence, the question arises as to whether it makes sense to demand some sort of compensation based on justice for such historical patterns of domination. To the extent that the grounds for many of the demands that cultural minorities make against the larger society are often linked to past harms suffered by their members, one could answer affirmatively.

However, there are several concerns that can undermine the intuitive appeal of this sort of argument. First, it can be argued that the citizens of today cannot be held collectively responsible for injustices that were committed in the past by their ancestors —injustices that they did not cause and could not have prevented in any way.[40] In addition, the kind of reasoning that once supported the decisions at issue is no longer upheld by present governments, or by the general electorate. Second, when both the direct victims of former violations of human rights and the perpetrators are long gone it could be pointed out that it does not make sense to open up a debate that will only generate divisions and hatred in civil society. An important corollary to this idea is the claim that the requirements of justice are generally satisfied if the members of previously subjugated groups presently enjoy the same rights and freedoms as the larger citizenry. Perhaps some symbolic reparations or compensations could still be significant—such as public declarations acknowledging the past injustice and asking for forgiveness. Rather than having a compensatory purpose, such measures normally aim to eradicate the long-lasting suspicion and resentment of certain groups in order to re-establish confidence in common institutions and contribute to reconciliation among communities. They are seen as transitory measures that could be justified through reasons of a merely prudential character.

But there is an alternative approach to historical injustice that challenges the ultimate relevance of these arguments. In addressing cases such as the status of indigenous peoples, some legal and political theorists have argued that it is morally imperative for current governments to undo, to the greatest possible extent, the harm done by their predecessors. This approach need not be based upon metaphysical ideas of collective guilt and responsibility. Rather, it is enough to show that people still benefit today from the injustices carried out by their ancestors. For example, people continue to profit from land and resources taken with impunity in the past. In this sense, the moral meaning of a past event is rooted in the fact that it has implanted a difference in the present that should not be overlooked. Political and cultural communities do survive for a long time, and substantial injustices normally result in consequences that endure beyond the generation that most immediately suffered them. It is reasonable, therefore, to assert that there is a moral requirement to handle the injustices that

past wrongs have caused to persist.[41] John R. Lucas makes a perceptive observation along these lines.[42] Asking whether young Germans today should respond to, or rectify whenever possible, the effects of atrocities committed by the Nazis before they were born, he states that by taking on the legacy of our predecessors we also assume some responsibility for acts that contributed to producing the good things that we enjoy today. As he expresses it: "We cannot eat the fruits of their labours and wash our hands of the stains of their toil."[43] The more we identify with our predecessors, and the more we are proud of their achievements, "the more also we must shoulder the concomitant responsibility."[44]

Other arguments point in a similar direction. For instance, a unilateral denunciation of, or failure to comply with, a treaty signed between the government of a state and one or more peoples can give rise to unfair consequences. In Chapter IV, reference was made to the unilateral rescission by the American government of the Treaty of Guadalupe Hidalgo, which guaranteed linguistic rights to Mexican Americans in the southwest of the United States.[45] Many other treaties had a similar ending. As Kymlicka argues, the legitimacy of the foundation of a state or its territorial expansion partly depends on the implementation of agreements previously made. Whenever it is impossible to re-institute the terms of a violated treaty, the moral obligation to fulfil our promises could support the recognition of some forms of group rights or of a special legal and political status to the groups affected. Otherwise, the legitimate expectations of their members would be unjustly diminished and devalued.[46]

Alternatively, some scholars argue that some events should not be wiped out from the collective memory. As Waldron says, "a well-known characteristic of great injustice [is] that those who suffer it go to their deaths with the conviction that these things must not be forgotten."[47] Such a conviction should not necessarily be interpreted as being grounded in some sort of spirit of revenge, but rather in the determination to preserve a collective memory and the lessons that can be extracted from them. Recall the apparent paradox in Renan's view about the need to forget and yet simultaneously remember. As was noted, his argument presupposed that certain events are deeply ingrained in the collective consciousness and pointed out that this phenomenon could prevent mutual understanding and cooperation between two communities belonging to the same state.

Hence, it could be argued that, whenever an identity group upon which great harm was once inflicted is not willing to forget and forgive those injuries, the demands of group rights acquire more substance. This willingness to remember should not be inevitably related to existing resentment, but to the need of every person to construct his or her identity and moral agency reflecting on his or her particular position in the world.[48] Habermas contends, on somewhat similar grounds, that even when the community to which the commission of historical injustices is imputed has solely the chance to symbolically apologise for them, and to clarify and provide public recognition of the facts, this is still relevant for what he calls "the *ethical–political* processes of self-understanding of citizens."[49] Contrary to the view that only uncritical traditions and strong values make a people equipped for the future, Habermas believes that the historical accounts of some of the darkest episodes of national history are a matter of public interest for members of subsequent generations.

This is a value that rests on the fact that generations born after crimes possess a historical legacy that they need to come to terms with. This process of critical revision—or "critical self-assurance," in Habermas's words[50]—is relevant because citizens need to clarify "the cultural matrix of a burdened inheritance" as well as "to recognise what they themselves are collectively liable for, and what is to be continued, and what revised, of those traditions that once had formed such a disastrous motivational background."[51]

Note that the arguments stated so far to justify group rights are not necessarily founded on reasons related to the value of cultural diversity or cultural belonging. Rather, they are based on ideals of remedial or compensatory justice, or even relate to a prudential rationale; in this context, group rights might play a central role in overcoming the tensions that usually undermine peace and democracy in divided societies. Certainly, some cultural minorities demand a higher level of autonomy (or even secession from the state) on the basis of the harm that their members suffered as a result of aggressive processes of nation-building. Group rights—and, in particular, self-government rights—could also work as a remedy after massive violations of human rights or the systematic maltreatment of certain communities.[52] Obviously, which particular rights should be recognised—secession, rights to special representation, constitutional renegotiation to accommodate cultural demands, linguistic rights, etc.—will depend on the context. The important point is that group rights could acquire a singular relevance in fostering stability and peace in contexts of what can be called "fractured statehood," where lack of political unity and mutual trust continue between different identity groups on account of traumatic historical experiences of injustice arising from deeply coercive nation-building policies.[53]

### *2.3. Conclusion: The Instrumental Relevance of Group Rights*

The comments above represent rough outlines of complex arguments, each one of which warrants more detailed exploration. However, it is to be hoped that enough has been said to stress the central role that this line of reasoning might potentially play in justifying the recognition of certain group rights in particular contexts. None of the arguments sketched points to the support of group rights on the basis of the moral value of cultural belonging or of cultural diversity as such. Nor is it their aim to explore questions of whether individual interests in cultural belonging are morally relevant.

It follows from this approach that those cultural minorities whose actual claims are not founded on past injustices would not be suitable candidates for group rights, since the recognition of these rights is granted largely as a means of remedying, to whatever extent possible, previous violations of basic human rights. What is at stake, therefore, is not the right to cultural belonging or cultural preservation in itself. On the other hand, from the perspective of global humanism, group rights can be seen as secondary rights; i.e., as rights that are temporarily needed where the international system and its institutions remain underdeveloped and imperfectly equipped to meet some basic requirements of democracy and fairness. In this situation, group rights can be even seen as a remedy to a shortfall in state legitimacy. Both perspectives are compatible with viewing ethnocultural identities fundamentally as a product of

alienation and oppression; as "a false consciousness which divides groups of common interests and blocks emancipation movements, and a phenomenon which will ultimately vanish in a truly free society because there is no more human need to which it answers."[54] Hence, rather than being understood as a permanent feature of liberal democracies, group rights could be seen as an instrument to make effective other principles or benefits that are considered intrinsically valuable.

But taking a step further it could be argued that cultural belonging is, instead, valuable, regardless of whether certain identity groups continue to suffer from past injustices, or of the possibility of envisioning a world democratic system capable of overcoming the sort of objections mentioned above. Section 3 addresses this issue. If cultural belonging is indeed a source of independent moral reasons that derive directly from the specific relationship between the individual and the cultural group, group rights could be also justified as basic rights.

## 3. GROUP RIGHTS AS BASIC RIGHTS: THE CONNECTION BETWEEN AUTONOMY AND CULTURAL BELONGING

It might be argued that the previous perspective does not fully capture the strength of the arguments in support of the rights of cultural minorities. Despite the various standpoints that different groups choose in support of their claims, cultural group rights can only be categorised as basic human rights to the extent that they are somehow directly relevant to accessing what Rawls calls "primary goods." In my opinion, the two theories analysed below corroborate this thesis. On the one hand, the essential pillar of Kymlicka's theory of minority rights is the reconcilability and interdependence of autonomy and culture. Hence, the discussion will focus particularly on clarifying this connection. On the other hand, Taylor's critique of the increasing social fragmentation of modern democratic societies leads to a singular concept of liberalism that allows for group rights in order to safeguard some shared social goods.

As noted earlier, the centrality accorded to the theories of Kymlicka and Taylor is justifiable both for expository convenience and for the reason that their views signal two distinct and meaningful directions relating to why and how liberalism ought to accommodate various types of cultural minorities within states. However, in recent years, a number of other political and legal philosophers have also shared this concern, attempting to show the consistency of certain cultural group-specific rights with liberal values and rights.[55] I will refer to this body of work within the exposition, whenever such a reference might help to better refine or complement the argument.

### *3.1. Cultural Belonging as the Basis of Autonomy: The Theory of Will Kymlicka*

The starting point of Kymlicka's theory is the liberal ideal of a society of free and equal individuals. However, Kymlicka is particularly concerned with the question of what is the relevant society to which this ideal applies. The answer is clear to him: "For most people it seems to be their nation."[56] In his view, few citizens of democratic countries would favour a system of open borders that would allow them to move to, freely settle in and vote in whichever country they choose. While such a system would remarkably extend the geographical scope within which political rights could be

enjoyed, it would also lessen the ability of national communities to survive as distinct cultures. If the choice were given, Kymlicka thinks the majority of people "would rather be free and equal members within their own nation, even if this means they have less freedom to work and vote elsewhere, than be free and equal citizens of the world, if this means they are less likely to be able to live and work in their own language and culture."[57]

The usual opposition of cultural minorities to the assimilationist campaigns normally associated with nation-building programmes seems to corroborate this assertion. But Kymlicka also argues that most theorists in the liberal tradition share this assumption, albeit implicitly. Referring to the work of two of the most important contemporary exponents of liberalism, Rawls and Dworkin, Kymlicka argues that the previous assumption is fundamental to understanding their theories.[58] Kymlicka's work tries to provide, then, a systematic development of egalitarian liberalism in relation to the problem of the role of cultural differences. His *leitmotiv* is to show that the existing gap is not due to a deficiency in the fundamental principles of liberalism but rather to the fact that, during the second part of the twentieth century, liberals have mostly worked with a model of the *polis* in which the political community coincides with the cultural community.[59] This model would have prevented them from spelling out the ultimate implications of the postulates they assume. Thus, Kymlicka proposes to start from a version of a political community such as the one configured by Rawls, and to ask what would be the terms of a just arrangement for the diverse cultural groups contained within it.[60] The question is relevant because, in his view, the public space should be inclusive not only of the plurality of existing world views in society but also of the plurality of cultures to which individuals belong. Yet, while the common rights of citizenship protect the multiplicity of beliefs adequately, they need to be supplemented with group rights in order to sustain cultural diversity[61]—for the reasons I will discuss in a moment.

Kymlicka's major contributions to this debate—especially *Liberalism, Community and Culture* (1989) and *Multicultural Citizenship* (1995)—can be seen as complementary. They reflect the same intellectual concern about the fact that the fate of national and ethnic groups is often left in the hands of xenophobic nationalists, religious extremists or dictators, given that liberal scholars have failed so far to accommodate multiculturalism in their theories of constitutionalism and rights. Kymlicka's primary aim is then to counteract what he considers a main deficit of liberal theory, especially since it entails ceding ground to the communitarians and other critics of liberalism.[62] Moreover, in his view, it is not just that the liberal tradition has little to offer in relation to the problems at hand, but rather that it has often offered contradictory advice: "Liberal thinking in minority rights," he writes, "has too often been guilty of ethnocentric assumptions, or of over-generalizing particular cases, or of conflating contingent political strategy with enduring moral principle."[63]

Hence, Kymlicka's purpose is to unveil some internal inconsistencies of liberal thought with respect to the status of cultural minorities.[64] The tensions experienced by multinational and multiethnic states, especially in Western democracies, provide the ground to build the necessary theory, for Kymlicka believes that the resolution of these conflicts is crucial for the preservation of democracy and human rights. One of the chief virtues of his work is that it has opened up an intense debate on

multiculturalism and minority rights. Furthermore, it has changed the terms in which this subject matter used to be thought about within liberalism. As already mentioned, until recently, most liberal theorists who discussed the problem of cultural minorities did so on the basis of the principle of non-discrimination. They assumed that the best strategy the state could adopt towards these groups was to leave the maintenance and transfer of their cultural practices up to the free choice of their members in the private sphere. However, as observed in Chapter IV, Kymlicka strongly argues that the orthodox liberal position is incoherent, insofar as it assumes that the state should abstain from promoting any particular culture. This is the most obvious flaw of the dominant approach, as the previous discussion has shown. It is also a central assumption in Kymlicka's thought. Regardless of the extent to which we find his views and proposals persuasive, the approach he constructs to analyse the relation between fundamental liberal principles and culture is genuinely original and has had a significant impact for the justification of group-specific rights.

The following sections will focus on how, according to Kymlicka, the demands of multiculturalism should be best resolved within a liberal-democratic context.[65] I will also examine some of the main objections to this theory and then try to establish to what extent these criticisms undermine its basic tenets. The discussion aims to clarify the scope and limits of a liberal theory of minority rights, and will be mainly concerned with understanding the general structure of the argument, not with exploring its particular applications in specific contexts. The implications of this normative theory for different types of cultural minorities will be scrutinised in Chapter VI. First, it is important to review Kymlicka's main contribution and central claims.

### *3.2. Cultural Belonging as a Primary Good*

By seeking to elucidate the basis of a distinctively liberal approach to minority rights, Kymlicka aims to accommodate many of the claims and values of cultural minorities within dominant contemporary liberal norms, thus overcoming the common charges of those who think that group rights are basically incompatible with liberal rights and principles.[66] Indeed, the first part of *Liberalism, Community and Culture* is essentially a lucid defence of the philosophical credentials of liberalism against Marxist and communitarian critics. Liberalism, as Kymlicka understands it, is characterised by two central features. On the one hand, the endorsement of a certain type of individualism: the individual is conceived, in the Kantian tradition, as the supreme moral unit, as an end—in and of —himself or herself. On the other hand, the upholding of a sort of egalitarianism in which each individual possesses an equal moral standing and should be treated by the government with equal consideration and respect.[67] This account is common among social or egalitarian liberals, a variation of liberalism subscribed to and developed by philosophers such as Brian Barry, Gerald A. Cohen, Ronald Dworkin, Stuart Hampshire, John Rawls and Amartya Sen. In contrast to other versions of liberalism—and, especially, to the libertarianism of Friedrich Hayek and Robert Nozick—it prescribes state intervention in order to comply with the moral postulate that every human life is equally meaningful.[68] This commitment towards equalising human value leads to a consideration of factors such as different abilities and circumstances, and of the need for a scheme of wealth

redistribution that provides each individual with the resources necessary to develop a different life plan.[69]

For Kymlicka, none of these characteristics implies that liberals do not value communities. In other words, the fact that the primary measure of the relevance of any good or object is its contribution to individual lives does not mean that the liberal doctrine should be grounded on a sociologically naïve view. On the contrary, the central importance conferred by liberals to values such as freedom of conscience or freedom of association is, he claims, inherently connected with the protection that they grant to eminently social relationships and goods.[70] This self-examination of the generally accepted view of liberalism is at the heart of Kymlicka's critical assessment of communitarianism. After a close examination of its main theses, he persuasively argues that none of the standard communitarian versions poses serious threats to liberal theory.[71] On this diagnosis, the problem of multiculturalism is related neither to the relative precedence of the individual over the community nor to the challenge of justifying individual human rights as transcending the existing plurality of life plans and conceptions of the good. Rather, the main question is whether "some forms of cultural difference can only be accommodated through special legal or constitutional measures, above and beyond the common rights of citizenship."[72]

Kymlicka sets out substantial steps in proposing how this question should be addressed in the context of liberal states seeking to accommodate minority groups. As I shall explain below, although some tensions may arise between minority rights and some problematic cultural practices that can potentially undermine individual human rights, Kymlicka argues that this charge can be circumvented and thus, *prima facie*, individual rights are not necessarily jeopardised by the recognition of group-specific rights.

It is important to clarify this position. Kymlicka stresses the discontinuity existing in many states between the political community, "within which individuals exercise the rights and responsibilities entailed by the framework of liberal justice" and the cultural community, "within which individuals form and revise their aims and ambitions,"[73] thereby criticising the common assumption of cultural homogeneity mapped in most liberal political theories. In his view, the liberal principles of equality and liberty require that persons be respected as members of *both* types of community, a goal that can only be accomplished if the existing individual rights of citizenship are supplemented with certain group rights for cultural minorities. In *Liberalism, Community and Culture* this idea is mainly discussed in relation to the status of indigenous peoples. In *Multicultural Citizenship* Kymlicka develops his previous argument (partly in response to criticisms of his early book) and expands it to include other forms of cultural diversity.[74] Whereas the initial elaboration is refined in the later version, the conclusion reached in both works is the same: liberal justice in multicultural states requires certain forms of group rights for cultural minorities. This idea presents a challenge to the orthodox liberal view that concern with culture and minority rights is somehow parochial, a communitarian remnant unnecessary in a liberal democratic society because the strategy of privatisation of diversity already guarantees pluralism and equal treatment.[75]

Why should interests related to culture be accorded the special protection usually granted by rights? The starting point of the argument has been outlined in

Chapter IV. Following Kymlicka, I have argued that modern states cannot remain indifferent to the ethnocultural landscape within their borders, since they cannot help but making decisions that inevitably influence the cultural sphere—for instance, by pursuing a language policy in public education. Hence, in this context, neutrality cannot mean non-intervention. Instead, in order to realise neutrality, some forms of what Kymlicka calls "group-differentiated rights" ought to be recognised in order to correct situations of collective disadvantage in which cultural minorities find themselves and thus preserve the state's impartiality. Therefore, it is in order to remedy and redistribute these burdens that group rights are justified.

However, as it was also noted, the plausibility of this reasoning strongly depends on answering a prior question: why is it so important to accommodate cultural interests and cultural diversity? Or, in other words, why should equality between cultural groups be a matter of concern at all? If cultural affiliations and interests were only secondary, then the interest in maintaining a vibrant minority culture with institutions functioning in a minority language, for example, could not turn into a state obligation, but instead would be a matter of policy to be left to the discretion of the majority.

It is in answering these complex questions that Kymlicka makes an essential contribution. The second step in his argument for minority rights asserts that culture is a precondition for choice and that cultural belonging should thus be regarded as a primary good for the meaningful exercise of autonomy.[76] For this reason, state policies designed to promote the majority culture are basically unfair.

The argument establishing an intrinsic connection between autonomy and cultural belonging requires elucidation. Its starting point assumes the valorisation of autonomy as being intrinsically connected to freedom.[77] Autonomy is understood as the individual's ability to exercise her moral capacities to discover, single out and choose among different conceptions of the good life as well as to change these choices in the light of other values or rules of reason. Liberals believe that the government, in general, should abstain from exercising its authority to interfere in this internal ability to govern one's own actions and pursuits. However, for Kymlicka, the conception of autonomy is culturally dependent in that it presupposes that individual choices do not occur in a vacuum, but are formed and shaped within a particular cultural context. More precisely, he refers to the need of a "societal culture," meaning "a territorially concentrated culture, centred on a shared language which is used in a wide range of societal institutions, in both public and private life," rather than, as in the thick sense, a culture based on "common religious beliefs, family customs or personal lifestyles."[78] According to Kymlicka, participation in a societal culture is what makes autonomy and freedom of choice meaningful.[79] Very briefly, the reasoning runs as follows:

Freedom involves making choices primarily among the social practices available to us. To discern the meaning of a practice and the significance of a given course of action requires an understanding of the language and history that makes meaningful to us the point of the activities or actions that the framework of choice comprises. For this reason, access to a societal culture provides the tools for understanding cultural narratives, and this is a precondition for making meaningful choices about how to lead our lives. Accordingly, in order to exercise their freedom, individual's

need not only information on the different options available but also the ability to evaluate it; they need access to a societal culture:

> Whether or not a course of action has any significance for us depends on whether, and how, our language renders vivid to us the point of that activity. And the way in which language renders vivid these activities is shaped by our history, our 'traditions and conventions.' Understanding these cultural narratives is a precondition of making intelligent judgements about how to lead our lives. In this sense, our culture not only provides options, it also provides 'the spectacles through which we identify experiences as valuable.'"[80]

Once the intrinsic connection between freedom and culture has been established, Kymlicka argues that cultural belonging is a primary good that the parties in the Rawlsian original position would not want to give up, independently of the particular way of life that they choose to lead.[81] This is so because of the culturally dependent conception of autonomy defended. Our cultural heritage, encompassing the narratives and stories transmitted through oral, literary or artistic languages, configure the means by which we become aware of what are the available options and life plans, their respective meaning and social value. Because the range of options is determined by our cultural heritage, having a rich cultural structure is important in order to be aware of the options available and to assess their value intelligently.[82] Cultures, therefore, are valuable not solely in themselves, but because it is only through membership in a societal culture that "people have access to a range of meaningful options."[83]

Significantly, Kymlicka supports this argument with citations of prominent liberal thinkers such as Dworkin, who argues that cultural structures based on a shared vocabulary of tradition and convention should be protected because they provide the context in which we identify our experiences as valuable: "the center of a community's cultural structure is its shared language,"[84] Dworkin says, explicitly recognising that people's dependence on their particular communities goes beyond the economic and security benefits this membership provides:

> They need a common culture and particularly a common language even to have personalities, and culture and language are social phenomena. We can have only the thought, and ambitions, and convictions that are possible within the vocabulary that language and culture provide, so we are all, in a patent and deep way, the creatures of the community as a whole.[85]

Kymlicka basically agrees with Dworkin, but deplores his failure to draw out the implications that follow from his own observations on the realm of culture, which, once again, might be due to the fact that most liberal theorists implicitly assume that nation-states are culturally homogeneous.[86] Yet, as Kymlicka stresses, in many contemporary democracies the political community and the cultural community are not coextensive. This factor explains the existence of special systems that provide, *de facto*, for the recognition of certain group-specific rights. These practices should not be ignored in the theoretical analysis, since they reflect our intuitions about the treatment that people deserve *qua* members of cultural communities, and not only as citizens.[87] In the light of this argument, the overwhelming tenacity that minorities have shown throughout history in preserving their cultures and languages against the

pressures of forced assimilation does not appear as inward-looking. Nor is it linked to nostalgia, emotions or resentment arising from past injustices, but rather to the individual's essential interest in preserving her cultural belonging.

The argument is straightforward and powerful. The idea that persons should be respected as members of a societal culture does not violate the essential postulates of liberalism: it does not assume that the community is more important than the individual, nor that the state should promote a certain conception of the good to preserve the integrity or the purity of a culture. In relation to this latter feature, it is crucial to emphasise that it is the *structure* of a cultural community, rather than its precise *character* at a certain historical moment, that Kymlicka conceives as a primary good—to the extent that it provides the context in which individuals exercise their freedom of choice.[88] Customs and practices related to a particular community at a given time can eventually change as a result of the individual choices of its members. What is important is to preserve the institutional and linguistic contexts—the *structure*, in Kymlicka's terminology—in which the creation and recreation of the social practices of a historical community are made possible.[89] Therefore, what should matter is not the change, or eventual disappearance, of a culture *per se*, but the nature of the process that leads to this result. It is one thing to ensure that members of minority cultures are not coerced to assimilate or to give up their efforts to preserve their culture; but it is another, very different one to guarantee the indefinite preservation of the traits that characterise this culture.[90] The distinction is relevant since, on this reasoning, group rights of cultural minorities are justified on the grounds of preserving autonomy and not of protecting cultural survival. Kymlicka rejects the radical communitarian view that contends that self-discovery replaces judgement because the self is already constituted by some given ends. On the contrary, the idea is that, although our identity is primarily circumscribed by a particular world of common practices that we do not choose, people retain an important power of choice.[91] The role of free will is inevitable because no culture is internally homogeneous and because "[t]o inhibit people from questioning their inherited social roles can condemn them to unsatisfying, even oppressive, lives."[92] Consequently, this justification imposes some limitations on the extent to which cultural diversity can be protected through liberal means. In particular, it cannot support those lines of argument that aim at imposing duties against the will of the members of a minority to coercively preserve their cultures and languages.

There are alternative accounts of the value of cultural belonging in the literature that try to articulate the complex relation between freedom and culture. For instance, Margalit and Raz argue that "familiarity with a culture determines the boundaries of the imaginable."[93] The fact that the world is composed of different "pervasive cultures,"[94] in their terminology, is morally relevant because individual well-being heavily depends on succeeding in the achievement of goals and relationships worthy of being chosen. Yet these goals and relationships are culturally related. That is to say, they are products of a cultural structure that makes shared experiences, traditions and tacit conventions possible, thus preserving the knowledge of how to do things, what is appropriate, valuable, prestigious and so forth. Accordingly, the case of preserving encompassing cultures from decay, Margalit and Raz argue, is a compelling one.

As can be seen, this justification of the kind of policies and rights associated with the preservation of multiculturalism is similar to the one provided by Kymlicka.[95] They all emphasise that individuals have good reasons for valuing their cultures and keeping deep connections with them. In fact, most contemporary theorists of liberal nationalism assume a culture-based conception of autonomy.[96]

Despite the nuances and disagreements on how exactly liberalism should accommodate the demands of cultural minorities, all these theorists share a similar view on the way in which individual identity is construed. On the one hand, they accept that, by and large, the cultural context determines the options of free individuals in terms of available goals, conceptions of the good and meaningful values. Yet, on the other hand, they claim that the individual is free to form and revise the particular choices she has made. This apparently inconsistent view of the self is nonetheless coherent. Unless we are able to understand its meaning within a particular culture, the freedom to choose and revise conceptions of the good and life plans is pointless. Although the options may be numerous, no one can reinvent himself or herself in a vacuum. Raz illustrates this central point with an illuminating example:

> Why so? the child may ask; why must I play chess as it is known to our culture, rather than invent my own game? Indeed, the wise parent will answer, there is nothing to stop you from inventing your own game. But – the philosophically bemused parent will add – this is possible because inventing one's own games is an activity recognized by our culture with its own form and meaning.[97]

In short, the basic rules that govern our life cannot be newly articulated constantly. As Raz points out, the density and multiplicity of their dimensions would make it impossible to deliberate at every step.[98] Or, put it differently, we are incapable of making choices simultaneously affecting all realms of our lives.[99] In a similar vein, Dworkin argues that, despite having the phenomenological possibility of distancing ourselves from our cultural background and affiliations and reflecting on the kind of life we lead, "no one can put everything about himself in question all at once."[100] Therefore, many of our decisions are made spontaneously, and in practice, we are able to act more or less automatically because we have internalised a coherent body of meanings, behaviours and practices that has been transmitted to us within a cultural context. The central choices that we make in our lives—the type of relationships we pursue or sustain, our professional occupation, the loyalties and commitments that we develop—have meaning within that context. Yet this is not a deterministic view. The individual is able to distance herself from her culture and adopt a critical perspective on the fundamental practices and values that define its character. This is the reason for this contextual (non-naive) conception of the person as a free moral agent.

Consequently, the value of group-specific rights emerges out of respect for the institutional and linguistic cultural structure that is a precondition for freedom and individual well-being. By appealing to autonomy, this argument helps to counter the widespread objection that liberalism and cultural group rights are ultimately irreconcilable. It should be noted that one implication of this is that these rights cannot justify the imposition of a duty (on individuals or public institutions) to preserve the particular character of a culture. Thus, if the members of a group show no interest

in some particular aspect of their culture, and would rather prefer assimilation into the mainstream, a duty to preserve this aspect or to remain faithful to their own community cannot be legitimately imposed.

However, assuming that in modern societies different societal cultures provide their members with a range of meanings, how should changes and innovations in what Kymlicka calls the "character" of a culture be explained? This is a troublesome question that requires some explanation. Of course, there are many factors at play that cannot be accurately discussed here without gross oversimplification. Nevertheless, it could be argued that it is always necessary to turn to an external system of values in order to transform the character of certain culture. If this is correct, two criticisms could challenge Kymlicka's argument, at least as outlined thus far. First, if we assume that individuals are free to change their values and goals because of their ability to access the meanings of other cultures, belonging to *one's own* cultural community might not be an essential interest or concern.[101] Second, to the extent that concepts such as "cultural change" and "cultural choice" presuppose the existence of reciprocal influences among cultures, one could challenge the very assumption that cultural communities can, in fact, be individuated. For obvious reasons, both categories of criticism could support further scepticism towards the justification of group-specific rights for cultural minorities.

As regards the first criticism, the assertion that individual transformations mainly have their origins in sources of values that are external to their particular culture requires closer inspection. Certainly, many changes are motivated by the influences of other cultures; yet the degree to which the meanings and beliefs newly incorporated are intelligible to us would still depend on whether our pre-existing mental structure allows us to recognise and interpret correctly other symbols and ways of life in order for us to appropriate them. In this manner, people's membership to their own societal culture is still necessary in order to acquire the kind of skills and abilities that are necessary to access, and eventually incorporate, elements of other cultural systems. In any event, it is implausible to think that an entire community could substitute all of their identifying cultural features at the same time. This is again the point in Raz's example above.

Yet one could insist that abstract human abilities such as imagination, curiosity or empathy are enough to facilitate connections with other cultures. These qualities could be enhanced through educational policies as part of integration programmes designed to assimilate minorities into the dominant culture without depriving its members of access to a societal culture. If we assume, as liberal nationalists do, that sharing the same language and culture is important in order to improve democracy and the welfare state, among other public goods, such a perspective might be reasonably embraced. At first glance, it might be persuasively defended on the grounds that it recognises the dangers of alienation and exclusion from the polity of cultural minorities. Thus, instead of turning to group rights as the answer, we should rely on state intervention to liberate members of minority cultures from the burdens of their background by granting them progressively full integration into the mainstream culture. Regardless of how the idea of integration is understood, this argument shows a certain sensitivity to the dependency of autonomy on culture and demands further examination. Section 3.3 will explore this approach in greater detail.

Let us turn now to the second criticism: the problem of individuating societal cultures. To address this issue properly, a more detailed exploration of the notion of culture would be required. But let me only insist on that the notion of culture should not be reduced to a uniform and compact body of values and practices. In most cases, changes take place within the same cultural scheme. As noted earlier in Chapter III, all cultures are constantly exposed to internal tensions that generate successive changes over time. That is why, in discussions of group rights, we should avoid being drawn into any form of essentialism. Modern anthropology warns of the risk of assuming a monolithic and static view of culture. Thus, Clifford Geertz and others caution against the temptation to see the relationship among different elements of cultures and other meaningful forms as consisting of some kind of inherent affinity that produces only harmony, instead of incongruity or conflict.[102] Keeping this observation in mind seems to me fundamental. Incongruities, internal conflicts and the multiplicity of meanings that are opened to us though the process of socialisation into a given culture are, in fact, *part* of this same culture. Even the most remarkably homogeneous community includes internal contradictions and different interpretations of the same practices and values that would eventually transform dominant beliefs and patterns of behaviour. Both the drive towards coherence (and the continuity of tradition) and the pull for transformation and change have thus an impact within any existing societal culture. Hence, it is crucial to understand that discontinuity and contradiction are *also* part of them; and the fact that cultural structures do not encompass perfectly connected and consistent systems of thought and values does not mean that a culture does not exist. As Geertz writes:

> Cultural discontinuity, and the social disorganization which, even in highly stable societies, can result from it, is as real as cultural integration. The notion (. . .) that culture is a seamless web is no less a *petitio principii* than the older view that culture is a thing of shreds and patches[103]

A culture, therefore, "is neither the spider web nor the pile of sand,"[104] and so our personal identity is often perceived as a hybrid and manifold one.

