

## LIBERALISM AND MINORITY RIGHTS

LIBERALISM AND MINORITY RIGHTS:  
THE ISSUE OF FAITH-BASED ARBITRATION  
WITHIN LIBERAL DEMOCRACIES

By

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## Abstract

In recent years there has been growing concern in liberal democracies over the legitimacy of accommodating religious diversity. In particular, the issue of faith-based arbitration – as well as the whole of Islamic *Sharia* law - has come under public attention with regards to whether religious arbitration can be allowed in areas of family and personal law. The current project examines the possibility of faith-based arbitration within liberal democracies. In attempting to do so, a critical examination of the relationship between culture and liberalism is examined. It is argued, alongside the works of Will Kymlicka and Joseph Raz that liberal theorists have overlooked or at the very least underappreciated the contributing role of culture to individuals' pursuit of the good. More importantly, if culture is to be understood as playing a significant role in regards to individual ends, then there will be a need to go further than just tolerating different cultures. What may be required is state support of different cultures within the liberal framework. However, given the importance of recognizing and supporting cultural practices, there still remains a need to ensure that the practices fall within liberal parameters. Hence, it is further argued that liberal checks and balances need to be met in order for cultural practices to be supported. In particular, both the harm principle and the principle of autonomy need to be met if practices are to be given the status of 'moral acceptability'. Along with examining the role of culture within liberalism, other areas of liberalism are examined. Most notably, the role of autonomy within liberalism is investigated as well as some of the difficulties associated with the principle of state neutrality.

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## Chapter 1: Cutting the Multicultural Fat

Cultural differences and the growing need to recognize and accommodate such differences are mounting problems for liberal democratic societies. However, these particular worries concerning cultural accommodation are nothing new. In fact, when mass immigration took place in the West in the 20<sup>th</sup> century (from various ethnic groups), worries concerning how the state would deal with the growing cultural diversity was on the minds of many. The general feeling at the time was that in order to achieve political, social and economic stability, Canada and the United States ought to adopt what came to be known as the ‘Anglo-conformity’ model (or assimilationist model). The expectation was simple, ‘prior to the 1960’s, immigrants to [Australia, Canada and the United States] were *expected to shed their distinctive heritage and assimilate entirely* to existing cultural norms.’<sup>1</sup> The policy was stringent and went as far as denying some groups state entry if it was felt that the group was unassimilable. Australia for instance adopted a ‘whites only’ policy, while Canada denied entry to Chinese immigrants for similar underlying reasons. It was genuinely believed and argued that for the purposes of social stability, all individuals should be assimilated into one culture and hence the state – in pursuing one cultural tradition – would have little to worry about concerning group rights. Joseph Raz emphasizes that such an outlook on social diversity is the outcome of nationalist thinking

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<sup>1</sup> Kymlicka, Will. Multicultural Citizenship (hereafter MC), p. 14, my emphasis.

which adhered to the belief that 'only common ethnicity, common language, and a common culture can constitute the cement which bonds a political community.'<sup>2</sup>

However, the idea of assimilating individuals into a single culture proved to be both illiberal and insensitive to cultural identity. Firstly, an individual's language of origin, religious beliefs, values and fundamental commitments cannot be completely shelved for other (sometimes conflicting) values and beliefs. A practicing Muslim, Jew or Hindu, for example, cannot be expected to adopt Christian values in order to fit in with society; such a demand comes at too high of a price to those individuals. In addition, one of the key aims of political liberalism is to attempt to free individuals from having to adopt a particular conception of the good. In fact, individuals are encouraged to pursue their own conception of the good – as long as in doing so they do not violate the rights of others. It is very evident that the assimilationist model is aimed at enforcing one specific conception of the good life on all individuals.

It was not long before group pressure created difficulties for the Anglo-Conformity model, and as Kymlicka points out, beginning in the 1970's, Australia, Canada, and the United States succumbed to group pressures and rejected the assimilationist model altogether. Instead they opted for a 'more tolerant and pluralistic policy which allow[ed] and indeed encourage[ed] immigrants to maintain various aspects of their ethnic heritage.'<sup>3</sup>

The first state to adopt a policy that aimed at accomplishing the above goal was Canada. In 1971, Prime Minister Pierre Trudeau introduced the Multiculturalism Policy.

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<sup>2</sup> Raz, Joseph, *Multiculturalism*, p. 195.

<sup>3</sup> Kymlicka, MC, p. 14



The aim of the policy was *in part* to allow ‘people who wish to maintain and express their ethnic or religious identity [to] be free to do so without fear of discrimination or stigmatization within the larger society – they should not have to hide or abandon their ethnic identity in order to participate in society’.<sup>4</sup> I say that the aim of the policy was *in part* to allow ethnic and religious expression because the policy still had a strong solid foundation in the liberal value of individual autonomy. Trudeau stressed in his introduction of the Multiculturalism Policy that each individual was to remain free in deciding how ‘they wish[ed] to maintain an inherited ethnic or religious identity, and to what extent they wish to challenge or reject the practices associated with their inherited group membership.’ (ibid) It was not the case that ethnic and religious values were to be recognized and upheld at all costs, but the option of pursuing such inherited traditions was now a possibility for all members of the state. In other words, individuals were free to express their identity but were equally free to reject it. Canada’s strong adherence to such liberal values as autonomy, expression, and equality would not allow any individuals to be forced to adopt a particular conception of the good against their will. It seemed at the time that the multicultural policy took into consideration both the importance of cultural identity and the autonomy of the individual. As we shall see later on, the tension between the expression of ones ethnic or religious identity and individual autonomy is not that easily diffused by multicultural politics.

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<sup>4</sup> Trudeau, Pierre (1971) "Statement to the House of Commons on Multiculturalism", House of Commons, Official Report of Debates, 28th Parliament, 3rd Session, 8 October 1971, pp. 8545-46.

Nonetheless, multiculturalism - as a state policy - enjoyed initial success and it would not be long before Canada would assume a leadership role in the development of the multicultural (or accommodationist) model. The success of this policy would continue for some time, with several other European states following Canada's example. The implementation of Multicultural policy became a new solution to the old problem of diversity. However, new problems would arise for the politics of multiculturalism. Not everyone had success with either implementing or maintaining a multicultural atmosphere. Several European Union states (France and Amsterdam for example) are now beginning to reverse their multicultural policies because of the ethnic separatism that it has created within their borders. Even in Canada, where (fortunately) multiculturalism has not led to ethnic separatism, issues have consistently come up concerning Canada and its treatment of ethnic, religious, and linguistic minorities. Therefore, I believe it is worthwhile to introduce and look at the politics of multiculturalism, specifically within the liberal democratic system of Canada, and to elaborate on some of the general issues facing this model in Canada today.

I should note however, that the concern with multiculturalism in this project is concentrated on a conceptual analysis of multiculturalism and not necessarily the procedural aspect. Questions of policy (e.g. affirmative action) are not the prime concern of this project; instead conceptual questions regarding the actual framework are examined. Hence, when reading this project one should bear in mind that questions concerning what a multicultural state is, what constitutes a group right, what role autonomy plays within liberalism and so forth will be the issues addressed.

**Multiculturalism: What is a Multicultural State?**

Denise Réaume once wrote that the ‘challenge of multiculturalism is that of negotiating the relationship between two or more normative systems within a political unit.’<sup>5</sup> Réaume is correct in noting that a multicultural society is one where two or more normative systems are at play, yet more can be said about the different types of normative frameworks that are available within a multicultural society. According to Will Kymlicka in *Multicultural Citizenship*, a state can be multicultural in two distinct ways. The first is by way of being multinational. By this, Kymlicka intends that a state may contain within itself more than one nation, where nation refers to ‘a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture.’<sup>6</sup> The states which contain several distinct nations within their border are no longer considered nation states but multinational states. Canada is one such example because it consists of three distinct nations; the Aboriginal, Francophone and the Anglophone. The idea here is that each of these nations have – what Kymlicka calls – their own societal cultures. By ‘societal culture’ Kymlicka intends ‘a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.’<sup>7</sup> Societal cultures and the significance they play in the argument for autonomy and group rights will be discussed in more detail in subsequent chapters. For the meantime, it can be said

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<sup>5</sup> Réaume, Denise. *Legal Multiculturalism from the Bottom-Up*, p. 185.

<sup>6</sup> MC, p. 11.

<sup>7</sup> MC, p. 76.

that in multinational states, the challenge of multiculturalism is the reconciliation of several *national* normative systems within one political unit.

Thus far, this is in line with Réaume's above analysis; however, this is not the only way in which a state can be considered multicultural. The second way cultural pluralism is achieved is by immigration. When a state accepts a large number of immigrants (both individuals and family units) into their state, the state can be described as being 'polyethnic.'<sup>8</sup> Polyethnicity refers to a state that contains a large number of ethnic, religious, and linguistic groups. *This crucial distinction between national groups and polyethnic groups will warrant a separate treatment of group rights issues.* In relation to the former, arguments are usually forwarded in favor of some self-governing rights. Meanwhile, the latter groups are expected – to some extent – to uproot themselves in the new society that they have voluntarily decided to join. In other words, the national group usually attempts to argue for group rights by requesting exclusion from the main culture, while the polyethnic groups aim at inclusion but also attempt to secure certain exemptions from mainstream laws and practices that interfere with their ethnic or religious identity.

The intent of the current project is to deal with the polyethnic side of multiculturalism. Therefore, while both types of groups do fit in with Réaume's analysis, and both present the challenge of trying to reconcile several normative frameworks in one political unit, the main interest will be on the normative framework of polyethnic groups

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<sup>8</sup> While Will Kymlicka applies this term, the term is originally coined by Canadian historian William McNeill. See 'The Rise of the West: A History of the Human Community'

and the challenge of reconciling them within the liberal democratic framework of western society.

### **Polyethnic Rights: Two Main Problems**

Now it is time to turn, briefly, to some of the general difficulties facing the accommodationist model in relation to polyethnic group rights (hereafter just group rights). I should point out that much like the above analysis concerning the breakdown of multiculturalism, something similar can be said about the issues facing the multiculturalist model. The reason I take this breakdown of issues to be important is because the field of multiculturalism is vast and one can easily become caught up in its web. To focus just on multiculturalism would be to focus on anything and everything to do with groups, regardless if it pertains to feminism, nationalism, or polyethnicity. Hence, it is useful to narrow the topic of this paper to not just polyethnic-type group rights but also to one of the main issues facing this model today.

Two further inter-related problems can be identified in relation to group rights, when examining the accommodationist model. The first relates to *intra-group* difficulties. This issue is one that a wide variety of academics have discussed and attempted to deal with in one way or another. The dilemma of intra-group conflict is captured nicely by what Ayelet Shachar calls the *paradox of multicultural vulnerability*;

Multiculturalism presents a problem, however, when state accommodation policies intended to mitigate the power differential between groups end up reinforcing power hierarchies within them. This phenomenon points to the troubling fact that some categories of at-risk group members are being asked to shoulder a disproportionate share of the costs of multiculturalism. Under such conditions, well-meaning accommodations by the state may leave certain group members vulnerable to maltreatment within the group, and may in effect, work to reinforce some of the

most hierarchical elements of a culture. I call this phenomenon the *paradox of multicultural vulnerability*<sup>9</sup>.

The paradox resides in the effect that group rights have on individual members. There is something paradoxical about accommodating group rights that enhance the group members' identity, but simultaneously injure members of the same group – sometimes even the very same member. A very similar issue is addressed by Susan Okin in her essay concerning multiculturalism and its effect on women.<sup>10</sup> Her main argument questions whether group rights accommodation reinforces gender inequalities within culture and society. Okin concludes that such (unequal) power structures are indeed reinforced in multicultural theory. Les Green also alludes to a similar point in his article 'Internal Minorities and their Rights'<sup>11</sup>, where he points out that while 'we acknowledge the rights of minorities in order to protect some of their urgent interests. . . [we should remember that] these minority groups are rarely homogenous; they often contain other minorities.'<sup>12</sup> Essentially there is a tension within liberal theory between the need to protect individual freedom and autonomy with that of accommodating cultural practices which may be harmful to members of the same group. In other words, there is a difficulty with both affirming some groups identity (by way of accommodating some social practice) and simultaneously injuring members of the same group by restricting their personal freedom and autonomy.

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<sup>9</sup> Shachar, Ayelet. On Citizenship and Multicultural Vulnerability, p. 65.

<sup>10</sup> Okin, Susan. Is Multiculturalism Bad for Women?

<sup>11</sup> Green, Leslie. 'Internal Minorities and their Rights' in The Rights of Minority Cultures (ed) Will Kymlicka, p. 257-274.

<sup>12</sup> Green, Leslie, p. 257.

This scenario is even more complicated when the vulnerable members are underage children who cannot make decisions on their own. One of the landmark American cases which brought this issue to the forefront was *Wisconsin v. Yoder*<sup>13</sup>, where a clash occurred 'between a Wisconsin state law, which required school attendance until age sixteen, and the Old Order Amish community, which claimed that high school attendance was contrary to their religion.'<sup>14</sup> This case split liberals down the line. On the one hand, some liberals argued that the state should make exemptions for particular religious practices and ways of life and that part of accommodation is toleration. On the other hand, *Yoder* 'has been attacked by liberals on the grounds that allowing the Amish parents to prevail risks undermining the development of autonomy in Amish children.'<sup>15</sup> Here, again, one can spot the difficulty that Shachar is attempting to forward in her paper, which is the paradox that occurs when the promotion of a group right interest comes at the cost of individual members within the group. I agree that this is an important issue that has arisen in multicultural politics. As *Yoder* helps illustrate, the problem of securing group rights without violating the autonomy of the members belonging to such groups is an issue that has surrounded multicultural politics for years on end. The aim of satisfying

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<sup>13</sup> This is one of the earliest cases to attempt to recognize and accommodate a minority group. There have been similar issues raised concerning the underage children of Jehova witnesses whom depend on their parents to make medical decisions. Issues arise whether life-saving medical procedures can be rejected on behalf of the children by their parents on grounds of religious beliefs. For example, should a life saving blood transfusion be denied to children of Jehova witnesses.

<sup>14</sup> Galston, William. *Two Concepts of Liberalism*, p. 516.

<sup>15</sup> Galston, p. 517.

both group requests and liberalism's commitment to autonomy, as we shall see, is an issue that is always hovering in the background of multicultural politics.<sup>16</sup>

However, another issue can be found in multicultural politics that is also worth noting. This is the problem of *inter-group* relations, which refers to the effect that the accommodation model has between groups. As Ayelet Shachar rightly notes, 'both advocates and critics of multiculturalism have recognized the potential in accommodationist policies to undermine the social unity of already diverse politics'<sup>17</sup>. Group rights issues can help initiate conflicts between groups; it can place groups in a competitive sphere where they find themselves lobbying for the limited government funds for cultural promotion. Brian Barry, one of the foremost opponents of multicultural politics, similarly argues that 'the politics of difference'<sup>18</sup> is a formula for manufacturing conflict, because it rewards the groups that can most effectively mobilize to make claims on the polity, or at any rate it rewards ethnocultural political entrepreneurs who can exploit its potential for their own ends by mobilizing a constituency around a set of sectional demand.'<sup>19</sup>

In addition to putting minority groups in a competitive sphere, there will also be a problem concerning the state and its selectivity in cultural promotion. Not all cultural ways of life will be promoted by the state – especially those that are considered illiberal

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<sup>16</sup> I do not want to claim that this problem is completely avoided. This issue will come to the forefront any time a state affirms the right to a group to govern over their members on community matters. I hope that I have not given the impression that this problem can be completely ignored in multicultural politics.

<sup>17</sup> Shachar, p. 64.

<sup>18</sup> Note to the reader that Multicultural politics in the literature is sometimes referred to as either 'the politics of difference' or the 'politics of recognition'. These terms come from the heavily influential paper on Multiculturalism by Charles Taylor 'Multiculturalism: The Politics of Recognition'.

<sup>19</sup> Barry, Brian. Culture and Equality, p. 21.



forms of practices (e.g. forced marriage at a young age, not allowing women to vote). However, such a negation of cultural practices does not come easily. As Canadian diversity grows, and minority groups increase in members – more demands will be made by groups in relation to not only having their cultural and religious standards accepted but also to be allowed to conduct their own affairs in accordance with their own standards. This will create inter-group tensions within society – primarily between that of the state and the demanding minority groups. For this reason, I believe this makes group-rights promotion an interesting area in multicultural politics because it raises two motivating questions: To what extent can newcomers demand acceptance of their cultural and religious standards? Moreover, to what extent do we give groups the rights to conduct their own affairs in accordance with their own way of life? I believe that the answer to these two questions will be important if we are to try to understand the problem of inter-group relations.

Following in line with the previous section concerning the two aspects of multiculturalism, I would like to further focus this project on the latter difficulty of accommodation - *inter-group* issues. Moreover, I would like to focus on a recent controversial issue that occurred in the Canadian context involving the Islamic law of Sharia and whether such a practice ought to be accommodated in Canada. Essentially, the two questions raised above come through nicely with this recent case. What we have here is a minority group that is in direct conflict with the state because not only do they want their religious way of life to be accepted, but they have also requested that they be allowed to conduct some of their community affairs by way of their own religious

method and standards. Nonetheless, before drawing on other important questions that come about from the Sharia issue, I will first outline the Sharia problem and explain why this is a good paradigm case for addressing some of the difficulties that multicultural politics are facing today.

### **Sharia in Canada**

In the fall of 2003, Syed Mumtaz Ali – a retired Ontario Lawyer – received vast media and public attention when he made comments regarding the establishment of an Islamic Institute of Civil Justice (IICJ) which would be aimed at ensuring the practice of Islamic principles of family and inheritance laws in Ontario. This proposal, which was to sneak its way in via the *Arbitration Act*<sup>20</sup> – was quickly met with opposition by woman rights groups, human rights watch and other similar organizations – both Muslim and non-Muslim. For example, the Progressive Muslim Union (PMU), released a statement issuing their concern over the possible adoption of Muslim principles in matters of arbitration and that in general they opposed ‘all religious courts and tribunals; be they Rabbinical or *Shariah*-based, Catholic or Hindu, and would like to stop the encroachment of religious law into the judicial system of Canada.’<sup>21</sup>

As a response to the frenzy that occurred after Mumtaz Ali’s comments, the Ontario government of Dalton McGuinty assigned former Attorney General of Ontario,

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<sup>20</sup> The Arbitration Act was introduced in 1991 by the NDP party of Canada in order to help alleviate some of the excessive workloads placed on Ontario courts. At that time, courts were overwhelmed with numerous cases, so it was felt that the introduction of a new Arbitration act may help by way of allowing small commercial companies between the United States and Canada to resolve private matters without having to go through the court system. This act would also continue to make room for faith-based arbitration in regards to matters of divorce.

<sup>21</sup> Progressive Muslim Union statement available on-line at [http://www.pmu.org/archives/pmu\\_positions\\_on\\_current\\_issues/index.php](http://www.pmu.org/archives/pmu_positions_on_current_issues/index.php)

Marion Boyd, with the task of reviewing the Arbitration Act along with the whole of faith-based arbitration (hereafter Boyd report).<sup>22</sup> One of the more interesting facts that came from the Boyd report (for the sake of this section) pertains to the actual loophole that Syed Mumtaz Ali attempted to exploit by way of the *Arbitration Act*. The Arbitration Act itself was initially proposed ‘as a framework for the provision of private arbitration services’<sup>23</sup> between business and organizational companies in order to arbitrate private disputes. What Mumtaz Ali was proposing was to use the *Arbitration Act* and apply it in the same manner as it had been applied by countless other businesses in Canada. Therefore, it was not the fact that the government had amended or ‘introduced any legislation or regulations that allowed the IICJ to conduct arbitrations according to Islamic personal law . . . rather, the structure of the *Arbitration Act* itself created this possibility.’<sup>24</sup> Mumtaz Ali was after the introduction of a separate tribunal that would deal exclusively with Islamic divorce in Ontario by way of Islamic principles and beliefs. In other words, he wanted to establish a separate family law practice in Canada that would deal exclusively with Islamic divorces – a ‘Sharia Court’.

