RIGHTS, LIBERALISM, MULTICULTURALISM*

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Abstract: In *my study, I deal with different positions regarding rights, liberalism and multiculturalism. For my investigation, I shall analyse the following studies:*

- *Will Kymlicka's Multicultural Citizenship: A Liberal Theory of Minority Rights and Multicultural Odysseys. Navigating the New International Politics of Diversity.*
- *Chandran Kukathas' Cultural Toleration and The Liberal Archipelago: A Theory of Diversity and Freedom,*
- *Doriane L. Coleman's Individualizing Justice through Multiculturalism: The Liberals' Dilemma, and*
- *Brian Barry's Culture and Equality: An Egalitarian Critique of Multiculturalism.*

In Kymlicka's liberal theory of group rights, the acknowledgement of rights to groups is to be interpreted as an extension and development of the liberal tradition. Multinational states must face problems resulting from the presence of different cultural groups and from the relations between the majority and the minorities living in the state. A multinational state ought to guarantee equality between its members: group rights are the instrument to put limitations on the political space of the majority.

Kukathas considers the state as being exclusively an aggregation between groups: the state has therefore no authority of intervention in the groups. Since liberalism is toleration, the rules, traditions, and habits which exist in the different groups ought, in the opinion of Kukathas, to be tolerated, even though these rules, traditions and habits are oppressive, intolerant and illiberal for the members of the group itself.

The analysis of Coleman introduces us to the questions connected to the cultural defences and to the problems that the strategy of the cultural defences represents for the American and not only for the American

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tribunals: the question is whether a pluralistic interpretation of the law is to be accepted, as those who plead for the cultural defences maintain, or whether a pluralistic interpretation of the law is to be refused. The analysis of Coleman gives us highly valuable elements to understand the problems represented by some interpretations of multiculturalism for the equal protection clause of the US Constitution and for the citizens' equality before the law.

Barry accepts as forms of group rights exclusively affirmative actions. In Barry's view, rights may be conceded to groups exclusively for economic reasons: disadvantaged sectors of the people of a country may receive specific rights in the case that these rights can eliminate the economic difficulties in which these sectors of people live. These rights ought to be suppressed, though, when the economic difficulties disappear. Barry considers the concession of cultural group rights as a danger to the equality of the citizens in a country: individual rights may never be sacrificed to group rights.

Keywords: *Kymlicka, Multiculturalism, Liberalism, Kukathas, Rights, Archipelago, Minorities, Coleman, Balkanization, Barry, Equality, Culture, Toleration.*

a) Introduction

In my inquiry, I would like to deal with aspects connected to the interpretation of rights, to the interpretation of liberalism and to the interpretation of multiculturalism. I have based my analysis on the positions of four thinkers:

- Will Kymlicka,
- Chandran Kukathas,
- Doriane Lambelet Coleman, and
- Brian Barry.

The mutual connection between the mentioned thinkers, which is the reason for my choice, is given, in my view, by their specific analysis of rights, liberalism and multiculturalism. Kymlicka considers the legitimacy of group rights as an extension, integration, and completion of traditional individual rights: in Kymlicka's view, the extension of traditional individual rights proves to be necessary due to the insufficiency of traditional individual rights. Kymlicka shows that a country can have to face questions and to cope with problems which cannot be solved on the basis of traditional individual rights, since these questions and problems go beyond the sphere of traditional individual rights. Traditional individual rights are, for instance, not appropriate for the defence of minorities within

a country since they have been thought out as a form of defence of the individuals and are concentrated on the individual dimension. Kymlicka is nonetheless aware that the acknowledgement and concession of group rights within a country may not mean that individuals become the property of a group, or that group rights trump individual rights. Individual rights ought to remain the foundation of all rights; only those group rights which are compatible with traditional individual rights may be admitted within a liberal country.

Kukathas, on the basis of his interpretation of liberalism as toleration, strongly limits the right of intervention of the state in the life and culture of the groups: the state does not have an immediate right to intervene in the life of the groups. The state is not a moral authority: it is exclusively the place of convergence of different groups which are independent of each other: the state is not a superior instance which might give the address of morality to the different groups, i.e., which might determine the correct moral values for all its inhabitants. The state is exclusively the keeper of the public order: it ought to promote and protect the mutual tolerance between the different groups. Since it is exclusively a keeper of the public order, a keeper of the co-existence between parts of the society and a keeper of the peace between the groups living in it, the state has no right to intervene within the groups. Kukathas' theory of rights turns out, therefore, to be different in its foundations from Kymlicka's proposal since Kukathas admits that the traditions of a group can limit the rights of the individuals who are members of the group. At the same time, Kukathas does not concede to the state the right to intervene in the internal life of the group: in his view, a series of little tyrannies represented by the different groups is better than a great tyranny represented by the state.

Coleman considers questions and problems connected to the influence of multicultural assumptions, principles, and ideas on the legal system: she shows that the admission of multicultural assumptions in the legal system means the violation of equality before the law and of the equal protection of the laws. In Coleman's view, the legal system cannot accept elements of multiculturalism: a legal system may never be exposed to the danger of the cultural defences, since cultural defences damage the condition of the individuals' equality before the law. The equal protection given by the laws, on the one hand, and the function of the laws as deterrence against crime, on the other hand, ought to remain the foundations of the legal

system: consequently, no element which could put in danger these aspects may be accepted within the legal system.