All this does not imply that to speak of an individual's identity as linked to a particular culture is meaningless, or, more generally, that cultural claims are nonsense. Undoubtedly, we have to oversimplify when we are compelled to synthesise the features of the cultures to which we belong, as we do when we try to define ourselves as individuals. The difficulty lies in the complexity and multidimensionality of the characteristics or facets we try to depict. Nevertheless, we still need to formulate a coherent narrative of ourselves and our social world. Far from being a futile exercise, our constant engagement, as individuals and as collectives, on this constructivist effort of definition gives real significance and authenticity to our lives and allows for differentiation. For this reason, I am largely in agreement with Modood's claim that it is not necessary to think that a culture has a perfectly defined essence in order to affirm its existence. As he says, "one did not need an idea of essence in order to believe that some ways of thinking and acting had a coherence;" and "as long as we do not impose an inappropriately high standard of coherence (e.g. the coherence of a mathematical system, [. . .] there is no reason to be defeatist from the start."[105]

Berlin also emphasised the importance of acknowledging the internal diversity of every culture.[106] Like Kymlicka, he thought that, although identity is circumscribed by a web of cultural practices that are not initially chosen, individuals retain a significant power of choice and, consequently, their actions preserve a voluntary component. Moreover, the centrality of freedom of choice in Berlin's thought comes from his idea that we are essentially self-creating creatures by virtue of the need to choose from a diversity of incommensurable rival values and lifestyles that we encounter in our daily experience as participants in a culture.[107] The role of free will, therefore, is inevitable because no culture is internally homogeneous. This reasoning is even more meaningful in liberal democratic states, which inevitably contain pluralistic societal cultures.[108] But yet again, this does not mean that we cannot individuate different cultures, even if the boundaries are blurred.

To conclude, if the reasoning so far is sound, then there are reasons to claim that cultural belonging is a primary good, essential to individual well-being. The state, therefore, should guarantee equal access to this good. For the reasons set out in Chapter IV, the separation between state and culture is largely impossible in modern conditions. Especially in welfare states, the government cannot help but intervene in the realm of culture through its educational, social and linguistic policies. In such situations, justice in multicultural states requires group rights in order to guarantee a higher level of impartiality and to correct the vulnerability and disadvantages that cultural minorities suffer arising from their incapacity to counteract the power of the dominant culture. Thus, Kymlicka concludes that "group-differentiated rights—such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims and language rights—can help to rectify this disadvantage, by alleviating the vulnerability of minority cultures to majority decisions."[109]

It should be noted that a standard conception of liberal equality is presupposed to support these rights: the need to rectify inequalities that are not initially chosen. Liberals should address the inequalities in access to our own culture in the same way that they have addressed socio-economic inequalities.[110] A minority should thus have access to the same resources as the majority (the dominant cultural group, in this case) in order to ensure the viability, development and prosperity of its culture. It is crucial to realise that the goal is not merely to tolerate minorities or to grant them specific rights for prudential reasons. Rather, the idea is that "in developing a theory of justice, we should treat access to one's culture as something that people can be expected to want, whatever their more particular conception of the good,"[111] especially since cultural membership is typically unchosen.

### *3.3. The Burdens of Assimilation and the Limits of Coercion*

Kymlicka deduces the account of cultural minority rights I have just sketched from a moral conception of the person that can be reconciled with some of the basic ideals of freedom and equal respect defended by social liberalism. On this account, group rights are not merely compatible with those postulates; liberal justice *requires* their recognition. This is so because cultural belonging is a prerequisite for the sort of

meaningful exercise of freedom of choice that matters to autonomy. This in turn yields an answer to the question posed at the beginning of this chapter about the ultimate justification of group rights as moral rights, involving the imposition on others of an obligation to recognise people's interest in cultural belonging.

However, as pointed out above, it remains unclear why access to any societal culture—not necessarily *one's own* culture but, for instance, the majority one—would not be sufficient to satisfy adequately the preconditions for autonomy. This is one of the main objections lodged against Kymlicka's theory. Several critics have argued that it fails to explain the transition from the general idea of the importance of culture for the exercise of individual autonomy to the conclusion that the particular cultures to which individuals happen to belong should be protected. John R. Danley, for instance, while accepting the presupposition that cultural belonging is crucial for personal agency, claims that this still does not explain why gradual assimilation to a larger cultural group should be regarded as harmful.[112] As long as members of cultural minorities are effectively supported by the state in this process of integration, the availability of a meaningful set of options for the exercise of autonomy would be guaranteed.

It is true that, over time, some people are able to achieve a level of integration that gradually leads them to relinquish their original affiliation and begin to identify themselves voluntarily as members of another cultural community. Furthermore, inherent in the use of the terms "assimilation" or "cultural integration" is the assumption that individuals are capable of changing their cultural membership. In fact, Kymlicka himself assumes that people ought to be able to question their cultural values and associations or even renounce them altogether if they so desire.[113] Likewise, as will be explained in greater detail in Chapter VI, he maintains that immigrants should integrate culturally into their host society.

In short, culture can be also the *object* upon which autonomy is exercised, not only the precondition of choice.[114] Considering assimilation into a new societal culture as an option, Allan Patten claims that a secure cultural membership can be provided by choosing an alternative affiliation and, as long as this is an alternative, the members of cultural minorities would not suffer in terms of anomie or loss of the kind of meaning that provides a point of reference in the world.[115] Cultural assimilation would thus not threaten individual freedom, contrary to what Kymlicka seems to suggest. The fact that alternative cultural structures exist would presumably be enough to secure the right to cultural belonging.

All this does not imply that minorities cannot choose to preserve their own culture: this is a legitimate option. But to the extent this is a choice rather than a necessity, "individuals must still take responsibility for their culture."[116] On this view, according group rights to cultural minorities is not morally required as long as this policy would normally impose special costs to non-members. For instance, suppose that the land claims of certain indigenous peoples are recognised through a right to territorial autonomy that involves a restricted access to certain resources for non-indigenous citizens. This right seems to impose an illegitimate burden on those who are not members and, in this way, Kymlicka's argument becomes vulnerable to the "expensive tastes" objection, as formulated in Chapter IV. Just as a person could not request social compensation for having lost access to certain luxury goods that had

circumstantially been available to her before—even if she held strong beliefs about the value of those goods and claimed that she would grow miserable if deprived of them—she cannot require, as a matter of justice, a form of redistribution involving sufficient funding to preserve the cultural minority to which she belongs. As explained before, in these cases the dominant liberal view is that, since people are responsible for their wishes and ambitions, they should modify their beliefs and adapt to new circumstances whenever they are unable to live up to their self-imposed life standards.

However, this perspective needs to face a number of problems that, in my opinion, are difficult to overcome. A first potential difficulty emerges from a wrong characterisation of the account that is criticised. Danley explicitly discards the idea that adopting coercive measures towards the goal of assimilation is legitimate.[117] Rather, his argument rests on the presumption that at least some minority groups could voluntarily decide to assimilate into the mainstream culture. Indeed, a hypothetical situation he reflects on portrays a tribal group whose members unanimously decide to renegotiate the terms of the treaty that they signed with a state in order to realise their wish to build new relationships and cultural institutions within the majority culture. In this case, even if the members of the tribal community retain a strong sense of cultural identity, the context in which they will make their choices will change. But this, according to Danley, still does not show that there is an impairment, and he therefore concludes that Kymlicka has not succeeded in explaining why the loss of a particular cultural identity is indeed a harm.[118]

In my view, however, this line of argument misinterprets the theory that is the object of critique by ignoring that this typically focuses on cases in which the group aims at maintaining its cultural distinctiveness. Indeed, Kymlicka's argument starts from the empirical assumption that most people do have an interest in the survival of the cultural groups to which they belong (including members of minority cultures) and then aims to determine whether these interests are morally justified. Of course, this is a claim that could be contested but, as observed earlier, it seems that there is sufficient evidence to indicate that only very rarely has a cultural minority chosen to assimilate voluntarily into the cultural majority. On the contrary, most of them (especially national minorities that have been able to mobilise politically) have strongly resisted assimilation, often at a great cost, and this is where Kymlicka's work is enlightening, since it provides some rational motivation behind this historical trend, connecting it to some basic human needs and interests.[119]

Yet, as was apparent from the discussion above, Kymlicka's conception of the person as a free, autonomous, agent sets certain limits to his theory of group rights. More specifically, it cannot justify an obligation imposed on members of minority groups to preserve their culture because, all things considered, what matters fundamentally is individual autonomy, and not cultural diversity. Therefore, to the extent that the empirical assumption I have mentioned is correct, exponents of the previous criticism bring little to the discussion. For, while Kymlicka's theory provides room for minorities to maintain their cultural identity, there is nothing morally objectionable in choosing to abandon it, at least to the extent that this is deemed a truly free decision.

There are other flaws related to the difficulties of looking at assimilation as a free option and, in particular, to attempts to convey other cultural structures purely as a

"free option" for minorities. In particular, this way of framing the problem tacitly presupposes that the members of minorities are indeed able to freely choose whether or not to preserve their cultures if the state refrains from adopting coercive policies designed to absorb them. But this assumption raises a number of questions that become more pressing if we take into consideration some earlier conclusions of this book. As was pointed out in discussing the conception of liberal neutrality, the dichotomy between interference and *laissez-faire* contains a fallacy when applied to the realm of culture. The state cannot help but get involved in cultural affairs, even if only indirectly, through making decisions in other spheres of government.[120] Hence, from the fact that the state refrains from pursuing programmes and policies explicitly oriented to assimilating minorities and undermining their cultures it cannot be concluded that minorities are simply free to decide whether or not to preserve them. The concept of choice is far more complex here. Given the power of transformation that normal state action in different fields has in structuring the cultural community, minorities will often be in a disadvantageous position. So depicting this scenario as one consisting of a range of options is seldom realistic, especially since the costs of maintaining their cultures under such conditions could turn out to be too high for minorities.

In short, the lack of group-specific rights already constitutes a significant interference in the interests of minorities. For instance, if linguistic rights are not recognised and a minority language is excluded from public education, minority groups will be faced with a very difficult struggle to counteract this indirect pressure towards assimilation. It is difficult to see how this can be depicted as a situation of free choice. If this is so, then those who advocate the described "free choice model" should, to be consistent, accept at least some forms of group rights, such as the political self-determination of minorities. On the one hand, this would release non-members from the obligation to contribute financially to institutions in which they are not interested; on the other, minorities would regain a genuine option, since they would not be subjected to the constraints resulting from the normal exercise of power by members of the dominant culture.[121]

But there is also a considerably different way of interpreting the position of Danley and other critics of the culture-based defence of group rights. The alternative they offer could be seen as implying that the very existence of the majority culture is sufficient to guarantee the right to cultural belonging of minority members. On these grounds, it could be argued that whenever they are unable to preserve, by their own means, a rich and secure cultural structure, minority members should integrate into the dominant culture in order to retain the preconditions of autonomy. While this line of thought does not preclude the previous one—that could imply secession and the formation of a new state in the case of national minorities that are territorially concentrated—it is particularly appropriate in those cases where preserving minority cultures is unfeasible. This could be for reasons related to the geographical fragmentation of the group itself, because political divorce is untenable, or for other reasons.

The tensions that secession, as a means to realise self-determination, may produce have been a matter of extensive discussion and it is not the intention to reproduce the terms of this debate here.[122] Rather, the aim is to draw attention to the idea of assimilation as an option that seems to be implied in the remarks of critics who claim

that group rights are not necessary to provide the preconditions of autonomy whenever another cultural structure is available to minorities. Certainly, this view seems embedded in Danley's suggestion that if members of cultural minorities find themselves in a situation of special vulnerability, it is because they somehow want to; nothing prevents them from "considering the abandonment of one's own culture as another option." Thus, "in the United States and Canada, members of aboriginal cultures have assimilation as an option."[123] In order to justify his view, Danley draws a comparison between cultural minorities and other disadvantaged groups to which one does not choose to belong, such as the handicapped. Nevertheless, he concludes that the analogy fails because cultural minorities do have the alternative of assimilation and therefore do not have a right to be compensated for their disadvantage.

Despite its intuitive appeal, this argument raises a number of troublesome questions:

(a) First, provided that we accepted the premise that the relevant factor to satisfy the preconditions of autonomy is to have access to a cultural structure, regardless of whether this is one's own, why should members of a minority instead of the majority be pressed to give up their cultural affiliation and make the effort to integrate in the dominant group? Perhaps one could answer by saying that the issue here is one of mere utilitarian calculation. Put it crudely: to the extent that the implementation of the mechanisms required to achieve the cultural assimilation of a numerical minority is less costly, it would be reasonable for minorities to accept the burden. But then, one could still ask why cultural assimilation has to be into the dominant *state* culture?

Suppose that Catalans, for instance, were compelled to abandon their traditional linguistic and self-government claims on the grounds that they have the option to integrate into the Spanish mainstream culture, which already provides a context for choice. Yet, if given the chance, Catalans could rather prefer to integrate into France, if this was a possibility, for a number of reasons. But while nothing in the previous argument suggests the illegitimacy of such a decision, assimilation is seen as a unidirectional process because the personal and territorial jurisdiction of states is simply taken for granted. This, however, makes the whole account too demanding and unsatisfactory. It is too demanding because it requires minorities to accept the present state of affairs in relation to their membership in the state. And it is unsatisfactory because the argument has implications that reach much further than is actually recognised. Indeed, its proponents should be willing to entertain the idea that for purposes of providing the preconditions of autonomy, there is no need for so many "societal cultures," corresponding to existing states, in the world. If cultural belonging is in fact an option for individuals, the most consistent implication would be to say that the legal and economic means devoted to maintaining all these cultural structures are unjustified and that resources should be diverted towards other priorities instead.

(b) The second problem affecting this critical approach to minority rights as formulated by Kymlicka is more difficult to resolve. The objection relates to ideas that have been already worked out at the begining of this chapter. As pointed out in the discussion of the problems that global humanism faces, cultural assimilation is not, as some critics of Kymlicka assume, a straightforward option, even though Kymlicka has to admit that culture in itself can be an object of choice (in order to be consistent

with the fundamental premises of his theory, as we have seen). But integration into another societal culture often involves enormous difficulties and this is a burden that cannot be legitimately imposed on minorities. This idea is crucial to the correct understanding of the implications of Kymlicka's theory of minority rights.[124]

Indeed, Kymlicka strongly argues that changing one's own culture is not always a simple option. While some people naturally possess special abilities that enable them to integrate rapidly and successfully into another culture, this is not the general rule. On the one hand, as mentioned earlier in this chapter, human imagination and empathy, qualities that seem decisive in this venture, are often much more limited than we would like to think—and are certainly not equally distributed. On the other hand, even those persons who have the required skills may receive a distorted and superficial image of the complex phenomenon they try to interpret from outside. Given these difficulties, successful integration often depends on the particular natural skills and circumstances of an individual. Perhaps this is why often only those who live in precarious conditions of existence consider emigration as an option and they often experience it as a loss. As Rawls writes:

> normally leaving one's country is a grave step: it involves leaving the society and culture in which we have been raised, the society and culture whose language we use in speech and thought to express and understand ourselves, our aims, goals and values; the society and culture whose history, customs and conventions we depend on to find our place in the social world. In large part we affirm our society and culture, and have intimate and inexpressible knowledge of it, even though much of it we may question, if not reject.[125]

Kymlicka perspicaciously observes with reference to this passage that although Rawls begins by speaking of the difficulty of leaving one's own country, his argument is not based on political links but rather on cultural ties.[126] Obviously, the costs of integration may vary according to various factors such as age, differences in social organisation and technological development, similarity of the new language that has to be learned with one's mother tongue and so on. But, generally speaking, full integration into another culture is a major achievement and one not everyone is equally equipped to accomplish. Moreover, to the extent that it depends upon learning a new language, those persons who do not possess the necessary abilities to learn and master that language will confront serious disadvantages.

Raz, Margalit and Tamir have explored the problems involved in seeing cultural change as an option involving no special costs. While, like Kymlicka, they do not reject at the outset the possibility of seeing culture as an object of choice, they all argue that the risk of acculturation and socialisation failure should not be underestimated. This is not only due to the factors described above, but also to the fact that the relative success of integration into another culture will also depend on external factors that are often outside of the individual's control. Thus, Raz and Margalit emphasise that belonging to a culture is a question of *mutual* recognition, and that we cannot control the factors that lead others to see us as members of the group. In this respect, effective integration does not depend only on ourselves, which is why acceptance as a full member will normally be "a matter of belonging, not of achievement."[127] Likewise, among the complexities involved in both the expression and practical realisation of individual preferences regarding national identity, Tamir points out that embracing another national identity is not merely about changing passports

because "convincing others that one has become member is the most difficult aspect of assimilation."[128]

Summing up, while we do not initially choose the culture in which we are born and raised, we can later reflect on our identity and decide to modify certain aspects of it, or even substitute it altogether and integrate into another one. Understanding culture both as a precondition for autonomy and as an object of choice requires additional clarification. In particular, membership in one's own societal culture is still necessary in order to acquire the skills and abilities that are necessary for interpreting and making informed decisions about other cultures. Overall, assimilation into a different culture has a cognitive dimension and success in this enterprise depends on so many contingent factors that it would be unfair to transform this option into an obligation. In Kymlicka words, "leaving one's culture, while possible, is best seen as renouncing something to which one is reasonably entitled."[129] Given the costs involved, to require members of minority groups to integrate into the majority culture would be to impose an unfair burden upon them, even if the state undertakes positive action to alleviate the constraints imposed.

On the other hand, even in those states where the majority and minority groups basically share the same life options, meanings and language, compulsory programmes designed to advance the assimilation of cultural minorities would be unjustified since it would oblige their members to sacrifice a secure identity that serves as a reference point in their orientation in the world. In this respect, as will be discussed in greater detail in the following section compulsory assimilation can also be regarded as a harm, which affects individual self-respect.

Following the arguments set out so far, the conclusion to be derived is that people have good reasons to value their particular cultural membership and that liberal theories of rights should acknowledge this. What Kymlicka calls "societal cultures" are the primary context in which autonomy is exercised; at the same time, they provide us with a secure identity that does not depend on particular qualities and achievements, such as being able to undertake the effort involved in assimilation or possessing the talent to learn another language easily. All things considered, the costs of the cooperation required from the state to guarantee the rights of minority cultures cannot be compared to the arbitrary sacrifices that minority members would be required to make in the absence of such rights. On the whole, they cannot be required to make such a sacrifice, even if some of them would willingly do so.[130]

Hence, rather than being unjust privileges aimed at satisfying expensive tastes that individuals should have the responsibility to change, cultural group rights are based on the need to correct unequal circumstances in the access to certain primary goods. Kymlicka's theory of minority rights has basically furthered the strength of liberal commitment to freedom and equality in the realm of culture. Now, the next task would be to explore in more detail the legitimacy of various kinds of specific rights that are demanded by minorities in the light of these standards of justice. This may help to advance our understanding of both the justification of group rights and their limits. But before taking up this theme in Chapter VI, it is pertinent to discuss the main lines of Taylor's approach to minority rights since it provides a different diagnosis of the problem and also a model that embodies an alternative internal structure to the one just described.

## 4. GROUP RIGHTS AS BASIC RIGHTS: THE CHALLENGE OF RECOGNITION

### *4.1. Recognition and Culture in the Theory of Charles Taylor*

Another response to the questions raised by the demands of cultural minorities has come in the form of what may be called a "recognition argument," which, in the broad sense, falls within the scope of contemporary debates about multiculturalism and the politics of difference. In this context, Taylor's analysis offers one of the most influential accounts of the challenges and dilemmas emerging out of the cultural conflicts. This is an account that also attempts to ground a normative theory of group rights that is respectful of some central liberal values. The argument starts from the importance of culture for individual identity and has to be placed against the background of two larger social phenomena that are among Taylor's main interests: the emergence of modernity and the sources of the self.[131] Thus, in his view, multiculturalism is tightly linked to the ideals of authenticity and dignity emerging from modernity.

A brief review of the theory will help to spell out this connection. According to Taylor, in pre-modern societies individual identity was closely linked to the role that each person occupied in the social hierarchy. Social recognition was granted selectively, in terms of honour and preference. The use of the term "honour" in the old regime presupposed inequality: "for some to have honour in this sense, it is essential that not everyone have it."[132] This scheme was justified by reference to external systems of meaning of a theological nature that legitimised the established hierarchical order. The emergence of modernity led to the progressive fracture of the hierarchical structures that configured social relationships, and to the collapse of homogeneous theological horizons of significance. The inegalitarian notion of honour was gradually displaced by the idea of dignity, which was conceived in a more universal and egalitarian sense derived from attributes common to all humankind. It eventually became clear that only this conception of dignity is compatible with a democratic society. As a result, "the forms of equal recognition have been essential to democratic culture."[133]

But the decline of the old regime not only set the basis for the triumph of the notion of equal dignity, it also gave rise, according to Taylor, to the ideal of authenticity. The modern conception of authenticity rests on a conception of *individualised* identity, defined in subjective terms of personal self-realisation. This ideal requires individuals to be faithful to themselves, to their particular form of being human. Taylor locates its origin in the eighteenth century, especially in Rousseau's notion of an internal moral voice—the source of the *sentiment de l'existence*[134]—to which individuals should pay special attention in order to discover their own sense of morality. Romantic philosophers, especially Herder, developed this ideal further so that, according to Taylor, it is in the background of the subjective strain characteristic of modern culture. Romantic doctrines exhort us to give full expression to our own originality and, of course, these particularities can come from nationality, race, gender and so forth.[135] Thus, a value is accorded to the type of internal introspection that invites individuals to reflect on and define their identities, without the limitations

imposed by the need to conform to an external system of hierarchies and values. Identity, in this regard, is no longer ideally conceived as socially derived, but rather is related to individual self-determination and self-interpretation.

However, Taylor strongly emphasises that the former, properly understood, does not mean that identities are inwardly generated, in a monological sense:

> My discovering my identity doesn't mean that I work it out in isolation but that I negotiate it through dialogue, partly overt, partly internalized, with others. That is why the development of an ideal of inwardly generated identity gives a new and crucial importance to recognition. My own identity crucially depends on my dialogical relations with others.[136]

Thus, if the individual choices, which define who I am, are to have meaning, access to a background that allows me to determine what is valuable and what is not worthwhile, i.e., to make value-judgements, is essential. Otherwise, my choices would be entirely arbitrary or trivial. The crucial feature of human life is, therefore, its dialogical character. Taylor convincingly argues that individuals acquire horizons of meaning through complex relationships with their community. Modern identity is constructed and transformed through a series of components that he identifies and brilliantly elucidates in his book *Sources of the Self* (1989). In particular, Taylor insists that we become beings capable of self-understanding by acquiring a language that not only encompasses "the words we speak, but also other modes of expression whereby we define ourselves, including the 'languages' of art, of gesture, of love and the like."[137]

Yet language is, by definition, a shared social practice, a collective social good of the type described earlier in this book. Each culture contains a system of shared meanings that provides its members with the necessary structure to enable their beliefs and conceptions of the good to be formed. A cultural community, in this sense, offers the space in which we define our identity and reflect on it. This is where Taylor's emphasis on the dialogical nature of the self comes from: an individual will only be able to configure a secure identity for himself or herself if he or she can count on the recognition of others. It is precisely this recognition that the emergence of modernity has rendered deeply problematic. At a time when individual identities were fixed by reference to established and more or less unquestioned social hierarchies, recognition was automatically guaranteed. Authenticity, as a modern ideal, has led to the loss of this sort of *a priori* recognition. Individual identity is now potentially in danger of rejection, distortion or denial. Given its intersubjective character, identity is moulded in part by recognition and by the lack thereof given by significant others. Thus, a person or group of persons can suffer real damage if their significant others, or the society around them, project a demeaning, inferior or contemptible picture of themselves; even more, this damage can take the form of systemic oppression, with many other negative side effects, when that picture is internalised by the members of certain identity groups.[138]

The point is central to the issue that concerns us here. Since individual identity is built within cultural communities, the lack of recognition or false recognition of these groups can be seen as a form of oppression of its members. Therefore, recognition of both individuals and the groups to which they belong becomes relevant for a

democratic society with aspirations to an equal concern and status for its members. On Taylor's view, this explains why, in an era of authenticity, cultural and identity claims play a central part in both the private and the social realms.[139] In the latter, the projection of a degrading image of certain groups ought to be regarded as a source of tyranny. It is this potential threat to self-respect that has given rise to the so-called "identity politics."

The ideal of authenticity has not only lent special meaning to the idea of recognition. In Taylor's theory, recognition is also inevitably mixed in with human dignity, an ideal that is also deeply embedded in the liberal tradition. Taylor argues that, in the public sphere, this principle requires, on the one hand, the universal protection of individual rights and freedoms and, on the other hand, the satisfaction of those particular needs that individuals have as members of specific cultures and social groups.[140] As can be seen, two apparently conflicting ideals are in confluence here: universal equality and difference.[141] Even if the latter one also has a potentially universal relevance—"*everyone* should be recognised for his or her unique identity"[142] – tensions can arise between them. Some of these tensions are examined below but, for now, it is important to stress that Taylor strongly criticises contemporary liberalism for having ignored the need for recognition, and for having focussed only on the attribution of universal rights and freedoms through a politics of equal respect associated to a practice of colour- or difference-blindness. This failure, which has led to a *de facto* imposition of dominant identities, essentially contradicts the ideal of authenticity.[143] Like Berlin, for whom contemporary nationalism arises "from a wounded or outraged sense of human dignity, the desire for recognition,"[144] Taylor thinks that the claims of cultural minorities and other identity groups such as gays and feminists are firmly rooted in this need for recognition and equal respect of those who want to be equally recognised and valued in their difference.

### *4.2. The Politics of Recognition and the Critique of 'Neutrality Liberalism'*

The politics of recognition is associated with two substantially different ideals: universalism, which invokes the idea of human dignity to ensure the same rights to all individuals, and difference, which appeals to the ideal of authenticity. In contrast to the politics of universalism, which is committed to interpreting non-discrimination in a way that ignores the differences among citizens, the politics of recognition explicitly acknowledges the particular identities of individuals as members of distinct groups. According to Taylor, most liberal thinkers are rooted in "the politics of universalism."[145] The commitment to procedural equality and state neutrality that characterises contemporary liberalism rests, in his view, on a conception of non-discrimination that is difference-blind. In particular, the prevailing inclination within this doctrine lays emphasis on equal human dignity, commonly understood in terms of autonomy. Autonomy revolves primarily around the abstract human capacity for self-determination. As discussed earlier in this book, it is more about the free configuration of one's own life, rather than about assigning a value to particular ways of life and conceptions of the good. The influence of this view is readily apparent in the idea of state neutrality but, alongside other influential critics of the traditional liberal response to difference, Taylor contends that liberal universalism leads to a failure to recognise its

significance. What is worse, it ends up reflecting a unitary vision of identity that, in modern liberal states, often mirrors the values and forms of life of the dominant culture. It is therefore misleading to confront the demands of recognition of an increasing variety of religious, ethnic and national minorities through the politics of universalism.

Taylor also stresses that the prominence of neutrality within the liberal tradition conflicts with the idea that rights apply differently in different contexts. More precisely, he thinks that this model is at odds with the attainment of collective goals such as cultural survival, which might demand different rights and policies on a case-by-case basis. Authenticity is thus ruled out in the politics of universalism, which seems unable to provide the justification for this ideal. Yet, given the complex link between individual identity and cultural belonging, Taylor argues that the failure to recognise and preserve the uniqueness of the different cultural communities threatens the principle of equal respect that underlies the very justification of the universalistic approach. In his own words, the liberalism of equal rights that tends to homogeneity "can give only a very restricted acknowledgement of distinct cultural identities."[146]

This analysis about the limitations of what Taylor regards as the pre-eminent conception of a liberal society underlies his seminal distinction between two models of liberalism.[147] The first model grants a central weight to the homogeneity of citizenship rights, but does not accord value to the policies directed at preserving a particular identity over time. Only the second model, in which along with the commitment to individual rights the intrinsic importance of the recognition of different groups is affirmed, can, in his view, justify those policies.

Taylor illustrates this argument by focusing on the case of Quebec.[148] According to the first model, the determination of this Canadian province to establish a distinct political and legal structure designed to preserve the French linguistic and cultural legacy violates the postulate of neutrality and is therefore discriminatory against citizens who do not share the identity that is being protected. According to Taylor, Quebec's desire to survive as a "distinct society" is what is at stake in the constitutional controversy that has been the source of discord between the Anglophone and Francophone communities in Canada. *Survivance* will inevitably involve the adoption of restrictive measures that treat those "inside" differently from those "outside," such as those adopted by the Quebecois government in the controversial Bill 101. Perhaps the most contentious measure that this law prescribed is the one that requires Francophones and immigrants to send their children to French schools—schools in which the language of education is French—while allowing freedom of choice to Anglophone Canadians. The bill also requires commercial and road signs to be in French, and the compulsory use of this language in private businesses that have more than fifty employees—what is often called "the *francisation* of the workplace."[149]

Leaving aside the particular terms in which these rules are set, in general, Taylor argues that the Quebecois agreed to the adoption of these restrictions because they regard them as necessary to assure a collective or community goal—i.e., the future viability of their community in a predominantly Anglophone context. This is the sort of approach that clashes with the dominant liberal position that collective goals must never take precedence over individual rights such as freedom of choice. However, Taylor insists that liberalism does not necessarily have to be viewed as characterised

by a commitment to cultural neutrality and procedural equality. A liberal society, he contends, can legitimately promote a particular conception of the good life "without this being seen as a depreciation of those who do not personally share this definition."[150] Here, Taylor thinks a distinction should be made between fundamental rights such as the right to live, freedom of religion and freedom of expression and the wide range of possible prerogatives and immunities that could legitimately be granted or revoked by the state within its scope in making public policy. While admitting that, of course, there will be tensions and difficulties in the search for these two goals simultaneously,[151] he nonetheless trusts that achieving a balance between them is not impossible, or at least does not present more difficulties than attempts to reconcile liberty and equality, or capitalism and democracy.

Before analysing some of the objections to this view, the following observation might be important. Although Taylor supports this second model of liberalism because it accommodates societies with robust collective goals like Quebec, this does not necessarily mean that all cultures should be seen as equally valuable and worthy of the same respect. Instead, his insistence on the equal value of all cultures is, above all, a *presumption*, a hypothesis that we should adopt in approaching other cultural communities and making value-judgements.[152] Thus, in order to arrive at an informed conclusion about the worth of recognition of any given group, it will first be necessary to develop a new language that transforms in some way our ideas of what is valuable, of what constitutes value. This shift towards what is different, towards understanding "the other," will eventually enable the sort of fusion of horizons that is required so as to capture the original contribution of other cultures and to perceive how they should be recognised in their own and singular authenticity. Taylor seems to suggest that we need to engage in this exercise of going beyond neutrality because liberalism cannot allege absolute cultural neutrality; rather, it is also a "fighting creed."[153]

### *4.3. Recognition and Autonomy: Some Criticisms*

Taylor attempts to offer a liberal defence not only of the right to cultural belonging but also of the right to cultural survival. He endorses a version of liberalism that has been frequently questioned by many critics who have pointed out that the distinction drawn between the two models of liberalism (and, in particular, the second model, which he supports) cannot be sustained. Objections to the politics of recognition have arisen from different theoretical perspectives, but most significantly by liberals concerned with the commitment to impartiality and neutrality, and also by feminists.

