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# Identity conflicts, human rights and the crisis of multiculturalism in Europe: from politics to the courts

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***Abstract***

Across Europe, courts play a central role in dealing with identity-driven conflicts across entrenched socio-cultural divides. Many of these controversies are seemingly religious disputes, involving the interpretation of individual rights. Judges are presented with what they see as a familiar legal challenge of demarcating the legitimate exercise of rights and assessing the grounds for accommodating or restricting a given expression. Yet, there is much more at stake in these disputes. This paper traces the so-called ‘crisis of multiculturalism’ in the rhetoric and political practice in many countries highlighting its influence in the tendency to seek accommodation through litigation. It inquires into the prospects of this strategy, pointing out the limitations courts face when dealing with identity conflicts pertaining to minority groups traditionally disadvantaged in mainstream political processes. The paper cautiously concludes that a shift towards more participatory political processes can foster the understanding necessary for mitigating identity conflicts.

***Keywords***

crisis of multiculturalism, minority rights, judicialisation of identity conflicts

***Author’s biographical note***

**Neus Torbisco Casals** is Professor of Law at Pompeu Fabra University (Barcelona) where she teaches courses relating to legal and political theory and human rights. She holds a doctorate in law from this University (2000) and she was granted a postdoctoral Hauser Research Scholarship at New York University School of Law. She has also held several visiting positions in Europe and North America, including the University of Ottawa and Queen's University (Canada) the Università Degli Studi di Siena (Italy) the University of Puerto Rico, the London School of Economics and, more recently, she has been a visiting professor at Harvard University School of Law. She is interested in legal and political theory generally, in especial, feminist jurisprudence, antidiscrimination law, multiculturalism, nationalism and human rights law (especially cultural and minority group rights). She has published several articles and book chapters on these topics and presented papers at national and international academic conferences. She is the author of *Group Rights as Human Rights. A Liberal Approach to Multiculturalism* (Springer, 2006)

## Introduction<sup>1</sup>

Identity is at the heart of individual and collective life. This is perhaps the ultimate reason for the enduring political and legal battles over cultural recognition and accommodation in contemporary democracies. Over the last few decades, minorities around the world have challenged the legitimacy of constitutions, laws and public policies on the grounds that they marginalise, fail to recognise, or are incompatible with their cultural, linguistic, religious or other identities. Take, for instance, the debates in Europe and North America about whether the cultures of non-Western immigrant groups, or of native peoples, should be explicitly recognised in the public sphere. A significant number of claims are raised as *exemptions* to generally applicable regulations in order to accommodate a particular practice or custom. This is usually the case of indigenous people's claims to hunt or fish in their ancestral territories, or of demands raised by members of religious minorities to express their identity by wearing religious attire beyond the private realm. When granted, such exemptions might be represented as discreet immunities or special arrangements permitted out of pragmatism - as a means for preventing social conflict, for instance - or as expressions of a weak form of toleration based on prudential reasons<sup>2</sup>, thus falling short of more substantial forms of group recognition capable of subverting the normative order.

However, the intensification of these demands as part of the increasing politicisation of identity issues reveals the limitations of this approach, or so this article contends. Deep disagreements regarding the status and rights of ethnocultural minorities, the meaning of citizenship and, indeed, the role of the democratic state in multicultural societies are played out in those disputes that have proved extremely divisive, even within the liberal democratic tradition. This impact has become especially apparent in European cultural wars surrounding the right of Muslim girls and women to

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<sup>1</sup> I am grateful to participants at the Faculty Workshop at Harvard Law School, where a very preliminary draft of this paper was presented during a visiting stay. For their insightful comments and discussion of earlier versions or parts of the paper I wish to thank John C.P. Goldberg, Nico Krisch, Patti T. Lenard and participants in the Inaugural Conference of the International Society of Public Law, organised by the European University Institute, the New York University School of Law and the University of Florence.

<sup>2</sup> The concept of toleration is notably contested. A toleration-based approach to the demands of identity, which tries to engage the most common understandings within the liberal tradition, will be further examined later in this article. For the time being, by "weak toleration" I mean a non-principled form of toleration that falls short of a robust ideal of mutual respect or positive recognition. Hence, it is more akin to what Michael Walzer (1997: 10) identifies as the form of toleration that emerged out of the religious wars in the sixteenth and seventeenth centuries as a simple *modus vivendi*, namely a "resigned acceptance of difference for the sake of peace".

wear the headscarf or other religious attire in schools and, more generally, in the public sphere of secular countries<sup>3</sup>; also, in confrontations over the presence of religious symbols in state buildings<sup>4</sup>, the content and language of the educational curriculum in multiethnic societies, or the use of religious or customary norms (and tribunals) to resolve community or family disputes<sup>5</sup>.

To be sure, the mobilisation of identity groups, particularly of minorities, to advance their claims is not a new phenomenon. It is rather the *expansion* of identity-driven disputes in today's constitutional democracy that makes it difficult to deal with these claims on a discretionary *ad hoc* basis, without a conscious principled philosophy that grants enduring solutions. A broader public debate, nonetheless, has been evaded in many countries<sup>6</sup>. To a significant extent, this is due to the continuing belief in an integrationist conception that assumes that, ideally, ethnic and national minorities should assimilate into the mainstream national culture to become equal members of society. This model stresses generality – that is, the need for common laws and regulations to which all citizens should be subjected – in order to preserve equality before the law as well as the coherence and integrity of the constitutional order. Heterogeneity and the fragmentation of the legal system are largely seen as dysfunctions, which may be exceptionally permitted but ultimately need to be eradicated.

But beyond the lasting influence of this monistic (uniform and hierarchical) state centred system of rules at the domestic level, identity claims also remain puzzling to political analysts who had assumed that globalisation and democratisation would

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<sup>3</sup> The headscarf debate has been particularly salient in continental European legislatures and courtrooms, most especially in France, but also in other European states. As I will show later in this article, the increasing number of proposals to ban this garment is emblematic of the crisis of multiculturalism in Europe and of tensions between Muslim communities and secular societies.

<sup>4</sup> In Europe, both the famous German (Bavaria) crucifix case, (BVerfGE 93, 1 1 BvR 1087/91 *Kruzifix-decision*) and the Italian Lautsi case, (Lautsi v. Italy, no. 30814/06, Judgment of March 18, 2011) finally adjudicated by the ECtHR, involved a dispute over whether religious minorities or secular families are entitled to claim the removal of Christian symbols from classrooms of public schools.

<sup>5</sup> The discussion is notably tense in relation to Islamic Arbitration Tribunals (also called 'Sharia Courts') and the application of sharia rules in the United States and in the Britain (visit: <https://www.aclu.org/religion-belief/bans-sharia-and-international-law>; <http://www.independent.co.uk/news/uk/home-news/islamic-law-to-be-enshrined-in-british-law-as-solicitors-get-guidelines-on-sharia-compliant-wills-9210682.html>). On the other hand, the status of customary law and of religious codes has been the focus of heated debates as well in New Zealand, Australia or South Africa.

<sup>6</sup> This is the case in most Western European countries (except for the UK) which provides the frame for the following discussion. In other parts of the world, such as Canada or the United States, as well as in the emerging democratic countries such as Brazil or India, the high levels of diversity and internal cultural heterogeneity are officially acknowledged as part of the ethos of the polity

significantly weaken identity ties, thus favouring cosmopolitan ideals and reducing the salience of ethnocultural strife<sup>7</sup>. As is increasingly acknowledged, this was a misguided assumption. Somehow paradoxically, just as Western societies have gradually become more homogeneous across states and cultures, and identities are viewed more as chosen than as innate or imposed, individuals tend to identify more than ever with their particular communities and reclaim their distinctive value. Hence, in contrast with the prevailing narrative of global integration, as assimilation in practices and values, processes of globalisation have fuelled a process of increasing political and legal fragmentation. As current developments in Catalonia and Scotland illustrate, even demands of secession have regained momentum in a context of supranational integration and de-territorialisation of politics. National minorities, as well as indigenous groups with a distinctive culture, language or history, often perceive the expansion of a globalised culture as a veiled hegemonic project, which is not neutral, but bears the character of the dominant groups and poses an existential threat to their own cultures. By seeking a higher degree of political autonomy, through new forms of power sharing at the infra and supra-state levels, they try to resist coercive forms of assimilationism<sup>8</sup> and assert their right to shape the institutions (global and local) that rule them<sup>9</sup>.

Identity cleavages are more apparent in an age of intense inter-cultural encounters and connections, that have virtually transformed society as they are, too, the relative privileges or vulnerabilities experienced by members of different groups. International immigration and refugee flows – both significant side effects of globalisation – have further accentuated identity politicisation by altering the composition of Western societies and potentially disturbing their core values.

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<sup>7</sup> Such widespread assumption can be traced to the scheme of values inherited from the Enlightenment and has been also influenced by modernisation theories, which maintained that once industrialisation and individual emancipation linked people together across states and continents, ethnonational consciousness and particularistic attachments would be reduced to a minor role. On these links, see M. Keating and J. McGarry (2001: 4-5); W. Connor (1994: 28-39); W. Kymlicka (2001: 204-258).

<sup>8</sup> I borrow this term from Eamonn Callan (2005: 471-500) who distinguishes the forms of assimilation that globalisation inevitably brings about, including cultural hybridity and the interpenetration of cultural practices, from “assimilationism” which expresses an attempt of the dominant group to entrench its power through a selective policy intended to impose a given culture or forms of life.

<sup>9</sup> Precisely because the demands of self-government by stateless nationalist movements in the West are largely grounded on liberal democratic grounds and appeal to a civic, secularized notion of nationality, rather than to a distinct ethnicity, they are difficult to dismiss. This is especially apparent in the Catalan discourse on the *dret a decidir* (“right to decide”) that grounds the claim of the minority nation to hold a sovereignty referendum and has been crucial to mobilise society across socio-economic, age and political lines.

Democratisation and human rights, on the other hand, have provided a more congenial environment for the proliferation of group demands that can be seen as part of what Charles Taylor and Axel Honneth have called ‘struggles for recognition’ (Gutmann, 1992: 25-73; Honneth, 1995).

As an effect of these developments, features such as ethnicity, gender, nationality, sexuality or religion have acquired prominence in public debates, as they are intentionally vindicated not only to reflect core traits shaping personal identities (that is, the way in which people conceive of themselves) but also to express ethical and political *commitments* (that is, normative views and dispositions towards behaving in certain ways or subscribing to certain convictions, thus influencing agency<sup>10</sup>). To be sure, race, gender and ethnic or sexual identity are social constructs, rather than biological traits. Yet, as Kwame Anthony Appiah argues<sup>11</sup>, these identities retain an ascriptive component that needs to be acknowledged– i.e., people are often identified and treated on this basis, *whenever they want this or not* - which is why identities and labels come to have psychological and social effects and should thus matter for ethical and political life. These normative commitments associated with identity shape the type of claims that frame this inquiry, which seeks to revisit a set of crucial concerns and misconceptions about group-differentiated citizenship that retain a central role in predominant political and legal approaches to identity-driven conflicts. These approaches, as I explain, remain mostly sceptical about expansive conceptions of human rights encompassing not just the individual rights of members of minority groups, but also group rights aimed at asserting a communal identity or culture beyond the private realm. The roots of this hesitancy can be found in the profound influence that the classical liberal model of engagement with diversity, based on toleration, has been able to maintain, despite the strong objections raised by multicultural and feminist critiques. At least in Europe, which provides the main focus of the subsequent discussion, the alternative difference-based approaches that had started to influence the legislation and policies of some countries during the late 1980s and 1990s seem to be losing the political battle.

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<sup>10</sup> This is inevitably linked to the collective identification aspect of identity, which confers significance to individual life plans and therefore carries ethical weight. The formation of identities, especially of minority identities, has usually being the product of stereotyping and reifying certain traits, natural or conventional, with demeaning purposes. See K. A. Appiah (2000: 41-53).

<sup>11</sup> 2005. See, too, his book *The Ethics of Identity*, (2005: 66).

One main challenge in this process has been to reconcile the ethics of identity with other fundamental values, such as social welfare and, more generally, human rights. The demands of identity, and the trend towards legal and political fragmentation, seem to call into question the universalist drive of the classical liberal model that inspired the human rights doctrines. Although liberal defences of multiculturalism stress that cultural and identity claims are (and should be, in order to be legitimate) compatible with the core ethos that underlies human rights, there has been a growing concern over the perceived trade-offs between protecting diversity and promoting human rights. This has resulted in a “progressive’s dilemma”, in an expression by David Goodhart<sup>12</sup>, which lurks behind the lack of a legal consensus over minority rights (as collective legal rights that should strengthen the protection of minorities against majority rule) and the renewed political hostility towards accommodationist policies.

The remaining discussion tries to substantiate this account, with a particular focus on the European context, and assess its impact in the legal realm, especially the repercussions of a turn towards courts for the vindication and protection of minority rights. By exploring the limitations of the prevalent individual rights paradigm, the article seeks to lay the ground for an alternative framework for dealing with the tensions described that is better able to integrate the universal in the particular. Some topical European disputes, especially the controversy over whether Muslim girls and women should have the right to wear traditional headscarves in public spaces, will be explored in order to illuminate the pitfalls of the dominant approaches.

