

MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS by Ayelet Shachar. Cambridge, UK: Cambridge University Press, 2001. 208 pp. \$20 (paperback), \$55 (hardcover).

Over the last 10 years, multiculturalism has become a prominent strand of thought in political philosophy. In liberal political theory, the accommodation of minority groups mainly becomes an issue of political importance when the laws or practices of such groups violate central values of liberalism, for example, individual human rights, democracy, or social justice. Can we remove intergroup injustices without generating intragroup injustices?

Ayelet Shachar's *Multicultural Jurisdictions* is an elegant and concise contribution to recent debates about multiculturalism.¹ She focuses on territorially concentrated minority groups and discusses *the paradox of multicultural vulnerability*: situations in which the rights of individuals inside the group are violated by the policies that are designed to promote their status as members of a cultural group (p. 3). Her aim is to strike the right balance between enlarging justice by accommodating cultural difference, without sacrificing justice through violating individual rights. Shachar concentrates on the domain where the multicultural paradox is most influential, namely, family law (chap. 3). Family law serves as an important gatekeeper within cultural groups, defining who is included and excluded as part of the tradition. Women are a vulnerable category in cultural groups because they have a special role: they give birth to the new members and are usually seen as the primary socializers of the young. This role "tends to serve as a rationale for severely limiting their choices in terms of educational and employment opportunities, besides maintaining property allocation rules that significantly curtail their access to independent means of livelihood" (p. 56).

Shachar's aim in *Multicultural Jurisdictions* is to present "a new approach to multicultural accommodation [that] must break away from the prevailing yet misleading 'either your culture or your rights' ultimatum that underpins existing solutions to the paradox of multicultural vulnerability" (p. 5). Unfortunately she does not explain which of the multicultural theorists defends this idea. The only theorist I know who might plausibly defend this position is Chandran Kukathas. She convincingly argues that such issues cannot fruitfully be analyzed in the dichotomy of intervention versus nonintervention by government, because cultural groups are *always* reacting to the effects of state power. More generally, nonintervention is a contradiction in terms,

because the question whether something is a *private affair*—the sphere where the state has no business intervening—is in itself defined by the state’s regime of law. Therefore, the questions are What kind of accommodation should the state should engage in? and Which legal-institutional mechanisms should it use? (pp. 40-41).

Shachar encourages national governments and cultural groups to share responsibilities for contested issues, such as family law. This approach, *joint governance*, aims to divide the jurisdictional authority between the state and the cultural group (pp. 88-89). The starting point in her analysis is a critical discussion of Kymlicka’s distinction between external protections and internal restrictions. *External protections* are rights claimed by a minority group against the larger society in order to reduce its vulnerability to the economic or political power of the larger society. *Internal restrictions* are rights claimed by a cultural group to restrict its members’ choice in the name of tradition or cultural integrity. Kymlicka claims that external protections can be justified in a liberal theory, whereas internal restrictions cannot because they clash with the liberal protection of basic rights. However, Shachar dismisses Kymlicka’s distinction as “all-too-easy” because the external aspects of rights are indistinguishable from internal impact (pp. 29-32).

Joint governance does better than “presently available normative or legal models [by providing] an adequate balance between respecting cultural difference and protecting individual rights” (p. 88), says Shachar. In chapter 6, she describes the most attractive variant of joint governance: transformative accommodation, which is based on four assumptions (pp. 117-18). First, since members of cultural groups are at the same time citizens of a larger political community, they always have multiple identity-creating affiliations. Second, both the cultural group and the state have legitimate claims of jurisdiction over their members/citizens. Third, both the group and the state are viable and mutable social entities that are constantly affecting each other through their ongoing interactions. Finally, it is in the self-professed interest of the group and the state to compete for the support of their constituents. Rather than see this conflict of interests as a problem, transformative accommodation “considers it as an occasion for encouraging each entity to become more responsive to *all* its constituents” and even to adapt their power structures to accommodate their most vulnerable constituents (p. 117).

