

Are Cultural Rights Human Rights?
A Cosmopolitan Conception of Cultural Rights

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ABSTRACT: The liberal conception of the state is marked by an insistence upon the equal civil and political rights of each inhabitant. Recently, though, a number of writers have argued that this emphasis on uniform rights ignores the fact that the populations of most states are culturally diverse, and that their inhabitants have significant interests *qua* members of particular cultures. They argue that liberals should recognize special, group-based cultural rights as a necessary part of a theory of justice in multicultural societies.

In this thesis I examine the idea of special cultural rights. In the first part (Chapters 1 to 4), I begin by setting out some of the different conceptions of culture and multiculturalism that are involved in the debate over cultural rights. I then discuss three claims made by supporters of special cultural rights: (1) that having culture is an essential part of individual autonomy; (2) that people have morally significant interests *qua* members of particular cultures; and (3) that these interests are inadequately protected by existing liberal conceptions of human rights. Although I conclude that (1) is correct, I argue that both (2) and (3) are mistaken. Among other things, I suggest that the version of culture relied upon by supporters of special cultural rights is an implausible one and I outline what I take to be a more plausible, cosmopolitan conception of culture.

In the second part (Chapters 5 to 9), I begin by looking at specific instances of cultural rights-claims, and analyzing the concept of cultural rights *qua* rights. I consider the practical and conceptual difficulties with special cultural rights at great length. But the core of my thesis is that our interest in culture lies in its contribution of worthwhile goals and options, and that this interest lies in culture generally rather than in particular cultures. Hence, adopting a special or group-based distribution of any right to culture would seem to be inconsistent with liberal egalitarian principles. If there are such things as cultural rights, I argue, they are general rather than special rights. I conclude by offering a very preliminary account of what a cosmopolitan conception of cultural rights might involve in the case of the right to free association and language rights.

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Défiez-vous de ces cosmopolites qui vont chercher loin dans leurs livres des devoirs qu'ils dédaignent de remplir autour d'eux. Tel philosophe aime les Tartares, pour être dispensé d'aimer ses voisins. L'essentiel est d'être bon aux gens avec qui l'on vit.

Jean-Jacques Rousseau, *Émile*

If everybody is looking for it, then nobody is finding it. If we were cultured, we would not be conscious of lacking culture. We would regard it as something natural and would not make so much fuss about it. And if we knew the real value of this word we would be cultured enough not to give it so much importance.

Pablo Picasso

Chapter One

Introduction

According to the website of the Serbian Ministry of Information in March 2000, “the Constitution of the Federal Republic of Yugoslavia made it possible to [sic] Albanians in Kosovo ... to enjoy the highest degree of human rights and liberties”.¹ Whether, though, the federal constitution also permitted the Yugoslav army to cleanse Kosovo of ethnic Albanians – as it attempted to in early 1999 – the ministry’s website doesn’t say.²

However, the fact that even the Milosevic regime paid lip service to the notion of human rights helps to highlight a relevant debate in contemporary liberal political theory. It is a commonplace that all states are culturally diverse: the population of any is, to some degree at least, made up of people from different ethnic, national, religious and linguistic groups who live, in Kant’s phrase, “unavoidably side by side”.³ At the same time, the standard liberal conception of the state is marked by an insistence upon the equal civil and political rights of each inhabitant, regardless of their membership of such groups.

The disagreement among liberals (and others) concerns whether this ideal of uniform human rights is sufficient to deal with the sorts of issues that arise within multicultural societies. Specifically, a number of writers object that the liberal emphasis on uniform human rights ignores the significant interests that people have *qua* members of different cultural groups. In particular, they argue that special, group-differentiated cultural rights are needed in order to protect these interests from majoritarian rule. On a host of issues - from self-government claims, indigenous rights, language use, education, immigration and citizenship, religious freedom, hate speech, land claims, affirmative action, through to the legal enforcement of traditional customs and values - political claims of groups and individuals are increasingly justified by reference to the need to maintain the integrity of specific cultures.

¹ <http://www.serbia-info.com/news/kosovo/facts/summary.html> – dated 14 June 1998 and visited on 7 March 2000.

² See e.g. “UN finds proof of ‘ethnic cleansing’ in Kosovo” by Judith Miller, *The New York Times*, 3 June 1999, “Kosovo: Was It Worth It?” by Timothy Garton Ash, *The New York Review of Books*, 21 September 2000.

³ Para. 43 of “The Metaphysical First Principles of the Doctrine of Right”, *The Metaphysics of Morals*, cited in Waldron (2000:155).

Without special rights to protect these cultures, the objection goes, the well-being of members of minority groups remains under threat.

It might appear in light of events in Kosovo, as well as the resurgence of ethno-national conflict in general over the past decade, that cultural rights are a just and appropriate solution to the pressing needs of cultural minorities in diverse societies. To many, cultural rights also represent a necessary antidote to (what they perceive as) the excessive individualism of much rights discourse; giving weight long overdue to the role played by communal goods and group affiliations in people's lives. And if we were to judge by the *déluge* of academic writing on multiculturalism in Europe and North America since the end of the Cold War, we might even begin to believe that cultural rights are an idea whose time has come. But my own view, which I hope to bear out in the course of this work, is that special cultural rights are an unacceptable (because illiberal) solution to the normative problems which multicultural societies present.

1. The issues

It is true that, until recently, liberal political theory largely neglected the sorts of issues raised by cultural diversity. Nor is the concern shown by proponents of cultural rights over this neglect somehow misplaced. On the contrary, it is essential that such diversity is taken seriously, which means *inter alia* seriously examining its consequences for the uniform conception of human rights. It could well be, therefore, that some cultural rights-claims *are* consistent with liberal values – indeed, that they are something which a genuinely liberal theory of justice requires.

It is important, then, to be clear about the nature of my disagreement with the idea of special cultural rights. In particular, my defence of the ideal of uniform human rights shares the same general premiss as such special rights: i.e. that culture is essential to individual well-being. Of course, there is nothing that is distinctively liberal about this claim; it is one that many communitarians, for example, might readily agree with. Indeed, it is also fairly truistic: few people would actually care to deny that culture (in some general, unspecified sense) is important.

What in my view is distinctively liberal is the fact that that many (though clearly not all) arguments for special cultural rights base themselves on a particular concern for autonomy, i.e. the idea that people's lives go better when they are

autonomous, and that an essential element in living an autonomous life is having culture. There is also, of course, an important argument to be had about the weight to be given to autonomy as a liberal value relative to others, such as tolerance for example (there is also an important argument about whether culture is as important to autonomy as, say, goods like food and shelter, or political participation). Nonetheless, I will argue, the claim that culture matters to autonomy is one that liberal political theory ought to take seriously as a basis for rights-claims.

This common foundation aside, however, the presuppositions of those in favour of special cultural rights differ radically from my own, and with important consequences. On closer examination I mean to show that existing accounts of such rights contain important mistakes. They rest on a series of claims (e.g. about the idea of culture, the nature of cultural membership, the character of political institutions, etc.) that are not only empirically implausible but also, I will argue, conceptually flawed. Hence, although their supporters are typically committed to showing that special rights are consistent with liberal values, their accounts suggest rights which are anything but.

The starting point for this thesis centres upon the idea of culture itself. Although it is subject to many different meanings, the sense of ‘culture’ upon which most political theorists tend to rely is that which arises primarily from ethnic, national, linguistic, and religious differences (what I shall call “cultural groups”). About this rather hazy concept, however, there is room for significant disagreement over whether ‘culture’ exists primarily as distinct entities called ‘cultures’ – each of which forms more or less a separate world unto itself – or whether it is perhaps better understood as a single, though wildly heterogeneous, *ethos* containing many cultural elements of diverse origin, and in which particular cultures play a much lesser role.

Supporters of cultural rights would certainly prefer us to adopt the former version. On this view (“the communitarian view”), cultures are paradigmatically coherent entities comprising comprehensive forms of life, embodied in a homogenous set of values, beliefs, practices and institutions which mark a broad range of human activities. It is a characteristic of culture following this approach that it not only provides particular options for individuals but that it offers an integral framework for an entire society. The idea of special cultural rights, therefore, is to protect this framework, to ensure that people are able to live securely within their particular culture even where they share a broader society with nonmembers.

On the opposing view (“the cosmopolitan view”), however, such a project looks incoherent. While it is an obvious truth that ethnic groups tend to produce distinctive cultures, there is no reason to think that these are either internally consistent or comprehensive – the ideal of such cultures offered by the communitarian view is purely chimerical. Quite naturally, most groups are reluctant to acknowledge that what they think of as their ‘own’ culture in fact has much in common with others, contains elements from many different sources, and exists within a broad array of competing ideas and practices. Equally, the cosmopolitan view of culture also tends to emphasize the plurality of cultural elements within each group, and the lack of any overall coherence among them. On this view, arguments for special cultural rights seem highly uncertain, at least not without a great deal of further specification of what in particular is being protected and why.

A second major source of disagreement concerns the concept of the person, which is in large part guided by the conception of culture that one adopts. The two concepts intersect in the notion of *cultural membership* – that people are naturally members of various social groups, including cultural groups. The disagreement concerns the conceptual relationship between somebody’s belonging to a cultural group and that person’s sense of moral agency, their substantive values and beliefs.

Proponents of special cultural rights place great emphasis on the idea of cultural membership: according to them, people cannot help but feel a strong bond to the culture of their group. Indeed, if we adopt a strong communitarian view of personhood, it is the only culture they know. On this view, membership of a culture (i.e. a cultural group) inevitably colours a person’s autonomy, because their ability to choose between different options is guided by their sense of personal identity and their beliefs about what is valuable. In this way, the idea of cultural membership makes vivid the particular interests that people have as a consequence of belonging to specific cultural groups, and helps explain the need for special rather than general rights.

In this thesis, however, I mean to put forward a quite different conception of cultural group membership, and its relationship to personal autonomy. This begins with drawing a basic distinction between membership of a cultural group (how a person is perceived by others) and personal identity (how a person perceives themselves, including their values and beliefs). However, whereas supporters of special cultural rights claim that membership significantly affects identity, I argue that

there is no obvious reason for this, and that the two categories can and do frequently conflict. As such, it is entirely possible (and, moreover, quite typical) to have members of cultural groups who don't take the group's culture especially seriously, as against outsiders who do.

Adopting this conception of membership, I argue, has a number of consequences. First, it avoids the commonplace but deeply misleading picture of members of cultural groups as people bound by common beliefs and values. On this view, members share a distinct social identity and typically a familiarity with the group's culture, but not necessarily much else. Any interests consequent on membership itself are therefore likely to be insubstantial, and certainly much weaker than the other sorts of interests that people have. Also, supposing that people do have significant interests by virtue of their (own) identification with culture, then those interests are properly *qua* one's personal identity not *qua* membership. I suggest that the interests that people *do* have by virtue of identity *per se* are relatively weak, are often exaggerated by supporters of cultural rights (e.g. Tamir) and certainly not autonomy-threatening.

This alone ought to make us suspicious of the claim that people have special interests in respect of their cultural membership, rather than in respect of their particular values and beliefs. It should also make us doubt whether cultural *membership* (as opposed to availability) matters all that much to the development and exercise of moral agency and personal autonomy. Most of all, it should make us question the group-basis of special cultural rights, since, as I argue, membership of the group in question isn't the characteristic relevant to the justification of the right.

The third area of disagreement concerns the nature of people's interests in cultural diversity in general. If we follow the orthodox multiculturalist line, people only have significant interests in their own culture. Their interests in other cultures are thought to be either nonexistent or, in any event, much less significant than they have in "their own". Hence, a general distribution of cultural rights would – among other things – very probably lead to the oppression of cultural groups because nonmembers would have a political say in minority cultures. I mean to challenge this view, suggesting that, although people's preferences may track their membership of particular groups, their interests *qua* autonomous persons are identical with those of nonmembers. In other words, if the existence of a culture is valuable because of what it contributes to human autonomy, its existence is valuable for members and

nonmembers equally. It is not a disagreement about the value of culture, but *who* it is valuable to. On this view, group-based distributions of cultural rights aren't simply misguided but directly antithetical to a flourishing liberal society.

These, then, are the major points of my argument. It also relies, however, on making a number of exclusions – some of which are merely tactical while others require justification. First, it should be clear that this thesis concerns rights-based arguments – i.e. that dimension of political argument that focuses the respect that is due to people's compelling interests under majoritarian systems – rather than goal-based or other sorts. As far as it goes, the importance of cultures may well fit under a goal-based system and *mutatis mutandis* the same arguments apply. However, the focus on rights has the effect of limiting from consideration certain aspects of argument – there is less attention paid than otherwise should be the case to issues of legislation and public justification in culturally diverse societies. These are important questions, and the relative absence of their discussion here is not meant to imply otherwise.

The same is true, by extension, to arguments based on outright relativism and strong moral skepticism (if there is a spectre haunting this thesis, it is relativism). These aren't entirely undiscussed here – relativism as an argument for tolerance is reviewed in Chapter 8 – but to a large extent they fall outside the scope of discussion. There are several reasons for this. The first is that, although the language of cultural relativism is frequently deployed on either side, there is good reason to think that what is meant is something else. In particular, the 'cultures' discussed are almost always groups based around ethnic, national, religious or linguistic differences. And yet there are also cultures based around workplaces and neighbourhoods, for example. If relativist arguments about culture hold true, therefore, then it is not clear why they only seem to apply to certain *sorts* of cultures rather than across the board.

More generally, it is difficult to escape the conclusion that many of the demands of cultural minorities are perfectly intelligible within a liberal framework, making relativistic claims at least partly redundant. A corollary of this is that, if relativism were true as a general thesis, there would be no basis for discussion whatsoever, as opposing viewpoints would be literally unintelligible to one another. The next point is more frequently made; that relativism is simply descriptive, and that deriving tolerance as a prescription from this fact is a mistake. Even if cultural

relativism is true, this does not in itself entail that either special cultural rights are correct or that general human rights are wrong.

The remaining points are slightly more definitional. Both ‘liberalism’ and ‘culture’ are broad concepts, and some argument is needed to defend the particular views that I am putting forward here. In particular, some might complain that this thesis puts forward a view of liberalism that is too narrow and that to claim autonomy as liberalism’s primary value is to ignore some important competing claims. There is much to be said for this view, but it is ultimately beside the point. If I take autonomy as the primary value, then so too do most exponents of special cultural rights, and my argument becomes an extended *tu quoque*. In the end, I am more concerned to address the core substance of the arguments than labels, and it is of secondary concern whether the writers involved identify themselves as liberal or not. It is sufficient for my purposes that, from among the various conceptions of liberalism, autonomy or liberty is treated as a primary value among liberal egalitarians.⁴

Another definitional point concerns the terms ‘multiculturalism’ and ‘cultural groups’. As will become clear, my concern is more with groups based around ethnic, national, religious or linguistic differences (what I will call, for want of a better term, cultural groups) rather than social groups in general (e.g. disabled people, the aged). More generally, I use the adjective ‘multicultural’ to describe a population containing more than one cultural group. In making these stipulations, however, I am aware that both terms have been used to describe a great many things. I discuss this together with an explanation for my stipulations in Chapter 2.

A similar definitional point concerns the idea of human rights. I tend to use the terms interchangeably with those of liberal uniform rights, but an obvious criticism is that this is, of course, not true. That is, there are some human rights that are not necessarily civil or political – some are economic and social, some are cultural, some are group-based, and so on. Arguably, human rights are not always liberal rights in the sense that there are conceptions of human rights that derive from nonliberal principles (e.g. certain religious conceptions). Equally, some might argue that liberal rights are more extensive than human rights in the sense that the latter describe only

⁴ By liberal egalitarianism I mean a commitment to equality not in the strong sense of equality of outcomes, but in the ‘weak’ sense of equal opportunities (including resources to take advantage of opportunities) based on equal worth. See e.g. Lukes’s characterization of an egalitarian society as one in which “one person’s well-being and freedom are regarded as just as valuable as any other’s” as well

those rights arising from basic human interests, while liberal rights also protect certain valuable, but nonbasic interests. I mean to address each of these points in turn, defending throughout the importance of uniform rights as a liberal ideal. The main point I wish to establish is that, however we classify rights, there is an important distinction between rights to goods for the benefit of all (e.g. clean air), and rights to good for the benefit of some (e.g. private property), and that special cultural rights are on the wrong side of this line.

My last point is to explain the relative absence of discussion of actual minority rights frameworks in various constitutions and international instruments. I have tried in the course of this thesis to discuss real world examples as far as practicable. However, several writers have made much of certain arrangements – either existing or proposed – which appear to indicate actual recognition of the concept of special cultural rights.⁵ Among the examples referred to are Article 27 of the 1966 International Convention on Civil and Political Rights (guaranteeing people a right “to enjoy their own culture”),⁶ the minority language education provisions in the Canadian Constitution (providing anglophone and francophone Canadians the right to have their children receive primary and secondary education in their own language),⁷ or the Council of Europe’s 1995 Framework Convention For The Protection Of National Minorities.⁸ The difficulty with discussing such examples, however, is that their philosophical or theoretical underpinnings are at best unclear and at worst simply incoherent. Most examples of minority accommodation, moreover, derive not so much from some principled attempt to deal with issues arising from cultural diversity but from simple political expedience (e.g. systems of ‘reservations’ for native peoples). For these reasons, I believe there is little to be gained from looking at such proposals or arrangements in any detail.

as one which holds a commitment “to rendering everyone’s conditions of life such that these equal rights are of equal worth to their possessors” (1993: 34).

⁵ See e.g. Kymlicka (1995:5).

⁶ Article 27 reads: “In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their own language” (999 UNTS 172, 179).

⁷ Section 23 of the Canadian Charter of Rights and Freedoms 1982, enacted as Schedule B to the Constitution Act 1982.

⁸ ETS No. 157, *adopted* 1 February 1995, entered into force 1 February 1998. The Treaty sets out a number of principles relating to ‘national minorities’, as well as requiring a number of undertakings from member States which are parties to the Convention. However, the undertakings set out are too vague to give rise to any further specific legal obligations on member States.

Another reason for not looking at the constitutional arrangements of certain countries in any great detail is to avoid the error of generalising too much from those examples. If all this gives rise to a certain degree of abstraction, I believe it is preferable to an account of cultural rights whose entire outlook is based on the example of a single country. As Barry points out, too many academic discussions of multiculturalism are skewed by what he describes as “the Canadian obsession with Quebec” (2000:6). My own point of view is far from universal, of course, and in practice it is more or less confined to those states that endeavour to follow liberal-democratic principles but I hope at least to have avoided the sin of assuming local circumstances to be global ones.

The ultimate point of addressing questions about special cultural rights, however, is more than simply an academic one. As one writer has remarked, in many parts of the world people are killing one another and states are disintegrating over questions of rights and public policy that have these sorts of questions at their root.⁹ Political theorists, then, have some obligation to address them as clearly as possible.

2. The outline of this thesis

If rights are meant to protect culture, then it would help if we at least began with a clear understanding of what ‘culture’ meant. Given this need for clarity, Chapter 2 is mainly devoted to the task of elucidating terms and definitions. I set out (very briefly) the idea of culture, identify some of the main versions of it, and isolate the main senses that are relevant to rights-based, normative political theory. This also means focusing on different versions of multiculturalism and conceptions of cultural groups, and the extent to which this has given rise to some confusion. It means clarifying terms such as ‘culture’, ‘cultural group’, ‘multiculturalism’, and ‘pluralism’ – terms which are given different meanings according to the context of the different debates (whether different countries and policies, different ideological perspectives, and/or different academic disciplines) they are employed in.

Because I am concerned with rights-based arguments, and the particular concept of special cultural rights, I also endeavour in Chapter 2 to offer a broad conception of human rights in liberal theory. I mean to identify a liberal ideal of rights

⁹ Will Kymlicka, email to author, 6 March 1996.

as egalitarian and individual, and concerned with autonomy and equal civil and political status. In the course of the thesis I expand upon this discussion and its relevance to the idea of equal distributions of rights and goods, general and special distributions, and the role of rights in protecting communal goods.

Chapter 3 looks more closely at the empirical relationship between culture and moral agency. This is a more substantial starting point for liberal theory, because it seeks to spell out how culture – in a broad sense – is constitutive of agency. Chapter 3 looks in detail at three more specific arguments about the relationship: Taylor, Raz, and Kymlicka. Each writer argues that people are not agents in a vacuum but develop these capacities in relationships with others: each argues strongly that agency is strongly dependant on a social context. However, I also argue that Taylor and Kymlicka (and to a lesser extent Raz) are guilty of overstating the extent to which people need particular communities, and understating the complexity of the relevant social context. This is reflected in the wider literature as confusing the groups (which people are members of) with context (which is the heterogeneous body of ideas and cultural elements which are available, whether sanctioned or supported or not).

Chapter 4 looks at the particular relationship between groups and individuals, particularly the conceptual relationship between cultural membership and personal identity. This involves looking in more detail at the concept of cultural groups, and the literature about group affiliations. Again, I argue, there is a widespread mistake or, at least, a tendency to elide the two concepts. I argue instead that the distinction tells us a great deal about why membership is an inadequate concept: members may have very little preference for their group's 'culture' (such as it is), and nonmembers may have very strong preferences. I conclude that, if anything is an appropriate characteristic, it is individual values and beliefs. However, the fluid and imprecise nature of values (and the possibilities of opportunistic holding of values) makes this inappropriate to form a basis for identifying relevant characteristics (and distributing rights and goods).

Chapter 5 looks at the particular rights claims that exponents of special cultural rights have put forward: it points to a very broad array of rights, and suggests that many sorts of so-called group rights are better understood as individual or uniform rights - this helps distinguish group-based claims for equal rights to the same goods and equal treatment (e.g. civil rights for blacks to obtain jobs and education on the same footing as whites), and group-based claims to special rights and special

treatment to support distinct goods to the exclusion of others (e.g. self-government rights to run a state for whites only). I suggest that this distinction also informs the relationship between general rules and exemption-claims, assimilation and integration claims, and the distinction between self-rule and self-government.

Chapter 6 looks in detail at the conceptual workings of rights – specifically, whether there is any sensible distinction to be drawn between existing uniform rights and special rights. Again, I suggest that although special, group-differentiated rights are conceptually plausible, the burden of justifying such a distribution is especially difficult to discharge. Such rights must identify characteristics such that *all* members of a particular group *and only those members* possess the necessary compelling interests that others do not.

In Chapter 7 I draw the arguments of the preceding four chapters together to conclude that special cultural rights fail to identify a compelling interest that is shared only by members of a group that justifies special rights. On the contrary, the nature of people’s interests in culture are necessarily general because people’s interests in culture are based in their interest in autonomy. As such, special cultural rights are not only misguided, they are also actively harmful because they draw upon arbitrary social distinctions as a basis for distributing rights. Special cultural rights, therefore, are manifestly anti-egalitarian.

If my thesis in Chapter 7 is correct, that the only rights to culture are general rights, then does this mean that human rights are adequate? In Chapter 8 I outline the claim that a general right to culture is capable of informing the idea of uniform human rights, and that the importance of cultural diversity to autonomy dictates that liberal structure is the best way of promoting this. Chapter 8 sketches what a general rights approach to cultural rights might entail: I don’t propose to offer a comprehensive account here, but merely outline its consequences for existing claims about self-determination and language rights. I outline the right to free association and the right to free expression as informed by a right to culture, and aim to demonstrate how the liberal framework of equal rights is wholly consistent with the state taking an active role in promoting cultural diversity. In Chapter 9, I offer some concluding remarks concerning a cosmopolitan approach to cultural rights.

Chapter Two

Rights and Culture

In a thesis about cultural rights, the idea of rights and the idea of culture are surely central concepts. Each is a concept with many different *conceptions*, however, and it is important to be clear which versions are at work when we consider the various arguments in the debate about cultural rights. That is the task of this chapter. Setting out the relevant concepts also means clarifying my use of terms such as ‘multiculturalism’, ‘cultural groups’, ‘liberal rights’ and ‘human rights’ which – like their core terms – can mean different things to different people. This too is part of my task in the chapter below.

1. Culture as an analytical political concept

It is a commonplace that culture is a difficult word to define. One writer thought it one of the two or three most complex words in the English language (R Williams, 1976: 87). Another remarked that, if this were so, it was difficult to know what the other two words might be (Jenks, 1993: 1). A third writer noted that culture “has been used to refer to a great variety of things, often a number of them at the same time” (Geertz, 1973: 91).¹ This latter remark was made in 1963, well before most western countries gave much thought to the politics of cultural diversity, and certainly before ‘culture’ and its offshoot, ‘multiculturalism’, had taken root in the working vocabulary of most political theorists.

Despite this ambiguity, or perhaps because of it, culture is now one of the more popular words in the modern political lexicon. Indeed, it is fast becoming a central concept in political theory without a great deal of analysis as to what it means. Thus, for example, in a recent work by Hans Blokland entitled *Freedom and Culture in Western Society*, the idea of culture plays – quite evidently – a central role in the author’s thesis. It is telling, then, that almost no space is given to explaining what culture is, or at least what the author understands by it, and none to any competing conceptions of what culture might be. Most significantly, Blokland does not count ‘culture’ among the category of essentially-contested concepts (such as ‘liberty’)

¹ More recently, Geertz has remarked that “no one is quite sure what culture is” (2000: 11).

relevant to his argument (1997:6). By contrast, Denise Réaume is exceptional among political theorists in describing culture as “one of the most indeterminate concepts in the political and philosophical lexicon It seems likely that both in the generic and in the particular the concept of culture is essentially contestable and therefore incapable of definition.” (1995, 119-120).²

Whether culture is capable of precise definition, though, is a question I will leave to others. It is enough for the purposes of my thesis to analyze those conceptions that are relevant to normative political theory and the idea of cultural rights. The broad outline of my argument is that there are two main senses of culture which are relevant here – one descriptive, one evaluative. A conception of culture typically involves *inter alia* some account of the relationship between these two senses.

On the one hand, culture is convenient shorthand for describing collective differences in practices and ideas: hence, the widely-accepted idea that different nations and peoples are paradigmatically different cultures. However, culture is also now used to describe the *ethos* of groups of almost any scale: hence, people talk about the culture of a business, about “football culture”, “café culture” or a “culture of denial”, as effortlessly as they refer to such entities as ‘Asian culture’ or ‘Western Civilization’.³

On the other hand, culture is used to refer to those pursuits and activities aimed at producing goods whose value is intrinsic rather than purely instrumental. By convention this includes the principal forms of aesthetic expression (e.g. music, literature, art). More generally, it is held to apply to such categories as religion, philosophy, science and the humanities, in the sense that these are the categories most closely associated with the notion of ‘cultivation’ or human development – they are widely assumed to represent, in Matthew Arnold’s phrase, “the best that is thought and known” (1993: 83).

