

UNE REVUE MULTIDISCIPLINAIRE SUR LES ENJEUX NORMATIFS  
DES POLITIQUES PUBLIQUES ET DES PRATIQUES SOCIALES

# Les ateliers de l'éthique The Ethics Forum

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CHALLENGES OF PUBLIC POLICIES AND SOCIAL PRACTICES

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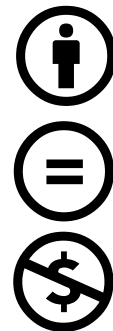
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# HUMAN DIGNITY AS HIGH MORAL STATUS<sup>1</sup>

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## ABSTRACT

In this paper I argue that the idea of human dignity has a precise and philosophically relevant sense. Following recent works, we can find some important clues in the long history of the term. Traditionally, dignity conveys the idea of a high and honourable position in a hierarchical order, either in society or in nature. At first glance, nothing may seem more contrary to the contemporary conception of human dignity, especially in regard to human rights. However, an account of dignity as high rank provides an illuminating perspective on the role it plays in the egalitarian discourse of human rights. In order to preserve that relational sense regarding human dignity, we can use the notion of moral status, to which some moral philosophers have paid attention in recent years. I explore the possibilities of the idea of moral status to better understand the idea of human dignity and its close relationship with human rights.

## RÉSUMÉ

Cet article défend la thèse que l'idée de la dignité humaine a un sens précis et philosophiquement pertinent. À la suite de travaux récents, il est possible de trouver des moments-clés importants dans la longue histoire de cette idée. Traditionnellement, la dignité exprime l'idée d'une position haute et honorable dans un ordre hiérarchique, soit dans la société ou dans la nature. À première vue, rien ne semble plus contraire à la conception contemporaine de la dignité humaine, en particulier en ce qui concerne les droits de l'homme. Toutefois, une explication de la dignité comme rang élevé offre un éclaircissement sur le rôle qu'elle joue dans le discours égalitaire des droits de l'homme. Afin de préserver ce sens relationnel concernant la dignité humaine, nous pouvons utiliser la notion de statut moral, à laquelle certains philosophes de la morale ont accordé une attention soutenue ces dernières années. J'explore les possibilités de l'idée de statut moral pour mieux comprendre la dignité humaine et sa relation étroite avec les droits de l'homme.

Since the Second World War, human dignity has become a leading idea widely used in moral, legal and political arguments. More than anything else, this prominence is due to its close association with human rights. Despite its philosophical pedigree, such influence would be incomprehensible if the concept of human dignity did not appear in major international human rights documents, from the Charter of the United Nations and the Universal Declaration of Human Rights on.

As with human rights, the appeal to human dignity has become common in public debates, in some cases as a formulaic invocation, in others as a powerful rhetorical device. Of course, the inflationary use ends up having deleterious effects on the meaning of words. Thus, the notion of human dignity may sound like a platitude, or be regarded as “mere decoration”, just a “fine-sounding phrase”.<sup>2</sup> Moreover, in recent years the use of the concept has generated much controversy. To critics, appeals to human dignity represent vague statements, or a resort to a mere slogan without a fixed content, useless for normative theory. As we shall see, much of this controversy has taken place in bioethics, but the issues raised are pertinent for the use of the term “human dignity” in the theory and practice of human rights.

Among the criticisms, I would like to address the objection about the vacuity of the notion.<sup>3</sup> For this task we must begin by looking at the long history of the term, which provides some interesting clues. Traditionally, *dignitas* conveys the idea of a high and honourable rank in a hierarchical order, either in society or in nature. That old hierarchical meaning strikes us as just the opposite of the contemporary conception of human dignity in human rights talk. Nevertheless, an account of human dignity as high rank offers a promising viewpoint on the use of the notion in the egalitarian framework of human rights.

In order to preserve that relational sense of human dignity, we can use the notion of moral status, to which some moral philosophers have paid attention lately. Analogous to legal status, moral status is defined as the rights and obligations assigned to someone by moral argument, not by law. The moral status of human beings determines how it is morally justified to treat them, or what is morally permissible to do to human beings. So the notion of human dignity should be understood as a high moral status consisting of a set of rights that guarantees a high degree of inviolability and respect.

The article has three parts. Part I is introductory and consists of two sections. In the first, I will consider briefly the use of the term “dignity” in international legal instruments on human rights. Such use raises some puzzling questions concerning the lack of normative meaning of the word and the symbolic role assigned to it. In the second section, I offer a quick survey of recent critical views about the notion of dignity in bioethical discussions. These criticisms are a good reason to look more closely at its meaning and role in moral arguments.

There are two sections in part II. In the first, I will discuss two conceptions of dignity, known as “restricted” and “universal”, usually differentiated in the spe-

cialized literature. One can be traced back to its origins in the Roman notion of *dignitas* as high rank or office, while the other leads to the contemporary understanding of dignity as the inherent worth of human beings. I argue that this contrast provides a very inaccurate historical overview and that we should take into account what Oliver Sensen calls the “traditional paradigm”. In the second section, I give an account of this traditional conception of dignity concerning the high place of man in nature. According to this perfectionist view, human dignity is regarded first and foremost as the ground for duties.

Part III consists of three sections. In the first, I consider Jeremy Waldron’s hypothesis, according to which the traditional sense of dignity as high rank offers a promising approach to understand the critical contribution of human dignity to the theory and practice of human rights. The last two sections explore the advantages and implications of understanding human dignity as (high) moral status, resting on rights and duties, and not as a special kind of value. On the one hand, its moral significance as a moral status remains unsettled and open to debate between opposing interpretations, as the resurgence of the traditional paradigm reveals. On the other, taking dignity as a moral status raises the question about how it relates to human rights and whether it can be seen as their ground.

## I

### 1. HUMAN RIGHTS

Certainly the moral, political and legal significance of the idea of dignity in our time is inseparable from its association with human rights. After the Second World War, the phrase “human dignity” appears on the main international human rights documents. For example, in the Preamble to the Charter of the United Nations (1945), where in the name of the peoples of the United Nations it is proclaimed “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”.<sup>4</sup>

It has definitely been the Universal Declaration of Human Rights (UDHR, 1948) that has done most to popularize the use of dignity in human rights discourse. At the UDHR the phrase appears five times: twice in the Preamble (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”) and in three articles (article 1: “All human beings are born free and equal in dignity and rights”; and also in articles 22 and 23 about socio-economic rights).<sup>5</sup> Following the UDHR, the mention of dignity has become commonplace in international human rights law and humanitarian law.<sup>6</sup>

The overwhelming use of dignity language in international law instruments shows a remarkable degree of consistency.<sup>7</sup> At least the same formulas are ritually invoked. There are some noteworthy points about this use. First, human dignity is closely related to human rights as a separate but interdependent concept,

while “dignity” and the “worth of persons”, both used with the adjective “inherent”, are taken as mere synonyms.

Second, the relationship between human rights and dignity is left unexplained in the UDHR and other texts; simply they are mentioned on equal footing, just connected by a coordinating conjunction. Only later in the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966) the kind of relation between the two notions is explicitly formulated: “Recognizing that these rights *derive* from the inherent dignity of the human person”. Of course, this represents a major move whose significance should not be overlooked. It establishes a priority in the order of justification. Dignity is assigned a foundational role in human rights discourse as the ground for human rights.<sup>8</sup>

And third, there is no definition of human dignity in declarations, treaties and other international human rights instruments. Its meaning is simply left to an intuitive understanding, assuming that everyone knows roughly what it is.<sup>9</sup> But is this a reliable assumption?

Needless to say, this kind of legal texts is not intended to address theoretical discussions on concepts and there may be sound political reasons to avoid them in order to achieve the widest possible international consensus on human rights. But the problem is how to reconcile this lack of clarity about the meaning of dignity with the justificatory burden assigned to the concept in relation to human rights, according to which people have rights *because* they have dignity. The problem is serious because there are widespread suspicions in contemporary debates about the meaninglessness of the term, as we shall see.

But even this may be seen as an advantage. The case is well described by Doron Shultziner, who explains the two features of human dignity as it is used for justifying rights in legal documents: the symbolic role and the lack of fixed content. By symbolic role, he understands that human dignity *seems* to offer a firm starting point for would-be universal legislation. But it does not really determine the content of this ultimate rationale, thus leaving the philosophical question open. Otherwise, human dignity works as a symbolic label, open to different interpretations. For that reason it is a rhetorical device useful for justifying political agreements concerning human rights “on a *seemingly shared ground*”.<sup>10</sup> Obviously, the price for playing that role is the lack of definite meaning. In fact, the content changes depending on the political agreements reached at different times. And this versatility is possible because “there is not fixed or universal content that spouts out of human dignity”.<sup>11</sup>

So considered, human dignity seems to be just a political expedient. From this point of view, what matters is the undeniable rhetorical force of the phrase “human dignity”, suitable for concealing disagreements under the guise of an alleged common ground. Moreover, this rhetorical effect seems to be directly linked to the absence of critical examination: “Few expressions call forth the nod of assent and put an end to analysis as readily as ‘the dignity of man’. It

sounds wholesome and real, and its utterance easily quiets our critical faculties”.<sup>12</sup> This is a disturbing conclusion, to say the least, and completely unsatisfactory in philosophical terms. Is the vacuity of the concept of dignity, or the restraint on critical scrutiny about it, the price to pay for consensus? It would be a shaky consensus indeed. Expediency cannot stop critical inquiry on this issue, especially taking into account what is happening with the idea of dignity in bioethics.

## 2. BIOETHICS

In recent years, human dignity has been the subject of intense controversy in bioethics debates. The term became popular in the seventies in connection with the discussion of life prolonging medical treatment and what was called “death with dignity”. But it is interesting to recall that, for example, it does not appear in the Belmont Report (1979), which sets out the major ethical principles for the discussion in bioethics.<sup>13</sup> In the last years, however, the concept has been also used in debates on biomedical innovations, especially those concerning human genetics, modes of assisted reproduction and enhancement techniques. By the way, the US President’s Council on Bioethics, an advisory panel of experts created by George W. Bush in 2001, played a decisive role in placing the issue of dignity at the center of those debates.<sup>14</sup> In fact, the Council’s first report, issued in 2002, was titled Human Cloning and Human Dignity.

Right away, the concept of dignity as applied to bioethics was fiercely questioned. The following year bioethicist Ruth Macklin developed a keen criticism as an editorial of the *British Medical Journal*. Of course, her discussion was limited exclusively to medical ethics, but it is interesting to note that it represented, and it still represents, a strong denunciation of the widespread use of the concept and its normative futility:

“Is dignity a useful concept for an ethical analysis of medical activities? A close inspection of leading examples shows that appeals to dignity are either vague restatements of other, more precise, notions or mere slogans that add nothing to an understanding of the topic”.<sup>15</sup>

In other words, the argument assumes, we can get rid of this concept without any real loss. Macklin severely criticizes the first report of the US President’s Council on Bioethics by constantly appealing to dignity without providing an analysis of it or explaining how it is related to other ethical concepts and principles. Given the lack of criteria about its meaning, “the concept remains hopelessly vague”.<sup>16</sup> In other cases, as she shows, the references to human dignity can be replaced easily by the principle of respect for persons or their autonomy, one of the traditional principles of bioethics. In short, Macklin confronts us with the following alternative about the use of dignity: either it is an empty slogan or it is merely redundant.<sup>17</sup> One cannot help but wonder whether Macklin’s criticism can be pertinent outside bioethics.



Dieter Birnbacher, among others, has expressed similar concerns about the use of the idea of human dignity in European biomedical debates. As normative principle, it has played a more important role than in Anglophone bioethics, but its inflationary use provokes a similar reaction of intellectual discomfort and raises similar questions to those already mentioned. Birnbacher holds two major objections against it. As expected, the first alludes to the suspicion about the lack of meaning:

“Partly it is due to the unclarities and ambiguities of the concept itself, inviting the suspicion that *Menschenwürde* functions more as a ‘*Leerformel*’ with no fixed content of its own, lending itself to a merely rhetorical and opportunistic application”.<sup>18</sup>

The second has to do with the rigid and stubborn way in which the rhetorical force of the phrase is usually used:

“*Menschenwürde* is typically invoked, both by ethicists and lawyers, as a kind of ultimate article of faith rather than as a principle open to rational debate. It typically functions as a ‘conversational stopper’ settling an issue and tolerating no further discussion”.<sup>19</sup>

Again, the discussion is limited to bioethics. But it is worth noting that there is a near-perfect fit between both objections and the two features identified by Shultziner regarding the use of human dignity in the international legal instruments on human rights. Human dignity is regarded as an empty label, and yet supposedly apt to block rational debate. Understandably, critics as Birnbacher or Macklin present these two features under an unfavourable light.

## II

### 3. TWO CONCEPTIONS OF DIGNITY

We can start by asking if it is truly impossible to find something like a fixed content in the uses of dignity, or at least some lines of continuity through its historical layers of meaning. For if we look at the history of the term we can find two different senses of dignity, which have been labelled as restricted and universal.<sup>20</sup> In fact, the history of the term is usually told as the relation between these two meanings, and how and when the former, restricted sense evolved into the second, universalistic one. Of course, my aim here is not to trace the history of the term “dignity”, but just to look for some clues to better understand its current use in the moral and political arguments.<sup>21</sup>

The origin of the restricted sense of dignity can be traced to its roots in ancient Rome. For the Romans, *dignitas* was a complex idea referring to the superiority and distinction of a high social position or rank. It was identified with political offices and persons holding them; for instance, a senator, or a consul, had *dignitas*. As expected, it was an intensely hierarchical notion closely linked to honour, privileges and deference due to high office or rank.

Therefore, we have to take it properly as a high status, determining distinctions between individuals and how they should be treated. So understood as a positional good, only a few in an elevated position could have dignity. Being exclusive, it was sought and fought zealously in Roman political life, as the case of Julius Caesar shows, because this kind of dignity could be gained, for example, by appointment to public office, but also lost.

It is important to notice that the dignity of a high position entailed obligations for those holding it: “The office or rank related to *dignitas* carried with it the obligation to fulfil the duties proper to the rank. Thus ‘decorum’ understood as appropriate dignified behaviour, was expected of the person holding the office”.<sup>22</sup> This close association with *decorum* and *gravitas* is a key point to understand the traditional usage, because dignity is manifested in public behaviour. In that sense, noble bearing, self-control and manners are the outer aspects of dignity.

This old hierarchical conception has had a long life after the demise of the Roman world and the traces are still present in our dictionaries. To give one example, the French Declaration of the Rights of Man and Citizen (1789) maintains the use of “dignities” as public offices, even if the text is claiming for the equality of all citizens in the access to them:

“All citizens, being equal in its eyes, are equally eligible to all public *dignities*, places, and employments, according to their capacities, and without other distinction than that of their virtues and talents” (article 6).<sup>23</sup>

This usage referred to high offices and people who occupy these honorary positions is alive in the old-fashioned parlance about “dignitaries” in official ceremonies or ecclesiastic “dignities” in the Church. Naturally we keep talking of “dignified behaviour” in relation to the mode of conduct and self-presentation in social life, as recorded by the Oxford English Dictionary: “Nobility or befitting elevation of aspect, manner and style; becoming or fit stateliness, gravity”. And, of course, the close relationship of honour and public esteem with a high rank or office is a topic that can be found in classic political texts.<sup>24</sup>

The universal meaning of dignity is completely different and is usually defined by opposition to this hierarchical and exclusive conception. In this sense, dignity is not something linked to a higher social rank or political position, or exclusive of a few men. Rather, it is a type of value that belongs to everyone as a human being, regardless of his or her social status and institutional position. Moreover, this value is seen as something given, an endowment, not something acquired or conquered; therefore, it cannot be lost or removed.<sup>25</sup> Finally, it is a kind of value that does not support scales or grades, so that every human being has the same equal worth.

This conception of dignity is perfectly suited to the discourse about human rights, unlike the other. Under the influence of Kant, or some of his influential readings,

the term “dignity” has become shorthand for “the inherent worth of human being”. Regarded as a value, it is typically described with adjectives as “inherent”, “intrinsic”, “inner”, “absolute” or “incomparable”. These adjectives express the essential character, not contingent or dependent on external circumstances, of dignity as a value that human beings have by virtue of their being human. As such, all human beings have it and each of them equally, regardless of social circumstances or personal achievements. Obviously, it fits nicely the universalistic and egalitarian spirit of the contemporary discourse on human rights.

We should highlight some philosophical aspects of this universal, currently prevalent, conception of dignity. First, the attribution of this inherent, inner, absolute or essential value to human beings, just for being human, sounds like an ontological claim. Indeed, that is exactly what it is, the assertion of a moral fact about the kind of value we can find in the world: human beings are valuable in themselves, each one having a worth different from anything else; and they have this great value because of some defining features of their common humanity.

Second, this ontological claim is usually understood as a perfect instance of what Teresa Iglesias calls “bedrock truths”, “because they have to be acknowledged—they cannot be proved”.<sup>26</sup> Thus it plays a basic role in some ethical normative theories and Christian and humanist views of common morality. According to them, the core of morality is respect for persons.<sup>27</sup> But why should we respect people? Naturally, the answer lies in the bedrock truth about the inherent value possessed by all human beings as such. In other words, people have dignity and dignity, understood as the inherent worth that people have, is the ultimate reason that justifies the way in which it is permissible to treat them. Accordingly, if we assume that morality is concerned with respecting people, the ontological claim about human worth seems to be the ground upon which the entire edifice of morality rests. So considered, the moral fact of human dignity amounts to the final reason in the moral order and the underpinning for human rights.

#### 4. THE TRADITIONAL PARADIGM

In the literature on dignity it is very common to contrast both conceptions of dignity. But that gives a distorted historical view, overly simple, in which it is easy to overlook important elements. Inevitably it raises questions, for example, about the historical origins of the so-called universal conception; or about the change of the old hierarchical meaning of dignity as high rank or status into something so different, if not opposed.

According to one standard account, the origin of the universal conception of dignity lies in the biblical sources of Jewish and Christian thought, particularly in the theological view of man as created in God’s image (*imago Dei*). For those seeking secular sources, the topic of human dignity became central in the European Enlightenment and the real turning point for the modern understanding of the concept of dignity is to be found in Kant’s philosophical writings. But this is still historically inaccurate, since the *dignitas hominis* was a classical theme developed by the Stoics and particularly by Cicero.<sup>28</sup>

However, although these classical authors attributed dignity to all humankind, it would be a gross misunderstanding to assimilate their view to the contemporary conception set out in the previous paragraphs. For this reason Oliver Sensen has distinguished carefully what he calls “the traditional paradigm” from the contemporary understanding of human dignity, but also from the restricted social sense of the “archaic paradigm”, as he calls it.<sup>29</sup> The traditional view is developed from the hierarchical conception of *dignitas* as a high rank, but universalizing it to all human beings. In fact, it preserves the hierarchical meaning of dignity, but displacing it from society to the natural order: it is a way of talking about man’s place in the cosmos, stressing that man is in a superior position, elevated above all other natural beings.<sup>30</sup>

This move was possible, according to the metaphysical tradition, because both the world and society were conceived as hierarchical orders. Thus human dignity meant the high rank man holds within the hierarchy of beings in the world. As a result, this traditional view also preserves the overtones of esteem and respect due to such honourable position. The reason why man occupies that elevated position is to be found in certain defining features of human nature, mainly reason and free will. This is the characteristic pattern of the traditional conception of dignity, as Sensen explains:

“The same basic structure can be found from Cicero onwards in Christian and Renaissance thinkers: Human beings are special in nature in virtue of a certain capacity (e.g. reason, freedom), and have a duty to make a proper use of it”.<sup>31</sup>

It is important to notice here a first significant difference with respect to the contemporary concept of dignity outlined above. Nowadays, we are accustomed to associate dignity with rights; in the traditional paradigm, however, dignity is regarded as the ground of duties, not of rights. In this regard the traditional paradigm is also akin to the old Roman sense of dignity as a high social rank that carries obligations with it. *Noblesse oblige* is the idea in both cases: one is obliged to behave in an appropriate manner, because of the honourable position one occupies. Understood as nobility in the natural order, human dignity requires men to behave according to their nature as rational and free beings, without stooping to the animal condition.<sup>32</sup>

At this point there is another element of contrast with the contemporary conception of dignity, because the traditional paradigm “is a perfectionist framework which expresses the duty to make a proper use of *one’s own* capacities”.<sup>33</sup> If the first duty is to make an appropriate use of attributes of human nature like reason or free will, this amounts to an obligation to preserve and respect our own dignity. So, dignity is focused on the agent and the duties associated with it are considered as agent-centred. They are not duties we owe to others, as in the case of rights, but first and foremost duties to ourselves.

There is a third feature in the traditional view of dignity related to this perfectionist framework. Under its contemporary sense, dignity is taken as a value that people have, no matter what they do. They cannot increase it or waste it; sim-

ply they have it as human beings, irrespective of their behaviour. The traditional view is more complex, since it recognizes two stages in dignity. All human beings occupy the same rank in the world order because of the common attributes of human nature, but only those who fulfil the duty to make a good use of them fully realize their dignity. So to speak, there are two grades within the same rank.

Undoubtedly, the key point of divergence lies in the very way of conceiving dignity. In the contemporary usage, it is a value-property that human beings have as such, unrelated to anything else; that is, a non-relational attribute. By contrast, in the traditional paradigm dignity keeps the sense of a relational property,<sup>34</sup> suggesting the upper echelons of a hierarchy, and thus superiority and subordination. Literally, it expresses the elevation of one thing above others, so that the elevation brings distinction, nobility or excellence. With this relational meaning in mind, dignity can be applied to different things or activities, not just to human beings. For example, we can speak of the dignity of philosophy in order to raise it as a noble activity above others. In this sense, Kant spoke of the dignity of morality; the labour movements in the nineteenth century clamoured for the dignity of work; or at present we hear about the dignity of parliament, the dignity of the medical profession, the dignity of languages, and so on.

### III

## 5. WALDRON'S HYPOTHESIS

This relational sense is an important key to understanding the rhetorical use of the term and its evolution. It is easy to see how the idea of a high rank was transferred from society to nature, both regarded as hierarchical orders. At first glance, however, the traditional hierarchical view seems to clash with the egalitarian spirit of the contemporary usage. But maybe not, all things considered. While the old Roman concept referred to the superior social position of some men over others, and hence was radically anti-egalitarian, the traditional view presented man's place in the cosmos as a higher rank, above all other natural beings. In this traditional view of the world, all natural creatures are subordinated to mankind, *but all men belong to the same high rank*. By sharing the same high status in the natural world, all men have the distinction and nobility that corresponds to that elevated position, therefore deserving the same esteem and honours.

It is true that this is framed in a metaphysical or theological picture of the world. But we cannot underestimate the political consequences of bringing back to society this idea of the high rank of man in God's creation. Indeed, the major effect of dignity applied to humankind is to elevate and ennoble men, all of them. If by nature men are entitled to the honour and deference due to such elevated rank, it is inevitable to draw conclusions about how human beings are treated in society and how they should be treated according to such high position. Historically it was so in modern political thought. The idea of mankind's dig-

nity, understood as noble rank in the natural world, challenged the established social order and the relations of domination and subordination between men.

In the same vein, the potential to articulate an egalitarian approach was available in the traditional view of human dignity: If all men share by nature the same rank, being equal in nobility or excellence, how can we justify the huge inequalities in society?<sup>35</sup> Paradoxically, the hierarchical conception of the world provided ammunition for a more egalitarian society inasmuch as these differences in the natural order rank enhanced equality in the same rank shared for all human beings. This is a story well known and I will not dwell on it. Simply, we have to bear in mind this line of progression from the traditional paradigm to the contemporary, egalitarian sense of dignity.

Nevertheless, there is a point worthy of attention about this evolution. As Jeremy Waldron points out, the sense of equality related to human dignity is upwards, meaning equality in sharing the same high, noble rank. This is a crucial issue. As he suggests, that should be considered the essential contribution of the idea of human dignity to the modern egalitarian discourse. In his words:

“[...] The distinctive contribution that ‘dignity’ makes to human rights discourse is associated, paradoxically, with the idea of rank: once associated with hierarchical differentiations of rank and status, ‘dignity’ now conveys the idea that all human persons belong to the same rank and that rank is very high indeed”.<sup>36</sup>

I’ll call it the “Waldron’s hypothesis”. It is an interpretative proposal about how we can better understand the use of the term<sup>37</sup>. Recalling the old restricted meaning of *dignitas* as high social status, he takes the contemporary usage as claiming to universalize that high rank to all human beings. If we examine the hypothesis, Waldron seeks to rescue the traditional association between dignity and high rank; but he places such a high position again back in society; and last, that high social status has to be allocated in an egalitarian and universalistic way, i.e., to all persons alike. In other words, we need to gain some historical perspective regarding the contemporary use of the concept of dignity, understanding it as an egalitarian transformation derived from the old socially-exclusive sense; an egalitarian drift, as we could add, in which the traditional paradigm has historically played a key role.

The point of Waldron’s proposal is to recover the idea of high social rank for the egalitarian discourse on human rights. Paradoxical as it may sound, the suggestion is really attractive. At first glance it seems paradoxical because the discourse of human rights is based precisely on the denial of differences in rank between humans beings. This is usually understood as the abolition of ranks in democratic societies. But Waldron’s hypothesis is subtler. It suggests that our democratic societies are not organized as societies without ranks, but as societies in which everyone belongs to the same high social rank. It may look similar, but the

difference is significant when thinking about the kind of social equality that we seek. Rather than abolish nobility, it aims to extend it to all members of society. So everyone should be treated according to the highest standards of respect and deference due formerly to a few men. The language of dignity just marks that difference: Instead of lowering the noble to the condition of the common man, as the elimination of ranks seems to suggest, it elevates the common man to a noble position. In short, it represents nobility for the common man, as Waldron puts it.<sup>38</sup> He thinks that this hypothesis offers a very promising approach for thinking about the rights we enjoy in democratic societies.

Waldron's proposal can be supported for instance by the work of the jurist James Q. Whitman. Whitman has studied the differences in the legal cultures of continental Europe and the United States, emphasizing the role that dignity plays in the European legal systems, notably in France and Germany. His research offers a broader sociological perspective, taking into account both laws and social practices, to examine what he calls "everyday social forms of dignity". Moreover, according to Whitman, the contemporary social forms of dignity should be understood in historical perspective, as the result of a history that goes back to the *ancien régime* in Europe. His main historical claim fits in perfectly with Waldron's hypothesis:

"Human dignity" as contemporary Europeans embrace it in continental Europe has been shaped by a rich and complex collective memory of the obnoxious past of the old regime. The core idea is that old forms of low-status treatment are no longer acceptable. [...] 'Human dignity', as we find it on the continent today, has been formed by a pattern of levelling up, by an extension of formerly high-status treatment to all sectors of the population".<sup>39</sup>

So, the language of human dignity cannot be understood without realizing how it has evolved from the old hierarchical sense of dignity as high social rank. In aristocratic times, the main institutions of dignity were institutions of privilege meant to secure rights and better forms of treatment for high-rank persons. In line with Waldron, Whitman argues that such history cannot be interpreted simply as the mere elimination of social ranks and privileges in Europe's modern democratic societies. If so, that would amount to an egalitarian society with no favour or special treatment for high-status people. But what Whitman discovers in his research on the idea of dignity in European laws and institutions, especially in the case of criminal law, is just the opposite pattern: The rejection and progressive elimination of old forms of low-status treatment. Again, the point of the idea of human dignity is that everyone has a high rank and should receive a respectful and dignified treatment corresponding to that elevated status. It means high-status egalitarianism.

## 6. MORAL STATUS AND CONSTRAINTS

Is the concept of human dignity too nebulous or vacuous to serve as the firm ground for human rights, as some critics claim? The brief review of the history of the term reveals instead a thick concept carrying a complex historical background. Drawing on this complex past, Waldron uses the ideas of high rank and nobility to provide an illuminating account for the use of the notion of human dignity in human rights discourse. His hypothesis is an invitation to see in a refreshing way the rights we take for granted, considering them as the old privileges of nobility now universalized. In a nutshell, he draws our attention to the core meaning of dignity as elevated status.

Engaging as it is, his account leaves some interesting questions open. Actually, Waldron goes no further discussing the notion of status, surely because he takes it to be clear enough in a legal sense; and for him status is a legal concept. Accordingly, the notion of dignity is at home in the law, as he says, being imported from its natural habitat to moral discourse. And, oddly enough, in his Tanner Lectures Waldron regards dignity as a philosophical artefact playing a constructive role in moral thinking, but “not a term that crops up much in ordinary moral conversation”.<sup>40</sup> But is dignity a term of art? Indeed, this is a striking statement when one sees the ease with which lay people use the term in everyday talk or in political discourses, and how often<sup>41</sup>.

Certainly, the concept of status deserves further attention. Some lessons can be drawn regarding our current understanding of human dignity. Moreover, to make sense of the use of dignity in ordinary language and in human rights discourse we should turn to the idea of status as a moral concept, not just a legal notion. Although recognized in national constitutions and international human rights law, human dignity as a kind of status is not only a creature of law, so to speak. It figures in moral claims when people feel mistreated or in moral arguments for critically assessing laws, policies or customs. As a matter of fact, many advocates of human rights take human dignity as something that should be recognized by law, though not created by law. Fortunately, the idea of moral status has drawn increasing attention in recent ethical theory and the works of some leading moral philosophers, as Frances Kamm, Thomas Nagel or Allen Buchanan, provide fruitful discussions.

What is a moral status? Broadly defined, the status of an entity is a normative condition that determines how this entity should be treated. Obviously, the status in question depends on the kind of normative system that establishes how the entity should be treated. Think of the legal status of X, where X is an agent or class of agents: it is the normative position of X as defined through the prerogatives or duties the law assigns to X. National citizenship is an obvious example of legal status today. By contrast, moral status can be defined as how it is morally justified to treat X; or, in the words of Frances Kamm, what is morally permissible or impermissible to do to X.<sup>42</sup>



So understood, moral status is a normative notion *stricto sensu*, since it has to be spelled out in deontic terms as permissions, prohibitions and obligations. A noticeable consequence follows from stressing this normative character: the usual description of human dignity as the inherent value of human beings is not accurate enough. Conceived as a (high) moral status, it cannot be the formula for a kind of value, no matter how precious, at least not directly as it is usually assumed in contemporary usage. Some things do not fit that description. Take for instance a familiar feature of axiological terms: their gradability.<sup>43</sup> Value concepts, unlike deontic concepts, can take the form of gradable adjectives, which support both their comparative use and the presence of a submodifier. Traditionally this was the case with “dignified”. Yet the contemporary use of “human dignity” seems to break with this pattern. Understood as the inherent and exclusive worth of human beings, it is a unique kind of value for which there can be no comparisons or differences in degree. There cannot be little, enough or too much human dignity in a person, nor do some people have more than others, since it is assumed that every human being has exactly the same worth.

It might seem that there is a contradiction here, as we present human dignity as *higher* status, that is, using it in a comparative sense. Of course, status is definitely a comparative notion.<sup>44</sup> As we have seen, there may be higher and lower status. Indeed, this is why the notion is recommended to us, suitable as it is for keeping the hierarchical meaning of dignity as elevated position.

Nevertheless, an explanation of human dignity as a moral status avoids these apparent difficulties since status is properly understood as a threshold concept, not a scalar one.<sup>45</sup> As such, moral status is ascribed to a group of beings because of certain features they possess, regardless of the lesser or greater degree to which such beings have them. Reaching a threshold, i.e. being in possession of certain traits or features, is a sufficient condition for having the appropriate status. Assigned on the basis of the relevant properties, X has (or does not have) a certain status, but X cannot have more or less of it. So there are no scales or degrees in the enjoyment of status. A completely different thing is that beings having different features enjoy different moral statuses. As noted before, we use the notion assuming that there may be a plurality of statuses. Furthermore, in order to grasp human dignity as moral status, we assume that there must be a hierarchy within the plurality of moral statuses, arranging beings in higher or lower ranks because of their features. So, the scale exists between different types of status, but not within them.

Needless to say, the hierarchy of moral statuses expresses distinction according to an order of importance. There is a strong intuition behind this hierarchy, as Frances Kamm points out: “the more important an entity is, the more matters how one treats it”.<sup>46</sup> In this sense, the status always displays, albeit indirectly, how valuable is the entity in comparison with others. But this worth is seen through the constraints that we should consider when dealing with it. If the moral status of X is defined as the treatment we owe to X, or what is morally allowed or not allowed to do to X, the lowest status would be equivalent to a lack of sta-

tus, since it would be morally permissible to do anything to X. By contrast, the higher the status of X, the more constraints on how X should be treated.

Thus, the practical force of a moral status lies in a set of constraints on behaviour. In other words, moral status is better explained in terms of rights and duties. Talking about human dignity in the context of human rights, this sounds quite natural. As mentioned above, the popularity of the notion of human dignity in the decades after the Second World War is inextricably linked to human rights. However, it is worth noticing that this association has not been always so close as it is today. As we have seen, traditionally the idea of human dignity took shape in a perfectionist cast and related to duties rather than rights. Furthermore, recalling the traditional paradigm is not just a historical curiosity, for some current uses of human dignity call to mind that traditional sense. Otherwise, focusing exclusively on the relationship with rights, we risk leaving out of sight the most controversial issues about dignity nowadays.

Thus, legal scholars as Stéphanie Henneute-Vauchez reports a significant trend in the legal understanding of human dignity today: “a critical enhancement of the HDP’s (human dignity principle) obligations-grounding function, to the detriment of its rights founding one”.<sup>47</sup> She sees this trend as a major shift that departs from the use of human dignity in human rights discourse after Second World War, representing a return to the old Roman sense of *dignitas*. Or, as she says, the legal morphing of human dignity in “human *dignitas*”, because the *fin-de-siècle* usage shares with the ancient *dignitas* two features: first, a similar function of grounding obligations, and remarkably duties towards oneself; second, the same régime of inalienability. Well understood, the crucial point in her account is the statutory conception of dignity, that is, presenting humanity as a status and every human being as depositary of it.

From a historical point of view, what is missing in her account is the traditional paradigm, where dignity of man was seen as high rank or status in the world order, similar to an entrusted office that comes with responsibilities and duties. Indeed, the features of *fin-de-siècle* dignity highlighted by Henneute-Vauchez correspond neatly to that traditional understanding and her discussion reveals that it never faded away. Rather, it is quite recognizable in current discussions, and not just in jurisprudence and legal scholarship. Considering the current controversies on the use of dignity in bioethics, it is easy to hold the suspicion that the source of troubles is not the concept’s lack of clarity, but precisely the reappraisal of the traditional sense, enhancing constraints on detriment of autonomy.

If so, there is an important lesson to be drawn. The explanation of human dignity as a high moral status, well anchored in history, does not go into details and leaves undecided the crucial issue of how to understand accurately the moral significance of this status. So, appeals to human dignity do not resolve problems at all. The fact, patent in bioethical debates, is that there are different interpretations at stake; to put it blatantly, more rights-oriented versus enforcing-duties (even against oneself) approaches. This explains why for example in controversies about dignified death and

euthanasia appeals to human dignity can be found on both sides. Understood as a moral status, whose content is open to disagreement, there is reason to doubt that it could count as rock-bottom truth in moral discussions.

## 7. DIGNITY AND RIGHTS

Our concern, however, was to deal with the concept of human dignity in human rights discourse. Therefore, we should turn now to comment on the link between human dignity as a high moral status and rights to wonder how exactly they are related and whether the concept of human dignity can be taken as the foundation for human rights, as it is usually argued.

Of course, status and rights are closely-related notions. Judith Jarvis Thomson once said that having a right is to have some kind of status<sup>48</sup>. But it is perfectly possible to turn her sentence the other way around and say that having a status is to have some kind of rights. Both notions are spelled out in terms of constraints on behaviour. For instance, take the right-claim that X has against Y that Y does P. The claim means that Y is under a duty towards X, namely to do P. Rights are then regarded as duties owed to a rights holder.<sup>49</sup> The same goes for status. As said above, the status of X determines how X should be treated, namely what is permissible or impermissible to do to X. All this is naturally formulated in terms of rights. The treatment due to X corresponds to the duties other agents owe to X, or, correlatively, to the rights that X has against other agents.

Hence the close link we assume between status and rights. That way it is easy to think about the latter as a sort of boundary or “protective perimeter”, adapting Hart’s aptly phrase. Indeed, this protective perimeter delineates the idea of personal inviolability guaranteed by rights that contemporary authors identify with the very concept of moral status.<sup>50</sup> To be more precise, the degree of inviolability is contingent on the kind of status, higher or lower. So, the higher the status, the greater and the stronger will be the protective perimeter, namely the number and stringency of rights ensuring the inviolability of the holder.<sup>51</sup>

Following a suggestion by Nagel, we take rights as aspects of status, since they express that kind of inviolability, i.e., the place that the rights holder should occupy within the moral (or legal, in the case of legal rights and legal status) community.<sup>52</sup> So considered, the link between human rights and dignity is even closer because the different human rights set forth by the Universal Declaration of Human Rights and subsequent international treaties have to be seen as constituents of the highest moral status called “human dignity”. If so, they are not two separate things, for human rights are the features delineating and composing that status. Plainly, the protective perimeter defines what counts as high status and inviolability.

Nevertheless, this changes the usual account of how dignity and human rights are related. Understood as a moral status, dignity cannot be seen as a separate ground for human rights. Of course, we may go on saying that human rights derive from dignity, but it is a rough way of speaking, pointing out simply that the two no-

tions are interdependent. It is true that people have those rights because they have dignity, but the claim works the other way around too: they have that status because they have the rights protecting their personal inviolability and imposing constraints on how they should be treated. That way it is not something previous or antecedent, as it is suggested when dignity is presented as the sort of separate value upon which the ultimate justification of human rights rests.

Hence, apparently, the notion of dignity looks redundant when referred to human rights.<sup>53</sup> Is it really so? Joel Feinberg in his essay on the nature and value of rights seems to hold a similar view. For him rights have a special moral significance as claims against others. They are moral devices well suited “to be claimed, demanded, affirmed, insisted upon”. For this reason, they are closely connected with “the customary rhetoric about what is to be a human being”, which includes ideas such as respect for persons and the dignity of human beings. Moreover, according to him, what is essential in these notions can be reduced to the idea of having rights:

“Indeed respect for persons (this an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called ‘human dignity’ may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, *is* to think of him as a potential maker of claims”.<sup>54</sup>

However, Feinberg adds something that we should not overlook. As he says, there are facts about possessing rights that explain their greatest moral significance, but cannot be packed in the definition of rights. He highlights one of these facts as especially remarkable: “Having rights enables us to ‘stand up like men’, to look others in the eyes, and to feel in some fundamental way as the equal of anyone”.<sup>55</sup> It is not coincidental that his words evoke accurately the upright bearing, the independent and self-assured attitude traditionally associated with dignity. For they convey what is the point of having rights and that is just what the concept of dignity, regarded as high moral status, is meant for.

In this sense dignity can be taken as a fundamental concept in human rights discourse. Of course, this is not to say that it is an indefinable notion and other terms should be defined in relation to it, for we have seen that human dignity can be spelt out in terms of duties. Nor is it the case that statements containing the notion are taken as basic premises from which all other statements derive. It is just to say that statements on dignity should be regarded as catching what is the point of human rights<sup>56</sup>.

The idea of human dignity is not redundant as far as it expresses the moral significance of being in possession of a set of rights ensuring the inviolability, independence and equal standing of human beings. Human dignity plays a distinctive moral role in human rights discourse, showing their sense or purpose: they form the moral status that people have by virtue of their humanity. Other-

wise, they would be a disparate list of rights. As we have seen, the decisive contribution of the concept of dignity in relation to human rights is to convey two things: that all human beings enjoy the same moral status and that this moral status is very high. Indeed, it means that human beings occupy the uppermost point in the hierarchy of moral statuses, thereby guaranteeing them a high degree of protection and inviolability.

According to its hierarchical background, dignity implies that all human beings deserve respect and deferential treatment, because of the noble and elevated moral position they occupy. Human rights come to translate this deferential treatment in different normative requirements. In this respect, the concept of dignity plays a guiding or regulatory role in human rights theory and practice. The treatment due to a high status may vary in response to changing historical circumstances, but the idea of high-ranking status can guide the search, selection and adjustment of various rights, as well as weighing their relative importance in the whole scheme.

Obviously, human dignity is a *moral* status because it does not depend on positive law, but on sound moral arguments. Besides, in the context of human rights discourse it is chiefly a political claim, namely that a just social order should be organized as a single high-rank society, guaranteeing the same inviolability and high regard to all its members because of this shared upper status.

## NOTES

- <sup>1</sup> Previous versions of this article were presented at workshops and conferences held at Málaga, Tromsø, San Sebastián, Valladolid and Jyväskylä. I am grateful to the participants, especially to José María Rosales, and the journal's referees for their helpful comments. This paper is part of the research project The Rhetorics of Democracy (FFI2008-00039), funded by the Spanish Nacional R + D Plan.
- <sup>2</sup> Waldron, Jeremy, «Dignity and Rank», *Archives Européennes de Sociologie*, vol. XLVIII, no. 2, 2007, pp. 201-237, p. 203.
- <sup>3</sup> Bagaric, Mirko & Allan, James, «The Vacuous Concept of Dignity», *Journal of Human Rights*, vol. 5, no. 2, 2006, pp. 257-270.
- <sup>4</sup> See <http://www.un.org/en/documents/charter/preamble.shtml>
- <sup>5</sup> See <http://www.un.org/en/documents/udhr/>
- <sup>6</sup> See McCrudden, Christopher, «Human Dignity and the Judicial Interpretation of Human Rights», *European Journal of International Law*, vol. 19, no. 4, 2008, pp. 655-724, for a comprehensive review of the use of “dignity” in international law and national constitutions. As a matter of fact, it is routinely included in the Preambles of general treaties like, for example, the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), and in more specific international law documents: the Slavery Convention (1956); International Convention on the Elimination of All Forms of Racial Discrimination (1965); Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); on the Rights of Children (1989); the Rights of Migrant Workers (1990); etc. The same applies to regional human rights documents as the American Declaration of the Rights and Duties of Men, the Arab Charter on Human Rights, or the African Charter on Human and Peoples' Rights. The curious exception is the European Convention for the Protection of Human Rights and Fundamental Freedoms, the oldest of regional charters (1950), which only refers to “the full recognition of the inherent dignity of all human beings” in its Protocol 13 on the abolition of death penalty, added in 2002 (See <http://conventions.coe.int/treaty/en/Treaties/Html/187.htm>).
- <sup>7</sup> McCrudden, «Human Dignity and the Judicial Interpretation of Human Rights», p. 672.
- <sup>8</sup> Shultziner, Doron, «Human Dignity: Functions and Meaning», *Global Jurist Topics*, vol. 3, no. 3, 2003, pp. 1-23, p. 4.
- <sup>9</sup> Schachter, Oscar, «Human Dignity as a Normative Concept», *The American Journal of International Law*, vol. 77, no. 4, 1983, pp. 848-854, p. 849.
- <sup>10</sup> Shultziner, «Human Dignity: Functions and Meaning», p. 5 (my emphasis).
- <sup>11</sup> “The very fact that various worldviews and ideologies are strongly related to the concept of human dignity produces a paradoxical situation in that human dignity as for itself does not contain any concrete content or meaning. Because human dignity anchors different worldviews, it cannot represent any particular set of values or meaning that ‘naturally’ stem out of it”, *Ibid.*
- <sup>12</sup> Morris, Bertram, «The Dignity of Man», *Ethics*, vol. 57, no. 1, 1946, pp. 57-64, p. 57.
- <sup>13</sup> See <http://ohsr.od.nih.gov/guidelines/belmont.html>
- <sup>14</sup> See the old website: <http://bioethics.georgetown.edu/pcbe/>. In 2009 President Obama created a new advisory committee, The Presidential Commission for the Study of Bioethical Issues, chaired by the philosopher Amy Gutmann. See the new website: <http://www.bioethics.gov/>.
- <sup>15</sup> Macklin, Ruth, «Dignity is a Useless Concept», *British Medical Journal*, vol. 327, no. 7429, 2003, pp. 1419-1420, p. 1419.
- <sup>16</sup> *Ibid.*, p. 1420.
- <sup>17</sup> The brief article of Macklin had an extraordinary impact. The US President's Council took it as a challenge and published in response a volume of 28 commissioned essays and commentaries, *Human Dignity and Bioethics* (Washington, President's Council on Bioethics, 2008). Almost immediately, Steven Pinker harshly attacked this report in “The Stupidity of Human

Dignity”, *The New Republic*, May 28, 2008, available at <http://www.tnr.com/article/the-stupidity-dignity>. Pinker follows the lead of Macklin to point out that “‘dignity’ is a squishy, subjective notion, hardly up to the heavyweight demands assigned to it”. Once we have the principle of autonomy in bioethics, he says, the loose talk about dignity adds nothing (p. 1). But he wonders why this talk has become fashionable. According to Pinker, there are political reasons behind: dignity is a conservative device used to reject medical innovations that would improve the lives and health of people. More precisely, it is a rhetorical weapon used by the spokesmen of religious approaches in bioethics, especially those related to the Catholic Church.

<sup>18</sup> Birnbacher, Dieter, «Ambiguities in the Concept of Menschenwürde», in Kurt Bayertz, ed., *Sanctity of Life and Human Dignity*, Dordrecht, Kluwer Academic Publishers, 1996, pp. 107-121, p. 107.

<sup>19</sup> *Ibid.*

<sup>20</sup> Iglesias, Teresa, «Bedrock Truths and the Dignity of the Individual», *Logos*, vol. 4, no. 1, 2001, pp. 114-134, p. 120.

<sup>21</sup> About the sources and history of the concept, see Schulman, Adam, «Bioethics and the Question of Human Dignity», in *Human Dignity and Bioethics*, Washington, President’s Council on Bioethics, 2008, pp. 3-18, and McCrudden, «Human Dignity and the Judicial Interpretation of Human Rights».

<sup>22</sup> Iglesias, «Bedrock Truths and the Dignity of the Individual», p. 120.

<sup>23</sup> Available at <http://www.historyguide.org/intellect/declaration.html>

<sup>24</sup> See Hobbes’s definition: “The public worth of a man, which is the value set on him by the commonwealth, is that which men commonly call *dignity*. And this value of him by the commonwealth, is understood, by offices of command, judicature, public employment; or by names and titles, introduced for distinction of such value”, in *Leviathan*, chapter X: «Of Power, Worth, Dignity, Honour, and Worthiness», *The English Works of Thomas Hobbes of Malmesbury*, London, Bohn, 1839-45. vol. 3, accessed from <http://oll.libertyfund.org/title/585/89836/2025503> on 2010-08-10.

<sup>25</sup> Iglesias, «Bedrock Truths and the Dignity of the Individual», p. 122.

<sup>26</sup> *Ibid.*, p. 116.

<sup>27</sup> See Frankena, William, «The Ethics of Respect for Persons», *Philosophical Topics*, vol. XIV, no. 2, 1986, pp. 149-167. Here I do not tackle the tricky issue of distinguishing between persons and human beings, and I simply take them as roughly equivalent.

<sup>28</sup> Nussbaum, Martha, «Human Dignity and Political Entitlements», in *Human Dignity and Bioethics*, Washington, President’s Council on Bioethics, 2008, pp. 352-354.

<sup>29</sup> Sensen, Oliver, «Kant’s Conception of Human Dignity», *Kant-Studien*, vol. 100, no. 3, 2009, pp. 309-331, p. 311ff. The point of Sensen’s article is to demonstrate that Kant held the traditional conception of dignity, with some nuances, but not the contemporary one. Certainly, this is a startling conclusion, given that Kant is always presented just as the philosophical champion of the contemporary understanding of human dignity. Based on the reading of a very well-known passage of the *Grundlegung zur Metaphysik der Sitten*, this is simply taken for granted in the discussions about human dignity, even by Kantian scholars. Through an exhaustive textual analysis of the 111 times in which the word “dignity” appears in Kant’s writings, Sensen explains why this represents a serious misunderstanding of Kant’s use of the term and, in general, of his ethical thinking.

<sup>30</sup> Incidentally, this talk about the high place of man in the universe was perfectly compatible with the widespread social practice of slavery, and authors like Cicero or Seneca saw no contradiction in it.

<sup>31</sup> Sensen, «Kant’s Conception of Human Dignity», p. 313.

<sup>32</sup> For instance, in a passage from *De Officiis*, Book I, 30, Cicero speaks of sensual pleasure as unworthy of man: “Indeed, if we will only bear in mind what *excellence and dignity belong to human nature*, we shall understand how base it is to give one’s self up to luxury, and to live voluptuously and wantonly, and how honourable it is to live frugally, chastely, circumspectly, soberly” (my emphasis).

- <sup>33</sup> Sensen, «Kant's Conception of Human Dignity», p. 314 (emphasis in original).
- <sup>34</sup> *Ibid.*, p. 313.
- <sup>35</sup> For a clear example of this political use, see the next passage from John Locke's *Second Treatise* (chapter Two: «Of the State of Nature»): "To understand political power right, [...] we must consider, what state all men are naturally in, and that is, a state of [...] equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that *creatures of the same species and rank*, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection [...]" (cited by Waldron, «Dignity and Rank», p. 217, my emphasis).
- <sup>36</sup> Waldron, «Dignity and Rank», p. 201.
- <sup>37</sup> *Ibid.*, p. 203.
- <sup>38</sup> Waldron, Jeremy, «Dignity, Rank and Rights» (The 2009 Tanner Lectures at UC Berkeley), New York University School of Law, Public Law Research Paper no. 09-50, p. 12, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1461220](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220).
- <sup>39</sup> Whitman, James Q., «'Human Dignity' in Europe and the United States: The Social Foundations», in Georg Nolte, ed., *European and US Constitutionalism*, Strasbourg, Council of Europe Publishing, 2005, pp. 95-107, p. 97.
- <sup>40</sup> Waldron, «Dignity, Rank and Rights», p. 2.
- <sup>41</sup> See Michael Rosen, "Replies to Jeremy Waldron: Dignity, Rank and Rights", p. 6, available at <http://scholar.harvard.edu/michaelrosen/publications/replies-jeremy-waldron>.
- <sup>42</sup> Kamm, Frances M., *Intricate Ethics*, Oxford, Oxford University Press, 2007, p. 227. See also her *Morality, Mortality*, vol. 2: *Rights, Duties and Status*, Oxford, Oxford University Press, 1996, pp. 259-289.
- <sup>43</sup> For an interesting analysis of the differences between evaluative and deontic terms, see Ogien, Ruwen and Tappolet, Christine, *Les concepts de l'éthique*, Paris, Hermann, 2008, pp. 37-75.
- <sup>44</sup> Buchanan, Allen, «Moral Status and Human Enhancement», *Philosophy and Public Affairs*, vol. 37, no. 4, 2009, pp. 346-381, p. 346.
- <sup>45</sup> Buchanan, «Moral Status and Human Enhancement», p. 357.
- <sup>46</sup> Kamm, *Intricate Ethics*, p. 227.
- <sup>47</sup> Hennette-Vauchez, Stéphanie, «A Human *Dignitas*? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept», European University Institute Working Papers, LAW No. 2008/18, p. 4.
- <sup>48</sup> Thomson, Judith Jarvis, *The Realm of Rights*, Cambridge (Mass.), Harvard University Press, 1990, p. 38.
- <sup>49</sup> By rights I mean the collection of Hohfeldian incidents: claims, liberties, powers and immunities, or clusters thereof. For simplicity I just mention claims. I also assume here that all human rights contained in international documents are real rights in this regard, but the issue would deserve a longer discussion.
- <sup>50</sup> Nagel, Thomas, «Personal Rights and Public Space», *Philosophy and Public Affairs*, vol. 24, no. 2, 1995, pp. 83-107, p. 89. Nagel draws on previous works by Kamm: «Harming Some to save Others», *Philosophical Studies*, vol. 57, 1989, pp. 251-256; «Non-consequentialism, The Person as an End-in-Itself and the Significance of Status», *Philosophy and Public Affairs*, vol. 21, no. 4, 1992, pp. 381-389; and *Morality, Mortality*, Vol. II.
- <sup>51</sup> Kamm, Frances M., «Nonconsequentialism», in Hugh LaFollete, ed., *The Blackwell Guide to Ethical Theory*, Oxford, Blackwell, 2000, p. 217.
- <sup>52</sup> Nagel, 'Personal Rights and Public Space', p. 85.
- <sup>53</sup> The French Catholic thinker Jacques Maritain, who played an important role in the preparatory works of the Universal Declaration, held this position: "The dignity of the human person? The expression means nothing if it does not signify that, by virtue of the natural law, the human person has the right to be respected, is the subject of rights, possesses rights", Maritain, Jacques, *The Rights of Man and Natural Law*, New York, Charles Scribner's Sons, 1951, p. 65, cited by Waldron, 'Dignity and Rank', p. 219.



<sup>54</sup> Feinberg, Joel, «The Nature and Value of Rights», *The Journal of Value Inquiry*, vol. 4, no. 4, 1970, pp. 243-257, p. 252.

<sup>55</sup> *Ibid.*

<sup>56</sup> Mackie, John L., «Can There Be a Right-Based Moral Theory», in Jeremy Waldron, ed., *Theories of Rights*, Oxford, Oxford University Press, 1984, p. 180.

# L'INTERPRÉTATION DU DROIT PAR LES JURISTES : LA PLACE DE LA DÉLIBÉRATION ÉTHIQUE

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## RÉSUMÉ

Dans cet article, il sera fait un bref rappel du modèle traditionnel d'interprétation des lois, toujours prescrit dans la doctrine, sinon épousé verbalement dans les tribunaux canadiens. Il sera démontré que ce modèle ne peut pas représenter toute la réalité du travail d'interprétation des juristes canadiens, pour plusieurs raisons. L'herméneutique, la sociologie critique, l'analyse du discours, prenant pour objet les textes législatifs, les jugements rendus, les arguments pratiques entendus, ont montré l'étendue du comportement réflexif réel, l'étendue du champ interprétatif visant les circonstances d'une cause. Les textes législatifs donnent de fait de plus en plus de place à l'interprétation des circonstances pertinentes à l'encadrement de l'action des justiciables. Sur un plan empirique, l'analyse des jugements, de même que les prises de position de juges lorsqu'ils s'expriment en dehors du forum judiciaire, mettent en évidence la variété des motifs effectivement pris en considération, l'espace considérable de délibération éthique impliquant de fait tous les interprètes, qu'ils soient simples citoyens d'une communauté, inspirés par l'un ou l'autre des ordres sociaux, ou acteurs spécialisés de l'ordre juridique. Cet article se propose d'examiner comment se produit actuellement, en droit canadien ou québécois, l'interprétation des juristes, dans des processus décisionnels réflexifs, en situations complexes, voire même dans la perspective du développement des institutions.

## ABSTRACT

After a brief reminder of the traditional model of statutory interpretation, still prescribed in doctrine, if not espoused verbally in Canadian courts, it will be shown that this model simply does not represent the reality of the interpretive work of practitioners and for several reasons. Hermeneutics, critical sociology, discourse analysis, taking for subject legislation, judgments rendered, the practical arguments heard, have shown the extent of actual reflexive behaviour, the scope of interpretation related to the circumstances of a cause. The legislator does in fact provide substantially more room for the interpretation of the circumstances relevant to the legal framework governing the action of justiciables. Empirical analysis of judgments together with the pronouncements of judges off the bench, highlight the variety of objectives that are actually taken into account, the scope of ethical debate involving all interpreters, the specialised actors of the judicial order as well as the common citizens inspired by the different normative orders. This article will examine how are produced currently, in application of Canadian or Quebec law, the interpretations of jurists, through reflexive decision-making, in complex situations, even in the context of institutional development.

« Nous avons besoin d'une interprétation de la justice fondée sur les accomplissements parce que la justice ne peut rester indifférente aux vies que mènent réellement les gens. »

Amartya Sen

Considérée en Égypte ancienne comme un idéal absolu (Maât), puis mise à l'écart par le positivisme juridique, la notion de justice fait aujourd'hui l'objet d'un débat renouvelé. Amartya Sen, dans *L'idée de justice*<sup>1</sup>, après avoir rendu un vibrant hommage à son ancien professeur, John Rawls, procède néanmoins à une critique approfondie de l'ouvrage du maître, *Théorie de la justice*, paru en 1971<sup>2</sup>. Les deux titres paraissent très voisins mais, dès les premières pages, Sen affirme sa différence. La *Théorie de la justice* évoque la recherche d'un ensemble d'institutions et de principes susceptibles d'animer ce que serait une société parfaitement juste. *L'idée de justice*, au contraire, plutôt que chercher quelques principes de justice pure, identifie les procédés permettant de la faire progresser dans la réalité, de façon à y réduire les injustices réparables. Dans cette perspective, on privilégie la recherche de solutions amélioratives urgentes aux injustices les plus criantes en s'appuyant sur une réflexion rigoureuse, dans des espaces de délibération publique. Sen se situe plus près de la pensée comparatiste, ou pragmatique, des théories de l'action, que de celle de Rawls.

Depuis la parution en 2009 de l'ouvrage de Sen, divers critiques ont soulevé les difficultés du fonctionnement démocratique, en raison de la diversité des cultures et des politiques publiques qu'elles suscitent, mais nombreux sont ceux qui ont salué son courage et la pertinence de ses réflexions<sup>3</sup>. Sen n'emploie pas nommément le terme de *fraternité* dans ses écrits, mais on constate que cette considération anime la trame de fond de sa démonstration<sup>4</sup>. Sa vision de l'homme n'est pas pessimiste. À l'encontre de plusieurs penseurs classiques du contrat social, il n'admet pas l'idée de sens commun voulant que l'homme soit mû principalement par l'intérêt et les avantages personnels, dans l'indifférence à l'intérêt commun<sup>5</sup>. Sen soutient que les motivations éthiques primordiales chez l'humain sont la compassion, la responsabilité et la bienveillance, valeurs fondatrices du tissu social.

La démarche critique d'Amartya Sen nous permet de poursuivre la réflexion sur l'administration de la justice et plus particulièrement sur l'interprétation des lois au Canada. L'administration de la justice constituant un aspect important de la gouvernance des sociétés, de la construction du vivre ensemble, l'interprétation des lois représente, dans le quotidien, le cœur du travail des juristes. Symbolisée par une femme aux yeux bandés, tenant une balance d'une main et un glaive de l'autre, la justice des tribunaux est censée être aveugle et neutre. Elle est réputée ne pas voir les justiciables visés par les règles de droit, ni les faits du contexte social; elle doit être impartiale avant d'abattre le glaive de la loi. *Dura lex, sed lex*. La loi est dure, mais c'est la loi ! Les réflexions dont ce texte est le témoin montrent que le bandeau a pourtant été et sera de plus en plus soulevé, que le positivisme juridique est remis en question. On comprend mieux aujourd'hui le champ de réflexion inévitable où se réalisent les phénomènes d'interprétation des lois et où se montrent les enjeux que l'on voulait laisser dans un domaine tenu à l'écart dans un autre ordre social distinctif, celui de l'éthique. Comment la réflexion des juristes compose-t-elle de fait avec la complexité du monde social, lorsqu'ils interprètent ? Comment de fait la réflexion éthique tra-

verse-t-elle le raisonnement interprétatif ? La considération du développement humain et social n'est-elle pas conviée par la loi elle-même dans le processus d'interprétation ? Le législateur tisse-t-il toujours une camisole de force pour ceux qui doivent interpréter et appliquer les lois ? En d'autres termes, comment une Thémis sans bandeau regarde-t-elle la vie réelle des gens ? C'est ce à quoi nous convient Amartya Sen et les analystes qui ont cherché à reconstruire les modalités réelles du processus d'interprétation et d'application des lois.

Dans un premier temps, nous ferons un bref rappel du modèle traditionnel d'interprétation des lois. Nous verrons que ce modèle est incapable de représenter, pour plusieurs raisons, la réalité du travail d'interprétation des juristes canadiens. Puis nous montrerons que la rédaction des textes législatifs accorde de plus en plus de place à l'interprétation des circonstances pertinentes à l'encadrement de l'action des justiciables. Enfin, l'analyse de jugements et de prises de position de juges influents, s'exprimant en dehors du forum judiciaire, mettra en évidence la variété des motifs réellement pris en considération. Il existe bel et bien un espace considérable de délibération éthique impliquant de fait tous les interprètes<sup>6</sup>.

