

Multiculturalism and Equal Treatment: Scope and Limits of the Uniform Treatment Approach

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Abstract

In this paper, I examine the scope and limits of Brian Barry's uniform treatment approach to cultural differences through a critical assessment of its two main arguments. The first maintains that under a regime of institutions serving legitimate public purposes, equal opportunity is an objective state of affairs, and religious or cultural maladjustments to laws and public policies are morally irrelevant to the issue of equal opportunity. The other maintains that unlike physical disabilities, religious and cultural affiliations are the result not of morally arbitrary factors over which one has no control but of life choices for which people must assume responsibility. To the first argument, I respond that equal opportunity is best viewed as an interactive phenomenon encompassing subjective and objective components and that a deliberative approach to cultural claims is more likely than Barry's uniform approach does to grant religious and cultural minorities equal opportunities and equal treatment. To the second argument, I respond that, even if they arise out of the life choices made by people, religious conducts and cultural practices deserve to be accommodated through law exemption because it is sometimes the only way our liberal democracies can show respect for citizens as ethical subjects.

Introduction

The literature on multiculturalism and the treatment granted to religious and cultural minorities in Western liberal democracies has increased considerably over the past fifteen years in the domain of political philosophy. Current debates split parties into two camps : those favorable to the uniform treatment of cultural differences – an approach that might be characterized as 'difference-blind' or 'culture-blind' – and those favorable to differential treatment – an approach to which the supporters of multiculturalism policies generally subscribe. The uniform treatment of cultural differences suggests that citizens should be treated the same way, by providing a common system of individual liberties and opportunities within which they can follow their life projects and fulfill their beliefs. This approach may be called 'neutral' with respect to difference insofar as it is assumed that so long as there are valid public reasons in support of laws or policies and it is in the general interest to maintain them, the particular costs and

burdens they impose on citizens fall outside the scope of public responsibility. Since people are generally considered responsible for their ends, they should themselves bear the costs and burdens related to them.

This important position regarding cultural differences has probably been most clearly developed by Brian Barry (2001) in his criticism of multiculturalism and the differential treatment approach. In this paper, I will examine the scope and limits of Barry's uniform treatment position through a critical assessment of its main arguments.

In the first part of the paper, I present those arguments. Barry has two main reasons for supporting the uniform treatment approach. The first maintains that under a facially just institutional framework, equal opportunity is an objective state of affairs and cultural and religious impediments to taking advantage of an opportunity are morally irrelevant to the issue of equal opportunity. The second reason explains why such impediments are morally irrelevant: unlike physical disabilities, religious and cultural affiliations are the result, not of involuntary circumstances over which people have no control, but of the life choices they have made and for which they must assume responsibility. In the second and third parts of the paper, I explain why each of these reasons is defective. I claim that the second reason – that I will examine in the first place – is defective because it excludes the possibility that, under a regime of facially just laws and policies, cultural and religious accommodations may be legitimate and necessary in certain circumstances even if members are expected to assume responsibility for their allegiances. I demonstrate that the most plausible case for such accommodations is the respect our liberal democracies owe to persons as ethical subjects. Next, I contend that the first reason is defective for one main reason: the objective account of equal opportunity hardly lives up to what it means for the members of a liberal democratic society to be treated as civic equals. I show that a deliberative approach, viewing equal opportunity not as a pure objective or subjective phenomenon but as an interactive one, is better suited to treating religious and cultural minorities as full civic equals.

Section 1

According to the uniform treatment approach endorsed by Barry, there are two main reasons why members of religious and cultural minorities should bear the costs and burdens of their affiliations. The first reason, as Susan Mendus (2002 : p. 32-34) has so forcefully argued, is that if justice is a matter of equal opportunities, equal opportunity is for Barry an objective state of affairs. In other words, there is for Barry (2001: p. 37) a difference 'between limits on the range of opportunities open to people and limits on the choices that they can make from within a certain range of opportunities'. In other words, there is a difference between 'having an opportunity' and 'having the cultural disposition' that makes it possible for people to take advantage of an opportunity. Whether or not one actually possesses the requisite disposition, the opportunity exists objectively and it is up to people to adapt their dispositions to the options open to them in such a way as to be able to take advantage of them, not up to public authorities to render these options tailor-made for people's dispositions. For example, if the law imposes the wearing of crash helmets on those members of the Sikh community who want to drive motorcycles, and if wearing turbans prevents them from taking advantage of this opportunity, for Barry it is up to the members of the Sikh community

to adjust their religious practices to the law, not up to governments to create an exemption aimed at accommodating their habits.