It ought to be clear, then, that one’s particular conception of culture plays a central role within any account of cultural rights. For if, in that account, culture were simply to refer to any set of practices and values without further specification, then the emphasis placed on the rights of some kinds of cultures (i.e. nations and ethnic groups) rather than others (e.g. small businesses or café-goers) would seem peculiar. Equally, if culture were taken to mean only that category of pursuits and goals which

² See also Rorty (1993), Jones (1998).

are intrinsically valuable, then its relationship with particular groups and with special rights would seem similarly obscure.

My task in the following sections, therefore, is to make clear the different senses of culture relevant to the debate over cultural rights, and the various accounts of the relationship between those senses. The first part of this task is broadly historical in approach: I believe the best way to gain a clear understanding of culture as a normative political concept is to give a very brief overview of its development, however elementary it may seem, in relation to other moral and political ideas relevant to the debate.

(i) Versions of culture

The word culture derives from the Latin *cultura*, meaning ‘cultivation’ – the tending of natural growth.⁴ Even in classical antiquity, though, cultivation meant more than simply the tillage of soil and the improvement of crops: it also signified worship (i.e. the cultivation of beliefs) and the training and education of persons, their improvement and refinement.⁵

The Roman concept of cultivation as human development, though, itself borrows heavily from the Greek notion of *paideia*, or education in its broadest sense – the training of the whole person, in body, mind and spirit.⁶ At the same time, the ancients drew a distinction between physical training, on the one hand, and moral and intellectual improvement⁷ on the other. The essence of education, then, is the development of the faculties (*dunamis*), the training of character (*ēthos*) and the cultivation of virtue.⁸

³ See e.g. Huntingdon (1993; 1996).

⁴ Oxford Latin Dictionary (1969: 354-355, 466-467).

⁵ *Cultura* also referred to one’s style or manner of living; the state of being so refined and civilized; and, pejoratively, the idea of being over-cultivated or decadent.

⁶ It is significant, then, that *paideia* is also translated as ‘culture’ in modern English – see Burnyeat (1998:2): “The Greek word means both culture and education. Plato’s message is that culture should be taken seriously for what it is: education.”

⁷ Literally, “mind and character” (*psuchē*) – see Plato, *The Republic*, Bk iii, 376e (1987: 71).

⁸ See e.g. Aristotle, *Ethics*, Bk ii, 1104a33-b20: “the importance ... of having been trained since infancy to feel joy and grief at the right things: true education is precisely this” (1976: 95); Plato, *The Republic*, Bk iii, 403c: “the object of education is to teach us to love what is beautiful” (1987:106). See also Cicero, *Tusculan Disputations*, Bk i:

“A field, be it ever so fertile, cannot be productive without culture, and it is the same thing with the soul without teaching, so much so that the two factors of production are each of them powerless without the other. But the culture of the soul, that is philosophy (*cultura autem animi philosophia est*)”.

The idea of cultivation features in classical political thought in two ways. On the one hand, there is the special emphasis that Plato gives to *mousikē paideia* or literary education in Book Three of *The Republic*. For the Greeks, the study of *mousikē* (e.g. poetry, music, art, letters) was the basis for education in general.⁹ In Plato's view, the importance of *mousikē* lies in its capacity to teach morality through the representation of affairs, human and divine. Hence, where poetry misrepresents these affairs, it is liable to produce moral error in others.¹⁰ Plato, then, has no difficulty in making education - what was typically a private matter among his fellow Athenians - a matter of *political* concern and one central to the formation of the ideal state. Nor is setting a public curriculum enough to counter poetry's potential for harm to morals: Plato's solution is nothing less than to banish poetry in general from the *Republic*.¹¹

Aristotle, on the other hand, is concerned to give an account of the relationship between habit (*ethos*) and the cultivation of moral goodness, but one that feeds into a more general conception of the role of the state, its constitution and laws, in making men good:¹²

Moral goodness ... is the result of habit, from which it has actually got its name, being a slight modification of the word *ethos*. This fact makes it obvious that none of the moral virtues is engendered in us by nature, since nothing that what it is by nature can be made to behave differently by habituation The moral virtues, then, are engendered in us neither *by* nor *contrary to* nature; we are constituted by nature to receive them, but their full development in us is due to habit [translator's emphasis].

⁹ For a discussion of the translation of *mousikē* see the note on Desmond Lee's translation of the *Republic* (1987:71): such education is properly 'musical' because concerned with the various arts of the muses, hence including *inter alia* philosophy. Note that beyond *mousikē*, classical education involved further study of mathematics and logic, with dialectic at its peak.

¹⁰ Art involves *mimesis* or representation of affairs, human and divine. If moral education involves *inter alia* studying the example of gods and heroes, then the poet or artist has a responsibility to represent such affairs correctly. See the discussion of the role played by cultural materials in Chapters 3 and 7.

¹¹ At another point, Plato does not condemn poetry *per se* but rather those poets whose art involves representation of what was bad and/or misrepresented what was good (i.e. all existing poetry). In other words, there is a place in the *Republic* for responsible poets: "For ourselves, we shall for our own good employ story-tellers and poets who are severe rather than amusing, who portray the style of the good man and in their works abide by the principles we laid down for them when we started out on this attempt to educate our military class" Bk iii, 398a-b (1987: 98).

¹² *Ethics*, 1103a14-b1 (1976: 91). Note that the idea of *ethos* here is equivalent to the idea of *mores* in Latin, which has the same connotations of habit, character, and custom.

The weight given to *ethos* is especially significant, when we consider that it applies not just to the habits of individuals but also to the customs of a population in general.¹³ Education, then, is not to be considered narrowly – the cultivation of virtue not only relies on formal training, but also on the *ethos*, the broader normative environment which people inhabit.¹⁴ More generally, Aristotle follows Plato in regarding education as a matter of political concern,¹⁵ but whereas *The Republic* emphasizes the regulation of *mousikē*, the *Ethics* indicates the role of the state in general, its laws and constitution, in cultivating moral goodness: “Legislators make their citizens good by habituation; this is the intention of every legislator, and those who do not carry it out fail in their object. This is what makes the difference between a good constitution and a bad one” (*Ethics*, 1103b1-25).¹⁶

Aristotle’s account of the relationship between *ethos* and virtue also helps to illuminate a more general point about the classical notion of culture:¹⁷ although *mousikē*, the *ethos* of a group, and the laws and constitution of a *polis* may each tend towards the cultivation of moral goodness, whether they actually do so remains very

¹³ I have used ‘population’ here as a deliberately neutral term. The diversity of states (*polis*), nations and peoples (*ethnos*) was well-known in classical antiquity. However, whatever relationship there is in classical thought between *ethos* and *ethnos*, it is not an equivalent one. At the very least, even if different peoples by definition have a different *ethos*, it is not at all clear that a difference in *ethos* entails a different *ethnos*.

¹⁴ Note that Greeks also used *nomoi* (rules or laws) to refer to different conventions among different peoples. *Nomoi*, however, are properly understood as prescriptive, whereas *ethos* is a broader, descriptive category. As such it seems plausible to treat *nomoi* as a species of *ethos*, at least for the purposes of this thesis. At the same time, it is important to note the general distinction that classical philosophy made between nature (*phusis*) and social convention (*nomos*), and the debate as to whether ethical concepts such as virtue were properly one or the other. More specifically, the dialogue of *Protagoras* asks whether virtue could be taught, or whether it was something generally acquired from one’s social context, like language, without special instruction.

¹⁵ See *The Republic*, passim; *Ethics* 1179b29-1180a16 (1976: 337).

¹⁶ See also 1130b8-32: “broadly speaking, most of the acts laid down by law are enjoined from the point of view of virtue as a whole, because the law directs us to live in accordance with virtue, and refrain from every kind of wickedness. Also the things that promote virtue in general are the regulations laid down by law with a view to education in citizenship” (1976: 176). However, Aristotle recognizes that being a good citizen and being a good person are not always the same. Equally, it is clear from the *Laws*, that the promotion of virtue via the state was of equal concern to Plato.

¹⁷ Of course, it is open to question whether there was a classical notion of culture in the modern sense of culture as an entity. However, the basis of my approach here is that we should not be overly-restricted by the lack of equivalent terms. See e.g. the approach taken by Waldron in respect of rights (1988: 62): “There is a common view that the concept of a right was unknown to the ancient philosophers, and the evidence for this view is supposed to be that the Greeks had no word that is translated by our term ‘a right’. Now, even if this is true about Greek vocabulary, it does not follow that in Greek political philosophy there is no sentence, paragraph, or chapter that presents an argument sufficiently close in spirit to modern arguments appealing to rights to justify being regarded as a rights-based argument. Whether any Greek arguments are of this sort is a matter of interpretation; it is a matter of our understanding of the substance of what they wrote not of the particular terms in which they expressed themselves”.

much a question of fact in each case.¹⁸ That is, however much diversity there may be between the customs and poetry of different peoples, for instance, and laws and constitutions of different states, the extent to which each cultivates moral goodness remains an objective fact by which their particular excellence may be judged.¹⁹

In general, ‘culture’ in early modern thought follows the classical sense of cultivation.²⁰ Hence, Bacon refers to “the culture and manurance of men’s minds”,²¹ the King James Bible implores “seed unto our heart, and culture to our understanding, that there may come fruit of it” (4 Ezra 8:6), and *Leviathan* notes that “the labour bestowed on the Earth, is called *Culture*; and the education of Children a *Culture* of their mindes” (II.31; 399-400).²² Once more, the focus is upon education as the development of mental capacities and the cultivation of moral virtues. Greater emphasis is given, though, to the cultivation of one characteristic in particular.²³

¹⁸ This was certainly not a unanimous view, however. The Sophists claimed that moral concepts were *nomoi*, or social conventions, and doubted that there was any external basis to judge between them where they differed. Note that Aristotle left open the possibility that the moral goodness of a constitution was not the only measure by which a constitution could be judged: he allowed also that there may at times be a difference between the qualities that make a good citizen and a good person: e.g. a good citizen of a timarchy is not likely to possess all the moral virtues of a good person.

¹⁹ This is also consistent with those cosmopolitan elements in Stoic thought which suggested that, its diversity notwithstanding, humanity formed a single *moral* community, one which involved obligations independent from those to one’s family or fellow citizens. See e.g. Cicero:

“But it seems we must trace back to their ultimate sources the principles of fellowship and society that Nature has established among men. The first principle is that which is found in the connection subsisting between all the members of the human race; and that bond of connection is reason and speech, which by the processes of teaching and learning, of communicating, discussing, and reasoning associate men together and unite them in a sort of natural fraternity” (*On Duties*, Book 1: XVI).

Note that Cicero did not think that this lessened one’s obligations to obey local norms, nor that obligations to foreigners were necessarily prior to obligations to fellow countrymen: he himself argued that the highest duty is to one’s country.

²⁰ Though in part *via* the less secular, medieval notion of *cultura mentis*.

²¹ Cited in Eagleton (2000:1). See also Bacon, *Essays*: “Of Custom and Education”, chapter 39, “therefore, since custom is the principal magistrate of man’s life, let men by all means endeavour to obtain good customs. Certainly, custom is most perfect when it beginneth in young years: this we call education, which is, in effect, but an early custom” (213). See also Montaigne, *Essays*, “On Presumption”, chapter 10, “men who have little care of the culture of the soul (*culture de l’âme*), but that look upon honor as the sum of all blessings, and valor as the height of all perfection”.

²² *Leviathan*, ed. C. B. Macpherson (London: Penguin, 1968) Part II, Chapter xxxi at 399-400. See also, the Apocrypha, King James’s Bible (1608) 4. Ezra 8.6 “O Lord, if thou suffer not thy servant, that we may pray before thee, and thou give us seed unto our heart, *and culture to our understanding*, that there may come fruit of it; how shall each man live that is corrupt, who beareth the place of man?”; Milton, *The Readie and Easie Way to Establish a Free Commonwealth* (2d ed: 1660): “spread much more Knowledg and Civility, yea, Religion, through all parts of the Land, by communicating the natural heat of Government and Culture more distributively to all extreme parts, which now lie num and neglected.”

²³ Davies also notes the particular emphasis on plasticity as an essential human characteristic: see e.g. Pico della Mirandola’s *Oration on the Dignity of Man*,

The prime quality of the Renaissance has been defined as ‘independence of mind’. Its ideal was a person who, by mastering all branches of art and thought, need depend on no outside authority for the formation of knowledge, tastes, and beliefs. Such a person was *l'uomo universale*, the ‘complete man’ (Davies, 1997: 471).

This emphasis on the cultivation of the autonomous person ties in with a key element in classical liberalism: that it is not the role of the state to cultivate the goodness of its citizens.²⁴ It is important not to exaggerate this point: certainly, no writer of the period appears to have thought that such an end was inherently undesirable or incoherent, or that it was somehow an irrelevant consideration for state action. Rather, it reflects significant doubt about the propriety and effectiveness of using the machinery of the state to force individual consciences in matters of personal belief (Waldron, 1993: 88).

The transition from the cultivation of moral goodness as a civic matter to the cultivation of individual autonomy as an essentially private concern is reflected in the treatment of education in contractarian thought. On the one hand, it is a necessary condition for the development of reason: “Man is made fit for Society not by Nature, but by Education” states Hobbes in *De Cive*.²⁵ The education of children is presented by Locke as one of the natural obligations of parenthood, because essential to their development as rational beings.²⁶ On the other hand, the fundamentally private nature of this obligation suggests that development as an autonomous being is something

“We have made thee neither of heaven nor of earth, neither mortal or immortal, so that with freedom of choice and with honour, as though *the maker and moulder of thyself*, thou mayst fashion thyself in whatever shape thou shalt prefer. [emphasis mine]”.

²⁴ See e.g. Barry (1963: 66): “Classical liberalism had other strands besides this one no doubt, but one was certainly the idea that the state is an instrument for satisfying the wants that men happen to have rather than a means of making good men (e.g. cultivating desirable wants or dispositions in its citizens)”.

²⁵ Chapter 1, n1 (1983: 2).

²⁶ In the *Second Treatise*, Locke reasons that, whereas Adam was created with full reason, infants are born “weak and helpless, without knowledge or understanding” (1924: 143), giving rise to a natural obligation upon parents to “preserve, nourish and educate the children they had begotten” (143). This explains, for Locke, the limited dominion that parents have over children in this period: “whilst he is in an estate wherein he has no understanding of his own to direct his will, he is not to have any of his own to follow” (144). More schematically, he states, “we are born free as we are born rational; not that we actually have the exercise of either: age that brings one, brings with it the other too” (145).

quite apart from – even prior to – the state of society.²⁷ There is little or no suggestion that membership of a political community, or even the ethos of a group beyond one's immediate family, is important to human development, still less that either is something that people *need* in order to become moral agents.²⁸

There is, by the mid-18th century, a general shift in the primary meaning of culture from culture as an activity to culture as an abstract entity. In other words, a shift from culture as cultivation to culture as *ethos*. It coincides with an increasing secularization of education, reducing the influence of religious foundations in schools and universities. It also corresponds to a much greater sociological emphasis in liberal political thought, exemplified in Rousseau's *Second Discourse*. First ridiculing the notion that man in his natural state could be a fully rational agent (1993: 63), Rousseau argues that the transition to civil society involves not only individual agency but *perfectibilité*, "the faculty of self-improvement, which, by the help of circumstances, gradually develops all the rest of our faculties, and is inherent in the species as in the individual" (60). Without this innate capacity for cultivation, he argues: "every art would necessarily perish with its inventor, where there was no kind of education among men, and generations succeeded generations without the least advance" (79-80).

The notion of the collective progress of humanity is, of course, a central theme in Enlightenment thought.²⁹ What is striking about Rousseau's account is first his depiction of *perfectibilité* as an inherently *social* process and, secondly, his emphatic

²⁷ The education of children is one of the natural obligations of a parent, and as such "are not bounded by the positive limits of kingdoms and commonwealths"; "a child is born a subject of no country or government. He is under his father's tuition and authority till he come of age of discretion" (1924: 177).

²⁸ Locke clearly argues that our ideas depend on our experience, but he also does not reduce this to a particular society or community; see *An Essay Concerning Human Understanding*, II.i.6 (1993: 47):

"And if it were worthwhile, no doubt a child might be so ordered as to have but a very few, even of the ordinary *ideas*, till he were grown up to a man. But all that are born into the world being surrounded with bodies that perpetually and diversely affect them, a variety of *ideas*, whether care be taken about it or no, are imprinted on the minds of children [original emphasis]"

²⁹ See e.g. Turgot *On A Universal History* (1750):

"Nature has given all men the right of being happy ... All the generations are linked to one another by a series of causes and effects which join the present condition of the world with all those that have preceded it ... and the whole human species, looked at from its origins, appears to the philosopher as an immense whole, which, like the individual, has its infancy and its progress ... The totality of humanity, fluctuating between calm and agitation, between good times and bad, moves steadily though slowly towards a greater perfection".

rejection of any association between *perfectibilité* and the idea of *moral* progress. Although culture is a necessary condition for moral agency and the possibility of virtue,³⁰ it is equally the foundation of all inequality between persons: “It follows”, says Rousseau, “that, as there is hardly any inequality in the state of nature, all the inequality which now prevails owes its strength and growth to the development of our faculties and the advance of the human mind, and becomes at last permanent and legitimate by the establishment of property and laws” (116).

Rousseau, then, distinguishes egalitarian principles and morality in general from the cultures of particular human societies (as he remarks elsewhere, “moral principles do not depend on the customs of a people”).³¹ However, the fact that socialization is prior to moral agency suggests a tension between the role of citizen and that of autonomous individual. The ideal *ethos*, in Rousseau’s view, is therefore one which manages to reconcile individuality with the cultivation of civic virtue, wherein each person lives both for themselves and for their fellow citizens as a whole.³² In other words, it is an *ethos* very much bound to the service of a particular political community. Of course, this partly reflects Rousseau’s own preference for small, close-knit republican government, as against larger, more detached political entities. However, it also hints at an emerging distinction in Romantic thought between the notions of culture and civilization.

Its emergence is far from straightforward, however. Kant, for instance, uses the terms more or less interchangeably, although *kultur* suggests more of the ideal whereas *zivilization* tends to indicate social convention. *Kultur*, then, is more closely associated in German thought with the goal of individual cultivation (*bildung*), and its

³⁰ “It appears, at first view, that men in a state of nature, having no moral relations or determinate obligations one with another, could not be either good or bad, virtuous or vicious” (1993: 71). See also *Émile*, Bk.1.165:

Reason alone teaches us to know good and evil. Therefore conscience, which makes us love the one and hate the other, although independent of reason, cannot develop without it. Before the age of reason we do good and bad without knowing it, and there is no morality in our actions, although there sometimes is in the sentiment of others' actions which relate to us.

³¹ *Julie, ou La Nouvelle Héloïse*, letter 81, at 304, cited in Todorov (1993: 45).

³² The ideal state requires the ideal education: see *Émile*: “Forced to combat either nature or social institutions, you must choose between making a man and making a citizen, for you cannot do both at the same time” (1.22); “From these necessarily opposite aims”, Rousseau suggests, “come two contrary forms of education -- one is public and common, the other individual and domestic” (1.29); See also the discussions of public or civic education in the *Social Contract* and in *Considerations sur le gouvernement de Pologne* (1769), and Rousseau’s arguments for a single system of state education.

emphasis on human perfectibility through education. Kant himself, though, maintains the Enlightenment distinction between morality and culture:

We are *cultivated* to a high degree by art and science. We are *civilized* to the point of excess in all kinds of social courtesies and proprieties. But we are still a long way from the point where we could consider ourselves *morally* mature. For while the idea of morality is indeed present in culture, an application of this idea which only extends to the semblances of morality, as in love of honour and outward propriety, amounts merely to civilization [emphasis in original] (“Idea for a Universal History with a Cosmopolitan Purpose”, 1991: 49).

Kant also follows Rousseau in his claim that sociality precedes rational agency. Although reason is the basis of the progression from nature to society (43-44), he argues, reason itself is insufficient to sustain that transition, as it requires “trial, practice, and instruction to enable it to progress gradually from one stage of insight to the next” (44). Without sociality, “every individual man would have to live for a vast length of time if he were to learn how to make complete use of all his natural capacities” (42-43). It follows that society is a necessary condition for the development of those capacities:

Then the first true steps are taken from barbarism to culture, which in fact consists in the social worthiness of man. All man’s talents are now gradually developed, his tastes cultivated, and by a continual process of enlightenment, a beginning is made towards establishing a way of thinking which can with time transform the primitive natural capacity for moral discrimination into definite practical principles; and thus a *pathologically* enforced social union is transformed into a *moral* whole [emphasis in original] (44-45).

For the *full* development of human capacities, though, mere society is not enough. According to Kant, people need “a society which has not only the greatest freedom ... but also the most precise specification and preservation of the limits of this freedom in order that it can co-exist with the freedom of others” (45). Kant’s conception of the ideal *ethos* goes further than Rousseau’s however, for it seeks to recognize moral

obligations extending beyond one's immediate political community towards humanity as a whole: the formation of particular societies is, in this sense, but an intermediate step in human development. Ultimately, argues Kant, the fullest development of human potential can only be guaranteed through a cosmopolitan commonwealth of states, a "perfect civil union of mankind", that in turn secured the equal autonomy of all its members (47-51).

This cosmopolitan ideal is consistent with a more general Enlightenment belief in a common European civilization, a set of shared traditions and concepts inherited and developed from classical antiquity. Against this, Romantic thought distinguishes the idea of culture in at least two different ways. First, in its individualist strands, *kultur* represents the 'study of perfection', that which is most valuable in human striving.³³ *Kultur* in this sense is especially concerned with the cultivation of individuality, that which is original and unique; hence its particular association with artistic expression.³⁴ Secondly, in Romantic nationalist thought, *kultur* is identified as that which is unique to a particular group, especially a nation or a people: its idiom and vernacular, customs, folkways and traditions. *Kultur* in *this* sense is the historical essence of an organic, moral community; a way of life passing from generation to generation. *Zivilization*, by contrast, represents mere convention, inauthentic and artificial.

The Romantic nationalist conception of culture marks a break with previous conceptions in that it assigns ultimate value to the existence of the culture itself. In its extreme manifestations, it also suggests that there is no morality independent of particular cultures. Being true to the *kultur* of one's people is prized more highly and deemed more virtuous than obedience to rules of civility based on rational principles.³⁵ From this conception too comes the notion of cultural *identity*: the idea

³³ The phrase is Arnold's (1993:59).

³⁴ Romantic conceptions of individualism influenced writers as disparate as Marx and JS Mill. See Lukes: "[t]he notion of self-development thus specifies an ideal for the lives of individuals - an ideal whose content varies with different ideals of the *self* on a continuum from pure egoism to strong communitarianism" (1973: 67).

³⁵ An extreme example of this conception of culture is that set out by Sumner:

The "right" way is the way which the ancestors used and which has been handed down. The tradition is its own warrant. It is not held subject to verification by experience. The notion of right is in the folkways. It is not outside of them, of independent origin, and brought to test them. In the folkways, whatever is, is right. This is because they are traditional, and therefore contain in themselves the authority of the ancestral ghosts. When we come to the folkways we are at the end of our analysis (1906: 3)

that people *belong* to a particular culture, which not only guides their outward behaviour, but forms their character, tastes and values, their sense of who they are. Whereas previous conceptions allowed that such characteristics were essentially matters of personal deliberation, on this view, one's conception of oneself is inseparable from the culture to which one belongs. It also suggests the notion of cultural *membership*: that there are criteria which mark out who does and does not belong to a particular culture. This was particularly associated, in Romantic thought, with the idea of race or ethnicity – in other words, promoting the notion of a natural, biological association between a common descent and membership of a common culture. This particular idea reached its fullest expression in the racialist ideology of Nazi Germany, as evidenced by the remarks of Hans Hanak, National Socialist *Kreisleiter* of Innsbruck in 1938:

Culture (*Kultur*) can't be acquired by education. Culture is in the blood. The best proof of this today is the Jews, who cannot do more than appropriate our civilization (*Zivilization*) but never our culture (quoted in Hobsbawm, 1992: 63).

Nonetheless, the more general idea of cultures as determinate entities with members is especially relevant to a central *political* thesis of nationalism: that the inhabitants of a state should, as far as possible, share a common nationality. Although earlier conceptions of culture allowed that inhabitants of the same state may speak different languages, have different ethnic origins, or follow different faiths, there was no suggestion that they belonged to different cultures *per se*: the idea of culture was a general one applying, but not necessarily limited to, all the inhabitants of a state. By contrast, Romantic nationalism presents nations and peoples as separate cultures in their own right, conceptually distinct from membership of a state.

Historically, the idea that inhabitants of the same state should also belong to the same nation or people fuelled two competing political forces across the 19th and 20th centuries. The first is the movement of stateless or substate groups towards self-definition as a nation or people as a means to articulate political claims against

For more general discussion of the nature of patriotism (as opposed to the particular romantic nationalist version cited above) see e.g. Appiah (1996), Miller (1995: Ch 3), Nussbaum (1996) Waldron (1993: 181-182).

existing states, including claims to statehood in their own right. The second is the movement by already-existing states to foster a sense of shared nationality among their own populations, especially through a system of public education through which a national language and the idea of a national history could be promoted. In both cases, the goal is the cultivation of a population that will, in turn, imagine itself as a nation.³⁶

The idea of cultures as distinct entities gives rise to a more general distinction in 19th Century thought between culture in general on the one hand, and particular cultures on the other. Thus the idea of a common civilization did not disappear, but increasingly distinguished itself as ‘Western’ or ‘European’ civilization, as opposed to various other, non-western ones.³⁷ Civilization in *this* sense is treated as synonymous with culture in its broader, Enlightenment sense – a set of common intellectual and aesthetic traditions, but also suggesting a certain degree of material and technological development. The Romantic emphasis on *kultur* over *zivilization* had some influence on subsequent distinctions between ‘high’ and ‘popular’ culture,³⁸ but it is otherwise difficult to identify any consistent and analytically perspicacious distinction between culture and civilization in general usage.³⁹

By contrast, the general concern of 19th century anthropology was to identify an object of study that could be described and analyzed without evaluative language. As Lévi-Strauss later remarked, “the concept of civilization – connoting a set of general, universal, and transmissible abilities – had to give way to the concept of culture in its new meaning: it now signified particular life styles that are not transmissible” (quoted in Todorov, 74). The *locus classicus*, though, is Sir EB Tylor’s 1871 definition – “That complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of

³⁶ For discussion of nation-building by states see Anderson (1991: Ch 6), Hobsbawm (1992), Smith (1991: Ch 5).

³⁷ For a brief historiographical survey of the notion of ‘Western Civilization’ see Davies (1997: 19-31). For a more extended account of the differentiation of non-western civilizations see Said (1994,1995).