## LE MODÈLE OFFICIEL D'INTERPRÉTATION DES LOIS AU CANADA ET SA CONTESTATION

Le principal outil du raisonnement juridique, l'interprétation des lois, peut s'avérer un travail ardu, jonché de formules, de méthodes, de techniques, souvent contradictoires. Les juristes doivent pouvoir suivre, comme Ariane, un fil conducteur, assurant une bonne compréhension des principes essentiels. Grâce à l'analyse d'un grand nombre de cas issus de la jurisprudence canadienne, de règles du droit positif, les chercheurs ont pu produire une description du modèle « officiel » d'interprétation, du modèle de raisonnement qui, en principe, devrait être utilisé pour produire le sens à donner à une disposition législative ou réglementaire<sup>7</sup>. La manière dont le juriste pense devoir interpréter la loi influe sur la rédaction législative, sur l'étude des lois, sur l'analyse des lois pertinentes à une cause demandant résolution au tribunal. S'agissant d'un processus social institutionnalisé, les acteurs sont réputés en maîtriser les arcanes et en reproduire les aspects. Mais comment se représentent-ils cette institution ? Cette représentation est-elle une image adéquate des processus réels ?

À grands traits, les principales caractéristiques du modèle « officiel » d'interprétation se présentent comme suit : le but de l'interprétation est de découvrir « l'intention du législateur historique », « l'intention de l'auteur » qui se trouve déjà là dans le texte de la loi<sup>8</sup>. Cette doctrine accomplirait l'objectif défini par Montesquieu; en république, le juge n'a qu'à être « la bouche de la loi ». À cette intention, à cette pensée du législateur, correspond le sens véritable du texte que l'interprète doit chercher à découvrir uniquement comme un simple fait. Ainsi, l'action du juge se limitant à une simple application de la loi « ne requiert [de sa part] aucun talent particulier, sinon des compétences professionnelles telles qu'une bonne connaissance des règles juridiques »<sup>9</sup>. Si le texte est clair, cette intention sera mise en évidence facilement. Par contre, si le texte est obscur, on aura recours alors, à contrecœur, à certains principes d'interprétation faisant appel au contexte de la loi, au corpus législatif et, à l'occasion, à certains éléments du contexte global d'énonciation de la loi. Le pivot de valeur qui paraît déterminer la théorie officielle est avant tout la valeur démocratique de fidélité à l'intention du législateur<sup>10</sup>, sans égard à la réalité des phénomènes de dominance qui marquent la réalité du pouvoir. Le législateur commande, au nom d'un sujet

collectif présumé formé d'égaux, et on invoque la sécurité juridique, c'est-à-dire le respect de la collectivité qui gouverne ultimement par son assemblée<sup>11</sup>. Le juriste présume ainsi que « tout le réel est susceptible de traitement par la loi, que la loi peut connaître de tout objet, que tout le réel est légalisable »<sup>12</sup>. L'interprète se voit ainsi refuser tout rôle créateur, toute réflexion ou délibération éthique<sup>13</sup> et l'éthique est alors refoulée, comme dans un monde à part, dans le collectif des autres ordres sociaux. Le positivisme juridique rend aveugle aux nombreux passages de normes entre ordres sociaux, à ce que Guy Rocher, à l'instar de Santi Romano, désigne comme l'internormativité<sup>14</sup>.

Au vu des connaissances actuelles en matière de construction du discours, de construction de ce qu'on appelle « la réalité » par les acteurs, quels qu'ils soient, ce modèle d'interprétation des lois, de la fidélité à « l'intention » derrière le texte, s'est trouvé contesté, et ce, de façon très intense, depuis un peu plus d'une trentaine d'années. De nombreux spécialistes de l'interprétation, des théoriciens des sciences humaines et de l'herméneutique en particulier, constatent que le « modèle » ne reflète tout simplement pas ce qui se passe dans la pratique judiciaire<sup>15</sup>. Pour ces critiques, le « modèle » présume une capacité tout à fait irréelle, voire « divine », d'interpénétration des consciences chez les acteurs de l'institution<sup>16</sup>. Il fait abstraction du fait que l'interprétation est inévitablement fondée sur les représentations, les valeurs et le dynamisme d'une large communauté. Selon le professeur Luc B. Tremblay,

[...] les juristes semblent de moins en moins capables de se concevoir comme de simples techniciens du droit. Quelque chose d'important est en train de se produire dans la communauté juridique. Nous assistons à ce qu'on qualifiera peut-être un jour de « rupture épistémologique »<sup>17</sup>.

Plusieurs juristes ont ainsi proposé des modèles d'interprétation des lois visant à représenter plus adéquatement ce qui se passe réellement en pratique<sup>18</sup>. Si ces modèles prennent en considération la recherche de l'intention législative, ils font aussi une place nettement plus importante à la part de subjectivité et de réflexivité des interprètes qui demeurent sensibles aux exigences du juste et du raisonnable dans les cas d'espèce, qui ont même l'obligation de juger, quelles que soient les contraintes que font surgir les circonstances et l'état des lois. Par ailleurs, des chercheurs ont récemment fortement contribué à mieux comprendre les interactions entre le cadre juridique et le vaste contexte social visé par la décision, qui est lui aussi à construire<sup>19</sup>. Ces modèles analysent une gamme étendue de facteurs, dont les objectifs des dispositions et des lois interprétées et les dynamismes sociaux permettant de calibrer les principes juridiques à mettre en œuvre. Des analyses plus fines ont démontré que le juge, lorsqu'il rend un jugement, a un rôle qui ne se limite pas au seul cas qui se présente devant lui. Il est, en quelque sorte, un constructeur de solidarité<sup>20</sup>, un agent de développement<sup>21</sup>, et à ce titre, il fait partie intégrante d'une institution judiciaire qui a aussi une mission sociale de soutien des valeurs de démocratie délibérative et de développement<sup>22</sup>. Pierre Noreau décrit très bien cette dynamique de production de la vie sociale :

Dans une perspective qui renoue avec la sociologie générale, le droit n'est pas seulement cette succession de commandements qui garantiraient un ordre social objectif, c'est aussi l'image idéale que la société offre de son activité et l'issue de conflits où s'exprime le travail qu'elle fait sur elle-même. Le

droit constitue dans ce sens l'expression de ce que la vie collective met en jeu. [...]

C'est dans sa mise en œuvre et dans son interprétation qu'il [le droit] retrouve sa signification sociale. L'acte de juger devient alors un acte de culture, une façon de rappeler ou de dénoncer les consensus sociaux, d'affirmer ce qui est en jeu dans l'échange social. Dans ce sens, chaque juge doit rappeler l'état des rapports sociaux tels qu'il peut les lire. Il raconte l'histoire actuelle de sa propre société. Et il le fait publiquement<sup>23</sup>.

Même si le juge rend seul un jugement, il n'en demeure pas moins en dialogue constant sur le plan éthique avec la communauté politique où il vit et où son jugement produira ses effets. Antoine Garapon, secrétaire général de l'Institut des hautes études sur la justice (ayant son siège social à Paris), et juge lui-même, dans un rapport faisant suite à une série de recherches empiriques et de colloques de la profession, montre que la tâche du juge n'est pas seulement intellectuelle, c'est-à-dire logique ou mécanique, qu'elle réclame aussi des vertus de création et d'invention :

[...] même lorsque le juge est seul, il s'efforce à penser avec les autres, de leur point de vue. L'intégrité suppose en effet un dialogue de la pensée avec elle-même. Le juge intègre peut ainsi évaluer sa propre décision dans un dialogue, sinon réel, au moins imaginaire. Le critère d'un tel dialogue n'est plus alors la certitude, comme chez Descartes, mais la cohérence<sup>24</sup>.

Nous pouvons ainsi estimer que la tâche des juges implique qu'ils développent des compétences dont la doctrine traditionnelle ne pouvait rendre compte. En effet, l'état des rapports sociaux se modifie sans cesse. Le monde paraît éclaté, souvent aléatoire, et de nature très complexe. Il est devenu indispensable de bien voir comment cette dynamique des rapports sociaux se reflète dans la rédaction des lois, et par incidence dans tout acte d'interprétation<sup>25</sup>. La doctrine traditionnelle ne rend compte ni des complexités du monde, ni du travail réel des juges. Il convient maintenant de montrer comment l'évolution de la pratique législative fait en sorte que les questions éthiques se posent inévitablement dans la conscience des interprètes du droit. Nous verrons qu'ils n'opèrent pas au sein d'un Emyrée surplombant le monde social, le législateur ayant lui-même redéfini la pratique interprétative.

### **RÉDACTION DES LOIS : NOUVEAUX RAPPORTS À L'ACTION, À L'ÉTHIQUE APPLIQUÉE**

La dynamique actuelle des rapports sociaux exerce une influence de plus en plus complexe dans la rédaction des lois. La mondialisation et l'avènement d'institutions internationales créées par le concert des États font désormais peser sur tous les participants, sur les organisations et sur les citoyens, des contraintes extrêmement variées, que ce soit sur le plan social, sur le plan institutionnel et juridique, et sur le plan économique<sup>26</sup>. L'éventail rédactionnel au sein des États est d'ailleurs devenu très imposant, d'où certains appels à la déréglementation. Il s'ensuit que les contraintes rencontrées par l'interprète pourront être plus ou moins pressantes, selon le degré de précision linguistique des textes législatifs et le contexte de leur élaboration.

D'un côté du spectre législatif et réglementaire, on trouve les lois constitutionnelles et quasi constitutionnelles, telles que les chartes des droits et libertés, généralement rédigées en termes vagues ou flous, sources d'incertitude par

définition, ou bien encore sous la forme d'énoncés de principe<sup>27</sup>. Ces textes font référence aux piliers de la société<sup>28</sup>, c'est-à-dire à ses valeurs prééminentes. De l'autre côté du spectre, on trouve les lois fiscales et les réglementations sur les valeurs mobilières dont les règles sont plus détaillées, plus précises. Certains ont argué que ces derniers textes excluent toute souplesse d'interprétation. Ce n'est pas l'avis du professeur Pierre-André Côté, pour qui tous les textes à interpréter nécessitent une réflexion non mécaniste :

Ce n'est pas dans l'existence ou l'inexistence de création que réside essentiellement la distinction entre l'interprétation d'une charte des droits et l'interprétation d'une loi fiscale, par exemple. Toutes deux exigent une création de sens, mais les contraintes qui pèsent sur la création du sens d'une charte des droits ne sont pas de la même ampleur ni tout à fait de la même nature que celles qui orientent l'interprétation en matière fiscale<sup>29</sup>.

On peut observer, conformément à notre approche analytique et critique, qu'il s'est produit depuis une trentaine d'années une évolution dans la rédaction des lois ordinaires permettant à l'éthique concrète de prendre une place plus évidente, plus aisée à reconnaître pour l'observateur. Cette modification de la rationalité du droit a pris trois formes distinctes. Tout d'abord, certaines lois ont rompu avec le principe du commandement strict au profit de modalités atypiques visant une amélioration des comportements futurs, avec la participation plus explicite de la société civile. D'autres lois obligent de recourir à des instruments conceptuels flous et à fondements moraux. Finalement, dans la foulée de l'adoption de chartes des droits et libertés, certaines lois préconisent explicitement l'exercice d'un pouvoir discrétionnaire de la part des juges, dans certaines circonstances<sup>30</sup>. Il s'agirait là de l'impact croissant de pratiques novatrices en matière de gouvernance face à la complexité des situations sociales émergentes.

La première approche a fait l'objet d'une intéressante étude. Dans un article publié en 2009, le professeur Pierre Issalys a bien illustré l'apparition dans certains textes législatifs de ces nouveaux rapports à l'action, c'est-à-dire d'un droit réflexif qui a recours à des techniques de corégulation, de négociation, de délégation, d'autorégulation. Selon Issalys :

[...] l'opération de décision ne consiste plus seulement à cristalliser, à faire apparaître, en le formulant de manière définitive comme commandement intemporel, abstrait, ciblé [...] un texte susceptible de produire des normes. De plus en plus souvent, du fait de l'apparition de ces nouveaux rapports à l'action, décider du contenu du texte implique justement de ne pas décider de tout absolument, mais plutôt de renvoyer à une pondération et à un choix éventuels entre des valeurs relatives, de signifier l'approbation d'actions dont le texte ne constitue pas l'origine, enfin de conduire vers un résultat plutôt que de le proclamer immédiatement réalisable comme s'il était déjà advenu dans l'ordre idéal du texte<sup>31</sup>.

Pierre Issalys classe ces modalités de rédaction rompant avec le principe du commandement, en six catégories ; il distingue l'action planifiée, orientée, sollicitée, mise à l'épreuve, accompagnée ou affranchie. Ainsi, dans l'action planifiée, le législateur a recours à «un langage militaire, architectural ou gestionnaire», pour encadrer une action diffuse et complexe ; il présente des

textes qui introduisent des « stratégies », des « plans d'action », des « programmes d'action », des « cadres de développement »<sup>32</sup>. Dans l'action orientée, les normes deviennent souples, non contraignantes, prenant la forme d'« orientations », de « schémas », de « directives ». Les textes qui privilégient l'action sollicitée invitent les participants à s'associer au législateur ou à ses agents pour produire ou substituer des textes normatifs. D'autres textes législatifs mettent en quelque sorte l'action à l'épreuve, en se réservant l'opportunité de la juger ultérieurement. Ces textes législatifs font donc la promotion de « codes de bonnes pratiques », prenant la forme de « projets-pilotes », de « lois expérimentales », etc. Certains textes législatifs accompagnent l'action en donnant « à la contrainte exercée à travers le texte une tournure plus conviviale ». Ils peuvent le faire par la voie de la tolérance, de la dispense, ou encore en substituant la contrainte administrative à la contrainte pénale. Enfin, les textes privilégiant l'action affranchie formulent des objectifs et laissent à l'action le libre choix des moyens.

Cette tendance à reconnaître la participation de la société civile à la production et à la mise en œuvre du droit comporte des incidences, pour le travail de l'interprète des lois, qui n'ont pas échappé à Karim Benyekhlef. L'interprète reçoit l'obligation de construire sa décision en fonction d'une complexité toujours indéterminée au moment de la rédaction législative :

Sans entrer dans les détails, on peut penser, intuitivement, que l'interprétation d'une loi-programme éloigne le juriste des canons classiques du positivisme juridique pour l'entraîner vers une analyse où le contexte d'adoption et de déploiement du texte, ses conditions générales d'application, l'auditoire auquel il s'adresse doivent constituer des éléments à prendre en compte. L'interprète se dirige alors vers une analyse « contextuée », pour emprunter le qualificatif de Jean-François Gaudreault-Desbiens<sup>33</sup>.

Dans la deuxième approche, le législateur a voulu promouvoir la justice et l'équilibre en codifiant plus spécifiquement certains instruments conceptuels flous à fondements moraux et donc sujets aux changements dans les coutumes. On pense ici à différents concepts; l'« équité », soit la juste appréciation de ce qui est dû à chacun<sup>34</sup>; l'« abus de droit », le « meilleur intérêt de l'enfant », la « raisonnable » . De fait , la « bonne foi », l'équivalent juridique de la « bonne volonté morale qui prend en compte l'intérêt de l'autre »<sup>35</sup>, est une notion qui se trouvait déjà dans le *Code civil du Bas-Canada*<sup>36</sup>. Cependant, lors de la réforme du *Code civil du Québec* en 1994, le législateur a décidé d'aller beaucoup plus loin et d'en inscrire l'exigence dès les premiers articles (art. 6 et 7 *C.c.Q.*), bref d'en faire un principe fondamental. « Pour la première fois, le droit positif écrit intègre-t-il, par mouvement systolique, les valeurs morales, sociales et politiques qui agiront sur l'interprétation et l'application des règles de droit »<sup>37</sup>. Selon les commentaires mêmes des rédacteurs du Ministère de la Justice lors de la réforme, on vise ainsi « à empêcher que l'exercice d'un droit ne soit détourné de sa fin sociale intrinsèque et des normes morales généralement reconnues dans notre société »<sup>38</sup>.

Ainsi, ces concepts flous à caractères moraux ou éthiques en viennent à encadrer divers domaines, comme la négociation, la formation, l'exécution et l'extinction de tous les contrats, la rémunération et l'équité salariale, l'indemnisation des victimes d'actes criminels, les actions en développement durable, etc. Le contenu de ces concepts n'étant pas spécifié définitivement par le législateur,



cela permet la prise en compte des autres normes et valeurs sociales. Ce sont alors les tribunaux, les arbitres et les parties au contrat qui doivent en quelque sorte les interpréter et en fixer les termes au fur et à mesure de l'évolution des pratiques et du contexte. Le législateur anticipe en quelque sorte qu'il existe des processus de délibération éthique dans la vie courante des interprètes et des citoyens en général, comme la presse nous le rappelle quotidiennement par ses analyses critiques ou ses chroniques d'opinion.

Enfin, la troisième approche de rédaction des lois s'est trouvée très certainement influencée par l'enchâssement de la *Charte des droits et libertés de la personne* dans la Constitution canadienne en 1982<sup>39</sup>. On compte pas moins de 242 dispositions du *Code civil du Québec* prévoyant explicitement un pouvoir d'intervention discrétionnaire des juges, un pouvoir d'adaptation à des situations où le droit positif n'apporte pas de solution satisfaisante. On trouve en abondance des expressions telles que «le tribunal détermine», «le tribunal fixe», «le tribunal prononce» ainsi que «le tribunal peut»: «...ordonner», «...autoriser», «...dispenser», «...attribuer», «...interdire». Selon Marie-Claude Belleau, cette évolution est très significative :

Il s'agit sans doute d'un des changements les plus fondamentaux qui distinguent le Code civil du Bas-Canada de 1866 de la codification de 1991. Par l'effet de cette politique législative, les juges sont appelés spécifiquement à intervenir «selon leur bon jugement» dans les institutions juridiques de droit privé. Le législateur de 1991 invite ainsi les membres de la magistrature à participer explicitement dans le développement des institutions juridiques et donc à exercer pleinement et ouvertement leur rôle de créateur du droit. Déjà certains auteurs s'interrogent sur l'impact d'un pouvoir discrétionnaire judiciaire accru dans le nouveau Code civil du Québec parce qu'il entraîne une instabilité juridique<sup>40</sup>.

Cette analyse « contextuée » entraîne inévitablement le pouvoir judiciaire dans une délibération éthique, dans une résolution des problèmes en fonction de valeurs à interpréter, à mettre en contexte. Gil Rémillard, ministre de la Justice lors de l'adoption du nouveau *Code civil du Québec* en 1994, en témoigne :

Mais on l'a voulu cette discrétion. Le Code civil est une œuvre collective. C'est ensemble, ministère de la Justice, barreau, notaires et magistrature, que nous avons décidé de donner ce pouvoir discrétionnaire aux tribunaux. Pourquoi ? Parce que l'on voulait avoir ce recul, cette indépendance, cette capacité d'analyser les consensus sociaux pour appliquer les règles de droit<sup>41</sup>.

La grande question est maintenant de savoir comment les juges ont accueilli ce nouveau contexte d'imprévisibilité sociale dans l'interprétation qu'ils font du droit canadien.

## L'UTILISATION PAR LES JUGES D'ARGUMENTS PRAGMATIQUES

Depuis le début des années 80, différents tribunaux canadiens, mais tout particulièrement la Cour suprême du Canada, évoquent le « principe moderne » d'interprétation formulé par le professeur Elmer Driedger, de l'Université d'Ottawa, afin de rendre compte de leur méthodologie d'interprétation. En effet, la Cour suprême du Canada y fait référence dans 59 décisions, de 1984 à janvier 2006<sup>42</sup>. Que dit ce principe ?

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.<sup>43</sup>

Dans un article très documenté, les professeurs Pierre-André Côté et Stéphane Beaulac montrent que cet énoncé doctrinal a eu pour mérite de « faire sauter le verrou » que constituait la règle traditionnelle du sens clair (communément appelée le *Plain Meaning Rule*) et d'encourager une méthode d'interprétation faisant appel à l'utilisation d'un éventail plus étendu de contextes, tels ceux que touchent les objectifs des dispositions et des lois interprétées<sup>44</sup>. Le juge s'est trouvé ainsi libéré de l'ancienne camisole de force.

De toute évidence, au vu de ce que nous avons précédemment illustré, l'énoncé doctrinal de Driedger, bien qu'il offre une certaine latitude à l'interprète, n'est pas si « moderne » qu'il le semble de prime abord. En effet, on n'y trouve pas explicitement exprimée la prise en compte des conséquences d'un jugement sur la vie réelle des gens, sur les incidences du contexte social; en d'autres termes, il ne rend pas compte des « dimensions relationnelles inévitables de l'activité judiciaire »<sup>45</sup>. Cet énoncé désappointe de nombreux juristes canadiens qui croient que pour le bien de la justice, les interprètes devraient avoir la candeur d'énoncer les vrais motifs de leurs décisions, de réduire ainsi le déficit de rationalité toujours présent dans l'exposé de leurs jugements<sup>46</sup>. Ces juristes plaident pour que l'on accroisse la cohérence du discours juridique.

Et à vrai dire, les faits démontrent de plus en plus que les interprètes de la loi ne s'en tiennent pas strictement à l'énoncé de Driedger. Par la force des choses, ils ont recours à des arguments pragmatiques (comme l'effet de la loi, c'est-à-dire les conséquences pratiques de son application pour les justiciables) même lorsque cela n'est pas mentionné et autorisé dans le libellé des lois<sup>47</sup>. Côté en fait la remarque : « Heureusement que les juges sont humains [...], et qu'ils montrent une grande réticence à donner à la loi un sens qui mènerait à des résultats concrets manifestement déraisonnables ou inéquitables <sup>48</sup>. » Afin de ne pas heurter les tenants du positivisme juridique, on fait souvent référence à des présomptions d'intention d'un « législateur raisonnable », « équitable » et « bon ». On présume que le législateur n'a pas voulu de tels résultats, et ce même si la rédaction de la loi n'ouvre pas explicitement cet espace de délibération éthique à l'interprète.

Quelques jugements rendus par la Cour suprême du Canada permettent d'illustrer notre propos. Dans l'affaire *Stewart*<sup>49</sup>, les juges de la Cour suprême du Canada, pour déterminer le sens de l'expression *une chose quelconque* employée à l'article 283 (1) du *Code criminel*, ont vraisemblablement été influencés par les

conséquences de son application au cas concret qui leur était soumis. Il aurait été injuste, en l'occurrence, de condamner l'accusé pour vol de renseignements après qu'une personne (que l'accusé croyait à tort avoir des liens avec un syndicat cherchant à syndiquer les employés d'un hôtel) l'ait engagé pour obtenir une liste de noms, adresses et numéros de téléphone des employés de cet hôtel. Ainsi, les juges ont donné une interprétation étroite à l'article 283 du *Code criminel*, de façon à ce que le vol d'une *chose quelconque* n'englobe pas les renseignements confidentiels en question.

En 1997, dans l'affaire *Rizzo*<sup>50</sup>, la question était de savoir si, en vertu de la *Loi sur les normes d'emploi* de l'Ontario, des employés avaient le droit de réclamer des indemnités de licenciement et de cessation d'emploi lorsque ces événements résultent de la faillite de leur employeur. Une question d'interprétation législative était au centre du litige, car le sens ordinaire des mots employés dans la loi donnait à penser que l'obligation de verser de telles indemnités est limitée aux seuls cas où l'employeur licencie ses employés, ce qui exclut la cessation d'emploi forcée résultant de la faillite. Or, la Cour suprême a considéré qu'une telle solution serait incomplète et surtout injuste vis-à-vis des employés qui n'ont pas eu la «chance», disons-le ainsi, d'être congédiés la veille de la faillite de l'entreprise. Pour cette raison, la Cour décida que la Loi valait également en cas de faillite.

Dans l'affaire *Harvard College*, le plus haut tribunal du pays s'est appuyé sur des considérations extérieures au texte, sinon à l'intention du législateur, pour rendre en 2002 sa décision<sup>51</sup>. Il s'agissait de déterminer si une souris génétiquement modifiée (une oncosouris) utilisée dans la recherche sur le cancer était une invention au sens de l'article 2 de la *Loi sur les brevets*. Le juge Bastarache rédigeait une opinion majoritaire excluant les formes de vie supérieures, telles que les plantes et les animaux, de l'application de la Loi fédérale, et ce, au motif suivant :

Étant donné que la délivrance de brevets pour des formes de vie supérieures est une question très controversée et complexe qui suscite de graves préoccupations d'ordre pratique, éthique ou environnemental non prévues par la Loi, je conclus que le commissaire a eu raison de rejeter la demande de brevet. Il s'agit là d'une question de politique générale qui soulève des points très importants et très lourds de conséquences et qui semblerait exiger un élargissement spectaculaire du régime traditionnel de brevets.

Dans l'affaire *Daoust*<sup>52</sup>, on se trouvait en présence d'une différence fondamentale entre la version anglaise et française d'un article du *Code criminel* décrivant l'infraction de recyclage des produits de la criminalité. Selon la version anglaise, l'accusé Daoust (un résident du Québec) aurait dû être condamné, et selon la version française être acquitté. Or c'est la version française qui a été retenue par la majorité des juges de la Cour suprême, même si après une analyse de l'historique de la loi, c'est la version anglaise qui représentait le mieux la décision du Parlement. Lorsqu'on lit attentivement le jugement, on se rencontre rapidement que des préoccupations d'équité et de sécurité ont prévalu dans ce dossier. L'accusé ne doit pas être induit en erreur, lorsque l'acte d'accusation fait référence à une infraction précise. D'ailleurs, ne doit-on pas supposer que l'accusé n'était tenu de connaître que la loi écrite dans sa langue ?

En 2005, la Cour suprême du Canada est allée encore plus loin, dans l'affaire *Dikranian*<sup>53</sup>, en déclarant une clause de droit transitoire, non applicable à un contrat de prêt étudiant. Dans cette affaire, un recours collectif contre le gouvernement, entrepris par l'étudiant Dikranian en son nom et au nom d'un groupe d'étudiants, contestait la rétroactivité de la loi réduisant, puis éliminant, la période d'exemption du paiement des intérêts du prêt. Même si la clause de droit transitoire était clairement rédigée par le législateur, la Cour a statué que les étudiants dont le contrat de prêt était en cours lors de l'entrée en vigueur de chacune des modifications jouissaient de droits acquis à l'encontre de celles-ci et pouvaient revendiquer l'application des règles en vigueur au moment de la formation du contrat de prêt.

On pourrait encore citer plusieurs jugements de la Cour suprême du Canada qui rappellent aux partenaires sociaux leur responsabilité de combler le déficit de justice et d'équité, dans les circonstances de leur vie commune, par le biais d'une négociation régulière (qui n'a aucun fondement d'un point de vue positiviste) de leur contrat moral de coopération et de bon voisinage<sup>54</sup>. À défaut de pouvoir atteindre la perfection, on doit quand même s'efforcer de réduire les injustices les plus graves qui trouvent plus facilement un large consensus. Cette approche rejoint clairement, à notre avis, la pensée d'Amartya Sen.

Les tribunaux inférieurs ont aussi produit des jugements analogues à ceux qui viennent d'être évoqués. L'analyse de ces décisions est toutefois plus ardue, car les motifs et les valeurs qui les sous-tendent n'y sont pas toujours clairement exprimés par les juges. De fait, comme le mentionnait le juriste Jean Carbonnier, « beaucoup de jugements rendus par les tribunaux dits inférieurs sont [...] des jugements intuitifs d'équité »<sup>55</sup>.

À titre d'exemple, dans l'affaire *Gubner*<sup>56</sup>, la Cour du Québec (un tribunal de première instance) permet à un couple de personnes âgées de mettre fin à la location du second logement du duplex qu'ils occupent, pour y installer leur infirmière. Pourtant, le *Code civil du Québec* prévoit clairement qu'un locataire a droit au maintien dans les lieux et que la résiliation d'un bail par le propriétaire ne peut se faire que s'il veut l'habiter lui-même ou y loger ses ascendants ou descendants au premier degré, ou tout autre parent ou allié dont il est le principal soutien. La Cour du Québec a pris en considération le vieillissement de la population et les ressources de plus en plus limitées des soins de la santé et a donc retenu une interprétation de la loi permettant « d'apporter une solution raisonnable au problème réel et concret qui lui était soumis »<sup>57</sup>.

Dans les décisions que nous venons d'évoquer, il s'agissait toujours de déterminer le sens du texte de loi, à l'intérieur d'un débat judiciaire traditionnel, c'est-à-dire hors de toute contestation constitutionnelle. Or dans des causes où les juges doivent interpréter le partage des compétences législatives dans le système fédéral canadien et les droits constitutionnels protégés par la *Loi constitutionnelle de 1982* et la *Charte canadienne des droits et libertés*, l'interaction entre le droit et les systèmes de valeurs d'une société est beaucoup plus apparente, de même que la préoccupation d'une « entrée en dialogue avec la société civile »<sup>58</sup>. C'est ainsi que la métaphore de l'« arbre vivant » est souvent utilisée par les juges de la Cour suprême du Canada pour expliquer leur démarche interprétative de textes constitutionnels qui contiennent inévitablement des notions floues. Dans nos recherches sur le site de la Cour suprême du Canada, nous avons répertorié au moins 17 jugements ayant recours spécifiquement à cette métaphore<sup>59</sup>.

À titre d'exemple, en 2004, dans le *Renvoi relatif au mariage entre personnes de même sexe*<sup>60</sup>, le gouverneur en conseil demandait à la Cour suprême du Canada d'entendre un renvoi relatif à la *Loi concernant certaines conditions de fond du mariage civil* et de répondre à plusieurs questions, dont celle de savoir si l'article dans cette loi qui accorde aux personnes du même sexe la capacité de se marier civilement est conforme à la *Charte canadienne des droits et libertés*. En effet, plusieurs intervenants affirmaient que la *Loi constitutionnelle de 1867* constitutionnalise la définition que la common law attribuait au « mariage » en 1867 et qu'en l'espèce l'intention des rédacteurs de la Constitution devrait être déterminante. Corollairement, certains avançaient que cet article équivaldrait en fait à modifier la *Loi constitutionnelle de 1867* par une interprétation fondée sur les valeurs qui sous-tendent la *Charte* (droit à l'égalité). La Cour suprême du Canada rejette cette interprétation et écrit : « Le raisonnement fondé sur l'existence de "concepts figés" va à l'encontre de l'un des principes les plus fondamentaux d'interprétation de la Constitution canadienne : notre Constitution est un arbre vivant qui, grâce à une interprétation progressiste, s'adapte et répond aux réalités de la vie moderne ». Elle conclut que l'article qui accorde aux personnes du même sexe la capacité de se marier civilement est conforme à la *Charte*.

Même si elle n'a pas fait allusion expressément à la métaphore de « l'arbre vivant », la Cour d'appel du Québec n'en a pas moins observé l'esprit en modifiant les règles du jeu sur la question de l'obligation alimentaire entre personnes non mariées au Québec. En novembre 2010, le plus haut tribunal de la province, dans l'affaire *Droit de la famille - 102866*<sup>61</sup>, a déclaré inconstitutionnel l'article 585 du *Code civil du Québec* traitant de l'obligation alimentaire entre conjoints mariés ou unis civilement. Le législateur québécois, en omettant d'inclure les conjoints de fait à cet article, crée une distinction discriminatoire (déraisonnable) violant ainsi l'article 15 de la *Charte canadienne des droits et libertés* qui protège l'égalité des personnes devant la loi. Pour en arriver à cette conclusion, la Cour d'appel n'hésite pas à évaluer les conséquences pratiques que peut avoir la négation d'une pension alimentaire entre conjoints de fait d'une part, pour le conjoint (bien souvent une femme) démunie, dans une situation de rupture, et d'autre part, pour les enfants issus de ces unions, alors qu'ils n'ont rien à voir avec les choix de leurs parents. L'obligation de fournir des aliments à un ex-conjoint de fait a donc été jugée, par la Cour d'appel, comme relevant de l'équité. La Cour, sous la plume du juge Julie Dutil, écrivait :

Je conviens [...] que l'union de fait est aujourd'hui acceptée dans notre société. Toutefois, avec égards pour son opinion [de la juge de 1<sup>re</sup> instance], je conclus qu'il subsiste dans la loi des désavantages fondés sur l'application de stéréotypes. On pourrait comparer la situation des conjoints de fait à celle des femmes en matière de rémunération à l'emploi. Bien qu'elles ne soient plus stigmatisées sur le marché du travail, les effets de la discrimination dont les femmes ont été historiquement victimes demeurent quant aux questions d'équité salariale (par. 84).

Et plus loin, la juge Dutil mentionne:

L'effet de l'article 585 *C.c.Q.*, tel qu'il est actuellement rédigé, est donc d'exclure ces personnes d'un droit pourtant fonda-

mental, soit « la capacité de subvenir à ses besoins financiers de base après une rupture » (...) (par. 125).

Le juge Louis Lebel, de la Cour Suprême du Canada, explique clairement cette démarche interprétative des lois en vertu de la Charte dans un article publié en 2001 dans la revue *Éthique publique* :

La structure de la *Charte canadienne des droits et libertés* rend inévitable un engagement des tribunaux canadiens et, ultimement, celui de la Cour suprême du Canada, dans les débats sur les valeurs sociétales. [...] Comme on le sait, l'acte constitutionnel de 1982 ne se contente pas d'énumérer les garanties constitutionnelles. [...] En droit constitutionnel canadien, il ne suffit pas d'établir qu'une disposition législative particulière restreint un droit fondamental. Une fois cette restriction démontrée, l'article 1 de la Charte permet à l'État de la justifier par son caractère raisonnable dans une société qui s'affirme libre et démocratique. Le texte de cette disposition impose alors un examen des valeurs sociétales, de leurs liens et de leur importance corrélative. [...] Les tribunaux deviennent alors arbitres de l'existence comme de la rationalité de ces restrictions<sup>62</sup>.

Jean-François Desbiens-Gaudreault et Diane Labrèche dans un ouvrage consacré au contexte social du droit dans le Québec contemporain, produisent une très belle analyse de l'influence des chartes dans l'évaluation des lois et notamment sur la critique des lois injustes, un peu comme on le faisait, à une certaine époque, avec le recours au droit naturel.

Il s'ensuit que, tel que consacré dans les chartes, le droit flirte parfois avec l'éthique. Il *flirte*, disons-nous, car il ne s'agit pas, en effet, de faire prévaloir des conceptions éthiques particulières sur le droit [...]. Le reconnaître n'exclut toutefois pas que des considérations éthiques plus larges puissent influencer sur la pratique et l'interprétation du droit lorsque celui-ci y donne ouverture, ce qui comme on vient de le voir, est de plus en plus souvent le cas<sup>63</sup>.

L'analyse de ces jugements, qu'ils se situent à l'intérieur d'un débat judiciaire traditionnel ou qu'ils consistent à évaluer une loi en fonction des droits fondamentaux protégés par la Loi constitutionnelle et les chartes, démontre que les juges, sans toujours ouvertement l'admettre, s'impliquent dans des processus de délibération éthique. Voyons quelques témoignages personnels à cet égard.

### DES JUGES TÉMOIGNENT...

Sur le plan scientifique, il n'est guère facile de procéder à des études empiriques sur la pratique judiciaire (autrement que sur des textes) en matière d'interprétation des lois<sup>64</sup>. Toutefois, certains juges se sont exprimés en dehors du forum judiciaire sur le travail d'interprétation des lois et le rôle des représentants de la justice, soit lors d'allocutions ou par des articles publiés dans des revues scientifiques. Les « interventions » récentes de trois juges de la Cour suprême que nous avons choisies sont des plus intéressantes, car elles montrent que la communauté juridique est sensible à différents contextes sociaux lors de l'interprétation des lois.

Ainsi, la juge Claire L'Heureux-Dubé, sa carrière à la Cour suprême du Canada tirant à sa fin, prononçait une conférence en 2002, devant les membres de la Cour supérieure du Québec, sur les défis des juges à l'ère de la mondialisation, sur leur rôle en tant que membres d'une communauté juridique globale<sup>65</sup>. L'accroissement des échanges internationaux sur les plans juridique, commercial, social et culturel ne saurait demeurer sans conséquence sur le droit national et sur la façon dont il est appliqué par les juges. Les droits de la personne, le droit de l'environnement, le droit de l'immigration, la propriété intellectuelle, le droit de la science et des technologies ont de plus en plus à composer avec des normes élaborées sous l'égide des Nations Unies et de diverses organisations internationales. Le temps est donc révolu, selon la juge L'Heureux-Dubé, où les affaires juridiques et économiques se régleraient dans le seul cadre des États et où les questions sociales ne relèveraient que des politiques nationales. Les problèmes appartiennent désormais au monde tout entier.

La communauté juridique mondiale fait souvent face à des problèmes sociaux similaires (suicide assisté, protection de l'environnement, droits des personnes homosexuelles, asile politique, etc.) et elle produit des solutions qu'on ne peut se permettre d'ignorer dans le traitement des cas d'espèce dans les juridictions nationales. L'activité juridique d'interprétation voit survenir un champ complexe de normes susceptibles de surdéterminer l'interprétation des normes nationales. Les juges ne sont plus tels des cloîtrés dans leur propre juridiction, car ils risqueraient alors de se priver de solutions nouvelles trouvées ailleurs, peut-être plus adaptées aux conditions émergentes dans cette ère de mondialisation. D'ailleurs, la juge Dubé cite de nombreuses décisions de la Cour suprême du Canada, où il fut pris en considération des sources du droit international pour l'interprétation d'une loi nationale canadienne.

Les juristes aux quatre coins de la planète doivent maintenant entretenir un dialogue soutenu afin de trouver des solutions « qui pourront avoir le mérite d'être opportunes, innovatrices et coopératives, pour une communauté légale désormais devenue globale ». Toujours selon la juge L'Heureux-Dubé,

Tôt ou tard, chaque membre de la magistrature devra sortir des sentiers battus et se pencher, par exemple, sur la légalité du clonage humain, les manipulations génétiques, la classification des banques de génomes, la forme et les modalités de la réglementation dans le *cyber espace*, etc. - toutes des questions controversées ayant des incidences à l'échelle mondiale. En tant que juges, la recherche de l'information pertinente pour la solution de ces litiges nous obligera forcément à nous familiariser avec ces divers domaines, d'où lecture de revues scientifiques, d'arrêts, de traités, de documents internationaux, etc. Et le travail des juges, des avocats et des étudiants s'alourdit d'autant ! Or, il est devenu impératif pour nous d'être le plus informés possible des contextes sociaux, législatifs, scientifiques et technologiques afin de bien cerner - avec clarté et justesse - les enjeux des causes qui nous sont présentés<sup>66</sup>.

De plus, la juge L'Heureux-Dubé fait état des dimensions de la personnalité des interprètes judiciaires qu'appellent ces nouvelles réalités :

Afin de remplir adéquatement notre rôle de juge, nous aurons aussi besoin d'ouverture d'esprit, d'imagination, de sensibi-

lité, de patience, et surtout, d'une énergie sans borne pour ainsi saisir les brillantes opportunités que nous apporte la globalisation judiciaire<sup>67</sup>.

Pour sa part, l'honorable Charles D. Gonthier, juge à la Cour suprême du Canada de 1989 à 2003, dans un discours prononcé en 2006 à la XVII<sup>e</sup> conférence des juristes de l'État, a fait part de ses réflexions sur l'esprit des lois et les valeurs fondamentales dont le juge doit s'inspirer lorsqu'il rend un jugement, ainsi que sur les fonctions complémentaires du droit et de l'éthique, comme lieux de débat sur les principes fondamentaux de la vie collective. À son avis, la notion de fraternité (le souci d'autrui, de son mieux-être) est au cœur de l'esprit des lois, même si elle est davantage vécue que conceptualisée. Cette notion n'apparaît nulle part dans nos chartes, par exemple, mais elle constitue tout de même, selon lui, la trame de fond de nos législations.

Ainsi, au soutien du texte de loi, se trouve l'esprit des lois. Cet esprit ne vise pas le seul énoncé de règles et doit être le reflet des valeurs auxquelles fait appel une société dans l'élaboration de règles juridiques. Ces valeurs de l'esprit des lois doivent comprendre la coopération, l'engagement, la responsabilité, le sens communautaire, la confiance, l'équité, la sécurité et l'empathie. Il s'agit là d'éléments de la solidarité ou fraternité. Ces valeurs, comme la liberté et l'égalité, sont fondamentalement des valeurs morales, valeurs auxquelles nous aspirons souvent sans les atteindre. Ces valeurs agissent avec la liberté et l'égalité ainsi qu'entre elles et ensemble sont l'écheveau dont est tissée la toile de la fraternité<sup>68</sup>.

Le juge Gonthier nous rappelle ce qu'est une collectivité, une communauté essentiellement morale, au sens où elle se définit par un certain nombre de principes, qu'elle y adhère, qu'elle reconnaît que des agents sont responsables de leur maintien.

Les collectivités ne sont pas simplement le résultat de la poursuite commune par plusieurs d'intérêts personnels. Elles ne sont pas non plus un simple moyen de satisfaire à des besoins collectifs. Les collectivités existent en grande partie du fait d'un désir d'appartenir à une famille. La fraternité est l'expression d'une confrérie de convictions et d'intérêts partagés<sup>69</sup>.

Conséquence de la complexification de la vie sociale, le rôle des juges s'est considérablement élargi. Auparavant, ils vquaient essentiellement à la résolution de différends entre personnes (la réparation des pots cassés) ou à la sanction de comportements criminels; maintenant, ils doivent tenter de maintenir, par la médiation ou autrement, un équilibre fraternel au sein de la collectivité, fondement de la paix sociale. Le juge Gonthier, même s'il n'utilise pas spécifiquement la notion de « développement » dans son allocution, paraît parfaitement persuadé que l'administration de la justice s'est vu confier un rôle fondamental à jouer dans la gouvernance de la société. Le juge Gonthier rappelle à la communauté des juges et juristes qu'ils sont appelés à être des éducateurs de la conscience et de l'intelligence collective, les médiateurs de conflits sociaux parfois profonds. Leurs jugements ont une valeur démonstrative et éducative pour la communauté juridique et pour la communauté humaine la plus étendue :



[...] les règles définies et sanctionnées par la loi sont nécessaires et un juste équilibre doit être recherché entre la loi et l'éthique, l'une n'excluant pas l'autre. La recherche de cet équilibre est importante. Elle est importante pour le juge appelé à rendre la justice avec sagesse et participer à la bonne gouvernance par l'interprétation de lois souvent imprécises et de large portée ou ayant à décider si un manquement à une règle d'éthique est tel qu'il mérite sanction de la loi. En décidant des remèdes à apporter et dans son appréciation de leur impact sur l'individu et la communauté actuellement et pour l'avenir, le juge doit s'inspirer des valeurs fondamentales et avoir à l'esprit leurs deux modes d'expression : la loi et l'éthique – celles-ci sont complémentaires et s'appuient l'une l'autre, mais diffèrent dans leur impact sur les personnes et la façon de réconcilier les valeurs humaines<sup>70</sup>.

Enfin, dans un article publié en 2011 dans un hommage collectif au professeur Pierre-André Côté, l'honorable Louis Lebel, juge à la Cour suprême du Canada, exprime sa perception de la méthode d'interprétation des lois dite moderne, de Driedger<sup>71</sup> et des interrogations qu'elle suscite à l'égard de la fonction de magistrat. Cette méthode, on le rappelle, mentionne qu'il faut lire les termes d'une loi dans leurs contextes, en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Le juge Lebel souligne que même si la formulation actuelle de Driedger ne fait pas mention de l'étude des conséquences d'une interprétation, cela ne signifie pas pour autant qu'elle ne se retrouve pas dans l'activité d'interprétation judiciaire. Ainsi, ajoute le juge Lebel:

J'avoue me résigner difficilement à m'incliner devant une interprétation absurde tirée de la lecture originelle du texte législatif. En effet, cette lecture doit s'effectuer dans l'ensemble de son contexte. Elle impose aussi l'examen des conséquences de l'interprétation pour le cas particulier ou, notamment au niveau des cours d'appel et des cours suprêmes, des effets systémiques de la décision envisagée. Le juge ne peut être indifférent au résultat de son action. La considération de l'effet de l'interprétation envisagée conduit souvent à une remise en cause de l'analyse originale pour rechercher un sens plus conforme à l'esprit d'une disposition particulière ou de l'ensemble de la loi où elle se trouve placée, sinon aux valeurs du système juridique à l'intérieur duquel elle agit<sup>72</sup>.

Pour le juge Lebel, l'interprétation des lois est une « œuvre complexe » qui « constitue, au moins en partie, un travail de création et de médiation » entre le législateur et le citoyen. Le juge n'est pas une voix passive de la loi. L'incomplétude, l'imprécision et la non-exhaustivité inévitables des règles de droit font que le juge doit en préciser les effets et la portée en les actualisant :

Certains souhaiteraient que le droit soit gravé pour l'éternité sur des tables de bronze. J'accepte plutôt qu'il soit un arbre vivant et qu'il trouve sa fécondité dans cet effort d'interprétation auquel incite la méthode moderne.

Le juge Lebel utilise la métaphore de « l'arbre vivant », non seulement comme précepte fondamental d'interprétation des lois constitutionnelles, mais comme

préoccupation permettant de faire face, à une réalité évolutive où le droit doit continuer de prévaloir sur les nombreuses tensions que produit une communauté vivante...

L'appel au dialogue entre juristes, entre juristes et législateurs, entre juristes et citoyens, tel que le suggèrent les juges L'Heureux-Dubé, Gonthier et Lebel, met en évidence la place incontournable qu'occupe la dimension éthique dans le champ de l'interprétation, en raison des nombreux pivots de valeurs mis en cause. Dans un monde sociologiquement complexe ou diversifié, l'ordre social du droit se voit réinsérer dans l'ensemble des ordres sociaux, avec pour acteur-clé le corps des juges de tous niveaux.

### POUR CONCLURE

Cette responsabilité des juges, nouvelle seulement par l'étendue de ses sources et de sa portée, rejoint la préoccupation d'Amartya Sen, ancrée dans la tradition multimillénaire indienne, pour qui la justice n'est faite que lorsqu'elle est vue comme faite. Chez lui, il existe un lien clair entre l'objectivité d'un jugement et son aptitude à résister à l'examen public<sup>73</sup>. Au-delà de la commodité et de l'utilité pratique, de l'efficacité de son exécution, c'est surtout le bien-fondé éthique de la décision qui peut être compromis s'il demeure de l'incompréhension à son sujet. En pareil cas, le progrès de la réflexion collective peut être entravé. Sen a montré que ce jeu social d'autoredéfinition permanente ne connaît pas de frontières. La tradition sanskrite classique dont il se réclame, dans son approche du concept de justice, distingue le « Niti » et le « Nyaya ».

Niti est notamment utilisé pour évoquer l'organisation appropriée et le comportement correct. Nyaya, contrairement à Niti, exprime un concept global de justice réalisée. Vu sous cet angle, le rôle des institutions, des règles et de l'organisation, si important soit-il, doit être évalué dans la perspective plus large et plus englobante de la Nyaya, indissociablement liée au monde qui émerge réellement et pas uniquement à nos institutions ou à nos règles<sup>74</sup>.

Une doctrine de l'interprétation juridique qui voudrait en demeurer à l'application de recettes de lecture textuelle, de simple recherche de l'intention du législateur, sans comprendre l'étendue des implications du judiciaire dans la gouvernance du monde qui émerge, ne ferait que laisser dans l'ombre la volonté de justice et de fraternité qui s'impose comme seule voie réaliste de survie de la communauté des humains. Cet espace de délibération éthique est une caractéristique essentielle au bon travail des juges. Terminons avec ce mot de synthèse qui nous vient de Jean de Munk...

Le droit n'est ni dans les choses, ni dans les esprits, et le dilemme classique est d'ores et déjà périmé : il est entre les sujets, là où seule une éthique de la parole fait désormais office de fragile rempart contre la dissolution totale des identités<sup>75</sup>.

## NOTES

- <sup>1</sup> Sen, Amartya, *L'idée de justice*, Paris, Flammarion, 2009. En 1998, Amartya Sen a reçu le prix Nobel d'économie pour ses travaux sur les causes de la famine, l'économie du bien-être et du développement et les mécanismes de la pauvreté.
- <sup>2</sup> Rawls, John, *Théorie de la justice*, trad. de l'américain par Catherine Audard, Paris, Seuil, 1987, c1971. L'ouvrage de Rawls, dans la tradition de Hobbes, Rousseau, Locke et Kant, a eu un impact significatif sur la philosophie politique, l'éthique, le droit et les sciences sociales, au XX<sup>e</sup> siècle.
- <sup>3</sup> Jeanpierre, Laurent, « L'idée de justice, d'Amartya Sen : le plaidoyer d'Amartya Sen », *Intimeconviction.fr*, 21 janvier 2010 ; France, Ingrid, « À propos du livre d'Amartya Sen, L'idée de justice, Flammarion, 2010 », *La revue lacanienne*, vol. 2, n° 7, 2010, p. 171-173; Terestchenko, Michel, « Amartya Sen, Martha Nussbaum et l'idée de justice », *Revue du MAUSS permanente*, 14 octobre 2010 [en ligne] <http://www.journaldumauss.net/spip.php?article719>
- <sup>4</sup> Amartya Sen est originaire de l'Inde, plus précisément du Santiniketan. Le préambule de la Constitution de l'Inde garantit non seulement l'égalité et la liberté, mais également il demande « de promouvoir parmi [tous les habitants de l'Inde] la fraternité qui assure la dignité de la personne et l'unité et l'intégrité de la nation ».
- <sup>5</sup> Terestchenko, Michel, « Amartya Sen, Martha Nussbaum et l'idée de justice », *Revue du MAUSS permanente*, 14 octobre 2010 [en ligne] <http://www.journaldumauss.net/spip.php?article719>
- <sup>6</sup> Il n'est pas question ici d'analyser les nouveaux modes de règlement des différends, où le travail éthique du juge-médiateur nous apparaît encore plus évident. On consultera le témoignage très intéressant de la juge Louise Otis, pionnière de la médiation judiciaire au Québec, lors d'une entrevue à Radio-Canada, le 21 janvier 2011. On trouvera cette entrevue sur le site suivant : [http://www.radio-canada.ca/emissions/le\\_21e/2010-2011/chronique.asp?Chronique=131747](http://www.radio-canada.ca/emissions/le_21e/2010-2011/chronique.asp?Chronique=131747). On consultera aussi les travaux de Lalonde, Louise, « Tournant éthique du droit et enjeux de la gouvernance, vers quelle gouvernance pour le droit ? », in Louise Lalonde, Jutras, F, Lacroix, A et Patenaude, J., dir., *Mélanges Georges A. Legault*, Sherbrooke, Éditions de la RDUS, 2008, p. 117-144; Lalonde, Louise, « Valeurs de la justice négociée et processus de médiation », in Vincente Fortier dir., *Le juge, gardien des valeurs*, Paris, CNRS Éditions, 2007, p. 184-198.
- <sup>7</sup> Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat, *Interprétation des lois*, 4<sup>e</sup> éd., Montréal, Thémis, 2009.
- <sup>8</sup> Le métamoteur spécialisé de la *Société québécoise d'information juridique* (SOQUIJ) permet d'accéder à plus de 7 000 décisions de la Cour supérieure du Québec, de la Cour d'appel du Québec et de la Cour suprême du Canada faisant spécifiquement référence à l'intention ou à la volonté du législateur.
- <sup>9</sup> Garapon, Antoine, Allard, Julie, Gros, Frédéric, *Les vertus du juge*, Paris, Dalloz, 2008, p. 5.
- <sup>10</sup> Bernatchez, Stéphane, « De la représentativité du pouvoir législatif à la recherche de l'intention du législateur : les fondements et les limites de la démocratie représentative », *Cahiers de Droit*, vol. 48, n° 3, 2007, p. 449-476.
- <sup>11</sup> Côté, Pierre-André, « Le souci de la sécurité juridique dans l'interprétation de la loi au Canada », *Revue du notariat*, vol. 110, 2008, p. 685-692.
- <sup>12</sup> Issalys, Pierre, « Le texte et l'action : leurs nouveaux rapports dans le langage des lois », in Karim Benyekhlef, dir., *Le texte mis à nu*, Montréal, Éditions Thémis, 2009, p. 156.
- <sup>13</sup> Nous faisons ici une nette distinction entre la morale et l'éthique. La morale est constituée des normes de comportements édictées et dans une bonne mesure pratiquées par une communauté humaine. Par contraste, à moins de refouler l'éthique dans une forme religieuse ou théologique, l'éthique implique une réflexion complexe d'êtres conscients désireux de faire le mieux possible dans les circonstances du moment, en tenant compte : des différentes lois,

- normes et politiques qui s'appliquent à la situation, des valeurs et des intérêts en jeu, des conséquences des actions sur autrui, de divers pivots de valeurs ou principes moraux, plus ou moins généralement acceptés, des attentes légitimes d'une collectivité. Morency, Marc-André, Simard, Jeanne, « Le cadre d'éthique dans l'organisation : un processus de création soumis à des contraintes » *Ethica*, vol. 16, n° 1, 2006, p. 11-33.
- <sup>14</sup> Rocher, Guy, « Études de sociologie du droit et de l'éthique », in Belley Jean-Guy, dir., *Le droit soluble. Contributions québécoises à l'étude de l'internormativité*, Paris, LGDJ, 1996. On écouterait aussi la conférence de Jean-Guy Belley et de Guy Rocher, « L'internormativité : les perspectives sociologiques et juridiques », Université de Montréal, jeudi 25 février 2010, <http://www.droitcalendrier.umontreal.ca/events/index.php?com=detail&eID=554&year=2010&month=2>.
- <sup>15</sup> Côté, Pierre-André, « L'interprétation de la loi, une création sujette à des contraintes », *Revue du barreau*, vol. 50, 1990, p. 322-336; Sullivan, Ruth, « Statutory Interpretation in the Supreme Court of Canada », *Ottawa Law Review*, vol. 30, 1998-99, p. 175; Sullivan, Ruth, *Statutory Interpretation*, Toronto, Irwin Law, 2007; Bernatchez, Stéphane, « De la vérité à l'intersubjectivité et du texte au contexte: vers une conception réflexive de l'interprétation du droit », in *Interpretatio non cessat : Mélanges en l'honneur de Pierre-André Côté*, Stéphane Beaulac, Mathieu Devinat, dir., Montréal, Éditions Yvon Blais, 2011; Graham, Randal N. M., « What Judges Want : Judicial Self-interest and Statutory Interpretation » *Statute Law Review*, vol. 30, n° 1, 2009, p. 38-72.
- <sup>16</sup> Certains diront même avec humour, « to say that we are possessed of the meaning is to imply directly (and impossibly) that we are God »; Macdonald, Roderick A., Wilner, Jos, « Living Together, Living Law » in *Mélanges Georges A. Legault. L'éthique appliquée, par-delà la philosophie, le droit, l'éducation*, Sherbrooke, Éd. Revue de droit de l'Université de Sherbrooke, 2008, p. 145-169.
- <sup>17</sup> Tremblay, Luc B., « L'évolution du concept de droit depuis 30 ans : de l'empire du fait au discours normatif sur le juste et le bien », in *Essai et conférences des Éditions GGC*, Chaire d'éthique appliquée, Sherbrooke, Université de Sherbrooke, 2003, n° 21, p.1.
- <sup>18</sup> Côté, Pierre-André, « L'interprétation de la loi, une création sujette à des contraintes », *Revue du barreau*, vol. 50, 1990, p. 322-336; Frydman, Benoît, *Le sens des lois. Histoire de l'interprétation et de la raison juridique*, Bruxelles, Bruylant, 2005, p. 23; Simard, Jeanne, « L'interprétation législative au Canada : la théorie à l'épreuve de la pratique », vol. 35, 2001, *Revue Juridique Thémis*, p. 549
- <sup>19</sup> Noreau, Pierre, « L'acte de juger et son contexte: éléments d'une sociologie politique du jugement », *Revue Éthique publique*, vol.3, n° 2, 2001; on pourra aussi consulter les textes du collectif, *Mélanges Andrée Lajoie*, Pierre Noreau, Louise Rolland, dir., Montréal, Éditions Yvon Blais, 2008.
- <sup>20</sup> Bédard, Jean, *Le pouvoir ou la vie. Repenser les enjeux de notre temps*, Paris, Fides, 2008, p. 78
- <sup>21</sup> De façon générale, le développement se dit de processus permettant de faire croître, de progresser, de donner de l'ampleur, de rendre plus complexe au fil du temps. Ce concept a d'abord servi de foyer de réflexion dans les sciences de la vie; mais il a essaimé et s'est trouvé à alimenter les sciences sociales, la sociologie et la science économique en particulier. Dans *Le scandale du développement*, paru en 1965, l'économiste Jacques Austruy proposait une définition du développement que nous avons adaptée afin d'y intégrer des considérations environnementales ou d'équité, des dimensions propres à une gouvernance fiduciaire. *Le développement est l'ensemble des transformations institutionnelles, psychosociales, mentales qui permettent une croissance durable, une diminution des inégalités, le maintien des cultures particulières, en symbiose avec l'environnement. Le développement, en dernier ressort, est la montée d'une intelligence collective, d'institutions par lesquelles les collectivités, les citoyens contrôlent leur destinée, en fonction de leurs intérêts de citoyens et de collectivités.* Voir Austruy, Jacques, *Le scandale du développement : commentaires par G. Leduc et L.-J.*

*Lebret. Bibliographie analytique et critique par Guy Caire*, Nouv. éd. corr. et mise à jour, Paris, M. Rivière, 1972.

- <sup>22</sup> Sur les fonctions du droit, on consultera, Noreau, Pierre, « Et le droit, à quoi sert-il ? Études des usages étatiques et des fonctions du droit contemporain » in Pierre Noreau, dir., *Le droit à tout faire : exploration des fonctions contemporaines du droit*, Montréal, Éditions Thémis, 2008, p. 205-251.
- <sup>23</sup> Noreau, « L'acte de juger et son contexte: éléments d'une sociologie politique du jugement », p. 21.
- <sup>24</sup> Garapon, Antoine, Allard, Julie, Gros, Frédéric, *Les vertus du juge*, Paris, Dalloz, 2008, p. 121.
- <sup>25</sup> Au Québec, l'École du Barreau a entrepris depuis déjà 10 ans de sensibiliser les juristes-étudiants aux questions du contexte social. Voir à cet effet : Gaudreault-DesBiens, Jean-François, Labrèche, Diane, *Le contexte social du droit dans le Québec contemporain. L'intelligence culturelle dans la pratique des juristes*, Cowansville, Les Éditions Yvon Blais, 2010, p. VII et VIII.
- <sup>26</sup> Aledo, Louis-Antoine, *Le droit international public*, Paris, Dalloz, 2009, p. 47.
- <sup>27</sup> On consultera à ce sujet, Beaulac, Stéphane, « L'interprétation de la Charte : reconsidération de l'approche téléologique et réévaluation du rôle de droit international », *Supreme Court Law Review*, (2d), vol. 27, 2005, p. 1.
- <sup>28</sup> Otis, Louise, entrevue à Radio-Canada, le 21 janvier 2011. On retrouve cette entrevue sur le site suivant : [http://www.radio-canada.ca/emissions/le\\_21e/2010-2011/chronique.asp?id-Chronique=131747](http://www.radio-canada.ca/emissions/le_21e/2010-2011/chronique.asp?id-Chronique=131747)
- <sup>29</sup> Côté, *Interprétation des lois*, p. 26.
- <sup>30</sup> Mentionnons enfin que des décisions prises dans des juridictions étrangères ou internationales peuvent obliger ou inspirer les juges nationaux.
- <sup>31</sup> Issalys, Pierre, « Le texte et l'action : leurs nouveaux rapports dans le langage des lois », in Karim Benyekhlef, dir., *Le texte mis à nu*, Montréal, Éditions Thémis, 2009, p. 165. On consultera aussi à ce sujet : Noreau, « Et le droit, à quoi sert-il ? Études des usages étatiques et des fonctions du droit contemporain »; Lalonde, Louise, *La parole des citoyens interpellée par les lois à exigence de réflexivité, quel(s) usage(s) et quelle(s) parole(s) ?* in V. Fortier et S. Lebel-Grenier, dir., *La parole et le droit*, Sherbrooke, Les Éditions Revue de droit de l'Université de Sherbrooke, 2008, p. 11-30 ; Nonet, Philippe et Selznick, Philip, *Toward Responsive Law. Law and Society in Transition*, New York, Harper & Row, 1978.
- <sup>32</sup> La *Loi sur le développement durable*, L. R. Q., c. D-8.1.1, adoptée par le législateur québécois en 2006 en est un bel exemple.
- <sup>33</sup> Benyekhlef, Karim, « Introduction – Le texte mis à nu », in Karim Benyekhlef, dir., *Le texte mis à nu*, Montréal, Éditions Thémis, 2009, p.13.
- <sup>34</sup> L'équité incarne ainsi les aspirations humaines à une justice meilleure. Elle est intimement liée à l'éthique, car elle implique, selon René Villemure, une appréciation, une part de subjectivité. « Le tout est de pouvoir distinguer entre une situation régulière, où les règles s'appliquent "objectivement", en toute justice, et une situation irrégulière, où l'application littérale de la règle va à l'encontre de l'esprit qui l'a édictée et induit une forme plus ou moins grande d'injustice. Dans ce dernier cas, l'équité demande l'intervention d'une certaine forme de subjectivité dans l'application de la règle. »; Villemure, René, « Distinguer l'équité de l'égalité », *Bulletin réflexif*, Institut québécois d'éthique appliquée, 7 janvier 2005; on consultera aussi, Moore, Benoît, «La réforme du droit de la consommation et l'équité contractuelle» in Fondation Claude-Masse, *Pour une réforme du droit de la consommation au Québec. Actes du colloque des 14 et 15 mars 2005*, Cowansville, Yvon Blais, 2005, p. 113-130; Paquet, Jean-Claude, «L'intervention du Protecteur du citoyen : au-delà de la légalité, l'équité» in Barreau du Québec, Service de la formation permanente. *Développements récents en droit administratif et constitutionnel (2004)*, vol. 207, Cowansville, Yvon Blais, 2004, p. 95-122. On

retrouve la notion d'équité dans les lois suivantes : art. 2, *Loi sur l'aide aux victimes d'actes criminels*, c. A-13.2; art. 351, *Loi sur les accidents du travail et les maladies professionnelles*, c. A-3.001; *Loi sur l'équité salariale* c. E-12.001; art. 79, *Code du travail*, c. C-27; art. 3, *Loi sur la fonction publique*, c. F-3.1.1; art. 2, *Loi sur la justice administrative*, c. J-3; art. 18, *Loi sur le ministère de l'Emploi et de la Solidarité et instituant la Commission des partenaires du marché du travail*, c. M-15.001; art. 6, *Loi sur le développement durable*, L.R.Q. c. D-8.1.1; art. 243.14, *Loi sur les régimes complémentaires de retraite*, c. R-15.1; art. 64, *Loi sur les terres du domaine de l'État*, c. T-8.1; art. 975 et 1434 *Code civil du Québec*.

