

Beyond “basic liberal proceduralism”

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The debate over multiculturalism has arguably provided a concrete as well as theoretically fruitful way of developing the arguments between liberals and communitarians of the 1980s and early 1990s. As Will Kymlicka suggested early on, discussions over cultural plurality “go to the heart of the liberal conception of the relationship between self and community.”¹ Alan Patten’s carefully argued, and though-provoking, *Equal Recognition*² signals from its very title the ambition to draw from and somewhat reconcile the moral insights of both traditions, in an attempt to offer the philosophical foundations for what he calls “the strong cultural rights thesis” (*ER*, 10). Such an attempt is done primarily from a liberal egalitarian perspective of the Rawlsian kind. Other contributions to this symposium deal more directly with the specifics of Patten’s strong cultural rights thesis; here I wish to take a broader view on whether *Equal Recognition* offers a distinctive liberal theory, one that makes space for the language of recognition, while further elaborating the relationship between self and community from a liberal egalitarian position.

The basic intuition underlying the book is that a well-ordered multicultural society needs to provide a *strong* array of rights and policies that give cultural minorities a fair chance to lead a meaningful life without necessarily having to abandon, or fundamentally compromise, their particular attachments to their own cultural lineage, since such cultural lineage is constitutive of their own sense of identity and of the way in which they may wish to shape their own life. Such rights and policies are meant to provide a fair background for cultural minorities to feel at

home in a multicultural political society, but should not be directly aimed at the preservation of the cultural institutions, traditions and contexts of minorities, if not in so far as these are sustained by the social choices of the members of the cultural minority operating within the larger multicultural society. As Patten argues, the general theory of justice here proposed in order to sustain *equal recognition* for cultural minorities is *proceduralist*, but *accommodating* to the demands of culture. In its procedural form, it upholds important liberal principles, such as personal autonomy, responsibility for one's own choices, and fairness of treatment; because of its accommodating intentions, it is sensitive to the way in which autonomy and responsibility need appropriate social contexts and conditions for them to be exercised meaningfully.

This dual character of equal recognition is implicitly reflected in the two-step strategy that Patten's argument follows in trying to establish the moral foundations for minority rights. First, he accepts that a "standard" liberal egalitarian theory of justice along Rawlsian lines offers a *prima facie* ground for the fair and equal treatment of all citizens, including cultural minorities; but, secondly, he suggests that for the treatment of minorities to be equal, and the accommodation of their interests to be fair, the standard liberal theory needs to be integrated with some further principles. This gives rise to his distinction between *basic* and *full* liberal proceduralism.

For Patten, basic liberal proceduralism establishes the *fair background conditions* for voluntary social cooperation in a context in which individuals and groups can pursue their own conceptions of the good. He identifies such basic proceduralism with the "standard package of liberal rights" (*ER* 150), comprising basic liberties, freedom from discrimination, social minimum, and policies of fair equal opportunity. More generally, he identifies basic liberal proceduralism with

Rawls's "pure procedural justice" and his two principles of justice (*ER* 29-30, and note 39). Quoting from Brian Barry's own defence of a basic procedural position, Patten seems to accept that from such a perspective "the basic subject of fairness ... is the distribution of rights, resources and opportunities."³ Where does this leave strong cultural rights?

The basic package, so Patten argues, does not offer solid enough ground for fairness when we come to cultural minority rights. This is why we need to extend it to a "full liberal proceduralism", by specifically incorporating cultural rights (*ER* 152). Indeed, in talking about the project of the book, Patten says that he wishes to treat "equal recognition as an *additional* element that ought to go into a satisfactory specification of fair background conditions, when thinking about procedural justice under conditions of cultural diversity" (*ER* 30, emphasis added). In a footnote to the same passage, he suggests that the standard fair conditions of equal liberties and mutual toleration, which Rawls posits for comprehensive conceptions of the good (including those associated to cultural ways of life), need to be *extended* so to include the requirement to equal recognition (*ER* 30, footnote 39).