The second reason Barry provides explains why the expectation that members of religious and cultural minorities bear the costs and burdens of their affiliations is not unreasonable: such affiliations are only subjective states of affairs. In other words, they are the result of the choices those members have made freely and willingly and they don't regret having made; they are not, unlike physical disabilities, incapacities that result from circumstances beyond their control they would never want to have. As he puts it:

The position of somebody who is unable to drive a car as a result of physical disability is totally different from that of somebody who is unable to drive a car because doing so would be contrary to the tenets of his or her religion. (...) Someone who needs a wheelchair to get around will be quite right to resent the suggestion that this need should be assimilated to an expensive taste. And somebody who freely embraces a religious belief that prohibits certain activities will rightly deny the imputation that this is to be seen as analogous to the unwelcome burden of a physical disability. (Barry 2001: p. 36-7)

Since physical disabilities represent an objective limit to being able to take advantage of an opportunity and since they result from unwanted circumstances, they deserve compensation. As for religious and cultural allegiances, they are the result of the choices made by people and, as such, it behooves those same people to bear the responsibility for the limits they have themselves created when it comes to taking advantage of an opportunity, these limits being purely subjective. Just as public funds should not be used to benefit people with expensive tastes who are then incomed because they require more resources for their satisfaction, they should neither be used to benefit members of minority groups who have religious and cultural preferences that turn out to be too costly for them.

It is worth emphasizing that Barry (2002: p. 215, p. 219) rejects the idea according to which 'everything is either a matter of chance or choice', an idea he feels has been mistakenly attributed to him by Mendus (2002: p. 34, p. 36). In other words, he dismisses the claim that a member of a religious or cultural community would have to bear the burdens of his or her affiliations only because these affiliations are not a matter of bad brute luck but a matter of choice. As Barry (2002: p. 219) puts it: 'The point is not, as Mendus suggests, that people choose their ends and therefore cannot complain about the consequences that flow from them. (...). But they cannot complain about being unable to achieve their ends if the reason for that is that their ends are ones that can *legitimately* (my emphasis) be frustrated by law.' Further in his reply to Mendus, Barry (2002: p. 220) makes his point clearer by adding that 'outcomes are not automatically validated by arising from choices. (...) People are in general responsible for making a choice from a given set of options. But they are not in general responsible for the options being what they are.' In other words, Barry seems to anticipate the case of the so-called 'adaptive preferences', that is, the case of people who are required to make choices under unjust or coerced conditions and adjust to them. In such circumstances, they can hardly be said to make genuine choices. This explains why, contrary to what is usually expected from the general line of argument outlined in *Culture and Equality*, Barry (2001: p. 49-50) allows a Sikh boy to wear his turban to school. He simply considers the set of options offered by the school (either wearing

a turban or going to school) as unfair given that employers or educational establishments cannot impose standardized dress codes unless it can be demonstrated that the latter are necessary and justifiable, which were not in the Sikh boy's case. However, Barry's point is not that the choice/chance distinction would be misguided but that we must be careful not to take such a distinction at face value and accept it without qualification. The existence of coerced conditions of choice brings to the fore the fact that inequalities among people's living conditions are not automatically validated in having arisen from their choices. Only those inequalities arising from choices made under just and non-coerced conditions are acceptable¹. But in no way does this observation affect Barry's claim, advanced in the passage cited above, that members of cultural and religious communities are not the victims of uncontrolled circumstances but are responsible for their ends and, as such, have no case for accommodation. This claim adds something important to Barry's general argument in favor of the uniform treatment approach. It explains why it is expected from members of religious and cultural minorities, and not from other categories of people such as disabled persons, to bear the burdens that laws and public policies place on them. The answer is that it is not unreasonable to expect human agents to transform their subjective dispositions in order to adapt to an external state of affairs such as a law or a public policy when the situation requires it. If such an expectation turned out to be unreasonable for some people, such as disabled people, then it would be unjust not to exempt those people from a public policy otherwise well intentioned or made in the general interest². However, if the costs and burdens of a valid public policy are not due to circumstances beyond human control but the results of people's life choices they don't want to abandon, as is the case for religious and cultural affiliations, it falls on those people to bear the responsibility for the costs and burdens generated by their life choices.

