

THE ATTITUDE OF COURTS AND PUBLIC INSTITUTIONS TOWARDS THE MULTICULTURAL REALITY

Manuel Carrasco Durán*

I. PURPOSE OF THE WORK AND THEORETICAL PREMISES

The aim of this Essay is to examine how courts and public institutions have dealt with conflicts caused by the varied practices of distinct cultural groups. The conflicts that will be examined are extracted from the Spanish reality, although the work will also allude to other European contexts. If we do not want to limit ourselves to a mere narration of cases, but instead want to judge the reaction of public institutions to those conflicts, we must set some premises from which we will be able to form an opinion and judgment about them.

First, from a juridical point of view, there are several sources of conflict arising in the multicultural context. Individuals must fulfill certain conditions, which are set in our laws from a cultural perspective, to exercise some rights. There are also legal rights and institutions conceived from particular cultural perspectives. Additionally, there are prohibitions and obstacles to behaviors that differ from those characteristic of the national group, which holds the position of political, social, and economic leadership in the state. We can consider these conditions, contents, institutions, obstacles, and prohibitions to be culturally conditioned.

When a state and a legal system attempt to create a space for the coexistence of all people within the state's territory, the cultural perspective should not play any role in the juridical decisions concerning what is allowed and what is forbidden or on what conditions the state should remain neutral in the cultural domain. Thus the state must not show any preference for any cultural solution when making such determinations.¹ This prohibition is necessary; otherwise, by accepting certain cultural preferences, the state is at the same time excluding those of other cultures. Such a process would inevitably cause the state to contradict its inclusive purpose.² These culturally conditioned contents, institutions, obstacles, and

* Professor of Constitutional Law, University of Seville.

1. See generally NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 20 (1997) (exploring "the conflict over multiculturalism," the "social situation from which it has emerged," and considering its "implications for the future of American society"); William A. Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516, 524–28 (1995) (favoring neutrality in liberal states as a means for individual and group differences to persist and be recognized—"we cannot give diversity its due without attending to its institutional preconditions . . . no pluribus without the unum").

2. The aim is to treat cultural diversity like political and ideological diversity are treated when we speak about the inclusive purpose of the state and the constitution. Klaus Stern's classical ideas

prohibitions, when incorporated into law, reflect the state's favoritism of the cultural preferences of the leading social groups over the cultural preferences of the other smaller social groups. Put more simply, neutrality should be conceived of as *active neutrality*. In this sense, neutrality is not indifference, but rather doing everything that is possible "to help or to hinder" everyone to the same degree.³

Second, the subject of our legal rights is that of the individual—the single person—not the cultural group. While a culture is a collective phenomenon in which experiences, customs, behaviors, language, and life philosophies that are common to a social group can be formed, the right to follow these customs belongs to the individuals who compose these groups. If we consider dignity and autonomy of the individual to be basic principles of our law, from which constitutionally recognized rights derive, then we must admit that individuals have the right to follow the behaviors of the group defining their cultural framework or to follow other behaviors. We must also accept, as a consequence, that the group has no right to force its members to follow the behaviors that are supposed to be characteristic of it.⁴

In any case, there are certainly claims common to the majority of the members of a group that are expressed collectively through the conferred right of a group's representatives.⁵ We can define cultural claims as those

about the inclusive purpose of the state can be applied to treat multicultural diversity. For more on the inclusive purpose of the state, see Ruth Rubio Marín, *La inclusión del inmigrante: un reto para las democracias constitucionales*, in *EXTRANJERÍA E INMIGRACIÓN: ACTAS DE LAS IX JORNADAS DE LA ASOCIACIÓN DE LETRADOS DEL TRIBUNAL CONSTITUCIONAL 11* (Centro de estudios políticos y constitucionales, Cuadernos y debates No. 160, 2004) (Spain) [hereinafter *EXTRANJERÍA E INMIGRACIÓN*]; and Javier de Lucas, *La(s) Sociedad(es) Multicultural(es) y los Conflictos Políticos y Jurídicos*, in *LA MULTICULTURALIDAD 59*, 83–84 (Consejo General del Poder Judicial, Cuadernos de Derecho Judicial No. 6, 2001) (Spain).

3. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 113 (1986) (quoting Alan Montefiore, *Neutrality, Indifference and Detachment*, in *NEUTRALITY AND IMPARTIALITY: THE UNIVERSITY AND POLITICAL COMMITMENT* 4, 5 (Alan Montefiore ed., 1975)).

4. Certainly, the concept of human dignity has often been used to criticize the idea of the existence of cultural rights from a perspective that equates admitting the existence of such rights with imposing a collective restriction upon an individual's behavior, contrary to his or her autonomy. An interesting journal article, Eva Martínez Sempere, *Derechos humanos y diversidad individual*, 4 *ARAUCARIA* vol. 4, no. 8, 2002, available at <http://digbig.com/4pfer>, follows this line of reasoning. These theories value an individual's right to autonomy. To overcome the divide between human dignity and culture, we must consider the right to one's own culture as an element of human dignity.

5. See Matteo Gianni, *¿Cuál Podría Ser la Concepción Liberal de Ciudadanía Diferenciada?* [Which Could Be the Liberal Conception of Differentiated Citizenship?], in *LA MULTICULTURALIDAD*, *supra* note 2, at 13 (regarding problems with representation of small groups); Iris Marion Young, *Deferring Group Representation*, in *ETHNICITY AND GROUP RIGHTS* 349, 351 (Ian Shapiro & Will Kymlicka eds., 1997) (discussing problems with group representation of various interests, experiences, and needs).

that are expressed to: (1) change the laws in order to modify or abolish the conditions set for the exercise of a right; (2) change the content of a right or the definition of an institution; (3) abolish obstacles to and prohibitions on the exercise of a right; or (4) include in the definition of the rights and institutions concepts that reflect the cultural group's understanding of them.