Barry resolutely refuses any form of group rights except for the case represented by affirmative actions, which should have, anyway, a limited time horizon. Traditional individual rights ought to be integrated through economic and social rights for the individuals: the subject, i.e., the addressee of rights is, in Barry's view, and ought to remain the individual. Barry is resolutely against any conception of constitutions as a mosaic of cultures and groups, in which different rights are assigned to different groups. Traditional individual rights ought to be extended through social and economic rights, which should nonetheless have as their subject the individual: social and economic rights ought to be directed to the individual; they ought to have the individual as their referent. The concession of rights to groups would bring about, in Barry's view, limitations on individual rights. Individual rights and group rights are, in Barry's view, incompatible with each other.

Thus, the four thinkers which I am now going to analyse show different positions as regards rights, groups, the power of the state, the authority of the governments, the meaning of liberalism, the components of the legal system and the relationships between individuals and groups: these differences give us the possibility to reflect on the complexity of the mentioned themes.

b) Positions of Kymlicka: rights for groups as an extension and integration of traditional individual rights

I shall begin my exposition with the analysis of some positions of Will Kymlicka. The position of Kymlicka can give us the possibility to reflect on the limits of all those conceptions of rights which exclusively consider the existence of individual rights, i.e., which limit the range of the possible rights to the traditional individual rights. Kymlicka shows that specific group rights can be considered as an extension of individual rights as long as they are compatible with individual rights. We shall see that the group rights for which Kymlicka pleads are interpreted by Kymlicka as a completion of the individual rights: the group rights regard the individual dimension in so far as the individual lives in a specific form of life, i.e., in so far as the individual lives a way of life with specific traditions, habits, and cultural expressions.

The recognition of specific group rights ensures the continuity of those cultural forms in which the individual has grown up and lives – beginning, for instance, with the language, and with the cultural forms connected to the language, in which the individual has grown up –. These group rights correspond to the way of living of the individual. Specific group rights constitute the completion and the integration of the traditional conception of individual rights since they are connected to the concrete way of living of the individual: they are related to the individual as a historical entity, i.e., to the individual who, since he is a historical entity, lives in a specific cultural environment.

Kymlicka's studies show, describe, and analyse the insufficiency of traditional individual rights in order that solutions to the limits of traditional individual rights can be found. Traditional individual rights are necessary, but not sufficient, since many problems of contemporary societies cannot be solved only through traditional individual rights. Kymlicka asserts the insufficiency of traditional individual rights:

> "Traditional human rights standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities..."[2]

Kymlicka presents in his texts a series of examples which testify to the insufficiency of traditional individual rights, thereby showing that traditional individual rights are insufficient when, in a country, there are questions and problems related to the presence of minorities to be discussed. The requests and the claims of minorities living in a country cannot be solved through traditional individual rights. Kymlicka points out that traditional individual rights cannot help us as regards specific problems:

- Traditional individual rights cannot solve the question connected to the languages which ought to be recognised as official languages in the case that in a country there is a plurality of languages.
- Traditional individual rights do not solve the question of whether groups should receive subsidies for their education system.
- Traditional individual rights cannot be used to determine the boundaries of the regions of a country if there are linguistic differences in the regions of a country.

[2] See *Multicultural Citizenship. A Liberal Theory of Minority Rights*, p. 4.

- Traditional individual rights cannot help us in determining whether there should be or should not be a devolution of power to regions.
- Traditional individual rights cannot be of any help if the question needs to be discussed whether the distribution of offices ought to consider or not the ethnical or national composition of a country.

In a country in which there are bilingual or multilingual components, a correct language policy ought to consider the groups which are present in the country. Any effective language policy cannot be based exclusively on individuals and on traditional individual rights: for instance, a traditional individual right, such as the right to free speech, cannot give us elements to establish how the language policy in a country should be organised. The right to free speech cannot give us appropriate elements to determine the linguistic strategies which a country should adopt in case of the presence of different linguistic groups in the country itself; it moreover gives no help in determining how linguistic politics should be organised in the case that a linguistic minority is to be protected against a majority.

The right to free speech cannot give us the elements which are needed in order that the correct relations between linguistic minorities and linguistic majorities in a country could be realised. Hence, in order to solve questions and problems related to the presence of different linguistic groups in a country, relying on a different field of rights from the traditional individual rights, such as the right to free speech, turns out to be unavoidable. An appropriate integration, extension and completion of the individual rights are therefore needed: these integrations, extensions and completions are, in Kymlicka's view, represented by forms of recognition of group rights.

Group rights ought to meet specific requirements and criteria: they should be based on and respect traditional individual rights. Traditional individual rights are and remain the foundations of the state order: group rights have the function of completing them. Therefore, group rights may, under no circumstances, contradict individual rights. Kymlicka clearly expresses that traditional individual rights cannot be sacrificed or forgotten to the advantage of group rights. Individuals and individual rights are not expendable. His theory is a liberal theory of group rights: the group rights which are recognised within a liberal order ought to have, as their foundations, the traditional individual rights; otherwise, these rights may not be recognised. Group rights have, therefore, specific limits; they ought to be compatible with traditional individual rights. The question is, therefore, to determine group rights so that they do not limit or damage

individual rights. The dimension of group rights ought to be defined so that it does not represent a limitation of individual rights. The recognition of group rights has the function of protecting minorities from majorities:

> "Special group representation rights within the political institutions of the larger society make it less likely that a national or ethnic minority will be ignored on decisions that are made on a country-wide basis.
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> Self-government rights devolve powers to smaller political units, so that a national minority cannot be outvoted or outbid by the majority on decisions that are of particular importance to their culture, such as issues of education, immigration, resource development, language, and family law."[3]

- Representation rights conceded to a minority will prevent this minority from not being considered if the decisions that are to be taken regard the minority too. Group rights are a trump card that minorities have as regards their relations with majorities: they prove to be, on closer inspection, an instrument of defence against the majorities.
- The right to self-government gives a national minority the very possibility of not being oppressed by the majority. For instance, the right to self-government means, for minorities, the possibility of not being oppressed by a majority when the questions to be decided regard the minority itself, such as the culture, the education, and the language of the minority.
- The right to specific religious and cultural practices protects the culture of determined minorities from the disadvantages that the traditions of the majority could represent for minorities.

