

Reflections on Collective Rights and State Sovereignty

Wibren van der Burg

1. Introduction

In the modern world, there are not many states that are not multicultural. Most states incorporate more than one ethnic or national community.¹ It need not be argued that this gives rise to many practical problems and conflicts up to the level of civil wars or even world wars: Sarajevo is a sad symbol of both. On the other hand, the multicultural character of a society may be a source to draw from for a rich and dynamic cultural framework. How should political theory deal with the fact of multiculturalism? This was one of the central questions of this conference; in this article some of the suggestions that have been presented in the various articles in this volume will be discussed. It should be stated from the outset that I will focus only on political theory, i.e. on theory concerning (the actions of) the state, and not on moral theory concerning (the actions of) the individual – which is the topic of Theo van Willigenburg's article.

We may distinguish two steps in an analysis of the political implications of multiculturalism. Both steps may be distinguished, but they are connected. The first step is to answer the question of why the coexistence of national or ethnic communities within the boundaries of one state should be politically relevant (section 2). There are obvious pragmatic reasons, but also arguments of a more philosophical nature. The second step in such an analysis would be to develop elements of a political theory that suggests ways of coping with the problems of multiculturalism that are theoretically sound and practically feasible. According to Türk and Fleiner in this volume, the central position of the concept of the nation-state in political theory seems to be one of

the main obstacles for an adequate theoretical approach of multiculturalism. There are two obvious strategies to counter this: one strategy is to go to the level below the state and to see whether individual and collective rights offer minority groups an adequate protection against the state (section 3); the second strategy chooses the opposite direction and focuses on the global level, not considering the national state as the basic unit of political theory, but the world community as such (section 4).

2. The Political Relevance of Multiculturalism

A fundamental question that has to be tackled before we can address other questions is why national and ethnic cultures are politically relevant. A cosmopolitan liberal may argue that ethnic and national cultures belong to a private sphere in which the state has no business. Thomas Fleiner suggests that – though clearly in the current international situation we cannot ignore national identity – a situation is desirable in which state and nation are no longer linked and in which culture and education are outside the state's sphere. In the last section I will return to his suggestion, but first we must analyse the positive arguments for considering culture a politically relevant issue. We may distinguish four main types of reasoning dealing with the question of why cultural pluralism should be seen as a relevant fact and why culture is the state's business. One is of a more pragmatic character; the other three have a more theoretical nature.²

A. Avoiding Conflict

The first line of argument is a very practical one and therefore in actual politics the most important one: the clash of ethnic and national identities is one of the most pervasive factors in political conflict, both within and between states. In Yugoslavia and the Russian Federation it led to civil wars, in Spain (the Basques) to a more limited form of organised violent conflict. In some countries cultural pluralism is a major obstacle to a smooth functioning of the political system: Belgium and Canada are good examples here. And even in those countries where the minority groups are now rather peacefully integrated, completely

ignoring the existing cultural pluralism would probably result in the resurgence of latent tensions: the situations of the Frisians in the Netherlands and Germany and of the Sorbs in Germany may be good examples. With respect to immigrant minorities, it seems that almost every Western country is confronted with problems like violent attacks on immigrants and their property. As a general conclusion we may therefore say that the state will ignore cultural pluralism only at its own peril.

This line of argument suggests an approach of compromise and mutual accommodation. Important as this may be in practical politics, theoretically it is not very satisfying. In the long run it may not be adequate in practice either. If political recognition of minority cultures is regarded only as a compromise, this compromise will be inherently unstable and vulnerable to shifting power constellations. The underlying conflict will always remain latent. Only if we can find a sound theoretical basis for practical compromise, we may hope that in the end the recognition of the minorities will be accepted as legitimate by both minority and majority. Moreover, this practical argument offers no suggestions about the contents or even the direction of state policies. It merely suggests that the state should take cultures seriously only in so far as this is necessary to avoid conflicts. As long as minorities do not complain, or if they are too weak to cause any serious trouble, there need not even be a reason for the state to recognise their interests. In some situations, it might even seem wise to suppress ethnic identities. For all these reasons, the practical argument needs to be supplemented by a sound theoretical one.

B. Culture As a Public Good

The first principled line of argument remains within the liberal-individualist framework.³ A generally accepted fundamental principle of modern political philosophy is that the state should treat its citizens with equal concern and respect.⁴ This principle has often been interpreted in a very abstract, neutral way so that all contingent differences between individual citizens are ignored as much as possible. In this interpretation, liberalism clearly cannot recognise the importance

of particular cultural identities, because it abstracts from this contingent characteristic.

Will Kymlicka (whose theory is discussed in this volume by Walter Lesch) has suggested a different interpretation of equal respect, in which both universal and contingent characteristics of the personal identity of citizens are taken into account. Equal respect for all citizens means respecting their full personality, including contingent characteristics as cultural identity. The individual remains the primary focus of Kymlicka's political philosophy, but he fully recognises the fact that the identity of this individual is partly socially and culturally determined. If belonging to a national or ethnic culture is partly constitutive of someone's identity and if a continuing cultural framework is necessary for the flourishing of the individual, then cultural membership and the cultural framework must be considered primary goods for him. The cultural framework is not a private good like food: it is a good that the individual shares with others. To be more precise, it is a public good: it is indivisible and can only be provided through a co-operative effort of the community.⁵ Cultural membership has a somewhat mixed character: it is a private good that presupposes the public good of a common cultural framework.