With this broader purpose in mind, the article proceeds in four parts. It starts with a brief conceptual elucidation aimed at identifying two alternative lines of justification of group-differentiated rights that have emerged from the first wave of theoretical scholarship on multiculturalism (section 2). I then turn to explore the roots of the prevailing discontent with accommodationist policies and the way this is impinging on the status and rights of ethnocultural minorities (section 3). The so-called “retreat” from multiculturalism adds to the increasing perception that cultural minorities have lost the *political* battle, and this informs a trend to seek accommodation and recognition through litigation. The third part thus examines the legal impact of the political retreat and the limitations that courts face in dealing with identity-driven conflicts (section 4). While minorities tend to over-estimate what can be achieved by judges, important questions arise as to whether and how public

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<sup>12</sup> Goodhart (2004) reproduced an expression used by conservative UK politician David Willetts.



courts can engage the multifaceted dimensions of conflicts of culture involving multiple and asymmetrical relations, how they can avoid the reproduction of ethnic and racial biases, and to which extent they should assume a central role in resolving these conflicts. Starting from a critical standpoint on the limits of law, the concluding part of the article reclaims the political space as the preferable domain for tackling cultural claims and identity conflicts.

### **1. Conceptualising Normative Multiculturalism**

The so-called ‘politicisation of identity’ brings to the fore political demands that people raise not merely as individuals but as bearers of a particular identity; that is, not as members of a polity but as members of a *particular* identity group within this polity. As indicated, regardless of how it is formed or changed, identity has a crucial impact on people’s life. Acknowledging its social and psychological effects is crucial to comprehend why individuals usually care about their attachments and identifications and, therefore, why identity becomes morally and politically relevant. Liberal democratic theories have been criticised for failing to take multiculturalism (and the demands of identity) seriously, seeking to construct a state that ignores the particular affiliations and constitutive attachments of citizens and relies, instead, on a homogeneous idea of citizenship that, in actual fact, tends to be biased against non-mainstream socio-cultural groups.

The term ‘multiculturalism’ is extremely fluid. Beyond conveying the pervasive *fact* of diversity (ethnic, cultural, linguistic, religious) in contemporary society<sup>13</sup>, it has accrued a broad range of theories and policies that confer normative significance to identity and cultural claims raised, most often, by minority groups. Throughout the 1990s, *normative multiculturalism* emerged as a distinctive stance to confront conflicts of culture and identity against the prevailing liberal model. The ground-breaking work of political theorists such as Will Kymlicka, Charles Taylor or Iris M. Young emphasised that, while traditional liberal approaches had been productive at promoting democracy and counteracting socio-economic inequalities, they had been less successful

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<sup>13</sup> Race, ethnicity, nationality, religion and language are the most prominent traits in defining multiculturalism, as they often correspond to older and persistent identity cleavages. However, immigrant communities and sexual minorities raise similar demands of recognition and are represented in progressive multicultural theories, too. For a categorisation and analysis of these demands, see Kymlicka (1995) and Modood (2013).

at overcoming cultural injustice (Kymlicka, 1995, Young, 1989, 1990 and Taylor, 1992). A central contention is that states can harm their citizens not just by denying members of minorities their civil, economic and political rights, but also by trivialising or ignoring their identities in the public sphere. This is the type of impairment that Nancy Fraser (1998) and Charles Taylor identified as a failure of recognition. According to Fraser traditional debates on redistributive justice tend to conceal this harm because their main focus is placed on identifying and remedying socio-economic injustice. Instead, cultural injustice is primarily linked to status hierarchies, which are not always reducible to economic ones but rooted in social patterns of interpretation and communication, including cultural domination, stereotypical or demeaning representations and general disrespect towards minorities.

In the view of critics, the conventional liberal model of citizenship tends to ignore this injustice by recreating a narrative of a single national culture that condemns newcomers to a second-class citizenship and reinforces the disadvantage of historically marginalised minorities. Granting group rights<sup>14</sup> to minority cultures, alongside the general rights of citizenship, is seen as key to remedying such failure, thus offering a rationale for legislation and public policies intended to accommodate difference and promote the long-term viability of minority cultures.

To be sure, the ethical grounds that justify group rights remain contested. This is a highly intricate debate that I cannot properly address here<sup>15</sup>; for our purposes here, it is important to distinguish between two distinct versions of the theory that are usually in tension in disputes involving identity claims. On the one hand, the more *conservative* accounts envision the liberal quest for universal human rights and objective principles of justice as deeply misguided and are inclined to prioritise group preservation (or “cultural survival”) over individual rights. This justification is typically based on a view of morality as historical and contextual, rather than universal. Ethnocultural groups are

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<sup>14</sup> Much has been written about group rights in recent years, and yet contestation about this category persists. Commentators disagree, among other issues, about whether it makes sense to think of a collective entity as the bearer of ‘human’ or ‘moral’ rights and, if so, which sort of group qualifies as a potential rights-holder. I shall not embark on the task of exploring this and other difficult conceptual questions here, as I have tried to do it in my previous work (Torbisco Casals 2006). For the purposes of this article, I assume that certain group-differentiated rights for minority cultures can qualify as human rights provided that their ultimate justification is connected to basic individual interests that members have in participating and reproducing their own culture (rather than on some irreducible interests attributed to the culture itself). The category of group rights is thus compatible with an individualised ascription to group members. The relevant contrast here is with individual rights that are justified by appeal to the humanity or citizenship condition and tend to be universal across societies.

<sup>15</sup> I have tried to distinguish between different ethical justifications of group rights in Torbisco Casals (2006).

depicted in an essentialist fashion, as the primary source of meaning and identification for their individual members, and hence need to be protected. As a result, religious and cultural conflicts are often portrayed as involving a clash of incommensurable, non-negotiable values – freedom of choice versus traditionalism; individual equality versus cultural preservation and so forth - and cultural rights and accommodations tend to be defended as part of a broader relativist perspective. This picture seems to prevail in the often overstated and generally unfounded popular myths about the perils of recognising cultural diversity; yet it is difficult to find serious advocates of multiculturalism who rely on this line of argument.

In contrast, *progressive* variants of multiculturalism<sup>16</sup> start from the assumption that cultural and identity claims can (and should) be reconciled with the core ethos underlying human rights as moral rights, with its traits of inalienability, universality and inviolability<sup>17</sup>. While this conception usually rests upon a more communitarian view of the self as strongly influenced by socialisation in a given communities, its proponents remain committed to the centrality of individual human agency and critical reflection and thus they see multiculturalism as compatible with liberal postulates. On the other hand, cultures, and cultural affiliations and identifications, are conceived as fluid and, in themselves, do not provide justificatory reasons for performing legally prohibited acts, for instance. What matters, then, is not the change, or eventual disappearance, of a culture per se, but the nature of the process that leads to this result. The point is to ensure that members of minority cultures are not *coerced* to assimilate or to give up their commitments and efforts to preserve their institutions or languages. Finally, progressive defences of multiculturalism typically reject the more radical relativist or sceptical conception, placing the accent on the need to take social and cultural pluralism seriously.

The influential defence of the rights of minority cultures by Will Kymlicka provides a good illustration, as it recasts the recognition of difference as an implication, rather than as a negation, of the commitment to autonomy<sup>18</sup>. Likewise, Tariq Moodod justifies his support of the public accommodation of difference on an equality argument,

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<sup>16</sup> I borrow the notion of progressive multiculturalism from Malik (2010: 447-67).

<sup>17</sup> On the notion of human rights as moral rights, see Nino (1991).

<sup>18</sup> Participation in a 'societal culture', Kymlicka (1995: 75-93) argues provides the tools for understanding cultural narratives and values, and this, in itself, is a precondition for making meaningful choices about how to lead one's life – that is, for becoming autonomous. Hence cultures (and cultural survival) are *instrumentally* crucial for individual freedom, which he takes to be the foundational liberal value. Yael Tamir (1993), and Margalit and Raz (1990: 439–61) have defended similar arguments.

which he understands not just as equality of opportunity, or equal dignity, but as equal concern and respect for all groups that compose a society. As he argues, the distinctive feature of this conception of multicultural citizenship has to do with its aspiration to a higher degree of inclusion in shaping the public sphere (Modood, 2013).<sup>19</sup> The focus on group differences is thus not based on an essentialist representation of groups or on a commitment to their survival as separate entities, but mostly on their social and political significance. Also, acknowledging their existence is seen as key to identifying and confronting the relations of subordination and domination embedded in social relations and in political structures and institutions. Iris Marion Young's compelling defence of a "politics of difference" similarly relies on condemning what she sees as a form of *oppression*, consisting in the invisibility, misrecognition or false representation of minority identities in the public sphere. Such failure involves the establishment of the dominant group experience and culture as the norm, at the cost of marginalising minority groups (Young, 1990).

Overall, these "progressive" versions of multiculturalism offer a new grammar to assess the ethics of a broad range of contested identity demands: from the rights of indigenous peoples and linguistic or national minorities to the accommodations demanded by religious and ethnic groups. Its proponents commonly subscribe to a vision of the political community based on a commitment to recognising, rather than transcending, particularity, thus reinforcing its inclusive character in a non-uniform way.

## 2. Multiculturalism and Its Discontents

In a 2001 book entitled *Politics in the Vernacular*, Will Kymlicka, probably the leading theorist of multiculturalism, identified a growing consensus over what he actually dubbed 'liberal culturalism'<sup>20</sup>, an expression essentially denoting the progressive forms described, implying that the case for the rights of minority cultures had been successfully established: "The more cases we study, the stronger is the claim that ethnocultural justice cannot be secured by a regime of common rights" (Kymlicka, 2001: 47). Normative multiculturalism had won the day, Kymlicka argued, by

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<sup>19</sup> See, too, Phillips (2007), who argues that multiculturalism draws on a foundational idea of challenging group-based inequalities, despite her argument cautions against essentialist definitions of culture by outsiders and criticizes the misuses of culture in discourses that deny human agency.

<sup>20</sup> Kymlicka compresses in this term both liberal forms of immigrant multiculturalism and of self-government rights for minority nations and indigenous peoples.

successfully redefining the terms of the public debate, as there were not clear alternatives or principled objections to this position.

However, more than a decade later, the institutional implementation of the theoretical consensus detected by Kymlicka remains elusive. Especially from a legal and jurisprudential perspective, the remarkable turn in the political theory of the last two decades hasn't had the impact that proponents of multiculturalism might have expected. At the domestic level, there has been little positive recognition of the rights of minority cultures as valid legal rights (either in the form of rules or constitutional principles) capable of producing binding effects. There are only a small number of states that have specific references to multiculturalism and cultural rights in their constitutions<sup>21</sup>. Likewise, cultural rights, as group rights, have not yet been fully incorporated in International Human Rights Law as a distinctive legal category involving collective entitlements and tangible state duties<sup>22</sup>. Although human rights norms have played an important part in providing a framework for the claims of minority cultures, these claims tend to be seen as reducible to individual civil and political rights. To a significant extent, this reductionist line is based on a widespread hostility against the very idea of collective or group rights based on varied concerns, ranging from conceptual reservations to more political ones, including the supposed "provincialism" of group rights versus the "cosmopolitanism" of individual rights. Hence, human rights lawyers dealing with cultural or identity claims tend to frame them within the prevailing human rights norms that apply to everyone, such as freedom of expression, religion, association or the right not to be discriminated against.

To be sure, Kymlicka, as many others, took the expansion of accommodationist policies adopted in various multi-ethnic and multi-national democracies towards the end

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<sup>21</sup> Among these few the Canadian Charter of Rights and Freedoms of 1982 is worth mentioning, which explicitly refers to the preservation and enhancement of the multicultural heritage of Canadians (article 27); likewise, the South African Constitution (1996) recognises the right to participate in one's own cultural life. The recognition of indigenous rights both in international law and domestic constitutions are the most significant exception to the general reluctance to introduce the category of collective rights and minority rights (as distinct from individual human rights) in legal documents. Besides the great achievement that the adoption of the UN Declaration on the Rights of Indigenous Peoples represented in 2007, most Latin American countries underwent significant constitutional reforms since the early 1990s, introducing amendments to refer to the multi-ethnic character of the state, mostly to recognise the identities and rights of their indigenous populations. The most remarkable precedent was set by Colombia, a country that in 1991 introduced the then most extensive constitutional regime of ethnic rights. On the recent constitutional transformation in the region and its current challenges, see Uprimny (2001) and Sieder (ed.) (2002).

<sup>22</sup> However, indigenous rights provide a remarkable exception. See *supra* note 29. For a general discussion that identifies the few normative clauses in the international law of human rights that seem to attribute the rights directly to groups, see Wellman (2010)

of the past century as a proof of the success of that normative model. As a matter of fact, those policies had indeed gained considerable ground throughout the late 1980s and 1990s in countries such as Canada, Australia, Britain or the Netherlands, where a range of laws were adopted that intended to recognise difference and accommodate multiple identities in the public realm. This development came about mostly to face up the need of integrating new waves of postcolonial migration without drawing simply on assimilationist strategies – that is, requiring newcomers to give up their identity traits that distinguish them from the mainstream “national” culture - but also to meet the historic demands of indigenous peoples and minority nations. On the other hand, a number of multinational democracies have adopted asymmetrical forms of federalism, or have granted autonomous regimes to minority nations in order to accommodate their cultural claims<sup>23</sup>.

But the last decade has witnessed a significant backlash against that trend, as a number of sociologists and political analysts have increasingly noticed<sup>24</sup>. The retreat from multiculturalism - understood as a policy involving a variety of programmes and regulations aimed at institutionalising diversity- is particularly visible in Europe, even in countries such as Britain or the Netherlands, which had officially or semi-officially granted a special legal status or entitlements to minority cultures<sup>25</sup>. Indeed, take the case of the Netherlands, where publicly supported multiculturalist programmes had been central since the 1980s. The model started to be under pressure in the late 1990s, when the growing presence of non-Western immigrant communities, especially Muslim minorities, came to be represented as a threat. In an increasingly hostile context, the critique of both immigration and multiculturalism by some well-known intellectuals helped to validate the growing popular dissatisfaction, ultimately paving the road for the institutional setback<sup>26</sup>. At the outset, the popular discontent was mainly focused on

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<sup>23</sup> For a comparative assessment of this raising trend, see Seymour and Gagnon (2012).