On the more liberal side, Habermas has drawn particular attention to some shortcomings of Taylor's theory. Basically, Habermas disagrees with the way Taylor presents the two versions of liberalism. In his view, although the second model of liberalism is largely presented as correcting some inadequate understanding of liberal principles, this version "attacks the principles themselves and calls into question the individualistic core of the modern conception of freedom."[154] So rather than denying the need for cultural recognition, Habermas criticises the way in which Taylor theoretically addresses the challenge of accommodating the needs of cultural minorities

and other marginalised groups. Perhaps because he maintains a similarly intersubjective and dialogical account of human identity, Habermas is largely sympathetic to the account of multiculturalism offered by Taylor and to the struggles for recognition of cultural minorities.[155] This general agreement is also consistent with his long-standing interest in articulating a theory of communicative action and, in particular, with his view that communication with others plays an essential role in the development of the identity of the individual and in social integration. Furthermore, to the extent that it recognises that political institutions are ethically shaped and hence that each democratic state possesses a unique character, Habermas' conception of liberalism is potentially more attractive to advocates of group rights than the standard liberal perspective.

Indeed, although Habermas thinks that the primary goal of the constitutional state is to make effective universally valid norms such as human rights, "every legal system is also the expression of a particular form of life and not merely a reflection of the universal content of basic rights;"[156] accordingly, "a correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual in the life contexts in which his or her identity is formed."[157]

In this respect, Habermas distinguishes between the abstract formulation of norms and their application, which has, of necessity, to be sensitive to the context. However, despite this broad agreement, Habermas does not accept that there is a necessary conflict between the two versions of liberalism that Taylor lays out, and he also rejects the compatibility with liberalism of some of the specific implications that Taylor derives from his account, particularly with respect to the so-called "right to cultural survival."

In relation to the first criticism, Habermas basically maintains that Taylor's way of framing the discussion is misleading. The politics of difference, aimed at protecting collective identities, does not necessarily clash with the politics of universalism, which protects individual freedoms. For one thing, Habermas argues that this approach does not account for the fact that the subject of the law only acquires autonomy to the extent that he or she can comprehend themselves as authors of the rules to which they are subjected (thus, there would be an internal conceptual connection between the rule of law and democracy).[158] If this claim is accepted, the alternative version of liberalism that Taylor articulates in order to correct the individualistic slant of rights would be, according to Habermas, unnecessary; rather, what is required is the consistent application of the standard model and the system of rights that it incorporates.[159] In other words, on this diagnosis, the problem is that democratic constitutional states have failed to live up to the ideals that they should honour.

Habermas illustrates this point by calling attention to the history of gender equality. Leaving aside the status of sexual identity, formal equality between men and women was unsuccessful because it did not address the structural reasons for the existing *de facto* discrimination. Habermas stresses that women cannot fully enjoy a free and equal status unless they participate actively in the formulation of the rules that determine the relevant aspects in which equal treatment is required—thus recognising the need for greater representation in the public sphere. Private autonomy, on this view, emerges from public autonomy; since personal autonomy is context-related there are no clear borders between the public and the private realms.[160]

In short, the problem of recognition might be alternatively studied through the prism of participation of all identity groups in the formation of legal and social norms. The overall aim, then, is to guarantee the inclusion of different groups in what Habermas calls "the ethical–political self-understanding" of the state.[161] The constitutional state is seen as a historical entity whose concrete form and normative implications are interrelated. This particular socio-historical make up shapes the scene in which citizens conduct their discourses and debates. Therefore, "if the population of citizens as a whole shifts, this horizon will change as well, other discourses will be held about the same questions and other decisions will be reached."[162] Hence, the emphasis is placed on the need to incorporate effectively all citizens as participants into the public debate, so that the resulting interpretation of controversial norms and the resolution of the conflicts are acceptable to everyone. Thus, Habermas points here to the preconditions that make it possible to speak of a unified constituency reflecting a common political culture so that all citizens are able to visualise institutions as "their own" (and not only as property, or means, of the larger majority).

Nevertheless, it is essential to set forth an important premise in this stance that may be somehow ambivalent in the previous description. Consistent with his theory of discursive ethics, Habermas thinks that by establishing the right processes for collective deliberation, constitutional states can still aspire to certain degree of impartiality among the different cultural subgroups that compose it—when rational debate takes place in a context that does not exclude or devaluate some forms of speech. For Habermas, the decisive matter is that the common political culture should be disentangled from the subgroups themselves. While it will certainly reflect the ethical commitments of all citizens (given the inevitability, in his view, of the ethical configuration of the constitutional state), the common political culture does not need to be seen as favouring or discriminating against any particular identity, at least to the extent that all groups are represented as autonomous agents capable of rational judgement in a democratic procedure that ensures discursive fairness.[163]

Habermas does admit that in many countries the rules of practical discourse in the public sphere do not meet his ideal standards, and that frequently the majority culture is largely equivalent to the general political culture for historical reasons. However, he maintains that the priority then should be to unravel this connection by implementing the adequate procedural rules in order to ensure effective participation and to enable different cultural, ethnic and religious groups to live together with equal rights.[164] The significance given to particular life contexts and identities within the public sphere is acknowledged, but this is not designed with the aim to privatise diversity (as in the Rawlsian model) but rather to regard as appropriate any topic that is to the fore in any given society. As a result, it is the task and the responsibility of political participants to find the grounds for agreement and consensus on the meaning of substantive principles of justice, an outcome that should emerge from the debate and not be established *a priori*. No additional rights such as group rights, or institutions, beyond the legal norms that formally institutionalise the rights of citizens, are, in Habermas' view, necessary to promote this model. Cultural rights are legitimate when they are understood to be a product of the exercise of individual liberties.[165]

On the other hand, Habermas also regards the assumed compatibility of Taylor's account with liberalism as dubious. He clearly shares with Kymlicka the view that the integrity of the person "cannot be guaranteed without protecting the intersubjectively shared experiences and life contexts in which the person has been socialised and has formed his or her identity."[166] But he points out that it is one thing to argue for coexistence with equal rights and quite another to argue for the universal value of every culture with the aim of preserving cultural diversity as it exists. This is a serious reservation that has also been expressed by other liberals who contend that the ecological analogy is a problematic one.[167] More precisely, what troubles Habermas is the ultimate compatibility of Taylor's theory with autonomy, since his account of discourse ethics is also based on this key value.

Other critics have also expressed concern that Taylor's theory seems to fail to acknowledge the extent to which his approach might inexorably lead to an undermining of an individual's capacity for autonomy. In particular, if it implies that we should seek to preserve languages and cultures as though they were endangered species, for then there could be a trend towards the freezing of the particular character of a culture and, perhaps, towards restrictions of individual autonomy for the sake of preserving public goods. Following Habermas' account, constitutions should ensure the *possibility* of cultural reproduction, but never impose cultural preservation as a duty on the members of a given group. Otherwise, individual freedom, which ultimately provides the rationale for cultural recognition, would be lost.

As it becomes apparent, this view is close to that of Kymlicka who, by emphasising the value of autonomy, allows for a critical revisionism that permits individuals to reflect on their different world views, cultural heritage and values and to eventually change them. Thus, Habermas argues that, while a citizen should have the chance "to grow up within a world of a cultural heritage and to have his or her children grow up in it without suffering discrimination,"[168] this does not imply that there is a *duty* to preserve traditional cultures, but rather that everyone should have the opportunity to deal with his or her culture, to live it in the conventional way, to transform it or even to deny it entirely.[169]

Instead, Taylor can be seen as arguing that the force of the politics of recognition is not just fulfilled by the equal opportunity of individuals to maintain their own languages and cultures. In his view, it is not merely the issue of having the French language available for those who might be willing to speak it, but

> it also involves making sure that there is a community of people here in the future that will want to avail itself of the opportunity to use the French language. Policies aimed at survival actively seek to *create* members of the community, for instance, in their assuring that future generations continue to identify as French-speakers.[170]

This differs fundamentally from Kymlicka's theory, as Taylor himself points out. In his opinion, Kymlicka's argument misconceives the claims of some groups such as aboriginal people and the Quebeckers and, in so doing, fails to offer a satisfactory answer. This is because the goal for them is precisely to survive as a separate culture,[171] and therefore the emphasis on autonomy misconstrues the value of cultural membership, offering no rationale for those measures intended to guarantee the long-term viability of cultures. As the discussion in Chapter VI will clarify, from the

perspective of minorities and other identity groups that regard themselves as distant from the liberal ideals of individual freedom, Taylor's model of cultural rights is undoubtedly more attractive. Nevertheless, for the reasons explained by Habermas, this view can hardly qualify as liberal, not even in the sense that Taylor suggests in his second conception of liberalism.

The feminist critique points in a similar direction. Different commentators have cast doubt on the nature of group identities and on the tendency to articulate authoritative descriptions of their particular character. The central objection here is that the politics of recognition could worsen the discrimination against the most vulnerable members of the communities that are the object of protection, particularly of women, but also others such as dissenters whose basic individual rights as citizens can be jeopardised by group rights. Hence, this critique of multicultural accommodation emphasises the need to be aware of the unintended consequences of well-intentioned efforts to reduce existing intergroup inequalities.[172] More precisely, the thick version defended by Taylor is regarded as particularly troublesome as it can lead to the exclusion or devaluation of the interests of "minorities within minorities,"[173] thus enhancing patterns of oppression and power relations within these groups. In contrast to the version of the relevance of cultural belonging endorsed by Kymlicka, Taylor is more ambivalent about the role of core liberal values such as freedom and autonomy in resolving these tensions. Since many of the internal value conflicts of a group are rooted in gender issues, feminist theorists raise concerns about the potential negative impact of the politics of recognition—as well as other forms of accommodating diversity—on the status of women. To the extent that the power of self-government is transferred to identity groups which neglect women's equality, some problematic cultural practices on central issues such as marriage and divorce might reinforce oppression. As Okin warns, the right to education has been denied to many girls and women in the name of cultural integrity. Moreover, rules about virginity, dress codes and even female genital mutilation have been defended explicitly as mechanisms to control women and limit their freedom and, in general, most cultures possess elements that aim to subjugate women.[174]

This is a genuine concern that cannot be dismissed. It is not clear how such tensions between group rights and intergroup inequalities (particularly women's equality) could be resolved within an approach such as Taylor's, since multicultural accommodation is primarily based not on autonomy but on recognition and cultural preservation. In my view, the feminist objection has a serious bearing on that approach to the extent it identifies different cultures as coherent systems of shared meanings that focus on certain conceptions of the good or collective goals that the government can decide to promote. Cultural survival, moreover, seems to be viewed as the continued existence of a cultural community defined in those terms. Thus, the accent is on the need to create conditions to generate new members willing to persevere in the maintenance of the sort of practices and traditions that give meaning to a collective identity. But this focus suffers from an essentialist bias that makes it an easy target from the standpoint of a conception of culture marked by flexibility and malleability of cultural identities. This was the view briefly set forth earlier in this book: one that grew out of the work of cultural anthropologists, such as Geertz and others, who have rigorously discredited essentialist constructions of cultural identity.[175]

It is true that, as was also noted, Taylor rejects ontological essentialism and defends the values of dialogue and civic participation. Similarly, the preoccupation with recognition emerges out of his special sensitivity to the causes of alienation and oppression that some minorities suffer. However, as formulated, his theory almost automatically transfers the need for individual recognition to the need for cultural group recognition and, in this sense, can be criticised as too reductionist. For Taylor not only marginalises other sources of identity that are not cultural—for example, those related to gender or sexual orientation[176]—but he overlooks both the role of internal power relations within a group in constructing individual identity and the controversial character of different cultures.

In short, Taylor's image of shared cultural values seems underpinned by a homogeneous vision of cultures that ignores an important aspect of the ideal of authenticity that he wants to respect: its oppositional dimension. As Kymlicka argues, although cultures provide us with horizons of significance, it is possible to reflect upon, criticise and distance ourselves from some of the concrete practices or conceptions of the conventional notion of the good. Suppose that I reach the conclusion that the Spanish social culture in which I live is based on a series of biases and beliefs about the role of women in the family as well as on the organisation of work and sexuality that systematically discriminate against me, unjustifiably restraining my life opportunities and undermining my legitimate expectations. In this case, being faithful to myself, being "authentic," should lead me to adopt an attitude of opposition in accordance with my beliefs. This attitude could take the form of a full range of actions or measures to attain the autonomy I desire: the rejection of heterosexual relationships or conventional forms of marriage; political mobilisation to transform the established power structures that cause discrimination; and even emigration to a more egalitarian culture that could offer more opportunities to develop and grow on different levels. Radical opposition, although it poses a serious danger of alienation, is *also* a crucial legacy of modern culture to individual identity. Hence, the defence of the "right to cultural survival," interpreted in an essentialist way, attacks the same ideal of authenticity as self-realisation that, to a significant extent, grounds Taylor's argument (especially since it can involve pressures on members of a group to identify and define themselves in a particular way).

Summing up, by overlaying the construction of individual identity with cultural identity, an essential dimension of authenticity is dismissed. The struggle of modern individuals, both internally and externally, to define their identity and autonomous self-realisation suggests a less harmonious relationship between the individual and the cultural community than the one Taylor might be inclined to accept. The risk is that his politics of recognition could grant an unequal privilege and capacity for domination to those who occupy positions of power in the social and political structures *within* each cultural community.

One last criticism that has been made against the politics of recognition—and one, which, in general, can be extended to all defences of a politics of difference—is that the emphasis on ethnic and cultural identity along with the granting of group rights to those groups will give rise to a separatist mentality, which will eventually lead to the erosion of common ties. Certainly, claims for recognition can provoke conflicts, but this is not a sufficient reason to leave aside an analysis of certain claims

made for the sake of justice. Calls for social unity require people to abandon their differences, think about the causes and try to solve them; but they can act to the detriment of justice, perpetuating existing structural inequalities.

### *4.4. Regaining Autonomy and Respect: Towards a Reformulation of the Politics of Recognition*

As shown already, Taylor's formulation of the politics of recognition poses problems. In particular, if it requires the maintenance of moral authenticity and the "essence" of existing cultural communities. On the one hand, this position runs the risk of underestimating the phenomenon of intra-community pluralism by emphasising the homogeneity of cultures as coherent systems of meaning, codes of conduct and traditions, and on the other hand, in delimitating the concrete values and practices that define a community it is easy to give advantage to the viewpoint of those members of the group who are in power. Moreover, the oppositional dimension of authenticity can demand disagreement or disconformity with dominant cultural values.

These criticisms relate more to some of the concrete implications that Taylor derives from his thesis rather than to his central concern for the need for recognition of identity. It is necessary, therefore, to reconstruct the philosophical foundations of the politics of recognition by carefully examining the consequences of the central elements of Taylor's reasoning: the dialogical character of the formation of human identity and the conditions under which this identity can be malformed.

The dialogical character of the formation of identity assumes the need to bear in mind up to what point interaction with others in contexts of social inequality compels members of a cultural group to identify themselves and be recognised in a series of false images or degrading stereotypes that threaten their self-respect. Referring to the case of women, Susan Wolf shows that the question is to determine in what sense they should be recognised. For it is evident that women "have been recognized as women – indeed, as 'nothing but women' – for all too long"[177] and the question of how to leave behind this type of deforming recognition is a pressing one. Wolf rightly emphasises that the predominant problem for women is not the risk of extinction or that the most powerful sector of the community will be indifferent to the identity of the opposite sex, but rather that this identity will aid oppression and exploitation. This is manifested, for example, in the lack of recognition of women as individuals with brains and talents, especially when they do not conform to the social role assigned to this sex; also, in the devaluation of activities traditionally associated with women, compared as those assigned to men, as well as the potential worth of this experience in other professional and intellectual endeavours. What is required, therefore, is not just recognition, but the ability to reform and renegotiate some social identities. In fact, as seen, Taylor himself defends that false recognition can also cause harm by confining people to a place where they are perceived as reduced beings.

Kwame Anthony Appiah distinguishes between three ideas associated with the notion of stereotype that are useful in determining the form in which false recognition can indeed cause harm and the particular good or goods that are destroyed or put at risk.[178] The first class of stereotype is what he dubs "statistical stereotype,"

which consists of ascribing to an individual a trait in the belief that it is a characteristic of the group to which he or she belongs.[179] Appiah uses here the example of how a physically strong woman applies for a job as a firefighter only to be told that "women are not strong enough to be firemen."[180] It seems apparent that, in order to satisfy the principle of equality, public action based on statistical stereotypes should avoid distinguishing in an unjustified way individuals whose characteristics do not actually correspond to the model. But the two other categories of stereotypes are more interesting for our present purposes: Appiah classifies false beliefs about an individual or group as "false stereotypes" and, as an example, points to typical assumptions about ethnic groups in terms of their ignorance, dishonesty or disloyalty.[181] "Normative stereotypes," the third category, do not contain an explanation of how a group is or behaves. They establish patterns of how the individual *should* behave in order to fit into the norms—that can be based on false stereotypes—associated with belonging to that group. The demand that female employees dress differently from males, for example, invokes a normative idea of gender that involves wearing skirts.

False stereotypes, as Appiah notes, involve an intellectual error, which in order to be refuted requires correcting certain misunderstanding of the facts. This task has moral importance and justifies the politics of recognition of identity that Taylor defends. The state should adopt measures designed, for instance, to provide space in the public forum (not only in parliament but also in public schools, on television, etc.) for the voices of the members of traditionally dominated or excluded groups so that they have the opportunity to remove the labels that the rest of society has placed on them. It is doubtful whether, without access to the power that allocates such a public presence, members of the affected groups can be capable of transforming the negative representations that accompany their identities by themselves. Pre-eminently, this is because the members of the dominant group often have the means of propagating, implicitly or explicitly, images and symbols that retain categories of individuals in false stereotypes.

These observations apply not only to women but are also fundamental to the eradication of racism, homophobia and the prejudices that ethnic and cultural minorities face. Examples provided by Taylor relate to the imperialist domination of European culture over aboriginal peoples and blacks. As he rightly observes, numerous studies show that this domination projected an "uncivilised" or "inferior" image of these people that has decisively contributed to attitudes of contempt towards these groups by the white society.[182] Similarly, language policies of European states in the nineteenth century, as explained, were directed at assimilating minority cultures and labelling their languages as "inferior." Or the conceptions of art over the past centuries have been strongly shaped by Western European views, remaining a product of Western supremacy and influenced by bourgeois values that had to prevail over the "primitivism" of the creative expression of other peoples. This view has determined the value of artefacts and their fate in the big museums of modern art. Taylor cites the unfortunate statement "When the Zulus produce a Tolstoy we will read them" attributed to Saul Bellow as quintessential arrogance, not only because statements of this kind show insensitivity to the values of other cultures portrayed as primitive, but mainly because they seem to exclude the possibility that the Zulus, although

they have the same potential as any other people, could offer something of value to the world.[183]

Of course, indigenous peoples and other nations depicted this way, conscious of this attitude, have organised themselves politically not only to claim the right to self-government but also to promote a positive understanding of their forms of ruling, art, and technology in order to refute the perception of their institutions and practices as "uncivilised." Thus, for instance, Africans and Hispanics in the United States have mobilised to celebrate publicly their identity in response to the distortion and invisibility of their life experiences in dominant discourses. This is also why Women's Day and Gay Pride Day are on the calendar. The politics that provide public space and support the reinterpretation of experiences, achievements and successes of falsely stereotyped groups should be seen as an essential part of the "politics of identity" or "the politics of recognition" to which Taylor refers.[184]

Taylor's focus on the foundations of these politics is, however, problematic. For one thing: he seems to suggest that the goal of committing public resources in order to correct false recognition is, precisely, to acknowledge the authenticity of certain ways of life the value of which has been fixed, or at least it is assumed, beforehand. Nevertheless, as Wolf objects, this line of thought leads in the wrong direction because it forces us to concede the assumption about the value of all cultures that in turn commits us to study all of them and to place ourselves in a position to see value in all of them.[185] This conclusion is unnecessary because the harm that the lack of recognition causes, as Wolf reminds us, has nothing to do with the question of whether or not we believe that the person—or culture—recognised has something important to say or contribute. Rather, the insult consists either in "ignoring the presence of these individuals in our community or in neglecting or belittling the importance of their cultural identities."[186] From this standpoint, identity politics matters, not as a means for valuing certain essential characteristics but rather as a necessary step towards individual emancipation and equal concern. In other words, recognition of difference is important because it promotes dignity, self-respect and equality. This pragmatic perspective in the analysis of identity—adopted in the legal field by scholars such as Martha Minow[187]—seems to me more appropriate because it does not assume that certain intrinsic qualities of an individual or a culture should be protected. The primary goal is to reverse the social self-understanding of the larger society when this is partly built upon the exclusion of certain minority groups that are regarded as "inferior" or "primitive."

If the distortion of identity affects a basic good such as self-respect—the primary good *par excellence*, according to Rawls[188]—this is because its evaluative dimension requires us to have the capacity to trust our own value as individuals.[189] We must also be confident that living in accordance with the ideals that define our particular values, our beliefs and life plans is worthwhile. To the extent that false stereotypes undermine this confidence—for example, by causing an individual to be ashamed of his or her culture—or render confidence extremely difficult to attain, harm to individual self-esteem will be inevitable.[190]

Now, concerning "normative stereotypes," by definition, they are not susceptible to truth or falsehood; as a result, combating them requires active policies that avoid a discrimination that imposes certain burdens on members of identity groups where

there are no good reasons for doing so. In this sense, what matters is not just restoring respect through a policy of recognition. This may be insufficient to promote equality: members of the dominant society may know perfectly well that stereotypes about certain minorities are false but may continue to maintain such discriminatory norms. These minorities therefore rarely insist solely on the need for recognition or rectification of false recognition. Rather, their claims are commonly integrated into a series of broader claims relating to the inequality of opportunities, political marginalisation or normative discrimination. For this reason, the politics of recognition cannot be reduced to identity politics as could be concluded from Taylor, but also involve distributive measures.[191]

If this reformulation of the line of thinking about multiculturalism inaugurated by Taylor is accepted, then the politics of recognition does not require us to subscribe to his second conception of liberalism, but rather to realise consistently the inherent potential of the principles of dignity and equality. This realisation, however, may need to accord group rights to minorities, as a key instrument to struggle against intergroup inequality.

Indeed, some of the affected groups would probably accept the previous reasoning about why identity matters. For instance, the organisers of the travelling photography exhibition *Americans*, inaugurated in the Chicago Museum of Fine Arts in September 2000, seemed to be inspired by similar views. As Edward James Olmos, an actor and film director of Mexican heritage and principal promoter of the exhibition, stated, the purpose of the exhibition was to show that "we are all Americans." As he explained, the idea occurred to the photographer Manuel Monterrey five years before, when he read a number of articles in important U.S. newspapers about Hispanics that reflected the stereotype of being marginalised and without aspirations in the land of opportunity. Monterrey felt personally wounded by this image of his culture and decided to show images of how Latinos are people with ambition and dreams like the rest of citizens and at the same time proud defenders of a unique and strong culture. Underlying the exhibition there was a claim for the right to one's own identity, given that "the Anglo-Saxon society has usurped the word American" and it was designed to increase the visibility and recognition of the Latino minority. Some of the exhibition's promoters made statements such as: "we did it for the dignity of Latinos in the United States;" "too many times this society has seen us not as American but as foreigners in this country;"and "when people see the face of America they have to see our image. On the exhibition's educational goal, they said "what is taught in school is the history of the last 380 years, the advance of European culture. In twelve years of elementary and middle school education, only one hour is dedicated to Mesoamerican culture, and this is to talk about Columbus and the conquest." "Anglo-Saxons don't have respect for other cultures. All the national heroes are white. There is only one hero of colour: Martin Luther King. And they do not even give any credit to the Native Americans."[192]

## 5. CONCLUSION

The arguments set out above form the basis for a theory of group rights of cultural minorities that goes beyond neutrality and non-discrimination but is founded on the principles of liberty, equality and dignity that inform social liberalism. Both

Kymlicka and Taylor offer good reasons to conclude that in this line of thought the traditional focus on the problem of cultural minorities has important deficiencies. The arguments examined—the internal connection between liberty and autonomy and the need for recognition of identity—are therefore equally relevant. On the one hand, the idea of societal culture that Kymlicka takes as a point of departure for his model of justice for multicultural societies is more adequate and provides a more solid basis for his theory. It allows him to argue that cultural belonging is a basic good without falling into an essentialist discourse on identity that leads to the defence of a right to cultural survival of different cultures. For the same reason, group rights should not serve to artificially reproduce cultural elements that have already been lost, or to limit the freedom of the members of cultural minorities who choose to assimilate into the dominant culture if this is more attractive. On the other hand, and keeping in mind the critical observations put forward on the implications of his argument, Taylor's "politics of recognition" allows us to complement Kymlicka's theory in order to successfully counter the challenges to it. The correlation between recognition of identity, self-respect and human dignity thus justifies the importance of a right to one's own culture even where assimilation into the dominant culture would not pose excessive problems. As Chapter VI shows, taking this argument further is fundamental to the justification of the claims of immigrants for a politics of multiculturalism.

There are, as shown, important disagreements between Kymlicka and Taylor; they both have different understandings of the liberal society and of the implications of neutrality. Yet both theorists agree that, as human beings who are born and form our identities within a culture that provides us with a range of meanings, we are rightly concerned with guaranteeing the preservation and access to the resources necessary for maintaining such framework. This is a conclusion that unites nationalism and liberalism in an argument of universal significance: the only legitimate nationalism is one that recognises both the right to political self-determination (whatever form this right takes) and the equal rights of other nations. It cannot be otherwise: if having a secure identity based on recognition and access to a cultural framework in which to exercise autonomy are precious goods for me, they must also be precious for the rest of humanity. As such, cultural group rights do not recognise the *special* importance of *our* group or of *our* identity. Such a view is embedded in the unacceptable ethnocentric version of nationalism that does not recognise that belonging to a cultural community is a universal need.[193]

This justification of group rights differs from instrumental justifications in that the latter ones emphasise the importance of cultural belonging only as a means to the achievement of other values. The problem with instrumental arguments is, first, that they do not explain the primary motivations that lead cultural minorities to claim group rights and to resist state assimilation programmes. This motivation is simply taken as a premise from which potential positive implications for the reconstruction of democracy and social justice can be drawn. In this sense, group rights could be justified, but for different reasons to those underlying the interests expressed by members of minority groups. Second, arguments that claim that identity links can instrumentally contribute to achieving liberal values do not orient us normatively with regard to how minorities should be treated: such arguments can be used to

support not only the self-determination and autonomy of the minority nation but also nation-building projects on the part of the state.[194]

However, the response to this ambivalence becomes clear by showing the intrinsic moral importance of cultural belonging. As Kymlicka observes, once we realise that the desire to live and work within our own culture is justified, the question becomes why national minorities should not wish the same?[195] Criticising Taylor—whose analysis of the sources of nationalism seems to assume that minority nationalism stems from a *sui generis* dynamic—Kymlicka shows that national minorities do not differ from majority groups in their desire to maintain their cultural institutions. Majority groups already have this interest guaranteed through their dominant position with regard to access to necessary resources and by making political decisions on official language, public symbols, education curriculum, etc. As argued in Chapter IV, it is as politically dishonest to deny the existence of nation-building projects of majority groups as to insist on the non-existence of minority cultural distinctiveness. Moreover, for those who remain sceptical about the moral importance of cultural belonging, in the absence of a true cosmopolitanism or global democracy that justly represents all interests, arguing for an internationalism that privileges state campaigns of nation-building in the name of "universal values" is deeply incoherent.

Finally, assuming that constitutionally based legal orders should provide for revisions of the law in order to meet the aspiration to social justice, the conclusion of this chapter demands that constitutions, policies and institutional arrangements should be revised or reconceived to accommodate the aspirations of cultural minorities. More specifically, minority cultures in multinational or multiethnic states have a justifiable claim that constitutional provisions should explicitly recognise a number of group rights that may be invoked to justifying state obligations. However, on the one hand, different ways of justifying moral group rights for cultural minorities (as basic rights or as instrumental rights) will arguably have different consequences in the realm of legal rights, institutional design and policy-making. On the other hand, there will also be substantial variations in the patterns of institutional transformation depending on time and context. A wide range of factors should be taken into account in analysing what particular measures or policies should be legally implemented in a given context, since group rights may have a different content and play different roles depending upon the type of cultural community. It would take a separate inquiry to develop a proper account of the legal and institutional implications that can be drawn from the philosophical debate. It is even arguable that a meaningful legal theory of group rights ultimately requires the development of a taxonomy of the characteristics of the various subgroups of the genus studied, an analysis that should be undertaken on a case-by-case basis.

## NOTES

1. Kymlicka (1989a, 1995a).
2. See Joppke and Lukes (1999, p. 1).
3. Taylor (1992). But see also Taylor (1991, pp. 49–53).
4. I borrow this term from Stephen Nathanson (1997, p. 176).
5. According to Scheffler (2001, p. 38), "common-sense morality holds that one has distinctive responsibilities toward family members and others to whom one stands in certain sorts of relationships."

[6] Defended, amongst others, by Pogge (2002, 2004) and O'Neill (1985).

[7] See, for instance, Beitz (1979, 1985), Goodin (1988, 2003), Young (2000, pp. 246–250) and Murphy (1999). For a discussion of these different perspectives on global justice, see Iglesias Vila (2005).

[8] Nathanson (1997, p. 176).

[9] See Williams' (1981, pp. 16–18) discussion on the tension between partiality (or self-interest) and impartiality.

[10] For a discussion on the appeal of particularist claims and how can they be compatible with what he calls "the generalist trend" in the realm of morality, see Raz (1999, pp. 218–246).

[11] See the discussion in Chapter IV, Section 3.3.

[12] To be sure, many experts agree in the inevitability of the increasing process of convergence towards English as the sole *lingua franca* of global communication, which some regard as a key tool for integration of the transnational society. See, for instance, Swaan (2001, pp.4–6,19–20). For a discussion about current trends in linguistic competence and the issues of fairness involved in the predominance of English in the European Union and beyond, see Van Parijs (2003, 2004a).

[13] See supra notes 6 and 7.

[14] Thus, the main problem that liberal egalitarians *and* nationalists such as Miller see to justify a restrictive stance regarding global redistribution is that the international sphere lacks the basic preconditions for applying distributive standards of justice; in Miller's (1999a, pp. 18–19; 1999b, pp. 188–197) view these are: strong solidarity ties that are able to overcome cultural and religious differences; some degree of shared understandings about what a just distribution of resources means; and a sufficient level of trust in that distributive principles will motivate all similarly. Likewise, Rawls' objection to the theoretical attempts at extending the principles of justice to a global scale is, in part, grounded on reasons of feasibility, since, in his view, the international community is not a cooperative structure. See Rawls (1999, pp. 558–559).

[15] For general overviews of the recent debates on global justice, see Shapiro and Brilmayer (1999), Hurrell and Woods (1999) and Follesdal and Pogge (2005).

[16] Precisely because of the costs involved in learning the *lingua franca*, and the unfairness derived from an unequal access to it, there have been proposals to distribute those costs fairly, including a linguistic tax scheme. See Van Parijs (2003, 2004a).

[17] See Connor (1994, pp. 176–177).

[18] I have tried to spell out further the problems surrounding the attempts at building supranational forms of democracy (with particular attention to the European Union case) in Torbisco Casals (2003).

[19] Nussbaum (1996).

[20] Nussbaum (1996, p. 6).

[21] Nussbaum (1996, p. 7).

[22] Nussbaum (1996, pp. 9–10).

[23] Nussbaum (1996, p. 9).