This line of argument is, in my opinion, a very convincing one, and it is the most promising approach in political theory to deal with the claims of cultural minorities. It suffices to demonstrate that culture is politically relevant. Still, it is far from complete. The thesis that a rich cultural framework is a public good, is uncontroversial – we will deal with this in subsection D. We have to make an additional argument: that it is *this* specific minority culture that is relevant to a citizen's flourishing and that it is his membership of *this* cultural group that is a primary good, and that this is a good worthy of state protection.

Jeremy Waldron offers three strong arguments against Kymlicka's position; I think, however, that these arguments result in a better understanding of what Kymlicka holds and what he does not hold rather than refute him. The fact that I was raised within a certain

culture, does not imply that this specific culture is necessary for my flourishing; perhaps a different cultural framework may do as well, or even better (Waldron ch. 8 (this volume): 'We need culture, but we do not need cultural integrity.'). This counter-argument is, in my opinion, only partly relevant. It is a strong argument against those extreme conservatives who hold that the state should preserve minority cultures exactly in the way they are now. Clearly, this is not Kymlicka's position. To uphold his position, we need only assume that, at least for some people, being member of one's own cultural group is partly constitutive of a personal identity, and that therefore the continual flourishing of the cultural framework of this group (open as it may be to the dynamics of change) is a very important good for them. For most of us, it is not a matter of choice to which culture we belong. One does not choose to be a member of a culture; one is born into it. Even if, later in my life, I should adopt a cosmopolitan perspective, I cannot completely detach myself from my own national or ethnic origins. 'Someone's upbringing isn't something that can just be erased; it is, and will remain a constitutive part of who that person is.' (Kymlicka 1989, 175) Though, theoretically, I may recognise the value of other cultures, and though I may enrich my own cultural identity with elements of those other cultures, it is my own culture to which I have grown accustomed and which is therefore of special value to me. It is not strictly essential to me, but neither is education. I could live without my own culture, but my life would be greatly impoverished. This is all that is needed to show that membership of a flourishing culture may be considered an important or primary good.

Waldron (ch. 4 (this volume)) gives a second argument against considering cultural membership a primary good: the fact that a cosmopolitan personality is possible. Again I think this is only a counter-argument against a more extreme position than the one Kymlicka holds. Indeed, cultural membership is not a universal primary good: some people can do without it. But for most of us it is a very important good. The fact that not all women (let alone men) get pregnant and bear children, is a valid argument to show that child-bearing is not a universal good for all women, but it is not a valid

argument against those who hold that having the opportunity to bear and raise children is a major good for many women, and that government policies protecting that good (like paid pregnancy and maternal leave) are therefore justified, even if the good is not universal. We may even hold that this good is so important that it should be protected by special rights. For Maris and Waldron cultural membership is not a good, but that does not mean that, if it is a good for some, it may be so important for them that it is worthy of state protection.

A third point made by Waldron is that even if cultural membership were a good, it would not be the state's business, just like religion is a major good for many citizens but should not be protected by the state. Why should the state protect or even actively support this culture instead of leaving it to the private sphere? The state does not take care of every primary good; a religious identity may be as important as a cultural one, but surely the state has no obligation to support the Amish in order to preserve their church. We still need to establish whether the state has any active obligations towards this specific primary good of cultural membership. A first remark on this point is that states in fact often protect and support religions. Not only is religious freedom protected; conscientious objections against military service and social security are recognised. In many countries, churches and religious institutions even get financial support from the state. In my view, this is often justified, on the ground that they offer important public goods, like mental support to those in the army, in universities or in hospitals. A second remark is that the answer to this question depends on one's general political outlook. If one prefers a minimal state like Nozick's, then the state presumably has no business in the sphere of culture. If, on the other hand, one is committed to something like a Western European ('Rhinelandic') welfare state, then the state has a more active role in supporting various types of public goods. If it is accepted that the state should support art, education, science and so on, then it seems to me that consistency yields the conclusion that the state should support those minority cultures that are an important public good for their members.

C. Culture as a Non-Reducible Collective Good

The second principled line of argument transcends the liberal-individualist framework. It considers culture to be a non-reducible collective good. It is this claim which may be found in Taylor and, in this book, in Türk. A non-reducible collective good pertains to a collectivity as such. A good is a non-reducible collective good, in so far as it is more than the aggregate of the goods which arise out of the individual membership of the collectivity.⁶ This claim gives rise to many important theoretical questions, such as how we can adequately conceptualise such goods and how we can establish that something is a non-reducible collective good. But I will leave these considerations aside and, for the sake of argument, simply assume that a culture is such a non-reducible collective good.

Even so, this is not yet a complete political argument for the proposition that states should take care of minority cultures, and especially not why they should prefer the continued existence of a minority culture over a gradual immersion of the minority in the majority culture. Politics should be oriented towards goods, but in a pluralist society confronted with scarce means not all goods can be equally realised or protected, and some goods, like religious salvation, are even regarded as belonging to the private sphere.⁷ Politics is about choices, and we need a good argument to defend why the state should protect one good rather than another. The majority culture is a good as well, and it would certainly be enriched if those now devoting their energy to preserving the minority culture, would in future direct their endeavours towards enriching the majority culture with elements from the minority culture. Moreover, why should it be a non-reducible collective good that in two hundred years time French is still alive in Quebec rather than everyone speaking English? Having only one language certainly facilitates communication and probably leads to fewer cultural conflicts. If we leave aside the interests of the members of a culture, we should rather hope for a diminishing cultural plurality, so it seems.