But recognizing a group's right to force its members to follow the behaviors considered by its representatives to be characteristic of that group creates an abusive imbalance of power within the group that limits the dignity and autonomy of its members.⁶ Synthesizing the collective nature of cultural phenomena with the individual right to live one's own culture can resolve the classical opposition between universalism and multiculturalism.⁷

Obviously, it is impossible to ignore the existence of collective rights. For instance, in the domain of federalism, official recognition of the language within a cultural community can be demonstrated by the requirement that all school teaching must be conducted in a certain language. In this example, the measure is based on the right of the community to keep its cultural characteristics by requiring that all its members be educated in the official language, ignoring parents' possible desire that their children receive an education in another language. Such is the case in Catalonia, where the autonomous political institutions have decided that Catalan is the language that must be used as a "vehicle" for teaching at school.⁸ But rights based on cultural facts should not be extended to the point at which they force the members of a cultural group to

6. JUAN JOSÉ SEBRELI, *EL ASEDIO A LA MODERNIDAD: CRÍTICA DEL RELATIVISMO CULTURAL* (5th ed. 1992).

7. For a complete examination of the questions raised by the concept of collective rights, see generally Neus Torbisco Casals, *La Interculturalidad Possible: El Reconocimiento de Derechos Colectivos*, in *LA MULTICULTURALIDAD*, *supra* note 2, at 271. According to this author, who follows Raz's theories on this point, collective rights can be understood as rights to public goods, that is to say, to goods that are important for the welfare of a group of people, in such a way that reference to that group becomes necessary. *Id.* at 304; *see also* RAZ, *supra* note 3, at 138 (discussing different conceptions of "welfarism") (citing Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 471–79 (1979)). According to Rainer Baubök, the justification of collective rights comes from individual interests and the decisive value of individual's welfare stemming from those individual interests, not from a decisive value of the collective by itself. Rainer Baubök, *Justificaciones liberales para los derechos de los grupos étnicos*, in *CIUDADANÍA: JUSTICIA SOCIAL, IDENTIDAD Y PARTICIPACIÓN* 159, 171 (1999) (Spain).

8. Arts. 20–21 of the LLei 1/1998, de 7 de gener, de política lingüística, Parlament de Catalunya [Law of Jan. 7, 1998 of political linguistics, Catalanian Parliament] (Diari oficial de la Generalitat de Catalunya [D.O.G.C.] 1998, p. 291) (Boletín Oficial del Estado [B.O.E.] 1998, 2989), available at <http://digbig.com/4pffk>. *See generally* Pau Puig i Scotoni, *Exercising Self-Determination Without Jeopardising the Rights of the Others: The Catalan Model*, 14 ST. THOMAS L. REV. 395 (2001) (discussing the "Catalan model" of self-determination).

act in the way considered characteristic of that group in their private lives. Rights based on cultural elements must be recognized in order to increase the possibilities from which people can choose a way of life and not to reduce to only one possibility individuals' options to autonomously choose their own behavior, no matter how much that possibility is supported by cultural arguments. Attempts to force people to follow one line of behavior should not be considered as a cultural sign, but as a sign of the existence of power relationships among the members of one social group.

Third, the idea that rights of cultural identity derive from universal rights—as asserted in most classical theories of liberalism—is a fiction. We know that all individuals have a cultural environment that forms the basis of their behavior, feelings, and beliefs. The cultural constructions of the elitists of the groups that have directed the political, social, cultural, and economic life in every state have been the origin for the creation of a national culture.⁹ This national culture has been considered to be the natural culture. The cultural elements of juridical norms have remained hidden because they were assumed to be natural. These *cultural* elements were accepted only because they were treated as *natural* elements of citizens' rights.

In this way, the cultural component of citizenship has remained traditionally invisible. But this exclusion has resulted in the idea of a supposed universal citizen, which affected only those individuals who were not members of society's leading cultural group. Those who were members of the culturally leading group were able to practice their cultural preferences because those preferences were considered to be natural attributes of the universal citizen. The right to equality consecrated in a state's constitution was reserved for those who fulfilled the legal conditions for citizenship.¹⁰ Those who practiced different lifestyles had to accept, in

9. For discussion of the cultural costs of creating a nationality, see generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 10–25 (1995) (outlining the patterns of cultural diversity and noting the criticism that multiculturalism “ghettoizes minorities”); DAVID MILLER, *ON NATIONALITY* 119–30 (1995) (recognizing the difficulty of reconciling the demands of ethnicity with the demands of nationality); YAEL TAMIR, *LIBERAL NATIONALISM* 140–41 (1993) (noting the inherent danger of the modern nation–state to alienate cultural minorities and discussing Kymlicka); CHARLES TAYLOR, *RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM AND NATIONALISM* 187–200 (Guy Laforest ed., 1993) (attributing the “root cause” of Canada's fractured nationality to Canadian society's failure to recognize various cultural groups); de Lucas, *supra* note 2; Joseph Raz & Avishai Margalit, *National Self-Determination*, reprinted in JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 110, 110–30 (1994) (observing that the case for self-government ignores considerations of “fundamental individual interests”).