- <sup>35</sup> Selon le ministère de la Justice, « équivalent juridique de la bonne volonté morale et intimement liée à l'application de l'équité, la bonne foi est une notion qui sert à relier les principes juridiques aux notions fondamentales de justice. »; Québec (province), *Commentaires du ministre de la Justice : le Code civil du Québec : un mouvement de société*, Québec, Les Publications du Québec, 1993, p. .
- <sup>36</sup> Selon Louise Rolland, on retrouvait déjà dans le *Code civil du Bas Canada* plus ou moins 64 références dont 31 ont été reprises par le nouveau *Code civil du Québec*. Rolland, Louise, « La bonne foi dans le Code civil du Québec : du général au particulier », *Revue de droit de l'Université de Sherbrooke*, vol. 26, 1996, p. 380.
- <sup>37</sup> *Ibid*, p. 379.
- <sup>38</sup> Québec (province), *Commentaires du ministre de la Justice : le Code civil du Québec : un mouvement de société*, vol. 1, p. 8.
- <sup>39</sup> Bernatchez, Stéphane, « Le rôle des valeurs et du contexte dans la transformation de la fonction de juger » *Mélanges Andrée Lajoie. Le droit, une variable dépendante*, in Pierre Noreau et Louise Rolland, dir., Montréal, Éditions Thémis, 2008, p. 333-379; Gaudreault Desbiens, Jean-François, « L'impact du discours des droits sur la culture juridique québécoise : vers un recul de l'hégémonie positiviste ? », *Rev. Interdiscipl. Et. Jur.*, vol. 44, 2000, p. 213; Lalonde, Louise, « L'application de la Charte des droits et libertés de la personne dans le monde vécu, de la protection civiliste à la promotion des droits fondamentaux. Réflexions sur le rapport entre la Charte et le monde vécu », *Numéro thématique hors série Revue du barreau*, 2006, p. 321.
- <sup>40</sup> Belleau, Marie-Claude, « Pouvoir judiciaire et codification : perspective historique », *Revue de droit de l'Université de Sherbrooke*, vol. 28, 1997-98, p. 71.
- <sup>41</sup> Rémillard, Gil, « Tribunaux de première instance : vision d'avenir », in *Tribunaux de première instance : vision d'avenir*, Actes du colloque 2004, Conseil de la magistrature, Québec, 2005, p. 13-22, [En ligne] [http://www.cm.gouv.qc.ca/fr/medias/fichiers/pages/Colloque\\_2004\\_18.pdf](http://www.cm.gouv.qc.ca/fr/medias/fichiers/pages/Colloque_2004_18.pdf)
- <sup>42</sup> Beaulac, Stéphane, Côté, Pierre-André, « Driedger's « Modern Principle » at the Supreme Court of Canada : Interpretation, Justification, Legitimization », *Revue juridique Thémis*, vol. 40, 2006, p.136-137.
- <sup>43</sup> Driedger, Elmer A., *The construction of Statutes*, Toronto, Butterworths, 1974, p. 67.
- <sup>44</sup> Côté, *Interprétation des lois*, p. 53.
- <sup>45</sup> Noreau, « L'acte de juger et son contexte : éléments d'une sociologie politique du jugement », p. 17.
- <sup>46</sup> Côté, « L'empereur est nu... et le juge ? », p.183-84. On consultera aussi, Sullivan, Ruth, « Statutory Interpretation in the Supreme Court of Canada », *Ottawa Law Review*, vol. 30, 1998-99, p. 175; Sullivan, Ruth, *Statutory Interpretation*, Toronto, Irwin Law, 2007; Samson, Mélanie, « La théorie structurante du droit : plaidoyer pour une redéfinition de l'agir juridique », *Lex Electronica*, vol. 14, n° 1, 2009, p. 1-19. On consultera en droit américain, Zeppos, Nicolas S., « Judicial Candor and Statutory Interpretation », *Georgetown L. J.*, vol. 78, 1989-90, p. 353.
- <sup>47</sup> Côté, *Interprétation des lois*, p. 509 et suiv.
- <sup>48</sup> *Ibid*, p. 514.
- <sup>49</sup> *R. c. Stewart*, [1988] 1 R.C.S. 963.

- <sup>50</sup> *Rizzo & Rizzo Shoes Ltd. (re)*, [1998] 1 R.C.S. 27.
- <sup>51</sup> *Harvard College c. Canada (Commissaire aux brevets)*, 2002 CSC 76, [2002] 4 R.C.S. 45.
- <sup>52</sup> *R. c. Daoust* [2004] 1 R.C.S. 217.
- <sup>53</sup> *Dikranian c. Québec (Procureur général)* [2005] 3 R.C.S. 530; Côté, Pierre-André, « Équité et droit transitoire – Commentaire de l’arrêt *Dikranian c. Québec (Procureur général)* », *Revue du Barreau*, vol. 65, 2005, p. 293.
- <sup>54</sup> *Ciment du Saint-Laurent inc. c. Barrette*, [2008] 3 R.C.S. 392; *Corbière c. Canada (ministre des Affaires indiennes et du Nord canadien)* [1999] 2 R.C.S. 203; *Renvoi relatif à la sécession du Québec* [1998] 2 R.C.S. 217.
- <sup>55</sup> Cité dans Noreau, « L’acte de juger et son contexte : éléments d’une sociologie politique du jugement », p. 20. L’auteur renvoie aux ouvrages de Carbonnier, Jean, *Sociologie juridique*, Paris, Armand Colin, 1972, p. 112 et de Arnaud, André-Jean (éd.), *Dictionnaire encyclopédique de théorie du droit et de sociologie du droit*, Paris, Librairie Générale de Droit et de Jurisprudence, 1993, p. 384.
- <sup>56</sup> *Gubner c. Dahan*, [2006] *R.J.Q.* 903 (C.Q.).
- <sup>57</sup> Pour une description plus complète des faits, on consultera Samson, Mélanie, « La théorie structurante du droit : plaider pour une redéfinition de l’agir juridique », *Lex Electronica*, vol. 14, n° 1, 2009, p. 16-17.
- <sup>58</sup> Lebel, Louis, « Un essai de conciliation de valeurs : la régulation judiciaire du discours obscène ou haineux », *Éthique publique*, vol. 3, n° 2, 2001, p. 51-58.
- <sup>59</sup> Le site de la Cour suprême du Canada est à l’adresse suivante : <http://csc.lexum.org/ft/index.html>
- <sup>60</sup> *Renvoi relatif au mariage entre personnes du même sexe*, [2004] 3 R.C.S. 698.
- <sup>61</sup> *Droit de la famille - 102866*, [2010] *QCCA* 1978. Le gouvernement du Québec a porté ce jugement en appel à la Cour suprême du Canada.
- <sup>62</sup> Lebel, « Un essai de conciliation de valeurs : la régulation judiciaire du discours obscène ou haineux », p. 52
- <sup>63</sup> Gaudreault-DesBiens, Labrèche, *Le contexte social du droit dans le Québec contemporain. L’intelligence culturelle dans la pratique des juristes*, p. 67.
- <sup>64</sup> Dans un numéro de la revue *Éthique publique* de septembre 2001, vol. 3, n° 2, un dossier spécial sur la magistrature et l’éthique était présenté. Plusieurs questions très intéressantes étaient soumises aux collaborateurs de ce numéro dont, entre autres : « Assiste-t-on à un remplacement de l’éthique par le droit ou l’émergence d’un nouveau partage des tâches de régulation sociale ? Qui, du juge ou du législateur, devrait avoir le dernier mot dans la définition des règles du vivre-ensemble ? Le juge se limite-t-il toujours, comme le souhaite le paradigme positiviste, à ne dire que le droit ? » On a ainsi accès à des témoignages de juges de juridictions différentes qui nous disent leur interprétation de ce qu’ils font.
- <sup>65</sup> L’Heureux-Dubé, Claire, *Les défis de la magistrature à l’ère de la globalisation : le rôle du juge en tant que citoyen du monde*, Notes pour une allocution présentée lors du lunch organisé par le Jury Club (Juges de la Cour supérieure du Québec), Montréal, le 7 mai 2002, 23 p.
- <sup>66</sup> *Ibid*, p. 9.
- <sup>67</sup> *Ibid*, p. 22.
- <sup>68</sup> Gonthier, Charles D., « Les Chartes : nos rôles et défis. Valeurs, droit et éthique », in Conférence des juristes de l’État. *Actes de la XVII<sup>e</sup> Conférence des juristes de l’État*, Cowansville, Yvon Blais, 2006, p. 106.
- <sup>69</sup> *Ibid*, p. 110.
- <sup>70</sup> *Ibid*, p. 118.
- <sup>71</sup> Driedger, *The construction of Statutes*.

<sup>72</sup> Lebel, Louis, « La méthode d'interprétation moderne : le juge devant lui-même et en lui-même », in *Interpretatio non cessat : Mélanges en l'honneur de Pierre-André Côté*, Stéphane Beaulac, Mathieu Devinat, dir., Montréal, Éditions Yvon Blais, 2011, p. 116.

<sup>73</sup> Sen, *L'idée de justice*, p. 466-67.

<sup>74</sup> *Ibid.*, p. 46.

<sup>75</sup> Munck, Jean de, « Controverses autour de l'ontologie du droit », *Revue de métaphysique et de morale*, vol. 95, 1990, 415, p. 423 . Pour une analyse plus sociologique des pratiques décisionnelles en matière d'interprétation, voir, Simard, Jeanne, Morency, Marc-André, « Interprétation des lois et création de normes : perspectives ouvertes dans l'étude multidisciplinaire du phénomène juridique », in *Interpretatio non cessat : Mélanges en l'honneur de Pierre-André Côté*, Stéphane Beaulac, Mathieu Devinat, dir., Montréal, Éditions Yvon Blais, 2011, p. 233.



# LA DIMENSION NUMÉRIQUE DANS LE CONCEPT DE MINORITÉ: EFFICIENCE ET JUSTICE ETHNOCULTURELLE <sup>1</sup>

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## RÉSUMÉ

L'article introduit au rôle de l'efficience dans la génération d'avantages ou de désavantages enregistrés par les minorités. L'objectif est de démontrer que l'efficience devrait jouer un rôle plus important dans le domaine de la justice ethnoculturelle. Pour ce faire, une brève présentation de la place du nombre dans la littérature sur le sujet est offerte, ce qui permet de saisir le fond de l'argument consistant à faire des déséquilibres numériques une source certaine des injustices subies par les minorités, notamment dans une perspective inspirée par l'égalitarisme de la chance. De ce point de vue, l'asymétrie numérique peut toutefois constituer une source d'avantages pour ces groupes. Dès lors, une telle asymétrie, qui est l'un des constituants de la définition de la minorité, prend une autre dimension. Plus que cette asymétrie, il apparaît que c'est l'efficience (la manière dont les groupes gèrent cette asymétrie) qui détermine les conditions et succès matériels des membres d'un groupe donné. Après une discussion des minorités efficaces et dominantes, l'article se conclut par la mise en lumière de quelques pistes de recherche rendues visibles par l'efficience et qui sont pertinentes pour la théorie de la justice en contexte multiculturel.

## ABSTRACT

The article introduces to the role of efficiency in the generation of advantages or disadvantaged for minorities. The objective is to demonstrate that efficiency should play a more important role in the domain of ethnocultural justice. For doing so, a brief presentation of the place of numbers in the literature on the topic is offered, which leads to the argument apprehending numerical disequilibria as a definite source of injustices borne by minorities, especially from a perspective inspired by luck egalitarianism. From this point of view however, numerical asymmetry can constitute a source of benefits for these groups. As one of the constituents of the definition of minority, asymmetry thus takes another dimension. Over and above this asymmetry, it appears that it is efficiency (in the manner that groups manage the numerical dimension) that regulates the material conditions and successes of the members of a given group. After a discussion of efficient minorities and dominant minorities, the article concludes by highlighting avenues of research that are made visible by efficiency and that are relevant to the theory of justice in a multicultural context.

Le *Littré* définit la minorité comme «petit nombre, par opposition à majorité» et suggère ainsi que le nombre est un élément essentiel de la définition, ce que confirme un survol de la littérature politique sur le sujet. En dépit de différences notables entre auteurs, l'idée d'une telle asymétrie est récurrente. Du fait de ce caractère central, il est intéressant de s'interroger sur ce que doivent au nombre le statut de minorité ainsi que les droits et obligations moraux qui y sont attachés. De ce point de vue, trois niveaux de réflexion s'entremêlent. Tout d'abord, quelle est la part du nombre dans le processus d'identification des minorités ? Ensuite, dans quelles mesures les inégalités et injustices subies sont-elles attribuables à un déséquilibre numérique ? Enfin, qu'est-ce que cela indique sur le lien entre ces deux usages du nombre : comme critère d'identification et comme facteur d'inégalités et d'injustices ? Bien que cet article couvre ces trois niveaux, l'essentiel du propos se concentre sur les deux dernières questions.

En tant que composante implicite mais constante des analyses multiculturelles au moins sur le plan descriptif, le nombre appelle une analyse normative approfondie afin d'en cerner les implications et limites, ainsi que la fécondité. Par l'entremise du nombre, ce qui est approché est une situation objective dans laquelle un groupe constitue une minorité digne d'intérêt pour la justice ethnoculturelle, car ses membres subissent des injustices et inégalités en raison de leur poids défavorable au sein d'une population par rapport à une «majorité». Dès lors, ce rapport défavorable rendrait difficile la réalisation de leurs préférences, projets de vie, intérêts ou conception de la vie bonne.

L'étude du rôle joué par le nombre introduit donc au cœur de la problématique multiculturelle des considérations relatives à l'efficience<sup>2</sup>. Il est mobilisé pour, à la fois, identifier les groupes potentiellement vulnérables et expliquer leur vulnérabilité (en lien avec d'autres caractéristiques jouant le rôle de marqueurs comme l'identité, l'appartenance religieuse et la culture). Toutefois, le fait de se pencher sur la corrélation entre nombre et inégalités amène à minorer l'influence du premier par l'entremise d'une prise en considération de l'efficience. Dès lors, il apparaît que l'influence du nombre est une relation ambiguë puisque des minorités peuvent, de ce fait, acquérir un avantage compétitif sur la majorité.

En résumé, l'article défend l'importance de l'efficience dans une analyse normative des minorités en adoptant une perspective extérieure à la tradition multiculturaliste. Pour ce faire, il part du nombre, élément constitutif de la plupart des définitions de la minorité. L'argumentation se déploie au cours de quatre sections. La première rappelle la centralité du critère numérique autant dans la théorie que dans la pratique légale et politique. La seconde démontre que le recours au nombre pour expliquer le statut de minorité est non seulement compatible avec l'égalitarisme de la chance, mais le renforce. Il s'assimile ainsi à une circonstance qui handicape la capacité des membres d'une minorité à vivre en accord avec leur culture. Plus précisément, la circonstance consiste en un déficit d'efficience induit par une position d'infériorité numérique. La troisième section interroge le postulat qui fait d'un rapport numérique défavorable une source d'inégalités en montrant qu'une situation asymétrique peut aussi engendrer des avantages concurrentiels pour les mi-

norités. L'importance de l'efficacité est ainsi mise de l'avant. La dernière partie donne de la consistance à cette idée au travers du phénomène des minorités dominantes. L'argument est que la prise en compte de l'efficacité apporte un éclairage différent sur les minorités tout en rappelant l'importance de la dimension socioéconomique.

L'intérêt de la démarche est donc triple. En premier lieu, l'article souligne les limites d'une intégration du nombre au sein d'une formulation de la justice inspirée de l'égalitarisme de la chance. En second lieu, il met en lumière un facteur, certes parmi d'autres, mais essentiel des inégalités d'ordre ethnoculturel : l'efficacité. Enfin, en prenant appui sur ce dernier facteur, le texte apporte un éclairage complémentaire sur la justice ethnoculturelle en recourant à une argumentation extérieure au multiculturalisme et inspirée de l'analyse économique dont les implications normatives restent à creuser.

## 1. LE POIDS DU NOMBRE

Le recours au nombre possède deux caractéristiques. Premièrement, il mobilise une compréhension intuitive de ce qu'est une minorité : un groupe dont le poids relatif défavorable au sein d'une population l'expose à des désavantages. Cette compréhension se retrouve dans la théorie politique. Owen Fiss place le nombre en tête des trois critères de la définition du statut de minorité suivi des désavantages économiques et du statut de « minorité discrète et insulaire » (*discrete and insular minority*)<sup>3</sup>. Bernd Simon, Birgit Aufderheide et Claudia Kampmeier indiquent de leur côté que « the common definition of minority or majority position membership rests on numbers. Groups with fewer members are then defined as minorities and numerically larger groups as majorities »<sup>4</sup>. Deuxièmement, un tel critère est pourvu d'une certaine objectivité. Dans l'absolu, il suffit de se livrer à un décompte des membres des différents groupes au sein d'une société afin d'attribuer le statut de minorité en conséquence. De plus, cette apparente neutralité présente l'avantage de fournir un cadre analytique qui explique les inégalités par des mécanismes matériels et qui lie facteur d'identification et cause d'inégalité. En d'autres termes, le nombre paraît offrir une explication causale doublée d'une justification morale du statut de minorité.

Ces deux caractéristiques font que, même si le nombre vient rarement seul, de nombreuses organisations internationales le considèrent comme le critère premier d'identification et donc, implicitement, l'un des fondements moraux du statut de minorité. Pour preuve, le rapport commandé par la Sous-commission sur la prévention de la discrimination et la protection des minorités de l'Organisation des Nations Unies afin de clarifier l'article 27 du *Pacte international sur les droits civils et politiques* définit une minorité ainsi :

A group numerically inferior to the rest of the population of a state, 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 and language.<sup>5</sup>

En guise d'illustration et comme le rappelle Fernand de Varennes, le critère numérique a été retenu par le Comité des droits de l'Homme de l'Organisation des Nations Unies (actuel Conseil des droits de l'Homme) : « the UNHRC has clearly opted for a strictly numerical categorisation, consistently disregarding the social and political aspects of the definition of a minority<sup>6</sup> ». À tel point que « it has now become clear that the existence of a minority lies in the strictly objective criterion of whether or not an ethnic, religious or linguistic group represents less than 50 percent of the state's population<sup>7</sup> ». Il fut par exemple appliqué dans l'affaire Sandra Lovelace pour déterminer si elle appartenait à une minorité<sup>8</sup>. Comme les Amérindiens malécites représentent moins de 50 % de la population, elle fut considérée comme appartenant à une minorité. À nouveau, le Comité des droits de l'Homme exprime une compréhension intuitive de nature numérique qui se retrouve dans la définition du terme « minorité » et qui, quoi qu'on en dise, marque la littérature sur le sujet.

Le Conseil de l'Europe retient également le critère numérique dans sa définition des minorités linguistiques. La *Charte des langues ou minoritaires* stipule ainsi que « par l'expression 'langues régionales ou minoritaires', on entend les langues pratiquées traditionnellement sur un territoire d'un État par des ressortissants de cet État qui constituent un *groupe numériquement inférieur* au reste de la population de l'État » (notre emphase).

Le rôle prépondérant de la dimension numérique n'est pas le propre du droit international public. La philosophie politique en fait aussi usage. Pour preuve, Chandran Kukathas considère que :

Viewing the matter in the most simple terms suggests some obvious problems for the pursuit of equality between groups. Perhaps the most obvious is the problem posed by differences of size. In any political society, small groups are usually going to be politically and economically weaker as groups.<sup>9</sup>

L'argument discuté au cours de ces pages est symbolisé par l'emploi de l'adverbe « habituellement » (*usually*) qui traduit l'intuition répandue que le nombre constitue une force ou une faiblesse. Ce faisant Kukathas lie de manière explicite un critère d'identification à une dynamique inégalitaire. Il détaille ce lien un peu plus loin.

Often, this is due simply to the fact that small groups, even of wealthy individuals, cannot compete with large groups of poorer ones, since the large group needs to demand only a small sacrifice from each individual to gather significant political resources. In democratic societies, in which votes are a political resource, group size is even more important.<sup>10</sup>

Le nombre donne donc lieu à des rendements d'échelle<sup>11</sup>, lesquels génèrent des inégalités. Will Kymlicka exprime la même idée à propos du mécanisme du suffrage dans les pays qui abritent des minorités autochtones.

(...) the 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).<sup>12</sup>

Les Autochtones sont désavantagés par la règle de décision majoritaire. Du fait de leur faible poids numérique, la ‘majorité’ peut leur imposer ses choix sans prendre en compte leurs intérêts<sup>13</sup>. De manière directe, le nombre est rendu responsable de leur situation. La solution évoquée par Kymlicka est de répartir les droits de vote avant une série de décisions politiques afin de permettre aux indigènes d’économiser leurs voix sur des sujets qui sont, de leur point de vue, d’un intérêt limité et de les reporter sur des thèmes plus importants. Il s’agit donc de contrer l’effet du nombre. Sans développer plus avant ce point, relevons que Kymlicka estime que cette solution n’est pas satisfaisante, car le principe libéral d’égal respect et considération s’en trouve violé. Quoi qu’il en soit, il est intéressant de relever que le nombre, au travers du vote, est considéré comme l’origine du handicap que subissent les minorités lors des scrutins démocratiques. Plus précisément, une part de l’origine des inégalités est située dans «l’effet de masse» imposé par le groupe en surnombre par rapport au groupe minoritaire.

Il est possible de répliquer à cette dernière affirmation qu’aucun de ces auteurs ne défend l’idée que seul le nombre compte. Or cette réplique ne peut s’appliquer à notre propos. Le thème du nombre possède une fonction objective dans la littérature multiculturaliste. Des auteurs et institutions divers et variés y situent l’origine d’une large part des désavantages socioéconomiques ou politiques dont les minorités souffrent. Outre ceux, plutôt rares il est vrai, qui en font l’unique critère, il existe un large éventail de positions au sein desquelles le nombre est à la fois un facteur d’identification des minorités et une source d’injustices. Il devient alors intéressant de creuser cette intuition. Par ailleurs, une discussion du nombre permet de mettre en lumière un des facteurs centraux des inégalités et injustices que subissent les minorités : l’efficacité.

En bref, ce qui est approché au travers du nombre est un rapport asymétrique entre groupes de tailles diverses qui peut constituer un handicap (ou une force comme il sera démontré ci-dessous). Cela revient à affirmer que la taille relative des groupes (les uns par rapport aux autres) joue un rôle important dans la constitution de relations asymétriques. Il convient alors de cerner ce qui, dans ce rapport déséquilibré, est source d’inégalités ou, plus précisément, de cerner le mécanisme qui fait la jonction entre le nombre et les injustices qu’un groupe donné d’individus subit afin d’en discuter la pertinence. En d’autres termes, que peut bien apporter le nombre à notre compréhension du phénomène minoritaire ? De quelle manière influe-t-il sur les raisons que les institutions ont d’adopter des politiques multiculturelles ?

## 2. ASYMÉTRIE NUMÉRIQUE ET EFFICIENCE

Dans *Liberalism, Community and Culture*, Kymlicka offre de manière implicite une formulation de l'argument numérique. Le mérite de la démarche est de dégager les mécanismes à l'œuvre qui permettent de lier nombre et inégalités. Comme le fait remarquer Joseph Heath :

He (Kymlicka) claims that agents should be held responsible for their own preference pattern, but they cannot be held responsible for how many others share the same pattern. In cases where having a certain culturally induced preference pattern results in disadvantage *by virtue of the fact that it is not widely shared*, agents have a legitimate claim for compensation.<sup>14</sup>

Dans le cas d'espèce, l'appréhension numérique de la minorité s'insère dans un schème inspiré de l'égalitarisme de la chance (*luck egalitarianism*), dont le postulat est que les individus ne peuvent être tenus pour responsables des inégalités qui découlent des circonstances. Les « variations in the levels of advantage held by different persons are justified if, and only if, those persons are responsible for those levels<sup>15</sup> ». Comme l'appartenance à un groupe numériquement minoritaire est un fait brut de l'existence, il est légitime de compenser les individus en raison de cette appartenance. La rareté d'une « structure de préférences culturellement induite » (*culturally induced preference pattern*<sup>16</sup>) fait la jonction entre, d'une part, le schème choix/circonstances et, d'autre part, l'appartenance culturelle. L'argument peut donc être formulé ainsi :

- Le nombre est une circonstance de l'existence au sens où l'individu n'a pas de prise sur celui-ci ;
- L'infériorité numérique est de manière prononcée une circonstance négative de l'existence lorsqu'elle s'applique à un marqueur moralement signifiant ;
- Ce type de circonstance négative donne *prima facie* droit à compensation ou à des mesures spécifiques ;
- L'infériorité numérique pose donc le principe d'une compensation dans un sens déterminé.

Ce lien intime entre poids numérique défavorable et inégalités se retrouve dans l'expérience de pensée du naufrage que Kymlicka emprunte à Ronald Dworkin. Dans la version de ce dernier, lorsque les passagers d'un navire échouent sur la grève, chacun est doté du même volume de ressources afin d'acquérir les biens nécessaires à la réalisation de sa conception de la vie bonne (exprimée au travers d'un agencement de préférences). Les prix finaux sont justes dans la mesure où ils sont conformes au test d'envie, c'est-à-dire si nul ne désire le panier de biens d'autrui, étant entendu que chacun possède les mêmes capacités de négociation et qu'aucun ne souffre de handicap. Dans la version de Kymlicka, les naufragés sont à bord de deux navires de taille différente. Le processus est identique à celui de Dworkin sauf que, sur l'île déserte, après la distribution des biens, les naufragés réalisent qu'ils appartiennent à deux groupes nationaux distincts dont l'un est minoritaire. Dès lors, bien que la répartition ait passé le test d'envie, les membres de la minorité vont envier le fait d'être en majorité :

(...) the problem is not that minority members envy the bundle of social resources possessed by the majority members *qua* bundle of social resources. On the contrary, the bundle of resources they currently possess, *qua* resources, are the ones best suited to fulfilling their chosen life-style. What they envy is the fact that the majority members possess and utilize their resources within their own cultural community.<sup>17</sup>

Les membres de la minorité regrettent d'être contraints à réaliser leurs choix de vie au coeur d'une « majorité ». Ils envient le fait d'être en position majoritaire. Il ne s'agit toutefois pas d'un sentiment qui s'assimilerait à de la pure jalousie. Il est plutôt question de ressentiment quant à un contexte de choix défavorable<sup>18</sup>. Les préférences des membres de la minorité deviennent dispendieuses en vertu d'un coup du sort. Ce qui illustre que, du point de vue de Kymlicka, certaines préférences sont intrinsèquement dispendieuses tandis que d'autres ne le sont que de manière accidentelle. L'exemple canonique pour les premières est l'amateur de champagne. Celui-ci ne souffre pas de préférences coûteuses parce que trop peu partagent sa préférence, mais parce que sa préférence pour le champagne mobilise en soi d'importantes quantités de ressources afin d'être satisfaite, ce qui est reflété dans la grille de prix. De plus, il est possible que ce goût ait été développé en raison même de son caractère dispendieux pour des raisons de distinction sociale<sup>19</sup>.

*A contrario*, l'appartenance minoritaire relève des circonstances. C'est la dilution d'un groupe dans un groupe plus important qui rend les préférences dont un individu est porteur relativement coûteuses<sup>20</sup> Heath précise que « (...) the disadvantage that the members of the minority cultural group experience is not due to the specific preferences that they have, but to the fact that they are not widely shared<sup>21</sup> ». L'origine des inégalités se situe principalement dans un fait du hasard. L'approche en termes de préférences relativement dispendieuses constitue alors une tentative d'expliquer le statut de minorité et d'en dériver des obligations morales sans faire appel à une quelconque compréhension de ce qu'est une minorité, c'est-à-dire d'éviter de se prononcer sur ses possibles éléments constitutifs.

Selon Heath, deux mécanismes expliquent l'origine numérique des inégalités subies par les membres des minorités. Le premier est celui des rendements d'échelle : plus le nombre de personnes qui partagent une culture augmente, plus l'offre culturelle s'accroît (ou, à production constante, plus les coûts liés à la pratique de cette culture diminuent). Un groupe plus peuplé qu'un autre enregistre alors des gains d'échelle plus importants dans la production de sa culture ( $C_1$ ) en comparaison d'un second groupe, c'est-à-dire que l'accès à une culture sera relativement moins dispendieux pour les porteurs de ( $C_1$ ) que pour ceux de ( $C_2$ ). Ces derniers sont donc désavantagés en termes relatifs puisque les coûts liés à ( $C_2$ ) sont plus importants que ceux liés à ( $C_1$ )<sup>22</sup>.

Le second mécanisme renvoie à la notion d'externalités. Dans le langage des sciences économiques, une externalité apparaît « à chaque fois que la décision de production ou de consommation d'un individu a une influence directe sur la production ou la consommation d'autres individus *autrement que par l'intermédiaire des prix du marché*<sup>23</sup> ». Appliqué au domaine ethnoculturel, l'argument revient à stipuler que les porteurs de ( $C_1$ ) génèrent des effets externes positifs pour les autres porteurs de ( $C_1$ ) et négatifs pour les porteurs de ( $C_2$ ). En résumé, l'évolution du nombre de porteurs d'une culture donnée impacte les coûts culturels pour les membres des deux groupes.

Le recours au vocabulaire économique possède le mérite de fournir un schéma qui fait du nombre l'origine des inégalités dont souffrent les minorités. Aucune autre dimension n'est prise en compte (comme souligné par Heath ci-dessus). L'argument respecte ainsi l'intuition relative à l'influence du nombre. Par conséquent, il n'est nul besoin de s'appuyer sur des compréhensions denses de la minorité en termes de différences ethniques, culturelles, religieuses ou identitaires. De la sorte, l'argument peut justifier la redistribution de ressources de la majorité vers la minorité tout en évitant les controverses quant au respect de la différence, à la valeur de la diversité culturelle, etc.<sup>24</sup> En résumé, une minorité doit bénéficier de mesures spéciales parce que ses membres sont désavantagés pour des raisons objectives. Enfin, l'approche offre un critère précis afin de connecter facteurs d'identification et de justification en faisant du phénomène minoritaire un problème d'efficacité (par l'entremise du nombre).

En ce qui concerne l'appel aux externalités, celui-ci apparaît d'emblée problématique pour des raisons à la fois analytiques et morales. Du point de vue analytique, une externalité survient lorsqu'un échange entre deux agents impose un coût à un tiers qui n'est pas reflété dans le système de prix. C'est la raison pour laquelle il s'agit d'une défaillance de marché, c'est-à-dire une défaillance d'une institution (au sens large) ayant pour vocation de convoier l'information indispensable (au travers du système de prix) à une allocation optimale des ressources. Or, dans le cas d'espèce, le coût supporté par le porteur de la préférence rare ( $C_2$ ) n'est que le résultat du marché, c'est-à-dire de la rencontre entre l'offre et la demande. En effet, comme la demande constituée par les porteurs d'une culture minoritaire est trop faible, leur poids sur le marché ne leur permet pas de réaliser leurs préférences à un coût équivalent à celui que supportent les porteurs de préférences culturelles plus répandues. Les coûts viennent justement des faibles gains d'échelle réalisés dans la production d'artefacts et mentefacts à destination de la minorité par rapport à ceux réalisés dans la production de biens culturels à destination de la majorité.

Un parallèle permet de rendre ce point plus clair. Lorsque les transports en commun sont inadaptés pour les personnes handicapées, générant des coûts pour ces dernières, cela ne résulte pas d'une externalité négative imposée par les personnes sans handicap, mais de la faiblesse de la demande pour des services de transport spécialisé, ce qui limite les effets d'échelle dans la production et fourniture de services adaptés, expliquant en retour les coûts élevés. On peut voir le



problème dans l'autre sens, c'est-à-dire une faiblesse de l'offre qui induit des prix élevés. Mais, dans ce cas, si faiblesse de l'offre il y a, elle est due à l'insuffisance de la demande. Les producteurs n'ont donc pas, pour des raisons de rentabilité, d'incitatif à investir outre mesure dans ce domaine. La taxation du reste de la population ne relève alors pas du principe d'internalisation d'externalités négatives, mais correspond soit au soutien d'une demande trop faible pour garantir des prix acceptables, soit à une redistribution mue par des considérations de justice.

En sus de la dimension analytique, la notion d'externalités est normativement chargée. Elle laisse entendre que certains acteurs 'se défaussent' d'une partie de leurs coûts sur d'autres agents, détériorant ainsi la situation matérielle de ces derniers, c'est-à-dire leur capacité à poursuivre leurs choix de vie sans interférence injustifiée. L'exemple le plus discuté dans la littérature – la pollution – confirme ce point. L'appel à la notion d'externalités charrie un jugement moral plus ou moins explicite qui se retrouve, par exemple, chez David Gauthier lorsqu'il qualifie de « parasites » les individus générant des externalités négatives<sup>25</sup>. En ce sens, le bien-être de la majorité se ferait aux dépens de la minorité puisque la première 'passerait' à la seconde une partie de la charge de ses institutions et choix culturels.

Par conséquent, la majorité ne jouerait pas le jeu de la coopération sociale par le simple fait de satisfaire ses préférences culturelles. L'appel à la notion d'externalités implique donc un certain nombre de présupposés et jugements normatifs qui s'écartent de ce que le concept prétend être : une notion positive, purement descriptive<sup>26</sup>. De plus, une telle présentation légitime l'imposition d'une taxe pigovienne<sup>27</sup> sur les membres de la majorité quelle que soit la minorité (identifiée en tant que telle par sa situation numérique) faisant fi de sa situation matérielle objective, comme la suite de notre propos s'emploie à le démontrer.

Par contraste, la notion de rendement (ou effet) d'échelle fait référence à une dynamique différente. La compensation des différentiels de gains d'échelle relève de la justice puisqu'elle s'applique à la redistribution de gains coopératifs qui ne résultent, de manière absolue, d'aucune distorsion de marché (les économistes parlent de « redistribution pure »<sup>28</sup>). Au contraire, si des individus sont dans une situation précaire, car rares sont ceux qui partagent leurs préférences culturelles, la raison tient au mécanisme des prix (c'est-à-dire au fait que le rendement marginal des investissements culturels de la minorité est inférieur à celui de la majorité par exemple). Toute redistribution est alors une question de justice se posant *ex post*, c'est-à-dire après que le marché se soit mis à l'équilibre. La différence avec les externalités est évidente puisque celles-ci renvoient à une défaillance de marché qu'il convient de corriger. La distribution des gains coopératifs par le marché est perturbée par des coûts qui échappent au système de prix<sup>29</sup>. La solution est alors de rendre les marchés plus efficaces, en d'autres termes de permettre au système de prix de jouer son rôle de variable d'ajustement et de pourvoyeur d'information, conformément aux postulats néoclas-

siques. L'objectif est d'inclure l'ensemble des coûts sociaux dans le prix payé par les individus pour leur « consommation » culturelle au travers d'une taxe spécifique. En bref, les externalités mettent en relief des inefficiences de marché (les fameuses « défaillances ») tandis que les rendements d'échelle donnent lieu à des différences d'efficience.

Un dernier point mérite d'être souligné. Si la référence à la notion d'externalités négatives peut à la rigueur se défendre, il est moins évident que, d'un point de vue analytique, les pratiquants d'une culture donnée bénéficient d'externalités positives<sup>30</sup>. En effet, si par là on entend que l'accroissement du nombre de pratiquants a une incidence bénéfique sur ces derniers dans le sens d'une réduction des coûts auxquels ils font face, il s'agit à nouveau d'effets d'échelle. Cela tient au fait que les membres d'un groupe culturel donné ne sont pas de simples consommateurs culturels, mais produisent également ce qu'ils consomment (par le simple fait de pratiquer leur culture au quotidien). Appréhender les gains potentiels pour des individus à être en position numérique avantageuse au travers du concept d'externalités positives ne saisit pas le fait que plus le nombre de personnes qui pratiquent une culture augmente, plus l'accès à cette culture est facilité par l'entremise de coûts moindres. Le mécanisme est celui du rendement d'échelle et non pas celui de l'externalité positive.

Quoi qu'il en soit, il est important de retenir que l'approche en termes de différentiel d'efficience (principalement en termes de rendements d'échelle) lie les injustices que les minorités subissent aux circonstances. De ce point de vue, les membres d'une minorité évoluent dans un contexte de choix dont les options sont plus dispendieuses que celles ouvertes aux membres de la majorité en vertu du nombre restreint d'individus partageant leurs préférences. Ce qui implique que, pour atteindre un niveau similaire d'accomplissements culturels, les membres d'une minorité doivent investir plus de ressources que ceux de la majorité. Le nombre forme alors la source directe d'inégalités. L'appel aux rendements d'échelle a le mérite de souligner le caractère involontaire des coûts supportés par les détenteurs de préférences culturelles rares.

Une telle perspective a l'avantage d'attirer l'attention sur la question des différentiels d'efficience, notamment du point de vue de la justice : certains groupes subissent des inégalités et injustices dont l'origine tient au fait d'être en minorité numérique. En cela, l'approche donne de la profondeur à l'égalitarisme de la chance qui s'appuie sur la distinction entre choix et circonstances en faisant des inégalités qui découlent de l'asymétrie numérique une affaire de circonstances, conformément à la dichotomie dessinée par Dworkin.

When and how far is it right that individuals bear the disadvantages or misfortunes of their own situation themselves, and when is it right, on the contrary, that others—the other members of the community in which they live for example—relieve them from or mitigate the consequences of these disadvantages? I used the choice/chance distinction in replying to these questions. In prin-

principle, I said, individuals should be relieved of consequential responsibility for those unfortunate features of their situation that are brute bad luck, but not from those that should be seen as flowing from their own choices.<sup>31</sup>

Les groupes plus nombreux bénéficieraient donc d'avantages concurrentiels qui rendraient la réalisation des préférences de leurs membres moins coûteuse, ce que les effets d'échelle mettent en exergue. Or, il existe des raisons de modérer la vision univoque de l'influence du nombre telle que présentée jusqu'à présent. En effet, qu'il s'agisse de groupes, d'administrations, d'entreprises ou d'États, la force entropique croît avec les dimensions de l'entité. En d'autres termes, les coûts marginaux ne constituent pas en règle générale une fonction inversement proportionnelle de la taille de la structure concernée<sup>32</sup>. Dans le cas contraire, il aurait été plus efficace de former des monopoles dans tous les secteurs de l'économie, ce qui n'est pas le cas. Les effets de taille ne sont pas infinis. Dans toute organisation il existe un seuil au-delà duquel l'efficacité décroît, c'est-à-dire que les coûts marginaux générés par l'accroissement de taille dépassent les gains marginaux. Les rendements d'échelle ont une limite. Plus que cela, il est possible que ce seuil puisse se situer très bas (en nombre d'individus), ce que la littérature sur les minorités efficaces illustre.

La question ne se limite pas à la simple théorie. De manière concrète, le monde abrite une multitude de minorités qui dominent des économies nationales ou des systèmes politiques en entier. Il est alors possible de considérer que leur situation numérique est en partie à l'origine de leurs avantages. Le caractère répandu des minorités dominantes souligne l'importance ainsi que la complexité d'une approche des minorités par le nombre, c'est-à-dire *in fine* de l'efficacité. Dans cette optique, les deux prochaines sections traitent des minorités efficaces puis des minorités dominantes. Le modèle des minorités efficaces permet de dégager les facteurs qui conditionnent l'efficacité, tandis que la partie sur les minorités dominantes offre des illustrations concrètes des avantages dont nombre de minorités jouissent vis-à-vis des majorités.

### 3. MINORITÉS EFFICACES

Il existe une objection majeure à l'encontre des approches qui font du nombre le fondement du statut de minorité, c'est-à-dire la source d'inégalités qu'il s'agirait de supprimer ou de compenser. En effet, s'il est possible d'expliquer pourquoi en théorie les membres des minorités souffrent de désavantages du fait de la faible fréquence de leurs préférences, ces derniers sont également susceptibles de bénéficier d'avantages comparatifs (sur les membres de la majorité) dans des environnements caractérisés par des imperfections d'information (ce qui est la règle).

(...) minorities have a comparative advantage in a wide range of economic activities characterized by pervasive informational imperfections and, consequently, high transactions costs. Apparently, the advantages of minorities stem from their ability to enforce trust and to sanction opportunistic behavior credibly, resulting in more cooperation within minorities than within majorities.<sup>33</sup>

Basé sur la théorie des jeux et l'interaction stratégique, le constat d'Hillel Rapoport et Avi Weiss ne relève pas de la pure théorie, mais résulte de l'étude des performances de divers groupes : les protestants dans certains pays catholiques, les catholiques dans certains pays protestants, les musulmans en Inde, les Baltes en Italie du Nord, etc. Avant de poursuivre, notons que même si les deux auteurs fournissent des éléments qui vont à l'encontre de la thèse du rapport numérique défavorable, le débat reste concentré sur des questions d'efficacité. Le nombre perd ainsi de son caractère univoque de handicap pour se présenter comme un avantage dans certaines situations, introduisant une vision plus fine des dynamiques sous-jacentes aux inégalités sociales.

Quatre facteurs expliquent l'avantage compétitif dont certaines minorités bénéficient<sup>34</sup>. Premièrement, certaines préférences des membres de la minorité seraient différentes de celles des membres de la majorité. La différence ne se situerait pas dans la substance des préférences (ce qu'elles sont), mais dans des degrés supérieurs d'altruisme ou de 'moralité' (la manière dont elles sont structurées). Une reformulation possible de ce que disent les auteurs consiste à voir les membres des minorités comme porteurs de préférences interdépendantes positives plus fortes (ou plus récurrentes) que celles de la 'majorité'<sup>35</sup>. Cela serait dû au fait que ces communautés investiraient davantage dans le modelage des préférences individuelles que les majorités.

Deuxièmement, les interactions à l'intérieur des minorités prendraient plus souvent la forme de jeux répétés qu'au sein de la majorité dans laquelle les jeux à un coup prédomineraient, favorisant la coopération dans le premier cas et la défavorisant dans le second<sup>36</sup>. En effet, la probabilité de faire face à un comportement coopératif entre deux individus est corrélée de manière positive avec la fréquence de leurs interactions, fréquence qui est plus élevée à mesure que la taille du groupe diminue. La répétition de ces contacts détermine le niveau de coopération dans le groupe concerné. Cela s'explique par le lien entre la récurrence des contacts et la probabilité de faire face à une sanction en cas de défection.

Troisièmement, les coûts de collecte de l'information quant à la fiabilité d'un partenaire seraient moindres au sein des minorités. Dans de petites entités, les individus ont des chances accrues de se connaître personnellement, ce qui facilite les échanges et la coopération. Si la réputation compte de manière générale, elle compte d'autant plus dans les petits groupes. Même s'ils ne se connaissent pas personnellement, un individu peut se renseigner à moindre coût sur un second individu au travers d'un tiers. En d'autres termes, il est toujours plus facile de collecter des informations sur un partenaire potentiel dans une minorité qu'au sein de la population prise dans son ensemble. Par ailleurs, cet élément tend à améliorer la capacité des agents à punir ceux qui ont fait défection par le passé (en refusant, par exemple, de coopérer à nouveau avec eux).

Quatrièmement, les comportements de type cavalier seul seraient plus rares au sein des minorités<sup>37</sup>. Les trois premières caractéristiques se combinent afin de réduire la défection. Le contrôle social est plus resserré et la probabilité de sanc-

tions bien plus élevée en cas de comportement non coopératif. De plus, lorsque d'importants gains sont retirés par les individus, les pertes associées à une défection et aux sanctions qui s'ensuivent (allant d'une diminution des interactions avec le cavalier seul jusqu'à son exclusion du groupe) sont plus importantes et constituent alors un puissant incitatif<sup>38</sup>.

Rapoport et Weiss défendent donc l'idée que l'asymétrie numérique constitue la source d'avantages de marché dont bénéficient de nombreuses minorités. Ils proposent de la sorte une vue plus complexe que celle faisant d'un rapport numérique défavorable une source d'inégalités. En suivant leur raisonnement, il devient même rationnel pour certains groupes de maintenir ce rapport défavorable afin de continuer à bénéficier d'avantages concurrentiels<sup>39</sup>. Dès lors, il est moins évident que le poids relatif des différents groupes produise à coup sûr des inégalités. Des minorités peuvent se révéler plus efficaces dans le secteur économique (diaspora chinoise en Indonésie) ou dans la fourniture de services à leurs membres (congrégations religieuses) que l'hypothétique majorité<sup>40</sup>. En bref, le nombre n'implique pas l'existence systématique de désavantages compétitifs nets.

Pour autant cela signifie-t-il que la compréhension en termes de préférences rares soit invalidée par celle en termes d'efficience? Rien n'est moins certain. Il est toujours possible de défendre l'idée selon laquelle elles forment les deux facettes d'une même histoire.

D'une part, les préférences rares suggèrent qu'évoluer, pour un individu, dans un environnement qui se caractérise par une certaine altérité (dans le sens d'une différence de structure préférentielle par rapport au reste de la population) possède des coûts. Ces derniers dépendent de plusieurs facteurs. Les deux principaux sont le degré de consistance et la taille du 'groupe'. D'autre part, l'approche en termes de coopération indique que les membres d'une minorité peuvent dégager des gains coopératifs tels qu'ils obtiennent des avantages significatifs sur les membres de la 'majorité'. À nouveau, ces derniers dépendent de la taille de la minorité et de son degré de consistance. Par degré de consistance, il faut comprendre l'existence sociale du groupe, c'est-à-dire son caractère identifiable et concret, ainsi que la présence d'institutions dont la fonction est de garantir le respect d'un ensemble de règles. Les deux interprétations (quant à l'influence du nombre) partagent les mêmes facteurs explicatifs.

Le premier facteur est la taille. De ce point de vue, il existe deux seuils. Un seuil plancher en deçà duquel le 'groupe' possède trop peu de membres pour engranger des gains coopératifs significatifs afin de contrebalancer les désavantages de marché et un seuil plafond au-delà duquel la cohésion de groupe se dilue. La coopération devient plus compliquée, les membres n'ont plus que des relations distendues les uns avec les autres et les défections se multiplient (ce qui ne signifie pas que le 'groupe' en tant qu'entité soit menacé de disparition; cela veut simplement dire qu'il perd ses avantages compétitifs). Bref, en ce sens, la «minorité» commence alors à ressembler de plus en plus à une «majorité».

Le second facteur est le degré de consistance. Il est le résultat de la sévérité des règles internes, de la légitimité des instances de régulation, voire des caractéristiques que les membres du groupe pensent partager. Le degré de consistance exerce une influence sur le niveau des deux seuils. Plus il est fort, plus la probabilité est grande que le seuil plafond soit élevé. Toutefois, ce dernier ne peut pas être indéfiniment repoussé. Le raisonnement est identique pour le seuil plancher. Un fort degré de consistance permet d'abaisser celui-ci. Un petit groupe extrêmement discipliné est capable de dégager des gains coopératifs importants (comme dans le cas de certaines sectes ou sociétés secrètes). Toutefois, des limites existent aux effets bénéfiques d'un fort degré de cohésion.

Pour nombre de minorités, tout l'enjeu est alors d'atteindre et de stabiliser une taille optimale en établissant un degré adéquat de rigueur notamment du point de vue de sa différenciation vis-à-vis de la société environnante. Car une rigueur trop importante peut à la fois dissuader les individus d'adhérer au groupe (ou d'y demeurer) et exacerber les tensions avec la société environnante<sup>41</sup>.

The notion of optimal strictness becomes especially important in a changing social environment. To remain strong, a group must maintain a certain distance or tension between itself and society. But maintaining this "optimal gap" means walking a very thin line in adjusting to social change so as not to become too deviant, but not embracing change so fully as to lose all distinctiveness.<sup>42</sup>

Ceci explique pourquoi les églises et groupes rigoristes sont réticents à grossir leurs rangs outre mesure car ils augmenteraient ainsi le risque de délitement, en amoindrissant l'efficacité de la régulation interne. La situation des minorités plus larges (comme la plupart des minorités nationales) se comprend alors mieux. En général, leur taille ne leur permet pas d'engranger les gains coopératifs qui caractérisent les groupes plus petits<sup>43</sup>.

Deux remarques découlent de ce qui précède. Premièrement, la taille d'un groupe, même couplée à un marqueur identitaire consistant (appartenance culturelle ou religieuse par exemple), est une donnée qui ne possède pas d'implication nécessaire pour les politiques publiques. Si l'on souhaite en dériver une analyse normative et des prescriptions politiques, il est nécessaire de bénéficier d'une vue d'ensemble qui prend en considération toutes les variables qui influent sur la compétitivité d'un groupe donné. En son absence, se fonder sur une approche de la minorité basée sur le caractère désavantageux du nombre peut aboutir à des résultats contreproductifs dans le sens d'une accentuation de certaines inégalités. La principale chose à retenir est que l'assimilation de la « minorité numérique » à un « groupe victime d'inégalités » conduit à légitimer des politiques (de redistribution de ressources, de transferts de droits, etc.) exacerbant le différentiel de compétitivité au profit de la minorité. Les institutions doivent alors prêter une attention soutenue aux effets redistributifs potentiellement

contre-éfficients de certaines mesures politiques lorsque les minorités concernées bénéficient dans les faits de niveaux d'efficacité plus importants que la majorité dans la production d'avantages coopératifs.

Deuxièmement, si l'on admet l'idée que toutes les minorités ne sont pas égales au regard des avantages coopératifs qu'elles génèrent, le type de minorité qui préoccupe Rapoport et Weiss peut sembler, en y repensant, très particulier. En effet, ces derniers décrivent des groupes aux liens très ténus. Dès l'entame de leur article, ils spécifient certes qu'aucun postulat n'est avancé quant à une hypothétique identité propre à la minorité. Rien ne devrait donc distinguer en substance les membres de la minorité de ceux de la majorité, le but étant simplement de démontrer le mécanisme par lequel des avantages compétitifs peuvent émerger indépendamment de la nature du groupe.

Cette neutralité épistémologique prête toutefois à discussion. Un élément, central dans l'analyse de Rapoport et Weiss, est difficilement transposable à toutes les minorités : la fréquence des interactions entre membres. En d'autres termes, les contacts répétés engendrent des gains coopératifs, ce qui implique la possibilité de tracer une frontière nette et consistante entre la minorité et le monde extérieur. Une telle condition prédétermine le genre d'entité auquel s'applique le modèle. Par exemple, des catégories comme les femmes, handicapés, Afro-Canadiens, ou gays et lesbiennes correspondent peu à cette description. À l'échelle de ces catégories prises dans leur globalité, les gains coopératifs sont négligeables, car ils ne forment pas des 'groupes' tels que caractérisés ci-dessus. Ce qui est d'autant plus problématique, dans l'optique de la justice politique, que les individus appartenant à ces catégories n'en subissent pas moins des discriminations, inégalités et injustices en raison de leur appartenance, réelle ou supposée, à de tels groupes.

Quoi qu'il en soit, le nombre ne donne pas d'indication claire sur la situation concrète des individus qui composent un groupe donné. Le fait de partager certains marqueurs, de subir des injustices et discriminations similaires ne fait pas pour autant de ces catégories de population des groupes minoritaires sur le modèle, à titre d'exemple, de congrégations religieuses fermées.

En dépit de ces réserves, l'efficacité dont font preuve certaines minorités permet de comprendre les réactions d'hostilité à leur rencontre<sup>44</sup>.

Our model provides economic foundations for the emergence of hostile attitudes and behavior towards minorities on the part of members of a majority. Providing that the minority alone cooperates, hostile attitudes emerge due to the ensuing decrease in the market payoff to majority members. Hostility will most probably not arise while the minority remains small, since the effect would be minute. However, when the size of the minority increases, the negative effect for the majority increases exponentially, potentially triggering hostility.<sup>45</sup>

Face à des groupes perçus, à juste titre ou non, comme dotés d'une forte cohésion interne et qui jouissent de gains coopératifs substantiels, la majorité peut être tentée de casser cette dynamique (ou d'en limiter les effets) au travers, par exemple, de l'imposition de coûts additionnels, de pratiques discriminatoires, de la destruction de l'origine de l'avantage compétitif (la cohésion interne) en forçant le groupe à se libéraliser, etc. De telles réactions peuvent s'expliquer par l'envie ou le désir de revanche qui anime les perdants de punir ceux qui réussissent en adoptant, en apparence, une posture non coopérative à l'égard du reste de la société. L'objectif peut être aussi de rétablir une situation plus avantageuse pour les membres de la majorité. Le phénomène des minorités dominantes illustre à la fois la supériorité en termes de coopération de nombre de minorités ainsi que les réactions d'hostilité que de tels avantages ne manquent pas de susciter. En outre, il confirme l'importance de l'efficacité en tant que facteur explicatif doté d'implications normatives.

#### 4. MINORITÉS DOMINANTES

Le rôle du nombre dans le statut de minorité prête à discussion tant sur le plan théorique que pratique. Sa limite principale tient à l'assimilation du poids relatif défavorable à une situation inégalitaire. En réalité, le lien de causalité est moins évident, ce qui rend plus complexe son incorporation au sein d'une théorie de la justice. Par exemple, la force du nombre peut se voir annulée, en partie ou totalité, par d'autres facteurs comme un accès privilégié aux ressources économiques ou aux leviers du pouvoir.

Ce qui explique que réduire le statut de minorité à un déséquilibre numérique peut difficilement rendre compte des minorités dominantes qu'Amy Chua nomme «market-dominant minorities»<sup>46</sup>. En ce sens, ces dernières illustrent l'incomplétude du critère numérique (dans l'octroi du statut de minorité moralement légitime à bénéficier d'un soutien de la part des institutions) lorsqu'il s'agit de saisir le problème minoritaire sous l'angle des différentiels d'efficacité. Le phénomène des minorités dominantes illustre, de manière très générale et indiscriminée (quant aux facteurs explicatifs), l'importance de l'efficacité dans des situations qui relèvent à première vue de la justice ethnoculturelle. Il confirme que, s'il est bien question d'efficacité, dans de nombreux cas les rapports numériques bruts peuvent constituer une approximation insatisfaisante des dynamiques de constitution et de renforcement des inégalités socioéconomiques impliquant une minorité et une majorité.

Présentes sur tous les continents les minorités dominantes ne réfèrent pas seulement à des groupes dominants sur le plan politique, dans le sens où ils monopoliseraient les leviers du pouvoir. Elles incluent surtout des groupes dont les membres sont simplement tolérés par la majorité et qui, en dépit de restrictions de leurs droits civiques et politiques, contrôlent l'économie du pays dans lequel ils résident. Le concept englobe donc une diversité de situations dont le point commun se situe dans l'existence d'un groupe moins nombreux qui domine économiquement le reste de la société.

En Asie du Sud-Est (Malaisie, Thaïlande, Indonésie, etc.), la minorité chinoise contrôle jusqu'à 70 % de l'économie, incluant des secteurs importants (produc-



tion, distribution de détail, restauration, banque, médias, etc.) alors qu'elle ne forme qu'une infime part de la population totale. Certains de ses membres sont proches du pouvoir, lui fournissant les ressources nécessaires à la réalisation de ses projets somptuaires. Le phénomène se rencontre ailleurs : en Amérique du Sud (descendants des colons européens et Libanais), Afrique (représentants de certaines ethnies comme les Ibos du Nigéria, les Bamilékés au Cameroun, les Kikuyus au Kenya, les Érythréens en Éthiopie, les Éwé au Togo, les Susus en Guinée, les Bagandas en Ouganda, les Tutsis au Burundi, etc. et plus généralement les Libanais, Français et Indiens). Chua voit ce schéma également à l'œuvre en Europe (Croates en ex-Yougoslavie).

Les minorités dominantes donnent de la consistance au modèle de la minorité efficiente. Leur existence confirme le caractère insuffisant du recours direct au facteur numérique tout en soulignant la centralité de la notion d'efficacité. Bien souvent, le nombre ne traduit pas les asymétries en termes d'opportunités, d'abondance et d'influence au sein d'une société<sup>47</sup>. L'existence ainsi que la fréquence des minorités dominantes problématissent l'articulation entre le nombre, les inégalités économiques et une dimension plus substantielle sous-jacente. En effet, il est courant de considérer les Chinois, en dépit d'une nette domination en Asie du Sud-est, comme une minorité politique en vertu des vexations et inégalités d'ordre culturel que ses membres subissent.

But there are other groups that combine cultural and political exclusion with economic privilege. A striking example is Chinese minorities in South-East Asian countries such as Indonesia, Malaysia, Philippines, or Thailand. In each of these countries, the Chinese minority forms a small percentage of the population, yet often owns a large part—perhaps even the dominant part—of the economy. In Indonesia, for example, the Chinese minority forms around 3 per cent of the population, but it is estimated to control 70 per cent of the private economy. Yet despite their economic privileges, they have faced serious cultural exclusions.<sup>48</sup>

Outre la référence au phénomène des minorités dominantes, Kymlicka soulève dans cet extrait de façon implicite la question du dualisme entre, d'une part, les avantages de nature économique et, d'autre part, les handicaps d'ordre politique et culturel. Une possibilité est alors d'appréhender la situation telle qu'elle se présente, c'est-à-dire en considérant que les deux dimensions appellent des traitements distincts, surtout lorsqu'elles vont dans des directions opposées. En guise d'illustration, la situation indonésienne nécessiterait à la fois des mesures afin de placer la minorité chinoise en situation d'égalité du point de vue civique et politique avec la majorité indigène ainsi que des dispositions structurelles et redistributives afin de mettre fin à leur domination économique, ou dans une perspective rawlsienne, de faire en sorte que ces inégalités soient liées à des fonctions ouvertes à tous, que chacun ait des chances égales d'y accéder et que les inégalités bénéficient aux plus démunis<sup>49</sup>. Kymlicka avance un argument allant dans ce sens.