Political argument is comparative: a policy or a general political

structure should promote good X rather than good Y. What arguments would we have to say that minority culture A should be considered so valuable that the state must preserve it for future generations rather than let it submerge in (and hopefully enrich) majority culture B? To make political decisions we often have to compare the value of beautiful nature with the value of good roads, but the value of two cultures is a different issue. The reason is that a culture is partly constitutive of a person, and therefore the value of a culture cannot be judged from a neutral perspective. The value of different cultures is largely incommensurable. In some respects, however, they may not be fully incommensurable, and we can make more neutral judgements, e.g. whether a culture is richer, more varied or is better adapted to its context.

One may try to argue that this specific minority culture A is somehow better than culture B. Of course, this is what members of a culture often believe, because it is *better for them*, being the persons they are, partly constituted by that culture. Perhaps they think their culture is richer, has an older tradition, and offers them words to express their feelings more precisely than would be possible in other languages and cultures. But when, from an external perspective, we compare two cultures, usually most of the criteria would rather point towards a greater value of the majority culture. Simply because of the numbers, there will be a greater variety of books and theatres, the majority language will be better adapted to modern culture, and so on. At the most, we may consider the cultures to be of equal value or incommensurable, as may be the case with the French and the English in Quebec, as they both belong to a larger cultural community. But even this falls short of arguing that the French Canadian culture might be considered better than the English, and therefore this line of argument will fail to establish the good of a culture in such a way that minority protection can be based on it. If two cultures are equally good or incommensurable, the value of the culture can be no legitimate reason to give one of them special protection. An analogy may clarify this point: if the state is asked to interfere with the pollution of a small lake by a major industry, while the value of an unspoilt lake equals the

value of the jobs that the company provides, it has no legitimate reason for interfering; it would only have so if one of the two clearly is more valuable than the other.

My conclusion is that, although a minority culture may be a non-reducible collective good, I do not see how this can be a good reason for state action to protect the culture against merging in the majority culture, or even against simply disappearing. To avoid misunderstandings: I do not deny that a culture is valuable for its members and that it is valuable for its future members; but this dimension can be adequately expressed when we regard culture as a public good. What I try to analyse here is the dimension that transcends those individualistic terms.

I may illustrate this with a more personal experience. I was raised bilingually, in Frisian (an old language spoken by about 600,000 persons in the north of the Netherlands) and in Dutch. There are, in my opinion, valid arguments for special measures to protect the Frisian language as a public good – arguments that may be based on the individual needs and goods of Frisians that are alive now or that will live in the future. Personally, I would regret it if I knew that this minority culture would no longer exist in the year 2100, simply because this language is valuable to me and it would imply that a living cultural tradition of which I am part, will cease to exist. All this can be adequately expressed by regarding Frisian culture as a public good. But I do not see how I can make a good argument based on the value of Frisian language and culture as such, that would establish it as a non-reducible collective good that merits state action for its preservation. It may perhaps be argued that Frisian is a more beautiful and poetic language than Dutch, because it has a much richer variety of sounds, and that it has a longer history than the Dutch language. Yet, by most 'objective' criteria, Frisian clearly is not a 'better' language or culture: Dutch has a much larger literature and is better adapted to modern society. If we look at it, detached from the interests and the good of those who live now and enjoy it, the existence of a Frisian culture is not better than the existence of a Dutch culture

enriched by the incorporation of Frisian culture.

D. Cultural Pluralism as a Good

The last reason for the political relevance of cultural pluralism is well known. We should value cultural pluralism as such because it enriches the cultural framework. This argument does not hold that a specific minority culture is valuable as a public or a collective good, but that a broad variety of cultures is valuable as a public good.⁸ Most liberal thinkers incorporate some variety of this general argument in their theory: pluralism is valuable because it offers choice and makes experimentation possible, and because it is an important source of cultural materials.⁹ The state should aim at a great variety of cultures on its territory, because it offers us and future generations a greater choice. Our grandchildren need not necessarily value Van Gogh, but at least we should offer them the possibility to decide for themselves whether they enjoy his work or not. Perhaps our grandchildren do not value the Quebec culture any more, but we should offer them the free choice, and therefore preserve the culture.

One should doubt, however, whether this really is a good argument for protecting minority cultures in the way they should be protected according to their more communitarian defenders. A pluralist culture offers us a choice; but does a plurality of cultures offer us the same choice? As a culture is partly constitutive of my identity, I cannot pick cultures in the same way I pick books. I can pick elements of cultures, but this is only possible if cultures are open to change and external influences, and if outsiders are allowed to enter and insiders allowed to leave.

There are degrees of freedom and openness here. Some cultures are more open than others, and therefore allow more choice to pick elements of other cultures in recreating a personal identity. If what is at stake in the value of cultural pluralism are the ideals of freedom of choice and of experimentation, then we should protect minority cultures only in so far as is necessary to guarantee these freedoms, and the protective measures should be consistent with these freedoms. Free exit

from and access to minority groups should be guaranteed, just like the freedom to combine elements of various cultures. Both the majority culture and the minority culture should be open cultures to which everyone has equal access. This means that Frenchmen may experiment with English words if they want, and that a Québécois may freely choose whether to send her children to a French or an English school. It means that the Inuit and other native Americans would have no possibilities to limit membership of the group, and so on. In sum, it would correct the free market of cultures in giving the various cultures more equal access to the market, e.g. by giving subsidies to minority cultures, but it would not permit any protectionist measures that shield off the minority from the outside world. And it is exactly this type of protectionist measure that forms the core of the criticism by communitarians like Taylor, who claim that individualist liberalism cannot do justice to minority cultures.

