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PROBLEMS OF CULTURAL RIGHTS

ABSTRACT

When one reads the declaration of UNESCO from the early twenty-first century and wonders not so much on the phenomenon of coexistence of different cultures, but rather on the multicultural projects formulated in relation to the above, one relates the key questions to its origin and possible new solutions, first political and then legal. In political philosophy today developed in the so-called Western societies, these projects are linked to the reflection on their liberal and democratic foundations, especially on the issue of individual and group rights. Outlining these problems may be the introduction to the discussion of the key issues emerging in the reflection on the modern citizenship, as well as the expected legal order of multicultural societies.

Keywords: cultural rights, rights of minorities, multiculturalism, liberal culturalism, liberalism

The Universal Declaration on Cultural Diversity was adopted unanimously during the 31st Session of the General Conference of UNESCO on 2 November 2001. It preceded the adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions which took place a few years later, on 20 October 2005. The declaration of 2001, according to the website of the Polish UNESCO Committee stated that diversity is the common heritage of mankind, and that cultural diversity is a source of creativity and the essential element for the dynamic development of societies (POLSKI KOMITET DS. UNESCO).¹ The above statements do not give rise to serious debate, although they already indicate the assumptions about equality of all cultures which in their diversity constitute the “common heritage of mankind” and “a source of creativity and the essential element for the dynamic development of societies.” However, its further formulations arouse serious disputes, sometimes focusing on the very foundation of the language used today, especially in the so-called West, among the members of liberal democratic societies. The Declaration in fact states, moving the reflection from the level of facts describing the actually existing many and diverse cultures, sometimes carrying contradictory content or patterns of behavior, to the normative level, supplementing the previous one (and perhaps derived from it, which brings about problems carried by the so-called naturalist fallacy). At the second level, one says: “normative” (or “somewhat normative” as one speaks about rights in the subjective sense, rather than the law in the objective sense), meaning that “the protection of cultural diversity is an integral part of human rights and as such should be seen as an ethical imperative” (POLSKI KOMITET DS. UNESCO).²

¹ In Article 1 of the Declaration (“Cultural diversity – common heritage of humanity”) one may read: “Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.” The next two articles (Art. 2: “From cultural diversity to pluralism of cultures” and Art. 3: “Cultural diversity as a factor in development”) state that “In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life. Policies endorsing integration and participation of all citizens are the guarantee of social consistency, viability of societies, civil society and peace. Cultural pluralism defined in this way is the political answer to the existence of cultural diversity. Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence” (POWSZECHNA DEKLARACJA: 2).

² In the key article 4 of the above Declaration of 2001, key for the reflection of this work) (entitled “Human rights as guarantees of cultural diversity”) we find the following words, which bring us not only onto a political, but also a normative level: “The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamen-

It appears, then, that what we have in mind is not a legal obligation, but only an ethical imperative involving real cultural diversity, and not only a normative resolution of moral value, but the connection between the actual cultural diversity with juridical relation, when mention is made of the fact that “the protection of cultural diversity is an integral part of human rights.” It seems that it is expected to protect the actual diversity of culturally specific identities, probably of individuals and/or groups by assigning individuals and/or groups with the rights allowing the protection of their identity and preservation of their diversity resulting from the diversity of their cultural contexts.³ Moreover, the website, when discussing the declaration, says that by “protecting

tal freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.” In the last cited article, Article 5 of the Declaration entitled “Cultural rights as an enabling environment for cultural diversity” one may find an important supplement to the normative level, as it says: Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. “The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms” (POWSZECHNA DEKLARACJA: 2-3).

