

IMAGINED GENEALOGIES: KYMlickA, MULTICULTURALISM AND LIBERALISM

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[I]n political and philosophical theories, as well as in persons, success discloses faults and infirmities which failure might have concealed from observation.

JOHN STUART MILL

ABSTRACT: The article provides a critical account of Will Kymlicka's theory of multiculturalism and its practical consequences. By questioning its intellectual coherence, the essay calls into question the genealogy of multiculturalism offered by Kymlicka, in an account of origins that evidences the philosopher's ambivalence towards universalism. Kymlicka's multiculturalism is also inconsistent with the protection of individual rights among cultural minorities. The article casts doubt on the liberal character of Kymlicka's theory, because he relies on nationalism to devise normative justifications against the external enforcement of individual rights. The article assesses

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the role of multiculturalism in the world as well as its abandonment of certain unfulfilled goals of liberal constitutionalism by providing some evidence from 20th century Colombia.

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INTRODUCTION

The aim of this essay is twofold: to provide a critical account of Will Kymlicka's theory of multiculturalism, devised 30 years ago, and to assess multiculturalism's history and some of its real world implications. I argue that political theories have consequences. Some implications, though not all of them, pertain to Kymlicka's version of multiculturalism. I provide evidence that Colombia's multicultural settlement in the 1991 Constitution was probably designed with Kymlicka's theory in mind, or at the very least, in keeping with it. I explore some of the negative political effects that followed. As a political theory, "liberal" multiculturalism is inconsistent. In the realm of praxis, multiculturalist policies often turn into "symbolic reparations," i.e. a cheap means to quell the remorse of majorities. They divert resources from broader initiatives of economic redistribution. Multiculturalism has also underwritten legal pluralism, which in new democracies often entails authoritarian backsliding.

In the first section of the paper, I contend that Kymlicka's *ex-post* efforts to craft a "consensus" theory of the origins of real-world multiculturalism are not persuasive. I document how Kymlicka has strategically shifted his own position regarding the relation between multiculturalism and human rights over the years. This imagined genealogy obscures and elides the displacement from universalism to particularism that has taken place over the last three decades. This account of origins is important because it reveals Kymlicka's profound ambivalence toward universalism. It also points to a conceptual retreat from earlier claims of multiculturalism being a distinctive theory, separate from human rights. In turn, Kymlicka's conflicted relationship with universalism casts doubts on whether his theory is properly liberal. By re-fashioning multiculturalism as the last wave of human rights, Kymlicka eluded the task of reassessing his early position regarding the insufficiency of universalism. This is a critique pertaining to the intellectual coherence of the genealogi-

cal narrative itself, as well as the ways in which Kymlicka has conceived his own intellectual enterprise. The inconsistency of his theory of cultural minority rights is a separate normative issue that will be discussed in the following section. I argue that Kymlicka's relies on a primordialist conception of culture that requires paternalistic safeguards to ensure the preservation of minority cultures. An ambivalence towards universalism and an essentialist understanding of culture do not, however, provide a solid foundation for a liberal political theory.

Section 2 attempts to answer the question: is Kymlicka a liberal? While he explicitly endorses a liberal conception of minority rights, he provides an inconsistent and ultimately non-liberal argument for the toleration of illiberal practices. Kymlicka relies on nationalism to devise normative justifications against the external enforcement of individual rights. This inconsistency regarding the proper enforcement of individual rights opens an escape hatch to illiberal policies.

In Section 3, I claim that while multiculturalism did not significantly change the institutional arrangements of the UK, the United States and Canada, in other parts of the world, multiculturalism contributed to the abandonment of certain unfulfilled goals of liberal constitutionalism. I discuss the case of late 20th century Colombia. The 1991 Constitution that established indigenous collective rights was, as some observers acknowledged, in keeping with Kymlicka's theory of multiculturalism. Some of the abuses that ensued, (as evidenced in the 1997 Paez Cabildo case) were in part the result of conflicting normative commitments within multicultural policies.

I close the essay by arguing that from the beginning, Kymlicka's theory of cultural minority rights was inconsistent in regard to its own scope of application. It claimed at the same time to be global *and* restricted to Western democracies. In new democracies, this theory offered arguments that enabled illiberal groups to infringe upon the rights of their individual members while claiming to abide by liberal norms.

1. IMAGINED GENEALOGIES

Kymlicka emphatically denies that he partakes in any kind of cultural or philosophical relativism whatsoever. He contends that the connection between multiculturalism (at least the “liberal” kind that he advocates) and relativism is the result of a misunderstanding. In a recent rejoinder to some of his critics, Kymlicka ascribed this misinterpretation to faulty genealogies². He countered with a “consensus” theory of the origins of real-world multiculturalism. Multiculturalism, as it happens, is nothing new. In fact, it might even be indistinguishable from other wide-ranging political reform movements. Thus, multiculturalism was best understood as part of “a larger human rights revolution in relation to ethnic and racial diversity”³. As Kymlicka claimed:

[T]he ideas and policies of multiculturalism that emerged from the 1960s start from the assumption that this complex history inevitably and appropriately generates group-differentiated ethnopolitical claims. The key to citizenisation is not to suppress these differential claims but to filter them through the language of human rights, civil liberties, and democratic accountability. And this is what multiculturalist movements have aimed to do”⁴.

Indeed, he contended, the rise of multiculturalism needs to be seen alongside “other citizenisation struggles that emerged at the same time including the claims of women, gays, and people with disabilities”. Those struggles sought to replace “earlier uncivil relations of domination, coercion, paternalism and intolerance with newer relations of democratic citizenship”⁵.

² Will Kymlicka, “The Rise and Fall of Multiculturalism? New debates on inclusion and accomodation in diverse societies,” *International Social Science Journal* (November 2010), pp. 97-112.

³ *Loc. cit.*

⁴ *Ibid.*, p. 79.

⁵ *Ibid.*, p. 75.

However, there are two problems with this account. In the first place, the narrative regarding the origins of multiculturalism rewrites history. It effaces the widely recognized shift from universalism to particularism that took place in the last quarter of the twentieth century. In this imagined genealogy, “diversity” never displaced universalism as the locus of political claims by groups. Hence, the egalitarian and universal character of the human rights movement is blurred or minimized. It would seem that for Kymlicka, Dr. Martin Luther King, Jr. was a multiculturalist *avant la lettre*. However, the idea of extending rights to all was part of the “color blind” project of many civil rights activists.

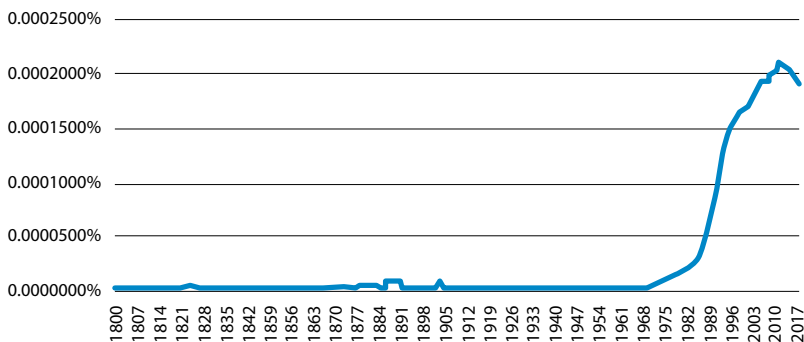
The processes and political reforms that Kymlicka labels “Liberal Multiculturalism” (recognizing land rights and self-governance rights for indigenous populations, regional autonomy and official language status for subnational groups, and more accommodating policies for immigrants) and that have been implemented for over 50 years in several parts of the world do not have a common philosophical matrix.⁶ Contrary to what Kymlicka claims, they do not partake of the same social, economic and political problems. Some of them can be traced to earlier times and sources. For instance, the policies of communal land in Mexico date back to the Mexican Revolution of 1910. The cultural accommodation of Indigenous groups that took place in the 1930s was part of a nation-building process by a nascent state, often in conflict with claims of self-government⁷.

The timing of Kymlicka’s imagined genealogy is also wrong. Figure 1 shows the frequency of the use of the word “multiculturalism” in English-language books.

⁶ Note that here, Kymlicka does not identify multiculturalism with any particular normative theory, but rather with a set of policy issues.

⁷ Alexander Dawson, *Indian and Nation in Revolutionary Mexico*, Tucson, University of Arizona Press, 2004.

FIGURE 1
Frequency of use of the word “multiculturalism” (1800-2019)



Source: “Multiculturalism”, Google Books Ngram Viewer (accessed on March 28, 2022), https://books.google.com/ngrams/graph?content=multiculturalism&year_start=1800&year_end=2019&corpus=26&smoothing=3&direct_url=t1%3B%2Cmulticulturalism%3B%2C0

The common use of the word “multiculturalism” between 1800 and 2019 really started to pick up in 1971, not the 1960s: it accelerated in the 1980s, particularly around the time of the end of the Cold War, and peaked off in 2013. From then, it began to decline. This data seems to support the contention that multiculturalism captured the antiliberal imagination after the demise of Communism. Its ascendancy took place in the post-communist years. Of course, one could argue, as Kymlicka does, that the *meaning* of the word “multiculturalism” predates its widespread use. That may very well be the case. However, how do we know that we are in fact in the presence of a social artifact called “multiculturalism”? The risk of an expansive semantic strategy is to see multiculturalism everywhere and hence, to date it before its actual emergence.