The argument from the value of pluralism is an important argument for state support of minority cultures. But, in my opinion, it only adds strength to the argument from culture as a public good, and has the same individualist limits. These limits may even be stricter, because the argument from pluralism explicitly condemns certain protectionist measures (such as limited access to membership) that might be justified on the basis of a culture as a public good argument.

The analysis of the various arguments for state support and protection of minority cultures leads to a simple conclusion. In political theory, the justification of protection for minority cultures should be founded on an individualistic basis. Cultures are a public good for their members; that is why they matter for the state. That they are a collective good as well, may be a ground for an active cultural policy in general, but not for an active policy to protect specific minority cultures. That a pluralist culture has independent value may give additional force to arguments for protective measures, but does not add anything substantive; it may even be an argument against certain illiberal forms of protectionist measures.

3. Collective Rights to Preserve a Cultural Identity

One of the central issues in the debate on cultural pluralism is whether we should protect (members of) cultural minorities by recognising collective rights.¹⁰ This issue is connected with the question of why the state should support minority cultures. Regarding culture as a collective good tends to lead to the recognition of collective rights rather than individual rights. When culture is regarded as a public good, however, it is still open whether individual or collective rights are the best method to protect this good.

We can leave aside the question, whether collective rights are recognised in current national or international law. In her dissertation, Galenkamp concluded that 'the question whether collectivities may have a legal status as bearers of some legal rights, has nowadays remained rather uncontested'; groups, in fact, have status and rights at the international level (Galenkamp 1993, 51). Current international law is nevertheless still very reluctant to name groups as holders of rights, preferring the attribution of rights to individual members of the group.

Our central question here is not an empirical one but a normative one: do we have good philosophical grounds to justify collective rights, and, more specifically, collective rights to preserve a cultural identity? In this volume two opposite positions are defended. Türk, basing his argument on the proposition that (in the terminology used above) ethnic and national cultures are both a public and a collective good, argues that we should recognise them; Galenkamp states bluntly that they are neither feasible, nor desirable, nor needed.

Türk's argument in favour of collective rights is in line with Taylor's attempt to construe a synthesis between liberalism and communitarianism. He argues that we should not choose between the universal and the particular, but that we should combine them. We need individual rights to protect universal values, but we should also recognise the 'ethical claim to cultural, social and administrative group rights' or 'special rights to ethnic groups'. Both types of rights follow

from the principle of respect for the individual. Universal rights may be based on more individualistic dimensions of his personality, like autonomy; collective rights are a recognition of the fact that the individual is partly formed in and belongs to a community. Collective rights may be necessary for the cultural survival of a community.

In her dissertation, Galenkamp defended a position that was quite similar to that of Türk's. The paradigms of 'Gemeinschaft,' communitarianism and collective rights on the one hand, and of 'Gesellschaft', liberalism and individual rights on the other hand are both legitimate but not easily compatible (Galenkamp 1993, 154). In her article in this volume, she seems to have abandoned this position in favour of a straightforward liberalism that tries to do justice to the collective dimension of personal identity within an individual rights framework. Her argument now is that we can and should do without collective rights. I think her case is put forward in a very clear way; at least her article shows that the problems linked to collective rights constitute a serious warning not to recognise them unless we really have no alternative. Rather than critically discussing each of her arguments and confronting them with Türk's, I will go one step beyond her analysis and see whether, indeed, a liberal scheme of individual rights can be developed that makes collective rights superfluous, at least with respect to the protection of minority cultures.

In the literature (in this volume, e.g. by Galenkamp), the concepts of 'collective rights' and 'special rights' are often seen as equivalents; I think, however, that there is an important difference. In the standard distinction between collective (or group) rights and individual rights, the question of who is the subject or right-holder is the crucial criterion: the individual or the collective. Another distinction is the one between universal and special rights, where the criterion is whether everyone has these rights, or only specific groups or persons. The right to speak one's language is formulated as a universal right because everyone is entitled to it (though it may give rise to special rights for members of minorities); the right to special aid for (members of) minority groups is a special right, because members of the majority are

not entitled to it. The debate between Galenkamp and Türk seems to be one between individual, universal rights on the one hand, and collective special rights on the other. I think the middle ground may largely be covered by recognising individual special rights, rights that individuals have as members of a special cultural community.¹¹

How far can a liberal-individualist political theory go in protecting minority cultures? To answer this question, I will start with a standard individualist approach to rights, and then progressively introduce more social dimensions.

1. Most traditional rights are primarily oriented towards private goods: life, liberty and property. Some rights have a strong social dimension: freedom of religion and association, though vested in the individual, are usually or even by definition exercised in a social setting. Protection of goods with a social character through individual rights is therefore perfectly well possible within a traditional rights framework (cf. Raz 1986, 251). Goods that arise from belonging to a cultural community need not be an exception to this. Just as we recognise freedom of religion, so we may recognise freedom of language: the right to speak one's own language whenever one wants to, be it in a private sphere or in an official setting like a courtroom. Of course, this right cannot be unlimited; we need not expect an English judge to understand Polish. In some cases a system of translation facilities may be adequate, but in other cases we could specify the universal right to speak one's own language in court by saying that there is a right to use a specific language on a certain territory. The best way to formulate this specification is by constructing a special right, e.g. the right to speak Frisian in court in the Frisian-speaking part of the Netherlands.¹²

Individual special rights to private goods with a social character fit perfectly well into a liberal rights framework. This category of special rights will mainly be liberty rights that guarantee freedom from state interference with enjoying one's own culture. Even if state action is required, it will usually only be minimal. Examples are permitting the use of Breton first names (a right that until recently was denied by the

French government) or allowing the use of minority languages in official settings (a right which in many Western countries is not fully recognised). However, for the continued existence of a minority culture more is needed, even if in many cases of ethnic conflict the recognition of these minimal rights would already be a major advance.