- ³ Once, in the introduction to a collection of essays SZLACHTA 2012: 8-10 I wrote that “‘Popular knowledge’ tells us that ‘once’ the world was not as complicated as it is today, that it was more homogeneous, or at least that the Western world was more uniform. Without going into discussion about the intriguing question of the existence of such a world or its possible ‘essence,’ one usually assumes that there were times when reference was made to the nature of the human species or nature as rationality or reasonability (reason) common to all species, and the norms of natural law were created basing on the above – the norms which the human mind could determine when it duly recognized nature as not shaped by itself, but contained in each person, perhaps introduced by God or developed in some other way or characteristic to it in some other way. The norms of natural law (as ‘once’ one spoke about natural norms and rules rather than ‘innate possibilities’ and even natural rights of an individual) were to set fundamental normative context for the activity of any human legislator, no matter who it would be; the content of these standards was to somehow limit the legislative will of each body, and probably also every sovereign. When one uses ‘popular knowledge,’ one usually does not see the consequences of the nominalist or even nominalist-voluntarist revolution because knowledge today is enriched with information about the anatomy of animals or structure of chemical compounds, the rivers of South America or romantic poets rather than information on disputes which shaped the mind of the ‘Western man.’ This ‘once,’ however, remains within the boundaries of that knowledge, and we turn back to this knowledge when we read, for example, the statements of the current St. Peter, Benedict XVI, on the importance for the Western legal culture of a meeting between Stoic philosophers and Roman lawyers in the second century before Christ. This meeting twenty-two centuries ago helped shape the theoretical concept finding justification for the ‘measures of law’ not in God’s revelation, but in nature; the concept indicating indirectly that beyond the arbitrary will of each of the ‘sovereigns’ lies ‘the final measure’ of what they introduce as the content of law, as a set of norms supported by sanctions; that – in contrast – it lies next to or above this will, that it binds this will, because before the judgment of will one has to appeal to reason able to know something that is not dependent on the mind of the knower and is not shaped by it. The task of the mind is to learn, and that of the will to relate to what has been learned. We must know that what was to be known was nature

the diversity we protect the rights of minorities, endangered languages and the right to education and expression in the mother tongue,” clearly associating a real cultural diversity with the rights granted not to individuals, but rather to groups, including minority groups. The signatories to the Declaration not only noted that “an essential criterion for the protection of diversity is the protection of cultural heritage and active cultural policy guaranteeing universal access and dissemination of information on the cultural goods and creations and ensuring the free circulation of ideas,” but also advocated “international cooperation in order to create and support indigenous cultural industries capable of existence both at national and international level,” pointing finally “to the need for cooperation between the public and private sector for the effective protection and promotion of diversity” – briefly, giving consent, and even calling for the use of also public funds both for the “effective protection” and to “support diversity” actually existing in many societies, not only probably the liberal-democratic cultural diversity (POLSKI KOMITET DS. UNESCO).

When we reflect not only on the sociological description of the well-known, “real” phenomenon of the coexistence of different cultures in today’s society, but rather responses to multicultural projects, key questions are asked about its origin and new political and legal solutions that it offers.⁴ In political philosophy, these projects are usually associated with reflection on the foundations of liberal societies and the question

and that reason was to apply to it the standards to protect it, especially after the terrible experiences of the previous century, the century of Auschwitz, but also the age of critical discussion on tradition reiterated by Pope Benedict in the German Bundestag in September 2011.” This collection included articles about the problems associated with the search for justification for universally binding legal rather than moral normative order in the second half of the twentieth century – the century marked by the rule of positivist and normativist approach to law, and attempts to identify the causes of these problems, including the problems of explaining the transition from what is actually normative in the so-called liberal democracies, and remarks on problems related to the treatment of the individual as a citizen and a man at the same time (which is present today and in the case of refugees is reflected in trying to determine what “nationality” and “citizenship” are) finally, the proposals submitted today by those considered to be liberals and those called agonist or radical democrats. The reader can find there remarks of historical nature and reflections on the content of contemporary debates, and can perhaps ascertain that we “are still discussing the same issues, although we are talking about them now due to the increase in problems resulting from the increase of the ‘real’ multiculturalism and the attempts to translate them onto the lookout for new justifications for normative order. The meeting between natural-legal and positivist-normativist approaches occurs today in a new context, which leads some scholars not so much to introduce new descriptions of the phenomenon of multiculturalism, as to declare that this phenomenon finally removes the basis for the standards found in the nature of the species, common to all (not taking into account the diversity of ethno-cultural groups and individuals), and also leads to the astonishing attempt to weaken or even abolish the ‘territoriality of law,’ i.e. the validity of the legal system for all citizens living in a country, occupying its territory. The transition from ‘factuality’ to ‘normativity’ must now take into account a new element differentiating ‘factuality,’ and possibly differentiating ‘normativity’ as – to some extent at least – a reflection of the other.” Articles published then taken up the problem of representation, no doubt related to the increasing multiculturalism as a phenomenon examined by sociologists, but also connected with the philosophical and political concept, sometimes, on the normative plain, called multiculturalism.