All these forms of rights constitute trump cards in favour of the minority: they aim at the protection and the promotion of minorities in their relations to the majorities. At the same time, they constitute an extension of individual rights since the individual belonging to a minority can be protected in his cultural interests through these rights against the traditions and the power of the majority. Group rights are not only rights for the group as such: they serve to the protection of the rights which constitute the culture and the tradition of the individual qua individual. They serve to protect the way of living in which the individual has grown up and in which the individual lives. It would be wrong, therefore, to consider these rights as being exclusively directed to the groups as such; they are rights

[3] See *Multicultural Citizenship. A Liberal Theory of Minority Rights*, pp. 37–38.

directed to the individual as such, too. Group rights protect the individual's concrete way of living: they safeguard the dimension of the individual as a historical being, who, since he is a historical being, lives in specific forms of culture, of traditions, of language, and so on.

The recognition of group rights can nonetheless present dangers. Kymlicka is aware of the dangers connected to the recognition of minority rights:

> "Recognizing minority rights has obvious dangers. The language of minority rights has been used and abused not only by the Nazis, but also by apologists for racial segregation and apartheid[4]. It has also been used by intolerant and belligerent nationalists and fundamentalists throughout the world to justify the domination of people outside their group, and the suppression of dissenters within the group. A liberal theory of minority rights, therefore, must explain how minority rights coexist with human rights, and how minority rights are limited by principles of individual liberty, democracy, and social justice."[5]

Only those group rights which are compatible with individual rights may be admitted within a liberal order. In Kymlicka's view, there are precise limits connected to group rights. Group rights, if they should be compatible with traditional individual rights, may not contradict individual rights. The rights conceded to the groups ought to be compatible with traditional individual rights; they may not go against them. A liberal theory of minority rights ought to find group rights which can coexist with human rights. The foundations of all rights ought to remain the traditional individual rights: this is the beginning point of any rights theory.

In Kymlicka's view, a strategy of non-intervention of the state, i.e., of neutrality of the state, when different groups are present in a country, proves to be not neutral at all: neutrality, i.e., non-intervention of the state is intervention for the majority. A strategy of neutrality in the presence of inequalities between groups is, on closer inspection, a choice for the conservation and the promotion of inequalities. Therefore, the neutrality of the state in relation to the different groups which constitute the nation turns out to be a preference for specific groups: for instance, non-intervention of the state immediately represents an advantage for the

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[4] Kymlicka exposes with great accuracy the grounds which brought to the refusal of group rights in the period following World War II in the book *Multicultural Odysseys. Navigating the New International Politics of Diversity*.

[5] See *Multicultural Citizenship. A Liberal Theory of Minority Rights*, p. 6.

cultural majority – such as, for instance, the linguistic majority –, which is present in a country.

In general, a policy of non-intervention from the state means that the minorities are exposed to the decisions of the majority: in case of the presence of different linguistic groups, this could mean that the language of the majority is imposed on all citizens without any consideration of or respect for the minorities, their language, their traditions, and their culture. A strategy of neutrality does not re-equilibrate the position of the majority with some advantages or forms of protection for the minorities and their culture. A policy of neutrality leaves the relationships within a country unchanged; a policy which considers the rights and the interests of minorities limits the power of the majority through a series of measures protecting the culture, language, and traditions of the minorities so that these cannot be affected by the decisions of the majority.

> "Again, the precise connection between equality and minority rights was rarely spelled out. But the general idea was clear enough. A multination state which accords universal individual rights to all its citizens, regardless of group membership, may appear to be 'neutral' between the various national groups. But in fact, it can (and often does) systematically privilege the majority nation in certain fundamental ways – for example, the drawing of internal boundaries; the language of schools, courts, and government services; the choice of public holidays; and the division of legislative power between central and local governments."[6]

- The question of group rights is directly a question of equality. Without group rights, there cannot be authentic equality in any country in which there are different cultural components.
- The multinational state, through a strategy of neutrality, privileges the majority group in different ways: drawing of boundaries, language in the schools and in the courts, and the relationships between legislative power and the local governments are all sectors in which inequalities come about unless there is no disposition in favour of the minorities.
- Only the recognition of group-specific rights regarding education, local autonomy, and language can guarantee that the national minorities present in a multinational state are not damaged by the decision of the majority. Group rights are instruments of defence of

[6] See *Multicultural Citizenship. A Liberal Theory of Minority Rights*, pp. 51-52.

the minority against the danger of the dictatorship of the majority: they are limits to what a majority can do in a country.

- The concession of group rights in favour of minorities proves to be indispensable in order to avoid the possibility of unjust decisions taken by the majority.

As regards the relationships within a group and between different groups, Kymlicka states:

> "a liberal view requires *freedom within* the minority group, and *equality between* the minority and majority groups."[7]

Kymlicka is aware that, within a liberal context, the freedom of the individuals who are members of a group ought to be protected: the group may not be or become a prison for the individual. An individual is a member of a group; he is not the property of the group.