<sup>24</sup> See, for instance, Joppke (2004: 237-57) and McGhee (2008) or Lesinska (2014).

<sup>25</sup> Beyond Europe, neoconservatives in the United States have rejoiced in this growing criticism, invoking it against opponents to tougher anti-immigration policies, such as those adopted in Alabama and Arizona. Even states such as Australia or Canada, where ethnocultural diversity is part of the nation’s founding myth and that the academic literature often take as paradigmatic examples of the success of multiculturalism are immersed in heated discussions about the relative merits and flaws of this model.

<sup>26</sup> In an essay entitled “The Philosophy of Human Rights” (1999) legal philosopher Paul Cliteur defends the superiority of “Western values”, including human rights, and portrays multiculturalism as an unacceptable ideology based on cultural relativism, which presumably leads to accept infanticide and the oppression of women. In 2000, another critical essay by a member of the labour party, Paul Scheffer, entitled “The Multicultural Tragedy” depicted multiculturalism as incompatible with democracy.

multiculturalism as a model characterised by an excess of toleration that runs the risk of producing an ethnically segregated society. Then two dreadful domestic events triggered the official endorsement of this discourse, which eventually led to the shift of policy. First, the murder of Pim Fortuyn – an independent candidate who came close to become Prime-Minister with a strong anti-immigration and anti-Muslim discourse<sup>27</sup> – during the 2002 national election campaign prompted the announcement of a substantial reform of the immigration policy by the newly elected cabinet. Although Fortuyn was actually murdered by a co-national<sup>28</sup>, the reform was seen as an essential step to counteract what he and his followers saw as an increasing *Islamisation* and *ghettoization* of society. Only two years later, the assassination of filmmaker Theo Van Gogh<sup>29</sup> by a Dutch-Moroccan Muslim contributed to legitimise and consolidate this shift of policy, even among those who had previously supported it. Following this incident, the Dutch Parliament introduced tighter restrictions to immigration and cancelled specific programmes designed to accommodate minority cultures.

The shift of discourse and policy in the Netherlands is not unique. The “failure” of multiculturalism has been vociferously announced across the continent and the process described has parallels in other European countries. There has been much political talk about the bigotries of multiculturalism turning into “a dangerous form of neglect and exclusion”, as Alan Duncan, the (at the time) Chair of the United Kingdom Commission for Racial Equality put it already back in 2004, in a declaration that caused major controversy (BBC, 2004). And yet, by 2011, the newly elected UK Prime Minister, David Cameron, openly challenged Britain's long-standing state-sponsored policy of multiculturalism as an “abysmal failure”, linking it to separatism and disintegration, rather than to plural inclusiveness and respect for plural identities and forms of belonging to the polity: “Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream. We’ve failed to provide a vision of society to which they feel they want

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<sup>27</sup> Fortuyn controversially claimed that Muslim culture had never undergone a process of modernisation and still lacked acceptance of democracy and women's and gay and lesbians rights. He also warned his fellow citizens that Muslims would try to replace the Dutch legal system with the sharia law.

<sup>28</sup> Fortuyn was actually murdered by a Dutch animal rights activist, who allegedly wanted to stop him from targeting the weaker parts of society.

<sup>29</sup> Van Gogh was murdered shortly after the release of his film *Submission I*, a publicly broadcasted movie based on a script by Ayaan Hirsi Ali, a native Somali who had been granted asylum in the Netherlands and became a prominent public figure because of her controversial statements about Islam. By using the literal meaning of Islam as the title of the film, Van Gogh wanted to transmit that, for women, uncritical submission to an Abrahamic religion means submitting to men. The film featured the stories of four women asking God to be released from domestic and social bondage.

to belong. We've even tolerated these segregated communities behaving in ways that run completely counter to our values.”<sup>30</sup>. Cameron called for a much more active form of “muscular liberalism” based on common values in order to counteract the rise of Islamic extremism and “home grown” terrorism.

In Spain, former President José Maria Aznar joined Cameron in condemning multicultural policies, which anyway had only been very timidly implemented in Spain in the previous decade. The new political leaders of Aznar's Popular Party, currently in power, have extended this critique to the decentralisation model constitutionally adopted in the late 1970s to accommodate national and linguistic minorities, which, they claim, have proved divisive, leading to an incremental dynamic of demands by national minorities to the point of threatening stability and solidarity. This belief has instigated the re-centralisation move that, in the view of critics, subverts the spirit of the 1978 Spanish Constitution<sup>31</sup> and has triggered massive protests in Catalonia<sup>32</sup>. In this region, the growing perception that the state's laws and financial regulations are being systematically used by the central government to encroach on the powers devolved to the Catalan institutions of self government has contributed to the socio-political expansion of claims of self-determination and secession<sup>33</sup>.

Somehow paradoxically, the hostility against the politics of recognition has been even proclaimed in countries such as Germany and France where, in actual fact, the multiculturalist model has never been officially adopted in any meaningful form. Still, Angela Merkel also joined the fashion and proclaimed the death of multiculturalism, which she misleadingly characterised as an attempt to build a ‘*multi-kulti*’ society consisting in living “happily side by side”, which had “utterly failed” in making

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<sup>30</sup> A full transcript of the 2011 speech of the UK Prime Minister, David Cameron, at a Security Conference in Munich is available at: <http://www.newstatesman.com/blogs/the-staggers/2011/02/terrorism-islam-ideology>

<sup>31</sup> One of the central features of the democratic transition of the 1970s was an agreement to overcome the centralized forms of government that had repeatedly failed in Spanish history, and recognize the self-government rights of historically oppressed national and linguistic minorities.

<sup>32</sup> In 2010, a gravely restrictive ruling of the Constitutional Court amended the Catalan Statute of Autonomy, which had been adopted in 2006 and endorsed by 70% of voters in a popular referendum in Catalonia. This ruling triggered a massive protest in Barcelona, with more than one million people in the streets, which set the grounds for a civic movement that claims the collective right of Catalans to decide their political future, which by now has gained enormous political and social resonance. A brief recount of the events (historical and recent) and issues that have led to the political movement in favour of secession is available at: <http://www.worldaffairsjournal.org/article/domain-spain-how-likely-catalan-independence>.

<sup>33</sup> This has revealed the limitations of the existing constitutional framework, which does not explicitly recognize the constitutive multinational character of the state and lacks mechanisms for the protection of cultural and linguistic rights. However, the main parties at the state level have strongly resisted proposals from Catalonia and the Basque Country to initiate a process of constitutional reform.



immigrants integrate into, and accept, the German national culture<sup>34</sup>. Former French President, Nicholas Sarkozy, made similar remarks, in a discourse aimed at justifying bans on Islamic veils as necessary to preserve secularism as a key element of French national identity, which was interpreted, as in Merkel's case, as an strategic attempt to please the rising number of far right conservatives within his own party<sup>35</sup>.

Recent developments in the European political scene, in particular the unprecedented success of the Front National of Marine Le Pen in the latest French elections<sup>36</sup> and the growing popular support of far-right anti-immigration parties in countries as Norway<sup>37</sup> shows the resonance of nationalist and extremist discourses. An initiative by the Rights, Equality and Diversity European Network<sup>38</sup>, co-funded by the European Union, displays the atlas of racism and discrimination in 17 European countries. Its more recent report states the alarming rise of organized far-right extremist groups, which are becoming influential in mainstream political parties and institutions across Europe and have lead to an increased diffusion of stereotypes, racism and xenophobia in the public sphere<sup>39</sup>.

As it is apparent, the common concern underlying the political statements and processes described is that public policies designed to encourage positive respect for the

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<sup>34</sup> This controversial statement was pronounced on October 2010. German Chancellor Angela Merkel went on to declare that it had been an illusion to think that Germans and “foreign workers” could “live happily side-by-side”. “We kidded ourselves for a while”, Merkel said, “that they wouldn’t stay, but that’s not the reality”; according to Merkel, the tendency had been to say “let’s adopt the multicultural concept and live happily side by side”, but this concept has “failed utterly”, she concluded, without elaborating further on the nature of the failure. Domestically, Merkel’s speech was interpreted as a shift in the previous, more open, approach to immigration, which positioned herself closer to the growing conservative section of her party. It also aligned her, intellectually, with the stance developed by Thilo Sarrazin in a controversial book entitled *Deutschland schafft sich ab* (“Germany is Doing Away with Itself”) that became a huge bestseller in 2010. Sarrazin (a German SPD politician and former member of the Executive Board of the Deutsche Bundesbank) describes Arab and Turkish immigrants as unwilling to integrate, denounces the failure of Germany’s post-war immigration policy and, with the exception of high skilled migrants, advocates for a restrictive immigration policy.

<sup>35</sup> For an interpretation of the French first *affaire du foulard* that stresses the crucial role of the growing popularity of Jean Marie Le Pen’s National Front Party and the increasing racist and xenophobic attitudes in the event leading to the enactment in 2005 of the law that banned Muslim headscarves and other “ostentatious” religious symbols from public schools, see Wallach Scott (2007).

<sup>36</sup> For a compelling analysis of the rise of right-wing populism in the context of European integration and globalization, which has brought into question prevailing assumptions about a “multicultural” Europe, see Berezin (2009).

<sup>37</sup> Especially since the horrific acts attributed to Norwegian citizen Anders Breivik appear to have been motivated by a hatred of Muslims and a distaste for cultural diversity, some political analysts find the 2013 electoral results disturbing; in the words of a commentator for The Guardian: “the country has not dealt with the roots of Breivik’s crimes”. Available at: <http://www.theguardian.com/commentisfree/2013/sep/10/norway-lurch-to-right>.

<sup>38</sup> Available at: <http://www.red-network.eu/?i=red-network.en.home&view=racismAtlas>

<sup>39</sup> Available at: <http://www.red-network.eu/?i=red-network.en.library.369>. For a persuasive account of how multiculturalism has come to be seen as a failed experiment in Europe, and its relation to laundering forms of racism, see Lentin Titley (2011).

languages, symbols and traditions of religious and cultural minorities have failed to encourage the integration of their members in the mainstream society. Instead, it has promoted an incremental spiral of self-government claims in the case of national minorities and incited immigrants to recreate their own separate cultures, thus threatening social cohesion and security by creating “parallel societies” capable of producing internal enemies.

Of course, the aftermath of 9/11 – especially the threats associated to global terrorism - and the unremitting economic crisis are central factors influencing this negative view of multiculturalism as “balkanising” the liberal state<sup>40</sup>. In Europe, the London and Madrid bombings have strengthened conservative agendas that support the hardening of immigration policies and the securitisation of relations between the state and minorities, deflecting attention away from questions of inter-cultural justice and group equality. For this reason, critics tend to see this rhetoric as the result of neo-conservative, extreme-right and populist tendencies that exploit the fear of Islam and the unremitting economic crisis to justify a step back into forms of assimilation into common values that feed the return of nationalist, anti-immigration and xenophobic discourses. As Alana Lentin and Gavan Titley put it: “the range of processes of social dissolution and varieties of anomie that multiculturalism is held responsible for is scarcely credible (...). As a loose assemblage of culturally pluralist sentiments, aspirations and platitudes, or more darkly as an euphemism for lived multiculturalism, it provides a mobilising metaphor for a spectrum of political aversion and racism that has become pronounced in Western Europe” (Lentin and Titley, 2011).

### ***The Retreat from Multiculturalism: Real or Rhetorical?***

As indicated above, the discourse about multiculturalism is not homogeneous and coherent. Certainly, on closer inspection, most of the statements quoted above are based on a caricatured version that hardly captures the progressive variants supported by its most serious advocates. Instead, the predominant political narrative associates it to the conservative model earlier described, which seems to involve the full abdication of the state’s duty to promote a vision of the civic society in favour of an uncritical celebration of diversity cultivated by irresponsible cultural relativist supporters. In a report recently published by the Migration Policy Institute, Kymlicka himself criticises

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<sup>40</sup> Certainly, these are factors that Kymlicka and other theorists of liberal multiculturalism could certainly not anticipate writing in the late 1990s.

this view of multiculturalism “as a feel-good celebration of ethnocultural diversity” (Kymlicka, 2012) that takes familiar cultural markers of ethnic groups and treats them as authentic practices to be preserved by its members and consumed by the rest of citizens. This, he argues, is a misleading picture that ignores the normative dimension of a doctrine that emerges as part of the human rights movement and proposes “new models of democratic citizenship” that require “both dominant and historically subordinated groups to engage in new practices, to enter new relationships, and to embrace new concepts and discourses” (p. 4-8). Furthermore, drawing on some recent policy research analysis, Kymlicka concludes that the highly publicised retreat is mainly rhetorical; that is, more a matter of politicians avoiding the use of the word “multiculturalism” - and favouring other terms as “pluralism” or “interculturalism” - than a real change of policy. In other words, the politics of identity is far from dead on this assessment.