[24] Nussbaum (1996, p. 9).

[25] Barber (1996, p. 34).

[26] Scarry (1996, pp. 99–105).

[27] Bok (1996, pp. 38–44). For further discussion of the "concentric circles" metaphor and the idea that our duties to those belonging to our closest circles of affection are stronger—a thesis that makes it difficult to establish a general priority for those who are worse off, see Shue (1988, p. 691) and Scheffler (2001, pp. 49–59). For a critical view of the implications that are typically drawn from such metaphor, see Iglesias Vila (2005).

[28] Bok (1996, pp. 40–41).

[29] Indeed, Walzer also criticises as meaningless this second idea. Like Bok, he argues that loyalties begin in the centre and that, therefore, children should first learn to explore their local life to develop a moral sense of their immediate commitments. Only from there it is possible to go farther. See Walzer (1996, pp. 125–127); similarly McConnell (1996, pp. 81–82) and Barber (1996, pp. 34–35).

[30] Nussbaum (1996, pp. 5–7, p. 10).

[31] Miller (1995, pp. 187). See also, Tamir (1993, p. 225).

[32] Rawls (1971, p. 455).

[33] Kymlicka (2001a, p. 213).

[34] On some of the difficulties and limits of this democratic aspiration with respect to global regulatory regimes, see Howse (2001) and Kingsbury *et al*. (2005).

[35] Kymlicka and Straehle (1999, pp. 69–70) and Kymlicka (2001a, pp. 117–121).
[36] For a review of this literature, see Kymlicka and Straehle (1999, pp. 78–84).
[37] Nevertheless, it remains unclear whether cultural homogenisation is, in fact, the aim of cosmopolitans. In fact, cosmopolitans usually regard cultural diversity in a positive and approving way, as Nussbaum (1996, pp. 136–137) herself admits in replying to her critics. This idea will be taken up again in the epilogue.
[38] International organisations are primarily open to control by governments, whereas citizens' avenues for participation are confined to their home states and usually hardly effective as regards international cooperation. See Kingsbury *et al*. (2005).
[39] Goodin (1988, p. 685).
[40] Regarding the guilt consciousness of the German people linked to the Holocaust, Habermas argues that such consciousness cannot justify the attribution of collective guilt, which he sees as conceptually incoherent. Rather, he argues that painful revelations of the behaviour of peoples' parents and grandparents are a private matter that can provoke sadness and sorrow, remaining a private issue for those involved. It is only for the purpose of citizen's self-understanding as part of a republic, as emphasised below, that history has an important public function (Habermas, 2001, p. 31).
[41] In this vein, see Waldron (1992). To illustrate the argument, Waldron examines the land claims of aboriginal peoples and suggests that we look at the expropriation of aboriginal lands not as an isolated illicit act that happened in the past, but rather as a wrong that has generated a persistent injustice.
[42] Lucas (1995).
[43] Lucas (1995, p. 77).
[44] Lucas (1995, pp. 77–78).
[45] See Chapter IV, Section 3.2.
[46] Locke's theory on the illegitimacy of conquest through an unjust war or illegitimate usurpation could also be invoked to overturn the previous state of affairs. In his *Second Treatise of Government*, Locke justifies the right to resistance of peoples unlawfully conquered after an unjust war, arguing that their members have no obligations towards the usurpers because they did not consent. Locke thought that, when a war is unfair, the aggressor unjustly invades the power and never acquires a right or title over the conquered people or land. See Locke (1988, pp. 384–397). For an extended argument, see Kymlicka (1995a, pp. 116–120). On the relevance of historical borders as a foundation for group rights, see Bauböck (1999, pp. 140–142).
[47] Waldron (1992, p. 5).
[48] As Waldron (1992, p. 6) puts it: "Each person establishes a sense of herself in terms of her ability to identify the subject or agency of her present thinking with that of certain facts and events that took place in the past (. . .). But remembrance in this sense is equally important to communities–families, tribes, nations, parties–that is, to human entities that exist often for much longer than individual men and women. To neglect the historical record is to do violence to this identity and thus the community that it sustains. And since communities help generate a deeper sense of identity for the individuals they comprise, neglecting or expunging the historical record is a way of undermining and insulting individuals as well."
[49] Habermas (2001, pp. 30–31).
[50] Habermas (2001, p.31).
[51] Habermas (2001, p.31).
[52] For a systematic development of the right to secession as a palliative mechanism in these cases, see Buchanan (1991).
[53] I try to make this point in Torbisco Casals (2004).
[54] Bauböck (1999, p. 144).
[55] See, for instance, Bauböck (1999), Levy (2000), Raz (1994), Spinner (1994) and Tully (1995).
[56] Kymlicka (1995a, p. 93).
[57] Kymlicka (1995a, p. 93).
[58] Kymlicka (1995a, p. 93). Although Kymlicka acknowledges that matters related to cultural and linguistic issues are not dealt with explicitly in Rawls' and Dworkin's theories.
[59] Kymlicka (1989a, p. 177).
[60] Kymlicka (1989a, pp. 3–5).
[61] See, for instance, Kymlicka (1995a, pp. 126–127).

[62] See Kymlicka (1989a, p. 2,137). On the relevance of developing a liberal theory of minority rights in order to handle real-life political conflicts more coherently, see also Kymlicka (2001a, p. 63).

[63] Kymlicka (1995a, pp. 194–195).

[64] See Kymlicka (1995a, pp. 193–195; 2001a, p. 63).

[65] A clarification might be pertinent here. The aim of the following text is not to provide a complete account of Kymlicka's work, but rather to spell out the fundamental claims he makes on the moral relevance of cultural belonging. I shall also consider the relative force of some of the main objections to this theory. We have already examined some of Kymlicka's views on group rights and other related topics earlier in this book, and Chapter VI will explore in more detail their normative implications for different patterns of cultural diversity.

[66] Hence, the task is not to develop an alternative approach to the rights of cultural minorities, since no "traditional" approach exists to date; rather, it is "to lay out the basic principles of liberalism, and then see how they bear on the claims of ethnic and national minorities." Kymlicka (1995a, p. 75).

[67] Kymlicka (1989a, p. 140).

[68] Nagel (1979, p. 105).

[69] For a detailed description of the differences between libertarianism and social liberalism, see Kymlicka (2002, pp. 53–159).

[70] Kymlicka (1995a, p. 26).

[71] Against communitarian critics such as Sandel or Taylor, who criticise Kantian liberals for maintaining an "atomist" view of the individual, Kymlicka (1989a, pp. 47–73) argues that most liberals do not value freedom of choice intrinsically but instrumentally, to the extent it is a precondition for leading an autonomous life, for choosing among different practices, beliefs and lifestyles.

[72] Kymlicka (1995a, p. 26).

[73] Kymlicka (1989a, p. 135).

[74] In *Multicultural Citizenship* Kymlicka distinguishes between three types of "group-differentiated rights:" self-government rights, polyethnic rights and special representation rights. The first category involves the exercise of some degree of political authority over a territory by the members of a minority group; the second refers to different sorts of cultural rights of non-territorial character that would be mainly attributed to immigrants (from the right to receive financial support from the state to develop cultural practices or festivals to the recognition of certain exemptions to the general rules); and lastly, special representation rights involve measures that aim at securing the permanent representation of minorities in the public institutions of the wider society. See Kymlicka (1995a, pp. 26–33). Chapter VI will discuss the justification and implications of these rights, especially of the first two categories.

[75] Chapter IV has examined some recent restatements of this view, especially by Kukathas (2003) and Galston (2002).

[76] Kymlicka (1995a, pp. 82–93; 1989a, pp. 164–167). In this sense, Kymlicka is implicitly rejecting what Silvina Álvarez names a "restricted or Kantian conception of autonomy," where autonomy is not conceived as a gradual property, or a contextual capacity, but mainly as a property of the reason possessed by all rational persons. On this discussion, see Álvarez (2002, pp. 233–240).

[77] For present purposes I use the terms "freedom" and "autonomy" coextensively; on the theoretical relevance of the distinction see Álvarez (2002, pp. 231–249).

[78] Kymlicka (2001a, p. 25). This is a recent formulation of his first conception of "societal culture" reproduced earlier in this book (see Chapter III, Section 3).

[79] Kymlicka (1995a, pp. 75–84; 2001a, pp. 209–210).

[80] Kymlicka (1995a, p. 83). The quotation marks refer to Dworkin's (1985, p. 228,231) book *A Matter of Principle*.

[81] Kymlicka (1989a, p. 166); similarly, Kymlicka (1995a, p. 86).

[82] Kymlicka (1989a, p. 165; 1995a, p. 83).

[83] Kymlicka (1995a, p. 83).

[84] Dworkin (1985, p. 230).

[85] Dworkin (1989, p. 488).

[86] Thus, Dworkin seems to regard the United States as a single cultural structure based on a "shared language," a statement that Kymlicka (1995a, p. 77) thinks is clearly false. This explains the widespread idea that no exercise of liberty within the basic structure of the political community can affect cultural membership. For a similar criticism of Rawls' work, see Kymlicka (1989a, p. 166).

[87] As Kymlicka also notes, few people would think that the state is allowed to unilaterally suppress the special statuses or rights accorded to some national minorities or indigenous groups, even if these changes in the realm of policy have occurred in the absence of a clear theory of legitimacy, mainly for prudential reasons. See Kymlicka (1995a, p. 127; 2001b pp. 28–29).

[88] Kymlicka (1995a, p. 86, pp. 88–90). On the difference between the structure and the character of a culture, see also Kymlicka (1989a, pp. 166–167).

[89] The aim here is to rely on a thin notion of culture, which characterises contemporary liberal approaches to issues of nationalism and minority rights. This conception primarily refers to the structure that provides the context for the emergence and change of particular practices, ways of life and conceptions of the good. In this vein, see, for instance, the notion of "national culture" that Miller (1995, pp. 85–86) suggests as a "set of overlapping cultural characteristics – beliefs, practices, sensibilities – which different members exhibit in different combinations and to different degrees." What is relevant is not uniformity of substance, but rather the fact that membership in this type of national communities "provides them with a background against which more individual choices about how to live can be made."

[90] Yet a cultural community can survive many internal transformations initiated by its own members through the exercise of freedom. As seen in Chapter IV, the distinction between the structure and the character of a culture (illustrated through the example of the transformation of Quebec during the period of the so-called "Quiet Revolution") is meant to illustrate this point. The polemic between Dworkin and Devlin about the laws regulating homosexuality in England provides another good example of the relevance of the distinction. See Dworkin (1977, pp. 242–246).

[91] Kymlicka (1995a, p. 92). For an extended justification of this stance, see also Kymlicka (1989a, pp. 52–60).

[92] Kymlicka (1995a, p. 92).

[93] Margalit and Raz (1990, p. 449).

[94] Margalit and Raz (1990, p. 449).

[95] Likewise, consider the following assertions, also by Raz (1994, pp. 176–177): "Freedom depends on options which depend on rules which constitute those options. The next stage in the argument shows that options presuppose a culture. They presuppose shared meanings and common practices;" and "[o]nly through being socialized in a culture can one tap the options which give life a meaning. By and large one's cultural membership determines the horizon of one's opportunities, of what one may become, or (if one is older) what one might have been."

[96] See Miller (1995, pp. 85–86), Tamir (1993, p. 22) and Nielsen (1999, p. 450, pp. 454–455). As Gans (2003, p. 39) contends, the freedom-based argument is a central thesis of what he dubs as "cultural nationalism."

[97] Raz (1994, p. 176).

[98] Raz (1994, p. 176).

[99] Tamir (1993, p. 22).

[100] Dworkin (1989, p. 489).

[101] For commentators who have argued in this fashion, see Margalit and Halbertal (1994) and Danley (1991).

[102] Geertz (1973, pp. 404–405).

[103] Geertz (1973, p. 407).

[104] Geertz (1973, p. 407).

[105] Modood (1998, p. 382). See supra Chapter III.

[106] For an excellent account of Berlin's conception of identity formation as circumscribed in a cultural context, see Gray (1995, pp. 72–73,100–101).

[107] Berlin (1969, pp. 168–169).

[108] Kymlicka (2001a, p. 211).

[109] Kymlicka (1995a, p. 109).

[110] Kymlicka (1995a, pp. 109–110).

[111] Kymlicka (1995a, p. 86).

[112] Danley (1991, p. 179). For a similar criticism, see Margalit and Halbertal (1994, pp. 504–505) and Nickel (1994, pp. 636–637).

[113] For this reason, I disagree with Danley's (1991, p. 175) opinion that, in Kymlicka's theory, culture figures only as part of the circumstances and never as the result of people's choice.

[114] See Boran (2003b, pp. 232–233).

[115] Patten (1999, p. 397).

[116] Danley (1991, p. 177). It might be relevant to note that, according to Danley, Kymlicka misrepresents the problem at issue. Danley thinks that the special status that is often granted to indigenous peoples, for instance, can be simply justified on the grounds of the need to honour certain treaties. That is why he concludes that there is no need for a theory of cultural minority rights. See Danley (1991, pp. 182–183). However, as I argued, this line of reasoning is very limited, since it only offers guidance for a restricted number of cultural conflicts. Moreover, it assumes that there is nothing to be said about the status and rights of those groups, which, because of lack of sufficient power, for instance, did not have the historical opportunity to negotiate an agreement, either in the form of a treaty or otherwise.

[117] Danley (1991, p. 180).

[118] Danley (1991, p. 181).

[119] Kymlicka strongly emphasises the relevance of this historical pattern of resistance to assimilation, which is, in part, the starting point of his attempt to account for this fact not merely in terms of power relations. See, for instance, Kymlicka (1995a, pp. 79–80) and Kymlicka and Straehle (1999, p. 66).

[120] See Kymlicka (1995a, pp. 108–115).

[121] As Kymlicka (1989a, p. 183) points out with reference to aboriginal peoples: "[T]he effect of market and political decisions made by the majority may well be that aboriginal groups are outbid or outvoted on matters crucial to their survival as a cultural community. They may be outbid for important resources (e.g. the land or means of production on which their community depends), or outvoted on crucial policy decisions (e.g. on what language will be used, or whether public works programmes will support or conflict with aboriginal work patterns)."

[122] For some central references, see supra Chapter IV, note 192.

[123] Danley (1991, p. 177). For a similar point, Tomasi (1995, pp. 589–590), although this author focuses on the interpretation of Kymlicka's notion of "secure" membership, which, according to Tomasi, cannot account for the situation of members of what he calls "transitional societies," or for the fact that, often, a certain degree of cultural instability can be important for social progress.

[124] In this respect, I disagree with Patten, who criticises Kymlicka for not providing the means to confront the challenge involved in the view we are examining here. See Patten (1999, pp. 403–404). Yet Kymlicka's special emphasis on the sacrifices required by assimilation and his argument about the role of cultural belonging in people's exercise of autonomy are, in my view, complementary and, together, they provide the tools to respond to objections such as Danley's.

[125] Rawls (1993, p. 222).

[126] Kymlicka (1995a, p. 86).

[127] Raz (1994, pp. 131–132).

[128] Tamir (1993, pp. 25–32).

[129] Kymlicka (1995a, p. 86).

[130] Kymlicka (1995a, p. 109).

[131] See, mainly, Taylor (1989, 1991, 1992). The following summarised account of Taylor's theory is mainly based on these sources.

[132] Taylor (1992, p. 27).

[133] Taylor (1992, p. 27).

[134] Taylor (1992, p. 29; 1991, p. 27).

[135] It is important to perceive the contrast with the Enlightenment approach. Very briefly: the main figures of the Enlightenment made a case for generality, arguing that differences were merely contingent and morally irrelevant, and therefore should not affect our standing as moral persons and as citizens. This ethical conception is based upon the belief that reason provides universal standards of morality that can be known by all human beings. Kant's categorical imperative, for instance, derives from a law of practical reason that anyone is able to recognise. In contrast with this commitment to universal standards of rationality, the Romantics emphasised the significance of diversity and the uniqueness of the different civilisations and cultures, rejecting the ideals of uniformity and generality that led to singularise a set of objective and coherent universal values. Thus, Herder or Vico deplored the drive towards the abandonment of the linguistic, cultural and historical ties that they perceived as more centrally related to the substance of humanity. On this basis, they urged us to appreciate the unique and incommensurable ends and values that characterise each historical period, reflecting different faces of what it means to be human, each one linked to a sense of belonging that is unique. This is, of course, a sketchy portrait of very complex cultural

transformations that evolve and intersect with each other, as their different conceptions of the self also do—for an extended discussion, see Berlin (1997, p. 19, pp. 168–193) and Taylor (1989, pp. 321–390). Yet it might help to keep in mind that contemporary debates on multiculturalism are strongly influenced by this long-standing philosophical discussion and, in the case of Taylor, the impact of Romanticism is clear in his philosophical outlook, since Taylor (1989, p. 393) thinks that both the Enlightenment and Romanticism have had a powerful influence in the modern self and views. See also Taylor (1995, pp. 79–99).

136 Taylor (1991, pp. 47–48).

137 Taylor (1991, p. 33).

138 Taylor (1991, p. 36; 1992, pp. 25–36).

139 As Taylor says, in the private sphere, we are all aware of how our identity can be well or badly formed through our contact with significant others, and hence our vulnerability. Taylor (1992, p. 36).

140 Taylor (1991, pp. 49–50; 1992, pp. 37–38).

141 This is, after all, the political translation of Taylor's (1989, p. 393) central claim that both the vocabularies of the Enlightenment and of Romanticism "have made us what we are" and we are still working out the implications of this tension for our postmodern self-understandings and conceptions of the self.

142 Taylor (1992, p. 38).

143 Taylor (1992, pp. 39–44,61–63).

144 Berlin (1997, p. 252).

145 See Taylor (1992, p. 37; 1993, pp. 174–181).

146 Taylor (1992, p. 52).

147 Taylor (1992, p. 56–60).

148 Taylor (1992, pp. 58–60; 1993, pp. 175–184).

149 The Bill 101 was introduced in 1977, shortly after the first provincial election victory of the nationalist Parti Québécois, and is regarded as the Charter of the French Language. The legislation was intended to protect and promote the French language in Quebec, which was regarded at risk. This bill made wide-ranging stipulations that had profound effects on the configuration of Quebec society, most notably the mentioned ones. For an extended discussion, see Levine (1986, pp. 3–27) and Coulombe (1995). A short outline of the constitutional conflict in Quebec might be useful at this point. Since the Constitution of 1867, the evolution of Canadian federalism has been marked by the difficulty of building a single state out of a number of heterogeneous and territorially dispersed colonial territories. The adoption of a federal model was more a response to the historical reality than the outcome of a prevalent political ideology, since federal arrangements were alien to the British constitutional tradition. Yet from the very moment of the approval of the Constitution, the question of its reform emerged, due to the dissatisfaction of some provinces with the established distribution of responsibilities. For the French-Canadians the political legitimacy of any constitutional accord needs to count with their explicit consent as they consider themselves as a founding nation within the federation. For this reason, the majority of citizens in Quebec understood the inclusion of the Charter of Rights and Liberties in the 1982 Constitution without their consent as a challenge to their political standing in the federation. For them, the Canadian identity came to be defined in individual, rather than communitarian, terms; as a country of equal citizens, which seemed to preclude the particular recognition of sovereign nations (and, indeed, by introducing the Charter, the confessed purpose of Pierre Trudeau was to create an overlapping Canadian identity throughout the territories, thus consolidating the union). Although the new Constitution guarantees in a very precise form the rights of the French-Canadians outside their territory, Quebec did not give its consent, mainly because two of their traditional demands were not acknowledged: the constitutional recognition of this province as forming a "distinct society" (the political expression of a nation) and their right to veto the reform of the Constitution. Once the Supreme Court denied, in 1982, the existence of this latter right, the majority alleged that the only alternative left to Quebec was secession. Several attempts to solve this conflict have been undertaken since then, mostly unsuccessfully. Two further constitutional negotiations failed (the Lake Meech Accord in 1987 and the Charlottetown Accord of 1992) because the contents of the potential agreement were regarded as insufficient. Two referendums on secession were held in Quebec, but both failed, too. In August 1998, the Canadian Supreme Court pronounced itself on the issue of secession, imposing certain conditions to another potential referendum, in what constitutes a unique attempt of a court to offer the legal grounds on such a delicate issue for contemporary constitutionalism. For an

analysis of this decision, see Groppi (1998, pp. 3057–3080). On the origins of the constitutional crisis in Quebec, see Tully (1994).

[150] Taylor (1992, p. 59).

[151] Taylor (1992, p. 59).

[152] Taylor (1992, p. 64).

[153] Habermas (1994, p. 62). One commentator who fully agrees with Taylor's view in this point is Walzer. Yet, despite this commonality, Walzer distances himself from Taylor's argument because he thinks that in order to deal with cases such as ethnic minorities in the United States, the first conception of liberalism that Taylor describes (i.e., the liberalism of neutrality as articulated by Rawls, Dworkin and others) is more appropriate than the second, favoured by Taylor (i.e., a conception that accepts that a liberal society can have substantial collective goals such as cultural survival). Moreover, Walzer argues that the first model should be subsumed within the second. See Walzer (1992a, pp. 99–103).

[154] Habermas (1994, p. 109).

[155] Habermas (1994, pp. 109–110).

[156] Habermas (1994, p. 124).

[157] Habermas, (1994, p. 113).

[158] Habermas (1994, pp. 112–113).

[159] Habermas (1994, pp. 113–116).

[160] Habermas (1994, pp. 114–115).

[161] Habermas (1994, p. 123).

[162] Habermas (1994, p. 126).

[163] Habermas (1994, pp. 124–135).

[164] Habermas (1994, pp. 128–129).

[165] Habermas (1994, p. 130).

[166] Habermas (1994, p. 129).

[167] See on this issue Habermas (1994, pp. 128–130). On the limitations of the ecological approach as applied to global linguistic diversity, see Boran (2003a, pp. 189–209).

[168] Habermas (1994, pp. 131–132).

[169] Habermas (1994, p. 132).

[170] Taylor (1992, p. 58–59).

[171] Taylor (1994, pp. 40–41, note 16).

[172] See, for different statements of this criticism, Wolf (1992), Okin (1998, 1999) and Shachar (1998, 1999).

[173] For a recent volume that includes different approaches to the problem of the potential clash between multicultural accommodation and the equality and individual rights of members of minority cultures, see Eisenberg and Spinner-Halev (2005).

[174] Okin (1999, pp. 12–20).

[175] See supra Section 3.2 and notes 102–104. For another influential work, see Clifford (1988).

[176] Here I am in full agreement with Shachar's (1999, p. 91) opinion that "although women may accrue some benefit from accommodation policies, as individuals with 'other' identities, they bear disproportionate costs for preserving their group's *nomos*. That is, the multicultural focus on 'identity' – as embedded in religious, racial, ethnic or tribal affiliation – fails to capture the multiplicity of group members' affiliations."

[177] Wolf (1992, p. 76).

[178] Originally in Appiah (2000, pp. 41–53). Appiah (2005, pp. 194–196) has recently restated the categorisation that follows in his book *The Ethics of Identity*.

[179] Appiah (2000, p. 47).

[180] Appiah (2000, p. 47).

[181] Appiah (2000, p. 48).

[182] Taylor (1992, p. 42,63).

[183] Taylor (1992, p. 42).

[184] Identity politics is a label that can potentially include very heterogeneous measures, from those related to public education to the policies and guidelines for acquiring works of art and books by public museums and libraries. For an enumeration of this wide range of measures, see Kymlicka (1998b, pp. 42–43).

[185] Wolf (1992, pp. 78–79).

[186] Wolf (1992, p. 81).

[187] Minow (1990).

[188] Rawls (1971, p. 440).

[189] Dillon (1997, p. 231).

[190] Here, the connection between recognition and dignity established by Isaiah Berlin is illuminating. Berlin (1997, p. 252) states that the phenomenon of nationalism often arises "from a wounded or outraged sense of human dignity, the desire for recognition" and adds that this desire "is surely one of the greatest forces that move human history."

[191] See Parekh (2004).

[192] Extracted from *El País*, September 11, 2000. *My translation*.

[193] Both Berlin and Raz share this view about the universal relevance of cultural belonging that forms the basis for group rights. Thus, for Berlin (1997) "To be connected with its members by indissoluble and impalpable ties of common language, historical memory, habit, tradition and feeling is a basic human need no less natural than that for food or drink or security or procreation." For Raz (1994, p. 178) "[Multiculturalism] is a liberal case, for it emphasizes the role of cultures as a precondition for, and a factor which gives shape and content to, individual freedom. Given that dependence of individual freedom and well-being on unimpeded membership in a respected and prosperous cultural group, there is little wonder that multiculturalism emerges as a central element in any decent liberal political programme for societies inhabited by a number of viable cultural groups."

[194] Moore (1999, p. 481).

[195] Kymlicka (1997b, pp. 56–64).

# CHAPTER VI: MULTICULTURALISM, ETHNIC MINORITIES AND THE LIMITS OF CULTURAL DIVERSITY

## 1. INTRODUCTION

The renewed interest in nationalism has been crucial for showing the political and moral relevance of cultural conflicts and for exposing significant shortcomings in the orthodox liberal position on minorities. Three values are generally invoked in this strand of thought: freedom, equality and identity. These occupy a central role in the articulation of the different approaches which, as I have argued, should be combined within a single comprehensive theory of group rights as basic rights.

This last chapter examines more closely the role played by these values within two different patterns of diversity: national minorities and immigrants (or ethnic groups). Certainly, these two categories of groups do not exhaust the universe of cultural groups making rights-claims—either at the infra-state or at the supra-state level. For this reason, the discussion that follows seeks neither to present a complete typology of groups nor to distinguish the whole range of policies and demands at issue. However, as Kymlicka claims—rightly, in my view—national minorities and immigrants generally represent the main sources of multiculturalism in modern democratic societies.[1] Hence, the clarification of the normative basis of an extensive range of policies and rights to accommodate both kinds of diversity should be helpful in assessing similar claims made by other groups. For instance, the basic justification for claims made by indigenous peoples might be quite similar to that supporting the demands of linguistic national minorities, even though the rights or entitlements needed to accommodate these types of groups might be, in practice, quite different.

Some brief conceptual observations might be important to clarify the scope of the following discussion. Although in its most generic sense the term "immigrant" refers to a person who resides in a different state from the one in which she was born—or, more precisely, different from the state of which she was originally a national—this chapter will only consider the demands of immigrants who have been legally admitted into the society where they reside and who aspire to consider it as their new home, more or less permanently. So I will not deal with the discussion of what immigration policies should a liberal egalitarian order adopt in a world afflicted by poverty and massive injustice such as ours. On the other hand, the expression "ethnic minorities" comprises the descendants of immigrants who are born in the country where their parents have settled (whether they have the


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nationality or not), together with successive generations who perceive their identity as closely related to these groups. For this reason, the terms "immigrants" and "ethnic minorities" are often used in the literature synonymously. As explained at the beginning of this book, the expression "ethnic minority" refers to a group with a common origin or background (real or imagined) that goes beyond strict family genealogies. Although it may appear inappropriate to use the term "immigrant" in referring to the second or third generation descendants—Chinese-Americans, Latin-Americans, Ukrainian-Canadian and so forth—the notion of ethnic minorities does not assume that the links of the members of these groups to their original languages or cultures are necessarily due to recent emigration. Nevertheless, one should bear in mind that sometimes the identification of these national groups also entails reference to a common background. Thus, along with Kymlicka, it may be held that what best distinguishes ethnic minorities from national groups are their different demands. Whereas national minorities usually call for separate institutions in recognition of their aspirations to self-government, most immigrant groups, or ethnic minorities, claim a higher role or presence within the common social institutions, reacting against models of integration based upon complete cultural assimilation.[2]

The second-half of the chapter explores the delicate issue of the limits of cultural diversity in a liberal democratic society. To sharpen the focus, some contemporary disputes that involve contested cultural claims will be revisited—in particular, claims by non-liberal minorities that will operate as a test to identify different models of multicultural citizenship. This discussion will hopefully contribute to defining how a theory such as Kymlicka's, which is mainly grounded upon autonomy, differs from that of Taylor, which is primarily concerned with individual and collective identities. Overall, the aim of the discussion is to spell out more precisely the implications and constraints of the different arguments for the justification of group rights examined in previous chapters.

Two broad approaches may be identified in trying to determine which of these theories, or lines of justification, is more coherent or able to shape the debates about contentious claims. The first views one of those justifications as embodying the best set of concepts and universally applicable criteria to inform the political and legal decisions involving group rights in multicultural societies. The second approach is less reductionist. Although it acknowledges that not all views can be integrated into a single coherent theory, which could be used to assess and decide all particular cases, it nonetheless aims at accommodating a wide range of justifications in a more constructivist form. This is the approach adopted in this chapter. Thus, the explicit endorsement of a particular set of values and principles to the detriment of others is considered necessary only at the moment of deciding cultural disputes and rights claims in particular contexts and societies. This approach assumes that none of the previous lines of justifying group rights should be discarded *a priori* since they all provide a potential basis for a resolution of a wide variety of questions that arise in hard cases. I think it is only in these contexts that their relative significance and constraints can be fully elucidated and balanced. Since the ultimate meaning and implications of philosophical patterns of justification will be shaped by particular disputes at the institutional level, it is important to understand the virtues and flaws of

different approaches—in this case, different justifications of cultural group rights—rather than endorsing only one.

## 2. NATIONAL AND ETHNIC MINORITIES: A DIFFERENT NORMATIVE STATUS?

### *2.1. The Challenge of Immigration: Between Assimilation and the "Politics of Multiculturalism"*

In the two preceding chapters, the problem of justifying group rights has been mainly illustrated by reference to the case of national minorities. This emphasis is not fortuitous: the literature on group rights has largely focussed on evaluating the claims of this particular type of cultural group, and especially the claims for linguistic and self-government rights. This focus has helped to draw attention to a number of theoretical issues that are now being revisited—from the suitability of prevalent views on political legitimacy to the compatibility of liberalism and nationalism.

However, a central feature of present-day multicultural societies, particularly in the West, is the influence of immigration. Mass migrations have come to constitute one of the human manifestations of the process of globalisation. Partly as a result of the growing differences between rich and poor countries, large numbers of people are struggling to flee poverty by migrating to the Western industrialised world in search of greater social and economic security. Other populations have been displaced by natural catastrophes, wars and internal conflicts. Overall, the United Nations "State of World Population 2004" by the UN Population Fund estimates that approximately 175 million people are international migrants and 10.5 million are refugees.[3]

In human migrations, people with different cultural backgrounds move and intermingle across territorial and political boundaries, a phenomenon that alters the composition of societies and presents specific dilemmas. As Rainer Bauböck points out, although internal migration has been a driving force of fundamental change with decisive consequences for the social fabric, only international migration has the potential to change the sense of historic continuity and shared identity of the members of the polity, so that communities can change significantly.[4] This general hypothesis, however, requires some qualifications. On the one hand, in the case of domestic migrations within multinational states, migrations can provoke challenges similar to those of international migrations, in so far geographical displacements are produced between different cultural or national communities that constitute the state.[5] On the other, collective displacements do not always entail the disruptive alteration of historical continuity to which Bauböck refers: for example, when a Diaspora or a group in exile is reincorporated into the community that they regard as their "national home," as in the case of Jews.