The second problem with Kymlicka’s imagined genealogy is that his own position on the relation between multiculturalism and human rights has strategically shifted over the years. It underwent an unacknowledged metamorphosis. When it was convenient to highlight multiculturalism’s

distinctiveness *vis a vis* human rights, it was considered a singular phenomenon.

Human rights do not appear at all in Kymlicka's seminal philosophical work, *Liberalism, Community and Culture*⁸. Six years later in *Multicultural Citizenship*⁹, Kymlicka not only did not believe that multiculturalism was part of the human rights movement, but sharply criticized that paradigm as insufficient. After WWII,

many liberals hoped that the new emphasis on 'human rights' would resolve minority conflicts. Rather than protecting vulnerable groups directly, through special rights for the members of designated groups, cultural minorities would be protected indirectly by guaranteeing basic civil and political rights to all individuals regardless of group membership. Guided by this philosophy, the United Nations deleted all references to the rights of ethnic and national minorities in its Universal Declaration of Rights¹⁰.

Kymlicka was highly critical of this development:

It has become increasingly clear that minority rights cannot be subsumed under the category of human rights. Traditional human rights standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities: which languages should be recognized in the parliaments, bureaucracies, and courts? [...] The problem is not that traditional human rights doctrines give us the wrong answer to these questions. It is rather that they often give no answer at all... the result... has been to render cultural minorities vulnerable to significant injustice

⁸ Will Kymlicka, *Liberalism, Community, And Culture*, Oxford, Oxford University Press, 1989.

⁹ Will Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights*, Oxford, Clarendon Press, 1995.

¹⁰ *Ibid.*, pp. 2-5.

at the hands of the majority, and to exacerbate ethnocultural conflict¹¹.

Accordingly, it was necessary to “supplement” traditional human rights principles with a “theory of minority rights”. This “amended” theory was sufficiently distinctive as to have a name of its own: *multiculturalism*. No shared history here.

As the fate of multiculturalism evolved and its rhetorical appeal decreased in the 21st century, Kymlicka reconsidered his position. In *Politics in the Vernacular*¹² he started to conceive multiculturalism as a potentially upgraded, yet still distinct, version of human rights. Kymlicka repeated the assertion that human rights were not enough: “Current conceptions of human rights leave serious issues of ethnocultural injustice unaddressed”¹³. “‘Common individual rights’ were not sufficient to ensure ethnocultural justice, particularly in states with national minorities”, he asserted¹⁴. Note that Kymlicka did *not* argue for an alternative or amended conception of human rights that might address those issues even then. Instead, he stuck to his own particular concoction: multiculturalism. Human rights were not only wanting in and of themselves, but they might “even exacerbate certain injustices”¹⁵. The only defensible interpretation of human rights was indeed one that dealt satisfactorily with those issues. Human rights standards needed to be critically amended with various minority rights. Evidently, at that point “the constellation of individual civil and political rights”, usually understood as human rights, was *not* the same as “multiculturalism”.

Finally, in Kymlicka’s imagined genealogy, multiculturalism jumps onto the human rights bandwagon in the second decade of the 21st century. By 2010, multiculturalism had

¹¹ *Loc. cit.*

¹² Will Kymlicka, *Politics in the Vernacular. Nationalism, multiculturalism and citizenship*, Oxford, Oxford University Press, 2001.

¹³ *Ibid.*, p. 70.

¹⁴ *Ibid.*, p. 72.

¹⁵ *Ibid.*, p. 70.

purportedly become the “third wave” of the human rights revolution. That phase embodied “the struggle for multiculturalism and minority rights that emerged from the 1960s”¹⁶.

Now multiculturalism, dating back five decades, was depicted as performing a key function in an *egalitarian* struggle. Since “ethnic and racial hierarchies” remained from the second wave of human rights (the struggle against racial segregation and discrimination), multiculturalism sought to remedy and to “overcome these lingering inequalities”. Here, the main task of multiculturalism was no longer to preserve distinct cultures, but to achieve the universalistic goal of equality. Hence, the “empowerment of Indigenous peoples, new forms of autonomy and power-sharing for sub-state national groups, and forms of multicultural citizenship for immigrants”¹⁷ were nothing but means to “overcome the legacies of earlier hierarchies and to help build fairer and more inclusive democratic societies”. In its final stage of transformation, multiculturalism was “first and foremost about developing new models of democratic citizenship, grounded in human rights ideals, to replace earlier uncivil and undemocratic relations of hierarchy and exclusion”¹⁸. Notice that the conflict between multiculturalism and universal standards of human rights had simply vanished. Multiculturalism had undergone a full metamorphosis: from its particularistic cocoon had emerged a full-fledged human rights butterfly.

What about the charge that multiculturalism is in fact a form of relativism? Kymlicka’s rejoinder to this critique is to deploy his imagined genealogy. As we have seen, critics of multiculturalism have misinterpreted the true origins of that movement. Thus, they have construed multiculturalism as “essentialism”, “determinism”, or “relativism”. This retort is

¹⁶ Kymlicka, “The Rise and Fall...”, art. cit., p. 100.

¹⁷ *Ibid.*, p. 101.

¹⁸ *Loc. cit.*

addressed to Cowan¹⁹, Barry²⁰ and Stjernfelt²¹. Indeed, Kymlicka argues, for those who endorse the cultural determinist interpretation “its pernicious effects can simply be deduced without examining the evidence. That multiculturalism is a threat to individual rights is not something to be empirically verified –it is true by definition”²². Thus, “while the cultural determinist interpretation is widely discussed in the academic literature, there is no credible evidence that it underpins any real-world multicultural policies”²³. On the contrary, he counters, “contemporary multiculturalist claims are rooted in a language of human rights that is diametrically opposed to cultural determinist ideas”²⁴.

According to Kymlicka, critics ignore the legal safeguards embedded in multicultural arrangements, “since they do not fit within their narrative. But these safeguards are fundamental to the logic of real-world multicultural policies”²⁵. Thus, Kymlicka asserts, “the cultural determinist interpretation makes no legal sense. It also makes no political sense... there is simply no credible genealogy that connects 19th century German romantics or early 20th century American anthropologists to public policy debates in the 1960s and 1970s²⁶.” Genealogy dissolves the problem: the Founding Fathers of multiculturalism “viewed multicultural reforms as part of a larger process of

¹⁹ Jane K. Cowan, Marie-Bénédicté Dembour & Richard A. Wilson (Eds.), *Culture and Rights: Anthropological perspectives*, Cambridge, Cambridge University Press, 2001.

²⁰ Brian Barry, *Culture and Equality: An egalitarian critique of multiculturalism*, Cambridge, Massachusetts, Harvard University Press, 2001.

²¹ Frederik Stjernfelt, “The Broken Cup: From Culturalism to Multiculturalism”, en Jens-Martin Eriksen y Frederik Stjernfelt (eds.), *The Democratic Contradictions of Multiculturalism* Nueva York, Telos Press, 2012.

²² Will Kymlicka, “Misinterpreting Multiculturalism,” in Michael Boos (Ed.), *Bringing Culture Back In: Cultural diversity, religion, and the State*, Aarhus, Denmark, Aarhus University Press, 2016, p. 82.

²³ *Ibid.*, p. 83.

²⁴ *Loc. cit.*

²⁵ *Ibid.*, p. 84.

²⁶ *Loc. cit.*

social and political liberalization and embedded these reforms legally and institutionally within a liberal rights framework”²⁷.

Yet, the critique does not vanish into thin air. Anthropologists criticize Kymlicka because he embraces an outdated understanding of culture. He is the one who *misinterprets* it. Indeed: “no sooner had anthropology emerged from this critique than anthropologists found their informants taking up with renewed gusto just such essentialized notions of ‘culture’ in their own political talk”²⁸. The problem here is not genealogical in nature. It should be obvious that to assert that Kymlicka’s notion of culture is “essentialized” does not entail a particular or self-conscious intellectual genealogy. People often embrace ideas without fully knowing where they come from. As Cowan asserts:

Kymlicka’s use of culture is frequently criticized, and it is not hard to see why. On the one hand, culture is that meaningful common life based on shared heritage that defines and establishes boundaries for a group... and that minority rights and multicultural policies must protect. On the other hand, culture is a vague, contentless context for choice that makes few demands on, much less shapes, the individual²⁹.

Indeed, Kymlicka’s political anthropology entails “an unacknowledged strategic essentialism smuggled into political theory, one that strategically overemphasizes a group’s stable and cohesive character”³⁰. But what does Cowan mean when she charges Kymlicka with “essentialism”? It can be argued that Kymlicka’s “societal cultures” entail primordial attachments. Essentialism is related to these ties. A societal culture is

²⁷ *Loc. cit.*

²⁸ Jane K. Cowan, “Culture and Rights after Culture and Rights,” *American Anthropologist*, Vol. 108(1), 2006, p. 9.

²⁹ *Loc. cit.*

³⁰ *Ibid.*, p. 12.

[A] culture which *provides* its members with meaningful ways of life across a full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. The cultures tend to be territorially concentrated, and based on a shared language.³¹

Societal cultures involve “common institutions and practices”. The “capacity and motivations to form and maintain societal cultures is characteristic of ‘nations’ or ‘peoples’... societal cultures, then tend to be national cultures”³². For Kymlicka it is difficult for people to move between cultures. He had asserted in his previous book that:

[O]ur ability as individuals to make our way in the modern world of seemingly unlimited possibilities depends, in fact, on the existence of a structure of social understandings which point out the dangers and limits of the resources at our disposal... if certain liberties really would undermine the very existence of the community, then we should allow what would otherwise be illiberal measures. But these measures would only be justified as temporary measures, easing the shock which can result from too rapid change in the character of the culture (be it endogenously or exogenously caused)³³.