The case of economically privileged but culturally stigmatized traders may seem like a peculiarity of the ‘crony capitalism’ found in authoritarian regime (...). But there are many cases within the established Western democracies of groups that are culturally stigmatized without suffering economic exclusion.<sup>50</sup>

Dans la suite de son propos, Kymlicka donne des exemples de minorités non dominées économiquement, mais qui demandent des aménagements multiculturels : les Catalans en Espagne, les homosexuels, les Arabo-Américains. Puis il conclut en affirmant que : « so not all multiculturalist claims involve a demand for economic redistribution<sup>51</sup> ». L’argument sous-jacent est qu’il existe des minorités bien loties du point de vue économique, mais qui présentent des demandes légitimes d’ordre culturel, donc le multiculturalisme ne peut pas se limiter à une simple redistribution. Il apparaît donc clairement que Kymlicka fait une distinction entre les dimensions socioéconomique et ethnoculturelle.

L’avantage d’une telle approche tient dans la possibilité d’adopter les deux perspectives (économique et culturelle). Deux reproches sont cependant concevables. Le premier est d’estimer que l’analyse ne laisse aucune place à des considérations d’efficacité que cela soit du point de vue descriptif ou normatif, ce qui minore le rôle des inégalités socioéconomiques ainsi que des mécanismes qui les génèrent. Une réponse envisageable serait de considérer que cette dualité ne constitue en aucun cas un problème rédhibitoire puisqu’il est possible de greffer des mesures redistributives à des dispositions multiculturelles.

La réponse semble tomber sous le sens, excepté que dans le cas des minorités dominantes des transferts économiques ou mesures correctives sont effectivement nécessaires, mais de la majorité vers la minorité, c’est-à-dire dans le sens inverse de celui évoqué par Kymlicka. Il s’agit du second reproche : s’il est avéré que des minorités bénéficient d’avantages compétitifs par rapport au reste de la population et que cela génère des inégalités matérielles, les institutions se retrouvent face à l’obligation de redistribuer des ressources des membres de la minorité en direction de ceux de la majorité. De plus, comme une large part de l’hostilité ethnique à laquelle font face les minorités en question découle de leurs avantages économiques, cela renforce l’idée que les inégalités matérielles sont au cœur de situations qui sont habituellement considérées comme relevant de la justice ethnoculturelle. Il est donc plausible d’objecter que la redistribution de ressources de la minorité vers la majorité est une option qui, sous conditions, doit être incluse dans toute formulation de ce type de justice.

Il est toutefois difficile de déterminer plus en détail la position sur le sujet d’un auteur comme Kymlicka, notamment en ce qui concerne l’articulation des deux dimensions susmentionnées et de leur hiérarchisation. D’autant plus que dans *Multicultural Odysseys*<sup>52</sup>, ouvrage qui recense les expériences multiculturalistes à travers le monde, la problématique des minorités dominantes est quasiment absente et n’est donc pas traitée en profondeur. Ces dernières ne sont mentionnées qu’en passant à propos de l’Afrique du Sud, qui plus est pour illustrer l’ab-

sence de légitimité morale de la minorité blanche à réclamer des droits différenciés (ce qui n'est pas le problème le plus important dans le cas d'espèce).

Claims for autonomy by certain minorities in post-colonial states, however, are often seen by the majority group as perpetuating an historic wrong, reinforcing a colonial-era injustice originally adopted precisely in order to suppress the majority group. Just as claims for 'minority rights' by white South Africans have little popular resonance, so too claims by other historically privileged minorities fall on deaf ears.<sup>53</sup>

La lecture de l'extrait suscite quelques remarques. Tout d'abord, le problème posé par les minorités dominantes est appréhendé à la lumière des États postcoloniaux, ce qui ne correspond pas à la plupart des minorités dominantes évoquées par Chua puisque ces dernières ne sont pas issues d'une ancienne puissance coloniale. Cela n'enlève rien à la particularité de la situation de minorités postcoloniales, mais il s'agit d'une problématique différente. En effet, alors que l'une des raisons pour ne pas donner un droit *prima facie* à compensation ou tout autre arrangement institutionnel à ce type de minorité tient, comme le rappelle justement Kymlicka, dans la crainte de la perpétuation d'un tort historique, une telle considération est en général absente pour les minorités dominantes.

La raison tient dans la dimension socioéconomique (redistribution des ressources). Celle-ci est au cœur du phénomène des minorités dominantes (telles que décrites par le modèle des minorités efficaces illustré par Chua). Une telle minorité n'a pas besoin de dominer politiquement pour s'imposer dans la sphère économique. C'est bien ce que le recours à l'efficacité exprime. En faisant de la minorité dominante une affaire de minorité postcoloniale, cette dimension socioéconomique est éclipsée par l'aspect ethnoculturel. Pour finir, si l'extrait parvient, à juste titre, à jeter le doute sur la légitimité des Afrikaners à être considérés comme formant des minorités pleines et entières (tout au moins en ce qui concerne certaines revendications), il laisse de côté ce sur quoi l'efficacité attire l'attention : une redistribution possible des gains coopératifs de la minorité en direction de la majorité.

Le type de réponse suggéré par les approches traditionnelles de la justice ethnoculturelle (redistribution de ressources de la majorité vers la minorité, droits spéciaux, etc.) est donc inadapté lorsqu'il est appliqué aux minorités dominantes (exemple de la diaspora chinoise en Asie du Sud-est) puisqu'il ne répond pas à l'origine du problème (une efficacité supérieure de la minorité), faute de l'identifier avec clarté. L'un des effets potentiels consiste en l'adoption de politiques qui s'appuient sur le postulat erroné d'un désavantage net des minorités. Ce faisant, les déséquilibres d'efficacité peuvent être accentués par l'octroi d'avantages additionnels (quotas, transferts de ressources, dérogation au droit commun, etc.).

Outre l'effet matériel de telles politiques, ces dernières ont une portée symbolique en affichant le peu de considération que les institutions ont à l'égard des inégalités d'ordre matériel et à la concentration du pouvoir économique. Il est

alors légitime de s'interroger sur le respect effectif que les institutions manifestent à l'égard de leurs citoyens<sup>54</sup>. L'effet peut être d'autant plus dévastateur dans un contexte de déréglementation des marchés et d'accroissement des inégalités comme le montre Chua<sup>55</sup>. Pour revenir au point de départ de l'article, le fait de placer les avantages d'un côté et les désavantages de l'autre ou de présupposer la nature des obligations de justice en fonction du sens de l'asymétrie numérique constitue une limite de l'appréhension du phénomène minoritaire au travers du nombre, limite qu'un changement d'attention en direction de l'efficience permet d'isoler.

À cette difficulté pourrait s'en ajouter une seconde qui reflète un souci constamment exprimé dans la littérature critique du multiculturalisme et des politiques de la diversité. Il s'agit de la tendance à percevoir dans toute minorité un défi avant tout d'ordre culturel : «not content with pretending that our problem is cultural difference rather than economic difference, we have also started to treat economic difference as if it *were* cultural difference»<sup>56</sup>. Au regard des violences dont certains «groupes» sont victimes (Han au Tibet, Chinois en Asie du Sud-Est, Indiens au Kenya, etc.), il est effectivement tentant de considérer que des mesures s'imposent afin de les protéger sur la base de spécificités qui sont (ou seraient) les leurs (culture, langue, religion, ethnie), c'est-à-dire de préserver leur nature, voire leur survie en tant que groupe<sup>57</sup>. Ces dispositions englobent des droits différenciés, une représentation politique garantie, des mesures d'exemption, etc. Cependant, ces minorités sont à la fois plus efficaces économiquement que la «majorité» (source d'une majeure part de l'hostilité à leur endroit) et une poignée de ses membres est souvent liée au pouvoir local. Des politiques multiculturelles ne constituent donc pas une réponse appropriée aux inégalités existantes, voire aux régimes iniques d'exploitation en place. Pis, les institutions prennent le risque de les renforcer et, à terme, d'attiser l'exaspération d'une partie de la population (surtout dans les régimes autocratiques et népotiques). *In fine*, les solutions préconisées ne sont pas du même ordre que le mal que l'on désire traiter. Si de tels groupes sont victimes de violences, ce n'est principalement pas parce qu'ils appartiennent à une culture, langue, religion ou ethnie différente, mais parce qu'ils monopolisent une part disproportionnée des ressources.

Les lignes précédentes ne visent à remettre en question ni le fait qu'un processus d'identification d'individus comme appartenant à un groupe ethnique spécifique (comme les Chinois du Sud-Est asiatique ou du Tibet) soit à l'œuvre, ni que cette identification serve de base aux mauvais traitements qu'ils subissent. Elles ne dénie pas plus que des mesures multiculturelles puissent être nécessaires. Ce qui est contesté est que l'origine des violences que les minorités dominantes subissent ainsi que la meilleure réponse se situe dans le champ ethnoculturel. Chua estime que ces groupes sont victimes de violences en raison de la combinaison d'un fort népotisme (Indonésie, Amérique du Sud, Philippines, Malaisie, etc.), d'une déréglementation sauvage des marchés qui leur a principalement bénéficié (en grande partie du fait d'une efficience plus élevée) et de l'explosion des inégalités socio-économiques qui s'en est suivi. Dans ce contexte, la source des violences n'est pas ethnique, raciale, religieuse ou cul-

turelle, mais socioéconomique. Lors des émeutes de Djakarta en 1998, les insurgés indonésiens n'en avaient pas après les Chinois, mais après le monopole des ressources et la réussite économique insolente qu'ils attribuaient à tort à la totalité des Chinois<sup>58</sup>. Leur exaspération était renforcée par la proximité affichée entre certains membres de la communauté chinoise et la famille Suharto. Il ne fait guère de doute que les violences subséquentes aient été exacerbées par des dispositions xénophobes présentes dans la population. Toutefois, le problème est avant tout socioéconomique, ce que souligne l'existence des minorités dominantes. Se pose alors la question de la place qu'occupe certaines minorités dans le corpus multiculturaliste : dans leur cas, est-il question de justice ethnoculturelle *stricto sensu*, ou d'autre chose ?

Par ailleurs, des raisons prudentielles enjoignent à considérer l'enjeu posé par les minorités dominantes comme pouvant échapper à la justice ethnoculturelle. En effet, si l'objectif des institutions est de protéger les minorités dominantes des violences dont elles sont les victimes, alors il est douteux que cela passe par l'arsenal multiculturel (droits, transferts de ressources). La meilleure garantie contre l'exaspération des « majorités » qui subissent des désavantages économiques récurrents et profonds consiste en une redistribution plus équitable des ressources (sous la forme de transferts monétaires et du développement des services publics). L'argument n'est pas toutefois simplement prudentiel. Il s'appuie sur l'identification adéquate des avantages concurrentiels dont bénéficient une minorité dominante et les liens que de telles asymétries entretiennent avec le traitement réservé à ces membres sous la forme de discriminations, d'inégalités civiles et politiques ou d'une insécurité larvée. L'identification des mécanismes de constitution des inégalités est précisément la direction que l'étude de l'efficacité désigne.

Au final, il est important de noter que la protection des membres des minorités dominantes ne déroge en rien au régime commun des droits fondamentaux comme celui à la sécurité des biens et des personnes. Comme tout citoyen, les membres des minorités dominantes doivent être protégés contre les discriminations, injustices ainsi que les atteintes à leur propriété et personne. Il est inutile d'insister sur cet aspect. Il n'en demeure pas moins que la fécondité d'une approche fondée sur l'efficacité est de placer la dimension socioéconomique, au travers de politiques redistributives ambitieuses, au centre d'une approche normative des minorités. L'exemple des minorités dominantes tend à prouver le caractère central de la dimension matérielle en dépit de ce que peuvent nous suggérer nos intuitions quant à la nature du problème minoritaire. L'enjeu principal devient dès lors politique (garantie des libertés fondamentales) et socioéconomique (répartition des ressources), avant d'être ethnoculturel.

## 5. CONCLUSION

En guise de conclusion, il est intéressant de reprendre l'argument tel que formulé en entame d'article.

- Le nombre est une circonstance de l'existence au sens où l'individu n'a pas de prise sur celui-ci;
- L'infériorité numérique est de manière prononcée une circonstance négative de l'existence lorsqu'elle s'applique à un marqueur moralement signifiant;
- Ce type de circonstance négative donne *prima facie* droit à compensation ou à des mesures spécifiques;
- L'infériorité numérique pose donc le principe d'une compensation dans un sens déterminé.

La prémisse (2) a été contestée lors des deux dernières sections, ce qui remet en question la formulation de (3) et (4). En transformant l'argument, cela donne :

- Le nombre est une circonstance de l'existence au sens où l'individu n'a pas de prise sur celui-ci;
- L'infériorité numérique peut autant être une circonstance négative que positive de l'existence lorsqu'elle s'applique à un marqueur moralement signifiant;
- Ce type de circonstance (positive ou négative) peut donner droit à compensation ou à des mesures spécifiques;
- L'infériorité numérique pose donc le principe d'une compensation dans un sens indéterminé.

Le fait que la direction de la compensation soit indéterminée provient du fait qu'il manque quelque chose d'essentiel à l'appréhension des minorités sous l'angle retenu ici : une réelle prise en compte de l'efficience. Dès lors, une implication pour les théories de la justice apparaît de manière nette : une situation de déséquilibre numérique, si elle peut se classer parmi les circonstances, ne constitue pas automatiquement un désavantage donnant droit à compensation ou intervention des institutions. De la sorte, l'asymétrie numérique, même lorsqu'elle sert à caractériser une situation qui implique des groupes définis par des marqueurs identitaires pertinents, n'est pas une circonstance au sens où pourrait l'entendre une approche inspirée de l'égalitarisme des chances comme celle discutée dans ces pages. Par contre, la discussion de cet argument révèle que la dimension réellement pertinente sur le plan moral est l'efficience.

L'incursion dans le champ du nombre soulève toutefois une série de questions qui portent sur la origines des différences d'efficience dont souffrent certains groupes ainsi que sur la valeur normative de celles-ci. Pourquoi certains groupes sont-ils plus aptes à générer des gains coopératifs que d'autres? Comment expliquer les différentiels d'efficience en recourant à des outils économiques? Qu'apportent ces derniers à l'analyse normative, notamment du point de vue de la justice ?

En brossant le tableau à grands traits, ces outils mettent en relief l'existence de variables sous-jacentes. Celles-ci, qui doivent être identifiées, transforment de manière constante l'infériorité numérique en avantage ou handicap. Elles font qu'une minorité peut engranger des gains coopératifs dans une situation donnée alors que la majorité (ou les autres groupes) ne le peut pas. Sans détailler plus, il est à noter que pour que ce schème soit pertinent, trois conditions doivent être remplies : (1) identifier de manière précise les variables en question; (2) établir clairement un lien de causalité entre ces dernières et des avantages et désavantages enregistrés par la minorité ou la majorité; (3) démontrer que minorité et majorité ne sont pas exposées aux mêmes variables sous-jacentes, puisque, dans ce cas, les asymétries auraient une autre provenance.

De ce point de vue, l'efficacité qu'un groupe enregistre dans la génération de gains coopératifs dépend très probablement de la manière dont celui-ci gère le nombre. Les conventions sociales propres à la minorité, à la majorité ainsi qu'aux interactions entre les deux sont des déterminants incontournables de cette gestion de la coopération. Certains groupes seraient donc plus efficaces que d'autres, car ils opéreraient selon des conventions qui se révèlent à l'usage plus adaptées pour garantir une coopération effective entre membres et gérer les problèmes d'action collective dans un contexte physique et social donné. De ce point de vue, l'avantage coopératif d'un groupe peut être attribuable à une règle qui est *en soi* plus efficace ou à une convention qui permet de tirer avantage des faiblesses coopératives de l'autre groupe (les comportements de cavalier seul constituent un exemple extrême).

Qu'est-ce qui détermine l'efficacité des conventions? Il pourrait être objecté que le raisonnement est simplement repoussé d'une étape : des groupes sont plus efficaces que d'autres car les conventions qui structurent leur comportement le sont... Une possibilité féconde est alors d'initier un retour à la culture, de façon indirecte. En effet, il est possible d'appréhender la culture comme constituée, en partie, de l'ensemble des conventions qui régit l'interaction entre individus ainsi que les institutions. Hormis des éléments communs, chaque culture se caractérise par des divergences de modes de coopération incarnés dans des conventions plus ou moins explicites. Dès lors, de telles divergences font que des groupes sont plus efficaces que d'autres, en particulier lorsqu'ils sont en situation d'infériorité numérique. Il semble alors important du point de vue descriptif et normatif de déterminer quelles sont les conventions qui donnent un avantage compétitif aux minorités.

En résumé, certaines règles seraient plus fonctionnelles que d'autres afin de gérer les problèmes d'action collective, de coopération, d'asymétrie de l'information, de contribution à la production de biens publics, etc. Une minorité pourrait très bien se révéler plus efficace qu'une majorité afin de produire des gains économiques pour ses membres, prendre le contrôle d'institutions ou, de manière plus prosaïque, survivre et prospérer, en raison des règles d'interaction qu'elle aurait adoptées (de manière souvent involontaire, comme résultat de l'histoire). Ce qui expliquerait que les cultures, au travers de leur contenu assi-

milé aux conventions de coopération, évoluent. Ce qui expliquerait également que certaines cultures persistent plus longtemps que d'autres<sup>59</sup>.

Une telle perspective ouvre deux champs d'investigation. Le premier, d'ordre épistémologique, tient dans une réflexion qui intègre au multiculturalisme les acquis d'autres domaines de recherche, notamment en théorie évolutionniste des jeux ou les approches stratégiques du contrat social<sup>60</sup>. Le second, proprement moral, est de poser la question de la redistribution intergroupe des gains coopératifs : que doivent les groupes qui ont du succès à ceux qui le sont moins ? Quelle est la nature ainsi que la force des obligations auxquelles ils peuvent être soumis ? En effet, il est possible de considérer que l'identification des mécanismes coopératifs avantageux est une chose et que, hormis les comportements nocifs pour autrui induits par de tels mécanismes (comme, par exemple, la production d'externalités), l'égalisation des gains coopératifs entre groupes ou la compensation des avantages dont certains bénéficient est une autre question. La conclusion de notre discussion des notions d'effets d'échelle et d'externalités renvoie à ce sujet de controverses : en vertu de quels critères justifier une intervention publique en présence de différentiels d'efficacité, en particulier lorsque ces derniers ne sont pas le résultat d'une interférence d'un groupe dans le fonctionnement d'un autre ? Une question connexe réside dans la légitimité des institutions à intervenir dans le groupe, c'est-à-dire en modifiant la structure des relations internes entre les membres de celui-ci.

Quoi qu'il en soit, l'étude du nombre ouvre, par l'entremise de la notion d'efficacité, de multiples avenues de recherche pour les théories de la justice dans un contexte impliquant des minorités. Elle met en lumière le thème de la coopération et de la redistribution des gains coopératifs au sein de toute société multiculturelle. Elle souligne la nécessité de prêter attention, non seulement aux inégalités, mais aussi aux mécanismes qui les génèrent. Bien que nombre de ces voies de recherche soient extérieures à la justice ethnoculturelle *per se*, il est difficile de ne pas reconnaître leur importance pour cette dernière ainsi que pour les politiques publiques qui en découlent.



## RÉFÉRENCES

- Ahier, Beck and John, «Education and the Politics of Envy», *British Journal of Educational Studies*, 51:4, 2003, pp.320-343
- Appiah, Anthony K., *The Ethics of Identity*, Princeton, Princeton University Press, 2005
- Axelrod, Robert, *Comment réussir dans un monde d'égoïstes*, Paris, Odile Jacob, 2006
- Barry, Brian, *Culture and Equality*, Cambridge, Harvard University Press, 2001
- Baumol, William, «On Taxation and the Control of Externalities», *The American Economic Review*, 62:3, 1972, pp.307-322
- Begg, David, Fischer, Stanley and Dornbusch, Rudiger, *Microéconomie*, Paris, Ediscience International, 1996
- Binmore, Ken, *Game Theory and the Social Contract Volume 1: Playing Fair*, Cambridge, MIT Press, 1994
- Binmore, Ken, *Game Theory and the Social Contract Volume 2: Just Playing*, Cambridge, MIT Press, 1998
- Chua, Amy, *Le monde en feu*, Paris, Seuil, 2007
- Coase, Ronald, «The Nature of the Firm», *Economica*, 4:16, 1937, pp.386-405
- Coase, Ronald, «The Problem of Social Cost», *Journal of Law and Economics*, 3:1, 1960, pp.1-44
- Dahlman, Carl, «The Problem of Externality», *Journal of Law and Economics*, 22:1, 1979, pp.141-162
- Doris, John, *The Lack of Character*, Cambridge, Cambridge University Press, 2002
- Dworkin, Ronald, *A Matter of Principle*, New York, Oxford University Press, 1985
- Dworkin, Ronald, *Sovereign Virtue*, Cambridge, Harvard University Press, 2002
- Fiss, Owen M., «Groups and the Equal Protection Clause», *Philosophy and Public Affairs*, 5:2, 1976, pp.107-177
- Ford, Richard T., *Racial Culture: A Critique*, Princeton, Princeton University Press, 2004
- Fraser, Nancy, and Honneth Axel, *Redistribution or Recognition?* London, Verso, 2003
- Gauthier, David, *Morals by Agreement*, New York, Oxford University Press, 1986
- Gitlin, Todd, *The Twilight of Common Dreams*, New York, Metropolitan Books, 1995
- Gutmann, Amy, «Civic Education and Social Diversity», *Ethics*, 105:3, 1995, pp.557-579
- Heath, Joseph, «Culture: Choice or Circumstance?», *Constellations*, 5:2, 1998, pp.183-200

Hicks, John, « The Foundations of Welfare Economics », *The Economic Journal*, 49:196, 1939, pp.696-712

Iannaccone, Laurence R., « Why Strict Churches Are Strong », *The American Journal of Sociology*, 99:5, 1994, pp.1180-1211

Jung, Courtney, *The Moral Force of Indigenous Politics*, New York, Oxford University Press, 2008

Kaldor, Nicholas « Welfare Propositions of Economics and Interpersonal Comparisons of Utility », *The Economic Journal*, 49:195, 1939, pp.549-552

Knight, Carl, « Liberal Multiculturalism Reconsidered », *Politics*, 24:3, 2004, pp.189-197

Knight, Carl, *Luck Egalitarianism*, Edinburgh, Edinburgh University Press, 2009

Kukathas, Chandran, « Equality and diversity », *Politics, Philosophy & Economics*, 1:2, 2002, pp.185-212

Kymlicka, Will, *Liberalism, Community, and Culture*, Oxford, Oxford University Press, 1989

Kymlicka, Will, *Multicultural Odysseys*, Oxford, Oxford University Press, 2007

La Caze, Marguerite, « Envy and Resentment », *Philosophical Explorations*, 4:1, 2001, pp.31-45

Levy, Jacob, *The Multiculturalism of Fear*, Oxford, Oxford University Press, 2000

Macedo, Stephen, « Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls? » *Ethics*, 105:3, 1995, pp.468-496

Michaels, Walter Benn, *The Trouble with Diversity*, New York, Metropolitan Books, 2006

Phillips, Anne, *Multiculturalism without Culture*, Princeton, Princeton University Press, 2007

Pigou, Artur C., *The Economics of Welfare*, London, MacMillan and co., 1932

Rapoport, Hillel and Weiss, Avi, « The optimal size for a minority », *Journal of Economic Behavior & Organization*, 52, 2003, pp.27-45

Rawls, John, *A Theory of Justice*, Cambridge, Harvard University Press, 1999

Richerson, Peter, and Boyd, Robert, *Not by Genes Alone*, Chicago, Chicago University Press, 2006

Simon, Bernd, Aufderheide, Birgit, and Kampmeier, Claudia, « The Social Psychology of Minority-Majority Relations », in Marilynn B. Brewer et Miles Hewstone ed., *Self and Social Identity*, Oxford, Wiley-Blackwell, 2004, pp.278-297

Spinner-Halev, Jeff, *The Boundaries of Citizenship*, Baltimore, The John Hopkins University Press

Varenes (de), Fernand, *Language, Minorities and Human Rights*, The Hague, Kluwer Law International, 1996

Veblen, Thorstein, *The Theory of the Leisure Class*, Mineola, Dover Publications, 1994

Zizzo, Daniel John, « Empirical evidence on interdependent preferences: nature or nurture? »  
*Cambridge Journal of Economics*, 27:6, 2003, pp.867-880

## NOTES

- <sup>1</sup> L'auteur tient à remercier Martin Blanchard, coordinateur de rédaction des *Ateliers de l'Éthique*, pour sa lecture attentive et critique ainsi que ses commentaires féconds.
- <sup>2</sup> L'efficacité est une notion aux acceptions multiples dans les sciences économiques. La principale est l'efficacité allocative incarnée par le critère parétien en vertu duquel une allocation est efficace si elle améliore la situation d'au moins un agent, sans détériorer la situation d'aucun autre agent. Dans la suite de l'article, nous utilisons la notion de manière très souple. L'usage que nous en faisons sert à caractériser toute situation ou entité qui maximise les extrants (*output*) qu'elle produit par rapport aux entrants (*inputs*) qu'elle utilise. Plus que d'une efficacité allocative, il s'agit d'une efficacité productive.
- <sup>3</sup> Fiss, 1976, p.152.
- <sup>4</sup> Simon et *al.*, 2004, p.278. Les auteurs donnent de nombreuses références du recours à une telle définition en psychologie sociale.
- <sup>5</sup> De Varennnes, 1996, pp.136-137.
- <sup>6</sup> De Varennnes, 1996, pp.140-141.
- <sup>7</sup> De Varennnes, 1996, p.141.
- <sup>8</sup> *Lovelace v. Canada*, Communication 24/1977, UN Document A/36/40 cité par de Varennnes, 1996, p.141. Lovelace contestait une disposition de la *Loi sur les Indiens* qui retirait aux Amérindiennes mariées à des non-Amérindiens leur statut indigène.
- <sup>9</sup> Kukathas, 2002, p.199.
- <sup>10</sup> Kukathas, 2002, p.199.
- <sup>11</sup> Les économistes réfèrent d'habitude à deux mécanismes qui ne se recoupent pas totalement : les économies d'échelle et les rendements d'échelle. Dans le cas qui nous intéresse, la notion d'effet d'échelle renvoie aux deux notions puisque des rendements d'échelle positifs correspondent à des économies d'échelle. De plus, notre usage du terme est trop approximatif pour rentrer dans de tels détails. Nous utilisons donc les trois appellations de manière indistincte.
- <sup>12</sup> Kymlicka, 1989, p.183.
- <sup>13</sup> Le domaine linguistique est un de ceux dans lesquels l'argument numérique est le plus fréquemment appliqué de façon explicite (Spinner-Halev, 1994, pp.160-166).
- <sup>14</sup> Heath, 1998, p.183.
- <sup>15</sup> Knight, 2009, p.1.
- <sup>16</sup> Heath, 1998, p.183.
- <sup>17</sup> Dworkin, 2002, pp.65-73; Kymlicka, 1989, pp.187-188.
- <sup>18</sup> Kymlicka, 1989, p.188.
- <sup>19</sup> Sur la distinction entre jalousie et ressentiment due, à David Hume, ainsi que le rôle positif du ressentiment comme indicateur d'injustices se référer à Ahier *et al.* (2003), Lacaze (2001, p.39), Rawls (1999, pp.467-468).
- <sup>20</sup> Il s'agit d'un cas de consommation ostentatoire (Veblen, 1994).
- <sup>21</sup> Heath, 1998, p.190. La dernière remarque renforce une interprétation du concept de minorité dépouillé de tout attribut substantiel.
- <sup>22</sup> Pour que ce résultat se vérifie, des postulats supplémentaires sont nécessaires quant à la nature des rendements marginaux (qui doivent être constants ou croissants), sur la nature des ajustements à un accroissement de l'« offre » culturelle, etc. Limitons-nous à remarquer que, comme la question de l'efficacité des minorités le démontre dans la suite de l'article, un accroissement de la taille (du groupe et donc de la production culturelle) ne va pas automatiquement de pair avec une compétitivité accrue.
- <sup>23</sup> Begg *et al.*, 1996, p.334.
- <sup>24</sup> Pour un aperçu de ces controverses, le lecteur peut se référer à l'ouvrage de Brian Barry (2001) ou celui de Walter Benn Michaels (2006).
- <sup>25</sup> Gauthier, 1986, p.96.
- <sup>26</sup> Dahlman, 1979, p.156.

- <sup>27</sup> Baumol, 1972 ; Pigou, 1932, II.IX.16-17. La taxe pigovienne repose sur le principe d' « internalisation des externalités », c'est-à-dire que l'effet externe négatif est réintégré au système de prix par l'imposition d'une taxe équivalente à la valeur de celui-ci sur l'agent qui en est l'émetteur.
- <sup>28</sup> Piketty, 2008, pp.4 ; 94-107.
- <sup>29</sup> Les traditions pigouvienne et coasienne se rejoignent sur ce postulat de l'externalité comme déviation d'un équilibre. Elle divergent cependant quant à la capacité d'accords librement négociés entre individus sans intervention extérieure (c'est-à-dire des institutions) à corriger la situation, c'est-à-dire à inclure le coût social dans les prix finaux (Coase, 1960).
- <sup>30</sup> Affirmer que la culture produit des externalités positives revient à l'assimiler à un bien public, ce qui soulève un certain nombre de questions qui ne sont pas évoquées dans cet article. Jacob Levy a fourni une brève discussion critique de l'argument qui fait de la culture un bien public (Levy, 2000, pp.114-121).
- <sup>31</sup> Dworkin, 2002, p.287.
- <sup>32</sup> Coase, 1937.
- <sup>33</sup> Rapoport and Weiss, 2003, pp.27-28.
- <sup>34</sup> Rapoport and Weiss, 2003, p.28. Le point d'intérêt de leur démarche est qu'ils ne font aucune présupposition quant à la nature des groupes afin de dégager la mécanique brute de la position minoritaire en l'absence de toute différenciation substantielle entre groupes. Ils offrent un schème théorique qui permet de saisir l'influence du nombre de la manière la plus claire possible.
- <sup>35</sup> Pour un aperçu du concept de préférence interdépendante, le lecteur peut se reporter aux travaux de Daniel Zizzo (2003).
- <sup>36</sup> Axelrod, 2006.
- <sup>37</sup> Agir en cavalier seul consiste à se soustraire aux règles communes lorsqu'il est plus rationnel de ne pas respecter ses engagements, car plus payant. Par exemple, sauter les portiques du métro pour ne pas s'acquitter du prix du ticket, ne pas payer ses impôts, circuler en automobile dans la voie des autobus, etc.
- <sup>38</sup> Pour une analyse similaire de la manière dont les « Églises strictes » parviennent à maîtriser ce problème en fixant un niveau adéquat de contrainte, se reporter à Iannaccone (1994). L'auteur montre, entre autres choses, qu'il est dans l'intérêt de telles institutions religieuses de demeurer minoritaires afin d'éviter le délitement et de conserver leurs avantages compétitifs.
- <sup>39</sup> Iannaccone, 1994.
- <sup>40</sup> La majorité est ici qualifiée d'hypothétique dans le sens où il est ardu d'identifier un groupe structuré qui formerait une majorité homogène. Les majorités sont toujours des ensembles hétéroclites formés de tout ce qui ne constitue pas la ou les minorités.
- <sup>41</sup> On comprend alors mieux la forme que prennent les interactions à l'intérieur de certains groupes. Comme les gains dépendent, en partie, du degré de consistance et donc de la rigueur des règles imposées, il existe alors un risque de dérives illibérales. Les minorités efficientes seraient donc confrontées à un arbitrage entre *efficacité collective* et *liberté individuelle*. Ce point de vue, dépourvu de tout jugement moral, est renforcé lorsque l'on considère que la majeure part des gains d'efficience sont supposés provenir du modelage des préférences ainsi que du contrôle par les pairs.
- <sup>42</sup> Iannaccone, 1994, p.1203.
- <sup>43</sup> Le nationalisme ou le traditionalisme marqué de certains groupes se comprend dans cette perspective. Ces derniers adoptent un comportement stratégique afin de resserrer les liens internes au groupe et contrebalancer le déficit d'efficience lié à leur taille.
- <sup>44</sup> Comme les émeutes de mai 1998 à Jakarta qui, même si elles n'ont pas eu un caractère populaire spontané, ont traduit le statut de bouc émissaire tenu par la minorité sino-indonésienne.
- <sup>45</sup> Rapoport and Weiss, 2003, p.43.
- <sup>46</sup> Chua, 2007.

- <sup>47</sup> Quoi qu'il en soit, lorsque la notion de minorités dominantes est mobilisée, il convient de garder à l'esprit que seule une partie des membres de la minorité bénéficie en général des avantages décrits précédemment (constat qui vaut également pour la « majorité »).
- <sup>48</sup> Kymlicka, 2007, p.81.
- <sup>49</sup> Rawls, 1999.
- <sup>50</sup> Kymlicka, 2007, p.82.
- <sup>51</sup> Kymlicka, 2007, p.82.
- <sup>52</sup> Kymlicka, 2007.
- <sup>53</sup> Kymlicka, 2007, pp.262-263.
- <sup>54</sup> Dworkin mentionne à ce propos le « broad agreement within modern politics that the government must treat all its citizens with equal concern and respect » (Dworkin, 1985, p.191).
- <sup>55</sup> Notons que cette reformulation de problématiques socioéconomiques en termes ethnoculturels peut avoir des raisons stratégiques (utiliser un discours plus efficace pour accéder à certaines ressources) légitimes du point de vue des minorités concernées (Jung, 2008).
- <sup>56</sup> Michaels, 2006, p.19. Se référer aussi à Barry, 2001 ; Gitlin, 1995 ; Michaels, 2006.
- <sup>57</sup> Appiah, 2004, pp.66-69 ; Ford, 2004 ; Song, 2007, pp.29-31.
- <sup>58</sup> En effet, même au sein des minorités dominantes, seule une minorité profite pleinement de la domination économique.
- <sup>59</sup> Les travaux de Peter Richerson et Robert Boyd (2006) sont instructifs à cet égard. Une appréhension évolutionniste de la culture constituée de conventions a été suggérée à l'auteur par Joseph Heath.
- <sup>60</sup> Ken Binmore (1994, 1998).

**DOSSIER:****DIVERSITY AND THE LIBERAL STATE**

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The articles contained in this issue are the proceedings of a joint workshop organized by Centre for the Study of Equality and Multiculturalism (CESEM) and Centre de Recherche en Éthique de l'Université de Montréal (CRÉUM) that took place in June 2010 at the University of Copenhagen. The idea behind the workshop was that most *de facto* multicultural countries face to some extent the same issues regarding diversity management, especially as regards cultural and religious affairs. And it is interesting to compare experiences and thoughts from North America and Europe and especially Canada and Denmark, where Canada is known for embracing multicultural policies and Denmark for firmly rejecting them<sup>1</sup>.

In recent years, Canada has had several intense debates on topics as various as the proposed introduction of the so-called 'Sharia tribunals' in Ontario<sup>2</sup> and the Bouchard-Taylor Commission on reasonable accommodation in Quebec<sup>3</sup>. Similarly, Denmark has experienced debates over e.g. mother-tongue instruction and religious symbols worn by judges, where Nils Holtug discusses the latter in the present issue. But such questions are not specific to Denmark and Canada. Recurrent debates on religious symbols in public schools and space have taken place in France over the last years<sup>4</sup>. Germany has had a similar debate on the wearing of such symbols by school teachers<sup>5</sup>. In the United States, various debates have concerned the right for members of police and army forces to wear religious symbols<sup>6</sup>, the right for parents from certain religious groups to prematurely remove their children from schools<sup>7</sup> or from courses they consider incompatible with their faith<sup>8</sup>. All these examples touch upon the issue of how to accommodate diversity in liberal institutions. All demonstrate the salience of the management of religious diversity in liberal democracies.

Issues of diversity and the liberal state are not limited to religion though. Even if liberal institutions emerged as an answer to discontent and wars fuelled by religious diversity, the questions at hand cannot be limited to this sole dimension. Diversity management in the liberal state concerns a broad array of issues. For instance, Canada and Denmark have indigenous peoples who have put forward claims for self-government. And even if one may argue that the issue of diversity is more visible in some countries due to their distinct histories, it is present everywhere. Religious, ethnic, linguistic, moral and national diversity is the common lot of all countries.

This does not mean that all these forms of diversity foster strictly identical questions. For example, demands that emanate from indigenous peoples and national minorities sometimes have profound constitutional implications, in terms of e.g. secession or political autonomy, which is seldom the case for migrant minorities. Despite these particularities, there is a general set of questions that unites them,

namely: how far should institutions in liberal countries go to accommodate difference? How do their (proclaimed) liberal commitments interact with demands for accommodating diversity, when such accommodation implies e.g. exemptions from common regulation, specific rights and social norms? By way of illustration, Morten Ebbe Juul Nielsen inquires about the normative dimensions of cases where several legal orders are to cohabit the same territory.

As pointed out above, the liberal state has emerged as a solution to the issue of diversity. Of particular concern here is the principle of neutrality, i.e. the claim that institutions should remain neutral with respect to different conceptions of the good. This principle has received various formulations that, more or less, share the same basic idea that the state should abstain from favoring or handicapping specific cultural, moral, religious or ethnic groups<sup>9</sup>.

A second, related, principle that also forms the basis of the liberal position since John Locke's *A Letter Concerning Toleration* (1689) is, precisely, toleration. Toleration is regularly appealed to in order to justify some hand-off policies from the state, accommodation of difference, and so on. In spite of its apparent overlap with neutrality, the principle expresses the slightly different idea that institutions (and individuals) should not interfere with conceptions of the good, even ones that diverge from the conception which is presumed to be endorsed by the majority and ones that this majority may find abhorrent or in contradiction with some of its fundamental principles<sup>10</sup>, as long as, to return to John Stuart Mill, there is no harm to others<sup>11</sup>.

So much for pure theory. As pointed out by several authors in the present volume, the principles of neutrality and toleration may appear unconvincing in a liberal environment for several reasons. One is that institutions operate in *de facto* culturally loaded environments<sup>12</sup>. No state is fully neutral, at least as regards consequences, as mentioned by Sune Lægaard. Some cultures or religions are always favored over others. Historical factors help to explain advantages in terms of state support that certain cultural or religious groups enjoy over others. It is often more difficult for holders of minority views to realize their conception of the good. They have to bear costs that members of the majority do not<sup>13</sup>. As a result, any affirmation of the neutrality of institutions could appear hypocritical from the minority's perspective, while blinding the majority to their undeserved advantages. This reason has been regularly invoked since the first philosophical discussions of political multiculturalism in the 1990's.

Another reason why some may be skeptical regarding the compatibility of liberalism and diversity accommodation is conceptual. In fact, as the argument usually goes, the principles of toleration and neutrality conflict with other normative commitments, which are central to the liberal tradition. Two antagonist interpretations of this tension are possible. One, which is common among critics of multiculturalism, proclaims that multiculturalism could (and, in fact, often does) conflict with fundamental liberal principles such as respect for basic human rights and/or gender equality<sup>14</sup>. Another elaborates on the previous argument (states are *de facto* culturally biased): liberalism tends to serve the interests of the majority or initiate or reinforce domination of some sort, especially in a post-colonial environment. According to both versions of the argument, with opposite implications though, a choice will have to be made between liberalism and diversity accommodation.



This special issue proceeds in a different way. Instead of elaborating on this much discussed tension, the articles take the discussion a step further. They take seriously and engage the idea that diversity has a feed-back effect on liberal principles and institutions. In other words, liberalism is transformed by the necessity of dealing with diversity. What liberal principles then lose in simplicity or neatness, they gain in refinement and adequacy, precisely because liberalism may be seen as a process of constant actualization of its principles (neutrality, toleration, individual freedom, respect). To repeat the point, since liberalism has been forged as an answer to diversity, it is natural that it gets challenged by – and may need to be transformed in light of – requests for accommodation. The articles also engage views about the monolithic character of liberalism and its inhospitality toward diversity. Liberalism is diverse, both in the sense that different interpretations compete (external diversity), but also in the sense that it is committed to value-diversity and principles that should be articulated together (internal diversity).

The first two articles offer a discussion of neutrality. Sune Lægaard identifies degrees of secularism and asks the important question of how to conceive of different forms of neutrality that go astray from pure secularism (as, e.g., in the case of Denmark). He employs the concept of “moderate secularism” in order to, first, study its relation to principles of neutrality, toleration and recognition, and, second, determine in which sense a moderately secular state could still be labeled ‘liberal’. Liberalism is thus put in context by reviewing the kind of moral obligations that are generated when liberalism espouses an impure form<sup>15</sup>. On this basis, Lægaard demonstrates the need for a normative analysis of moderate secularism, i.e. a rethinking of the nature of mildly neutral states that diverge from the liberal ideal, and for conceiving of liberalism as a pluralistic normative notion.

Nils Holtug offers a critical evaluation of a law on religious symbols passed in 2009 in Denmark, banning the use of such symbols by judges in courts of law, following pressure from the nationalist right (the *Danish People’s Party*). First, he demonstrates how the law came into existence through a transformation of justifications, starting with concerns about the allegedly illiberal connotations of Muslim headscarves on the nationalist right (and even in mainstream Danish politics) and ending, in the official motivation for the law, with concerns about secularism and state neutrality. Second, he argues that appeals to liberal neutrality for legitimating the ban are flawed, implying that there is indeed room within the liberal framework to accommodate diversity. Holtug unfolds the principle of neutrality by spelling out four ways of understanding it in the context of the law (neutrality of justification, neutrality of consequences, equality of opportunity, and real and perceived impartiality) and argues that they cannot justify the ban on religious symbols. On the contrary, variants of the neutrality argument imply that the law is unjust.

The next two articles illustrate how diversity challenges liberal institutions from within, especially courts and the legal architecture. Morten Ebbe Juul Nielsen considers three challenges that multi-legalism (i.e. the cohabitation of several legal orders on a given territory) presents. The first two challenges rely on the choice between hard and soft forms of multi-legalism, and the clash between culturally based claims and universalistic concerns. The article spots the ‘choice of law’ as an issue of major concern. In short, in a multi-legal context, it is necessary to define some second-order rules and establish adjudicating institutions

with the very purpose of arbitrating between claims stemming from different ‘*nomos* groups’, i.e. groups structured around different systems of law. The article goes beyond the pure principled opposition between multicultural multi-legal claims and universalistic commitments, which is recurrent in the literature, by raising the question of how properly to conceive of the articulation of distinct legal spheres (while leaving supremacy on the territory untouched). As the two precedent articles, it digs into the normative implications of liberalism.

Daniel Weinstock’s article is a reflection on toleration. It deals with the arguments used to assess the legitimacy of religious claims for accommodation in Canadian Courts. It is argued that Brian Barry’s “paradox of toleration” (either a law is essential and exemptions are not justified or a law is not essential and it should be abrogated) is too simplistic for understanding how to balance individual rights and public interest. Weinstock reviews the two methods used by courts for deciding if some exemptions should be granted: the subjective test (what is evaluated is the sincerity of the claimant and her understanding of religious or cultural requirements) and the objective test (what is evaluated is the material proof for the practice for which exemption is asked). Upon assessing the strengths and weaknesses of each approach, a mixed test requiring claimants to make a “plausible case” for their demands is defended.

Kasper Lippert-Rasmussen’s article broadens the scope of the discussion by engaging liberal justifications of political multiculturalism. In this debate, one prominent liberal position is Will Kymlicka’s, which is arguably based on luck egalitarianism<sup>16</sup>. Kymlicka’s account has been challenged by Jonathan Quong on the ground that it contains loopholes and is in fact inconsistent with luck egalitarianism<sup>17</sup>. Quong claims that an argument based on the Rawlsian conception of fair equality of opportunity would be a better candidate for legitimating poly-ethnic rights. However, in part because Quong’s argument does not clearly identify the reasons why people immigrate, Lippert-Rasmussen defends the idea that luck egalitarianism is still superior for supporting cultural justice. In short, the article argues that choice matters, especially regarding migrants, when institutions are to determine if some individuals or groups are entitled to some kind of support or recognition in order to counterbalance the disadvantages they suffer in virtue of their minority status. By re-introducing the importance of individual choice, Lippert-Rasmussen draws the contours of a “luck multiculturalism” and assesses the widely held view that cultural inequalities and injustices are mainly a question of circumstance.

In summary, this special issue covers three important dimensions of diversity management. Firstly, it engages the proper meaning and normative implications of liberal principles such as neutrality and toleration. Secondly, it offers some views on the implications of such principles regarding the process of accommodation and the legal architecture of liberal democracies. Finally, it opens up the fundamental question of how to conceive of liberalism in order to firmly ground multiculturalism.

## REFERENCES

- Ackerman, Bruce, *Social Justice and the Liberal State*, New Haven, Yale University Press, 1980
- Banting, Keith, Richard Johnston, Will Kymlicka and Stuart Soroka, «Do Multicultural Policies Erode the Welfare State? An Empirical Analysis», in Keith Banting and Will Kymlicka (eds.), *Multiculturalism and the Welfare State*, Oxford, Oxford University Press, 2006
- Bouchard, Gérard, and Charles Taylor, *Building the Future*, Quebec City, Gouvernement du Québec, 2008
- Commission de réflexion sur l'application du principe de laïcité dans la République, *Laïcité et République*, Paris, La documentation française, 2004
- Dworkin, Ronald, «Liberalism' in Ronald Dworkin, *A Matter of Principle*», Cambridge, Harvard University Press, 1985
- Joppke, Christian, «State Neutrality and Islamic Headscarf Laws in France and Germany», *Theory and Society*, 36:4, 2007, pp.313-332
- Kymlicka, Will, *Liberalism, Community, and Culture*, New York, Oxford University Press, 1989
- Kymlicka, Will, *Multicultural Citizenship*, New York, Oxford University Press, 1995
- Larmore, Charles, *Patterns of Moral Complexity*, Cambridge, Cambridge University Press, 1987
- Locke, John, *A Letter Concerning Toleration*, 1689
- Mill, John Stuart, *On Liberty*, London, John W. Parker and Son, West Strand, 1859
- Nagel, Thomas, *Equality and Partiality*, New York, Oxford University Press, 1991
- Norman, Wayne, *Negotiating Nationalism*, New York, Oxford University Press, 2006
- Okin, Susan, *Is Multiculturalism Bad for Women?* Princeton, Princeton University Press, 1999
- Quong, Jonathan, «Cultural Exemptions, Expensive Tastes, and Equal Opportunities», *Journal of Applied Philosophy*, 23:1, 2006, pp.53-71
- Rawls, John, *Political Liberalism*, New York, Columbia University Press, 1993
- Tamir, Yael, *Liberal Nationalism*, Princeton, Princeton University Press, 1995
- Young, Marion Iris, *Justice and the Politics of Difference*, Princeton, Princeton University Press, 1990
- Williams, Melissa, «The Politics of Fear and the Decline of Multiculturalism» in John Erik Fossum, Johanne Poirier and Paul Magnette (ed.), *The Ties that Bind*, Bruxelles, Peter Lang, 2009, pp. 53-76

## NOTES

- <sup>1</sup> Banting et al, 2006.
- <sup>2</sup> Williams, 2009.
- <sup>3</sup> Bouchard and Taylor, 2008.
- <sup>4</sup> Commission de réflexion sur l'application du principe de laïcité dans la République, 2003.
- <sup>5</sup> Joppke, 2007.
- <sup>6</sup> *Goldman v. Weinberger; Webb v. City of Philadelphia.*
- <sup>7</sup> *Wisconsin v. Yoder.*
- <sup>8</sup> *Mozert v. Hawkins County School Board.*
- <sup>9</sup> Ackerman, 1980; Dworkin, 1987; Larmore, 1987; Rawls 1993.
- <sup>10</sup> A part of chapter 4 of John Stuart Mill's *On Liberty* (1859) is devoted to the issue of polygamy, i.e. the toleration that should be displayed when confronting certain conceptions of the good.
- <sup>11</sup> 'That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right' (Mill 1859, p.22).
- <sup>12</sup> Young, 1990.
- <sup>13</sup> Kymlicka, 1989.
- <sup>14</sup> Okin, 1999.
- <sup>15</sup> In that respect, Lægaard's article can be interpreted as belonging to a liberal tradition that tries to assess its compatibility with nationalism or nation-building (Norman, 2006; Tamir, 1995).
- <sup>16</sup> Kymlicka, 1989, 1995.
- <sup>17</sup> Quong, 2006.

# RELIGIOUS NEUTRALITY, TOLERATION AND RECOGNITION IN MODERATE SECULAR STATES: THE CASE OF DENMARK<sup>1</sup>

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## ABSTRACT

This paper provides a theoretical discussion with point of departure in the case of Denmark of some of the theoretical issues concerning the relation liberal states may have to religion in general and religious minorities in particular. Liberal political philosophy has long taken for granted that liberal states have to be religiously neutral. The paper asks what a liberal state is with respect to religion and religious minorities if it is not a strictly religiously neutral state with full separation of church and state and of religion and politics. To illuminate this question, the paper investigates a particular case of an arguably reasonably liberal state, namely the Danish state, which is used as a particular illustration of the more general phenomenon of “moderately secular” states, and considers how one might understand its relations to religion. The paper then considers the applicability to this case of three theoretical concepts drawn from liberal political philosophy, namely neutrality, toleration and recognition, while simultaneously using the case to suggest ways in which standard understandings of these concepts may be problematic and have to be refined.

## RÉSUMÉ

L'article fournit une discussion théorique, avec comme point de départ le cas du Danemark, de certaines questions théoriques concernant la relation que les États libéraux peuvent entretenir avec la religion en général et les minorités religieuses en particulier. La philosophie politique libérale a longtemps tenu pour acquis que les États libéraux devaient être neutres sur le plan religieux. L'article s'interroge sur le statut de l'État libéral quant à la religion et aux minorités religieuses si cet État n'est pas strictement neutre avec une pleine séparation de l'Église et de l'État ainsi que de la religion et du politique. Afin d'éclairer cette question, l'article se penche sur le cas particulier d'un État pouvant être raisonnablement qualifié d'État libéral, l'État danois, lequel est utilisé en tant qu'illustration particulière du phénomène plus général des États « modérément séculiers », et il considère comment son rapport à la religion peut être conçu. L'article considère ensuite l'applicabilité à ce cas particulier de trois concepts issus de la philosophie politique libérale, en l'occurrence la neutralité, la tolérance et la reconnaissance, tout en se servant de manière simultanée de ce cas afin de suggérer des raisons pour lesquelles les compréhensions standards de ces concepts peuvent être problématiques et doivent être affinées.

## INTRODUCTION

This paper provides a theoretical discussion with point of departure in the case of Denmark of some of the theoretical issues concerning the relation liberal states may have to religion in general and religious minorities in particular. In liberal political philosophy, it has long been taken for granted that a liberal state has to be a religiously neutral state. The ideal liberal state has to be institutionally somewhat similar to the US; with regard to religion, liberal political philosophy is to a large extent a theoretical interpretation of the US constitution's First Amendment's anti-establishment and free exercise clauses.

There are many complicated theoretical discussions of the notion of neutrality, including criticisms of its coherence or desirability (e.g. Sher, 1997) and whether neutrality really requires non-establishment (Holtug, 2009), which I will not even attempt to go into here. Instead I want to ask: how can and should we understand theoretically what a liberal state is with respect to religion and religious minorities if it is not a strictly religiously neutral state with full separation of church and state and of religion and politics?

This question can be understood in several ways. If one shares the theoretical concerns about the requirement of liberal neutrality, then the question concerns an alternative formulation of what liberalism means in theory with regard to religion. If one still endorses the ideal of liberal neutrality in some form, then my question is rather how we should understand non-ideal real-world liberal states, which are often far from strictly neutral, i.e. what it is about non-neutral states that still makes them recognisably liberal? I will sketch some relevant considerations in relation to this question through an investigation of a particular case of an arguably reasonably liberal state, namely the Danish state. My question is how one might understand its relations to religion and what it might teach us about the possible relation between religion and liberal states.

The Danish case of state-religion relations is chosen as focus for a number of reasons: First, the Danish state is in many crucial respects a distinctively liberal state; it is a democratic and (in a sense to be explained) non-confessional state with wide-ranging religious freedom and other liberal rights. Secondly, it is not a neutral state with separation of church and state; the Danish state is rather what has been called a "moderately secular" state, which is arguably neutral in some senses and respects, but not in others. This is not a peculiar phenomenon since most, if not all, European states either have established churches and state support for organized religion or regulate and uphold various links to organized religion, even in the French case (Bowen, 2007; Modood, 2007); the Danish state is merely a particularly stark example of the general European combination of religious neutrality and non-neutrality, relative separation and institutional involvement.

The theoretical question then is: a) how should we understand state-religion relations in such cases, i.e. which theoretical concepts should we use to *describe* these relations if we cannot simply invoke neutrality and separation, and b) how do we relate *normatively* to state-religion relations if a state can be liberal without being religiously neutral, either in principle (if one accepts the theoretical criticisms of the idea of neutrality) or at least in non-ideal practice?

The paper will present the Danish case and show how complicated it is to apply standard theoretical concepts such as neutrality, separation, toleration, respect and recognition to it. My focus will partly be on the constitutionally defined role of the Evangelical-Lutheran church as the “People’s Church”, partly on the way the Danish state relates to religious communities other than that of the Lutheran church.

The paper discusses some central liberal theoretical concepts in relation to this case. The first is neutrality. I argue that even though the Danish state is not strictly religiously neutral, we should distinguish between neutrality in different respects and dimensions. It then becomes less clear that the religious non-neutrality of the Danish state makes it especially illiberal.

The paper proceeds to consider whether the Danish state, since it is not strictly religiously neutral, should rather be understood as being tolerant towards religious minorities. The paper shows, first, that there are a number of conceptual complications in applying the (attitudinal) concept of toleration to the state in general and to the relation between the Danish state and religious minorities in particular. It is argued that one cannot in any straightforward manner conclude from the existence of state support for an established church that the state is opposed to other religious communities in the way required for (traditional) concepts of toleration to apply to it.

The paper moves on to further theoretical issues deriving from the debates on multiculturalism, where traditional liberal ideals of neutrality and toleration are often rejected in favor of some form of public recognition of minorities by the state. I argue that the concept of recognition is better suited than notions such as neutrality and toleration to describe Danish state-religion relations and that this need not in itself make them illiberal. But the paper also notes a number of problems for proponents of policies of recognition, namely that recognition may involve misrecognition and inequality.

My aim is not to find the “real” historical rationale for the Danish arrangements, which are complex products of historical evolution influenced by many different ideas and forces, and therefore unlikely to embody one single or coherent idea or rationale. I rather try to use such a messy real life case to illustrate some challenges faced by our theoretical models. I take it that we want our theoretical models to help us both describe and assess real life cases. If we are liberals,

we want to have theoretical concepts and normative standards to guide us in assessing the liberality of states and help us understand what their liberality consists in. The paper uses the Danish case in two ways: On the one hand it uses it to point out how commonly invoked concepts like neutrality and toleration may simply be descriptively inaccurate in relation to states like the Danish one. On the other hand it uses the case to question formulations of liberalism, especially as requiring religious state neutrality; if a state can be reasonably liberal without being strictly religiously neutral perhaps religious neutrality has to be qualified as a central requirement of liberalism?

My conclusion will neither amount to an all things considered assessment of the case or a general view about how liberalism should be understood. I will more modestly try to illustrate both how a non-neutral state might reasonably be characterized as liberal, how its relationship to religions challenges concepts of religious neutrality, toleration and recognition, while indicating some remaining liberal normative worries about various aspects of the case.

### **MODERATE SECULARISM IN PRACTICE: THE DANISH CASE**

Denmark provides an interesting case for present purposes because the Danish institutionalisation of the state-religion relationship exemplifies what Tariq Modood has termed “moderate secularism”. This is due to the existence of an established church sponsored by the state, with substantial inequalities in the statuses enjoyed by different religious minorities or communities (Modood, 2007; Lægaard, 2008). Moderate secularism captures the actual types of state-religion relations in Europe, which are not characterized by absolute separation demanded by more radical forms of “ideological secularism”. European states do not ignore or remain aloof in relation to religion in general or religious groups in particular, but recognise and regulate religion and religious groups in a variety of ways. This is the “moderate” aspect, which consists in the ways they depart from the traditional liberal idea of secularism as separation and neutrality. Although not upholding absolute separation, moderate secular states nevertheless secure a degree of mutual autonomy of state and religious communities, which is why they still qualify as “secular”. So Modood’s idea is that secularism is not an either-or, as the traditional liberal interpretation in terms of religious neutrality suggests, but a matter of degree. Furthermore, he claims that the real or genuine sort of secularism is not necessarily the most radical forms, but that there are reasons why the more moderate versions are actually preferable. These reasons have to do with the fact that the moderate state-religion relationship allows states to actively *accommodate* religious minorities and treat organised religion as a *public good* (Modood, 2010: 5-6).

In this section I will sketch the institutional relations between the Danish state and religious communities with a point of departure in the Danish state’s own official presentation of this scheme (Ministry of Ecclesiastical Affairs, no date).



The point of the sketch is to function as a basis of a discussion of how different theoretical (conceptual and normative) models apply or fail to apply to the case. These are all models that have some theoretical connection with liberalism, so in this sense this is a discussion of in what ways the Danish state is liberal in its relations to religious communities.

The main characteristic of the state-religion relationship in Denmark is the fact that, according to § 4 of the constitution, the Evangelical-Lutheran church is the so-called “Danish People’s Church” (“Folkekirken”) or National Church and “is supported as such by the state”. The Danish head of state, which, since Denmark is a limited constitutional monarchy, means the king or queen, has to be a member of the national church. While the national church is formally distinct from the state (hence the designation as a “National” or “People’s” church rather than a state church) it is described in § 4 of the constitution as a fourth pillar of the state besides the three standard powers described in §§ 2 and 3, namely the executive (personified by the monarch, in whose name the government rules), the legislature and the courts (Christoffersen, 2010, p. 147). So the church is *part* of the state while simultaneously being *distinct* from all other organs of the state. In practice, state and church are connected in a variety of respects. The state is the legal subject of the national church, whose highest authority is the national parliament and which is administered by the Ministry of Ecclesiastical Affairs. The state also funds the church, partly by way of church tax collected as part of the ordinary taxation from all members of the national church. But the state also funds church buildings, education of priest and the Ministry of Ecclesiastical Affairs by way of the ordinary state taxation levied on all residents whether members of the National Church or not. In 2008, 82% of the Danish population were members of the National Church, although the share is continually dropping.

So Denmark has a fairly strong form of established religion. In practice there is nevertheless a significant degree of separation of national church and state; the doctrinal creed and similar issues of religious content of the national church are not subject to ordinary parliamentary regulation since they are constitutional issues; the Ministry of Ecclesiastical Affairs only makes administrative, non-theological decisions; day-to-day affairs of the church are run at the local level by elected parish councils.

In political practice, the non-separation of church and state means that the church is dominated by the state, which has never implemented legal rules for internal decision making within the church as promised in the constitution of the Danish state (§ 66), probably because that would allow for the church to form its own opinions on religious or political matters. So the relationship is asymmetrical; the state is separated from the church in the sense that the church has no way of affecting national politics (in this way the Danish national church is in a weaker position than, e.g., the Anglican church in Britain), but the church is not

separated from the state, since the state holds ultimate authority over the church (in this respect the Danish national church is in a peculiar and probably uniquely weak position among organised churches, whether established or not, since it has no internal decision making body whatsoever). But at the same time the status of the national church strongly signals that Denmark is a Christian country, and that the state is in some sense a Christian state.

Because of its history as a direct institutional continuation of the church of the absolutist state predating the 1849 constitution, the national church not only performs religious and symbolic functions, but also carries out important executive and administrative state functions. The most important example is that civil registration and the issuing of birth certificates are taken care of by the parish offices of the national church. This means that the records of all people born in Denmark (with the exception of Southern Jutland, which was only reunited with the Kingdom of Denmark in 1920, and people associated with recognised religious communities, cf. below) are kept by the national church and that all parents (until recently, when online registration become an option) had to register their newborn babies at their local parish office. Such purely administrative practicalities have a symbolic effect reinforcing the signals sent by the general church-state relationship in Denmark.