It would be possible to suggest that full liberal proceduralism is an *ad hoc* extension of the Rawlsian framework for justice as fairness, or, more generally, of impartialist and proceduralist liberal theories, in order to include a specific class of rights, cultural rights, which are justified by the special conditions of "cultural diversity." I think we should resist such an interpretation, firstly because in Patten's account cultural rights and equal recognition are subsumed within more general categories; secondly, because equal recognition is the specification of the principle of "neutrality of treatment" (*ER* 159), which would not seem to apply to minority culture issues alone. Moreover, culture, though for Patten more appropriately defined as a

“precipitate of a shared formative context,” is described as something akin to a personal conception of the good, and this is what makes it an appropriate “object” for recognition and neutrality of treatment. Hence, “full liberal proceduralism” is neither a theory that applies exclusively to cultural rights nor entirely dependent on the specific conditions of multicultural societies. It follows that there must be something more fundamentally problematic with “basic liberal proceduralism,” something that needs addressing by extending it to a “fuller” version, particularly, but not exclusively, when dealing with cultural rights.

One obvious candidate for such an extension of liberal proceduralism is Patten’s distinctive analysis of neutrality, which he develops at length in Chapter 4 as a prelude of his analysis of equal recognition. There, he advances an interpretation of state’s neutrality as based neither on intentions nor on effects, but on how the state treats different conceptions of the good by promoting policies that either assist or hinder particular conceptions. The focus of neutrality of treatment is on the policies themselves, and how successful the liberal state is in devising policies capable of *equally accommodating* different conceptions of the good and ways of life (*ER* 115). Patten’s discussion of neutrality is both complex and intriguing. He tries to steer a middle path between intentions and effects, but cannot avoid considering either when defining how policies provide fairness of treatment. Clearly, any policy has an aim and a related justification, which Patten distinguishes as two aspects of neutrality of intentions (*ER* 112). It is relatively easy to disentangle the aims and justifications that support a particular conception of the good, from the aim to treat different conceptions equally and neutrally, in cases in which the state abstains from acting. The distinction works less well with more pro-active policies, or policies of accommodation, such as those that neutrality of treatment seems to take on board.

These involve more fine-tuned considerations of what may promote and accommodate a particular conception of the good, and therefore a need to understand such a conception more from the inside, so to speak, making also inevitable more substantive judgements of value. Moreover, as Patten readily admits, a certain consideration of the effects of a policy, at least in terms of how it may directly effect the realizability of a particular conception of the good, cannot be entirely ignored when considering issues of neutrality of treatment (*ER* 116). Neither of these difficulties makes Patten's idea of neutrality of treatment less distinctive or unworkable. Nonetheless, they point to the fact that subtle (pragmatic?) kind of judgements are often required in order to devise policies that are neutral, while at the same time sensitive to what the policy is in fact promoting (its aim-function); and how the policy outputs have some relevance in assessing the appropriateness of policy inputs (its effect-function). Neutrality of treatment involves some situated kind of judgement and ultimately a reference to some more fundamental kind of principle or consideration of equality.

Indeed, as Patten says, neutrality of treatment should be considered a downstream principle (*ER* 108-111). Fair and neutral treatment is owed to people because they have a strong claim to (a vital interest in) a fair opportunity for *self-determination*, which is more of an upstream value. Besides, in order to make judgements on how different conceptions of the good can be treated fairly in relation to each other (and therefore treated neutrally from the state's perspective), one needs to assume a "baseline." Since Patten effectively excludes the "do-nothing" option as a fall-back position, his view of the baseline is that this should "reflect the guiding idea of fair opportunity for self-determination" (*ER* 118). The latter, rather than neutrality of treatment, seems a more appropriate candidate for the foundation of a *full*

procedural liberalism. To extend the *basic* version, we may need to dig deeper in what self-determination entails.