Likewise, the equality between minority and majority ought to be supported and protected: if there is no equality between minority and majority, there is no authentic equality between the members of the majority and of the minority. There will be no authentic equality between the inhabitants of the country since the members of the majority will always be in a position of privilege. Therefore, the concession of group rights to minorities proves to be indispensable in order that equality between the individuals of a country is brought about and promoted.

An essential aspect in Kymlicka's analysis is that group rights are not simply group rights: they are functional to the protection and affirmation of individual rights since they protect and promote the specific individual's way of life. By promoting and protecting the language and the culture of the individual belonging to a minority, for instance, the state promotes not simply the group, but the very way of life of the individual. Group rights are not simply and abstractly rights for groups: they are rights, on closer inspection, of the individual insofar as the individual is considered in his living in a group, with a determined language, traditions, culture and so on. Group rights regard the way of life of the individual: therefore, they should be defined as rights conceded to the individual insofar as the individual is considered in his way of life.

The recognition of group rights proves to be a form of compensation for the forms of injustice which were perpetrated against groups living in a

[7] See *Multicultural Citizenship. A Liberal Theory of Minority Rights*, p. 152.

country. The acknowledgement of group rights within a country is a precise message directed to all citizens: this acknowledgement means that the state equally belongs to all citizens:

> "First, a multicultural state involves the repudiation of the older idea that the state is a possession of a single national group. Instead, the state must be seen as belonging equally to all citizens. Second, as a consequence, a multicultural state repudiates any nation-building policies that assimilate or exclude members of minority or non-dominant groups. Instead, it accepts that individuals should be able to access state institutions, and to act as full and equal citizens in political life, without having to hide or deny their ethnocultural identity. The state accepts an obligation to accord recognition and accommodation to the history, language, and culture of non-dominant groups, as it does for the dominant group. Third, a multicultural state acknowledges the historic injustice that was done to minority/non-dominant groups by these policies of assimilation and exclusion, and manifests a willingness to offer some sort of remedy or rectification for them."[8]

- Within a multicultural state, the state is not the possession of a single group. The state does not belong to a group. The message which the liberal multiculturalism gives is that the state does not belong to a particular group. Through the recognition of the concept of group rights, in general, and through the recognition of group rights for minorities, in particular, the state declares that it does not belong to any specific group.
- Through the recognition of group rights, the state acknowledges and repairs wrongs which have been committed against minorities in the past. A multicultural state acknowledges, for instance, the injustices caused by assimilation strategies which have been made against minorities.
- Thanks to the recognition of group rights, minorities do not need to conceal their existence or their presence. No citizen is foreign within the state. Citizens can have access to state institutions without having to conceal their own identities. Authentic freedom and equality in the state are reached thanks to group rights.

[8] See *Multicultural Odysseys. Navigating the New International Politics of Diversity*, pp. 65–66.

- Through the concession of group rights, the multicultural state refuses every form of nation-building policy which excludes members of minorities. There is no dominant culture in the country since the state belongs to all citizens.

I would like finally to quote a further passage. Kymlicka clearly states that the concept of human rights and of equality between individuals has led to group rights:

> "The adoption of liberal multiculturalism has been both inspired and constrained by human rights ideals. Indeed, the trend towards liberal multiculturalism can only be understood as a new stage in the gradual working out of the logic of human rights, and in particular the logic of the idea of the inherent equality of human beings, both as individuals and as peoples."[9]

Correct group rights prove to be the integration of individual rights: they are not a factor which opposes individual rights, but a factor which completes individual rights. Recognising group rights is a part of the process of affirmation of equality.

c) Kukathas: liberalism as toleration

In order to show the contents of a different interpretation of liberalism, of the duties of the state and of the individual rights, which proposes toleration as the principle of liberalism, I shall consider some ideas expressed by Kukathas in his essay *Cultural toleration*.

The central aspect of Kukathas' meditation is Kukathas' conception of liberalism: liberalism is not, for Kukathas, a system of values; it is a system of organisation of the relations between groups and communities within the same country. The central point of Kukathas' thesis, as regards his interpretation of toleration, is the denial that there is a "we" over the different individuals and the different groups forming a society. There is no "we" over groups and individuals that can decide what is right or what is wrong in the life of organisations of groups and of individuals. In any state, there is only one principle, if the state is liberal: toleration. Kukathas compares in his works two concepts of liberalism with each other:

- Liberalism is interpreted as a complex of values and moral standards.
- Liberalism is interpreted as a settlement through which different moral standards coexist.

[9] See *Multicultural Odysseys. Navigating the New International Politics of Diversity*, pp. 88–89.

Kukathas adopts the second conception of liberalism: liberalism is not, in his opinion, a system of values; liberalism is an organisational system based on the reciprocal toleration between the different components of the whole community.

As regards the conditions which hold in a country, it is not relevant, in the opinion of Kukathas, that the different components have reciprocal respect towards each other. The presence of a relation of respect between the different elements living in the country has no importance for the stability of a country. The only relevant aspect for the internal stability of a country is that the different components of the society accept the coexistence of each other. The image of the archipelago, which is used by Kukathas for the title of one of his studies, explains the general conception of Kukathas: a society is constituted by different groups; these different groups are independent of each other; they form islands. Moreover, there is no superior system above the archipelago. There is no superior authority which may impose values on the different groups. All which is needed between the elements of the society in order that peaceful coexistence is guaranteed is reciprocal toleration: nothing else is required, and nothing else is relevant.