The fact that Denmark has an established church already implies that there is not religious equality in Denmark; the national church is the only church supported by the state. There is religious freedom in Denmark, however, which is both guaranteed by § 67 of the constitution, according to which citizens have the right to unite to worship God according to their convictions as long as this is compatible with decency and public order, and § 9 of the European Convention on Human Rights, which has been incorporated into Danish law. But religious inequality is not simply a matter of all forms of religion deviating from the Lutheran Christianity of the national church being second rated to an equal degree; there is also a complicated gradient of the statuses assigned to religious communities deviating from the national church. Officially, there are three classes of religious communities in Denmark other than that of the national church (Ministry of Ecclesiastical Affairs, no date; Simonsen, 2002).

First, there are the so-called “recognised” religious communities. This is the designation of the status assigned to religious communities other than the national church until 1970 (when a new marriage law came into effect). Recognition was bestowed by royal decree (in practice a legislative act of the parliament) and was extended to 11 religious communities, including the Jewish Mosaic religious community, the Catholic Church in Denmark, reformed churches, the Methodist Church, the Russian-Orthodox Church in Copenhagen and the Baptist Church.

Secondly, there are the so-called “approved” religious communities. Approval is the status assigned to religious communities by the state from 1970 onwards on the basis of the provisions of the Marriage Act. Applications for approval are reviewed by an advisory committee consisting of independent academic experts on religion and law with a view to establishing whether the applying group fulfils non-evaluative criteria concerning its religious nature (belief in transcendent powers), practice (written creed and rituals) and organisational structure (written rules, assigned representatives and membership) (Advisory Committee, 2010, p. 7). Over 100 religious communities, including over 20 Islamic communities, have received approval.

Thirdly, there are so-called “religious societies”. This is the designation of religious communities that have not applied for or been granted approval but operate under ordinary religious and associational freedom, e.g. because they do not conduct marriage ceremonies. These communities may still apply for status as charitable non-profit associations, which makes them eligible for the same kinds of tax-deduction and other tax benefits also shared by recognised and approved communities.

Recognised and approved religious communities have a number of rights and privileges in common, including the right to perform marriage ceremonies with legal effect under the Marriage Act, the right to residence permits for foreign preachers under the Aliens Act, the noted tax benefits, and the right to establish their own cemeteries under the Cemeteries Act. There are some differences in rights, however. Religious communities recognised by royal decree before 1970 continue to have ministers approved by royal decree, they may name and baptise children with legal effect, they keep their own church registers and may transcribe certificates on the basis of such registers. This means that ministers of recognised religious communities perform some of the same executive functions that are performed for the state by the National Church, most importantly the civil registration of newborn babies (Simonsen, 2002, p. 22). Recognised religious communities are accordingly not entirely private associations, but perform some public functions that approved religious communities do not. Curiously, this part of the Danish institutional scheme is reminiscent of corporatist models of society; a feature otherwise quite foreign to Danish society with its strong unitary and universalistic welfare state.

## NEUTRALITY

While Danish society is one of the most strongly secularised societies in the world in terms of indicators like church attendance and prominence of religion in people’s daily lives, it is obvious from the above sketch that the Danish state is not religiously neutral and that there is not separation of church and state. I nevertheless described the Danish state as a liberal and non-confessional state in the introduction. I want to defend this characterization (which is not necessarily

equivalent to an apology or endorsement of the system thus characterized) by bringing more nuances into the discourse about state neutrality.

Recent liberal political philosophy routinely discusses neutrality as a relationship between the state and persons with regard to their conceptions of the good or ethical doctrines, moves on to distinguish between neutrality of effects, aims and justifications, and often defends a more or less expansive form of the latter as a requirement for state legitimacy on the basis of some form of deontological argument about respect for persons (Gaus, 2009, pp. 81-82). For present purposes, I want to suggest the relevance of a number of further distinctions.

First, I am only concerned with *religious* neutrality, not with the general rejection of perfectionist reasoning in politics. While this delimitation may avoid complicated discussions about whether the justification of political neutrality itself has to and can be neutral, it may also be problematic, since religious neutrality is usually considered to be a defining feature of liberalism enjoying greater intuitive plausibility than broader doctrines of state neutrality generalised on the basis of it.

Secondly, there is reason not to speak only of *state* neutrality, since this elides some important distinctions between different levels of state activity. Liberal neutralists in fact disagree about what the requirement of neutrality concerns. Some are concerned with what might be called *legislative* neutrality, e.g. because it is through legislation that states authorize coercion of citizens and regulate their freedom (Waldron, 1989, p. 71). Others limit the requirement of (something like) neutrality to more fundamental *constitutional* issues (cf. Rawls' recurring reference to "constitutional essentials and matters of basic justice", e.g. 1996, pp. 44, 214-15, 228). Something like neutrality can also be required in relation to the practical execution, implementation and administration of law. This is what is captured in classic calls for equality before the law, non-discrimination and the rule of law; people should be treated the same in relation to a given law unless the law itself specifies that some difference between them should make a difference for how they are treated.

Thirdly, in addition to the distinction between the different levels of state activities, it seems important to distinguish between those activities that are *coercive* and those which are not. I will not attempt to provide any precise definition of coercion but will for present purposes rely on a common sense idea according to which taxation, the penal system and similar sanctions are clear cases of state coercion, whereas what I will call "symbolic" or merely "expressive" acts of the state need not be.

My point is simply that some state activities at some levels can be religiously non-neutral (in whatever precise sense one is interested in) while other activities

at other levels are religiously neutral. My further claim is that non-neutrality is arguably more problematic from a liberal point of view when it concerns coercive acts than when it concerns merely symbolic acts. Together this implies that it may not be problematic if a state is non-neutral in some respects; it is not as if any deviation from neutrality contaminates the entire state and makes it illiberal.

In relation to the Danish case, these distinctions both help explain and justify my characterization of the Danish state as reasonably liberal despite the obvious absence of strict separation and full religious neutrality. As already described, the religious non-neutrality of the Danish state is mainly constitutional (the setting up of the evangelical-Lutheran church as the people's church and the support of it by the state as such) and administrative (the administration of the people's church by the Ministry of Ecclesiastical Affairs). Almost all other state activities are in practice unaffected by these specific forms of religious non-neutrality and constitutional, legislative and administrative mechanisms are in place to prevent religious non-neutrality from spilling over into other domains (e.g. § 70 of the Constitution, which specifies that no one can be deprived of access to the full enjoyment of civil or political rights on grounds of his or her faith, as well as various constitutional and human rights protections of religious freedom and provisions against religious discrimination). While the Danish state is constitutionally non-neutral in relation to religion, and supports and administers the People's Church, all other aspects of state activities are as religiously neutral as in other liberal states (which is not to say that they are neutral in other respects). Most importantly, the state is religiously neutral with respect to basic rights, legislation and the implementation and administration of law, and the constitutional non-neutrality is, so to speak, insulated from having effects on other aspects of the state.

Exceptions to non-neutrality are mainly symbolic, i.e. not coercive: The declaration that the evangelical-Lutheran church is the People's Church is primary expressive and is not in itself a basis of state coercion. The same is the case for the various uses by the state of Christian symbolism. The only real exception to this rule is the small part of the financial support from the state to the church which is not covered by the church tax levied only on members of the church. This is both an economic spill-over effect (the funds used to support the Church cannot be used for something else) and one which is coercively imposed by the state, which is arguably problematic.

## **TOLERATION**

Given that the Danish state is not strictly religiously neutral, how can the state-religion relationship be understood theoretically? From the point of view of liberal political philosophy, an obvious idea is that a non-neutral state like the Danish one might rather be described as a tolerant state. This reading is based on a traditional conception of toleration as requiring a) the presence in an agent

of a negative attitude, e.g. some form of dislike or disapproval, to some object, which disposes the agent to interfere with the object, b) that the agent has the power to interfere with the object, and c) that the agent nevertheless, e.g. for principled reasons, refrains from thus interfering (Forst, 2008). Toleration thus understood is different from neutrality precisely because of the first condition, which ascribes a negative attitude and resultant disposition to interfere to the agent, which for that reason cannot count as neutral (at least not with regard to aims). This is especially clear in cases where the object of disapproval is religiously defined, e.g. a religious belief or practice, and the reason for the disapproval is itself a religious belief.

The Danish state as described might be understood as tolerant for a number of reasons. First, the very fact that makes it non-neutral in relation to religion, i.e. the constitutional establishment of the Evangelical-Lutheran church as the National Church and the support by the state for it as such, might provide a reason for ascribing religious beliefs to the Danish state that could ground the kind of negative attitude to religious beliefs and practices deviating from those definitive of the national church. Secondly, the state clearly fulfils the second condition of power. Thirdly, since the state nevertheless upholds freedom of religion, it would seem to fulfil the third condition of non-interference. Together this theoretical interpretation of the relation of the Danish state to minority religions seems to fit well with how toleration and neutrality is often discussed in political philosophy; toleration is a kind of half-way house between principled neutrality and religious persecution and oppression, which retains the negative attitude to religious differences, but refrains from acting on these attitudes.

In this section I will argue, however, that the Danish state does not obviously fulfil the negative attitude condition and that it is furthermore questionable whether it makes sense to apply the concept of toleration in the suggested way. This means that, even though the Danish state is not strictly religiously neutral, it is not tolerant either, at least not in the traditional sense usually invoked in liberal political philosophy. The question then is how we might describe it instead? In the next section I will discuss how we might instead interpret the Danish state-religion relation on the basis of consideration of the way in which the application of the non-interference condition also seems to fail to capture the state-religion relation.

The negative attitude condition for toleration includes several sub-components, all of which might be problematic, either on their own or as applied to the Danish state-religion relation: First, it is assumed that the state can have religious beliefs in some sense; second, it is assumed that the having of religious beliefs implies a negative attitude of disapproval or dislike towards different religious beliefs, practices or groups having these different beliefs or practices; and third, it is assumed that such negative attitudes dispose the state to interfere with the objects of dislike or disapproval.

As to the assumptions that institutional actors like states can have beliefs and attitudes, this is in itself problematic (see Lægaard, 2010, for a more thorough discussion of this point). A modern state is not identical to any particular individual person or groups hereof, e.g. government ministers, members of parliament, civil servants, or citizens; a modern state is rather a complex political organisation defined by rules, most notably by the rules laid down in the constitution. Even though the rules can include statements such as “the evangelical-Lutheran church is the national church”, these are *constitutive* of certain *institutional* relations rather than *expressions of beliefs* that the institutions can be said to have. States have decision procedures, e.g. elected legislatures, and representatives who can carry out the decisions made in these procedures, e.g. the various executive branches of government, and can therefore act. These actions may even be responsive to reasons. But the fact that states can act on the basis of decisions responsive to reasons does not imply that the state acts on the basis of beliefs or attitudes that are its own; its acts are rather explained as the aggregate effects of individuals influencing its decision procedures as shaped by the institutional rules and various other factors, e.g. relations of power.

This means that if one ascribes beliefs and attitudes to institutional actors like states, these beliefs and attitudes must either refer to (aggregates of) beliefs or motives of individual persons somewhere in the state’s internal decision procedures, or are really statements about the outwards actions of the state. But in the first case, the beliefs and attitudes are not beliefs and attitudes *of the state* and in the second case the “beliefs” and “attitudes” are not motivational or causally explanatory factors but empirical re-descriptions of the state’s behaviour. So the assumptions that states can have beliefs and attitudes are problematic in general. In the specific case, this means that one cannot infer from the fact that the Danish state constitutionally and practically supports the national church that the state subscribes to the Evangelical-Lutheran confessional doctrines constituting the church’s creed (whatever this might mean). So it is far from clear that the state can be ascribed Lutheran beliefs on the basis of the fact that it constitutes and supports the National Church, which is part of my reason for describing it as non-confessional.

One response to this reasoning might be to say that it is sufficient for interpretations of states as tolerant that they can be ascribed beliefs and attitudes in more indirect ways. Rather than saying that the Danish state has religious beliefs, one might then simply say that it has a certain institutional relation to the Lutheran church, which is defined by a certain religious creed, and that this is equivalent to having the negative attitude to other religions required for describing the state as tolerant. What matters in order for the state to be described as tolerant is not the having of beliefs but of any feature equivalent to a negative attitude disposing the state to interfere with certain religious minorities, which can then be overridden by reasons for toleration.

On the strictly dispositional reading, the question then is whether the Danish state's support for the national church implies the equivalent of a negative attitude towards other religious groups? While the Danish state cannot straightforwardly be ascribed religious beliefs it can reasonably be said to *prefer* the national church, and perhaps thereby its religious doctrine and creed. The acts and policies of the Danish state are not based on beliefs or assertions about religious *truth* (compare Modood, 2010, p. 8) but they do explicitly, formally, and substantively show *preference* for a church defined by Lutheran beliefs. The question is whether one can infer from this fact that the third assumption holds, i.e. that the state is disposed to interfere with other religions? This is not a logical entailment; it simply does not follow from the fact that an agent shows preference for one thing that the agent is disposed to interfere negatively with other things. Unless the things in question are practically impossible, support for one does not necessarily involve interference with the other. If different religions can co-exist, support for one is not tantamount to interference with another. But if the inference is not one of logic, how might it be understood?

One possibility might be that members of the government or prominent members of parliament might express negative views about minority religions and argue in favour of using the state's power to interfere with these religious minorities. But as already noted, the beliefs and attitudes of individuals cannot be equated with beliefs and attitudes of the state, and even if the former might causally *influence* how the state acts or is disposed to act, the resultant acts of the state cannot be understood as *expressions* of the beliefs of individuals. So this possibility only results in the required kind of disposition to interfere if the state has been captured by political actors with such a disposition. But then it is not the constitutional support for the Lutheran Church that makes the state intolerant but the fact that it has been taken over by intolerant people.

Another possibility is that both the ascription of a negative attitude to, and of a disposition to interfere with, religions deviating from that of the national church are based on actual *acts* of interference. The reasoning would then be comparative: since the state regulates minority religions in ways that are more restrictive than its regulation of the national church this amounts to a form of negative interference with minority religions, and this can furthermore be understood as an expression of a general negative attitude towards and disposition to interfere with minority religions. There are several problems with this proposal.

First, toleration is about acts of non-interference of a certain kind, not about acts of interference. So one has to be able to justify the ascription of a more general negative attitude and disposition to interfere on the basis of actual acts of interference. Secondly, it is not clear that the Danish state fulfils the empirical condition of actually being more restrictive towards religious minorities than towards the national church; in fact, freedom of religion is more extensive outside the national



church than inside it (inside the national church there are limits to what beliefs and practices are acceptable, which are ultimately (although rarely) enforced by the state), and general rules limiting acts of religious minorities also limit the national church. It is clear that the state actively supports the national church, but the absence of support for minority religions is not in itself an act of interference.

The main difference between the state's regulation of the national church and religious minorities therefore concerns the noted aspects of state regulation of religion that involve delegation of executive state powers to recognised and approved religious communities. Recognition and approval, as well as the accompanying rights, are premised on conceptions of the role of a religious community heavily influenced by and biased towards the Lutheran Christianity of the national church to such an extent that the main criteria for being approved as a religious community concern the similarity in organisation and structure between the religious community and the local parishes of the national church. So the state can be said to impose a partial Lutheran conception of religion on minority religions in these respects. The problem is that this does not (or not primarily) amount to interference with religious minorities in any obvious sense; in fact, these are rather examples of how the state actively recognises and empowers religious minorities in certain ways (albeit in ways premised on a partial, Lutheran inspired, conception of religion).

So despite its religious non-neutrality it turns out to be quite hard to justify the ascription to the Danish state of a general disposition to interfere with minority religions, let alone of such a disposition based on a general negative attitude to minority religions. This undermines the interpretation of the Danish state-religion relation in terms of toleration. But the problem does not stop at the already discussed attitudinal condition for toleration; as already touched upon, the Danish state is in fact involved in positive recognition and empowerment of religious minorities that not only make the description of it as interfering negatively inaccurate, but also suggest that its general relation to religious minorities is not one of negative toleration but some more form of positive engagement. I will therefore turn to the concept of recognition as a third theoretical model for understanding the relation between the Danish state and minority religions.

## RECOGNITION

In debates about liberalism and multiculturalism the term "recognition" has come to denote certain kinds of policies towards minority groups that many advocates of multiculturalism as a normative view think liberalism is either not able to justify or provide the wrong kind of justification of. Charles Taylor's classic statement of the idea of a politics of recognition (1994) was formulated as a critique of liberal neutrality, and multiculturalists such as Bhikhu Parekh (2006) and Tariq Modood (2007) are critical of attempts, such as Will Kymlicka's, to ground multicultural policies on liberal premises. The idea is that whereas lib-

eralism is concerned with individual equality and uniform rights, multiculturalism is concerned with recognition of collectives and group differentiated rights. Recognition is furthermore thought to be an alternative to neutrality and toleration as a model for how the state should relate to minorities; whereas neutrality for instance may require the state not to take any stand on the value of different ways of life and to consider everyone only in their capacity as citizens, and toleration involves non-interference with certain disliked or disapproved of differences, recognition is generally thought to involve a positive, acknowledging, affirmative and accommodative relation to ways of life, groups and differences.

I will not attempt to recapitulate or assess to extensive body of theoretical work on these issues. I will rather use the Danish case to illustrate both a positive and a negative thesis about the sketched standard understanding of the relation between liberalism and multiculturalism and between neutrality, toleration and recognition. The positive thesis involves a factual-interpretative claim and an evaluative claim: the former is that recognition is in fact a more precise description of the actual relations between a state like the Danish one and its religious minorities than neutrality and toleration, and the latter is that the relevant kind of recognition is not obviously illiberal. The negative thesis is that recognition is not only a positive relation that is good for the groups receiving recognition, since positive recognition is both compatible with inequalities in recognition and involves indirect forms of misrecognition or recognitive forms of discrimination or even oppression.

The factual part of the first thesis has already been argued in the above discussion of how neutrality and toleration are not precise characterizations of how the Danish state relates to religion in general and minority religions in particular. It only remains to be argued that the state-religion relations are in fact relations of recognition in something like the sense at stake in the debates about multicultural recognition. Recognition can be thought of as an act carried out by one actor (here, the state) which both accommodates or empowers the receiver of recognition (here, religious communities, which are granted rights, privileges and executive powers) and publicly expresses some affirmative attitude or message about the receiver (here, that the religious communities have the status of national church, or recognized or approved religious communities, respectively, with the positive acknowledgement by the state that go with these statuses).

Multicultural recognition is furthermore often thought to concern groups rather than individuals and to ground rights that are either group rights or individual rights that are differentiated on the basis of individuals' membership of such groups. This might be understood in a communitarian sense, e.g. as elevating groups over their members, but it need not; group differentiated rights may be rights of individuals that are merely differently placed in virtue of their membership of different groups, and even rights held by groups can be understood as

collective rights based on the aggregate interests of the individual members of the group rather than as corporate rights based on irreducible features of the group (Jones, 2009). What matters for present purposes is that, whatever their theoretical understanding and justification, policies of recognition are somehow group directed or shaped. This is also true of the Danish case, since the religious communities are ascribed rights at the collective level.

Recognition is finally often thought by multiculturalists and proponents of “politics of difference” to concern aspects of collectives or groups which differentiate them from other collectives or groups (Parekh, 2006). This is arguably also the case here, particularly in the case of the recognition of the Evangelical-Lutheran church as the national church, but to some extent also in the recognition and approval of religious communities, which at least serves to recognize them as religious associations and to distinguish them from other private associations. So the state-religion relation seems to be a relation of recognition in more or less the standard sense usually presupposed in debates about multicultural recognition.

Does this mean that the Danish state is illiberal, at least in this respect, because it engages in recognition of religious communities? If one equates liberalism with the requirement of religious neutrality and strict separation, this is of course the case. But if one relaxes the conception of liberalism to primarily denote protection of equal civil, political and social rights, for present purposes especially including religious freedom and non-discrimination on religious grounds, it becomes quite hard to see that the practice of having an established national church and of recognizing and approving religious communities is illiberal. There are some reasons for concern in addition to the noted fact that even non-members are compelled to contribute to the funding of the national church. The law of ethnic equal treatment, which is the discrimination ban applying to public institutions, does not prohibit discrimination on religious grounds in order not to undermine the possibility of the national church to include religious criteria in employment decisions. But in general the actual effects on effective equal rights of these illiberal practices are negligible; they primarily have symbolic significance. My point is that even though the state’s recognition of religion is a form of multicultural recognition, it apparently does not have any of the problematic consequences usually cited as reasons why liberals should be wary of policies of recognition; the recognition in question does not undermine individual rights, does not in itself significantly detract from or subvert policies of redistribution, and arguably does not affect potential internal oppression in religious minorities. This is not to say that liberals should be happy with Danish practices of religious recognition, but the problems involved fall far short of human rights abuses, civil rights violations or socio-economic inequality, and do not seem to be due to the state’s involvement in policies of recognition *as such*.

If one grants the positive thesis, is there any problem with the Danish practice of religious recognition? Especially from a (liberal) multiculturalist viewpoint, isn't it good news that policies of recognition are so firmly established and relatively unproblematic? My negative thesis is that things do not look so bright after all. The thesis can also be divided into several claims. One is that recognition is not just positive and accommodating but also involves the imposition of certain conceptions and frameworks on the receivers of recognition. Another is that recognition might actually also involve misrecognition. And a third is that recognition can be unequal. Rather than arguing for these claims in the abstract I will again try to illustrate them by reference to the Danish case.

The recognition by the Danish state of the Evangelical-Lutheran church as the national church and the approval of Muslim associations and congregations as religious communities might appear to be purely positive things. If the standard of comparison is the general freedom of religion protected by the Danish state, these acts of recognition may seem to be improvements, both in terms of the material opportunities provided, legal rights granted, and symbolic messages sent. But this is not the case. As already noted, the privileged position of the national church comes at the price of a relation of domination by the state over the church and some limitation of religious freedom within the national church. Furthermore, the approval of religious communities is premised on a Lutheran inspired conception of religion and especially on a particular Danish understanding of the role and place of religion; religious communities are approved on the basis of having a dogmatic and organizational infrastructure more or less like protestant congregations, and the rights they are granted are interpreted on this basis. Approval might therefore be thought of as expressing not only affirmation and accommodation but also the imposition of an essentialist view of religion.

Some might think this in itself problematic, but proponents of multicultural recognition have a further reason to be worried, namely that the recognition by the state of religious communities for this reason covers a deeper misrecognition: Even though religious communities are approved for the purpose of conducting marriage ceremonies, getting tax deductions and receiving preachers from abroad, they are precisely not recognized in other ways. If one by "recognition" understands the affirmation of some group's "identity" *as understood by its members*, approval by the Danish state is in many cases not an act of recognition: the communities are recognized, but not necessarily *as* what their members understand them to be. If one furthermore understands recognition as involving special concern and rights, e.g. rights against religious defamation, the Danish practice of approval may also prove disappointing; the latter was illustrated during the Danish cartoons controversy where Muslim representatives reported the newspaper publishing the Mohammed cartoons for breach of the so-called blasphemy clause of the Danish penal code and were surprised, and offended, when the public prosecutor decided that the cartoons were not in breach of this clause (Lægård, 2007).

Finally, even though the Danish state clearly recognizes a number of religious communities, there are obvious inequalities in the recognition granted, not only between the national church and other communities, but also between recognized and approved communities and between these and mere religious societies. The question is whether this is problematic or even unjust? This is clearly the case if one accepts a requirement of religious neutrality, but then the problem is recognition as such, not the inequality in recognition. If one rejects the requirement of religious neutrality and endorses some form of moderate secularism, the question is whether one also advocates some demand for equal recognition that would make unequal recognition problematic or unjust? Without going deep into the complicated theoretical debates about recognition, I will merely suggest that this question may actually be quite difficult for proponents of multicultural recognition to answer. The answer depends on what theoretical understanding and justification of policies of recognition one accepts. Some proponents of recognition advocate a “contextualist” approach according to which recognition should not be assessed and justified on the basis of abstract theoretical principles but should rather be negotiated in particular contexts of recognition (Parekh, 2006; Modood, 2007). On such views, which are also explicitly coupled to an endorsement of moderate secularism, one cannot condemn inequalities of recognition as such on the basis of some theoretical principle of equality. But if recognition rather has to be negotiated, there is no guarantee or even reason to expect that the result will be some form of equality, since the inequalities characterizing the context are also bound to influence the outcome of negotiations (Læggaard, 2008).

So the picture is quite muddled from the perspective of recognition. On the one hand, recognition in fact seems to be the best theoretical model for capturing the state-religion relations of moderately secular states like Denmark and the practices of recognition of the Danish state are not particularly illiberal. On the other hand, recognition is not all positive, but involves domination and imposition, as well as misrecognition and unequal recognition, which at least “contextualist” theories of recognition may not immediately have the resources to handle in plausible ways. A liberal theory based on some principle of equality might, on the other hand, point to ways of resolving some of the problems with recognition. I have suggested that it is not the acts of recognition as such that are problematic from a liberal point of view, but the domination and inequality inherent in them. The most problematic aspect of Danish state-religion relations is probably the coercive taxation imposed on all residents to fund part of the National Church. This might be disbanded without challenging the establishment as such. The misrecognition potentially involved in the Lutheran inspired conception of religion on which recognition is based might also be softened; the Advisory Committee has already argued for a more “objective” conception of religious communities, and the potential mismatch between the recognition given and the self-conception of members of religious communities might be avoided by pub-

licly explaining the type of recognition given. The final inequality between the symbolic status of the National Church and all other religious communities is inevitable given establishment, but are not unjust as such if one does not equate liberalism with strict neutrality.

## CONCLUSION

In this paper I have sketched different theoretical models for understanding how liberal states relate to religion in general and religious minorities in particular. I have done this in relation to a particular case of an arguably quite liberal but not strictly religiously neutral state, namely Denmark. My question has been how we should understand what it means to be a liberal state in these respects if liberalism is not equated with strict religious neutrality and separation. I have argued that neutrality is not an all or nothing affair, which allows for the characterization of the Danish state as liberal. The fact of non-neutrality furthermore does not imply that the state is tolerant, since the concept of toleration is both problematic to apply to states for theoretical reasons and because its application in the particular case presupposes a number of empirical conditions and assumptions that may not hold. I then argued that the concept of recognition provides a better theoretical model for understanding state-religion relations in Denmark. I have finally suggested that this result poses a number of challenges for the traditional understanding of recognition in debates between liberalism and multiculturalism; recognition is not necessarily illiberal, but it is also not obviously as good a thing as many proponents of multicultural recognition tend to assume, and standard theories of recognition are arguably not immediately equipped to evaluate these problematic aspects and provide practical guidance in relation to them.

The reciprocal illumination of the theoretical models and the Danish case suggests some tentative lessons, which might be the object of further systematic discussion elsewhere. One such lesson is that liberalism might be understood as a more *plural* normative standpoint, not necessarily in the sense of fundamental value pluralism, but in the sense that there are several things liberals are concerned with, even with regard to a relatively narrowly circumscribed issue such as religion. Liberalism is certainly not just about state neutrality. Whether or not the state should be religiously neutral, it seems more important whether and how it secures freedom of religion and non-discrimination on religious grounds. Returning to the parallel between liberal theory and the First Amendment, one might argue that “free exercise” is more important from a liberal point of view than “non-establishment”. Neutrality may be important, but some forms of religious non-neutrality may be unobjectionable and non-neutrality is generally of greater concern in relation to coercive aspects of state activity than merely symbolic acts of state. Symbolic acts are also important, but even here it is not an all or nothing affair. I have suggested that the concept of recognition is well suited to capture some of the symbolic aspects of state acts, but also that such forms of recognition are often theoretically complex mixed blessings. All of this needs

further discussion and systematic defense, which I cannot even begin to provide here. For now I merely hope that the present discussion has illustrated the relevance of these types of considerations.

## REFERENCES

- Advisory Committee Concerning Religious Communities, 2010, Vejledende retningslinjer udarbejdet af Det Rådgivende Udvalg vedr. Trossamfund, 4th revised version, 15 December 2010, available (in Danish) for download on [http://www.familiestyrelsen.dk/fileadmin/user\\_upload/Trossamfund/Vejledende\\_retningslinjer\\_trossamfund.pdf](http://www.familiestyrelsen.dk/fileadmin/user_upload/Trossamfund/Vejledende_retningslinjer_trossamfund.pdf) (accessed 23 June 2011)
- Bowen, John R., 2008, *Why the French don't like Headscarves: Islam, the State, and Public Space* (Princeton: Princeton University Press).
- Christoffersen, Lisbet, 2010, "State, Church and Religion in Denmark", in *Law & Religion in the 21st Century – Nordic Perspectives*, ed. Lisbet Christoffersen, Kjell Å Modéer and Svend Andersen (Copenhagen : DJØF Publishing), pp. 145-161.
- Forst, Rainer, 2008, "Toleration", *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/fall2008/entries/toleration/>
- Gaus, Gerald F., 2009, "The Moral Foundations of Liberal Neutrality", in *Contemporary Debates in Political Philosophy*, ed. Thomas Christiano and John Christman (Chichester: Wiley-Blackwell), pp. 81-98.
- Holtug, Nils, 2009, "Liberal Equality and the Politics of Religion", *Nordic Journal of Religion and Society* 22(2), 165-78.
- Jones, Peter, 2009, "Cultures, Group Rights, and Group-Differentiated Rights", in *Multiculturalism and Moral Conflict*, ed. Maria Dimova-Cookson and Peter M.R. Stirk (London: Routledge), pp. 38-57.
- Lægaard, Sune, 2007, "The Cartoon Controversy as a Case of Multicultural Recognition", *Contemporary Politics* 13(2), 147-164.
- Lægaard, Sune, 2008, "Moderate Secularism and Multicultural Equality", *Politics* 28(3), 160-168.
- Lægaard, Sune, 2010, "Attitudinal Analyses of Toleration and Respect, and the Problem of Institutional Applicability", *RESPECT project working paper*, No. 2, <http://www.respect.iuss-pavia.it/index.php?workingpapers>
- Ministry of Ecclesiastical Affairs, no date, "Freedom of religion and religious communities in Denmark", available for download on <http://www.km.dk/ministeren-og-ministeriet/andre-trossamfund/religionsfrihed-og-trossamfund.html> (accessed 7 December 2009)
- Modood, Tariq, 2007, *Multiculturalism: A civic idea* (Cambridge: Polity).
- Modood, Tariq, 2010, "Moderate Secularism, Religion as Identity and Respect for Religion", *Political Quarterly* 81(1), 4-14.
- Parekh, Bhikhu, 2006, *Rethinking Multiculturalism*, 2<sup>nd</sup> edition (Basingstoke: Palgrave).
- Rawls, John, 1996, *Political Liberalism*, paperback edition (New York: Columbia University Press).



Sher, George, 1997, *Beyond Neutrality - Perfectionism and Politics* (Cambridge: Cambridge University Press).

Simonsen, Jørgen Bæk, 2002, “Constitutional Rights and Religious Freedom in Practice: The Case of Islam in Denmark”, in *Religious Freedom and the Neutrality of the State: The Position of Islam in the European Union*, ed. W.A.R. Shadid and P.S. van Koningsveld (Leuven: Peeters), pp. 20-28.

Taylor, Charles, 1994, “The Politics of Recognition” in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press), pp. 25–73.

Waldron, Jeremy, 1989, “Legislation and moral neutrality”, in *Liberal Neutrality*, ed. Robert E. Goodin and Andrew Reeve (London: Routledge), pp. 61-83.

## NOTES

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# NATIONALISM, SECULARISM AND LIBERAL NEUTRALITY: THE DANISH CASE OF JUDGES AND RELIGIOUS SYMBOLS

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## ABSTRACT

In 2009, a law was passed in the Danish parliament, according to which judges cannot wear religious symbols in courts of law. First, I trace the development of this legislation from resistance to Muslim religious practices on the nationalist right to ideas in mainstream Danish politics about secularism and state neutrality – a process I refer to as ‘liberalization’. Second, I consider the plausibility of such liberal justifications for restrictions on religious symbols in the public sphere and, in particular, for the ban on the wearing of religious symbols by judges. I argue that such justifications are flawed and so are not plausible corollaries of anti-Islamic justifications originating on the nationalist right.

## RÉSUMÉ

En 2009, le Parlement danois a voté une loi qui stipule que l’interdiction pour les de porter des signes religieux dans les tribunaux. Dans ce texte, je retrace en premier lieu le développement de cette législation, depuis la résistance aux pratiques musulmanes de la droite nationaliste jusqu’aux idées répandues dans la politique danoise à propos du sécularisme et de la neutralité d’État – un processus que je qualifie de « libéralisation ». En second lieu, je considère la plausibilité de telles justifications libérales en ce qui concerne les restrictions sur la présence de symboles religieux dans la sphère publique et, en particulier, l’interdiction faite aux juges de porter des signes religieux. Je défends l’idée que de telles justifications sont déficientes et ne constituent pas des corolaires plausibles des justifications antimusulmanes en provenance de la droite nationaliste.

## 1. INTRODUCTION

With increasing levels of diversity in liberal European states, religion is increasingly becoming politicized. In particular, the influx of Muslims has been a cause of controversy and heated debates over Muslim practices and Muslim symbols in the public sphere, and even over the compatibility of Islam and liberal values.<sup>1</sup> Not least in Denmark, where unusually restrictive policies have furthermore been implemented, by European standards, in terms of for example immigration, naturalization, permanent residence and possibilities for work for asylum seekers.<sup>2</sup> In part, this can be seen as an expression of the real political influence of the nationalist, right-wing *Danish People's Party*.

In this article, I focus on political controversies regarding religious symbols in the public sphere in Denmark, and the ways in which ideas originating on the nationalist right are becoming part of mainstream politics and legislation by means of a transformation of justifications. Thus, ideas about inherent problems in Islam are transformed into ideas about the requirements of secularism and the ideal of state neutrality.

To illustrate this process, I focus on a new law that renders it impermissible for Danish judges to wear religious symbols in courts of law. While the ideas behind this legislation were originally put forward by the *Danish People's Party* in terms of a general resistance to Muslim headscarves in the public sphere, motivated by thoughts about the oppression of women and even about the (alleged) totalitarian connotations of Muslim headscarves, the new law is explicitly motivated by a concern for state neutrality and the impartiality of courts.

First, then, I trace the development of this legislation from resistance to Muslim religious practices on the nationalist right to ideas in mainstream Danish politics about secularism and state neutrality. I shall refer to this transformation of justifications as a process of 'liberalization'. Second, I consider the plausibility of such liberal justifications for restrictions on religious symbols in the public sphere and, in particular, for the ban on the wearing of religious symbols by judges in courts of law. I argue that such justifications are flawed and so are not plausible corollaries of anti-Islamic justifications originating on the nationalist right. In other words, while liberalization may sweeten the pill, it does not add plausibility to opposition to judges' wearing Muslim symbols.

The case of religious symbols in courts of law is particularly interesting, compared to other cases regarding religious symbols in the public sphere, for two reasons. First, what originally sparked the resistance to judges' wearing religious symbols was a concern about a specific such symbol, namely the Muslim headscarf. However, there are in fact no female Muslim judges in Denmark wearing headscarves, and nor is there any indication that this would occur in the near future. In that respect, the law may be said to have more symbolic value than to ad-

dress an imminent problem (insofar as we consider judges wearing headscarves a problem). Second, the case of judges wearing religious symbols is interesting because at least some liberals, who are otherwise rather sceptical about restrictions on religious freedom in the public sphere may feel that this is a special case. After all, courts are particularly endowed with notions of neutrality and impartiality, as symbolized by goddess *Justitia*, blindfolded and carrying the weights of justice.

## 2. THE DANISH POLITICAL DEBATE ON RELIGIOUS SYMBOLS

In Denmark, a liberal-conservative coalition, consisting of the liberal party *Venstre*<sup>3</sup> and the *Conservative People's Party*, came into power in 2001 and they have won two consecutive elections since then. They have in various ways tightened immigration policies, reduced social benefits for immigrants, and introduced more restrictive rules for citizenship and permanent residence (including more difficult language tests and knowledge tests of Danish politics, history and culture). It is generally acknowledged that such policies, as well as a “tougher” terminology when addressing the crime, educational underachievement, unemployment, and (allegedly) illiberal practices of (some) immigrants and their descendants have played a significant role with respect to winning three consecutive elections.

However, the liberal-conservative coalition does not have a majority in the Danish parliament and they have relied systematically for parliamentary support on the *Danish People's Party*. In this respect, the *Danish People's Party* has had more real and sustained influence on state policy-making than most other right-wing nationalist parties in Western Europe. And they have consistently pushed for more restrictive immigration policies and for policies of assimilation as a condition for providing the parliamentary support needed by the government.

In particular, Muslims in Denmark have been targeted by the *Danish People's Party*. Recurrent themes are that Islam and liberal values are incompatible and that Islam is an aggressive, expansionist ideology. For example, Mogens Camre, former member of the European Parliament has stated: “Islam cannot be integrated,” “Islam wants to dominate Europe,” “they [the Muslims] are here because expansion into, and domination of, the West is on the agenda of Islam,” and “Muslims belong in Muslim-land, and that ain't here.”<sup>4</sup> Likewise, Kristian Thulesen Dahl and Søren Espersen, prominent MPs, have said, respectively: “In many ways we are anti-Muslims”, and “I think Islam is the largest problem in the world.” Louise Frevert, former MP, has compared Islam to a “cancer”, and Pia Kjærsgaard, MP and chairman of the party, has suggested that “Islam is, in essence .... a religion that cherishes violence.”

While these are some of the more extreme statements made by representatives of the *Danish People's Party*, they are also suggestive with respect to conceptions

of Islam on the nationalist right. Thus, ideas of Islam as a totalitarian, oppressive, sexist, violent ideology are recurrent themes. Also, as we have seen, the suggestion that Muslims are scheming to conquer the West and that Muslim immigrants constitute a vanguard is a common figure of thought.

Indeed, some of these ideas about Islam and Muslims are also to be found as motivations for resistance to Muslim religious institutions and symbols, including opposition to mosques, minarets, burial grounds, and headwear and clothing in the form of *hijabs*, *niqabs* and *burqas*. The *Danish People's Party* has proposed that headscarves should be removed from the public sphere, and should thus not be worn by MPs, teachers, students, doctors, nurses, policemen, social workers, soldiers and judges. Indeed, Pia Kjærsgaard has stated that: "Islamic headscarves, and all that they represent, do not belong in Denmark."<sup>5</sup> This is because they are distinctly "un-Danish."<sup>6</sup> In fact, the idea that practices or policies are unfitting (in Denmark) because they are 'un-Danish' has spread from the nationalist right to mainstream and (even) leftist politics, and is now a term commonly used to discredit ideas and policies with which one disagrees.

The particular ways in which headscarves are considered un-Danish pertain to ideas about them being oppressive towards women, expressions of a totalitarian ideology and signs of lack of will to integrate. In fact, Søren Krarup, MP, declared in 2007 that: "Islam is not a religion, but a totalitarian system, and so of the same kind as the totalitarian systems of the 20th Century – Communism and Nazism", and so "insofar as one says that the swastika is a symbol of Nazism, it is of the same kind as the headscarf of Islam."<sup>7</sup> Pia Kjærsgaard, who herself considers the headscarf a symbol of political Islam,<sup>8</sup> later confirmed this interpretation: "I completely agree with Søren Krarup that it is the exact same symbol – a headscarf and a swastika."<sup>9</sup>

The *Danish People's Party* has succeeded in bringing Muslim religious symbols on the political agenda, such that worries about Muslim symbols are increasingly also being raised by individual members of the liberal-conservative coalition and individual *Social Democrats*. However, the new law, from June 2009, prohibiting judges from wearing religious (as well as political) symbols in courts of law,<sup>10</sup> indicates a novel strand, in that a parliamentary majority has passed a law to prevent religious symbols in (a particular part of) the public sphere.

The debate, leading up to the proposal of the law, was triggered by a statement by the Courts of Denmark implying that judges should be allowed to wear Muslim headscarves. The *Danish People's Party* opposed this decision and accused the government of being indecisive on the issue, and after some hesitation a law proposal was drafted by the government and eventually passed with the votes of the liberal-conservative coalition, the *Danish People's Party* and the *Social Democrats*.

However, the ideas that have been used to motivate the law have undergone a transformation in the process. More precisely, there are two sets of justifications at work at the same time. One pertains to the headscarf as an Islamic symbol – a concern that has repeatedly been raised the *Danish People's Party*. And it is interesting that the public political debate leading up to the drafting of the law focused almost exclusively on Muslim headscarves rather than on religious symbols more generally. Notably, this was the case not just for *Danish People Party* MPs, but also for MPs from the liberal-conservative coalition. Indeed, religious symbols in courts of law simply had not been on the agenda until the question of Muslim headscarves surfaced in the debate.

However, even though the debate focused on headscarves, it also increasingly began to address issues of impartiality and neutrality. For example, Lene Espersen, who was Minister of Justice at the time when the debate took off, stated that she feared headscarves would threaten the neutrality of the courts.<sup>11</sup> And in the law proposal that followed, the focus was on religious symbols quite generally. It was pointed out that it is essential that judges are independent and impartial, and it was explicitly stated that the purpose of the law is that judges shall appear religiously and politically neutral in courts of law.<sup>12</sup>

Indeed, focus on secularism and state neutrality illustrates another strategy in contemporary Danish politics for tackling issues of religious and cultural diversity. It has been voiced by, among others, former Prime Minister and leader of the liberal-conservative coalition, Anders Fogh Rasmussen, who publicly suggested that there should be less religion in the public sphere. This was a call for a further secularization of society. However, while it may seem reminiscent of French conceptions of *laïcité*,<sup>13</sup> it is also in important ways different. Thus, among Danish politicians it has in general not been accompanied by a desire to abandon the Danish established church, and in this respect, Rasmussen is no exception. In fact, he explicitly supports the existence of an established church in Denmark. Furthermore, he specifically justifies his call for less religion in the public sphere in terms of a Lutheran conception of the separation of religious and worldly affairs,<sup>14</sup> which, again, constitutes a departure from French *laïcité*.

Now, the move from the initial debate about Muslim headscarves, and the legitimacy of judges wearing them, can be described as a process of *liberalization*, where concerns about state neutrality end up motivating the law proposal. Not in the sense that the initial scepticism towards specifically Muslim symbols no longer plays a role, but in the sense that a second, more liberal justification is complementing it, and indeed constitutes the official motivation for the law. That Muslim symbols are nevertheless still considered special – and especially problematic – is suggested by the following considerations: 1) the political debate focused almost exclusively on headscarves; 2) it was only when the Courts of Denmark stated that headscarves would be permitted that religious symbols in

courts even became an issue; and 3) while the official motivation for the law was to ensure that courts appear religiously neutral to citizens, no efforts have been made to get rid of a logo, used by the Danish courts, that includes a Christian cross.

It is also worth stressing that the drafting of the proposal in terms of a general ban on religious symbols may serve a strategic purpose, namely to rule out conflicts with anti-discrimination legislation. This strategic advantage may also have been the *Danish People's Party's* reason for adopting the neutralist justification for the law proposal,<sup>15</sup> while also pushing the agenda of discrediting Muslim symbols. As an example of the latter, in response to the Courts of Denmark decision, they launched a campaign with posters portraying a *niqab*-wearing judge, with the word 'submission' written underneath (although *niqabs* had not been part of the debate and were not what the Courts of Denmark had opened up for).

A more recent development, which illustrates resistance in parts of the liberal-conservative coalition to at least some Muslim symbols, is a proposal from the *Conservative People's Party*, according to which *burqas* and *niqabs* should be banned in the public sphere (literally, from the moment one steps out on the sidewalk).<sup>16</sup> This proposal, which mirrors proposals in Belgium and France, was motivated by a concern for Muslim women, who were claimed to be forced to wear them, and the idea that such clothing is oppressive. On this basis, the government commissioned a report on the use of *burqas* and *niqabs* in Denmark. The report concluded that between 100 and 200 hundred women wear *burqas* or *niqabs* (the report did not distinguish, because the number of women wearing *burqas* is estimated to be very low; the authors of the report afterwards suggested two or three). About half of these 100-200 women are ethnic Danes who have converted to Islam.<sup>17</sup>

The authors of the report did not find a case for claiming that women are forced to wear *burqas* or *niqabs*. And while the conservative proposal did originally gain support from the *Social Democrats* (besides the *Danish People's Party*), *Venstre*, the other party in the liberal-conservative coalition, ended up not supporting it and it was eventually dropped.

In this section I have argued that ideas about Muslim symbols in the public sphere, originating on the nationalist right, have made it into mainstream politics, but have also undergone a transformation in the form of liberalization. More specifically, two kinds of justifications are at work at the same time, namely both the initial scepticism with respect to Muslim symbols, but also a secular one, urging state neutrality. In particular, I have suggested that the emergence of the ban on religious symbols, worn by judges in courts of law can be understood in this way, but I believe that this case is an instance of a more general pattern.



Since secularism and state neutrality thus become official justifications, for example for the new Danish law, it is of course worth asking whether they are plausible justifications. In the rest of the paper, I consider this question in relation to the Danish law. Another way of putting this is whether resistance to Muslim symbols in courts of law can be justified by transforming such resistance into an issue of state neutrality and general opposition to religious symbols in this setting.

### 3. STATE NEUTRALITY

While the new Danish law was officially motivated by the idea that courts should appear neutral to citizens, it is not entirely clear how this is to be understood and in the following, I shall consider and assess various interpretations. According to the traditional liberal ideal of state neutrality, the state should not favour any particular conception of the good at the expense of other such conceptions. There are various ways of understanding this but usually, contemporary political theorists have in mind the ideal of *neutrality of justification*, that is, the idea that the state should not justify its policies on the basis of a specific conception of the good.<sup>18</sup>

State neutrality thus relies on a distinction between political conceptions and conceptions of the good.<sup>19</sup> While both include value judgements, the former includes only ‘thin’ claims about liberal justice, whereas the latter may include ‘thick’ judgements about virtually any aspect of how we should go about living our lives. Thus, religious claims constitute a conception of the good and so cannot legitimately be invoked to justify state policies.

Whatever plausibility this ideal of state neutrality has, it is clear that it does not in itself rule out much religion in the public sphere.<sup>20</sup> Thus, it is quite compatible with a policy that allows employees in public institutions to express their religion in the form of religious symbols, as long as this policy does not appeal to a conception of the good. So if a state policy permits judges to wear religious symbols on the basis that it should respect their freedom of religion, this is quite compatible with state neutrality, because freedom of religion is a political doctrine. In fact, neutrality of justification is even compatible with the existence of an established church, as long as it is justified politically, say, as a way of promoting social cohesion in society.<sup>21</sup>

There are of course other ways of understanding state neutrality, including the idea of *neutrality of consequences*. According to this doctrine, all conceptions of the good should fare equally well in society – no matter how expensive or unattractive they are. Will Kymlicka remarks that this doctrine in fact seems quite illiberal, as it does not respect freedom of choice and does not hold people responsible for the costs of their choices.<sup>22</sup> However this may be, it is difficult to see how it could be used to justify the prohibition on judges wearing religious symbols in courts. In fact, it seems to be a doctrine better equipped to argue the

opposite, since religious judges may point out that, unlike other conceptions of the good, their conceptions are being restricted by the Danish law.

It may be suggested that we need to distinguish between ‘civilians’ and representatives of the state when considering religious symbols in the public sphere. Thus, it could be argued that unlike for example children in schools, civil servants and other state employees – especially those with whom citizens are confronted – *represent* the state and therefore particularly stringent rules apply to them with respect to what symbols they employ. Insofar as they wear a religious symbol, they will be signalling state affiliation with this religion. However, note first that neither of the two conceptions of state neutrality considered so far implies that policies should be more restrictive for state employees. With respect to neutrality of justification, permissive policies for state employees may still be justified in terms of freedom of religion, and with respect to neutrality of consequences, a policy that hinders the expression of religion through symbols will still be easier to comply with under some conceptions of the good than under others, even if it applies only to state employees.

Second, it is not clear that for example judges wearing religious symbols can be said to be expressing anything about state affiliations to religions. After all, no one is suggesting that female judges wearing make-up are expressing anything about state attitudes to gender roles, or that male judges with long hair are expressing a state commitment to hippie culture. A different question, however, is whether people are likely to perceive judges wearing religious symbols as biased rather than impartial, and I return to this issue in Section 5.

#### 4. EQUALITY OF OPPORTUNITY

State neutrality can be said to express an ideal of equality in the sense that state policies should not favour some individuals over others by promoting their particular conception of the good. Thus, one way of understanding the concern for state neutrality is as a concern that state policies should imply equal opportunities for individuals to live according to their particular such conception. In fact, when the new Danish law was proposed to the parliament by Brian Mikkelsen, who had by then replaced Lene Espersen as Minister of Justice, he emphasized that the law is compatible with a principle of equal treatment of persons, irrespective of their gender, race, language, religion, political views, national or social affiliation etc., although this was not explicitly used to motivate the law, but rather to emphasize that it does not conflict with the European Convention on Human Rights.<sup>23</sup> The reason given was that the law applies to *all* religions (and political views).

Political theorists have likewise stressed the relation between state neutrality and some form of equality of opportunity. For example, one of Robert Audi’s prin-

ciples for the separation of state and church – what he calls the ‘equalitarian principle’ – is concerned with discrimination that limits the opportunities of people with specific religions,<sup>24</sup> and Veit Bader’s principle of ‘relational neutrality’ requires a state “equidistant to both religious and secular worldviews and practices”.<sup>25</sup>

Interestingly, there are also interpretations of French *laïcité* that stress the relation between neutrality and equality of opportunity, and are furthermore taken to imply that state employees must not wear religious symbols.<sup>26</sup> Thus, Cécile Laborde writes:

More attention has been paid to the question of the legitimacy of the expression of religious faith by state agents. We have seen that *laïcité* postulates that only if the public sphere is kept free of all religious symbols can it treat citizens equally. This puts stringent limits on the expression of religious beliefs by public functionaries. Official republicans insist that a line be drawn between ‘freedom of conscience’ and the ‘expression of faith in the public sphere’. It is not always legitimate for citizens to ‘make use of a private right in public’: in the public sphere, the value of religious freedom must be balanced against other values derived from the principle of *laïcité* as neutrality.<sup>27</sup>

The egalitarian principle to which Laborde alludes “requires that the state does not give preference to one religion over another: the equality referred to here is equality between believers of all faiths”.<sup>28</sup> She furthermore stresses the similarities between this conception and Brian Barry’s liberal egalitarianism in *Culture and Equality*, and indeed, Barry here characterizes neutrality as “a coherent notion that defines the terms of equal treatment for different religions”.<sup>29</sup>

However, it is difficult to see how a ban on the wearing of religious symbols by ‘state agents’ can flow from an ideal of equal treatment, or for that matter from other ideals of equality of opportunity. Consider again the new Danish law. It is of course true that since all religious symbols are banned, there is a sense in which the law treats different religions, and the people affiliated with them, equally. However, it is by no means clear that it is the only way of doing so. Suppose, for example, that everyone was allowed to wear the religious symbols he or she happened to prefer. There is also a sense in which *this* rule would treat individuals equally. So even *if* we were to acknowledge that the ban on religious symbols is a way of treating people equally, it is not clear how the principle of equal treatment is supposed to *imply* such a ban.

This is important because, as Laborde concedes in the passage quoted above, there seem to be other important liberal principles that speak against a ban.

Laborde mentions freedom of conscience, but we might equally invoke freedom of expression. If both a ban on all religious symbols and a policy that allows people to wear the religious symbols of their choice are compatible with equal treatment, the basic liberties mentioned seem to tilt the balance in favour of the latter policy.

Furthermore, the claim that a ban on wearing religious symbols constitutes equal treatment may be challenged. This is particularly clear when we consider the interests not just of people with different religions, but also of atheists. For atheists, the ban on religious symbols is costless, which, obviously, it is not for people for whom wearing religious symbols to work is important. Equally, the law is costless for people who are religious but have no desire to wear religious symbols or are able to hide them under their clothing (and have no desire to wear them ‘openly’). Therefore, arguably, the ban on religious symbols does not treat people equally. In fact, this very complaint was raised by the largest organization for Muslims in Denmark (Muslimernes Fællesråd), who argued that while the ban on religious symbols is formally equal, it is only Muslim women who are prevented from wearing their religious symbols (because other symbols can be hidden under clothes or wigs).<sup>30</sup>

To consider this argument in greater detail, we need to distinguish between different conceptions of equality of opportunity. After all, it may be suggested that while the law impacts differently on different individuals depending on their religious commitments, this is quite compatible with equality of opportunity. In fact, this is a point Barry stresses repeatedly in *Culture and Equality*. Thus, he argues that “if uniform rules create identical choice sets, then opportunities are equal”,<sup>31</sup> and in particular this can be so even if some people derive more satisfaction from the rules than others. To illustrate: even if a law that prohibits drugs impacts differently on different people (depending on whether they would be inclined to take drugs or not), this does not imply that the law violates equality of opportunity. Likewise, even if a law that prevents judges from wearing religious symbols impacts differently on people, this does not challenge the claim that it creates equal opportunities.<sup>32</sup>

Now, I have criticized this account of Barry’s in detail elsewhere,<sup>33</sup> but here I merely want to suggest that it cannot be used to discredit the claim that the new Danish law violates equal opportunities. It is true that there is a *sense* in which the law generates identical choice sets for everyone, because it gives everyone the same option: if one wants to be a judge, one must avoid wearing religious symbols in court. But even if the law gives rise to identical choice sets in *this* sense, this is not sufficient to guarantee equal opportunities. After all, a law that requires judges to *wear* Muslim headscarves would give people identical choice sets in the same sense. It gives everyone the same option: if one wants to be a judge, one must wear a Muslim headscarf in court. But clearly this latter law

would not give people equal opportunities. So the fact that a law gives everyone the *same* option does not guarantee equality of opportunity. In fact, it is neither a necessary nor a sufficient condition for such equality.<sup>34</sup>

The reason a law requiring judges to wear Muslim headscarves does not give people equal opportunities, I suggest, is that it gives rise to different levels of advantages, depending on people's religious commitments.<sup>35</sup> And this, of course, is precisely the point of the claim that the new Danish law violates equality of opportunity. It gives rise to different levels of advantages for different individuals depending on their religious affiliation.

Of course, in order to assess levels of advantages, we need an account of the currency of egalitarian justice. Consider, first, equality of resources. Roughly, this account implies that a distribution of resources is equal if it would result from an auction in which individuals have equal purchasing power.<sup>36</sup> Now, access to wearing religious symbols need not directly affect people's purchasing power. Nevertheless, equality of resources implies that it would be wrong to gratuitously limit people's access to specific resources, and this would seem to include the resource of wearing a religious symbol. After all, Dworkin's auction is incompatible with arbitrary restrictions on the kinds of resources people can acquire. As Dworkin himself points out, if the auctioneer were to transform all the available resources into a large stock of plover's eggs and pre-phylloxera claret for which people could bid, then this would hardly result in a fair distribution of resources.<sup>37</sup> Everything else being equal, we should assume maximal freedom both with respect to the kind of resources people can acquire in the auction and the uses they are entitled to make of them, because this will allow people to maximally express their preferences in the auction.<sup>38</sup> So limiting judges' access to religious symbols in courts would be illegitimate, according to equality of resources, unless an appropriate independent reason could be given for doing so. And note that no such reason has surfaced in my discussion so far.

If, instead, we focus on welfare, or opportunities for welfare, as the currency of egalitarian justice, it seems clear that the Danish law will have different impact on people depending on their religious commitments. For example, it will frustrate the (self-regarding) preferences of Muslim women aspiring to be headscarf-wearing judges but not of, for example, atheists. So like equality of resources, equality of (opportunity for) welfare would seem to provide a case against the new Danish law, everything else being equal.

Of course, insofar as our focus is on *opportunities* for welfare, there is an issue of whether people should be held responsible for their specific religious preferences in such a way that, for example, they have no legitimate complaint if a law makes it more difficult for them to satisfy these preferences than it does for other people to satisfy *their* religious (or other) preferences.<sup>39</sup> I argue elsewhere that,

according to equality of opportunity for welfare, we should not in general hold people responsible for their religious preferences in this way, in part because such preferences are typically acquired as a part of childhood socialization and are often costly to abandon.<sup>40</sup> However, I shall not repeat this argument here.

Nevertheless, note that we would not in general want to hold people responsible for their religious preferences in the way considered above. For example, with respect to the imagined law that requires judges to wear Muslim headscarves, we would not want to excuse the differential impact of this law on the basis that this difference is due to differences in people's religious preferences, for which they should be held responsible. Therefore, like equality of resources, equality of opportunity for welfare would indeed seem to imply that the differential impact of the new Danish law implies a violation of equality of opportunity, everything else being equal.

Before I end this section, let me briefly point out that when considering equality of opportunity so far, I have been focusing on the extent to which specific rules (such as the new Danish law) have differential impact. Thus, I have been considering whether such rules *produce* inequality of opportunities. However, it may be (plausibly) argued that what matters is rather whether such inequalities will *exist* if the rules are implemented. To illustrate, a policy of giving to citizens an equal sum of money does not in itself produce inequalities of opportunity, but it may well maintain (or even increase) them, for example because some people with disabilities need to spend a certain proportion of this sum on medicine. However, even if we shift the focus and consider which inequalities exist once the law is implemented, this does not seem to alter the conclusion that the law violates equality of opportunity. After all, the individuals primarily targeted by the law are Muslim women, and since this is hardly a privileged group, it is also not a group that is compensated for the comparative disadvantage to which the law gives rise by other advantages to which they have access.

## 5. IMPARTIALITY

As pointed out above, it was stated in the proposal of the new Danish law that it is essential that judges are independent and impartial. While this was not explicitly used in the proposal to motivate the law, some politicians from the *Danish People's Party* have suggested that there is a real risk that judges wearing headscarves will not be impartial.<sup>41</sup> However, there are at least three reasons why this concern seems misplaced. First, there is no empirical evidence to suggest that judges wearing headscarves or other religious symbols would be more prone to partial judgements than would other judges. Second, the real worry expressed here does not concern religious symbols as such, but rather the religious commitments that cause people to wear them. Removing the symbols therefore does not remove the real cause of concern, namely the underlying religious commitment.<sup>42</sup> And third, there are already independence requirements for judges to se-

cure that a judge does not rule in a case where his or her independence may be questioned.<sup>43</sup>

Nevertheless, as also pointed out above, there is another concern pertaining to impartiality – and one that *was* officially used to motivate the law – namely that judges should appear religiously neutral in courts of law. This concern is not with whether judges *are* impartial, but whether they are *perceived* to be impartial by the general public. The fear is that if people do not consider judges impartial, their trust in the judicial system will be undermined.<sup>44</sup>

Here, however, we need to be careful. The issues raised by this argument for the law are in fact much more general than is conceded in the law proposal. After all, there can be all sorts of reasons why people do not have faith in judges. Men who are accused of rape may doubt they will be given a fair treatment by a female judge. Squatters may doubt they will receive a fair trial if the judge is a suit-wearing, conservative-looking ‘stiff’. Equally, it seems likely that when female judges first appeared, some people (and, presumably, mostly men) were concerned about their capacities for rational, impartial judgement.

This suggests that the mere fact that some people do not trust judges with specific characteristics can hardly constitute a sufficient reason not to allow judges to have these characteristics. For example, distrust in the rational capacities of women has of course never been a good reason to ban female judges. Rather than give in to discriminatory gender stereotypes, such stereotypes should be fought by allowing women to become judges and thus to show that they are equally capable of performing the job. And the overwhelming acceptance of female judges today indicates that this has indeed been a successful strategy.

Why should we then think differently of judges who wear religious symbols? Even *if* some people are inclined not to trust judges who wear such symbols (or, more specifically, Muslim headscarves, which was after all the particular symbol that raised the debate and paved the way for the law in the first place), why would we want to *accommodate* that concern by banning religious symbols? Unless, at least, there is reason to suppose that judges wearing religious symbols in courts will lead to a massive break down in trust in the judicial system, and there is no evidence to suggest that this would be the case.

In fact, the Danish Association of Judges expressed that it does not condone the new law, and argued that people already respect and trust the Danish courts, where the law will not contribute to such trust.<sup>45</sup> And another Danish judicial organisation even suggested that the new law is likely to diminish trust in courts, because apart from the ban on religious symbols it also includes a requirement that some judges should wear capes, which creates an impression of elitist judges, who do not reflect the society that surrounds them.<sup>46</sup> However this may

be, it seems that Danish judges have in general not shared the worries motivating the law, concerning a loss of trust in courts due to the presence of religious symbols.