⁴ This and the next few paragraphs follow the article “Introduction to the Liberal Project of Multiculturalism” included in the already cited collection of essays SZLACHTA 2012: 139-148.

of the so-called relations between individual rights and the rights (perhaps perceived only as norms) of groups to which individuals, being nationals of states including these groups, belong. Thus posed issue, requiring extensive discussion on the plain of the history of ideas (political thought), and also indicating individual positions formulated today by those with extreme and moderate approach to multiculturalism, feminist and communitarist environments critical towards this approach, would require an extremely elaborate text, which is still lacking in Polish literature of the subject. The author of the text, however, is not attempting to fill this gap, but he rather focuses on critical comments on project considered most significant from a theoretical point of view and providing a point of reference for the apologists and critics of the ideology of multiculturalism. This project, developed by Will Kymlicka in his work on contemporary political philosophy (KYMICKA 2009: 397-452), is sometimes referred to as "liberal culturalism," thus associated with the liberal tradition. Indeed, precisely in this tradition one may usually find the basis for the formulation of multicultural projects, understood as justifying respect for otherness and cultural diversity, "plurality of individuals" regardless not only of their gender, race or social class but also their cultural or ethnic group. Such a definition of this tradition leads to the issue of equal value of each individual, which can not be influenced by the above mentioned or other conditions that empirically determine differences between individuals. Basically the main point here is equal dignity (or "value") of each of the individuals and – postulatively, or at least potentially postulatively – the same value of each individual life and its projects.

What becomes problematic already at this point is the question of determining the criteria to punish individuals for certain acts that are nothing more than a realization of a part of their own life project. This issue has been dealt with by political philosophy of politics since its very beginnings. Its creators have formulated different justifications for the existence of subjective and objective sovereignty, even in modern times associated with only legislative sovereignty. In the tradition of liberal thought this subject also is raised, generally leading to a thesis about the need to adopt a justification which takes as a starting point the will of the individual to submit to the sovereignty in order to obtain protection for individual rights and freedoms etc., including – which sometimes is especially emphasized – external security. Apart from an undoubtedly engaging discussion on the countercultural approach and even abandoning the selected topic as too broad, one may only state that looking for justification for the possibility (right) to punish for certain actions of individuals by somehow justified and understood sovereignty, guides us towards the relationship between a strictly individualist approach (with individual as to be the ultimate source of sovereignty as such), and situating the individual not before or against any groups, but within them. Limiting the liberal tradition identified by the ideologues of multiculturalism (referred to by Kymlicka) to strictly individualist approach problematizes the treatment of citizens of a multicultural state at the same time as an individual (which, according to this tradition is consistent especially with justifying sovereignty, and with it the existence of any normative order [see in particular (to recommend a text available in Polish) HABERMAS 2005]) and as a member of a group other than the state, because identified as national or ethnic,

forming at least a minority in the given country (mainly immigrants, e.g. long settled in the territory and enjoying the citizenship of the country – this may well concern the Aborigines in Australia and the French-speaking Canadian citizens living in Quebec. In these countries the reflection on multiculturalism is particularly relevant and has been undertaken for a long time, and the name of the Canadian communitarist Charles Taylor is often mentioned among the main creators of this kind of reflection). The strictly individualist assumption leads to the open proclamation of the possible respect for each individual, but also – which is important here – to justifying the existence of a single normative order for all individuals regardless of their affiliation to any group belonging to the same state as other groups. The conclusion essential at this point is worth noting: the diversity of citizens on grounds of their group affiliation may not lead to a differentiation of citizens-individuals in their function to justify the generally applicable norms, binding all individuals in the same manner regardless of their eventual membership in the group.

