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Are fundamental principles somehow flexible? The challenge of legal pluralism and cultural diversity

Os princípios fundamentais são de algum modo flexíveis? O desafio do pluralismo jurídico e a diversidade cultural

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Abstract

In this paper I will try to demonstrate why and how a hermeneutical approach, based on a more flexible interpretation of fundamental rights, can be useful to accommodate cultural differences and at the same time preserve a societal cohesion around basic values. My approach is not alternative, but additional to the more classical policies based on group rights and on individual rights, and it is a system of legal interpretation somehow similar to the margin of appreciation doctrine, which the European Court of Human Rights adopts in its case law to balance the enforcement of rights and national traditions. I argue that it should be possible, even within a single state, to allow restrictive interpretations of Constitutional principles in a way that limits their goals and validity, in order to balance them with the right to cultural identity.

Keywords: pluralism, group rights, multiculturalism, interpretation, margin of appreciation.

Resumo

Neste artigo vou tentar demonstrar por que e como uma abordagem hermenêutica, baseada em uma interpretação mais flexível dos direitos fundamentais, pode ser útil para acomodar diferenças culturais e ao mesmo tempo preservar a coesão social em torno de valores básicos. A minha abordagem não é alternativa, mas adicional para as políticas mais clássicas baseadas em direitos de grupos e em direitos individuais e é um sistema de interpretação jurídica em certa medida similar à doutrina da margem de apreciação, que a Corte Europeia de Direitos Humanos adota em seus entendimentos para equilibrar a aplicação dos direitos e as tradições nacionais. Sustento que deve ser possível, mesmo dentro de um único Estado, permitir interpretações restritivas dos princípios constitucionais de uma forma que limite seus objetivos e validade, de modo a equilibrá-los com o direito à identidade cultural.

Palavras-chave: pluralismo, direitos de grupos, multiculturalismo, interpretação, margem de apreciação.

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Introduction

In recent years, multiculturalism has been criticized for a long list of reasons, such as for being at odds with liberal democracies, for treating cultures in a monolithic and essentialist way, for disempowering women, for demanding non-existent group or collective rights, and finally for undermining social cohesion and the inhabitants' sense of belonging. At the same time, multicultural policies have faced a sort of practical and theoretical retreat, due to the lack of public support, to concrete failures of cultural integration in many cases, and to an increasing assertiveness of the state in imposing its liberal principles on all inhabitants (Joppke, 2004), in the name of what has been called a "cultural-diversity skeptical turn" (Vertovec and Wessendorf, 2005).

The concern for civic integration is increasingly overweighting the desire to recognize diverse identities, and such a widespread fear for social cohesion is now determining new forms of political assimilationism (Back *et al.*, 2002; Brubaker, 2001; Grillo, 2007). What is at stake is the idea that multiculturalism is divisive and as such threatens national unity (Schlesinger, 1992). The core of this fear, however reasonable it may be, is that diverse societies are at risk since they are unable to enforce and protect their internal cohesion. Internal diversity and internal cohesion are, from that point of view, two contradictory dimensions, two facets that can hardly be held together (Schaeffer, 2014). Social cohesion and social order seem to be better guaranteed, from those perspectives, through a framework of shared values and shared practices, in other words through the strengthening of individual belonging to the political community (Barry, 2001).

In the following pages, I will try to demonstrate why and how a hermeneutical approach, based on a more flexible interpretation of fundamental rights, can be useful to accommodate cultural differences and at the same time preserve a societal cohesion around basic values.

Accommodation through interpretation

The first caveat that must be stressed is that recognition of ethno-cultural diversity does not mean only *legal* recognition. Even if it is common to think that charters of rights are a primary institutional solution to the needs of minority groups and to their cultural preservation, the recognition of group rights or of individual rights can fail (I stress this 'can') in obtaining what maybe counts more, so to say social integration and social acceptance. In some way, the assumption that recognition is necessarily or primarily linked to a certain distribution of rights or to a certain application of rights is marked by a liberal bias and denies that struggles for recognition are not simply motivated by the desire to see practices and traditions legally recognized, but by the absence of any kind of social recognition. These claims, in other words, arise from the need for a different image of self and from the undermined self-esteem due to a hostile societal and cultural environment (Patrick, 2002).