10. For a description of groups that have been traditionally excluded, see Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in *FEMINISM AND POLITICS* 401, 401–29 (Anne Phillips ed., 1998); see also LUIGI FERRAJOLI, *DERECHOS Y GARANTÍAS:*

the best of cases, the state's indifference and their own invisibility in the eyes of the state. Within this framework, different ways of life were accepted in the private sphere but were publicly hindered or prohibited by regulations stemming from the cultural perspective of the leading social group. In the worst of cases, the members of the nondominant cultural groups were punished or persecuted, and their ways of life forbidden, even in the private domain.

In this sense, specific cultural groups seek either the equal exercise of their members' rights, on the same terms as those exercised by members of the leading social group, or the inclusion of a particular group's norms and values in the definition of rights and institutions collectively supported by the members of a separate, specific cultural group. Either way, equality is no longer a right of a nonexisting, universal person, but rather becomes a right to live one's own cultural preferences on equal terms with those who follow other cultural preferences, since the state must remain neutral.

Fourth, it is certain that law is a cultural product of the group with the ability to participate in the lawmaking process. This participation can be direct or, ordinarily, by means of political representatives. In reality, not all who live in the territory of a state can participate in the election of its representatives. Immigrants who have not obtained state citizenship, for example, are excluded.¹¹ Nevertheless, a state must ensure the coexistence of all people within its territory.

If we compare and analyze these ideas, we will find a source of cultural conflict. People who live within the state, many of them permanently, live under laws approved by representatives whom they did not elect. In other words, the task of creating culturally neutral laws is entrusted to representatives who have been elected, not exclusively, but fundamentally, by the members of the leading cultural group in society. As a result, representatives with specific cultural backgrounds are responsible for making culturally neutral laws to help the state fulfill its inclusive aim. Service employees and judges usually belong to the same leading cultural group and, similarly, are entrusted to make decisions that should not be culturally conditioned. The way in which public representatives, service employees, and judges favor their own cultural values over those of alternative groups also determines the way in which laws and public decisions will be culturally conditioned.

LA LEY DEL MÁS DÉBIL 75 (Andrés Ibáñez & Andrea Greppi trans., 1999).

11. Rubio Marín, *supra* note 2, at 17–29; RUTH RUBIO-MARÍN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES 2 (2000); RICARD ZAPATA-BARRERO, MULTICULTURALIDAD E INMIGRACIÓN 26–90 (2004).

Fifth, stating that all laws are culturally conditioned, or stating that laws would be of such a general nature in order to accommodate all the groups within the state's territory, would make them unenforceable because every individual could excuse his behavior with a cultural exception. In a context like this, the law would fail to serve as a criterion to judge conflicts of interest because the cultural customs of the group would prevail over the law. The state would also fail to reach its inclusive goal, since the various cultural groups would continue to follow different value systems without any communication or commonalities between them.

For this reason, it is necessary to underscore the fact that not every condition to exercise a right can be considered culturally determined—even though such conditions are common in some cultural groups. Here we must contrast the juridical approach from other scientific approaches such as the sociological or anthropological ones. From a sociological or anthropological perspective, it is not difficult to examine objectively the characteristic behaviors of a cultural group, since it is the mission of a sociologist or anthropologist only to describe, rather than judge, the behaviors. Law, in contrast, is a science that must evaluate and judge behaviors by certain juridical criteria that form the basis for accepting or rejecting such behavior.

The aim then is to find a criterion that could serve to judge the attitude of laws and public decisions toward the cultural components and characteristic behaviors of different social groups. Individual human dignity is the common value that must be respected by all groups. This value limits the ability of group members to justify behavior that infringes on another's dignity based on cultural grounds. In fact, if we decline to use the cultural attitudes of one group to judge the attitudes of another group—since our judgments must be neutral—the individual is the only remaining common element that can be preserved in all contexts regardless of the individual's cultural makeup.

Sixth, because we have considered that the conditions, obstacles, and prohibitions set by laws in relation to cultural practices must not be considered as juridically justified when they are culturally conditioned, the question, then, becomes how to determine in fact whether or not they are culturally conditioned. Such laws are not culturally conditioned when their purpose is to preserve equal possibilities for: (1) respect and protection of constitutional rights; (2) exercise of those constitutional rights; and (3) preservation of constitutional values. Such constitutional rights express, as a purely juridical construct, the centrality of the individual in a democratic society and establish the juridical concept of human dignity. Obviously, laws that place conditions on these rights have a cultural origin and context.

But while a sociological or anthropological approach stresses the cultural origin of behavior, the juridical approach focuses on the goals and effects of the laws to determine whether the behavior has real cultural significance worthy of protection. A law may originate in a chamber composed primarily of members of the same cultural group, but such a law cannot be considered culturally conditioned if it is not directed at making one cultural concept prevail over another, especially if it is aimed instead at ensuring individuals' constitutional rights. Human dignity, expressed by the recognition of those rights, is a value that can be generalized and attributed to all people on equal terms, since no one can claim that one individual's human dignity is less valuable than another's.

Characteristic behaviors of a group will be considered real cultural practices if they have no negative consequences for the members of that group to exercise their individual rights. If such practices restrict the individual rights of some members of the group, then we will not consider them real cultural practices, but rather the result of power relationships that are generalized within the group. Power relationships cannot be characteristic of a culture but can be characteristic of a certain time. Although culture can evolve by itself or through contact with other outside cultures, power relationships within a culture can change without altering the essence of the culture. Therefore, power relationships are not worthy of the same protection as cultural practices. In fact, if we examine our history, we can see how many behaviors and attitudes that were characteristic of certain times have changed when the power relationships that they expressed changed, while the culture itself remained essentially the same.¹² The same public preference for one cultural group over another can be considered the expression of a power relationship. If we reject such power relationships, we should also reject power relationships between members of the same cultural group that involve a restriction of constitutional rights on one part of its membership, especially when the members favored by that relationship try to disguise the restriction as cultural custom.