While Kymlicka claims that societal cultures are a distinctly modern phenomenon and “their creation is intimately linked to the process of modernization”, they embody what Clifford Geertz calls primordial attachments, which stem

from the ‘givens’ – or more precisely, as culture is inevitably involved in such matters, the assumed ‘givens’ – of social existence:

³¹ Emphasis added. Kymlicka, *Multicultural Citizenship*, *op. cit.*, p. 76.

³² *Ibid.*, p. 85.

³³ Will Kymlicka, *Liberalism, Community, and Culture*, Oxford, Oxford University Press, 1989, p. 170.

immediate contiguity and kin connection mainly, but beyond them the givenness that stems from being born into a particular religious community, speaking a particular language, or even a dialect of a language, and following a particular social practice³⁴.

Indeed, Kymlicka seems to ascribe primordial attachments to societal or national cultures. This is, it must be said, precisely the enterprise of nationalism: to conceive the nation as primordial to the constitution of a people and to establish a monopoly of meaning. According to Kymlicka, the causes of a people's attachment to their own culture "lie deep in the human condition, tied up with the way humans as cultural creatures need to make sense of their world, and that a full explanation would involve aspects of psychology, sociology, linguistics, the philosophy of mind and even neurology"³⁵. The necessity of the preservationist approach flows from primordialism: "the freedom which liberals demand for individuals is not primarily the freedom to go beyond one's language and history, but rather the freedom to move around within one's societal culture"³⁶. Yet, without primordialism, preservationism becomes untenable. If societal cultures are not foundational to individuals in the way Kymlicka claims, then there is no reason to zealously protect them as he advocates. National minorities can make just claims to manage the evolution of their culture, but they may not demand special group rights to do so. The reason to demand protection vanishes once a more fluid and realistic notion of culture is adopted.

Seyla Benhabib criticism of "cultural preservationism" clearly applies to Kymlicka:

whether conservative or progressive, attempts to preserve culture share faulty epistemic premises: 1) that cultures are clearly

³⁴ Clifford Geertz, *The Interpretation of Cultures*, New York, Basic Books, 1973, p. 259.

³⁵ Kymlicka, *Multicultural Citizenship ...*, *op. cit.*, 2005, p. 90.

³⁶ *Loc. cit.*

delineable wholes; 2) that cultures are congruent with population groups and that a non-controversial description of the culture of a human group is possible, and 3) that even if cultures and groups do not stand in one-to-one correspondence, even if there is more than one culture within a human group and more than one group that may possess the same cultural traits, this poses no important problems for politics or policy³⁷.

As Turner contends, such a misunderstanding of culture

risks essentializing the idea of culture as the property of an ethnic group or race; it risks reifying cultures as separate entities by overemphasizing the internal homogeneity of culture in terms that potentially legitimize repressive demands for communal conformity; and by treating cultures as badges of group identity, it tends to fetishize them in ways that put them beyond the reach of critical analysis³⁸.

Focusing on genealogies is just Kymlicka's distraction maneuver to shift the attention from the main charge leveled at him that he espouses an outdated and primordial concept of culture. In spite of protestations to the contrary, his understanding of culture relies on a static conception that requires paternalistic safeguards to ensure preservation of minority cultures. Whether essential, deterministic or primordial, this is not the political anthropology of classical liberalism in any shape or form. In any case, it is not enough for a political theory to claim that it does not partake from a relativistic or essentialist understanding of society; what is truly relevant are the logical implications of its application in concrete cases and in the real world.

³⁷ Seyla Benhabib, *The claims of Culture: Equality and Diversity in the Global Era*, Princeton, Princeton University Press, 2002.

³⁸ Terence Turner, "Anthropology and Multiculturalism: What is anthropology that multiculturalists should be mindful of it?", *Cultural Anthropology* 8(4), 1993, p. 412.

2. “LIBERAL” MULTICULTURALISM?

More than 20 years ago, historian Russell Jacoby argued that the demise of Communism had eviscerated radicalism and enfeebled liberalism³⁹. A radical political theory served the purpose of keeping liberalism honest. Once upon a time, liberals challenged conservatism and other political doctrines that aimed at placing culture, religion and tradition above the individual. Yet, after the fall of the Berlin Wall, even foes of liberalism claimed liberalism for themselves.

It is significant that *Liberalism, Community and Culture*, Kymlicka’s groundbreaking book, was published in 1989. In that book, Kymlicka argued that culture was a “primary good.” Liberalism had anomalously omitted it. Therefore it had to be amended to include it. Unlike other critics of liberalism, Kymlicka engaged in an operation of philosophical revision made possible by the new ideological context of the world after the end of the Cold War. Before 1989, the core of Kymlicka’s ideas would have been recognized as non-liberal, despite protestations to the contrary. While one could claim that the whole history of liberalism is a continued operation of ideological subversion, what is interesting is the particular context of Kymlicka’s philosophical revisions. It seemed as if liberalism was the only player left in the field after 1989. Criticisms that would have come from outside now had to be framed as internal to that theory.

After nearly 30 years, the aim of redefining liberalism along the lines suggested by the author of *Multicultural Citizenship* has, for the most part, failed. Most liberals have not found it persuasive, and for good reasons. It can be argued that liberal theorists in general did not embrace Kymlicka’s revisionist ideas that 1) culture is a Rawlsian primary good, and 2) liberalism called for special cultural rights. Minority group rights and privileges have indeed been established

³⁹ Russell Jacoby, *The End of Utopia: Politics and culture in an age of apathy*, New York, Basic Books, 1999, p. 8.

around the world, yet seldom are they presented or defended as *liberal* rights. Quite the contrary. The world as a whole is not more liberal now than it was in 1995. At present there is a blowback against liberalism, as books such as Patrick Deneen's *Why Liberalism Failed* illustrates⁴⁰. Illiberal movements and governments now proudly call themselves such. The ascendancy of multiculturalism peaked in the late 1990s. However, by the end of the first decade of the 21st century, it was clearly in decline. The momentous event that changed things was the terrorist attacks on September 11, 2001. After that point, "culture" as a category would be regarded with much more suspicion and hostility than before. Even before the attacks, Samuel Huntington had predicted *kulturkampf* in his polemical essay "The Clash of Civilizations" published in 1993,⁴¹ two years before *Multicultural Citizenship*. The realization that a cultural phenomenon, Muslim terrorism, could be a global problem dampened the enthusiasm for the multiculturalist agenda around the world.

At the starting point of his theoretical voyage in 1989, Kymlicka acknowledged that his brand of "liberalism" was different from classical liberalism. In *Liberalism, Community and Culture*, he argued that:

My concern is with this modern liberalism [from J.S. Mill to Rawls and Dworkin], not seventeenth-century liberalism, and I want to leave it entirely open what the relationship is between the two. It might be that the developments initiated by the 'new liberals' are really *an abandonment of what was definitive of classical liberalism*⁴².

This move is telling, since neither John Stuart Mill nor John Rawls saw themselves as departing from the tradition of Locke,

⁴⁰ Patrick Deneen, *Why Liberalism Failed*, New Haven, Yale University Press, 2018. 2018.

⁴¹ Samuel Huntington, "The Clash of Civilizations," *Foreign Affairs*, 72(3) Summer 1993.

⁴² Emphasis added. Kymlicka, *Liberalism, Community...*, *op. cit.*, p. 10.

Montesquieu or Tocqueville.⁴³ Previous critics of liberalism had been open in acknowledging that they were *not* liberals, but something else⁴⁴. However, Kymlicka dressed his theory with the robes of liberalism. In regard to multiculturalism, Brian Barry queried:

[I]t is natural to ask why it should be thought by anybody that policies aimed at promoting diversity or tolerance (as they are defined by contemporary political philosophers) have any claim to count as implications of liberalism. The most important reason is that liberalism has in recent years been equated by many people with cultural relativism⁴⁵.

Are multiculturalist policies liberal in any significant sense? Barry is right when he asks,

If a liberal is not somebody who believes that liberalism is true (with or without inverted commas), what is a liberal? The defining feature of a liberal is, I suggest, that it is someone who holds that there are certain rights against oppression, exploitation and injury to which every single human being is entitled to lay claim, and that appeals to ‘cultural diversity’ and pluralism under no circumstances trump the value of basic liberal rights⁴⁶.

⁴³ Kymlicka has serious disagreements with J.S. Mill, the only classical liberal to whom he relates. While Mill had the virtue of recognizing the importance of culture, he was, Kymlicka charges, an enemy of small nationalities. For a rebuttal of this critique see: Georgios Varouxakis, *Mill on Nationality*, London, Routledge, 2002, and Tim Beaumont, “Kymlicka’s Alignment of Mill and Engels: Nationality, Civilization and Coercive Assimilation,” *Nationalities Papers*, 50(5), 2022, pp. 1003-1021.

⁴⁴ Stephen Holmes, *The Anatomy of Antiliberalism*, Cambridge, Massachusetts, Harvard University Press, 1993, pp. 2-3.

⁴⁵ Brian Barry, *Culture and Equality:..., op. cit.*, p. 127.