The public outcry, which quickly followed this proposal, would initially be against the establishment of any such tribunals by the IICJ. The fear expressed by many was that this might create space for similar abuses against women and children such as

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<sup>22</sup> In her 150-page report, Boyd forwarded forty-six recommendations that revolved around allowing faith-based arbitration to continue but not without further checks and balances on the *Arbitration Act*. Boyd writes ‘the *Arbitration act* should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review is observed’ (Boyd, p. 134). My intent is not to examine the forty-six recommendations but to highlight that the report did not rule out faith-based arbitration but quite oppositely suggested that it is compatible with Canadian family law practices.

<sup>23</sup> Boyd report, p. 5.

<sup>24</sup> Boyd report, p. 5.

those reportedly found in other countries where Sharia law is practiced – including such places as Pakistan, Iran, Afghanistan, and Nigeria.<sup>25</sup> In addition to this, it was also generally felt by those who opposed the establishment of an Islamic tribunal, that all the hard work over the years to secure gender equality and individual liberty may be lost if the IICJ was to get its way.

However, what ended up happening at the end was not only the rejection of the IICJ's proposal but the whole of faith-based arbitration became threatened. Ontario Premiere, Dalton McGuinty, expressed his decision by stating, "I've come to the conclusion that the debate has gone on long enough. There will be no Sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians."<sup>26</sup> This was felt, by the Christian-Jewish-and Muslim communities as a complete setback to one of their more celebrated group-rights victories. For long before 1991, religious members had sought out private arbitration on grounds of their religious beliefs. Community leaders hailed such an accommodation of religious diversity as a great good but now this form of accommodation has come under threat. Religious communities felt as though they have lost an integral part of their way of life in Canada.

### **Guiding Light**

So what problem(s) does the Sharia issue bring to the forefront? Essentially, I think the issue raises a difficulty for multiculturalism referred to sometimes as the problem of 'thick multiculturalism', that is the problem of trying to find some form of

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<sup>25</sup> Boyd report, p. 3.

<sup>26</sup> Globe and Mail, September 12<sup>th</sup>, 2005. 'McGuinty Government Rules Out Use of Sharia Law'.

‘compromise between a liberal and an illiberal point of view.’<sup>27</sup> I believe that some of the more current liberal theories of minority rights face tremendous difficulty when trying to deal with non-liberal groups that do not take autonomy promoting reasons as the core of their normative values. In other words, there is a complex problem for liberal theory when it attempts to deal with minority groups that make claims concerning the importance of their practices which (while not promoting autonomy), may still have an intrinsic value for their own members.

The question that, I believe, spurs out of the Sharia issue is should faith-based arbitration be allowed in a liberal democratic society? Another way of engaging this main question is by asking the following: Can a practice, which may be intrinsically valuable to its members, be supported in a liberal democracy even though it is not autonomy respecting? I want to draw a distinction here between ‘autonomy promoting’ and ‘autonomy respecting’. The question of interest in this project is whether a group practice can be tolerated without being autonomy respecting. It is reasonable to think that a group may engage in practices that do not promote autonomy but very well respect autonomy by still making room for individual choice within the practice itself. For instance, when individuals join a group or organization, their individual autonomy may not be promoted, in the sense that they are not allowed to pursue any set of options (since presumably being part of the group dictates certain restrictions); nonetheless, individuals may still have room to practice their autonomy within the group. However, this is different from allowing a practice that does not respect the autonomy of the agent in the

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<sup>27</sup> Tamir, Yael. ‘Two Concepts of Multiculturalism’, p. 6

least bit. So the questions facing this project concern the possibility of allowing practices that are not autonomy respecting rather than practices that are not autonomy promoting. This will be a point that will be further explored in the second chapter.

So how can liberal theory account for the demands made by non-liberal cultural groups in Canada? It is the investigation of this question that will occupy the remainder of the project. However, the question cannot be asked in isolation. Along with asking the above question, more will need to be asked about the relationship between liberalism and culture. For what role can culture play in liberal theory? How important are cultural and religious preservation for the autonomy of the individual? What role do culture and religion play in providing individuals with a 'context of choice' and in promoting their autonomy? Should we value culture and religion because of the role they play in individuals lives or are political and legal exemptions based on culture not valid – especially when the practice conflicts with liberal ideals?

These are some of the questions that I will be looking to in order to guide the remainder of this project. In order to elaborate on these questions, I will be primarily drawing upon the works of Will Kymlicka and his liberal theory of minority rights as presented in *Liberalism, Culture and Community* and *Multicultural Citizenship*. It is his later book, *Multicultural Citizenship*, where Kymlicka presents, in finer detail, the issue of polyethnic rights and the limitations to their demands. However, it will be important to also draw upon his earlier work in order to understand the liberal theory of minority rights that Kymlicka eventually presents us. Together, both works are important to gaining a better understanding of Kymlicka's view of liberalism, which, interestingly

enough, is not completely opposed to collective rights, as traditional liberal theory has generally been thought to be. However, this should not be *prima facie* taken to mean that Kymlicka abandons important liberal values such as moral individualism, and individual autonomy. On the contrary, he has a deep seeded commitment to liberal values of autonomy and individual freedom. Instead, Kymlicka's attempt is to provide a theory of minority rights within the liberal framework that would allow some minority groups a right to cultural preservation and hence some possible forms of exemption from mainstream laws and practices, while also remaining committed to the core values of liberalism.

In the next chapter, I first attempt to retrace Kymlicka's view surrounding the importance of culture to the autonomy of the individual. I question the role that culture and religion play in relation to providing a context of choice for its members, and to what extent Kymlicka's theory accounts for non-liberal groups. Upon fleshing out Kymlicka's theory, I then focus my attention on some of the main criticisms launched against his liberal multiculturalist view. In particular, I am interested in the egalitarian critique of liberal multiculturalism as presented and defended by Brian Barry. It is Barry's belief that Kymlicka presents us with a theory of minority rights that is suitable for (already) liberal minorities and does little to help us with non-liberal groups, such as the demands made upon liberal society by religious groups, in particular Muslim groups. I argue that while Kymlicka's theory does have its base in liberal autonomy, this does not necessarily lead to the conclusion that his theory is only applicable to liberal minorities. In the third chapter, I turn my focus on two main concerns with Kymlicka's theory, as proposed by

Barry. In general, and for reasons he articulates, Barry is not very convinced that autonomy ought to be the central tenet of liberal theory – a view that is bound on a crash course with Kymlicka's theory. Furthermore, Barry argues that if autonomy is to be a central value, then we risk the possibility of violating an-all-too-important liberal principle – the neutrality principle. In the fourth chapter, I draw upon the works of Joseph Raz in *The Morality of Freedom* in order to construct a reply to the two major criticisms launched by Brian Barry. In this chapter, it is my intent to show that Raz provides us with an intriguing response to both of Barry's concerns. In the final chapter, I return to the issue of faith-based arbitration with hopes of shedding some light on whether such a practice ought to be allowed in liberal democratic societies. By the last chapter, I hope to have established some good understanding of what the liberal commitment to autonomy entails, and whether Raz's liberal perfectionism can make room for faith-based arbitration. Ultimately, it will be instructive to learn what we can from this recent controversial Canadian issue especially as more group rights are proposed in the 21st century. How is Canada, in the future, to deal with similar appeals by other groups? I hope that at the very least, the Sharia issue can become a kind of guiding light for the future of multicultural politics.

Before proceeding, there is one more issue that needs to be addressed. In a recent paper presented to the Canadian Council of Muslim Women (CCMW), Kymlicka forwarded a few observations regarding the Sharia law issue within Canada. In regards to the Sharia issue, Kymlicka writes:



Unfortunately, I believe that [the Sharia debate] is in fact a very poor test case for these larger debates. The reality is that the opportunity made available for faith-based arbitration under Ontario's Arbitration Act has almost nothing to do with multiculturalism. . .

In sum, I believe that there are two conversations being run together in the current public debate about Sharia tribunals. One conversation concerns the role of private arbitration as a tool for providing citizens with more affordable and accessible (and less adversarial) forms of dispute resolution. . . The second conversation concerns the link between Islam and liberal multiculturalism, and whether we can sustain a consensus on liberal multiculturalism in a context where Muslim communities are growing and increasingly politicized. Will Canadians extend to Muslims the same trust they have shown to other minorities in providing multicultural accommodations, and if so, will Muslim leaders and organizations acknowledge the liberal foundations (and limits) of these accommodations?

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Kymlicka argues that the case concerning faith-based arbitration and the multicultural framework is not the 'test case' that Canadian society has been waiting for but is instead a mix up of two separate conversations. For the most part, I do not think that Kymlicka is necessarily wrong on this point but I think his point can be viewed in two separate ways. On a procedural level, that is when discussing policy and forms, I believe Kymlicka's point can be granted. Perhaps procedurally we are running two conversations together - in that, we are discussing an arbitration act and the multiculturalist policy as though they are the same policy. Fair enough. However, I think this is much different than suggesting that faith-based arbitration has almost nothing to do with multiculturalism altogether. On the contrary, from a conceptual level, I believe the Sharia issue brings to the forefront many of the issues facing multicultural theories today. Such issues include accommodation rights, individual vs. group rights, liberal and non-liberal theoretical outlooks and so forth. So it should be noted that while I do agree with Kymlicka that the Arbitration issue may be misleading on a procedural level, I want to still maintain that it

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<sup>28</sup> Kymlicka, 'Testing the Bounds of Liberal Multiculturalism?'

is conceptually rich with much in it to reveal some of the most important difficulties facing multiculturalism today.

## CHAPTER 2: Culture, Liberalism and Kymlicka

What is the relationship between culture<sup>29</sup> and freedom within Kymlicka's liberal framework and what implications arise out of such a conception? Up until recent years, liberal theorists have offered little in their work about the relationship, if any, between culture and freedom. Perhaps this is the case because the notion of 'culture' has no place within a theory that primarily concerns itself with the relationship between individuals and their state. Rawls, for instance, never explicitly argued for culture as a primary good.<sup>30</sup> Now, this is not to say that Rawls had no concern with culture but rather he did not place any high importance on the idea itself. Put differently, while there may be nothing about culture to make it inconsistent with liberalism, it also seems as though there is nothing special about it to make it significantly valuable as well. Liberal disregard of culture seems then to suggest that it plays little to no role with respect to individuals and their ability to choose and revise their own ends and conception of the good. However, is it possible to understand culture in a way that would make it valuable for liberalism instead of merely consistent with it? In addition, if an argument can be made, such as to suggest that culture is fundamentally important for liberalism, then what type of culture do we need? Will only liberal cultures suffice for freedom or do other cultures count as well?

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<sup>29</sup> I will be explicitly defining the term culture in the next section, for the time being I am using the word in the most general sense.

<sup>30</sup> See *Liberalism, Community and Culture*, p. 166 'while culture is therefore a crucial component of Rawls's own argument for liberty, he never includes cultural membership as one of the primary goods with which justice is concerned'

It is the intent of this chapter to sketch, in detail, Will Kymlicka's notion of culture as it relates to freedom (with a special emphasis on the role he believes it to play in justifying a liberal theory of minority rights). Part of this exploration of Kymlicka's view will include drawing out some of the difficulties that arise from his theory in relation to non-liberal minority practices. As may be recalled, the purpose of this project is to examine different liberal responses to non-liberal groups, who despite the liberal framework of the state they inhabit, still continue to demand recognition of non-liberal practices which they view as integral and intrinsically valuable to their community.

In what follows, I will first explain Kymlicka's theory; my focus will be on his notion of 'societal culture' and the way it provides individuals with a 'context of choice'. It is important to keep in mind that Kymlicka's concern is not just with providing us with reasons for accepting the idea of culture within liberalism but rather to show that 'freedom is intimately linked with and dependent on culture.'<sup>31</sup> Upon fleshing out some of Kymlicka's views, I will then draw out the implications of his theory in relation to non-liberal groups. Most notably, I want to take notice of Brian Barry's criticism of liberalism and autonomy as he presents it in *Culture and Equality*. This criticism warrants attention for at least two reasons. It attacks the core of Kymlicka's theory, and second, it opens the door to a wider debate between neutral liberals and perfectionist liberals – however, this will be the concern of the third chapter.<sup>32</sup> For now, the criticism

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<sup>31</sup> MC, p. 75.

<sup>32</sup> For the time being, and in the most general sense, the distinction between these two ideas is as follows; under liberal perfectionist ideals (such as those found in both Raz and Kymlicka), proponents argue that the state has a duty to promote the cultures which in turn promote or enhance autonomy. The view of liberal neutrals, on the other hand, advocate that the state ought to remain neutral in its promotion regarding the many conceptions of the good – in that the state ought not to favor one conception over the

with which I will be dealing in this chapter is a more specific problem concerning the role of autonomy in Kymlicka's theory. As we shall see, some commentators of Kymlicka's work present him as somewhat 'autonomy addicted', by which I mean that he is only concerned with culture (and social practices) in so far as they enhance one's autonomy and as an apparent consequence Kymlicka is charged with only supporting those practices in society which enhance our autonomy. I will argue that such a view is a mischaracterization of Kymlicka's project, and that such an outlook takes the role of autonomy much further than Kymlicka wants to take it. Furthermore, I will also argue that within Kymlicka's theory there is room for non-liberal practices, but not without the upholding of at least one special condition. However, I must first turn my attention to the issue of culture and freedom, as presented and defended by Will Kymlicka.

### **Kymlicka Freedom and the 'Culture' that brings it**

Thus far, I have used the term 'culture' without properly defining it within Kymlicka's liberal theory of minority rights. Kymlicka is aware that the term is fairly broad and can encompass almost any group of individuals, ranging from social groups (e.g. gay culture) to nationalistic groups (e.g. German nationals). Hence, he limits his application of culture to what he calls 'societal culture', which he defines as a culture which 'provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially

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other. I believe that there is quite a considerable overlap between this area of political thought and some of the questions guiding this project concerning non-liberal practices, state promotion, and liberalism.

concentrated, and based on a shared language.<sup>33</sup> However, a little more needs to be said about societal cultures. For one, they involve ‘common institutions and practices’. It is not enough to say that societal cultures revolve around a shared language. They penetrate every level of social life, including the media, schools, and the economy. Second, and this ties in with the first point, societal cultures ‘did not always exist, and their creation is [thought to be] intimately linked with the process of modernization.’ This refers to the need of modern states to have a common culture, one that includes a standardized language that is ‘embodied in common economic, political and educational institutions.’<sup>34</sup> This is thought to be instrumental for a number of reasons, most notably for the success of a modern economy, the establishment of a common identity, and for reasons pertaining to the ‘modern commitment to equality and opportunity.’<sup>35</sup>

Having said this, there are a few things I would like to further draw from the conception of societal culture in order to flesh out some of its implications. First, how does it relate to polyethnic groups? More specifically, how can we make sense of a societal culture that contains a wide range of ethnically diverse groups without invoking an assimilationist type model? It seems, from what has just been noted about societal cultures, that modern states may need to assimilate individuals if they are to have a flourishing economy, a common identity and so on. Second, how is the notion of freedom to be understood in Kymlicka’s theory? Finally, what is the connection between

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<sup>33</sup> MC, p. 76.

<sup>34</sup> MC, p. 76.

<sup>35</sup> MC, p. 77.

culture and freedom for Kymlicka and does this establish a case for valuing culture within liberalism?

### **How do Societal Cultures Relate to Polyethnic Groups?**

From the outset, I think, Kymlicka's societal culture risks the chance of being mistaken for some type of assimilationist ideal, one that places emphasis on assimilating individuals for state interest reasons. Such reasons might include economic prosperity, reduction of civil strife, fulfilling a nationalist agenda and so on. I want to briefly argue in this section that such a view would be a mistaken assumption of Kymlicka's intent.<sup>36</sup> Even though it may be granted that polyethnic groups do not have the language, territorial concentration or institutes to enjoy their *own* societal culture that does not mean they do not have *a* societal culture, it just means that they require the dominant societal culture of their state to provide them with the meaningful options that societal culture aims to provide. Immigrants, in other words, are expected to integrate into society, and not set up their own societal culture separate to the one that already exists. As Kymlicka points out, 'commitment to 'multiculturalism' or 'polyethnicity' is a shift in *how* immigrants integrate into the dominant culture, not whether they integrate.'<sup>37</sup> This makes a good amount of sense. However, the idea that immigrants do not have a right to re-create their own societal culture should not amount to or be confused with the idea of assimilating minorities into a dominant culture. On the contrary, Kymlicka points out

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<sup>36</sup> Let me first note that national minorities, under this definition of culture, would have their own distinct societal culture that would provide its own members with a meaningful range of human activities. Aboriginals, in other words, have the language, territorial concentration, and institutes to provide their members with the resources they need to lead a meaningful life. Unfortunately, the national minorities and their societal culture side of the debate will not be discussed in this chapter for reasons articulated in the first chapter, mainly that this project is concerned with the issue of polyethnic rights.

<sup>37</sup> MC, p. 78, authors italics.

that since there is a rejection of the idea of ‘enabling immigrants to re-create their societal cultures, then we must address the issue of how to ensure that the mainstream culture is hospitable to immigrants, and to the expression of their ethnic differences. Integration is a two-way process – it requires the mainstream society to adapt itself to immigrants, just as immigrants must adapt to the mainstream.’<sup>38</sup>

This idea of ‘two-way integration’ invokes an accommodationist view rather than an assimilationist one, that is, it does not require citizens to shed their cultural heritage in order to participate in the public sphere. There is no longer any overall aim on behalf of the government to force immigrants to shed their entire heritage in order to participate in the dominant societal culture, but instead the two-way integration requires the institutes to add more options within their already existing establishments in order to accommodate the growing diversity. This, Kymlicka argues, is important because immigrants can now ‘contribute new options and perspectives to the larger [societal] culture, making it richer and more diverse.’<sup>39</sup> If anything, this adds to his use of the idea of societal cultures – for it precisely provides more options. In addition to contributing new options within the already existing social institutes, there is nothing to rule out the construction of (some) new institutes which hold a great value to their members. What I have in mind here is something like religious institutes. There is no demand, for example, that churches operate as Mosque’s on Friday’s in order to accommodate practicing Muslims. A societal culture is open to the idea of separate societal institutes. Whether such institutes want to conduct their affairs in their own (say) language then the option would be

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<sup>38</sup> MC, p. 96.

<sup>39</sup> MC, p. 78-9.



available. And equally so, if such institutes wanted to use the common language of the state to conduct their affairs then this too would be possible— in fact pursuing such an option has its benefits, such as widening the religious practice to outsiders. For instance, the Friday's *Khotba* (or sermon) in Mosques is almost always presented in English in hopes of not only reaching the new generation of Canadian Muslims who have either been born in Canada or have resided in Canada for many years, but also in hope of reaching a new group of individuals who might be interested in the religious faith. Ideally, this is all part of providing more options for all members of the state. There is nothing to rule out the re-creation of parts of immigrant's societal cultures, especially those that play a significant role for their members.

I hope to have cleared up any misconceptions that societal cultures force us back into an assimilationist type model. While Kymlicka does promote a form of common culture, there is nothing in the idea itself to make it hostile to immigrant groups. They too can engage in the societal culture without having to completely bracket their distinctive heritage.

So far, a case has been made for the contributing role of culture in providing a set of choices. However, this has yet to amount to any reasons as to why a societal culture provides us with 'meaningful' choices. What connection is there between societal culture and liberal values? More importantly, what are the liberal values that Kymlicka adopts and how does societal culture fit in with it? This is the second question, which concerns the notion of freedom in Kymlicka's theory.