However, there are reasons to remain cautious about such a confident conclusion, at least in the Western European setting that is the main focus here. Disputing the empirical grounds for Kymlicka’s assessment would obviously require a separate empirical inquiry; yet from a legal perspective two observations are relevant:

First, although some states maintain a range of policies and institutions designed to meet the demands of minority cultures, the widespread rejection of multiculturalism and the disturbing trends noticed above suggest that the progressive variants of this doctrine have had a limited influence in transforming the orthodox individualist discourses on constitutional rights and legal human rights. In fact, the very dispute on whether accommodationist policies should be reversed (or not) could hardly take place in the terms detailed above had the notions of group-differentiated citizenship and cultural rights been substantially endorsed as central in human rights theories. In fact, the sort of unabridged rejection of normative multiculturalism would be almost unthinkable if civil and political rights were at stake. This is because demands that are put forward genuinely in terms of rights act as strong normative reasons that enjoy priority over reasons of general utility (social priorities or public goods<sup>41</sup>), thus generating “waves of duties” (Waldron, 1997) to protect them – duties that should be fulfilled by the legislative and adjudicative authorities. Regressions can certainly occur, as it is currently the case with social rights (attributed, in mainstream discourses, to the

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<sup>41</sup> This is the idea that underlies Ronald Dworkin’s famous expression of rights as “trumps” (1997 and 1984).

economic crisis); but it is generally acknowledged that there is a minimum content that needs to be fulfilled, which usually translates into concrete legal and institutional guarantees that cannot be discharged simply by asserting social or economic costs.

Thus, for instance, it is highly inconceivable that a high profile European politician from a mainstream political party announced the wholesale cancellation of, for instance, gender equality policies, or of women's rights, on the grounds that the emancipation of women has a negative impact on, say, the birth rate, divorce rates, or children's education. This is so because women's rights are regarded as *fundamental* human rights, as freedom of speech or freedom of religion, and lie at the core of contemporary constitutionalism. Even though making these rights effective might have costs (and the economic crisis has reportedly affected policies and programmes designed to fulfil women's equality) these are not reasons to question their existence or relevance but *rather* to ask how they should be distributed or perhaps diminished, or how these rights should be harmonised with other potentially conflicting rights claims.

In brief, legal theories of constitutional justice and human rights remain largely wedded to the traditional individualist notion of human rights. It is doubtful that a conscious group-differentiated model (beyond the formal recognition of some legal exemptions, generally to accommodate religious minorities) has ever been applied or consolidated across Western Europe<sup>42</sup>. While most democratic constitutions have entrenched fundamental civil, political and even social rights, which are generally backed by strong guarantees, cultural claims as group rights that might require granting a significant degree of protection or autonomy to identity groups remain contested, not just in practice but also in theory<sup>43</sup>. As a result, the accommodation of identity claims, and the politics of difference, is essentially tied to the fate of political action and of judicial recognition. In many countries, the accommodationist policies that theorists of multiculturalism perceive as a sign of success of models of group-differentiated citizenship have actually been adopted ad hoc, without a conscious philosophy that

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<sup>42</sup> Surely, a notable exception is the UK, where a conscious multicultural model has been implemented through a range of institutions and practices in areas such as education designed to acknowledge the moral and legal significance of national and religious particularities. But even here these policies have become contested.

<sup>43</sup> Prominent liberal philosophers and political theorists have offered principled arguments that dispute the very possibility of reconciling multiculturalism with liberalism, and group rights with individual human rights. Among the most influential are: C. Kukathas (1992, 2007), B. Barry (2001), S. Scheffler (2007), K. A. Appiah (2005). Even if Kymlicka might be right in asserting the weakness of the main objections raised by critics, the weight and influence of this critique in preventing the consolidation of cultural rights as genuine human rights should not be ignored.

takes the underlying demands claims as a matter of justice. The very fact that multicultural programmes and self government statuses are under fire in the European context adds to the contention that minority accommodations were largely conceived as discretionary ‘concessions’ or ‘permissions’ (thus revocable) rather than as genuine rights<sup>44</sup> (which would confer ‘immunities’ to minorities *against* the state). In this perspective, their justification might have been based either on purely pragmatic reasons, such as preventing the escalation of conflict or achieving a *modus vivendi*<sup>45</sup>, or on a more principled approach based on toleration, which is prevalent among progressive streams of liberalism.

Note, however, that even a more substantive toleration approach<sup>46</sup> falls short of a politics of equal respect for minority cultures and mutual recognition of group-based differences that is characteristic of the multicultural model<sup>47</sup>. Toleration mostly requires the self-restraint of the majority, which can be fulfilled simply by enforcing negative duties that are less stringent than positive institutional ones. It might demand, for instance, a duty to not harm minority groups, or to avoid policies of forceful assimilation that tear their members out of their communities. However, these policies can be objected as they involve serious restrictions on fundamental *individual* rights such as banning a minority language or forbidding the practice of a given religion. It is one thing, say, to avoid forcing non-Christian religious groups to give up their beliefs and traditions, but quite another one to grant them, as a group, equal status and recognition in the public realm, including forms of political representation that might allow their distinctive values and rules to influence legislation.

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<sup>44</sup> S. Scheffler (2007) articulates a philosophical defence of *ad hoc* or informal adjustments to accommodate immigrants made by social institutions and individuals, rather than by the state, in the name of facilitating their integration in their host society rather than as a matter of justice.

<sup>45</sup> Michael Walzer (1997) draws attention to the fact that, historically, some political regimes have institutionalised diversity on the basis of a pragmatic conception of tolerance, as they saw that respect of the plurality of religious and moral pluralism was instrumentally crucial for the stability of the political order.

<sup>46</sup> Here I am mostly referring to the idea that minorities should not be *forced* to adopt a religion, language or culture different from their own, and their practices should be mostly permitted even though they are not accepted as legitimate or valid. Historically, this kind of toleration meant a significant progress as compared to the persecution of religious minorities; yet it was already criticised by Kant as based on a hierarchical relation that confer a “presumptuous title” to those who tolerate. For a rich discussion about the historical development and the normative limitations of this conception, see Forst, (2013).

<sup>47</sup> As Kymlicka emphasises, multiculturalism is part of the human rights revolution and it aims not just at ensuring the non-discriminatory application of laws, but at transforming the laws to better reflect the distinctive needs and offer public recognition and support to minorities. See Kymlicka (2012).

The toleration approach still presumes a relation of subjection based on asymmetrical power. Minorities are perceived as subjected to the state authority, that determines the terms of and conditions of accommodation. Their distinctive customs and traditions require a *qualified permission*, which might be granted as long as they remain private. That is why being tolerated is, as Leslie Green contends, “uncomfortable”<sup>48</sup>. It presupposes an adverse judgment on a given practice or tradition that is accompanied by an effort to authorise it that is neither grounded on reasons of justice and rights, nor on moral acceptance or understanding<sup>49</sup>. To this extent, a toleration approach simply assumes the exclusion or unequal standing of cultural minorities in the mainstream political culture and decision-making processes<sup>50</sup>. Interpreted in this light, the legal adjustments made in response to identity claims in many European states might have responded more to the assumption of the toleration paradigm, often inspired more on what Jacob Levy dubs a ‘multiculturalism of fear’<sup>51</sup> than on a ‘multiculturalism of rights’. If this is so, then it hardly makes sense to talk about the multicultural *failure*, as the model has hardly found implementation in its more genuine conception.

### ***Conservative Critiques and the Dilemma for Progressives***

The backlash against multiculturalism is repeatedly presented as the preserve of neo-conservatist movements at a time where politicians need to react to the pathological social fears provoked by the escalation of terrorist acts in the name of Islam, on the one hand, and reclaim the nationalist imaginary of social unity in order to confront the economic crisis, on the other. Besides, the anti-multiculturalist talk also serves as a

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<sup>48</sup> Leslie Green uses this eloquent expression to elucidate the nature of toleration. See Green (2008: 277-98).

<sup>49</sup> For a recent characterisation of toleration that, despite assuming the asymmetrical position between the tolerated and the authority who has the power, but is based on an effort of *understanding* that falls short from acceptance and recognition, see Green (2008)

<sup>50</sup> There is another conception of toleration that contemporary liberal democrats relate to the principle of state neutrality and which is normatively grounded on a form of equal respect of all conceptions of the good. On this conception, which Rainer Forst (2013) dubs the “respect conception” and justifies as grounded on the “right of justification” members of minority groups are equally entitled members of a political community. However, even if the tolerating parties respect one another as autonomous persons or as equally entitled members of a political community, there is still a presumption of separation between the private and public domains.

<sup>51</sup> Evoking Judith Skhlar’s famous notion of a “liberalism of fear”, Levy argues that while difference-conscious policies might be the best means to deal with cultural diversity, this claim has to be contextually assessed. In his view, recognition is not (and cannot) always justified as a matter of right and, in terms of accounting for this practice, contends that accommodation of the claims of minority cultures have often been based on a public-order oriented principled inspired by pragmatism. See Levy (2000: 32).

pretext for conservative governments to evade their responsibility for the rising inequalities that lie beneath the discontent of the middle classes, diverting the blame to immigrants (portrayed as “sucking up” jobs and welfare benefits<sup>52</sup>). Altogether, these pressing issues have contributed to a change of discourse that emphasises the *duties*, rather than the rights, of citizenship. The 2009 “Green Paper” - entitled “Rights and Responsibilities: developing our constitutional framework” - developed by the UK government is illuminating. The document states that some responsibilities are central to the functioning of the society and thus deserve an elevated constitutional status “over and above their operation as part of the general law or our individual moral codes”<sup>53</sup>. Yet, under this framework, it was actually a *Labour* government (that of Gordon Brown’s) that introduced a new citizenship ceremony for new nationals, involving an oath of allegiance to the Queen along with a pledge to respect the rights, freedoms and common values.

The trend to institutionalise integration into common national values or identity in a mandatory way has counterparts in other states, which have undergone a significant shift in public attitudes towards immigrants and ethno-national and religious minorities partly as a result of the economic crisis (Lesinska, 2014). The shift suggests that even the earlier widespread tolerant attitude is giving way to calls to restrict immigration and move back to an assimilationist model of integration that imposes an added burden to members of minority groups, thus elevating the costs of belonging<sup>54</sup>. Furthermore, a crucial feature in the European context is that leaders of mainstream political parties (*including leftist parties*) are increasingly endorsing extremist anti-immigration and

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<sup>52</sup> This fear has been very present in some recent policy changes in Germany and the UK. In Germany, the influential *Sueddeutsche Zeitung* as well as the magazine *Der Spiegel* openly talked of the costs for the welfare state of “poverty migration” from Eastern Europe (Bulgarians and Romanians, mainly), emphasizing that poor immigrants congest homeless shelters and other social services and called for a change of policy that reduced the benefits for migrants and welcomed only the highly skilled that can help fuel the economy: <http://www.sueddeutsche.de/politik/armutseinwanderung-cdu-streitet-ueber-fingerabdrucke-fuer-bulgaren-und-rumaenen-1.1855119>. In the UK, both *The Telegraph* and *The Sun* have warned that migrants from Eastern Europe moving to Britain will flood an overstretched labour market. In July 2014 David Cameron announced that his Coalition government are preparing actions and regulations that will cut down immigration benefits, restrict student visas and control the job advertisements outside the UK (see: <http://www.telegraph.co.uk/news/uknews/immigration/10996721/David-Cameron-announces-immigration-benefits-crackdown.html>). Following this announcement, a spokesperson for the European Commission declared that these measures will be scrutinized to assess whether they are in compliance with EU Law.

<sup>53</sup> Available at: <http://www.official-documents.gov.uk/document/cm78/7860/7860.pdf>

<sup>54</sup> In an article co-authored with Keith Banting, Will Kymlicka (2006) stresses that the backlash only affects immigration policy; yet the case of Catalonia earlier referred corroborates that some national minorities are also starting to experience its effects.

even xenophobic discourses, in an attempt at counteracting the increasing power of extreme-right and populist parties<sup>55</sup>. The move is not merely discursive. It has been followed by policy measures that, in many cases, are not purely symbolic (such as citizenship ceremonies and oaths of allegiance) but actually restrict the legal rights of migrants, including the welfare entitlements for newcomers (in a context of major adjustments towards the liberalisation of the labour markets)<sup>56</sup>. In other cases, regressive measures that considerably limit cultural rights and policies are imposed with the complicit approval of the left, as in the case of national and linguistic minorities in Spain<sup>57</sup> or of religious groups in France<sup>58</sup>. The goal in most cases is to dismantle special legal regimes and return to a model of “one society, one citizenship, and one law for all”, often grounded on an unapologetic superiority of European or Western values.

In order to fully comprehend, and hopefully address, the obstacles to framing identity and cultural claims as rights it is crucial to acknowledge that these demands raise weighty challenges *beyond* the conservative realm. As noticed, the anti-multiculturalist stance seems to be winning the minds of progressives, too. Radical democrats, feminists and social liberals are increasingly cautious to support group-differentiated rights, even though the security and anti-immigration arguments play a lesser role in their discourses. One crucial issue was well captured by what David Goodhart - the founder and at the time editor of British magazine *Prospect* - polemically identified a decade ago as a “dilemma for progressives” (Goodhart, 2004), which points to an inevitable trade-off between supporting cultural and identity claims and “sharing” (e.g. endorsing some basic social rights and other liberal egalitarian values). According to Goodhart, to preserve a generous welfare state through a progressive tax system

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<sup>55</sup> On this interpretation see M. Berezin (2013)

<sup>56</sup> The principal targets are of course the so-called “illegal” migrants, refugees and asylum seekers.