In any case, the relevant point is that claims by immigrants have generally played a secondary role in the debate about group rights, probably because these groups, in general, do not aspire to political autonomy or have only occasionally insisted on the need for special group rights, as distinct from individual human rights, in order to recreate their languages and cultures in the public sphere. This may be merely circumstantial,

arising from their territorial dispersion or the lack of any political agency or representation in mainstream political parties. It can also be a matter of priorities. The situation of social disadvantage that these groups face in many countries, together with the difficulties of applying for citizenship, means that their associations focus primarily on fighting against discrimination and social prejudice, condemning the violation of individual human rights and fighting for the extension of social and political rights to long-term residents. Quite rationally, the pre-eminent concern for many immigrants who have fled poverty, armed conflicts and dictatorships is to acquire residency status, survive with dignity on a decent salary, and have access to a home and certain basic rights. An additional, but complementary, explanation can point to what Jon Elster calls adaptive preference formation.[6] Immigrants are not only socially subordinated in most societies, but are also taught not to challenge the *status quo* if they want to be accepted and, in the long run, be able to seek the positions occupied by the dominant majority; hence, they simply try to adapt and not to expect any special recognition of their cultures and languages.[7]

In short, like many national minorities in nineteenth century Europe, ethnic minorities are usually faced with cultural assimilation since this becomes a *sine qua non* requirement for integration, both legally and socially, as full members of the host political community. Or else, they risk suffering persistent social economic inequality and alienation from public life. Precisely because assimilation can carry costs that are too high, and require cognitive capabilities that not everybody possesses, many immigrants perceive (at least psychologically) their stay abroad as temporary, even if they never take the decision to return to their home countries.[8] In such instances, their main interest is to preserve their relationships and close ties with other members of their national communities to which they wish to go back eventually. With such expectations in mind, claiming cultural group rights and actively seeking to modify the biased or discriminatory character of the public sphere in the host state, is not seen as the main priority.

To be sure, there are significant exceptions to this picture which have progressively acquired a special importance in our contemporary age of migration.[9] Although immigrants do not usually claim political autonomy or independence within a territory, in those Western industrialised states where immigration has been more or less sustained over time (either because these states have traditionally welcomed newcomers or because they have been unable to resist immigrants' attempts to settle permanently), their degree of political mobilisation has become more prominent and their demands substantially different. Especially the intellectual and political elites of second and third generations of immigrants that, for some reason or another, have been unable (or unwilling) to assimilate have set-up strategies to renegotiate the terms of integration and raise claims, sometimes in the form of group rights, against pervasive social and cultural discrimination.

The transition from immigrants to cultural minorities is usually made possible because of the opportunities (legal, political, economical) that the receiving society offers—even if only because democratic states grant all citizens a number of basic political and social rights that are key in this respect.[10] Ethnicity and identity then come into sight as a political force replacing ideological divergence, a process that is accompanied by a new agenda that places cultural claims in the centre.[11] This has

been the case in many of the so-called "countries of immigration,"[12] with societies that have historically been formed mainly by immigrants such as Canada, the United States and Australia, which experienced a powerful ethnic revival in the 1960s and 1970s. Different ethnic minorities began to draw lessons from past experiences of coercive, but often unsuccessful, assimilation and to advocate the need of a "policy of multiculturalism" as a better model to deal with diversity, implying a positive respect of different cultural identities on the part of the state as a measure to protect them against pervasive discrimination. Their claims basically aim at redesigning the economic and political institutions that lack the real participation of the relevant ethnic groups.

In addition, the politics of multiculturalism entails reconsidering and eventually adapting those rules that may be tacitly justified in a homogeneous society—such as state funding only for some denominational schools or local festivals, the institution of certain public holidays and so forth—but that are likely to diminish the aspirations of ethnic minorities in a multicultural context, relegating their identities to the fringes of society. What ethnic minorities thus start challenging is the typical expectation of most states that immigrants and their descendents will conform (and *ought* to conform) to the dominant culture and renounce their pre-existing identities altogether. In the end, the goal is to achieve public recognition and to build new forms of interaction and coexistence of different cultural groups. Inasmuch as certain special rights are attributed to individuals on the basis of their membership in certain identity groups, this model of integration brings about another deviation from the traditional concept of liberal citizenship as implying equal rights for everyone.

In the beginning of the 1970s, Canada was the first country to officially adopt a policy of multiculturalism with the main aim of supporting the cultural development of ethnic groups and, therefore, it delineated the basis for an alternative model of integration.[13] Shortly after, the United States and Australia were to follow.[14] Generally, these programmes assumed as a guideline a positive conception of multiculturalism, understood as a political principle requiring the government to act with a view to sustaining cultural diversity.[15] Take, for instance, the policy adopted by the Canadian government in July 1988. This included, among other objectives: recognising and promoting "the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society;" acknowledging "the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage;" recognising and promoting "the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity;" promoting "the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to such participation;" ensuring "that all individuals receive an equal treatment and equal protection under the law, while respecting and valuing their diversity;" fostering "the recognition and appreciation of the diverse cultures of Canadian society and promote the reflection and the evolving expression of those cultures;" preserving and enhancing "the use of languages other than English and French." In addition, the Canadian Multiculturalism Act establishes that all federal institutions shall promote "policies, programs and practices that enhance the understanding and respect for the diversity of the members of Canadian society"

and "carry on their activities in a manner that is sensitive and responsive to the multicultural reality of Canada."[16]

In applying these principles, a number of specific measures demanded by ethnic minorities have been taken or discussed in Canada and other countries that have officially adopted similar policies. These include affirmative action aimed at increasing the representation of ethnic minorities in financial and educational institutions, guarantees of a certain number of seats in federal or provincial legislatures, revisions of school curricula to acknowledge the historical and cultural contributions of immigrant groups, and flexible dress codes and work times to accommodate religious beliefs.[17] Each of these programmes developed under the rubric of "multiculturalism" raises specific questions that need to be confronted separately. This chapter will not engage in a systematic exploration of how these multiculturalism policies work in practice, since this analysis should be undertaken on a case-by-case basis. What is important for our purposes is to stress that they are based on a pluralist conception of what it means to be a member of a multicultural state or society that differs considerably from the assimilationist model that requires immigrants to conform almost entirely to the cultural rules and practices of the mainstream society. Moreover, the multicultural model, rather than viewing the varying origins and allegiances of people as a factor of instability that will lead to disloyalty and fragmentation, sees such diversity as a source of enrichment that should be preserved and cherished. Thus, to a large extent, the official endorsement of this model diverts the focus from the view that immigration is mainly troublesome. Admittedly, statements such as those incorporated in the Canadian Multiculturalism Act could be criticised for embracing a complacent rhetoric of values that is difficult to translate into tangible policies and programmes encompassing divisive areas such as education, language or race relations. Yet, by expressing a commitment to respect pluralism, these explicit statements of the principles inspire the accommodation of diversity and provide a solid basis for creating a different type of dynamics between the mainstream society and the new cultural communities formed by immigrants and their descendants.[18]

It would be inaccurate, however, to assert that the phenomenon of post-war mass migration has only caused difficult dilemmas in societies that have been traditionally open to immigration. The increasing migrations to Europe in the last decades have also accentuated the deviations from the model of citizenship predominating in the nation-states. As Brubaker argues,[19] this is a model theoretically defined as egalitarian, sacred (in the sense that it is supposed that citizens are willing to make sacrifices for the state, even to die for it if necessary), based on national belonging (the nation understood as evoking a shared language, culture, history and values), democratic (membership entails political rights and participation in self-rule), unique (to the extent that it is presupposed that each individual belongs only to one state) and consequential (it is expressed as a community of well-being that entails certain privileges that distinguish members from non-members, those who belong from those who are outsiders or foreigners). Among the deviations that Brubaker has in mind are the long-term exclusion from access to citizenship of large masses of immigrants with prolonged residency, the acceptance of new citizens who do not see themselves as members of the mainstream cultural community, the rise of the number of individuals with a status of partial or dual citizenship and the loss of "sacredness" in the

idea of membership.[20] These features arise from both the rate of growth of post-war immigration and the changing type of migration—which began as temporary labour migration and slowly turned into settlement immigration, even if belatedly acknowledged by the states.[21]

In brief, present immigration in Europe is increasingly characterised, as in the countries on the other side of the Atlantic, by its progressively permanent residential nature and its diverse cultural origins, two traits that are often at the roots of cultural conflict.[22] The effects of this phenomenon in relation to group rights claims by ethnic minorities are undoubtedly central. For one thing, it is predictable that, sooner or later (depending on particular contexts) European states with self-complacent myths of neutrality will be confronted with similar types of conflicts and claims to those that marked the emergence of multiculturalism policies in North America or Australia. In fact, this is already happening in countries that lack a tradition of incorporating immigrants such as Spain;[23] likewise, cultural conflicts such as the *affaire des foulards* in France have already challenged dominant ideologies of cultural homogenisation through national systems of education and administration (I will come back to this French debate in some detail shortly).

Additional cases could be reported to show that cultural diversity arising from immigration is perceived as challenging some central legal and political practices in Europe. Consider the increase of marriages between persons of different nationalities. International private law regulates the legal relationships of families when there is a foreign element. Initially, the aspiration both to preserve national unity and to look after and control migrants was used to justify the designation of the country of nationality as the personal legal statute. This connection began to lose ground throughout the twentieth century and in secular countries has been progressively replaced by the so-called principle of proximity, which postulates the link of the individual to the legal system of her place of residence.[24] However, increased multiculturalism is also having an impact in this area, as the renewed debate about the place of foreign law in defining the personal legal statute demonstrates. The original trend towards the invocation of foreign law in domestic jurisdictions has regained new adherents among multiculturalists, who see it as the best model for granting immigrants the option of preserving their cultural identities.[25]

The emergence of these controversies shows the current relevance in Europe of questions about the principles that should inform immigration policies. For many, the French assimilationist standard of integration is in crisis, and some sectors of society, including organisations of immigrants, have come to argue that Europe should start on the path of the democracies on the other shore of the Atlantic towards an official recognition of multiculturalism. Hence, social institutions that were originally intended for more homogeneous societies should be closely scrutinised to determine whether the rules, symbols and practices embedded in them disadvantage immigrants or fail to recognise their identities. Of course, the problems arising in the European context present particularities. Despite the public impact of cultural controversies like the ones mentioned, perhaps the fact that in many countries large groups of individuals with long-term legal residency are still excluded from the political community (generally because of restrictive policies of naturalisation and citizenship), remains the main problem in the European scenario, raising serious issues related to

discrimination in the exercise of individual human rights.[26] Thus, to the extent that the concept of citizenship is still equated with full state membership, it makes it impossible for certain categories of persons to exercise basic political rights such as the right to vote.[27] This not only makes the lives of immigrants more difficult, but it also poses substantial difficulties for successful political mobilisation, thus making the expression of their claims harder.[28] Also, there is probably no single formula to simultaneously guarantee both integration and fairness in multicultural societies. Nevertheless, a public commitment to address the legitimate interests of immigrants in a fair accommodation of their identities (even if there is a no agreement about what this means and what are the necessary legal measures) can be seen as a gesture toward advancing equality between groups. Furthermore, the official recognition of immigrants' group rights can be seen as a symbolic act to counter the enforcement of coercive measures of acculturation, thus providing a framework in which particular policies on immigrant integration can be discussed without the ethnocentric bias that has often been at the heart of the assimilationist model.

However, only few European states seem to favour this turn. Although immigrants were a decisive factor in the industrialisation and reconstruction of Europe after World War II, countries such as France and Germany still refuse to think of themselves as "countries of immigration" and, even less, to redefine their policies of integration in a multiculturalist perspective.[29] Moreover, most governments are reluctant to accept immigrants beyond the minimum required by refugee and asylum conventions and try to close their boundaries (often ineffectively) to newcomers. The protection of national identities (assumed to be culturally and linguistically homogeneous in states as France or Germany) is surely among the dominant reasons behind this trend. Although, officially, hardly any state explicitly appeals to this argument to justify the imposition of strong restrictions to immigration, practical controversies and political discourses show that this is usually seen as a threat for nation-building projects that seek to create a cohesive citizenship based on a shared ethos and the invocation of a common culture. Certainly, many invoke practical limitations to accommodate newcomers, such as unemployment rates or economic recessions; yet the latest UN reports on population indicate that, in coming decades, only permanent immigration can provide the structural component necessary for demographic growth (which will make it possible to preserve sustained economic growth and preserve welfare systems) in most European countries.[30] Therefore, it seems plausible to understand the general disregard of most European democracies for the advantages of more open immigration policies at least in part as a reflection of their fears of social and cultural disintegration; namely, the idea that opening their borders will force them to reinterpret their cultures, to redefine their identities and reform their political and social institutions to integrate the new citizens.

Several strategies are used to avoid embarking on this enterprise of uncertain results. Some try to limit the continuity of membership by recruiting foreign workers on a temporary basis, "guest workers," in those economic sectors where such an option is unavoidable, or even desirable. Temporary immigrants do not appear so threatening, since they are not perceived as aspiring to full membership in the state and the situation is viewed as transitory.[31] Another method that is typically employed to minimise the increase of diversity is the selection of immigrants based on national origin.[32]

In general, these political strategies are based on the presumption that, ideally, the incorporation of new members into the political community should be via cultural assimilation, an objective that may be easier to achieve with immigrants of a similar historical and ethnic background. This demonstrates, once more, the thesis that states do not see themselves as formed by mere collections of individuals united under a social contract, but as cultural and historical communities, whose members are intergenerationally related and experience their lives as a contribution to this legacy. Immigration, especially when people come from different cultural backgrounds, threatens this image.[33] Let us pause briefly to revise the events leading to the passing in France in 2004 of a new law that prohibits the display of any conspicuous religious symbols by pupils in public schools—the so-called veil law (*la loi contre le voile*)—which might illustrate the debate.

### *2.2. The Foulard Affair: French Schools and the Muslim Headscarf*

The view that immigration and greater cultural diversity is widely perceived as a problem for the "national identity" of Western democracies is reflected, as mentioned, in the widespread impact of episodes such as the debate on the Muslim headscarf in France, but also in the debate about "English-only" policies in the United States. This latter dispute has already been reviewed in Chapter IV.[34] The headscarf controversy epitomises some of the core dilemmas arising from multiculturalism in Europe, and thus it will be a helpful starting point for the following discussion.

On March 15, 2004, President Jacques Chirac signed into law a text approved in the National Assembly by a large majority representing a wide range of political opinions (494 votes to 36, with only 31 abstentions). The law[35] prohibits the students in public elementary schools and high schools to wear symbols or clothes through which their religious affiliation is conspicuously (*ostensiblement*, in the original formulation) displayed. Although it also applies to the wearing of the Jewish skullcap (or *kippa*), the Sikh turban, and to any Christian cross that is too visible (as opposed to discreet), the law was mainly aimed at ending with the increasing number of Muslim schoolgirls that had been attending public schools with their heads covered. On the whole, it is interpreted as a reaffirmation of *laïcisme* (or secularism) a core and uncompromising principle of the French Republic involving the separation of state and religion. While the religious beliefs of the students are fully protected by the law, they are seen as a private matter of no relevance for the general curriculum that is taught in public schools.

The proposal to deal with the issue of the headscarf through law making, instead of through a more informal system of accommodation, was the final episode of almost two decades of conflict. Originally, it was a rather local problem in some French public classrooms which sparked off a national and international debate: the expulsion in the Autumn of 1989 in Creil (a working-class city north of Paris) of three immigrant schoolgirls of North African origin who insisted on wearing their headscarves (the *foulard* or *hijāb*) in the classroom as part of their clothing.[36] This event highlighted deep discrepancies over the legitimacy of the French assimilationist policies, the meaning of secularism and of freedom of religion and equality. The initial incident was followed by others of a similar nature which triggered bitter

disputes, in part driven by the dissatisfaction of French Muslims with their progressive socio-economic impoverishment and the treatment of their religion (nowadays in numerical terms the second in France) and culture by the state. The conflict created enormous public debate at the time. Many regarded a potential acceptance of immigrant claims as an institutional capitulation that would threaten a central principle of French national identity, namely the principle of *laïcité*[37] which, in the words of President Chirac, "is part of the social contract in France."[38] In this affair, both the left and the right reacted similarly. Both sides made what Norma Claire Moruzzi describes as "near-hysterical references to a vulnerable national heritage, Moslem fanaticism and fundamentalism;"[39] both emphasised the need for preserving neutrality in the public classroom.

In 1989, the case ended with a ruling by the *Conseil d'Etat*, the highest French administrative court, acknowledging that to wear a headscarf, or other religious symbols, was not necessarily incompatible with secularism, unless this conduct posed an obstacle for teaching activities or constituted an act of intimidation, provocation, proselytisation or propaganda that could disrupt the normal work of a school or the security and freedom of others.[40] The opinion of the court was mainly based on the need of carefully balancing, on the one hand, the freedom of conscience of students and, on the other, the founding principles of the Republic: freedom and equality. The expression of the opinions, beliefs and religions by the students (also in dress and symbols) ought to be respected by public law;[41] yet these expressions should be restricted if they disrupt the normal order and work in the classroom and intimidate or coerce pupils. The final decision was then left to school principals. The Ministry of Education put the accent on the need of addressing each conflict, and conducting the assessment, on a case-by-case basis. In an official circular promulgated in 1994, the Ministry endorsed the criteria adopted by the *Conseil d'Etat* that the wearing of any dress or symbols should not be *ostentatoire* (conspicuous or prominent). But public school teachers complained that this was circumventing the problem and, without more specific guidelines, the decisions would largely depend on the particular judgements of the principals—on whether they found some particular garment acceptable or not. Secularism could thus mean different things in different places and, in addition, there was no clear rule about what was to be done with the students that rejected a principal's decision. Should they be expelled from the class, but allowed to attend private courses? Under what circumstances should drastic measures such as expulsion be applied?[42]

In short, teachers resented the burden imposed upon them by the doctrine of the *Conseil d'Etat*. In fact, the wide majority (educated in a deep commitment to the secularism of French schools) found that wearing a headscarf was an unacceptable expression of a religious background that infringes upon neutrality.[43] This was primarily because they thought that children had to be protected against religious proselytism and that public elementary schools should remain indifferent towards the ethnocultural affiliations of the pupils. In addition, headscarves in schools were seen as the beginning of a movement to demand an exceptional status for French Muslims (as regards polygamy, exceptions from other elements of the public curriculum like mixed swimming classes, etc.). This accommodation was not seen as neutral, but rather as an unacceptable move towards multiculturalism or communitarianism,

which, in France, is widely perceived as a threat for social cohesion. In the best Republican tradition, *egalité* ensures "that all students should be treated in the same manner and have access to the same resources and opportunities,"[44] and this is interpreted since the nineteenth century as disallowing any exemptions or rights for particular groups.[45]

Despite the general dissatisfaction with the method, the approach promoted by the *Conseil d'Etat* seemed to work quite well throughout the 1990s. However, by the end of the decade, the number of schoolgirls that were wearing the headscarf increased,[46] as did the conflicts and the media attention to incidents related with what was commonly perceived as a provocation or defiance of the secular state. Dealing with the controversial issue by adopting a general law became increasingly important, for reasons related to both international and national politics: September 11 and the invasions of Afghanistan and Iraq exacerbated fears of a radical indoctrination of French Muslims by Islamic networks, and then the unanticipated results of the first round of the French presidential elections of 2002 came about, with Jean-Marie Le Pen, the extreme right candidate for the National Front, shockingly winning the second position with a radical anti-immigration discourse with racist undertones.[47] In August 2003, President Jacques Chirac decided to appoint a commission (with Bernard Stasi, a former cabinet member, as its chairman) to address the complex questions raised by the principle of secularism. The nineteenth members nominated were chosen from a wide spectrum of views—among them three Jews, six women and three Muslims—but they all shared the beliefs in the separation of church and the state. The commission's report, which was made public in December 2003, covered a broad range of issues and formulated a number of recommendations to avoid compromising the neutrality of the republic.[48] Among them was the need of issuing a law to ban "conspicuous" religious symbols or clothes, including the headscarf in public schools (except universities). The immediate official response was then to introduce the law previously mentioned which forbids wearing them—other recommendations were simply ignored.[49]

For our purposes, the headscarf case is interesting because, on the one hand, it points to the complex problem of distinguishing between religion and cultural identity, especially when it involves immigrant communities, and, on the other hand, it raises a number of issues related with the meaning of neutrality in a multicultural state, which has been the main focus of the preceding chapter.

As regards the first matter, although from the French perspective the controversy was officially presented as a challenge to the separation of church and state, more than this seemed to be at stake. The incidents can also be described as a struggle for recognition and identity by the French Muslim community that called into question central pillars of French identity. This may also explain that both the Christian Catholic tradition and the Republican one coincided in the idea that "wearing a headscarf in class was militantly anti-French and should not be tolerated."[50] More than religion and headscarves were involved.[51] What the so-called veil law incorporated is not only a statement on secularism, but also the reaffirmation of French national identity through the rejection of multicultural modes of integration involving separate policies for different groups. For the very notions of group rights and multiculturalism are seen as incompatible with the founding myths of the (one and indivisible)

Republic: "to be French is to be *Républicain*, is to be *laïque*, is to be committed to *égalité*"[52] in the sense described above. The loyalty to a neutral educational system is seen as a natural derivation of these values, another constitutive element of French identity. The central message of the new law, therefore, was not only that God and public education should not be mixed but, more importantly, that there was no place for exceptionalism in a secular, neutral, state. Hence, no ethnic group should receive official support or any kind of special recognition.[53]

A similar statement on identity, which goes beyond the free expression of religious beliefs, underlies the claims of French Muslims who defended the right of schoolgirls to wear the headscarf. For them, more than symbols were involved, too. Many French Muslims, especially those from the Maghreb and other North African regions, are part of a big post-colonial labour migration that has not been especially welcomed in Western European societies—even if, as indicated in the previous section, certainly required by their markets. In France, as in other countries, they have become significantly disadvantaged in social terms: heavily concentrated in metropolitan suburbs or *cités* made up of tower blocks, afflicted by high rates of unemployment and with deficient forms of organisation and public visibility though representation (there are no Muslim candidates in the big political parties, not even at election districts).[54] It is in these communities that a young generation of French Muslims born in France (many of them the sons or daughters of French Algerians who maintained their loyalties to the state and tried to assimilate rapidly in order to conform to the secular imperatives of France), have become increasingly resentful at the treatment received from the state.[55] Some of them are attracted by local Islamists that exploit their feelings by offering them help and protection and, overall, the adoption of a secure identity and purpose in life. To a great extent, this explains that, while in the 1980s and the beginning of the 1990s Muslim women rarely wore the headscarf, today there are many more that use it as a way of asserting not only their faith but also their identity.[56] In sum, here too, more than religion is involved.

It might be important at this point to elaborate a bit on the complex issue of the meaning of the headscarf. In all Islamic cultures, *hijāb* (meaning modesty) refers to female modest dress,[57] and this may include the sort of garment that the French call *foulard* or veil, although commentators and the media in the West often refer to it as "chador," "bandanna" or even "burka," inaccurately. Terminological laxity is far from irrelevant here; as Shadid and Van Koningsveld rightly note, this defective selection prevents us from distinguishing different practices and attaching them certain meanings when we try to assess their symbolic legitimacy and public repercussion.[58] Islamic normative sources prescribe that women ought to dress modestly, but the female modest dress code is interpreted in a great variety of ways in the Islamic world. A number of women in Western Europe understand it as requiring a full covering of the body, with the exception of the face and hands; but what most schoolgirls were occasionally wearing in France was not a gown but a headscarf (*khimār*), simply covering their hair, sometimes tied under the chin to conceal the neck, resembling a nun's wimple. It was this headscarf that they refused to take off in the classroom. From a strictly religious basis, most Muslim scholars, in line with the opinion of the European Council for Fatwas and Research, think that the headscarf is not just a religious symbol (as commonly understood in the West) but a duty prescribed for the

public social space by the Islamic law.[59] So, by forcing them to remove the headscarf, not only freedom of expression but also the freedom of conscience of Muslim women might be affected.[60]

The religious status of the headscarf as a genuine obligation seem thus clear, despite the recurrent attempts at linking its use only to an expression of radical fundamentalism. Indeed, the widespread view that there is "something aggressive" in veils or headscarves that the secular state should not tolerate has continued to be expressed strongly and frequently in different political circles and in the media. Underlying most of these arguments, there is the rejection of Islam and of Muslim social groups. Very often, the strong attitude against the headscarf is based on religious and social stereotypes.[61] Thus, wearing a headscarf is seen as an act of Islamic propaganda, instead of as genuine compliance with religious duties and one's own beliefs; also, common stereotypes relate the female modest dress code to women's oppression, a judgement that, for many, is also based on a reductionist stereotype—feminist reactions in this respect will be briefly discussed at the end of this chapter. But most of all, the headscarf is widely associated with an unwillingness of immigrants to integrate in their new society and to a lack of loyalty to the state. Moreover, the perception of the headscarf as an issue deserving central political attention in France and other European states[62] is surely linked to the idea that the headscarf is a symbol of alienation and of lack of integration.

However, it seems to me that this affair is primarily illustrating a demand for an alternative *model* of integration for ethnic minorities, one that is more political than cultural and respects the plural identities and ways of belonging to the state of people with different cultural and religious backgrounds. This is how we can make sense of the fact that, for many young female Muslims, wearing the headscarf in public has become a primary form of asserting their identities, sometimes against the views and practices of their own families.[63] If this is accepted, the strong reactions against these demands by the state can also be interpreted as a way to impose a certain definition of the national identity. It is in this sense that during the intense public debates that took place in France before the adoption of the new law, some commentators referred to the dispute as one between secular fundamentalism against religious fundamentalism.

Let us finally turn to the questions of neutrality involved in this case. Initially, it might seem that the solution finally adopted is fully consistent with this principle, which is at the core of the French secular tradition but also of liberalism, as this book has tried to demonstrate. In support of this conclusion, it could be recalled that the sphere of application of the veil law includes public state schools and not private schools or universities. It is not a law on people at work or in other public spaces and, as mentioned, it also bans conspicuous symbols and clothes from other religions, and not just the headscarf. Hence, if the case is only seen through the lens of the separation of church and state, one could conclude that the religious beliefs of school pupils are treated with an equal "benign neglect" and are equally respected as a private matter.

Yet such an assessment obscures many important factors in this controversy. In general, these factors have to do with the way in which secularism has been inconsistently applied in practice in France—as in most other liberal states. For instance,

many French official public holidays are related to Christian holidays and the fact that Sunday is the weekly holiday does not have "neutral" effects in all religions. On the other hand, the 1905 law that consolidated the victory of anti-clericalism and, with it, the rule that no religion should be officially recognised or supported through public funds has never been fully applied. As Harry Judge recounts,[64] adjustments were made throughout the twentieth century to apply exceptions to the Catholic Church in the overseas territories and in Alsace-Lorraine after the German occupation. Furthermore, the Fifth Republic expanded substantially the funds for religious schools, most of them Catholic, which were allowed to preserve their "distinctive character" if they followed the state educational programmes and accepted students of all religious affiliations. No Muslim school in France receives such a treatment. In 2003, the demand for Catholic schools among the Muslim community increased substantially, since these schools could not oppose the wearing of the *hijāb* without risking their funding with charges of religious discrimination. Theoretically, state resources should also be given to Islamic schools provided that they meet the same requirements, but most analysts observe that this alternative is likely to encounter many bureaucratic obstacles and political opposition.[65]

It is also significant that most of the recommendations of the Stasi Commission that had the aim to counter the existing imbalance among communities and addressing the social and economic inequalities that French Muslims face were largely ignored.[66] Thus, the final report detected incongruities in the application of secularism and neutrality (for instance, districts where the only schools available were Catholic schools; the special status of religious instruction in the public curriculum in some regions was not applied to Islam, etc.) and had recommendations on housing and urban planning, on the revision of public holidays, on how to deal with religious issues in hospitals and in the work place. Yet only the advice on headscarves was adopted.

So the question arises, once again, as to whether neutrality was the genuine aim of the law, as the French authorities and the deputies that voted for it insisted, or whether the real point was to promote a *particular* meaning of secularism, one that produces unequal effects among the different religious and cultural groups in France.

## 3. THE JUSTIFICATION OF THE RIGHTS OF ETHNIC MINORITIES: A PROBLEM FOR LIBERAL NATIONALISM?

The core issues of the debate about the integration of immigrants have been generally described in the first section. It has been suggested that the shift towards what have been called "multiculturalism policies," which imply a greater accommodation of the sort of cultural diversity that immigrant groups bring about, is central in order to provide a fair system of integration. There is a wide range of policies that could be sanctioned but, in general terms, they all have in common the idea that the host society should be open to reconsidering its basic institutions, rules and practices in order to accommodate the plurality of identities and attachments. In addition, multiculturalism policies are more than anti-discrimination laws that try to grant equality in the enjoyment of the basic individual rights guaranteed to all individuals in liberal democratic states; they also include some level of official

recognition and public support to the distinct practices and identities of ethnic minorities that is meant to be permanent, and hence they can be characterised as group rights.

Yet how can multicultural policies become compatible with the claims of liberal nationalism? Many scholars in the field leave this central question unexamined, and thus the answer remains ambiguous in the literature. Often, defenders of liberal nationalism seem to argue mainly that minority nations also enjoy the right to adopt nation-building policies, as the majority does, leaving aside other sources of diversity within multinational states. Some of these writers are concerned that the gradual decline of the nation-state model in favour of other hallmarks of identity may erode a shared sense of citizenship and solidarity. To the extent that this outcome could diminish the prospects for democracy and the welfare state—which, as some liberal nationalists assert, can be better enhanced in contexts of cultural homogeneity—there would be a trade-off between multiculturalism policies and these other values.[67] In addressing this crucial issue, first, it is important to prove that multiculturalism policies can be regarded as rights, and thus required as a matter of justice; that is, we need to show that they are not intended solely to make the integration of immigrants more efficient. If this were the only purpose, assimilation could still be defended as the best model for guaranteeing the sort of social values (cohesion, solidarity, fraternity) that are of main concern to liberal nationalists.

In their quest for increased political mobilisation, ethnic minorities have often used the language of group rights to justify their aspirations to a policy of multiculturalism, with measures such as those described above. But are these rights morally justified as such? As indicated, this question raises a number of complexities when analysed within the framework of liberal nationalism. According to this theory, it is legitimate that nations support policies aimed at promoting their own language and culture in the public sphere as part of their right to self-determination. As Kymlicka and Straehle write, "liberal nationalists are not just defending nation-states as they happen to exist, but also defending the legitimacy of nation-building programmes."[68] This defence could be justified by some of the arguments that have been discussed in the previous chapter: from instrumental reasons, such as guaranteeing the solidarity and trust that are seen as essential to fostering the wide co-operation needed to implement social schemes, to moral reasons related to the value of cultural membership and identity recognition. To the extent that the state is a unity containing one or several national minorities, the most coherent conclusion to be drawn from liberal nationalism—though one not always supported by its proponents—is to grant group rights to these minorities. Hence, "the state must renounce forever the aspiration to become a 'nation-state', and accept that it is, and will remain, a 'multi-national state.'"[69]

However, the former approach in itself does not offer a clear answer as to how liberal states should deal with the demands of immigrants. One could think that the liberal nationalist response clashes with the philosophy that inspires a policy of multiculturalism. In fact, as indicated, most states assume that controlling immigration is a crucial instrument for preserving the cultural structure of the political community. The same usually applies to the case of national minorities. Québec, for instance, secured the right to decide on the choice and integration of immigrants who intended

to reside in this Canadian province with the argument that this is a decisive matter for the preservation of their cultural institutions.[70] In this respect, the interests of national minorities in Western democracies in relation to immigration are very similar to those of their host states. Demographic and economic considerations undoubtedly play a key role in this matter.[71] But, initially, it seems plausible to contend that a substantial increase in the number of immigrants can only be made compatible with the preservation and development of a societal culture—in Kymlicka's terms—provided that the model of integration is based on assimilationist ideals.

In short, the objection that the policy of multiculturalism undermines the aim of preserving different national cultures should not be underestimated. The crux of the matter is whether it is possible to argue that both national and ethnic minorities have group rights in order to protect their respective cultural interests. In other words, is the defence of liberal nationalism compatible with the justification of a multicultural model of integration for immigrants?