To sum up what I have said thus far: Barry's uniform treatment approach has two main grounds for expecting members of religious and cultural minorities to bear the costs and burdens of their affiliations. The first reason is that equal opportunity is an objective state of affairs. The fact that some people are culturally ill-equipped for grasping an opportunity is totally irrelevant to the issue of equal opportunity the moment the set of options provided is fair and serves a legitimate purpose. The second reason is that, unlike illness, physical disabilities, and most social and economic inequalities, religious and cultural affiliations are the result of the life choices made by people for which they must assume responsibility. If a good case can be made for a law or a public policy, its differential impact on people has no moral weight the moment the costs incurred are not the result of morally arbitrary circumstances beyond the reach of human control. I will now address each reason individually and I will begin by the second reason.

- 1 From this point of view, we might say that Barry would sometimes be ready to accommodate members of cultural or religious groups – not, however, because their life style would have something special that justifies differential treatment, but because they can sometimes be victims of unjust conditions of choices external to them. Note that such a situation tends to make a case, not for law exemptions (which Barry opposes), but for the abolition of the illegitimate conditions of choice (for instance, a bad public policy) and their replacement by fairer ones.
- 2 Barry (2001: p. 36) actually believes that disabled people deserve differential treatment as a matter of justice.

Section 2

For some scholars (for instance Bedi 2007), the main difficulty with the second reason Barry provides for the uniform treatment approach is that it conceives of religious and cultural affiliations as the result of people's choices rather than something unchosen or an involuntary circumstance they face. I will follow a different line of argument. I will provisionally bracket the issue of the nature of religious or cultural identity and assume for the sake of argument, just as Barry does, that religious and cultural allegiances arise out of people's life choices and that people are responsible for them. Assuming the previous situation to be the case, the target of my criticism will be Barry's claim that such a situation entails that people have no case for religious exemption or cultural accommodation. In other words, assuming, as most liberal philosophers do, that cultural and religious beliefs and practices are freely endorsed and that members of cultural and religious communities are responsible for their affiliations, Barry contends that they must also assume the costs and burdens of their affiliations and disputes that convincing arguments can be made in such cases for law exemptions. For him, only the costs and burdens arising from involuntary and morally arbitrary circumstances deserve remedy. In this section, I would like to show that, *contra* Barry, even on the assumption that members of cultural and religious groups must assume responsibility for their allegiances (1) a good case can be made for religious and cultural accommodations, namely the respect our liberal democracies owe to persons as ethical subjects and (2) respect for members of cultural and religious groups as ethical subjects entails that we should not always expect them to assume all the costs and burdens their allegiances involve.

(1) In my view, the best strategy for justifying religious and cultural accommodations is to derive the latter from the respect our liberal democracies owe to citizens as ethical subjects and the need to protect fairly their ethical freedoms (religious freedom and freedom of conscience). Although the spirit of my argument finds its source in Habermas's recent writings on religion and multiculturalism (see Habermas 2008a, b), in order to put more flesh on the bones of my argument, I will rely in what follows on the recent contributions of Gutmann (2003: p. 168-78) and Bou-Habib (2006). Both authors consider religious and cultural affiliations as one expression, among others, of ethical personhood, which Gutmann calls 'conscience' and Bou-Habib 'integrity'. Four features of ethical personhood are emphasized by Gutmann and Bou-Habib. First, what in their view deserves respect and moral consideration is not religious or cultural goods *per se*, or the religious or cultural sources of ethical personhood. For Gutmann (2003: p. 154-62), religion is not to be treated as something special in our democracies, neither for its truth value nor for its public value. Bou-Habib (2006: p. 117-21) conceives of religious and cultural values and traditions not as intrinsically valuable goods, but only as 'derivative' goods. The central issue for both authors is rather what religious conduct or cultural practices *make possible*, namely to enable a person to live 'with integrity' (Bou-Habib 2006: p. 117) or in accordance with his or her 'ultimate ethical commitments' (Gutmann 2003: p. 168). 'Conscience', 'integrity', 'conscientious conduct' are what deserve respect and moral consideration, not the derivative goods, whatever they may be, that make them possible. Second, both authors define ethical personhood – no matter what terms are used to designate it – in a similar way, that is, as the state of someone who is governed by rules that *bind* him or her. As Gutmann puts it:

Conscience, as I am using the term here, designates a person's ultimate ethical commitments: ethical precepts that are experienced as binding on those who believe in them. (...) A constant across different conceptions of conscience is that it is not mere whim or will. Conscience is law-like, not capricious, and it binds the will of a conscientious believer. When conscience fails to bind someone's will because the will is morally weak, the failure stands as a moral reproach to the conscientious believer. (Gutmann 2003: p. 168)