<sup>57</sup> The case of Catalonia is instructive here, too: the systematic rejection of a constitutional reform proposed by the Catalan government in order to entrench their cultural rights and guarantee a fairer fiscal pact has been accompanied by a significant encroachment on devolved powers. Thus, a recent educational law (Law 8/2013, *Ley Orgánica para la Mejora de la Calidad Educativa*) relegates the official languages other than Castilian to “non-core curriculum subjects” and imposes the obligation to ensure the teaching “in” Castilian in all of the Autonomous Communities. It also reduces the extent to which the Catalan Parliament can define the school curriculum and severely affects the integrative school language model that has been applied with very successful results over the last three decades. In a very explicit declaration, the Spanish Minister for Education admitted that one of the aims of the new law is to “españolizar a los alumnos catalanes”(that is: *make Catalan students more Spanish*). The Catalan government, together with the main educational organisations and associations, oppose the new model, which they see as a threat for the successful integrationist school language model that has prevailed for over three decades

<sup>58</sup> Indeed, socialist President François Hollande has hardened the anti-multiculturalist discourse of his predecessor, introducing new restrictions on wearing the veils and other prominent religious symbols and supporting, in 2010, a law that completely bans the wearing of burqas in the public space.



needs a high degree of cooperation and social cohesion that might be hard to maintain in diverse democracies that have adopted a politics of identity. The point has been justified at length by political theories of liberal nationalism, which stress that the strong sense of common belonging fostered by nationality has been central in expanding the circle of affection and solidarity beyond primordial attachments, accentuating what is common rather than different, thereby fostering the high level of trust and cooperation that social democracies need to thrive<sup>59</sup>.

Whether the institutionalisation of difference indeed undermines the grounds for redistribution remains a crucial issue for the left. In Goodhart's controversial opinion<sup>60</sup>, Britain had become too diverse to sustain the type of mutual obligations upon which the welfare state is based and it was time to revise the positive stance towards immigration and multiculturalism. The idea that special cultural group rights regimes might be detrimental to social rights (by threatening the basis for the welfare state) is part of the reason why leftist political parties in Europe have not voiced a strong disagreement with the official rejection of multiculturalism.

To be sure, advocates of progressive multiculturalism have tried to confront this objection and demonstrate the fallacy of the argument. Kymlicka and Banting, for instance, have undertaken a careful and systematic empirical analysis in order to determine whether the adoption of multicultural policies in different countries has indeed eroded the welfare state. Their conclusion is, essentially, that the criticism is groundless. There is not enough evidence, in their view, to confidently affirm that a strong trade-off exists, which forces social democracies to face a stark choice between social rights and cultural rights<sup>61</sup>. Yet independently of what we make of this assessment, once again, the implicit supposition in this debate is that democracies have discretion to forsake multiculturalism policies altogether and return to a model that emphasises civic integration in an homogenising or nationalist fashion aimed at excluding certain identities from the public sphere. As indicated, this shift towards more compulsory forms of integration is hardly refutable. It not only affects the countries

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<sup>59</sup> David Miller (1995), Yael Tamir (1993), among others, have provided a sophisticated defence of this position. For an excellent elucidation of the threats that diversity poses to trust and an exploration of avenues to overcome these challenges, see Lenard (2012)

<sup>60</sup> His essay caused considerable outrage at the time, as it broke many of the taboos that had prevented a more open criticism of multiculturalism by leftist intellectual and political elites (in contrast with a more general public hostility towards accommodationist practices). Goodhart has since developed this essay into a book (Goodhart, 2013).

<sup>61</sup> Banting and Kymlicka (2006a) For an extended discussion on whether cultural diversity is detrimental to social solidarity and the welfare state, see Banting and Kymlicka (2006b) and Van Parijs (2004)

where the discredit of accommodationist policies has been more pronounced, but seems to be part of the general turn towards reducing diversity. At the very least, this shows that Kymlicka's robust account of minority rights and cultural rights as akin minimum to human rights or constitutional rights – namely, as reasons that should act as normative constraints to adopting the restrictive policies mentioned– have proved deeply unstable throughout this debate.

There are two other facets of the progressives' dilemma that reinforce the reluctant attitude displayed by many leftist theorists, politicians and human rights lawyers towards recognising identity claims and cultural group rights. Multiculturalism has been often pitted, on the one hand, against feminism and, on the other, against liberal secularism. The later objection concerns the potential of a politics of identity to jeopardise state neutrality and the separation between church and state<sup>62</sup>. Liberal theorists of minority rights have paid insufficient attention to the status and rights of religious minorities, as they usually start from a presumption in favour of secularism that entails a form of neutrality based on a strict separation between the public and the private realms. Kymlicka's theory of minority rights offers a good example. His defence of the rights of minority cultures crucially relies on an account that brings to light the inconsistencies of the classical model of liberal toleration as implying the idea that, in principle, the state should adopt a "hands-off" approach to culture in order to grant the equality of all cultural groups (rather than intervening to provide the preconditions for minority cultures to flourish). As the argument goes, advocates of toleration fail to realize that the analogy between religion and culture is simply unsustainable in the cultural realm. For, as Kymlicka argues, while it is possible to imagine a completely secular state, no political structure can be entirely "acultural":

"[M]any liberals say that just as the state should not recognise, endorse, or support any particular church, so it should not recognize, endorse, or support any particular cultural group or identity.(...) But the analogy does not work. It is quite possible for a state not to have an established church. But the state cannot help but give at least partial establishment to a culture when it decides which language is to be used in public schooling, or in the provision of state services. The state can (and should) replace

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<sup>62</sup> Thus, while maintaining diametrically opposed understandings of liberalism, Brian Barry (2001) and Chandran Kukathas (2007), coincide in arguing that difference-conscious forms of citizenship and rights (and, more generally, the public recognition of identity) are contrary to liberal values.

religious oaths in courts with secular oaths but it cannot replace the use of English in courts with no language” (Kymlicka, 1995: 111)

A key determinant in this sense is, as Kymlicka puts it, whether a culture’s language “is the language of government,” and, especially, the language of public education, since this will guarantee “the passing on of the language and its associated traditions and conventions to the next generation.” (Kymlicka, 1995) Since the regulation of the public sphere has an inevitable linguistic dimension, a duty of non-interference by the state cannot be the answer to accommodating the interests of minorities. In other words, it is not sufficient—as some sort of linguistic *laissez-faire* derived from the tolerance model might suggest—to oppose state intervention in the use of minority languages in the streets, homes, in private correspondence, in names and surnames or in civic associations. As Stephen May argues, apolitical and ahistorical approaches to language often take the “state” languages (as the “official languages”) as a given, without questioning how they came to be accepted as dominant and legitimate nor addressing complex issues related with the advantages that members of the dominant language group enjoy in crucial areas of administration, politics or the economy (May, 2003).

This last point is central. It is not only that, historically, no democratic nation has been built upon strictly civic values or defines belonging in terms of adherence to democratic or constitutional principle, as stressed by scholars of nationalism that highlight that all liberal states have been historically involved in projects of nation-building mostly aimed at promoting the dissemination and hegemony of a single culture (generally, the majority culture)<sup>63</sup>. The point is that the link between liberal government and intervention in the cultural realm is necessary, as it is impossible for the modern state not to make decisions in this sphere. This argument, nevertheless, still relies on the possibility of strictly differentiating between religion and culture, thus downplaying the fact that many cultural values and practices have been deeply influenced by religion – for instance, the fact that Sunday is a holiday, or that Christmas marks a special break, can hardly be explained without pointing out at the on going influence of a particular religion. As Tariq Modood emphasises, the critique is particularly compelling in Europe, where most countries contain sizeable Muslim minorities and therefore identity and cultural demands often bear a significant religious component (Modood, 1998).

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<sup>63</sup> See, for instance, Gellner (1983); D. Miller (1995); Tamir (1993) Anderson (1983). They all stress that national belonging has crucially relied on ethnocultural factors, real or imagined.

Moreover, the mainstream liberal secularist position ignores that there is a plurality of state-religion models and absolute separation is an exception in Europe (mostly circumscribed to France). To be sure, a number of Christian-based churches have retained a formal legal status and particular links with the state, and this privileged position is constitutionally recognised in many Western European countries. As a result, both legislation and the configuration of public institutions have been influenced by values that are connected to the mainstream religion. Hence, as an argument to reject the demands by religious minorities whose identities are bound up with a rejection of secularism, the appeal to state neutrality (based upon a strict separation between religion and culture, and between state and religion) overlooks the hegemonic position of the dominant religion and its enduring influence in the political and legal culture<sup>64</sup>.

As regards the feminist critique, commentators have depicted identity claims and ethnocultural accommodation as suspicious because of its potential for women's oppression. Susan M. Okin raised this central objection in the late 1990s in a famous essay suggestively entitled "Is Multiculturalism Bad for Women?" (1997). The argument can be extended to other vulnerable groups within minority communities and runs roughly as follows: insofar group rights strengthen the boundaries between communities (by demarcating spaces of collective self-government relatively free from external interference), they could worsen the situation of their most vulnerable members, namely, of the *minorities within minorities*, also called "internal minorities"<sup>65</sup>. In particular, to the extent that group rights are attributed to identity groups that neglect women's rights, oppressive practices that reinforce female subjugation in their own cultures could be implicitly legitimized<sup>66</sup>. There is a conundrum here, which Ayelet Shachar defines as a "paradox of multicultural vulnerability" (Sachar, 1999), whereby well-intentioned efforts aimed at enhancing group autonomy and mitigating inter-group power inequalities can easily lead to intra-group subordination. Mainstream legal and jurisprudential approaches have been especially concerned about how to protect the rights of girls and women belonging to illiberal cultural groups, which are internally organised in patriarchal, non-democratic

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<sup>64</sup> Even in France the idealised view of secularism has been criticised as inconsistent with the historical privileges enjoyed by the Catholic Church and the prevalence of mainstream identities in the political realm. See Judge (2004).

<sup>65</sup> Green (1994); for a general discussion, Eisenberg Spinner-Halev (ed.) (2005)

<sup>66</sup> As Okin (1997: 14) warned, the right to education has been denied to many girls and women in the name of cultural integrity; also, forced marriages or even female genital mutilation have been defended for cultural preservation.

ways. There is a risk that special legal regimes end up reinforcing the power of group hierarchies within the group, especially patriarchal leadership. Traditional male leaders might claim a central role to shape the collective self-understanding of the community and to defend the “authentic” traditions or practices that they interpret as emblematic of the group’s distinctive identity. Not only may this lead to imprison communities in rigid and static understandings of their own practices<sup>67</sup> (making it difficult to examine difference *within* groups and the complex interpretation of meaning<sup>68</sup>) but also to the rejection of dissenters as *outsiders*, in a defensive effort to preserve the traditional markers that had granted them an special status and legal protections in the first place (Sunder, 2007).

In short, the prevalent fear is that granting group autonomy on the basis of identity might impinge on internal cultural dissent, thus reinforcing existing *intra-group* inequalities and aggravating the subordination of vulnerable groups (among them, women are an obvious target in most cultures)<sup>69</sup>. The legal recognition of cultural pluralism *across* groups might thus help them to maintain their distinctiveness, but at the cost of entrenching existing hierarchies and suppressing internal pluralism and reform. Once the state delegates its regulatory powers to the group (as a means to recognise the community right to handle their internal affairs) and the internal elites are legally recognised as legitimate authorities, the tendency might be to overlook human rights violations (such as sexual violence, racist dynamics or discriminatory rules of membership) within these communities.

Summing up, the perception that the costs of recognition are too high currently reinforce the conservative stance against multiculturalism with reasons based on individual autonomy, social equality and women’s rights. The additional facets of the “dilemma for progressives” posed by Goodhart are key to comprehend why human rights scholars and constitutional theorists tend to share the scepticism towards differentiated forms of citizenship and legal entitlements - which they think can encroach the individual rights of members in minority cultures, including the right to

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<sup>67</sup> Anne Phillips (2007) advocates for a politics of recognition that consciously eludes the type of reified conception of culture that have been the object of critique by liberal scholars and postmodern feminists.

<sup>68</sup> On the risk of ignoring internal contestation, see Phillips (2007).

<sup>69</sup> A rich body of literature has emerged over the last decade that have tried to move beyond the “multiculturalism versus feminism” debate and identify specific problems and strategies to address Okin’s challenge in a way that reduces the existing tensions and preserves both theories as compatible. Some crucial works focus on the legal repercussions of multicultural approaches for women’s rights and the rights of other “internal” minorities: Phillips (2007) Shachar (1999 and 2001) and Song (2007).

dissent and to exit the group. Toleration, in a common perception, offers a better paradigm to deal with the demands of identity, as the state retains the power of setting the limits of accommodation.

### ***The Legal Impact of the Political Retreat***

The priority so far has been to trace the grounds for the current fragility of progressive variants of multiculturalism, rather than substantially addressing the objections outlined. The persistent lack of political consensus on the morality of minority (group-differentiated) rights *as human rights* is surely influenced by the elusiveness of the dilemmas sketched, which also explains the relatively weak opposition to the current backlash against accommodation. The retreat, in addition, reinforces the idea that those policies were predominantly adopted on a prudential account of toleration, which entailed according exemptions to particular identity groups, rather than recognising genuine rights. It thus fell short from embracing the transformative view of the polity based on equal inclusion of differentiated identities advocated by theorists of multiculturalism.

In the legal realm, the most notable implication of this failure is that we remain confronted with a competition of group rights and individual rights, as mutually excluding categories, which perceives conflicts as intractable. Looking at these disputes through this prism leads to assume the need of setting clear priorities, and the tendency has been to dismiss the category of group rights altogether on the grounds that they can potentially jeopardise individual rights. Not only this means that the elementary concerns of justice that underlie liberal multiculturalism are largely downgraded, but the reversal of accommodationist policies tends to strengthen the oversimplified dichotomy that pervades the public debate in the face of identity conflicts: “it is either your culture or your rights”<sup>70</sup>.