2. The next step is to formulate special rights to a public good. Most universal rights to a public good have only recently been recognised; an example is the right to a clean environment. They are more like standards of aspiration than strict claim-rights; still, they can be useful and sometimes they have direct legal implications. A flourishing culture can be seen as such a public good as well; a wide variety of books, plays, films, television, et cetera, in one's own culture is a public good.¹³ Analogous to the right to a clean environment, we may construe the right to a rich cultural environment.

For members of a majority culture, this right is usually reasonably provided for by the free cultural market. Some additional state support for 'high culture' like the arts, or for a public broadcasting service is nevertheless necessary, as well as some regulation to ensure that the market remains free rather than being dominated by a small number of media tycoons and large publishing and broadcasting companies. For members of minority groups, however, the situation is different.¹⁴ The commercial prospects for a book are usually much worse, simply because there is a smaller number of readers. As a result, without additional state funding books would be much more expensive and the variety of books would be very small. With other arts, like drama, it may even mean that no quality products are available at all, simply because it is impossible to earn a living through the theatre in a minority culture. Not every cultural group is equally affected by this problem of unequal access to the cultural market-place. The French culture in Canada and France, on which Maris focuses, is clearly more viable under market conditions than the Inuit culture. Perhaps his thesis that empirically speaking, 'it is implausible to argue that national cultures could not survive without state encouragement and enforcement,' it is empirically implausible that national cultures cannot survive without state enforcement' holds for

large cultures like the French,¹⁵ but for small minority cultures like the Inuit I think there are good reasons for rejecting it.

For small minorities, the universal right to a rich cultural environment may be the basis for a special right for their members, namely that the state supports and protects the minority culture. Only if we do this, the members of minority and majority will be treated more or less as equals, though clearly even with state support the minority culture will have a weaker position. There are various legitimate ways to implement this right. Just as the state may restrict commercial signage for environmental reasons, so it could do for cultural reasons: a billboard on the Big Ben might be prohibited. I fail to see why this should be different for other aspects of the cultural environment, and why the state should not be allowed to demand that all advertisements on a minority's territory are either bilingual or are stated in the minority language.

A cosmopolitan may now argue that it is unclear why the right to a rich cultural environment should be the ground for a right to support a specific culture.¹⁶ Could we not say that members of the minority culture have an adequate cultural environment, because they can enjoy the majority culture as well? Why then should the state support this culture instead of culture in general? Some support for the minority culture might be warranted, just as the state supports opera and public libraries. But special additional support is not warranted, so the argument may be. I think this argument is faulty, because it suggests that the choice of a culture is completely free. But, as I have argued above, it is not. I cannot choose languages and cultures in the same way I choose my food.¹⁷ Having access only to a culture which is not my own, not merely means that I get fewer cultural goods than others or at a higher price (reading literature in a foreign language is always more difficult than reading it in one's own) but may also affect my sense of personal identity and capacity. Therefore, if a rich cultural infrastructure is essential for my personal identity and welfare, it must include the culture that I belong to and the language that I am used to. Other cultures and elements from other cultures should be optional,

even to the extent that I may reverse my preferences as a real cosmopolitan. The possibility of a cosmopolitan lifestyle may be a good argument against a general right to support for specific cultures, but cannot be an argument against a special right to such support for those persons who feel more strongly connected to their own minority culture.

3. Instead of formulating an individual special right to freedom of language or to active support for a minority culture, one may also construe these as the collective rights of a minority culture. Even if they are formulated as the rights of individuals, reference to the group culture is usually necessary. Often it will be simpler to formulate these as the rights of groups rather than as the rights of the members of groups. I do not see any major arguments against this construction, and sometimes it may be a more effective and fruitful approach. Such collective rights are justifiable; yet, they do not add anything to the individual rights framework and are completely derivative rights, both in contents and in justification. We may call them reducible collective rights, because they can ultimately be reduced to rights of individuals acting as members of a collective group.¹⁸

A collective right may be considered non-reducible in so far as it is more than the aggregate of the rights which arise out of the individual membership of the collectively. When Galenkamp states so provocatively that special rights are neither feasible, nor desirable, nor needed, she seems to refer only to those non-reducible collective rights.

Aboriginal land rights present a problem: are they reducible or not? For the survival of an aboriginal culture it may be essential that the land of the group is held in common. It would be slightly artificial to formulate this as an individual right. Nevertheless, in my opinion, the reason why we must respect collective rights to land is because it is necessary for the flourishing of the individual members of the culture as members of a cultural group. Though they are indivisible in the sense that they cannot be divided in rights to equal shares of the land, they are reducible, because their ultimate basis is the individual.¹⁹

4. Political theory consists of more elements than rights alone. We do not have a right (let alone a human right) stating that Rembrandt's paintings should be protected so that we can enjoy them. Yet, it is clearly not only a legitimate state policy to support art, but often also a duty. Not everything members of minority cultures want, can be claimed as a right, but that does not prevent a liberal state from going beyond the rights framework and support minority cultures in many ways. The state may even have a duty to do so.