12. For instance, it would be unacceptable to consider that social discrimination of women in the most varied domains (work, education, family, etc.) is an element of the Spanish national identity. This is so despite the fact that Spain certainly kept some discriminatory norms towards women and socially excluded women's access to some jobs until the late 1970s and even the 1980s. By that time, most Western European countries had already been enforcing nondiscriminatory policies that favored equality between men and women. Certainly that situation has since changed. Spain's current policies on equality have the same achievements and faults as the rest of the Western European countries. Social change has been more sudden in Spain in this domain because Spain has had to enforce nondiscriminatory policies at the same level of other European countries coming from a situation of backwardness in this movement towards equality, but it would be absurd to consider this real social change as an adulteration of a supposed, traditional, Spanish national identity.

On the contrary, if conditions and restrictions on rights cannot be linked to preserving constitutional rights for all individuals, we will have a strong suspicion that they are culturally conditioned and that they express a preference for one cultural point of view over others. If equality helps guarantee human dignity, culturally conditioned terms set by laws and public decisions interfere with the respect due to human dignity because they produce a hierarchy among different cultural expressions in which one is given preference over the others. In the same sense, we will consider obstacles and prohibitions that restrict some cultural practices to be culturally conditioned even if they apply to all cultural practices regardless of their cultural origin.

A multiculturalist society is a society that guarantees its members the right to express their chosen cultural concepts in a context where public institutions are neutral and where the relationships among the members of different cultures are developed in an atmosphere of freedom, equality, tolerance, individual autonomy, and human dignity. Such a society guarantees an open forum among people with different cultural concepts in a framework of freedom and equality.

Finally, the study about how different cultural practices can be recognized and accommodated by the laws—or the study on multiculturalism—must be contextual and practical. Considering the study as contextual involves an awareness that all arguments make sense only in a concrete context. This context can be geographic (and the politics for accommodation can vary depending on the fact that we are examining a local, regional, national, or international context, and can vary depending on which local, regional, national, or international context we examine), social (we can consider cultural conflicts as a result of the social exclusion of the people who belong to a cultural group), economic (if we consider cultural conflicts as a result of economic factors), or cultural (we can consider cultural conflicts as the result of the contact among different cultures). The approach to cultural conflicts can also vary depending on which scientific point of view we adopt to deal with them, whether juridical, sociological, or anthropological. The arguments addressing a conflict may differ depending on the context in which we place ourselves; such arguments may be valid explanations and solutions in one context but not in others.

In the same sense, cultural problems and claims can differ depending on fields of multiculturalism that exist in our separate societies. Groups that are characterized by the sexual orientation of their members argue for rights that have been traditionally withheld from them because of their sexual orientation. Cultural groups that immigrate into our society often clamor for the recognition of their cultural specificity, expressed through

rights common to the rest of the population such as education, work, familial relationships, and so on,¹³ and mix these cultural claims with other social and economic claims. Claims by cultural minorities in federal contexts require authorities to the autonomous political institutions to recognize and preserve the cultural differences of those groups. The creation of an integrated public forum in Europe that embraces the identities of the European states and regions is another advance in the multiculturalism field.

It is evident that we cannot examine all fields of multiculturalism in this Essay. We will concentrate on the behaviors, attitudes, beliefs, language, and feelings of those groups that differ from the leading social and cultural group in the state, and we will concentrate on claims that are not linked to federalist elements since they do not concentrate in a specific territory within the state. Such groups arise from immigration and the maintenance of culture by descendants of immigrants or from the existence of previously excluded cultural minorities who are traditionally included as part of the state's population.

To require studies on multiculturalism to be practical is to require them to address concrete conflicts that are part of reality in concrete contexts. The studies on multiculturalism should open a permanent dialogue between theory and reality in a process that projects theories into concrete conflicts as part of an attempt to find adequate solutions and then to adjust theories according to the results of their application to those conflicts.¹⁴

II. THE CONSTITUTIONAL FRAMEWORK FOR THE MULTICULTURAL SOCIETY AND THE REACTION OF COURTS

There are obvious difficulties in creating a constitutional framework reflecting the multicultural reality of our societies that is binding upon the courts and public institutions. The primary problem is that our constitutions do not recognize the individual right to behave according to the practices of a particular culture. Some modern constitutions state that public institutions must protect each individual's right of access to culture.¹⁵ However, this right is conceived in terms of guaranteeing access to cultural goods and encouraging the state to perform a political program that puts cultural goods

13. See generally Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171 (1993) (discussing the nature of claims posed by multiculturalism to social justice).

14. ZAPATA-BARRERO, *supra* note 11.

15. See, e.g., Constitución [C.E.] art. 44 (Spain), available at <http://digbig.com/4pffr> ("The public authorities shall promote and watch over access to culture, to which all are entitled.").

at everyone's disposal. This is a social policy of the state, which does not have the same protective characteristics of positive individual rights and does not recognize the right to follow one's own culture.

There are certainly some expressions of cultural diversity that are the object of constitutional rights such as religion and language, the latter often linked to the federalist domain. For instance, Spain has signed several agreements with the Holy See regarding juridical, economic, educational, cultural, and religious matters in the army.¹⁶ Spain has also signed several Cooperation Agreements with the Federation of Evangelical Religious Communities of Spain, the Federation of Israelite Communities in Spain, and the Islamic Commission of Spain, based on article 16.3 of the Spanish Constitution,¹⁷ which allows cooperative relationships between the State, the Catholic Church, and other religious confessions.¹⁸ These agreements provide juridical effects to marriages celebrated according to the religious rites of those confessions and recognize the right to teach those practices at school and to receive religious services in the army, hospitals, prisons, etc.¹⁹ Further, the constitution recognizes the languages of several Spanish Autonomous Communities (Galicia, Basque Country, Navarra, Catalonia, Valencia, and Balearic Islands) as the official languages in those communities along with Spanish.²⁰ In fact, the governments of these autonomous communities have performed intensive "normalization" actions to make the use of those languages routine in schools, public institutions, and in all other social settings.