> "I want to suggest, however, that the problem should be approached differently – in a way which does not presuppose the existence or the authority of the state. That is to say, I want to begin without presuming that it is already established that there is a "we" who are faced with the problem of determining how far to tolerate particular groups in "our" midst."[10]

Kukathas does not rely on the authority of the state in order to ground an attitude of toleration between the different groups of a country and in order to establish the kinds of behaviour which may be tolerated and the kinds of behaviour which may not be tolerated within the country. There is no "we" who may judge the extent and the limits of toleration. There is no superior authority leading the public space and determining the way in which the public space ought to be organised. The state is not a further entity which synthesises and organises the other groups from a superior position. The state exclusively exists in order to enable and ensure the coexistence between the different groups. The state has no right to give a moral address to the different groups which live in the country. The state

[10] See *Cultural Toleration*, p. 71.

has only the function of keeper of public order; the principles of behaviour are matters which the different groups decide within themselves. The state is nothing more than a keeper of public order. Kukathas proceeds then to expose his concept of toleration:

> "At this point two questions arise: first, why should we be concerned if there is no independent value attached to toleration; and second, can there be a defense of toleration which does not subordinate it to some other value and, thereby, undermine it?"[11]

Toleration is, in Kukathas' opinion, not subordinated to some other value. Toleration is the principle itself of liberalism. Toleration is the only principle; the other values of a society ought to be subordinated to toleration, not toleration to the other values of society.

A point of great interest in Kukathas' meditation is his way of interpreting the public realm. The public realm is not a space in which there is an established standpoint of morality. The public realm is, for Kukathas, an area of convergence of different moral practices. Kukathas considers the state exclusively as the organiser of the coexistence between groups. The state is not an entity over the components which belong to the country. Therefore, there is no superior instance which has the legitimacy to determine what the different components of the state ought to do. The components are sovereign within themselves. There is no established standpoint on morality within the state (or at least there should be no established standpoint on morality within the state): there is exclusively a convergence of groups. Liberalism is toleration: it is mutual toleration between the groups living in a country. From this principle, all the rest should be derived. It is thus excluded that toleration can be subordinated to something else; on the contrary, all the rest ought to be subordinated to toleration.

> "Rather than conceive of the public realm as embodying an established standpoint of morality which reflects a desirable level of stability and social unity, we should think of the public realm as an area of convergence of different moral practices. All societies, to varying degrees, harbor a variety of religions, languages, ethnicities, and cultural practices and, so, a variety of moral ideals. The public realm is the product of interaction among these various ways. Indeed, it is a kind of settlement reflecting the need of people of different ways

[11] See *Cultural Toleration*, p. 78.

> to develop some common standards by which to regulate their interaction – given that interaction is unavoidable."[12]

- The public realm is a settlement to regulate the interaction between groups. The public realm does not contain an already established standpoint of morality.
- The public realm is an area of convergence of different moral practices.
- All societies contain in themselves a plurality of religions, languages, ethnicities, cultural practices, and moral ideals.
- The public realm is exclusively the interaction of these different pluralities.
- The public realm is only the space in which the rules for the interaction between the different elements of the plurality are established.
- The public realm is not, therefore, something which stands above the different elements of plurality and establishes right and wrong in the life in society. It is exclusively a space in which the way of interaction between the elements of plurality is established.
- The state, therefore, has no right to intervene in the groups, since it is not something which may determine the way in which the groups ought to live.

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

> "Even in cases where there is clear evidence of terrible practices, however, there is good reason not to give established authority the right to intervene. First, persuasion is always preferable to force, morally speaking, so it would be better to allow the effects of interaction between peoples and communities of different moral outlook to work towards the elimination of dubious customs."[13]

We can see the following points in this passage:

- Persuasion is better than force. The state should persuade but might not intervene.
- Moral principles ought not to be imposed.

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

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[12] See *Cultural Toleration*, p. 84.

[13] See *Cultural Toleration*, p. 89.

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

One of the assumptions of Kukathas is that absolute power would produce absolute corruption. Kukathas believes that a series of little tyrannical forms within a country would, anyway, be less dangerous than a great tyranny represented by the whole state organisation. As regards the way in which a group which has an oppressive disposition towards its members could be brought to change its attitude, Kukathas contends that persuasion is better than invasion by an external power: the state should try to persuade the members of the group to give up the oppressive disposition instead of enforcing the abandonment of these dispositions. It can happen that, in a society, there are islands of tyranny represented by some groups. Kukathas nonetheless prefers a decentralisation of tyranny to a condition in which there is a central tyranny. Power tends to corrupt, whereas absolute power corrupts absolutely: the presence of tyrannical groups is, in Kukathas' opinion, less dangerous than the presence of a central institution that can have absolute authority over the whole society.

Moreover, in Kukathas' view, the presence of an ultimate authority determining what is right and what is wrong would mean the end of liberalism: in a liberal society, there is a plurality of authorities establishing different ways of life. If, on the contrary, there is an ultimate authority establishing for every person what is wrong and what is right, there is no more space for toleration of different attitudes. Therefore, liberalism as toleration is lost:

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

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[14] See *Cultural Toleration*, p. 89.

[15] See *Cultural Toleration*, p. 92.

No authority in a liberal state may determine what is morally acceptable. Kukathas' proposal is clear: toleration of different positions is the very essence of liberalism. Without toleration, there is no liberalism. Liberalism as toleration excludes the presence of a central authority which establishes common moral points. If there is such an authority, toleration disappears, and liberalism is destroyed. To maintain liberalism, toleration of different views ought to be guaranteed, even though these views imply tyrannical structures in some groups belonging to the public realm.