³⁸ See e.g. FR Leavis, *Mass Civilization and Minority Culture* (1930). Leavis’s general thesis was that culture was by definition a minority concern, as only a small number of individuals at any particular moment in time were capable of fully appreciating its meanings.

³⁹ See e.g. TS Eliot (1948:57):

I have made no attempt in this essay to determine the frontier between the meanings of these two words [‘culture’ and ‘civilization’]: for I came to the conclusion that any such attempt could only produce an artificial distinction, peculiar to the book, which the reader would have difficulty in retaining; and which, after closing the book, he would abandon with a sense of relief.

society".⁴⁰ Cultures, then, are (1) *comprehensive*, encompassing the whole way of life of a particular group;⁴¹ (2) *distinctive*, in that they mark how one group differs from another; and (3) based upon an *integrated* set of practices, institutions, values, norms and beliefs, including moral values. On this model, 'culture' in the sense of aesthetic expression, the arts and sciences, is typically regarded as a *subset* of particular cultures, in the sense that each culture is deemed to have its own conception of what is intrinsically valuable in terms of human development, activities and pursuits, what is true or false, etc.

More generally, though, the idea of culture as an entity has since taken on a more general sociological application in the 20th century. It refers to the ideas, values and practices of groups of almost any size, from families to continents. In this sense, it is closer to the origin sense of *ethos* in that it does not specify a particular *sort* of group. On this view, cultures, in the sense of nations and peoples, are but a species of culture generally. As we will see below, however, only cultures belonging to *some* kinds of groups are thought to be morally important or politically significant, to the extent that they give rise to cultural *rights*.

(ii) *Versions of multiculturalism*

At the root of discussions about multiculturalism, one might expect to find the consistent use of at least one conception of culture. Certainly, talk of multiculturalism does not seem to make much sense until we are clear about the particular conception involved. As it is, though, 'multiculturalism' is used to refer to different things in different contexts, so that it is not at all clear that the same idea is being discussed in each case. Additionally, many writers appear to use the term descriptively at some points, and normatively at others, without appearing to acknowledge the shift from one meaning to another. To complicate matters further, some writers distinguish 'multiculturalism' from such terms as 'cultural diversity' and 'pluralism', assigning different meanings to each, while others tend to regard the same terms as synonymous with one another.

⁴⁰ Of course, different schools of anthropological thought have since developed many different definitions: see Kroeber and Kluckhohn (1952) in which they cite over 100 such definitions.

⁴¹ See e.g. TS Elliot: "culture is not simply the sum of several activities but a way of life" (1948: 27);

In the course of this thesis I mean to show that this terminological and conceptual confusion about culture and multiculturalism bedevils the debate about cultural rights generally. In the following two chapters in particular, I argue that this confusion allows many normative and conceptual claims about culture to be presented as fact. In this chapter, though, my purpose is simply to set out the different versions of multiculturalism involved in the debate over cultural rights. We need to distinguish, then, what is meant by the various uses of the term ‘multiculturalism’ and such related terms, ‘pluralism’, ‘cultural diversity’, and ‘cultural group’.

A useful starting point is the idea of *social diversity* which describes the presence of various social distinctions in a given population. All societies contain such distinctions: each contains men and women, young and old, abled and disabled, and so forth, which give rise to social groups based around such distinctions. Modern societies, though, are characterized by a high degree of social diversity, including inter alia that relating to neighbourhood, education, job and career, sexual orientation, family life and religious beliefs.⁴²

Arising from this is the idea of *social* or *viewpoint pluralism*: “the existence of a plurality of inconsistent *views* on moral, religious, social and political issues” [my emphasis] (Raz, 1994: 316). This is different in kind from social diversity, though, because it adverts to a diversity of certain *beliefs* rather than straightforward social distinctions. On this view, however, neither the fact of social diversity or social pluralism presuppose the existence of social groups as *bearers* of particular beliefs. This distinguishes social pluralism – in the sense of diverse beliefs – from a competing conception in which pluralism describes the *institutionalization* of such beliefs according to different social groups.⁴³ It is also important to distinguish this sense of social pluralism from a *normative* conception: i.e. one that promotes the desirability of such social corporatism.⁴⁴ Distinct again is the concept of *moral or value pluralism*, which is not a sociological concept *per se* but a claim about moral

Raymond Williams: “Where culture meant a state or habit of the mind, or the body of intellectual and moral activities, it means now, also, a whole way of life” (1959: 267).

⁴² This is what Thomas Pogge refers to as ‘lifestyle groups’ (1997: 187).

⁴³ See e.g. MG Smith: “In a condition of cultural plurality, the culturally differentiated sections will differ in their internal organization, their institutional activities, and their system of belief and value. Where this condition of cultural plurality is found, the societies are plural societies” from *The Plural Society in the British West Indies* (Berkeley: University of California Press, 1965) at 14, cited in Barry (2000:9).

⁴⁴ Barry, for instance, defines pluralism as a “political programme that aims to institutionalize cultural difference by segmenting society” (ibid).

values, specifically that there exists “a plurality of irreducibly distinct and competing values” (Raz, 1994: 314). Thus, in principle, it is possible for social pluralism to be true, but moral pluralism to be false. I discuss the relationship between moral pluralism and autonomy in Chapter 3 and its relationship with cultural diversity in Chapter 7.

The point of my setting out these concepts first is that none of them presuppose conditions of *cultural diversity* as it is generally understood. That is, it is at least conceptually possible, on this view, to have a society which is socially diverse (i.e. whose population is highly differentiated in social terms) and socially plural (i.e. which contains a diversity of inconsistent views on moral, political and social issues, etc), but whose social diversity and plurality derives entirely from within a single culture. On this view, then, ‘culture’ refers to its anthropological sense i.e. (1) a distinct, comprehensive and coherent system of practices, institutions, norms, values and beliefs, (2) such as which arise from ethnic, linguistic, religious and national differences. The difficulty with the anthropological model is that (1) and (2) are in fact distinct and independent considerations, as we shall see in greater detail in the course of this thesis.⁴⁵ In both the popular and academic imagination, however, (1) and (2) are linked. For this reason, cultural diversity is generally understood as describing a particular *kind* of pluralism:

To say that a society is pluralistic is not the same as saying it is multicultural: pluralism may relate to individual lifestyles, vocations, religious faiths, ethics, politics, and experiences, with no assumption that these differences coalesce into the shared and abiding entities we call ‘cultures’. Pluralism is the genus; cultural diversity is a species of it. (Waldron, 1996: 96)

For the purpose of clarity, then, I use *cultural diversity* in a purely descriptive sense to refer to that diversity of practices, values and beliefs which arises primarily from ethnic, linguistic, religious and national differences. In doing so, however, I do not presuppose the idea that this kind of diversity is somehow qualitatively different from run-of-the-mill social pluralism. As I see it the distinction is simply the *origin* or source of the values and beliefs in question. In general, then, a society can be assumed

to be culturally diverse where its inhabitants belong to more than one cultural group (i.e. those social groups primarily distinguished by ethnicity, language, religion or national origin).

In the course of this thesis, I mean to present a cosmopolitan conception of culture which will involve offering a slightly revised account of cultural diversity and multiculturalism. For ease of reference, though, I use the terms *multiculturalism* and *multicultural* more or less interchangeably with cultural diversity as I have stipulated it here. Even so, it is important to make clear the different meanings belonging to that term.

First, multiculturalism is most widely used to denote the presence of different ethnic, religious, linguistic, and national groups in a given population, on the general assumption that each of these groups amount to a distinct culture in their own right. This is so, even in countries such as the United Kingdom and the United States where the actual degree of cultural distinctiveness of many such groups is extremely low, most obviously in the case of ethnic groups.⁴⁶

Secondly, multiculturalism in the United States is also associated with the more general idea of pluralism or *social* diversity: hence not only cultural groups but also social groups based on gender, age, sexual orientation, disability and socioeconomic class come under the rubric of multiculturalism or, as it has been termed, identity politics.⁴⁷ This is valid, of course, to the extent that some social groups might form cultures in the broader, sociological sense (certainly it seems doubtful that the aged as a social group possess a comprehensive, and coherent set of values and beliefs providing a distinct way of life).

Thirdly, and more specifically, multiculturalism in the US refers to a set of *policy* debates over education: favouring the study of authors from diverse ethnic backgrounds, for example, as well as the promotion of bilingual education for Hispanics and other non-English speaking minorities. Fourthly, multiculturalism in Canada denotes a broad set of government policies carried out through a series of government agencies, which aims at promoting the flourishing of different ethnic,

⁴⁵ In fact I mean to show that there are strong grounds to doubt the viability of (1) as an accurate description of any actual group or society. See Chapters 3, 4 and 7.

⁴⁶ See e.g. Kymlicka: "If there is not a single culture in the United States, there is a dominant culture that incorporates most Americans, and those who fall outside it belong to a relatively small number of minority cultures" (1995: 77). And, as Barry puts it, the different constituent nationalities of the United Kingdom have a "very low cultural content" (2000: 32).

⁴⁷ See e.g. Gutmann (1994), Minow (1990), Young (1990).

religious, linguistic and national groups within Canadian society as a whole. In other words, it actively promotes tolerance and accommodation for different immigrant groups so as to aid their general integration into the population.⁴⁸ Multiculturalism in *this* sense, though, is typically set off against what Charles Taylor has described as ‘deep diversity’ or the ‘politics of recognition’.⁴⁹ These latter terms are closely associated with Taylor’s thesis that *some* sorts of cultural groups (i.e. francophone Quebec) require a different sort of constitutional accommodation than that which is required in the case of either immigrants in general or social groups such as women, gays, or the disabled.⁵⁰

The difficulty comes, as several authors have noted, when the same term (‘multiculturalism’) is used both descriptively and prescriptively.⁵¹ This allows writers to pass off the fact of diversity as sufficient grounds for their normative claims about cultural rights. In the next two chapters, I look in detail at the relationship between the idea of cultural diversity as it relates to the concept of autonomy (Chapter 3) and cultural membership (Chapter 4). I hope to show that many of the arguments made in support of special cultural rights rely on conceptions of culture that are very far from incontestable. It remains in the final section of this chapter to outline some of the basic elements of the concept of rights, and some of the general normative features of the liberal ideal of human rights.

2. Rights

If there is one term which rivals multiculturalism for its multivocality, it is rights. Although this section does not deal directly with the conceptual problems surrounding the idea of cultural rights *qua* rights (that is dealt with in Chapters 5 and 6), it is important to be clear about some of the more general terminology concerning the idea

⁴⁸ Much has been made of the supposed contrast between the Canadian government’s promotion of multiculturalism and the American assimilationist ideology of the “melting-pot”. In fact, what empirical evidence there is suggests that ethnic identities are sustained to a greater degree in the US than in Canada after two generations: see Reitz and Breton (1994), Kymlicka (1995: 14).

⁴⁹ For discussion of the idea of ‘deep diversity’ see Taylor (1992, 1993). For an account of ‘the politics of recognition’ see Taylor (1994).

⁵⁰ For instance: “[Official multiculturalism] is far from accommodating all Canadians. For Quebeckers, and for most French Canadians, the way of being Canadian (for all those who still want to be) is via their belonging to a constituent element of Canada, la nation québécois, or canadienne-français ... Their way of being Canadian is not accommodated by first-level diversity” (Taylor, 1992: 445).

of rights. In particular, it is important to spell out that particular liberal model of human rights which the notion of special cultural rights is meant to remedy.

(i) *Sorts of rights*

We can begin with the very schematic description that a right is a justified claim, linking the *subject* of a right (the rights-holder) with an *object* (what is claimed).⁵² What counts as a right, though, depends partly on the nature of the right being claimed: the existence of any *legal* right is always a question of fact, based upon the rules of the legal system in question; the existence of a particular *moral* right, on the other hand, is a matter of moral argument.⁵³ Hence, normative claims for certain legal rights are almost invariably based on arguments as to what moral rights there actually are. It has to be borne in mind, though, that there are more ways of protecting moral rights than simply creating legal rights after their image: it may be, in fact, that recognizing certain moral rights requires instead adopting a particular set of policies, a change in constitutional arrangements, or the creation of new political institutions.

Another distinction is that between special and general rights. *Special* rights are those which arise out of some particular relationship, transaction or characteristic. If I agree to sell you my car, for example, you have a particular duty to pay me the agreed price and I have a special right to be paid. As such, these are not rights or duties that attach to any other person. *General* rights, by contrast, are those which are inherent in some common capacity or status.⁵⁴ A typical example given of a general

⁵¹ See e.g. Westin (1998: 56), Kymlicka (1995: Ch.2). This not only produces confusion but is also, argues Barry, “intellectually corrupting” because “it can licence an unargued shift from one to the other” (2000: 6).

⁵² Hohfeld (1919) distinguishes four main senses of the term ‘right’ in *legal* discourse: claims, liberties, powers and immunities. By contrast, the concept of rights in normative political theory is subject to various definitions. See my discussion of the concept of rights in Chapter 6.

⁵³ The distinction between legal rights and moral rights is discussed in greater detail in Chapter 6.

⁵⁴ See Hart (1984: 84):

- (1) General rights do not rise out of any special relationship or transaction between men. (2) They are not rights which are peculiar to those who have them but are rights which all men capable of choice have in absence of those special conditions which give rise to special rights. (3) General rights have as correlatives obligations not to interfere to which everyone else is subject and not merely the parties to some special relationship or transaction

Waldron (1988: 107) suggests that Hart runs together the distinction between special and general rights with that between rights *in personam* and rights *in rem*. Rights *in personam* are held against some individuals and not others; rights *in rem* are held against all the world. Hart thought that special rights were necessarily *in personam*, general rights *in rem*. However, Waldron points out that property rights

right is the right to free expression, i.e. it is not contingent on a particular transaction, but derives from some shared status (e.g. *qua* a citizen, human being, or rational agent). Generality, though, is a matter of degree (see Hare, 1963). The right to vote, for instance, is typically considered a general right, but is nonetheless contingent on *inter alia* being of voting age and not being in prison, etc. Equally, as Waldron notes, “there is no watertight, knockdown argument against recasting ... special rights as general rights which are conditional in their content” (1988: 124). Nonetheless, I do not think the distinction is a specious one. If nothing else, general entitlements and special entitlements appear, from an egalitarian liberal standpoint, to involve different sorts of justification: if one can make the argument that a right to X is morally justified, then the case for a special rather than a general distribution as a matter of justice would appear to require some further argument (see Chapter 6).

A distinction is often drawn between *individual* rights and *group* rights: the former inhere in, and are typically exercised by, individuals, the latter inhere in groups and so on. The language of individual rights, group rights, and collective rights is often an ambiguous one, though. Many so-called individual rights, for instance, have collective features (e.g. the right to free association), and many apparently group rights are based around individual interests (e.g. the right of shareholders to be paid a dividend).⁵⁵ More importantly, some rights may vest in individuals as a *consequence* of belonging to a group, in which case neither the term individual right or group right is sufficient to capture the significance of its distribution. I discuss these problems in detail in Chapter 6. However, for ease of reference I will use the term *group-differentiated* rights for those rights whose distribution is explicitly group-based, and the terms *uniform* or *general* rights for those rights which are distributed to each person without qualification (it is implicit in this classification that group-based rights are a sort of special rights, whereas uniform rights are always general rights).

are an obvious class of special rights (contingent upon a particular relationship or transaction) that are held to the exclusion of all others (rights *in rem*).

⁵⁵ For example, many civil and political rights require collective support (i.e. the notion of due process requires a court system, freedom of expression regulatory bodies, and so on). Many civil and political rights presuppose the existence of collective forms (such as the right to vote, or freedom of association). Equally, whatever difficulties may be associated with the redistribution of wealth, social and economic rights are very easily understood as individual entitlements and don't presuppose collective rights in any sense.

(ii) *Human rights as a liberal ideal*

The recognition of certain basic rights has been a central concern of normative political theory since the Enlightenment. Classical liberalism advanced the idea of *general* rights against the exercise of state power, i.e. *civil and political* rights to such goods as political participation, free expression, association, due process and so on. More latterly, the notion of general *economic and social rights* against the state (e.g. to such goods as housing, education and welfare) has been presented. Most recently, writers have suggested the existence of a “third generation” of general rights, such as a right to the environment, and among which cultural rights are sometimes classed.

At the base of all these rights, though, is the concept of human rights: the idea that each person has certain “morally crucial” interests that “are not to be sacrificed merely for the sake of the greatest happiness or the prosperity of society in general” (Waldron, 1988: 14). Human rights, then, are those rights which people have *qua* humans, rather than *qua* members of some subset of humanity, such as some particular ethnic group, social class or country. It is, at its core, a humanistic concept and, as such, potentially conflicts with those moral outlooks that assign ultimate value to other entities, such as faith or nation.⁵⁶ Nonetheless, it is entirely possible to have non-liberal conceptions of human rights *per se*. For example, a socialist conception may deny that civil and political rights are sufficiently compelling interests to justify their status as *human* rights, whereas a libertarian conception may lay emphasis upon civil and political rights as human rights but question the plausibility of a human right to such goods as housing or employment.⁵⁷

What, then, are the principal features of the liberal conception? One core idea is the notion that human rights are concerned with *individual liberty* or *autonomy*. That is, an important strand of liberal thought involves the view that peoples’ lives go better when they are free to follow their own conception of the good life.⁵⁸ Human

⁵⁶ Note, however, that the fact that a particular moral theory involves a conception of rights does *not* necessarily make that theory a *rights-based* one: see Raz (1986: 194-198). For the distinction between rights-based, goal-based, and duty-based *political* theories see Dworkin (1979: 90-96, 169-176). For a discussion of the distinction in relation to *moral* theories see JL Mackie (1984: 358), Waldron (1988: 64-68).

⁵⁷ See Lukes (1993: 26-35). For libertarian conceptions of rights see e.g. Nozick (1974: Part I and 238). For an example of a socialist conception of human rights see Kamenka and Tay (1978); for discussion of various religious conceptions see e.g. An-Na’im (1992), Rosenbaum (1980).

⁵⁸ See e.g. Rawls (1972: 641), Dworkin (1983: 24-30), Raz (1986: Ch 15), Kymlicka (1989: 10-13). I discuss the importance of autonomy as a liberal value in Chapters 3 and 7.

rights, then, protect those general interests that relate to people's ability to direct their own lives: hence rights to participate in the general political framework, rights against undue state encroachment, but also rights to those economic and social resources necessary to live autonomously (e.g. housing, education, etc). In this sense, the liberal conception of human rights is also strongly *egalitarian* in character, one concerned with treating each person as having equal moral status *qua* human beings.⁵⁹

The egalitarianism of the liberal conception also translates into a strict concern with equal liberty as *equal rights* or, more specifically, the guarantee of equal treatment and an equal civil and political status by the *uniform distribution* of legal rights.⁶⁰ Of course, what equal treatment might amount to is far from uncontested with liberalism generally.⁶¹ Certainly, the liberal idea of a uniform distribution does not rule out differential treatment in order to secure those rights: if A and B both have an equal right to X, for example, it may be that B nonetheless requires more resources than A to reach X.⁶² What is significant, though, is that A and B both have the right to *the same good* as one another, and are equal as far as that basic entitlement is concerned.

What the ideal of equal liberty as equal rights *does* appear to rule out is any suggestion that the inhabitants of the same country could differ in the content of their

⁵⁹ See e.g. Dworkin's reference to an 'egalitarian plateau', in which "the interests of the members of the community matter, and matter equally" (1983: 24). However, is it not true that *all* conceptions of human rights are egalitarian by definition, in the sense that all stress an equal distribution of rights? I agree that the concept itself can be thought egalitarian in this minimal sense. By 'egalitarian', though, I mean not only equal distribution of rights themselves but also a commitment to making the opportunities those rights represent equally available, i.e. through the redistribution of resources (see Chapter 1 *supra*, n4). Hence, a libertarian conception of human rights would, in *this* sense, be less substantively egalitarian than a liberal conception. I am grateful to David Miller for pointing this issue out to me.

⁶⁰ See e.g. Rawls (1972: 206ff), Barry (1998: 307). However, some writers doubt its historicity as a liberal value – see e.g. Kymlicka:

Liberals today insist that the liberal commitment to individual liberty precludes the acceptance of collective rights, and that the liberal commitment to universal (colour-blind) rights precludes the acceptance of group-specific rights. But these bald statements are no part of the liberal tradition. Few if any liberals, until very recently, supposed that liberal principles allowed only universal individual rights. What contemporary liberals take to be well-established liberal principles are in fact novel additions to the liberal canon (1995: 68).

⁶¹ See e.g. Dworkin (1985: 188-191), Raz, (1986: 218-220), Kymlicka (1995: 108-115), Barry (2000: 30).

⁶² I am not suggesting that this is a general feature of rights, however: it would also depend on the content of the right in question. For instance, part of the right to due process is a right to a fair trial. Part of the right to a fair trial involves being able to understand proceedings. If A and B are both on trial, but only A understands the language of the court, then more resources will be expended giving B the *same* right as A (e.g. by hiring interpreters, etc). Despite the extra resources involved, there is no suggestion that B's trial is fairer than A's.

basic rights, especially that some might have different *civil and political* rights by virtue of their belonging to a particular social group.⁶³ Where members of a group have rights and liberties that others do not, this is taken to indicate that the state does not consider members and nonmembers as either alike in political status or as *morally* alike. For people to have *these* sorts of rights *qua* members seems antithetical to the ideal that people should have the same sorts of rights *qua* persons.

Liberalism, then, not only offers a conception of human rights in the sense of what rights people have, but also a conception of how those rights should be distributed within a society. This ideal distribution, moreover, is one guided by the same principles underlying the rights themselves: that is, if liberals are concerned to treat people as being of equal moral worth, with an equal interest in leading autonomous lives, then they need to ensure a uniform distribution of the rights to the same general goods.

However, not all liberals agree with this conception of equal rights. Some deny that equal liberty requires any such uniform distribution, while others argue that existing conceptions of human rights already accommodate collective and group-based rights. Still others contend that equal liberty, if it is in fact a liberal principle, is at any rate only one value among several, and cannot always be expected to trump out against conflicting considerations within a liberal theory of justice. All these points are made in support of the idea of special cultural rights.

However, what I have offered here is merely the briefest sketch of the general conception. The starting point for considering the idea of special cultural rights is to examine their theoretical basis. Very roughly, these are the claims that (1) having culture is an essential part of individual well-being; (2) people have morally significant interests *qua* members of particular cultures; and (3) that these interests are inadequately protected by existing liberal conceptions of human rights. I will consider the first claim in the next chapter.

⁶³ Note there is a certain tension between general citizenship rights and universal human rights. On an ideal account, the difference is simply one of scope. As Waldron notes, “generality and universality ... are two different dimensions in terms of which prescriptions may be described, though it is worth reminding ourselves that generality is a matter of degree, whereas a statement is either universal or it is not” (1993, 78). Thus the right to vote in French elections is – strictly speaking – a general right of French citizens only, not a universal one. However, we might also say that the right to vote in French elections is the specific expression of a universal individual right to participate in the government under which one lives.

Chapter Three

Culture and Autonomy

The claim that culture is essential to individual freedom is the starting point for many arguments in favour of special cultural rights. Existing liberal conceptions of rights, it is claimed, either overlook this fact or simply ignore it. As a consequence, uniform conceptions are inadequate to protect the specific interests that people have in particular cultures.

And yet, as we have seen from the discussion in Chapter 2, none of the major writers in the liberal political tradition ever appear to have denied the necessity of culture to development as a moral agent, either in some general sense of human sociality or in the slightly more specific sense of education. In fact, a great deal of liberal theory seems to involve an implicit account of culture: i.e. how persons acquire notions of the right and the good from their social environment.

What seems peculiar to arguments for special cultural rights, then, is the claim that people are beholden to *particular cultures* in a way that significantly affects their ability to lead autonomous lives, “because freedom is intimately linked with and dependent on culture” (Kymlicka, 1995:75). On this view, uniform conceptions are guilty not of ignoring the importance of culture *per se*, but the fact of cultural diversity and the *group-based* character of autonomy. In this chapter, then, I look at three existing accounts of the relationship between culture and autonomy: those of Charles Taylor, Joseph Raz, and Will Kymlicka, each of whom have argued for some notion of special cultural rights (although to somewhat different degrees).¹ My own view, which I hope my analysis of these accounts bears out, is that while the broad claim (people need culture in general) is true, the specific claim (people need some particular culture, which partly limits their autonomy) is false. In fact, I suggest that a more plausible account of the relationship between culture and individual freedom is one consistent with a more cosmopolitan conception of culture.

¹ Kymlicka has given the most extensive account of special cultural rights (1989, 1995). Taylor has argued for special rights in respect of Quebec (1992, 1993, 1994), while Raz has given much more qualified support to self-government rights (Raz & Margalit, 1994).

1. Culture and human nature

Before turning to consider some specific arguments about culture and autonomy, it is useful to consider some *general* claims about the relationship between culture and human development. As we have seen from the survey of different versions of culture in the last chapter, disagreements about culture involve, *inter alia*, claims about human nature or, less metaphysically, the concept of the person.² Now, as categories, neither ‘human’ or ‘person’ entail any particular account of the good. Nonetheless, conceptual disagreements about culture (and hence about persons) often take on a normative cast - in the sense that “facts about human nature are taken to directly entail conclusions about the human good” (Hurka, 1993: 28).³

Whatever the merits of that approach, I think it is plausible that at least part of our arguments about culture and personhood concern something which is true independently of our own beliefs on the matter. Specifically, I think there are certain facts about human beings and human sociality that frame, and to a certain degree correct, the various disagreements that we have about moral principles. It is in this sense that I think it is useful to set out what I take to be a couple of moral facts (i.e. facts which have moral consequences) relevant to the subsequent discussion of culture and autonomy.

First, there is the biological unity of humanity, the claim that all human beings share common biological capacities for reason and language. At the end of the twentieth century, I take this as a given that no serious writer in political theory would care to dispute. An elaboration of this claim is the anthropological doctrine of “the psychic unity of mankind” which asserts “that there are no essential differences in the fundamental nature of the thought processes among the various living races of man” (Geertz, 1973: 62).⁴ The fundamental unity of humanity in these respects is a basic premise of my argument.

² A general distinction between ‘human’ and ‘person’ tracks a distinction between biology and moral argument. ‘Human’ is a biological category, whereas ‘person’ is generally taken to refer a rational or moral agent.

³ Hurka himself is referring to perfectionist naturalism, of which he refers to Charles Taylor as one example of writers taking this approach.

⁴ Geertz continues: “If the existence of a modern type of mind is held to be prerequisite to the acquisition of culture, the universal possession of culture by all contemporary human groups ... makes of the psychic unity doctrine a simple tautology; but whether genuinely tautological or not, it is a proposition for whose empirical validity the ethnographical and psychological evidence is altogether overwhelming” (1973: 62).