Shachar observes that contested social arenas are internally divisible into submatters, distinct, separable, yet complementary legal components, and that power can be divided along these submatters within a single social arena. For example, family law can be divided between the demarcating function—that regulates one’s marital status and one’s entitlement to membership in a given community—and a redistributive function—defining the rights and

obligations that spouses are bound to honor and determining the economic and custodial consequences of a marriage (pp. 119-20). Shachar's *no-monopoly* rule establishes that neither the group nor the state should be allowed to acquire exclusive control over a contested issue that affects individuals both as group members and as citizens. This rule makes them complementary power-holders, forced to compete for the loyalty of their shared constituents in each different social arena (pp. 120-22). In family law, for example, the group authority may prevail over the demarcating aspects of family law (including questions of status regulating marriage or offspring affiliation to the group) while the state authority may prevail over its distributive aspects (including questions of how material resources are allocated in certain relationships, and which public benefits flow from one's family and group membership status) (pp. 120-21, 132). These institutional provisions grant individuals a choice between the jurisdiction of the state and the cultural group, and this means that

clearly delineated and selective "entrance," "exit" and "re-entry" options are thus a crucial component in improving the situation of traditionally vulnerable group members. . . . Once the old balance of power shifts from power-holders to individual members, a dynamic new space for meaningful participatory group membership is thus created. (Pp. 123-24)

Shachar's proposed solution of transformative accommodation is very convincing *at a theoretical level*. But specifics are lacking. Shachar formulates her critique of Kymlicka and others via a discussion of the Martinez case, but she does not return to the case in any detail once she has worked out her own alternative. The Martinez case, a notorious example in the multicultural literature, is a U.S. court case between the Santa Clara Pueblo tribe and the Martinez family (*Santa Clara Pueblo v. Martinez*, 436 US 49 [1978]; as described by Shachar, pp. 18-20). The U.S. government allows the tribe to create and enforce laws for the community to support its interest in preserving its religious comprehensive worldview. Take, for example, the rules of admission: membership is guaranteed only to children whose parents are both Pueblo members or to children of male members who marry outside the tribe. Membership is denied, however, to children of female members who marry outside the tribe. The case concerns Julia Martinez, who married an outsider but whose children were raised and socialized on the Pueblo reservation: they spoke the tribe's language and participated fully in the life of the tribe. Still, these children were not considered as members of the tribe, "barred from access to federal services such as health care, education and housing assistance, just as they were forced to forfeit the right to remain on

the reservation in the event of their mother's death—simply because their mother broke the Pueblo's punitive code against women by marrying a non-tribe husband" (p. 19).

Although Shachar claims that "transformative accommodation can rise to the challenge by allowing cultural differences to flourish, while creating a catalyst for internal change [and] thereby moving towards a meaningful resolution of the paradox of multicultural vulnerability" (p. 118), she passes up the chance to show how this would work in the Martinez case, which merits only a footnote:

According to this account, Mrs. Martinez . . . could have turned to the state and not the group in order to ensure that her children received the same health benefits to which the other residents of the Pueblo reserve were entitled. . . . [T]he three principles of transformative accommodation could have ensured that [she was] not left without remedy after all: the sub-matter allocation of authority (in this context between demarcation and distribution), the "no monopoly" rule (which forbids the possibility that the group controls *both* status *and* property issues) and the establishment of clearly delineated choice options (here allowing vulnerable insiders to turn to the "outside" if their group fails to address their basic needs). (P. 142, n. 51)

But why should the division of demarcation power to the group and distributive power to the government solve any of the problems Shachar herself mentions? For one thing, Shachar does not show how the transformative accommodation can be implemented as a policy, for example, how the Pueblo tribe can be convinced to hand over the distributive functions to the state. Moreover, the injustices, resulting from these "gender-discriminatory membership rules" (p. 18) are not challenged by her approach. To her own phrase, the solution provided by such a division is "all-too-easy."

Multicultural Jurisdictions has some important strengths. Shachar gives an adequate and illuminating analysis of the current debate on multicultural accommodation and the role of family law in these debates. Moreover, she focuses on an important issue, long underexposed in multicultural political theory: the negative effects of multicultural accommodation, specifically its impact on vulnerable parties within the minority groups, especially women and children. Her analysis of these issues is much more nuanced than other theories in the field—for example, Okin's or Barry's—and her book is focused, well written, and concise. Finally, her own alternative, transformative accommodation importantly addresses the paradox of multicultural vulnerability. A weakness of the book is the abstract and theoretical character of her elaboration and the absence of an elaboration of examples that are less favorable towards her own theory (and that she presents to criticize other theorists). Only when Shachar is able show how her approach can be imple-

mented in, and provide answers for, actual multicultural discussions, she can claim its “exciting uniqueness” (p. 120). This makes it difficult, if not impossible, to judge whether *transformative accommodation* provides the “innovative new approach” (p. 88) she envisages.

NOTE

1. Cf. Joseph H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford, UK: Oxford University Press, 2000); Jacob T. Levy, *The Multiculturalism of Fear* (Oxford, UK: Oxford University Press, 2000); Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2001); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, MA: Harvard University Press, 2002).

—*Roland Pierik*
Tilburg University