For Bou-Habib (2006: p. 117) as well, 'integrity' is used 'to refer to what is maintained when a person acts in accordance with his perceived duties. If a person believes he has a certain duty and fulfils it, his integrity (...) remains intact; if he is unable to fulfill it, then he suffers a loss of integrity.'³ Third, for both authors the sources of ethical personhood are not only religious, but secular as well. Gutmann (2003: p. 168) affirms that the source of ethical precepts 'is thought to be an ethical authority that is variously identified as God, nature, reason, or human individuality itself. Some of these sources are considered as external, others internal to the conscientious person.' In the same vein, Bou-Habib (2006: p. 122) states that 'since a person's integrity is at stake (...) in the category of actions that are themselves directly required as a matter of perceived duty, it follows that *non-religious* conduct will have as strong a claim for accommodation under the integrity argument as will religious conduct.' In other words, for both authors, secular or even atheist conscientious objectors should eventually be accorded the same possible exemptions from laws and public policies (for instance military drafts) as religious conscientious objectors. Finally, both authors emphasize that 'conscience' or 'integrity', whatever moral weight we attribute to either, no doubt represents a necessary but never a sufficient condition for religious or cultural accommodation. They form a *necessary* condition in the sense that:

(...) not all forms of religious conduct will have a claim to accommodation: only those forms of religious conduct that are experienced as being matters of duty are eligible for accommodation. (...) That it is necessary that a form of religious conduct be perceived to be a matter of duty before it can have a claim to accommodation is a condition that applies to any form of religious conduct, no matter how central to the religion it is perceived to be. (Bou-Habib 2006: p. 122)

Although necessary, 'conscience' and 'integrity' are insufficient conditions. They are insufficient conditions, first in the sense that they must also meet the additional condition that they not hinder or prevent other people from having the same opportunity to live in accordance with their most cherished ethical commitments. As Bou-Habib (2006: p. 123) puts it:

The very ground on which the integrity argument stands is precisely the claim that religious accommodation is necessary to give all persons, religious and

3 Since religious conducts are matters of conscience and obligation in a way that cultural practices are not necessarily, one might object to the ethical identity argument I put forth that it makes a far better case for religious accommodation than for *cultural* accommodation. While conceding the point in theory, I nevertheless consider that the distinction between religious conducts and cultural practices is often blurred in practice since many believers do not endorse, or comply with, all the tenets of their religious duties and many non-believers see many aspects of their cultural identity – history, language, national symbols – as something having a great moral weight and as a matter of duty and conscience. For a discussion of the issue, see Song (2007: p. 65-66).

non-religious alike, an equal opportunity for well-being. But if this is the ground of the argument, it must then follow that the accommodation it affords religious persons cannot come at the expense of other people's equal opportunity for well-being.

'Conscience' and 'integrity' are also insufficient conditions in the sense that they represent only *prima facie* reasons for religious or cultural accommodations that must be weighed against the legitimacy of a law or a public policy. In effect, if governments were to exempt every religious or secular conscientious objector from all laws, this:

(...) would disestablish democracy in order to privilege the conscience of every individual above that of the majority, even when some members of the majority may have conscientious reasons to support the law in question. Automatic exemptions from legitimate laws on the basis of conscientious objection undermine the ability of duly constituted majorities to make law (Gutmann 2003: p. 176).

In my opinion, the ethical personhood view I have just outlined provides one of the most plausible arguments for cultural and religious accommodations and for law exemptions. Its main advantage is that it succeeds in explaining why and under what circumstances religious and cultural practices deserve accommodation without resorting to too strong hypotheses regarding the nature of religious or cultural identity, which will always appear controversial as much from a liberal as from a non-liberal point of view. It thereby avoids the shortcomings of the two opposite views of cultural and religious accommodations which stand at the opposite ends of the choice/chance spectrum. At the one end of the spectrum are those, such as Bedi (2007), who claim that law exemptions are legitimate and necessary only if religious conduct is conceived of as something unchosen. At the other end are others, such as Barry, who claim just the contrary, that law exemptions are illegitimate and unnecessary because members of cultural and religious communities must be held responsible for their life choices. The defect of the first view is that it succeeds in justifying cultural and religious accommodations and law exemptions only at the cost of excluding those who might claim responsibility for their allegiances. The second view gives a more liberal account of such allegiances but it is at the price of cultural and religious accommodations. Despite their differences, both views share a common underlying assumption: that under a facially fair system of laws and policies, differential treatment is legitimate and necessary only if people are victims of involuntary circumstances for which they cannot claim responsibility.