Patten explains both the general and the specific grounds for the strong interest citizens have in self-determination, and why therefore the state needs to provide a fair opportunity for them to exercise such a capacity (*ER* 131-36). The more general interest consists in the entanglement between self-interest and well-being and in the intrinsic value of self-determination, in the sense of autonomous control over the attempt to direct one's own life. The more specific interest consists in the fact that there are aspects of one's conception of the good that are particularly vital to one's own integrity as a person and which people should have a fair chance to pursue according to their own judgment. In the section in which the "value" of self-determination is discussed (*ER* 4.6), Patten resists a perfectionist reading of it. In so far as this value may play a central role in the "extension" of basic liberal proceduralism, it would seem to be in broad agreement with Rawls's own attempt in *Political liberalism*.⁴ Is this sufficient? It would seem to me that in order for full liberal proceduralism to be convincing, a number of issues about fair opportunity for self-determination may need to be engaged more fully, though the book does so implicitly in a number of places.

I can only here very briefly indicate what these issues are. Let me take, first, the general grounds for self-determination. The entanglement between self-interest and well-being is clearly acknowledged as a problem by Rawls in his discussion of how to define a basic list of primary goods. In *Political Liberalism*, he talks about "the many significant variations among persons in their capacity ... and in their determinate conceptions of the good, as well as in preferences and tastes,"⁵ and how a basic list of primary goods may be insufficient to do justice to the variety of needs

involved by the diversity of capacities and personal aims. This is the general problem of interpersonal comparison, which takes a particular form with regard to intercultural comparison. The congruence of the basic list of primary goods, which I take approximates Patten's baseline, in relation to the opportunities it offers for self-determination, may be put into question because it fails to capture fully the way in which needs are culturally determined. Moreover, as Amartya Sen has suggested, primary goods on their own are not sufficient as indicators for individual's real opportunities, since an account of the capability (or capability set) necessary to convert opportunities into personal ends is also required.⁶ Rawls's own answer to these considerations is that, in political liberalism, one assumes that *citizens* have different capacities, but that they have "at least to the essential minimum degree" the capacity to be "fully cooperating member of society over a complete life," and that this sets the limits of what is "the political and the practicable" in defining the basic resources for citizens to be treated as free and equal.⁷ It would seem to me that this still leaves plenty of scope for dispute over the entanglement between self-interest and well-being, and its significance for self-determination. In Patten's case, it could be argued that one needs a more developed conception of what self-determination entails in general terms, in order to provide full liberal proceduralism with a proper foundation for strong cultural rights.

Secondly, one can look more closely at the specific grounds for the value of self-determination, and how one's conception of the good (of which identification with one's cultural lineage may be a manifestation) relates to the integrity of a person. On this Patten has more to say throughout the book, particularly when he tries to distinguish his full version of liberal proceduralism from the basic version defended by Brian Barry in *Culture and Equality* with respect to the argument about "expensive

tastes” (*ER* 177-82).⁸ Barry’s objection to the kind of strong multicultural rights defended by Patten hinges on a naïve conception of equality in front of the law, which fails to recognize that any law is burdensome to some particular group, and this also applies to “citizens with particular beliefs, preferences, or circumstances” (*ER* 178).⁹ Patten’s rejoinder is that his own conception of equal recognition does not deny the social division of responsibility, and the capacity of individuals to revise their preferences and conceptions of the good during the course of their life also in consideration of likely costs and opportunities. Because of the proceduralist character of his theory, Patten discounts the fact that equal recognition may not be able to guarantee the survival and flourishing of all cultures and permissible ways of conducting one’s life, if the social costs for the rest of the community are unfair, as in the case of the expensive tastes argument.

He rejects, however, the idea that justice sole requirement is the provision of an equal baseline (rights, resources, opportunities), without “responsiveness to actual preferences and beliefs about value” (*ER* 179). He suggests that Barry’s argument fails to take on board that “choices taken under unfair or unreasonable conditions do not generate responsibility,” and that fair background conditions need to be in some way “responsive” to the conceptions of the good people have in the first place (*ER* 179-80). As a further elaboration of this point, and as a way of showing that such “accommodating approach to certain preferences” is in line with mainstream liberal views, Patten makes use of Dworkin’s “principle of abstraction,” which suggests that there is a previous stage to a fair process of distribution of resources, as the one of Dworkin’s imaginary auction, and that this consists in setting up prior background conditions determining the kind of goods available, without the nature of them being prejudicial to the kind of opportunities available to the people engaged in the auction

itself (*ER* 180-82). In the case cited by Patten, the prior background conditions involve either the size (large vs. small lots of land) or the kind (luxury vs. staple food) of goods available for the auction, so that different people have all a *fair* opportunity to benefit from the *fair* process of distribution. Patten considers Dworkin's "principle of abstraction" as a form of responsiveness to people's prior preferences, or at least to some relevant ones.