In the face of this dilemmatic depiction, the predisposition to preserving individual human rights is increasingly expressed through the adoption of prohibitionist strategies coercively enforced in order to target *potentially* threatening practices that are perceived as idiosyncratic of increasingly unpopular minorities. Incidentally, this approach supports the political attempts at reinforcing a homogeneous view of the

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<sup>70</sup> For a general critique of rights-based approaches to conflicts of identity involving cultural and religious groups that points to the shortcomings of a framing that tends to frame issues as a matter of stark choices, thus exacerbating the perception that the values or claims at stake are incommensurable, see Eisenberg (2009: 71-4).

“national identity”, based on common values rather than on the more pluralistic conception of the political community advocated by progressive multiculturalism<sup>71</sup>. The polemic expansion of the so-called “veil bans” across Western Europe is particularly revealing of the predisposition to regulate contested identities and restrict its public expression (in this case, the right to manifest a minority religion) in the name of preserving individual rights. Let me pause briefly to explore the complex issues surrounding the legal restrictions on various kinds of Islamic religious attire.

### ***A prohibitionist approach: Islamic veil bans in Europe***

As it is well known, a significant number of states (most notably France, but also Belgium, Denmark or Switzerland) have adopted a varied range of legal restrictions on the wearing of veils in various forms over the last decade, from the *hijab*<sup>72</sup> or headscarf to the body-covering Arabic *burqa* and the more Afghan-style *niqab*, which also covers the face apart from the eyes. To be sure, not all states have legislated at the national level. For instance, there is no general legislation on the issue of religious symbols in Spain, Italy or Switzerland, and plans to adopt a face veil ban in The Netherlands were deferred after the centre-right government collapsed in 2012<sup>73</sup>. Yet several regional or local governments have banned (or announced their intention to ban) full Islamic face-veils from most public spaces, including government buildings, schools and libraries. For instance, local and regional authorities in Italy, Germany or Switzerland have approved restrictions, which are thus confined to specific parts of the territory<sup>74</sup>. And the Catalan government defended the bans that some municipalities have already tried

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<sup>71</sup> A full transcript of David Cameron speech is available at: <http://www.newstatesman.com/blogs/the-staggers/2011/02/terrorism-islam-ideology>

<sup>72</sup> The word *hijab* comes from the Arabic for veil. Islamic normative sources prescribe that women ought to dress modestly, but the female modest dress code is interpreted in a great variety of ways. A number of women in Western Europe understand it as requiring a full covering of the body, with the exception of the face and hands; but what most Muslim women wear is not a gown but a squared shaped headscarf, which comes in myriad styles, that covers the head and neck but leaves the face clear.

<sup>73</sup> The ban proposal reflected the influence of the anti-Islamist Freedom party, which was the third largest in parliament and an ally of the minority coalition government.

<sup>74</sup> In Northern Italy, a number of municipal bans have been adopted to deter public use of the Islamic veil and some mayors from the anti-immigrant Northern League have banned even the use of Islamic swimsuits in public sports centres. There have been debates on extending the law nationally to impose penalties on Muslim face coverings, but these plans have not yet come to fruition. In Germany, even though the Federal Constitutional Court ruled in 2003 in favour of a teacher who wanted to wear an Islamic scarf to school, many of the *Landers* have banned schoolteachers from wearing headscarves, making use of their competence to rule of this issue locally. As in the previous cases, there is no national law restricting the wearing of veils in Switzerland, but a number of high profile officials have raised the issue of adopting a face-veil ban; also, in September 2013, 65% of the electorate in the Italian-speaking region of Ticino voted in favour of a ban on face veils in public areas.

to impose<sup>75</sup>. So far, such constraints remain circumscribed to specific public spaces, including state schools, courts, public libraries or government facilities. But calls to broadening the range and scope of these restrictions (even to include private providers of public goods, such as education) are persistent, as polls show that the majority of citizens in countries that have adopted these bans support them<sup>76</sup>. In the case of the controversial Belgium and French “burqa bans”, the restriction has been extended to *all* public spaces<sup>77</sup>.

For our purposes, the heated controversy sparked by whether or not Muslim veils should be allowed in the public sphere is interesting as part of the larger European debate on multiculturalism. The complexity of the veil symbol highlights the intersecting issues of ethnicity, religion, secularism, gender equality and also fears of terrorism, which cut across the traditional right and left divides and has led to a confluence of positions across the socio-political spectrum. More generally, the reignited debates over the place of religion in the public sphere involve highly sensitive questions about collective identities and the constitutive self-image of the polity that transcend the religious dimension. In particular, the passions evoked by Muslim veils bring to light the underlying factors behind the politicisation of religion across Europe: most centrally, the increasing visibility of Muslim religious and civic organisations, which reflects the transformation of a relatively homogeneous social landscape into a much more pluralistic one typical of post-colonial immigrant states. The very perception that this is an issue deserving *legal* attention looks disproportionate, taking into account that very few Muslim women actually wear full body gowns and most of them interpret Islamic normative sources prescribing female modest dress as simply requiring them to cover their hair with a headscarf. The legislative reaction is, to a great extent, linked to the perceived unwillingness of immigrants to integrate. However, as often noted by Muslim scholars, in line with the opinion of the European Council for Fatwas and Research, the headscarf is not just a religious symbol (as commonly

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<sup>75</sup> The city of Lleida, in the north of Catalonia, had approved restrictions on full Islamic face-veils in some public space, but Spain’s Supreme Court overturned the ban in February 2013, ruling that it infringed upon religious liberties and was therefore outside the competence; yet it left the door open for the Parliament to legislate to implement a ban at the national level.

<sup>76</sup> In Denmark, the government is currently pressured into extending the current ban of Islamic veils in courtrooms to school teachers and medical staff; and the French socialist President, François Hollande, has publicly talked about the need to extend the restrictions on wearing the headscarf and other Muslim veils to private sector providers of pre-school or day care education.

<sup>77</sup> As some commentators have stressed, these bans mean that women who won’t stop wearing these religious attire are effectively put under a situation similar to house arrest: See: <http://www.theguardian.com/world/2011/sep/19/battle-for-the-burqa>.



understood in the West) but a genuine duty prescribed for the *public* social space by the Islamic law (Shadid, 2005). So, forcing women to remove the headscarf represents a serious restriction of both freedom of religion and freedom of conscience.

Nevertheless, the strong attitude against the headscarf is often based on religious and social stereotypes. The widespread view that there is ‘something aggressive’ in veils or headscarves that the secular state should not tolerate seems to prevail in political discourses and in the media. Muslim minorities regret the representation of the normal religious expressions, such as wearing a headscarf, are seen as “fundamentalist”, or an act of religious propaganda, and fear that the restrictions imposed on headscarves contribute to validate the impinging anti-Islamic sentiment. Likewise, common stereotypes relate the female modest dress code to women’s oppression, a judgment that, as some feminist reactions point out, is also based on a reductionist stereotype and assumes that minority women are unable to make their own choices. Increasingly, these biased interpretations obey to the strategic manipulation of meanings by mainstream political parties in an attempt to counteract the rising populist and anti-immigration movements noted earlier, which perceive diversity as a threat to the main pillars of “the” national identity to which the state is associated.

To be sure, the bans described are not formally targeting Muslims as a group, nor do they refer to the Islamic religion or to Islamic veils directly. For instance, in France, the text signed into law on March 2004 by President Jacques Chirac prohibits *all* students in public elementary schools and high schools to wear symbols or clothes through which their religious affiliation is conspicuously (*ostensiblement*, in the French formulation) displayed<sup>78</sup>. Accordingly, the ban also applies to the Jewish skullcap (or *kippa*), the Sikh turban, and to any Christian cross that is too visible (as opposed to discreet). In Switzerland, the restrictions on veils recently adopted in the Italian-speaking canton of Ticino also specify that they apply to “any group”; and the prohibition proposed by the city council in Barcelona affects any head garment that impedes identification, including motorbike helmets and balaclavas.

However, even though the prohibitions are not openly targeting Muslim women (and the tougher sanctions are rarely been imposed) they have a particular *impact* in undermining their opportunities and ways of life, thus putting them at a disadvantage in relation to the dominant social and religious group. In particular, they do deter women

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<sup>78</sup> Officially Article 141-5-1 No 2004-228 of the National Code of Education.

who make the choice of wearing the headscarf and other veiling attire for religious reasons from access to public jobs at a time where unemployment rates have hit record percentages in Europe. On the other hand, the fact that the adoption of these legislative measures had been preceded by a nearly obsessive political fixation with the Muslim headscarf and other Islamic veils – mimicked, too, in the media - cannot be ignored, which makes it hard to see the legal prohibitionist approach in a more neutral vein, as a mere requirement of secularism.

Indeed, as some commentators observed in the 1990s, even before the first veil ban was legally approved in France, “wearing a headscarf in class was militantly anti-French and should not be tolerated” (Moruzzi, 1994)<sup>79</sup>. In other words, what the so-called veil law incorporated is not just a statement on secularism, or on the separation of church and state, but also the reaffirmation of French national identity through the rejection of plural modes of belonging. The central message of the new law, therefore, was not only that God and public education should not be mixed but, more importantly, that Muslims should assimilate and there was no place for “exceptionalism”<sup>80</sup>. As indicated at the beginning of this essay, from a jurisprudential perspective, it is one thing that, occasionally, legislators or courts grant an exemption to a given identity group (largely out of toleration or good will) and another, very different one, is how to face to the rising demands for special regimes or differentiated legal arrangements that are based on a broader discourse of recognition and the right to collective identity. As Tariq Modood states, Muslim assertiveness is both religious and political (Modood, 1998). For their identities cannot remain just private, as their religion includes prescriptions that go beyond the strictly private realm to encompass a broad range of rules that regulate the family as well as interpersonal interaction. Muslims can thus be seen as an ethnocultural minority, and not just a religious group. Their political demands are misrepresented if taken merely as akin to religious conscientious objections (that might be recognised through exemptions from civic obligations), as what they obviously wish is for their norms and identities to have a certain degree of inclusion in the public sphere (Modood, 1998: 387). Banning a symbol such as the headscarf is consequently interpreted as a rejection to the group aspirations to integrate without assimilating to the dominant values and culture.

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<sup>79</sup> For a similar critique see Kramer (2004).

<sup>80</sup> On the negative perception in France of ‘exceptionalism’ or ‘multiculturalism’, as destructive of the integrity of society see Judge (2004: 17) and Kramer (2004).

The French veil saga, with its characteristic obsession to regulate the public manifestation of religion, illustrates the repression of the demands for an alternative model of integration that recognises and respects the plurality of identities and ways of belonging to the polity<sup>81</sup>. From this perspective, we can make sense of the fact that, for many young female Muslims, wearing the headscarf in public has become a *reactive* form of asserting their identities (rather than their faith) in the face of increasing intolerance, sometimes against the views and practices of their own families (Shadid and van Koningsveld, 2005; Judge, 2004). This pattern is also revealing of both the inherent fluidness of identities (as they are susceptible to change in a political climate that is perceived as racist or hostile) and their strengthening power as sources of collective pride and individual self-esteem, as the Muslim religious revival shows.

Overall, the previous remarks give credit to the view that framing the debate on veil-bans (and other restrictions on religious attire in the public realm) as an issue of freedom of religion or freedom of conscience obscures many important factors.

### ***Courts and Culture: the limits of litigating identity conflicts***

One crucial effect caused by the increasingly prohibitionist approach associated to the shift of policy earlier described is the trend to seek accommodation through litigation. As minorities see their status and rights increasingly threatened by an adverse political climate, which have little hope to influence given the structural marginalisation of their interests in the mainstream institutions (including political parties and the legislature), they turn to courts for protection. Through this strategy, they seek reinstatement in what they see as entitlements, and not mere concessions granted out of toleration. As a result, judges, rather than legislators, are increasingly playing a central role in dealing with cultural clashes and identity claims that confront majority and minority cultures, usually of immigrant descent. This raises questions as to whether the judicial sphere provides the best context in which to settle these disputes or, on the contrary, it might exacerbate the existing conflicts between majority and minority cultures.

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<sup>81</sup> In other countries, the ban proposal was explicitly announced as part of a declared goal of protecting the local culture and values and assimilating migrants. The debate in The Netherlands is illustrative, as the government explicitly associated plans to ban face-covering veils worn by Muslim women to preserving “a shared Dutch culture and values” See: [http://www.nytimes.com/2011/09/17/world/europe/dutch-to-ban-full-face-veils.html?\\_r=0](http://www.nytimes.com/2011/09/17/world/europe/dutch-to-ban-full-face-veils.html?_r=0)

At the outset, there are reasons to think that the essential role of the judiciary in protecting vulnerable minorities – which is usually invoked in objections to the anti-majoritarian critique of judicial review – places public courts in a good position to assess the demands related to identity. A potentially positive side effect of the increasing judicial mobilisation of identity groups is that it increases the opportunities for inter-cultural interaction and to inform public understandings. Indeed, the litigation strategy confers public visibility to groups that are generally underrepresented in mainstream democratic processes, thus giving the chance to members in these groups to substantiate their interests and claims. When rulings reflect an effort to hear the voices of women, or of racial, ethnic, gay and religious minorities, and to treat their reasons fairly, they have a potential for overcoming the majoritarian prejudices. In particular, the authoritative power and social prestige often associated to state high courts (supreme courts as well as constitutional courts) and international tribunals significantly increase their power to shape public knowledge and ideology. Hence, judicial decision-making can help overcoming the concerns about the fairness of public adjudicatory processes raised by those who have been traditionally disadvantaged by these processes. Eventually, this might help to reduce the public misunderstandings over minority cultures, thus generating a virtuous cycle of mutual understanding and higher toleration of minorities.