Despite this consensus, however, many popular claims about different cultures seem to trade on the idea that such differences are based on *intrinsic* (i.e. biological and hereditary) differences between various population groups, especially ethnic groups. A typical example of this view is frequently expressed in debates about adoption, that infant adoptees should not be deprived of ‘their culture’ by being placed with parents of a different ethnicity.⁵ As we will see throughout this thesis, the belief in an inherent connection between culture and ethnicity seems an especially enduring one.

The second basic claim is that of *human sociality*, i.e. that biological capacities (e.g. language, reason) require a social context in order to develop them. As we have seen from Chapter 2, the acceptance of *this* fact has been a fairly consistent feature of modern liberal political thought. To spell it out in anthropological terms, culture is an integral part of the evolution of human mental capacities: an individual is not a functioning person simply by virtue of their natural biological capacities, but needs “the humanizing influences of other human beings. The attributes of humanity are a function of human society, of human socializing factors acting upon potentialities capable of being humanized” (Montagu, 1974: 25-26).⁶

To test this claim, we need only imagine what human beings would be like if they didn’t have access to any culture whatsoever. Besides the obvious impossibility of a human infant becoming *physically* self-sufficient, the picture of a solitary individual developing into a recognizable person, thinking and able to communicate with others in a meaningful way, yet without any social contact, seems clearly implausible.⁷ Hence, we can take as our second premise the claim that people need human society, not merely for the physical benefits it offers (shelter, food), but in order to be full persons. This much, then, is uncontroversial. As John Rawls observes:

Now the sociability of human beings must not be understood in a trivial fashion. It does not imply merely that society is necessary for human life, or

⁵ See e.g. Kirton, ‘Race’, *Ethnicity and Adoption* (2000).

⁶ Indeed, modern biological anthropology suggests that the capacity for culture is an *interdependent* feature of human evolution. See Geertz: “Rather than culture acting only to supplement, develop, and extend organically-based capacities logically and genetically prior to it, it would seem to be ingredient to those capacities themselves. A cultureless human being would probably turn out to be not an intrinsically talented though unfulfilled ape, but a wholly mindless and consequently unworkable monstrosity. Like the cabbage it so much resembles, the *Homo sapiens* brain, having arisen within the framework of human culture, would not be viable outside of it” (ibid, 68).

⁷ See Pinker (1994: 277), Eco (1997: 49-50).

that by living in a community men acquire needs and interests that prompt them to work together for mutual advantage ... Nor is it expressed by the truism that social life is a condition for our developing the ability to speak and think, and to take part in the common activities of society and culture. No doubt even the concepts that we use to describe our plans and situation, and even to give voice to our personal wants and purposes, often presuppose a social setting as well as a system of belief and thought that is the outcome of the collective efforts of a long tradition. These facts are certainly not trivial; but to use them to characterize our ties to one another is to give a trivial interpretation of human sociability (1972: 522).

Therefore, whatever disagreement there is between liberals and communitarians or among liberals themselves concerning the relationship between persons and culture, it does *not* concern the bare fact of human sociality. Nor does it appear to be the *fact* of social and cultural diversity per se. The issue, rather, is the *consequences* of such diversity. As Margalit and Raz express it: “it is a social and a moral fact that [our world] is a world of nations, tribes, peoples, etc., that is, that people’s perceptions of themselves and of others and their judgements of their opportunities and the responsibilities of life are shaped, to an extent, by the existence of such groups and their membership of them” (Raz, 1995: 125, n1). Thus, in this example, one fact (i.e. cultural diversity) is taken to support a set of claims about personal identity (e.g. people’s self-perceptions) and autonomy (e.g. their judgements about opportunities). In the course of this chapter and the next, I hope to present a quite different (i.e. more cosmopolitan) version of this relationship.

2. *Autonomy and ethos*

i. *Taylor and language communities*

The first account of culture and autonomy I will discuss is that by Charles Taylor. In outline, Taylor’s argument is that the human capacity for moral agency – and hence for any sort of autonomy – is developed only in relation to particular communities which provide a framework of values and higher-order goods. He attaches particular

importance in his account to the notion of cultures as communities based around a particular language.

This account acts as foundation for Taylor's critique of those liberal conceptions of society that accord priority to uniform rights ahead of group-based interests (I refer to this critique in Chapter 7). In this section I want to examine Taylor's thesis about the relationship between individuals and cultures; specifically his claim that any freedom which individuals possess is meaningful only within the boundaries of a particular language community and only in relation to goods constituted by that community.

The starting point for Taylor's account is the familiar idea that humans as a species are marked out by their possession of certain capacities, such as reason and language, that make possible their development as persons (1985: 103).⁸ As he notes elsewhere, our various notions of equal respect for persons are rooted in this "universal human potential", an equal capacity for something like rational agency (1994: 41).⁹ However, according to Taylor, existing liberal accounts of personhood, especially those of classical liberalism,¹⁰ misconceive the relationship between our membership of communities and our exercise of autonomy. Many liberals, broadly speaking, see no intrinsic or deep connection between the idea of membership of particular language communities and the development of those capacities associated with our status as rational agents, i.e. possessing a sense of self, holding values, making choices and the ability to pursue life-plans.¹¹ For Taylor, such a view is deeply mistaken. "There is no way we could be inducted into personhood", he argues,

⁸ Taylor's description is as follows: "[o]ur ordinary notion of a person [is] defined by certain capacities: a person is an agent who has a sense of self, of his/her own life, who can evaluate it, and make choices about it. This is the basis of the respect we owe persons. These capacities form an important part of what we should respect and nourish in human beings. To make someone less capable of understanding himself, evaluating and choosing is to deny totally the injunction that we should respect him as a person" (1985: 103).

⁹ Elsewhere, Taylor refers to what he calls 'the politics of equal dignity' as based "on the idea that all humans are equally worthy of respect. It is underpinned by a notion of what in human beings commands respect, however we may try to shy away from this 'metaphysical' background. For Kant, whose use of the term *dignity* was one of the earliest influential evocations of this idea, what commands respect in us was our status as rational agents, capable of directing our lives through principles. Something like this has been the basis for our intuitions of equal dignity ever since, though the detailed definition may have changed" (1994: 41).

¹⁰ See e.g. the approaches of Locke, Hobbes and Kant referred to in Chapter 2 above.

¹¹ Taylor suggests that the usual translation of Aristotle's description of humans as the 'rational animal' or 'animal possessing *logos*' could equally be rendered as the 'language-animal' (1985: 217). Elsewhere, Taylor notes that the importance of articulacy of our conceptions of the good, "emerges from a particular ethical view, or range of views, which sees reason, in the sense of the *logos*, of

“except by being initiated into a language” (1989: 35). It is a mistake, moreover, with broad consequences:

The disengaged identity and its attendant notion of freedom tend to generate an understanding of the individual as metaphysically independent of society What it hides from view is the way in which an individual is constituted by the language and culture which can only be maintained and renewed by the communities he is a part of (1985: 8).

The traditional account of persons as rational agents who pursue conceptions of the good according to autonomously-determined values is, Taylor argues, one that ignores the necessary relationship between human agency and the presence of an existing culture or language community within which such agency develops (1985:3). I will present this argument in three parts.

First, Taylor makes the relatively familiar point that human agency is commonly understood as more than merely the capacity for making choices but the possession of a self with a degree of personal identity. What counts as establishing personal identity is a question that I do not intend to address here, but it can at least be said to involve our capacity for evaluation and reflection. Whereas mere agency might mean the ability to make choices or hold preferences about particular situations, being a person or having a self involves having *second-order* desires - that is, desires about the sorts of first-order goals and preferences we should have.¹² Taylor expresses this through the idea of persons as being *self-interpreting*, which involves as a matter of course a sense of self-identity.

This brings us to the second point in Taylor’s argument which is that our identity consists at least partly in our evaluations. Taylor, though, argues for a strong version of this thesis, i.e. that “our identity is defined by our fundamental evaluations” (1985: 34). That is, there are certain evaluations that constitute us as persons, without which “we would cease to be ourselves, by which we do not mean trivially that we would be different ... but that shorn of these we would lose the very possibility of

linguistic articulacy, as part of the telos of human beings. We aren’t full beings in this perspective until we can say what moves us, what our lives are built around.” (1989: 92).

¹² The term is Frankfurt’s (1978: 5). See also Taylor (1979).

being an agent who evaluates” (Ibid). Self-interpretation cannot take place without the presence of a self who interprets:¹³

To know who I am is a species of knowing where I stand. My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose. In other words, it is the horizon within which I am capable of taking a stand (1989: 27).

However, Taylor doesn't deny the possibility of someone questioning what they had previously held to be a fundamental evaluation or constitutive good. This is so even though, as he argues, evaluations are not chosen as such but “articulations of our sense of what is worthy, or higher, or more integrated, or more fulfilling” (1985: 34). On this account, radical reevaluation is possible, “not in the sense of radical choice, however, that we choose without criteria; but rather in the sense that our looking again can be so undertaken that in principle no formulations are considered unreviseable.” (1985: 40).¹⁴ A person engaged in reevaluation does not choose between values as such, but instead seeks to articulate and define their “deepest unstructured sense of what is important” (ibid: 41).

The importance of articulating our ideas about the good brings us to the third part of Taylor's thesis which is the relationship between evaluation and language. Language, on this view, is not simply an abstract medium for the articulation and expression of our ideas about value and the good, but the social framework of such

¹³ Taylor argues that such frameworks, and the “strong qualitative” distinctions they contain, are indispensable: “Moreover, this is not meant just as a contingently true psychological fact about human beings ... Rather the claim is that living within such strongly qualified horizons is constitutive of human agency, that stepping outside these limits would be tantamount to stepping outside what we would recognize as integral, that is, undamaged human personhood” (1989: 27).

¹⁴ See also Kymlicka (1989: 52-53):

What is central to the liberal view is not that we can *perceive* a self prior to its ends, but that we understand our selves to be prior to our ends, *in the sense that no end or goal is exempt from possible reexamination* i.e. I can always perceive my self without its *present* ends. But this doesn't require that I can ever perceive a self totally unencumbered by any ends - the process of ethical reasoning is always one of comparing one 'encumbered' potential self with another 'encumbered' self. There must always be some ends given with the self when we engage in such reasoning, but it doesn't follow that any *particular* ends must always be taken as given with the self.

values and conceptions of the good formed within a particular speech community. It is within this moral framework of qualitative distinctions and in relation to this community that persons acquire their identity:

This is the sense in which one cannot be a self on one's own. I am a self only in relation to certain interlocutors: in one way in relation to those conversation partners who were essential to my achieving self-definition; in another in relation to those who are now crucial to my continuing grasp of languages of self-understanding - and of course, these classes may overlap. A self exists only within what I call 'webs of interlocution' The full definition of someone's identity thus usually involves not only his stand on moral and spiritual matters but also some reference to a defining community (1989: 36).

On this view, it is the speech community that is constitutive of individual agency because it is only in relation to other selves, other interlocutors that we gain that sense of ourselves which is necessary to evaluate, articulate and pursue conceptions of the good. "Without any articulation at all," as Taylor rather flatly states, "we would lose all contact with the good, however conceived. We would cease to be human."(1989: 97).

As a thesis about language generally, few liberals would disagree with the claim that language is essential to our agency in at least two ways: (1) that it is the framework within which we evaluate and articulate second-order goals and higher goods; and (2) it is only in relation to other interlocutors that we understand our agency and pursue these goods. It seems doubtful, therefore, that liberals conceive of an identity disengaged from language in either of these senses (e.g. Rawls, 1972: 522). Much more contentious, though, is the considerable emphasis that Taylor places on particular cultures or speech communities as 'horizons' or *necessary limitations* on our agency. This emphasis has three aspects. First, it is a claim about the nature of our attachment to speech communities. Second, there are the contingent consequences of linguistic diversity, that we are selves not merely in relation to language *in general*, but in relation to a *particular* language. Third, there is a claim about the way in which our notions of the good are bound to particular linguistic communities, rather than available generally.

First, Taylor maintains our freedom is constituted by our embeddedness in ‘webs of interlocution.’ The particular position that we understand ourselves to occupy in relation to others, and the available qualitative distinctions within the web generally, provides us with our sense of identity which gives us our ‘orientation in moral space’, as Taylor calls it. As seen above, Taylor argues that our moral agency is dependent on this sense of identity and hence is limited by it. Where individuals understand existing, socially-given qualitative distinctions as constitutive of themselves, they will be unable to treat these attachments as revisable without threatening the sense of their identity that is a precondition of their agency.

Nonetheless, as we have seen, Taylor *does* allow that persons may engage in the reevaluation of fundamental values, may revise even what had been deemed their most constitutive attachment. In fact, he readily acknowledges the idea of individuals moving beyond their original culture or speech community (however this is construed) as a real possibility. Indeed, Taylor suggests, this sort of move is itself encouraged by the “most important spiritual traditions of our civilization”(1989: 36). What he denies, however, is the possibility of somehow transcending webs of interlocution entirely:

The nature of our language and the fundamental dependence of our thought on language makes interlocution in one or other [form] inescapable for us We may sharply shift the balance in our definition of identity, dethrone the given, historic community as a pole of identity, and relate only to the community defined by adherence to the good (of the saved, or the true believers, or the wise). But this change doesn’t sever our dependence on webs of interlocution. It only changes the webs, and the nature of our dependence (1989: 38-39).

However, by acknowledging that individuals are not bound to their original frameworks, I think Taylor’s argument against disengaged notions of the person loses much of its force. In particular, Taylor allows that our interlocution with others need not be understood in an immediate form, but may extend to “a community of the like-minded”, such that “the ‘conversation’ will no longer be exclusively with living contemporaries, but will include prophets, thinkers, writers who are dead” (1989: 37-38). Interlocution may include, therefore, not just actual interaction with others (from face-to-face exchanges to correspondence) but participation in an ongoing tradition,

such as art or literature. Indeed, a great deal of art, philosophy and literature is written in this manner, as much against the models of the past as against one's contemporaries.¹⁵ Who counts as an interlocutor, on this view, can reasonably include not just actual living persons, but also those conceptions of persons that we idealize or even imagine (e.g. historical figures, saints, fictional characters, etc). I think this concession significantly dilutes the requirement of interlocution, and the burden of embeddedness.

This is because it is no longer necessary that I draw my identity from "my immediate historic community", so long as I understand myself as holding a framework of values that can potentially be shared with other, possibly fictive, persons. Indeed, it seems difficult to see what 'dependence' on webs of interlocution amounts to, if it is merely the requirement that we remain oriented towards *some* notion of the good that we can articulate, even hypothetically, to somebody. Nor do I think that any serious account of individual autonomy would view this sort of requirement as much of an obstacle. It does not seem to me, then, that this aspect of "our embeddedness in webs of interlocution" represents any real limitation on moral agency.

The second aspect of Taylor's argument that being embedded in language communities places limits on our autonomy is that our identity is formed in relation to *particular* languages rather than an abstract conception of language in general. This aspect can be distinguished, I think, from the earlier aspect of Taylor's argument concerning embeddedness because it is a contingent rather than necessary feature of language. To explain what I mean here by 'contingent', I mean that the present diversity of languages needs to be understood as a *historical* fact only rather than a logical feature of language itself, i.e. that even though different languages do exist, it is not true that they *must* exist.¹⁶ Another way of expressing this is to say that we can at least imagine a world where, because different languages never developed, everyone spoke or understood the same language.

¹⁵ See e.g. Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (1997).

¹⁶ We can concede this much, even if we acknowledge that language need not have evolved monogenically, or that the emergence of linguistic diversity - while not inevitable - is the most likely outcome of human evolution. As Darwin put it, "the formation of different languages and of distinct species, and the proofs that both have been developed through a gradual process, are curiously parallel" (*The Descent of Man*, 1874: 106, cited in Pinker 1994: 241). It is enough to hypothesize a world wherein only one language survived the floods or asteroids or whatever. The alternative, that different languages *must* exist, seems highly doubtful, for there are an infinite number of possible languages that could exist but do not.

In such a world, how much force would Taylor's account about our dependence on language have? It would still be true that we could not imagine ourselves as utterly disengaged from webs of interlocution or a conception of the good, but I've already argued that this is hardly fatal to most liberal conceptions of individual autonomy. We would very likely still recognize that the particular form of our language was the stuff of social agreement and arbitrary convention, rather than divine providence or natural order, not least because within any language there are various competing idioms that follow geographical concentrations, educational differences, technical needs, and personal taste. We would also be very likely to conclude that, despite having only one language, there was nonetheless an important distinction to be drawn between 'the world as it seems to us' and 'the world as it exists independent of our experience of it' - that the world was open to be variously described and that at least some forms of description could be falsified by reference to it (B Williams, 1993: 139). Even in the absence of other languages, I think that it is likely that we would recognize that human agency depends partly upon an existing speech community as a source of values and articulations of the good, that people who were raised without speech suffered severely in their development. The one thing that we wouldn't possess, though, is any sense of a social *identity* as being *constituted* by our speaking a particular language more so than any other. Nor would this matter to our agency or autonomy. Although a population that lacked a diversity of languages might in truth be the poorer for it, we would not know it.

However, Taylor's argument also rests on a claim about the non-transparency of different languages, the idea that conceptions of the good are only available to us because they have been articulated within our particular language:¹⁷

The rather different understandings of the good which we see in different cultures are the correlative of the different languages which have evolved in those cultures. *A vision of the good becomes available for the people of a given culture through being given expression in some manner.* The God of Abraham exists for us (that is, belief in him is a possibility) because he has

¹⁷ See also Rawls: a plurality of existing conceptions of the good in society "simplify decision by offering definite ideals and forms of life that have been developed and tested by innumerable individuals, sometimes for generations. Thus in drawing up our plan of life we do not start *de novo*; we are not required to choose from countless possibilities without given structure or fixed contours" (1972: 563-564).

been talked about, primarily in the narrative of the Bible but also in countless other ways from theology to devotional literature Universal rights of mankind exist for us because they have been promulgated, because philosophers have theorized about them, because revolutions have been fought in their name, and so on. There are atheists in our civilization, nourished by the Bible, and racists in the modern liberal West. But articulation is a necessary condition of adhesion; without it, these goods are not even options [my emphasis] (1989: 91).

A lot seems to turn, though, upon how “availability” and “language” are understood here. Taken practically, it is undoubtedly true that the mutual unintelligibility of languages is a significant barrier to the transmission of ideas and values. Nonetheless, Taylor also downplays the significance of translation as a way of making other goods available. Indeed, the very fact that translation is possible helps to demonstrate the ultimate transparency of goods. That is, although we certainly cannot transcend language, we do not need to use the same language to in order to share meanings, values or ideas (see e.g. Eco, 1997: 345).¹⁸ But for a great deal of translation from the original Hebrew, one assumes, belief in the God of Abraham would not be a possibility for most people.

To include translation, though, would involve an extremely broad conception of language communities: people would belong to the same general community so long as they simply had *access* to some of the same values and beliefs, and shared certain options in common. That is, it does not especially matter that A and B do not understand one another, so long as they both share a common understanding of P or Q. And, at one point, Taylor appears to suggest communities can recognize certain sorts of commitments which aren’t constrained by any particular language:

¹⁸ Eco’s particular concern is the notion of a universal language, i.e. a single language capable of expressing all ideas. Such a concept assumes that, “despite the individual genius of any single language, and despite the fact that each constitutes its own rigid and unique way of seeing, organizing and interpreting the world, it is still always possible to translate from one language to another. However, if this is a prerequisite inherent to any universal language, it is at the same time a prerequisite inherent to any natural language. It is possible to translate from a natural language into a universal and artificial one for the same reason that justify and guarantee the translation from a natural language into another (1997: 345).

We are all framed by what we see as universally valid commitments (being a Catholic or an anarchist) ... and also by what we understand as particular identifications (being an Armenian or a Quebecois). We often declare our identity as defined by only one of these, because that is what is salient in our lives, or what is put in question. But in fact our identity is deeper and more many-sided than any of our possible articulations of it (1989: 27).

Now, identified as a ‘society of interlocutors’, Catholicism and anarchism certainly aren’t exclusive to any particular group of language speakers. Even Quebec society encompasses at least two different languages. However, if webs of interlocution extend to people who share certain beliefs *as available options*, rather than actually holding them as beliefs, then it is clear that a ‘society of interlocutors’ constitutes an even broader category of persons. Indeed, given the sheer diversity of values and beliefs in a multicultural world, one formed by many centuries of social interaction wherein “no known society is pristine and untouched, the product of its own history alone” (Carrithers, 1992: 25) it does not seem a wholly implausible proposition to suggest that all existing human societies and languages together form a single web of interlocution, however attenuated that might seem.

On this view, the ‘availability’ of different conceptions of the good under conditions of linguistic diversity is best treated as a practical question, rather than a necessary constraint on individual autonomy. Certainly, even the practical constraints imposed by a particular community can have real consequences (e.g. censorship, prohibitions on apostasy) for the meaningful exercise of autonomy. That, though, is not the same as saying that autonomy is *dependent* on particular language communities. Rather, it is my part of my thesis here that competence in *any* language gives one access – at least in principle – to the entire array of human ideas and values.

It is clear, though, that Taylor would not agree with such a broad interpretation of ‘availability’ or ‘language’. He argues for a strong version of the thesis that articulations of the good take their meaning from their expression within a particular community, and are therefore unintelligible outside of the context of the particular qualitative distinctions that community makes (1989: 80). More generally, much has been made of the notion of ‘thick description’, which suggests that it is impossible to render the meaning of individual terms (especially of ethical terms) without comprehending the whole network of related meanings within which they are nested

(Geertz, 1973: *passim*). I find this more than a little exaggerated, though. Certainly, the idea of translation does not necessarily presuppose an identity of concepts or meanings between different languages, nor does it suggest that the translation of meanings between different languages somehow takes place “without some insight as to the forms of social organization within which they work.”¹⁹ Languages differ in their qualitative distinctions as they do in many other things, just as Italian has no equivalent for the verb *to skip*, or English no translation for *cappuccino*. And there is certainly no requirement that other people’s values and beliefs should be comfortable or familiar to us (see e.g. Waldron, 1997: 18-19). Nonetheless, it is implausible to suppose that highly complex ethical concepts can not be translated from language to language. If this were true, Taylor’s own examples (the God of Abraham, Roman Catholicism, anarchism) would be utterly unintelligible.

Hence, although Taylor is able to show that language is constitutive of individual autonomy, he fails to show that one’s ability to articulate and revise values and beliefs is *intrinsically* dependant on *particular* languages or communities. Although a society may impose practical limits on the availability of certain options or the pursuit of a certain goal, a person remains a moral agent regardless, with the same capacity for autonomous choice as any other. Moreover, in a world where exposure to elements of diverse cultures is an inevitable feature of daily life for most people, it seems to me much more plausible to understand any notion of language communities or webs of interlocution as much broader entities than the specific community, the country or even the continent which we inhabit.

ii. Raz and social forms

Autonomy, as Raz depicts it, is not a characteristic of persons or moral agents in general. It is contingent, he states, on autonomy being of central value in a society, and supported by its social forms. By ‘autonomy’, Raz is referring throughout to *personal* autonomy: the notion that “an autonomous person is part author of his own life” (1986: 204).²⁰ His argument, in outline, is that personal autonomy requires *inter*

¹⁹ See e.g. B Williams (1993: 131): “To understand a language you need to understand the social life and outlook of those who speak it.”

²⁰ Raz distinguishes between *personal* and *moral* autonomy as follows:

alia the existence of certain options made available by one's culture. According to Raz, part of living autonomously is not only holding a certain attitude to one's life (i.e. some minimal sense of being self-directed), but also living "in a certain environment", one which "respects the condition of independence, and furnishes [persons] with an adequate range of options. The autonomous life depends on the general character of one's environment and culture" (ibid: 391). Raz puts his argument more schematically as follows:

Individual well-being depends on the successful pursuit of worthwhile goals and relationships. Goals and relationships are culturally determined Family relations, all other social relations between people, careers, leisure activities, the arts, sciences, and other obvious products of 'high culture' are the fruits of society. They all depend for their existence on the sharing of patterns of expectations, on traditions preserving implicit knowledge of how to do what, of tacit conventions regarding what is part of this or that enterprise and what is not. Familiarity with a culture determines the boundaries of the imaginable. Sharing in a culture, being part of it, determines the limits of the feasible (Margalit and Raz, 1995: 133-134)

The starting point for my examination of Raz's account of culture and autonomy is the relationship he describes between individual goals and social forms. Like Frankfurt, Taylor and others, Raz defines agency in terms of having second order goals, i.e. goals about the sorts of goals one wants to have. In particular, autonomous persons are characterized by holding comprehensive goals, which consist in the pursuit of particular *values*. The possibility of having such goals, Raz argues, requires the existence of *social forms*, which he describes as consisting of "shared beliefs, folklore, high culture, collectively shared metaphors and imagination and so on"

Personal autonomy, which is a particular ideal of individual well-being should not be confused with the only very indirectly related notion of moral autonomy. The latter originates with the Kantian idea that morality consists of self-enacted principles [however] it allowed only one set of principles which people can rationally legislate and they are the same for all. Nobody can escape their rule simply by being irrational and refusing to accept them. Personal autonomy, by contrast, is essentially about the freedom of persons to choose their own lives. Moral autonomy both in the Kantian and in other versions is a doctrine about the nature of morality. Personal autonomy is no more than one specific moral ideal which, if valid, is one element in a moral doctrine (1986: 370, n2).

(1986: 311). Note, though, that social forms need not be socially *approved* forms (310) so that, for instance, being a vagabond might be a meaningful goal so long as there were *some* extant social belief in the worthiness of a wandering life.²¹

One reason Raz gives to support his claim about the necessity of social forms is the fact that some sorts of goals presuppose the existence of common institutions for their pursuit: lawyers need courts and doctors hospitals, and so on. To put it less glibly, being a lawyer or a doctor involves being part of a “complex social form”, involving a number of conventions and distinctions which are socially given. This extends, Raz argues, to those activities whose dependence on social forms seems less than obvious. Bird watching, for instance, “seems to be what any sighted person can do” (311) but apparently there is more to bird watching than watching birds. According to Raz, one can only *be* a bird watcher in a society where bird watching “or at least some other animal tracking activities, are recognized as leisure activities, and which furthermore shares certain attitudes to natural life generally” (ibid). This means that “engaging in the same activities will play a different role, have a different significance in the life of the individual depending on social practices and attitudes to such activities” (ibid).

Another reason Raz gives for the claim that goals need social forms is the idea that these sorts of goals can’t be chosen outright, but only acquired across time “by habituation”. The argument here seems to be that comprehensive goals are complex, and their availability depends on familiarity with a great many conventions and shared understandings “too dense to allow explicit description or learning, they can be learnt only by experience, direct or derived (e.g. from fiction)” (312). Similar to Taylor’s argument that beliefs and values are available primarily through their articulation through traditions and conventions, Raz’s argument is that we apprehend the value of comprehensive goals only through inhabiting a common culture.