From the ethical personhood perspective, it is no longer necessary to conceive of religious conduct and cultural practices as a kind of involuntary circumstance to make them eligible for law exemption. What is central to this perspective is not the *nature* of the authority that binds the ethical subject but the *equal respect* our liberal democracies owe to citizens whose ways of life are governed by ethical precepts and conceptions of the good that are perceived as a matter of duty and compliance, no matter what the *sources* of authority are. As we saw above, the source of authority may sometimes be perceived as external to the ethical subject (God or nature), and then as something that is fixed, rigid and unchosen. But it may also be perceived as internal to the ethical subject (conscience or reason), and then as something that, even if it is 'constitutive of the individual's sense of identity and even self-respect and cannot be overcome without a deep sense of moral loss' (Parekh 2000: p. 241), is nevertheless under

human control and not irrevocable. The source of authority may also be religious or secular. But whatever source that may bind the ethical subject, the ethical personhood view contends that religious and cultural accommodations are legitimate and necessary not because religious and cultural affiliations are on a par with involuntary and unfortunate circumstances that plague human beings but because our liberal democracies must show the same respect for minority or non-mainstream consciences as for majority or mainstream consciences. Since the ethical commitments of the latter are already reflected in majoritarian laws and policies, religious and cultural accommodations sometimes represent the only way to assure minority or non-mainstream consciences the same respect as the majority or mainstream consciences, that is, the same opportunities to live in accordance with the ethical beliefs and commitments they experience as binding without a law or a policy unduly impinging on them. In sum, the ethical personhood view is founded, not on an account of how best to compensate people who are presumably victims of unfortunate circumstances, but on an account of how best to live up to what equal ethical freedoms mean in a liberal democratic society and how best to show equal respect for all its citizens, religious as well as secular.

(2) In light of the ethical personhood argument just provided, the main defect in Barry's position is that it doesn't adequately account for what we may reasonably expect from citizens in terms of compliance with laws and public policies. Barry believes that given a fair set of rights and opportunities, such compliance is not unreasonable when any human agent normally constituted can perform the expected behavior, when there is no material or physical obstacle to compliance. This is why, in the passage cited in the previous section, he contrasts the situation of a disabled person with that of a member of some religious group. The former faces objective, physical, limits to being able to take advantage of an opportunity, while the latter faces only subjective, cultural, limits, for which he or she must be held accountable. Barry concludes that since unlike the former, it is not physically impossible for the latter to surmount his or her limits, and since these limits don't arise out of morally arbitrary circumstances beyond human control, it is not unreasonable for him or her to adapt his or her behavior to the set of opportunities provided. However, in order to know to what extent we may reasonably expect religious or secular citizens to take advantage of the opportunities offered to them, and to what extent compliance with laws may possibly threaten their integrity or impose unreasonable costs and burdens on them, it is essential to take into consideration the various aspects of their basic interests and needs and not limit them to a mere question of physical integrity. A facially fair system of laws and policies may not only impose illegitimate costs and burdens on, or threaten the integrity of, people faced with physical disabilities, but also people with different cultural or religious backgrounds. In this latter case, compliance with laws and public policies represents a reasonable expectation, not only when we assume that members of religious and cultural groups can, as any other human agent normally constituted, perform what laws and public policies require or when their physical integrity is respected, but also when their *ethical integrity* is respected and given due moral consideration, when a law or a public policy does not require them to perform an act that overtly infringes their perceived duties. If the costs for engaging in a certain activity are very high for someone who complies with such duties (e.g. abandoning a central belief or religious practice upon which his or her ethical identity relies or being excluded from, or ostracized by, his or her own community), it becomes very difficult to claim that such a person has the same opportunities as any other who doesn't have to pay the same