The argument so far is completely consistent with an individualistic approach. Full recognition of the individual and reducible collective rights discussed so far would, in my opinion, adequately protect almost all aspects of cultural communities that should be legally protected. Realising this ambitious scheme of rights would be a real step forward. Yet, there are two elements of the case for protection of cultural groups that cannot be fully addressed in this way.

The first problem that cannot be fully addressed in this individualistic approach is mentioned by Taylor and Maris. Members of a community usually want more than only the right to enjoy their culture for themselves. They see themselves as part of a common project, a valuable common tradition that they inherited from their ancestors and that they should preserve for future generations. If free market principles of choice and experiment determine the course of the culture, and especially if members of the cultural group are free to leave the group or to introduce elements of the majority culture into the minority culture, the latter might wither away – even if actively supported by the state. Non-reducible collective rights that limit these freedoms may be necessary to preserve the culture for future generations.

A second problem for which an individualist framework is not fully adequate, occurs when a culture withers away. There will be some people left who will have to switch off the light or, in less dramatic terms, in their old age people will be confronted with the fact that their culture is not as lively as when they were young: there is hardly anyone left with whom they can share their culture, their language and

enjoy so many things that were once essential to their identity. Collective rights may prevent this withering away of a culture.

For both problems, collective rights that go further than would be possible in an individualistic framework may be a solution. Collective rights should guarantee the right for minorities to ward off the dominant culture and language from their territory, to send all children belonging to their group to their own schools, to prohibit intercultural marriages, and to limit exit and entrance options. So, we may conclude that in some cases a recognition of non-reducible collective rights is necessary to protect minority cultures.

There may be a need for (non-reducible) collective rights here, but this alone does not justify them. A first remark may be that we should doubt whether this is really feasible. If a culture is already so weak that it cannot be preserved without the full protection that a sophisticated individualistic liberalism can offer, we must doubt whether it can be preserved in the long run by freedom-restricting measures. The youth revolt of the sixties and the history of the Communist countries in Eastern Europe have shown that it is extremely difficult for the state to control behaviour in the cultural sphere.

A second remark concerns the question of justification. The collective rights suggested here would give rise to serious interference with the freedom of both outsiders and members of the groups. It is very difficult to justify such freedom-limiting interventions. Though they are meant to protect the individual cultural rights of some of the members, the freedom of some other members is seriously restricted. Can we justify this? Kymlicka and Taylor are among those who argue that we sometimes can, whereas Galenkamp is strongly opposed.²⁰ It seems to me that this interference can rarely, if ever, be justified, and least in a liberal society in which individual cultural rights are adequately guaranteed. If there is official recognition and state support for the minority culture, if it is not simply because of poverty and lack of educational and professional chances that members want to leave their community or join the majority culture – as now often is the case with

indigenous cultures – but simply the fact that they prefer the other culture, then it is hard to make the case for restriction of their freedom.²¹ The arguments for protection of minority cultures that I discussed above, are based on the idea that these cultures are still valuable to their members. These arguments cannot justify the artificial preservation of an insulated 'Disneyland-culture' (as sketched by Waldron Ch. 8) when the members no longer want the culture or when they want to adapt it to modern society.

Cultures change all the time. We do not grant older people the right that their culture is preserved for their sake, e.g. that for the sake of those who still cling to the hippie culture of the sixties, this subculture should be artificially preserved. It is a fact of modernity that every generation, when old, is confronted with a culture in which they find themselves partly strangers and in which perhaps essential values that they held dear (like marriage 'till death do us part') are no longer generally accepted. Of course, the state should give the older generation the freedom to live as it was used to, and even support special cultural activities for this 'minority culture', but the state can hardly be expected to take illiberal measures that force the younger generations to sustain a culture that they no longer want. Why then should we act differently with regard to cultural minority groups?

A similar counter-argument can be made against the idea that the continued existence of the minority culture is a common project of its members and that this project should be protected by collective rights. We do not do that for other projects to which people are devoted. Many persons are devoted to their church or to their political ideals; their greatest aim in life, which may even partly constitute their identity, may be that their church will still flourish in a hundred years time or that their ideals will be realised. But that clearly is no argument for a special status for this church or for these ideals. Why then should we award a special status to my minority culture, when this is the project to which I am devoted?

To sum up the argument: genuine collective rights to protect minority

cultures beyond what is possible within the individualist liberal framework, will usually seriously restrict the freedom of members or outsiders. It is difficult to see how this can be justified. An appeal to the importance of this specific culture as a collective good or to the common project of its continued existence is no ground for a special status in political theory. An appeal to the interests of the older generation cannot overrule the interests of the younger members of the culture that want change for themselves.

For a general conclusion, this sketch is not sufficient; there may be exceptional cases in which genuine collective rights are both necessary and justified. I think these exceptions mainly concern compensation for historic injustices, and especially when it is necessary to guarantee that in the transition from an illiberal society to a liberal one in which individual rights are fully respected, the minority does not wither away. But collective rights are clearly not a panacea for the problems of multiculturalism. In my opinion, we had better stick to liberalism and expand the liberal rights framework.

My tentative conclusion may be presented in the form of an amended version of Galenkamp's thesis. It can be formulated in an almost paradoxical way: When collective rights are justified (as reformulations of individual rights), they are not really necessary (just because they are merely reformulations); when they are necessary, they are usually either not feasible or not justifiable.

4. Reconsidering the State

Both Fleiner and Türk argue that the concept of a culturally homogeneous nation-state is at the core of theoretical and practical problems. The dominant position of the nation-state in political theory can be corrected at two levels: the intermediate level below the state – that of the cultural communities and their members – and the international and supranational levels beyond the state. Construing rights and other protective mechanisms for (members of) cultural minorities is one way to mitigate and counterbalance these problems.