⁴⁶ Brian Barry, “Second Thoughts - and Some First Thoughts,” in Paul Kelly (Ed.), *Multiculturalism Reconsidered: ‘Culture and Equality’*, Cambridge, Polity Press & Blackwell Publishers, 2002, pp. 132-133.

In regard to Kymlicka's theory, Barry argued, "A theory that has the implication that nationalities (whether they control a state or a sub-state polity) have a fundamental right to violate liberal principles is not a liberal theory of group rights. It is an illiberal theory with a bit of liberal hand-wringing thrown in as an optional extra⁴⁷." Kymlicka's bottom line is exactly the same as that of wholehearted cultural relativists. For he agrees with them that "it would be 'cultural imperialism' for liberals to bring pressure to bear on regimes that violate human rights in an attempt to increase the number of people in the world who enjoy their protection"⁴⁸.

These claims call for elaboration. It is true that Kymlicka nowhere asserts that 1) illiberal minority norms are morally defensible and that 2) there is any moral and/or legal right to violate liberal rights. On the contrary, he endorses the view that a "liberal" conception of minority rights "will not justify (except under extreme circumstances) 'internal restrictions' –that is, the demand by a minority culture to restrict the basic civil or political liberties of its own members"⁴⁹. A different question is: when is it legitimate and useful to use the coercive apparatus of the state to impose liberal norms onto illiberal groups? The problem lies in Kymlicka's response to this particular query. Following the disclaimer about not supporting illiberal claims is his contention that "liberals have no automatic right to impose their views on non-liberal national minorities"⁵⁰. Their responsibility is, however, "to *identify* those views".⁵¹ "Automatic rights" are seldom found (although fundamental human rights might qualify). How should a liberal state treat non-liberal minorities? Should liberals "impose their views on minorities which do not accept some or all

⁴⁷ *Ibid.*, p. 140.

⁴⁸ *Loc. cit.*

⁴⁹ Kymlicka, *Multicultural Citizenship...*, *op. cit.*, p. 152.

⁵⁰ *Ibid.*, p. 171.

⁵¹ Emphasis added. *Loc. cit.*

of these liberal principles?” Clearly Kymlicka’s answer to this question is: “no”⁵².

However, the justification of this answer is flawed. According to Kymlicka, the problem lies in identifying the proper remedy, and moreover, what third party has the authority to intervene in order to enforce rights. Yet, that might not be the key problem. As just war theorists have recognized for a long time, the decision to wage war relies on *balancing normative and utilitarian reasons*⁵³. From the point of view of liberalism, intervening to stop a genocide poses no normative quandary; yet if the consequences of such actions could make people worse off, then there are utilitarian reasons that should be put in the balance to determine if such intervention, justified as it may be, is warranted. This is the kind of argument that Kymlicka *does not make*. Instead, he relies on nationalism to concoct non-liberal normative arguments against external enforcement of rights. Hence the use of the word “imposition” to refer to enforcement, suggesting a degree of illegitimacy in the intervention to compel respect for rights. It is fitting that Kymlicka is a critic of such normative devices such as national bills of rights and constitutional courts empowered to enforce rights through judicial review. The consequence of weakening enforcement arrangements is to diminish the capacity of the state to effectively protect rights of individuals.

What good can Kymlicka’s theory of multicultural citizenship do? By providing a philosophical justification of individual rights violations, multiculturalism has done a considerable disservice to the cause of democratic consolidation in some regions. Ethnic or national groups may seek the use of state power to restrict the liberty of its own members in the name of group solidarity. Likewise, Kymlicka’s account of internal restrictions is critically flawed. As Ira Katznelson argued a year after the publication of *Multicultural Citizenship*:

⁵² *Ibid.*, p. 161.

⁵³ Michael Walzer, *Just and Unjust Wars: A moral argument with historical illustrations*, New York, Basic Books, 1977.

sensitive to the charge that his requirements make liberalism itself sectarian, Kymlicka distinguishes between insistence on and the imposition of a norm. Liberals, he argues, should deploy a theory of minority rights consistent with liberal values, but they should not seek to impose it coercively in practice except *under exceptional circumstances*. This formulation exposes the limits of political theory disconnected from history and sociology. Either the theory does not amount to much in the end (why worry about liberal standards if they are not enforceable?): or, alternatively, if such standards are to be consistently carried through (against Kymlicka's preferences), that threaten to become instruments of repressive imposition⁵⁴.

The rejection of internal restrictions is either unfeasible, undesirable or merely rhetorical.

For Kymlicka the normative concern that reins in foreign intervention is sovereignty and self-government. Indeed, he argues that: "both foreign states and national minorities form distinct political communities with their own *claims to self-government*⁵⁵." Liberalism, however, has historically defended the rights of individuals against the encroachments of self-governing majorities. As Benjamin Constant asserted in the 19th century: "the sovereignty of the people is not unlimited: it is, on the contrary, circumscribed within the limits traced by justice and by the rights of individuals. The will of an entire people cannot make just what is unjust. The representatives of the nation have no right to do what the nation itself has no right to do..."⁵⁶. The normative status within liberalism of arguments based on self-government that restrict individual rights is feeble. Thus, in order to determine when it is warranted to intervene in the internal affairs of a *national* minority (not any cultural minority, since Kymlicka is willing to back

⁵⁴ Ira Katznelson, *Liberalism's Crooked Circle: Letters to Adam Michnik*, Princeton, New Jersey, Princeton University Press, 1996, p. 158.

⁵⁵ Kymlicka, *Multicultural Citizenship...*, *op. cit.*, p. 167.

⁵⁶ Benjamin Constant, *Political Writings*, Cambridge, Cambridge University Press, 1993, p. 182.

more interference in the case of immigrant minorities “as they are moving to a liberal society by choice whereas the national minorities may have been conquered”⁵⁷), it is necessary to assess not only the severity of rights violations but “the degree of consensus within the community on the legitimacy of restricting individual rights and... the existence of historical agreements with the national minority”⁵⁸. Yet, this reasoning could justify the tyranny of the majority, as Tocqueville conceived it. Likewise, long standing unjust practices of majorities against vulnerable individuals do not acquire legitimacy over the passage of time, at least to most liberals.

According to Kymlicka, “attempts to impose liberal principles by force are often perceived as a form of aggression or paternalistic colonialism”⁵⁹. Yet, surely claims to self-government cannot justify egregious violations of human rights. Why would past crimes of colonialism provide a political community *carte blanche* to infringe on the present rights of its citizens? The “perception” of actions is not the philosophical issue here (no one likes to be intervened with) but to determine if such actions are indeed aggressions or colonial ploys. The argument seems to be that courts in settler states have historically justified the dispossession of Indigenous peoples on the basis of racist and illiberal doctrines, and most Constitutional Courts have been composed entirely of non-Indigenous judges, who do not speak Indigenous languages and do not know much about Indigenous laws. This is true. Yet, can we simply assume from history the behavior of present courts? To disqualify the rulings of judicial institutions as colonialist it is necessary to prove that indeed such tribunals, in the present, are racist and illiberal. Many Western countries have acknowledged their past injustices and passed sweeping human rights reforms in their legislations, such as Mexico in 2011⁶⁰. Many

⁵⁷ A point made by an anonymous reviewer.

⁵⁸ Kymlicka, *Multicultural Citizenship...*, *op. cit.*, p. 161.

⁵⁹ *Ibid.*, p. 167.

⁶⁰ Pedro Salazar (Coord.), *La reforma constitucional sobre derechos humanos. Una guía conceptual*, Mexico, Senado de la República/Instituto Belisario

countries require translators to be present in judicial proceedings involving members of Indigenous groups. The point is that the accusation that courts are biased and racist cannot be a blanket assumption to dismiss them. It is not reasonable to cast a shadow on the legitimacy of majority judicial institutions based on preconceived notions and without actual evidence of wrongdoing. The past certainly matters, but it cannot become an alibi to cover present injustices. Colonialism must not be used strategically as a trump card. It is a bold and unsubstantiated claim to pretend that the rulings of liberal courts, acting accordingly, would not be accepted by non-liberal minorities. What would be the standard of legitimacy of alternative forms of accountability? Universal human rights? Acquiescence by minority groups? Adjudicating institutions and the principles upon which they are based need to command respect among broader society.

The consequences of de-legitimizing courts and tribunals is to cast a shadow on the possibility of majority justice itself. This, in turn, allows us to regard enforcement as a form of illegitimate “imposition”. Indeed, for Kymlicka, when confronting illiberal cultures, liberal claims can only be admonitions, since “in the end liberal institutions can only really work if liberal beliefs have been internalized by members of the self-governing society, be it an independent country or a national minority”.⁶¹ It is the same case as when Kymlicka claims that attempts to impose liberal principles by force often backfire. Where are the cases to back this assertion? Why and when do they backfire? Is perception the cause of failure? How can we know? No factual support for these *empirical* claims is provided, however. Why is there “relatively little scope for legitimate coercive interference?”⁶² The determination of the results of an intervention should be an open matter, to be determined empirically on a case-by-case basis: it cannot be settled in ad-

rio Domínguez, 2014.

⁶¹ Kymlicka, *Multicultural Citizenship...*, *op. cit.*, p. 167.

⁶² *Loc. cit.*

vance as a rule of thumb. Costs, consequences, are a variable, not a fixed given. This is why, in spite of mentioning backfiring, Kymlicka is not a consequentialist. The real argument is masked: one should not interfere in the internal affairs of self-governing national minorities that violate individual rights basically as a matter of principle.