price. The availability of a teaching position in a secular school that bans the wearing of religious symbols represents an opportunity whose costs will vary depending on whether the applicant is a secular woman or a faithful Muslim woman. As Miller (2002: p. 51) and Song (2007: p. 63) have clearly stressed, equality of opportunity is not only equality in regard to the physical possibility of engaging in some activity, but also equality in regard to the possibility of engaging in some activity without risk of incurring *excessive costs*. Costs may be excessive, not only as to the physical ability of someone to perform what the law prescribes or to take advantage of an opportunity, but also as to one's conscientious conduct and ethical integrity, as to what one's perceived duties are. It is worth emphasizing that in this case costs could be excessive not primarily as a consequence of intrinsic burdens, that is, duties that a religious or cultural community imposes on its members, but as a consequence of indirect or extrinsic burdens (Miller 2002: p. 50 ; Song 2007: p. 63), which originate from the *conflict* between duty-based religious conducts or cultural practices and public policies. Asking Sikhs to wear turbans is an intrinsic burden, forbidding their children access to some schools because of this is an extrinsic burden. While the responsibility for intrinsic burdens – the duties that a cultural or religious community imposes on its members – does not fall on public authorities, extrinsic burdens – the external costs arising from compliance with such duties – cannot but be a matter of public concern. This is not to say that all extrinsic burdens should be assumed by public authorities and that all conscientious objectors should be exempted from laws. As I pointed out earlier, 'conscience' and 'integrity', regardless of their moral importance, are only *prima facie* reasons for religious or cultural accommodation, reasons that must be weighed against the legitimacy of a law or a public policy. However, it is one thing to say that extrinsic burdens are insufficient conditions for religious or cultural accommodation and quite another to say, as Barry does, that they are simply not a matter of public concern. Thus far, the main ground we have examined for this view is that, since religion- or culture-based duties are not the results of unchosen circumstances beyond human control, those who feel bound by such duties are responsible for the costs and burdens they generate. But Barry provides another reason for his view. According to this other reason, equal opportunity would be an objective state of affairs and, the moment the set of options provided is fair, the fact that some people are not culturally adapted to grasp an opportunity would be irrelevant to the issue of equal opportunity. After dismissing the former reason, I would now like to examine more carefully this other reason.

Section 3

The objective account of equal opportunity is contrasted by Barry (2001: p. 37) with the opposite view, supported for instance by Parekh (2000: p. 241), who maintains that opportunities would be a subjective rather than an objective state of affairs in the sense that 'a facility, a resource, or a course of action is only a mute and passive possibility and not an opportunity for an individual if she lacks the capacity, the cultural disposition, or the necessary cultural knowledge to take advantage of it.' The main weakness of the subjective account is that, as Parekh himself admits, cultural inabilities do not annihilate opportunities simply due to the fact that people do not have the cultural dispositions necessary to take advantage of them. Whatever subjective constraints – cultural, religious or psychological – that prevent people from grasping an opportunity, the set of opportunities exists objectively, a fact that the subjective account cannot dis-

miss without difficulty. But the objective account fails to see a central point: the moment one disregards all – purportedly subjective – cultural or religious factors that prevent people from taking advantage of an opportunity, no possibility is left to scrutinize the impact laws have on citizens. The objective account simply dismisses as morally irrelevant the idea that the differential impact of a law or a public policy may be more burdensome for some groups than others on the grounds that every law has a differential impact on different groups and that differential impact is not in itself unfair the moment it derives from just laws (Barry 2002: p. 213-14). However, the main problem with the objective account is that, even if ‘the differential impact of a general law cannot in itself found a claim that the law is unjust’ (Barry 2001: p. 38), it doesn’t follow, as Barry seems to believe, that facially just laws and public policies are infallible and that their apparent fairness should not be investigated further and tested against possible injustices committed in particular situations when demands for accommodation are made.

Given the shortcomings of the objective and subjective accounts of equal opportunity, I would like to propose an account of equal opportunity – and equal treatment generally speaking – as an interactive phenomenon. On the one hand, laws and public policies are to be considered as only *prima facie* fair or just. Their fairness or justice cannot be ascertained a priori, but only contextually, that is, in terms of the actual impact they have on the life context, the interests and needs of citizens⁴. On the other hand, accommodation and exemption claims made on behalf of ‘conscience’, ‘integrity’, or ‘compliance with duty’, whether on religious or secular grounds, are also to be considered as only *prima facie* legitimate or warranted demands. In other words, in the same way as the fairness of a law or a policy must be tested against possible injustices, the legitimacy of an exemption claim must be appraised and weighed against the aim and scope of the law or public policy. In sum, I think that equal opportunity and equal treatment have both a subjective and an objective component. In order to know whether all citizens have access to the same opportunities and are treated equally, the legitimacy both of the law or public policy and the demands for accommodation by citizens should be given due weight and balanced against one another.