This is why any policy centred on the recognition of rights (both group and individual rights) can lead to an overlapping of normative issues and symbolic issues. On the contrary, I argue that rights can be an important strategy in order to support and strengthen social acceptance and recognition, but they are a *posterius* compared to it. Recognition is related to the symbolic and requires a deeper change in patterns of interpretation and socially shared paradigms for the comprehension of social practices. In male-female relationships, in food traditions, in child education, in the definition of aesthetic canons, what allows minorities to practice and live their cultural patterns is the social openness that exists towards them. This social openness needs a cultural change that consolidates over time, changing traditional paradigms for the interpretation of these practices. According to Fraser (2003, p. 13; see also Fraser, 1997), "The remedy for cultural injustice […] is some sort of cultural or symbolic change […] More radically still, it could involve the wholesale transformation of societal patterns of representation, interpretation, and communication in ways that would change everybody's sense of self".

At the same time, it is undeniable that any legal system is an expression of a particular form of life and of a particular culture, understood in the broadest sense of the term, as modes of life, practices, beliefs and ideas of a particular community. It is evident that these modes of life are reflected in rules on school programs, protection of the linguistic heritage, public holidays, social practices, and so on. That is the reason why if our aim is recognition and social acceptance, we have primarily to look for a policy that bolsters such a social aptitude (Pfeffer, 2014) and that at the same time does not undermine social cohesion; recognition of specific rights can be a second step, but should not be the pivotal part of such a policy.

I would like to underline this point: I am arguing for a public policy, not generically for a cultural change. In other words, I am not merely hoping for a deep cul-

tural change in the way diverse societies perceive cultures and traditions (that would be amazing, of course), but for a legal strategy in order to foster cultural recognition without undermining societal cohesion.

The starting point is the awareness of the fact that rights as we normally conceive them are biased due to a lack of a trans-cultural view, and it is curious that in seeking for an accommodation among cultures we lack precisely these trans-cultural aptitudes that should instead be crucial. Our understanding of human rights, that is of those rights that we should grant to ethno-cultural groups, is shaped by certain ideas of happiness, well-being, autonomy, freedom which are themselves culturally formed and cultivated (Parekh, 2006, p. 109). Even the most basic concepts such as those of human nature, human body, birth and death, rationality are to some extent culturally embedded, and different cultures appreciate different feelings or emotions, conceive differently children's education and the periodization of life, and so on (Parekh, 2006, p. 121).

I am not arguing that human rights are inconceivable outside western cultures: I simply affirm that we have to find a way, a politically reasonable strategy, to deal with such a diversity when we speak about rights, in order to foster a trans-cultural understanding (at least in a certain measure) of diverse social practices and diverse cultural identities.

In order to activate that trans-cultural understanding, which is the premise for any policy of integration in multicultural societies, one promising approach is the intercultural dialogue indicated by Parekh. Cultural rights, from his perspective, shall be accompanied by a universal or cross-cultural dialogue, since we must counter our innate tendency to universalize our own values and rise to the necessary level of intellectual abstraction (Parekh, 2006, p. 128). Such a dialogue not only brings together different cultural traditions, thus ensuring that the values we eventually find are as universal is humanly possible, but it also imposes on each party the obligation to test their reasons and to see whether they are acceptable to members of other cultures. Furthermore, this dialogue "shows respect for other cultures, offers those involved a motive to comply with the outcome, and gives the values an additional authority derived from democratic validation and a cross-cultural global consensus" (Parekh, 2006, p. 128). The most interesting characteristic of that dialogue, however, is that it involves human nature and other general values, but it is less about different values conflicting with each other than about different interpretations of the same values. What Parekh points out is that cultural diversity is not (or not primarily) about conflicting values, but about universal values (even those sanctioned in the UN Declaration) that need to be interpreted, prioritized, and eventually reconciled, in the light of specific circumstances of each society. What constitutes a harm to human dignity varies in cultures, even if all share the idea that human beings have something that we can call dignity and that indicates their intrinsic worth; similarly, every culture produces mechanisms to protect human dignity or human life, but some prefer the language of rights enforced by the state, others prefer the language of duties, enforced by social conditionings and the moral pressure of neighbours.