Kymlicka's conclusion is *not* that liberals should place in the balance normative and utilitarian concerns when deciding if they should intervene. Rather, his is the empirically unproved and normatively unwarranted conclusion that: "in cases where the national minority is illiberal, this means that the majority will be unable to prevent the violation of individual rights within the minority community. Liberals in the majority group have to learn to live with this, just as they must live with illiberal laws in other countries"⁶³.

Kymlicka is *not* a reluctant liberal who embraces utilitarian or consequentialist concerns. While it is true that he asserts that the state should nonetheless do certain things to promote liberalism within illiberal cultures, such as condemn illiberal national minorities and support liberal reformers inside minority cultures, it may be the case that the most powerful symbolic act by the state is the actual *toleration* of violations of rights, in spite of expressive condemnations. What is the practical use of a political theory that provides such a wide escape hatch to its normative commitments? There are reasonable grounds to ask whether Kymlicka's theory, in light of its inconsistencies, is truly liberal.

The reasons given by Kymlicka to refrain from intervention in cases of clear violations of rights are not liberal. But neither are they utilitarian or consequentialist. Liberals should consider utilitarian reasons to determine if a normatively warranted intervention is appropriate or not. However, remorse, guilt, or nationalism are not valid normative reasons to intervene (or not to intervene) when serious violations of rights are committed, either in the national or international arenas.

⁶³ *Ibid.*, p. 168.

3. MULTICULTURALISM IN PRACTICE

It is clear that not all forms of multiculturalist policies, as they currently exist in the world, would be acceptable to Kymlicka. Surely he does not endorse many of them. Yet, at least some illiberal arrangements have found inspiration in his theory. While philosophers cannot be blamed for the use others make of their ideas, it is worth pondering about the consequences of normative ideas in the real world. This is not a matter of intentions, but of effects. Can undesired results potentially be brought about by inconsistent theoretical responses to questions such as: when it is acceptable to intervene in the affairs of minority cultures?

Multiculturalism has called into question the historically unfulfilled objective of achieving equality before the law and subjecting all citizens, including the most powerful among them, to a single body of norms. It has also compromised respect for basic human rights. Traditionally, the rich and powerful have managed to exempt themselves from common laws. Many countries are still struggling today to craft true equal citizenship; the claim that there should only be one status of citizens (no estates or castes), so that everybody enjoys the same legal and political rights. The idea was that these rights should be assigned to individual citizens, with no privileges (or disabilities) accorded to some and not others on the basis of race or group membership. Thus, as Barry argues,

[I]n advocating the reintroduction of a mass of special legal statuses in place of the single status of uniform citizenship that was the achievement of the Enlightenment, multiculturalists seem remarkably insouciant about the abuses and inequalities of the *ancien régime* which provoked the attacks on it by the Encyclopaedists and their allies. It is not so much a case of re-inventing the wheel as forgetting why the wheel was invented and advocating the reintroduction of the sledge⁶⁴.

⁶⁴ Barry, "Second...", *op. cit.*, p. 11.

The term “legal pluralism” connotes the simultaneous existence of distinct normative systems within a single territory, a condition usually associated with colonial rule⁶⁵. Many multiculturalists sought to revive premodern ways of thinking about political authority. The modern state represented an enormous gain for liberty and equality over such arrangements, precisely because it gave everyone the same rights. In a follow-up to his *Culture and Equality*, Barry contends: “I want to add that many countries still have to achieve the wheel, and in these countries the multiculturalists’ doctrine encourages the belief that they are better off to stick to the sledge⁶⁶.”

One problem with assessing the impact of multicultural theory is that it is difficult to distinguish “multicultural policies” from other kinds of policies or political arrangements, such as federalism, consociationalism, anti-discrimination laws and citizenship policies⁶⁷. All of these are integrated in the Multiculturalism Policy Index (MPI).⁶⁸ Claiming that multiculturalism is to be credited with all these developments is a stretch of that political theory. In other words, analytically, the MPI does not measure one phenomenon, but several. The connection among them is not always clear. For instance, the theory and practice of consociationalism developed from a different matrix, through comparative politics in the 1960s. Consociationalism “means government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy”, as Lijphart defined it⁶⁹. Culture was there, but it did not have the relevance –or meaning– that theorists of multiculturalism later ascribed to it.

⁶⁵ Van Cott, “A Political Analysis...”, art. cit., p. 209.

⁶⁶ Barry, “Second...”, art. cit., pp. 228-229.

⁶⁷ K. Banting & Will Kymlicka, “Is there really a retreat from *mul,ticulturalism* policies? New evidence from the multiculturalism policy index,” *Comparative European Politics* 11, 2013, pp. 577-598.

⁶⁸ “The MCP Index Project”, Multiculturalism Policies in Contemporary Democracies, Queen’s University, <https://www.queensu.ca/mcp/about>

⁶⁹ Arendt Lijphart, “Consociational Democracy,” *World Politics*, Vol. 21 (2), 1969, pp. 207-225.

An interesting development is that over the last ten years, advocates of multiculturalism are willing to jettison the term itself in light of its declining popularity. From early claims of being a “well-defined” and distinct political theory, they now argue that “these principles and policies could still be alive and well, although now under the heading of ‘diversity policies’ or ‘intercultural dialogue’ or ‘community cohesion’ or even ‘civic integration’”⁷⁰.

Multiculturalism was, for the most part, an intellectual enterprise of Anglo-American political philosophers and social theorists. While some academics have been bold in their proposals for group rights and institutions that encompass new understandings of cultural diversity; the institutional arrangements of the UK, the United States, and even Canada have not seen a sharp departure from the model of liberal democracy⁷¹. Even by the standards of the friendly MPI, established Western democracies have experienced few dramatic constitutional changes. Multicultural Policies (MCP) have a strong expressive dimension that rarely affects the key institutional elements of liberal democracy, housed in the engine room of the constitution⁷². Moreover, some of the policies that are credited to multiculturalism predate the advent of that political theory in the 1990s.

The causal connection between multicultural theory and actual political change has not been substantiated anywhere. Also, as their defenders themselves acknowledge, the MPI fails to capture anti-multicultural policies of recent years⁷³. Other problems with the MPI is that it only surveys 21 OECD countries and does not compare them systematically across all dimensions. There is mounting evidence that multiculturalist policies have retreated in the last 15 years in some Western

⁷⁰ Banting & Kymlicka, art. cit, p. 592.

⁷¹ Iris Marion Young y Danielle S. Allen, *Justice and the Politics of Difference*, Princeton, Princeton University Press, 2011, pp. 8-13.

⁷² Roberto Gargarella, *Latin American Constitutionalism, 1810-2010*, Oxford, Oxford University Press, 2013.

⁷³ Banting & Kymlicka, art. cit. p. 586.

democracies, *particularly* in the domain of immigration⁷⁴. Recently even countries that ranked high on the MPI have experienced acute political crises that can be traced back to MCPs. For example, a constitutional crisis erupted in Spain due to Catalan attempts to conduct a referendum regarding the independence of Catalonia in 2017.

While in the 1990s many countries were struggling to establish liberal constitutions after decades of communist or military rule, political theorists in the West rejected precisely these ideals. For instance, Tully argued that:

[C]onstitutions are not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements in accord with, and violation of the conventions of mutual recognition, continuity and consent. In sum, as the people remove modern constitutionalism from its imperial throne and put in its proper place, what remains to be seen look to me like the outlines of the black canoe in dawn's early light⁷⁵.

While there is little danger that the United States will consider in the near future the Bill of Rights of her Constitution as only one of the “languages” of constitutionalism, these theories can and have inspired constitution-makers in Latin America and other countries. Kymlicka, for instance, deliberately sought to influence constitution making in Eastern Europe and else-

⁷⁴ Francis Luong, “Separating Illiberal from Liberal People: The fall of multiculturalism and the rise of liberal identity,” in Dina Mansour and Andrew Milne (Eds.), *Negotiating Boundaries in Multicultural Societies*, Boston, Brill, 2019; Rainer Baubock, “Farewell to Multiculturalism? Sharing values and identities in societies of immigration,” *Journal of International Migration and Immigration* 3(1) 2002, pp. 1-16; Rogers Brubaker, “The Return of Assimilation?,” *Ethnic and Racial Studies*, 24(4), 2001, pp. 531-548; Christian Joppke, “The Retreat of Multiculturalism in the Liberal State: Theory and Policy,” *British Journal of Sociology*, 55(2), 2004, pp. 237-257.

⁷⁵ James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity*, Cambridge, Cambridge University Press, 1995, pp. 183-84.

where at the turn of the century. His theory of multicultural citizenship found receptive ears in several countries⁷⁶. In a 2000 laudatory article in the *Wall Street Journal*, Kymlicka was described as “a slight, self-effacing philosophy professor with a habit of wearing red Converse sneakers at formal occasions⁷⁷.” Western political theorists tell constitution-makers in Europe and Latin America that the old idea of constitutionalism will not work anymore. Those countries, they argue, would be better off if they would let that idea go.

In advising the Estonian citizens, Kymlicka candidly argued, “even if we can identify some emerging trends regarding the accommodation of ethnocultural diversity in the West, it doesn’t follow that Estonia should uncritically adopt these Western models⁷⁸.” However, these theoretical certainties fly in the face of empirical evidence that show that interethnic cooperation has been much more common than what is often thought⁷⁹. While some ethnic conflicts are intractable, many others are not.