The objection that can be expressed against Kukathas' view is that Kukathas' interpretation of tolerance weakens the stability of a society. Since, within the interpretation of tolerance offered by Kukathas, the different groups of the public realm are completely independent of each other, we have only a sum of communities having contact with each other but remaining substantially extraneous to each other. Kukathas counteracts the objection in the following way:

> "For, as I have said at the outset, there is no reason to begin by assuming that there is an established "we" in the form of the state which possesses the authority to determine how far to tolerate dissenting groups within its midst. (…)
> It is not for the state to determine what forms – or form – the associations which comprise it will take. The state is a political settlement which encompasses these diverse associations; but it is not their creator or their shaper. This holds all the more strongly if the state is claimed to be a liberal state. The liberal state does not take as its concern the way of life of its members but accepts that there is in society a diversity of ends – and of ways in which people pursue them. It does not make judgments about whether those ways are good or bad, liberal or illiberal."[16]

Kukathas is consequent as regards his assertions:

- The state is for Kukathas only a sum of mutually independent aggregations and mutually independent groups.
- The state is nothing above aggregations and groups.
- There is no plurality in the form of a "we" which transcends the specific aggregations, and which consequently may determine the values of the different aggregations.
- Therefore, the state does not have the right to determine where tolerance can begin and where tolerance should end.

[16] See *Cultural Toleration*, p. 94.

- If tolerance is assumed to be the principle of a state, toleration is always valid and without any exception.
- The state does not express judgments on the goodness or badness of the different groups and organisations which are present in society.

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

> "The value which is fundamental to liberalism is toleration. A society or community is a liberal one if, or to the extent that, it is tolerant. What it tolerates as a liberal society or community is dissent or difference (which is a kind of dissent insofar as living or believing differently involves an implicit repudiation of the norms or standards embraced by the majority, or by the dominant institutions of society). Toleration, in the sense in which it is being used here, is an undemanding virtue, since it requires little more than indifference to those who are, or that which is, tolerated."[17]

The essential point is that there is no authority which can decide moral values. Toleration implies, in Kukathas's view, that there are no leading values, no imposition of leading values, no politics of leading values, and no interference of any supreme authority with the principles of the different associations. Parallel associations not only exist, but they should exist without being disturbed by any authority of the state. The state exists only to guarantee the peaceful coexistence of the different components. Kukathas is aware of the problem of dissent in the community; he expresses the following considerations:

> "Fundamental to the liberal standpoint is the conviction that individuals should not be forced to act against conscience – to act in ways they consider wrong. It is the value of liberty of conscience which lies at the core of the liberal ideal of toleration. In this regard, a society is a liberal one if individuals are at liberty to reject the authority of one association in order to place themselves under the authority of another ..."[18]

d) Coleman: choosing rights over culture

The analyses written by Doriane Lambelet Coleman describe the danger which can be represented by the assumption of determined cultural rights in juridical systems. To better analyse the question of cultural defences, I

[17] See *The Liberal Archipelago*, p. 23.

[18] See *The Liberal Archipelago*, p. 25.

would like to consider some of the subjects expressed in the article *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*.

The title of the article introduces us to the main problem with which multiculturalists are confronted: if certain group rights are conceded, the equality of the citizens before the law can be in danger. Group rights can become a danger if they are admitted into the legal system. As regards the concept of individualising justice, Coleman says:

> "The phrase describes the *process* by which criminal and constitutional law doctrine affords defendants a subjective evaluation of their moral culpability."[19]

To individualise justice means that moral culpability can be subjectively evaluated with regard to the cultural provenance of the person having committed certain crimes. Coleman analyses different cases in which the moral culpability of the accused person was annulled or at least strongly limited due to the influences represented by the cultural group and by the culture to which the accused person belonged. The influence of the culture has been considered as a factor which annulled or limited the responsibility of the accused person:

> "In these cases, the defense presented, and the prosecutor or court accepted, cultural evidence as an excuse for the otherwise criminal conduct of immigrant defendants. These official decisions appear to reflect the notion that moral culpability of an immigrant defendant should be judged according to his or her own cultural standards, rather than those of the relevant jurisdiction. Although no state has formally recognized the use of exonerating cultural evidence, some commentators and judges have labelled this strategy the "cultural defense.""[20]

Cultural influences are used to find grounds which mitigate the criminal behaviour of the person who has committed a crime: these grounds limit the culpability of the person due to the cultural influences which have induced the person to commit a crime. The court decisions have the common characteristic that the moral culpability of certain persons has to be judged on the basis of their cultural standards: these cultural standards limit, in a certain measure, the objective jurisdiction. The strategy lying at the basis of the cultural defence is, in general, that the culpability of a person depends on the cultural environment from which a person comes.

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[19] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, p. 1093, footnote ∗.

[20] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, p. 1094.

> "The cultural defense (and the issues it raises about the rights of immigrants to retain aspects of their cultures when they come to the United States) is an important part of the larger debate about multiculturalism which currently is prominent in academic, social, and political circles. In particular, this larger debate concerns whether there is and should be a unifying American culture that guides our institutions, including the justice system, or whether the United States is and should be a culturally pluralistic nation in all respect, including in the law."[21]

The theme of the cultural defence is part of the debate on multiculturalism: applied to the specific case of the law system, the question is whether multiculturalism should involve the legal system too. Coleman discusses the problem with reference to the United States, but the question can be applied to every country. If elements coming from other cultures are introduced into the American law system, this procedure can lead to violations of the doctrine of the Equal Protection Clause expressed in the 14th Amendment of the American Constitution, on the basis of which all citizens ought to receive the same protection from the laws.