As Parekh clarifies (even if he does not completely answer his question), the political problem is how to prevent different groups from engaging in self-serving moral reasoning, or in trying to justify internal discriminations against group members. He only stresses that we can ask their spokesmen (but how to find them?) to justify their decisions when they appear unacceptable to us with a strongly and reasonably compelling defence, and that if we are not convinced, we should press them to change, thus encouraging a debate within the various communities themselves.

My proposal is based on Parekh's ideas, and it is not alternative, but additional to the more classical policies based on group rights and on individual rights. This third strategy, not yet sufficiently explored and analyzed, is more directly linked to case law and to hermeneutic margins that are allowed to Courts, and it is based on the idea that legal interpretation is the key for the activation of a wider trans-cultural understanding of rights. From that perspective, I am convinced that in some social arenas (family, child education, food traditions, immigration...) it would be possible to demarcate submatters and accommodate traditional rules and state law through a nuanced system of legal interpretation. That system can enforce the integration of the main and more defined ethno-cultural groups, and it is to be placed side by side with other policies, when it is possible and when other solutions are somehow unfeasible.

The basic idea is purely hermeneutical: truth or human dignity are regulative principles that play the role of guiding our search (and our judicial activity) under the assumption that we can make mistakes and learn from them, in an ongoing process of dialogue and adjustments. That idea has been expressed by Popper, as is well-known, with the metaphor of a mountain peak that is wrapped in clouds; nonetheless, different climbers can try to reach it from different ways, and the fact that the peak cannot be seen, or that they repeatedly fail, does not discourage

them from making additional attempts. Furthermore, the climber "may not merely have difficulties in getting there – he may not know when he gets there, because he may be unable to distinguish, in the clouds, between the main summit and some subsidiary peak. Yet it does not affect the objective existence of the summit" (Popper, 2002, p. 216). Similarly, according to Finnis (1980, p. 231-233), we can therefore distinguish between *concepts* of rights (e.g. of the human right to life, to a fair trial), which can be widely shared, and *conceptions* of those rights, which can deeply differ from each other.

We can apply this basic idea to our problem, thus understanding how different cultures can have different ways to express the same concepts, such as human dignity, gender roles, bodily integrity, etc. At the same time, this fact shall not be interpreted from a relativistic perspective, as if those concepts did not say anything at all. Just as the mountain peak, human dignity does exist, even if it can be expressed in different ways and even if there are many perspectives from which to observe it: it is somewhere, and our cultures indicate different paths we can take to reach it. Most importantly, not all of these paths are equivalent: some are longer, some are shorter, some are harder, and some can fail (and reach a secondary peak).

If we start from that assumption, we can understand how rights are generally thought of as universal, but by becoming embedded in particular contexts they can be affected by some particular qualifications and sensitivities. This does not mean that rights are always relative, but that their minimal meaning (their *residuum*, using Husserl's words) can give life to diverse maximal conceptions of them. From a similar perspective, Michael Walzer (1994) distinguishes between minimal and maximal meanings of moral concepts, between 'thin' and 'thick' accounts of morality; both serve at different times and for different purposes, and they can interact and work in conjunction.

From that perspective, the system of legal interpretation that I suggest is a mechanism somehow similar to the margin of appreciation doctrine, which the European Court of Human Rights adopts in its case law to balance the enforcement of rights and national traditions (see, among others, Arai-Takahashi, 2001; MacDonald, 1993; for a recent and comprehensive work, see Legg, 2012); it is similar to it only in the sense that is an interpretative way to balance specific traditions and sensitivities with universal rights, but it is markedly different in the way it is used and implemented.

In fact, the margin of appreciation doctrine has been developed by the European Court of Human Rights (ECtHR) as an interpretational tool, by which the Court can distinguish what is properly a matter for each community to decide at the local level and what is so fundamental that the same requirements are imposed on every state, regardless of variations in culture. Accordingly, this doctrine works as a tool for balancing different understandings of human rights between contracting states: in explicitly agreeing to the rights outlined in the ECHR, these states are at the same time allowed to interpret this set of rights for their own domestic society. The ECtHR remains in the background, as a secondary interpreter, checking this deference with a requirement of proportionality, banning restrictive interpretations of rights that go beyond what is necessary to pursue the purpose of the restriction (Arai-Takahashi, 2001, p. 14). Besides that, the margin of appreciation's width varies according to the consensus existing within the ECHR membership: as the consensus grows, the margin that the ECtHR is willing to give shrinks: this is the reason why the more states agree on what represents a core human value (what the Court is trying to preserve), the less is the Court likely to allow any derogation. In such a way, consensus is an indicator to define when and to what extent a practice has become part of Europe's core rights.