Some constitution-makers around the world have seen themselves as partaking in a broader movement of “post-na-

⁷⁶ G. Pascal Zachary, “A Philosopher in Red Sneakers Gains Influence as Global Guru,” *The Wall Street Journal*, Market Section, March 28, 2000; Will Kymlicka & Magda Opalski (Eds.), *Can Liberal Pluralism Be Exported?: Western political theory and ethnic relations in Eastern Europe*, Oxford, Oxford University Press, 2002.

⁷⁷ Zachary, *loc. cit.*

⁷⁸ Kymlicka argued: “we are still at the first stages of developing theories or models of ethnic relations in the West. To be sure, most Western countries have a long (and sometimes bloody) history of dealing with ethnic diversity within a liberal-democratic constitutional framework. But until very recently, the lessons from this history have not been articulated into a well-defined theory, and so the actual principles and ideals which guide Western democracies remain obscure, often even to those who are involved in managing ethnic relations on a day-to-day basis”. Will Kymlicka, “Estonia’s Integration Policies in a Comparative Perspective,” in *Estonia’s Integration Landscape: From apathy to harmony*, Tallinn, Jaan Tõnisson Instituut, 2000.

⁷⁹ James Fearon & David D. Laitin, “Explaining Interethnic Cooperation,” *American Political Science Review* 90(4), 1996, pp. 715-735.

tionalist” constitutionalism. They have read that post-nationalists constitutions reject universalistic notions of citizenship based exclusively on uniformly applied individual rights and emphasize multiple forms of citizenship through a variety of institutions and autonomous domains of sovereignty that maximize the effective participation of diverse groups in society⁸⁰.

While Kymlicka has defended multiculturalism as a broad phenomenon, it is not evident what the relevance is of world experiences to his particular brand of multiculturalism, which argues that the traditional liberal model lacks a conception of culturally-alienated peoples or groups. Yet, his ideas have inspired constitution-makers and judges in some countries to frame particular policies. Kymlicka can claim that he cannot be blamed for exerting such influence. His idea of multicultural citizenship offers arguments and justifications to back away from a principled and robust defense of individual rights. This is, at the very least, a disservice to the cause of democratic consolidation in some nations.

Colombia: Multiculturalism in action

Colombia is an example of the multiculturalist ideology in action⁸¹. In 1991, Colombians held a constitutional assembly. The new constitution included special rights for minorities, as well as provisions for establishing a “participatory” democracy. According to Donna Lee Van Cott, the need to build a new political order by imbuing political institutions with democratic values capable of legitimating the state and regime generated a break from Colombia’s Liberal constitutional tradition. It was believed that the prior tradition promoted a culturally and ethnically homogeneous vision of national identity based

⁸⁰ Barry. “Second Thoughts...”, *op. cit.*, p.10.

⁸¹ This section follows José Antonio Aguilar Rivera, “Multiculturalism and Constitutionalism in Latin America,” *Notre Dame Journal of International & Comparative Law*, Vol. 4, Issue 1, Article 2, 2014.

on the myth of a mestizo nation. The new model explicitly recognized the failure of the creole nation-building project and began a new one based on the veneration of ethnic and cultural diversity⁸².

According to many participants in the constitutional debates, “the prior, homogeneous, exclusionary model of national identity was judged to lie at the root of the failure of democracy. Thus, political reform was mixed inextricably with the process of defining a national identity that embraced society’s linguistic and cultural diversity⁸³.” This constituted an ideological rupture with the vision of the nation—and of society—constructed and propagated by the elites at the beginning of the 19th century and “thus an opportunity for reconciliation and the mutual creation of a more viable national project”⁸⁴.

In a country ridden by civil strife, the presence of Native Colombian representatives had a powerful symbolic effect. In their presentations and in their written proposals, the Indigenous delegates argued repeatedly that the road to national unity and identity, consensus and reconciliation lay through the recognition and protection of ethnic and cultural diversity⁸⁵. Thus, the Indigenous goal of inserting a special chapter on ethnic rights into the constitution was linked to the broader aim of reconciliation understood as participatory democracy. Since the widespread violence that Colombia had experienced entailed the violation of fundamental rights, the protection of the rights of ethnic minorities was seen as emblematic of a new regime of rights protection. Ethnic rights, it was assumed, would help stop the political violence. According to Van Cott:

⁸² Donn Lee Van Cott, *The Friendly Liquidation of the Past: The politics of diversity in Latin America*, Pitt Latin American Series, Pittsburgh, University of Pittsburgh Press, p. 8. 2000, p. 8.

⁸³ *Ibid.*, p. 16.

⁸⁴ *Loc. cit.*

⁸⁵ *Ibid.*, p. 73.

[R]ecognition of indigenous rights furthered substantive goals. For example, recognizing indigenous authorities and territories implied a dramatic extension of the reach of a historically weak state into areas long dominated by extralegal authorities. Granting indigenous jurisdiction fosters the allegiance of indigenous authorities to the state while helping to establish the state as the source of authority. Recognizing indigenous customary law dramatically extends the reach of the rule of law, filling a geographically huge vacuum of legality⁸⁶.

The *illusion* of the rule of law was thus created. In Colombia, the logic of the Ottoman Empire was recreated to make up for the weakness of the state. Unlike the deep economic and political factors underlying violence, national identity could be easily “amended” by a symbolic act in the constitution. It was also a cost-effective measure. However, ethnic rights proved to be a false solution to Colombia’s intractable structural problems. From the time of the National Constitutional Assembly (Asamblea Nacional Constituyente, or ANC) editorialists used the example of the inclusion of original peoples to demonstrate the representativeness of the body and to deflect charges that the ANC lacked legitimacy due to the low turnout in ANC elections. Aware of this symbolic leverage, the Indigenous delegates threatened not to sign the final text of the Constitution if their demands with respect to territorial rights were not included. According to Van Cott, “their refusal to sign would have impugned the legitimacy of the reform process, appearing to imply that the rights of the most excluded Colombian social group had been trampled upon”⁸⁷. In order for the con-

⁸⁶ The proposals made several demands: recognition of the multiethnic and pluricultural character of Colombia; recognition of the political, administrative, and fiscal autonomy of ethnic territories; state protection for ethnic cultures and languages; greater representation of indigenous peoples in political bodies at all levels; participation in economic policy and planning decisions; and the inalienability of communal land rights, *ibid.*, p. 74.

⁸⁷ *Ibid.*, p. 77.

troversial articles to be passed, the language was deliberately vague, with specifics left to statutory legislation. For some, “it would prove to be a hollow victory, as the lack of consensus on this issue would impede the full implementation of indigenous and black territorial rights”⁸⁸.

The new Constitution was immediately criticized for its excessive length and inelegant and inconsistent language, several contradictions and ambiguities, and the inclusion of diverse populist offerings and regulations. Colombian constitution-makers rejected the idea that the basis of political solidarity in the Constitution should be the creation of rights and the mutual acceptance of procedures⁸⁹. Most constituents believed that a strictly procedural charter would not inspire the patriotism or feeling of community necessary to establish a viable democratic regime. They required a civil religion for their state.

A new title (Title 4) established all forms of direct democracy: elections, plebiscites, referenda, popular consultations, open meetings, legislative initiatives, and recall. Article 40 of the Constitution established plebiscites and referenda, as well as the recall of municipal, departmental, and national representatives (except for the president). The government created Workshops for a New Citizenry. These bodies were designed to promote the transformation of Colombia’s passive, submissive, individualistic citizens into an active, participatory national political community⁹⁰. Such declarative measures were cost-effective. As Van Cott recognizes,

[O]ne important aspect of democratic participation that Colombia’s constitution-makers did not address was the problem of extreme economic inequality... Aside from redistributing resources from the center to the periphery, the constitution makes no effort to redress extreme economic inequalities,

⁸⁸ *Loc. cit.*

⁸⁹ *Ibid.*, p. 78.

⁹⁰ *Ibid.*, p. 82.

which are without a doubt among the root causes of violence in Colombia”⁹¹.

The recognition and protection of ethnic rights became the pillars of the new “participatory democratic model” of Colombia. The political theory of multiculturalism came in handy to make the argument for special rights. According to Van Cott,

constitution-makers made an argument for group-conscious policies similar to that of Iris Marion Young: A disadvantaged social group merits special group-conscious policies because its oppression by a dominant culture renders ‘its own experience invisible,’ which can only be remedied ‘by explicit attention to and expression of that group’s specificity,’ and because such policies may be necessary ‘to affirm the solidarity of groups, to allow them to affirm their group affinities without suffering disadvantage in the wider society’⁹².

More broadly, theorists argue that liberal democratic guarantees of equal rights and special rights protecting cultural identities are insufficient to sustain democratic “discourse” in a multicultural political community. In such societies, state and society must endeavor to propagate a “militant tolerance” of diversity⁹³. The newly created Constitutional Court of Colombia would come to exemplify this “militant tolerance”.

While the indigenous delegates failed in the ANC to achieve a separate, comprehensive statement of ethnic rights, they were able to secure the institutionalization of the presence of original peoples as a distinctive group with special rights in Colombian society. They are mentioned no less

⁹¹ *Ibid.*, p. 83.

⁹² *Ibid.*, p. 84. Young claims that: “A democratic cultural pluralism thus requires a dual system of rights: a general system of rights which are the same for all and a more specific system of group-conscious policies and rights.” Young and Allen, *op. cit.*, pp. 173-174.

