

Multiculturalism in Crisis?

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The Owl of Minerva?

If Hegel was correct when he said that the Owl of Minerva makes its flight at dusk, then we should be cautious about the future of multiculturalism. It is easy to see that at one level, perhaps the level of rhetoric, multiculturalism has never been in better shape. London is reported to have won over Paris and been given the honour to organise the 2012 Olympic games thanks to its multicultural society. The EU Youth Program has announced the theme of ‘intercultural dialogue’ as its main priority for the coming years. The Russian presidency of the Council of Europe has had its banner of ‘intercultural dialogue’ as its main parole last autumn, while conferences on multiculturalism succeed one another in the Western hemisphere and especially in the old continent.

The paradox is that all this talk of intercultural dialogue, multiculturalism and diversity coincides with phenomena at odds with them. Firstly, in the age of al-Qaeda and of perceived massive migration flows ‘we have grown accustomed to thinking of the world as divided among warring creeds, separated from one another by chasms of incomprehension’ as aptly put recently by Kwame Appiah. While intercultural dialogue is our emblem, divisions and polarisation, globally and within societies, is blatant as we shockingly learned during the Paris riots of the autumn 2005. On the other side of the Atlantic, while the cultural diversity of the United States has become one of the most pious of the pieties of our age, the proportion of foreign-born Americans is far less than it was seventy years ago; rates of mixed marriages have soared in the past few decades and fewer and fewer Americans live in neighbourhoods

with a concentration of people who the same 'national origins'. The exception exists and affects blacks who have not had the privilege of becoming 'white'.¹

These paradoxes and contrasts in rhetoric and in real life form the background against which I will be trying to discuss the question suggested to me by the organisers. I appreciate the fact that the organisers are aware of the fact that I find pleasure in an occasional intellectual challenge, but I must admit that the present task turned out more daunting and tricky than I ever expected [this is why I sent my draft only the day before my departure for Donostia].

After weeks of collecting materials, taking notes and trying to identify the main components of my concerns, I felt some days ago completely unable to actually write down my thoughts. I believe this is so because discussions and arguments tend to get overly emotional as soon as issues of culture and identity are brought forward. After all, as some advocates of multiculturalism would say, our autonomy is defined or at least outlined by the cultures and identities we are born into. For surprisingly many people ethnicity, the nation, the tribe, religion are all things they are prepared to sacrifice their lives for. Benedict Andersson put in his *Imagined Communities* the hypothetical question: Who will willingly die for Comecon or the EEC? At an individual level we know that in enlightened and wealthy countries like Sweden Sami children are today still harassed at school, immigrants with excellent knowledge of the Swedish language are excluded from the labour and housing markets to a far greater extent than persons with typical Swedish names and looks, and Finnish speaking social workers are prohibited to use Finnish in their workplace during work brakes.

So what about multiculturalism?

Then I came to think of my ongoing debates with two good friends. Both would claim that they are supporters of the idea of human rights. One is a legal philosopher who adheres to the theory of moral realism and thereby argues that in issues of moral significance – that is in issues of how we treat others - there is a single correct answer, a best option, even though it may be difficult to establish. The way to proceed is constant debate with those claiming different answers to be the truth. My other friend is a practicing Catholic who argues that there is objective truth and that this truth is transcendental, metaphysically foundational and

¹ K. Appiah, *The Ethics of Identity*, PUP, 2005, 115.

materialised in the holy scripts and the teachings of wise theologians. Both are well educated, Western Europeans, cosmopolitans, one is a man and the other is a woman. My two friends would give very different answers to questions such as euthanasia, abortion, positive measures against discrimination or the exclusion of women from the higher orders of most religions around the world. So, obviously there is not one single Western European perspective or 'culture'.

For that reason I have also chosen to reject the geographic limitations suggested by the organisers of the conference. While using writings and arguments predominantly from a European and North American context, I maintain strongly that the ideas identified are not geographically bound. Liberalism as political theory and its implications in law is not limited to North America and Europe and within liberalism there are hundreds of variations, for instance with regard to the various conceptions of the minimal or the proactive state. Europe and Canada have in many ways, in particular with regard to the ideal of the welfare state as well as with regard to the coexistence and struggles of two or more 'founding peoples', more in common than the two countries of North America. Some of the most inspiring readings of today's debates on multiculturalism are produced by people with their origins in India, Ghana, the Middle East or, for that matter, in Greece albeit some 2.500 years ago.