**Liberal Freedom**

Throughout *Multicultural Citizenship*, Kymlicka is not shy about what he takes to be the defining feature of liberalism, which ultimately boils down to individual autonomy,<sup>40</sup> which entails an individual's right to adopt their own conception of the good, and to further be allowed to revise any such conception. 'The defining feature of liberalism is that it ascribes certain fundamental freedoms to each individual . . . it grants people a very wide freedom of choice in terms of how they lead their lives. It allows people to choose a conception of the good life, and then allows them to reconsider that decision.'<sup>41</sup> The crucial aspect of people leading a good life, for Kymlicka, is not only in being able to adopt one's own conception of the good but in the ability to revise one's own ends in light of new information or in light of new desirability to change one's own conception of the good. 'It is all too easy to reduce individual liberty to the freedom to pursue one's conception of the good. But in fact much of what is distinctive to a liberal state concerns the forming and revising of people's conceptions of the good, rather than the pursuit of those conceptions one's chosen.'<sup>42</sup>

I would like to touch on this point because it is crucial for understanding the grounds of Kymlicka's interest in attempting to show that culture is of great significance to liberal theory. Kymlicka's core concern in liberal theory is the individual's ability to lead a good life. This is hardly a break from classical liberal theorists. I think it is safe to say that the majority of (if not all) liberals have at their core the interest of allowing

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<sup>40</sup> See chapter 8 in *Multicultural Citizenship*, Kymlicka strongly critiques any grounds that liberalism should be based primarily on toleration, but instead argues that autonomy is more valuable because it not only ensures equality *between* different groups, but it also ensures freedom *within* groups .

<sup>41</sup> MC, p. 80.

<sup>42</sup> MC, p. 82.

individuals to pursue their own ends as long as in doing so they do not violate the rights of others (e.g. by not violating something like Mill's Harm Principle). However, Kymlicka's further concern is providing us with grounds as to why culture is of crucial importance to liberalism, given that we are ultimately concerned with individuals and their pursuit of the good.

Kymlicka's fixation with the good life leads him to propose two preconditions for leading such a life. The first is that individuals must lead their lives from within. By this, Kymlicka intends that only individuals themselves can choose actions which are in accordance with their own beliefs about values. The catch here is that in order to do this, individuals will require the 'resources and liberties to lead their lives in accordance with their beliefs about value.'<sup>43</sup> The second precondition to leading a good life is that individuals must be free to question their beliefs 'in light of whatever information, examples, and arguments our culture can provide.'(ibid) To make this precondition possible, individuals will need to acquire the skills and awareness of other conceptions of the good in order to evaluate their own, or even to abandon their own for another conception that they may feel more in tune with. It is important to stress here that individuals do not need to revise or even question their own ends; however, what is required is that the option to do so be genuinely available. And, for Kymlicka at least, it is 'important to stress that a liberal society is concerned with both of these preconditions'<sup>44</sup> equally, which is why he is so keen on defining liberalism as requiring

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<sup>43</sup> MC, p. 81.

<sup>44</sup> MC, p. 81-2.

not merely the choosing of our conception of the good but also the ability to revise such ends.

So if liberalism should be concerned with the autonomy of the individual to choose and revise their own ends, and if culture provides us with a set of choices, then what is the connection between liberalism and culture?

### **Kymlicka's 'Context of Choice' and Raz's 'Horizon of Opportunities'**<sup>45</sup>

Having put forth the above two preconditions for leading a good life, the door becomes open for Kymlicka to make his connection between societal culture, autonomy, and liberalism. Given that the 'predominant liberal conception of individual freedom'<sup>46</sup> is concerned with allowing individuals to lead their lives from within and in having the opportunity to revise their chosen ends, then the freedom to do so will require the availability of options. If freedom depends on options, then 'the next stage in the argument shows that options presuppose a culture.'<sup>47</sup> Both Kymlicka and Raz advocate the view that having a culture (which is the idea of having a shared vocabulary and meaning in all levels of society) is essential if our options are to be meaningful to us. Both Kymlicka and Raz explain:

Put simply, freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us. . . and to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture. . . .to understand the meaning of social practices, therefore, requires understanding this 'shared vocabulary' – that is, understanding the

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<sup>45</sup> In this section, I plan to draw from both Kymlicka and Raz. Both individuals present a similar argument for the value of culture within liberalism. I am not interested in discerning who came first, Kymlicka or Raz, but only interested in pointing out that both authors advocate a similar argument.

<sup>46</sup> MC, p. 82.

<sup>47</sup> Raz, Joseph. *Multiculturalism: A Liberal Perspective*, p. 176.

language and history that constitutes that vocabulary . . . understanding these cultural narratives is a precondition of making intelligent judgments about how to lead our lives.<sup>48</sup>

Only through being socialized in a culture can one tap the options which give life a meaning. By and large, one's cultural membership determines the horizon of one's opportunities, of what one may become, or (if one is older) what one might have been. . . this case is a liberal case, for it emphasizes the role of cultures as preconditions for, and a factor which gives shape and content to, individual freedom.<sup>49</sup>

Now when one comes back to Kymlicka's original proposition concerning freedom's intimate link with and dependence on culture,<sup>50</sup> one can begin to make more sense of Kymlicka's position. For according to Kymlicka, societal culture provides us with a 'context of choice', much like Raz's conception of culture gives us a 'horizon of opportunities'. Both of these thinkers make a strong, plausible case for the importance of culture within the liberal framework, and I think both make a successful argument as to why culture ought to be so important.

Furthermore, as stated near the beginning of this chapter, Rawls never included cultural membership in his list of primary goods – that is; he did not think that it was one of the goods that would be agreed upon by the parties in the original position. But now that Kymlicka has shown that culture is a precondition to enabling us to having options and a context of choice, he confidently goes on to say that 'Rawls's own argument for the importance of liberty as a primary good is also an argument for the importance of cultural membership as a primary good.'<sup>51</sup> For how else can we exercise our liberty and autonomy if we do not have a culture that makes such options not only possible but also meaningful?

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<sup>48</sup> MC, p. 83.

<sup>49</sup> Raz, *Multiculturalism: A Liberal Perspective*, p. 177-8.

<sup>50</sup> MC, p. 75.

<sup>51</sup> Kymlicka, *Liberalism, Community, Culture*, pg. 166.

As Kymlicka concludes, 'the connection between individual choice and culture provides the first step towards a distinctively liberal defense of certain group-differentiated rights. For meaningful individual choice to be possible, individuals need . . . access to a societal culture.'<sup>52</sup> Hence, liberals should take notice of the important role of culture for individual autonomy. If liberals are really dedicated to the view of liberalism that Kymlicka is advocating, then culture will be essential for the horizon of opportunities to be truly meaningful to us.

However, given Kymlicka's position on the importance of cultural membership for autonomy, there are a few questions to be asked. While it is clear that autonomy plays a role in Kymlicka's theory, the question of whether it is to be taken as the only factor relating to culture is important to ask? Furthermore, does Kymlicka want all social practices to be autonomy enhancing, in that they too provide a wide range of options within themselves or is he open to practices that restrict autonomy? I will now take up the criticism laid against Kymlicka, which is aimed at painting him as being overly concerned with autonomy at every level of his theory; a view, which I think, mischaracterizes him completely:

### **Having an Addiction, an Autonomy Addiction**

The criticism, which I would now like to address, is well captured by a paper entitled *Cultural Pluralism from Liberal Perfectionist Premises* by Monique Deveaux. In her article, Deveaux is critical of Kymlicka (and Raz)<sup>53</sup> on the grounds that their liberal

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<sup>52</sup> MC, p. 83-4.

<sup>53</sup> I will focus my discussion on Kymlicka, but I think the same argument can be read as a defense of Raz as well.

theory places too much emphasis on personal autonomy and that in turn it unjustly limits the scope of liberal recognition to only those practices that have an autonomy-enhancing role. Deveaux explains:

Both Raz and Kymlicka adopt an overly liberal account of the significance of cultural identity and group membership, which locates the value of these features in their autonomy-enhancing role. This in turn leads these authors to delimit unnecessarily the *scope* of respect and accommodation for cultural minorities, and in particular, to reject formal protections for what they view as illiberal cultural groups, whose practices may not support or indeed may undercut members' personal autonomy.<sup>54</sup>

Therefore, according to Deveaux the 'overly liberal account' of Kymlicka (and Raz) will lead a liberal state to dismiss groups that are non-liberal 'since they frequently *do not contribute to their member's capacities and opportunities for autonomous agency*'.<sup>55</sup> She feels as though membership in traditional cultural communities that are non-liberal in their belief system may be overlooked by liberals like Kymlicka and Raz. In other words, the claim is that non-liberal cultures, under Kymlicka's view, would not warrant state recognition or promotion since they do not contribute to autonomous agency. I want to challenge this claim, and argue that while Kymlicka does place a significant importance on autonomy within his theory, he does not go as far as requiring all social practices to be contributive to autonomous agency in the sense that Deveaux is suggesting. I think this is a misunderstanding of Kymlicka's theory, and makes him sound 'autonomy addicted' or obsessed.

Let me explain. The importance of autonomy for Kymlicka, as understood by Deveaux, seems to go further than our need to have a societal culture in order to lead our

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<sup>54</sup> Deveaux, Monique, *Cultural Pluralism from Liberal Perfectionist Premises*, p. 474.

<sup>55</sup> Deveaux, p. 485, my emphasis.

lives from within and be able to choose and revise our own conception of the good. Deveaux seems to be further suggesting that not only is autonomy and culture linked but that the social practices in which individuals may engage must also be autonomy promoting. If read this way, then Deveaux has a point when she claims that Kymlicka's interest in culture and cultural practices is in 'some sense instrumentally, but not intrinsically, valuable.'<sup>56</sup> By this, Deveaux intends that our 'values, practices, and beliefs' are important only insofar as they contribute to autonomy or enhance our autonomy. This is where I think the claim has gone too far. It is one thing to suggest that societal culture is instrumental for autonomy, in that it provides a range of meaningful options from which an individual can choose their life plans (and revise such plans as well). However, this is different from suggesting that the options within the cultural context must also be instrumental in that they too provide their members with autonomy or that they enhance individual autonomy in the same sense as societal cultures do.

This view of Kymlicka is even more troubling when Deveaux attempts to put her understanding of Kymlicka's autonomy addiction into an example concerning recent demands for sex-segregated Muslim schools in Britain. Deveaux claims that:

In important ways, this form of [Muslim] schooling might diminish students' personal autonomy as defined by Kymlicka, since children educated in traditional religious environment would be discouraged from taking up other lifestyles or mores that conflict with Islam. However, there are certainly other individual and collective benefits to be gained: a sense of place and belonging, reprieve from constant sense of being culturally different. . . .[but] based on Kymlicka's account of the value of cultural membership and the central importance of members' personal autonomy, liberals would have to reject the demand for Muslim schools, if this form of schooling indeed hampers the development of students' independence.'<sup>57</sup>

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<sup>56</sup> Devaux, p. 485.

<sup>57</sup> Deveaux, p. 494.



The problem with this passage is that it makes personal autonomy the *only* factor for Kymlicka in guiding state action in relation to minority practices. But is this the role that Kymlicka wants for autonomy in his liberal theory of minority rights? First, there is no denying Deveaux's original claim concerning the instrumental role of culture in relation to autonomy within Kymlicka's theory. He fully acknowledges that 'cultures are valuable, not in and of themselves, but because it is only through having access to a societal culture that people have access to a range of meaningful options.'<sup>58</sup> Any way you look at it, Kymlicka does value societal cultures because of their contribution to human flourishing *via* providing meaningful options which in turn allow for individual autonomy as has been argued for and been understood throughout his theory. What Kymlicka does not suggest, however, is that the practices themselves which become available through a societal culture should also only be recognized through their enhancement of autonomy. Therefore, while being a member of some group may diminish one's personal autonomy; this is not the grounds for the state restriction that Kymlicka wants. As we shall see below, Kymlicka explicitly wishes that individuals have a range of options made possible, but does not go as far as Deveaux wishes him by demanding that the practices themselves aim at promoting autonomy.

So what might Kymlicka be suggesting? Well, as I have been attempting to highlight all along, Kymlicka's emphasis on autonomy stems directly from his interest in showing why liberals ought to take into consideration the value of culture - in relation to furthering our ability to choose and revise our conception of the good. This, I think, is

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<sup>58</sup> MC, p. 83.

clear enough. But now one may ask, what role does autonomy have in the social practices that individuals may pursue? Do social practices also have to promote autonomy? And I think (part, at least, of) the answer to this question lies in a distinction which I would like to draw out between ‘violating one’s autonomy’ with ‘restricting one’s autonomy’. In regards to the former, I have in mind cultural groups that go as far as to deny their members any rights to question their ends or revise them. I think one can imagine a group whereby members are restricted to not only pursuing the limited options made possible by the state, but also in not being allowed to question their ends, revise them, or even exit their community at will. An example of such a community can be found within the Egyptian societal culture. The constitution of Egypt allows for freedom of conscience but not without excluding the right to question or revise the Islamic faith. Even if such a state was to make room for a wider range of opportunities, one could still reasonably say that such a state is violating its members’ right to be autonomous. The latter category- restricting one’s autonomy - on the other hand, would include groups where even though one’s autonomy is restricted (by virtue of being a member of the particular group), there is nothing disallowing members to revise their own conceptions within the group. Moreover, individual members, by virtue of being members of the group, may have certain limits to what options they may pursue, they nonetheless remain free to accept or reject the options placed on them by the group. The point I am trying to highlight with this distinction is that autonomy is a matter of degree. One can have their autonomy diminished without necessarily having it violated. Almost all members of any group – whether it is a sport team, a chess club, a religious organization, accept some

limitation to their autonomy. How else can an individual be designated the title of group member unless they accept (to a certain degree) the boundaries of their membership?

How does this relate to Kymlicka? Essentially, I think Kymlicka's theory may make use of something like the above distinction. The autonomy of the agent is practiced when they are faced with a wide range of meaningful options and are left free to choose (and revise) whatever ends they personally value. Moreover, not all options will be valuable to the individual; this will vary from one individual to the next. Now the individual may very well select an option that restricts (not violates) his/her personal autonomy but that does not make the actual activity itself lacking in value. For instance, take the ordinary game of chess. When one freely chooses to join a game of chess (perhaps by joining a chess club), one's autonomy will be restricted to the rules of the club and hence one no longer has the option of playing the game as one sees fit. This individual is still free to walk away from the activity, their right to do so, presumably, is not threatened. More so, even though their autonomy is restricted to the rules of the group, this in no way makes the activity less valuable for the individual engaging in it. There still is an intrinsic worth to the activity even though it is autonomy restricting. I think something similar can also be said about religious membership, such that, under Kymlicka's view, while being a member of religious community may restrict one's autonomy, there can still be a value to it as long as the option of revising their own ends is still made possible.

Coming back to Kymlicka's explanation of individual autonomy within the liberal framework, Kymlicka never seems to suggest that the activities we pursue are valuable

insofar as they are autonomy enhancing but he only goes as far as to suggest that the possibility of revising our ends must be made genuinely possible. In other words, what Kymlicka seems to want is the autonomous right to revise and select our final ends, but this does not rule out the selection of ends that may be restrictive on our autonomy. This is not particularly problematic for him. It only becomes problematic when the individual's right to leave such a group is threatened or not made possible. As he clearly explains:

A liberal society . . . not only allows people to pursue their current way of life, but also gives them access to information about other ways of life . . . and makes it possible for people to engage in radical revision of their ends without legal penalty. These aspects of a liberal society only make sense on the assumption that revising one's ends is possible, and sometimes desirable, because one's current ends are not always worthy of allegiance. *A liberal society does not compel such questioning and revision, but it does make it a genuine possibility.*<sup>59</sup>

To emphasize one last time: The place of autonomy for Kymlicka is in allowing us to choose and revise our ends, not in the activities we choose *per se*. In other words, there is a bare minimum of autonomy for Kymlicka because at the end of the day he is a dedicated liberal who demands that individuals be free to revise their own ends. However, Kymlicka is not autonomy obsessed to the point where he not only wants a societal culture for freedom but also wants the options within the culture to be aimed *only* at enhancing our autonomy.

Therefore, I think Deveaux's overall point that Kymlicka's liberal view leaves out of its scope non-liberal cultural practices is mistaken. Indeed, there is room for non-liberal cultural practices within Kymlicka's theory that may be restrictive on members'

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<sup>59</sup> MC, p. 82, my emphasis.

autonomy. However, this is much different from practices that violate the right to autonomy. I do not think Kymlicka wants to go as far as Deveaux had hoped to take him.

However, having said all this, I do not want to entirely dismiss Deveaux's criticism of Kymlicka. I think there is a wider question relating to autonomy that ought not to be quickly dismissed. While I have argued that Kymlicka does not demand autonomy enhancement at every level of his theory, there is still the wider question of 'why autonomy at all'? For some time now, there has been a growing debate between neutral liberals (Rawls, Barry) and liberal perfectionists (Kymlicka, Raz) over the nature of autonomy within the liberal tradition. Both sides place a different emphasis on the extent of autonomy in promoting and shaping state social forms and practices. I believe this to be an important topic covering a great number of issues involving liberal principles, non-liberal groups, and state promotion of the good. This will be the concern of the coming chapter.

## CHAPTER 3:

### The Problem with Autonomy

In the preceding chapter, I have attempted to clarify, to some extent, the role of autonomy within Kymlicka's liberal theory of minority rights. Moreover, there was an attempt at showing that even though he is presenting us with a liberal theory; this does not necessarily require that we turn our backs on non-liberal groups. In fact, such groups can still have a place within Kymlicka's theoretical parameters; there is just the requirement that they not violate their individual member's personal autonomy. In other words, Kymlicka is against what he commonly describes as 'internal restrictions', which refers to requests made by group leaders to violate their own member's autonomy on grounds of wanting to protect the group 'from the destabilizing impact of *internal dissent*.'<sup>60</sup> These types of claims are usually forwarded in the name of group solidarity, which go far beyond the principle of autonomy, as argued for in the previous chapter. In effect, what one gets is group leaders (be they Rabbis, Patriarchs, Mullahs and so on) making a demand to violate their member's autonomous rights in order to preserve some group characteristic. For example, religious groups may demand that their members have no right to being proselytized by members outside of the religious community. This argument against having a right to being converted – or even an individual's right to convert - is a form of internal restriction that is sometimes demanded by religious communities, and the grounds for such a demand usually stem from a need to preserve

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<sup>60</sup> MC, pg. 35.

their religious culture, even at the cost of their individual member's autonomy.<sup>61</sup> Other forms of internal restrictions come by way of silencing group members, by which I mean violating their right to expressing any negative thoughts and/or opinions about their faith, again on grounds of religious preservation.<sup>62</sup>

With the exception of not allowing the violation of one's right to be autonomous, Kymlicka does still provide us with room for non-liberal groups. I think this is not contentious. Moreover, when one recalls that the intent of this current project is to examine the different possible liberal responses to non-liberal groups, one can begin (I hope) to see that the liberal framework need not be hostile to such demands.

However, even though the previous chapter laboured at providing grounds as to why non-liberal practices may be tolerated, there still remains the question of 'why autonomy at all'? For even though Deveaux's argument was argued against in the previous chapter, there still remains, embedded deep down, the question of why we need to uphold autonomy altogether. In other words, there is an underlying concern regarding the potential consequences of asking non-liberal groups to maintain (at the end of the day) a form of liberalism at the core of their practices, beliefs, and institutes. This is an issue, which, I believe, requires further exploration for several reasons. First, we seem to (so far) lack any strong grounds as to why autonomy matters. Second, this is an issue that touches the core of Kymlicka's liberal theory, and hence some reply is called for.

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<sup>61</sup> Currently, this is a growing issue in India. See 'The secular state and the religious conflict; Liberal neutrality and the Indian case of Pluralism' by Balagangadhara and Roover

<sup>62</sup> Salmon Rushdie is one such case that comes to mind.

Therefore, I would like to further dedicate this chapter to the exploration of the notion of autonomy within the liberal tradition and to further question its relevance within the multicultural framework of Will Kymlicka. It has been since argued, by critics of the multicultural model, that there tends to be something puzzling about asking non-liberal minorities to internalize, for instance, the liberal principle of autonomy and to also make it part of the core of their practices, and institutes. Put differently, it is as though there is something illiberal about asking non-liberal groups to conform to autonomy even when there is little-to-no-place for the value of autonomy within the structure of such groups. Some critics maintain that in all reality there are groups that do not value autonomy as part of the belief or value system and asking such groups to internalize the liberal principle of autonomy is in itself forcing a conception of the good on such groups, and hence can be viewed as an illiberal request.