Let me very briefly also mention another, less principled conception of ‘neutrality’, which also concerns the way in which judges appear to people. According to this conception, a person is neutrally dressed in so far as her clothes do not ‘stand out’ or ‘arouse attention’. However, what counts as neutral in this sense will of course vary across different cultural and religious groups in society. And to legally fix dress codes for judges simply on the basis of majority conceptions of what it is normal and appropriate to wear seems both moralistic and to plunge into the waters of what John Stuart Mill referred to as the ‘tyranny of the majority’.<sup>47</sup> This is hardly the way forward insofar as our concern is with *liberal* justifications.

This is not to suggest that ‘anything goes’ for judges in courts of law and indeed, the question of exactly where to draw the line is a difficult one. I have already pointed out that there are independence requirements for judges and this is, it seems to me, as it should be. So, for example, wearing a t-shirt for a company that is under trial would indicate that a judge should not be considered independent in the relevant case. For the same sort of reason, there may be cases in which judges wearing religious symbols should not be used, where these symbols may in one way or another suggest that a judge cannot be considered independent in a particular case. And presumably there are certain other symbols, for example, swastikas, that should not be admitted, at least in part because by wearing it, a judge would indicate a lack of commitment to the democratic basis for the state (including the judicial system), which may raise the suspicion that he or she would not feel committed to its laws.<sup>48</sup> Nevertheless, as suggested above, the issue of where to draw the line is a difficult one, and I do not pretend to have exhaustively dealt with it here.

## 6. CONCLUSION

I have argued that the values underpinning the new Danish law have gone through a transformation, originating in anti-Islamic concerns on the nationalist right and then gradually moving towards secular concerns with liberal neutrality. Not in the sense that the former values were replaced, but in the sense that the latter kind increasingly supplemented them and indeed formed the official justification for the law.

Furthermore, I have argued that the law cannot be justified in terms of liberal neutrality. This is so whether we conceive of such neutrality as neutrality of justification, neutrality of consequences, equality of opportunity, or real or perceived impartiality. In fact, several of these interpretations imply that the law is unjust. This is a worrying result, especially since there are also other liberal values that seem to imply that the law is dubious, including freedom of religion and freedom of expression.



While I have been specifically concerned with the ban on judges' wearing religious symbols in courts, I believe that this case illustrates a more general tendency of trying to liberalize anti-Islamic concerns that are, in fact, quite illiberal. Furthermore, the arguments I have employed have implications for a wider range of issues concerning religious symbols in the public sphere, both in Denmark and elsewhere. For example, many of them are equally relevant when assessing restrictions on religious symbols, including headscarves, in schools.<sup>49</sup>

## RÉFÉRENCES

Arneson, Richard, "Equality and Equality of Opportunity for Welfare", *Philosophical Studies*, vol. 56, no. 1, 1989.

Audi, Robert, *Religious Commitment and Secular Reason*, Cambridge, Cambridge University Press, 2000.

Bader, Veit, *Secularism or Democracy? Associational Governance of Religious Diversity*, Amsterdam, Amsterdam University Press, 2007.

Barry, Brian, *Culture and Equality. An Egalitarian Critique of Multiculturalism*, Cambridge, Polity, 2001.

Dworkin, Ronald, *Sovereign Virtue*, Cambridge, MA: Harvard University Press, 2000.

Gaspard, Françoise and Farhad Khosrokhavar, *Le Foulard et la république*, Paris, La Découverte, 1995.

Holtug, Nils, "Liberal Equality and the Politics of Religion", *Nordic Journal of Religion and Society*, vol. 22, no. 2, 2009a.

Holtug, Nils, "Equality and Difference-Blind Rights", in Nils Holtug, Kasper Lippert-Rasmussen and Sune Lægaard (eds.), *Nationalism and Multiculturalism in a World of Immigration*, Basingstoke, Palgrave Macmillan, 2009b.

Joppke, Christian, *Veil. Mirror of Identity*, Cambridge, Polity Press, 2009.

Kymlicka, Will, *Contemporary Political Philosophy*, 2nd edition, Oxford, Oxford University Press, 2002.

Laborde, Cécile, "Secular Philosophy and Muslim Headscarves in Schools", *Journal of Political Philosophy*, vol. 13, no. 3, 2005.

Mill, John Stuart, *On Liberty*, reprinted in Mary Warnock (ed.), *Utilitarianism and On Liberty*, London, Fortuna Library Edition, 1962.

Modood, Tariq, *Multiculturalism. A Civic Idea*, Cambridge, Polity Press, 2007.

Rawls, John, *Political Liberalism*, New York, Columbia University Press, 1993.

Raz, Joseph, *The Morality of Freedom*, Oxford, Clarendon Press, 1986.

Think Tank on Integration in Denmark, *Immigration and Integration Policies in Denmark and Selected Countries*, Ministry of Refugee, Immigration and Integration Affairs, 2004.

## NOTES

- <sup>1</sup> Modood, 2007.
- <sup>2</sup> Think Tank on Integration in Denmark, 2004.
- <sup>3</sup> Which means ‘left’, although the party is on the right in Danish politics, but it was considered left of the other main party at the time it was founded (incidentally, this other party was called ‘Højre’, which means ‘right’ – a predecessor of the *Conservative People’s Party*).
- <sup>4</sup> All the quotes in this paragraph can be found at <http://www.humanisme.dk/hate-speech/samlet.php>, where the original sources are also listed. All translations are by the present author.
- <sup>5</sup> Again, see <http://www.humanisme.dk/hate-speech/samlet.php> (my translation).
- <sup>6</sup> Pia Kjærsgaard, ”Tørklædets svøbe”, *Ugebrev*, 21.5.2007, [http://www.danskfolkeparti.dk/T%C3%B8rkl%C3%A6dets\\_sv%C3%B8be\\_.asp](http://www.danskfolkeparti.dk/T%C3%B8rkl%C3%A6dets_sv%C3%B8be_.asp) (my translation).
- <sup>7</sup> See <http://www.humanisme.dk/hate-speech/samlet.php>, (my translation).
- <sup>8</sup> Pia Kjærsgaard, ”Tørklæder”, *Ugebrev*, 23.4.2007, <http://www.danskfolkeparti.dk/.asp>.
- <sup>9</sup> See <http://www.humanisme.dk/hate-speech/samlet.php>, (my translation).
- <sup>10</sup> Lov om ændring af retsplejeloven (Dommeres fremtræden i retsmøder), lov nr. 495 af 12.6.2009.
- <sup>11</sup> See, e.g., the interview with Lene Espersen in ”Justitsminister i tvivl om dommere må bære tørklæde”, *Politiken* 29.7.2008.
- <sup>12</sup> Dommeres fremtræden i retsmøder, lovforslag nr. L98, folketingsåret 2008/2009.
- <sup>13</sup> For further clarification of the implications of *laïcité*, in particular in relation to headscarves, see e.g. Joppke, 2009, and Laborde, 2005.
- <sup>14</sup> See the interview with Anders Fogh Rasmussen in ”Religionen i Foghs private rum”, *Kristeligt Dagblad*, 30.6.2006.
- <sup>15</sup> Pia Kjærsgaard, ”Neutraliteten i fare”, [http://www.danskfolkeparti.dk/Pia\\_Kj%C3%A6rsgaard\\_Neutraliteten\\_i\\_fare.asp](http://www.danskfolkeparti.dk/Pia_Kj%C3%A6rsgaard_Neutraliteten_i_fare.asp).
- <sup>16</sup> ”K kræver forbud mod burka”, *Politiken*, 17.8.2009.
- <sup>17</sup> *Rapport om brugen af niqab og burka*, Department of Cross-Cultural and Regional Studies, University of Copenhagen, 2009.
- <sup>18</sup> Kymlicka, 2002, p. 218; Rawls, 1993, pp. 193-4.
- <sup>19</sup> Rawls, 1993, pp. 11-15.
- <sup>20</sup> Holtug, 2009a, p. 169.
- <sup>21</sup> Note that the point is not that this would be a plausible justification, only that it would be – in the relevant sense – a neutral one.
- <sup>22</sup> Kymlicka, 2002, p. 218.
- <sup>23</sup> Dommeres fremtræden i retsmøder, lovforslag nr. L98, folketingsåret 2008/2009, under ”Bemærkninger til lovforslaget”.
- <sup>24</sup> Audi, 2000, p. 36.
- <sup>25</sup> Bader, 2007, p. 101.
- <sup>26</sup> Let me, however, briefly reiterate the *ad hominem* point that *laïcité* cannot consistently be invoked to justify the new Danish law by politicians who support the continued existence of an established church.
- <sup>27</sup> Laborde, 2005, p. 322.
- <sup>28</sup> Laborde, 2005, p. 309.
- <sup>29</sup> Barry, 2001, p. 29.
- <sup>30</sup> Muslimernes Fællesråd, ”Høringssvar ifm lovforslag om kvindelige dommeres fremtræden under retsmøder”, [http://www.mfr.nu/index.php?option=com\\_content&view=article&id=51:horingssvar-ifm-lovforslag-om-kvindelige-dommeres-fremtraeden-under-retsmoder&catid=1:seneste-nyheder&Itemid=29](http://www.mfr.nu/index.php?option=com_content&view=article&id=51:horingssvar-ifm-lovforslag-om-kvindelige-dommeres-fremtraeden-under-retsmoder&catid=1:seneste-nyheder&Itemid=29).
- <sup>31</sup> Barry, 2001, p. 32.

- <sup>32</sup> Note, incidentally, that while Barry in his discussion focuses on the case for difference-blind rights and against group-differentiated rights, this is not what is at issue here. After all, the new Danish law is difference-blind, as it gives the same right to everyone, namely to be a judge only if one is willing to remove one's religious symbols in courts of law.
- <sup>33</sup> Holtug, 2009b.
- <sup>34</sup> Holtug, 2009b, pp. 84-6.
- <sup>35</sup> An alternative explanation would be that such a law severely restricts the *number* of options open to people. The idea might thus be that what justice requires is that people should have an adequate range of (valuable) options to choose from (Raz, 1986, p. 408). However: 1) Even if we were to accept this alternative explanation, it is not clear that it gets the proponent of the ban on religious symbols off the hook. After all, just as the headscarf requirement rules out all options that involve not wearing religious symbols or wearing ones that are incompatible with headscarves, the ban on religious symbols rules out all options that involve wearing such symbols. It is not clear that the former rules out more (valuable) options than the latter (and how would we even assess this?). 2) It is not even clear that the alternative explanation can explain why the headscarf requirement violates equality of opportunity. After all, there are presumably many valuable options left, even if one cannot become a judge because one does not want to wear a headscarf. 3) In any case, equality of opportunity cannot simply be a matter of the range of valuable options. A law that requires judges not to be fans of Manchester United leaves the bulk of valuable options intact, including the option for judges of being fans of Manchester City, Arsenal, Chelsea etc. But clearly the law would nevertheless violate equality of opportunity.
- <sup>36</sup> Dworkin, 2000, Ch. 2.
- <sup>37</sup> Dworkin, 2000, p. 67.
- <sup>38</sup> Thus, according to Dworkin, equality of resources presupposes (or implies) a conception of liberty; see Dworkin, 2000, Ch. 3.
- <sup>39</sup> Arneson, 1989, p. 85.
- <sup>40</sup> Holtug, 2009b, pp. 102-12.
- <sup>41</sup> Peter Skaarup, "Hovedtørklæder i retten", [http://www.danskfolkeparti.dk/Peter\\_Skaarup\\_Hovedt%C3%B8rkl%C3%A6der\\_i\\_rettet\\_.asp](http://www.danskfolkeparti.dk/Peter_Skaarup_Hovedt%C3%B8rkl%C3%A6der_i_rettet_.asp).
- <sup>42</sup> Of course, the ban on religious symbols may prevent some Muslims from becoming judges, and preventing this may have been part of the motivation for the *Danish People's Party*, but presumably this justification would conflict with existing anti-discrimination legislation, and is in any case incompatible with the kind of liberal justification for the law I am presently considering.
- <sup>43</sup> Dommerfuldmægtigforeningen, "Letter to the Ministry of Justice", 8.12.2008.
- <sup>44</sup> Dommeres fremtræden i retsmøder, lovforslag nr. L98, folketingsåret 2008/2009.
- <sup>45</sup> Den Danske Dommerforening, "Letter to the Ministry of Justice", 27.11.2008.
- <sup>46</sup> Retspolitisk Forening, "Høringssvar fra Retspolitisk Forening vedrørende forslag til lov om ændring af retsplejeloven (Dommeres fremtræden i retsmøder)", 8.12.2008.
- <sup>47</sup> Mill, 1962, p. 129.
- <sup>48</sup> Of course, as we have seen, some members of the *Danish People's Party* consider headscarves morally *on a par* with a swastika. Less dramatically, headscarves are sometimes characterized as patriarchal, connoting female inferiority and expressing a desire to control women's sexuality. However, headscarves seem far more open to different interpretations than e.g. swastikas, where some interpretations of the former imply they are oppressive and others that they are liberating, including that of the 'autonomous veil' worn by young second-generation Muslims in France, signifying a protest against racism, and "the desire to be French and Muslim, modern and veiled, autonomous and dressed in the Islamic way" (Joppke, 2009, p. 13; Joppke attributes the quote to Gaspard and Khosrokhavar, 1995. For a similar variety of interpretations in a Danish context, based on interviews with Muslim women, see Tina Magaard's report, *At være muslimsk kvinde i Danmark*, 2009, Ch. 4). Given the variety of reasons Muslim women may thus have for wearing a headscarf, it would be problematic to uniquely privilege a par-

ticular interpretation and, in any case, a liberal state should be wary of ruling out headwear that *may* be considered sexist, whether it be headscarves or make-up. (However, for an argument to the effect that (one form of) liberalism may be compatible a ban on religious symbols in the public sphere, see Joppke, 2009.)

- <sup>49</sup> For comments on an earlier version of this article, I would like to thank participants at the workshop on Religious Diversity in the Liberal State at Centre for the Study of Equality and Multiculturalism, University of Copenhagen, 2010, and especially Søren Flinch Midtgaard, Sune Lægaard, Daniel Weinstock and two anonymous referees for *The Ethics Forum*.

# MULTICULTURAL MULTILEGALISM - DEFINITION AND CHALLENGES

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## ABSTRACT

Multilegalism is a species of legal pluralism denoting the existence of quasi-autonomous “minority jurisdictions” for at least some legal matters within a “normal” state jurisdiction. Multiculturalism in the advocatory sense might provide the justification for establishing such minority jurisdictions. This paper aims to provide 1) a detailed idea about what such a multicultural multilegal arrangement would amount to and how it differs from certain related concepts and legal frameworks, 2) in what sense some standard multicultural arguments could provide a starting point for seriously considering multicultural multilegalism in practice, 3) how the idea fares against some standard liberal criticisms, and finally 4), to point out three salient problems for multilegalism, concerning a) choice of law problems, b) a dilemma facing us as to whether state supremacy should be upheld or not, and c) clashes with basic human rights.

## RÉSUMÉ

Le multi-légalisme est une espèce de pluralisme légal qui dénote l'existence de « juridictions minoritaires » quasi-autonomes, au moins en ce qui concerne certains domaines légaux au sein d'une juridiction d'État « normale ». Dans son acception juridique, le multiculturalisme peut justifier la mise en place de telles juridictions minoritaires. Cet article vise à 1) fournir une idée détaillée de ce à quoi un arrangement multilégal pourrait ressembler et de quelle manière celui-ci diffère de certains concepts et modèles juridiques afférents, 2) évaluer la pertinence d'arguments multiculturels standards comme point de départ pour sérieusement considérer la pratique multilégal, 3) voir comment cette idée répond à certaines critiques libérales classiques, et 4) souligner trois problèmes importants pour le multilégalisme concernant a) les problèmes de choix de la loi, b) le dilemme de savoir si la suprématie de l'État doit être maintenue ou non, et c) les tensions avec les droits humains fondamentaux.

## INTRODUCTION

Multiculturalism is an empirical fact and a hotly contested political and theoretical issue. The focus in this paper concerns the relation between culture(s) and law(s) given the fact of (cultural) pluralism. At the opposing extremes of this debate we find some interesting similarities: one answer to the fact of pluralism is liberal neutrality and difference-blindness: one law and one uniform set of rights for all; the way to deal with cultural diversity is by way of benign neglect; we should all be considered as equals and hence, we allow primarily for exemptions and special rules when very heavy pragmatic considerations point to the necessity of such deviances from the norm. Brian Barry<sup>1</sup> and Jeremy Waldron<sup>2</sup> (*mutatis mutandi*, at least) count as proponents of such a view. At the other extreme, we find a position which says that we must accommodate and codify cultural differences to a degree where it becomes impossible, or at least highly undesirable, to keep the different cultures under the same roof: in other words, an advocacy of secession in cases of sufficiently salient cultural differences.<sup>3</sup> Without in any other way wanting to juxtapose these positions, it is noteworthy that they agree on a form of legal *monism*. The ideal is “one state/culture, one legal framework.” They draw radically different conclusions from the fact of pluralism, of course. One wants to strengthen universalism and equality before the same law, ignoring the variety of cultures; the other to create a multiplicity of smaller and distinct legal communities, but they agree on the central, monistic contention.

Between these positions lie various other replies to the fact of pluralism. Roughly, this is the logical spectrum of (theoretical, normative) *multiculturalism*. Some multiculturalists veer towards liberal neutrality and advocate a “rules and (potentially far-reaching) exemptions” approach *modus* Kymlicka which, in broad terms, advocates the view that, yes, we should have a general framework of rights much like what difference-blind universalists proposes, but, on the other hand, we should allow for exemptions and special group rights in order to fulfil the liberal egalitarian promise given the fact of cultural diversity. Other multiculturalist accounts are more sceptical about the desirability and/or feasibility of our entrenched kinds of universalist and uniform legal and political framework and are hence inclined towards advocating far-reaching culturally mandated legal and political autonomy, without necessarily taking it to the extreme of secession.<sup>4</sup> Still, common to these positions is the idea that we have (some form of) general, overarching legal and political framework within which minorities have certain group rights, exemptions from the general rules etc.

Here, I attempt to explore some facets of a question which has attracted some attention in recent years, at least in political discourse: should *cultural* minorities have their own systems of law, distinct from but still within the general justice system of liberal states? More precisely: should we allow special, (semi-)autonomous systems of justice or law concerning some issues for some minorities, *for cultural reasons*? There is an important difference here between how “mainstream” multicultural theories generally conceives law and the specific idea of *multicultural multilegalism* which is at centre stage in this paper: It is uncontroversial to claim that multiculturalism advances various ideas to the effect that law should make exemptions, exceptions, qualifications to existing laws and bestow special legal privileges to certain groups or members of certain

groups. That, however, does not necessarily amount to a departure from a belief in a classical, monistic law: “Laws have all sorts of exceptions, conditions, and qualifications. Provided they...are stated in general terms and administered impartially, their existence does not violate the principle of the rule of law...”<sup>5</sup> The characteristic feature of multicultural multilegalism is not exceptions etc. *per se*; rather, it is the state-condoned, *i.e.*, *de jure* granting of legal powers or autonomy (as concerns some definite part of law or pertaining to a definite part of the social reality which laws can seek to regulate, see below) to minorities for reasons of culture.

Two *prima facie* examples here is what some Muslim spokespersons have advocated (and to some extent established, e.g., in the UK) namely Sharia law courts dealing with matters of family law and other legal matters; and the various examples of indigenous/first nation/national minority peoples having considerable, if not complete legal autonomy.

However, interesting as these cases might be, they are not completely exemplary for the issues I want to pursue. First, there is nothing intrinsically peculiar or anomalous about the way Muslim family law courts work, if we see it as a way of working with, e.g., contract or private law between citizens. Sure, it might be a considerable deviation from the norm to establish permanent councils dealing with such matters, and of course we can foresee the possibility of clashes with other legal institutions and principles, but that is in the nature of private law and not exceptional to such Sharia courts. Second, if institutions of “elder’s councils” or self-proclaimed Sharia courts work by coercive force and without *formal legal recognition*, they are not different from, e.g., a bike gang or other criminal organization imposing their rule on their members and/or unwilling members of the public; they do not constitute a *legal* exception.

Now, we have become quite familiar with “multilegalism” as concerns national minorities, first-nation peoples etc., and we are also familiar and comfortable with various forms of federalism, where “minor” jurisdictions are embedded within “major” jurisdictions. Although relevant, this is not quite what I want to focus on. The focus is on *multicultural* multilegalism; forms of legal autonomy granted explicitly for “cultural” reasons, and not for claims of original residence, history or any of the other arguments that might typically lie behind granting legal autonomy – even full legal autonomy – to first nation tribes, national minorities etc.

Hence, a “prototypical” multicultural multilegal arrangement would be one that at least partially acknowledged the *nomos*<sup>6</sup> of a group for reasons that are recognisable multicultural (or reflected such reasons, at least), and gave that group (forms) of legal autonomy and/or powers, and did so irrespective of historical (e.g., a history of past injustices) or territorial matters.

Hence, if a western state gave forms of legal autonomy to the group of, e.g., Sikhs within its borders and for recognizable multicultural reasons, it could count as “multicultural multilegalism.” As far as I know, Sikhs have no special historical or cultural claim, based on (long term) past occupation of territory in the west to special recognition of their *nomos* (I here simply assume that Sikhs can



be said to have a certain *nomos* that differs, at least in certain aspects, from the “mainstream western *nomos*”, whatever that might be.) Moreover, let us assume (rather boldly, and again for reasons of the argument) that no past injustices could legitimize forms of legal autonomy for the Sikhs. In essence, the only (plausible) justification for this would be *multicultural* in form: it would be to enhance self-determination, or to promote respect or recognition, or to pursue an ideal of equality between (cultural) groups.

Naturally, instigating forms of multilegalism is fraught with potential dangers, at least as seen from a (broadly conceived) liberal point of view. As an illustration<sup>7</sup>, consider the case of *Santa Clara Pueblo v. Martinez*.<sup>8</sup> The *Pueblo* enjoyed certain limited forms of legal autonomy, notable among these some issues concerning family law. Yet, the formal overarching “canopy” of law is firmly that of the state (and federal law.) A brief summary of The *Martinez* case is illustrative, both of multilegalism and for many of its associated challenges, to be unfolded below: Julia Martinez, a “full-blooded” tribe member, married outside the tribe. The “membership rules” of the *Pueblo* was strictly patrilinear, *i.e.* men of the tribe could marry outsiders and their off-spring would be included in the tribe and its jurisdiction, and not so for women. The upshot of this arrangement was, among other things, that

...the Martinez children (and all similarly situated children) had no right to enjoy the rights, services, and benefits that were automatically granted to children of *Pueblo* fathers...The Martinez children were thus barred from access to federal services such as health care, education, and housing assistance, just as they were forced to forfeit their right to remain on the reservation in the event of their mother’s death...<sup>9</sup>

As concerns the cases of indigenous peoples and national minorities (ranging from, e.g., *Inuit* to Basques), these might be of tremendous importance as repositories for empirical knowledge about how (and how *not*) to handle the fact of pluralism, legally and politically, but they fall somewhat out of the scope of my particular interest here, partly because of their “independent” status, at least relatively speaking,<sup>10</sup> partly because of their (contingent) territorial status,<sup>11</sup> and partly because both seem to have reasons, backing the legitimacy of their claims to (various forms of relative) independence that differ somewhat from the kind of multicultural reasons that I want to focus on.<sup>12</sup> It might very well be the case that some such groups deserve their own nation or state, *simpliciter*, complete with legal system etc. However, this is not the focus here; it is rather the cases where justice could point in the direction of *certain* forms of legal autonomy *within* the general framework of a liberal state and legal system, for cultural reasons, and independently of territorial and historical claims,

As implied, the issues I want to raise take their outset in some theoretical lines of thought in contemporary multiculturalism and taking them to what *might* be their logical conclusion. In brief, multiculturalists argue for special group rights for (at least certain) minorities. They might do so for egalitarian reasons; or because they believe that it is the only or best way to recognize minorities; or because these rights are the proper way to show proper respect and concern for

minorities. Generally, with the case of indigenous and colonized peoples as (at least occasional) exceptions, it is *not* argued that this extension of rights includes special rights to establish parallel or separate formally recognized systems of justice. Special multicultural rights “take place” under the umbrella of the general law of the common polity, so to speak. But why? If equality, or recognition, or proper respect entail that we should grant special status in the form of special rights to minorities, why should minorities not have the right to make their own *legal* arrangements, at least within certain constraints? Call such legal arrangements *minority jurisdictions*. And call the state of affairs in which we have at least one such minority jurisdiction within or working in parallel with a majority jurisdiction an example of *multicultural multilegalism*. Let me stress here: we are talking about legal, *i.e. de jure* acknowledged structures and autonomy, not *de facto* autonomy. The fact that liberal regimes allow persons to pursue a host of different conceptions of the good is not directly relevant to the arguments discussed in the following.

In the present paper, I discuss only a fragment of the issues relevant here. My main aims are 1) to characterize when and how such legal arrangements would constitute something distinctly different from, e.g., the arrangements citizens in liberal regimes can make under private law and the like, and 2) sketch – by no means give a thorough examination of – some of the theoretical and normative problems such arrangements would encounter.

## OVERVIEW

First, multilegalism or legal pluralism is contrasted against a “naïve” or “realist” picture of state sovereignty and legal monism, in order better to understand the concept of multilegalism. Second, the broader notion of legal pluralism is sketched, and multilegalism is defined as a subspecies of legal pluralism, stressing, among other things, the specifically, and peculiar legal status (official, state acknowledgement of ways in which the state gives up or suspends some of its normal powers) of such an arrangement. Third, it is argued that the concept of multilegalism is in important ways different from legal arrangements such as we find them under the heading of “private law”. Fourth, we move to a sketch of why contemporary political-philosophical thoughts about multiculturalism might entail an endorsement of multilegalism. Fifth, some standard challenges relevant for multilegalism are considered and found less damaging than what might seem the case, *prima facie*. Sixth, some other challenges to multilegalism are presented and discussed: A) any decision involving parties or relevant legal material from more than one jurisdiction involves well-known problems, discussed in “choice of law”-theory. Here, it is argued that multilegalism will entail the same problems, and this might undermine the plausibility of multilegal arrangements. B) It is argued that “hard multilegalism” (where the majority jurisdiction gives up its supremacy, *i.e.*, its final right to make legal decisions) can be unpalatable, steering us towards “soft multilegalism”, where legal powers are “delegated” to minority jurisdictions conditionally. However, soft multilegalism might not fulfil its intended role. C: here, it is argued that (hard) multilegalism might engender conflicts with basic human rights, which again points in the direction of soft rather than hard multilegalism, reiterating the problem of soft multilegalism as discussed in B).<sup>13</sup>

## THE STATIST-MONIST PARADIGM OF LAW

What is law? “The man on the Clapham omnibus” would probably agree to the following picture: the state decides what the law is, and the state is well-defined in territorial terms. Final authority resides in the government/parliament. The state might delegate a large amount of discretion to courts, but courts are still bound (by statutes and precedents.) Moreover, the state decides, or *can* decide, on all matters. Its sovereignty is general.

Some legal scholars, philosophers, and political theorists might scoff at such a picture; nevertheless, it is still part and parcel of many theorists’ outlook, or so I will maintain. Caney<sup>14</sup> describes the “realist” picture of state sovereignty in a way that makes the terms very relevant for our discussion.<sup>15</sup> The standard assumptions concerning state and law consist in the following:

A sovereign state has (legitimate) authority. This refers to the state’s authority, not its capacity, to coerce. Hence, this is a juridical/legal idea, which does not refer to the state’s economic or political power. Caney calls this *legality*.

The state has “the final word”: there is no further entity to which the state must refer in upholding its legality. This is *supremacy*.

The state has legality and supremacy concerning the inhabitants or citizens of a given territory, at least *ceteris paribus*. Call this *territoriality*.

The state has legality and supremacy concerning *all* matters, not just some. Clearly, it is not necessarily so that the state *actually* claims legality and supremacy over all matters (that would be absurd), but in principle, the state has the authority to claim the right to decide concerning all issues (for which an agent can make meaningful decisions, one might add), and not just some. Call this *comprehensiveness*.

Clearly, any kind of minority jurisdiction that goes beyond the boundaries given by accepted possibilities as specified in private/civil law will constitute a violation of one or more of these features. Even though territoriality might be interesting in cases where minority jurisdictions are conceived of in terms of “legal powers concerning X...n in territory Y” (where Y is, e.g., a municipality), and legality is interesting because it must be attached to any minority jurisdiction that is at least semi-autonomous (e.g., have legal powers to decide at least concerning issues X...n), focus will be on the features of *supremacy* and *comprehensiveness*.

## THE CONCEPT OF LEGAL PLURALISM

Legal pluralism is a state of affairs in which more than one legal authority claims sovereignty or jurisdiction over either the same person or the same territory or the same issue, and these authorities are not ordered in a hierarchical system that would give one authority precedence over another.<sup>16</sup> Using the vocabulary from the above, *supremacy* and/or *comprehensiveness* is suspended, or at least these features are somehow amended. Note that given this description, legal pluralism need not involve any actual conflicts. One authority (A1) might claim authority over some person (P1) concerning issue (I1), whilst another authority (A2) claims authority over P1 concerning I2. Since there is no necessary connection (ordering in a hierarchy) between A1 and A2, or between I1 and I2 (the issues need not have any causal or other connections to each other), it is possible to have a case of legal pluralism without having conflicts.<sup>17</sup>

It is our ingrained, indeed, in a way commonsensical picture of legal authority – the statist-monist picture from above - where everything legal is ordered in a perfect hierarchy with the sovereign, the rule of recognition, or whichever final authority one prefer on the top of the pyramid which creates the idea that any deviation from this norm *must* involve conflict.

Nevertheless, legal pluralism might very well engender conflicts. Legally speaking, this happens when two or more authorities claim *final* authority (supremacy) over some person or issue concerning the same case, or when two authorities claim authority regarding the same case, but none of them possess final authority. Moreover, legal pluralism might engender conflicts that are extra-legal. Even if there are no strict legal problems or conflicts involved in legal pluralism, it might create problems on the political or social arena. Imagine, for instance, a state of affairs where different persons inhabiting the same territory are under different final authorities concerning (some issue of) criminal law. When two persons under different authorities are party to the same conflict – say, P1 under jurisdiction A1 is accused of committing a crime against P2 who is under jurisdiction A2 – legal troubles are of course likely to surface (though not necessarily). But even if no legal complications arise, the situation is not unlikely to give rise to political and social tensions. Imagine, for instance, that A1 finds P1 guilty for a crime and sentences P1 to 2 weeks of community service where, if P1 was under jurisdiction A2 and had been found guilty, P1 would have served no less than 10 years prison. However, since –or insofar - one or the other authority can claim (legitimate) supremacy, no *legal* troubles arise. Surely, such a situation might (in a certain sense) be legally stable but could of course be a source of resentment and feelings of civil estrangement.

This is not a trivial conclusion. *Prima facie*, it might seem the case that only cases of legal pluralism involving potential *legal* conflicts are cases of potentially problematic legal pluralism. However, it should now be clear that it is not so: eventual social and political problems are as relevant for an evaluation as is legal controversies.

The sense of legal pluralism here is related to, but not equivalent to the issue of legal poly-centrism.<sup>18</sup> In general, “polycentric law” refers to the existence of various non-statist “quasi-legal” institutions as sources of law and authority (e.g., “native law”, families, clans, religious institutions etc.) that definitely exert their authority over individuals, but fail to be recognized in “black letter” codes of law as well as legitimate material in case law.<sup>19</sup> For our purposes, these non-statist institutions are excluded from consideration, and can gain interest only if *some* form of genuine legal recognition (whether as black letter law or as legitimate material for case law) is bestowed upon them.<sup>20</sup>

Multicultural Multilegalism involves: 1) *De jure* acknowledgement of plural and potentially overlapping or competing jurisdictions. Polities might *de facto* acknowledge competing sources of legality (as when they are empirically forced to do so, or when they acknowledge competing legal systems, e.g., the laws of a religious sect) tacitly. However, the crucial thing – even when the state *de facto* tolerates the set of rules of some powerful group, say, a large corporation or a criminal organization because the state is not in a position to do anything about

it – is the *de jure*, not the *de facto* acknowledgement, not mere toleration whether out of necessity or wish.<sup>21</sup> Hence, It does not concern itself with the (empirically given) existence of various non-state organizations, groups etc. that have their own, “extra-legal” rules, insofar these are not recognized officially and *de jure* as “true” legal material.

2) Using a somewhat different idiom, multilegalism constitutes a decisive departure from what Waldron calls “...the basic ethos of legal equality, of one law for all”<sup>22</sup> because it allows for “sortal-status” in the law as opposed to “condition-status” only. The latter denotes the variety of different legal statuses (e.g., “being eligible for”; “having the duty to”, “being liable for” etc. etc.) which the law generates or expresses, and which do not “...tell us anything about the underlying personhood of the individual who have them: these statuses arise out of conditions into which anyone might fall” whereas “[s]ortal-status categorizes legal subjects on the basis of the sort of person they are..”<sup>23</sup>

3) Multilegalism, then, is a specific subspecies of legal pluralism. Minimally, it consists in the suspension of the majority jurisdiction’s (the state’s) *comprehensiveness*: its claim to have the right to decide on *all* issues, at least in principle.<sup>24</sup> The majority jurisdiction hands over legal powers to a minority jurisdiction concerning some issues, e.g., those relating to family law, etc. In short: multilegalism arises when the state confers certain powers of *legal autonomy* to some minority group which then can be said to establish a minority jurisdiction (concerning at minimum one issue) “outside” or perhaps rather alongside the normal legal framework of the state. “Powers of legal autonomy” can be understood as concerning three different issues: *legislative* (powers to create law within some sphere/concerning a certain set of issues), *adjudicative* (powers of adjudicating legal cases within some sphere etc.) and concerning *legal status* (powers to decide whether or not someone belongs to a given jurisdiction.)<sup>25</sup> The central idea of multicultural multilegalism I have in mind includes the first two, i.e., the legal autonomy on question involves both legislative and adjudicative powers (“parliament and courts.”) However, as I believe that the most plausible form of multicultural multilegalism is built around consent (to membership of a minority jurisdiction), I am skeptical as to whether the third power is or should be a part of the “package.”<sup>26</sup> In any event, multicultural multilegalism would mean that a minority jurisdiction held certain *limited* forms of “sovereignty with respect to persons”, as opposed to “sovereignty with respect to territory”;<sup>27</sup> *how* this status (the status as subject to a minority jurisdiction) is decided is less crucial for understanding the idea of multicultural multilegalism.

4) *Multicultural* multilegalism is concerned only with forms of multilegalism instigated for reasons that are recognizable “multicultural”, e.g., for reasons of bringing about states of affairs that are more equal/just in terms of cultural majority/minority disparities, recognition of cultural minorities, or acknowledgment of minorities’ identities (see below), or cases where one of such arguments could plausibly be construed *post facto*.

Finally, a crucial distinction here is whether the majority jurisdiction gives up *supremacy*; its insistence on “finality.” It is probably useful here to distinguish between *hard* and *soft* multilegalism. Hard multilegalism is the case when the majority jurisdiction gives up supremacy concerning the same issues, or some subset of those, where it renounces comprehensiveness; in soft multilegalism, the

majority jurisdiction retains supremacy, at least in principle. Or: hard multilegalism entails that the majority jurisdiction gives up supremacy (concerning some matter(s)) *unconditionally* whereas soft multilegalism means that the majority jurisdiction hands over the right to make legal decisions (concerning some matter(s)) *conditionally*.<sup>28</sup>

## THE DIFFERENCE BETWEEN MULTILEGALISM AND PRIVATE LAW

Any plausible modern system of law will include branches that concerns disputes beyond those specified in public law, primarily conflicts between citizens themselves. Different legal systems and jurisdictions will define the boundaries (however fuzzy) between private and public law in somewhat different ways; however, that need not bother us here.

It might be claimed, and with some initial plausibility, that there is no deep legal or moral difference between the kind of multilegalism discussed here, and the state of affairs in legal systems which includes private law. Barring an imagined extreme cultural essentialist suggestion, it would seem evident that membership in minority jurisdictions should be voluntary;<sup>29</sup> hence, the individual enters freely into a set of contractual or quasi-contractual obligations, not very unlike what we enter into when we sign business- or marital contracts. Disputes arising on that background are normally dealt with in private law, so what's the difference between minority jurisdictions in multilegalism and private law arrangements in the present legal context?

There seems to be agreement that the state always backs up any legitimate decision reached in private/civil law suits (normally, if A agrees in court to pay compensation to B and A does not cough up the money, the state can resort to coercion to enforce the agreement in court, if the agreement is otherwise legally acceptable.) But, decisions or agreements reached in minority jurisdictions *need* not have any impact for the majority jurisdiction – they need not “carry over” into the majority jurisdiction.<sup>30</sup> Moreover, *publicum privatorum pactis mutari non potest* – private parties can't make up just any law they want; A cannot agree to compensate B by, e.g., voluntarily becoming the slave of B, and it is the standard, coercive power of the state which steps in and ensures against such agreements.

Again, this need not be the case for decisions made in minority jurisdictions – indeed, it would seem to be part of the legal autonomy given to them that it needn't (of course, we cannot imagine that any minority jurisdiction would have a justifiable legal right to sanctify deals such as the one just described.)

Furthermore, private law is in legal practice distinguished from, e.g., criminal law (the proviso “in legal practice” here indicates that there is nothing *necessary* about the distinction between private law and criminal law.) This is not the place to go into details about what differentiates these two parts of the justice system. However, it is obvious that criminal law deals with *penal* issues where certain rights-infringements are at stake (e.g., property rights or the right to live.<sup>31</sup>) The *gravitas* of issues is, *ceteris paribus*, on a certain level. To cut a long story short, and being aware that there are many possible exceptions: it seems to be a part of the tacit understanding of the differences between the sub-systems of private and criminal law that criminal law deals with the heavier matters in terms both of the injustice done and the possible legal sanctions affixed, whereas the

Polity allows less grave matters to be resolved in civil law – matters that affect (first and foremost) interests of private parties, and not “society as a whole.”<sup>32</sup> The same seems, *mutatis mutandi*, to hold true for the whole of public law: it deals with matters of public interest and not “merely” with disputes that affect only the interests of the directly involved parties.

Now, the definition of multilegalism does not rely on, or mirror, these distinctions. Multilegalism, multicultural or not, is not the idea that “less grave matters” should be dealt with in semi-autonomous or fully autonomous courts; the idea is silent as concerns *which* matters should be dealt with in minority jurisdictions, which might include penal law issues. In short, multilegal arrangements do not mirror the distinction between private and criminal law, but cuts across that and related distinctions.

A related critique of the idea that multilegalism qualifies as something *distinct*, legally speaking can be expressed, roughly, in these terms: it is not a problem for complex systems of law that persons, in one sense, gets ascribed different statuses. That is more or less what law *does*. We can easily accommodate the idea of a “single-status [legal] community” even if quite radically different statuses exist and are generated by the legal system. *A* being paraplegic generates (or is) a special status for *A*; *B* being contractually obliged vis-à-vis *C* generates special obligations (or “obligation-status”) for *B* and special rights etc for *C*; but nothing in this undermines the coherence and universality of the legal system as such. However, there is surely a salient difference between formulae such as “All citizens who are or become severely disabled are entitled to *x*” or “Any citizen entering otherwise legal contracts are bound by law to uphold the specifics of those contracts” on one hand, and “Some citizens of a *special cultural status* have the opportunity to form their own legal communities regarding *x, y, ... n*.” (Recall the distinction between condition- and sortal status mentioned in the above.) And even if one believes that generality and universality can be stretched to accommodate such a formula, it could plausibly be said to be a decisive difference *in kind* to mark out certain citizens as having special rights to legal autonomy and powers as opposed to others, for cultural reasons.<sup>33</sup>

### WHY MULTILEGALISM? – SOME POSSIBLE MULTICULTURALIST ANSWERS

In current debate, there seems to be three main avenues for the conclusion that we ought to give minorities *legal* recognition in the sense that we ought to acknowledge their own (culturally, religiously, socially....) based set of rules – their *nomos* - for at least some part of their own affairs.<sup>34</sup> They are embedded in the (admittedly extremely diverse) current of theoretical multiculturalism, and the following rides roughshod over many theoretical disputes, and over-emphasises subtle differences. Multiculturalists agree that ordinary, general, difference-blind rights<sup>35</sup> are not sufficient, or even downright inimical, to achieving fair treatment of at least some minorities. *Liberal* multiculturalists argue that certain minorities are worse off through no fault of their own because access to cultural goods are more expensive when you belong to a minority and because they bear the higher transaction costs of living in a culturally foreign polity. The “official” argument of the most influential liberal multiculturalist, Will Kymlicka, (and, in his vein, a host of other liberal theorists)<sup>36</sup> is somewhat more complex: he ar-

gues<sup>37</sup> that access to one's own "societal culture" is a constituent part of the ability to form and revise a conception of the good on equal terms with other citizens. Social justice, then, needs to be concerned with culture because the good of access to one's own culture might be distributed unequally. In short, liberal multiculturalists argue on *egalitarian* terms.<sup>38</sup> Secondly, another multiculturalist tradition is established by, or takes its cue from neo-Aristotelian (or perhaps, neo-Hegelian) philosophers like Charles Taylor or Axel Honneth and argues that we ought to *recognize* minorities and their claims because recognition is a basic normative notion of great importance. In short, they argue in terms of *recognition*.<sup>39</sup> Thirdly, a diverse cluster of theories argue that we owe each other respect which in turn means respect for person's or groups *identity*. The central notion here is *respect* for identity, or, perhaps rather, for difference.<sup>40</sup> Note that *equality* plays a role for all these kinds of multiculturalism; yet their normative emphasis and content varies along the lines of egalitarianism, recognition, and identity.

*Egalitarian* multicultural arguments take it as a given that (some) cultural minorities are worse off through no fault of their own,<sup>41</sup> and that it is sometimes necessary (or the most efficient route) to supplement standard, difference-blind liberal rights with various cultural rights (e.g., language rights; exemptions from regulations of holiday closing times etc.) All rights of this kind are political rights and hence legal rights (it is something "we" as a political community owe minorities, and not (just) something we as individuals owe each other) and hence, given a certain description, liberal multiculturalism is approaching multilegalism. However, it is not *multilegal* rights (e.g., the powers of legislation and adjudication as mentioned in the above) which are in the forefront of standard liberal multiculturalism.<sup>42</sup> But if language, customs, rites, traditions etc. are important to persons, and they can be "culturally worse off" through no fault of their own, it is not clear why liberal multiculturalists should not be prepared to extend multicultural rights to multilegal rights. After all, what reason can be given for the *intrinsic* difference between the right to exercise religion, traditions, language in accordance with one's cultural point of view etc. but not law? Taking her cue from Cover<sup>43</sup>, Shachar argues that some form of multilegal rights might be needed to protect minorities because "...the normative universe in which law and cultural narrative are inseparably related"<sup>44</sup> really is the right way to describe the things: norms, law and culture are intertwined to a degree where it becomes meaningless to distinguish between them. Hence, taking liberal multiculturalism to its logical conclusion might indeed entail forms of multilegalism.

As regard the strands of multiculturalism which emphasises identity, recognition and respect, the case is perhaps even clearer. We cannot ignore that views concerning law, just punishment etc. are important components of person's identity and to suppose that these views are somehow more "external" or less "culturally determined" than, e.g., views about religion or *mores*, is simply wrong. If we, as this kind of multiculturalism generally claims, must give political priority to "recognition of cultural differences" or "respect for identity", then it seems quite possible that we must extend this respect to legal arrangements of a multilegal kind. Naturally, this is relative to the more specific *kind* of respect which we owe *vis-à-vis* identities etc., and again glosses over important qualifications and theoretical differences.<sup>45</sup>



Against this, multiculturalists might evidently be sensitive to a host of reasons for *not* extending standard multicultural rights to the point of giving minorities (certain forms of) legal autonomy, i.e., multilegal rights. This is especially so for those who argue on strictly egalitarian terms: giving legal autonomy to, e.g. patriarchal communities might engender or solidify inequalities between the sexes, and hence not work in order to achieve equality, either inter- or intragroup (re: Kymlicka's distinction between "external protections and internal restrictions"; Shachar's discussion of "the paradox of multicultural vulnerability"). The claim is not that multilegal rights flow logically straightforward from multiculturalism; it is merely to point out that standard multicultural arguments might very well lead to the conclusion of multilegalism.

The distinction between hard and soft multilegalism is perhaps now clearer: liberal multiculturalist will probably veer towards soft multilegalism because such multiculturally based rights to (forms of) legal autonomy could serve an egalitarian purpose. Given that the deep justification of such liberal egalitarian multilegalism is equality (and not identity, recognition or difference), it would seem unnecessary, even dangerous, to argue that the (*ex hypothesis* liberal) state should renounce its supremacy. Rather, multilegal rights would be *instruments* to achieve equality, and the state should retain its "right of recall" if the minority jurisdiction uses its legal powers in a way which is counterproductive vis-à-vis equality.

On the other hand, multiculturalist arguing on the basis of identity etc. should *ceteris paribus* be more inclined towards hard multiculturalism. After all, if we ought to respect the culturally given identity of persons or groups, why insist on a (allegedly) "culturally neutral" legal system (which will reflect the particularities of the given majority's culture anyway, or so many multiculturalists of this kind will maintain) as the final arbiter of all things legal? Will it not be an act of condensation if the majority jurisdiction with one hand gives minorities multilegal rights, but with the other hand insist on a right of recall, as if the majority does not really trust these people to handle their own affairs? (We will return to this point below.)

We have now briefly seen some arguments for how multiculturalism might entail a defence of multilegalism, and we can proceed to more critical evaluation.

### THE PROBLEMS OF MULTILEGALISM

Worries about multicultural fragmentation of the legal system are of course not new. Too much emphasis on difference, Jeremy Waldron asserts, will undermine the rule of law and we will end up in a situation where "...we might have in effect a multiplicity of legal systems or subsystems in a given society."<sup>46</sup> Waldron's main worries about this "multiplicity" are that a) it will lead to an increase in social transaction costs, b) it will open a door for legal manipulation via the "cultural defence", c) it is in a certain sense self-defeating because salient cultural differences will reproduce themselves within minority jurisdictions, and d) it is in itself undesirable and rather than the "balkanization" of society, we should aim for genuine universalistic solidarity and equality.

Waldron's points are both informative and important. However, they are not all necessarily as damaging to the idea of multicultural multilegalism as they might seem *prima facie*.

First, the concern about increased transaction costs:

The mildest consequence of this nightmare [*i.e.*, the creation of a multiplicity of legal systems in a given society] would be a radical attenuation of people's ability to deal confidently and impersonally with strangers – which is one of the great contributions that uniform law makes to the detail of market and other social arrangements. Attention to difference means that we are no longer able to deal with another person under the simple category of *legal subject*.<sup>47</sup>

Waldron's concern is that too much emphasis on difference will lead to a situation where “[p]eople will carry their personal law with them, as a special set of privileges and obligations.” And naturally, if we as individuals should spend a lot of time investigating the cultural, social, religious etc. backgrounds of each and every person with whom we engage just to be sure we do not involve ourselves (or the other party) in some kind of legal kerfuffle, then we would indeed have a unpalatable increase in our social transaction costs. However, multilegalism need not add *very* much to the complexity of legal differences we already face in systems that are closer to the monist-statist picture of law.. Whereas the extreme individualization of law which Waldron seems to have in mind – where each and every person “carry their personal law with them” – might logically be a multilegal possibility, it is not a necessary or even a likely consequence. A more realistic picture is one where one to a small handful of rather large and rather distinct religiously, linguistically, or culturally different communities gets to establish minority jurisdictions concerning a rather circumscribed set of affairs. This is not terribly more complex than the situation in a globalized world where we have to engage with foreigners each and every day, and where we are all manoeuvring in and out of a multitude of different social and cultural settings, each with their own concomitant set of attitudes and expectations.

Secondly, Waldron is concerned that emphasis on difference will lead to a situation where criminal defendants via the “cultural defence” (“in *my* culture, it is OK to burn widows”) can get off the hook, and where the most privileged citizens can in fact immunize themselves against the application of law via clever manipulation of their own alleged cultural background (if you look hard enough, one will probably find a culture to defend each and every horrible crime possible for humankind.)<sup>48</sup> The first of these worries is genuine and relates to the crucial question of how we should weigh culturally based or borne values as against universal ones, as expressed for instance in human rights etc. We will return to that question below. The second worry is easily deflected: “membership” in a minority jurisdiction should, I reckon, be voluntary *ex ante*, and it would be absurd if one could come *ex post* and *claim* membership.<sup>49</sup>

Third, Waldron raises the objection that “decentralization” of the law/state and re-formation “organized on culturally homogeneous lines” is in a certain sense

self-defeating, because “the situation of plurality and difference will quickly reproduce itself” (Waldron (2007), p.143.) The contention is, in a nutshell, that if differentiation of legal communities is the remedy for the ailment of pluralism, then the cure will only make sure that the same problems of pluralism will repeat themselves, only within a smaller community. However, this does not seem to be very likely. It might be the case that liberal communities will tend to generate salient inter-societal cultural differences over time. But, all the fluidity and negotiability of cultures aside, it does not seem to be the case that all cultures *per se* generates important inner division lines, and even if they do, it is not necessarily the case that a newly created “culture within a culture” will lead to the creation of another minority jurisdiction – the new culture might plausibly be more sympathetic to the values and *nomos* of the majority jurisdiction. Think here of second or third generation immigrants who become more and more familiar with the surrounding majority culture (the so-called, and in some cases elusive “liberal expectation”).

Fourth, Waldron is worried that legal “decentralization” is undesirable in itself:

...in the circumstances of the modern world we have a general obligation to come to terms with those we happen to live near, and not to try to manipulate boundaries and populations so that we only live near those whom we like or those who are like ourselves.<sup>50</sup>

Waldron grounds this line of thought in Kant’s political theory, emphasising that political communities should try to solve the problems of difference through universal laws, not by changing (the boundaries of) the political communities themselves.

Against this, it could be claimed that we sometimes fulfil our obligation to come to terms with our fellow citizens precisely by allowing them to form their own legal communities (within one or the other more general framework of rights, for instance) rather than pressing each and every person into the exact same framework. Deciding when to go for the uniform option and when to go for the multilegal, or other models, must depend on the specifics of the situation and cannot be specified a priori.<sup>51</sup>

Having deflected, or at least alleviated the concerns Waldron voices, can we say that multicultural multilegalism is off the hook? Of course not. We will now go into three challenges that in different ways should make us wary to embrace multilegal arrangements as a part of the solution to the challenges of pluralism.

## FIRST CHALLENGE: WHICH LAW?

For any multilegal arrangement, there is the possibility that the law of the minority jurisdiction will clash with the law of the majority jurisdiction, or even, in more advanced cases, we can have clashes between two or more minority jurisdictions, and eventually cases involving two or more minority *and* the majority jurisdiction. Which law should take precedence? Choice of law, or choice of law theory, is the branch of legal theory and jurisprudence which concerns the “awkward fact” that we have distinct jurisdictions, specifically, the issue whether or when a foreign law is relevant to a case. Hence, the problem of “choice of law” is evidently not particular to multilegal arrangements, but is already a well-known phenomenon. It would seem evident that some of the puzzles and challenges encountered in choice of law are illuminating of, if not entirely equivalent to, the puzzles and challenges one would or will encounter in multicultural multilegalism. It is quite easy to see how the fact of distinct jurisdictions might create difficulties:

... a New York driver takes a Turkish passenger on car trip in Ontario. The car crashes. The passenger sues the driver in a British court. In deciding whether the driver is immune from suit by the passenger, should the court look to the law of New York, Turkey, Ontario, or England?

What is needed is obviously a clear cut theory which provides both a rationale and a plausible underpinning of that rationale in order to explain what legal material from which jurisdictions are relevant in which cases, and, preferably, a theory of their internal ranking. Unfortunately,

[choice of law theory] is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.

Now, this quotation is from 1953, but if Dane’s account of more recent developments in the field is anything to go by (“...choice of law is a psychiatric ward *in* a swamp, a jurisprudential wilderness encounter group”) there is very little evidence to the effect that things have changed for the better.

In deciding which law(s) is (are) the relevant one(s) and/or making decisions based thereupon, it can be claimed that the court should not view themselves as embroiled in the process of *making* law: rather, their decisions should identify and reflect already existing *rights* which parties to a given dispute have. In other words, a party’s rights *do not* hinge on, or is altered by, the existence of the court deciding the case. Rights “vests” in pre-existing events and states of affairs, including the laws of foreign jurisdictions. (This is the so-called “classical view”.) Against this, it might be claimed that the court is, indeed, involved in the making of law. It is perhaps possible, and even prudent, to “mirror” laws of foreign jurisdictions in deciding a case involving choice of law; but it could be argued that what is and should be going on is not the application of laws of jurisdiction X in the jurisdiction of Y; rather, the court’s decision is indeed its own, and hence, it is engaged in the creation of legal rights (the so-called “modernist view.”)

This might seem a very theoretical dispute; however, it reflects a series of potentially difficult problems in a legally pluralistic situation. If we have a case involving parties from two different jurisdictions, we should first have to decide what court should decide on the question of choice of law. A plausible candidate is some “neutral” court, despite all the controversies regarding such neutrality one might foresee. Once established, the question then arises whether that court should base its decisions on “vested rights”, e.g., pre-existing rights created in the jurisdictions in question (in a “classical” vein), or whether it should think of itself as creating its own rights (as the modernists would have it.) The problem with the first alternative becomes clear if we imagine that the laws of the jurisdictions in question would lead to different and incompatible decisions. In the absence of some substantial reason to decide in favour of one over the other jurisdictional interpretation (remember, that the classical view insists that it is not engaged in the creation of rights), what is this neutral court to do? Flip a coin? The modernist view is less burdened by this problem, insofar it is not bound by the insistence on the *pre-existing* vestedness of rights. However, it could be said to undermine the idea multilegalism – that the legal system to which a party belongs expresses a certain kind of respect for the party, recognizes him or her, or helps towards a more equal status – no matter what decision such a court would reach whenever there is a conflict between the laws of one of the original jurisdictions. For, at least one of the parties to the conflict is not treated legally in accordance with the party’s original jurisdiction.<sup>52</sup>

At this junction, it becomes obvious that *any* kind of pluralistic arrangement must include second-order rules for “deciding how to decide” in cases like this in order to retain any claim to plausibility. If such rules are specified beforehand *as part of the distinct legal arrangements themselves*, the complaint that some party is not being treated in accordance with his or her original jurisdiction will disappear. And at least some of the more technical problems concerning how to decide in choice of law-problems will be alleviated.

However, it is equally clear that this will create another form of tension. Let us stick with a relatively simple form of conflict involving choice of law in a multilegal arrangement: a legal dispute involving person *P1* from minority jurisdiction *A1* and person *P2* from majority jurisdiction *A2*. The laws of *A1* and *A2* covering the case do not match.<sup>53</sup> The second-order rules, being results of a democratic process, are necessary to ensure that neither party can raise the complaint that he or she has not had a fair opportunity to participate in the construction of laws that are binding for him or her as a citizen. However, if the second-order rules generally incline towards favouring *A1* over *A2*, *P2* might reasonably claim that the results of the process treats members of *A1* as democratically more important than members of *A2*, democratic decisions notwithstanding (conflicts between members competing minority jurisdictions can create the same problem.) The situation in reverse, where the rules tend to favour *A2* over *A1* is perhaps democratically less problematic as seen from a purely quantitative perspective (probably, the majority jurisdiction is larger in terms of number of citizens, albeit conceptually it need not be the case.)<sup>54</sup> This will indeed take out much of the sting – for better or worse – of the problem, but it might leave it somewhat unclear as to whether the goals of giving minorities more legal power is really achieved, both from an egalitarian and a recognition-based perspective.

However, not *all* legal situations will involve choice of law problems, so there might, on balance, still be a case for multicultural multilegalism.

Where does this leave multilegalism? There are two issues here, a legal and a somewhat broader cluster of moral theoretical questions. As concerns the legal, it becomes unclear to which extent we can speak of truly *distinct* jurisdictions or spheres of law if one jurisdiction acknowledges such second order rules. If the minority jurisdiction must acknowledge the rules of the majority jurisdiction in cases X, Y...n, it is at most a distinct jurisdiction in cases involving only intra-group disputes (that is not to say that this is not quite far-reaching autonomy, at least potentially.) If both minority and majority jurisdictions acknowledges second order rules specifying powers of adjudication etc. to a third, neutral court, it seems they are both part of the same legal “supra-system.” In short: there is a genuine question whether *supremacy* has really been suspended – but this is of course acceptable to those who would propose soft multilegalism. The question of distinctness is theoretically interesting, but I will not pursue that line of inquiry further.

The moral questions (which includes political ones) concerns 1) the highly controversial and complex question about which kinds of legal decisions for what areas should be regulated (entirely or predominantly) by the majority jurisdiction, and which should be so by the minority, given the plausibility of a multilegal arrangement. That question is far beyond the scope and ambitions of this paper; nevertheless, we will return to some general aspects that question towards the end of it. 2) The more specific question of the kind of respect which the legal system – or in the case of multilegalism, legal systems – owes to citizens. As we have seen, it seems to be the case that it can be very hard to accommodate the ideal of equal respect for citizens when the first-order rules of two legal systems collide, even if there are second-order rules for determining choice of law-style problems. *Ex hypothesis*, we owe it to members of both minority and majority jurisdictions, and there would be no need for minority jurisdictions if not the kind of respect we owe to members of the minority *differed* from that which we owe to the members of the majority.<sup>55</sup> However, it seems that there will be cases where we cannot fulfil the promise of owing each member equal respect when we have multilegal arrangements. That will for some be a cause of serious worry. It could be claimed that we should allow minority jurisdictions to have powers exclusively dealing with intra-group conflicts, thereby removing the source of the problem. My hunch is that there will still be important borderline cases here – imagine conflicts of divorcing and then marrying “outside” one’s jurisdiction, in the vein of the *Martinez* case – and that this kind of legal autonomy will not suffice for some of the more radical proponents of special minority legal rights.

## SECOND CHALLENGE: THE DILEMMA OF HARD AND SOFT MULTILEGALISM

Taking the cue from the various multicultural arguments, what reasons are there for preferring hard or soft multilegalism? Given the premises of recognition- or identity-based multiculturalism, it seems that hard multilegalism is mandated. If respect and identity play pivotal roles, why should we opt for political arrangements that give groups (forms of) autonomy vis-à-vis cultural, aesthetical, religious etc., but not *legal* frameworks, institutions and rules? And do these groups

really have legal autonomy if the majority jurisdiction insists on a “right of recall?” Of course, if the identity based theory in question is sensitive to the fact that cultural identity is a fluid and negotiable phenomenon, it might be sensitive to serious worries concerning locking person’s in some static prison of fixed identity: the person identifying him- or herself with culture X today might on introspection or due to experience identify him- or herself with culture Y tomorrow. Nevertheless, taking that into consideration, it can still be claimed (indeed, it need to be claimed by identity-theorists) that there is *something* non-transient and sufficiently static about the cultures themselves, rather than the persons identifying themselves with the cultures, that makes it meaningful to speak of “cultural groups” or “culture” to begin with.

The case is less clear for egalitarian multiculturalists. The egalitarian argument for multilegalism must be instrumental: it is not respect for or recognition of the cultural group *as such* which is in focus: rather, giving multilegal rights is but one instrument in order to rectify injustice in the form of (unchosen) inequality. Moreover, as already mentioned, liberal multiculturalists might be wary to give up the formal rights of the majority state to interfere in the legal matters of minority groups due to worries about the creation/solidifying of internal injustices.