Fleiner argues for the other approach: the fundamental level at which political theories of the state are built, should be that of the world community, without connecting this to a Utopian idea of a world-state. States should be considered to have a mandate from mankind. The state should be regarded as one functional organisation among others, with a specific, limited task; however, this restriction should be built on territory and function, not on national or ethnic lines. The link between nation and state should be relinquished.

Theoretically, this is an interesting approach, and it seems to be a fruitful starting-point for philosophical reflection on the character of the state. I would, nevertheless, like to mention two problems that may too easily be neglected in such an institutional cosmopolitan perspective.²²

One problem is a matter of political psychology. One of the major sources of loyalty to the state is precisely the fact that it is a national state. An important part of communitarian criticism has been that liberal states that ignore this national dimension may not be able to raise adequate feelings of loyalty, and that, as a result of this, societies may disintegrate.²³ Perhaps they are legitimate in the sense that they are theoretically justified, but their legitimacy in the sense of their being able to command loyalty and obedience from the side of their citizens, may be quite problematic. Jürgen Habermas and others have tried to counter this objection by suggesting a constitutional patriotism.²⁴ It is doubtful, however, whether this will always be adequate. Perhaps it may be so in states such as Switzerland and the Netherlands, but what about societies like Belgium, Canada or the Russian Federation? Certainly, the non-national state held together by constitutional patriotism is an inspiring ideal, but in many countries this ideal is too far from reality to be useful in practical politics. Fleiner acknowledges the importance of national feeling, but it remains unclear how he wants to combine this with his main thesis.

A second problem is a matter of cultural politics. Fleiner (section 3 (this volume)) suggests that the state should stay out of the spheres of culture and education. The cultural interests of the nation should be

pursued not by the state, but by the nation itself. This seemingly neutral position is, in my view, quite problematic. As I have argued above, if we leave culture and education completely to the free market, minority cultures will have major problems to survive. Active state support will therefore usually be justified. The state could, of course, delegate this care for culture and education to the various national and ethnic communities, and respect their cultural autonomy, as Fleiner suggests. But then a host of new problems arises. Do these cultural communities have a claim to state funding – and if so, how should the funds be divided? – or should they have the right to levy taxes themselves? If funding and taxation are simply in proportion to the numbers of their members, the smaller communities will not be able to attain the same standards of quality for the same price as the larger ones. What counts as a cultural community? If we recognise the Turkish immigrants in the Netherlands as such, then the next question is whether we should also recognise the Turkish Kurds as a separate community. And so on: what is the minimum size of a group to be recognised as an independent community which has rights to state support for their culture and education? It seems that all the problems about determining the limits of the national groups, so convincingly sketched by Fleiner, find their analogue at the level of determining the limits of the various cultural communities within a state.

These are two serious problems for a more cosmopolitan approach, but rather than being insurmountable obstacles, they are points to which further explicit attention will have to be paid. The perspective Fleiner suggests, seems worth exploring, though it seems to me that it should be combined with an active state policy towards a pluralist culture and towards a plurality of cultures rather than with abstinence. Further elaboration of individual rights to cultural collective goods may be an important element of this attempt to rethink the nation-state. The articles in this volume have made it clear that there is still much to do, not only in the field of practical politics and diplomacy, but also in the construction of better political and moral theories. Moral and political philosophers have an important contribution to make to this theoretical work.

Notes

1. For reasons of simplicity, the term cultural groups will be used here to refer to both national and ethnic groups.
2. I will not discuss a fifth type of argument, namely that special protection for minority cultures is justified as a form of compensatory justice for historic injustices. This may be an important argument, e.g. in the case of the aboriginal peoples of America, but a whole cluster of very complex problems is connected to it, which cannot be fully discussed in the context of this article.
3. When I use the term 'individualist', this has nothing to do with atomism. I try to construct a position that is strongly socialised in fully addressing the social dimension of personal identity, but still distinctly individualist in the sense that the individual ultimately is the central value of political theory. Thus, I subscribe to what Hartney 1991, p. 297 calls 'value-individualism'.
4. The principle of equal concern and respect has gained great popularity through the work of Ronald Dworkin, but I think he correctly assumes it is a principle that is acceptable to almost everyone in Western society. Dworkin 1978, 180.
5. On public goods, see Rawls 1971, p. 266 ff. and Raz 1986, p. 198 ff.
6. Galenkamp 1993, p. 132.
7. This is a variation on Waldron's third argument that was discussed in subsection 2B. While it is not valid in the case of culture as a public good, because here it can be reduced to private goods, the argument has a different standing with respect to non-reducible collective goods.
8. The cultural framework is even a very special type of public good: not only is it not diminished by consumption, but it is even reinforced by consumption: the more people speak their language and read books or magazines, the more the culture flourishes.
9. Cf. Raz 1986, Waldron, ch. 8 (this volume), Kymlicka 1989, p. 81.
10. A very interesting collection of essays on various dimensions of this topic may be found in the special issue on collective rights of the *Canadian Journal of Law and Jurisprudence*, vol. IV no. 2 (July 1992).
11. The analysis of special rights below is largely based on my dissertation, Van der Burg 1991, pp. 161-168 and on Young 1990. The fact that special rights are often treated as equivalent to collective rights, is not surprising. The most important reason for accordinig special rights is that members of special groups need them because of their group membership. Even then, it is important to distinguish whether the group as such is the right-holder, or the individual members are the right-holders. Moreover, some