16. Agreement Concerning Religious Assistance to the Armed Forces and Concerning the Military Service of Members of the Clergy and Members of Religious Orders, Spain-Vatican, Jan. 3, 1979, 1154 U.N.T.S. 64, available at <http://digbig.com/4pffs>.

17. C.E. art. 16.3, available at <http://digbig.com/4pffr>.

18. Laws 24/1992, 25/1992 and 26/1992, Nov. 10, that passed the Cooperation Agreements held with the Federation of Protestant Religious Entities of Spain, the Federation of Israelite Communities in Spain, and the Islamic Committee of Spain, respectively. Ley 24/1992, de 10 de noviembre, por la que se aprueba el acuerdo de cooperacion del estado con la federacion de entidades religiosas evangelicas de España (B.O.E. 1992, 24853); Ley 25/1992, de 10 de noviembre, por la que se aprueba el acuerdo de cooperacion del estado con la federacion de comunidades israelitas de España (B.O.E. 1992, 24854); Ley 26/1992, de 10 de noviembre, por la que se aprueba el acuerdo de cooperacion del estado con la comision islamica de España (B.O.E. 1992, 24855).

19. Arts. 7-9 of Ley 24/1992, de 10 de noviembre, por la que se aprueba el acuerdo de cooperacion del estado con la federacion de entidades religiosas evangelicas de España (B.O.E. 1992, 24853); Arts. 7-9 of Ley 25/1992, de 10 de noviembre, por la que se aprueba el acuerdo de cooperacion del estado con la federacion de comunidades israelitas de España (B.O.E. 1992, 24854); Arts. 7-9 of Ley 26/1992, de 10 de noviembre, por la que se aprueba el acuerdo de cooperacion del estado con la comision islamica de España (B.O.E. 1992, 24855).

20. C.E. arts. 2-3, available at <http://digbig.com/4pfxk>.

The constitutions also recognize the protection from discrimination for any personal or social condition. Experience shows, however, that protecting concrete expressions of cultural diversity is insufficient to consolidate a general recognition of the right to one's own culture. On the contrary, the constitutions have undoubtedly recognized the right to equality, which has been interpreted in terms of uniformity.²¹ This uniformity has caused the courts and public institutions to look at cultural differences as suspicious or as something abnormal that must be suppressed or at least ignored. The following three arguments summarize the responses of the court and public institutions to such problems.

A. Lack of Integration of Cultural Differences

Many laws of European countries require immigrants (or any other person applying for citizenship) to show a certain degree of integration into national society.²² The fact that a person keeps her link with her original culture can sometimes be considered a lack of integration. This was the case with a native Moroccan woman who applied for Spanish citizenship in 1999. The Spanish national authorities rejected her application because she kept a link with her native culture, even though she proved that she had sufficient knowledge of the Spanish language and that she had a job in Spain. This case is even more curious because this woman lived in Melilla, a Spanish town in northern Africa that keeps open commercial and social relations with its neighboring country of Morocco. The woman appealed this decision and the Audiencia Nacional found that she should receive Spanish citizenship because she kept a link with her native religion only and not with her native culture (Audiencia Nacional decision of June 13, 2000). Based on the constitutionally protected freedom of religion, the court held that the fact that a person is a Muslim cannot be used to deny her application for Spanish citizenship. However, since the right to keep one's own culture, which is more than religion, is not protected, the decision in this case does not prevent one's native culture from being the basis of denial of Spanish citizenship. In fact, this decision is an example of a culturally conditioned decision.

21. Francisco Caamaño Domínguez, *De la igualdad como legalidad a la igualdad como dignidad: Reflexiones, en clave constitucional, sobre una sociedad decente*, in *EXTRANJERÍA E INMIGRACIÓN*, *supra* note 2, at 95.

22. *E.g.*, Art. 61 of Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (B.O.E. Jan. 12, 2000, 544).

B. Legal Norms Created by State Law and Equal Application of Those Norms to Different Cultural Groups

The state must create laws that apply equally to everyone. These legal norms cannot protect cultural differences because they cannot be fragmented into multiple cultural divisions. For instance, Spanish law requires a couple to be legally married for a surviving spouse to have access to a widowhood pension.²³ However, article 49 of the Spanish Civil Code recognizes juridical effects only to marriages celebrated “before the Judge, Mayor or Service Employee indicated in the Code” or “in the religious way legally set.”²⁴ That is, according to the rite of one of the religious confessions with which the Spanish state has signed a cooperation agreement.²⁵ What happens, however, if a couple has been married according to the rite of the Roma people? This couple may have been married for twenty or twenty-five years under the Roma rite, but the spouses will not have the right to receive the widowhood pension because the state does not legally recognize their marriage (decision of the Superior Justice Court of Madrid, November 7, 2002).²⁶ The widowhood pension case is an exception because nowadays most of the rights traditionally linked with marriage are also recognized for couples that live together in a stable way. In such cases, the state uses the marriage by Roma rite as proof that the couple is stable, or a couple in fact (decision of the Provincial Court of Valencia, June 18, 2002).