⁹³ Kenneth Bayne, “Liberal Neutrality, Pluralism, and Deliberative Politics”, *Praxis International*, 12(1), 1992, pp. 50-69.

than twenty times in the Constitution⁹⁴. The Constitution also recognized the collective and inalienable nature of existing indigenous lands (*resguardos*). Moreover, the Constitution recognized Indian pre-constitutional jurisdictional and autonomy rights over their traditional lands, as opposed to property rights. By granting constitutional recognition to the indigenous territories, the Colombian State allowed for the exercise of indigenous customary legal systems (Article 246) as well as the exercise of self-government rights by indigenous *cabildos* or other native forms of self-government. Article 171 created a national two-seat senatorial district for Indians. Likewise, Article 176 stated that “the law may establish a special election district (yielding a maximum of five representatives) to ensure participation in the House of Representatives by ethnic groups, political minorities, and Colombian residing abroad”⁹⁵. According to Van Cott,

[T]he Colombian constitution fully embraces neither the communitarian nor the traditional liberal positions with respect to the rights of cultural communities. *Instead, the text reflects the approach of Will Kymlicka and Yael Tamir of recuperating from the Liberal tradition the valorization of cultural membership as a necessity for the full realization of the Liberal vision of equality.* However, on certain issues the constitution strays into the sphere of communitarianism, to assign rights directly to communities rather than to individuals, and to allow certain conditions under which cultural community rights may prevail over the freedom of individuals—for example, by recognizing the prevalence of the customary law of unacculturated indigenous communities. Colombian constitution-makers’ inclination to support the ‘cultural survival’ argument of communitarians—the idea that cultural associations merit protection apart from the rights of their members in order to ensure the survival of the culture in the face of internal and external threats – would be affirmed

⁹⁴ Van Cott, *The Friendly Liquidation*, *op. cit.*, p. 85.

⁹⁵ *Ibid.*, pp. 85-86.

by the Constitutional Court, which has attempted to provide concrete guidelines for the harmonization of conflicting liberal and communitarian norms. Most political theorists claiming any ties to the liberal tradition, including Kymlicka and Tamir, vehemently reject the ‘cultural survival’ argument”⁹⁶.

Yet this is precisely the point: the argument of “cultural survival” is built into Kymlicka’s theory of minority rights. That, along with a structural reluctance to accept legitimate external interventions in the affairs of minority cultures provide an implicit escape hatch for illiberal violations of individual rights. As Barry argues, typically, multiculturalists are bold in theory and timid in practice: “Whether they approve or not, the writings of authors such as Taylor and Kymlicka are in fact cited in support of policies that can only result in the violent oppression of the vulnerable”⁹⁷. Is this true? In order to answer this question empirically, let us consider how the 1991 Constitution was applied.

In at least some cases, the new Constitution fostered human rights abuses. Article 246 of the 1991 Constitution reads:

The authorities among the native peoples may exercise judicial functions within their territorial areas in accordance with their own rules and procedures, which must not be contrary to the Constitution and laws of the Republic. The law shall establish the forms of coordination of this special jurisdiction with the national judicial system”⁹⁸.

In fact, the implementing legislation required by Article 246 was never passed, because a consensus could not be reached in the Colombian congress as to the meaning of “coordination”.

In the absence of legislation, the Constitutional Court of Colombia developed a standard for implementing a com-

⁹⁶ Emphasis added. *Ibid.*, pp. 87-88.

⁹⁷ *Ibid.*, p. 85.

⁹⁸ Van Cott, “A Political Analysis...”, art. cit., p. 214.

munity's right to integrity and established precedents for the protection of collective rights, although only individual rights are listed as fundamental rights⁹⁹. By 1999, more than 37 rulings had considered the issues of pluriculturalism, indigenous constitutional rights, and indigenous jurisdiction. The Court also protected the right of indigenous communities to collective property, collective subsistence and the maintenance of cultural and ethnic diversity –both as a right of indigenous communities and as a mandate of the state to protect all kinds of diversity for the benefit of all Colombians. The rulings of the Court have been more significant in regard of the right to judge civil and criminal matters within indigenous territories according to indigenous law. According to the Court, cultural traditions are to be respected, depending on the evaluating court's judgment with respect to the extent that those traditions have been preserved. Therefore, the more contact an indigenous community has had with Western culture, the less weight may be assigned to its cultural traditions. In practice, this gives the court the impossible task of measuring the degree of assimilation of a given community. Also, as Kymlicka would have it, the decisions of and sanctions imposed by indigenous tribunals must not violate fundamental constitutional rights or the international human rights incorporated in the Constitution. Finally, the Court established the supremacy of indigenous customary law over ordinary civil laws that conflicted with cultural norms, and over legislation that did not specifically protect a constitutional right of the same rank as the right "to cultural and ethnic diversity"¹⁰⁰.

As the case of the conflict between the Paez *cabildo* (a form of township government imposed on original peoples by the Spanish Crown and later adopted and "naturalized" by indigenous cultures) and seven indigenous defendants showed in 1997, these three standards proved to be mutually exclusive. The issue of special indigenous jurisdiction gained national

⁹⁹ Van Cott, *The Friendly Liquidation*, *op. cit.*, pp. 111-112.

¹⁰⁰ *Ibid.*, p. 113.

attention in Colombia when Francisco Gambuel, a Guambiano man living in the Páez community, sued the *cabildo* of Jambal, Cauca. The Páez are the largest and politically more dominant indigenous group in the southwestern department of Cauca, the area of greatest indigenous concentration in the country and the origin of the national indigenous movement. It is an area of intense rural land conflict where at the time, several guerrilla organizations maintained active fronts and competed with drug traffickers, paramilitary organizations, and public authorities for control over the use of force¹⁰¹. In this case, a conflict erupted between the *cabildo* and seven defendants banished from the community, who were stripped of their political rights as indigenous people and sentenced to varying amounts of *azotes* (lashes) with a leather whip. The sentence followed the defendants' conviction as "intellectual authors" of the assassination of the town's indigenous mayor. Local guerrillas actually claimed responsibility for the murder; the indigenous defendants were convicted because they publicly linked the mayor to the paramilitaries and, thus, inspired an indigenous sector of the Ejército de Liberación Nacional (ELN) guerrilla army to kill him. Gambuel's supporters argued that the *cabildo's* ruling violated Páez norms of procedure –a claim sustained by a confidential memorandum from an indigenous law expert, in which he argued that there was no evidence of intellectual authorship, but only of "*tardecer*", a concept in Páez law that attributes guilt to a prior act that may have inspired a later outcome, although no causal link could be proven. Also, in Páez law, the expulsion of a community member was never applied as a punishment for the first offence, as it was against Gambuel and his associates. A non-indigenous lower court ruled that the *cabildo* had denied the defendants the opportunity to defend themselves, that the traditional judges in the case were biased, and that the whipping constituted torture and, thus, was illegal under international

¹⁰¹ I closely follow Van Cott's recollection of these events. Van Cott, "A Political Analysis...", art. cit., pp. 219-220.

law, which had constitutional precedence in Colombia. A new investigation ensued and a new trial was ordered. Following an appeal by the Páez *cabildo*, a higher court affirmed the lower court's ruling, observing that corporal punishment, even if it did no permanent physical harm, violated the defendants fundamental constitutional rights. The case generated international controversy when Amnesty International accused the *cabildo* of condoning torture. Gembuel and his followers claimed that they were being persecuted because they were political rivals of the *cabildo* leadership. The case then went up to the Constitutional Court. On October 1997, the Court upheld the *cabildo*'s determination of guilt and sentencing (T-523/1997)¹⁰². In his decision, Magistrate Carlos Gaviria Díaz concurred with the Páez *cabildo* that the intention of the whipping was not to cause excessive suffering but, rather, to represent the ritual purification of the offender and the restoration of harmony to the community. The extent of physical suffering was ruled insufficient to constitute torture. Gaviria Díaz concluded with the observation that only a high degree of autonomy would ensure cultural survival.

Earlier the Court had defined the scope of indigenous special jurisdiction in a 1996 ruling on a claim brought by an Embera-Chamí man that his *cabildo* had violated his right to due process, ruling that the standard for interpreting indigenous jurisdiction "must be the maximum autonomy for the indigenous community and the minimization of restrictions to those which are necessary to safeguard interests of superior constitutional rank"¹⁰³. According to Van Cott, this decision was noteworthy

[F]or its defense of the *cepo* (stocks), a form of corporal punishment common to indigenous communities that was imported from Spanish colonial law. A number of the punishments used today by indigenous communities are derived from

¹⁰² Van Cott, *The Friendly Liquidation*, op. cit., p. 221.

¹⁰³ Van Cott, "A Political Analysis...", art. cit., p. 218.

Spanish colonial rule, but indigenous authorities insist that these have become part of their own ‘authentic culture’, as most cultures continuously borrow and adapt practices from cultures with which they have contact¹⁰⁴.”

One wonders why indigenous communities then could not adopt new institutions and norms from a more recent dating. The Constitutional Court, however, ruled that the stocks, although painful, did no permanent damage to the offender. Moreover, such punishment was meted out prudently, for a brief duration of time, by the indigenous authorities. As such, it did not constitute cruel or inhumane treatment. Finally, the Court exempted indigenous customary law from the Western expectation that pre-established sanctions would be meted out in similar cases¹⁰⁵. Also, a later decision (T-496) extended the territorial scope of indigenous jurisdiction territories to personal jurisdiction in cases where a judge deemed the cultural alienation of an indigenous defendant warranted it.