How should one then go about in order to find out whether there is a crisis of multiculturalism? Thinking of my two friends, I decided to allow myself to use you as friends and continue thinking aloud.

I decided that I needed to take the following steps:

- look at the conceptual tools employed in multiculturalist debates;
- look at the tensions existing between multiculturalism and human rights;
- identify any gaps in multiculturalist arguments;
- and in particular look at gaps in the justificatory grounds proposed in law and in political theory in favor of multiculturalist accommodation;
- and finally, look at recent shifts in multiculturalist debates in particular as they are shaped by and through international law.

This final step makes the assumption that when there is a crisis there is a high likelihood that there will be change. This means, by the way, that crises are in many ways useful phenomena.

My argument will be that there are two main critiques of multiculturalism today:

1. the first criticism derives from the fact that we de facto treat different cultures differently and we are insufficient in arguing why we do so;
2. the second criticism is that multiculturalism (including minority rights) is at odds with the idea of autonomy and common humanity which is underpinning human rights.

The conceptual tools: culture, diversity, identity and human rights

When writing on the issue some ten years ago, I found that the very concept of culture is problematic as it leaves very many questions open. At the time my main argument was, and still is, that minority protection in international law is grounded on three main distinct justificatory arguments:

- as a conflict prevention and peace preservation effort;
- as tool for the preservation of cultures;
- as a necessary complement to classical individual human rights, in order to ensure the equality and self-fulfilment of individuals, i.e, human dignity.²

These threefold justificatory grounds are already infusing tension within the system of law since they pull to different directions in concrete situations. Security considerations may lead to limitations of individuals rights as we very well know after a few years of ‘war on terror’. Acceptance of practices presented as essential or traditional to a culture, such as not allowing girls to fulfil basic education, pose obvious threats and limitations to individual dignity.

However, the very concept of ‘a minority’ does not operate in a vacuum and is often the result of the juxtaposition of the term to other concepts such as ‘indigenous peoples’, ‘citizens’, ‘non-citizens’, ‘immigrants’. But also to concepts such as ‘woman’ and ‘man’, handicapped, worker, or homosexual. All these collective identities are constituted through the social

² A. S. Åkermark, *Justifications of Minority Protection in International Law*, 1997.

construction of boundaries, which allows a distinction to be made between those who belong and those who do not, say Eisenstadt and Schluchter.³ There is thereby a constant dialectic between those defining and those who are defined and self-defined. Categorisation and hierarchisation are undoubtedly methods for the distribution of rights and resources and as such may have as a consequence the marginalisation of groups and individuals and often their exclusion from power.

What then is this culture that is to be preserved and protected? For those of you who have already done your categorisation of my speech and perhaps even start being disappointed that this is going to be only post-modern political theory stuff, let me then turn to Article 5 of the Framework Convention for the Protection of National Minorities.

Article 5, even though it does not explicitly define what is a minority, speaks of the ‘essential elements’ of the *identity* of minority members, ‘namely their religion, language, *tradition and cultural heritage*’.

Of those elements language has been granted a privileged position in law as marker of identity. Perhaps this is so in order to bypass the obvious risks in defining ethnicity and minority on the basis of blood-transmitted common ancestry, while not falling into the ambiguity of a reference to ‘culture’. After all, while some of us could imagine a perfectly happy life without practicing any religion or claiming any particular ethnicity, we all need to use a language both in the private sphere as well as in public affairs.

Article 6 FCNM makes though further reference to the need of ‘*intercultural dialogue*’, while Article 9 obliges Parties to adopt ‘adequate measures in order to facilitate access to the media ... in order to promote tolerance and *cultural pluralism*’. (emphasis added)

Culture can be perceived as an evolving system of values, beliefs, attitudes and practices for ‘making sense of the world’.⁴ But it can also be perceived as a constant, homogenous and rigid set of such values and practices. The trickiest of arguments surrounding culture and identity is the (often) unbearable weight of history. As we saw just above there is a link in the

³ Introduction in S. N. Eisenstadt, W. Schluchter, B. Wittrock (eds.), *Public Spheres and Collective Identities*, 2001.

⁴ As inspired by Ulf Hannerz, *Cultural Complexity*, *Studies in the Social Social Organization of Meaning*, 1992.

logic of the FCNM, and indeed of most minority debates, between culture and tradition or heritage. Very often this link is even stronger: there is a link between *culture, history and territory*. This is also evident in provisions such as Article 10, para. 2 on the right to use the minority language in contacts with administrative authorities or Article 14, para. 2 concerning minority language education in the FCNM. Both provisions refer to ‘areas inhabited by persons belonging to national minorities *traditionally or in substantial numbers*’.