The same argument has been used by the courts to decide which parent must assume care of the children after a separation or divorce. Article 92.5 of the Spanish Civil Code states that the normal solution to this problem must be to keep brothers and sisters together.²⁷ This norm is uniformly enforced, even in cases where both spouses are Roma, although traditional Roma custom dictates that girls live with their mothers and boys live with their fathers, and both spouses’ families agree to enforce this solution (decision of the Superior Justice Court of Navarra, September 30, 2003).

Nevertheless, the courts have fluctuated about how to weigh cultural differences when deciding juridical conflicts. For instance, belonging to the Roma minority has sometimes been taken into account as a mitigating factor for criminal defendants when social circumstances are important to

23. Art. 174 of Real Decreto Legislativo 1/1994, de 20 de junio, por el que se aprueba el Texto Refundido de la Ley General de la Seguridad Social (B.O.E. June 29, 1994, 14960).

24. Código Civil [C.C.] art. 49 (Spain), available at <http://digbig.com/4pgsp>.

25. *Id.*

26. Octavio Salazar Benítez, *El derecho a la identidad cultural como elemento esencial de una ciudadanía compleja*, 127 REVISTA DE ESTUDIOS POLÍTICOS 297 (2005) (Spain).

27. C.C. art. 92.5, available at <http://digbig.com/4pgsp>.

understand the reasons for their offenses or crimes. Since traditional Roma customs allow revenge as a socially accepted way to solve problems, at least one court considered the culture of the Roma defendant convicted of murder as a mitigating factor when determining the sentence to be imposed (decision of the Provincial Court of Ávila, January 27, 2004).²⁸ In another case, a twenty-four-year-old Roma man accused of sexually abusing a fourteen-year-old Roma girl was acquitted by the Supreme Court based on their common Roma culture.²⁹ The court took into account the characteristic Roma custom of precocious engagements and marriage, the fact that the two met freely in a disco, and that the man did not prevail upon the girl through a position of superiority.³⁰

However, to understand the real terms by which these decisions have been constructed, it is necessary to recognize two common elements. First, the courts did not enforce group customs in these cases but instead used the Spanish Criminal Code. By analogizing the altered perceptions of the Roma culture to the altered state of mind (and resulting altered consciousness) caused by rage or other similar states of passion, which the Spanish Criminal Code recognizes as mitigating factors, the Provincial Court of Ávila was able to impose a lighter sentence. Similarly, the Spanish Supreme Court did not find the Roma man guilty of sexual abuse both because he was following Roma social customs and because he did not satisfy the Spanish Criminal Code element of sexual abuse requiring that he prevails upon the girl through a position of superiority. In both cases, the Spanish Criminal Code norm was enforced. Second, this way of enforcing criminal norms has been used only when the person accused of a crime and her victim are both Romas, not when only the person accused is Roma and her victim is not.

C. Cultural Practices That Violate Constitutional Rights

Some cultural practices must be forbidden because they violate constitutional rights. Article 149 of the Spanish Criminal Code condemns the practice of genital mutilation,³¹ and article 107 of the Spanish Civil Code makes it easier (especially for Muslim women) to seek separation and divorce.³² If a law does not recognize the right to separate or divorce or it

28. This decision was revoked by a decision of the Supreme Court of Spain, STS, Feb. 23, 2005, because the Provincial Court did not admit a psychiatric statement as decisive proof of the fact that the convicted could be under the effects of alcohol at the moment of committing murder.

29. STS, Jan. 3, 2000.

30. *Id.*

31. Código Penal [C.P.] art. 149 (Spain), available at <http://digbig.com/4pgst>.

32. C.C. art. 107, available at <http://digbig.com/4pgsw>.

recognizes both rights only in a discriminatory way, the code enforces Spanish law over the law of the country where the marriage took place.³³

It is helpful to express some of the motives the Spanish Organic Law 11/2003³⁴ uses to justify the inclusion of these norms in the criminal and civil codes. This law was made “from the recognition that social integration of foreigners in Spain makes new realities appear to which laws must give an adequate response.”³⁵ It is evident that this response is not directed to create the possibility that foreigners can express their own cultural practices within the law, but that it is directed at preventing some behaviors that violate individual rights. In this sense, the law punishes the crime of genital mutilation, or ablation, as the law says, “because the genital mutilation of women and children is a practice against which it is necessary to fight with the strongest firmness, without justifying it with supposed religious or cultural reasons.”³⁶ Besides, the Spanish Civil Code establishes the reform that was indicated in the domain of separation and divorce “with the objective to improve the social integration of immigrants in Spain and to guarantee that they enjoy similar rights to those that the nationals have,” and “to guarantee women’s protection towards new social realities that appear with the phenomenon of immigration.”³⁷ Clearly, the legal system’s concept of social integration consists of abolishing behaviors that violate constitutional rights. The laws concern themselves with practices that are widespread in a social group when they find a reason to forbid these practices, but the law does not open ways to make it easier to perform the cultural preferences in cases where practices do not violate constitutional rights.

In the same sense, a child’s right to receive education has preference over traditional cultural customs when the parents do not want their child to attend certain classes; for example, if a Muslim father tries to prevent his daughter from attending gymnastics classes. The European Court of Human Rights has applied the same jurisprudence in regard to the attendance of sexual education classes.³⁸ In another example, a criminal judge condemned a Muslim religious minister in Spain because he described and recommended, in a book, the proper way to beat women

33. *Id.*

34. Ley Orgánica 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros, Exposición de Motivos IV:3 (B.O.E. 2003, 234), available at <http://digbig.com/4pgsx>.

35. *Id.*

36. *Id.*

37. *Id.* pt. IV:4.