### *3.1. Kymlicka's Theory and the Rights of Ethnic Minorities*

In the light of Kymlicka's theory of minority rights, this puzzling question could be answered positively. Rather than aiming to recreate their cultures within their host state, the main purpose of recognising the rights of ethnic minorities would then be to facilitate the integration of immigrants into their new society. Two arguments support this view. First, Kymlicka claims that although immigrants carry their cultures with them, they lack territorial concentration and an institutional structure—a *sine qua non*, in his view, for making the right to belong to one's *own* culture feasible. Secondly, he contends that, unlike national minorities, immigrants voluntarily decide to abandon their own cultures. These two distinctive characteristics help to clarify the kinds of disadvantage that both types of groups experience in relation to their interest in cultural membership. In contrast to the dominant cultural majority, national minorities usually face greater difficulties in developing their societal cultures. But the case of immigrants is different: they are disadvantaged whenever *access* to the societal culture of the territory where they try to settle depends upon conditions that are too demanding. For this reason, throughout Kymlicka's work, the discussion of the rights of ethnic minorities is basically a discussion about whether the usual requirements for integration that states impose on immigrants can be regarded as fair. In other words, his main concern is to identify the best model that will guarantee the integration of ethnic minorities into the mainstream institutions.

The notion of access is normatively charged. Kymlicka emphasises that it requires an effective protection against discrimination and social prejudices which make it difficult to exercise basic individual rights.[72] But he also argues that the common policies that try to promote the assimilation of immigrants into the dominant culture do not respect their legitimate interest in maintaining certain traits of their own cultural identities. For these reasons, Kymlicka defends group rights of ethnic minorities that can take the form of the kind of measures discussed by the Stasi Commission in the headscarf case: the obligation by the state to adapt public holidays, protocols and state symbols to incorporate minority traditions, or of subsidising ethnic festivals and even providing part of immigrants' primary education in their original

vernacular languages.[73] However, it is important to insist that, unlike the rights of national minorities, the purpose of what Kymlicka calls "polyethnic rights"[74] is not the preservation—or recreation, in this instance—of another societal culture. Rather, the public commitment to "multiculturalism" or "polyethnicity" is intended as "a shift in *how* immigrants integrate into the dominant culture, not whether they integrate."[75] In this model, immigrants "are no longer expected to assimilate entirely to the norms and customs of the dominant culture, and indeed are encouraged to maintain some aspects of their particularity."[76] It therefore provides an understanding of integration as a bidirectional process that involves efforts from both parties. Immigrants can legitimately react against those policies aimed at homogeneously shaping their identities so that they fully conform to those of the cultural majority. Kymlicka insists particularly that what is at stake in policies of multiculturalism is access to the dominant culture and not the establishment of separate institutions:

> None of these policies encourages immigrant groups to view themselves as separate and self-governing nations with their own public institutions. On the contrary, all are intended precisely to make it easier for their members to participate within the mainstream institutions of the larger society. These multiculturalism policies involve revisions to the terms of integration, not a rejection of integration itself.[77]

However, the reasoning underlying this justification of the group rights of ethnic minorities contains ambiguities. First, the view that members of these groups should, in principle, integrate into the mainstream societal culture, whether that of the state or that of a national minority, is primarily based on the presupposition that migration is a voluntary decision. In Kymlicka's theory, the premise is that immigrants have chosen to leave their cultures and, therefore, should not have the right to recreate them in other states.

This presupposition is highly controversial: to what extent can one affirm that people willingly opt for emigration? In general, the circumstances that induce migrants to leave their countries make it difficult to describe their decision as free or voluntary. This is obvious not only in the case of refugees and asylum seekers, but also when migration is connected to a persistent lack of goods and resources that are essential for the satisfaction of basic human needs. It is not uncommon for immigrants to affirm that "they were forced to emigrate." Certainly, in order to make this contention more powerful it would be necessary to support it with empirical research. But for present purposes it should be enough to acknowledge that in a large number of cases the decision to emigrate is taken when the alternative option of remaining implies a situation of despair that nobody should be forced to endure.

In any event, to the extent that members of a certain ethnic group did not voluntarily renounce their own culture, Kymlicka's theory should presumably grant that this group has the right to recreate its societal culture in another territory (given that this is a theory driven by the Rawlsian commitment to remedy the disadvantages that are beyond the individual's control). Obviously, the institutional implementation of this right may be very complicated in practice. It is likely that the right of immigrants to recreate their own societal culture within the borders of another state would clash with other legitimate interests and rights (from property and land rights to self-government rights). Although finding a balanced solution capable of satisfying the

diverse interests at stake might prove extremely complicated or even unfeasible, this should not obscure the potential problems of Kymlicka's theoretical approach to the demands of ethnic minorities.

Note, too, that this approach not only highlights the element of choice but also the fact that ethnic minorities have *already* lost their societal culture. Unlike national minorities, they lack an institutional structure to sustain their culture in another state and the necessary conditions, such as territorial concentration, to rebuild it. So their options are basically reduced to integration. However, as Carens asks, "if people's native societal cultures are so important to them, why shouldn't immigrants be able to bring their societal cultures with them and establish them in their new home?"[78] I agree with Carens in that, by drawing such a sharp distinction between immigrants and national minorities, Kymlicka undermines the case for group-differentiated rights for immigrants.[79]

Other critics have also objected to this reconstruction of immigration as a source of cultural diversity on similar grounds. Young, for instance, agrees with Kymlicka that a liberal community can and should grant public significance to cultural pluralism, but she objects to the mutually exclusive dichotomy between national and ethnic groups as being too categorical.[80] In her opinion, there are other groups that do not fit into Kymlicka's categories. African-Americans, for instance, are neither an incorporated national minority nor a group of immigrants, but descendants of slaves who were brutally transported to a new territory, coercively deprived of their original cultures and forced to live segregated lives, marginalised within the state. Similarly, there are other groups such as those comprising members of the former British, Dutch or French colonies to whom citizenship of the states they previously belonged to was promised, but who then were faced with exploitation, and socio-political exclusion once they emigrated there. Based on these and other cases, Young concludes that it would be more appropriate to look at the differences between cultural groups as a matter of degree, as if they were in a "multicultural continuum." This perspective, she thinks, would fit better with the reality and provide the basis for making finer gradations in our moral arguments.[81]

In short, these objections point to the view that deciding whether a group is or is not a societal culture should be a process of gradual interpretation. The correlation that Kymlicka's theory establishes between national minorities and institutional separateness on the one hand, and ethnic minorities and institutional integration on the other, thus seems to raise some tensions. Kymlicka himself is aware of the limitations of the theory in relation to hard cases such as those mentioned by Young. Accepting that the classification does not provide an answer to all the problems raised by multiculturalism,[82] he insists on its utility as a tool or a guide in addressing those intermediate instances that, being exceptions to the general patterns of diversity, deserve a separate analysis. Consequently, these cases are not seen as undermining the validity of the theory since "the fact remains that immigrants and national minorities form the most common types of ethnocultural pluralism in Western democracies."[83]

Kymlicka is probably right in maintaining the appropriateness of depicting a broad distinction between these patterns of ethnocultural diversity. In spite of the grey areas, the claims of immigrants are generally distinct from those of national minorities, even though both are often expressed in the language of group rights. But even if this assumption is accepted, it is still unclear whether the implications that

Kymlicka draws from it on how to deal with ethnic minorities are ultimately coherent. For a set of central normative conclusions are derived from a series of empirical observations: the sort of demands usually raised by immigrants, the unwillingness of most states to grant them the necessary means for recreating their societal cultures and so forth. Still, against this objection, it could be argued that these conclusions are reached not just from *ad hoc* or contingent empirical practices, but after a careful analysis to demonstrate that these are persistent traits and patterns that should be taken into account when assessing normative standards.

In any event, the central claim that, on the whole, ethnic minorities aspire to a form of social integration that grants them certain cultural rights against pure assimilation into the majority culture seems accurate. Whether this is because emigration is voluntary, or because the usual territorial dispersion of immigrants would make any attempt to recreate their own societal cultures unfeasible, is not so relevant. These elements should be seen as factors that *explain* why the demands of these groups remain different to those of national minorities rather than as normative criteria.[84] Therefore, the key point is that,

> . . . while immigrant groups have increasingly asserted their right to express their ethnic particularity, they typically wish to do so within the public institutions of the English-speaking society (or French-speaking in Canada). In rejecting assimilation, they are not asking to set up a parallel society, as is typically demanded by national minorities.[85]

There is a further potential objection to Kymlicka's defence of polyethnic rights, which emerges from the very justification of multiculturalism policies. In order to formulate it, it is important first to set out in more detail the grounds for these rights. As the argument stands, the main purpose of multiculturalism is to recognise some special rights for ethnic minorities so that their members are better equipped to fully integrate and participate in the mainstream public institutions. In particular, polyethnic rights mainly involve revisiting the terms of integration so as to lessen the risk of alienation of these groups. Thus, in his assessment of the measures adopted in Canada, Kymlicka argues that the adjustment of public holidays, dress codes, etc. to accommodate minority religious beliefs and ways of living has prevented serious social and political tensions such as those that have recently arisen in France. These are conflicts that inevitably produce social fractures, encouraging ethnic minorities to withdraw from public institutions, which they see as biased, and to build their own separate institutions such as private schools.[86]

The same logic of integration is applied to linguistic matters, but here Kymlicka argues that immigrants should be encouraged to learn the official language—or languages—of the state since, otherwise, they will be in a position of serious disadvantage. The question is, therefore, what is the best policy to achieve this goal.[87] Having expressed the issue in these terms, Kymlicka focusses attention on recent studies carried out by socio-linguists and pedagogues, according to which children of immigrants integrate most successfully if they follow bilingual courses that allow them to learn their mother tongue as part of their primary education. In Canada, for instance, this is the case with Chinese immigrants living in Vancouver who attend bilingual schools in Mandarin and English. In addition to integration, Kymlicka offers other reasons in favour of a policy of multiculturalism. In particular, he stresses that assimilation can

only be achieved at the cost of imposing considerable disadvantages on immigrants. Many of the rules and practices regulating institutions that were originally designed by and for a culturally homogeneous society can inflict unfair burdens on immigrants, in the same way that the institutions designed by and for men became oppressive for women.[88] For example, by choosing Sunday as a week holiday most states intended to accommodate Christian religious practices that were those of the vast majority.[89] But in a multicultural society, followers of another religion who wish to comply with its prescriptions will be at a disadvantage.[90] The same reasoning would apply to other traditions that are incorporated in legal rules.[91]

As can be seen, this second argument differs from the ones analysed earlier in that it points to equality. The idea is that the needs and interests of ethnic minorities should be taken into consideration in the same way as the needs and interests of the majority. This view accords with Moruzzi's understanding of what is at stake in the case of the headscarf. In her view, using the defence of secular values in France to prohibit girls with a headscarf from entering schools implicitly legitimises discrimination in the exercise of religious freedom:

> When French intellectuals mount a defense of secular values, they are refusing to acknowledge that their version of secularism allows for freedom of religious practice for one hegemonic group – who go with their heads uncovered outside of a sacred space and pursue their community devotions on Sunday – but not for others – who may believe that the head should always be covered and that the Sabbath falls on Friday or Saturday. For members of those religious and cultural communities, French secularism becomes an unequal religious prohibition, and hence a deeply felt political problem.[92]

The essence of the demands of many ethnic groups is, thus, to have the equal chance of practising their customs, traditions and religious beliefs. In principle, this approach is consistent with the justification of the rights of national minorities that Kymlicka offers. As argued in the previous chapter, his argument is primarily focussed on the moral relevance of cultural belonging rather than on the value of cultural pluralism. The basic idea is that ethnic minorities should integrate into the "cultural structure" of the society where they reside. This goal might require learning the official language, but it is nonetheless compatible with the recognition of some traits of their original culture that are reflected in public institutions and rules. The *character* of a culture, therefore, must also change and adapt so as to accommodate the identities of the new members of the polity. The ideal is to make it an inclusive political community with which all members can identify. Integration (by ethnic minorities) and accommodation (through special cultural rights and policies adopted by the receiving states) are thus two sides of a process that should be comprehended as bidirectional rather than unidirectional. As Parekh argues, in a multicultural society, the shared culture which reconciles the different cultures and fosters unity must grow out of the interaction between them; it is therefore a "multicultural constituted culture,"[93] that leads to a "constantly evolving 'we.'"[94]

All this suggests that group rights of both ethnic and national minorities are compatible. However, this conclusion is still debatable. Several of the "polyethnic rights" that Kymlicka discusses might indeed be justifiable assuming that they are basically intended for first-generation immigrants. But it is unclear why the policy of multiculturalism should have a permanent role and even become embedded into the

constitutional structure of diverse states. Put another way, why should the so-called group rights of ethnic minorities be seen as anything more than transitional measures designed to integrate new immigrants?

It might be thought that, after all, if the purpose is integration, then the policy of multiculturalism should be understood as a transitory form of affirmative action aimed at correcting some disadvantages—for instance, in learning an official language. However, in this case "polyethnic rights" could not be considered as cultural group rights *stricto sensu*. Although Kymlicka does not specify whether, for instance, the members of second and subsequent generations of immigrants would also be entitled to receive part of their education in their mother tongue, it may be deduced that this indeed would be so. At any rate the requirement to adapt state symbols (flags, mottoes such as "in God we trust" written on official documents, etc.) official ceremonies, public holidays and, above all, school curricula to make students aware of the different cultures within a society, is envisaged to be permanent.

But if this is so, the question emerges again: what is the basis for polyethnic rights? If the fundamental interest of ethnic minorities is social integration, then the justification for these rights cannot be the preservation of their own particular cultures. Nor should it be the need to guarantee access to the societal culture that is necessary in order to exercise autonomy—at least not permanently. However hybrid their identities might be, for the second and subsequent generations of immigrants it is reasonable to think that the culture to which they belong is mainly that of the country in which they have been born rather than the one from which their ancestors had emigrated. To the extent that in these cases multiculturalism policies were merely aimed at eradicating racism and discrimination, it would be sufficient to appeal to individual rights and freedoms in order to justify them. The reason is that, in this case, access to a societal culture (with the exception perhaps of the first generation), as a basic good that the state should ensure, is already guaranteed. In other words, most members of ethnic minorities have not *lost* their societal culture. If this is so, why adopt a policy of multiculturalism that involves the permanent recognition of group rights? Do these policies unnecessarily and artificially provoke the fragmentation of society into different cultural groups?

Kymlicka's argument is somehow ambivalent in this point. Surely, rather than being based upon the link between cultural belonging and autonomy, these rights would better be anchored in ideas of equality. Nevertheless, if the ultimate goal is integration, the justification for the profound transformation of public institutions that Kymlicka advocates probably demands additional arguments. Beyond furthering equality, his model of polyethnic rights does not entirely justify why ethnic minorities should be entitled to preserve certain aspects of their cultural identity and see them embodied in public institutions. In addition, the compatibility of this standard with the rights of national minorities is not at all obvious. The problem arises because, as was shown in the preceding chapter, his theory rests primarily on the connection between autonomy and cultural belonging. The argument of equality plays an important role in guaranteeing access to cultural belonging, but in the case of ethnic minorities, it could be argued that most of their members have this good guaranteed. The defence of the right to public financing of ethnic festivals, the adaptation of state symbols, the transformation of institutions and school curricula to better represent the

existing cultural pluralism becomes an easy target for anyone utilising Rawls' *expensive tastes* argument. Except for the type of measures strictly necessary to make social integration easier for recent immigrants (such as linguistic assistance, affirmative action and educational schemes aimed at fighting racism), the policies of multiculturalism could be seen as largely discretional, and not as implementing genuine rights.

### *3.2. Identity, Recognition and Group Rights for Ethnic Minorities*

The understanding of multiculturalism policies as group rights may find another, probably stronger, basis in Taylor's theory of recognition, especially if we add to it the nuances discussed in the previous chapter. The justification could be basically the following: policies that force ethnic minorities to assimilate entirely into the dominant culture are morally wrong because they do not respect the particular identities of members of those groups. Surely, they may have completely lost access to their societal cultures, as well as the possibility of recreating them in another society. But this is no obstacle to perceiving certain symbols, narratives, customs, languages or histories as constitutive parts of the moral self. In this sense, forceful assimilation may be regarded as unfair; not merely because it makes access to the common institutions difficult, as Kymlicka would say, but, above all, because it deprives the members of ethnic minorities of the liberty to shape their own identities. In a liberal state, cultural assimilation should be only an alternative that immigrants may choose, instead of a condition for integration. The reason is that forcing people to relinquish their own cultures altogether is incompatible with guaranteeing self-respect, a good that, as we saw, is considered essential in most conceptions of liberal justice.

In fact, on occasion, Kymlicka himself suggests that "polyethnic rights" are aimed at the recognition of different ethnocultural identities: "to help ethnic groups and religious minorities express their cultural particularity and pride."[95] However, as I argued, it is doubtful that the principles that ultimately support his theory are, by themselves, sufficient to justify a duty of the state not only to lessen the disadvantages caused by free competition in the "cultural market," but also to transform its institutions to adjust to the cultural pluralism that immigration brings about. Membership in an ethnic minority is an important aspect of self-identification for many people and, in this respect, the lack of recognition of these identities may cause failures in socialisation and create segregationist tendencies, as it is progressively happening with Muslims in Europe. On the other hand, as Raz and Margalit maintained, belonging to a group is a matter of mutual recognition. But when recognition depends upon the cultural assimilation into the dominant majority, it imposes an excessive burden on immigrants who wish to join and participate in public institutions and yet preserve their own identities. They then "are made to feel estranged, and their chances to have a rewarding life are seriously damaged."[96]

The substance of the objection to Taylor's argument on the moral relevance of recognition can now be grasped more clearly. Let us recall that, unlike Kymlicka, Taylor rejects the assumption that liberalism presupposes state neutrality regarding citizens' conceptions of the good and justifies the desire of national minorities to preserve their specific ways of life. For this reason, it is plausible to assume that his view on nationalism is hardly compatible with multiculturalism policies. Although Taylor

points out that communal goals, along with individual rights and respect for other cultures, must be balanced, the result of this assessment in a particular case may well yield a prevalence of the dominant conception of the public good over the exercise of some individual right. In contrast, when the moral relevance of recognising identity is emptied of all essentialism, it is possible to make the ideal of state neutrality compatible with rectifying the different kinds of disadvantages related to the public expression of their identities that members of any cultural minority may suffer.

The recognition of cultural rights for immigrants will obviously transform public institutions and even change the nature of the dominant culture. This should not be seen as bringing about the decline of its cultural structure, but rather the transformation of its character. In general, multiculturalism policies have undermined neither the common political institutions nor the wish of ethnic minorities to participate in, and be loyal to, these institutions. For instance, in Canada, since the official enactment of that policy, naturalisation has increased notably—an indicator that can be partly interpreted as a reflection of the growing desire of members of ethnic minorities to become full members of the political community.[97]

A further implication of a multicultural model of citizenship that honours the principle of state neutrality needs to be stressed. Under this model, the cultural rights of ethnic minorities are not primarily directed at promoting a particular religion but, more generally, at cherishing the expression of minority identities under the same conditions as that of the majority or dominant culture. Of course, cultural identities often involve religious connotations, as the headscarf case illustrates.[98] Muslim women may cover their head with a scarf, just as Catholic women wear a crucifix around their necks. Nevertheless, to interpret such practices or customs as a sign or a statement of firm adherence to religious orthodoxy is not necessarily accurate, as the previous section suggested. In any event, although it could be argued that neutrality ideally requires that no religion should be recognised in the public sphere, in practice most states have historically contravened this principle because the characteristic idiosyncrasies of religions are often embedded in the cultural symbols and functioning manners and rituals of the public institutions. For this reason, neutrality would be better interpreted here as consequential neutrality, which, *prima facie*, would require equal recognition for all religions in the public sphere in most contexts. In the case of the prohibition of the headscarf in France, we could argue, inline with Moruzzi's observations quoted above, that, since complete secularism has never been practised, the measure adopted targets Muslims and Jews more than Catholics (for Catholicism does not have specific dress codes) and is therefore not neutral. Religious minorities, then, do not stand for "exceptionalism," as the majority in France thinks, but they demand the same level of recognition that the majority obtains by seeing their common practices and identities already reflected in the public sphere. If the state partially subsidises schools aimed at Catholic education, permits crucifixes (even small ones) in the classrooms, and, like in Spain, expects its army to perform out religious ceremonies and pay homage to holy figures, it is not surprising that the members of other religions should aspire to the same kind of public support in a democratic society.[99] It is precisely because, unlike cultural neutrality, religious neutrality could be theoretically achieved through a policy of non-intervention that liberal states often oppose some of the demands of ethnic minorities. Nevertheless, it is important to

realise that previous infringements of the principle of neutrality by the state suggest that the best implementation of this ideal might be better achieved by extending the privileges that the dominant religion enjoys. Normally, the problem is that these privileges are often so embedded in the normal life (for instance, the fact that Sunday is a holiday) that they are not seen as such anymore.

The main idea that underlies the approach I am suggesting can then be summarised as follows. Historically, the building of social identities has been affected by certain beliefs about the meaning of being a woman, Jew, homosexual, black, etc. If we lived in societies that were truly neutral and had not institutionalised these beliefs—non-sexist, non-anti-Semitic, non-racist and non-homophobic—the need to reshape these identities, to obliterate non-egalitarian conventions underlying the stereotypes behind existing rules and practices, and the claims for recognition would probably never be raised. But identity politics has always been present, and since these goals subsist as ideals, the claims, too, should be expected to persist, as people need to express and make sense of their own, socially constructed identities.[100]

In conclusion, although an approach like Kymlicka's tends to assimilate the treatment of social minorities and that of ethnic minorities, it is important to insist on the relevance of this distinction because it captures important elements of the justification of polyethnic rights. As this section has argued, the validity of Kymlicka's argument is doubtful beyond the first generation of immigrants. This deficit could be overcome by stressing the moral relevance of the recognition of cultural identity for the self-respect and dignity of people. Certainly, as in the case of belonging to a national minority, self-identification as a member of an ethnic minority is seen partly as a matter of circumstance and partly as a question of choice. However, the way in which ethnic minorities experience their identity is usually very different from that of national minorities (in the long run, the temptation of assimilation suggests more plausible scenarios and the original ethnic identity takes on a rather symbolic nature). Accordingly, multiculturalism policies have to be sensitive to their particular contexts.

## 4. LIMITS TO CULTURAL PLURALISM: THE JUSTIFICATION OF "PARTIAL CITIZENSHIP"[101]

Jeff Spinner explains that in 1991, David Dinkins understood that a liberal society cannot accept all cultural practices and values merely because they are part of someone's identity. As the Mayor of New York, Dinkins criticised the Irish-American community for excluding gays and lesbians from participation in St. Patrick's Day celebrations. Dinkins decided not to take part in the parade since his participation would not have been a private matter and could thus have been interpreted as a public endorsement of that exclusion. Although some members of the community complained about what they perceived as the mayor's attempt to change their traditions, in Spinner's view the decision was correct:

> liberal principles, while flexible enough to incorporate many ethnic practices, are not infinitely malleable. Sometimes they will clash with cultural practices in public and in civil society, and, when this happens, these practices need to change.[102]

Liberal principles, indeed, are not infinitely malleable. For liberals, the question of the limits of cultural pluralism represents an enduring concern, as pointed out in various parts of this book. As indicated, the reluctance towards, or the rejection of, group rights is usually justified on the grounds that their recognition may seriously undermine individual rights. Moreover, some liberals oppose group rights claiming that their recognition would lead to uphold these rights over and above the individual rights of the members of the group.

For the reasons laid out in Chapter II, this objection is intimately linked to the dominant conception of group rights as rights that are held by the group itself, which, as explained, is not the best way of understanding this category. Nevertheless, the underlying concern about the conflict between group rights and individual rights is still central, especially if we bear in mind that not every cultural minority would find acceptable the line of justification for group rights developed throughout the preceding chapters. Thus, some cultural minorities make claims in terms of group rights for reasons unrelated to individual autonomy, recognition or equality. This is the case for illiberal groups that either do not value these principles at all, or interpret them in a way that is radically different from the liberal tradition. Think, for instance, of certain religious sects or indigenous groups whose particular traditions and customs contravene basic liberal principles. Sometimes the demands of these groups demonstrate their desire to live, to some extent, outside the mainstream society. The acceptance of a more or less secluded way of life is common to certain religious sects, whose theology demands the avoidance of any contact with the modern world. That is why they demand from the state exemptions that allow them to keep their community closed and so preserve their ways of life. Sometimes such communities are concentrated in small territories and their level of internal institutionalisation is such that they could be regarded as truly "societal cultures," in Kymlicka's terminology.

In these cases, claims of group rights often focus on cultural survival, understood as a value in itself: that is, the aim is to continue achieving collective aims such as the preservation of a certain religion and other traditions and customs over time. Problems arise when these groups do not follow some basic liberal norms and principles internally—for instance, the freedom of women—because they tend to view the lives of individuals as instrumental, as a means to serve the community and safeguard its particular nature. For instance, the Amish in North America want to preserve a special legal status not in order to integrate into the mainstream society without assimilating to the mainstream culture, like many immigrants, nor to participate in the political life on an equal footing or to preserve their cultural structure from decay, such as the Flemish, Catalan or Quebecois peoples. Rather, their main purpose may simply be to stay at the margins of society, avoiding the effects of liberal citizenship on their identities. This is the main idea underlying the expression "partial citizenship." It suggests that the state should protect the social isolation necessary to allow the development of certain ways of life that are based on conceptions of the good at odds with liberal rights and freedoms.

This is, in part, what was at stake in the famous case *Wisconsin v. Yoder*, decided in 1972 by the United States Supreme Court.[103] The facts were as follows. In 1968, three Amish parents were arrested in Wisconsin because they refused to send their 14- and 15-year-old children to high school. They did not have any objection to their

attendance at primary school. However, as the rest of the members of this sect, they wanted to prevent their children from going to high school because they were afraid that under the influence of their classmates, they would abandon their traditional life-style and beliefs. The Old Order Amish is a Christian sect descending from the European Anabaptists of the sixteenth century. This order rejected the alliance between the church and the state since it believed that Christianity meant a spiritual link among a community of believers, and it opposed children's baptism, violence and oaths. Like other dissenting sects, the Amish were expelled from various countries and they began to migrate to America at the beginning of the eighteenth century.[104] Most of them settled in Lancaster County in Pennsylvania (U.S.) and in Ontario (Canada). Religion still guides all spheres of life within these communities. For example, it regulates in detail the conduct of their members, their diet, their social relations and their clothing.

The arrest of the parents was justified by the U.S. government by reference to the aim of ensuring that every child receive the necessary level of education to succeed in the modern world. Such incidences were not new, though previously school authorities and the members of these groups had reached agreements under which, generally, Amish children were exempted from attending classes regularly and allowed to combine their education in vocational subjects with their work on the farms. Before the court, the Amish argued that sending their children to high school would radically transform their identities to the extent that they would stop being members of the group. The state attorney, instead, held that were the Amish children educated in their communities, they would only be able to live in a certain way and their choices would be very limited. The Court was not convinced by this argument. Justice Burger, in his opinion for the Court, upheld the Amish claim and exempted them from abiding by the general law that makes education compulsory until the age of sixteen. The Court argued that pressure to assimilate to the dominant life-style and norms of American society would be very strong and would draw the children physically and emotionally apart from their community.

As I have explained above, within contemporary liberalism, the predominant line of argument to defend the rights of cultural minorities is based upon the connection of cultural belonging and the value of freedom, mainly understood as autonomy. From the point of view of a neutrality-based liberalism, a decision like the one of the United States Supreme Court can be hardly justified because granting a status of "partial citizenship" to the Amish cannot consistently be based upon this value. Amish children learn that they should not follow their own will or preferences if they want to live as true Amish and be children of God. These are groups that do not value individuality; on the contrary, they try to dilute it within the community and, as Chapter IV concluded, in justifying group rights, neutrality has a limit when the fundamental rights of the individual are at stake. With regard to the Amish case, most of its members did not decide to join the community but were born into it; hence, there is no room left for the argument that, in exercising their autonomy, they freely decided to endorse values that are incompatible with the notion of freedom and choice. Moreover, it could be argued that if the state allowed parents to restrict their children's education beyond a basic level, their future autonomy could be seriously undermined. In fact, the Amish are overtly concerned with ensuring that their

children are not exposed to alternative views of the world that might lead them to question their own beliefs and values. The children's capacity to choose between renouncing or confirming their membership in the group will also be limited by their lack of resources to succeed outside the community.[105] And, even if they possessed these resources (and so the right to exit was made more effective through state intervention), the choice would have difficult consequences: by choosing to integrate in the wider society they would face the loss of their original membership in a community that has been a substantial source of their identities.

There is no simple way out of this dilemma; largely because individual freedom is not always compatible with the goal of cultural survival as an independent moral ideal. From the perspective of the Amish, whose conception of the good clashes with some central liberal values, a theory of group rights such as the one discussed in previous chapters does not solve their fundamental problem. So, justifying the recognition of difference on the basis of autonomy and equality only allows for the preservation of a limited range of pluralism in worldview and values. Admitting the incompatibility of his own argument with the demands of non-liberal groups, Kymlicka draws an important distinction between "internal restrictions" and "external protections" that defines the scope of his theory:

> The first involves the claim of a group against its own members; the second involves the claim of a group against the larger society. Both kinds of claims can be seen as protecting the stability of national or ethnic minorities, but they respond to different sources of instability. The first kind is intended to protect the group from the destabilizing impact of *internal dissent* (. . .), whereas the second is intended to protect the group from the impact of external decisions (e.g. the economic or political decisions of the larger society).[106]

This approach enables us to confront the feminist concern about the potential tensions between group rights and inter-group inequalities. Since many of the internal value conflicts of groups are rooted in gender issues, one central objection—as formulated by Susan Okin in her celebrated essay "Is Multiculturalism Bad For Women?"[107]—is that multicultural accommodation could worsen the situation of women, as the most vulnerable and oppressed members of the communities that are the object of protection (although we can of course extend this criticism to include other "minorities within minorities" such as minors, or dissenters whose basic individual rights as citizens can be jeopardised by group rights). More precisely, to the extent that group rights that involve self-government powers are attributed to identity groups which neglect women's autonomy, their subjugation could be implicitly legitimised.

This critique of multicultural accommodation thus emphasises the need to be aware of the unintended consequences of well-intentioned efforts to reduce existing inter-group inequalities. This is a genuine concern that cannot be dismissed. It is not clear how such tensions between group rights and intra-group inequalities (particularly women's inequality) could be resolved. In fact, the way of approaching this problem can serve as a test to sieve the reach, and relative priority, of some central liberal–democratic principles in debates about multiculturalism. If the starting point is an autonomy-based conception of liberalism, as in the case of Kymlicka, only those cultural minorities' demands that are aimed at protecting their cultures from

the impact of majority decisions are justified. Any requests for self-government or exemptions made by representatives of non-liberal groups to restrict the individual rights of their members would be illegitimate. However, the distinction is not easily applicable. Take again the case of the Amish. Their claims can be seen as having the purpose of applying internal restrictions (involving discriminating patterns) to their members; but they could also be regarded as external protections vis-à-vis the wider society—that is, as an attempt to preserve their rural way of life.