This raises the further question of what precise class of preferences, beliefs, styles of life should be considered for prior accommodation, so that the background conditions are fair. In *Political Liberalism*, Rawls deals with the problem of the variations in people's capacities and their conceptions of the good by distinguishing four different classes: a) moral and intellectuals, b) physical, c) conceptions of the good, d) tastes and preferences.¹⁰ Leaving aside the first two, Rawls considers the latter (d) as entirely the responsibility of the individual and therefore not needing special accommodation; but conceptions of the good require a more considered treatment, since they are closer to the person's moral capacity.¹¹ For Rawls, they need to be accommodated not to the point of absolute protection, since no society can reasonably contain all forms of life, but only in so far as the realization of the principles of political liberalism in institutions "specifies fair background conditions for different and even antagonistic conceptions of the good to be affirmed and pursued."¹² Rawls's solution seems to me inadequate for the purposes of Patten's full liberal proceduralism, at least for two reasons. Rawls's test of whether fair background conditions for self-determination exist seems to be dependent on the possibility that they effectively work as such, while Patten suggests that we need some way of being responsive in the very establishment of the fair background conditions. The other reason is that Rawls's way of looking at conceptions of the

good, and subordinately to strong belief systems and ways of life, both of which can be associated to cultural lineages, would seem to downplay the *identity-related* aspects of the conception of the good, the special commitments, that Patten think offers specific ground for self-determination. There is ground here not only for a (relative, not absolute, in my view) distinction between preferences and tastes on one side, and conceptions of good on the other; but for a much more fine-grained differentiation between a variety of aspects and manifestations of ways of life that may contribute to our self-understanding and how we conceive, view and select our different aims throughout the course of our life.

The fine-grained analysis of the various aspects of our conception of the good, the extent to which these are identity-related and therefore less subject to revision or personal responsibility, and, finally, the way in which such conceptions need to be factored in for devising fair background conditions, all of this may require a great deal of contextual judgement, similar to the one we said was needed for the disentanglement of self-interest and well-being in defining what self-determination consists in. As Sen suggests, there may be no “royal road” to evaluation in such matters.¹³ Perhaps we need a more modest way of dealing with the problems of cultural rights, self-determination, and institutional accommodation. One rich in the kind of arguments and nuanced distinctions that *Equal Recognition* offers in abundance; but less confident that our arguments are basic and not always in some sense derivative and from mixed principles, without some ultimate unassailable foundation.

Endnotes

¹ Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), p. 136.

² Alan Patten, *Equal Recognition. The Moral Foundations of Minority Rights* (Princeton and Oxford: Princeton University Press, 2014). Henceforth cited parenthetically as *ER*, followed by the relevant page numbers.

³ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity), p. 35 (cited in *ER* 178).

⁴ John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), Lecture V, in particular; for Rawls's restatement of some of his view on the subject of autonomy and the person cf. Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (Oxford and Cambridge Mass.: Blackwell, 1992), pp. 173-80, 193-97, and 199-205; and Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2nd Edition 2002), pp. 228-44.

⁵ Rawls, *Political Liberalism*, p. 182.

⁶ Amartyan Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), Chapter 3 "Freedom and the foundations of justice".

⁷ Rawls, *Political Liberalism*, p. 183.

⁸ The difference with Barry over this has also consequences with respect of the idea of neutrality of treatment, as Patten suggests in *ER* p. 117, footnote 23.

⁹ Cf. Barry, *Culture and Equality*, pp. 32-40.

¹⁰ Rawls, *Political Liberalism*, pp. 183-86.

¹¹ *Ibid.*, pp. 195-200.

¹² *Ibid.*, pp. 199.

¹³ Sen, *Development as Freedom*, p. 85.