The reasons to prefer soft multilegalism is straightforward: first given the premise that the majority jurisdiction is defined roughly in terms of a reasonably just society (following, e.g., Rawls’ definition of “reasonable Peoples”<sup>56</sup>) – *not* an insignificant or mundane premise, it must be readily admitted - with due respect for basic human rights etc., soft multilegalism seems the safest way to ensure against gross injustices happening within minority jurisdictions as an effect of multilegal arrangements. Naturally, there is no way to *guarantee* that the majority jurisdiction *is* more fair or morally correct than the minority, and there is definitely the possibility of cases where we can expect minority jurisdictions to be more in tune with, e.g., human rights than the majority. But given that we want legal systems to track (or even mirror) moral sound judgments, liberal multiculturalists ought in cases where the majority is illiberal to discuss and perhaps advocate secession and the establishment of an entirely separate legal system rather than multilegalism. Second, precisely because we are here *not* talking about secession but co-existence, soft multilegalism seems, *ceteris paribus*, to be more in line with a host of considerations of the stability and cohesion of a modern state. Only if there is some justification for keeping the minority within the legal confinements of the state (*i.e.*, the majority jurisdiction) can it be relevant to consider multilegal arrangements. Such considerations could be stability (giving up the right of recall might engender conflicts and secessionists movements); cohesion (marking a group as permanently “different” from the rest of society could tear up the fabric of society and undermine duties of civility etc.); solidarity (the willingness to make contributions and share duties and burdens might be undermined by giving permanent special legal status to a minority group); and even cultural affinity (the cultural groups of the majority and the minority jurisdiction probably share a “common horizon”, even though they are not exactly alike; instating multicultural multilegalism could fuel cultural estrangement.)

If one takes one’s cue from liberal multiculturalism, it seems to be the case that there are, or can be, rather robust reasons to prefer soft over hard multilegalism.

However, it is not clear that soft multilegalism can fulfill its intended role. The problem is most pressing for those arguing partly or wholly on the basis of identity and recognition or respect for culture. Succinctly put: There is something odd in the position that 1) we must respect or recognize persons' identity or their culture, 2) one form of this is to hand over certain legal powers and establish a multilegal arrangement, 3) but still insist on the right of recall or *de jure* supremacy on behalf of the majority. This would, at least in certain circumstances, seem to display either an attitude of mistrust or condescension, and it is perhaps an especially troubling aspect for those multiculturalists that stress the "symbolic" aspects of multicultural accommodation, a line of argument not necessarily relying on claims about identity or recognition. This problem might be less acute for those arguing on liberal egalitarian terms as this line of argument does not rely on any "intrinsicist" notions of respect for identity or culture, but stresses the instrumental justification for why we should have multilegal arrangements. But still, the instrument (the existence of a minority jurisdiction with their own legal powers) might not work very well if the whole arrangement is viewed with suspicion by either side.<sup>57</sup> Moreover, there is a definite risk involved in the somewhat unstable arrangement where the state actually overrules the decisions of a minority jurisdiction. Shachar presents us with one empirical example of this, which lead to widespread political turmoil and social and cultural confrontation.<sup>58</sup>

In short, multicultural multilegalism might impale itself on either of the horns of the following dilemma: hard multilegalism seems unpalatable if and when the minority jurisdiction misuses (as seen from the perspective of the liberal, at least) its powers, and because it can fortify or create differences between citizens that are counterproductive and/or morally indefensible (the idea that *all* differences are to "be celebrated" is, frankly, too silly to take into consideration here.) On the other hand, soft multilegalism seems to express the wrong attitude (one of mistrust and disrespect), especially as seen from the point of identity- or difference based multiculturalism. Maybe it is a bit coarse to describe this as a dilemma; the liberal multiculturalist can advocate soft multilegalism on the basis of a all things considered judgment that it provides the best solution in certain circumstances, taking the problems sketched here into consideration; and, *mutatis mutandi*, the same goes for recognition- or identity-based multiculturalists and hard multilegalism. What I have tried to show here is that multilegalism is in no way a panacea that will make problems concerning cultural pluralism and the *nomos* go away.

### THIRD CHALLENGE: MULTILEGALISM AND RIGHTS

Rights, legal or moral, can be in conflict. Granted, if rights are ultimately grounded in utility (or some other consequentialist notion), it might be the case that we always have a final theoretical criterion for deciding which right should prevail when two or more rights come in conflict, at least theoretically speaking. But even if this is the case, concrete interpretations of actual cases will involve controversies and conflicts.

In liberal democratic societies, the state is given a *de jure* monopoly of coercion, not because there is a widespread trust in the perfection and insight of actual states or governments, but because there is sufficient skepticism concerning



all other alternatives: the state is the least bad option, and democracy helps to ensure that really bad laws, decisions or governments will not survive indefinitely; and the liberal democratic state is seen as the best way of protecting basic rights.

As Shachar has shown rather persuasively, multicultural multilegalist rights can clash with such basic rights. Suppose, if only for the sake of argument, that we have a basic right to freedom of speech. Suppose, furthermore, that we have a right to be culturally recognized which extends into multilegal rights of legal autonomy in deciding how to interpret freedom of speech, or even suspend that right altogether. What are we to say if a cultural dissenter belonging to a minority jurisdiction commits “crimes of free speech”? Should we say of such a person that his or her cultural identity (which he or she *ex hypothesis* does not honor in the case) takes precedence – that the person’s *cultural right* to multilegal arrangements takes precedence, even in spite of the person’s actions? Or should we say that the person’s basic right to free speech is more fundamental and more important?

All possible answers to such and similar conflicts involve problems: 1) to insist that cultural rights takes precedence can involve the following contradiction: by going beyond or contravening cultural standards the active party is necessarily *not* accepting those standards (with the exception of cases of practical irrationality.) Hence, it flies in the face of common sense to insist that it is “more respectful” to treat persons in accordance with their cultural tradition than it is to treat them in accordance with their revealed preferences. Granted, not all cases need involve this contradiction. A person might, genuinely and without contradiction, break a standard and prefer to be sanctioned in accordance with the very source of the standard in question rather than some external source (I might prefer a booking for a nasty foul in accordance with the rules of football rather than face an indictment for GBH.) That might be so, but the question about fair treatment still lingers on if one believes that there is a larger gamut of rights and normative considerations beyond those specified by cultures and traditions. In short: How far should we go towards accommodating culturally based normative propositions and treat them as legally justified, when they, directly or in their likely consequences, violate or infringe basic rights? Multiculturalist multilegalism provides no answers to this question in itself. 2) Taking the other way out and insisting that basic rights always takes precedence removes this worry, but engenders another one. Namely, why should we have multilegal rights in the first place? We do have a system of handling private disputes, *i.e.*, private law; we have democratic rights of association, freedom of conscience etc. giving at least a quite broad range of possibilities for people to arrange the social world in accordance with their preferences;<sup>59</sup> and democracy ensures people’s proportional right to be heard. Where, then, one might ask, is the need for multilegal rights? After all, private law could be made (more) sensitive to the special needs of vulnerable minorities, including their cultural needs, without implying multilegalism.

My intuition is that the best way to maneuver in these waters involves a very careful, case-by-case approach rather than a definite, one model fits all judgment concerning the desirability of multicultural multilegalism: Note that a multiculturalist multilegal arrangement need not involve a clash between rights or

rights-interpretation. *All* rights call for specific interpretation according to the specific circumstances, and it might very well be the case that a specific cultural community is fully equipped to interpret a given right in a way which is both morally superior and (evidently) more sensitive to the empirical circumstances. It *need not* be the case that a minority must compromise human rights or the moral boundaries of what, e.g., a liberal or decent People can or should tolerate. Rights are subject to interpretation within a reasonable scope and both circumstances and moral theory might point in the direction of the plausibility and desirability of certain multilegal arrangements, where minorities are allowed to partake in the interpretation of rights within a (I would surmise) rather confined legal space. Waldron's example of the non-sexual character of an Afghani father kissing the penis of his baby son is illustrative:<sup>60</sup> without the "culturally informed" interpretation – the *knowledge* that in this cultural group, fathers kissing the penis of their baby sons is definitely not a sexual act – the majority jurisdiction could not reach a fair verdict (given the premise is true, of course.) But, and this is the important point, there is no establishment of any kind of *autonomous* legal institution or granting of legal powers involved here. A plausible legal arrangement, more sensitive to culturally embedded knowledge will not necessarily amount to giving minorities legal autonomy of the multilegal kind, and it would take careful consideration in drawing up the legal, political and moral boundaries within which legal interpretation and, if justifiable, rule-making is to take place. But such an arrangement is definitely not beyond the borders of the possible or morally desirable.

## CONCLUSION

We must distinguish between hard and soft multilegalism. Hard multilegalism means that the state has given up supremacy (regarding some issue(s), i.e., it has given up comprehensiveness) "for good" or unconditionally, which, *ceteris paribus*, entails that we should be extra careful when opting for such an arrangement: once initiated, the majority jurisdiction has no (legal) right to interfere with the decisions of the minority jurisdiction. Soft multilegalism does not entail this problem, at least not theoretically. However, it is not entirely clear that soft multilegalism can fulfill its intended role given certain multicultural premises. On the other hand, it is not necessarily the case that multilegalism is, for that reason alone, implausible or morally unpalatable.

If multilegal arrangements were instituted, they would potentially give rise to a score of moral and legal problems. One cluster of problems concerns the choice between hard and soft multilegalism mentioned in the above. Another concerns the potential clash between (multi-) culturally based and particularistic claims and rights on the one hand, and universalist, e.g., human rights, on the other.

Probably the least discussed and least understood set of problems relate to problems akin to the problems of choice of law theory: when parties to a conflict belong to different jurisdictions - which law should prevail? This points in the direction that we need clear second-order rules and adjudicative institutions in place to make plausible and legally justified decisions in such cases. Moreover, clear and fair rules of admission and exit, and in the latter case, possible compensation, are needed to avoid complications such as that shown by the *Martinez*-case. It is a mistake to believe this is a trivial matter. *Multicultural*

multilegalism is premised on the assumption of *differences* in the conceptions of law – in the *nomos*-conception – between groups, and on further assumptions concerning equal treatment, respect and possibilities (according to liberal multiculturalists), or due recognition or respect for identities. Hence, at least in some cases, respecting (following, giving precedence to etc...) the *nomos* of one party to a conflict precludes the possibility of respecting (etc.) the *nomos* of another, when we have choice of law-style conflicts. *Equality before the law* – as always a puzzling concept, with or without multicultural multiculturalism – is still held to be an attractive principle. Instigating multicultural multilegalism - if it is to have any real impact and make a real difference to already existing legal frameworks - will inevitably exacerbate the challenges of pursuing this ideal.

In practice, this calls for very close attention to the complexities surrounding choice of law-style problems, including those of admission/exit (or legal status) when we consider institutional designs for multicultural multilegalism. Academically, we need a better understanding of the theoretical difficulties involved in choice of law theory as applied to multiculturalism and law.

In sum: The conclusion that multicultural multilegal arrangements *per se* are not justifiable is wrong. In some cases, it might indeed be a plausible way of accommodating cultural differences in a way satisfying multicultural political goals. However, the various challenges and problems, legal or moral, presented here and the fact that multicultural multilegal arrangements could involve other problems, not addressed in the present paper (such as the problems of stability, cohesion, and solidarity between groups) calls to attention the necessity of close scrutiny and detailed analysis of any concrete suggestion of such a way of altering the legal framework of a liberal democratic state.

## BIBLIOGRAPHY

- Arnaud, André-Jean (1995) "Legal Pluralism and the Building of Europe", in Petersen and Zahle (1995), *Legal Polycentricity – Consequences of Pluralism in Law*. (Dartmouth: Aldershot)
- Barry, Brian (2000) *Culture and Equality. An Egalitarian Critique of Multiculturalism*. (Cambridge: Polity Press)
- Caney, Simon (2005) *Justice Beyond Borders*, (Oxford: Oxford University Press)
- Cover, Robert M. (1983) "The Supreme Court, 1982 Term: Nomos and Narrative", *Harvard Law Review* 97, 4
- Dane, Perry (1996) "Conflict of Laws", in Patterson, D. (ed.) *Blackwell Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell)
- Dworkin, Ronald (1986) *Law's Empire*, (Cambridge (Mass.); Harvard University Press)
- Festenstein, Matthew (2005) *Negotiating Diversity* (Cambridge: Polity Press)
- Forsyth, Miranda (2007) "A Typology of Relationships Between State and Non-state Justice Systems", *Journal of Legal Pluralism and Unofficial Law* 56: 67-112
- Holtug, Nils (2009) "John Rawls og den postmoderne kritik", in Jacobsen et al., *John Rawls' politiske filosofi* NUS press: Malmø
- Honneth, Axel (1995) *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press)
- Kymlicka, Will (1995) *Multicultural Citizenship* (Oxford; Oxford University Press)
- Kymlicka, Will (2001) *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, (New York: Oxford University Press)
- Kymlicka, Will (2002) *Contemporary Political Philosophy* (2.ed.), (Oxford: Oxford University Press)
- Kymlicka, Will (2010) "The rise and fall of multiculturalism? New debates on inclusion and accommodation in diverse societies", pp. 32-49 in Vertovec and Wessendorf, *The Multiculturalism Backlash* (Routledge: London)
- Modood, Tariq (2007) *Multiculturalism: A Civic Idea* (Cambridge; Cambridge University Press)
- Nielsen, Morten E.J. (2010) "A Conflict between Representation and Neutrality", *Philosophical Papers* 39, 4
- Parekh, Bhikhu (2006) *Rethinking Multiculturalism: cultural diversity and Political Theory* (Basingstoke: Palgrave Macmillan)
- Petersen, Hanne and Zahle, Henrik (1995) *Legal Polycentricity. Consequences of Pluralism in Law*. (Dartmouth: Aldershot)
- Phillips, Ann (2003) "When Culture Means Gender: Issues of Cultural Defence in the English

Courts”, pp. 510-531 in *The Modern Law Review*, Vol. 66, #4

Rawls, John (1999) *The Law of Peoples* (Cambridge (Mass.): Harvard University Press)

Raz, Joseph (1994) “Multiculturalism: A Liberal Perspective”, pp. 67-97, *Dissent* (winter) (1998) “Multiculturalism”, pp. 193-205, *Ratio Juris* 11(3)

Shachar, Ayelet (2001) *Multicultural Jurisdictions. Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press)

Spinner, Jeff (1994) *The Boundaries of Citizenship. Race, Ethnicity and Nationality in the Liberal State* (Baltimore: John Hopkins University Press)

Tamir, Yael (1993) *Liberal Nationalism* (Princeton; Princeton University Press)

Taylor, Charles (1994) “The Politics of Recognition”, in Gutmann, Amy (ed.), *Multiculturalism* (2.ed.) (Princeton, Princeton University Press)

Waldron, Jeremy (2002) ““One Law for All: The Logic of Cultural Accommodation,” 59 *Washington and Lee Law Review* 3

Waldron, Jeremy (2007) “Status versus Equality: the Accommodation of Difference”, in Shabani, Omid Payrow, *Multiculturalism and Law: A Critical Debate* (Cardiff : University of Wales Press)

Young, Iris Marion (1990) *Justice and the Politics of Difference* (Princeton: Princeton University Press.)

## NOTES

- <sup>1</sup> See Barry, Brian, 2000
- <sup>2</sup> See Waldron, Jeremy, 2002; 2007
- <sup>3</sup> Perhaps a writer such as Alain de Benoist could be taken as an exponent of such a view.
- <sup>4</sup> Young (see e.g., Young, Iris Marion, 1990) could perhaps be an example of this view. Naturally, both kinds of multiculturalism might advocate secession for special cases; but the point of multiculturalism is to give answers to the question “how could and should different cultures, *living in the same political regime*, live and treat each other”.
- <sup>5</sup> Waldron, Jeremy, 2002, p. 4.
- <sup>6</sup> A “Nomos group” is roughly, a group whose collective identity is at least partially, but also crucially, dependent of or constituted by an outlook of how the *law* ought to be, see Shachar, Ayelet, 2001, p. 2.
- <sup>7</sup> All empirically given examples I can come up with misses the target I have in mind ever so slightly, but I have chosen to provide an empirical example to give the reader a firmer grasp of the idea of “multicultural multilegalism” I have in mind. The reasons why the *pueblo* example does not fit 100% are 1) that it is dubious whether the legal autonomy granted to the *Pueblo* was informed by any form of recognizable multicultural rationale, at least by today’s standard, and 2) the jurisdiction of the *Pueblo* is at least to some degree delineated in territorial terms (it is a census designated *place*, though it is true that “boundaries” are not legally recognized) and I want multicultural multilegalism to apply first and foremost to persons rather than territories, and 3) the Santa Clara Pueblo can plausibly be said to have forms of historical claims to their territory vis-à-vis a conquering nation (if one accepts those kinds of reasons), something I wish to set aside for the purposes of this article.
- <sup>8</sup> Santa Clara Pueblo v. Martinez, 438 US 49 (1978.) The case is explained in Shachar (2001), pp.18ff; Shachar refers to Resnik, Judith, 1989, “Dependent Sovereigns: Indian Tribes, States, and the Federal Courts”, pp. 671-679 in *Chicago Law Review* 56.
- <sup>9</sup> Shachar, Ayelet, 2001, p. 19
- <sup>10</sup> See Kymlicka, Will, 2001; cf.: Kymlicka, Will, 2002, pp. 349ff
- <sup>11</sup> It is not a necessary fact that national minorities and indigenous people are territorially defined or that their jurisdiction is territorially defined; however, both seem to be the default.
- <sup>12</sup> E.g., claims of “priority” or “originality” concerning occupation of a territory or claims of past injustices, redress etc.
- <sup>13</sup> A final word before proceeding: this paper is placed – uneasily, I am sure some would say – at a cross section between political, legal, and moral philosophy (throw in legal theory and applied philosophy, if you will.). However, this is, I believe, necessitated by the nature of the matter at hand. I hope to be forgiven for a certain degree of looseness in use of terms and concepts that might denote or connote differently when used squarely in the middle of either of these fields of inquiry.
- <sup>14</sup> Caney, Simon, 2005, pp. 148ff.
- <sup>15</sup> It is surely the case that Caney discusses state *sovereignty* and not law *per se*. Still, the idea of legal monism is so closely associated with the idea of state sovereignty, that it seems evident to this author that a presentation of the latter can serve as illumination of the former.
- <sup>16</sup> I try to unpack here what Arnaud says in this succinct way: “*Pluralism* means the simultaneous existence – within a single legal order– of different rules of law applying to identical situations.”, Arnaud, André-Jean, 1995, p. 149.
- <sup>17</sup> To illustrate: local authorities might claim authority vis-à-vis me concerning zoning laws whilst the UN might claim authority vis-à-vis me in matters concerning crimes against Humanity. As local authorities need not acknowledge the UN as authorities in matters of local infrastructure (*mutatis mutandi*, the same goes vice versa for UN – all things equal, local zoning regulation will not involve crimes against Humanity) we have a situation where two different authorities claim authority over one and same person but concerning different matters, and there is no inherent conflict.

- <sup>18</sup> See, e.g., *Polycentricity. The Multiple Scenes of Law* (ed. by Ari Hirvonen) by Pluto Press, cf.: Petersen and Zahle, 1995.
- <sup>19</sup> See the collection by Petersen and Zahle, 1995.
- <sup>20</sup> However, it must be admitted that the lines between statist and non-statist institutions are blurred. Especially because we must admit the existence of very real jurisdictions that work among, between or over the neat spheres of separate states, e.g., the EU and the UN. Nevertheless, one defining feature of such real institutions is that they are in at least some sense recognized by individual states, even though the extent and exact nature of such recognition is a matter of much controversy.
- <sup>21</sup> Compare Forsyth, Miranda, 2007. Forsyth suggests a typology of relations between the state and some non-state “justice system” going from “Repression of a non-state justice system by the state system” to “Complete incorporation [i.e., full acceptance] of the non-state justice system by the state.” The interesting point is where we should draw the line between the kinds of legal pluralism I want to discuss and those I find uninteresting in the present context, and using Forsyth’s typology, it lies between “no formal recognition but active encouragement of a non-state justice system by the state” on the “wrong side” and “limited formal recognition by the state of the exercise of jurisdiction by a non-state justice system” on the “right”. Hence, it is the *formal* recognition which is the *sine qua non*.
- <sup>22</sup> Waldron, Jeremy, 2007, p. 137.
- <sup>23</sup> Waldron, Jeremy, 2007, p. 140. On reflection, this distinction is quite unclear. A right to, say, post-caesarean recuperation at the expense of the public health system can only be available to women – men simply can’t fulfill the condition in question – so it seems that such a right must be connected to “sortal-status”. But that surely is not what Waldron intends. Nevertheless, it seems to me that there is *something* relevant – *pace* a lot of blurry cases at the edges – in the distinction between laws and rights that are not concerned with your *full* identity, be it as a man or woman, worker or aristocrat, believer or atheist, member of this or that culture or not, and those that *do* take in such identity markers as relevant.
- <sup>24</sup> Cf.: Shachar, Ayelet, 2001, p. 91, where the term “jurisdictional autonomy” denotes the idea that some minority (“a *nomos* group”) can be held responsible for certain legal matters without tying such powers to (territorial) self-government.
- <sup>25</sup> I am very grateful for this suggestion from an anonymous reviewer at *les atelier*. It is conceivable that we could have a version of multilegalism with completely different rules for different people, say, Jews and gentiles, within the same state but with the laws being passed from the same legislative body and being treated by the same courts. Further combinations (e.g., same parliament, different courts etc.) are also conceivable. I want to set such (unlikely, but theoretically interesting) cases aside and focus on a form of multilegalism where a minority has *autonomy*, albeit possibly quite limited autonomy, as concerns legislative and adjudicative matters.
- <sup>26</sup> This still leaves room for the possibility that minority jurisdictions should have certain forms of legal powers to decide in fringe cases. This could involve issues such as “gratuitous” claims of membership (in itself a complicated and blurry issue, of course) and cases of legally incompetent individuals (e.g., children.)
- <sup>27</sup> See Caney, Simon, 2005, pp. 150ff. It is not inconceivable that multicultural multilegalism could take a form that involved forms of territorial “scoping”, e.g., that some law applied only to a) members of the minority jurisdiction, b) *within* a certain territory. What I want to stress is that the territorial component is contingent.
- <sup>28</sup> Does this mean that soft multilegalism implies that the state/majority jurisdiction has not really given up supremacy? In a certain sense it does, because it is always conceivable that the state can overrule a given verdict in the minority jurisdiction under soft multilegalism. However, this is also the fact for hard multilegalism; the crucial difference between the two residing in the *de facto* of the latter kind of intervention as opposed to the *de jure* of the first. Nevertheless, soft multilegalism is *not* equivalent to the normal state of affairs with supremacy: surely, there is a difference between giving autonomy conditionally to a juris-

diction, and not acknowledging any jurisdiction at all. Compare with the way many states deal with religious communities that are given legal recognition and rights to make marriages. In a sense, the state can always withdraw that right; but there is a distinct difference between a religious community that is recognized as having the right to make marriages, and those that do not have this right.

- <sup>29</sup> The term “Private Law” has different connotations in different countries and in different academic fields. Private Law as I use the term here means, roughly, the part of modern legal systems concerning itself with disputes between private citizens or legal persons other than the state, but “in the shadow of the axe” (the state), and not “outside” the apparatus of the state and its legal framework.
- <sup>30</sup> Needless to say, it would undermine the point of multilegalism if parties to a case chose *ex facto* whether or not they belong to this or that minority jurisdiction or the majority jurisdiction: entry, however, should be voluntary.
- <sup>31</sup> This raises a complicated issue, namely, how one should envisage *enforcement* of decisions reached in minority jurisdiction courts: should minority jurisdictions be empowered to have bodies of enforcement (police forces, jails, bailiffs etc.) or should enforcement be the exclusive right of the majority jurisdiction? For reasons of space we will not pursue that line of inquiry here.
- <sup>32</sup> Clearly, private law deals with rights-infringements as well, at least indirectly. For example, tort law primarily deals with issues of whether persons have, or have not, been negligent of their duties of care or reasonable caution, thus infringing other parties right to be treated with sufficient care etc.
- <sup>33</sup> This is riddled with ambiguity, for just what counts as a public rather than a private interest depends of course on which broader normative theory one uses as yardstick.
- <sup>34</sup> See also the discussion in Waldron, Jeremy, 2007, pp. 135f, 199ff. As already mentioned in the above, there are reasons to be mildly skeptical about this distinction; but singling out *culture* as a means of dividing groups of persons into different forms of legal status or right-entitlement surely is different from focusing on life events such as disability or unemployment or old age, that, in principle, can befall us all.
- <sup>35</sup> I ignore here eventual pragmatic arguments based on power relations or issues concerning stability. Moreover, as mentioned before, I ignore the complexities surrounding the question regarding “indigenous peoples”, colonized peoples, etc., who seem in general to have a different and more far-reaching claim to self-rule, at least *prima facie*.
- <sup>36</sup> Much hinges on one’s exact understanding of “difference-blind” rights here. Arguably, many multicultural rights can be conceived in the same vein as difference-blind, *i.e.*, as universal, general and “non-sortal”, *e.g.*, as language-rights for *any* person with encounters inequality based on language etc. What I have in mind is a stronger sense of multicultural rights, where the very fact of a “different” culture is taken as relevant for an assessment of which rights a given person ought to have as opposed to “difference-blind” where that kind of difference is taken to be irrelevant from the outset.
- <sup>37</sup> *E.g.*, Raz, Joseph, 1994; 1998, Spinner, Jeff, 1994, Tamir, Yael, 1993
- <sup>38</sup> See, *e.g.*, Kymlicka, Will, 1995. He also invokes the more straightforward egalitarian argument presented in the above.
- <sup>39</sup> Kymlicka, Will, 2002, pp. 135ff; cf. Festenstein, Matthew, 2005, pp.70ff.
- <sup>40</sup> See Taylor, Charles, 1994; Honneth, Axel, 1995.
- <sup>41</sup> See, *e.g.*, Modood, Tariq, 2007; Parekh, Bhikhu, 2006; Young, Iris Marion, 1990. Of course, this map of multiculturalism could be drawn in a number of different yet plausible ways. For instance, as indicated, many if not all of the theories that stress recognition and identity also rely on egalitarian norms. Even Iris Marion Young who, from a post-modernist stance criticizes the notions of universality and equality with much aplomb implicitly affirms norms of equality (See Holtug, Nils, 2009.)
- <sup>42</sup> Will Kymlicka, the most influential proponent of liberal (egalitarian) multiculturalism is in some ways reluctant to advance this kind of egalitarian argument on behalf of *immigrants*



on the ground that they have themselves chosen to emigrate, and hence, following the standard luck egalitarian principle, they have no legitimate complaint concerning eventual inequalities. This is vulnerable to the objections that immigrants do not necessarily choose to emigrate (this objection can be made on empirical or metaphysical grounds) and that the *children* of immigrants obviously do not choose to be born in a majority culture which is foreign to their own.

- <sup>43</sup> Again, we exclude cases of secession.
- <sup>44</sup> Cover, Robert, 1982.
- <sup>45</sup> Shachar, Ayelet, 2001, p. 2.
- <sup>46</sup> To give an example: If one takes one's cue from Axel Honneth's theory of recognition, one might insist that whatever pertains to legal status belongs to his second sphere of recognition, which is inherently universal, anti-particularist in kind. On the other hand, one could also read Honneth in another way, namely, as advocating a view giving "ground", universal legal recognition to all (*vis-à-vis* the second sphere of recognition) supplemented by special rights to groups based on the specific forms of solidarity pertaining to the third, more particularistic sphere. Cf.: Honneth, Axel, 1995.
- <sup>47</sup> Waldron, Jeremy, 2007, p. 130. For the following, see Waldron, Jeremy, 2002; 2007.
- <sup>48</sup> Waldron, Jeremy 2007, p. 131.
- <sup>49</sup> Waldron, Jeremy, 2007, pp. 131f, referring to Waldron, Jeremy, 2002, pp. 12f. See also Phillips, Ann, 2003, pp. 513f.
- <sup>50</sup> Shachar is less concerned about the *ex ante* model. See Shachar, Ayelet, 2001, pp. 45f. However, it seems to me that she did not take into considerations the lessons learned from the debate over the "cultural defence", partly for the reason that much of the literature surfaced after 2001.
- <sup>51</sup> Waldron, Jeremy, 2007, p. 143.
- <sup>52</sup> Waldron's cosmopolitical point of view is not sufficiently exhibited here, and in any event there are many other universalist frameworks available; however, it needs much more detailed exposition in order to be philosophically water tight, and even then I believe that it can only work as a defence of a *pro tanto* reason for going for the universalist, uniform model.
- <sup>53</sup> The following is partly built on Dane, Perry, 1996, pp. 209ff.
- <sup>54</sup> Dane, Perry, 1996, p. 209.
- <sup>55</sup> Prosser, William, 1953, *Michigan Law Review*, (51), p.916, quoted in Dane, Perry, 1996, p. 209.
- <sup>56</sup> It is not a complaint that law cannot make us all win. As a party to a democratic process of lawmaking, the citizen has to accept (within reason, of course) that the law cannot mirror all of his or her interests, and this does not in itself undermine legitimacy. See Nielsen, Morten Ebbe Juul, 2010. However, it is an entirely different matter when the legal status of a citizen is completely set aside.
- <sup>57</sup> It is irrelevant just what the divergence between the two laws is; the most dramatic situation would conceivably concern whether some act is criminalised to begin with.
- <sup>58</sup> It is probably not conceptually impossible to come up with institutional designs that ensures, or helps towards, equal treatment of parties from different jurisdictions; yet, the question is both under-illuminated and extremely complicated. See, e.g., Shachar's suggestions concerning a form of "transformative accommodation" or "joint governance", Shachar, Ayelet, 2001, pp. 88ff. This author finds it very hard to envisage the exact institutional form that follows from Shachar's otherwise instructive thoughts of the matter, and I venture that citizens living under such a regime would be rather confused as concerns their precise legal status.
- <sup>59</sup> Maybe not on a ground level; but in practice the kind of respect must differ.
- <sup>60</sup> Rawls, John, 1999, pp. 35ff *et passim*.

- <sup>61</sup> This might be only a minor problem, and point only to the rather obvious fact that all political and legal arrangements are sensitive to the empirical circumstances. See Kymlicka, Will, 2010, pp. 43ff.
- <sup>62</sup> See Shachar, Ayelet, 2001, pp. 81ff.
- <sup>63</sup> Note that an egalitarian multiculturalism can maintain that members of unprivileged groups have a right to (substantive, not just formal) equal access to cultural goods giving at least a *prima facie* ground for compensation in order to promote equal access without getting embroiled in multilegalism, even if there is a case for saying that the logic of liberal multiculturalism heads in the direction of multicultural multilegalism.
- <sup>64</sup> See Waldron, Jeremy (2002), pp. 5ff (2002) and Waldron, Jeremy, 2007, pp. 150f, referring to *State vs. Kargar*.

# BEYOND OBJECTIVE AND SUBJECTIVE: ASSESSING THE LEGITIMACY OF RELIGIOUS CLAIMS TO ACCOMMODATION

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## RÉSUMÉ

Il existe à l'heure actuelle dans le contexte juridique deux principales approches à l'évaluation de la légitimité des demandes d'accommodement pour des motifs religieux. La première, objective, affirme que ces demandes doivent pouvoir s'appuyer dans des faits concernant la religion en question. La seconde, subjective, s'appuie sur l'appréciation de la sincérité de la demande faite par le requérant. La première approche a l'avantage de rendre compte de la distinction entre les deux principes constitutionnels que sont, d'une part, la liberté de conscience, et de l'autre, la liberté de religion. Elle a l'inconvénient de tendre à ériger les tribunaux en « experts » sur des questions religieuses. L'approche subjective rend plus difficilement compte de la distinction entre les deux principes, et de plus risque de donner lieu à une prolifération de demandes. Pour atteindre une synthèse plausible de ces deux approches, il nous faut identifier les fondements normatifs justifiant l'intérêt que les démocraties libérales ont à reconnaître une telle catégorie d'accommodements. En prenant appui dans le célèbre argument de Kymlicka justifiant les droits de nations minoritaires, nous pouvons identifier un intérêt que ces types d'État ont à protéger les conditions permettant aux citoyens de manifester leur « agentivité culturelle », leur capacité à s'identifier en se les réappropriant et en les réinterprétant les normes, pratiques et rites issues de traditions religieuses.

## ABSTRACT

There are at present two ways in which to evaluate religiously-based claims to accommodation in the legal context. The first, objective approach holds that these claims should be grounded in « facts of the matter » about the religions in question. The second, subjective approach, is grounded in an appreciation by the courts of the sincerity of the claimant. The first approach has the advantage of accounting for the difference between two constitutional principles : freedom of conscience on the one hand, and freedom of religion on the other. It has the disadvantage of transforming courts into expert bodies on religious matters. The subjective approach has a harder time accounting for the distinction. It also risks giving rise to a proliferation of claims. A plausible synthesis between the two approaches requires that we uncover the normative grounds justifying the granting by liberal democracies of religious accommodation. An analogous argument to that put forward by Kymlicka in the case of minority nations identifies the interest that citizens have in being able to exercise their « cultural agency » : the creative reappropriation and reinterpretation of the rituals, practices and norms of religious traditions.

## INTRODUCTION

It has been said that toleration is a paradoxical, perhaps even a contradictory concept, and that the type of attitude it points toward should be discouraged rather than prescribed. To tolerate suggests that you are letting something slide that you disapprove of. If you disapprove of something that is actually morally wrong, then it seems that you are engaging in a form of moral cowardice not to condemn it. But if you disapprove of something that is actually morally permissible, then maybe what you should be doing is trying to overcome whatever foible makes you disapprove of it. You, rather than the person or group you are tolerating, are the problem. The cases in which actual toleration is required and appropriate seem vanishingly difficult to identify.<sup>1</sup>

Attending to the way in which we have attempted to institutionalize toleration in liberal-democratic legal regimes makes the issues clearer, even if it does not completely dissolve the perplexities. Laws and policies decided upon by democratic majorities and by their representatives and administrative regulations are adopted by public institutions because (one hopes) legislators and public officials feel like they will promote the common good. Yet there may be individuals and groups that feel that they must act in ways that the laws and regulation proscribe. The question that arises is whether there are some infractions of these laws and regulations that should not be sanctioned, indeed, if exemptions and exceptions ought to be built into the law itself. In some cases, the cost of enforcement may simply be too high. There are cases, however, where those who disobey do so for reasons that justify, or at least excuse, disobedience. Call these “toleration cases”. The “toleration cases” are ones in which though someone does something “wrong” (at least as the law defines rightness and wrongness), she does so for good reason, or at least for reasons that we would want upon reflection to endorse, sufficiently at least to warrant tolerating non-compliant behavior. They stand in a special position to the law. They do something that we would condemn without second thought in a person that did not occupy the specific position in the space of reasons that they do, which is such that the law imposes an excessive constraint upon them if it does not give some weight to the reasons that they have to act in a manner different from that prescribed by the law, given the specific position that they occupy. The set of “toleration cases” that seemed difficult to identify when looking at toleration in an abstract and individualistic way all of a sudden makes sense in an institutionally contextualized setting. These are the cases that would seem to call for “reasonable accommodation” on the part of public institutions.

Philosophers like Brian Barry have argued that our perplexity about toleration should survive into the legal institutional arena. As he has famously argued,<sup>2</sup> either a law mobilizes the coercive power of the state in the service of a very important goal, in which case it should be enforced even upon those who claim that it imposes a disproportionate burden upon them, or it does not, in which

case the unimportant goal that it does serve is not enough to justify recourse by the state to the use of coercion for anyone.

Barry's neat dilemma simplifies the issues at hand in at least two ways, however. First, it does not follow from the fact that some policy goal is important that no exemption should be granted. Many policies do not require full compliance in order to achieve their ends. Where the policy imposes burdens, and where there is therefore a risk of free-riding, "toleration cases" may provide a non-arbitrary way in which to select those limited sets of persons who will be allowed to exempt themselves from the law without giving rise to the race to the bottom that free-rider logics tend to set in motion.

Second, many laws that have tended to elicit requests for accommodation target self-regarding behaviour, to do for example with personal security and health. For example, the Hutterites of the Wilson Colony in rural Alberta requested an exemption from a law requiring of all inhabitants of that Canadian province that their drivers' licenses bear a photograph, in order to protect them against fraud and identity theft.<sup>3</sup> Arguably, exemptions to drug laws requested for religious reasons do not when they are granted impose costs upon others.<sup>4</sup> It is much harder to argue that state paternalism can brook no dissent than it is to argue that laws concerning other-regarding actions must be universally followed.

So Barry's attempt to convince us that the "paradox of toleration" survives into the legal institutional arena does not exempt us from trying to determine what the contours of the set of "toleration cases" are – those cases in which we rightly legislate against behaviour *x* or mandate behaviour *y*, and yet think that there are cases in which certain people ought to be exempted from the strictures of the law.

In Canada, Courts have been primary actors in the attempt to delineate the criteria that define this set of cases. This is both for the obvious reason that conflicts over accommodation are quickly brought before the Courts if settlements cannot be found by the agents themselves, but also for the more fundamental reason that the *Canadian Charter of Rights and Freedoms* requires of the Court that it achieve a balance between the legitimate interests of the State and the rights of individuals. Section 1 of the Charter, which precedes the enumeration of protected rights and liberties, states that these rights are subject to limitations that can be justified in the context of a just and democratic society. It has been left to the Court to determine how precisely to strike that balance in a principled and transparent way.

Courts engaged in determining whether religious believers should be exempted from laws that apply to members of the broader society are faced with dizzying complexities. In the Canadian constitutional context, they must determine

whether a law or policy (or even, in the context of the Quebec *Charter of Rights and Liberties*, the behaviour of private agents) constitutes an infringement of religious rights and liberties. What's more, they must determine whether the public policy aim in the context of which the infringement occurs is justifiable in the context of a free and democratic society. They must finally determine whether the limitation of right that the policy entails meets stringent proportionality tests. This battery of tests is known as the *Oakes Test*.<sup>5</sup>

Before the Court can determine whether a given law *justifiably* limits a constitutionally protected right, it must first determine whether there is a *prima facie* limitation. That is, it must first determine whether the individual rights claim that is being brought to bear to claim an exemption to a law is plausible on its face. This has proven to be particularly tricky in the case of religious rights and freedoms. What religious claims should be entertained for section 1 analysis, and which should be rejected out of hand?

Canadian constitutional theory and practice has veered between two ways of addressing this problem.<sup>6</sup> One, which I will call the objective test, takes it to be the case that there is a fact of the matter as to whether the claim being made by an individual is actually required by the religion that she professes. The second, which I will predictably call the subjective test, makes the claimant's sincere avowal of what his faith requires determinative of whether an accommodation should be considered. It makes a parallel epistemic claim to that made by the holders of the objective view, namely that Courts are in a position to make out the "sincerity" of the claimant's avowal.

The Canadian Supreme Court is at this point in time unsettled as to which of these two approaches should be adopted, a fact that bears witness to the considerable legal and philosophical issues at stake.<sup>7</sup> In a 2004 case that has spilled much scholarly ink, *Syndicat Northcrest v. Amselem*, the Court by the barest of majorities affirmed the subjective account.<sup>8</sup> But in a subsequent case to do with Jewish divorce, the Court seemed to lean toward an objective account, and allowed itself to make claims about what the religious obligations of a man who refused to grant his wife a Jewish divorce (a *get*) "really" were.<sup>9</sup> What makes matters more confusing for the Canadian constitutional scholar is that some of the Justices that wrote most eloquently in favour of the subjective approach in *Amselem* were now making arguments of an "objective" kind.

Though these cases are drawn from the Canadian constitutional context, I believe that the issues that they raise are of broader philosophical and constitutional interest, and apply to any constitutional regime that has read the guarantees of religious freedom as mandating certain forms of accommodation.

I have two principal purposes in this paper. First, I will spell out both the sub-

jective and objective approaches, and identify the problems and impasses to which they give rise. Second, I will propose an alternative approach that hopefully preserves the advantages of both approaches while avoiding their shortcomings, and that draws on an integrated philosophical justification that attempts to spell out grounds that a liberal democracy could point to in order to specify the value that it can, from within the confines of liberal theory, identify in religious belief and practice.

### THE OBJECTIVE APPROACH

The objective approach to determining whether a claim for religious accommodation has *prima facie* plausibility makes two claims. The first is that there is a religious “fact of the matter” against the background of which individual religious claims can be assessed. According to this view, a person may sincerely believe that her religion requires her to do x or not to do y, and yet be wrong. Let us call this the “fact of the matter” claim (or FOM for short).

The second claim is that Courts, aided by the panoply of tools that they have at their disposal (expert witnesses, “friend of the court” briefs, etc.), are in a position to make out the “objective” rightness or wrongness of the claim for accommodation. Let us call this the “epistemic authority” claim (or EA for short).

It is important for my purposes that these two component parts of the objective approach be clearly distinguished. It is in principle possible to hold FOM and not EA. That is, it is possible to think that there is a religious fact of the matter, but that courts are not in a position to ascertain it.

FOM has some virtues for Courts that have among their concerns that of avoiding the proliferation of accommodations. This concern might be justified on both pragmatic and principled grounds. Pragmatically, one can imagine a Court being sensitive both to the carrying capacity of the judicial system being rapidly outstripped by demands for accommodation were the perception to arise that they were too easily granted, and to broader efficiency concerns were laws to function on an *à la carte* basis. At the level of principle, it is at least plausible to claim on ethical grounds that those who make a claim to be exempted from a law that has been judged to be in the general interest have to bear a high threshold of justification, one which only a subset of those who might *feel* moved to ask for accommodation can actually satisfy. Let me call the concern that accommodation claims be limited the “anti-proliferation” requirement.

Indeed, FOM seems to rule out “frivolous” or “idiosyncratic” claims. If, as a Jew, I claim that my religion requires that I stay home from work to watch all of the World Cup matches, that claim can be ruled out of court because plainly there is no Biblical injunction to watch football. The claim I make as a Jew will have to point to a practice that has some kind of credential in Biblical texts and in the practice of the

Jewish people through history. And not just any claim will satisfy this requirement. Another advantage of FOM is that it makes sense of the fact that we distinguish, both in the Canadian constitutional tradition but more broadly philosophically between religious freedom and freedom of conscience. If (to anticipate) we adopt a subjective approach to the *prima facie* evaluation of religious claims to accommodation, then we elide that distinction, for there is nothing to distinguish an individual's claim that his religion dictates that he act in a way contrary to a law or regulation and an individual's claim that his individual moral conscience does so. (For my immediate purposes, it suffices for me to establish that the objective approach makes sense of a conceptual distinction that exists in law. I will later say something to speak to the philosophical importance of making the distinction). FOM requires that once it is established that the claimant is a member of a religion, it be established that the religion, considered as a relatively uncontroversial text or a readily identifiable set of rites and practices, actually does require that he act in the manner that he says it does. Call this the *perspicuity requirement*: all things equal, it speaks in favour of an approach to the problem we are considering that it affirms rather than elides a distinction written into constitutional law.

Note, however, a first disadvantage (for some) of FOM, one that follows from the perspicuity requirement, and from the fact that it drives a wedge between protection of freedom and protection of conscience. Though FOM seems to put bulwarks in place against proliferation, it does not similarly protect against what I would call opportunism. Opportunism occurs when a person asks for an accommodation that is due to him given FOM (he is a member of religion X, and religion X actually does require that he prescind from doing something that the law or a regulation to which he is subject requires), though the reason he makes the claim has nothing to do with the reasons that his religion mobilizes in order to justify the stricture. It might be laziness or lack of preparedness that leads me to invoking the holiday of *Simchat Torah* as a way of justifying not showing up to the exam, but FOM will grant me the exemption because, wanting to make the matter of the granting of exemptions as objective as possible, it will just want to see whether, first, I am a member of the religion I claim to be a member of (I am), and second, that the claim I am making have religious warrant (it does).

Anti-opportunism might seem a requirement just as important as anti-proliferation. There seems something morally galling about someone "taking advantage" of a legal regime granting accommodation to people to allow them to better observe their religious faith in order to fulfill an end having nothing to do with that purpose.

On the other hand, sincerity, or conformity of individual motivation to moral purpose, is not something we standardly require of people when they exercise other rights and entitlements. If parents claim parental leave and then hire a sit-



ter so that they can spend a lot of time doing things other than looking after their kids, we do not think that their leave should be taken away from them (even if we judge them morally quite severely for exercising their right in this manner). The right to vote is justified at least in part by the idea that all citizens are equally capable of judging the political merits of different candidates, and yet we would not think of taking the right to vote away from someone who avowed voting for the candidate which had the best haircut.

We abstain from making rights and entitlements conditional upon people making use of them for reasons that conform to the purpose for which they were enacted at least in part because we worry about licensing meddlesomeness of the part of public institutions such as Courts. Though we morally condemn those that make opportunistic use of accommodation regimes, we are equally morally worried about judges being able to act as Inquisitors standing in judgment of the seriousness of individuals' religious practice. I would therefore actually see the fact that FOM does not discourage opportunism as a cost of a desirable characteristic of public institutions in general and of Courts in particular, which I will refer to as the *anti-meddlesomeness requirement*. We don't want Courts determining whether someone has a right on the basis of their delving to too great a degree into people's lives to determine whether they are actually "good Jews" (or good Catholics, or good Muslims, and so on).

One undeniable shortcoming of FOM is that it tacitly represents religions as much more simple and monolithic than they actually are. Religions are not codes of ethics that clearly prohibit and prescribe behavior. That is so for at least two reasons, which I will refer to as "diversity of sources" and "diversity of interpretations".

By diversity of sources, I refer to two distinct phenomena. The first has to do with the diversity of written sources. A judge who determined for example that she would simply read the Pentateuch in order to determine what Jews' religious obligations are would be short-circuiting millennia of writings that have subtly but importantly different statuses in the Jewish religion – the Talmud, the Mishna, and almost countless Rabbinical commentaries. I am certain that the same can be said of other religions.

The second phenomenon that falls under the general heading of "diversity of sources" has to do with the fact that religion has to do not just with individual belief but also with communal practice and ritual. People worship in groups. What's more, for many religious persons, *practice is more important than belief*. That is, the question of whether the metaphysical claims made in the holy texts of their religions are true or not is far less important than is the requirement of remaining true to tradition, to taking part in a certain range of practices that bind the individual to community both synchronically and diachronically. And for re-

ligions that have spread across the globe, as have the world's major religions, practice will be inflected by non-religious, cultural considerations. To again use examples drawn from my own religion, the clothing worn by ultra-orthodox Ashkenazi Jews have less textual warrant than they do connection to traditions that grew up among practicing Jews in certain corners of the Pale of Settlement. But it would be a mistake to say that because Jews from Iraq do not dress in the same way, therefore no accommodation should be made for this way of dressing in circumstances in which it might come into conflict with some administrative requirement.

By “diversity of interpretation”, I mean something that is doubtless obvious, namely that religious texts have been through the centuries and in some cases millennia (in the case of “older” religions”) subject to a wide range of interpretations, some of which have become institutionalized (there are Orthodox, Conservative, Liberal and Reconstructionist synagogues, all of which are organized around different ways of interpreting the diversity of Jewish texts and practices; similarly there are Sunni, Shiite and Ismaeli Muslims, a dizzying range of Christian sects, and so on), others “infra-institutional” – they are the kinds of difference of interpretation that might divide believers who still think of themselves as members of the same religion.

Given diversity both of written and of “practice-based” sources and diversity of interpretations, it is probably a euphemism to conclude that interpreting the religious obligations of a claimant is more difficult than interpreting the Tax Code (which is not to say that that is easy!). This does not necessarily invalidate FOM (though maybe it does), but it places the hurdle that it has to face extremely high indeed.

This brings us to the second claim made by proponents of an objective approach to assessing the *prima facie* warrant of religious claims. That claim was that of the epistemic authority of the Court to determine facts of the matter about whether a person making a claim for accommodation is actually doing so on the basis of an accurate representation of his religious obligations. Now, EA would be plausible were facts of matter about religious obligation easy to ascertain. But as we have just seen, they are not.

Now, EA might still be vindicated if it turned out that, fortunately, Courts in countries like Canada were *very good* at interpreting religious doctrine, interpretation and practice. But there is no reason to think that this is so. The training that judges receive and the experience that they accumulate before they are named to the bench rarely if ever qualify them for that particular task.

A defender of EA might however point to the fact that judges are aware of their

own shortcomings in this regard. This is the reason that they enlist help in order to make their decisions. They receive “friend of the court” briefs and lawyers on both sides of a legal conflict solicit expert witness testimony, most notably.

The problem with this kind of epistemic prosthesis is that they often reflect rather than overcome debates and conflicts of interpretation. In *Amsalem* (a case that opposed a religious Jew to his landlord over the issue of whether, as the landlord argued, his religious obligation was satisfied by the construction of a communal *souccah* for all the Jewish inhabitants of the condominium complex in which he lived, or whether, as the claimant argued, his religions required that each Jewish family be able to construct their own on their own balcony (which was opposed by the landlord for aesthetic reasons as well as for reasons of safety)), lower Courts found in favour of the landlord largely on the basis of the testimony of rabbis who claimed that the laxer practice was sufficient to honor religious obligations. The Supreme Court, which found in favor of the claimant by a 5-4 margin, affirmed the subjective approach to determining the *prima facie* plausibility of Amsalem’s claim, but in so doing consulted, and decided to give preference to, a rabbi who claimed that as far as religious obligations such as the construction of *souccah* is concerned, it is important that the individual believer be given as much latitude as possible in order to allow him to “take joy” in the fulfillment of his religious obligation.<sup>10</sup>

In choosing to privilege the testimony of one expert witness rather than another, the Court was in effect reclaiming for itself the epistemic authority that it claimed to be backing away from by calling on expert witnesses in the first place. But it is difficult to see how they could have done otherwise: religious experts are not like ballistics experts. They are themselves subject to the interpretive difficulties wrought by the plurality of sources and interpretation. What’s more, in the case of the rabbis heard by different levels of courts in the *Amsalem* case, these experts are (unlike ballistics experts, at least one would hope) parties to the debates and disputes of interpretation that expert testimony is purportedly being sought out to overcome.<sup>11</sup>

The obstacles that lie in the way if a court being able to claim epistemic authority are considerable. But there are moral obstacles as well. To appreciate these, consider that one response to the problems just canvassed might be to say that though there are considerable obstacles to determining the fact of the matter about an individual’s religious obligations, the matter cannot be left undecided when demands for accommodation are put forward. Someone has to determine whether the accommodation will, or will not be granted. Why not entrust that task to the Courts?

We might resist entrusting the Courts with this task for at least two reasons. First, if courts are asked to adjudicate between rival interpretations of religious text and practice, they are in effect being asked to violate the obligation of neutrality

which it particularly important that Courts cleave to in religious matters. Neutrality requires that the state not affirm any particular religion. Now, in granting accommodations on religious grounds, the Court is not violating that requirement because it is not saying anything about the relative value of different religions, but rather weighing against one another the importance of a law or regulation that has *prima facie* justification relative to the common good, and the importance of a religious obligation that has importance for the claimant.

But in claiming, (say), that Orthodox Judaism is a “better” interpretation than Liberal Judaism, the Court, and therefore the State, is departing from that stricture. It is now saying that the claims of one religious group are more credible as interpretations of the religion in question than are those of another, and that in virtue of that fact demands for accommodation that flow from it will be granted, whereas those that flow from the other will be denied. If we believe that neutrality is particularly important in the State’s treatment of religion, then we have reason to believe that Courts should not be involved in the business of determining religious facts of the matter.

Second, demands for accommodation often (though not always – religious Christian groups have in majority Christian countries asked to be exempted from strictures that prohibit religious symbols in public spaces and institutions) emanate from religious minorities. Sometimes, these religious minorities are ones that perceive themselves as having been oppressed by the State of which the Court is the emblematic embodiment. Minority status tends to breed suspicion and fear of institutions that are thought of as “speaking for” the religious or cultural majority. This tendency is exacerbated when a history of oppression compounds minority status. Thus, there is a concern that decisions made by judges who are not members of the religious minority in question, and who sit on a Bench that is seen as representing the majority, faces a legitimacy deficit in making judgments about the facts of the matter about a minority religion, either directly, or via the indirect route of legitimating one religious expert rather than another.

In sum, the objective approach has advantages and disadvantages. By disciplining accommodations through the demand that they be “objectively” verifiable, it satisfies the “anti-proliferation” requirement. By making sense of a distinction written into the *Charter* between conscience and religion, it satisfies the perspicuity requirement. I argued that though it runs the risk of inviting opportunism, it in so doing avoids the even worse pitfall of meddlesomeness.

On the other hand, it implicitly suggests that determining facts of the matter about religion is much easier than it actually is. What’s more, it is grounded in a view about the epistemic authority of the Court that is both epistemically and morally suspect, even when the competence of the Court is enhanced by expert witnesses and the like.

The opposed approach, the subjective approach, looks at the question of the establishment of the *prima facie* plausibility of a claim for religious accommodation from an opposite tack. It claims that a claim has *prima facie* warrant if it is made sincerely by the claimant. In order for a claim to accommodation to be deemed worthy of consideration, it must be the case that the claimant truly believes that it is essential to his ability to worship and to experience his spirituality. It is to this approach that I now turn.

### THE SUBJECTIVE APPROACH

The subjective approach seeks to establish the sincerity of claimants.<sup>12</sup> It requires that they truly believe that they are religiously obligated to do x whereas the law requires that they do y. Being defined in explicit opposition to the objective approach, it has a very large and permissive conception of what counts as a plausible religious claim. Each individual is, as it were, his own religious arbiter, the individual best able to determine religious right from wrong. Let's call this attitude toward the individual religious conscience of each believer the "sincerity" condition.

It is very important to note that the subjective approach incorporates its own claim to epistemic authority (EA2). The court that invokes the subjective approach is not claiming to be expert in determining religious truth and falsity. Rather, it is claiming to have privileged access to the sincerity of the claimant.

Whereas the bugbear of the objective approach seems to have been the danger of proliferation, the worry of the proponent of the subjective approach seems to be opportunism. What the approach most seems to want to avoid is people making opportunistic use of religious prescriptions, claiming that they are entitled to an accommodation even where nothing in their biography suggests that they have ever acted beforehand on the basis of the values that the religion mandates. And so, it claims to be able to "read the hearts" of claimants in order to rule opportunists out.

What are the advantages of the subjective approach? Some of them can simply be read as ways of addressing the flaws inherent in the objective approach. Thus, while the objective approach sets itself the epistemically daunting task of establishing religious "facts of the matter" despite the diversity of sources, practices and interpretations, the subjective approach is premised upon the ability of Courts to do something that they have been doing since time immemorial, which is to establish the credibility of claimants, in the present context that they really believe what they claim to believe. While the risk of meddlesomeness and judicial overreach is obviously still present (one can well imagine courts overreaching by claiming to know better than claimants what is truly in their hearts), the task is not one for which Courts seem by their very nature unsuited to carry out. Both the determination of sincerity, and the Courts' status as appropriate insti-

tutional mechanisms through which to establish sincerity, seem easier to establish than the corresponding tasks that the objective approach has to accomplish, those of establishing religious facts of the matter, and of trying to use the essentially juridical expertise of judges in order to adjudicate religious conflicts.

Another potential advantage that I would claim for the subjective approach is that of recognizing the agency of believers. I say “potential” here because the realization of this potential would require lessening the emphasis placed on the inward dimension of *sincerity*, and playing up a broader conception of *agency*. The subjective conception with its emphasis on sincerity would seem to stress the relation of the believer to his own mental content. He must bear the appropriate propositional attitude to it, namely *belief*. But one could imagine a subjective approach that emphasized not (non-neutrally) belief but rather agency, the fact that whether through fully articulated belief to which sincerity or insincerity can be ascribed, religious experience is never passive. The subjective approach recognizes that religion is not just something that *happens* to people, but rather something that people *do*. Even in cases where, (as we will see below), it is inappropriate to reduce religiosity to a question of individual belief and conviction, religious belonging and practice is something that profoundly inflects and informs people’s (sometimes inchoate and taken-for-granted) experience of the world, of their relations with others, and of their perception of their obligations. It is a mistake to put forward the simplistic dichotomy according to which believers are either fully procedurally autonomous agents whose belief is entirely driven by conscience, or mindless automatons who merely await the deliverances of some higher authority. Religion can inform the agency of individuals rather than short-circuiting that agency. Religion matters to believers, and that mattering is something that cannot be accounted for according to a view of the faithful as merely determined in their actions by outside authoritative sources.

But the disadvantages of the subjective approach are considerable as well. Chief among them is in my view the central claim of the subjective approach, which is that the only bar that a claim for religious accommodation has to pass is that of individual sincerity, a claim that is premised upon the further claim that religion is ultimately about individual conviction and conscience.

There are as far as I can see at least three problems with this set of interlocked claims. First, as has already been mentioned, by reducing religion to a matter of *belief*, the approach gives us no way to account for the distinction that is present in our constitutional tradition and in that of many others, which is that freedom of conscience and freedom of religion are protective of different things. Invoking a vaguely Dworkinian idea that in interpreting constitutional texts we should try to make the law “the best that it could be”, we should avoid interpre-

tations of Charters that make them redundant, that provide in effect two constitutional protections where one would have sufficed.<sup>13</sup>

Second, as Avigail Eisenberg has pointed out, there is something implausible about the subjective interpretation taken on its own terms. Indeed, to use one of Eisenberg's own examples, were a Jew to claim that his sincerely held view about what his religion required of him is that he ingest peyote for ceremonial purposes, the subjective view if taken literally would only be able to establish sincerity, and would have to abstain from the argument that on no plausible interpretation of Jewish law, custom or practice is that an even remotely plausible claim. In fact, in order to avoid absurdities of this kind, the subjective approach must at least tacitly incorporate an objective dimension setting the bounds of plausible sincerely held convictions about the requirements of this or that religion.<sup>14</sup>

Third, there are not only narrow legal, but also more broadly philosophical reasons to want to hold on to the conscience/religion distinction. The subjective conception in collapsing religious belief onto conscientious conviction tacitly reduces all religion to what we might call a "Protestant" conception of religion, which privileges the moment of belief over that of practice and deference to tradition. Now clearly, some religions clearly do prioritize conviction in this manner – that was a central theological motivation behind the Protestant Reformation, and it is in some measure what distinguishes orthodox from liberal denominations of Judaism. But many strands of contemporary religion do not place the individual conscience of the believer on such a pedestal, and on the contrary emphasizes the epistemic humility of the believer in subordinating his individual conscience to authority, be it the authority of tradition, of text, or of religious leaders. The subjective conception tacitly or explicitly downplays such forms of religiosity, and in so doing it violates the neutralist strictures that public institutions such as Courts ought to cleave to in adjudicating religious claims to accommodation.<sup>15</sup>

While it illegitimately privileges certain forms of religiosity over others, the subjective conception also ignores what is morally distinctive about claims of conscience, and about the specific reasons that it makes sense to protect the capacity of citizens to make claims of conscience. When one thinks of the paradigm cases of conscientious refusal or objection – pacifists who refuse to go to war, health-care professionals who refuse to perform euthanasia in those jurisdictions in which it has been decriminalized,<sup>16</sup> and the like – what we see are people who have strong moral objections to certain state policies. The best interpretation of the protection of freedom of conscience in my view is that (paradoxical as it may sound), while we want citizens to obey the law, we also want them to be able to think autonomously about the moral claims that the law makes. We don't want citizens who are slavish in the face of the law. We want them when they obey to

do so because they have considered and affirmed the legitimacy of what the law requires of them. Now the *cost* of this might be that in exercising their capacity to think independently of the law's requirements, citizens will come to conclusions radically opposed to those of legislatures and tribunals. They will determine that wars ought not to be fought, whatever the practical and ethical stakes, because nothing can justify one in deliberately taking another human life. They will reach the conclusion that health-care professionals ought under no circumstances be involved in the termination of life, no matter how grim it has become. Now my intention is not to *endorse* either of these two stances, but rather to emphasize the importance for democracies to possess citizens who feel that they can follow their moral reasoning where it goes (within limits) even when this places them in conflict with what the law requires, and to protect them within well-circumscribed limits in their exercise of that capacity.<sup>17</sup>

The subjective conception elides the distinction between the kinds of claims that are made by would-be conscientious objectors, and those that are made by claimants for religious accommodation. Though they may sometimes be extensionally equivalent (the vegetarian and the Buddhist may both be asking for an exemption from meat-based diets, say in institutional contexts that otherwise impose it, and from which claimants cannot exit at will, like the army or prison), the religious claimant and the moral claimant are making claims that are substantively quite different. The moral claimant says that he cannot do *x* because he believes it to be *wrong*, full stop, whereas the religious claimant is claiming that *x* is unacceptable given his religious commitments, or one might perhaps better say his religious identity. Now, as we have seen above, there may be some religions and denominations that have already as it were placed an emphasis on individual conscience as opposed to identification with a tradition and community of believers, it is difficult to claim even in their case that claims of religious accommodation are necessarily reducible to claims of individual conscience. For a subjective claim for religious accommodation can be to the effect that the believer sincerely believes that his religion requires of him that he abstain from *x*, rather than that morality requires of him that he abstain to *x*. The further step that would need to be taken in order to argue for the equivalence, not just extensionally but intensionally, which is that religion is reducible to morality, would be extremely difficult to establish, to say the least.