Leaving aside the problem of distinguishing in practice between internal restrictions and external protections, this distinction should, in my view, play only a limited role in assessing the morality of demands for group rights. First of all, because it can easily degenerate into an essentialist bias that makes it an easy target from the standpoint of a conception of group rights and identities marked by flexibility and malleability. After all, inequalities that surround gender relations (as well as ethnic relations, etc.) are deeply ingrained in all cultures. Despite the on-going struggle by feminist and human rights movements and the formal prohibition of discrimination, women (and also other minority groups such as immigrants) dramatically fail to enjoy the same status and well-being as men, also in democratic states. Here, gender inequalities (and inequalities among other identity groups) tend to be institutionally embedded, deeply rooted in cultural symbols, legal norms and decision-making processes, so that different statutes are created which produce social subordination. As explained earlier in this chapter, behind the veil controversy in France there is a wider problem of immigrants' subordinated status, which generates a deep frustration and sense of alienation in the community that has not yet been confronted.

If this is so, the problem arises as to who should have the power—and, above all, with what legitimacy—to classify a cultural minority as "illiberal," categorise their demands of rights as mainly involving internal restrictions and target its cultural practices with various sanctions or restrictions in the name of the individual rights of their members. Although in some cases these measures might be justified, a cautionary principle should apply in this context. Perhaps a relevant factor in determining the status that should be accorded to illiberal minorities could be the degree of oppression that some of their members are suffering as well as the repressive nature of their practices. Surely, to identify different standards of oppression (more and less tolerable, so to say) might be difficult. But this criterion might be essential in order to prevent us from drawing rigid, dogmatic lines between "liberal" and "illiberal" groups, instead of regarding this distinction as a matter of degree.

Certainly, some of the rules that groups like the Old Order Amish follow can hardly be regarded as compatible with basic liberal principles. That is why the legitimacy of the exemptions granted by the state to secure their preservation remains contested. However, isolationism is a rather exceptional phenomenon, and I agree with Kymlicka in that most minorities want to participate in modernity while preserving their particular cultures.[108] This, I think, is the perspective that can best depict the aspirations of most ethnic groups such as French Muslims, who are willing to send their children to French public schools (instead of creating their own denominational schools) without giving up their cultural identities and religious symbols entirely. It is the reluctance of the mainstream society to accept the rather innocuous forms of accommodation that are usually demanded which can easily drive a minority

towards isolation and radicalisation. Thus, in the case of France, it is likely that the Muslim community will progressively search for ways of creating their own parochial schools and this will probably lead a segregation of children belonging to different communities, which is what the state, in fact, wanted to prevent.

In any event, it is important to recognise the propensity of the majority, or the most powerful group in society, to treat other groups or cultures as inferior or to judge them in an essentialist way in order to justify the imposition of power. In confronting these cases, we need to apply modesty: we need to constantly remind ourselves, in order to avoid double standards, that the mainstream society in the so-called liberal democracies currently contains a number of illiberal features and practices, including the discrimination against women, homosexuals and other social minorities. It would therefore be unfair to automatically stigmatise certain cultures and deny them any group rights on the grounds that "they are not liberal" or "they can adopt certain internal restrictions." Furthermore, in some cases (think of indigenous peoples) liberal states can hardly justify the imposition of certain values and ways of life on groups that have suffered at the hands of the majority throughout their history.

All this is not meant to deny the relevance of the insights that feminist such as Okin have contributed to the debate about multiculturalism (in particular, the idea that certain multicultural policies and minority rights may increase the vulnerability of women as subjugated members in some cultures[109]), but to acknowledge the constraints that should delimit state judgements and decisions. These limits imply that the question of how non-liberal minorities should be treated by liberal democratic states cannot be definitively addressed in the abstract; instead, it needs to be assessed on a case-by-case basis. In this process of evaluation, the following observations should be kept in mind:

First and foremost, although liberal culturalists usually regard as morally unjustified those demands for group rights that involve internal restrictions for members of the group in order to preserve the particular character of a culture, this is not a reason to promote intrusive or compulsory measures against these groups. As Kymlicka himself insists, identifying a theory of justice is one thing and imposing it on others a very different one.[110] Two arguments support this position. On the one hand, when the individual commitment to a certain conception of the good is strong and deep, the imposition of sanctions will hardly change individual conduct or achieve a deep internal transformation. Thus, state intervention might turn out to be not only ineffective, but also counterproductive. A number of liberal philosophers have specifically emphasised this point. As was pointed out earlier, Locke argued that force and coercion in relation to religion are commonly useless, and his argument can be extended to matters of morality.[111] Similarly, Hamilton suggested a prudent approach when examining how to deal with opposition to the new Constitution for the United States, "[f]or in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword," adding that "[h]eresies in either can rarely be cured by persecution."[112]

This is an important guideline in any contextual examination of how a certain non-liberal minority should be treated by a particular state—and perhaps also in considering issues of international intervention in outlaw or non-democratic states, although this is not the focus here. Special regimes of "partial citizenship" enjoyed by

some non-liberal minorities are often granted *ad hoc*—specifically because of the exceptional character of this kind of measures—without the intention of using them as precedents or models in the general treatment of other minorities. In this sense, the decision in *Wisconsin v. Yoder* could be justified as a reasonable principle to lay the ground for a *modus vivendi* between different communities, but perhaps not from the point of view of justice.[113]

A related consideration is that, ideally, the state should use indirect means to promote the internal transformation of groups. Any group, even the most homogeneous and secluded, has "internal minorities" (in Leslie Green's terms[114]) that disagree with some of its practices and beliefs. If this is so, perhaps what the state can do is to facilitate and support internal dissent. As Locke also observed, "it is one thing to persuade, another to command; one thing to press with arguments, another with penalties."[115] Admittedly, the boundary between imposition and encouragement may be blurred, but the argument nonetheless retains its power for further reflections on the limits of intervention and imposition of moral and political values.

Secondly, when examining how to deal with non-liberal communities that oppose change, it is important to remember that these cultures *also* provide their members with a context of meanings and guidance in the world. For this reason, the coercive imposition of liberal values may very well harm members of these groups—precisely the effect to be avoided. As Rawls writes, for some people, it is "simply unthinkable to view themselves apart from certain religious, philosophical and moral convictions, or from certain enduring attachments and loyalties."[116] In this sense, coercion from the outside can also degrade or harm the self-respect of members of minority cultures; and, to paraphrase Margalit, a decent society should not humiliate their members.[117]

Let us briefly revisit the case of the headscarf in France. When feminists claimed that covering the head with a scarf was a clear symbol of female subjugation and that consequently, it could not be seen as an act of political protest and should be banned, this message excluded public discussion on the variety of meanings that this piece of clothing had from different individual perspectives. More importantly, it excluded the possibility of debating this issue with the members of the groups involved.[118] Some Muslim women argue that they wear the *hijab* for political reasons but that this does not mean that they agree with other more controversial Islamic traditions, such as polygamy and, in any event, a practice is followed for multiple reasons worth being distinguished.[119] But even if we reject this argument, could it not be argued that the posters advertising naked women and pornography in kiosks everywhere in Western cities are also symbols of female oppression and subjugation? In our societies, there are corporations that oblige their female employees to wear miniskirts and brassieres; but in spite of this fact, we still perceive ourselves—probably with an excess of complacency—as *liberal* societies.

If we take this idea seriously, Taylor's argument about the relevance of recognition is probably more apt to ground a status of partial citizenship such as the one that the Amish enjoy. As we saw, Taylor conceives as plausible a version of liberalism that expresses a commitment toward a certain conception of the good. Yet he also adds that the conflicts between particularly contested claims and individual rights need to be settled case-by-case, through balancing the different values involved.[120] In this

sense, Taylor does not seem to regard these conflicting values as incommensurable, as some commentators would. In contrast, Kymlicka's theory draws clear limits of liberal tolerance. However, it can still be criticised for paying insufficient attention to the role of identity recognition in these cases, since the problem of non-liberal minorities is located at the level of the political legitimacy for *imposing*, rather than defining, a liberal view of justice. Kymlicka admits that there might be other prudential reasons that should be taken into consideration when implementation is at stake. But for him, a minimal moral substantive content, related to the intrinsic value of freedom, cannot be the subject of negotiation.[121]

Finally, note that it is inconsistent to argue that since there are certain profoundly non-liberal groups that maintain practices in conflict with human rights, we should reject the idea of group rights altogether.[122] This argument assumes that our capacity for reasoning is extremely limited. In other words, it presupposes, even before starting the discussion, our inability to draw the pertinent distinctions between different kinds of demands—those that are more and those that are less justified. On the other hand, the common habit of invoking the most suspicious and controversial practices (genital mutilation, polygamy and so on) as paradigmatic examples of the demands of ethnic or religious minorities is not only reductionist, but also symptomatic of the lack of consideration for the claims of the most moderate members of those groups. The existence of dubious customs, clearly incompatible with all possible interpretations of basic human values, and the need to fight them should not be used as a reason to reject the legitimacy of all claims for cultural group rights.

At this point, it is important to bring out the different approach to the problem of illiberal groups of a conception of liberalism based on tolerance and pluralism instead of neutrality—even if, for the reasons laid out above, this approach has not been adopted in this work. Recall that the theories of Kukathas and Galston can be seen as a counterargument to a critique of an autonomy-based liberalism (and group rights): namely, that this way of reconciling liberalism and multiculturalism runs the risk of reducing diversity to a mere façade. The alternative line of argument defended by this other strand of contemporary liberalism tries to restate the independent value of tolerance in the liberal tradition through emphasising the centrality of values such as freedom of conscience and freedom of association. From this perspective, a case can be made for illiberal groups, even though they uphold values that conflict with individual autonomy. Exit, and not intervention, plays a central role in a theory that is based upon a thinner conception of what it means to be free. As indicated, the idea that a member of a cultural minority should be able to leave the group is central in this conception of liberalism, in part because it is seen as a less intrusive remedy to oppression of vulnerable members.

I have already discussed the important flaws in this position, and I shall not rehearse them here. But it is important to insist on the limitations of the right to exit at this point. At the outset, as already noted, we should note that this alternative perspective is wrong in assuming that entrance into a group is free. In many cases, as with ethnic minorities, one is born into a community and raised with its values, so it is difficult to depict them as associations in which one voluntarily decides to become a member. While accepting this point, theorists like Kukathas insist that the central role should be given to exit; so, presumably, by remaining within the group (and thus not choosing to opt out) one is

implicitly showing his or her adherence to its internal regulations, even if they are indeed oppressive from a liberal perspective. This acquiescence legitimates their authority.[123]

Yet, on the one hand, a formal, and quite minimalist, interpretation of the right to exit (such as the one favoured by Kukathas) is normally not enough to protect the dissenter. To make it a real option, substantial opportunities to integrate into another group should be provided. Some defenders of exit have been concerned with elucidating specific measures to address the most common difficulties.[124] This implies that the state needs to get involved in order to diminish existing obstacles but, by doing so, the basic appeal of non-intervention (of the "politics of indifference") diminishes significantly. But, on the other hand, the main problem is that reliance on exit to guarantee some basic level of individual freedom might be misplaced in many cases. Consider once more the case of the Amish. What would exit mean for younger generations that dissent from some of the dogmatic interpretations of what it means to be Amish? Even if state laws help them face the economic and material obstacles that would otherwise prevent them from leaving the community, this cannot prevent the loss of a sense of belonging and of family and friends, or ostracism by the community. This hard decision might be even harder in the case of married women, as they might find it impossible to leave behind their families and children. Also, it cannot be an option to protect children from attempts at suppressing the development of the basic capacities that one day could allow them to make a choice. So, the state intervenes even if it abstains from interfering. For it implicitly promotes certain essentialist interpretations of minority cultures through upholding dogmatic and authoritarian interpretations of their values and traditions. Those who would like to see reforms only have the prospect of exiting the group and thus renouncing their membership.

But this is not what many minorities within minorities wish. Instead, they seek state support to enable them to contest the patriarchal dogmatic interpretations of their own culture and values; for instance, some Jewish women might want to offer their views on why Jewish divorce should not be the form of dissolving marriage, without seeking to leave the community. Gay Catholics might argue that the orthodox understanding of homosexuals in the Catholic Church is inadequate and should be ruled out. Muslim women may want to declare that there are other forms to show modesty than covering their bodies entirely, but still be committed to their religion and be regarded as Muslim.

If this is so, a more promising avenue to respond to the feminist challenge to multiculturalism (and, in general, to autonomy-related concerns about group rights) would be to shift the focus of the debate towards what might be called a "participatory approach." This would be a group-conscious approach that acknowledges that public deliberation with the involvement of members of the relevant cultural groups about the justification of their internal practices becomes crucial in a multicultural society. The legitimacy of minority practices and self-regulations would arise not from acquiescence of their members but from discussion with the presence of members of the affected groups. To this end, certain ways of guaranteeing the presence of women (and other minorities within minorities), *also within cultural minorities*, will be essential to tackle the alienating dynamics that acutely contribute to their subordination and lack of opportunity to shape their own cultures in all kinds of societies. In this sense, this approach bears the promise of a transformation of the status of

oppressed minorities that is not based on complacent but often biased ways of judging other cultures. At the same time, it allows for a stronger recognition of cultural identities and actual demands of minority cultures than dominant approaches, and is thus better able to preserve the core of the multicultural critique of classical liberalism. Although I cannot develop this suggestion, I think this line of thinking connects better with the virtues of what Parekh and Benhabib call "intercultural" and "cross-cultural dialogue."[125] This approach can provide the ground for a better understanding of other cultures, which must always start "with a methodological and moral imperative to reconstruct meaning as it appears to its creators and makers."[126] This is what Benhabib calls "the *hermeneutic truth of cultural relativism*."[127]

In sum, in a multicultural society public deliberation and discussion with the participation of the relevant cultural groups about the justification of their internal practices becomes crucial. As Waldron points out, in a liberal multicultural society individuals should not expect that the practices of their cultural group be recognised simply because they claim that these practices are central to their identities.[128] For this reason, the decision of the mayor of New York City not to participate in a celebration that excluded certain groups was probably correct. But we should not automatically deny the rightness of certain practices alien to the mainstream culture. To judge these practices requires a prior public debate with the participation of all the parties involved, who will be able to provide their reasons for them. That is why,

> Our first responsibility in this regard is to make whatever effort we can to converse with others on their own terms, as they attempt to converse with us on ours, to see what we can understand of their reasons, and to present our reasons as well as we can to them.[129]

Unfortunately, this responsibility is often ignored in many democratic states that are all too frequently dominated by *a priori* convictions and prejudices about the fundamentalism of those who do not conform to the mainstream culture and who are as a result accused of being unable to live up to basic standards of humanity or rationality.[130].

## 5. CONCLUSION

This chapter has explored the scope of multicultural policies, and in particular of group rights, in terms of their breadth and depth. It has sought to determine which groups they should cover, and where the limits of multicultural tolerance should lie—two central questions that have raised important challenges to liberal projects of multiculturalism.

Many accounts of multiculturalism focus on national minorities in liberal states, and so have the previous chapters of this book. However, some of the main challenges of cultural diversity today, in particular in Europe, stem from a different source, namely immigration, and I have discussed some of the complexities this raises, in part through a case study of the recent headscarf controversy in France. The situation and claims of ethnic minorities, including immigrants, are often different from those of national minorities, and any political theory will have to take this into account. However, too strong a contrast between both categories is unwarranted, and many approaches of liberal nationalists underestimate the similarities between them,

often by overrating the element of choice in immigration. This is true, in particular, of Will Kymlicka's proposals, which I examine in greater detail in this chapter. These need to be revised not only to accommodate the gradual rather than categorical differences between ethnic and national minorities, but also because they downplay the importance of the home culture for immigrants of later generations. An approach closer to Taylor's, with an emphasis on recognition, is better able to cope with this challenge. Drawing on this and insights from previous chapters, I suggest a stronger role for the principle of state neutrality, understood as an ideal of consequential neutrality, in which state interventions in favour of the dominant culture are balanced by similar interventions for the benefit of ethnic minorities, insofar as their particular situation and claims warrants them.

Any liberal theory of group rights needs to define its limits, and in particular its stance towards illiberal groups. From a liberal standpoint, the idea of "partial citizenship," allowing some groups isolation from the state framework in order to pursue cultural practices that are incompatible with liberal principles, is problematic; as we have seen in previous chapters, cultural survival is not a good in itself and therefore cannot justify violations of individual rights. A stance that, in this vein, limits the range of protected worldviews and values is also able to respond to feminist critiques of multiculturalism that see group rights as potentially contributing to the subjugation of women in illiberal groups. One influential proposal to combine these limits with a general respect for cultural diversity has been to distinguish between "internal restrictions" and "external protections" of groups, favouring the latter but excluding the former. However, apart from practical problems involved in this distinction, it runs a serious risk of essentialising groups and reproducing biases of majority cultures. All cultures contain illiberal elements, and allowing one of them to judge others easily leads to the stigmatisation of "the other" and to a neglect of the importance even of non-liberal cultures for the identity of their members. Any intervention into a minority culture must therefore be subject to a requirement of modesty and must also remain aware of the counterproductive effects it can have. Another common proposal to realise liberal values with respect to illiberal groups is an emphasis on exit rights. This, too, however, raises serious problems as it either drifts into a formal, meaningless right to exit or again into an interventionist enforcement of conditions that make a right to exit meaningful. In contrast, drawing on the internal diversity of cultural groups and the character of claims of minorities within minorities, I suggest a participatory approach to reconciling liberal principles and respect for non-liberal cultural groups. This approach would require deliberation with dissenters inside the groups concerned, and would thus favour a transformation from within rather than interventions from outside, and would also require majority cultures to engage in deliberation with the groups themselves before jumping to conclusions on their practices. Neglecting this duty to deliberate would itself run counter to liberal principles.

## NOTES

1 See Kymlicka (1995a, p. 10). It is worth noting at the outset that the plausibility of this claim has been criticised by several commentators, partly because, as I will explain shortly, it has a correlate with different categories of minority rights (Parekh, 1997, 2000, pp. 102–109; Carens, 1997, 2000, pp. 55–56; Young, 1997). These criticisms are explored in more detail later in this chapter.

[2] However, the distinction between these categories can be blurred: theoretically, nothing prevents ethnic minorities from viewing themselves as national minorities with the aim of obtaining some kind of institutional separation or political self-government. Nevertheless, territory has generally revealed itself as an essential element in the self-perception of the groups as national or ethnic minorities. Thus ethnic minorities, even if they are more or less territorially concentrated, do not usually have a nation-type self-image, nor do they claim the kind of group rights that national minorities demand. Yet, as Joseph Carens contends (2000, p. 81) this may generally be true as an empirical matter, but the question of what to do if they did make the same types of claims remains valid.

[3] See www.unfpa.org/swp/2004/pdf

[4] Bauböck (1998, p. 321). Bauböck's assertion that internal migrations have often been the motor of historical change is supported by the industrialisation experiences of states, which generally involve mass displacements from rural areas to urban ones.

[5] That is why in countries like Spain, for instance, the term "immigrant" is normally used to refer to both people coming from abroad and people that have settled from another Autonomous Community (from Andalusia to Catalonia, or from the Basque Country to Madrid). In this situation, political debates about immigration are necessarily linked to discussions related to the status and rights of the national or linguistic minority (see Zapata Barrero, 2004, pp. 262–264). In contrast, population movements within the United States or Germany are not generally categorised as "immigration," since internal diversity is mostly regarded as having a regional or local character, rather than a "national" one. For a volume that includes recent works on the impact of immigration on several European national minorities and also in Quebec, see Aubarell *et al*. (2004).

[6] Elster (1983).

[7] Carens (2000, pp. 98–99) reflects on the relevance of this argument to account for the position of African-Americans.

[8] Although this is an issue that cannot be explored in detail, it is important to keep in mind that the category of international migrations is a heterogeneous one, and therefore some relevant distinctions should be made. On the one hand, the displacements of refugees and of asylum seekers should probably be classified as forceful and as *prima facie* transitory migrations. Moreover, coercive displacements may involve entire cultural communities, such as in the case of diasporas (where a whole community is deprived of the land where they were settled and are relocated to another territory or forced to get dispersed). On the other hand, "guest" workers programmes have been implemented in order to ensure the temporary stay of immigrants (preferably individuals without families) and, therefore, as Lucas argues (2002, pp. 27–28), to deny them the condition of "immigrant" altogether, reducing them to mere "foreigners." However, this model has clearly not impeded the permanent settlement of many individuals who initially entered the country under this category, as is the case of many Turks in Germany. The following pages will mainly focus on the problem of justifying the rights of immigrant groups whose presence in a given state is the product of individual and family migrations intended to settle more or less permanently, at least in the sense that the group would most predictably continue to be part of the host state. This is clearly the trend in the old and recent immigration societies; i.e., it is the case of Moroccans or Ecuadorians in Spain, Latinos in the United States, Turks in Germany or Chinese communities in Canada. The conclusions reached should thus not be automatically transposed to all conflicts involving ethnic minorities, but may be useful to illuminate cases that are less common or at the margins of categories.

[9] For this characterisation of our contemporary world, see Castles and Miller (1993).

[10] It might therefore be inappropriate to use the term "immigrant" in this case—this is, as explained, why it makes sense to speak instead of "ethnic minorities."

[11] Bauböck (1998, p. 327) illustrates this development of the late twentieth century by pointing to the transformation of U.S. black citizens into African-Americans.

[12] See Walzer (1997, pp. 30–35). Although the great transatlantic migrations at the turn of the twentieth century often provide the grounds for categorising certain states as containing "societies of immigration," the dominant myths are not always accurate; thus, even during these "open borders" period there were significant discriminations (or cultural and racist bias in the systems for selecting immigrants) of potential newcomers on the grounds of nationality, gender, race or literacy. In addition, large numbers of overseas migrants returned back to Europe and did not become full citizens. See Bauböck (1998, p. 333) and Carens (2000, pp. 108–109).

[13] The Canadian *Multiculturalism Act* (R.S. 1985, c 24; available at: www.pch.gc.ca/progs/multi/policy/act_e.cfm) was enacted in 1988. For discussion, see Kymlicka (1998b, Chapters 1–8).

[14] Mainly as a result of the policies adopted after 1945 to promote immigration, Australia is, with Canada and the United States, one of the most diverse democratic countries in the world. Although its population in 1945 was just over 7 million people, today it is more than 20 million people. One of the main reasons for adopting those policies was to build a strong society capable of resisting threats from Asia, after the increasing insecurity arising from the proximity of the Japanese military forces during World War II. The official policy of multiculturalism was adopted in the 1970s and led to the active involvement of the government in the problems of unemployment, discrimination and educational disadvantages suffered by ethnic minorities. Some special programmes were also adopted to recognise and protect their cultural distinctiveness. For further information and discussion, see Poole (1996).

[15] Note, however, that this normative notion of multiculturalism (which incorporates the idea that cultural diversity is a value in itself) is not the one that has been used in this book.

[16] Excerpts from the Canadian *Multiculturalism Act*. See supra note 13.

[17] For a more comprehensive sample of the policies that are usually discussed under the label of "multiculturalism," see Kymlicka (1998b, pp. 42–43).

[18] In Kymlicka's view (1998b, p. 46) the Canadian policy of multiculturalism promotes fair terms of integration because it ensures that "the common institutions into which immigrants are pressured to integrate provide the same degrees of respect and accommodation of the identities of ethnocultural minorities that have traditionally been accorded to British- and French-Canadian identities."

[19] Brubaker (1989, pp. 3–4).

[20] Brubaker (1989, p. 5). On how the unitary model of citizenship, based on the idea of a nation-state, fails to capture contemporary realities, as can be seen through the increasing phenomena of dual citizenship, see Carens (2000, pp. 162–166).

[21] Brubaker (1989, pp. 5–6). In part, the exclusion of immigrants from equal access to rights and opportunities has not raised the deep concerns that one would think it should provoke in democratic states because of the widespread perception that this is a temporary phenomena. Hence, the debate in countries such as Spain, which only very recently has become a destination for international migrants, often remains focussed on how to restrict access to the territory and protect the basic rights of legal and illegal immigrants, but not about how to fully include them into the political community. Obviously, the debate about integration needs to start form the assumption that most newcomers will indeed stay. On the democratic deficits of an approach to immigration that makes admission of new citizens strongly dependent on naturalisation, see Rubio-Marin (2000).

[22] For a comparative study of the different traditions in Europe and North America as regards citizenship and naturalisation, see Brubaker (1989). For a specific comparison between Germany and the United States, see Rubio-Marin (2000).

[23] For instance, there are increasing conflicts related to the practice of religions other than Catholicism that call into question self-complacent myths of neutrality. For details on this controversy, see Zapata Barrero (2005). Spain has been rapidly transformed in an immigration country. On this transformation and recent data, see Lucas (2003, pp. 49–53).

[24] Quiñones Escámez (2000, pp. 23–24).

[25] Although this view, in turn, has been contested on the grounds that resorting to the law of residence makes more sense in a multicultural context: on the one hand, because this rule is based upon a presupposition of the integration of immigrants and, on the other, because applying the law of nationality may imply a *de facto* legalisation of controversial practices, such as polygamy. On this debate, see Quiñones Escámez (2000, pp. 23–29).

[26] The socio-economic perspectives that commonly guide the policies of immigration in most countries assume a utilitarian view that often leads to instrumentalising immigrants according to the needs of the receiving country. For this reason, Lucas emphasises that, in fact, these policies imply the negation of the immigrant, by overlapping this category with that of a guest-worker In contrast, human rights approaches to immigration emphasise the need to protect the individual rights of (both legal and illegal) immigrants on the basis of considerations of fairness and democracy. See, for instance, Rubio-Marin (2000) and Lucas (2002, 2003).

[27] An increasing trend in immigration policies within the European Union is to distinguish between temporary immigrants and resident immigrants, imposing different conditions for access depending on

their nationality of origin and the existence of agreements between the states. The category of permanent residency is generally related to proving at least five years of permanent residency. But this legal trend is still far from reflecting the model proposed by theorists who think that, after a certain time of permanent residence, the immigrant should have the right to fully enjoy the citizenship status, including political rights, as native-born citizens. See, in this sense, Carens (1989). Rubio-Marin (2000) calls for "automatic inclusion" as a consequence of residence in a political space, regardless of the specific provisions on naturalisation.

[28] Note that this reality also entails a significant contradiction for liberal theories that postulate the universality of human rights, as Rubio-Marín, Lucas and other authors emphasise (see supra notes 26 and 27). To the extent that liberal states legitimise their authority on sections of population that they assume they must protect, practices that exclude resident immigrants from access to basic goods and rights violate this central aspiration.

[29] The case of France is paradigmatic in this sense. As both Walzer (1997, pp. 37–40) and Brubaker (1989, pp. 7–8) stress, in numerical terms France is a leading country of immigration in Europe and has even encouraged immigration during some periods of its history for demographic reasons. Yet, despite what the figures show, and unlike states like Canada, cultural diversity is not part of the "national myth," probably because of the deeply ingrained trust in assimilation. The republican tradition intends to transmit the image of a universal community of citizens, culturally and politically united, based on a common language and adherence to the republic. Ethnic and cultural diversity is tolerated only when its manifestations and development occur in the private sphere.

[30] See UN Population Division "Replacement migration: is it a solution to declining and ageing populations?;" UN Doc ESA/P/WP.106, March 21, 2000.

[31] Even sending states tend to encourage their migrants to perceive their situation as temporary and to return "home" when their economic circumstances have improved. Sometimes, the host state will describe as permanent an immigration that is regarded as temporary by the sending state, either because some immigrants are still regarded as members in their countries of origin despite having lived abroad a long time, and even obtained a new citizenship. Today the possibility of preserving multiple attachments has of course increased, mainly due to the rapid enhancement of the means of communication and information, as well as the possibilities of territorial mobility. All these transformations make it possible for immigrants, more than ever before, to keep strong ties with their countries of origin and retain many aspects related with their cultural identities. In this sense, permanent residency might not be sufficient to assume that citizens of foreign origin belong to the community in terms of feeling emotional attachment or identification—namely, in the "psychological dimension" (Carens, 2000, p. 166). The fact that the legal status of citizenship might not coincide with a sense of belonging or integration presents another important challenge to the traditional model of citizenship as described earlier in this chapter.

[32] As Poole recounts (1996, p. 408), in Australia, the repopulating programmes provided opportunities that were initially limited to inhabitants of states who were considered politically and ethnically similar. In fact, migrants themselves often take into consideration cultural similarities associated with a common history or language when choosing a country of destination.

[33] The same reasoning applies to sending countries. As mentioned, most states are interested in promoting the return of their citizens abroad, who are constantly reminded of their origin. The combination of various criteria, *ius sanguinis* and *ius soli*, to have access to full citizenship can be seen as an example of this. *Ius sanguinis* is used to grant the children of immigrants that are born abroad the nationality of their parents; hence, from the perspective of the state, the emigration of their citizens is not normally seen as an irreversible loss of population and many assume that their citizens abroad will maintain social and economic ties as well as political loyalty. That is perhaps why dual nationality is still seen as an irregular category that should be granted only exceptionally, since it gives rise to potentially conflicting loyalties and identifications. For a critical account of this trend, see Carens (2000, p. 164) and Rubio-Marin (2000).

[34] Of course, there are other movements that oppose immigration and the politics of multiculturalism on overtly racist grounds. For instance, the association *Americans for Immigration Control*—see www.immigrationcontrol.com—one of the largest lobbies for immigration reform, defends higher border controls and restrictions, together with a highly selective philosophy of immigration that privileges white immigrants of European origin on the basis that they offer less resistance to assimilation. Likewise, the Federation of Americans for Immigration Reform (available at: www.fairus.org) calls for

more restrictions on immigration so that national security and cultural assimilation can be secured. Republican extremists in the United States have insisted over the last decade that America was founded by white, Christian Europeans and that Asian immigration, for example, threatens the supremacy of Western Christian civilization. For this and other similar declarations by members of the Anglo-conformity model, see Ong Hing (1993, pp. 870–876). In France, the discourse of Jean-Marie Le Pen and his extreme right party against immigration also share this racist undertone and they had the opportunity to agitate the Islamophobic sentiment and attract an enormous number of new voters in the first round of the Presidential elections of 2002.

[35] Officially Article 141-5-1 No. 2004-228 of the National Code of Education.

[36] I deal with questions related to terminology later in this section.

[37] The debate between defenders of secularism and supporters of the right to wear the Islamic veil in state schools was extensively covered in *Le Monde* (November 4–6, 1993). The case also made the headlines of *The New York Times* of December 5, 1993. Two opposed perspectives on the conflict are defended in Galeotti (1993, pp. 585–605), who applies to this case the liberal doctrine of tolerance in order to defend multiculturalism, and Moruzzi (1994, pp. 653–672) who criticises this approach as insufficient to protect the rights of minorities.

[38] Quoted in Kramer (2004, p. 62).

[39] Moruzzi (1994, p. 660).

[40] Conseil d'Etat, Assemblée Génerale (Section de l'intérieur), no. 346.893, November 27, 1989, available at: www.conseil-etat.fr/ce/rappor/index_ra_cg03_01.shtml

[41] Although this freedom, according to the *Conseil d'Etat*, is not enjoyed by teachers because, as public servants in a secular institution, they must be seen as neutral.

[42] The decision of the *Conseil d'Etat* also insisted that, before formal sanctions could be implemented, principals should make efforts at dialogue with the children and their parents (which was often done through an official mediator) in order to achieve a compromise and cordially resolve the dispute. But it was still unclear how this process had to be conducted and which should be the time for dialogue and compromise. On these and other problems arising from this general lack of guidance, see Judge (2004, p. 19).

[43] See Kramer (2004).

[44] Judge (2004, p. 11).

[45] For an account of the reforms in public elementary schools promoted by the father of French secular education, Jules Ferry, and the 1905 law that consecrated the separation of the church from the state, see Judge (2004, pp. 1–5).

[46] According to commentators (see Kramer, 2004; Judge, 2004) the increasing number of French Muslim girls that tried to enter the classroom draped in traditional Islamic clothing had less to do with the places where their families came from than with the frustration of their living conditions in the deteriorated suburbs or *cités*, their feeling of being alienated from French politics and culture and the rising of a global movement to regain their pride by conforming through orthodoxy.