In the case of the demands of religious and cultural communities, I think that an adequate approach to equal opportunity and equal treatment should take into consideration those burdens I have called indirect or extrinsic arising from the conflict between duty-related religious conduct or cultural practices and public policies. Especially, members of religious and cultural minorities and those responsible for public policies should be allowed to deliberate among themselves, not only about the costs society (or any institution, organization, corporation, etc.) should have to incur by accommodating a religious or cultural minority, but also about the costs the latter would have to incur without any accommodation. Such an approach to cultural claims, which might be called ‘deliberative’, has been adopted recently by many authors working on multiculturalism (Parekh 2000: p. 268-273; Young 2000: p. 16-51; Miller 2002: p. 57-60; Benhabib 2002; Deveaux 2006: p. 89-126; Song 2007: p. 68-84). However, in my view it

4 A word of caution must be mentioned here. My claim is not that normative independent standards of justice – or public reason – are unnecessary, and that we shouldn’t work to develop a normative conception of civic equality. My claim is that in order to know what civic equality requires in terms of equality of opportunity and equal treatment in particular situations, whether uniform treatment or differential treatment, we need, in addition to normative notions of justice, a concrete assessment of the demands made by citizens and the impact laws and public policies have on their life context.

is Song (2007: p. 67, p. 75) who has suggested the most interesting model of the kind of deliberation that should take place among members of religious and cultural communities and the representatives of public policies.

In order to know whether the differential impact of a law is reasonable or risks resulting in an injustice, the deliberation should be governed by a dual test. The first test questions the *impact* of the law or policy on the group:

What is the nature of the burden imposed? What is the value of the tradition or practice in question, and what role does it play in defining the group's beliefs or identity? To what extent is this role contested? Does the law have the effect of denying basic liberties and opportunities to members of minority religions and cultures or reinforcing their marginalized status in society? (Song 2007: p. 67)

In light of the ethical personhood view outlined above, I think that this first test should scrutinize the law to see if it impinges on a religious conduct or a cultural practice that is a *matter of duty* for the group and then of fundamental interest to its members. As I contented earlier, in order to prevent the proliferation of demands on behalf of religious or cultural practices, 'conscience' and 'integrity' should be considered as necessary conditions for law exemptions or accommodation claims. In other words, deeming a cultural practice central to a group's beliefs or identity should not be the only factor to be taken into consideration. It should also be demonstrated that such a practice is a matter of duty or compliance for the members of the group and that infringing such a duty would come down to infringing some ultimate ethical commitment, thus entailing moral costs one normally cannot afford to bear. However, it is worth noting, as Bou-Habib (2006: p. 122) points out, that such a condition does not necessary 'entail that many central religious practices will not have a claim to accommodation, since the distinction between practices that are 'central' and 'peripheral' to a particular religion tends to map on to the distinction between practices that are perceived to be a matter of duty, and practices that are not so perceived.'

But accommodation and exemption claims made on behalf of 'conscience' or 'integrity' are only *prima facie* legitimate. This is why the second test must question the *purpose* or the *rationale* of the law or policy. What interest does it serve? Is it a mere convention inherited from the past that no longer serves a legitimate purpose? Does it provide a suitable interpretation of some basic rights? Are there strong public reasons for it and is it in the general interest to maintain it? It is crucial to ask about these questions because it is the responsibility of the state to ensure that the general interest and the basic rights and liberties of all citizens will be protected or won't be compromised by any accommodation claim.

In such a dialogical process governed by the dual test, participants should become gradually aware of the costs and burdens that *each party* must bear. If the dialogue reveals that the law or policy impinges on a fundamental interest – a central belief or practice that is a matter of conscience or duty – then the representatives of the law or policy will have to examine whether law exemption is possible. If the dialogue reveals, even more profoundly, that the law or policy conceals a misguided understanding of some basic rights that proves to be unsuitable to certain situations, then the representatives will have to envisage the possibility of revising, or even abolishing the law. If, on the contrary, the dialogue reveals that the law or policy serves to protect an overriding public interest and that failing to protect it would compromise some of the

citizens' basic rights and liberties, then it will fall on those representatives of the religious or cultural minority involved in the deliberations to inform their members that they will from that point on have to adapt their beliefs and practices to the public norms in place.