In order to flesh out the problem with demanding autonomy, and to further understand the place of autonomy in Kymlicka's liberal theory I will first be drawing upon the work of Brian Barry in *Justice as Impartiality* and *Culture and Equality*. Through Barry's work, one can find the criticism stated above concerning autonomy and non-liberal groups.<sup>63</sup> The argument is well contained and loaded with much insight, which in turn makes it ripe for philosophical examination. Upon fleshing out Barry's criticism of autonomy and liberalism, I will then go on to examine Kymlicka's take on this particular issue in *Multicultural Citizenship*. In relation to this topic, the writings found in *Multicultural Citizenship*, I believe, present a weak justification for the value of

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<sup>63</sup> This criticism against Kymlicka is not just contained to Brian Barry. William Galston makes a similar complaint that will also be considered.



autonomy. Now, this is not to say that Kymlicka does not provide grounds for the importance of autonomy within liberalism but rather he does not provide us with the material to understanding the crucial significance of autonomy in the liberal tradition. The difference is one of depth. Kymlicka takes the notion of autonomy for granted, suggesting that it is important to have in order for individuals to pursue their own ends. This is, however, different from articulating an actual argument as to why autonomy is crucial for liberalism. There is a difference between stating that autonomy is important for liberal theory from actually giving reasons as to why it is so important. This is not to say that Kymlicka is wrong in his conclusion. This is far from it. What I want to get at is the actual argument for why the state needs to pursue the promotion of autonomy. Kymlicka, in my opinion, fails to give us a strong account of the actual importance of autonomy. This will be the concern of the current chapter.<sup>64</sup>

### **Barry Interesting**

In his critique of the value of autonomy within multicultural liberal theory, Barry begins his exposition with a reference to William Galston's influential paper, 'Two concepts of Liberalism'. In brief, Galston focuses his attention on the famous *Wisconsin v. Yoder* case, whereby the Amish community leaders 'claimed that high school attendance was contrary to their religion and would impede [the Amish community] in

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<sup>64</sup> The chapter to follow will draw support for the importance of autonomy within liberalism by examining the works of Joseph Raz's in *The Morality of Freedom*. This will be done in order to gain a stronger insight on the significant role of autonomy within the liberal tradition. Raz presents a view that goes far beyond stating the contributing role of autonomy but rather places the idea of autonomy itself within the liberal theoretical framework in a way which provides us with more grounds to answering the question, why autonomy at all?

the constitutionally guaranteed free exercise [of religion].'<sup>65</sup> Ultimately, the request was for the right to pull Amish students from the public school system by the age of 16 on grounds of group/religious preservation. Put differently, the demand made by the Amish community (in particular the leaders of such a community) was aimed at granting the Amish community leaders the right to govern their own member's affairs (irrespective of what individuals within the group may want). For example, an Amish student would no longer have any say regarding whether they can continue being educated in the public system after the age of 16, but would instead be forced to leave the public school system to enter the system which is provided by the Amish community. In effect, such a demand fits in with Kymlicka's notion of internal restrictions as described above. For what was being demanded by the Old Order Amish community was exactly the type of requests made by group members whereby individual autonomy is violated on grounds of some group-based interest. This case is even more difficult and complicated because it has under aged members at its center. It is the community leaders and elders who seem to have the say over their member's future in this case, which creates an even more difficult scenario.<sup>66</sup>

Nonetheless, the reason for highlighting Galston's paper, for Barry, has less to do with the outcome of the case than it does with the division it created between liberals at the time. The fundamental question that arose from *Wisconsin v. Yoder* was what core value is at the heart of liberalism, is it autonomy or diversity (understood as toleration)? Those who argued for toleration, such as Galston, held that since liberalism is dedicated

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<sup>65</sup>Galston, p. 516.

<sup>66</sup> See MC, p.162.

to diversity there is an apparent consequence that part of such a dedication entails allowing groups the right to conduct their affairs in accordance with their conception of the good, and hence the state ought to be open to the possibility that group leaders be given a right to rule over their members affairs. Those who took autonomy as the core value of liberalism argued for the opposite, that is to say they demanded that a group be restricted in its right to violate its member's autonomy. In other words, the children of the Amish should have the right to be aware of other conceptions of the good, and if they remain committed to their Amish roots, then this was done on their own will, as opposed to being the only option.

What Barry is interested in revolves around showing that 'given the choices between these two interpretations [that is, liberalism as autonomy or liberalism as diversity] the right answer is 'neither of the above'.'<sup>67</sup> The focus of the remainder of this section is to attempt to understand why Barry rejects the first option, the autonomy option. In relation to the second option, it will be (for the most part) left alone. Ultimately, Barry does not even regard the second option as a form of liberalism at all. 'I have argued that this [form of liberalism] should not count as a variety of liberalism at all, because it fails to pay enough attention to the interests of individuals in being protected against groups to which they belong.'<sup>68</sup> According to Barry, there is something altogether problematic about granting a group the right to violate its members civil and political rights in so far as they do not interfere with members outside of their community. Barry points out that 'it is not necessary to have an elaborative set of

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<sup>67</sup> Barry, *Culture and Equality*, p. 119.

<sup>68</sup> *Culture and Equality*, p. 147.

political principles, liberal or other, to appreciate what is wrong with the notion that groups should not be publicly accountable for what happens within them as long as it does not impinge on outsiders.’(ibid)

### **Galston, Autonomy, and Liberalism**

To begin, then, I want to briefly highlight the whole of the complaint launched against those liberals that take autonomy as the core of liberalism in order to get a grasp of the heart of the issue. In order to do this, I will draw upon the general difficulties and implications that William Galston raises in his article concerning this matter. Nonetheless, even though Galston gives us the overview of the problem, it will be Barry’s specific criticism against the autonomy view that will be taken up in great detail.

Galston presents several difficulties with the adoption of autonomy at the core of liberalism. First, Galston claims that ‘the decision to throw state power behind the promotion of individual autonomy can weaken or undermine individuals and groups that do not and cannot organize their affairs in accordance with that principle without undermining the deepest source of their identity.’<sup>69</sup> Not all individuals within the state choose to organize their lives around the principle of autonomy. Even Deveaux picks up this point and suggests that there are those who find life decisions overwhelming and would rather belong to such groups where decisions are already made for one self. Such ways of life seem to be undermined by a state which ‘throws its power’ behind autonomy. Second, in relation to groups, what is to be said about the obvious problem that ‘many cultures or groups do not place a high value on choice and (to say the least) do

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<sup>69</sup> Galston, p. 521.

not encourage their members to exercise it.’<sup>70</sup> Again, how are such groups to be responded to? Are they to alter their identity until they have eventually internalized liberal principles that originally had little room in their value set? Third, Galston further draws on this implication and suggests that the autonomy principle ‘represent a kind of uniformity that exerts pressure on ways of life that do not embrace autonomy.’<sup>71</sup> Something which has an assimilationist tone to it. Groups are left to either lose out from being part of the political state or to somewhat ‘convert’ to liberalism. Seems that either way, the group loses out, the options seem to be either lose state sponsorship and recognition or become something new that the group does not value. When reading these criticisms one should bear in mind that Galston is in favor of the diversity/tolerance side of the liberal debate and hence sees the autonomy view as a threat to social diversity. For how can we have diversity if we are selectively excluding certain individual and groups on the grounds that they do not value autonomy? This appears to be a hindrance to diversity. What Galston does want liberals to keep in mind is that *‘[a]utonomy is one possible mode of existence in liberal societies – one among many others; its practice must be respected and safeguarded; but the devotees of autonomy must recognize the need for respectful coexistence with individuals and groups that do not give autonomy pride of place.’*<sup>72</sup> The reason I emphasize this last point is because, as we shall see, it is a point that Barry also picks up on, and it will be of much concern in the next chapter.

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<sup>70</sup> Galston, p. 522.

<sup>71</sup> Galston, p. 523.

<sup>72</sup> Galston, p. 525, my emphasis.

This, in general, is the thrust of the complaint against liberals that take autonomy to be the core of the liberal tradition. Brian Barry picks up Galston's point and further articulates the problem of autonomy. However, Barry does this on grounds that the promotion of autonomy violates liberal neutrality. There is key difference between Barry and Galston. While both writers complain against the autonomy view, they both do for separate reasons. As mentioned earlier, Galston has in mind the promotion of the diversity view of liberalism. Barry, on the other hand, wishes to reject both Galston and Kymlicka's conception of liberalism. As mentioned above, Barry does not even consider the branch of liberalism that Galston values as a form of liberalism at all.

### **Barry, Autonomy, and Liberalism**

So what is Barry's complaint against autonomy being the core of liberalism? There is nothing in Barry's writings to suggest that he does not accept the implications and criticisms launched by Galston. However, Barry's view on this issue stems from his concern over the violation of liberal neutrality. Liberal neutrality is understood, roughly, as the view that 'the state should not reward or penalize particular conceptions of the good life but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued.'<sup>73</sup> Barry's criticism then is as following:

The case against [Kymlicka] is straightforward. The 'ideal of autonomy'<sup>74</sup> is, it may be said, a conception of the good life like any other, so the inculcation of autonomy by the state is as much of a violation of neutrality between conceptions of the good as would be the inculcation of, say, some specific religious doctrine.<sup>75</sup>

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<sup>73</sup> Kymlicka, *Liberal Individualism and Liberal Neutrality*, p. 883.

<sup>74</sup> The 'ideal of autonomy' is a reference to what has been discussed all along, that is, the notion of autonomy being the core of liberalism.

<sup>75</sup> *Culture and Equality*, p. 123.

What Barry is suggesting, in effect, is that the promotion of autonomy forces liberals to value one specific conception of the good over others, which in turn creates difficulties for the liberal commitment to neutrality. Such a view will lead to devaluing certain groups and individuals because of their non-autonomous beliefs, practices and institutes. Hence, the liberal promise 'of equal treatment for groups [is] hollow . . . because it does not respect the freedom of illiberal groups to arrange their internal affairs as their beliefs dictate.'<sup>76</sup> This is not to say that Barry de-values autonomy - this much should not be taken from his view. Much like Galston, Barry wants autonomy to be 'one possible mode of existence' but not the only one within liberalism. He draws upon J.S Mill to reinforce his point that even though there is a connection and a concern for autonomy within Mill's liberalism, this does not necessarily lead to the promotion of autonomy on behalf of the state. 'Like Mill, contemporary liberals can, and do, regard it as an argument for liberalism that a liberal society makes individual autonomy possible. . . [but] this in no way commits them to the proposition that states should engage in the compulsory inculcation of autonomy.'<sup>77</sup> To do so, arguably, would be to allow the state to mould its citizens character, something that Mill strongly opposed. Furthermore, Barry wants to maintain that although there are those that will support the notion of autonomy within liberal institutes, it is not clear that they would necessarily endorse these principles purely on grounds of autonomy. Instead, such grounds, argues Barry, can be

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<sup>76</sup> Culture and Equality, p. 118.

<sup>77</sup> Culture and Equality, p. 120.

endorsed and established 'without recourse to any appeal to the value of autonomy.'<sup>78</sup> This, historically, can be said to be true. The 'defining features of liberalism [such as] the principles of equal freedom. . . civil equality, freedom of speech and religion [etcetera] . . . can be arrived at in a number of alternative ways. In the past, especially, God and Nature have been widely invoked to provide a foundation.'<sup>79</sup>

So what possible replies can Kymlicka, and others alike, have for Barry's criticism? Accordingly, Barry's complaint is a serious concern, for not only does it attack the core of Kymlicka's theory, but it also suggests that liberals, like Kymlicka, violate an important tenant of liberalism, primarily the neutrality principle.

### **The Multiculturalists Response**

Having stated the problem that Barry poses for Kymlicka, and all other liberals that value the ideal of autonomy, it is now time to examine one possible line of defense against Barry's attack on Kymlicka. It will be argued that this response does not properly address Barry's concern. In fact, Barry, himself, takes account of this potential line of defense in his book, *Justice as Impartiality*.

Those responding to Barry may take the position that the value of autonomy does not necessarily violate the principle of neutrality but in fact is required for any such principle to be realized. The argument would run as following:

[According to the conception of the good as autonomy], what is of central importance in human life is that people should make up their own minds about how to live and what to think, and that they should be able to express their beliefs freely and act on their conclusions about the best way to live. . . This is a second-order conception of the good in that it does not specify what the good actually consists in. Anything could be regarded as a

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<sup>78</sup> Culture and Equality, p. 121.

<sup>79</sup> Culture and Equality, p. 122.



good (in the second-order way) so long as the person who conceived it as a good (in a first-order way) had arrived at this conception in a way that satisfied the requirements of autonomy.’<sup>80</sup>

The reply is an interesting one, and worth looking at in some detail. What liberals, like Kymlicka, might suggest is that in promoting the ideal of autonomy, liberals would not be favoring one conception of the good over any other, but would precisely be allowing for neutrality by allowing individuals to select their own conception of the good. Their only concern is that individuals go about this process on their own volition and free will. So, for example, one could choose the religious life as their definition of the good life. This would be a first-order conception of the good life; however, the way in which such a decision was reached was through a second-order conception, that being autonomously chosen. Hence, how could a state be in violation of the conception of the good if it merely brings forth the condition for individuals to select their own conception?

However, Barry warns that ‘a partisan of autonomy as a second-order conception of the good would...be wise to pause before accepting’<sup>81</sup> any such conclusions. This still does not open the door wide to any conception of the good, but only those that reside within the liberal parameters. For instance, consider a scenario where there is a school that is dedicated to forcing a specific religious belief on its pupils. Barry claims that ‘a hard-line partisan of autonomy might well conclude that such schools *should* be prohibited.’<sup>82</sup> In addition, one would not be seriously considered a partisan of autonomy if they did not hold that such a school (with its dedication to suppressing autonomy)

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<sup>80</sup> Barry, Brian. *Justice as Impartiality*, p. 129.

<sup>81</sup> *Justice as Impartiality*, p. 130.

<sup>82</sup> *Justice as Impartiality*, p. 131.

should lose out on state support (*via* public funding, for example). If this is the case then ‘this would itself be enough to constitute a departure from neutrality.’ (ibid)

Barry is forceful in his argument, and points out with the above example that even when liberals take the second-order conception route, this does not necessarily get them out of the problem concerning the violation of the neutrality principle. This is best captured by Barry when he insists that the error made by Kymlicka is as follows:

[A] conception of the good as autonomy does not imply that the pursuit of all substantive conceptions of the good is equally valuable. Only those conceptions that have the right origins – those that have come about in ways that meet the criteria for self-determined belief – can form a basis for activity that has value.<sup>83</sup>

It appears, then, that the criticism that liberals like Kymlicka violate neutrality still holds. Nevertheless, I do not necessarily think that Kymlicka is defenseless at this point. One could recall, from the previous chapter, that Kymlicka has no interest in all individuals of the state exercising their autonomous rights, he never suggests that the liberal framework requires such ‘Socratic’ forms of questioning but only makes them genuinely possible. So it is not that the state is actively persuading people to be autonomous. However, this does not directly deal with Barry’s concern. The state is still ‘throwing its power’ behind promoting autonomy and only allowing social forms, practices, and institutes that promote autonomy as an ideal. If autonomy is promoted, Barry will want to maintain, then neutrality gets tossed out the window. This is an implication which is troubling for liberal theorists (most of them at least). The biggest implication, I believe, that comes from Barry’s view is that the ‘groups whose members do not subscribe to the tenets of liberal individualism are inevitably going to be put at a

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<sup>83</sup> Justice as Impartiality, p. 131-2.

disadvantage'<sup>84</sup> within the liberal state. It is really a question of how to deal with such groups, and their non-liberal set-up in a way that both respects liberalism but still makes room for those practices within the liberal framework.

I now want to examine, in brief, the importance that Kymlicka places on autonomy in *Multicultural Citizenship*. As it will be shown, Kymlicka's emphasis on autonomy does not necessarily give us much depth to answering the criticisms launched by Barry. Kymlicka, I believe, does summarize the importance of autonomy within liberalism, but fails to give us a detailed account of the inner workings of autonomy within the liberal theoretical framework. Upon showing that Kymlicka falls short of discussing the depth of autonomy, I will draw upon Raz to help shed some light on autonomy and the possible replies it may give us to the problem posed by Barry.

### **Kymlicka's Take on Tolerance and Autonomy**

The previous section looked at one potential reply that liberals, such as Kymlicka, might offer to Barry. However, the reply seems to fail in getting around Barry's objections. In sum, Barry offers (at least) two objections which are going to be of much concern in the next chapter. In general, the problem he presents can be broken down to (a) the concern over the violation of neutrality and (b) the idea that autonomy is but one strand of liberalism. Both these issues will be dealt with directly in the coming chapter through the work of Joseph Raz.

For the time being, I want to examine what Kymlicka has to offer in relation to the place of autonomy within his liberal theory. I argue that Kymlicka is aware of the

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<sup>84</sup> Barry, Brian. *Culture and Equality*, p. 118.

criticisms made by writers such as Galston and Barry, and while I think he offers a good reply to the concerns of Galston, he still falls short of providing a strong reply to Barry's two main concerns.

Kymlicka is aware of Galston criticism. He is aware that some cultural minorities – be they national or polyethnic – do not necessarily favor a system that is tied to the promotion of individual freedom and personal autonomy. Such a system, in turn, will be viewed as inhospitable to the needs of minorities and will end up either marginalizing such groups or assimilating them. Kymlicka writes:

Yet surely what some minorities' desire is precisely the ability to reject liberalism, and to organize their society along traditional, non-liberal lines? If the members of a minority lose the ability to enforce religious orthodoxy or traditional gender roles, have they not lost part of the *raison d'être* for maintaining themselves as a distinct society? <sup>85</sup>

...others would view my theory as illiberal, precisely because its unrelenting commitment to individual autonomy is intolerant of non-liberal groups. . . . Basing liberal theory on autonomy threatens to alienate these groups and undermine their allegiance to liberal institutions. . . <sup>86</sup>

In responding to the criticism that autonomy leads to the alienation of non-liberal groups, and hence to a great deal of intolerance to non-liberal view points, Kymlicka focuses his attention on showing that the idea of tolerance is dependent on, rather than an alternative to a commitment to autonomy.<sup>87</sup> The argument he puts forth attempts to show that liberals have an interest in toleration, but not just any form of toleration but what Kymlicka calls – *liberal tolerance*. Much like Rawls, Kymlicka credits the Religious Wars for abetting in the establishment of tolerance, within the political sphere. The catch, however, is that it is important to recognize that the 'religious tolerance in the

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<sup>85</sup> MC, p. 153.

<sup>86</sup> MC, p. 154.

<sup>87</sup> MC, p. 155.

West has taken a very specific form – namely, the idea of individual freedom of conscience.’<sup>88</sup> In other words, what primarily came out of the Religious wars was the freedom of individuals to pursue their own conception of the good without the fear of discrimination. Individuals could now be Protestant, Orthodox, or whatever the case may be, without the worrisome of being picked on.

This puts a spin on the criticism of Galston, who seems to be in favor of tolerance in the ordinary sense of the word, which ‘generally refers to the conditional acceptance of or non-interference with beliefs, actions or practices that one considers to be wrong but still “tolerable,” such that they should not be prohibited or constrained.’<sup>89</sup> However, this is not enough for Kymlicka. Essentially, to have any other form of toleration is to open the door for the abuse of individual rights. Let me explain. Prior to what is commonly called ‘the march of rights’ in the 20<sup>th</sup> century, the dominant model, which dealt effectively with minority rights, was that of the Ottoman Empire – known as the ‘Millet system’. This model allowed for tolerance through granting each of the main religious communities (Muslim, Jewish and Christian) self-governing rights which in turn allowed each community to impose religious laws on their own members (each unit was called a ‘millet’). The idea here was that individuals were granted rights *qua* being members of a group. Accordingly, the ‘system was generally humane, tolerant of group differences and remarkably stable.’<sup>90</sup> However, the system, according to Kymlicka, was not a liberal one, precisely because ‘it did not recognize any principles of *individual* freedom of

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<sup>88</sup> MC, p. 156.

<sup>89</sup> Standard Encyclopedia of Philosophy, ‘Toleration’ entry.