This account and simplification ignores of course the fact that the borders of territories change regularly, the fact that people do move voluntarily or involuntarily and that many of our countries who are now considered as immigrant receiving were big emigration societies less than a century ago. The territorialisation of solution does not seem to be a good answer.

So now the difficult questions appear. *If we protect minorities for the sake of culture mainly, why then is the culture of old minorities more valuable and protection worthy than the culture of recent, and perhaps more vulnerable, immigrants?* The argument of consent, proposed by Will Kymlicka, does not seem sufficient and it does not sound at all politically correct. Many migrants feel forced to move to another country for a variety of reasons and many do not consent at all to the idea of abandoning their original identities. So why should they have lesser rights? Why do our liberal democracies, or at least most of them, accept readily the obligations of the FCNM but reject the obligations of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) which *inter alia* requires respect for their cultural identity (Article 17, para.1)?

One possibility would be to argue that history matters. If then history matters, how does it matter? I believe that this is one point where we need further thinking: are we proposing an argument of the special responsibility of states towards those that have lived within its boundaries for a long time? But most of our states have not existed for all that long! Are we proposing that there is a compensatory element? Because states have suppressed minorities for a long time they now need to make up for past injustices, the argument goes. The risk exists of course that this compensatory spiral can be driven long back in history and in between all kinds of groups all claiming to be ‘native’ and ‘autochthonous’.

Am I then asking you to abandon the idea of collective identities and of culture? No, this is not my intention. I just wish to draw your attention to the historical usages of the term

‘culture’ in late 19th century, the peak of colonization, when Sir Edward Burnett Tylor, the ethnologist, defined culture as the ‘complex whole which includes knowledge, belief, arts, morals, law, customs and any other capabilities and habits acquired by man as a member of society’. In contrast when the Western colonizing powers wished to describe themselves they use the term ‘civilised nations’ as we all know very well from the provision on the sources of international law in the Statute of the International Court of Justices and its predecessor the Permanent Court of International Justice. So culture emphasises difference, and perhaps even inferiority.

The struggle between similitude and difference

What are then the conceptual tensions between multiculturalism and liberal individual autonomy? Well this is indeed a well rehearsed subject, for instance in Brian Barry’s *Culture and Equality* (2001). The starting point here is that equality and non-discrimination assume that people are inherently alike, that there is at least a potential or hypothetical equal status between individuals. This idea of a common humanity is also a core underpinning of the entire human rights project. It is not a coincidence that John Stuart Mill used the vocabulary of human rights in the context precisely of the abolition movement. Slaves are like us, slaves are ‘human beings, entitled to human rights’.⁵

By contrast multiculturalists start off from the position of difference and, in most cases, assume that complete equality is by definition impossible. The struggle between ideas of similitude and ideas of difference is, I would argue, the main reason why there is a perception of tension between multiculturalism and human rights. The universalistic similitude of human rights does not accept the fundamental otherness accepted in multiculturalism. Human rights universalism assumes, further, that there is a universal truth, that is, a common, even of minimal, understanding of human dignity. Multiculturalism can be seen as the reaction to the post-Enlightenment rejection of a single truth. And this rejection happened to coincide historically with and gain force out of the anti-colonisation movement.

⁵ As cited in Appiah, loc. cit., 145.

The concrete results of the struggle between similitude and difference can also be seen in the diverging responses states as well as international human rights organs give to the headscarf problem. Some European countries do not introduce any legal restrictions, others introduces only in primary education, some limit only headscarves covering the entire face others prohibit any kind of religiously tainted symbols.⁶ In the Leyla Sahin case the European Court of Human Rights accepted that the principle of secularism was so fundamental for Turkey that the prohibition of the headscarf among university students was acceptable and not in violation of the right to religion or the right to education of the ECHR.⁷ In a similar case concerning Uzbekistan, the Human Rights Committee argued that the freedom to manifest one's religion had been violated.⁸ So multiculturalism must be in crisis if so different answers are given to the same basic question. What is interesting about the headscarf debate is that it is a microcosmos of the arguments concerning multiculturalism. What is striking, however, I find in the arguments of both organs is that the importance and contextualisation of particular rights for particular individuals is absent. There is no narrative in either cases of the perceived importance and relevance of different options for Sahin and Hudoyberganova. It is almost as if these cases were argued while the applicants were completely absent. The only exception to this is the dissenting opinion of Judge Mrs Tulkens who enquires about the effect of the measure on the right of the applicant's rights to education.