I think such a deliberative approach is better suited to assuring members of religious and cultural minorities equal opportunities and equal treatment than Barry's more limited objective account for one core reason: this approach is more likely to live up to what it means for the members of a political society to be treated as equals, that is, to their fundamental right to equal consideration and equal respect. Historically, several philosophical doctrines (Kantian, utilitarian, libertarian, etc.) have proposed a certain conception of moral equality among persons. But when it comes to the principles governing the moral equality among *citizens* within an institutional framework or political society – which I call *civic equality* – I think the best conceptions developed over the past fifteen or twenty years pertain to political theories that have sought to embody a certain deliberative ideal⁵. Such theories often disagree about the value of individual, or private, and that of political, or public, liberties and the proper balance between them one has to look for. Some theories propose a more substantial account of the deliberative ideal as they rely on constitutional principles (Gutmann & Thompson 1996: p. 17, p. 49) or an independent normative conception of justice or public reason (Rawls) they deem necessary in order to constrain, limit, guide or regulate public deliberations. Others (Habermas) put forth a more procedural account as they seek to incorporate substantial constraints directly within the deliberative procedures. But whatever substantial or procedural elements such theories emphasize, they all agree on a certain conception of civic equality. First, citizens are treated as civic equals when their fundamental rights and individual liberties are duly protected, when they recognize each other as moral persons who deserve equal respect and equal consideration, in sum, when they are subjects of rights. But it requires more than the enjoyment of the same bundle of rights to be treated as civic equals. Citizens must also be given an equal voice and allowed to deliberate equally about how their rights may be significantly exercised within their life context, according to their interests and needs. Without this further condition, the norm of civic equality would reflect only a juridical relation among citizens envisioned as mere rights addressees. However, the norm of civic equality must also reflect a public, institutional and political relation among citizens envisioned, no longer as mere rights beneficiaries, but also as participants, as cooperative members of society, as signatories of the bundle of rights granted to them. And they cannot be so conceived if they cannot deliberate in public forums about the impact public norms have on their life context. In a nutshell, in order to live up to the full idea of civic equality, laws and public policies must not only be just in accordance with some independent criteria of justice but also legitimate in accordance with a certain deliberative ideal of political citizenship and democratic participation.

From the above norm of civic equality we may draw certain implications regarding equal opportunity and equal treatment. According to such a norm, citizens treat each other as civic equals, not only when they make sure that their basic rights and liberties are equally protected, but also when all can publicly assess the scope of their rights and liberties and submit the fairness of laws and policies to the test of democratic deliberation. In light of this norm, it is far from sure that the uniform treatment of citi-

⁵ Among the major contributions let's mention: Cohen (1997); Habermas (1996); Rawls (1993: p. 212-54; 1999); Gutmann & Thompson (1996). For a sympathetic overview, see Freeman (2000).

zens is recommendable in all circumstances since we cannot be certain that the prevailing laws and policies of our society will be fair or just in all situations, that they will never impose illegitimate burdens on certain groups of citizens over others, like religious and cultural minorities, or, if such burdens are imposed, that those who complain about their differential impact will only do so on purely subjective grounds. Yet this is exactly what the objective account of equal opportunity endorsed by Barry is forced to assume. The weakness of this account is the belief that uniform treatment is the only genuine expression of civic equality and, as a consequence, that there is simply no need to validate such an assumption in light of possible injustices. In reality, the objective account lives up to only one aspect of the norm of civic equality – the aspect guaranteeing all citizens the same bundle of rights and liberties – but dismisses the other aspect, which is no less fundamental in order to treat all citizens as full civic equals: the aspect giving them a public voice that enables them to effectively test the apparent fairness of the prevailing public norms that govern their lives. In sum, a suitable approach to equal opportunity and equal treatment should take seriously, rather than disregard as Barry does, one of the central aspects of civic equality which allows citizens to clarify among themselves, through dialogue, the concrete impact laws and policies have on their life context.

Conclusion

In this paper, I have examined the scope and limits of the uniform treatment of religious and cultural differences as the case for this approach has been most forcefully argued in Barry's writings on multiculturalism. I have drawn two main conclusions. First, religious conducts and cultural practices deserve to be accommodated through law exemption in certain circumstances because it is sometimes the only way our liberal democracies can show respect for citizens as ethical subjects, that is, as persons whose identity is shaped by deep ethical commitments to which they are bound. Barry's uniform approach is defective in this respect since it seems ready to accommodate people only if the differential impact of a law is the result of morally arbitrary factors for which they cannot claim responsibility. In Barry's view, that would not be the case with religious and cultural affiliations. My second conclusion is that a deliberative approach to cultural claims is best suited to assuring members of religious and cultural minorities equal opportunities and equal treatment for one main reason: the deliberative approach views equal opportunity as an interactive phenomenon encompassing subjective and objective components and, as such, it can achieve more success than Barry's objective account in treating members of religious and cultural minorities as full civic equals as it is not limited to making sure that they enjoy the same bundle of rights and liberties as all other citizens, but also that they can publicly assess the scope of their rights and liberties through public deliberation.

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