Still, there are a number of considerations that should moderate this optimistic account. To begin with, even acknowledging the transformational potential of public adjudication – i.e. in equalising ethnocultural groups and advancing progressive agendas *beyond* the courtroom – the fact that it could also be the other way around should not be ignored. Indeed, judicial decisions can also be harmful to the extent that they contribute to legitimise existing social misconceptions and biases against minority identities. The idealised view of judges as impartial and almost infallible authorities, which can act as a safe harbour from majoritarian prejudice, underestimates the concerns about judicial biases that might seriously impinge on the courts' ability to keep the promise of protecting vulnerable groups. After all, judges are generally part of a middle or upper class professional elite that, in most countries, is predominantly composed by members of the dominant socio-cultural group. While cultural belonging and political ideology does not need to determine - and should ideally not even influence, in the case of judges – their interpretation of legal norms, this idealised view of adjudicators are both fair and impartial has been seriously disputed. The more

radically sceptical stance is associated to American realism, which at the beginning of the 20th century challenged the orthodox claim that law provides an autonomous system of legal reasoning, untainted by politics, morality discourses or social conflict. Realist theorists insisted in the claim that judges, too, have a personal background and a political mind, and it is arguable that factors such as their religion, education, political views, sexual preferences and ethnocultural belonging can contaminate their reasoning<sup>82</sup>. The legacy of this doctrine remains alive in today's legal feminist theories and critical race studies, especially influential in the United States jurisprudence and in other common law countries where formalism and positivism is less prominent in legal education. But even if we reject the most radical realist accounts against judicial impartiality<sup>83</sup>, the fact that the judicial bench across Western democracies remains quite monochrome<sup>84</sup>, so to say, should make legal analysts attentive to the impending risk of deviations from this requirement in cases involving minority claims and identities.

Beyond the general concerns on whether the composition of courts can lead to breaches of impartiality when it comes to assessing the demands of ethnocultural or religious minorities, two additional observations are also relevant. First minorities should not overestimate what courts can achieve, especially taking into account the institutional constraints – both procedural and substantive - that affect their function. Put differently, it is important to remind that there is so much that judges can do. Judges are *not* legislators, and are required to act as legal rather than as moral agents<sup>85</sup>. In order to preserve democracy and the rule of law, their institutional function is circumscribed to applying legally binding norms. Hence, in adjudicating a given dispute, they are simply not allowed to ground their decisions on their own ideas about what is fair or just, but on arguments that constitute a valid legal justification. Now, human rights norms and fundamental rights are typically expressed through abstract and vague

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<sup>82</sup> For a recent reconsideration of the challenges of legal realism to formalist legal philosophy, see Schauer (2013) philosophical reconstruction of the American legal realism doctrine, see Leiter (2007).

<sup>83</sup> The critique of impartiality has also been notably sophisticated by prominent contemporary political theorists such as Iris M. Young (1990).

<sup>84</sup> An example from the UK is revealing: the limited class background of the judiciary was confirmed in figures by the Lord Chancellor's office on May 1995, which revealed that 80% of Lords of Appeal and High Court Justices were educated at Oxford and Cambridge. The social imbalance amongst the senior judiciary has been further examined and confirmed in several reports on judicial appointments by the Commons Home Affairs Committee. As far as gender and ethnic background is concerned, the reports also reveal the small percentage of women judges at the upper level of the judiciary and that the almost insignificant number of black or Asian judges. Although we lack a comparative analysis here, I suspect that the British judiciary is far from unique and similar imbalances can be found across Western Europe.

<sup>85</sup> For a map of the relations between democracy and courts and the ways in which democracy has both changed and challenged adjudication, see Resnick and Curtis (2011).

clauses that incorporate contested concepts with an indeterminate legal meaning. As a result, there are strong disagreements about the significance of these clauses, which is why the judicial task of interpretation is crucial. In the context of the discretion that judges have in the realm of rights, they could adopt an activist position with the aim of upholding minority rights. As it will be explained shortly, the European Court of Human Rights (hereinafter, ECtHR), could have decided to support a more generous version of freedom of religion and consciousness with the aim to uphold the demands of minority litigants. But the main point here is that judges cannot *create* new rights, as their job consists in interpreting and applying existing law (domestic or international) which, as explained earlier, has not yet incorporated a group-conscious, identity sensitive, notion of minority rights. Secondly, the idea that public adjudication can further the democratic inclusion of marginalised groups tends to ignore the fact that judicial disputes take the form of contradictory processes, and thus tends to produce winners and losers; so, when demands of identity are at stake, these processes can arguably lead to magnify socio-cultural divisions and exacerbate the sense of mutual distrust and disaffection.

***An Illustration: The Jurisprudence of the European Court of Human Rights concerning Islamic Veils***

Returning to the example offered above, a review of the European Court of Human Rights' jurisprudence (hereafter, ECtHR, or "the Court") in cases involving state laws banning the wearing of Islamic headscarves might be useful to spell out and illustrate the institutional constraints and potential biases described<sup>86</sup>. In a line of well documented cases<sup>87</sup>, the Court has taken a decisive stance in favour of the state interest to ban the wearing of religious symbols or attire in the public sphere and, in particular,

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<sup>86</sup> A number of domestic courts (ordinary and constitutional) throughout the continent have assessed these bans as well, before they have acquired prominence as human rights issues at the supra-state level. The focus on ECtHR case-law is mainly aimed at illustrating the theoretical points stated through the Court's substantive reasoning; yet the specific institutional constraints that the Court faces as a supranational human rights Court is a relevant factor that needs to be acknowledged.

<sup>87</sup> The ECtHR has considered whether it is acceptable to accept restrictions on the right to manifest religion by wearing religious attire under article 9(2) of the European Convention of Human Rights (hereinafter ECHR) in a varied range of cases. Here I focus on a few crucial decisions that have consolidated the Court's general line of reasoning concerning the compatibility of headscarf bans with the right to freedom of religion and other rights recognised in the ECHR: *Dahlab v. Switzerland*, Application no. 42393/98, 15 Feb. 2001 (hereinafter "Dahlab"); *Leyla Sahin v. Turkey*, Eur. Ct. H.R. Grand Chamber, Application no. 44774/98, 10 Nov. 2005 (hereinafter "Sahin"); *Dogru v. France*, Application no. 27058/05, 4 Dec. 2008 (hereinafter "Dogru") and *Kervanci v. France*, Application no. 31645/04, 4 Dec. 2008 (hereinafter "Kervanci").

the Islamic headscarf. The acceptance of state-imposed restrictions on the individual right to manifest religion recognised in article 9 of the European Convention of Human Rights<sup>88</sup> (hereinafter ECHR) has been justified on different grounds, including “the rights and freedoms of others” and public order, health and safety. As a result of these judgments, the Contracting States enjoy a broad margin of discretion to interfere (legitimately) in the public expression of religious beliefs with particularly harsh prohibitions and sanctions (including the expulsion of children from public schools) as part of their overriding right to shaping public education and preserving other fundamental rights (most notably, gender equality) or the constitutional character of the polity (such as to uphold the public order, including a robust principle of secularism).

Before considering the specific reasoning of the ECtHR jurisprudence and the way in which it brings to light the biases indicated, the specific subsidiary role of the Court, which was set up by the Council of Europe in order to interpret and apply the ECHR, should be acknowledged. As a result of this position - that could be seen as an *institutional constraint* that might affect any international court of justice<sup>89</sup> - the ECtHR has generally adopted a cautious approach to avoid replacing the jurisprudence and practice that can be found in the domestic realm of Contracting States, and avoid acting in ways that can be interpreted as a challenge to the constitutional pluralism that characterises the European landscape<sup>90</sup>. This idea of subsidiarity has been justified in order to favour a division of labour between the States and the Court in the interpretation and application of Conventional rights<sup>91</sup>; in particular, it underlies the

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<sup>88</sup> Article 9 states that (1) “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”; and (2) “freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.

<sup>89</sup> In this case, the constraint is self-imposed, so to say, and it is therefore not strictly “constitutive” of the ECtHR function. In the veiling cases that concern us here, the Court could have decided to undertake a more activist position with the aim of upholding the claims of minority litigants.

<sup>90</sup> Prominent international law scholars and human rights theorists have vindicated this subsidiary role assumed by the ECtHR, as well as the general deference owed to the state in controversies over the interpretation of human rights, as a means to preserve constitutional pluralism and recognise the *prima facie* stronger democratic legitimacy of domestic institutions. See, for instance, McGoldrick (2011) and Josep Weiler’s EJIL blog entry commenting on the Lautsi case: “Lautsi: Crucifix in the Classroom Redux”, available at: <http://www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/>. Other scholars, interpret this doctrine as a needed feature taking into account the general institutional constraints, such as the need to preserve authority and legitimacy, facing an international court of human rights. See Krisch (2004)

<sup>91</sup> The idea is that the State has the primary role in protecting those rights and the ECtHR supervises this task as a secondary resource. Yet this is not an interpretative stance supported by the text of the ECHR,

controversial “margin of appreciation doctrine” (hereinafter, MA doctrine), reiteratively invoked by the Court, in order to grant special deference to the domestic interpretation of European human rights law, especially when there are significant disagreements at the European level. At first sight, the prudential reliance on the State position on the grounds that its public authorities (including national judges) are better situated to determine the necessity of restricting of a given right – in this case, freedom to manifest religion – and its justification under the generic clauses established by the Convention sounds reasonable; likewise, the justification of the MA doctrine as a means to preserve the inherent pluralism in the European landscape and respect the diverse constitutional traditions of the Member States appear equally sensible. However, in practice, this doctrine, together with the rather feeble conception of fundamental rights incorporated in the ECHR<sup>92</sup>, has had the effect of privileging collective goals over individual rights, such as the rather uniform anti-multiculturalist leaning of the States earlier described (which, in the case at hand, is reflected in a prohibitionist approach towards Islamic veils).

Indeed, the court uses the absence of a European consensus on the role of religion in the public sphere as a reason for granting national authorities a wide margin of discretion in dealing with religious diversity. But, *de facto*, this argument legitimizes the defensive attitudes *against* minority religions and reinforces domestic majoritarianism. The subsidiarity principle, in other words, hinders the *internal* pluralism that exists at the state level and grants an automatic privilege to the dominant group to interpret fundamental human rights. Moreover, by systemically endorsing the position of the state as a “neutral” and “impartial” actor, it ignores that public institutions and the normative frameworks within which minority claims are assessed tend to have been shaped by the dominant culture and religion. Ironically, then, by recurrently resorting to the MA doctrine in cases involving claims by minority litigants, the Court fails to protect vulnerable identity groups from discrimination and, in the case at issue, becomes complicit in legitimising a regressive return to closed nationalist positions aimed at assimilating minorities.

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but a jurisprudential doctrine elaborated by the Court since the case of *Handyside v. United Kingdom*, Application no. 5493/72, 7 Dec 1976.

<sup>92</sup> As some human rights scholars acknowledge (see Letsas 2006), the broad range of utilitarian and collective reasons against which the rights granted by the Convention can be balanced makes it difficult to conceive human rights in Europe as “triumphs” over reasons of public value and utility..



Now, leaving aside the institutional complexities added by the peculiar position of the ECtHR in the European human rights system, and independently of what we think about the substantive grounds of the Court's decisions in cases concerning bans on Islamic veils, the predominant framing of these judicial disputes as a "rights in conflict" also impose significant limitations. Thus, at the outset, courts are presented with what they see as a familiar legal challenge of demarcating the legitimate exercise of the individual right to freedom of religion and assessing the grounds for accommodating or restricting this particular symbol in the face of competing claims – equality and non-discrimination, health and security, public order and so forth. But this framing obscures the broader group dimension of the conflict, including its historical and social roots, as well as the group likely reaction to what, strictly speaking, is a discreet judgment on a particular individual case. As the previous account on the public controversy over Islamic veils shows, there is much more than headscarves involved in these judicial battles, where minority litigants are not merely claiming their right to manifest their religious belief but also making a statement about identity and the systemic disadvantage that their group faces in many other areas of life. By overlooking the collective and multifaceted dimension of these conflicts, and the impact of a given ruling in reinforcing the power of one cultural group over the other, public adjudication systems can actually foster the hardening of the conflict as well as the sense of distrust and vulnerability felt by members in minority groups.

In sum, judicial decisions in cases involving conflicts of identity end up having a deep impact in the relations between minority and majority cultures, thus shaping the very character of the polity. But such crucial question should not be the primarily left in the hands of judges. Judges, in fact, can hardly be expected to address the systemic legacies of exclusion that gave rise to the demands of identity in the first place. To be sure, exemptions might be judicially granted, thus forcing states to tolerate a given minority practice<sup>93</sup>. But, even the most mindful forms of judging cannot replace a broader need for recognition. At best, the judiciary can contribute to raise the public awareness of the problems and claims of minorities, but the shifting intersections between ethnicity, religion and culture that underlie disputes over veils are difficult to grasp in a courtroom. Likewise, to undertake the profound democratic reform that is

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<sup>93</sup> Certainly, nothing prevents the ECtHR from placing a higher emphasis to differences and the unequal standing of minority groups in cases concerning discrimination and freedom of religion, in line with the concern to grant equal protection shown by the United States Supreme Court. See, on this doctrine, Siegel (2004).

necessary to confront structural inequalities and incorporate the views of minorities into the main political and legal institutions (making them feel as part of the society rather than as the outcast) clearly exceeds their competence.