So the subjective approach alleviates the objective's approach's considerable epistemic burden, but it comes at the cost of representing religion tendentiously, and of not allowing us to account for the distinctive importance of constitutional protections of freedom of conscience.

Is there a way of combining the strengths of these two approaches into a hybrid approach that would avoid the pitfalls of both? It is to this question that I now turn.



## A SYNTHESIS?

I would like in this last section to propose an approach that attempts to avoid the pitfalls associated with the approaches that have just been mooted, while retaining their advantages. I want to begin by taking a step back from the detail of juridical debates to do with religious accommodation to ask a more basic, philosophical question: what reasons might a liberal democracy have to ascribe value to religious practice sufficient to ground claims for religious accommodation (as well as other claims that religious groups might make, such as subsidies and tax-exempt status, and limited autonomy over certain areas of communal life)?

As an example of the kind of argument that I am after, consider Will Kymlicka's well-known argument in favor of self-determination rights for minority nations that have been involuntarily incorporated into larger political entities. Regardless of the benefits that individuals may draw from being members of a national group, Kymlicka claims that a liberal need see value in national affiliation only to the extent that it provides him with an important ingredient of individual agency. To wit, it provides them with a "context of choice" within which to exercise their individual capacity for choice.<sup>18</sup> Can we come up with a structurally similar argument to Kymlicka's in the case of religious belonging, one that provides liberals with reasons to value it, irrespective of the particular grounds that members of a religious group might profess for their membership?

I believe that we can. To begin to make some headway, I would like to take my bearings from a recent paper of Samuel Scheffler's on the moral importance of tradition. By the term "tradition", Scheffler intends to denote a set of quite different kinds of things that bear family resemblances to one another rather than falling under a unique set of necessary and sufficient conditions. Among the features that the members of this set possess, Scheffler lists "beliefs, customs, teachings, values, practices and procedures that is transmitted from generation to generation".<sup>19</sup> Though traditions are not all *religious* traditions, on this account, all religions seem to me to be traditions. Indeed, the very etymology of the term "religion" points to its function in "linking together" people and generations in precisely the manner that traditions, broadly understood, do.

On Scheffler's account, traditions perform an important function in "anchoring" individual identity in time. He claims that it is an important condition of individuals coming to feel that they are possessed of a stable identity that they be able to make themselves at home against the backdrop of the identity-threatening flux of space, and most clearly, of time. By linking individuals to something that possesses a meaningful stability across time, a tradition "plays a role in relation to time that is analogous to the role that a home plays in relation to space".<sup>20</sup>

If Scheffler is right about the importance of tradition to one's sense of enduring, stable identity, then, to the extent that we accept what I take to be a fairly uncontroversial premise, it is also important to individual *agency*. That premise is the following: we cannot be agents (as opposed to wantons who, according to Harry Frankfurt's famous characterization, act on the basis of the strongest occurrent desire<sup>21</sup>) if we do not have a relatively stable sense of self. The vindication of this premise is given by much current work in the theory of action, that has sought to complete the belief-desire model of agency by observing that our agency is expressed through temporally extended plans or projects that incorporate and account for our myriad individual actions.<sup>22</sup>

If this account is plausible, it follows that we cannot be agents if we do not possess a temporally extended sense of self. If Scheffler is right about tradition, it follows that traditions are important not only to stabilize our identities against the identity-threatening backdrop of the flux of time, but also to our ability to be agents rather than merely wantons. And if I am right in claiming that religions are (among other things) traditions as defined by Scheffler, it follows that religions are among the various ways in which individual agency is sustained. It provides a temporally extended context against the backdrop of which agents come to see themselves as possessed of a temporally extended self.

Two other points need to be made to extend Scheffler's account in a manner that allows us to answer that I set for myself at the outset of this section. First, though Scheffler claims that traditions can be constituted by any subset of the set of properties that he claims traditions to be constituted by, he clearly believes that there are at least some properties that are necessary constituents of traditions. First, most trivially, traditions are temporally extended. They are beliefs, practices, rituals, institutions, etc., that people inherit from the past and pass on to the future. Second, they are intersubjective and collective. They are, in Scheffler's words, "public, collective enterprises".<sup>23</sup> This means, first of all, that it is difficult if not impossible to imagine a solipsistic tradition. Traditions seem to be the sorts of things that link people together. Second, they are, again to use Scheffler's terms, *enterprises*, that is that they link people together in practices (rather than for example merely in beliefs). The collective nature of a tradition is constituted by the fact that they bring together people whose behavior and belief is not merely convergent, but rather who do things together.

If all of this is true, then it follows that religions are part of a smaller set than might have originally been thought by referring to the list of properties of traditions that Scheffler introduced in order to provide a general definition of traditions. Traditions are paradigmatically collective enterprises, as, I take it, are religions.

I will make a second point by introducing a distinction. All religions provide their members with what might be termed “authoritative scripts”. That is, they identify certain texts, obligations, beliefs, rites and practices as constitutive of what the tradition is. Now some religions are “closed”, both in the sense that they do not allow religions to evolve by accretion and syncretism, and in the sense that the interpretation of these texts, practices, and so on are the preserve of an authoritative epistemic elite. Ordinary members of closed religious traditions receive these traditions as commands more than they receive invitations to participate in the reappropriation and reinterpretation of authoritative scripts.

Some religious traditions are “open”, in the sense that either they do not foreclose the evolution of religious traditions through accretion or syncretism, and/or they allow or openly encourage members of tradition to exercise agency within the tradition by interpreting and reappropriating for themselves the authoritative scripts that have been bequeathed to them, in order to adapt and give meaning to these scripts in the context of their circumstances.

With this characterization of religious tradition in hand, I am now in a position to offer an answer to the question I posed to open this section of the paper: what can a liberal find of value in religious tradition, that might be sufficient to ground state accommodation of religion, in the form, among other things, of legal exceptions and exemptions? The answer would seem to be this: regardless of what people *think* (for example that they are doing the will of God), religions (and other forms of organized tradition) can matter to liberals because they contribute both a condition and a site for individual agency. They provide a condition in that they are among the ways in which humans achieve the agency-enhancing temporal stability of their identities. And, at least in their “open” variants, they allow agents to exercise what might be termed “cultural agency”, namely the creative participation in the interpretation and reappropriation, and supplementation of partially open, authoritative scripts.

Clearly, a liberal theory will find more value in open than in closed religious traditions, because such traditions sustain and encourage rather than inhibiting an important form of agency. Such traditions recognize the interest that people have in interpreting and reappropriating for themselves the authoritative scripts that they inherit from the past in order to make them meaningful in the light of present experience and circumstance.

How does this account allow us to split the difference between the subjective and objective approaches to accommodation that were discussed above? My claim is that by digging deeper than either account does into the moral and philosophical grounds that warrant liberals ascribing value to religious traditions, they allow us to see the kernel of truth in both accounts, while hopefully avoiding the pitfalls that would arise from seeing either one as a sufficient, stand-alone account.

Remember that I am guided in these reflections by what I have called above the “perspicuity requirement”, which claims that to the extent that constitutional documents and common philosophical and legal usage distinguish between freedom of religion and freedom of conscience, we must find ways to distinguish the moral considerations that underpin them, rather than running them together. Freedom of conscience is underpinned by the view that within limits (the delineation of which is at present a pressing moral and philosophical task), people should not be forced to act against their moral beliefs. A justification of this limit upon the State is presumably that in a liberal democracy, it is desirable that citizens be encouraged to be morally inquisitive and critical, rather than morally deferent and incurious.

Religious freedom, as distinct from freedom of conscience, matters for different reasons from a liberal standpoint. The account of toleration and accommodation that emerges from this account ensures that the practice of religious accommodation allow the liberal democratic state to realize these reasons.

By integrating aspects of the objective account described and critiqued above, the account that naturally flows from the argument just sketched satisfies the perspicuity requirement. Indeed, like the objective account, the account defended here, (which, for lack of a better word, I will go on to term the “hybrid” account), my account requires for a claim made on religious grounds that it be connected to what I have here called an authoritative script. There is a range of texts, practices, rites, and so on, that are at least partially constitutive of a religion, and a claim has to be made at least partly by reference to these (partly, and not completely, because as I have mentioned above some religious traditions evolve by accretion and syncretism).

The hybrid view therefore endorses a version of FOM. There is a fact of the matter about the texts, rites, practices, beliefs, and so on, that are constitutive of a religious tradition. But it lessens the epistemic burden placed upon courts by requiring of them not that they be able to ascertain who is right and who is wrong in their interpretation of a religious tradition, but rather, more modestly, that they be able to ascertain that these interpretations, the rightness and wrongness of which they do not seek to establish, are actually interpretations of a religious tradition. The form of EA embodied in the hybrid account, though not completely free from possible controversy, does not require of courts that they take sides in religious conflicts as regularly as the objective account would. Presumably, determining what scripts are authoritative for a given religious tradition will not involve courts in as much controversy as would the requirement that they determine which side is right in the interpretation of these scripts.

The hybrid account also shares much with the subjective account mooted above. Stated in very general terms, the account takes agency seriously by recognizing

the importance of traditions in sustaining individual agency, and thus provides grounds that liberals, given their emphasis on individual agency, to support accommodations for religious persons. As opposed to a purely subjective account that would presumably require of members of religious minorities that they justify their claims to exemptions as if they were claims of conscience rather than tradition-based claims, however, this account does not privilege what I have above called “Protestant” conceptions of religion. Rather, it takes seriously the possibility that some traditions provide benefit to individuals not by being a form of belief, but rather by being a form of practice.

What’s more, the hybrid account would allow us to make distinctions between traditions that seem sensible from a liberal point of view. It would most notably recognize that while all religious traditions have importance for individuals in that they contribute to the temporal stabilization of individual identity, they do not all contribute equally to the promotion of individual agency. Closed religious traditions might not provide grounds for exemption that are as strong as do open traditions. (I hasten to add that it does not follow from a religious tradition being “open” that it is internally organized along liberal, democratic lines. Many religious traditions that view themselves as “orthodox” are nonetheless sites of quite creative cultural agency, and are often rife with internal debate).

A liberal account grounded in the arguments presented here would thus enjoin judges to consider claims for accommodation made by members of religious traditions, to the extent that they are grounded in recognizable interpretations of these traditions, and particularly when they are put forward by members of “open” religious traditions, that is by traditions that, though they need not themselves be organized democratically or in accordance with liberal norms, nonetheless provide a space for individuals to engage in cultural agency.

I want to make two final notes in closing. First, it should be clear throughout that the test I am imagining here in very broad lines establishes a first bar that claims to religious accommodation must pass, at least within the context of the kind of logic that Canadian Charter jurisprudence embodies. Indeed, Section 1 of the Canadian Constitution allows the Court to set aside a *prima facie* reasonable claim to accommodation if a pressing objective of general interest can be shown in a manner compatible with the values of a free and democratic society to warrant the limitation of the protection of a right. Clearly, on my account, those claimants who have satisfied the *prima facie* plausibility test still have a significant hurdle to clear. So while I have shown that liberals have reason to give claims grounded in religious tradition some *prima facie* weight, it does not follow that once recognized, such claims should be viewed

Second, and relatedly, I think that it nonetheless makes a difference for a claimant whether he be told that, though his claim has met a *prima facie* burden of proof,

it has to be set aside because of pressing social needs, or whether, on the contrary, he be told that his claim has no merit, even independently of this broader consideration. It is important that we calibrate this first hurdle just right so that it provides vindication just to those claimants that we think merit it given our best understanding of the values underpinning freedom of conscience and of religion, even if it turns out that that vindication is only *prima facie*.

## NOTES

- <sup>1</sup> For a recent collection of historical and conceptual inquiries into toleration, see Melissa Williams and Jeremy Waldron (eds.), *Toleration and its Limits*, The NYU Press, 2008.
- <sup>2</sup> Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Oxford: Oxford University Press, 2001.
- <sup>3</sup> Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567
- <sup>4</sup> See for example the Canadian case R. v. Malmö Levine; R. v. Caine, [2003] 3 S.C.R. 571, 2003 SCC 74
- <sup>5</sup> I have sought to articulate the logical structure of the Oakes test in greater detail in Daniel Weinstock, “Philosophical Reflections on the Oakes Test”, in L. B. Tremblay et G. C. N. Webber (Eds.), *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* Montréal: Éditions Thémis.
- <sup>6</sup> These have been well chronicled in Dia Dabby, *Triangulation of Rights, Balancing of Interests: Exploring the Tensions between Freedom of Conscience and Freedom of Religion in Comparative Constitutional Law*, M.A. Thesis, Faculté de Droit de l’Université de Montréal, January 2010.
- <sup>7</sup> For some important discussions of some of these issues, see *inter alia*, Richard Moon, “Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms”, in *Brandeis Law Journal*, 41 (3), 2003; Benjamin L. Berger, “The Limits of Belief”: Freedom of Religion, Secularism, and the Liberal State”, in *Canadian Journal of Law and Society*, 17 (1), 2002; and Paul Horwitz, “The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond”, in *University of Toronto Faculty Law Review*, 54 (1), 1996.
- <sup>8</sup> Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 2004 SCC 47
- <sup>9</sup> Bruker c. Marcovitz, [2007] 3 R.C.S. 607, 2007 CSC 54
- <sup>10</sup> Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 2004 SCC 47, at 75.
- <sup>11</sup> For some interesting thoughts about the place of religious experts in adjudicating religious disagreements before the Courts, see Lori Beaman, “The Courts and the Definition of Religion”, in *Defining Religion: Investigating the Boundaries between the Sacred and the Secular*, edited by Arthur L. Greil and David G. Bromley, Oxford: Elsevier, 2002.
- <sup>12</sup> For a strong defense of this approach, see Jocelyn Maclure and Charles Taylor, *Laïcité et liberté de conscience*, Montréal: Boréal, 2010.
- <sup>13</sup> This interpretive notion is of course drawn from Ronald Dworkin, *Law’s Empire*, Oxford : Oxford University Press, 1986.
- <sup>14</sup> Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims*, Oxford: Oxford University Press.
- <sup>15</sup> Cf Benjamin Berger, “Law’s Religion: Rendering Culture”, in *Osgoode Hall Law Journal*, 45 (2) 2007.
- <sup>16</sup> See Mark R. Wicclair, *Conscientious Objection in Health-Care*, Cambridge : Cambridge University Press, 2011.
- <sup>17</sup> Cf Kimberley Brownlee, *Demands of Conscience*, forthcoming from Oxford University Press.
- <sup>18</sup> Will Kymlicka, *Multicultural Citizenship*, Oxford : Oxford University Press, 1995.
- <sup>19</sup> Samuel Scheffler, « The Normativity of Tradition », in *Equality and Tradition. Questions of Value in Moral and Political Theory*, Oxford : Oxford University Press, 2010, p. 290.
- <sup>20</sup> Ibid., p. 301. Cf. G.A. Cohen, « Rescuing Conservatism :
- <sup>21</sup> Harry Frankfurt, « Freedom of the Will and the Concept of a Person », in *The Journal of Philosophy*, 72 (1975).
- <sup>22</sup> See for example Michael Bratman, *Intentions, Plans, and Practical Reason*, Cambridge : Cambridge University Press, 1999.
- <sup>23</sup> Scheffler, p. 301.

# IMMIGRANTS, MULTICULTURALISM, AND EXPENSIVE CULTURAL TASTES: QUONG ON LUCK EGALITARIANISM AND CULTURAL MINORITY RIGHTS

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## ABSTRACT:

Kymlicka has offered an influential luck egalitarian justification for a catalogue of polyethnic rights addressing cultural disadvantages of immigrant minorities. In response, Quong argues that while the items on the list are justified, in the light of the fact that the relevant disadvantages of immigrants result from their choice to immigrate, (i) these rights cannot be derived from luck egalitarianism and (ii) that this casts doubt on luck egalitarianism as a theory of cultural justice. As an alternative to Kymlicka's argument, Quong offers his own justification of polyethnic rights based on a Rawlsian ideal of fair equality of opportunity. I defend luck egalitarianism against Quong's objection arguing that if choice ever matters, it matters in relation to cultural disadvantages too. Also, the Rawlsian ideal of fair equality of opportunity cannot justify the sort of polyethnic rights that Quong wants it to justify, once we set aside an unwarranted statist focus in Quong's conception of fair equality of opportunity. Whatever the weaknesses of luck egalitarianism are, the inadequacy of the position in relation to accommodating cultural disadvantages of immigrants is not among them.

## RÉSUMÉ :

Kymlicka a offert une justification égalitarienne de la chance influente en faveur d'un catalogue de droits polyethniques visant les désavantages culturels dont souffrent les minorités migrantes. En réponse, Quong argue du fait que, si les éléments d'un tel catalogue sont justifiés, parce que les désavantages pertinents dont souffrent les migrants résultent de leur choix d'immigrer, (i) ces droits ne peuvent être dérivés de l'égalitarisme de la chance (ii) ce qui nourrit des doutes quant à l'égalitarisme de la chance en tant que théorie de la justice culturelle. En tant qu'alternative à l'argument de Kymlicka, Quong offre sa propre justification des droits polyethniques basée sur l'idéal rawlsien de juste égalité d'opportunités. Dans cet article, je défends l'égalitarisme de la chance contre l'objection de Quong en vertu du fait que si le choix compte, il compte également en ce qui concerne les désavantages culturels. En sus, l'idéal rawlsien de juste égalité d'opportunités ne peut justifier le type de droits polyethniques que Quong désire lui faire justifier, une fois mise de côté la coloration statistique injustifiée au sein de la conception de la juste égalité d'opportunités avancée par Quong. Quelles que soient les faiblesses de l'égalitarisme de la chance, son caractère inadéquat quant à l'accommodement des désavantages culturels dont souffrent les migrants n'en fait pas partie.



## 1. INTRODUCTION

Many liberals are critical of cultural minority rights and believe that laws should be insensitive to cultural differences.<sup>1</sup> However, according to an influential line of argument by Will Kymlicka, cultural minority rights can be derived from liberals' core commitment to equality.<sup>2</sup> Kymlicka's argument takes its starting point in the claim that secure membership in one's own culture is a crucial resource.<sup>3</sup>

In fact, it is so important that, really, autonomous choices among different goods are only possible to the extent that one enjoys the 'context of choice' that secure membership in a societal culture uniquely provides. Accordingly, Kymlicka construes cultural membership as a primary good in the Rawlsian sense.<sup>4</sup> It is a good that any rational individual will want whatever life plans she has. Since justice requires that inequalities that are not traceable to choices made by individuals are eliminated, it follows that justice may require various sorts of cultural minority rights to ensure that all citizens, notably members of cultural minorities, are not denied access to their culture. Rightly construed, cultural minority rights may be necessary to realize an 'endowment-insensitive' distribution.<sup>5</sup>

More specifically, Kymlicka believes that this resourceist luck egalitarian argument justifies cultural minority rights for Canadian Indians (and Inuits). A Canadian Indian did not 'choose to be born... into an aboriginal minority surrounded by an English-Canadian majority, and therefore it seems unfair to expect [her] to bear the presumably considerable costs of assimilating to the majority culture'.<sup>6</sup>

The case of immigrants is different, however. A Dane who immigrates to Canada and finds that she lives 'surrounded by an English-Canadian majority' cannot say that these cultural disadvantages of hers – assuming that such they are – is not in any way traceable to her own choice and, accordingly, is unjust from a luck egalitarian perspective. Kymlicka, thus, thinks that the case of cultural minority rights – polyethnic rights as he calls them – is relevantly different from the case of minority culture rights of indigenous people: 'The expectation of integration [of immigrants to the majority culture] is not unjust, I believe, so long as the immigrants had the option to stay in their original culture. Given the connection between choice and culture... people should be able to live and work in their own culture. But like any other right, this right can be waived, and immigration is one way of waiving one's right. In deciding to uproot themselves, immigrants voluntarily relinquish some of the rights that go along with their original national membership.'<sup>7</sup>

Still, Kymlicka thinks that immigrants are owed certain polyethnic rights enabling integration.<sup>8</sup> These rights 'may require some modification of the institutions of the dominant culture in the form of group-specific polyethnic rights, such as the right of Jews and Muslims to exemptions from Sunday closing legislation, or the right of Sikhs to exemptions from motorcycle helmet laws. Without these exemptions, certain groups would be disadvantaged (often unintentionally) in the mainstream. Immigrants can rightfully insist on main-

taining some of their heritage, and dominant institutions should be adapted to accommodate those differences.<sup>9</sup>

In a recent and very interesting article, Jonathan Quong has attacked Kymlicka's view of polyethnic rights in particular and luck egalitarianism in general. He believes that Kymlicka fails to endorse the implications of his own commitment to luck egalitarianism, when it comes to polyethnic rights. Quong writes as follows: 'But why should a theory of multicultural justice that is based on luck egalitarianism care about easing the costs of cultural integration for immigrants. Immigrants have chosen to move to the new societal culture. If we are adopting the chance/choice distinction at the heart of 'luck multiculturalism', shouldn't immigrants bear the full costs of integration?'<sup>10</sup> While one may exercise no or little direct or indirect control over one's cultural membership, the fact that the cultural preferences of immigrants are expensive is a result of their choice to migrate and that is what defeats the luck egalitarian case for compensation.<sup>11</sup> Because Quong thinks justice 'permits exemptions from generally applicable laws in many cases of cultural disadvantage (presumably including cases involving immigrants: KLR), and that justice requires exemptions when such cases involve the principle of fair equality of opportunity', he infers that luck egalitarianism fails to provide a satisfactory 'approach to questions of cultural justice'.<sup>12</sup> He then proceeds to offer his own justification of polyethnic rights based on a Rawlsian appeal to the public value of fair equality of opportunity, properly construed'.<sup>13</sup>

Broadly speaking, there are two lines of argument in Quong's negative argument against Kymlicka. One concerns whether the case of immigrants causes problems for luck egalitarians. Another more specific one concerns whether Kymlicka follows his luck egalitarian argument where it leads him with respect to polyethnic rights. In my view, Quong is right that there are various tensions or perhaps even inconsistencies in Kymlicka's views on equality and polyethnic rights. For instance, to the extent that polyethnic rights are grounded in a concern for equality, it is hard to see why immigrants might not have polyethnic rights even if these hinder integration into mainstream society.<sup>14</sup> However, my main interest is with the first and broader line of argument. I want to defend luck egalitarianism against Quong's challenge. His argument fails to specify the relevant circumstances that lead people to immigrate, and once we do that, we will see whether immigrants and non-immigrants faced equally good sets of options prior to the former's choice to migrate or whether they did not. If they did, luck egalitarianism is not implausible for holding that the situation does not call for compensation as a matter of justice. If they did not, justice may indeed call for compensation, but luck egalitarianism can justify such calls. Accordingly, Quong's challenge to luck egalitarianism is undermined. This defence of luck egalitarianism follows in Section Three after a more elaborate presentation of Quong's critique of 'luck multiculturalism', i.e. luck egalitarianism applied to

questions of cultural justice, in Section Two. Section Four turns to Quong's own positive defence of polyethnic rights. I argue that Quong's own argument relies on an unargued, implausible, statist assumption and that it fails to establish polyethnic rights in the kind of cases where Quong thinks such are permissible or required. Hence, the main claim of this article is that, despite Quong's criticism and his Rawlsian contender, the luck egalitarian view on polyethnic minority rights is defensible.

## 2. QUONG'S CHALLENGE

This section sets out the nature of Quong's challenge to luck multiculturalism in greater detail. The first thing that should be noted is that luck egalitarianism, or at least political philosophers normally identified as luck egalitarians, hold, or may hold, that different kinds of disadvantages may befall a cultural minority and that some of these disadvantages are unjust, *even if* the decision to immigrate amounts to a genuine choice. Hence, for the purpose of assessing Quong's critique, we should set aside *such* disadvantages. More generally, we should not assume that luck egalitarianism can be defined as the view that disadvantages traceable to choice are just *whatever the initial frame of choice*. So suppose, for instance, that the relevant disadvantage is discrimination against immigrants rooted in racial or cultural prejudice. Such disadvantages would be disallowed by Ronald Dworkin, who believes that justice requires that no one is disadvantaged as a result of the discriminatory, external preferences of others.<sup>15</sup> The sort of disadvantages that is of relevance to an assessment of Quong's criticism is disadvantages that reflect, say, nothing other than the relative numerical sizes of the relevant cultural communities. In this respect, the relevant disadvantages are of the very same sort as those experienced by people who favour pears over apples, when there are economies of scale in the production of fruits, and most people favour apples over pears.<sup>16</sup>

Note, next, that Quong's discussion proceeds from the assumption that immigrants are at a disadvantage relative to the majority population in their new country in which the former constitute a minority unlike in their country of origin. My discussion shall proceed on the same assumption, but I should like to note that this is a special, albeit perhaps quite common, case. Many immigrants move from illiberal countries in which they are minorities of their own and may in fact face even harder conditions in terms of access to their own culture. For instance, we can understand why Kurds immigrating from Turkey or Copts from Egypt will not be impressed with a dismissal of their claims to something stronger than polyethnic rights on the Kymlickean ground that they had 'the option to stay in their original culture' given the sort of pressures Kurds experience in Turkey and Copts in Egypt.<sup>17</sup> Also, some immigrants move to countries in which they do not constitute minorities, but where the non-immigrant population may find that they experience cultural disadvantages as a result of immigration. Perhaps this is the case for certain Anglophones in parts of Southern California where Latinos form the majority.

Third, it is one thing to say that luck egalitarianism does not imply that justice requires polyethnic rights for immigrants. It is another thing to say that luck egalitarianism is incompatible with polyethnic rights for immigrants. This difference is important here and softens Quong's criticism somewhat for the following reason. Some luck egalitarians say that inequalities that are not traceable to genuine choices are unjust, leaving open what justice requires about equalities.<sup>18</sup> Others say that equalities that are not traceable to genuine choices, e.g. because one person acted responsibly and the other acted grossly irresponsibly, and nevertheless, they end up equally well off, are unjust as well.<sup>19</sup> Call the former minimal luck egalitarians and the latter maximal luck egalitarians. The relevance of this distinction to the present issue is that minimal luck egalitarians can say that while their favoured version of luck egalitarianism does not imply that justice requires polyethnic rights equalizing the position of members of immigrant minorities with that of the majority of the non-immigrant population, it is not incompatible with it either. Hence, to rebut any kind of luck egalitarianism, it is not enough for Quong to argue that any plausible account of cultural justice must be compatible with polyethnic rights. Some forms of luck egalitarianism are compatible with such rights. Rather, he *must*, as in fact he does, make the stronger claim that any plausible theory of distributive justice must imply that justice *requires* polyethnic rights provided that immigrant cultural minorities exist etc.

Fourth, Quong presents his challenge as if it is specifically concerned with immigrants, because immigrants who form a cultural minority are disadvantaged as a result of a choice that they have made. But this focus misrepresents the nature of his argument. Consider the case of a *non-immigrant* cultural minority whose members suffer various disadvantages for being a cultural minority. Suppose, moreover, that the transaction costs involved in immigrating are zero and that the cultural majority in a neighbouring state has a culture identical to that of the minority in the first state. Suppose, finally, that these people do not choose to immigrate. Presumably, luck egalitarianism implies that if they choose not to, the disadvantages that they suffer are traceable to a choice that they have made, and accordingly, justice does not require that they be compensated for the disadvantages they suffer from being a cultural minority, albeit not a minority of *immigrants*. It is important to stress that not only immigrants are where they are because of choices they made. The same is true of those who choose to stay where they are rather than immigrating. Hence, rightly construed, Quong's challenge has a broader scope than that which he himself ascribes to it and, arguably, it is therefore an even more powerful challenge.<sup>20</sup>

### 3. IMMIGRANT BY CHOICE

With these specifications in mind, let us return to the core of Quong's rebuttal of luck egalitarianism. In my view, the apparent strength of Quong's argument derives from our thinking about the matter being shaped by the fact that inequalities existing within a state between immigrants and non-immigrants are in fact rarely simply traceable to choice but, to a large extent, reflect inequalities which were among the main reasons why the immigrants became immigrants in the first place. For instance, it is not as if the people who occasionally storm the Spanish enclave in Morocco, Melilla, or sail in small boats to the Canary Islands to arrive in Europe have equally good options as Europeans and, accordingly, that insofar as they succeed in ending up in Europe and experience various forms of disadvantages from being a cultural minority – in fact, very many different cultural minorities – these disadvantages are simply traceable to choice. These people are immigrants basically because they want to escape poverty in their countries of origin and believe their economic opportunities in Europe will be much better. Luck egalitarianism does not condone people being worse off as a result of choices they made to escape unacceptably bad situations, when those whom they are worse off than faced no such unfavourable choice situation. Hence, to make sure that our intuitions about the justice of polyethnic rights are not polluted by confusing facts about the desperate situation of many real-world immigrants, we must construct a scenario where these factors are eliminated.

Before I proceed to do so, I want to register that Quong himself recognizes the need to consider cases in which the decision to immigrate is the result of a 'genuine choice'. In an endnote, he writes: 'Following Kymlicka, I take it as given that immigrants are people who have a genuine choice about whether or not to immigrate – they are not, that is, refugees or asylum seekers.'<sup>21</sup> But this strikes me as not being the best place for such a crucial stipulation. Surely, in light of the fact that the sort of hypothetical immigrants we need to consider for theoretical purposes are so different from real-life immigrants, such a stipulation needs to be upfront and unless it is, we cannot trust that the intuitions we have concern immigration in principle (as opposed to persecution- or poverty-induced displacement). Obviously, it is huge question for luck egalitarians when a choice is genuine (whereby I will mean 'choice of such a nature that it may justify inequality'). Suffice for present purposes to say that for choice to warrant inequalities between two persons, it is necessary that they faced equally good choice situations, e.g. it is not the case that one agent faced better options than the other agent or was better informed about them than the other agent. While this may not be a sufficient condition for genuineness of choice, at least it is seen as a necessary one by some of the main proponents of luck egalitarianism.<sup>22</sup>

So consider a case where we have a world consisting of two different states. Let us suppose that these have different cultures and each is culturally homogenous. Let us moreover suppose that there are no unjust inequalities between the two

states and no unjust inequalities within the two states. For instance, it is not as if the climate in one country is harsh and arctic, while it is pleasant and Mediterranean in the other, or that GDP per capita is larger in one of the countries. Suppose that under these circumstances, one-tenth of the population in each of the two states decides to immigrate to the other state – suppose they want to experience the thrill of living in a different country or that they want to explore some particular aspect of life in the other country – where they will then form a cultural minority suffering various disadvantages as a result of their choosing to immigrate, e.g. they will find it hard to get a job where they can speak their language of origin etc. Hence, it is true of each member of the cultural minorities of the two countries that she is worse off than the majority population in her country, because she knowingly chose to act in a way that she knew would lead her to suffer the disadvantages of being a cultural minority. In this case, luck egalitarianism implies that minority members are not due compensation as a matter of justice.

Given that members of the two new-formed cultural minorities are worse off as a result of their own choice and that the alternative to making this choice was in no way unreasonably bad, luck egalitarianism does not imply that justice requires that they be granted polyethnic rights to ease their integration into mainstream cultural institutions even assuming that such rights are a way of addressing cultural disadvantage. I for one see no counterintuitiveness in this implication of luck egalitarianism.<sup>23</sup> So, as I see it, Quong is right that one can construe scenarios involving disadvantaged cultural immigrant minorities in which luck egalitarianism does not require polyethnic rights, but he is wrong to think of this as something that refutes luck egalitarianism. Note, also, that many forms of polyethnic rights may nevertheless be compatible with luck egalitarianism because they do not affect how well off people are.

One response to the argument so far may be that all I have done is to flesh out the uninteresting fact that Quong and I have different intuitions about what justice requires. So in the following, I shall back up my intuition with three supporting considerations.

First, Quong does not attack the assumption that expensive tastes voluntarily cultivated ground no claim for compensation. He considers a case of a political philosopher, Dan, who lives in a large, metropolitan city where satisfying his love for opera is ‘relatively inexpensive’. Dan then ‘chooses to relocate to a small rural town... Going to the opera is now very expensive for Dan as no one in his small rural town likes opera... Opera is only expensive for Dan because he chose to make it expensive... If Dan was not owed any compensation before, then he cannot possibly have a luck egalitarian claim to compensation when he immigrates to the small town.’<sup>24</sup> Apparently, Quong does not disagree that Dan has no claim for compensation on grounds of justice.<sup>25</sup> But if so, and if Quong thinks

that cultural preferences are different from, say, preferences for opera in a way that matters from the point of view of justice, he should explain what these differences consist of. However, as far as I can see, he offers no such explanation.

One might respond that it is not difficult to think of something Quong could say at this point, namely that cultural preferences are deep in a way most other expensive preferences, e.g. the preference for opera, are not.<sup>26</sup> However, this suggestion strikes me as false. For some people, e.g. artists, tastes for expensive art really are deep, deeper than their taste for their own culture. Moreover, for many people, their preference for their own culture over a closely related culture, say, some Danes' preference for Danish over Swedish culture, cannot be said to be deeper even if the preference for one's own culture over a very different culture may be different. In any case, however, this view of the depth of different kinds of preferences is fleshed out, it relocates the relevant cut. That is, the relevant difference from the point of view of justice is not located in the cut between expensive cultural preferences and expensive non-cultural preferences, but between deep and shallow expensive preferences, where expensive cultural preferences are then located at both sides of this divide.<sup>27</sup>

Second, it is hard to deny that choice makes a difference to one's claim to compensation for cultural disadvantages, if any choice ever is morally relevant for the injustice of a disadvantage. So compare the following two cultural minorities. The first minority suffers various disadvantages from being a cultural minority, and these disadvantages are unrelated to any choice made by members of this minority. They are not a minority as a result of immigration, and for some reason, it is literally impossible for them to immigrate. The second minority suffers from comparable disadvantages, but their disadvantages are disadvantages they knowingly brought upon themselves through their choice to immigrate, and they could eliminate these disadvantages completely through immigrating back to the country from which they immigrated. The decision to immigrate was not forced in any way, and similarly, immigrating back to their country of origin is neither costly nor difficult. In all other relevant respects, the two cases are identical. I submit that to the extent that we can compensate one and only one of these minorities for the disadvantages they suffer, justice is better served if we compensate the former minority. But if so, the choice to subject oneself to the disadvantages resulting from being a member of a cultural minority through immigration *is* relevant from the point of view of justice. Or to put this in a slightly more guarded way: to the extent that choosing to act in a way that makes one worse off than others defeats or weakens claims to compensation when such choice was made in a sufficiently good choice setting, decisions to immigrate do not differ from other choices regarding other matters in that they do not affect the strength of claims to compensation.

Admittedly, this does not imply that the costless choice to immigrate or the option of costlessly reversing this choice fully mitigates the injustice of suffering disadvantage as a result of being a cultural minority, but at least it shows that it is not irrelevant to the amount of injustice. Since Quong's position on this matter, which I return to in the next section, is to deny that choice makes *any* difference to the strength of claims to polyethnic rights to address cultural disadvantage, even the weaker claim that choice reduces the strength of claims to polyethnic rights is incompatible with his position.<sup>28</sup>

Third, consider a situation in which people have been dislocated and need to be resettled. Some people prefer to be located in an area where they form a cultural majority and, thus, where their cultural tastes are inexpensive. Others prefer to live in an area where they form a cultural minority (not *because* they form a cultural minority, but for some other reason) and, thus, will experience certain disadvantages. I contend that it is hard to see why, on the basis of Dworkinian luck egalitarianism, people who have the former cheap preference should compensate people who have the latter preference. But this situation is not relevantly different from a situation in which people are already distributed across different countries, but where there are no particular reasons to favour living in one country over another, e.g. that the average income in some countries are much higher than in others, and transaction costs involved in immigration are zero. Accordingly, it is hard to see why, on a Dworkinian luck egalitarian view, people who prefer to immigrate in this scenario should have a claim to compensation.

Let me complete this treatment of Quong's negative argument against luck egalitarianism with a brief note on Cohen's later views on expensive tastes. In 'The Currency of Egalitarian Justice', Cohen held that the cut between choice and luck (i.e. that which was not the result of genuine choice) was the basic distinction from the point of view of egalitarian justice. In his later work, he retracted from this position arguing that people who have a preference 'with which they strongly identify and which happens to be expensive' cannot reasonably be expected 'to forgo or restrict satisfaction of that preference (because it is expensive)'. This would amount to asking them to 'accept an alienation from what is deep in them'.<sup>29</sup> As I read these passages, they imply that, on Cohen's later view, immigrants who strongly identify with their cultural preferences, which happen to be expensive – unlike snobbish preferences where part of the reason why some good is preferred is exactly that it is expensive – cannot reasonably be expected to forgo the satisfaction of these preferences. On the assumption that polyethnic rights are necessary to this purpose, this would imply that, on Cohen's later view, polyethnic rights to ensure the satisfaction of the expensive cultural preferences of a minority can be justified. Quong, however, thinks otherwise, repeating his 'fundamental point', i.e. that 'immigrants are a paradigmatic instance of people who are responsible for the fact that their (cultural) tastes are expensive'.<sup>30</sup> But it is unclear if this point accommodates Cohen's 2004-view about the unreason-



ableness of asking people to alienate themselves from something that is deep in them. On this view, the mere fact that a person is responsible for her taste being expensive does not imply that she has no claim to compensation, since she might strongly identify with this preference.<sup>31</sup>

Whatever is the right interpretation of Cohen's later view, this has no bearing on the main issue at hand. For his later view introduces a distinction – the distinction between tastes with which one identifies and tastes with which one does not identify – which is not best seen as a distinction between chosen and unchosen tastes or expensiveness of tastes, and it is the latter distinction which Quong thinks lies at the heart of luck egalitarianism as he understands it and rightly so in my view.

#### 4. RAWLSIAN FAIR EQUALITY OF OPPORTUNITY AND POLYETHNIC RIGHTS

As I have noted, Quong himself is not opposed to polyethnic rights. Indeed, he thinks that some are permitted by justice and that others may be required. In their defence, he offers an argument that 'relies on a Rawlsian view of justice and fair equality of opportunity'.<sup>32</sup> On Quong's view, 'the purpose of a theory of justice is to ensure that all citizens have a reasonable or adequate chance to pursue their conception of the good. This primary aim, however, is constrained by the compossibility condition: the principles of justice must ensure (as far as possible) that we do not ruin other people's chances of pursuing their conception of the good while we pursue our own'.<sup>33</sup> Obviously, it is crucial what Quong means by 'reasonable or adequate chance'. On one view, a chance is 'reasonable or adequate' when it is attractive enough in some absolute sense that does not involve comparisons with the chances of other people. However, this is not the sense that Quong has in mind. On Quong's view, people's chances are 'reasonable or adequate' when and only insofar as people have fair equality of opportunity in Rawls' sense. Equality of opportunity in this sense obtains when and only when 'people with similar abilities and ambitions have the same chances of success'.<sup>34</sup> So, for instance, if an adolescent cultural minority member is exactly as talented and has exactly the same ambitions as an adolescent cultural majority member and yet is likely to be less successful in realizing her ambitions, then inequality of opportunity obtains and, accordingly, the society in which they live is unjust.

While Quong appeals to Rawls' principle of fair equality of opportunity, he distinguishes between unfair inequalities of opportunity depending on whether these concern the 'basic opportunities of citizenship' or not. For where 'a law disadvantages members of a particular cultural and religious group, but where that disadvantage does not affect the basic opportunities of citizenship... [cultural exemptions are permissible]', but not required.<sup>35</sup> However, where such inequalities do affect basic opportunities of citizenship 'like employment and education,' such exemptions are required by justice.<sup>36</sup>

The case of a rule that, say, makes it harder for orthodox Jews to ‘combine the pursuit of their chosen conception of the good with the career of a police officer’, e.g. because police officers are required to work on Saturdays, illustrates an inequality of the former sort, i.e. one that violates fair equality of opportunity and, thus, ought to be rectified.<sup>37</sup> The case of Sikhs and an exemption from a rule that requires construction workers to wear helmets falls within the former category.<sup>38</sup> In short: ensuring fair equality of opportunity often requires polyethnic rights.

Does Quong’s Rawlsian equality of opportunity account justify the sort of polyethnic rights that he wants to justify? I see several problems here. Suppose, as in one of my examples above, that immigration involves no transaction costs, and suppose that for any minority member, there is some country to which they could immigrate such that, in this country, they would not suffer from any cultural disadvantages since they would form a cultural majority in this country. In this scenario, there would, in a certain sense, be no unfair inequalities of opportunity. True, it may not be the case within a country that ‘people with similar abilities and ambitions have the same chances of success’ provided that the case of immigration is ignored for the purpose of determining whether fair equality of opportunity obtains. However, once we take into account the option of immigration, such fair equality of opportunity would obtain. Members of the cultural minority would have better opportunities than members of the relevant cultural majority in case they chose to immigrate, and this counterbalances the worse opportunities that members of the minority have compared to members of the cultural majority in the situation where they do not immigrate.

Quong might well respond that the ideal of fair equality of opportunity disregards the possibility of immigration and enjoin people to enjoy equal opportunities within the country in which they presently live. Quong puts it this way: ‘The purpose of a theory of justice is to ensure that all have a reasonable or adequate chance to pursue their conception of the good’ where, by ‘all citizens’, he means all citizens who belong to the same polity and, thus, relate to one another as co-citizens and not all citizens whichever polity to which they belong.<sup>39</sup>

Obviously, this is how the ideal of equal opportunity is often understood, and it is well known that Rawls, in his formulation of his principles of justice, only considered societies that were closed immigration-wise.<sup>40</sup>

However, on reflection, it is unclear why opportunities that people would have if they were to immigrate are irrelevant to justice. In particular, the view that they are strikes me as unfounded in cases where immigration involves no transaction costs. Moreover, this view seems hard to reconcile with the view that opportunities involving intrastate migration counts for the purpose of assessing the justice of inequalities. So suppose that my set of options is as good as that of my fellow Americans, but to realise the best options, I must move from Boise to

New York, whereas some of my fellow Americans can realise their best options while staying in New York. Suppose that either moving involves no transaction costs for me or it does, but that these are offset by the extra benefits (relative to people already living in New York) that will accrue to me if I migrate to New York. Most would say that these opportunities defeat the injustice of inequality, i.e. if I choose to stay in Boise and, as a result, end up worse off than New Yorkers this is not unjust, because I had the choice and chose to stay where I was. Why should they think any different if Idaho were to secede from the US even if everything else remained equal?

It might be replied that this comparison between inter- and intrastate migration is flawed because migration within states does not involve cultural disadvantages of the sort that migration across state borders does. However, while it might be true in general that cross-border migration involves greater cultural disadvantages, it is not true of cross-border migration per se. Presumably, intra-Scandinavian migration may involve fewer cultural disadvantages that polyethnic rights are meant to address than, say, intra-state migration in the former USSR. It seems that, at the root of Quong's defence of polyethnic rights, there is a problematic and yet unargued state-centred restriction on the scope of the principle of fair equality of opportunity (not rooted in a view about cultural disadvantages, but more likely reflecting a state-centred view of justice to the effect that justice requires the state to give its citizens a fair equality of opportunity *qua* members of that state).<sup>41</sup> However, in the present dialectical setting, canvassing this restriction on Quong's part threatens to undermine his criticism of luck egalitarianism. For, surely, if Quong is entitled to disregard opportunities not realized through a choice (not to) immigrate, then so are luck egalitarians. So imagine that a group of immigrants who face unfair inequalities of opportunities in Quong's sense and who are worse off than their new fellow citizens in terms of the relevant luck egalitarian currency, but whose members would have avoided either disadvantage had they chosen not to immigrate in the first place. Quong wants to say that the former kind of inequality is unjust and, presumably, he can do so only if he disregards the fact that immigrants failed to realize the best choices in their opportunity set in deciding to immigrate. But if Quong can say this – and I write 'if', stressing that I think disregarding immigration-related opportunities is *ad hoc*, although I concede this is a huge discussion in itself – then so can a luck egalitarian, i.e. she might say that since the choice to move to another country, unlike other choices, does not defeat the injustice of inequalities between immigrants and non-immigrants in the country to which the immigrants have moved.<sup>42</sup> Hence, it turns out that the objection that Quong directs against luck egalitarianisms appears to stick to it only because he denies luck egalitarians the option of disregarding immigration choices when assessing the justice of disadvantages, while allowing himself the very same assumption. But that means that he has provided us with no reason to favour his own fair equality of opportunity-based position over luck egalitarianism.

While, as indicated, I am sceptical of state-centred views of justice, the present argument neither relies on this scepticism, nor purports to defeat state-centred views. In a nutshell, it simply points out that in his contrast between luck egalitarianism and his own fair equality of opportunity view of justice, Quong ignores state-centred versions of luck egalitarianism and cosmopolitan versions of his own view. Hence, even if we accept Quong's view that the option of immigrating should be ignored for the purpose of assessing distributive justice, this neither refutes luck egalitarianism as such (since there are state-centred versions of luck egalitarianism that are compatible with this claim), nor supports fair equality of opportunity view (since there are cosmopolitan versions of this view that are incompatible with the claim that the opportunity of immigrating is irrelevant justice-wise). As we have seen, Quong believes that justice 'permits exemptions from generally applicable laws in many cases of cultural disadvantage, and that justice requires exemptions when such cases involve the principle of fair equality of opportunity'.<sup>43</sup> This view has an interesting implication which Quong does not mention. For suppose that while immigrants suffer from various kinds of cultural disadvantage, they also enjoy a number advantages not related to their culture.<sup>44</sup> Suppose, for instance, that they have a higher education and more savings than people in the country to which they immigrate, generally speaking.<sup>45</sup> If we think polyethnic rights are required by justice, when necessary or sufficient to bring about fair equality of opportunity, where this ideal requires that people have fair equality of overall opportunities and not fair equality of opportunity for each major category of opportunity (e.g., family life, worshipping, jobs), then polyethnic rights for immigrants would not be justified in such cases. In fact, we could imagine that 'exemptions' from general laws favouring the non-immigrant majority could be a way of realizing fair equality of opportunity overall.

Alternatively, Quong might say that not only should people enjoy fair equality of opportunity overall, but they should enjoy fair equality of opportunity in different spheres, where one such sphere is access to culture.<sup>46</sup>

But even this view would not secure polyethnic rights to address cultural disadvantage. Not all cultures may be equally accessible. Suppose, for instance, that the language of the majority culture is very difficult to acquire, e.g. Chinese written language, which involves thousands of different symbols and not just twenty eight letters, and which is very different from the spoken language. Again, to achieve fair equality of opportunity in terms of culture, it may be the case that exemptions should be made that favour the non-immigrant majority. While an appeal to fair equality of opportunity may justify a requirement of justice that polyethnic rights favouring disadvantages of immigrant minorities are implemented to address cultural disadvantages deriving from minority status, it might also favour exemptions favouring the non-immigrant majority despite the fact that the immigrant minority suffers from cultural disadvantage as a result of constituting a minority.

## 5. CONCLUSION

From the point of view of multicultural theory, the question whether immigrant minorities should be compensated for cultural disadvantages is crucial. Kymlicka has offered a luck egalitarian catalogue of so-called polyethnic rights addressing such disadvantages. In response, Quong argues that while the items on the list are justified, in the light of the fact that the relevant cultural disadvantages of immigrants result from their choice to immigrate, Kymlicka's luck egalitarianism is unable to justify them and that this casts doubt on luck egalitarianism as a theory of cultural justice. Instead, Quong offers his own justification of polyethnic rights based on a Rawlsian ideal of fair equality of opportunity. I have defended luck egalitarianism against Quong's objection arguing that choice matters in relation to cultural disadvantages too, if it ever matters. Also, I have contended that the Rawlsian ideal of fair equality of opportunity fails to justify the sort of polyethnic rights that Quong wants to justify, once we set aside an unwarranted statist focus in Quong's conception of fair equality of opportunity. Whatever the weaknesses of luck egalitarianism are, the inadequacy of the position in relation to accommodating cultural disadvantages of immigrants through polyethnic rights is not among them.<sup>47</sup>

## NOTES

- <sup>1</sup> E.g., Barry, Brian, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Cambridge, Polity Press, 2001.
- <sup>2</sup> Kymlicka, Will, *Liberalism, Community, and Culture*, Oxford, Clarendon Press, 1989, esp. pp. 182-205. I discuss Kymlicka's luck egalitarian argument in favour of cultural minority rights in Lippert-Rasmussen, Kasper, «The Luck-Egalitarian Argument for Group Rights», in Sune Lægaard, Nils Holtug, and Kasper Lippert-Rasmussen, eds., *Nationalism and Multiculturalism in A World of Immigration*, London, Palgrave Macmillan, 2009, pp. 53-80.
- <sup>3</sup> It is important for Kymlicka that cultural membership is construed as a resource rather than as a source of or a component in welfare since, as a resourcist luck egalitarian, he rejects that people with welfare deficits due to so-called expensive tastes merit compensation, and from a welfarist, egalitarian point of view, cultural preferences simply qualify as expensive tastes; see Cohen, G. A., «Expensive Tastes and Multiculturalism», in Rajeev Bhargava, A. Kumar Bagchi, and R. Sudarshan, eds., *Multiculturalism, Liberalism, and Democracy*, Delhi, Oxford University press, 1999, pp. 80-100. Also, Kymlicka assumes that membership in *one's own* culture is the relevant important resource. Cross-cultural migration is very difficult and, in many cases, unreasonably costly according to Kymlicka; for critical discussions, see Waldron, Jeremy, «Minority Cultures and the Cosmopolitan Alternative», in Will Kymlicka, ed., *The Rights of Minority Cultures*, Oxford, Oxford University Press, 1995, pp. 93-119; Lippert-Rasmussen, K. «The Luck-Egalitarian», pp. 80-100.
- <sup>4</sup> Rawls, John, *A Theory of Justice*, Oxford, Oxford University Press, 1971, pp. 90-95.
- <sup>5</sup> 'Endowment-insensitivity' and 'ambition-sensitivity' are the two requirements that Kymlicka thinks sum up Ronald Dworkin's theory of egalitarian justice : Dworkin, Ronald, *Sovereign Virtue*, Cambridge, Mass., Harvard University Press, 2000, esp. pp. 11-119.
- <sup>6</sup> Quong, Jonathan, «Cultural Exemptions, Expensive Tastes, and Equal Opportunities», *Journal of Applied Philosophy*, vol. 23, no. 1, 2006, 53-71, p. 55; Kymlicka, *Liberalism*, p. 189.
- <sup>7</sup> Kymlicka, Will, *Multicultural Citizenship*, Oxford, Clarendon Press, 1995, p. 96.
- <sup>8</sup> Kymlicka's egalitarian defence of 'group-specific rights for ethnic and national minorities' is not the only argument for such rights that he offers. He also believes that these rights are justified on grounds of the value of cultural diversity and (in some cases) historical agreements, *ibid.* pp. 108-123.
- <sup>9</sup> *Ibid.*, pp. 96-97. It is harder to identify polyethnic rights than one might initially think: see Holtug, Nils, «Equality and the Rights of Religious Minorities», *Res Cogitans*, vol. 4, no. 2, 2007, pp. 49-79. The rule that shop owners must close on their day of worship may well serve the same purpose as an exemption of Jews and Muslims from Sunday closing laws even if it is a rule that applies to everyone. Since none of my arguments depends on the exact definition of polyethnic rights, I set aside this issue and rely on the use of rather uncontroversial examples of polyethnic laws.
- <sup>10</sup> Quong, «Cultural», p. 55.
- <sup>11</sup> Cf. Cohen, G. A., «Expensive Tastes Rides Again» in Justice Burley, ed., *Dworkin and His Critics*, Oxford, Blackwell Publishing, 2004, 3-29, p. 7.
- <sup>12</sup> Quong, «Cultural», p. 53.
- <sup>13</sup> *Ibid.*, p. 53.
- <sup>14</sup> As an example of how Kymlicka does not follow his own luck egalitarian argument where it leads him with respect to polyethnic rights Quong mentions the exemption of Sikhs from 'laws requiring motorcycle or construction-site helmets', Quong, «Cultural», p. 56. Kymlicka endorses this exemption. But according to Quong, Kymlicka is not in a position to do so, given his luck egalitarian view. On this view, Sikhs who prefer not to wear helmets simply have 'an expensive cultural habit that [Kymlicka] himself has defined as chosen rather than unchosen', *ibid.*, p. 56.
- <sup>15</sup> Dworkin, Ronald, *Taking Rights Seriously*, London, Duckworth, 1977, pp. 235-238; cf. Kymlicka, *Multicultural*, p. 96.

- <sup>16</sup> Cf. G. A. Cohen, «The Currency of Egalitarian Justice», *Ethics*, vol. 99, 1989, pp. 906-944.
- <sup>17</sup> The issue raised by such cases is how many costs members of one state have to bear to cushion the bad effects of unjust policies of unjust elites or majorities in other states.
- <sup>18</sup> For instance, this is true of a widely used definition of telic egalitarianism as the view that '(i)t is in itself bad if some people are worse off than others', Parfit, Derek, «Equality and Priority», in Andrew Mason, ed., *Ideals of Equality*, Oxford, Blackwell Publishers, 1998, p. 3.
- <sup>19</sup> Cohen, G. A., «Luck and Equality: A Reply to Hurley», *Philosophy and Phenomenological Research*, vol. 72, no. 2, 2007, pp. 439-446.
- <sup>20</sup> In fact, its scope is even broader. Not only is the core of Quong's argument not specifically concerned with *immigrants* as opposed to non-immigrants. It is not even specifically concerned with cultural *minorities* as opposed to cultural majorities. Consider the case of a cultural majority whose members suffer various disadvantages relative to a cultural minority living in the same state for being a cultural majority. Suppose, for instance, that the various disadvantages that result from being a cultural minority are more than counterbalanced by the advantages of intercommunal solidarity and cohesion that come with being a minority. Suppose that the societal culture of the majority will disintegrate because of the complacency and disregard for culture resulting from being a majority with the result that people born into the majority culture will suffer various unchosen disadvantages in the absence of polyethnic majority rights. In that case, it would seem that there is a luck egalitarian case for polyethnic majority rights – whether the relevant majority consists of immigrants or non-immigrants – that is no weaker than the case for polyethnic minority rights under the different and more realistic assumption that cultural disadvantages result from being a cultural minority rather than a majority. While this is a normative implication that I find plausible given certain admittedly quite unrealistic empirical assumption, I shall set this case, as well as that of a non-immigrant cultural minority mentioned in the previous paragraph aside, and focus on the case which Quong addresses in his argument, i.e. that of an immigrant cultural minority.
- <sup>21</sup> Quong, «Cultural», p. 69n12.
- <sup>22</sup> Arneson, Richard J., «Equality and Equal Opportunity for Welfare», *Philosophical Studies*, vol. 56.1, 1989, 77-93, esp. pp. 85-87; Cohen, G. A., «The Currency of Egalitarian Justice», *Ethics*, vol. 99.4, 1989, 906-944, esp. p. 934.
- <sup>23</sup> As noted in section two, first paragraph, the sort of cultural disadvantages that I am concerned with here reflect nothing other than the relative numerical sizes of the cultural communities involved. Hence, I am not here suggesting that luck egalitarians must endorse cultural disadvantage reflecting unjust discriminatory state policies etc.
- <sup>24</sup> *Ibid.*, p. 57.
- <sup>25</sup> Note that I am not asserting that Quong's reasons for withholding compensation to Dan are of a luck egalitarian sort.
- <sup>26</sup> Actually, Quong believes that 'depth matters, and when a society's basic rules affect a person's capacity to combine her deep commitments with primary opportunities like employment and education, this is *prima facie* a matter of justice' (personal communication: on file with author).
- <sup>27</sup> I am not sure exactly how to specify depth here. Presumably, the more a preference is tied to one's self-conception, the deeper it is, other things being equal; *ibid.*, p. 58.
- <sup>28</sup> As Quong puts it : 'If social justice ought to be realized *within* states, then the majority in State A owes the minority fair terms within the confines of their state and not by reference to opportunities elsewhere' (personal communication : on file with author).
- <sup>29</sup> Cohen, «Expensive», p. 7.
- <sup>30</sup> Quong, «Cultural», p. 70n20.
- <sup>31</sup> This is not to say that Cohen's 2004-view implies that immigrants necessarily have a claim to compensation. If they could costlessly immigrate to somewhere else, where they would suffer no cultural disadvantage, in a sense they are not being asked to alienate themselves from something that is deep in them, when the state to which they have immigrated does not compensate them for their present cultural disadvantage.

<sup>32</sup> *Ibid.*, p. 53.

<sup>33</sup> *Ibid.*, p. 58.

<sup>34</sup> *Ibid.*, p. 58.

<sup>35</sup> *Ibid.*, p. 58.

<sup>36</sup> *Ibid.*, p. 62.

<sup>37</sup> *Ibid.*, p. 64.

<sup>38</sup> Much here hangs on when a law disadvantages someone. On a very inclusive understanding, a law disadvantages a minority whenever there is an alternative law such that under this law, this minority would be better off. On a more restrictive understanding, the law has to be the cause that triggers the relevant disadvantage. On the latter view, a disadvantage suffered by a linguistic minority is likely to be a case where the law ‘disadvantages members’ of the minority. Quong’s text is not very explicit on this issue. Some passages seem to involve the narrow understanding – e.g. *ibid.*, pp. 61, 63 – while others seem to involve the broader understanding – *ibid.*, pp. 64, 65. Also, I am not sure why exactly Quong thinks the police officer and the construction worker examples differ with regard to ‘basic opportunities of citizenship’. One possibility is that, on his view, the religious concern underlying the working conditions discriminating against orthodox Jews cannot be expressed in terms endorsed by public reason, whereas the safety concern underlying the relevant helmet regulation can.

<sup>39</sup> *Ibid.*, p. 58.

<sup>40</sup> Rawls, *Theory*, p. 8.

<sup>41</sup> I owe this formulation of the state-centred view of justice to an anonymous reviewer of this journal. I have assumed throughout that our issue is one that concerns the fundamental principles of justice, in part because the luck egalitarian account of justice, which Quong criticizes, is located at this level. If, instead, Quong’s defence of polyethnic rights is located at a non-fundamental level, e.g. at the level of principles of regulation, such that the fact that, in the real world, immigration involves significant transaction costs bears on which principles we should accept, I do not want to reject his position. However, Quong’s disagreement with luck egalitarianism would disappear if his critique is so located. Given certain empirical facts, including facts about transaction costs and the political and social situation of real-world immigrants, luck egalitarianism may well justify polyethnic rights.

<sup>42</sup> This restriction may be one that luck egalitarians will find it hard to provide a plausible rationale for, perhaps harder than Rawlsians who believe the scope of justice is restricted for reasons having to do with reciprocity and participation in a shared basic structure. But, first, the relevant Rawlsian restriction is problematic as well and, second, its relevance to the present issue is unclear in light of the Poggean view that a global basic structure exists.

<sup>43</sup> Quong, «Cultural», p. 53.

<sup>44</sup> I here set aside the complication that while immigrants differ among themselves such that some of them have much better opportunities than others, polyethnic rights compensate all members of the relevant group for worse opportunities.

<sup>45</sup> In fact, such disadvantages may interact with the disadvantage of belonging to a cultural minority such that for people who are generally resourceful in terms of income, education, etc., belonging to a cultural minority may be less of a disadvantage than for people who are disadvantaged in terms of other resources. If so, we could imagine that two groups of immigrants should have different polyethnic rights, etc. from the point of view of luck egalitarian justice, even if, in some sense, their cultures differ to an equal degree from the culture of the majority population.

<sup>46</sup> I assume without argument that the view that overall equality of opportunity is irrelevant, while fair equality of opportunity in relation to different kinds of good is relevant is an unattractive view.

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