In sum, the ECtHR uses the margin of appreciation doctrine to accommodate different interpretations of rights among states, preserving at the same time what it considers the "core" European values, what cannot be derogated nor restricted through interpretation.

I argue that it should be possible, even within a single state, to allow restrictive interpretations of constitutional principles in a way that limits their goals and validity, in order to balance them with the right to cultural identity. Of course, and analogously to the ECtHR doctrine, this "culturally sensitive" interpretation cannot be too wide: in particular, universal principles cannot be limited without justification, and their interpretation cannot be such as to abolish them or to determine an application incompatible with their nature. Besides this, two more caveats shall be considered in order to determine the width of such interpretation: the specific nature of the rights involved must be taken into account, and the existing consensus on the specific issue or its problematic status shall be considered. Let me explain.

First, in order to disentangle conflicts between cultural traditions and national law, it can be useful to consider the argument that the ECtHR used to justify the margin of appreciation – in Handyside v. UK (Application n. 5492/72, Judgment 1976, Dec., 7th). The Court recognized that when there is a significant moral plural-

ism, a state needs to have a margin of appreciation and evaluation in the application of the European Convention principles.

Similarly, the recognition of the same general principle of vertical subsidiarity justifies the idea that in some arenas smaller groups (regions instead of states, local authorities instead of regional ones, schools boards instead of the National Department of Education) are in a better position to interpret and apply the same principles, so as to avoid an intolerable contrast with local traditions, specific circumstances and family cultures. In that perspective, this hermeneutic model takes into account the fact that contested social arenas (such as child education, family law, criminal justice) can be internally divided into "sub-matters" (Shachar, 2001, p. 118), so to say into multiple legal components, and allocates interpretative authority along these sub-matters' lines. In so doing, when we face a legal dispute or a conflict between traditional rules and general principles, we shall necessarily consider all these sub-matters together, advocating for a more nuanced and context-specific interpretation.

Second, the width of this judicial discretion, which usually varies according to particular circumstances, is to be also related to the specific nature of rights involved. According to some scholars (Legg, 2012, p. 200), and similarly to what has been argued in the matter of the margin of appreciation, it is necessary to emphasize the difference between absolute rights and rights that may be limited. Thus we can arrange on a scale absolute rights (life, prohibition of torture), strong rights (fair trial, liberty, derogations), qualified rights (privacy, freedoms of religion, assembly and speech, and non-discrimination) and "weak" rights (property, education and free elections), which progressively affect the width of the hermeneutical discretion and the amount of deference to be accorded to Courts when they have to deal with cultural questions. This does mean that while absolute rights cannot be limited, other rights may be, both by defining them and by restricting their exercise, for reasons such as the protection of a cultural identity or a minority tradition.

Of course, that list is highly questionable in the sense that one can challenge my choice to consider one specific right as strong or week. For instance, Donnelly distinguishes fully universal rights (such as rights to life, liberty and security of the person, protection against slavery or inhuman treatments, etc.), more relative rights (freedom of conscience, speech and association) and rights that "are best viewed as interpretations, subject to greater cultural relativity", such as the right of free and full consent of intending spouses (Donnelly, 1984, p. 417-418). But what is at stake here is not the status of every single right, but the idea that among different rights some are stronger than others. This distinction simply means that for some rights (which I called strong rights) no argument is solid enough to justify any kind of limitation, while for other rights (qualified and weak) it may be, both by defining them and by restricting their exercise, for reasons such as the protection of a cultural identity or as the diverse meaning that is given to a specific concept, which is implicit in the right.

Third, the width of this margin of interpretation should be defined considering the existence of a consensus within the community and within the public debate on a specific question. More specifically, and similarly to what is affirmed by the ECtHR, the width of this margin should be inversely proportional to the consensus on a particular issue (Benvenisti, 1999); the more the Courts are able to identify a wide consensus on a debated issue, the less a margin of appreciation can be granted to group's authorities in order to balance, in specific sub-matters, cultural traditions and general rules. In other words, it is possible to say that a margin of interpretation should be granted to the extent that one can observe a remarkable diversity of moral and legal rules about a specific issue.