Let me turn to illustrate the risk of gender and ethnic bias in public adjudication systems through the substantive reasoning of the ECtHR on cases regarding Islamic veils<sup>94</sup>. Both in the cases of *Dahlab* and *Sahin*, the Court perceived the wearing of the headscarf by two adult women as a form of assuming gender inequality (through internalising patriarchal domination) and as a symbol of radicalisation (or provocation) in itself dangerous. Both claims were a crucial part of the reasoning that led to the decision of upholding the measures adopted by the Swiss and Turkish governments, respectively, as legitimate (that is, compatible with the ECHR)<sup>95</sup>. In the *Dahlab* case, the applicant was a Swiss primary school teacher who was requested to take off her headscarf while performing her teaching duties – even though, notably, there were no complaints from parents of the teacher’s pupils – as was deemed incompatible with section 6 of the Canton of Geneva Public Education Act, which requires the public education system to respect pupils and parents political and religious beliefs. The ECtHR framed the issue as one that weighing the teacher’s right to manifest her religion against the need to protect pupils “by preserving religious harmony” and the judges agreed with the Swiss government in that that “it appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others, and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils”<sup>96</sup>.

In the case of *Sahin*, the applicant was a Turkish medical student at Istanbul University who, after having left to Vienna to continue her studies, challenged the Turkish law banning the Islamic headscarf at universities and other educational and state institutions under the European Convention, arguing that her exclusion from university for reasons of wearing the headscarf violated her freedom of religion. The ECtHR also upheld the Turkish law: all judges of the Chamber, and all but one judge of the Grand Chamber accepted that, while the applicant’s exclusion from university interfered with her freedom of religion, the interference was justified to the aims pursued of preserving secularism and democracy, and also “the rights of others”, in

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<sup>94</sup> See supra note 120.

<sup>95</sup> For a critical review of this assessment, Marshall (2008).

<sup>96</sup> *Dahlab v. Switzerland*, op. cit., 8

particular, women's equality. Typically, laws banning the burqa or niqab, as well as limiting the use of Islamic headscarves, have been officially justified on these grounds (specially by leftist governments) that the Strasbourg Court has helped to consolidate.

However, these judgments can be questioned on different grounds. To start with, not only the Court avoids considering an alternative, less reductionist, interpretation of the headscarf (thus freezing its meaning as a tool of male domination and as a symbol of religious radicalism); even more crucially, the choice of the applicants is not portrayed as fully autonomous, even though both claimants are adult women who declare that they freely decided to wear the headscarf. Instead, the judgments implicitly portray them as victims of indoctrination or false consciousness. And, as a result, the state intervention is interpreted as discouraging a harmful choice, rather than as an illegitimate or disproportionate restriction of a right, therefore contributing to the liberation of women.

But this paternalistic impulse is based upon a mere *suspicion* that is not seriously substantiated throughout the judgment and thus sounds as a simple reproduction of popular prejudices and stereotypes. Moreover, even if Muslim women *did* wear the headscarf out of a process of indoctrination, the Court's reasoning (and, in particular, the neglect of an analysis of proportionality as a result of an almost unrestricted understanding of the MA doctrine) would remain problematic. On the one hand, there is no actual evidence that wearing the headscarf (nor other veils or gowns) causes any harm to others. In *Dhalab*, the Court itself recognises that is very difficult to determine the impact of the headscarf in the freedom of religion or conscience of primary school children, and it was uncontested that Ms. Dhalab had avoided engaging into any action suspicious of proselytism and that she had not caused any disturbance as no complaints were raised either from pupils or parents. And yet in both cases the Court decides to take at face value the position of the State (invoking the MA doctrine), which is based on asserting an abstract *risk* of influencing or offending others, the perils of radicalisation of society (in *Sahin*) and of proselytism (a fear reproduced in both judgments). However, as J.S. Mill famously argued, a mere *potential* offence or harm to "society" cannot justify (ethically, in this case) the state interference in people's freedom. The argument was prominently used by H.L. Hart against Lord Devlin in their famous dispute on the prohibition of homosexuality<sup>97</sup>, and it can be rehearsed today

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<sup>97</sup> H.L.A. Hart wrote against Devlin's Wolfenden report in 1957, claiming that the law should not interfere with private acts that harmed nobody. Instead, Devlin had argued that popular morality should be allowed to influence law making, and that even private acts should be subject to legal sanction if they

against this jurisprudential line, as Judge Tulkens did in her solo dissenting opinion in *Sahin*<sup>98</sup>. As a result of this unconstrained deference to the state assessment, whether (or why) the strong interference with the right to manifest religion of the claimants is *proportionate* to achieve the aims put forward by both states remains uncertain. It is equally unclear to which extent the “rights and freedoms of others” are jeopardised<sup>99</sup>, or why removing the headscarf would help to preserve the “public order”.

On the other hand, the argument used by the ECtHR is suspicious of applying a higher standard of scrutiny to practices typical of minority cultures, overlooking the fact that many practices and customs of women in the dominant (self-assumed as liberal) society have also been informed by the internalisation of patriarchal and discriminatory norms, which in turn keep supporting gender hierarchies within the mainstream culture, too (Song, 2005). However, the level of inspection of these majority practices is usually lower, as they are automatically presumed to be autonomous choices or are simply taken as “normal” within the dominant culture. Such self-indulgent leaning compromises fairness and can lead to significant double standards in judging other cultures. Think, for instance, in the internalisation of sexist aesthetic canons by Western girls and women, which subject them to harmful diets and even dangerous surgical operations. Even the institution of marriage (religious or secular) could be seen as potentially harmful for women, as domestic violence is a crime usually concealed in this realm and many women accept a subordinated position in the family. Yet, in all these cases, the same doctrine of the MA will probably lead to see these practices typical of the dominant culture or religion as less dangerous or politicised in a self-complacent view. Hence, the ECtHR approach grants freedom of expression a significantly higher protection and cannot be curtailed on the grounds of subjective feelings and religious offences. A notable recent case that expresses this dissonance is the final decision by the Grand Chamber in the *Lautsi* case<sup>100</sup>. Even though I cannot rehearse the complexities of

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were held to be morally unacceptable by the “reasonable man”, as the existence of society depended crucially on preserving common moral values. Devlin's argument was expanded in his 1965 book *The Enforcement of Morals*. As a result of his debate with Devlin, Hart wrote *Law, Liberty and Morality* (1963)

<sup>98</sup> “[O]nly indisputable facts and reasons whose legitimacy is beyond doubt - and not mere worries or fears- are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention”. *Sahin*, Dissenting opinion by Judge Tulkens, para 5.

<sup>99</sup> A perverse effect of the MA doctrine is that it shifts the burden of the proof to the applicant, who has to justify that the restriction is disproportionate.

<sup>100</sup> *Lautsi v. Italy*, no. 30814/06, Judgment of March 18, 2011 (hereinafter “*Lautsi*”). The case has generated a significant scholarly debate. See, for instance, the articles by Dimitrius Kyritsis and Stavros

this decision here, the Court reversed a previous ruling against Italy that had upheld the claim of the applicant, Ms. Lautsi, who argued that the presence of crucifixes in Italian public schools was against the parent's right to educate their children according to their convictions and beliefs (article 2 of Protocol 1, ECHR) and article 9 (freedom of religion). Without entirely supporting the government's claim that the crucifix is mainly a *cultural* symbol linked to Italian history and identity, whose meaning was well beyond endorsing the Catholic religion, the Court did assert that the crucifix is an essentially *passive* religious symbol and granted Italy a broad margin of discretion based on the lack of evidence that Ms. Lautsi children had been indeed affected by its presence in the classroom<sup>101</sup>.

In short, the jurisprudential doctrine of the ECtHR reveal the propensity of the majority, or the most powerful group in society (to which judges clearly belong), to treat other groups or cultures as inferior or to apply double standards when judging them. In the veil cases mentioned, the ECtHR clearly fails in recognising women as free agents who make choices – perhaps unreasonable, in the eyes of some people, but even unreasonable people should have rights. Paradoxically, this approach authorises the loss of freedom in the name of preserving it and reproduces the unproductive discourse that pits multiculturalism and feminism against each other. Muslim women are depicted as subjected to a fundamentalist community and are left with no options in order to become “equal” citizens than to reject their religion; this portrayal ignores the reality of internal contestation *within* Islam and that most Muslim women are pursuing strategies that try to harmonise religion and individual autonomy (Malik, 2010).

On the other hand, in confronting conflicts of identity, judges should be guided by a solid *precautionary constraint* out of what Avigail Eisenberg calls “institutional humility”<sup>102</sup> in order to avoid imposing more stringent restrictions or duties to members in minority group<sup>103</sup>. If this occurs, then judicial decisions help to consolidate the misrepresentations of minority identities and their symbols while being excessively

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Tsakyrakis, Lorenzo Zucca and Joseph Weiler in ICON, *International Journal of Constitutional Law* (2013). Vol. 11 No.1: 200-233.

<sup>101</sup> *Lautsi* (2011), para 66 and 72. The Court thus fails in considering the presumed risk of affecting children as an evidence to restrict the right of Italy to place crucifixes in public schools.

<sup>102</sup> According to Eisenberg (2009) “Institutional humility requires that institutions and public decision-makers have the capacity to reflect on the possible ways in which access to public debates is unequal and norms which are putatively neutral are in fact biased”

<sup>103</sup> All this is not meant to deny the relevance of the insights that feminist scholars such as Okin and Shachar have contributed to the debate about multiculturalism, but to acknowledge the constraints that should guide judges as well as legislators. I have elaborated more about these constraints in Torbisco (2006).

condescending with the majority culture. The contrast of the arguments of Sahin and Lautsi are illustrative in this regard.

Finally, the ECtHR jurisprudence on veils also bring to light the risk of ethnic bias and that judicial decisions contribute to essentialising minority identities and reinforcing popular prejudices<sup>104</sup>. In the judgments of Dogru and Kervanci (both applications against France, for banning the headscarf in physical education and sports classes), not only the ECtHR avoids scrutinising whether the restriction of Article 9 (2) of the Convention was necessary to protect health and safety (and simply accepts, instead, that it is “reasonable” to think so and exclude pupils wearing headscarves from sports classes) but it stresses that the headscarf controversy had created a “general atmosphere of tension”, implying that minorities were somehow responsible for this anxiety, instead of considering that they might be in fact victims of xenophobic attitudes.

#### **4. Conclusion: Reclaiming the Political Space**

The first part of this article contends that the retreat of multiculturalism is quite real, at least in Europe, and takes this fact as evidence that minority rights are far from consolidated as genuine human rights. Although turning to Courts is an obvious move for minorities to reclaim what they took as morally justified entitlements – rather than as mere legal exemptions granted out of toleration – I have tried to show that there are obvious limitations in this strategy and, as a consequence, the results might be disappointing for minority litigants. The legal and political dispute over whether Muslim girls and women should have the right to wear traditional headscarves in public spaces illuminate the pitfalls of the predominant individual rights frameworks. As the preceding section has tried to show, there are serious concerns as to the fairness of public adjudicatory processes and the ability of judges to engage the multifaceted dimensions of identity conflicts. Thus the ECtHR’s jurisprudence tends to ascribe Muslims values that contradict human rights and liberal values (such as attributing a lesser role to women or pursuing religious practices that are regarded as suspicious). As far as the headscarf is concerned, there are multiple interpretations attached to this symbol – both religious and political – that remain ignored in the predominant line of thought. By ignoring these interpretive levels, judges engage in a dogmatic application

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<sup>104</sup> For further discussion, see Sunder (2001)

of biased particularistic values in the name of defending human rights and ignore that conflicts also exist *within* the minority culture over the authenticity of certain practices or the meaning of symbols.

The judicial realm, in the end, might prove an even less egalitarian framework for contestation and protection of group related identity claims, as judicial procedures do not usually offer an adequate space for internal contestation and inter-cultural dialogue. For these reasons, I think Professor Vernon Bogdanor is right in arguing that “it is a mistake to overburden the judiciary by giving judges the duty to resolve complex social problems, problems that they are ill-trained to resolve” (Bogdanor, 2013); courts, as he contends, cannot be expected to deal with the wider problems facing a multicultural society. There is the danger, as this article has tried to show, that judicial disputes on sensitive cultural issues end up having counterproductive effects, such as solidify the prevalent political stereotypes and prejudices against unpopular minorities, and reaffirm the hostility and resentment in divided societies. Moreover, as a result of this perceived failure in their public litigation strategies, minorities might seek to withdraw from mainstream institutions, which they see as biased and create their own “parallel” societies (including legal and judicial systems) with the goal of circumventing existing a regulation that the perceived as biased against their identities. The rise of minority arbitration and of debates on the status of Sharia Law can be interpreted in this light.

In line with a growing literature that stresses the virtues of ‘intercultural’ or ‘cross-cultural’ dialogue and direct involvement by those immediately affected by public decisions, I suggest that we need to shift the focus to deal with cultural and identity conflict and reclaim the political space as the main setting to discuss issues of identity. In particular, a *participatory approach* to issues of identity provides a better strategy to overcome the oversimplification and false dilemmas that tend to dominate the prevailing legal approaches<sup>105</sup>. This model can be enhanced through political processes designed to meet the demands or inter-group justice in multicultural democracies and it is based upon an idea of politics that reacts against the omnipresence of the state, assuming that the political community is under permanent construction by all its members. It thus takes for granted the equal moral standing of minority cultures, which is regarded as essential to empower these groups and perceive them as valid

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<sup>105</sup> See, for instance, Deveaux (2007).

interlocutors with genuine rights and the ability to shape the public space. A political participatory approach thus relies on intercultural communication, instead of isolationism.

It is certainly not the case that the political sphere should entirely displace the legal and judicial frameworks when conflicts of identity arise. Rather, the point is that the latter should take a secondary role. Identity disagreements, as well as the concerns and political interests of members of minority groups, can be better scrutinized and reasoned through minority participation in transparent and inclusive public processes. Eventually, such procedures can be expected to produce enduring settlements out of mutual respect and recognition rather than provisional judicial victories that can hardly repair a deeply fractured society.

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