[47] On the influence of these events, see Kramer (2004) and Judge (2004).

[48] Le rapport de la commission Stasi, Le Monde, December 12, 2003, pp. 17–24, available at http://medias.lemonde.fr/medias/pdf_obj/rapport_stasi_111203.pdf

[49] On the complaints by some members of the Stasi Commission about this result, see Kramer (2004, p. 62).

[50] Moruzzi (1994, p. 656).

[51] Judge (2004, p. 9) and Kramer (2004).

[52] Judge (2004, p. 17).

[53] On the negative perception of "exceptionalism" or "multiculturalism," as destructive of the integrity of society, see Judge (2004, p. 17) and Kramer (2004, p. 60).

[54] However, it is estimated that the number of Muslims in France approaches 5 million. In addition, they constitute almost 50% of the prison population and only a small percentage of University students are Muslims. See on these and other significant data, Kramer (2004) and Judge (2004, pp. 7–8).

[55] As Kramer explains (2004, p. 66) most people that fled to France immediately after the independence of Algeria (and also in the following decades) were made many promises by the French government that were never fulfilled; yet, they remained faithful to the French state in gratitude and tried to assimilate, accepting, for instance, that religion is a private matter in France. However, the Muslim

generations that were born in France need not accept their circumstances of social exclusion and the French cultural and political rhetoric in the present.

[56] According to Kramer (2004, p. 60), in 2003 more than 3000 girls were going to school with some sort of veil.

[57] Shadid and Koningsveld (2005, p. 36).

[58] In Shadid and Van Koningsveld's opinion (2005, p. 38), the lack of understanding of the meaning and variation of the Islamic dress in the West usually gives way to tendentious interpretations and stereotyping. *Chador*, for instance, is a Persian word referring to a particular piece of clothing that covers the hair and part of the face. This garment is characteristic of some regions of the Arab world (especially in Iran), but it is unfamiliar in Algeria, Tunisia or Morocco, the countries of origin of many of the girls initially implicated in this affair.

[59] Shadid and Van Koningsveld (2005, p. 36).

[60] This was part of the opinion of the French *Conseil d'Etat* in the early 1990s.

[61] Shadid and Van Koningsveld (2005, pp. 43–48).

[62] For the policies adopted in Belgium and the Netherlands, as well as the role played by the ECHR, see Shadid and Van Koningsveld (2005).

[63] See Shadid and Van Koningsveld (2005, p. 38) and Judge (2004, pp. 12–13). There is a similar reaction among Jews in France and other countries were anti-Semitism is gaining ground. See Kramer (2004, p. 70).

[64] Judge (2004, pp. 5–8).

[65] Judge (2004, p. 15). Even so, some examples of Muslim parochial schools do exist (in Lille and in Aubervilliers, for instance, two of the cities were some widely publicised disputes over the headscarf took place).

[66] Some of the members of this commission complained about this outcome. For an account of this disappointment, see Kramer (2004, p. 62).

[67] For an excellent book that includes works that examine this potential conflict, see Van Parijs (2004b).

[68] Kymlicka and Straehle (1999, p. 74).

[69] Kymlicka and Straehle (1999, p. 76). Not all liberal nationalists agree with this conclusion. Miller, for instance, suggests that two ideal options are available to national minorities: on the one hand, assimilation and, on the other, secession and the creation of a new state. Along with the classical liberal nationalism of Mill and others, Miller remains sceptical as to the possibility of an equal coexistence of different cultures and languages in the same polity: "even if the commitment is made in good faith," Miller writes (1995, p. 88) "the likely effect is that such states will offer weaker protection to each culture taken separately than would be expected in a culturally homogeneous state, since measures taken to protect one culture will be resisted by adherents of the other." For some complementary arguments in support of the same conclusion, see Schnapper (2004). In contrast, as we saw earlier, Tamir, Kymlicka and Taylor have defended (even if on different grounds) the possibility of a multicultural state, and they all maintain that national minorities should have a significant level of self-government or political autonomy within the state in which they live.

[70] The Quebec Government negotiated with the Canadian federal government the transfer of most responsibilities concerning immigration, and has almost complete authority over immigrants arriving in Quebec. See Carens (2000, pp. 108–109).

[71] With this assertion, I do not suggest that immigration policies inspired by economic and demographical interests are morally justified. Exploring in depth the morality of open borders would require a separate inquiry; yet, it is important to realise that the thesis maintained in the previous chapter about the value of cultural belonging could be interpreted as a reason against the idea of a general human right to migrate. My main interest, however, is merely to stress that both national minorities and the wider majority tend to invoke similar reasons in supporting restrictions to immigration. Therefore, if this type of policy is seen as legitimate for states (whether for the sake of cultural preservation or for reasons of a more instrumental nature), it is hard to see why national minorities should not be allowed to benefit from the same prerogatives.

[72] Kymlicka (1995a, pp. 30–31).

[73] Kymlicka (1995a, pp. 30–31, 78–79, 113–114, 176–181).

[74] In *Multicultural Citizenship*, Kymlicka refers to these rights as "polyethnic rights," but in recent works he also uses the expression "accommodation rights." Contrast Kymlicka (1995a, p. 31 with 1997a, p. 73).

[75] Kymlicka (1995a, p. 78).
[76] Kymlicka (1995a, p. 78).
[77] Kymlicka (1998b, p. 44).
[78] Carens (1997, p. 43).
[79] Carens (1997, p. 44).
[80] Young (1997, p. 49).
[81] Young (1997, pp. 50–51). In a similar vein, Levey (1997, p. 219).
[82] Indeed, Kymlicka claims that the cases to which Young refers are exceptional precisely because the "will" requirement is not met (Kymlicka, 1995a, pp. 24–25).
[83] Kymlicka (1997c, p. 78).
[84] In various passages of *Multicultural Citizenship*, Kymlicka seems to support this view merely on empirical evidence. See Kymlicka (1995a, pp. 14–15, p. 30, 31, 176).
[85] Kymlicka (1995a, p. 15).
[86] Kymlicka (1998b, pp. 44–45).
[87] Kymlicka (1998b, pp. 44–45).
[88] Kymlicka (1998b, p. 47).
[89] The Spanish Constitutional Court expressed a different view in the 1980s (STC 19/1985, in the case of the Seventh Day Adventist Church). The Court had to decide about the possible incompatibility between religious duties and labour obligations concluding that the conflict between Article 16 (that recognises the right to religious freedom) and Article 14 (that recognises the right to equality) of the Spanish Constitution has to be settled by following Articles 31.1 and 17.1 of the *Estatuto de los trabajadores*. The Court argued that the recognition of a different week holiday would imply an exemption from the *Estatuto*, which cannot be imposed on the employer, although of course the employer can grant this exemption discretionarily. The interesting point for the present discussion, however, is that this reasoning was partly justified on the grounds that the choice of Sunday as a day of rest has to be interpreted nowadays as a secular tradition (despite the fact that it is precisely this tradition which is contested by minorities who feel deprived of the opportunity to comply with their religious faith). But, in practice, the separation of Church and State has been hardly achieved in Spain (as in many other supposedly secular countries) and we could find many examples of failures to live up to this liberal ideal. Take, for instance, another judgement of the Spanish Constitutional Court (STC 177/1996, November 11). Here, the Court asserted that state secularism assumes a principle of neutrality that forbids any kind of confusion between religious and civil functions; however, it considered that this value does not prevent the military from celebrating religious festivities or participating in ceremonies of religious nature. This decision settled an appeal (*recurso de amparo*) submitted by a general who was punished to sixty days of arrest when he refused to participate in a tribute ceremony in Valencia, on the occasion of the fifth centenary of the Virgin of helpless people. When the general realised that this was a religious procession he requested to be relieved from attending it for reasons of conscience. He also requested, as a subsidiary option, to be allowed to abandon the troops when the tribute to the Virgin would take place. Since his request was dismissed, he left anyway the ranks and was punished for this action. Although the Constitutional Court acknowledges that the appellant had the right to exercise the religious freedom in this form, and could thus not be obliged to participate in acts of a religious nature, the judgement implicitly accepts the legitimacy of this kind of military celebrations. For a more recent case that was resolved analogously, see STC 101/2004, June 2.
[90] Muslim religious requirements, for instance, involve several demands that are directly prohibited or obstructed by the legal norms in Western societies. We do not need to refer to practices that dramatically show the incompatibility of liberal democratic principles with some religious prescriptions. Take, for instance, consumption of *halal* meat, which requires the existence of butcheries and slaughterhouses warranting that the killing of the animal has been produced respecting certain ritual. In Spain, the Royal Decree 54/1995, which updated the Spanish legislation in accordance with the European regulations, includes an explicit reference to animal sacrifices in relation to religious practices. The provision establishes that in case of animals that are the object of particular methods of sacrifice commanded by certain religious rites, the rules requiring dazing an animal before killing it do not apply. This is a clear instance of an exemption from the general regulation in order to respect the interests of certain minorities; yet not all countries adopt provisions to facilitate the exercise of freedom of religion. Similar problems can be found in funeral regulations. Following with the same example, Muslims prefer that the body of the deceased must be buried before

24 hours and not in a coffin. These religious constraints raise the need for building cemeteries that are suitable for Muslim immigrants. We could cite many other aspects in which European regulations reflect, and give priority to, the mainstream cultural tradition (religious education paid with public funds, curricula contents and so on). Taking up again the case of Spain, the inclusion in the income tax form of a section where people can opt for a voluntary donation to the Catholic Church (an option that is not open to other religions) is another example of this bias, although, as regards marriage, this same country endows the Muslim marriage celebrated on Spanish territory and by a qualified Islamic authority with automatic civil effects. For further discussion, see Quiñones Escámez (2000, pp. 20–22).

91 The same happens with police or army uniforms. These uniforms do not prevent wearing a wedding ring or a chain with a crucifix—both significant religious symbols for Christians. In contrast, for a Sikh or an orthodox Jew, complying with this public duty might imply renouncing to express their religious identity.

92 Moruzzi (1994, p. 665).

93 Parekh (2000, p. 219). This shared culture can emerge out of what Benhabib (2002, p. 36) calls a "*pragmatic imperative* to understand each other and to enter into a cross-cultural dialogue," which involves "conversation" about cultures and values, rather than "confrontation" among them. See also Appiah (2005, p. 246).

94 Parekh (2000, p. 238).

95 Kymlicka (1995a, p. 31, also 38, 96).

96 Margalit and Raz (1990, p. 444).

97 See Kymlicka (1998b, p. 18, 53). In addition, it is worth noting that, against a common perception, multiculturalism policies are not threatening the future of the welfare state in the countries that have adopted them officially. See Kymlicka and Banting (2004, pp. 256–278).

98 In modern anthropological studies, religion is often treated as a cultural system that generates particular idiosyncrasies. Geertz (1973, pp. 89–90) for example, writes that sacred symbols have the purpose of synthesising the *ethos* of a people, its character and ways of life, as well as setting out its moral and aesthetical style.

99 See supra note 89.

100 See Appiah (2005, 68–70)

101 I am borrowing this expression from Spinner (1994, p. 95), who uses it to refer to religious sects like the Amish, that reject full integration into the wider society and are willing to maintain a partial form of belonging to the political community on the grounds that such status is crucial for developing their illiberal ways of life.

102 Spinner (1994, pp. 72–73).

103 *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Other tribunals, domestic and international, have confronted similar cases in which the underlying problem can be interpreted as the compatibility between cultural group rights and individual rights and freedoms. For instance, in 1970, the Canadian Supreme Court had to decide on the legitimacy of the power held by the Hutterite Church over its members (Hofer vs. Hofer, 1970, SCR 958). The Court had to deal with a situation in which some Hutterite members joined another church and, after being expelled from membership in the colony, their share of the assets was denied. The Court, however, held that they were not entitled to this property. Likewise, the United Nations Committee on Human Rights has decided on several analogous issues (see, for instance, *Sandra Lovelace v. Canada*, No 24/1977).

104 See Spinner (1994, pp. 95–108) for further discussion of the Yoder case.

105 See Gutmann (1995, p. 570).

106 Kymlicka (1995a, p. 35).

107 Okin (1999).

108 Kymlicka (1995a, p. 164).

109 For a detailed account of the complexities of issues related to family law in Islamic and Jewish cultures, see also Shachar (1998, pp. 285–305).

110 Kymlicka (1995a, pp. 164–170).

111 This is indeed a central argument of Locke's *Letter Concerning Toleration*. For a critical account, see Waldron (1993).

112 Madison *et al*. (1987, p. 88). This argument is analogous to Locke (1991, pp. 16–21).

[113] Kukathas and other defenders of the tolerance approach would argue that, in order to satisfy liberal standards, the only guarantee that the state is supposed to enforce is the right of exit from the group by those members that so wish. For the reasons developed in Chapters IV and V, this perspective is unsatisfactory. See also, Reitman (2005). In any event, it is important to realise that there are clear discrepancies about how to deal with illiberal groups within liberal theory.

[114] Green (1994).

[115] Locke (1991, p. 18). Compare with Kymlicka (1995a, pp. 165–166).

[116] Rawls (1993, p. 31).

[117] Margalit (1996). The argument put forward by Margalit compares a decent society with a just one, although these conceptions are not necessarily rival conceptions but can be complementary in most cases.

[118] On this and similar reactions in the late 1980s and 1990s, see Moruzzi (1994).

[119] More on feminist views in the case of the headscarf can be found in Kramer (2004, pp. 68–70).

[120] See supra Chapter V.

[121] Kymlicka (1995a, p. 92). Similarly, Raz (1994, p. 178) and Tamir (1993, p. 9).

[122] See Kymlicka (1999), who argues that, in general, multicultural and feminist sensibilities should be seen as complementary rather than opposed.

[123] Kukathas (2003, p. 25). See supra Chapter IV, Section 2.2.

[124] See Barry (2001, p. 147–162).

[125] Parekh (2000, p. 268) and Benhabib (2002, p. 36).

[126] Benhabib (2002, p. 34).

[127] Benhabib (2002, p. 34).

[128] Waldron (2000, p. 163).

[129] Waldron (2000, p. 163).

[130] Waldron (2000, p. 172).

# EPILOGUE: THE VALUE OF CULTURAL PLURALISM: SOME FINAL REMARKS ON AN UNEXPLORED TOPIC

The justification of group rights laid out throughout this book is not connected to the value of preserving cultural diversity. Rather than as a good in itself, multiculturalism has been conceived—as in most scholarly and political debates—as a social fact from which cultural conflicts and demands of recognition arise. To the extent that the arguments developed so far are compelling enough, group rights would be justified in order to meet certain requirements of liberal justice in diverse societies. In particular, the thrust of the theories discussed is related to a more general quest for expanding the notions of freedom, equality and dignity so as to accommodate the demands for a "politics of difference" in multicultural democratic states.

But once these demands are accommodated, liberal culturalism does not offer independent reasons to claim that multiculturalism is, *in itself*, a central value; or, to put it in a different way, that multinational or multiethnic states confer upon their members an additional good. Rather the contrary: it is not uncommon to appeal to arguments in support of the relevance of cultural belonging as a political basis to justify separatist ambitions. For this reason, group rights advocates should be able to respond to the alleged danger of "balkanisation" of society which, critics contend, will eventually result in societal fragmentation, thereby undermining solidarity and trust that, as explained, are widely regarded as important elements of democratic citizenship. This is a serious challenge that points to the unintended consequences in terms of social unity that the recognition of group rights could bring about. This is a central problem and would require a separate investigation, but let me finish this work with some observations that might be pertinent.

At the outset, one would expect a complete theory of multicultural citizenship and group rights to incorporate an account of what might be the grounds for social unity in diverse societies. Note that this subject has far-reaching implications beyond the domestic level. Given that nowadays the state system is being replaced by new forms of governance, it is important to put forward a model of integration containing specific guidelines for accommodating diversity within emerging supra-state political entities while, at the same time, fostering unity and solidarity among their constituent units. More specifically, it is essential to entertain the idea that many of the existing devices and institutions for accommodating cultural diversity might be undermined by post-national forms of governance that disregard symbolic and substantive arrangements between different cultural groups within states. Although liberal culturalists have made central contributions to understanding a wide range of issues concerning

justice in the treatment of minority cultures, its main exponents have mostly remained state-centred, ignoring the fact that the post-national reordering of the public sphere might reduce the significance of borders and, hence, the meaning of some classical territorial mechanisms to accommodate cultural diversity. Moreover, prominent theorists of multiculturalism do not clearly explain what might be the grounds for social unity in a multicultural state.

Indeed, at the end of *Multicultural Citizenship*, Kymlicka tries to convey some thoughts on this issue, he considers the usual emphasis on shared values as a source of political allegiance between different groups but, ultimately, finds it unconvincing. In particular, he points to the fact that even if, for instance, Norwegian and Swedish societies converge on the same values (as Canadian Francophones and Anglophones increasingly do, too), this does not go along with support for a political union of both countries (or, in the Canadian case, it has not reduced the support to political autonomy in Quebec). Consequently, "the fact that they share the same values does not, in itself, explain whether it is better to have one state or two."[1] Therefore, neither shared moral or political values nor similarity in the way of living and conceptions of the good seem to provide satisfactory grounds to account for the political union of different cultural groups in a multinational or multiethnic state. What liberal culturalists do maintain is that, if there is a formula to promote a sense of solidarity and political loyalty to the state "it will involve accommodating, rather than subordinating, national identities."[2] In other words, if citizens perceive that their particular cultural attachments and identities are adequately protected, they will probably lack reasons for avoiding co-operation or demanding secession. In this vein, Taylor insists that not only respect for diversity in itself is an asset in multicultural states, but also respect for the diversity of forms in which members of different identity groups belong to the state.[3] With reference to Canada, Taylor writes:

> To build a country for everyone, Canada would have to allow for second-level or 'deep' diversity, in which a plurality of ways of belonging would be acknowledged and accepted. Someone of, say, Italian extraction in Toronto or Ukrainian extraction in Edmonton might indeed feel Canadian as a bearer of individual rights in a multicultural mosaic. His or her belonging would not 'pass through' some other community, although the ethnic identity might be important to him or her in various ways. But this person might nevertheless accept that a Québécois, or a Cree or a Déné might belong in a very different way, that these persons were Canadian through being members of their national communities. Reciprocally, the Québécois, Cree, or Déné would accept the perfect legitimacy of the "mosaic" identity.[4]

In short, contrary to the opinion that group rights will lead to state fragmentation, one could argue that this new trend towards the official accommodation of the different dimensions of cultural diversity does not necessarily erode the common public space and the levels of co-operation and civic education that are required to implement social schemes. In my view, this holds especially in those contexts that might be called "fractured nationhood;" that is, in states where old patterns of nation-building, aimed at making the cultural and the political congruent, failed. In these circumstances, public recognition and accommodation of the existing pluralism through group rights may turn out to be crucial to the preservation of democracy and social unity. Thus, in the Canadian example, it might have contributed to lessening the risk of secession. But a

comparable logic could apply to other states. Consider the case of Spain, for instance. After suffering a civil war and a long dictatorship, the recognition of official language rights and self-governing institutions of the different cultural communities by the 1978 Constitution provided the framework from which to begin a difficult process of reconciliation, democratisation and modernisation of society. Nowadays, most people would agree that the explicit recognition of linguistic and cultural diversity—including the fact that many Spaniards see their identities as primarily linked to, say, the Catalan or the Basque nation—has been central to the relative success of that process.[5]

Democratisation, economic solidarity and welfare might thus be enhanced, and not eroded or impeded, through the constitutional recognition of diversity and the attribution of self-government rights, and other group rights, to some historical cultural communities, as has been the case in Canada, Spain and other countries.[6] Certainly, the contention that stability is more vulnerable in these cases might be correct. However, the success of the model is still remarkable if we bear in mind that previous nation-building policies designed to forcibly assimilate citizens into the dominant language or culture had *already* caused deep social fractures that threaten democratic values, trust and social unity. This underlying context should not be overlooked when assessing the implications of group rights recognition.

Now, this idea still does not give us a clear clue as to the sort of elements that facilitate the generation of social cohesion in a multicultural state. Of course, if we already have a society encompassing various intermingled ethnic or national groups, then probably the best option is to find the means to preserve a peaceful coexistence together. But if the question at stake is, as in most multinational states (or even international federations such as the European Union) whether to preserve (or enhance) the union instead of fostering the institutional means for maintaining or regaining a higher level of autonomy and independence, then it is legitimate to wonder why should the former option be favoured over the latter. Take again the Canadian case. Insofar as it can be argued that a fundamental constitutional disagreement persists between Quebec and Canada—and assuming that, all things considered, secession was a viable option—is there any reason to press for political unity even under such complex circumstances?

Leaving aside the likely practical problems to implement secession, the point I am trying to make here is that, at first glance, the theories on multicultural citizenship and group rights analysed do not seem to offer, or suggest, any specific argument against an scenario of a political world divided in as many units as identity groups and cultures exist. This conclusion raises some perplexities, especially if we realise the underlying motivation that inspires most liberal defences of minority rights. Thus, it is important to note that the arguments examined throughout this book were mainly aimed at accommodating and negotiating diversity *within* existing states, rather than to promote the disintegration of the common public sphere and the dissolution of multicultural states. For this reason, both Kymlicka and Taylor stress the virtues of federalism as an institutional mechanism regarded as particularly suitable to accommodate diversity *within* unity, group rights and individual rights. Taylor goes even further when he argues that the Canadian "cultural mosaic" is not a utopia, and that people should be satisfied and proud to contribute to the creation of a country that allows "deep diversity."[7] Yet again, are there any reasons, beyond the pragmatic or

sentimental ones, to hold that secession, or other less radical forms of political and social fragmentation, could be somehow thought of as a loss?

I think one possible line to confront this issue would be to explore the validity of the argument that sees multiculturalism not as a mere fact, but as a normative value. In this line, after they have exposed the weakness of some strong normative assumptions of classical liberalism regarding cultural diversity, the time has come for liberal proponents of group rights to examine this issue, also because of its important implications for the construction of transnational government and global justice.[8] Going back to the issue of federalism, it is clear that federal designs are normally preferred because of the practical difficulties involved in alternative solutions like secession (economic viability, the side-effects of territorial disputes, etc.).[9] Nevertheless, throughout the writings of some theorists of multiculturalism, some isolated passages might be found where it is suggested that to live in a diverse society may be an enriching and positive human experience, even morally valuable. Compare the following passages:

> Liberals cannot endorse a notion of culture that sees the process of interacting with and learning from other cultures as a threat to 'purity' or 'integrity', rather than as an opportunity of enrichment. Liberals want a society that is rich and diverse.[10]

> Cultural and linguistic provision is richer, and therefore more advantageous, in pluralistic and tolerant communities.[11]

> Multiculturalism insists that members of the different groups in a society should be aware of the different groups in their society and learn to appreciate their strengths and respect them. This in itself leads to inevitable developments in the constituent cultures, especially those which have developed in relative isolation and ignorance of other cultures.[12]

Hence, perhaps the possibility of cultural pluralism as an intrinsic good should not be overlooked. Obviously, in order to justify this intuition we should be able to argue not only that cultural belonging does have a moral value, but also that to live in a multicultural society has its own benefits. A possible line of reasoning could start from assessing the claim that only by getting to know what is *not* part of our culture can we learn to appreciate (or reject) certain values or ways of life. Moreover, only when we have the possibility of looking beyond our cultural framework we may be able to rethink, revise and eventually change our practices and conventions, thus making full and meaningful exercise of our self-determination as individuals. This claim could be supported by resorting to the classical debate about the value of freedom of speech. As is well known, Mill brilliantly argued that the public debate that the recognition of this freedom promotes is important because it allows testing our tendency to see our own individual moral judgements as infallible. To his mind,

> where there is a tacit convention that principles are not to be disputed, where the discussion of the greatest questions which can occupy humanity is considered to be closed, we cannot hope to find that generally high scale of mental activity which has made some periods of history so remarkable.[13]

If any given group will maintain its strength and vigour only through its ability to change in order to integrate external impulses, intercultural experiences might be valuable and stimulating for everyone. And to the extent that living in a multicultural environment increases the opportunities to cross the narrow borders of our

own groups on a daily basis, cultural diversity may be able to transform, and eventually enrich, the horizons of significance available to those who do *not* belong to a particular culture.[14] Among nineteenth century liberals, Acton clearly stated—against Mill, in this case—that the combination of distinct nations within a state is a condition so necessary for civilised life as the mixture of people in society.[15]

Expanding the argument, one might think that many of the current disputes concerning the interpretation of constitutional principles and values of democratic states, as well as of the conformity of certain practices to them, come from the way in which different cultural traditions interpret them. In a context of cultural homogeneity, we rarely feel compelled to give reasons to others in an attempt to justify our ways of living or our actions. For instance, in a society in which family values are well grounded in a given tradition (catholic, say) probably neither citizens nor public institutions need to think seriously about how to assess polygamy or blasphemy. It is the contrast and interaction among members of different cultural groups in the public sphere, typical of a multicultural society, which often makes it easier for members of a given cultural group to engage in a self-conscious project of revising their own practices and internal rules the validity of which is usually taken for granted. In this vein, Habermas argues that, even a dominant culture whose survival is not under threat, will only preserve its vitality adopting a revisionism without reservations, designing alternative ways to the existing ones, or integrating alien impulses.[16]

In short, the idea I am trying to outline, in a somehow vague and incomplete manner, is that multiculturalism can be key for socio-political deliberation as well as for individual autonomy in modern societies, although the initial conflict between cultures can certainly be traumatic. As is often pointed out, the most basic exercise of morality is to putting oneself in others' shoes; if this is so, people who have learned to live in a multicultural society may be better prepared for this exercise of identification. In addition, institutions in this context will probably be submitted to a higher level of popular scrutiny that can lead to a richer level of justification for public policies and government action.

Note that this line of argument, which is concerned with justifying the value of multiculturalism, can be perfectly compatible with the idea of group rights defended throughout this book. Indeed, multiculturalism may be only individually experienced as a good when equality between cultural communities is guaranteed and this is one of the main goals served by group rights. That is to say, only in a highly democratic and inclusive state that recognises a *prima facie* equal standing of all groups can there be a positive predisposition to deliberation, dialogue and mutual understanding.

Admittedly, the argument I have outlined has only tackled the problem of the basis for social unity in a multicultural polity indirectly. Just as contemporary states actively promote mobility among students in order to give them the benefit of studying other languages and experiencing life in other cultures—which is generally perceived as "enriching"—cultural diversity within the same state could be seen not as a "problem," or a "fact" we have to live with, but as a challenge from which we can all benefit. By making a virtue out of a necessity, perhaps the ties that unite cultural communities will be renewed and enhanced within an institutional framework that grants mutual respect.[17]

## NOTES

[1] Kymlicka (1995a, p. 188).

[2] Kymlicka (1995a, p. 189).

[3] Taylor (1993, pp. 155–186).

[4] Taylor (1993, p. 183).

[5] I have defended this view in Torbisco (2004).

[6] In an article entitled "Do multiculturalism policies erode the welfare state?," Kymlicka and Banting (2004) make an effort to test whether, as a matter of fact, multicultural policies have eroded the welfare states in the countries were these policies have been adopted to respond to cultural claims. After assessing the data available in the case studies they examine, they conclude that there is no evidence of a connection between the adoption of multicultural policies and changes in the welfare state.

[7] See the quotation reproduced above.

[8] I have already noted the relevance of this question in the EU context, but its interest goes beyond this framework. Suppose, for example, that we believe that obligations of justice should be extended globally. Should we then direct our efforts towards the enforcement of global democracy and the progressive disempowerment of existing states, or should we think of alternative mechanisms to achieve this goal instead? It follows from the "liberal-nationalist" approach that, if the first route is taken, there could be a risk of undermining the bedrock for the emergence of the kind of social cohesion that allows the implementation and effectiveness of human rights and democracy. For an attractive account that involves reconciling the claims of cultural groups of different characteristics and the challenge of devising a set of international institutions through which to promote fairness among peoples across the globe, see Young (2000, pp. 236–271).

[9] That is why Taylor thinks that in political discourses separatism often has a purely symbolic value (Taylor, 1993, p. 6). Tamir (1993, p. 75) also argues that the right to national self-determination can be satisfied through a variety of political arrangements designed to secure the individual right to participate in the cultural life of the national community.

[10] Kymlicka (1995a, p. 12). In this spirit, the Canadian Multiculturalism Act declares that the government will promote the understanding and creativity between individuals and communities of different origins.

[11] Dworkin (1989, p. 480).

[12] Raz (1994, p. 181).

[13] Mill (1991, p. 39).

[14] Bauböck (1999, p. 147).

[15] Indeed, in an article of 1862, Lord Acton argued that the multinational character of the British nation ensured freedom: For Acton (1999, p. 31) "[t]he combination of different nations in one state is as necessary a condition of civilised life as the combination of men in society."

[16] Habermas (1996, p. 211).

[17] For a similar argument, see Ong Hing (1993).

# CONCLUDING REMARKS

We live in an extraordinarily complex social world. We are witnessing the beginning of a new century knowing that phenomena such as globalisation and mass migration are altering the traditional homogeneity of most democratic states, particularly in Europe. It would be naive to assume that these emerging dilemmas, generating as they do drastic structural changes, will be resolved with simple recipes. The aim of this book has been to explore one of the numerous challenges arising from the increasing emergence of a multicultural citizenry: the necessity of expanding the traditional catalogues of human rights so as to recognise group rights for cultural minorities.

The language of group rights, nationalism and multiculturalism often appear in contexts in which the central pillars of liberalism are called into question. For this reason, many liberals have been prompted to link the defence of cultural minority rights to the postmodernist attack on Enlightenment universalism, to the pre-eminence of groups above individuals, to radical communitarianism and moral relativism. And, indeed, some of these connections may be accurate for some of the discourses involving group rights.

Nevertheless, against the trend to scepticism of many contemporary philosophical doctrines, the enquiry has been guided by the conviction that the main methods and ideals that liberalism has inherited from the Enlightenment continue to offer a precious instrument to reflect about, and successfully face, our current challenges. Yet the experience of a dramatic twentieth century, coupled with the knowledge nowadays available on the cultural roots of many violent conflicts and on the influence of culture and identity on human well-being, should lead us to acknowledge the need for a deep revision of the interpretation of central liberal principles such as freedom, equality and dignity. Overall, this book constitutes an attempt to show the relevance of this task of analytical reconstruction in order to offer adequate answers to the specific problems that minority cultures face within democratic states.

One last clarification: certainly, when we deliberate on how to solve certain cultural conflicts related to the recognition of group rights, we might need to look back to the past. This book's emphasis on arguments of distributive justice, rather than historical reasons, does not aim at evading the fact that many of the present injustices related to ethnocultural minorities are no more than reminiscences of a conflicted and often disturbing past. And history, with its lights and shadows, is always constructed from the present, not only on the basis of what we were, but also on the grounds of what we *want* to be. Those minority groups that are keeping the memory of the misdeeds committed against them alive may legitimately refuse to accept the compromises of the present, even if these can be regarded as fair from the point of

view of distributive justice. "Only a redeemed mankind receives the fullness of its past," wrote Walter Benjamin.[1] His *Angelus Novus* of historical consciousness, that he saw symbolised in the famous painting by Paul Klee, remains suspended in the air turning its face and eyes to the horrors of the past. For Benjamin, it is not possible to turn to the future without first trying to rescue those who are victims of history, especially if these victims are still among us. Perhaps group rights, as other human rights, are indeed too weak a tool to rescue those victims; yet the recognition of their legitimacy might be crucial to preventing new grievances in the future.

## NOTES

1 Benjamin (1996, p. 254).

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