However, it seems somewhat unclear from this account whether Raz thinks social forms are necessary only to the *availability* of particular goals, or whether he is making the stronger claim that they actually help constitute the *value* of those goals. Let me begin by agreeing with Raz that individual well-being involves *inter alia* “the successful pursuit of worthwhile goals”. Autonomy, then, requires the availability of such goals. Now, it may be that at least some such goals require institutions and social

²¹ This is my own example, however, not Raz’s. Whether an itinerant life could be *intrinsically*

practices for their pursuit. In this sense, I agree that social forms matter to availability: one cannot, for instance, successfully pursue the goal of being an astronaut in a country without a space programme. But it seems wholly implausible to suggest that the *worthiness* of a goal depends purely or even largely on its social recognition, “the public perception of common social forms of action” (1986: 310). Surely what matters to individual well-being is whether or not a goal is *intrinsically* valuable.

Take Raz’s example of bird watching. Whether or not it is supported by social forms may matter to its availability, but it is difficult to see how that matters to its *value*. The alternative is to believe that an activity is valuable simply because there is some corresponding social form. One difficulty with this view is that it requires us to derive values from facts. Another is that there is no shortage of examples of social forms based around activities that are harmful or morally pernicious (e.g. slavery). It seems more plausible to assume that although social forms may give rise to different options, the value of those options remains a separate question. In fact, Raz later makes clear that autonomy only contributes to individual well-being insofar as one pursues options which are independently valuable (1986: 411-412). Nonetheless, his particular emphasis on the necessity of social forms tends to obscure this latter point.

Another issue arising from Raz’s account is the *extent* to which a social form must be present within one’s society in order to give rise to meaningful options. To extend the previous example a little further, in order to be a bird watcher is it necessary to belong to a culture that recognizes bird watching? Or is it simply enough to know what bird watching involves? At one point Raz clearly acknowledges the latter to be a possibility:

Both the question of the degree to which the practice has to be shared, and the question of whether it has to be shared by one of the groups in the midst of which an individual lives, or of which he is a part, or if it is enough if it is a practice of a group he is familiar with, though not a member of, admit of no straightforward answer the reasons for the general thesis suggest that it is very much a matter of degree in most cases (1986: 310).

valuable is of course a separate question. See my discussion below.

More generally, this passage suggests a tension within Raz's arguments between particular cultures and culture in general. On the one hand, he states that "options presuppose a culture" in that they "presuppose shared meanings and common practices" (1995: 176), and that "only through being socialized in a culture can one tap the options which give life a meaning" (1995: 177). On the other hand, he makes clear that autonomy "requires that many morally acceptable options be available to a person" (378) and that value pluralism is an essential condition of autonomy (1986:370-399 *passim*). Hence, when Raz describes the conditions of autonomy as "the existence of a public culture which maintains and encourages the cultivation of certain tastes and the undertaking of certain pursuits" (1986: 421-422), it is plausible that *this* sense of culture should not be understood in parochial terms.²² More generally, Raz's reference to fiction and dramatic works as means of apprehending comprehensive goals (ibid: 312) seems consistent with a cosmopolitan conception of culture, one in which the range of possible goals is drawn from a broad range of sources.

iii. Kymlicka and societal cultures

From the beginning of *Multicultural Citizenship*, Kymlicka makes it clear that, although the term 'culture' can distinguish anything from very local differences to entire civilisations, he is concerned with the sort of culture that arises from "national and ethnic differences" (1995: 75). In particular, he claims that the modern world is divided into what he terms 'societal cultures', 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.

²² See Raz's characterization of the requirements of multicultural societies: i.e. that they also share a common culture, "in which the different coexisting cultures are embedded", the same economic environment, and the same political society (1994: 187-189). Note that Raz distinguishes between two types of multicultural society: one where different cultural communities live in different regions within a country (e.g. the Inuit in Canada), and one where, "even though the communities may be disproportionately concentrated in different residential neighbourhoods, there is in the main no geographical separateness" (1994: 173-174). In discussing multicultural societies here, Raz is referring to the latter. It seems reasonable to infer that his account (with Margalit) of national self-determination applies only to cultural groups in the former situation (1994: 128, 142).

These cultures tend to be territorially concentrated, and based on a shared language [my emphasis] (1995: 76).

Kymlicka refers to Dworkin's idea that members of a culture share "a shared vocabulary of tradition and convention."^(Dworkin, 1985:231) However, he adds that, for his own definition of a societal culture, this vocabulary must be not only be present but also be supported by common institutions and practices because, "for a culture to be embodied in social life means that it must be institutionally embodied - in schools, media, economy, government, etc" (76).

For Kymlicka, then, a societal culture is synonymous with the idea of a distinct 'people' or 'nation', in the sense of "an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history" (18). Apparently, this is because the "capacity and motivation to form and maintain such a distinct culture is characteristic of 'nations' or 'peoples'" (80). Conversely, Kymlicka notes, just as the presence of a distinct culture is generally considered by most writers on nationalism to be the "defining feature" in the formation of a nation, "so nations are almost invariably societal cultures" (Ibid).

What has all this to do with individual autonomy? For Kymlicka, the defining feature of liberalism, is that "it ascribes certain fundamental freedoms to each individual. In particular, it grants people a very wide freedom of choice in terms of how they lead their lives" (Ibid). In Rawlsian terms, people want not only the freedom to pursue their own conceptions of the good life but also the freedom to revise those conceptions. As Kymlicka puts it, "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 once chosen" (82). The relationship he draws between freedom and culture is that cultures – by which Kymlicka of course means *societal* cultures - are the *necessary context* for the choices that constitute our freedom, in the sense that "freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us" (83). People's choices, then, are based on beliefs about the value of social practices and such beliefs are "in the first instance, a matter of understanding the meanings attached to it by our culture" (Ibid). All of which explains Kymlicka's use of the Dworkinian idea of culture as 'a shared vocabulary':

Whether or not a course of action has any significance for us depends on whether, and how, our language renders vivid to us the point of that activity. And the way in which language renders vivid these activities is shaped by our history, our ‘traditions and conventions’. Understanding these cultural narratives is a precondition of making intelligent judgements about how to lead our lives The availability of meaningful options depends on access to a societal culture, and on understanding the history and language of that culture - its ‘shared vocabulary of tradition and convention’ (1995: 83).

Showing that people need access to societal cultures in order to be able to make meaningful choices is a basis for arguing that people need access to *some* culture.²³ Kymlicka, though, argues that a culture “of one’s own” is a good all individuals are legitimately entitled to, a primary good in the sense that it is “something that people can be expected to want, whatever their more particular conception of the good” (86). The reasoning for this particular claim, though, is rather slight. Kymlicka cites remarks by other writers about the strength of attachment that persons appear to feel in respect of their particular society (Rawls, 1993: 277) or ‘pervasive culture’ (Margalit & Raz, 1995: 132).²⁴ He concludes that, although some people seem to be able to live without difficulty outside their original society, “most people, most of the time, have a deep bond to their own culture” (1995: 90). This is enough, then, for Kymlicka to conclude that there is a strong case for people to have special rights to their *own* culture.

²³ Kymlicka argues that “for meaningful individual choice to be possible, individuals need not only access to information, the capacity to reflectively evaluate it, and the freedom of expression and association. They also need access to a societal culture. Group-differentiated measures that secure and promote this access may, therefore, have a legitimate role to play in a liberal theory of justice” (1995: 84).

²⁴ Rawls refers to the “fact that we are born into our society and within its framework realize but one of many possible forms of our person; the question of our entering another society does not arise The attachments formed to persons and places, to associations and communities, as well as cultural ties, are normally too strong to be given up, and this fact is not to be deplored [T]his structure is to be viewed as a scheme into which people are born and are expected to lead a complete life” (1993: 222, 277). Margalit and Raz observe that individuals can join a new pervasive culture, “but only by changing, e.g. by adopting their culture, changing one’s tastes and habits accordingly - a very slow process indeed” (1994: 132). Like Kymlicka, Margalit and Raz cite the importance of membership of particular cultures to one’s well-being and autonomy and stress the importance of group membership to self-identity: “people’s sense of their own identity is bound up with their sense of belonging to encompassing groups and that their self-respect is affected by the esteem in which these groups are held Individual dignity and self-respect require that [such groups] be generally respected and not be made a subject of ridicule, hatred, discrimination, or persecution” (134).

I think the obvious difficulty with all of this lies in the unargued shift from claiming (1) that people need culture in general (i.e. a shared vocabulary) to claiming (2) that people need access to their own ‘societal cultures’ in order to make meaningful choices. My argument here follows closely on points made by Jeremy Waldron in response to an earlier version of Kymlicka’s thesis (Kymlicka, 1989; Waldron, 1993). He claims that, in arguing from (1) to (2), “Kymlicka is guilty of something like the fallacy of composition” (1993: 106). Although options themselves must have cultural meanings, this does not entail the existence of an entity called a culture which orders all of these meanings, nor that there is such a thing as ‘cultural integrity’ which must be protected in order for people to be free. “Meaningful options”, Waldron points out, “may come to us as items or fragments from a variety of cultural sources” (106):

If all this is correct, then membership in a particular community, defined by its identification with a single cultural frame or matrix, has none of the importance that Kymlicka claims it does. We need cultural meanings, but we do not need homogenous cultural frameworks. We need to understand our choices in the contexts in which they make sense, but we do not need any single context to structure all our choices. To put it crudely, we need culture, but we do not need cultural integrity (Waldron, 1993: 106-107)

Although Waldron is writing here before Kymlicka’s much expanded thesis in *Multicultural Citizenship* with its particular emphasis on the notion of ‘societal cultures’, I would argue that the same objections apply *mutatis mutandi*. In particular, I mean to discuss Kymlicka’s reply to Waldron’s critique and offer my own arguments as to why this reply is inadequate. Before doing so, it is worth stating my agreement with Kymlicka (and Waldron) that autonomy is only meaningful within some cultural context - that we require cultural materials to make vivid the various options that are available to us, to be able to both pursue and revise our own goals and values. The basis of my disagreement with Kymlicka, then, is that his account of ‘societal cultures’ as the exclusive (or even the dominant) matrix within which we develop our autonomy is false.

First, although Kymlicka allows that there are many versions of culture, he contends that only culture that arises from ethnic and national differences can be said

to provide the cultural materials that are relevant to individual freedom. As Waldron has argued, though, it is simply not the case that cultural materials are of necessity organized this way. I think it highly plausible that a population may share laws and institutions without being organized according to a single cultural system that posits “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”. In *Multicultural Citizenship*, though, Kymlicka considered Waldron’s critique at length:

Waldron’s conclusion is, I think, mistaken. It is true that the options available to the members of any modern society come from a variety of ethnic and historical sources. But what makes these options ‘available’, or meaningful to us? After all there are limits on the ‘cultural materials’ which people find meaningful. I have argued that options are available to us if they become part of the shared vocabulary of social life - i.e. embodied in the social practices, based upon a shared language, that we are exposed to (1995: 103).

Kymlicka refers to Waldron’s own example of *Grimms’ Fairy-Tales* to illustrate his argument. Waldron had claimed that fairy tales, such as that of those of the Brothers Grimm, “do not come from some *thing* called ‘the structure of our culture’. They are familiar to us because of the immense variety of cultural materials ... that are available to us. But neither their familiarity nor their availability constitute them as part of a single cultural matrix.” (1993: 107). Kymlicka responds, however, that “surely one of the reasons why *Grimms’ Fairy-Tales* are so much a part of our culture is precisely that they have been translated and widely distributed in English. Were Grimms’ Fairy-Tales only available in the original language, as is the case with the folklore of many other world cultures, they would not be available to us” (1995: 103). As Kymlicka concludes, “[t]hat we learn in this way from other cultures, or that we borrow words from other languages, does not mean that we do not still belong to separate societal cultures, or speak different languages” (Ibid).

It is important, though, to distinguish between the two claims that Kymlicka makes here: (1) that we belong to different societal cultures and (2) that we speak different languages. Now, as regards (1), although we certainly live in different societies, I think it is highly doubtful that we *belong* to different societal cultures as

Kymlicka has defined them. My skepticism concerns the ontology of Kymlicka's conception of 'societal' cultures: from the presence of a population governed by laws and institutions, Kymlicka manages to infer the existence of a single, coherent cultural system offering "meaningful ways of life across a broad range of human activities". Yet, for a culture to have *coherence*, one assumes that it would be impossible, as a matter of definition, for its elements (i.e. the cultural materials and meanings within that system) to contradict or compete with one another. In other words, an essential characteristic of societal cultures seems to be unity of meaning. Now, Kymlicka does not pursue this line of reasoning and it is easy to see why. Coherence of this kind would be antithetical to the sort of diversity of goods and values that Kymlicka is keen on. Fortunately, there is little reason to suppose that anything like societal cultures actually exist in the world, because it directly contradicts what we know about social diversity being a general feature of human societies.

However, as regards (2), I agree that linguistic diversity has important consequences for the availability of cultural materials. But I do not think that these consequences are the ones that Kymlicka suggests, nor do they support his theory in quite the way he imagines. Even so, his claim that "options are available to us if they become part of the shared vocabulary of social life - i.e. embodied in the social practices, *based upon a shared language* [emphasis added]" is an important one to consider. How do we respond to the claim that it is only a common language and society that makes cultural materials both available and meaningful?

There are two points to be made in response to these claims, which I will outline as follows. First, although the language we speak is relevant to what cultural materials are available to us, it is wrong to claim that it is language *itself* that limits the availability and meaningfulness of cultural materials. The availability of cultural materials is always a practical question, and languages themselves place no intrinsic limits upon possible meanings. Secondly, even if one accepts that a shared written and spoken language plays a primary role in transmitting cultural materials, it does so in a manner that cannot be reduced to the 'history', 'traditions and conventions', or 'cultural narratives' of any particular society. Languages are not the same thing as 'societal cultures' or even societies. I will address each of these points in turn.

First, Kymlicka's claim that a shared language makes cultural materials (such as Grimm's Fairy Tales) 'available' or 'meaningful' is ambiguous at best. On the one hand, he might mean that the transmission of 'cultural meanings' between two parties

(e.g. the Brothers Grimm and their readers) requires as a precondition that they (or their translators as agents) employ a language that both recognize and understand. This is sensible but of little significance. More controversially, as when Kymlicka states that “there are limits on the ‘cultural materials’ which people find meaningful”, he seems to suggest that particular languages (and ‘societal cultures’) are somehow responsible for limiting in some *systemic* fashion what cultural materials are available and meaningful within that language (a bit like the claim that because Chinese has no natural equivalent for ‘human rights’, for instance, the concept has no meaning there). If this is actually his argument, I think it is seriously flawed.

The ‘availability’ of any particular set of cultural materials is not the function of a language *per se*. A text produced in one language becomes available in a different language by the act (or acts) of translation alone - its ‘availability’ must therefore be a more or less practical question of distribution through the heterogeneous matrices of individuals, families, schools, publishers, universities and so forth.²⁵ The ‘meaningfulness’ of cultural materials is obviously governed at the most immediate level by the particular rules that structure each language, including those for grammar, syntax, phonology and so forth. However, beyond such ‘first-level’ set of rules and conventions that regulate the production of either speech or text in a given language, languages themselves place no inherent limits upon the individual interpretation of cultural materials. It may be that particular communities and societies place *normative* limits upon possible interpretations, but it is clear that this must be distinct from the role of linguistic structures in organizing meanings and from the *capacity* of such structures to transmit cultural materials.²⁶

Kymlicka’s claim that “options are available to us if they become part of the shared vocabulary of social life - i.e. embodied in the social practices, based upon a shared language” is further undermined when we consider that the production of cultural materials in one’s own language (including the relevant act of translation) can easily occur beyond the usual boundaries of one’s language and society. The most

²⁵ Note especially that these networks need not be officially-sanctioned ones: e.g. black markets, samizdat, and ‘underground’ distribution networks.

²⁶ Indeed, when we consider other examples, Kymlicka’s arguments concerning the availability and meaningfulness of diverse cultural materials seem unworkable. Music and purely visual media, such as architecture, painting or sculpture, don’t depend on language *per se*. Of course, the interpretation of these materials will typically take place against a background of relevant conventions, traditions and practices. Even so, a painting does not become more ‘available’ or a piano concerto more ‘meaningful’ simply because the interpreter shares a language with the author.

prevalent examples of this are satellite television, news services, and foreign films and videos.²⁷ The impact of cultural materials transmitted through satellite services like the BBC World Service or CNN, through the distribution of foreign films and videos, through television programmes, radio services and cartoons, should not be understated, at least if we are to take seriously the regulation imposed upon them by various governments. Indeed, such is the nature of the threat to notions of ‘cultural integrity’ depicted that even a (presently) elite medium as the internet is closely regulated in a number of countries.²⁸ If the options illustrated by such cultural materials are only made available, meaningful and vivid by becoming “part of the shared vocabulary of social life - i.e. embodied in the social practices” of such countries, then one might be forgiven for wondering at the need for such regulation.

My first point, then, is that languages themselves limit neither the availability or the meaningfulness of cultural materials from different sources. One may agree with this even while acknowledging that language plays a fundamental role in forming an individual’s cultural context and that differences in language may place significant practical restrictions on the availability of cultural materials. However, my second point is that, even if one agrees that language plays a fundamental role, it does so in a manner that cannot be reduced to the ‘history’, ‘traditions and conventions’, or ‘cultural narratives’ of a particular society. Languages are not the same thing as ‘societal cultures’ or even societies. Kymlicka acknowledges this point in a footnote of *Multicultural Citizenship*, noting that:

While the members of a culture share the same language, it does not follow that all people who share the same language belong to the same culture A culture, as I am defining it, involves a shared history as well as a common

²⁷ Consider then the phenomenon of watching a foreign film with subtitles: the spoken language is different from that of the subtitles, but our comprehension proceeds apace with the immediacy of the actors on the screen. See e.g. Pinker: “When we are comprehending sentences, the stream of words is transparent; we see through to the meaning so automatically that we can forget that a movie is in a foreign language and is subtitled” (1995: 21).

²⁸ See e.g. ‘Vietnam issues strict rules for Internet access’, CNN, 4 June 1996: the item reported the Vietnamese government’s General Directorate of Posts and Telecommunications as issuing regulations forbidding, “searching, printing and transmitting data that can affect national security, social order and safety, or information that is not appropriate to the culture, morality and traditional customs of the Vietnamese people. [emphasis added]” However, as the report concluded that: “Some wonder if the government is exaggerating the Internet threat. Millions of Vietnamese have access to international telephone links and radio broadcasts, while hardly any have private computers and modems.” Also e.g. “Malaysia casts legal eye over Net” *The Guardian*, 2 April 1999, p.18: “Under [a] new law, a communications and multimedia commission will establish a watchdog to regulate material including ‘unsuitable content’ and ‘the representation of Malaysian culture and national identity.’”

language, and their embodiment in particular societal practices and institutions ... A common language, then, is necessary for a shared culture, but not sufficient.

While this seems correct, taken together with Kymlicka's claim that choices are *only* made available, meaningful and vivid to persons where they are 'part of the shared vocabulary of social life', underlined by the same 'shared history' and embodied in their own 'particular societal practices and institutions', it leads to an absurd conclusion. Consider the scenario where different 'societal cultures' exist within the same language: the logical conclusion of Kymlicka's argument is that cultural materials *in the same language* cannot be meaningful *unless* they are also part of a shared 'societal culture'.

This seems plainly false. If, as I've already argued, a common language is the dominant *medium* for the transmission of cultural materials, then this must necessarily *include* such cultural materials as knowledge of practices and institutions, traditions and histories. Either these latter sorts of materials are meaningful in some pre-linguistic, pre-interpretative sense, which seems deeply implausible, or Kymlicka has made a mistake. Moreover, his mistake is one which is fatal to his entire argument: language, rather than membership of a 'societal culture', is the dominant context within which we gain access to cultural materials and cultural meanings. Kymlicka fails to show that we need particular culture as opposed to access via a language (any language) to the general wealth of diverse materials and meanings of culture in general.²⁹

3. Summary

To summarize very briefly, the three accounts of autonomy examined above each argues from a broad claim about culture (people need culture in general) to a specific claim about particular cultures (people need some particular culture, and this fact limits to some degree the capacity for individual autonomy). Throughout the course of this chapter I have argued that, although the general claim is sound, it seems much more implausible empirically to accept the specific claim.

²⁹ In Chapter 8, I discuss the question whether the particular importance of language gives rise to any significant group-based moral interests, i.e. language rights.

In each case, the central difficulty has been the relationship between the individual capacity for autonomy (which I've assumed is innate) and the availability of meaningful options (which is a function of culture in general). The ability to deliberate over one's important values and beliefs requires, first of all, a language which makes available cultural materials (in the sense of existing values, ideas, and beliefs). Some minimal competence in a language (e.g. understanding its meanings), then, would seem to be a precondition of autonomous development.

What is implausible, though, is the specific claim that people need a particular culture, and that the options, values and beliefs that are available to them are limited by what their culture makes available. To summarize my arguments, it is useful to first offer a simple model of culture in general. Let us assume that a culture in the sense of an *ethos* is made up of different elements.³⁰ On the one hand, there is the expression of ideas, values, and beliefs, whether that expression is through novels, sermons, works of art, speeches, broadcasts, rituals, and so on. Each such instance can be taken as an element or fragment of culture. On the other hand, there are more concrete cultural elements, which are practices, conventions, traditions and (at the most concrete) institutions.³¹ And the general importance of the various elements of culture is that they (1) suggest possible values, beliefs and goals; and (2) generate options.

In the course of this chapter I have made the following criticisms of the specific claim about the relationship between autonomy and particular cultures; (i) it greatly exaggerates the degree to which people need to be a member of some particular group in order to apprehend different ideas or values; (ii) it fails to distinguish between the value of an option (which is intrinsic) and the availability of an option (which depends on the extent to which a given society supports that option); and (iii) it overlooks the extent to which all elements of culture are transmissible across ethnic and national boundaries, as well as between different languages. As a result, the specific claim confuses the existence of practical limits on the availability of options with inherent limits on the capacity to live autonomously. This is a bit like the mistake involved in arguing that, because I cannot leave the room (because the

³⁰ I use the term 'elements' as synonymous with 'cultural materials' or 'social forms'.

³¹ A broad division then might be between the expression of ideas and actions based on ideas. However, it is clear that expression itself ultimately reduces to actions. Hence expressive elements of culture such as broadcasts and rituals are also based upon more concrete elements, such as a broadcasting system or an organized church, etc.

door is locked from the outside, for instance), I also could not want to leave the room (because leaving the room is not an option which is available to me).³²

More generally, the flaw in the specific claim is the too-heavy emphasis on the idea of specific cultures (typically identified with particular social or cultural groups), and a corresponding failure to appreciate that the social environment of most people in most countries is composed of a diverse range of values, beliefs, practices, traditions and institutions. In other words, the elements of culture that are available to them are greater than those for which their society may support options, and undoubtedly greater than that limited set of options that have been sanctioned by their particular cultural group.

³² More generally, it is akin to saying that it is impossible to be a doctor (the comprehensive goal) in a country where most people do not understand the concept of medicine (i.e. the lack of social forms and institutions based on medicine).

Chapter Four

Membership and Identity

The case for special cultural rights doesn't rely simply on a claim about the nature of autonomy (i.e. that it is group-based). It also relies on a claim about the sorts of interests that people have as consequence of *belonging* to particular cultural groups. This chapter looks at this claim.

Specifically, even if I am right about the nature of autonomy, it might still be true that people's *view* of themselves as members of different cultures gives rise to important moral interests. Or it may be that the groups themselves provide certain collective goods, and it is important to protect members' access to those goods. Neither of these claims rely on an argument about the nature of autonomy. And it may be that these goods and interests aren't sufficiently protected by uniform conceptions of rights. As Shapiro and Kymlicka ask:

Are there legitimate interests which people have, emerging from their ethnocultural group membership, which are not adequately recognized or protected by the familiar set of liberal-democratic civil and political rights as reflected, say, in the American Bill of Rights, or the French Declaration of the Rights of Man? (1997: 4)

The subject of this chapter, therefore, is the claim that people have interests *qua* members of cultural groups. I analyse this claim in two parts. First, there is the *nature* of cultural groups. This looks at the thesis that membership of these sorts of groups is different somehow than membership of other sorts of social group. I also look at a number of difficulties with how membership is *defined* from group to group. The second part of my analysis concerns the *conceptual* relationship between cultural membership and personal identity. In particular, the case for special cultural rights relies on the claim that membership is *constitutive* of personal identity. I mean to argue, however, that this is mistaken. And in doing so, I offer a very different account of the interests that people have *qua* members of cultural groups.

1. Personal identity and cultural membership

Personal identity and cultural membership are distinct concepts, although they do not always seem so. For many people, belonging to a cultural group is part of their sense of who they are as a person. For such people, any distinction between the two ideas appears to make little sense. My own argument, though, is that such views nevertheless involve a conceptual mistake. It is important, then, to be clear on what the distinction is.

First, *personal identity* consists in the self-perception of individuals or, as Derek Parfit puts it, “what we believe ourselves to be” (1987:199). We have already examined one conception of personal identity in the previous chapter, in the work of Charles Taylor. He argues that our sense of self is at least partly bound up with our commitments and beliefs. To put this another way, certain beliefs and attachments are partly constitutive of personal identity. As Taylor puts it, the “full definition” of any individual identity involves “some reference to a defining community” (1989: 36). Now, many writers disagree about the extent to which personal identity is voluntary or involuntary. Nonetheless, at the core of each of the various accounts is the idea that personal identity is at least partly *subjective*, in the sense that it depends on how people perceive themselves. Whether personal identity is a matter of unfettered choice, though, remains to be seen.

Secondly, *cultural membership* describes the relationship between persons and social groups. By ‘social groups’, I mean those groups whose members recognize one another *qua* members, as opposed to ‘categories’ which are merely persons identified by common characteristics, but who don’t necessarily compose social groups (e.g. people with brown hair). Now, let us assume for the time being that a person (*A*) is a member of a group (*B*) if he or she is recognized, first, by other members (*C*) as a member and/or, secondly, by other non-members (*D*) as a member. The basis for this recognition lies in their perception that *A* shares certain characteristics in common with *C*, who together compose the members of *B*.

Now, this is clearly a very schematic account: one which applies not only to the membership of cultural groups but also social groups in general. It is greatly complicated when we consider that modern societies contain a very large number of social distinctions and, consequently, that any individual may be a member of a more than one group. It is also important to keep in mind that the criteria for membership

may involve very different *kinds* of characteristics, in the sense that recognition on the basis of speaking a language is very different from recognition on the basis of a common ethnic background.