<sup>90</sup> MC, p. 157.

conscience.’(ibid) The fact of the matter was, in allowing each community to self-govern its own affairs, this left little to no room for its members to exercise any, for example, heresy or apostasy. Moreover, the individual members had no right of exit without fear of discrimination and/or persecution. The system failed the *individual*, for it allowed no room for freedom of conscience (or many other freedoms for that matter).

Hence, to say that liberalism is concerned with tolerance is somewhat misleading, both to those who call themselves liberals and to those who oppose liberals. Tolerance should not just be understood as the acceptance of all ways of life, regardless of its impact on the individual’s right. I believe that within the parameters that Kymlicka has constructed his theory upon, one can see the difficulties that he raises against the Millet system. It can accurately be described as a ‘federation of theocracies.’<sup>91</sup> He goes on to conclude his remarks by suggesting that:

...it is not enough to say that liberals believe in toleration. The question is, what sort of toleration? Historically, liberals have believed in a very specific notion of tolerance – one which involves freedom of individual conscience, not just collective worship. Liberal tolerance protects the right of individuals to dissent from their group, as well as the right of groups not to be persecuted by the state. It limits the power of illiberal groups to restrict the liberty of their own members, as well as the power of illiberal states to restrict liberty of collective worship. This shows, I think, that liberals have historically seen autonomy and tolerance as two sides of the same coin. What distinguishes *liberal* tolerance is precisely its commitment to autonomy – that is, the idea that individuals should be free to assess and potentially revise their existing ends.<sup>92</sup>

However, having laid out this reply to some of the concerns held by Galston (and others alike), this has yet to get us around some of the theoretical criticisms that Barry has launched against Kymlicka’s theory. In a sense, Kymlicka continuously re-

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<sup>91</sup> MC, p. 157.

<sup>92</sup> MC, p. 158, authors italics.

establishes what he takes to be the core of liberalism (autonomy of course), but has yet to provide us with the meat of the argument. Autonomy, it seems, is a good thing to have. But is it the only thing which should concern the state? It seems as though we are nowhere near answering the question of 'why autonomy at all' which started this chapter. Nevertheless, I believe there are grounds to which we can draw upon to shed light on the question of 'why autonomy at all'. So far, I have fleshed out the problem with autonomy, in accordance with Barry's view, within the liberal tradition. It is now time to focus exclusively on the question of state neutrality and the role of autonomy within it. Is autonomy only one strand of liberal theory or is it the core? Moreover, can there ever be strict political neutrality, and if not, then what ought the ideal goods of the state be?

## **Chapter 4**

### **Neutrality, Value Pluralism and Raz's Autonomy**

From the previous chapter, I have been able to highlight two distinct issues that arise in relation to autonomy and the multicultural model, as understood by Kymlicka and Raz. In brief, the problem is twofold. First, there is a difficulty related to the violation of the neutrality principle. Barry argues that in favoring autonomy, the state promotes one conception of the good over another, which eventually leads Barry to suggest that this violates the liberal principle of neutrality. Second, and this certainly ties in with the first criticism, is the question of the role and value of autonomy within liberalism. One has to seriously question whether autonomy is of central importance to liberalism or whether it is just one strand (out of several) related to it. If autonomy is one strand of liberalism then Barry's concern over the violation of neutrality will need to be addressed. However, if we are to comprehend autonomy's role as being more central, then we need to understand how autonomy can play a central role within liberalism.

It is my intent in this chapter to examine the validity of the neutrality principle, as well as the place of autonomy within liberalism. I believe that Raz offers us an intriguing response to both of these issues. In relation to the first, Raz argues that the notion of neutrality is both not possible and chimerical. The first part of this chapter will outline Raz's critique of the neutrality principle. I will argue that Raz presents a strong criticism against liberal neutrality, and that if we are to take his criticism seriously, then we must question the value(s) that Raz would want the state to adopt and support (*via* its political



forms, legislative acts and so on). In particular, my main concern is with Raz's emphasis on autonomy as an important value.

The second part of the chapter will deal with Raz's role of autonomy within liberalism. Contrary to Barry's argument, Raz maintains a central place for autonomy within liberalism. In bringing forth Raz's conception of autonomy, I will be focusing on the doctrine of value pluralism. I believe this is a key idea for understanding Raz's emphasis on autonomy, such that one way of understanding the significance of autonomy within Raz's *Morality of Freedom* is by comprehending autonomy's relationship with value pluralism. It will be concluded that if one does accept the connection between value pluralism and autonomy, then autonomy can no longer be said to play a partial role in liberal states, but on the contrary, it will be of central importance. I should note that the current chapter will be restricted to dealing with the problem of neutrality and the role of autonomy within liberalism. The conclusions and implications that are to be drawn from Raz's view with regards to the question of faith-based arbitration will be taken up in the final chapter when the issue will be examined in detail.

### **Part I: Liberal Neutrality**

Within modern liberal thought, there has been a great deal of importance placed on the political doctrine of neutrality. Liberal political theorists seem to share an interest in wanting to ensure that the state (and its laws) will 'remain *neutral* with respect to the varying conceptions of the good life held by individuals.'<sup>93</sup> This is viewed, by many, to be of key importance for modern liberal theory. One can take the writings of such

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<sup>93</sup> Lehning, pg. 187.

thinkers as John Rawls and R.M Dworkin for insight into the importance of the political principle of neutrality. For instance, John Rawls's political writings are marked with the importance of establishing a system of fairness that does not rely on one specific conception of the good. In other words, his principles of justice, which are to be assessed behind the veil of ignorance and which are to guide our political and economic institutes, are not to be based on any one comprehensive doctrine or any one conception of the good. Ronald Dworkin also emphasizes liberal equality when he states that 'political decisions must be, so far as possible, independent of any particular conception of the good life. . . since citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another.'<sup>94</sup>

Raz labels such doctrines of political neutrality as anti-perfectionist principles. Anti-perfectionists, claims Raz, are marked by their interest in wanting to ensure 'that the implementation and promotion of ideals of the good life, though worthy in themselves, are not a legitimate matter for government action.'<sup>95</sup> Further still, Raz wants to label such anti-perfectionist doctrines (e.g. the political neutrality doctrine) as 'doctrines of restraint'. Such doctrines are aimed at denying the 'government's right to pursue certain valuable goals, or require it to maintain undisturbed a certain state of affairs, even though it could, if it were to try, improve it' (ibid). In addition, while the doctrine of neutrality is one such example of a doctrine of restraint, it is by no means the only one. Raz dedicates an entire chapter in *The Morality of Freedom* to dealing with the 'exclusion of ideals',<sup>96</sup>

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<sup>94</sup> Dworkin, *A Matter of Principle*, p. 191.

<sup>95</sup> *M of F*, p. 110.

<sup>96</sup> The exclusion of ideals is defined by Raz as another doctrine of restraint, however, while the doctrine of political neutrality tells government what to do, the exclusion of ideas 'forbids them to act for

which he purports to be another doctrine of restraint - even though both doctrines of restraint differ in form, they support the same conclusion concerning the need for state neutrality. In other words, both doctrines aim to inhibit the state from acting in any such a way as to promote one conception of the good over another. It can be said that both doctrines limit state action to those that are deemed as fulfilling the demands of the neutrality doctrine. On the one hand, the doctrine of political neutrality 'advocates neutrality between valid and invalid ideals of the good. It does not demand that the government shall avoid promoting unacceptable ideals. Rather, it commands the government to make sure that its actions do not help acceptable ideals more than unacceptable ones.'<sup>97</sup> Exclusion of ideals, on the other hand, 'claims that government action should be blind to all ideals of the good life, that implementation and promotion of ideals of the good life, though worthy in itself, is not a legitimate object of government action.'<sup>98</sup>

So what is Raz's concern with anti-perfection principles, and on what grounds does Raz reject the doctrine of political neutrality, as understood by such liberals as Rawls? Ultimately, Raz will want to claim that 'autonomy is a perfectionist principle . . . the autonomy principle permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant one.'<sup>99</sup> His argument for perfectionism is quite

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certain reasons' (p. 135). It is the idea that the state ought to exclude conceptions of the good from its political means, such that even if there are some conceptions of the good which are true, valid or sound, this should never serve as a reason for state action (it also rules out acting against false, invalid and unsound conceptions as well). The exclusion of ideals will not be of much focus in the current chapter, but rather the doctrine of political neutrality will.

<sup>97</sup> M of F, p. 110-1

<sup>98</sup> M of F, p. 136.

<sup>99</sup> M of F, p. 417.

intriguing, and its implications are of importance to the area of multiculturalism. Hence the remainder of the current chapter will primarily focus on the work of Raz in *The Morality of Freedom* with special emphasis on his rejection of political neutrality, and emphasis on autonomy, which together help establish his doctrine of liberal perfectionism.

### **Political Perfectionism or Neutrality?**

‘[The] diversity of doctrines – the fact of pluralism – is not a mere historical condition that will soon pass away; it is, I believe, a permanent feature of the public culture of modern democracies.’<sup>100</sup> Rawls statement concerning the fact of pluralism is hard to dispute. Where ever one looks within modern liberal democratic states, one surely finds the fact of pluralism. There exists a wide range of conceptions of the good, and it seems as though the enforcement (or discouragement) of any one conception by the political state is a violation of neutrality. Rawls’s concern was to set up the principles of justice in a way that it would not rely exclusively on one conception over another, for the point of ‘justice as fairness’ is to ensure that any one individual, picked at random, would also be able to agree with the terms established in the original position. But is strict political neutrality a feasible approach to the fact of pluralism? Raz certainly thinks not. Raz wants to suggest that there is a ‘logical gap between pluralism and neutrality.’<sup>101</sup> More particularly, Raz wants to maintain that moral pluralism, which is the view that ‘asserts the existence of a multitude of incompatible but morally valuable forms of life’

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<sup>100</sup> Rawls, *The Idea of an Overlapping Consensus*, p. 4.

<sup>101</sup> M of F, p. 133.

(ibid), is incompatible with neutrality. Raz explains that when Moral Pluralism is 'coupled with an advocacy of autonomy':

It naturally combines with the view that individuals should develop freely to find for themselves the form of the good which they wish to pursue in their life. Both combined lead to political conclusions which are in some ways akin to those of Rawls: political action should be concerned with providing individuals with the means by which they can develop, which enable them to choose and attempt to realize their own conceptions of the good. But there is nothing here which speaks of neutrality. For it is *the goal of all* political action to enable individuals to pursue valid conceptions of the good and to *discourage* evil or empty ones.<sup>102</sup>

For Raz, in other words, the fact is moral pluralism does not necessarily lead to the doctrine of political neutrality - in order to deal with the many conceptions of the good. This is a major point of difference from other liberal political writers. On most accounts, the fact of moral pluralism is usually thought to be a point supporting the need for political neutrality. In other words, the idea that there is a wide range of conceptions of the good, ranging from religious to secular doctrines, ought to compel the state to be neutral in its actions. That is to say, moral pluralism has been traditionally thought to lead the state in taking a neutral stand towards the many different conceptions of the good – this is a justification based on epistemic or skeptical considerations because we do not know which conception is correct or valid, it remains best for the state to remain neutral and support them all.<sup>103</sup>

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<sup>102</sup> M of F, p. 133, author's italics.

<sup>103</sup> It should be noted that this is only one basis offered for neutrality. There may be others. For example, neutrality could be based on the idea that each person has a right to determine for himself, what has ultimate value in his life – even if his choices are not always the best, and even if we know best and he would be better off if he freely chose the course of action we know to be better – the state must still remain neutral in allowing the individual to self-determine their own path in life. To interfere with them would be a violation of neutrality.

Instead, what Raz wants to suggest is that the many valuable forms of life will require certain public goods in order to flourish. Moreover, such public goods will be incompatible with other forms of life; if the state wants to allow for such ways of life to flourish then it will have to promote them within the public sphere. Put differently, if the state really has an interest in allowing individuals to pursue their own conception of the good, Raz will argue, then political action should be directed towards ‘valid’ conceptions of the good.<sup>104</sup> Hence, for Raz, ‘pluralism is compatible with perfectionism but incompatible with neutrality.’<sup>105</sup> As we will see later, Raz’s notion of Moral Pluralism will be helpful in drawing a central role for autonomy within liberalism. The connection between moral pluralism and autonomy will become much clearer in the second part of this chapter. But for the time being it remains important to maintain the focus on Raz’s criticism of political neutrality. For now, the main concern is on what exactly is meant by political neutrality, and on what grounds does Raz reject political neutrality.

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<sup>104</sup> This, of course, immediately sparks the question of what Raz intends with ‘valid’ conceptions. While it is not something that can be discussed in great length at this point, a few points of clarification are still needed – but the issue will be returned to in the final chapter. For Raz, our autonomy will eventually be tied to the pursuit of what he calls ‘morally acceptable options’. That is to say, for Raz, the options made possible within the state will need to allow room for individuals to be able exercise some choice. He is aware that, within a state, there will be morally repugnant options available for some individual, and Raz certainly bites the bullet and admits that ‘for the most part the opportunities for dishonesty, indolence . . . cruelty . . . and other vices and moral weaknesses are logically inseparable from the conditions of human life’ (p. 381). For Raz, there will always exist options that violate individual freedom. However, he is keen on ensuring that the existence of such options is not the product of state promotion, and furthermore carries the concern that the state remain prepared to intervene to stop any such practices from taking place. As we will see later, the validity of an option will be strongly intertwined with autonomy. For the time being, it remains important to keep in mind that Raz only wants state promotion of morally acceptable options.

<sup>105</sup> Lehnig, pg. 198.

**Raz and the Doctrine of Political Neutrality**

Raz borrows his definition concerning the principle of neutrality from Montefiore, who argued that one is neutral if one does their best to help or hinder the various parties concerned to an equal degree.<sup>106</sup> This is better known as 'principled neutrality'. To be neutral is to help or hinder the parties concerned to an equal degree and, more importantly, one does so 'because one believes that there are reasons for so acting which essentially depend on the fact that the action has an equal effect on the fortunes of the parties' (ibid). From the principled neutrality, political theorists have derived (at least) three different interpretations of political neutrality. Essentially, then, depending on how one reads into Montefiore's principle, one may interpret political neutrality differently. Raz highlights three popular interpretations:

1. No political action may be undertaken or justified on the ground that it promotes an ideal of the good nor on the ground that it enables individuals to pursue an ideal of the good.
2. No political action may be undertaken if it makes a difference to the likelihood that a person will endorse one conception of the good or another, or to his chances of realizing his conception of the good, unless other actions are undertaken which cancel out such effects.
3. One of the main goals of governmental authority, which is lexically prior to any other, is to ensure for all persons an equal ability to pursue in their lives and promote in their societies any ideal of the good of their choosing.<sup>107</sup>

The first interpretation is offered by Nozick and is a commonly adopted interpretation of the neutrality principle.<sup>108</sup> If the objective is to help or hinder all conceptions of the good to an equal effect, then the political action of the state must ensure that it never justifies its action on the assumption that it is promoting one ideal

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<sup>106</sup> M of F, p. 113.

<sup>107</sup> M of F, p. 114-5.

<sup>108</sup> See Nozick, Robert, *Anarchy, State and Utopia*

over another. Any such justification based on some conception of the good would be considered a violation of neutrality. It may be argued that Nozick's definition cannot hold since any state's political organizations, laws, contracts and so forth implement some conception of the good. For instance, one can critique Nozick on the grounds that the prohibition against rape is non-neutral, in that it violates a rapist's conception of the good, and hence does not have an equal effect on all citizens of the state. What such a law does, it can be argued, is differentiate between individuals (e.g. the rapist and the non-rapist) and their conception of the good. Nozick, however, has a reply to this criticism, which basically claims that it is absurd to think that a law is unfair because it has a different impact of individuals. The reason for prohibiting rape is an *independent* reason from having anything to do with some conception of the good.

Let me explain this last point because it will become important when the Sharia debate is examined in the next chapter. Recall that the doctrines of restraint (such as political neutrality and the exclusion of ideas) make the claim that state action cannot be justified on grounds of promoting one conception of the good over another – irrespective if one conception is considered valid or sound or whether promoting one is more worthwhile. Hence, there is a limit set on governments to ensure that when ever they promote a law, the justification of the law itself is not based on the state favoring one conception of the good over another. Put differently, this limit is meant to force the state to make sure that whatever state laws or policies it enacts they themselves are not based on the state favoring one way of life over another. This, in turn, may lead a rapist to protest that their conception of the good, which involves engaging in the activity of rape,



is being selected against *via* state laws and as a result the non-rapist's conception is being favored by the state. This claim, presumably, leads the rapist to assert that neutrality (as understood so far) is being violated. The claim would be that the state is no longer remaining neutral between the many conceptions of the good (in this particular example the state is not being neutral between the rapist and the non-rapist conception).

However, this is not what neutrality requires with respect to state laws. What Nozick wants to maintain, which I take to be of great importance, is that the reason that the law itself is created is not grounded in some conception of the good, that is to say, the justification of a law is not based on the state wanting to promote one conception of the good over another because it deems one as being sound or valid or worthwhile. Instead, the creations of rape laws (for instance) are based on some *independent reason* (i.e. on some extrinsic reason, such as the potential harm that may occur if rape is not prohibited). That is to say, the reason the state prohibits rape has nothing to do with valuing or promoting a conception of the good over another but is instead justified on grounds of harm. This reason has nothing to do with any one conception of the good let alone the promotion of one way of life over another.

This distinction between 'conception of the good' and 'extrinsic reasons' needs to be made clearer and I think an example may help clarify the point. If, for example, Canada was to introduce a law which prohibited all religious practices except those of the Christian religion on grounds that Christianity is a more valuable way of life, then the state can be said to be non-neutral, in that it aims to promote one conception of the good over another. The reason for promoting the Christian conception would presumably be

justified on the grounds that the Christian way of life is more valuable. If, instead, Canada was to pass a law which was aimed at prohibiting religious practices that involved harming individuals, and it just (for sake of argument) happened to be that all forms of religious practices engaged in one form of harm or another (with the exception of the Christian religion), then the state would still, indirectly, promote the Christian conception of the good. However, the justification for promoting Christianity (in the second scenario) is not based on the state valuing Christian beliefs over other beliefs, but instead the state ends up favoring the Christian faith on reasons having nothing to do with valuing one conception over another. Presumably, then, the reason the law would allow Christians to practice their way of life would have nothing to do with violating neutrality and more to do with the fact that their practices do not bring about harm to any of their community members or the wider community as a whole. The main difference between these two scenarios is that the first introduces a law which violates neutrality while the second steers clear from any such violation. Hence, as long as the state is acting for reasons having nothing to do with favoring one conception over another, but instead on some *independent* reason then we remain clear of violating the principle of neutrality. Essentially, all general laws will have differential effects on their subjects, but this is far from marking such rules as non-neutral. What needs to be determined is whether the law is based on a conception of the good or some independent reason. This, in itself, becomes an independent measurement concerning whether a way of life or a conception of the good will be supported by the state.

I do admit that this is a difficult claim to uphold, because it aims to give us a kind of measurement for assessing goals, ends and ways of life. And while there may be goals and ways of life which seem valuable for the individuals that participate in them and may very well add value to the individuals engaging in them, this does not necessarily require the state to support such ends at all costs. However, I want to leave this part of the discussion for the time being. It is a point which will be returned to in the final chapter when the issue of faith-based arbitration is further discussed. For the most part, it will be important to show that *if* faith-based arbitration is to be allowed, then there will presumably be a need to have a few restrictions put in place. However, the justification for the restrictions cannot be based on Canada valuing other ways of life over those of the Islamic faith but instead there will have to be some extrinsic reasons that allow for restrictions without necessarily suggesting that the Muslim way of life is not valuable (or inferior to other practices). In other words, if faith based arbitration is to be labeled as a 'morally acceptable option' by Raz then it will presumably have restrictions placed on it in order to make it acceptable in a liberal framework. However, the restrictions which are to be placed on it cannot have their justification grounded in the state valuing one conception over another but instead the justification will require some extrinsic reason in order to explain why the practice must take the form that it does. This will be clarified in the coming chapter.