Thus, Van Cott affirms,

[N]ot only were corporal punishment and expulsion ruled constitutional, the Court in the Jambaló case applied its decision to a community whose level of cultural assimilation is high relative to more isolated, less educated communities. This would appear to lower the burden of proving cultural ‘purity’ on the part of indigenous authorities. The decision also contributes to the inconsistencies demonstrated by the Constitutional Court in developing and applying the constitution’s ethnic rights regime.

The Court

[H]as fluctuated between a vision that seeks a consensus on minimal universal norms and the restriction of the exercise of

¹⁰⁴ *Ibid.*, p. 219.

¹⁰⁵ *Loc. cit.*

indigenous jurisdiction to a sphere of universally accepted rights, and a vision that recognizes an intangible sphere of ethnic diversity whose integral nature precludes restriction”¹⁰⁶.

The rulings of the Constitutional Court of Colombia convey a warning. While the ideological justifications of human rights abuses committed in the past by Latin American dictators have waned, this new brand of violations of fundamental rights bears a progressive façade. The subordination of indigenous special jurisdiction to the Colombian constitution and legislature would appear to imply that conflicting elements in customary law are to be superseded. If this were the case, there would be little objection. However, multiculturalists tend to criticize this limitation, because it “tends to downgrade the role of traditional norms or relegate them to further study, special legislation or other ‘future’ measures which are not easily forthcoming”¹⁰⁷. The former Chief Magistrate of the Colombian Constitutional Court agrees. Carlos Gaviria Díaz argued “that to subject indigenous jurisdiction to this limit would be absurd since it would nullify the meaning of autonomy under Article 246 by implying that Indians must conform to all the procedures of the Colombian penal code, including the creation of pre-existing written laws”¹⁰⁸. Hence, Colombia demonstrates the danger of multiculturalism in action.

When multiculturalist policies do not legitimize abuse, they often serve as “symbolic reparations” that seem attractive because they are a cost-effective means to quell the remorse and guilt of the majority. Instead of entailing broad initiatives of redistribution to address past injustices and deprivation in terms of class, such policies offer symbolic compensations that do not strain state budgets¹⁰⁹. These policies might be cost-effective, but they are not progressive.

¹⁰⁶ *Ibid.*, p. 8.

¹⁰⁷ *Loc. cit.*

¹⁰⁸ Carlos Gaviria Díaz, “Alcances, contenidos y limitaciones de la jurisdicción especial indígena”, in Van Cott, “A Political...”, art. cit.

¹⁰⁹ Aguilar Rivera, *El fin de la raza... op. cit.*

The classic liberal model of citizenship makes no provision for cultural group rights. In regard to forms of collective rights that operate as “external protections”, such as self-government rights, in new democracies they can entail forms of authoritarian backsliding. Legal pluralism, as it has been established in countries like Mexico or Colombia, does not constitute a form of democratic “deepening” but an authoritarian regression¹¹⁰. Not only are political parties banned in communities where self-government rights are adopted, there is also an exclusion of women, secret ballots, and universal suffrage¹¹¹. It will come as no surprise to anthropologists to learn that cultural practices become rigid and less capable of adaptation where economic dislocation occurs. Human communities cannot be shielded or protected as pieces in a museum. To adopt a preservationist stance means, in the end, to leave individuals in those communities at the mercy of the market and without the necessary resources to adapt to new circumstances.

What good can Kymlicka’s theory of multicultural citizenship do in cases such as Colombia? The unwillingness to unambiguously assert, as standard forms of liberalism do, the primacy of human rights over customary law proved to be a disservice to the cause of democratic consolidation in some nations. Ethnic or national groups may use state power to restrict the liberty of its own members in the name of group solidarity. It is not surprising that Latin American political philosophers, such as the Mexican Luis Villoro, found significant common ground with Kymlicka at the time. Indeed, Villoro’s defense of the autonomy of indigenous groups shares a lot of ground with *Multicultural Citizenship*, by his own admis-

¹¹⁰ José Antonio Aguilar Rivera, “Los Derechos Indígenas en México: Un caso de Regresión Autoritaria” in Diódoro Carrasco & Moisés Jaime Bailón (Coords.), *¿Una Década de Reformas Indígenas? Multiculturalismo y Derechos de los Pueblos Indios en México*, Mexico, Cámara de Diputados, 2009.

¹¹¹ David Recondo, *La política del Gatopardo. Multiculturalismo y democracia en Oaxaca*, Mexico, CIESAS/CMCA, 1988.

sion¹¹². Villoro explicitly uses Kymlicka's arguments to reject liberal democratic universalism. Such view, he claims, might be adequate "only if a just and equitable nation-state exists, in which all the groups within it enjoy the same opportunities to exercise their rights"¹¹³. Villoro praised Kymlicka's idea of a "differentiated citizenship". Indeed, his account of the theory is much more straightforward than Kymlicka's own account. Such conception, Villoro argues, springs from the fact that individual rights, common to all citizens, are "insufficient to guarantee freedom of choice to members of different cultural communities"¹¹⁴. Liberals, on the contrary, endorse the idea that "nobody, anywhere in the world, should be denied liberal protections against injustice and oppression"¹¹⁵.

CONCLUSION

While Kymlicka's theoretical ideas were influential beyond Canada, *Multicultural Citizenship* contained many explicit caveats in regard to the applicability of the theory outside of Western liberal democracies. The Multiculturalism Policy Index suffers from the same problem. What if Latin Americans and Eastern Europeans ignored such precautions, as they did many years before when reading Marx? Revolution ought to occur in the most developed industrial nations, or so the theory went. In *Multicultural Citizenship* Kymlicka thought that his theory "of minority rights" had a broad scope of application outside the developed West. Indeed, he argued that "the necessity for such a theory has become painfully clear in Eastern Europe and the former Soviet Union. Disputes over local autonomy, the drawing of boundaries, language rights, and naturalization policy have engulfed much of the region

¹¹² Luis Villoro, *Estado Plural, Pluralidad de Culturas*, Mexico, Paidós, 1998, p. 94.

¹¹³ *Ibid.*, pp. 100-101.

¹¹⁴ *Loc. cit.*

¹¹⁵ Barry, "Second Thoughts...", *op. cit.*, p. 138.

in violent conflict. There is little hope that stable peace will be restored, or that basic human rights will be respected, until these minorities issues are resolved”¹¹⁶.

The dangers posed by “internal restrictions” have not troubled Kymlicka. Liberals ought not to be overly concerned about the danger posed by such restrictions, since “there is little support for the imposition of internal restrictions amongst the members of minority groups themselves. Very few of the mainstream immigrant organizations within *Western democracies* have sought such policies. Illiberal demands were ‘rare, and rarely successful’”¹¹⁷. Indeed, at some point Kymlicka hinted that his book could be irrelevant to most of the world. Thus, he asserted that

[T]he argument over the primacy of the individual or the community is an old and venerable one in political philosophy. But it should be clear, I hope, how unhelpful it is for evaluating most group-differentiated rights in *Western democracies*. Most such rights are not about the primacy of communities over individuals. Rather they are based upon the idea that justice between *groups* requires that the members of different groups be accorded different rights¹¹⁸.

Well, either the application of the theory is restricted to countries where basic individual rights are well established, or it is useful in many other places, as the author declared in the opening pages of *Multicultural Citizenship*. Professor Kymlicka can’t have it both ways.

What an inconsistent theory of cultural minority rights can do is provide arguments to illiberal groups to infringe upon the rights of their individual members while claiming, at the same time, that they are abiding by liberal norms. It is quite certain that Kymlicka does not approve or endorse violations of

¹¹⁶ Kymlicka, *Multicultural Citizenship*..., p. 5.

¹¹⁷ *Ibid.*, p. 41.

¹¹⁸ *Ibid.*, p. 47.

human rights. Yet, the fact remains that similar ideas inspired and helped justify such abuses in places such as Colombia.¹¹⁹ The intrinsic ambiguities built into the theory and its lack of commitment to the universalistic principles of liberalism are to blame.

In 2001, Barry asserted that multiculturalism was a side-show “that should never have got the main billing”.¹²⁰ The more substantial objection to it is that it diverted attention away from more important problems, such as redistribution. The emphasis on culture and amending universalistic principles of justice shifted concerns toward social and economic inequalities. It also provided the basis for a regressive politics of symbolic reparations. In hindsight, we can argue that *Multicultural Citizenship* espoused not a revision of liberalism’s account of citizenship, but rather a political and philosophical justification of something else: nationalism. Kymlicka himself acknowledges that nationalism is a powerful force in the world, and that he has conflicting views about its proper place within the political theory that he favors¹²¹. However, his preferred “multination federalism” is nothing but nationalism for ethnocultural minorities. Ironically, Kymlicka does not object to J.S. Mill’s nationalism; only to his preference for *large* nations over small ones. As Barry charged: “thanks to what is left on ‘difference-blind liberalism’... there is a strict limit to the damage that western multiculturalists can do in their own countries. But elsewhere the same ideas, freed of this constraining framework, take on a life of their own”.¹²² This development should concern us all. And yet, in more recent times, Professor Kymlicka has concerned himself with crafting a political theory of animal rights.

¹¹⁹ Kymlicka, *Politics in the Vernacular*, *op. cit.*, pp. 221-241.

¹²⁰ Barry, *Culture and Equality*, *op. cit.*

¹²¹ Kymlicka, *Politics in the Vernacular*, pp. 221-241.

¹²² Barry, “Second Thoughts...”, *art. cit.*, p. 230.

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