- special rights are not connected with group membership: pregnancy leave may be regarded as a special right, but not as a group right.
12. The question of when the existence of a group should give rise to such special rights can only be answered by way of a detailed analysis of many relevant factors. 'Critical mass' and 'history' must be among those factors – see Brett 1992, pp. 357-358.
13. In fact, the cultural environment has a more mixed character of private and public good, because many elements (especially those of 'high culture') are not completely free. There is a limited number of theatre tickets, one has to pay for them, and so on. For my analysis this mixed character is not really relevant, because rights to private goods are less problematic than rights to purely public goods.
14. Cf. Kymlicka 1989, chapter 9.
15. See however, the interesting analysis of the French Canadians in Brett 1992.
16. Cf. Waldron, ch. 8 (this volume).
17. Cf. Kymlicka 1993, p. 175.
18. Cf. Donnelly 1990, p. 48.
19. I must admit that this conceptualisation does not do justice to the claims of many aboriginal peoples: they claim that it is a right inherent in their cultural tradition, which includes past and future generations. Whether political theory should recognise this far-reaching claim is a topic of discussion. I do not think there are convincing reasons to do so, but this point cannot be elaborated here.
20. Cf. Appiah 1994, 163, who warns for the danger that we replace one kind of tyranny by another.
21. Most societies, however, are not so liberal. Perhaps in the transition period to a more liberal society, collective rights may be justified as temporary measures for reasons of compensation of unjust circumstances, and as an extra protection against illiberal circumstances.
22. The concept of institutional cosmopolitanism is introduced by Pogge 1992, p. 50.
23. An interesting discussion of this topic can be found in a special issue of the *Boston Review* Vol. XIX (1994) 5 on 'Patriotism or Cosmopolitanism'.
24. Habermas 1994, p. 134.

References

APIAH, K. A., *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in: TAYLOR, C. et al., *Multiculturalism. Examining the Politics of Recognition*, Princeton, NJ: Princeton University Press, 1994, pp. 149-163.

BRETT, N., *Language Laws and Collective Rights*, in: *Canadian Journal of Law and Jurisprudence*, vol. IV, no. 2 (1992), pp. 347-360.

BURG, VAN DER, W., *Het Democratisch Perspectief. Een verkenning van de normatieve grondslagen der democratie*, [The Democratic Point of View. An Exploration of the Normative Basis of Democracy] (diss. Utrecht University) Arnhem: Gouda Quint, 1991.

DONELLY, J., *Human Rights, Individual Rights and Collective Rights*, in: BERTING, J. et al. (eds.), *Human Rights in a Pluralist World*, Westport: Meckler, 1990, pp. 39-62.

DWORKIN, R., *Taking Rights Seriously*, Cambridge, Mass.: Harvard University Press, 1978.

GALENKAMP, M., *Individualism versus Collectivism. The Concept of Collective Rights*, (diss. Erasmus University Rotterdam) 1993.

HABERMAS, J., *Struggles for Recognition in the Democratic Constitutional State*, in: TAYLOR, C. et al., *Multiculturalism. Examining the Politics of Recognition*, Princeton, NJ: Princeton University Press, 1994, pp. 107-148.

HARTNEY, M., *Some Confusions Concerning Collective Rights*, in: *Canadian Journal of Law and Jurisprudence*, vol. IV no. 2 (1992), pp. 293-314.

KYMLICKA, W., *Liberalism, Community and Culture*, Oxford: Clarendon, 1989.

POGGE, T.W., *Cosmopolitanism and Sovereignty*, in: *Ethics* 103, 1992, pp. 48-85.

RAWLS, J., *A Theory of Justice*, Oxford: University Press, 1971.

RAZ, J., *The Morality of Freedom*, Oxford: Clarendon Press, 1986.

TAYLOR, C., *The Politics of Recognition*, in: C. Taylor et al. (1994), *Multiculturalism. Examining the Politics of Recognition*, Princeton, NJ: Princeton University Press, 1994, pp. 25-73.

YOUNG, I.M., *Justice and the Politics of Difference*, Princeton, NJ: Princeton University Press, 1990.

Contributors

Wibren van der Burg is Senior Researcher in Jurisprudence at Tilburg University, The Netherlands. He is treasurer 1991-1995 of the Societas Ethica, the European Society for Research in Ethics.

Thomas Fleiner is Professor of Law at Fribourg University, Switzerland.

Marlies Galenkamp is Lecturer in Jurisprudence at the Erasmus University, Rotterdam, The Netherlands.

Robert Heeger is Professor of Ethics at Utrecht University, The Netherlands, and is president 1991-1995 of the Societas Ethica, the European Society for Research in Ethics.

Walter Lesch is Lecturer in Moral Theology at Fribourg University, Switzerland.

Cees Maris is Professor of Jurisprudence at the University of Amsterdam, The Netherlands.

Richard H. Roberts is Professor of Divinity and Director of the Institute for Religion and the Human Sciences at the University of St. Andrews, Great Britain.

Hans Joachim Türk is Professor Emeritus in Philosophy and Social Ethics at the Fachhochschule Georg Simon Ohm, Nürnberg, Germany.

Jeremy J. Waldron is Professor of Law (Jurisprudence and Social Policy Program) at the School of Law, University of California, Berkeley, United States.

Theo van Willigenburg is Lecturer in Ethics at Utrecht University, The Netherlands, and is secretary 1991-1995 of the Societas Ethica, the European Society for Research in Ethics.