To return to the three different interpretations provided above there is also something to be said about the second and third interpretation. In regards to the second interpretation of neutrality - that is regarding the point that no political action may be

undertaken if it effects individuals pursuit of the good unless a counter action is taken - if supporters of such an interpretation concede that the prohibition of rape is non-neutral, then by their very own definition they will 'require the government to take action to compensate would-be rapists by improving their chances to realize other aspects of their conception of the good.'<sup>109</sup> Even on the third interpretation above, if it turns out that prohibition 'denies would-be rapists more of a chance to pursue the good life than it gives their possible victims, then one may have to adjust other features of the political framework to make sure that this does not result in inequality of ability to pursue one's conceptions of the good (ibid). The reason I have brought up this particular example, and the three interpretations take on this scenario is to highlight Raz's point that 'ensuring to all an equal ability to realize their conception of the good is more likely to require acting in a non-neutral way, acting to improve the ability of some at the expense of others.'<sup>110</sup> For Raz, there is an impossibility of political neutrality.

Nonetheless, out of the three interpretations above, the third presents the strongest challenge to Raz. It is what he labels the principle of comprehensive (political) neutrality. The principle of comprehensive neutrality is derived from Rawls's work, and is considered by Raz to be both incoherent and chimerical. I now want to focus on Raz's attack on Rawls's conception of comprehensive neutrality (and neutrality as a whole).

### **Raz and The Impossibility of Strict Political Neutrality**

In his section, *The Impossibility of Strict Political Neutrality*, Raz sets before himself the task of showing that the very idea of political neutrality is chimerical. He

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<sup>109</sup> M of F, p. 116.

<sup>110</sup> M of F, p. 116-7.

acknowledges that defenders of Rawls might argue that neutrality can be a 'matter of degree', and hence Rawls's project can be read as an attempt to give us a mere approximation to neutrality as opposed to a strict form of neutrality. This in turn can be used as a possible defense to Rawls's project, suggesting that Rawls may still provide us with a better alternative than those previously forwarded by Nozick. However, regardless of whether neutrality is a matter of degree or not, Raz proceeds to give us two interpretations to a scenario which he constructs in order to challenge the validity of political neutrality in a way which makes even the 'approximation to complete neutrality a chimerical notion.'<sup>111</sup> The principle aim with the following discussion is to question the common definition of neutrality which argues that neutrality is best achieved by treating everyone the same. It will instead be argued that neutrality is a more complex idea which may require us to factor in such consideration as an individuals (or groups) differing needs, starting points, baselines and so on and that neutrality may require differential treatment as opposed to a homogenous treatment of all people.

Let us now consider these two interpretations.<sup>112</sup> Both interpretations are designed to illustrate, successfully I should add, the fact that 'several kinds of considerations may lead to different and incompatible policies all of which are commonly regarded as policies of neutrality.'<sup>113</sup> So it is not so much the idea that neutrality cannot be accomplished at all, but rather it is the point that neutrality may require differential treatment as opposed to homogenous treatment of groups (and individuals) within the

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<sup>111</sup> M of F, p. 120.

<sup>112</sup> For simplicity, I will use the example of the Blues and Reds for both arguments. Raz only applies the Blues and Reds example in his second argument for the incoherence of political neutrality.

<sup>113</sup> M of F, p. 122.

state. What Raz's conclusions seem to hint at is that equal treatment does not necessarily entail same treatment.

Scenario: Imagine a country, the Browns, that has no commercial or other relations with its two neighbouring states, the Blues and the Reds, who also happen to be warring parties.

The first interpretation provided by Raz questions how it is that political neutrality can be established in such a case? Under the principle of neutrality, would the Brown's only be neutral if the help it could have given but did not give to the Red's is equal with the help it could have but did not give to the Blue's? What if the Brown's were to supply both states with the same commodity, X, but one state was in more need of the commodity while the other was not. Is it still neutral even though it does not effect or hinder both parties to an equal degree? In such a case, are the Brown's helping or hindering the party that is in short supply of the commodity, let's say the Blues? Even though the example is a simple one, it does bring forth the point that assessing neutrality in such a case is more difficult than initially thought. Given our definition of principled neutrality (of the need to effect each party to an equal degree), one can see, I think, that neutrality in this case will require the state to act in non-neutral ways, that is, commit actions that will effect each party to different degrees (in hopes that this will put the two parties on equal footing).

There is a point which I would like to explicitly draw from this first interpretation offered by Raz. According to the principle of neutrality, the Browns are essentially left with two choices. Either they are to give each side the same goods or alternatively, just stand aside and do nothing. If they give the same commodity to the same degree, then

one group will be left at a disadvantage, if they refrain from doing anything, the same group remains at a disadvantage. Even if the principle instead required equality of effect, such that the two parties ought to be brought to an equal footing, then this would require that the side that is more in need be given more than the side that is in less of a need. The point of the matter is that being neutral does not necessarily always mean giving everyone the same treatment at all times because in doing so this will, presumably, have an unequal – i.e. non-neutral – effect on the parties involved.

The second interpretation adopted by Raz begins with the same scenario stated above but suggests that ‘whether a person acts neutrally depends on the base line relative to which his behaviour is judged, and that there are always different base lines leading to conflicting judgments.’<sup>114</sup> Consider, again, the above case but with the addition that the Brown’s have been supplying the Red’s with food for some time before the war had broken out. In turn, it turns out that the supplying of the food is allowing the Red’s to maintain their war efforts. What, then, is it to be neutral? Should the Brown’s discontinue supplying food to the Red’s? This is really a matter of where the base line is. Given that the Red’s were previously being supplied, ceasing the supplies would hinder them. Had the Red’s not been receiving any aid, then would it still be neutral to aid them, given that it would bring them to an equal playing ground with the Blues? As Raz rightly notes, ‘it may be said that this is just one of the cases where it is impossible to be neutral. Without confusing not helping and hindering...’<sup>115</sup>

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<sup>114</sup> M of F, p. 121.

<sup>115</sup> M of F, p. 122.

There is something to be said about the importance of the distinction between helping/hindering and not helping/hindering. The doctrine of comprehensive neutrality requires the state to be neutral with regards to people choosing and successfully pursuing their conception of the good but one can plausibly ask whether failure to help is a form of hindrance? In other words, if the state does not help individuals to pursue their conception of the good, through for example, social forms and other political policies, is it not the case that the state is hindering certain conceptions of the good by failing to help? Raz wants to claim, through the two above interpretations, that ‘within the range of the state’s responsibility to its subjects failing to help is hindering.’<sup>116</sup> Acting neutral between the conceptions of the good, even if approximately neutral, does not necessarily require the state to give everyone the exact same treatment. The point, rather, has been the opposite. That is to say, what Raz has shown is that doing nothing or doing the same for the Red’s and Blue’s does not always amount to being neutral. It ultimately boils down to the baseline. If being neutral is the aim of a state, then the way to go about it does not necessarily entail identical treatment to all the parties. Sometimes neutrality requires a state to treat everyone differently in order to meet the requirement of being neutral.

This point taken by Raz relates well to the area of Multiculturalism. In the particular area, neutrality is not defined on grounds of homogenous treatment. It is thought that giving a homogenous treatment across the board can have a very different impact on the welfare or interests of various groups. The implication, as we have seen, of

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<sup>116</sup> M of F, p. 124.



Raz's view is that depending on where the baseline is - treatment will differ. This is a crucial point in multicultural theory which I would like to expand on. It is the argument that neutrality does not necessarily entail same treatment.

In making this point, I would like to draw on a useful distinction made by R.M Dworkin. There is something to be said about the difference between the 'right to equal treatment' and the right to 'treatment as an equal'. The former refers to the right to 'an equal distribution of some opportunity or resource or burden. Every citizen, for example, has a right to an equal vote in a democracy; that is the nerve of the Supreme Court's decision that one person must have one vote even if a different and more complex arrangement would better secure the collective welfare.'<sup>117</sup> In multicultural terms, the state is to treat all individuals equally irrespective of race, gender, religion, ethnicity and so on. It is similar to what Charles Taylor calls 'politics of equal dignity.'<sup>118</sup> In a sense, it requires the state to treat individuals in a 'difference-blind' fashion, whereby the principle of nondiscrimination is upheld by way of providing all individuals the same treatment across the board.

The right to be 'treated as an equal', on the other hand, refers to the right 'not to receive the same distribution or some burden or benefit, but to be treated with the same respect and concern as any one else.'<sup>119</sup> This category of rights treatment requires the state to take into consideration differences between individuals in order to establish the most equal treatment. Consider the example used by Dworkin which invokes an

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<sup>117</sup> Dworkin, 'Taking Rights Seriously', p. 227.

<sup>118</sup> See Taylor, 'Multiculturalism: Politics of Recognition', p. 41

<sup>119</sup> Dworkin, p. 227.

individual who has two children and ‘one is dying from a disease that is making the other uncomfortable.’<sup>120</sup> Dworkin argues that the father would not be showing equal concern if he were to flip a coin in order to decide which of his children should have the remaining dose of the drug. Dworkin’s example is intended to show that ‘the right to treatment as an equal is fundamental, and the right to equal treatment [is] derivative.’ (ibid). That is to say, there will be times when treatment as an equal will require equal treatment, but not all circumstances will demand this. There will, in other words, be times where treatment as an equal does not require equal treatment in order to treat individuals (or groups) equally.

This useful distinction of Dworkin coincides with Raz’s idea of knowing where the baseline is. It also resembles what Taylor calls ‘the politics of difference’, which asks us to recognize the unique identity of individuals and groups and often ‘redefines nondiscrimination as requiring that we make these distinctions [i.e. the unique identity of individuals and groups] the basis of differential treatment.’<sup>121</sup> Much like Dworkin and Raz, Taylor is suggesting that equal treatment (under the heading of the politics of difference) will require differential treatment, that is treatment which takes into consideration an individual (or group’s) baseline when considering how best to treat the individual (or group) fairly.

Equality, then, under the multicultural framework appears to steer away from political neutrality as understood so far, that is the multicultural framework steers away from the claim that we ought to treat everyone the same, regardless of differing needs,

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<sup>120</sup> Dworkin, p. 227.

<sup>121</sup> Taylor, p. 39.

starting points, baselines, impacts on the welfare of those affected and so on. Instead, the point to be taken is that at times neutrality can (and often does) lead to different policies – all of which remain aimed at ensuring equality amongst all individuals.

To sum up: Raz (along with Dworkin and Taylor) provides us with different ways of understanding neutrality which need not be summarized as equal treatment (but could be possible re-interpreted to suggest something more like treatment as an equal). Raz's aim has been to show that state may not be able to reach its goal of neutrality if it pursues something like the Montefiore neutrality principle. In other words, the need to affect each party to an equal degree can very well lead to different policies, all of which have neutrality as their main concern. Hence, deciding on what policies are best to forward depends on where the baseline of the individual (or group) is.

Now that an argument has been provided as to why the state need not be neutral in the way it has been traditionally understood, Raz opens the door to allowing states to adopt and pursue certain goals and values – all of which aim to treat individuals as equals. Raz's state is best described as a liberal perfectionist state, by which he intends a state that has at its core a conception of the good which it aims to pursue. However, one cannot help but question the value(s) that Raz does want the state to support. If indeed the state is not to be neutral, but is instead to be a perfectionist state, i.e. the state does pursue a conception of the good, then what exactly ought the state to pursue? I believe that the question of autonomy now comes to the forefront. It is no secret in the *Morality of Freedom* that Raz wants to place his emphasis on personal autonomy as a valid conception which the state is justified in promoting and supporting. Indeed, Raz places

emphasis on autonomy at both the state and individual level. He labels the pursuit of autonomy as the 'principle of autonomy' which he defines as the need for 'people to secure the conditions of autonomy for all [others]'.<sup>122</sup> Autonomy, for Raz, is a legitimate pursuit of the state. The question now is why? If the state is to favour autonomy, then on what grounds is this to be justified? More importantly, we will need a stronger reason than those provided in the previous chapter for the central importance of autonomy. In other words, it is not enough to say that autonomy is a second order conception that is needed for individuals to find their own conception of the good. As we saw in the previous chapter, such an argument does not elude Barry's main criticism. Instead, a stronger justification will be required in order to validate autonomy as a legitimate state pursuit.

In order to validate the pursuit of autonomy by the state, and more importantly, to understand the key central significance of autonomy within liberalism, the doctrine of value pluralism will need to be introduced and brought into relation with autonomy. In what follows, I will discuss the doctrine of value pluralism and what I believe to be the link between it and autonomy. It will be argued that in understanding the relationship between value pluralism and autonomy, one can begin to see why autonomy is (a) a legitimate pursuit of the state and (b) why it is a central component and not merely one out of several strands of liberalism.

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<sup>122</sup> M of F, p. 408.

**Part II: The Centrality of Autonomy**

The role of autonomy within liberalism is yet to be resolved. There remains the question of whether autonomy is one strand (of many) within liberalism, as Galston and Barry have suggested, or whether it plays a more central role? And if we are to accept it as playing a more central role, then on what grounds can we justify autonomy's centrality?

The question of 'why value autonomy at all', I believe, can be answered by way of understanding the doctrine of value pluralism. The notion of value pluralism can be traced far back through political philosophy,<sup>123</sup> and has actually been traced back as far as Machiavelli's political writings. While the idea of value pluralism stems back over five hundred years, it has had two revivals in recent years. The first revival of value pluralism can be found in the works of Isaiah Berlin in his *Four Essays on Liberty*, which question whether there is, if any, a connection between liberalism and pluralism. One popular argument that has emerged from Berlin's work is the idea that since a range of valuable (yet conflicting) life forms exists, we will need some form of political institutions that can deal with this fact of pluralism. This, in turn, led to several popular arguments supporting liberalism as the best political theory on the grounds that only when liberalism is filtered through our basic political and economic institutes are we able to best cope with the fact of pluralism.<sup>124</sup> A renewed interest in Berlin's value pluralism has led to a second revival (within the literature) concerning the validity and soundness of Berlin's apparent connection between liberalism and value pluralism. In general, part of the

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<sup>123</sup> See Stanford Encyclopedia of Philosophy, Isaiah Berlin entry.

<sup>124</sup> For a good criticism of this view, see Crowder 1994, and 2002.

current debate questions the paradox of trying to simultaneously uphold liberalism as a universal theory while maintaining a value pluralist view. In other words, the two ideas appear to be inconsistent. Those who argue for liberalism on grounds of personal autonomy reject those who appeal to value pluralism, and vice versa. Those who argue in favor of personal autonomy end up arguing for a 'uniquely privileged importance of autonomy [while the value pluralist maintains that] no single value merits privilege status.'<sup>125</sup> Raz, on the other hand, draws from both of these ideas (personal autonomy and value pluralism) to make a stronger case for liberalism.

It will be argued that if the doctrine of value pluralism is to be taken seriously, and a wide range of valuable (yet incomparable or incommensurable) forms of life are to exist within a state, then autonomy's role is no longer just a simple strand of liberal thought. It is instead a central component required in order to allow individuals the freedom to pursue their own projects and enhance their well-being. Before doing this, I will first try to put forth some understanding of the doctrine of value pluralism.

### **Value Pluralism**

As stated above, the doctrine of value pluralism has had a more recent revival in the work of Isaiah Berlin, especially in his *Four Essays on Liberty*. It is here where Berlin observed that 'the world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute. . . the ends of men are many, and not all of them are in principle compatible with each

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<sup>125</sup> McCabe 'Raz's Contextual argument for Liberal perfectionism', p. 493

other...'<sup>126</sup> The idea of there being an incompatibility concerning the choices and values we pursue is the heart of Berlin's ideas concerning value pluralism. It is this notion of incompatibility that I would like to flesh out in my exploration of value pluralism. It appears as a simple idea at the outset, for it seems all too obvious that we naturally find different options in life which lead to different lifestyles. More to the point, what is so special about stating that not all ends are compatible – seems hardly worth questioning. However, from this simple notion of incompatibility, further important ideas can be derived, such as those of pluralism and incommensurability.

Much like Berlin, Raz follows with a similar definition of value pluralism. Raz defines value pluralism (or Moral Pluralism, as it is sometimes referred to by Raz) as the view that 'there are various forms and styles of life which exemplify different virtues and which are incompatible.'<sup>127</sup> Further still, value pluralism makes the claim that not only are ways of life incompatible but that they are also morally acceptable and 'display distinct virtues, each capable of being pursued for its sake.'<sup>128</sup> It may be best to illustrate what Raz means with an example. One can imagine an individual who wants to simultaneously be both a great sailor and a dedicated family man. Both lifestyles, Raz would suggest, cannot be realized in one life, i.e. they are incompatible. One can choose to be a dedicated sailor but would have to equally give up (to a great extent) their ambition of being a dedicated family man. The opposite is also true, such that one cannot be a devoted family man and yet fulfill their goal of living out at sea. The incompatibility

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<sup>126</sup> Berlin, *Two Concepts of Liberty*, p. 168-9.

<sup>127</sup> M of F, p. 395.

<sup>128</sup> M of F, p. 396.

may be further illustrated with an even more basic example of an individual who wants to have a career in both dentistry and law. Success in one usually means sacrificing the other. An individual who successfully pursues a career in dentistry, most probably cannot (as successfully) pursue a career in law. Both require a different set of learned skills, behavior, understanding and so on. This, I think, is not difficult to comprehend.

So far this example has only illustrated that there are incompatible activities or ways of life from which individuals can choose from. This is not yet the central point of value pluralism. Rather, value pluralism relates to the idea that there is more to the choices that we are faced with than the choices being incompatible. There is a need to show that the choice between being a sailor and a family man (for example) lead to separate and incompatible values, and moreover the choices we are left to choose from are themselves incomparable. This is the point of value pluralism which I would like to draw out.

From the above example/scenario and definition, several writers have drawn three related claims concerning value pluralism. The three claims help summarize what value pluralism entails. They are (a) anti-reductionism of values, (b) tragic nature of conflict, and (c) incommensurability of values.

The first feature of value pluralism, the anti-reductionism of values, maintains that 'the goods of human life are many...they cannot be derived from or reduced to any one value...the diverse experiences, activities, options, projects and virtues that enter into good lives for humans are not tokens of a single type.'<sup>129</sup> <sup>130</sup> This implies that the 'goods

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<sup>129</sup> Gray 'When Liberals and Pluralist have to part company', p. 20



of human life have no common denominator.’<sup>131</sup> <sup>132</sup> Raz makes the same observation when he writes that things become ‘philosophically significant the moment one rejects a still pervasive belief in the reducibility of all values to one value which serves as a common denominator to the multiplicity of valuable ways of life.’<sup>133</sup> In relation to our sailor example, what the individual loses from choosing one option rather than the other is not the same as what he gains. In other words, there is ‘no judgment that one gains more than one loses’ (ibid), instead what the individual does is ultimately choose one option over another, and neither of the options are susceptible to any comparison. Hence, the idea that one is getting the same thing as one is giving up is not supported by this view. A view which takes such an approach is, for example, utilitarianism, whereby things are measured in relation to happiness (or pleasure) and one questions whether giving up family life for sailing brings about more or less pleasure/happiness. Under value pluralist conceptions, this view is wrong. So to bring together the two related claims, not only is there the tragic theme of having to select one option over the other, but no common measurement is available to assist the individual in choosing one over the other.

The first claim, the anti-reductionism of values, helps make sense of the second feature of value pluralism. The tragic nature of choosing amongst different values is an observation which Berlin makes explicit. Berlin notes that if ‘the ends of men are many,

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<sup>130</sup> Peter Schaber makes the same point. See *Value Pluralism: Some Problems*, p. 71.

<sup>131</sup> Gray, p. 20.

<sup>132</sup> Berlin captures this feature nicely when he writes ‘To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decisions as an operation which a slide-rule could, in principle, perform. (p. 171)

<sup>133</sup> Raz, *Multiculturalism: A Liberal Perspective*, p. 179.

and not all of them are in principle compatible with each other, then the possibility of conflict – and of *tragedy* – can never wholly be eliminated from human life, either personal or social. . . *the necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.*<sup>134</sup> Much like the example given earlier concerning the individual that wants to both be a dedicated family man and a full time sailor, there is something to be said about the two separate values he wishes to pursue. Mainly, there is no hierarchical list which he may be able to use in comparing the two ways of life, and furthermore there is something tragic about having to choose among the options we are faced with. Any choice we make likely entails a great sacrifice in terms of the other value we are giving up. The tragedy resides in the fact that we cannot escape this predicament.