If certain cultural influences are considered with reference to the culpability of the persons, a situation in the law system comes about in which the victim does not receive the same protection from the law as other citizens have. At the same time, if certain mitigating circumstances are conceded on the basis of the influences of a culture, the defendant is not treated as other defendants who have committed the same crime but do not belong to the same culture: they do not receive the mitigating circumstances which other people receive since they do not belong to the culture for which the cultural defences are admitted. Coleman clearly expresses the conviction that, if the strategy of the cultural defences is accepted, the Equal Protection Clause[22] is not respected. Coleman adds to her analysis the following points:

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[21] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, p. 1094.

[22] The text of the Equal Protection Clause is the following:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (see https://constitution.congress.gov/constitution/amendment-14/)

> "For legal scholars and practitioners who believe in a progressive civil and human rights agenda, these illustrations also raise an important question: What happens to the victims – almost always minority women and children – when multiculturalism and individualized justice are advanced by dispositive cultural evidence? The answer, both in theory and in practice, is stark: They are denied the protection of the criminal laws because their assailants generally go free, either immediately or within a relatively brief period of time."[23]

- Women and children, who are in most cases the victims of the cultural defences, face the denial of the protection of the laws.
- Victims have no hope that the condition will change since the acceptance of the cultural defences exercises an influence also regarding their future ways of behaving.
- The law cannot exercise its deterrence power.
- The strategy of cultural defences can produce a series of precedents, which will endanger the effectiveness of the law.
- The cultural defences are a danger to the expansion of the protection of women and children.

Coleman often expresses in her study the opposite conception of "choosing rights over culture". Rights ought always to have precedence over any cultural influence. She speaks with reference to the acceptance of the cultural defences of a balkanization of criminal law:

> "(…) the use of cultural evidence risks a dangerous balkanization of the criminal law, where non-immigrant Americans are subject to one set of laws and immigrant Americans to another. This is a prospect that is inconsistent not only with one of the law's most fundamental objectives, the protection of society and *all* of its members from harm, but also with the important human and civil rights doctrines embodied in the Equal Protection Clause. Thus, society as a whole is best served by a balance that avoids the use of discriminatory cultural evidence."[24]

- The results of the introduction of the cultural defences would be that non-immigrated Americans would be judged on the basis of the American law system and immigrants would be judged on the basis of a different law system.

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[23] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, p. 1095.

[24] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, p. 1098.

- There would be no equality before the law. Cultural defences bring about discrimination between citizens: they compromise the equality of the citizens before the law.
- Cultural defences are incompatible with the aim of the laws which consists in protecting the members of society from damages. They are incompatible with the Equal Protection Clause of the American Constitution.

Coleman underlines that, once the influence of the culture on moral culpability is admitted, the full accountability for the actions is compromised:

> "someone raised in a foreign culture should not be held fully accountable for conduct that violates United States law… [if that conduct] would be acceptable in his or her native culture".[25]

The whole system of the culpability of the defendant is damaged by the strategy of cultural defences: the defendant who has been raised in a foreign culture can be justified as regards his behaviour on the basis of his belonging to another culture which has determined or at least strongly influenced his behaviour. Thus, moral culpability is annulled or at least strongly diminished if the strategy of the cultural defences is accepted within the legal system:

> "In those cases where cultural evidence is accepted as dispositive, the state effectively scraps conventional assault, battery, murder, and abuse analysis – all of which should result in a finding that the defendant had the requisite specific intent to commit the crime at issue – and is guided instead by a relative standard that denies moral culpability to some significant extent."[26]

In case the conception of the cultural defence is accepted, the state refuses to accept that the defendant is morally responsible. The protection against crime and the equal protection doctrine are damaged by the admission of cultural defences:

> "Indeed, permitting cultural evidence to be dispositive in criminal cases violates both the fundamental principle that society has a right to government protection against crime, and the equal protection doctrine that holds that whatever protections are provided by government must be provided to all equally, without regard to race, gender, or national origin. (…)

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[25] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemm*a, p. 1101.

[26] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, p. 1123.

> In fact, advocating the use of the cultural defense is problematic precisely because it focuses exclusively on the rights of the defendant, and thus fails entirely to consider the primary function of the criminal law, that is, the protection of victims and the public generally from criminal conduct."[27]

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

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

> "The message is sent that if you are an immigrant, you are not guaranteed the right to choose to escape those aspects of your culture (or those stereotypes about your culture) that collide with the criminal law."[28]

The question of the message that is sent if the strategy of the cultural defences is accepted is essential: if a person is an immigrant, she can think that she is not guaranteed as regards protection from the laws in all cases which can be affected by the strategy of the cultural defences. The trust in the authority of the state is damaged in all those persons who can sense the danger of a diminution of their rights because of the acceptance of the cultural defences.

e) Barry: rights exclusively for individuals

Barry represents the position of acknowledgement of rights for individuals qua individuals. Rights belong to individuals qua individuals without consideration of their belonging to groups: rights belong to the individuals qua individuals, not to the individual since they are members

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[27] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, p. 1136.

[28] See *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, p. 1137.

of determined groups. Social rights constitute, in the opinion of Barry, the integration of civil rights.

Liberalism is not for Barry:

- Indifferentism toward values.
- Toleration of any model of life and of organisation of groups within a country.
- Relativism of values.