The Liberal tradition has two faces, according to Kymlicka: on the one hand, it was used as justification for the redistribution policy, crucial in the work of building of welfare states, significantly weakening the differences between individuals seen by the Marxist tradition as belonging to different social classes; on the other hand, it is used for formulating the so-called policy of difference, emphasizing differences between individuals rather than removing them, as in today bygone policy of redistribution. The policy of acceptance or difference, close to the followers of the ideology of multiculturalism therefore rests on a different premise than the once effective redistributive policy; it does in fact – otherwise than the previous one – create differences between individuals. Although these differences are no longer “class” or “economic,” but “cultural,” however – let us emphasize this fact – the point is to differentiate individuals. The same tradition is therefore used to justify the pursuit of equality between individuals but also differences between them; this first goal is subordinated not only to the purely economic dimension, but also the legal or entitling one. The second option is not limited to the purely cultural dimension, but is also connected with the legal or entitling one. Kymlicka, in fact, sees no tension between the two pursuits present in the liberal tradition, and thus does not take into account the difficulties or inconsistencies within this very tradition. His “liberal culturalism” in fact leads us to claims which are unacceptable for one of the liberal pursuits specified above, for striving to achieve equal position of each individual and their rights in comparison with any other individual belonging to the same country with any other citizen subject to the same legal system.⁵ That claim

⁵ Sometimes this tension is perceived by the followers of the ideology of multiculturalism and leads them to seemingly paradoxical claims, such as the one of a British citizen of Indian descent Bhikhu Parekh, the author of the famous report adopted by Her Majesty's Government, which demands discrimination (as differentiation of particular groups) and (also) refraining from all discrimination (as taking into account the positions of all the groups). Looking at this paradox in the words of a supporter of multiculturalism, and even reconstruction of the “traditional” way of thinking about Britishness as a phenomenon dominated by white British tradition one can see how far it departs from the absolute prohibition of discrimination for individuals, usually commonly associated with the liberal tradition (see also another article by the Author of this work PAREKH 2006: 65-78).

can be made even more dramatic by giving it the following wording: if one of the liberal aspirations is to support equality before the law (ie. uniformity of rights for each individual), the second aspiration contradicts this goal, and even acts against the very essence of previous efforts, leading us from the need to rethink the far-reaching transformation of the theory of citizenship varied in connection with differences between rights of individual citizens.

The tension thus observed in Kymlicka's project is of paramount importance; it is not important that we associate it – as Kymlicka does – with the possible dissonance which is present in the liberal tradition. What is important are not the words or even the uniformity of positions in the history of political thought (it is enough to mention that within the liberal tradition several competing trends may be discerned, whose supporters refer to different categories and different constructs – for example, utilitarians and liberal rationalists, now called supporters of liberalism based on rights), but quite a fundamental issue: the ideologues of multiculturalism consciously deny the thesis of the possible assignment of powers exclusively to individuals undifferentiated from the point of view of the legal position. It is an extremely powerful statement, in fact, also Kymlicka takes it into account if in connection with it he introduces a distinction of external security and internal restrictions: on the one hand he aims to take into account the possible influence by other groups and/or multicultural state to a given group identified by its “cultural identity,” on the other hand to take into account the possible influence of the group on its members. External security measures, for the sake of their value, negate the possibility of limiting by other groups and/or multi-cultural state of the given group that identifies itself through its cultural identity; their nature is thus colloquially liberal: the “freedom” of the group is at stake, which can neither be denied nor even violated by external influences; the second element of the distinction is in fact of a similar value, as it is also “colloquially liberal,” since in this case it is required that the individual (this time not a group to which they belong) is not in its decisions or ways of life constrained from the outside, not so much by the state or another group, but by the group to which they belong. In this way, our claim on the contradiction between aspirations within liberalism is protested against at the level of liberal commonness, because it turns out that both the agreement to external security measures and opposition towards internal restrictions have liberal value. A “liberal culturalist” defending the autonomy and diversity of each group⁶ appears in this way at the same time as a defender of individuals as members of each of the groups. Thereby, however, he opens an unusual perspective, using liberalism to justify the need to take into account not only

⁶ This question is still valid, and in another context it was already posed in the text, regarding the possibility of justifying the existence of normative criteria for the operation of individual groups or making their own decisions built on their own cultural identity; in other words, on the possibility of its co-participation (as by each of the individuals justifying the existence of sovereignty and – subsequently – normative order justified by them general standards binding each individual in the same way regardless of the differences between them) in the work to justify sovereignty over the groups (and each of them separately), and thus justify the existence of standards binding each group in the same way.