The basic distinction that I want to draw is this: unlike personal identity, cultural membership is *independent of a person's conception of themselves*. I don't mean that membership is objective in some absolute sense (i.e. part of the independent furniture of the universe). What I mean is that membership is based on the perception of others (whether members or non-members) that person *A* shares characteristics in common with the members of group *B*.¹ Since personal identity is based only on how people think of themselves, though, this means that it is possible to be a member of a group *without* actually thinking of oneself as a member. Equally (as I will argue in section 4), it is possible for a person to identify with a culture without actually being a member.

2. Groups and cultures

In Chapter 2, I defined *cultural* groups as those social groups primarily distinguished by ethnicity, language, religion or national origin. My own reason for adopting this definition is somewhat tactical, because I want to leave open the question whether in fact 'cultural' groups always possess distinct cultures. Nonetheless, the distinction between social groups based on *these* kinds of characteristics (i.e. ethnicity *et al.*) on the one hand, and other sorts of social group (e.g. disabled people, the aged) on the other, is one that is very widespread. I think it appropriate, therefore, to consider some of the reasons given for drawing it.

On one view, the difference between social groups and cultural groups is simply one of degree. All social groups provide their members with a social identity: *not* a sense of self but rather a sense of how they are identified by others. One way of distinguishing cultural groups, then, is by the general significance that attaches to membership: Margalit and Raz, for instance, distinguish those sorts of groups which necessarily have a 'high social profile', the "membership of which is one of the

¹ See e.g. Margalit and Raz: "Membership in the group is, in part, a matter of mutual recognition. Typically, one belongs to such groups if, among other conditions, one is recognized by other members of the group as belonging to it. The other conditions (which may be the accident of birth or the sharing of the group culture, etc.) are normally the grounds cited as reasons for such recognition. But those

primary facts by which people are identified, and which form expectations as to what they are like, groups membership of which is one of the primary clues for people generally in interpreting the conduct of others” (1994: 131). Margalit and Raz draw a contrast with the example of the fiction-reading public generally: it is a category rather than a social group in that membership is a simple matter of reading fiction, “it does not matter whether others recognize us as fiction-reading” (1994: 130), nor does it furnish its members with a sense of sharing a social identity.

The problem with this approach, however, is that it fails to account for what Barry describes as the “culturalization” of social differences (2000:305). Iris Marion Young, for instance, defines *social* groups as a “collective of persons differentiated from at least one other group by cultural forms, practices, or way of life” in a way that is “highly visible” (Young, 1994: 43).² In other words, attempting to distinguish cultural groups on the basis of their ‘high social profile’ alone isn’t sufficient because there are social groups that are just as distinctive as cultural groups.³

Another distinction, then, is what Margalit and Raz describe as the ‘pervasive’ cultures of cultural groups. Such groups have a culture that “encompasses many, varied, and important aspects of life, a culture that defines or marks a variety of forms or styles of life, types of activity, occupation, pursuit or relationship” as well as “cultural traditions that penetrate beyond a single or few areas of human life, and display themselves in a whole range of areas” (Raz, 1995: 129).⁴ This view of cultural

who meet the other conditions and yet are rejected by the group are at best marginal or problematic members of it.” (1994: 130). See also Kymlicka (1995), Waldron (1996).

² “A social group is defined not primarily by a set of shared attributes, but by a sense of identity. What defines Black Americans as a social group is not primarily their skin colour; some persons whose skin color is fairly light, for example, identify themselves as Black. Though sometimes objective attributes are a necessary condition for classifying oneself or others as belonging to a certain social group, it is identification with a certain social status, the common history that social status produces, and self-identification that define the group as a [social] group” (Young, 1990: 44).

³ As Kymlicka notes, although “there is a sense in which gays and lesbians, women, and the disabled form separate cultures within the larger society”, he argues, “this is very different from the sense in which the Québécois form a separate culture within Canada, and it is important to keep these different senses of culture (and ‘multiculturalism’) in mind” (1995: 19). By contrast, Appiah points out that a common culture can easily be shared by people of different social identities; for example, male and female, gays and straight: “it is crucial to understanding gender and sexuality that women and men and gay and straight people grow up together in families, communities, denominations. Insofar as a common culture means common beliefs, values and practices, gay people and straight people in most places have a common culture” (1996: 76).

⁴ Similarly, although he himself does not endorse the conception, Waldron suggests one of the more typical characteristics associated with peoples and nations is the notion of a set of historically-based practices and traditions “permeating the lives of its members in a constitutive way” (1996:96). Membership “is usually taken to be ascriptive rather than voluntary, and to have implications across the whole range of one’s actions and relations with others, not just some specialized activity or concern” (Ibid).

groups as having ‘pervasive’ cultures is also endorsed by Kymlicka in his account of societal cultures, who claims that “the capacity and motivation to form and maintain such a distinct culture is characteristic of ‘nations’ and ‘peoples’” (1995: 80), i.e. the sorts of culture that arise from “national and ethnic differences” (75).⁵ Consequently, he suggests, groups such as the disabled, or immigrant groups, fail to constitute pervasive cultures.

What are we to make of this claim? I’ve already expressed strong doubts about the plausibility of pervasive cultures in Chapter 3. And I certainly doubt that all ‘cultural’ groups (i.e. social groups primarily distinguished by ethnicity, language, religion or nationality) *necessarily* possess distinct cultures. Nevertheless, it seems sensible to accept that many cultural groups *do* in fact give rise to distinct cultures (in the sense of values, ideas and beliefs, practices, traditions, and institutions), and for this reason alone it is helpful to distinguish them from other sorts of social groups which generally do not. As a related point, cultural groups can also be distinguished from social groups by a *capacity* to form ‘encompassing’ groups;⁶ in the sense that societies based upon cultural groups necessarily *include* those social distinctions between men and women, gays and lesbians, people with disabilities, the aged and so on.⁷ As Waldron notes, these are all recurring categories within any community “abiding longer than just a few generations” (1996: 96).

The real point of any distinction, though, is to “identify groups by those characteristics that are relevant to the justification of the right” (Raz, 1995: 129). This raises at least two problems for accounts of special cultural rights. The first is that particular cultural groups disagree, often vehemently, about who is a member. The second is that, where there is a consensus, the criteria for membership are often based on the sorts of characteristics that are morally arbitrary. I deal with the latter point in Chapter 7. I will say more about the former point below.

⁵ See Chapter 3.

⁶ Self-sufficiency is obviously a matter of degree, but it is one of the oldest criteria for self-government in political thought: see e.g. Aristotle, *The Politics*, Bk. I, 1252b: “When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in the existence for the sake of a good life.” I think it is a worthwhile question to ask whether any ‘community’ could seriously hope to be self-sufficient in an age of global markets. As Margalit and Raz remark, “the ideal of economic autarchy died a natural death.” (1995: 143).

3. Membership of cultural groups

Belonging to a group is a matter of recognition by others members. But recognition is not a matter of discretion. On the contrary, it defines what kind of group it is. As Frederick Barth explains, without specific markers between member and nonmember, cultural groups would be unable to maintain their distinct identity:

The boundaries to which we must give our attention are of course social boundaries, although they may have territorial counterparts. If a group maintains its identity when members interact with others, this entails *criteria for determining membership and ways of signalling membership and exclusion* [my emphasis] (1969: 15).

A significant problem arises, though, when the members of the group disagree about the nature of the group or who is a member (questions which ultimately address the same issue). A good example of this are the debates within and beyond Israel concerning who is Jewish, a question which receives quite different answers from the different traditions of Judaism.⁸ This is just one example among many, however. Disputes over membership and group identity are generic: they arise for all sorts of reasons, but they are thrown into sharp relief where the distribution of goods and resources under the group's control is in dispute.⁹ As we will see, this is especially problematic for those writers who treat cultural membership as something objective, because it requires some account of how such disagreements should be resolved. More generally, it is an embarrassment for the whole idea of special cultural rights whose distribution is based on belonging to a cultural group.

One answer to this problem is to seek some authoritative answer from within the group itself. There are at least two problems with this solution. The first is that it assumes that cultural groups are *autocephalous*, i.e. that they are formally organized, with some internal structure that coordinates the group's activities. The general difficulty with this view is that *cultural* groups themselves typically lack any such

⁷ Another way of putting the distinction is to note that, although women and men, abled and disabled, gays and straights, young and old, etc each form distinct social groups, they don't seem to be (for whatever reason) the sorts of groups that give rise to distinct, self-governing political associations.

⁸ See e.g.. "Israelis alarmed by 'influx of non-Jews'" by James Meek, *The Guardian*, 6 January 2000

structure. (Indeed, it is arguable that the absence of structure is a general property of cultural groups). The second problem is that, even if there *were* some formal structure to decide the issue (as is arguably the case with some religious groups), it is questionable whether that structure would have any *actual* authority to determine the matter.¹⁰ For instance, the Ultra-Orthodox Rabbis could declare that only Jews who attend Ultra-Orthodox Synagogues are really Jewish, but what force does this declaration have on those Jews who do not recognize the authority of Ultra-Orthodox Rabbis?

A different approach is to argue for some general objective criteria for determining cultural membership. For example, there is a disagreement among Pueblo as to whether the children of Pueblo women married to outsiders are themselves Pueblo.¹¹ Now, one could argue – as a part of some general conception of cultural membership – that the children of members are always members themselves. This might involve some sort of description of how, as a matter of course, children are exposed to the culture of their parents via their upbringing. So it offers good sociological reasons for considering children of members as members. The difficulty with this sort of approach, though, is that it ignores or simply disregards how the Pueblo themselves may actually conceive of the group's identity.¹² For if one adopts an objective approach to the question, 'who is a member', then there is no obvious reason why it should be applied in all cases, even where it directly contradicts some group's unanimous view about membership.

My own view, however, is that cultural membership is a normative concept. Disagreement, therefore, ultimately concerns values, not facts. Hence where two Irish people hold contradictory views about who is Irish, for example, it doesn't *entail* that either one is mistaken. It may simply mean that they hold rival conceptions of Irishness. I shall say more about this in Chapter 7. In the next section, though, I want to consider the conceptual relationship between cultural membership and personal identity.

⁹ See e.g. "Tribal membership disputes grow heated with casino riches at stake", CNN, 31 August 1999. "Israelis alarmed by 'influx of non-Jews'" by James Meek, *The Guardian*, 6 January 2000

¹⁰ 'Authority' of course is a deeply complicated notion at the best of times. By *actual* authority, then, I mean the conditions under which it would be *morally* right for X to obey Y. The particular difficulty in this sense is that culture is too an amorphous an entity to make authoritative statements about.

¹¹ See e.g. *Santa Clara Pueblo v Martinez* 436 US 49 (1978).

¹² Kymlicka (1995) comes closest to offering an objective account of cultural membership: I discuss this difficulty in more detail in Chapter 7.

4. Identity and persons

From considering group membership, we turn to consider its flip side: personal identity. In this section, I am specifically interested in what interests may arise from people's sense of personal identity, especially in relation to their values and beliefs. At the same time, I will discuss how people understand their relationship to a broader cultural context, especially their membership of cultural groups; various claims about the sorts of interests that arise from this; as well as notion of authenticity and the importance of 'recognition'.

First, it is important to reiterate (once again) the distinction between personal identity and cultural membership. Personal identity concerns how people perceive themselves, what they believe themselves to be. Cultural membership, on the other hand, concerns how people are perceived by others, not in terms of their idiosyncratic characteristics, but as bearers of various collective identities, in particular those social distinctions thought to denote a different 'culture'. I've already argued in this chapter that such membership is almost entirely a matter of ascription, rather than choice, and thus has little to do with personal identity. Of course, it may be that personal identity is equally unchosen, but it doesn't follow from this that it is in any way identical to cultural membership.

Many writers, though, tend to define an individual's values and beliefs precisely in terms of their cultural membership. Nor are the shortcomings of this approach always obvious. There is often little or no conflict between how someone understands themselves and the collective identities which others recognize them as bearing.¹³ And most writers don't go so far as to claim that the various groups which a person is member of *wholly* constitute personal identity, because to hold that would reduce individuals to mere bundles of group affiliations. Instead, the usual approach is to regard cultural membership as something that is *partly* constitutive of personal identity, leaving room for other, more idiosyncratic features of the individual personality.¹⁴

¹³ As Kymlicka notes, "most people, most of the time, have a deep bond to their own culture." (1995, 90), but he readily concedes that these are generalizations, not necessary facts of human existence.

¹⁴ This point is made by Appiah: "The connection between individual identity, on the one hand ... and collective identities, on the other, seems to be something like this: Each person's individual identity is seen as having two major dimensions. There is a collective dimension, the intersection of their

‘Partly constitutive’, however, is wholly ambiguous. Although allowing that not everything about a person is determined by their membership of groups, several writers seem determined to make that dimension of the self as insignificant as possible. Susan Mendus, for example, argues that “we are not self-made, but self-made only within certain limits: the limits provided by our membership of often diverse and inconsistent groups” (1989: 205). In other words, cultural membership might not constitute everything about a person, but it *does* limit people’s ability to engage in reevaluation of a fundamental kind. I’ve already discussed and rejected this claim in the last chapter. Mendus seems to suggest that being a member of a group binds our options for self-understanding in certain respects. However, although being a member of a cultural group can have many important consequences, I don’t think this kind of restriction is one of them.

Slightly less sweeping are the claims made by Yael Tamir and Iris Marion Young. Young argues that “groups ... constitute individuals. A person’s particular sense of history, affinity, separateness, even the person’s mode of reasoning, evaluating, and expressing feeling, are constituted partly by her or his group affinities” (Iris Marion Young 1990: 45). Again, ‘constituted partly’ seems to do a lot of work in this sentence, because it is easy to imagine a broad spectrum of ‘constitutiveness’, ranging from someone indifferent to their membership of a group, at one end, to someone almost completely defined by their attachments, at the other. Unfortunately, there is no knockdown argument against a claim this vague.

Tamir’s claim is more specific: “Membership in a nation is a constitutive factor of personal identity. The self-image of individuals is highly affected by the status of their national community” (Tamir 1993, 73). This seems clearly false, however, because Tamir is obviously taking a possible relationship (people can be highly affected by the status of their national community) for a necessary one (people are always highly affected by the status of their national community). I don’t think anyone would deny the weak version of this claim, that membership in a nation can be a constitutive factor of personal identity, or that the relative fortunes of a nation may have a bearing on people’s own outlook even where they themselves are not materially affected. France winning the World Cup, for example, certainly did a lot

collective identities, and there is a personal dimension, consisting of other socially or morally important features - intelligence, charm, wit, cupidity - that are not themselves the basis of forms of collective identities.” (1994: 151) Appiah himself, though, offers several criticisms of this view.

for the general mood of the French people, however momentarily. And there is also very real sense in which the well-being of individuals can be affected by their membership of national groups, such as in respect of persecution and discrimination, but this obviously wouldn't require membership of a nation to constitute your personal identity. For example, it didn't matter to anyone (least of all the German authorities) whether you felt Jewish or thought of yourself as Jewish, when it came to rounding people up in Nazi-occupied Europe. Tamir's statement might be true as a vague generalization (i.e. a lot of people are highly affected by their sense of national well-being), but it certainly doesn't hold true for all members of any national group.¹⁵

My arguments so far have suggested examples of people who, for various reasons, don't self-identify with their ascribed membership of particular groups: where A doesn't identify with group B but are nonetheless recognized as a member by others (whether members or non-members). However, since there is no necessary relationship between self-identity and membership, the inverse is also possible. These are cases where people identify with a group of which they are not recognized as a member - person A identifies with group B, but despite this is rejected by its members C. A straightforward example is the case of German-born children of Turkish *Gastarbeiter*. There is an option for people born and educated in Germany to think of themselves as German. At the same time, people in this position but not of ethnic German descent may not be recognized by other Germans as members of the German nation. Until May of 1999, though, they were not recognized by the German state as citizens.¹⁶ As Kymlicka observes, "membership in the German nation is determined by descent, not culture. As a result, ethnic Germans who have lived their whole lives in Russia and who do not speak a word of German, are automatically entitled to German citizenship, while ethnic Turks who have lived their whole lives in Germany and who are completely assimilated to German culture are not allowed to gain citizenship" (Kymlicka 1995, 23).¹⁷ A potential distinction between self-identity and membership is also conceded by Margalit and Raz:

¹⁵ Tamir's claim is particularly interesting in that she argues that cultural and national affiliations are best understood as chosen, rather than involuntary. Her position is best outlined in the following passage: "The claim that, if given to choice, identity features cannot be constitutive, seems unreasonable. We readily accept that life-plans, religious beliefs, and social roles are objects of reflection and choice, yet constitutive of our identity. Cultural and national affiliations falls under the same category, of being both chosen and constitutive." (1993: 33)

¹⁶ See e.g. "New German government to reform citizenship laws", CNN, 15 October 1998; "Germany Makes Citizenship Easier for Foreigners to Get" by Roger Cohen, *The New York Times*, 22 May 1999.

¹⁷ Kymlicka was writing before the change in German citizenship laws.

[A] group affects those who grow up among its members, be they members or not. But to say this is no more than to point to various anomalies and dilemmas that may arise. Most people live in groups of these kinds, so that those who belong to none are denied full access to the opportunities that are shaped in part by the group's culture. They are made to feel estranged and their chances of having a rewarding life are seriously damaged. The same is true of people who grow up among members of a group so that they absorb its culture, but then are denied access to it because they are denied full membership of the group (1994: 130).

As I have already stated, most writers typically don't acknowledge this as a possibility, because they fail to distinguish between personal identity and cultural membership. Kymlicka, Raz and Margalit, on the other hand, recognize a possible distinction, but treat it as an 'anomalous' problem i.e. one that doesn't bear on their arguments concerning the importance of membership. I mean to argue the contrary, however: membership is correspondingly *less* important, because there is no necessary relationship between personal identity (i.e. what they identify *with*) and their cultural membership.

However, it might be argued that this approach imposes a distinction between identity and membership that is wholly artificial. As Waldron notes, "the heroic ideal of authentic individual self-creation ... has not been found plausible as the basis of most people's identities; and is often rejected as fanciful, elitist, and parochial. It is much more plausible sociologically and, to many, much more comfortable to assume that people forge their identities in the crucible of the nation, culture or ethnos in which they are reared" (Waldron, 1997: 4). In particular, it seems implausible that people's sense of their own identity can be unaffected by other people's perceptions of them. The point is made by Margalit and Raz: that, "[s]ince our perceptions of ourselves are in large measure determined by how we expect others to perceive us, it follows that membership of [distinctive] groups is an important identifying feature for each about himself." (Raz, 1995: 131). For example, if the self consists (at least in part) in its relationships with others, and I grow up in a society that attaches ethical consequences to my ethnicity, religion, language, or nationality then I cannot help but to perceive this as an important aspect about myself. The mere fact of being treated by

others as a member will produce a degree of self-identity with the group.¹⁸ More generally, Raz suggests that identification of this kind is consistent with a high degree of indifference or even negativity:

Identification [with certain groups and communities] does not mean willing endorsement. It means one's self-understanding of who one is. People can see themselves as Jews, or Muslims, or as academic types, and so on, while hating themselves and/or Judaism or Islam or academic types generally, and that hate may be fuelled precisely because their identification with the group, or type, is hateful for them (1995: 310).

It seems to me, though, that this sort of self-hatred may arise from two very different sorts of identification. In one example, Peter *self-identifies* as Catholic in the sense that he believes in the teachings of the Church, but hates himself for believing what he does because it conflicts, say, with his preference for eating meat on Fridays. In another example, though, Peter self-identifies as an atheist but hates that he is regarded by *others* as a Catholic (because he was raised and educated as a Catholic and in his social environment, his surname and his accent mark him out as such). In both cases, Peter would recognize that his social identity is Catholic, but I think it is analytically unhelpful to say that in both cases he therefore identifies himself with Catholicism and other Catholics. Hence, I would reserve the notion of *identification* with a cultural group to only those cases where the person adopts the values and beliefs of that group.

How, then, are we to understand the relationship between cultural membership and personal identity? One analogy is to treat membership as akin to something like one's experience or upbringing. As Kymlicka argues, "People are bound, in an important way, to their own cultural communities. Someone's upbringing isn't something that can just be erased; it is, and will remain, a constitutive part of who that person is" (1989: 175). But what exactly does Kymlicka mean when he uses the term 'constitutive' here? Does it mean that people are not free to review and revise their earlier attachments? I do not think Kymlicka would endorse *this* interpretation of

¹⁸ The converse, that people don't tend to identify with groups of which they aren't considered members is also a sensible claim. However, since it is possible to identify with elements of a culture

constitutiveness. Indeed, in his more recent work, he suggests that the freedom to revise one's attachments is among the most important aspects of individual freedom (1995: 91-93).¹⁹ So, his claim that upbringing is constitutive of personal identity must mean something else.

I think the most sensible interpretation of this claim is that a person's upbringing is constitutive of their personal identity, only insofar as it provides the *background* or *starting point* from which individuals form and revise their values and beliefs. Upbringing, though, does not *determine* what values or beliefs a person has, nor does it *prevent* them from rejecting even their deepest attachments or commitments. This is typically the case, for instance, where people raised in a particular religion or way of life move away from it in adulthood. Another way of putting it is to say that your personal identity can consist not only in what you adhere to, but also in what you reject.²⁰

This view of upbringing is supported by the fact that people who are the products of the same social environment (e.g. siblings) can come to hold very different beliefs and values from one another. So, for example, one brother may take being Maori very seriously, while another brother may be entirely indifferent to the same ethnicity. As Appiah points out, being African-American may mean that you are aware of having a strong social identity, but this doesn't mean that you necessarily share "values, beliefs, and practices" with other African-Americans (1996:75). So the most plausible version of the relationship between membership and identity is to say that one's upbringing and membership can be significant *sources* of personal identity but that somebody's values and beliefs are always their own, whatever their content.²¹

without actually being a member, this may be relatively insignificant. Ultimately, in such cases, people make up their own minds as to how they identify themselves, as the *Gastarbeiter* example shows.

¹⁹ Kymlicka emphasizes that he is "only dealing with general trends. Some people seem most at home leading a truly cosmopolitan life, moving freely between different societal cultures But most people, most of the time have a deep bond to their own culture" (1995: 91). He explains that his theory of minority rights favours a scheme whereby the "national culture provides a meaningful context of choice for people, without limiting their ability to question and revise particular values or beliefs" (93). Note, however, that this scheme imposes penalties for people who wish to revise their attachment to 'national' cultures.

²⁰ I will say a great deal more about this view of personal identity, and its consequences, in Chapter 7.

²¹ These arguments against Kymlicka apply *mutatis mutandis* to a broadly similar claim made by Kukathas, "Individuals invariably find themselves members of groups or associations which not only influence their conduct but also shape their loyalties and their sense of identity. There is no reason for any liberal theorist to deny this" (1995: 232).

5. *Well-being and recognition*

I want to look now at the claim that people have specific interests either in respect of their cultural membership or in respect of their identification with particular cultures. I will look at these in turn. First, cultural membership. I have already adverted to some of the problems with identifying interests based on ascriptive membership of social groups. In Chapter 2 I suggested that the picture of cultural groups being marked out by a pervasive and coherent culture was false. Such groups are more likely to have some elements of a distinct culture, for instance be marked out by certain beliefs and traditions, but share many others with the wider society. More generally, many ‘cultural’ groups (i.e. those distinguished by ethnicity, nationality, religion or language) may not actually be culturally distinct in any significant sense from the wider population, such as Appiah suggests is the case with African-Americans.²² So one general reason to be skeptical about the claim that people have interests in particular cultures *qua* members is the fact that many cultural groups seem to lack sufficient culture.

Let us assume, though, that a cultural group *does* possess a distinct culture, composed of various beliefs, values, practices and traditions. What interests, then, do its members have? We have already looked at one account of people’s interests in culture in Chapter 2: the claim that it is a *necessary* condition of autonomy (what I will refer to here as the argument from necessity).²³ Kymlicka, Margalit and Raz, are some who place special emphasis upon this aspect of membership. However, as we saw, this only really establishes that people need culture in general, not membership *per se*. Another possibility, though, is that even though members don’t need access to their group’s culture in order to be autonomous moral agents, their *identification* with the group’s culture may still give rise to morally significant interests. In other words, although members don’t need the group’s culture in order to be free, having access to that culture may nonetheless be a good that is worth protecting.

²² See Appiah (1996).

²³ It is important not to confuse this with the (communitarian) argument about embeddedness, which is an argument that people need culture because without it they would cease not only to be autonomous, but to be people in some vague, embedded sense: see e.g. Sandel (1982). The communitarian argument about respecting culture might be concerned about its value to members, but not in an autonomy-enhancing sense. What I have called the argument from necessity is, by contrast, a liberal one insofar as culture is thought a necessary condition of autonomy, and valuable in precisely that respect.

In my view, this claim about the importance of *access* to culture as a good seems the most plausible justification for cultural rights in general. Particular cultures are not a necessary condition of autonomy but they can be valuable because they help provide the sorts of goals and options that make autonomy worthwhile. Indeed, some writers who make the argument from necessity acknowledge that people are *able* to make the change from one culture to another, *without* losing the capacity for autonomy *per se*: “Leaving one’s culture, while possible, is best seen as renouncing something to which one is reasonably entitled. This is a claim, not about the limits of human possibility, but about reasonable expectations” (Kymlicka, 1995: 86).²⁴

Equally, even allowing that people can move between cultural groups, Margalit and Raz stress the relationship between membership and individual well-being: “the prosperity of [a] culture is important to the well-being of its members. If the culture is decaying, or if it is persecuted or discriminated against, the options and opportunities open to its members will shrink, become less attractive, and their pursuit is less likely to be successful”(134). As Raz claims:

For most people, membership in their cultural group is a major determinant of their sense of who they are; it provides a strong focus of identification; it contributes to what we have to call their sense of identity Therefore slighting one’s culture, persecuting it, holding it up for ridicule, slighting its value, etc. affect members of that group. Such conduct hurts them and offends their dignity. (Raz, 1995: 178).

However, this ignores the fact that different sorts of persecution involve different kinds of harm. On the one hand, it is possible to persecute people *qua* members, regardless of whether they identify with the group’s culture or not. This is very often the case with the persecution of ethnic groups, such as the ethnic cleansing in the former Yugoslavia; the targeting of gypsies in Eastern and Central Europe; or the persecution of Jews in Nazi-occupied Europe.