So far, two things have been introduced; there is the tragic predicament that we are placed with every time we have to choose between different ends, which are coupled with the idea that there is no common denominator to human values. Essentially, there is no *summum bonum* 'or hierarchy of goods in terms of which human lives can be weighed or ranked'<sup>135</sup> available to the individual when making such difficult choices. These two claims made above help lead into the third related claim concerning incommensurability.

'[T]wo options are incommensurate [when] reason has no judgment to make concerning their relative value'<sup>136</sup>, we are told by Raz. When two options are incommensurable, we are to understand that they are incomparable (not just

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<sup>134</sup> Berlin, Two Concepts, p. 169, my emphasis.

<sup>135</sup> Gray, p. 20.

<sup>136</sup> M of F, p. 324.

incompatible). That is, the two options are neither better nor worse than one another nor are they of roughly equal value, we are instead unable to compare the value of the options, i.e. we deny that their values are comparable.<sup>137</sup> They cannot be better or worse because there is no common denominator by which we can measure them and they are not of roughly equal value because any talk of 'equal' value seems to suggest that both options could be ranked and are found to have no gap between how valuable they are. Put differently, talk of equal value suggests that some ranking can take place – which under value pluralist conception is rejected. Essentially, what this tells us is that when we are faced with incommensurable options, reason is indeterminate. Now this is not to be confused with the idea that our decisions are irrational when two options are not comparable. This, I think, is an important point to stress. What Raz is suggesting is that while there is 'no reason to shun one of the alternatives in favour of the other',<sup>138</sup> (e.g. being a sailor or family man) this does not add up to some type of indifference towards which choice we pick (since presumably they are incomparable). What incomparability does mark is the 'inability of reason to guide our action, not the insignificance of our choice' (ibid). Raz maintains that our ability to choose does not depend on 'valuing the chosen option more than the rejected one... One is able to choose when the two are of exactly the same value, as well as when they are incommensurate. The fact of the choice does not reveal why it was made. The chooser may even have chosen the less valued option.'<sup>139</sup> Having two incommensurable options then does not preclude choice. Hence,

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<sup>137</sup> M of F, p. 329.

<sup>138</sup> M of F, p. 334.

<sup>139</sup> M of F, p. 338.

one still has 'reason' to pick one option over another, for whatever reasons they may have. However, the point is that reason itself does not give us some objective measure in order to compare the two options. This is what is meant by incommensurability. Albert Dzur nicely summarizes Raz's take on incommensurability when he writes;

Incommensurability is the more complicated idea that the different goods which separately contribute towards different sorts of flourishing cannot be ranked or prioritized in a way that will suit all persons. Incommensurability does not mean that we cannot as individuals do what we always do, namely, choose paths and courses and goods in accordance to some scheme of choice. And incommensurability does not mean that such individual choices are groundless or irrational. Incommensurability only means that there is no "objective" or "rational" principle or procedure that would allow all persons in all places to rank the different goods available to them.<sup>140</sup>

Together these three related claims give us some insight into what is meant by value pluralism. We are told that there is a predicament concerning whatever choice we make, it seems to always require us to compromise one thing for something else of value. Furthermore, when faced with such choices we cannot rely on some common denominator, which adds to the tragic nature of the predicament – the idea that there is no escaping the compromise of one value for another. Finally, reason cannot help us compare the different values which are available. We are simply left with a heterogeneity of values with no tool in deciding which is more valuable than the other. Value pluralism, in other words, leaves us with hard choices.

So what are we to take from this idea that there is no 'rational' principle or procedure by which we are able to rank different available goods? Also, how does autonomy fit in with the scheme of things? Raz tells us that 'value pluralism is intimately

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<sup>140</sup> Dzur, 'Value Pluralism vs. Political Liberalism' p. 3

associated with autonomy.’<sup>141</sup> I now want to consider the connection between value pluralism and autonomy. As we shall see, if the value pluralist conception is accepted, and we are left with an array of incompatible yet valuable choices, then the role of autonomy will be more than just a simple strand in liberal thought. It will instead be of central importance for any state which upholds a value-pluralist conception.

### **Autonomy and Value Pluralism**

Before linking autonomy with value pluralism, there are a few key ideas concerning personal autonomy that need to be introduced in Raz’s work in order to get a full grasp the actual connection between autonomy and value pluralism.

‘In western industrial societies a particular conception of individual well-being has acquired considerable popularity. It is the ideal of personal autonomy.’<sup>142</sup> For Raz, the ideal of personal autonomy involves the notion that people should be (part) authors of their own lives. In chapter 2, I examined in some detail the notion of autonomy within liberalism. Accordingly, in following Kymlicka, autonomy was defined by two important conditions; the freedom to select our own conception of the good, and having the room to revise/or reject our ends in light of new information or developed beliefs. In this section, I examine the notion of personal autonomy in more detail along with its connection to value pluralism.

The autonomous person, for Raz, is he/or she who is (part) author of their life. ‘The ideal of personal autonomy is the vision of people controlling, to some degree, their

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<sup>141</sup> Raz, *Ethics in the Public Domain*, p. 119.

<sup>142</sup> M of F, p. 369.

own destiny, fashioning it through successive decisions throughout their lives.’<sup>143</sup> This can be distinguished from the need to have a fully planned life, one that is structured around unity and specified plans. There is nothing to suggest that only those individuals who have planned out the remainder of their life – in accordance with their personal goals and so on – are autonomous. On the contrary, an individual could frequently change his mind about his life plans but remain autonomous. The important point is that there is a need for self-awareness in relation to the choices individuals make in their life. In addition, it is also crucial to keep in mind that autonomy, for Raz, is a matter of degree. This is a point that we saw in chapter 2. Autonomy is not an all-or-none ideal whereby individuals either have it or not. The point rather is that autonomy can be limited without necessarily being diminished or violated. Along with this general remark concerning the degree of autonomy, Raz introduces us to three necessary conditions (or capacities) of autonomy which are of importance. The conditions of autonomy are; appropriate mental abilities, independence, and an adequate range of options.<sup>144</sup>

The *first* condition ties with personal autonomy by suggesting that if a person is to be an author of their own life then they will need, at minimum, the ‘mental abilities to form intentions of sufficiently complex kind.’<sup>145</sup> Such ‘mental abilities’ include comprehension in relation to realizing one’s goal, mental faculties necessary for planning actions and so on. The *second* condition is independence. In brief, not only must an individual have the basic mental capabilities to select their own ends, and be provided

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<sup>143</sup> M of F, p. 369.

<sup>144</sup> M of F, p. 372.

<sup>145</sup> M of F, p. 372.

with a range of choices, he must neither be coerced nor manipulated into making a particular decision. But there is a disclaimer here. Coercion, for the most part, is considered a negative concept because it diminishes one's options. However, not all coercive acts are necessarily bad. Raz explains that at times one may be coerced from selecting some specific option but may still be left with plenty of other options. Intuitively, this makes a certain amount of sense. One can imagine a scenario where one individual is attempting to coerce a friend from not pursuing a career in pizza delivery without necessarily diminishing their autonomy. Now it may be true that we have diminished their specific option of wanting to be a pizza delivery worker but it can still be argued that we have not fully diminished their autonomy, presumably because there are other worthwhile options available to the individual, such as work in construction, landscape, truck delivery and so on. Again, it remains important to keep in mind that autonomy is a matter of degree and all of the above conditions ought to be read with this point in mind. One does not need to be fully autonomous in order to have autonomy.

The *third* condition, or range of options, is of key significance for Raz when it comes to the connection between autonomy and value pluralism. It is important here to introduce a distinction between range of options and choice. Raz rightly notes that it is not enough to have choice for personal autonomy. 'All that has to be accepted is that to be autonomous a person must not only be given a choice but he must be given an adequate range of choices.'<sup>146</sup> Raz best illustrates this example when he states that one is not really granted a choice if one is given a set of a hundred identical houses to select

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<sup>146</sup> M of F, p. 373.

from. Such a set, according to Raz, lacks a range of choice (even though it provides the individual with a choice). One can select any one of the houses, but how much of a choice is there really? To have an adequate range of choices, the example needs to include, for instance, an apartment, a townhouse, or even a shack. Such a set provides a range of choices. This can also be illustrated with an example involving religion. If one is provided with only one religious view and told to practice it whichever way they wished (without breaking the tenets of the faith) then what choice do they have? Again, to have an adequate range of choices one must be provided with options ranging from monotheism, polytheism and perhaps even atheism.

From the three capacities of autonomy mentioned above, and for purposes of this analysis, the most important feature which I would like to focus on is the range of options. For Raz, there is something to be said about the range of options made available within a liberal democratic society. Mainly, the range of options made available to the individuals of the state will share a similarity with the features of value pluralism discussed thus far. It seems reasonable to suggest that the range of options made available in the state will be of incomparable and incommensurable value. That is to say, the options that an individual can pursue, whether it is in their academic, occupational, or social life will share the features of being non-reducible to a common hierarchy, incommensurable and further still place the individual in the predicament of having to sacrifice one value for another – of which no comparison can be made. Nonetheless, having a range of options will be important in helping individuals pursue their own conception of the good. It seems plausible to say that individuals define a great deal of



their lives by the choices they pursue, which in turn depends on the options made possible within the state and to which individuals have an access to. Since we cannot ascertain which options individuals ought to pursue (because of the value pluralist conception that has been discussed so far), the place of autonomy takes on a new role within liberal theory. Raz helps make the connection between the range of options and autonomy by stating the following:

[A]utonomy is valuable only if one steers a course for one's life through significant choices among diverse and valuable options. The underling idea is that autonomous people had a variety of incompatible opportunities available to them which would have enabled them to develop their lives in different directions. Their lives are what they are because of the choices made in situations where they were free to go various different ways. *The emphasis here is on the range of options available to the agent. This points to a connection between autonomy and pluralism.* A pluralistic society, we may say, not only recognizes the existence of a multiplicity of values but also makes their pursuit a real option available to its members.<sup>147</sup>

This point requires some further elaboration.<sup>148</sup> What is being said here is the following: First, pluralism imposes on us some hard choices. This has already, I hope, been demonstrated by the earlier discussion of what value pluralism is. Next we will need to cope with such choices, and in turn, we will need to develop 'certain disposition of character, or virtues.'<sup>149</sup> Crowder captures Raz's point well when he claims that 'those virtues overlap the character traits distinctively promoted by liberal forms of politics, in particular the exercise of personal autonomy. In short, liberalism promotes the virtues required for coping successfully with the exigencies of choosing among conflicting incommensurables' (ibid). Therefore, if pluralism is true, and we have to cope with

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<sup>147</sup> Raz, *Ethics in the Public Domain*, p. 119.

<sup>148</sup> I will be drawing from George Crowder's book for an elaborate explanation of what Raz is getting at. Crowder essentially follows Raz's argument for the connection between autonomy and value pluralism in his book 'Isaiah Berlin: Liberalism and Pluralism'

<sup>149</sup> Crowder. *Isaiah Berlin: Liberalism and Pluralism*, p.164.

difficult choices, then we will need to be autonomous. As Crowder tells us ‘value pluralism imposes on us choices that are demanding to a degree, such that they can be made well only by autonomous agents. If pluralism is true, then the best lives, those informed by critical choices among the available options, will be characterized by personal autonomy.’<sup>150</sup>

On these grounds, autonomy no longer becomes just a strand of liberalism (out of many) but is instead of central importance if we are to deal with the pluralist nature of liberal democratic societies. ‘For those who live in an autonomy-supporting environment there is no choice but to be autonomous: there is no other way to prosper in such a society.’<sup>151</sup> The argument given by Raz is specifically aimed ‘at those who regard autonomy as valuable, but as merely one option among many.’<sup>152</sup> According to Raz, ‘their mistake is in disregarding the degree to which the conditions of autonomy concern a central aspect of the whole system of values of a society, which affects its general character. The conditions of autonomy do not add an independent element to the social forms of a society. They are a central aspect in the character of the bulk of its social forms’ (ibid).

I think we can now make sense of Raz’s claim that ‘value pluralism is intimately linked with autonomy’. The connection resides in the fact that having a plurality of valuable, yet incommensurable options, leaves little to no choice but to create a central role for autonomy. For Raz there are two separate but related claims to be made. The

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<sup>150</sup> Crowder, p. 168

<sup>151</sup> M of F, p. 391.

<sup>152</sup> M of F, p. 394.

first involves the idea that ‘one can exercise autonomy only when faced with a range of significantly different valuable options.’<sup>153</sup> The second is that having a range of valuable options is of little significance if autonomy is not made possible. Both claims depend on each other - a range of options needs to be made possible for the exercise of autonomy while autonomy must be supported if a range of options are to be pursued. Autonomy, then, is key for value pluralism. For individual well-being,<sup>154</sup> the choices made between the many incommensurable goods available within liberal democracies will require the development of an autonomous character if individuals are to successfully pursue their own conception of the good.

This brings about Raz’s argument in support of a perfectionist liberal state which is committed to personal autonomy. Ultimately, for Raz, our well-being depends on our success in achieving valuable goals. Such goals are determined by the range of options available within one’s environment. For Raz, success in the pursuit of our goals will require an exercise of our autonomy.

Raz’s insistence on the centrality of autonomy in liberal democratic societies speaks volumes. There are many questions that come to the forefront in relation to the argument that our well-being rests on the options made available in the state. In particular, what is to be said about faith-based arbitration as an option within the state? What does Raz mean by morally acceptable options? Such questions, as well as others,

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<sup>153</sup> McCabe, p. 499.

<sup>154</sup> It should be noted that for Raz our ‘well-being’, which he defines as the ‘wholehearted successful pursuit of valuable goals’, is a function of success within a way of life and not some metric system whereby one measures well-being to determine which course of life is best to follow. In other words, well-being should not be confused with some metric system, similar to that of Utilitarian calculus, whereby an individual can choose the ends which produces the most units of happiness (or pleasure). For a more detailed discussion on Raz’s concept of well-being, see *Ethics in the Public Domain*, chapter 1.

will now need to be addressed. The next chapter will bring back the question of faith-based arbitration. How does such an option fare out under Raz's liberal perfectionism? Further still, is there any room for faith-based arbitration in liberal democratic societies? If not, then what toll does this take on the well-being of individual members belonging to such groups? Also, if value pluralism tells us that there is no measurement between incommensurable options, then are we not to keep faith-based arbitration for those to which it is valuable and crucial for their well being? It is now time to bring forward some conclusions concerning the value of faith-based arbitration within liberal democratic societies.

## Chapter 5

### Keeping the Faith

In this final chapter, I would like to return to the question of faith-based arbitration and its possible existence within liberal democratic societies. Part of my overall interest is to come to an understanding of what Raz intends with the idea of only promoting ‘morally acceptable options’ and what condition(s) need to be met for an option to be considered morally acceptable. In my attempt at dealing with this issue, I will be, first, looking at some of the solutions so far offered to this issue. Primarily, there have been two solutions offered. The first has been to full out reject the entire option of faith-based arbitration, while the latter has been to unconditionally accept the option. In what follows, I intend to address why the option of faith-based arbitration needs to be made possible in liberal democratic societies. In order to make this argument, I will be drawing on some of the concepts already presented in previous chapters. It is my intent to rule out the option of completely rejecting faith-based arbitration by way of making an argument to why the option needs to exist. Hence, if an argument can be made as to why the option should be available, then the option of full out rejecting faith-based arbitration can be avoided. However, given that an argument can be made concerning why such a practice ought to be allowed in liberal democracies, there will still remain the question of whether the practice ought to be allowed with no restrictions (except presumably those inherent in the practice itself). Put differently, if the practice is to be allowed, then in what form should it be allowed? Should there be restrictions? If so, what should such restrictions look like and on what grounds are they to be justified. Essentially, it is a

question of what needs to be done in order for the option to be a 'morally acceptable' one.

### **Finding the Two-Way Street**

Both academic and public literature solutions concerning the issue of faith-based arbitration have generally been broken down into two sides. On the one hand, there are those who argue that faith-based arbitration, as a whole, has strong potential to violate some of the most cherished individual rights. In particular, it can potentially violate the rights of women and skew property and other distribution rights (e.g. inheritance) heavily in favor of men. Hence, for this and other similar reasons, faith-based arbitration leads to more complications and difficulties than the state would like to deal with and so it remains better to take the entire option of faith-based arbitration off the table. This has certainly been the line of argumentation taken by the Ontario Government of Dalton McGuinty and the Canadian Council of Muslim Women (CCMW). It is Mr. McGuinty's hope to eliminate the controversy surrounding the issue by pushing for its complete elimination across all religious faiths. As things stand right now, the last public statement made by McGuinty with regards to this issue warned that legislation would be introduced 'as soon as possible'<sup>155</sup> in order to eliminate both the use of Sharia law and the whole of faith-based arbitration. While no such legislation has yet to be introduced, one only wonders when it will, and what possible response will come from the religious communities.

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<sup>155</sup> Globe and Mail, September 12<sup>th</sup>, 2005.

On the other hand, there are those who sympathize with group demands and argue that faith-based arbitration has significant value for those who live a life in full accordance with their religious doctrine and also believe it is not the state's responsibility to either enforce faith-based arbitration or police it. In other words, the practice of faith-based arbitration should remain an option for those who want to practice it without the state deciding how best to arbitrate on religious grounds. This option requires the state to take its hand out of the matter, so to speak, and leave the minority communities to conduct their own affairs in accordance with their own standards or way of life. Such a solution can be found in the writings of Mumtaz Ali, who it may be recalled, initially helped launch the demand for a Sharia based tribunal within Canada *via* the IICJ – Islamic Institute of Civil Justice.

Both solutions, in my view, fail in being too extreme. The first solution bars an important practice for religious communities on the grounds that it is too difficult to manage in an environment strongly dedicated to individual rights. However, the same point can be made of almost any practice. Consider the rights to freedom of expression. This afforded right has, on many occasions, come with considerable complications and difficulties. For example, should hate speech be protected? What counts as hate speech? Do holocaust deniers have a case for free expression? What about those who claim to deny the holocaust on academic grounds?<sup>156</sup> While there is no denying that such questions are important to answer, the point I am trying to get across, which I take to be a

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<sup>156</sup> The case of David Irving comes to mind. Also, it should be noted that I only draw on these examples for sake of illustrating the point, not to draw attention to the ongoing debate concerning what is and what is not hate speech.

commonsensical one, is simply that if we are willing to sanction free expression despite the attendant complications and difficulties, then surely the fact that faith-based arbitration brings with it similar complications and difficulties is not enough to warrant our rejecting it altogether.

Nonetheless, just because the practice is not to be full out rejected this does not necessarily amount to the state having to accept the practice in its entirety. Again, take the example of free expression. For sake of argument let us assume that it is a good thing to have – this does not necessarily entail that we are to uphold free expression at all costs. Surely there are limitations to free expression. To stick with the above example, there are limitations which aim to eliminate some forms of expression such as those of hate speech, that is speech which willfully promotes hatred against an identifiable group based on gender, race, ethnicity, religion (and in some cases old age and disability). This form of speech, whether written or spoken in the public sphere, is not guaranteed or protected under the Canadian *Charters of Rights and Freedoms*. So to those that demand that minority practices ought to be allowed with no restriction (with the exception of those restrictions which are inherent in the practice itself), we can again, on grounds of commonsense reject their demand. It makes little sense to say that a liberal state ought to fully take its hand out of a practice which is occurring within its borders, especially when such a practice *might* run the risk of harming individual rights.<sup>157</sup>

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<sup>157</sup> I do not want to be misunderstood at this point as making the assumption that faith-based arbitration automatically harms individual rights, but rather the point is that any practice which *may* harm individual rights needs to be examined by a liberal state more carefully.