Diversity

The three quotes below represent cornerstones of western political and legal theory and thinking on issues of diversity and multiculturalism:

1. But the inclinations of men are diverse, according to their diverse Constitutions, Customes, Opinions; ... Whilst thus they doe, necessary it is there should be discord, and strife: They are therefore so long in the state of War, as by reason of the diversity of the present appetites, they mete Good and Evill by diverse measures.

⁶ D. McGoldrick, Human Rights and Religion. The Islamic Headscarf debate in Europe, 2006.

⁷ Leyla Sahin v. Turkey, European Court of Human Rights, Grand Chamber Judgment 10 November 2005 (Chamber Judgment 29 June 2004).

⁸ R. Hudoyberganova v. Uzbekistan, Views of the Human Rights Committee, 5 November 2004.

2. If it were only that people have diversities of taste, that is reason enough for not attempting to shape them all after one model. But different persons also require different conditions for their spiritual development; and can no more exist healthily in the same moral, than all the variety of plants can exist in the same physical atmosphere and climate.
3. Human plurality, the basic condition of both action and speech, has the twofold character of equality and distinction...Human distinction is not the same as otherness [...].

The quotes belong in turn to Hobbes, Mill and Arendt.

Hobbes takes for granted that diversity creates conflict. For how are we to live in a society where there is no consensus about the good life? Hobbes put the question long before we ever came to reflect about our multicultural societies.

Mill, on the other hand, utilises the language of nature, as he often did, in arguing that diversity in nature and by consequence among humans is perfectly normal and all we need to do is to create differentiated conditions to meet the needs of different individuals. Both Hobbes and Mill operate at the level of individuals.

Hannah Arendt is more complex. In adopting an Aristotelian point of view she emphasises action and speech. In acting and speaking, men and women show who they are, reveal actively their unique personal identities and thus make their appearance in the human world, she argues. Humans are distinct and unique but they reveal their uniqueness through social interaction, in defining and responding to the question about identity. The answer to the question 'Who are you?' necessitates a narrative, a story identifying and distinguishing the person speaking. What is interesting then is creating space for such narratives to be told, and listened to.

Final remarks

All this sounds strangely abstract perhaps. In fact, it has immense consequences for the solutions we adopt in law. And law at the moment is shifting its emphasis I believe. From the original model of tripartite justificatory grounds of minority protection (equality – culture – conflict prevention) that I outlined earlier, it is turning into a four point platform with the new

fourth point being increasingly at the heart of debates. The fourth point is democratic decision-making and political participation. So, as has been said, the politics of recognition push us back to the recognition of politics. It is then not a coincidence that participation is one of three thematic areas of interest identified by the Advisory Committee of the Framework Convention – the other two being education, the arena par excellence of multiculturalist debates, and media which is again closely related to the ability to tell stories - nor that many studies are conducted at the moment by academics, governments and international organisations alike on issues of participation of minorities, immigrants, and non-citizens. Nor is it a coincidence that in a recent affirmative action case (*Grutter v. Bollinger et al*, 2003) the US Supreme Court stresses that affirmative action in higher education is crucial in the preparation of a diverse body of students not only for work but for citizenship.

As we could not agree whether there is a universal metaphysical truth, we need conversation in order to understand the values and preferences of others and negotiation in order to find common points of experience and values. Some would say that this is an expression of the proceduralisation of human rights. Instead of defining a priori what a human right is, we establish the procedures necessary to define what human rights are. Together with Arendt and Appiah I would argue that even if the commonality in human nature is limited to the ability to give accounts of narratives, this is not too little at all. It allows us to realise, what Amartya Sen has recently described as the ‘illusion of unique identity’ and how it is more divisive than the universe of plural and diverse classifications that characterize the world in which we actually live. For me as a lawyer this presents an agenda for research and action: which legal and political solutions promote multiple identities? Multilingual education, mixed marriages, dual citizenship, free movement of persons? Which human conditions allow for complex narratives to be told? Good and tolerant forms of education? Inclusive participation in private as well as in public life? Public service media accommodating least resourceful voices? The agenda is ours to define.

Turning for a final time to the original question. Is there a crisis of multiculturalism? Yes. Both because we care too much about cultural identities and because we care too little about them.