On the other hand, persecution can take the form of the active suppression of some particular custom or ritual. *This* kind of persecution, however, would affect the

²⁴ See also Margalit and Raz (Raz, 1995: 129) “People may migrate to other environments, shed their previous culture, and acquire a new one. It is a painful and slow process, success in which is rarely

well-being of *all* those people who identify with that culture. But this category would be different from the membership of the cultural group in question, because there are some members who have little or no interest in the survival of the group culture, and many nonmembers who might have quite strong interests in the culture's survival.²⁵

What all of this suggests is that the claim that people have interests in particular cultures *qua* members of cultural groups is false. If it is possible to be a member of a cultural group and yet not identify with that group's culture *and* if it is possible for nonmembers to identify with a group's culture *then* membership *by itself* has none of the importance attached to it.²⁶ Rather it is more plausible to argue that person P who identifies with particular culture X has an interest in the protection of culture X, because P's identification with X is part of P's sense of personal identity and hence contributes to P's own well-being. Whether or not P is a member of X is of no consequence.

This argument, though, doesn't take into account the fact that *access* to cultures may be limited according to membership in groups. As Margalit and Raz note, the culture of a group may be shared by nonmembers, who are "then are denied access to it because they are denied full membership of the group" (Margalit and Raz, 1995: 130). As they claim:

membership of groups [with pervasive cultures] is of great importance to individual well-being, for it greatly affects one's opportunities, one's ability to engage in the relationships and pursuits marked by the culture. (Margalit and Raz, 1995: 134)

However, these are practical limits only: the fact that an option is only *available* to nonmembers does not mean that it is *valuable* only to members. The fact that many groups limit the availability of options on the basis of membership doesn't show that membership itself is a morally important interest that people have. If anything, it

complete." Kymlicka, Margalit and Raz all emphasize the importance of identity with a culture to individual well-being.

²⁵ The notion of persecution of a culture as opposed to the persecution of a group, is in fact a difficult one to draw. It might be as specific as banning a particular practice or include the wholesale suppression of a particular language or religion. Most historical examples of persecution, however, are rarely that sophisticated, focusing on the *existence* of groups.

²⁶ If in fact most members of a group *do* take their membership seriously, though, it matters, but in a different way: i.e. to the ability of the state to impose an objective conception of cultural membership upon members. I discuss this in Chapter 7.

seems to significantly *weaken* arguments for protecting cultural membership. This is because the most basic interest that people have in respect of culture is *not* an interest in being a member *per se*, but in being free to pursue the options, opportunities, and goals made available by that culture. Therefore, if we take the relationship between autonomy and culture seriously, we should be concerned to ensure people have access to those cultural materials which give rise to valuable options.

By emphasizing the importance of culture to individual well-being and freedom of choice, then, the argument from autonomy offers a profoundly *liberal* justification for cultural rights in general. However, arguments for *special* cultural rights involve two further steps. It must be shown that there are particular interests raised by cultural diversity that aren't protected by existing conceptions of uniform human rights. And it must be shown that these interests are special, group-based interests rather than general interests. I will look at these claims in Chapters 6 and 7. In the next chapter, though, I will look in detail at the *content* of particular cultural rights-claims. My purpose throughout is to determine the extent to which cultural rights-claims involve group-based interests as opposed to general ones.

Chapter Five

Special Cultural Rights

The case for special cultural rights is based on the claim that there are certain interests that arise from the existence of distinct cultures which aren't adequately protected by existing liberal conceptions of human rights, that "respect for human rights is not sufficient to ensure ethnocultural justice, and that where ethnocultural justice is absent, the rhetoric and practice of human rights may actually worsen the situation" (Kymlicka, 2000b: 1).

Behind this general claim, though, there are some important differences among writers about the *kinds* of rights that are needed to protect people's interests in culture.¹ Accounts of cultural rights range in scope and purpose, from claims for exemptions for certain customs or the accommodation of religious diversity in the workplace, which concern more directly individualized interests, to claims for cultural groups for things like control over land and resources, and rights to self-government. They also go under different names, from such terms as 'minority rights', 'cultural rights', 'group rights', and 'collective rights'.

Nonetheless, the various accounts share certain common features. Each is concerned with the fate of cultural minorities, especially under majoritarian systems of government. Each argues that additional rights are needed because existing human rights are inadequate in some way. And, in general, each is concerned with the protection of distinct cultures.² The point of this chapter, then, is to analyze the particular *sorts* of claims that arise from accounts of special cultural rights, and to determine whether there are any further distinctions that might be relevant to our discussion of such rights (see e.g. Levy, 1997). In particular, I will argue that there is an important distinction between those cultural rights-claims that are capable of being rendered as *general* rights, and those which are *necessarily* group-based. The first part of this chapter, though, sets out the general *political* case for special cultural rights.

¹ Of course, some of these arguments go much further, arguing against the universal application of human rights standards, making it more difficult to accommodate some of these arguments within the liberal tradition. As significant as these latter arguments are, this thesis is exclusively concerned with more or less liberal accounts of minority or cultural rights - that is, those claims that are premised upon, or are at least consistent with, value individualism (the idea that everything valuable is valuable by reference to the ultimate value of individual human beings) and the importance of autonomy. See Chapters 1 and 2.

1. *The plight of minority cultures*

“The era of homogenous and viable nation-states is over”, announces Tamir (1993: 3). “Most countries today are culturally diverse”, states Kymlicka (1995: 1). “Cultural heterogeneity”, declares Réaume, “is overwhelmingly the norm in modern states” (1995: 118). While the ideal of nationalism is a state whose population is “ethnically, culturally, and linguistically homogenous”, observes Hobsbawm, “Of the almost 200 states today only about a dozen correspond to this programme” (1996: 86).

The notion of homogeneity is, to be sure, a slippery one. We have already remarked in Chapter 4 about the problems defining ethnic and linguistic groups, and I think it should be relatively clear that there are some considerable difficulties with the idea of quantifying culture. Without going into detailed argument, however, I think it is highly doubtful that *any* country or state today is properly homogenous in any relevant sense: either in terms of ethnicity, religion, nationality or even language. Whether we measure cultural diversity by the presence of different ethnic, religious, linguistic or national *groups* in a particular state; or by the presence in a given society of distinct traditions, practices, values and beliefs arising from diverse origins, the conclusion that almost all states are multicultural states seems unavoidable.

The particular point of describing cultural diversity in terms of cultural *groups*, though, is that it makes it possible to speak of majority and minority *cultures* within a given society. This is an important part of the *political* case for special cultural rights, which seeks to highlight the plight of minority cultural groups under majoritarian systems of government. A typical example of this plight tends to involve societies thought to have a single ‘majority culture’ which dominates the workings of the state at the expense of smaller minority groups. These groups, it is alleged, are *consistently* outvoted on a broad range of decisions to the point of marginalization from the democratic process. Indigenous peoples, such as native Americans in the United States and Canada, are regularly cited as examples of cultural minorities in this position.³ A different set of cases concern states where a culturally distinct minority is narrowly outvoted at the national level, despite forming a majority within a particular territory of the country, such as Quebec. Hence, it is argued that in democratic

² But see contra Kukathas (1995, 1997). I examine these arguments in Chapter 8.

societies the preferences of members of minority cultural groups on certain issues will inevitably lose out to those of the majority culture:

Traditional human rights standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities: which language should be recognised in the parliament, bureaucracies, and courts? Should each ethnic or national group have publicly funded education in its mother tongue? Should internal boundaries (legislative districts, provinces, states) be drawn so that cultural minorities form a majority within a local region? (Kymlicka, 1995: 4-6)

Kymlicka argues that the problem, “is not that traditional human rights doctrines give us the wrong answer to these questions. It is rather that they give us no answer at all.” (1995: 5) In order to develop a “comprehensive theory of justice in a multicultural state”, liberals “need to supplement traditional human rights principles with a theory of minority rights.” (1995: 5-6).

Before turning to look in detail at particular cultural rights-claims, it is worth considering some of the potential difficulties with this thesis about minority cultural groups. First of all, the notion of minority cultures losing out under a majoritarian system is more problematic where there are either (1) several competing minorities of roughly equivalent size, (e.g. Muslims, Croats and Serbs in Bosnia or French, German and Italian speakers in Switzerland) such that there is no obvious majority culture; or (2) where there is much less consistency and cohesion among the various groups in terms of political outlook; such that, again, there is no obvious majority culture. Unlike situation (1), however, the absence of a majority *isn't* produced by the absence of an outright group enjoying a numerical majority, but by the fact that members of groups A, B, or C, don't tend to *vote* as members of groups A, B, and C; or if they do, it is only on a limited set of issues (so no group loses out *consistently*).⁴

Secondly, the especial focus upon the plight of minority cultures in the context of liberal-democratic states tends to obscure the related question of the rights available to cultures that *aren't* in a minority *vis-à-vis* the state. That is, do arguments

³ There is an extensive literature on the rights of native Americans and native Canadians and, more generally, on the rights of indigenous peoples: see e.g. Boldt and Long (1985), Johnston (1995), Kymlicka (1989, 1995), Levy (2000), Macklem (1993).

for the protection of cultures apply only to those groups that are in a minority under a majoritarian-democratic system? Or do they apply to *any* culture, even one that enjoys the support of a majority of the population of a given state? For it is arguable that there are majority cultures who consider their long-term survival threatened, despite the fact that they have the machinery of a sovereign state at their disposal (e.g. France).⁵ As Levy notes, if there are some separate constraints on a state that don't apply in respect of internal minorities, then this points towards separate justifications.⁶

These questions also point to a more general distinction between the idea of minority rights and the idea of special cultural rights: strictly speaking, minority rights are contingent upon, and concerned with, the interests associated with being a minority in a democratic system; cultural rights, by contrast, are concerned with the protecting the interests that arise from identity with, or membership of, a distinct culture.⁷ Although there is clearly an overlap, it is important to keep in mind the potential for these ideas to pull in different directions: minority rights-claims *can* be concerned with interests that aren't cultural in nature; cultural rights-claims *could* conceivably be made on behalf of cultures that aren't numerical minorities within the boundaries of a given state. And, quite plausibly, group rights and collective rights can apply to groups and collectivities that are neither minorities nor cultures.⁸

2. Cultural rights-claims

In this section, I look at different sorts of rights-claims made under the head of cultural rights and the different sorts of justifications involved. Any coherent account

⁴ More generally, this latter sort of situation calls into doubt the *salience* of cultural groups in political argument.

⁵ Many states, in fact, claim extensive powers to restrict incoming materials (TV, Radio, Magazines, Internet), whether by censorship or merely by market and customs regulation, on the basis of protecting a distinct culture (see Chapter 3, n28). Immigration controls have also been justified by reference to such claims: see Kymlicka (1995: 125), Tamir (1993: 127), Carens (1995).

⁶ The question of which external rules are legitimate might then be reduced to the question of what rules states themselves can legitimately impose on nonmembers. Even on this theory, some account is required of what those rules are, and whether the rules a small, culturally endangered state may impose on nonmembers are different from those which may be laid down by a large state which is not so endangered. If no such difference is stipulated, then the justification for external rules simply reduces to the justification of self-government. (Levy, 1996: 35).

⁷ This places the notion of cultural rights methodologically closer to the communitarian arguments, being concerned solely with the relationship between individual and community, but *not* contextualized in respect of the strength of that culture vis-à-vis other cultures.

⁸ See Raz: "Groups and corporations can and do have rights. Nations have a right to self-determination. Woolworth owns stores and has rights against its employees, etc" (1994: 44).

of cultural rights ought to address at least two tasks: first, they must offer some theoretical foundation for the various claims made; and secondly, they should help identify *who* can claim such rights.

A useful example of this is Kymlicka's theory of special cultural rights. He describes three types of cultural right: group representation rights, polyethnic rights, and self-government rights. By his account, *all* cultural groups whose interests are in danger of being overridden under majoritarian procedures are *prima facie* entitled to the first kind of rights, i.e. some form of special representation, such as quotas to ensure that members of minority cultural groups are represented in legislatures, or to have some kind of executive veto over matters affecting the group's basic interests.

However, the distribution of the *other* kinds of rights (polyethnic and self-government) depends very much on the particular characteristics of the cultural group in question. One of the central distinctions Kymlicka makes is between cultural groups which arise from immigration and what he terms 'national minorities', which are defined as groups with a distinct 'societal' culture of their own.⁹ This distinction matters because, in Kymlicka's view, only groups with distinct cultures (i.e. national minorities) are entitled to self-government rights. Having rights to self-government means cultural groups can place restrictions on nonmembers in order to maintain the protection of the societal culture of the minority group, e.g. preventing non-members from owning land in the group's area or from participating in the group's political institutions.¹⁰

By contrast, immigrant cultural groups, because they don't have distinct institutions or a wholly coherent and pervasive culture, are entitled only to 'polyethnic rights', which are "intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the

⁹ I have already discussed Kymlicka's definition of 'societal cultures' in Chapter 3.

¹⁰ These are the restrictions that Kymlicka suggests ought to be applied in relevant cases (1989: 186). Such restrictions, he argues, "ensure that the members of the minority have the same opportunity to live and work in their own culture as members of the majority." (1995: 109) This, he acknowledges, places a burden upon non-members, but "the sacrifice required by the existence of these rights is far less than the sacrifice members would be required to face in the absence of such rights" (109). An important distinction, in Kymlicka's view, is that between restrictions placed on outsiders and restrictions on members. Restrictions on members are called *internal restrictions*: these, Kymlicka suggests, are "illegitimate from a liberal standpoint" (104), because they involve demands "by a minority culture to restrict the basic civil or political liberties of its own members" (152), in the name of protecting the distinct culture of the group. Restrictions on nonmembers, by contrast, are merely *external protections* justified by the fact that nonmembers have a secure culture of their own, and by the need to "promote equality between groups, by rectifying disadvantages or vulnerabilities suffered by members of a particular group" (152).

economic and social institutions of the dominant society” (1995: 31). The sorts of claims that Kymlicka includes under this head include public assistance for cultural practices (such as special subsidies for arts or media); exemptions from particular regulations and laws relating to the expression of their identity (such as headgear exemptions from uniforms).

One way of sorting cultural rights-claims then is to distinguish the *type* of cultural group that makes it. This approach is problematic, though. As Jacob Levy notes, it “unnecessarily distinguishes between quite similar claims made by a different variety of groups” (1997: 23). Specifically, Kymlicka’s distinction between the claims of national minorities and those of immigrant groups; “emphasizes the separatist nature of one kind of claim and the integrationist or cooperative nature of the other” (50). Both sorts of groups, for example, may claim a right that its members be free from compulsory military service, but with different justifications. An immigrant group may claim that military service is contrary to the group’s religious beliefs. An indigenous group, on the other hand, might have no such *ethical* objection but may claim that *compelling* its members to perform service harms the group’s ability to govern itself. As Levy notes, sorting rights-claims by the kind of cultural group involved, “divides like rights-claims, and it lumps together claims which might be *made* together but which must be *justified* separately” (Ibid). As he asks:

Is the Native American Church’s peyote exemption really more like tribal self-government than it is like the right of Jews and Catholics to ceremonial wine during Prohibition? In one sense, yes; the peyote and self-government claims are both made by Indians. [However] the affinity between the peyote and alcohol cases make it much more plausible to argue for or against them together than to separate them and argue peyote along with self-government (50).

Levy’s own classificatory scheme, then, seeks to “identify those cultural rights-claims which are morally alike and (as importantly) those which are unlike” (22). He identifies eight basic categories of cultural rights: (1) exemption claims, (2) assistance claims, (3) self-government claims, (4) external rules, (5) internal rules, (6) recognition/enforcement claims, (7) claims for special representation, and (8)

symbolic claims (1997:24).¹¹ I will take this scheme as a useful starting point for my own analysis, although I will argue that internal and external rules and recognition claims are properly understood as self-government claims.

(i) Exemption claims

Rights-claims under this head concern *exemptions* for members of cultural groups from laws “which penalize or burden cultural practices” (25). Obvious examples of such claims are those concerning religious headgear, such as Sikh turbans, Jewish *yarmulka*, and Muslim *chadors*, in respect of uniforms and (in the case of turbans) traffic codes.¹² Other examples of such claims involve the Amish seeking various exemptions from social security and high-school education, and a variety of (mostly-religious) groups seeking exemption from conscription.

Exemption claims address those general and apparently neutral rules that impose a distinctive burden on members who wish to follow the customs and traditions of their cultural group. They seek individualized exemptions on the grounds that members have an important moral interest in following such practices. The notion of a ‘distinctive’ burden, suggests Levy, concerns the idea that the same actions in one culture (the minority group) has a very different meaning in another culture (that of the majority): “The exemption is justified as a recognition of that difference, as an attempt not to unduly burden the minority culture or religion *en route* to the law’s legitimate goals” (27).

Exemptions, then, are *necessarily* special rights: it exempts *some* from the application of a rule that would otherwise apply *generally*. If the exemption were a *general* rather than a *special* right, then the original general rule would be unworkable as a law. As Levy notes, this is problematic “for republican or liberal theories which place overwhelming importance on *equal* liberty. It is also a problem for the conception of the rule of law which emphasizes the general applicability of laws and the absence, as it were, of proper nouns from legitimate law-making” [my emphasis] (28).

¹¹ Levy himself notes two possible criticisms of his own scheme: “that it has multiplied categories unnecessarily and that it has created categories which are too broad to be useful” (52).

¹² See Poulter (1998) for an extensive account of such exemptions in English law: e.g. the Motor-cycle Crash-helmet Act 1976 (which provides an exemption for Sikhs who wear turbans from the requirement to wear helmet while riding a motorcycle).

However, I think it is important to be clear about why *culturally-based* exemption claims seem problematic in this way. After all, most liberal societies provide a wide variety of exemptions from all manner of general rules. There are group-based exemptions from things like jury-duty, taxation or use of copyrighted material, for instance.¹³ And all manner of exemptions apply to people holding a particular office or status: emergency services, for instance, usually have a specific liberty to run red-lights in certain circumstances. And members of most legislatures typically enjoy a special privilege against liability for defamation for statements made in the course of parliamentary (or congressional) debate.

Rather I think the argument against culturally-based exemption claims is better understood as a normative claim about liberal equality, rather than legality *per se*. That is, the suspicion of cultural exemptions appears to be based on the Rousseauian ideal that laws ought to apply generally because, in principle, they are made *by all for all*.¹⁴ Laws are the outcome of a democratic process in which all inhabitants participate, with a view to producing normative rules that apply generally.¹⁵ Hence, as Barry argues:

there are sometimes good reasons (whether everybody accepts them or not) for having laws that prohibit certain conduct. If the reasons are strong enough, then exceptions should not be made for anybody; conversely, if a good case can be made for saying that exceptions should be granted, this suggests that the reasons for having the law in the first place are inadequate. (Barry, 1998: 317)

¹³ Such exemptions are group-based in the sense that they recognize classes of persons identified by particular relevant characteristics: e.g. full time parents in the case of jury duty, poor people in the case of taxation, and private individuals in the case of copyright materials.

¹⁴ See e.g. *The Social Contract*: “The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them. The constant will of all the members of the State is the general will; by virtue of it they are citizens and free” (1993: 274-275).

¹⁵ Participants in a democracy have a duty to support just institutions even where they, as individuals, supported a minority view (Rawls, 1972: 355). In turn, the rights of individual participants impose a series of constraints upon the state, preventing a legislative majority or a government from imposing the sorts of rules that violate their fundamental interests in “life, freedom and well being” (Waldron, 1997: 2). See also Dworkin: it is a virtue of law as integrity that government must “speak with one voice, to act in a principled and coherent manner towards all its citizens” (1986: 165). Note that consistency in the application of law is distinct from the notion that law itself necessarily forms a coherent set of rules; and that each of these ideas are distinct from the notion that cultures are coherent systems of ideas, values, practices and institutions.

This refers back to the relationship between equal liberty and the distribution of general rights outlined in Chapter 1: the equal distribution of general rights in a society directly bears on the idea that all the inhabitants of a country have an equal moral status.¹⁶ Understanding this relationship helps us to distinguish more clearly between ordinary exemptions and those that are culturally-based.

First, ordinary exemptions are typically justified by reference, not to their benefit to particular individuals, but to some *general* interest that would be harmed by imposing a general obligation without exception.¹⁷ The privilege given to members of legislatures against liability for defamation, or the freedom of ambulance drivers to run red lights are good examples of this, because the chief beneficiary of such liberties is not usually considered to be the politician or the ambulance driver. The reason for such exemptions is typically the promotion of some *general* good.¹⁸ By contrast, exemptions that are distributed according to the membership of particular cultural groups seem to be the antithesis of a general interest or collective good, i.e. one that either benefits everyone equally or is one that is available, at least in principle, to all.

For example, if a law requires motorcyclists to wear helmets, and this is physically incompatible with a rule requiring male members of a religious community to wear turbans, then there is no practicable way to grant an exemption to the latter in a manner that is consistent with the purpose of the general obligation *and* the importance of equal liberty. Either the *general* interest (of religious freedom or of

¹⁶ This isn't to say, however, that *every* legal exemption reflects a moral right. After all, the justification for an exemption (in a broad sense) to a general rule is simply that there is good reason not to apply the rule to a particular set of circumstances. For example, lawyers under English law are in general *automatically* exempt from jury duty, i.e. they cannot decide for themselves whether to exercise the exemption in particular cases. The basis for this exemption is not because lawyers *themselves* have any special interest in not being jurors, but because of a concern that having lawyers as jurors would skew the jury process. Hence, the rule does not in any sense reflect a *right* of lawyers to be exempt from jury service, but rather a public interest in have them excluded.

¹⁷ See e.g. Raz on the collective aspect of liberal rights: "In most liberal democracies the press enjoys privileges not extended to ordinary individuals. Those include protection against action for libel or breach of privacy, access to information, priority in access to the courts or to Parliamentary sessions, special governmental briefings, and so on. They are sometimes enshrined in law, sometimes left to conventions. The justification of the special rights and privileges of the press are in its service to the community at large" (1986: 253). Another way of arguing this has been to point to some unfairness or unequal burden that the general obligation places upon particular set of cases. However, showing a burden simply demonstrates individual hardship. It needs to be shown that the unfairness relates to some fundamental interest, to generate a moral argument for an exemption.

¹⁸ The justification of the exemption is therefore *consistent* with the general applicability of the rule, and inconsistent with wholesale arguments against regulation altogether (e.g. parliamentary privilege can be justified without doing away with the general laws governing defamation; recognizing a private-use exemption doesn't suggest that the notion of copyright itself is meaningless).

personal autonomy) justifies displacing the general obligation altogether, distributing the option of wearing (or not wearing) religious headgear to all, or members of the particular religious community should refrain from riding motorcycles. The alternative is an exemption which distributes the options made available by a general interest or collective good unequally, according to a particular set of values and beliefs, rather than a general status.¹⁹

(ii) Assistance claims

Assistance claims are claims for resources to enable “the minority or subordinated culture to do those things which the majority culture can allegedly do already” (1997: 29). This category covers a very wide variety of claims; from the provision of translators or minority-language speakers so that members of minority language groups can enjoy the provision of government services in their own language; extra resources for the community activities of minority groups; or even the range of affirmative action programmes to allow members of minority cultures to gain access to goods and services and employment on the same terms as members of the majority.²⁰

However, there are at least two senses of ‘assistance’ at work in Levy’s account of such claims, and they seem to pull in very different directions.²¹ First, there is ‘assistance’ to maintain the *integrity* of the minority culture alongside the majority culture; and secondly, there is the notion of ‘assistance’ which informs Kymlicka’s notion of polyethnic rights, i.e. to assist the *integration* of minority

¹⁹ In many circumstances, upholding a general rule *against* an exemption claim has the effect of *protecting* the interests of proposed exemptees. For example, the Amish may seek an exemption from the general rule requiring their children to attend high school on the grounds that it harms their interest in religious freedom: see e.g. *Wisconsin v Yoder* 406 US 205. Nonetheless, the state may refuse the exemption on the grounds that, as autonomous persons, they have a greater interest in the sorts of options and freedom made available by a high school education. The harm to their ability to choose between different goods is harmed more by *non*-attendance than by attendance.

²⁰ Levy continues, “It is argued that the majority culture, simply by being in the majority, has its cultural integrity and heritage protected for free, as it were, while other cultural groups have to create, maintain, and fund institutions such as private schools, fraternal associations, museums, art galleries, theater companies, community newspapers, cultural clubs, and so on in order to preserve their cultural integrity to anything like the same degree. Special state measures to ease that burden are assistance rights” (1997: 30).

²¹ This is implicit from the outset of Levy’s account of the category of assistance rights: “Special provision is sought because of culturally specific disadvantages or because the desired common activity has been designed in such a way as to keep members of nondominant groups out” (29). It is clear that ‘culturally-specific disadvantages’ may have nothing whatsoever to do with the desire to participate in a common activity, e.g. students may wish both to wear religious headgear *and* attend public school.

groups *into* the majority culture. For his part, Levy notes that some assistance-claims seem to have an integrative function while others do not:

Many assistance rights are integrationist and so not subject to the charges of separatism; this is the case for multilingual ballots, for example, which allow all to participate in a common political system. On the other hand, funding for minority-language schools, newspapers, radio stations, and so on, while allowing the minority to do the same sorts of things as the majority, do not encourage the two groups to pursue their activities *together* and do not seem integrationist. (1997: 31)

In my view, this distinction is a highly important one because it bears on the entire distinction between special and general rights. In other words, claims for resources to enjoy the same goods as other members of the same society, such as political participation, housing, education, etc, are to my mind clearly instances of specific claims based on *general* rights. Hence, I think it is a mistake to describe these sorts of assistance-claims as special cultural rights.

The extent to which assistance claims for separate institutions are special rights, though, seems more ambiguous. One example of this is the debate over bilingual education in the Californian public school system: does this kind of assistance support the existence of distinct language groups? Or is it simply a means of allowing children from minority language backgrounds to enjoy the same general level of education as children who speak the majority language? It is also open to question whether support for minority language education is qualitatively any different from the establishment of school systems along confessional lines (e.g. Protestant, Catholic or Jewish school boards), or even the sorts of ethnic divisions in school populations that can occur in the absence of formal desegregation policies.²² Whatever the answers to these questions – and I take no view on them here – I think it implausible that all assistance claims count as special cultural rights simply in respect of the support they may give to group-based institutions.²³

²² I am referring to the sorts of divisions that occur due to a combination of factors like property prices and parental choice, rather than formal segregation (such as in Apartheid South Africa or the American South prior to *Brown v Board of Education*).

²³ I discuss this in more detail in Chapter 8.