38. *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) at 27–28 (1976), available at <http://digbig.com/4pgsy>.

according to the Muslim tradition (decision of a criminal judge from Barcelona, January 12, 2004).

When we examine the decisions of courts and public authorities, it is difficult to avoid the impression that cultural differences often have been viewed as something suspicious and that courts and public authorities have had a hostile attitude toward these cultural elements. The existing legal framework provides some instruments for changing this attitude without any need to change existing laws. For instance, it is possible within our legal framework to allow the maintenance of links to native culture without preventing a foreigner from obtaining citizenship. The denial of citizenship because of cultural reasons is a culturally conditioned decision that gives preference to the dominant culture over others and contradicts the inclusive aim of modern states. This creates the difficult problem of determining when identification with the national culture can be a requirement for obtaining nationality. The national identity must evolve by incorporating elements from both the socially excluded and the majority group. Moreover, respect for groups that have been socially excluded in the past can be a sign of national identity itself. The concepts of process, evolution, and interaction play an important role in understanding this.³⁹

Other changes in the attitude toward different cultural practices could require legal changes. One example is the possible changing of civil norms to allow juridical recognition of marriages celebrated according to traditional rites of certain social groups. However, each solution creates new problems. Public institutions must protect constitutional rights and ensure the principles of nondiscrimination, but some traditional customs of cultural groups were created without considering the need to respect those rights and principles. Must traditional institutions and customs change to obtain legal recognition by the state? To what degree can the state recognize any juridical value of customs that do not properly respect fundamental constitutional rights and principles? It is almost impossible to respond to these questions from an abstract perspective. Solutions to these questions must be formed on a case-by-case basis with one limit: constitutional rights should not give way to practices that contradict them, even if these practices are argued from a cultural perspective.

Finally, it is necessary to understand that cultural diversity is a fundamental element of our present society and that claims for cultural freedom and recognition appeal to the fundamental basis and principles of social relationships,⁴⁰ the very principles that require constitutional

39. de Lucas, *supra* note 2, at 66–70.

40. Salazar Benítez, *supra* note 26.

recognition.⁴¹ When we speak about the right to practice one's chosen culture, we deal with a claim that is constitutional in nature. Nevertheless, there is currently a conflict between this constitutional claim and the lack of recognition by our constitutions of an individual's right to behave according to the customs and practices of the cultural group to which an individual belongs. We can certainly derive a weak recognition of such a right from some basic constitutional principles, such as freedom and individual autonomy, but this does not provide clear protection for this right. The constitutional right to privacy can provide an additional way to deduce a sort of protection for the right to behave according to one's own culture, but the object of discussion is not the right to behave in this way in one's private life. Problems arise when public authorities erect culturally conditioned obstacles to common practices in certain cultural groups. Two examples will be discussed to demonstrate the kind of problems that can arise due to the lack of an express recognition of the right to one's own culture.

1. Use of the Hijab at School

In Germany, Denmark, the United Kingdom, the Low Countries, and Spain, the use of the hijab by girls at public schools is commonly allowed. It is allowed for reasons such as the freedom of belief (Germany), the rejection of discriminatory measures (Denmark, U.K., and Low Countries), and the aim to ensure the schooling of all students of foreign origin (Spain). It is curious, however, that the use of the hijab has not been admitted in any

41. In fact, one of the most frequent criticisms to Kymlicka's theories stems from the lack of current cultural claims outlining the cultural options from which people may choose. Gianni, *supra* note 5, at 35; see also WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 168–69 (1989) (responding to arguments that restrictions on claims are necessary to protect society and stating that “liberalism requires that we can identify, protect, and promote cultural membership, as a primary good, without accepting . . . [the] claim that this requires protecting the character of a given cultural community”). This problem poses the question of which cultural preferences must be protected. The possible options range from restricting protection to only national communities to the broader protection of cultural groups. See Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 25 (Amy Gutmann ed., 1994) (contrasting “the driving forces behind nationalist movements in politics” with the urgent demand for recognition for cultural groups as a means of establishing an identity); Young, *supra* note 5, at 351 (discussing the difficulty in selecting a group representative); Iris Marion Young, *Together in Difference: Transforming the Logic of Group Political Conflict*, in THE RIGHTS OF MINORITY CULTURES 155, 174 (Will Kymlicka ed., 1995) (noting the dilemma that “a unified class-based social movement is necessary to achieve [social] change,” but that “justice within and as a result of such a movement requires differentiating group needs”). For a summary of the main arguments on this subject, see generally María José Añón Roig, *La interculturalidad posible: ciudadanía diferenciada y derechos*, in LA MULTICULTURALIDAD, *supra* note 2, at 217.

of these countries as an expression of a right to behave according to one's own culture. The hijab is indeed an important cultural component. It is even more curious that in France, where the cultural argument has been considered in relation to the hijab controversy, the cultural element of its use has provided arguments to forbid this practice at schools because of the risk of dividing students into different cultural communities.⁴²

Cases can get even more complicated. The decision of the German Federal Constitutional Court (September 24, 2003) held that prohibiting a teacher from teaching at public schools because she wanted to wear her hijab violated her constitutional rights.⁴³ However, the reason for this decision was that the state (Baden-Württemberg) did not have a law forbidding such a practice, not that the practice was a protected cultural right.⁴⁴ Baden-Württemberg and other German states have since announced that they will pass several laws prohibiting teachers from wearing the hijab in school in the near future.⁴⁵ But obviously, there is no problem if a nun wears her frock in school.