Two questions are of utmost importance. First, it has to be specified how wide can this margin of interpretation be, and second, it has to be clarified who could be entitled to evaluate the fairness of that margin and its width.

The first question is influenced by the two factors I have already mentioned and by a general principle of legal interpretation. The two factors are – as I mentioned above – the specific nature of the rights involved and the existence of a consensus within the community on a specific question. According to the first factor, only with regard to some rights is it possible to argue for a margin of cultural interpretation or, in other words, for different definitions of them as well as for a restriction in their exercise. According to the second one, such an interpretative discretion is inversely proportional to the width of societal consensus on a debated issue. Finally, the general principle to be considered is that such a discretion cannot be so strong as to unreasonably compress a right, nor to abolish it, nor to determine an application incompatible with its very nature; and, of course, such a discretion must be justified and supported by solid arguments. It is impossible to claim a different understanding of a right without arguing why it would be necessary to protect a specific cultural iden-

tity and why it is notwithstanding consistent with the minimal meaning of that right.

In addition to that, other principles can be usefully taken from the ECtHR case law in order to clarify how this cultural discretion can work in a sub-national context and how it can be implemented by national Courts. Firstly, the principle of effective protection of individual rights requires rights to be interpreted broadly and exceptions narrowly (Greer, 2010, p. 6), and (secondly) this is linked to a more general principle of non-abuse: rights are to be protected either from their abuse or from their limitation. Thirdly, a principle of legitimate interpretation can be used by national Courts establish some minimal standards in the definition of constitutional rights, in order to prevent local authorities and institutions from conveniently redefining their way around their obligations. Fourthly, the principle of 'proportionality' can limit interference in constitutional rights to that which is least intrusive in the pursuit of cultural recognition (Greer, 2010, p. 6).

The second question is to explain who is entitled to such a discretion and who has to control its rightfulness. More precisely, the central question is to understand how the protection of rights and the democratic pursuit of the common interest can be distributed between judicial and non-judicial institutions. What I am arguing is, in fact, that in specific sub-matters and social arenas different institutions can claim a margin of interpretation of rights for cultural reasons, and that national Courts maintain the task of controlling whether or not these interpretations are consistent with the essential meaning of rights, legitimate and acceptable. This is, as one can see, a system of joint interpretation, where some authorities (regions, local institutions, school boards, etc…) claim a more or less wide discretion in the understanding of rights and others (national Courts) control these interpretations and endorse them or not.

Such a system of joined interpretation requires a rearrangement of the distinction between the margin of appreciation and the exercise of discretionary power. The margin of appreciation derives, from a theoretical point of view, from the finding of indeterminate legal concepts (*unbestimmte Rechtsbegriffe*, in German tradition), while discretion is the manifestation of a choice, that is the exercise of a power. Discretion refers to a liberty of action much wider and deeper than that which is required from the margin of appreciation, and it is not necessarily linked to the presence of indeterminate legal concepts. At the same time, however, discretion is often exercised under a strict control by higher institutions and following detailed requirements or options; it does not therefore involve interpretation of concepts and principles, but rather a choice between methods, thus taking specific circumstances into account.

The joint interpretation approach I am arguing for is, as a matter of fact, intermediate between the two. It does presuppose a specific form of contested determination of legal concepts, which comes not from vagueness, but from the presence of two or more cultural frameworks of reference: legal concepts, in that case, are not indeterminate in themselves, but they *become* indeterminate as long as there are different cultural starting points from which they can be read.

Such a possibility of different determinations of legal concepts does justify local institutions' claims to implement rights in ways consistent with specific cultural traditions and practices, and it requires national Courts to exercise judicial control over such claims. The Courts' task is to control the legitimacy and the width of these divergent interpretations of rights: these alternatives in understanding rights determine a form of discretion, because the subjects who have to implement rights and rules are confronted with several (apparently) lawful solutions. In fact, we are admitting that many solutions can appear to be lawful, each of them being consistent with different cultural starting points. In such a situation, we can allow some form of discretion in choosing between different lawful possibilities, and Courts have to check the legitimacy of the chosen one (Barak, 1989, p. 7).