Positively, Barry considers liberalism as:

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

Consequently, only those ways of life and organisations can be accepted, within a liberal perspective, that accept the autonomy of individuals and respect this autonomy. Liberalism is not the toleration of theories and ways of life that endanger the autonomy of individuals and that refuse the autonomy of individuals. The autonomy of individuals is the measure of judgment to evaluate whether a theory is a liberal theory or not. Barry believes that the concession of rights for groups compromises the equality of the citizens. If a group receives specific rights that another group does not have, the result is that the equality between citizens is undermined.

Barry believes that certain rights can be conceded to underprivileged groups. These rights should be eliminated, though, when the inequality and the disadvantages that these rights should solve are eliminated. These rights are not rights that are conceded to the group qua group, with reference to the culture of the group and with the aim to protect the culture of the group. These rights are conceded in order that a determined group which finds itself in a difficult economic condition can be helped economically and socially. Therefore, these rights are a kind of compensation. These rights are therefore conceded in order that the disadvantaged group can obtain the kind of equality which constitutes the ground principle of liberalism. Liberalism is the affirmation and promotion of equality among citizens when this equality is not present.

> "The core of this conception of citizenship, already worked out in the eighteenth century, is that there should be only one status of citizen (no estates or castes), so that everybody enjoys the same legal and political rights. These rights should be assigned to individual citizens, with no special rights (or disabilities) accorded to some and not others on the basis of group

membership. In the course of the nineteenth century, the limitations of this conception of equality came under fire with increasing intensity from 'new liberals' and socialists. In response, liberal citizenship has, especially in this century, come to be supplemented by the addition of social and economic elements."[29]

- Barry exclusively pleads for the existence of one and only one status of citizens (individuals are considered by Barry as individuals and not as members of groups).
- Every citizen ought to have the same legal and political rights.
- There should not be rights accorded on the basis of group membership.

Social and economic rights ought to integrate traditional civil rights:

"(…) the universal civil and political rights of citizens envisaged (if far from completely instantiated) by the French and American Revolutions were indeed insufficient, and need to be supplemented by universalistic social and economic rights. This line of thought, which does not denigrate universal civil and political rights but seeks to build on them, is in my view a development fully within the tradition of Enlightenment."[30]

Civil rights have been integrated with universalistic social and economic rights. The integration of civil and political rights through social and economic rights constitutes, in the opinion of Barry, a development which comes about within the tradition of the Enlightenment. The extension of the rights exclusively regards, and ought to regard, citizens and not groups.

"For there may be cases in which a system of group-based rights for those suffering from systematic disadvantage will be a way of helping to meet the egalitarian liberal demand that people should not have fewer resources and opportunities than others when this inequality has arisen out of circumstances that they had no responsibility for bringing about. However, special treatment for members of disadvantaged groups is justifiable only for as long as the inequality persists. We may say, therefore, that the objective of special treatment for members of disadvantaged groups is to make the need for that special treatment disappear as rapidly as possible."[31]

[29] See *Culture and Equality: An Egalitarian Critique of Multiculturalism*, p. 7.

[30] See *Culture and Equality: An Egalitarian Critique of Multiculturalism*, p. 12.

[31] See *Culture and Equality: An Egalitarian Critique of Multiculturalism*, p. 13.

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

As regards the principles defining liberalism, Barry expresses the following considerations:

> "The defining feature of liberalism is, I maintain, the principles of equal freedom that underwrite basic liberal institutions: civic equality, freedom of speech and religion, non-discrimination, equal opportunity, and so on."[32]

Barry considers the following characteristics as the basic characteristics of liberalism:

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

Barry clearly expresses the duty of the liberal state to intervene not only against the protection from death but also from physical injury. The notion itself of a liberal state requires the intervention of the state in the case that there are dangers for the citizens:

> "Any doctrine that gives the state the duty to prevent physical injury and death from being inflicted on its inhabitants will have the implication that the state should intervene. All that has to be said is that a liberal state is such a state."[33]

A liberal state, in Barry's view, ought to prevent physical injury and death from being inflicted on its inhabitants. The state ought to intervene. Barry strongly denies that forms of cultural diversity may limit individual rights:

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[32] See *Culture and Equality: An Egalitarian Critique of Multiculturalism*, p. 122.

[33] See *Culture and Equality: An Egalitarian Critique of Multiculturalism*, p. 124.

> "The defining feature of a liberal is, I suggest, that it is someone who holds that there are certain rights against oppression, exploitation and injury to which every single human being is entitled to lay claim, and that appeals to 'cultural diversity' and pluralism under no circumstances trump the value of basic liberal rights."[34]

f) Conclusion

Throughout the analysis, we were able to see different positions dealing with rights. Kymlicka suggests that traditional individual rights need integration in order that the system of rights can successfully face the questions and the problems of contemporary societies. If the state is indifferent towards the questions and the problems represented by a majority and a minority, the problems which can arise due to the presence of different groups in society will remain with disadvantages for the minority. The choice for non-intervention is, on closer inspection, a choice which goes to the advantage of a majority group within the state. Group rights are needed in order to protect minorities from majorities.

Kukathas limits the value of liberalism to toleration between the different groups composing a society, renouncing therewith any form of value associated with liberalism. Coleman considers the recognition of cultural rights as damaging at least certain aspects of the juridical system, such as the equality of the citizens before the law and the equal protection of the law. Barry admits as rights for groups exclusively affirmative actions: he considers as a kind of potential damage to individual rights, whichever concession of rights to groups.

The positions regarding rights, liberal theories and compositions of societies can be, therefore, interpreted in ways which are very different from each other. This difference is to be connected to the complexity of the structure which contemporary societies have.

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[34] See *Culture and Equality: An Egalitarian Critique of Multiculturalism*, pp. 132–133.

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