“individual rights” but also “group rights,” prepares us to accept liberalism as a position acting against itself, against its own, so far dominant principle of equality of individuals before the law; prepares to us accept the thesis that it is dangerous for its main principle, and even “self-contradictory.”

This quite a fundamental problem from the point of view of a historian of political thought brings us to the issue which is much more serious from the perspective of anyone observing the development of discourse on multiculturalism and growth of the phenomenon itself. The fundamental problem concerns the prospects of being associated by some with the creation of each individual out of “shattered” group identities their own individual identity according to their own taste (perhaps strongly shaped by media content), leading in the final instance to the emergence of a world of identical people, in fact losing their differences in spite of reverse attempts, associated by others with the prospect of having to reformulate the previously existing legal systems in different countries (no longer national ones), or even to establish in their place conglomerates of legal systems derived from many different group identities. The major question in connection with the second option sounds very serious: can we then defend the existence of any normative point of reference common to all new legal systems: whether it will be a conglomerate of equals, and equally respected in a given territory normative projects, applicable only to the members of a given group, in the absence of even elementary norms of a common normative base, however, exceeding a set of only procedural standards, or will a certain amount of common standards be maintained, if only those belonging to criminal law, allowing to disqualify certain actions, which – although justified by reasons of cultural identity – will be considered as negating the generally applied pattern and will justify the punishment of their perpetrators? If the second solution is accepted, however, it will open the critical prospect from the point of view of proponents of multiculturalism; the prospect of having such rules in this set that would disqualify certain behaviours justified for the sake of the particular traditions of the community, for the particular interest of the identity group, and it will happen perhaps because of one/some (but not all) particular group identities/traditions. It seems that such a solution cannot be accepted by the proponents of multiculturalism. It is no longer a question of the so-called affirmative actions in favour of some minority disadvantaged socially or economically or even culturally – it is a much more serious problem requiring a different and a new approach. An approach not taken into account in the liberal culturalism of Kymlicka, which is conservative in expecting a slow change in present legal systems which are still based on the territorial principle; an approach that will perhaps characterise those who will radically reconsider the liberal tradition and recognize that the place of individuals justifying with their consent the existence of sovereignty, and thus a single normative order should be taken by other entities, this time – groups. These will be cultural and ethnic groups co-habiting with others on the same territory, formerly states, based on the uniform national concept, now with their own normative systems, congruent to the appearance of some common procedural norms and possibly also a material ones, including criminal law, but also certain (because given the right to do so), that at any time they can leave such a relationship of groups. But will states exist then or will they disappear based on

the “principle of territoriality”? And will opposition to the internal restrictions imposed by the group on its members be possible?

Such questions are particularly justified now. Delight in the multicolour diversity of contemporary liberal societies, sometimes increased by media campaigns and public resources (which the Declaration did not mention) should not obscure these questions. The point is not to limit tolerance for “otherness,” running xenophobic policies of closeness towards national and ethnic minorities that fuel opposition of the majority, most often concerned about, for example, competition in the labour market, towards newcomers from afar or settled for generations, heirs of a tradition and identity different than the majoritarian one tradition. The point is only to think about the theoretical consequences of projects formulated today, and associated with liberal tradition. The call to take up this kind of reflection is by all means justified as a call to carry out a kind of intellectual exercise towards the practical reality which subject to clear changes – it is enough to see the consequences of affirmative policies in the area specified herein. This exercise becomes easier when we take into account old approaches, as those formulated in the early fifteenth century (the so-called late Middle Ages, some centuries before the Enlightenment, which is so close to many) by the rector of the Kraków Academy, Paweł Włodkowic, and also new approaches found in the statements of representatives of other non-Western contemporary cultures, who do not know well (and perhaps do not know at all or do not accept) the liberal, essentially individualistic thinking of the main creators of Western multicultural projects, especially liberal culturalism. Looking from this perspective, the attempt to include in a volume devoted to cultural rights as rights of groups rather than individuals the approaches both present and past seems to be obvious, first because they let us trace the beginnings of justifications for group rights, and secondly – they reveal their conditioning in the expectations and demands formulated by those arriving in West, hoping to benefit from multicultural policies implemented there, after all, based on the concept of cultural rights accurately identified and described in the Universal Declaration on Cultural Diversity of 2001 and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression of 2005.

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