But I have yet to address the actual issue of faith-based arbitration and why it is that I think the option needs to be made possible. So far all that has been said is that full out rejection or full out acceptance is hardly the solution to this matter – if we are to understand why we should accept faith-based arbitration in a particular form which respects the appropriate (in a liberal society) restriction and limitations, we need first to examine the question of why it is important for the option to exist in the first place. It is reasonable to assume that if an argument can be made, then the option of ruling out the whole of faith-based arbitration can be disregarded. Nonetheless, the form in which it ought to exist will still occupy us near the outset of this chapter.

### **The Option of Faith-Based Arbitration**

In chapter 2, I examined the possible role of culture within liberal theory. As it may be recalled, traditionally the notion of culture has played little-to-no-role within liberalism, on the presumption that liberalism, along with its strong atomistic nature, does not need to relate culture with individuals and their conception of the good. Instead it was considered, for a long time by some classical and contemporary liberals, that individual ends could be selected independent of cultural context.

However, other contemporary liberal writers, such as Kymlicka and Raz, have taken it upon themselves to consider more closely the role of culture in relation to individuals and their conception of the good. Such writers have vigorously argued that the importance of culture (again, in relation to individuals and their conception of the good) has been overlooked or at the very least underappreciated. What Kymlicka and Raz have been able to do is not just merely show that culture can be of importance to

liberal theory, but rather they have been able to provide reasons for the necessity of culture to liberal theory. They have done this in at least two ways. They have shown that liberal principles and beliefs need not reject the cultural context of individuals (i.e. that cultural context fits in with liberal principles), and more importantly, they have shown that culture is of absolute necessity if individuals are to form their own conception of the good and experience well-being in the pursuit and practice of that conception.

Culture, Kymlicka and Raz argue, is what provided individuals with their 'context of choice' or their 'horizon of opportunities'. By this, both writers argue that prior to even having the options from which individuals were to pursue their ends, culture was essential for providing the actual options themselves. That is to say, culture provides the meaningful options from which individuals can pursue their conception of the good. Hence, if at the core of liberal theory there is the concern of allowing individuals to pursue their own conception of the good, then one could see how the emphasis on culture by Kymlicka and Raz does little to threaten liberal theory, but on the contrary, adds much to it. Ultimately, culture becomes a key piece in allowing individuals to pursue their ends.

More over, as an implication of Kymlicka's and Raz's emphasis on culture for liberal theory, there is now a reasonably placed importance put on states to recognize and accommodate cultures. Accommodation, as we saw in chapter 2, did not necessarily entail the creation of separate societal cultures but rather there was a need for the already established institutes to incorporate, to their best, some of the important options which arise from different cultures. Hence, there is a need to add new options (or at the very

least modify old ones) in order to accommodate polyethnic groups.<sup>158</sup> Allowing part of an immigrant's culture to flourish in Canada is of great importance because of its contribution to that individual's pursuit of the good.

In particular, I have in mind the importance of religious culture for those individuals who are devoted to their faith. These individuals, I want to argue are different from other so-called religious individuals, in that the individuals I have in mind are those that live, eat, sleep, and breathe the dictates of their faith. Put differently, the individuals I have in mind are to be distinguished from the *pseudo*-religious who attend Church on Sunday's or the Mosque on Friday more on grounds of convention than devotion or dedication. It is reasonable to think that there are many individuals who seek to reap some of the benefits of (say) Christmas or *Eid* and so on, and claim to be religious on specific calendar days, but more than attending these celebrations (or more than a weekly attendance to their place of worship), religion plays a minor role in their lives. I am concerned about those individuals whose religious culture is integral to their life, and the meaningful options which are derived from their culture constitute the *only* set of options to their lives.

If culture, as Kymlicka and Raz argue, is of crucial significance to individuals and their conception of the good, then there is an important need to take the religious culture of devoted individuals seriously. Moreover, there is a need to take the options which are derived from the culture itself seriously because, presumably, the culture of religious

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<sup>158</sup> The *Arbitration Act* is one good example of the type of accommodation that Kymlicka and Raz might have in mind. The request to recognize religious practices was not a request to establish a new legal system, but instead to allow the already established system to incorporate a new option for polyethnic groups.

individuals provides both the meaningful context to its followers as well as their 'horizon of opportunities' – limited as it is, it is still the opportunities which their faith dictates to them. To deny some form of recognition to the culture or the options derived from the culture is a major set back to those specific individuals.

What Kymlicka and Raz have done is provide us with some good reasons as to why liberalism need not be hostile to such cultures, and more importantly, why cultural recognition is of crucial significance for individuals and their chosen ends. To take seriously the recognition of religious culture entails not just having the state agree to letting polyethnic groups have their practices, while at the same time stopping short of actually accommodating it. On the contrary, there must be real (political and legal) implications to recognizing the options which stem from religious culture. In other words, it is not a matter of simply letting polyethnic groups be told that the state respects their practices, but there is an actual need to give the practice the proper recognition within the political and legal constructs of the state. The issue of faith-based arbitration presents a good example. Allowing devoted Muslims to resolve their marriage dispute through Islamic personal law while at the same time not acknowledging the divorce terms through the Canadian legal system (by way of altering the terms of child support, custody, tax claims for these individuals based on their religious framework) marks an example of a practice that the state allows but does not actually legally or politically recognize. In this regard, the meaningful option of having divorce settled properly for religious individuals (to which religion means the world to) is not supported or given due recognition by the state, which in turn shows little to no recognition of the religious

culture from which the practice stems. Instead, what ought to be taken from the request that religious arbitration be given recognition is that the state should actually take into consideration the real implications which arise from the practice being observed. The option of faith-based arbitration cannot really be considered as being 'real' if the legal system does not follow through by way of accommodating it (i.e. does not follow through by granting the religious form of the divorce on the divorce itself). Put differently, the terms of divorce - to be properly recognized - would have to concur with those of the religious culture and not any other set of beliefs. This is part of what it means to recognize a culture, in particular a culture that is of great significance to its followers.

This all ties back to the significance of culture that Kymlicka and Raz have been able to bring attention to. I think it suffices to say that we need to, at least, take seriously both religious culture (because of its contribution to individual's conception of the good) and the options/practices which come as a result of the religious culture itself. To just throw out the option of faith-based arbitration for those whose culture provides the only meaning to their lives is to hinder those individuals to a great degree - one that liberal principles would not be much in favor of let alone want to endorse. By removing the option, the state hurts both the religious culture from which the practice comes from and the individuals to whom this is of absolute importance and necessity.

I hope to have not jumped ahead of myself and given the impression that the above gives us reason to allow any and all practices found in cultures, instead, I hope to have given some reasons as to why recognizing and accommodating cultures (and their options) is an issue which needs to be taken seriously. Furthermore, I hope to have

provided some reasons to why we should avoid the option of excluding faith-based arbitration. It is easy at times to reduce the debate to an issue over divorce terms, but in reality what is at stake here is the importance of *personal law* for those devoted individuals whose religion does not make up a part of their lives, but is their whole life. For them, and to the importance of their religion, I think that liberal states, at the very least, owe taking their wish for religious arbitration seriously - serious enough that liberal states ought to at least consider the form that the practice should take rather than just completely rejecting it.

I now want to turn to one potential drawback which might arise if we are to make the option possible before I outline some suggestions regarding the form that the option should take if we are to meet Raz's 'morally acceptable' criteria. For the most part, something has to be said about those that do practice their faith but wish not to follow through with religious arbitration.

### **Having the Option**

Having provided, what I think are, plausible reasons why we should take seriously the option of faith-based arbitration and why we should make the option available in at least some minimal form, I want now to acknowledge one potential drawback to making the option possibly available. It has to be acknowledged that by making the option possible there may now be pressure exerted on members of the religious community by their community leaders (or possibly other members) to have to practice the option. This certainly was the case when Mumtaz Ali put forth the proposition that 'once the "Sharia Court" was available to Muslims, they would be required, as part of their faith position,

to settle disputes only in that forum, if they were to be regarded as “good Muslims”.<sup>159</sup> While this statement is up for questioning, it did, however - indirectly at least - silence those religious members who were not fully in favor of Sharia Courts, as well as exerted pressure on other Muslim individuals who originally were in favor of the Canadian Family Law procedures to change their view to be more in favor of Sharia courts.

This certainly creates difficulty for those members who still want to maintain their religious membership in their community but also do not want to pursue the religious arbitration route (for whatever reasons they may personally have). Prior to making the option possible, it was always easy to avoid it because the option did not exist. Hence, the worry over community pressure or the worries of being ostracized by other community members could not be much of an issue since the option never existed to either be pursued or rejected. But now that the option may be a possibility, the fear of facing group pressure and ostracization by group members becomes a potential reality.

The usual response to the dilemma of group pressure on other members to conform has usually been the reassurance in the political doctrine of the ‘right to exit’, which all members of liberal states are said to be guaranteed. That is, in one form or another, all members of liberal states are granted the right, for example, under the Canadian *Charters of Rights and Freedoms* to ‘freedom of association’<sup>160</sup> which can equally be read as the ‘freedom to *dissociation*’. Members of the state are free to associate with whatever members (or groups) they so desire – this is a guaranteed right.

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<sup>159</sup> Boyd Report, p. 3.

<sup>160</sup> Charter, section 2(d).

However, one can certainly take a step back and question what such a right, such as that to exit, really means.

Brian Barry helps shed some criticisms on the political right of exit. In particular, one has to ask if the option of exiting is even a possibility for some individuals. Barry takes into consideration three separate sets of costs that individuals may endure if they are to leave their community. They are intrinsic, associative, and external costs. For purposes of this discussion, I want to briefly introduce the intrinsic cost. This form of cost relates to the price that individuals will have to personally endure if they are to leave their community. 'The intrinsic cost that [Muslims] suffer are those that are inherent in the fact of no longer being in the [Muslim community]. What these costs are will in each case depend on their beliefs.'<sup>161</sup> That is to say, for some individuals the right of exit is compared against the possibility of eternal damnation which all of a sudden makes the option of exiting not very viable to those individuals. So while it may be true that individuals have the right to associate or dissociate with whomever they choose, it has to be kept in mind that this is much easier said than done. For some individuals, leaving their religious community is a very difficult option to exercise and would require the individuals to take an enormous step in their lives.

I have to admit that this is a problem and a drawback for those that still wish to maintain their status in their community but choose not to pursue religious arbitration. While the state would never force individuals to take up the option of faith-based arbitration against their will, one does have to bear in mind the internal pressures which

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<sup>161</sup> Barry, Culture and Equality, p. 150-1.



come from community members on those that do not want to go ahead with the practice. In addition to this, and to further complicate things, how other community members choose to treat those that do not go through with available practices is also something that liberal states cannot change. Barry points out that there are associative costs that 'arise as a result of decisions taken by group members that they are permitted to take by a liberal state. Thus if members of the [Muslim community] breaks off social relations with you as a consequence to [for example] your expulsion, this is something that they are free to do. People in liberal societies cannot be prohibited from being narrow-minded and sectarian in this kind of way.'<sup>162</sup>

It was always easier for the non-conforming individuals when the option did not exist. But now that the option may exist, I have to admit that the issue is no longer that simple. However, I do want to emphasize that, as difficult as it may seem, those individuals do have some room for pursuing other options outside the community or in other communities. Even though they bear some intrinsic costs, this is not to be taken as though they have no chance of entering other Muslim communities. For instance, the Progressive Muslim Union (PMU) is one such group that practices Islamic principles but does not favor the adoption of any religious forms of arbitration. The communities which are organized and run by the PMU are one such alternative to individuals. This ultimately comes down to a decision that a member would have to make on their own.<sup>163</sup>

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<sup>162</sup> Barry, Culture and Equality, p.151.

<sup>163</sup> In a sense, the decision to stay in a community whereby the individual may not fully agree with the tenets of the faith is similar to the inner workings of some churches. In some areas of Christianity, there are some set-ups that favor the male more than the female figure. For instance, there are churches where only the male can hold a ministry position. In such cases, there will always be the painful decision for some female members regarding whether they should remain in the group or not. This is a decision that

On the whole, I think this drawback is important to acknowledge but it does not give us enough grounds to reject making the option of religious arbitration possible. Individuals have to make up their own minds and sometimes the consequences are of great impact to their lives – this much has to be acknowledged. However, this should not be the grounds to deter us from making the option available.

### **Putting the Faith Behind Faith-based Arbitration**

In this final section it is time to turn over to the issue of the ‘moral acceptability’ in regards to the option of faith-based arbitration. So far, I have argued that the option should be taken seriously for reasons having to do with the importance of religious culture in relation to both its members and to the parameters of liberal theory. Moreover, I have argued that despite the drawback that occurs from making the option possible, we still have countervailing reasons for keeping the option possible. Having argued for this alternative, the form in which the practice should take remains to be answered. I want to turn to this issue partly because it has never been in my interest to suggest that the practice should occur with no restrictions. This is a point which surely Kymlicka and Raz would agree upon – the practice needs to meet certain limits.<sup>164</sup>

Unfortunately, in the interest of space, I will not be able to spell out, in detail, the form that the practice should take. This is primarily because it is an entire subject on its

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only the individuals themselves can make. Whether they want to remain in their particular sect of Christianity or instead to leave and join another sect whereby women play more of an active role in the administrative aspect of the Church is a decision they have to make, it is no one else’s.

<sup>164</sup> Interestingly enough, even those in favor of religious arbitration, reported Boyd, were in favor of liberal checks and balances in order to secure protection against the types of abuses most commonly feared under the banner of religious arbitration. Boyd writes, ‘Virtually all of the respondents favouring religiously based mediation and arbitration advocated for additional safeguards to be applied where family law matters are to be arbitrated in order to prevent the kind of discrimination and inequity most feared by the opponents’, p. 68.

own and would unarguably need a full length treatment in a book of its own in order to work out the specific details of religious arbitration. The Boyd report itself is nearly a 150-page report dealing with the issue, whereby Boyd outlines in total 46 recommendations that need to be in place if the option is to exist. I have no intention in this section to go over, in any detail, the Boyd Report. However, I do intend on drawing on my previous chapters in order to help outline in broad terms the kinds of requirements that I think need to be met if the option is to pass through Raz's 'moral acceptability' criteria.

In particular, I have two considerations which were introduced in the previous chapter that I think can help shed some light on what the limited form needs to include. The first of these is the need for prohibition based on independent extrinsic reasons such as the Harm Principle and/or a universal code such as that of Human Rights. The second consideration will be the assurance of autonomy at the core of any practice – for reasons we already looked at in previous chapters but will be helpful to rearticulate. I now want to turn to each of these considerations.

### **Extrinsic Reasons**

Any limitation placed on the option of faith-based arbitration cannot be based on the state arguing that there is no value in the practice itself. As it may be recalled, the doctrine of value pluralism makes any such claim difficult to maintain. It is difficult to argue that the practice is not valuable because presumably to do so would suggest some hierarchical set of values whereby, the practice of religious arbitration does not appear on the list or appears near the bottom of such a list. Such claims cannot be made by the state

due to the incommensurable nature of values and the lack of any such *summum bonum* hierarchical list. Hence, to prohibit the practice on grounds of it not being valuable will not suffice. Instead, any limited form of religious arbitration will have to be based on an independent extrinsic reason based on the avoidance of harm to others. That is to say, if aspects of the practice involve harming the rights of individual members, then those aspects themselves can either be prohibited or altered as to ensure that the right in question is no longer being violated.<sup>165</sup> This prohibition will, in turn, be based not on grounds of whether the state values a conception of the good but will instead be based on the grounds that the practice itself engages in the violation of a right which is cherished by the state (or something like the Universal Declaration of Human Rights). The main point of this claim is that the restriction does not pick on any specific group or practice but any and all practices which violate this principle. Essentially, it is a standard that liberal principles will not allow us to violate – irrespective of how important the practice is to its member.

One could step back at this point and question whether having something like the Harm Principle leads us to violate the doctrine of value pluralism, in that all of the sudden there appears to be something that we do in fact value and measure to be of great importance. I want to, nonetheless, suggest that I consider the independent notion of harm to be different from the point that the doctrine of value pluralism was getting at.

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<sup>165</sup> For example, Boyd goes through extraneous length to secure protection to both children and vulnerable women in her recommendation for changes to the *Arbitration Act*. In her 9<sup>th</sup> recommendation Boyd writes ‘The *Arbitration Act* should be amended to permit a court to set aside an arbitral award in a family or inheritance matter if: (a) the award does not reflect the best interest of any children affected by it; (b) a party to it did not have or waive independent legal advice. . . ‘p.134. While this is only one of many recommendations, it reveals the great length that is ready to be taken to ensure that such members of society are not harmed by engaging in the option of religious arbitration.

With regards to value pluralism, the main concern was to show that different ways of life – whether it involves a career in academics, medicine, in building relationships and friendships and so on – cannot be compared or ranked and that each set of pursuits contribute different and incomparable values to those that engaged in them. I find this point to be different from the Harm Principle in that while certain ways of life are still deemed valuable in and of themselves they cannot be supported because of their violation of a cherished right by the state. The Harm Principle, I want to suggest, is independent of the doctrine of value pluralism in that it places restrictions which, in turn, do not allow for certain practices, however, the principle itself does not necessarily deny that the practices have no value.

Therefore, in regards to the first consideration, the form of the practice needs to ensure that the practice itself does not lead to the worries and abuses that members of society fear will come about from the recognition and accommodation of religious arbitration.

### **Autonomy Reasons**

The second claim which I would like to draw upon is the importance for protecting autonomy at the core of any state supported practice. As Raz points out '[a]utonomy is a distinct ideal, and it can be pursued in different societies which vary considerably in the other aspects of the pursuits and opportunities which they afford their members. Autonomy is, to be sure, inconsistent with various alternative forms of valuable lives. It cannot be obtained within societies which support social forms which

do not *leave enough room for individual choice*.<sup>166</sup> I have tried to show in the previous chapter that autonomy ought not to be taken as one out of several aspects of liberalism but instead as a central component. Autonomy, as we saw, is crucial for individuals and their pursuit of the good. Earlier in this chapter, it was argued that we need culture to provide the options. Autonomy and culture go hand in hand in that we need autonomy to pursue the options that our culture makes possible. It is not enough to say that culture provides the possible goods; autonomy is just as crucial for the pursuit of the good. Hence, for an option to exist, and moreover, to be consistent with Raz's moral acceptability criteria, the ideal of autonomy must be present at the core of the practice. In drawing back on my earlier point concerning the potential difficulty created for those who want to remain in their community but also want to opt out of the religious arbitration option, it remains of crucial importance (for them and others like them) to 'leave enough room for individual choice' in the practice itself. According to Raz, then, for a practice to be morally acceptable, it must, at the very least, meet the demands of liberal societies. That is, it must ensure individual room to exercise choice in accepting or rejecting the options, as well as securing (irrespective of any group of individuals) that the practice itself does not lead to the types of violations that liberalism and human right codes aim to eradicate.

At the end of the day, I hope we can now come to some realization of how important the recognition of cultural practices can be and why liberal societies should take the issue seriously. However, none of this should add up to accepting the practice in

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<sup>166</sup> Raz, M of F, p. 395, my emphasis.

its entirety with no restrictions. Instead, we must aim to integrate the practice within the parameters of liberal society and make it acceptable by such standards. I hope to have not disappointed the reader at this point. Rather, I hope to have added to the debate by giving something for both minority groups and liberal society to think about. It is important to understand the form that the practice ought to take in accordance with avoiding individual harm and allowing personal autonomy to flourish. I would like to end this project on a note by Marion Boyd which urges us to set up the practice in a way that would be both appropriate to liberal society and would still leave the decision to those to whom it is of great significance for. If we establish the parameters of moral acceptability, then maybe we should have a little faith in faith-based arbitration.

Understanding that not everyone will choose to resolve legal disputes in the same manner is central to seeing what is at play in this debate. . . Just because we may disagree with the manner in which this alternative is used by some individuals does not mean we are allowed to deprive them of the right to use it, as long as they are using it *in an appropriate manner*. Therefore, as long as true consent is obtained, each individual should have the right to make decisions for her or himself, even where those decisions are not those the majority of others would make.<sup>167</sup>

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<sup>167</sup> Boyd Report, p. 74-5, my emphasis.

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