It is true that, by accepting such a margin of cultural discretion, state's courts and institutions have to abandon a (still deeply rooted) conception of law as a unified and hierarchical system of norms, at least in part. As a matter of fact, the reality of sub-national relationships between multiple legal orders and of fluid and contested frameworks of social practices has to be accepted (Von Benda-Beckmann and Von Benda-Beckmann, 2006). Therefore, our systems have to accept the fact that many practices can find their legitimate discipline as a result of complex and partially unpredictable patterns of interaction and negotiation among rules and traditions (Griffiths, 1986).

At the same time, the idea that there is a "pervasive irreconcilability" between customs and individual rights, so as to render their coexistence impossible, is a simplistic fiction (Perry, 2011, p. 29). Many experiences prove the existence of a large number of commonalities, instead of conflicts, between the basic values that are implied in diverse social practices and the importance of seeing the intercultural debate as an opportunity to develop a more nuanced conception of human rights,

which can be consistent with the peculiarities of the local context (McDonald, 1988, p. 310, 318). The tension between affirming a universal substantive vision of human dignity and respecting the diversity and freedom of human cultures (Carozza, 2003, p. 40-41) is probably an opportunity to build a new understanding of rights, and new forms of coexistence, and it should be therefore accepted and implemented.

For these reasons, giving space to such an interpretative discretion, with regard to the enforcement of rights compared to cultural practices, will be an ongoing challenge rather than a solid hermeneutic criterion. Just as the margin of appreciation doctrine, this hermeneutic balance implies drawing lines between rights and legitimate cultural restrictions, thus weighing controversial political and social questions. This is the reason why it is impossible to find in advance any precise definition of what can be done and what cannot; and this is why there is no fixed criterion to determine to what extent some specific rights can be restricted and how. But definitely single Courts, facing specific questions, are in a better position than the legislator to decide where to set the boundary and to what extent a specific practice can be allowed, even if it requires a different interpretation and an alternative understanding of a specific right.

Consider the following example about ritual bodily mutilations and their conflict with the constitutional principle of bodily integrity. Recently, for instance, a German Court affirmed that male circumcision shall be considered a crime, even when practiced within a religious community and on religious grounds. In fact, the Court affirmed that circumcision "is contrary to the right of the child who will have to decide later and consciously about their religious affiliation" and that "the child's right to physical integrity must prevail over the right of parents" in the field of education and religious freedom. According to my perspective, conversely, and without allowing any specific individual or group right, it would be possible to argue that "bodily integrity" can be understood in different ways, provided that such interpretations do not imply a complete denial of this concept. In other words, a cultural group could interpret the concept of "integrity" differently from the mainstream culture, e.g. by saying that physical integrity can be respected not merely when the human body is completely and perfectly intact, but also when a small and not dangerous mutilation contributes to its "purity", according to the hermeneutic horizon within which the ritual practice is exercised. On the contrary, when a mutilation is so intense that it can represent a danger to an individual's health – this is evidently the case of female genital mutilations – the margin of interpretation cannot be invoked: in these cases injuries are so permanent and dangerous that any supposed interpretation of bodily integrity cannot be consistent with that right, being rather a denial of it.

Again, consider the definition of "adulthood" and the limits to marriage. In many European countries, the minimum age for marriage is fixed at eighteen years and can be anticipated to sixteen solely in some cases. However, in many cultures, such as the Roma culture, an individual can marry even at the age of twelve or thirteen. The problem is not only that such marriages are not recognized by the state (but this is in fact a big issue, particularly in relation with applications for family reunification), but also that in many countries if a thirteen-year-old girl marries a seventeen-year-old boy of the same ethnicity, their sexual acts would be considered illegal by criminal law (e.g., Art. 609 quater, "Sexual acts with minors", Italian criminal law). In other words, the boy, regularly married according to the Roma culture, may be punished with a sentence from five to ten years (his behaviour would be deemed rape), even with the girl's consent. The reason is that a minor cannot dispose of his or her body and their sexual liberty is restricted by the law. But the point is: what does adulthood mean? I think that it is clearly a cultural question, at least in part, and that the moment when the adult age begins depends on the cultural framework within which one lives. Thus, it could be possible to recognize an interpretative discretion to cultural groups in order to determine when a person can be considered free to decide for himself or for herself, provided that such interpretation does not imply a complete denial of this concept: e.g., the adult age can never begin before the physical development is complete.