2. Roma Caravans

There is also an interesting decision from the European Court of Human Rights. In *Beard v. United Kingdom*, members of the Roma minority claimed the right to continue living in caravans according to their tradition.⁴⁶ The claim was directed against decisions of local authorities of the United Kingdom forbidding them to live on the lands that the Romas owned because the caravans harmed the environment and aesthetics of the landscape.⁴⁷ The authorities of the United Kingdom offered to move the Romas to other lands, but these places were uninhabitable and were not large enough to accommodate the caravans of all the families affected by the measure.⁴⁸ The court acknowledged that article 8 of the European

42. Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190.

43. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sep. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 282 (F.R.G.), available at <http://digbig.com/4pgta>.

44. *Id.*

45. A comment about this decision can be found in María Ángeles Martín Vida & Sven Müller-Grune, *¿Puede una maestra portar durante las clases en una escuela pública un pañuelo en la cabeza por motivos religiosos?*, 24 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 313, 314 (2004) (Spain).

46. *Beard v. United Kingdom*, 33 Eur. H.R. Rep. 442, 464 (2001), available at <http://digbig.com/4pgtb>.

47. *Id.* at 450–51.

48. *Id.* at 452–53.

Convention on Human Rights, which recognizes the right to private and familial life, forces the state to allow Roma to continue their traditional way of life.⁴⁹ However, the court also stated that it could not judge the decisions of national authorities about territorial policy because in such instances the court must defer to decisions of the state where the state has a discretionary appreciation margin.⁵⁰ The court admitted that there is a consensus forming in Europe about the need to recognize the ways of life of minorities, but it recognized that this consensus is not yet concrete enough to require specific state obligations.⁵¹ Thus, the decision leaves the impression of having recognized an empty right. It says that Romas have the right to live according to their traditional customs, but it also says that this right can be limited by the decisions of public authorities regarding territorial policy, and that the state is not obligated to accommodate displaced persons affected by those measures.

The fact that the right to one's own culture does not have a specific constitutional recognition weakens its protection and puts it at the disposal of public authorities to limit it based on the most diverse social interests. Giving a specific constitutional recognition to such a right would strengthen its protection and would help to clearly establish its limits. One such limit must be the prohibition of widespread cultural practices that violate constitutionally recognized individual rights.

CONCLUSION

The attitude of courts and public institutions toward cultural diversity has often been characterized by mistrust. The practices of cultural diversity that come from specific social groups have been considered a suspicious element that tends to break the principle of equality, which is one of the fundamental bases of the democratic state.

Equality has often been understood as a synonym for uniformity. There is no reflection in public institutions about how a constitution and the laws can be conditioned by cultural practices of the majority, and there is no recognition of an individual right to express one's culture by specific characteristic behavior. When one attempts to consider questions of cultural diversity, the result has no real effect and recognizes an empty right. Similarly, there has been no attempt to change the traditional ways of interpreting the concepts of equality and neutrality in order to understand them as attitudes of equal respect for all cultures, when cultural practices do

49. *Id.* at 470.

50. *Id.* at 475.

51. *Id.* at 471.

not violate individual rights, rather than as attitudes to prevent the cultural practices of the minority groups from being performed at all.⁵²

On the contrary, a constitution and the laws are deemed to be culturally neutral and, therefore, to set the standard for which minority cultural groups must strive to accommodate. The neutral nature of a constitution and the laws make this accommodation a unilateral process—rather than a bilateral one—by which minorities try to conform. The protection that a state gives to cultural practices comes from its prohibition on discrimination, but reality shows that this kind of protection is not sufficient to guarantee individuals' rights to practice behaviors that are characteristic of their cultural groups.

Individuals' constitutional rights always have preference over a hypothetical collective right of a social group to perform behaviors customary within that group when these hypothetical rights contradict the constitutional rights. In fact, there is no problem in admitting that individuals' constitutional rights have preference over the customs that are common within a group, since social practices that violate constitutional rights of the individuals of the same social group must be treated not as cultural practices but as power relationships among the individuals that compose a group. Power relationships cannot be protected over the constitutional rights of the individuals that are part of them. If we want cultural diversity to be accepted in society, it is necessary to reject practices associated with power relationships because they violate the rights of the individuals, which in turn causes mistrust and rejection among the majority of the society. Moreover, supporting those practices favors neither a free cultural dialogue nor the creation of links and the feeling of confidence among individuals of different groups. The practices of specific social groups have usually been taken into account by courts and public institutions only to reject reliance on them in cases in which they endanger constitutional rights.

However, there are some cultural practices that do not affect individuals' constitutional rights and that sometimes have not received the recognition of the right to be performed by the individuals of the social group. So these attitudes can be interpreted as culturally conditioned because they express a preference for one specific cultural practice over another, or because they tend to deny an individual's right to express his or her own culture. The image of the universal citizen, devoid of all cultural signs, is a fiction. All people have a cultural background, and the

52. Neutrality is not considering cultural differences unimportant, but rather allowing all cultural differences to express themselves and according them equal treatment.

possibility of expressing cultural behaviors must be considered a requirement of human dignity. Human dignity is a basis for the recognition of constitutional rights, among other reasons, because the laws always have a specific cultural background. If we reject the possibility of individuals to express behaviors characteristic of their own cultures, we are admitting a preference for the social group, the cultural premises of which are expressed in the laws over the cultural options of other social groups. This contradicts the inclusive aim of the state, which must embrace all individuals who live within its territorial limits, whatever their cultural practices may be, as a guarantee of human dignity and a peaceful cohabitation. In fact, the right to express a different cultural identity is the real basis for the principle of equality in cultural terms while the uniformity imposed by laws results in inequality by giving preference to certain cultural practices over others.