Let me give one more example. If we consider the clinical practice, we can observe that all Western laws are based on the principle of informed consent based on a specific conception of personal autonomy: to put it simply, the individual is seen as the one who can make medical decisions on his or her own behalf. This is because Western culture appreciates individual liberty and self-determination as the more significant values to be taken into account and because illness is interpreted both as something that affects exclusively the individual body (except for specific cases) and as something that concerns individual life experience (Fan, 1997; Chengthe Tay and Sung Lin, 2001, p. 51). Thus, this model requires medical providers both to give patients all the information they need to decide about treatments and to respect what patients intelligently and voluntarily de-

cide: in other words, this principle determines a disclosure of information to patients as wide as possible and the need to respect patient's self-determination about treatments to be performed or avoided.

However, people from several cultures do not really ask for a complete and autonomous control over their medical decision-making. At the same time, rules governing conversations between physicians and patients don't take into account that, in accordance with their culture, some patients want to involve different decision-makers, and they ignore the fact that not all patients want the same information content in disclosures, and not all information is sought for the purpose of medical decision-making (Bowen Matthew, 2008; Blackhall *et al*., 1995). For these reasons, the principle of autonomy and individual responsibility, such as that of informed consent, should be interpreted as allowing different contents in disclosures and different procedures of decision-making: for instance, in order to acknowledge the real influence of the cultural context in which the patient is embedded, it should be possible to allow family-centred decision-making procedures and forms of involvement of family groups (Shaibu, 2007; Bonder and Martin, 2013, p. 93). In order to address these peculiar perspectives, we need to underline the fact that from one and the same concept of autonomy we can infer two different conceptions of personal autonomy and that one of them can be much more congruent with the patient's culture: for instance, through a more communal understanding of individual desires, plans, and values, we can conceive them as not independent from the relational network within which the person is embedded, but as related to it. Who should be entitled to exercise such a discretion in clinical questions? According to the subsidiary principle, it should be exercised by local ethical committees. These committees are in the best position to appreciate both individual claims and the patient's clinical condition; thus, they are in the best position to determine whether and to what extent it is possible to bend existing norms and procedures in order to respect individual cultural identity. Of course, their discretion is under the review of national courts, which have to check the legitimacy of the chosen understanding of the autonomy principle.

Conclusions

I would like to highlight the most significant aspects of my proposal.

First, it is focused on practices, rather than on identities. Law, in my perspective, can certainly support social acceptance of cultural identities, but its focus is on social practices, not on abstract cultural traditions. And the nuanced approach that I'm proposing does activate a case by case analysis of identity-related practices and doesn't intend to evaluate whole cultures or entire traditions.

Second, it is a form of joint interpretation, since the state has to accept that individual life can be regulated also by traditional rules and in general by a complex and overlapping mosaic of rules, which come from multiple authorities. In fact, even in cases when it could be inappropriate to allow specific individual or group rights, such a model establishes a judicial mechanism in order to allow a trans-cultural understanding of rights, at the same time holding fast to the need for a shared framework of values within society. In fact, this proposal aims to combine the respect for fundamental rights with the defence of a group's identity by allowing a wider margin of interpretation in the enforcement of constitutional rights. Group members or their institutional representative can only propose diverse interpretations of constitutional rights in order to balance them with the group's cultural identity; but they cannot limit those rights without justification nor abolish them or determine an application incompatible with their minimal meaning.

Third, this perspective does recognize the importance of the subsidiarity principle: it is only by granting a concrete margin of interpretation to group members and to their institutional representatives that it is possible to adequately perform a case by case analysis. In that way neither the group nor the state could acquire full jurisdiction over matters that affect group members, and such co-operation might lead to a greater openness to the recognition of specific cultural practices.

Fourth, that approach may be interpreted as a judicial mechanism to encourage groups to gradually develop their traditions and to update them in accordance with constitutional standards. As a result of the consensus parameter, national Courts are able to identify most problematic issues, thereby stimulating a natural development of internal rules. At the same time, this approach does allow minority groups to maintain their own traditions on specific issues, but requires them to bear a heavier burden of proof before national Courts, in order to demonstrate their compatibility with correct interpretations of constitutional standards.

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