(iii) Claims for special representation

Claims for special representation concern the participation of minority groups in democratic decision-making. As Levy puts it, “[i]n order to secure protection of their interests or rights, in order to secure certain privileges, in order to have a say in the actions of the state, ethnic minorities often seek some form of guaranteed representation in the state’s decision-making bodies, especially but not only legislatures.” (43)

Certainly, such claims are necessarily claims for special rights. However, it is also clear that identical claims could sensibly be made on behalf of many non-cultural minority groups. Equally, the justification for special representation claims can’t be based entirely on having and maintaining a distinct culture because the claim is essentially one of *participation* in the decision-making framework of the broader society. As Kymlicka notes, “the logical consequence of self-government [claims] is reduced representation, not increased representation. The right to self-government is a right against the authority of the federal government, not a right to share in the exercise of that authority.”²⁴

(iv) Self-government claims

The last main category of cultural rights I will consider is claims for self-government. Now, although claims for self-government are always group-based claims, it is entirely possible to advance arguments for self-government that do not rely on claims of cultural distinctiveness. The American War of Independence is a useful example of a movement towards self-government that did not rely on such claims. Nonetheless, the issues raised by self-government claims lie at the heart of this thesis, if only because a preponderance of writers have come to regard the possession of a distinct

²⁴ Kymlicka notes that the situation is more complicated in federal systems where representation claims might be made to *protect* the right to self-government as part of the federal division of powers: “To over-simplify ... self-government for a national minority seems to entail guaranteed representation on *intergovernmental* bodies, which negotiate, interpret, and modify the division of powers, but reduced representation on federal bodies which legislate in areas of purely *federal* jurisdiction from which they are exempted.” (1995: 143)

culture as the principal justification for *any* group having a right to self-determination or self-government.²⁵ As Levy notes:

Self-government claims are the most visible of cultural rights-claims and among the most widespread; ethnic, cultural, and national groups around the world seek a political unit in which they dominate, in which they can be ruled by members of their own group The normative claims are similar in all of these cases: there ought to be a government which members of the group can think of as their own. They should not be ruled by aliens. Borders ought to be drawn, and institutions arranged, to allow the group political freedom from domination by other groups. (Levy, 1997: 32-33)

To be clear about what the right to self-government is, we ought to be clear about what it isn't. First, there is the distinction between self-government and self-rule. Secondly, there is the distinction - or rather the lack of a ready distinction - between self-government as a cultural right and three other categories of cultural rights that Levy identifies: internal rules, external rules, and the recognition and/or enforcement of a cultural group's legal code.

First, self-government and self-rule are described as distinct concepts: self-government seems to entail self-rule but not *vice versa*. The right to self-rule is, for Tamir, merely the political right to *participate* (either directly or by voting) in the process of government:

But enjoying self-rule does not mean having one's views accepted. In pluralistic and heterogeneous communities, one will inevitably be outvoted on a variety of issues. At the conclusion of a fair process, individuals may find themselves in a minority position, unable to influence, let alone imprint the political sphere with their culture, preferences and norms of behaviour, yet they could hardly claim that their right to self-rule has been violated. (Tamir, 1993: 70)

²⁵ In this thesis, I use the terms 'self-government' and 'self-determination' interchangeably, except where the context of the argument indicates otherwise – for example, Tamir refers to the idea of

The right to self-rule entails a set of representative institutions and mechanisms to facilitate democratic *participation* in making laws, but it doesn't entail that any given participant will achieve the particular outcome that they desire. By contrast, the right to self-government seems to be a right to a particular result or outcome: self-government rights "ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority" (1995: 109).

The right to self-government, according to Tamir, "is often described as the right of individuals to a public sphere, thus implying that individuals are entitled to establish institutions and manage their communal life in ways that reflect their communal values, traditions and history - in short, their culture" (70). In this sense, Tamir regards the right as deriving from a general right to culture (rather than, say, a general right to govern oneself).²⁶ Specifically, people "wish to be ruled by institutions informed by a culture they find understandable and meaningful, and which allows a certain degree of transparency that facilitates their participation in public affairs."

When they are able to identify their own culture in the political framework, when the political institutions reflect familiar traditions, historical interpretations, and norms of behaviour, individuals come to perceive themselves as the creators, or at least the carriers, of a valuable set of beliefs (Tamir, 1993: 72).

Because the right to self-government is essentially about the institutional embodiment of a particular culture, "[p]olitical arrangements based on this right should reflect the unique character and draw on the history, the culture, the language, and at times the religion of the national group, thereby enabling its members to regard it as their own" (74). Because self-government isn't reducible to self-rule, Tamir claims that "[m]embers of national minorities who live in liberal democracies ... [Quebec, native Americans, Basques, Australian aborigines] are not deprived of their freedoms and

national self-determination, which obviously stipulates the particular sort of group to whom the right attaches.

²⁶ Tamir: "It now seems obvious that the right to national self-determination is merely a particular case of the right to culture. In this light, the right to national self-determination should be seen as an individual right, contingent on a willed decision of individuals to affiliate themselves with a particular national group and to give public expression to this affiliation" (1993: 73).

civil liberties, yet feel marginalized and dispossessed because they are governed by a political culture and political institutions imprinted by a culture not their own.” (72).

Which brings us to the second point about the relationship between self-government and other categories of cultural rights.²⁷ Levy suggests that self-government claims are ‘unique’ among cultural rights-claims in that they require “addressing territories and borders.” The right to self-government, however, doesn’t necessarily entail the right of a minority culture to a sovereign state, a country of their own. This is made clear by several writers, including Tamir.²⁸ Rather, self-government is generally understood as a *right to political arrangements* that accommodate, so far as is practicable, the right of the cultural group to maintain politically its cultural integrity (which may of course include, where appropriate, outright separation).²⁹

Understood as a right to certain political arrangements, though, it becomes more difficult to distinguish self-government claims from three other categories of cultural rights identified by Levy: claims to enforce *internal rules*; claims to enforce *external rules*;³⁰ and claims for the *recognition or enforcement* of a group’s traditional

²⁷ Aside from the problems associated with the justification itself, the notion of self-government as a right to a particular *outcome or result* X (where X is the ability of members of minority cultures “to perceive themselves as the creators, or at least the carriers, of a valuable set of beliefs” or “to live and work in their own culture as members of the majority”) raises the question of whether self-government is necessary to achieve X, or whether X can be guaranteed by other sorts of cultural rights.

²⁸ See Tamir (1993), Kymlicka (1995), Miller (1995). Tamir argues that: “the suspicion that behind every demand for national recognition lurks a separatist claim for the establishment of an independent nation-state ... need not be the case” (1995: 69). Similarly, Kymlicka suggests that “secession is not always possible or desirable. Some national minorities, particularly indigenous peoples, would have trouble forming viable independent states. In other cases, competing claims over land and resources would make peaceful secession virtually impossible. In general, there are more nations in the world than possible states, and since we cannot simply wish national consciousness away, we need to find some way to keep multination states together” (1995: 186). Equally, Miller notes that “if we put all the conditions for justifiable secession together, we can see that the principle of national self-determination is very far from licensing a separatist free-for-all. We can ... see that there are cases in which no redrawing of boundaries between states could implement the principle fully, and here we must look for solutions that fall short of traditional statehood.” (1995: 115-116).

²⁹ See e.g. Miller, who observes that “there are various devices by which groups can achieve partial autonomy inside an existing territorial state ... essentially, what is required is a constitutional settlement which creates a representative institution for the people in question and assigns to it legislative and policy-making powers over matters that are essential to their identity and material welfare” (1995: 115-116).

³⁰ A typical example of external rules concerns laws concerning the freedom of movement (immigration) or voting-rights of non-members. A typical example of an internal rule are injunctions upon blasphemy or marriage with outsiders. Clearly a rule may be a restriction on the freedom of both members and non-members, such as a general rule against using a particular language. In other cases, the characterization of a rule can be determined from its sanction – this is obviously so where the sanction is exclusion from the group.

legal code by the dominant society.³¹ In particular, Levy's claim that territoriality – the need to address questions of territory and borders - is unique to claims of self-government seems difficult to support. A claim to enforce external rules concerning immigration would be nigh impossible without establishing some local or regional jurisdiction, for example, but this doesn't entail that the group in question itself controls the territory or possesses political institutions.³² Equally, a group may possess political institutions - such as an assembly - without possessing a specific territorial jurisdiction or even specific political authority to make or enforce laws.³³ Finally, land rights may give a group control over territory without amounting in any sense to legal or political jurisdiction or the presence of political institutions that reflect their distinct culture.³⁴

What is most distinctive about claims to self-government, then, seems to be the claim to some form of political authority or sovereignty over some particular matter. As has been made clear, such authority or sovereignty needn't amount to complete statehood, but does entail some degree of autonomy to make and enforce rules free from governmental interference. This entails the existence of at least *some* political institutions (though, of course, not necessarily democratic ones) and the group having authority to enforce *some* rules (which may include or exclude internal or external rules or its own legal code); but it may or may not be combined with jurisdiction or control over a particular territory.³⁵

³¹ Levy uses claims for the enforcement of Aboriginal land rights, traditional or group-specific family law as examples of this type of claim. As Levy states, it is “fairly common for cultural communities to seek to give their traditional law a status in the law of the land, to seek to have their members bound by the traditional law of the community rather than the general law of the wider state. Very often, these claims seek to have the general law recognize a culturally specific way of establishing certain rights which are established otherwise by the general law” (1997: 36).

³² This is similar to the example of many reservations for indigenous peoples established in the nineteenth century that placed restrictions on non-members moving into or buying property within the reserved territory, but rarely involved indigenous self-government of the reserved territory.

³³ Of course, this begs the question of whether the institutions ought properly be described as ‘political’. Strictly speaking, I believe we should treat political authority as implying legal authority, the power to make laws or regulations, or otherwise determine and enforce policy distributing public funds or resources.

³⁴ Because land rights are essentially a grant of private property rights. This is the case, at least, with grants of land rights in Australia, New Zealand and British Columbia.

³⁵ Note that many arguments in support of self-government entail control over a specific territory, e.g. Margalit and Raz (1995). In several cases, this tends to distinguish self-government from group-differentiated citizenship. Of course, where a group is given some degree of self-government over its affairs without a specific territorial basis, it is - strictly speaking - not true to say that it has no territorial jurisdiction whatsoever. It is more accurate to say that it enjoys a jurisdiction coextensive with that of the larger state within which it exists.

Does the right to self-government understood as a right to the political expression of one's distinctive culture entail or require self-government in the *specific* sense of political authority over (at least some of) the group's affairs? I think this is very unclear from many of the arguments in support of self-government as a cultural right. The exception is the acknowledgement by Margalit and Raz that, although the need to express one's culture politically would make self-government *instrumentally* valuable, it isn't *intrinsically* so:

To the extent that a person's well-being is bound up with his identity as a member of an encompassing group, it has an important public dimension. But that dimension is not necessarily political in the conventional, narrow sense of the term. Even where it is, its political expression does not require a political organization whose boundaries coincide with those of the group. One may be politically active in a multinational, multicultural polity (1995: 137).

The importance of being able to express one's culture in the public sphere is *not* such that "it should be done in the political framework exclusive to one's group or dominated by it. There is nothing wrong with multinational states, in which members of the different communities compete in the political arena for public resources for their communities" (137). They concede that "[t]here is nothing in the need for a public or even a political expression of one's membership of an encompassing group which points to an intrinsic value of self-government" (138).

Tamir's account, by contrast, would suggest the opposite conclusion: self-government is instrumentally valuable in that it facilitates political participation, but having a government of one's own seems *intrinsically* valuable because "individuals come to perceive themselves as the creators, or at least the carriers, of a valuable set of beliefs" (1993: 72). There are several difficulties with this view. The first is one of straightforward scepticism – it seems implausible that the only or even the best way that people can view themselves as holding a valuable set of beliefs is to have a right (in Tamir's account, an individual right, no less) to political institutions that embody (rather than, say, simply allow expression of) those particular beliefs.

The second difficulty is that Tamir's prescription itself is especially vague. She suggests self government requires institutions reflecting "the unique character and [which] draw on the history, the culture, the language, and at times the religion of the

national group”. The institutional requirement as to language might be easy enough to satisfy, but how precisely does a legislature or governmental department, for example, draw upon or reflect the history, culture or religion of a given group? It also suggests a prior problem with determining what that history or culture *is*. Particular religions and languages tend to be relatively determinate in their content (although even in these cases there can be bitter internal disputes), but histories and cultures are hopelessly vague, abstract (not to mention lacking coherence and integrity) categories to be applied to political institutions.

If, on the other hand, we assume that the unique character, history, culture and language of a group *can* be somehow be determined and embodied in political institutions, then this raises two further difficulties: if the outcome is determinable and knowable *in advance* of the political process, then self-government clearly doesn't entail *self-rule* (i.e. democratic participatory government). Indeed, Tamir makes this explicit – self-rule and self-government “differ in their individualistic and communal aspects, represent two distinct human goods, and derive their value from two separate human interests” (1993: 70). The desire for self-government flows, not from the importance of being able to make laws for oneself *per se* but from – in Berlin's words – the ‘desire for recognition’.³⁶ Tamir herself cites Berlin on this point:

Although I may not get ‘negative’ liberty at the hands of the members of my own society, yet they are members of my own group; they understand me, as I understand them; and this creates within me the sense of being somebody in the world. It is this desire for reciprocal recognition that leads the most authoritarian democracies to be, at times, consciously preferred by its members to the most enlightened oligarchies, or sometimes causes a member of some newly-liberated Asian or African state to complain less today, when he is rudely treated by members of his own race or nation, than when he was

³⁶ Berlin describes it as follows: “The desire for recognition is a desire for something different: for union, closer understanding, integration of interests, a life of common dependence and common sacrifice. It is only the confusion of the desire for liberty with this profound and universal craving for status and understanding, further confounded by being identified with the notion of social self-direction, where the self to be liberated is no longer the individual but the ‘social whole’, that makes it possible for men, while submitting to the authority of oligarchs or dictators, to claim that this in some sense liberates them” (1969: 158). It is interesting to note that Berlin thought the desire for recognition ‘entails negative freedom for the entire group’ – it is unclear, though, why this does not entail negative freedom of the group from one another.

governed by some cautious, just, gentle, well-meaning administrator from outside (Berlin, 1969: 157-158).

On this particular conception, then, the ideal of self-government seems to have little to do with actual political participation. The very idea of having institutions reflective of the culture, history and tradition of your ascriptive cultural group needn't entail being able to participate in governing yourself (especially if self-rule isn't acknowledged as part of 'your' culture). This may be especially so where the group's traditional decision-making structure is explicitly non-democratic.

If, on the other hand, some form of political participation *is* necessary in order to *determine* the character of institutions, then there can be no guarantee that the outcome will reflect the particular interpretation of history and culture of *all* members. Simply put, a system of self-government run upon majoritarian procedures will reflect the interpretations (of history and culture) of the majority, or at least the most widely held. Tamir's account seems plausible only if we suppose that all members of a group are likely to share a single interpretation of their own history and culture. At best, this seems a somewhat idyllic conception of minority cultures (or any cultures) are like.

At worst, it is hopelessly naïve. There is no reason to suppose that people who share the same ethnicity or language, for example, won't disagree – even strongly disagree - over the particular character of political institutions. It is arguably a well-known feature of many national groups to have those sorts of disagreements (hence civil wars and revolutions). Even religious groups - the sort of cultural group that might be supposed to be the most uniform in terms of values and beliefs – can be characterized by deep disagreement over the particular nature and form of institutions (cf. the internal divisions within each of Christianity, Islam, or Judaism). Consider Kymlicka on this point:

The freedom which liberals demand for individuals is not primarily the freedom to go beyond one's language and history, but rather the freedom to move around within one's societal culture, to distance oneself from particular cultural roles, to choose which features of the culture are most worth developing, and which are without value. (1995: 90-91)

The interesting thing here isn't what Kymlicka actually says (that liberal freedom is about being able to move *within* one's culture), but what it entails. Having this sort of freedom entails disagreements about the sorts of moves that are available within one's culture. And it seems extraordinary to suppose that these disagreements will never extend to what one's culture *is* – what its traditions and conventions and practices are or ought to be.

If I am correct, then proposals for democratic forms of self-government for so-called cultural groups can only reflect the majority's idea of the group's "unique character" – self-government can never be certain to be intrinsically valuable to *all* members of a group. In effect, self-government amounts to the right of the majority of members of a cultural group to *be a majority* within a political structure. Self-government doesn't extend to minority points of view within minority cultures.³⁷

Democratic political institutions also pose a different problem for self-government as a cultural right – that of *retaining* the distinctive nature of the culture that was the original justification for self-government. If the character of institutions, and the particular policies pursued represent the outcome of individual choices, then there exists the real possibility that – at some point over time - members will opt for a set of institutions or policies that fail to reflect or embody the distinctive culture that gave rise to the original right.³⁸ The alternative (other than simply not having representative institutions) is to impose constraints or checks upon the ability of democratic institutions to arrive at such outcomes – either by entrenching certain rules in the constitutional structure, for example, or by weighting the decision-making process in favour of the existing conception, e.g. by requiring special representation for traditional leaders or providing them with a veto.

Kymlicka denies that this is much of a problem for self-government as a cultural right – he insists that self-government is a 'permanent' right, as opposed to polyethnic rights like affirmative action, which are temporary, remedial measures

³⁷ A number of writers have adverted to the 'minority-within-a minority' problem: see e.g. Green (1995), Barry (1998), Kukathas (1995), Tamir (1993). More often this has been to do with the problems with drawing territorial boundaries around a minority group that doesn't also contain members of other groups. My point here is quite different – it is that any cultural group beyond a handful of members is likely to contain people who differ strongly on their interpretations about their *own, shared* cultural heritage. Some other writers *do* advert to this particular problem: e.g. Réaume (1995) – their solutions, however, are rarely substantial.

³⁸ There is another possibility, that the culture may lose distinctiveness not through its own actions, but by virtue of being imitated. At this point, then, the justification for self-government (i.e. sustaining

(1995: 30). He argues that it is “right and proper” and “natural, and desirable, for cultures to change as a result of the choices of their members. We must, therefore, distinguish, the existence of a culture from its ‘character’ at any given moment” (1995: 104). Although modernization has forced similar changes on diverse nations, “the process of modernization does not change the fact that these nations still form separate societal cultures, with their own institutions, using their own languages”. In this sense, the actual choices of the group seem less important than the fact that the group is in a position – politically – to actually make choices. Group autonomy is an intrinsic good, regardless of whether the group sustains or rejects its own culture.

Stressing that people’s choices are constitutive of culture makes Kymlicka’s account of self-government seem much less potentially illiberal than Tamir’s.³⁹ But his distinction between the temporary ‘character’ of a culture and its longer-term existence is doubtful precisely because we are no longer able to identify what makes the group in question a particular group, or a culture a particular culture. It might seem a very technical objection but it goes to the heart of the concept: if we are going to say that the very existence of a group – rather than any of its particular, concrete beliefs, traditions or practices – is what matters in justifying self-government, we had better be prepared to say exactly (rather than vaguely) what counts as being a group and why. Where Kymlicka does go into detail about the criteria for making those sorts of distinctions (1989: 163-181), he footnotes his concession that defining a ‘minority cultural community’ is “a vexed problem, and all attempts to stipulate necessary and sufficient conditions have been notoriously unsuccessful” (1989: 179, n2).

Ultimately, Kymlicka’s distinction between ‘character’ and ‘existence’ is subject to exactly the same sort of disagreements as the content of a culture. Who can say where one culture ends and another begins? Who can determine that any particular change will threaten the existence - rather than the mere character - of a culture? What one member views as central to their cultural identity may be regarded as recent invention by another. Members may agree that they share a common identity but very little else.⁴⁰

a distinct culture) would have disappeared. Would this then give rise to a duty on the culture to change in order to remain distinct?

³⁹ As Levy points out, “For Rawlsian liberals, identifying culture as chosen deprives it of the sort of moral status which could trump liberal claims, which is why Kymlicka ... takes pains to identify a culture as a ‘context of choice’ rather than the result of choices.” (1997: 55, n43)

⁴⁰ I discuss the consequences of this kind of disagreement for the distribution of special cultural rights in Chapter 7.

Interestingly, Kymlicka's distinction is criticized by Réaume for failing to give sufficient justificatory *support* to self-government as a cultural right. Réaume also argues that it is more or less impossible to draw a practicable distinction between the 'character' and 'existence' of a culture, although in her own case, it amounts to an argument in favour of self-government to protect the *specific* practices and traditions of cultural groups:

The protection of the existence of the culture must embrace the protection of the concrete practices the community has chosen to adopt, adapt or reaffirm The participants in a culture do not think of their culture as merely an abstract decision-making procedure; they experience it as well as the concrete decisions they have made Without incorporating actual practices, Kymlicka's conception of culture supports only a claim to the protection of *some* context of choice for members of a community, not *their* context of choice [original emphasis] (1995: 129-130).

Réaume, though, fails to counter the original objection that Kymlicka was trying to address – if the justification for self-government lies in protecting some *particular* cultural content, then why is it valuable to be able to revise it or lose it altogether? Accounts of self-government as a cultural right must address such questions: if the right is essentially a right to a particular outcome, why is the right framed as a right to political authority? Does self-government entail self-rule? If so, then how is the democratic nature of self-rule reconciled with the justification of self-government? If the justification is to protect a particular culture, then there is a problem with constraining the possible effects of unfettered self-rule. If the justification is the good of the group being able to make decisions, then there is a pressing need to explain why it should be restricted to certain groups of people as against any other.

3. Summary

In the course of this chapter, I have looked at four main types of cultural rights claims: exemption claims, assistance claims, claims for special representation, and claims for self-government. In each case, I have suggested that there is an important conceptual distinction between those rights that support the existence of *general*

goods and those rights that are necessarily *special*, group-based rights. I have also indicated certain conceptual and practical problems with the idea of claiming certain goods (e.g. self-government) as rights. In the next chapter, Chapter 6, I look at the concept of cultural rights *qua* rights.

Chapter Six

Rights and Goods

In the last chapter I analyzed various sorts of cultural right-claims and distinguished between different justifications offered for their categorization. In this chapter I discuss some problems with the idea of cultural rights *qua* rights.

Why are these conceptual arguments over rights important? Rights, according to Hillel Steiner, are “the elementary particles of justice”. They are “the items which are created and parcelled out by justice principles. We learn something about justice by examining the formal or characteristic features of rights’ (1994: 2). Rights matter to our arguments about culture, and what rights there are or (in the case of legal rights) ought to be. Equally, how we understand ‘culture’ matters to what rights there are or should be. In particular, the distribution of rights determines our access to culture, and shapes our freedom, both negative and positive.

The core idea of rights that I am relying upon here is that rights protect interests that belong to persons.¹ They do so by imposing duties upon other people to promote or serve those interests. As Raz puts it, “rights are grounds of duties in others” (1986:167). However, not all the interests that people have are protected by rights – only those goods or interests that are of sufficient moral importance to justify the imposition of duties upon others. We use the language of rights, then, to describe those claims that some person’s interest is important enough to justify placing other people under a duty to promote or protect it.²

There are two typical features of rights that bear emphasizing at this point. The first is that rights - as they are set out here - seem predicated on individuals. Individuals are the *subjects* of rights. The second is that, if rights are predicated on individuals, then the interests that they protect must be interests in what are termed ‘individualizable’ goods – that is, goods that can be rendered to each rights-holder independently of any other (i.e. that giving X to A does not require giving it to B and C as well). Individualized goods are the *object* of rights.

¹ This follows – broadly speaking - the Interest theory of rights; see Raz (1986), MacCormick (1982, 1982b). Another traditional school of thought is that rights protect choices – the Choice theory of rights; see e.g. Hart (1984). As Hartney suggests, “these two views can be reconciled if one recognizes that autonomy or possibility of choice is a good, and that it is in one’s interest (in the broad sense that it contributes to one’s well-being) to have such a possibility” (Hartney: 225, n28). See also the discussion in Waldron (1988: 79-100).

The language of cultural rights, by contrast, is typically more communal in character. They are usually described as ‘collective rights’, or ‘third generation’ rights in the family of (human) rights generally.³ These are, in Waldron’s words, “the solidarity rights of communities and whole peoples rather than individuals. They include minority language rights, the right to national self determination, and the rights that people may have to diffuse goods such as peace, environmental values, the integrity of their culture and ethnicity, and healthy economic development” (1993: 5).

On this description, collective rights appear to be ‘collective’ in both senses: (1) the *subject* of right is collective (the rights are predicated on groups rather than individuals); and (2) the *object* of the right is collective (the rights are to communal rather than individualized goods). Although there is an important argument for holding that (1) and (2) are necessarily related – most usually the claim that *only* groups can have rights to collective goods⁴ - it is worth treating them for the time being as separate and distinct ideas, for the following reasons.

First, some writers admit the possibility of one without the other - that rights to public goods are plausible but the idea of groups having rights isn’t, or *vice versa*.⁵ Even if the two ideas are necessarily related, their relationship needn’t be one of logical equivalence.

Secondly, each idea appears to raise different issues. The notion of *groups* as rights-bearers involves some difficult questions about defining groups, the nature of group agency, and the relative priority of group and individual rights. The idea of rights *to* public or collective goods, on the other hand, involves clarifying the notion of public goods themselves, considering the claim that many so-called individual rights depend on public goods, and determining whether such goods are particularly well-suited to being the object of any right, whether individual or group.

In addition to evaluating these two ideas, it is also necessary to consider whether the contrast given between individual rights and collective rights is itself a misleading one. In particular, the notion of group-differentiated rights – the idea of rights held by individuals as a *consequence* of belonging to certain groups – suggests that that

² Raz (1986). See also Waldron (1993: 212).

³ The first generation being the standard set of civil and political rights; the second, claims to economic and social goods, such as the rights to housing, employment or education: see e.g. Waldron (1993).

⁴ Another possible necessary relationship between (1) and (2) is that the only *rights* groups *can* have are rights to collective goods. Unlike the first proposition, this wouldn’t automatically exclude individuals from *also* having rights to collective goods, alongside those of groups.

⁵ For discussions of the separability of these issues see Tamir (1993), Raz (1986), Waldron (1993).

distinction is often more purely descriptive than conceptual. However, the concept of group-differentiated rights is itself unclear and still raises many of the same difficulties as those raised by group rights and rights to public goods: in particular, those with defining a relevant group, on one hand, and the nature of interest protected, on the other.

Accounts of cultural rights have typically involved claims about all three ideas: *inter alia*, the claim that cultural groups have rights; the claim that culture is a collective good; and the claim that members of cultural groups have rights *qua* members. In this chapter, therefore, I will examine each of these ideas in turn: first, group rights; second, public goods; third, group-differentiated rights.

1. Group rights

Can groups have rights? As a preliminary matter, let us consider the claim that they do already – that every legal system recognizes states and corporations as having rights. There are two reasons, however, for viewing this as an inadequate premiss for demonstrating the existence of group rights generally: the first is a distinction between moral rights and legal rights; the second is a distinction between the nature of groups involved.

(i) legal rights and moral rights

First, legal rights and moral rights involve different types of discourse. In talking about rights in this thesis, it should be made clear that I am speaking of moral rights first and legal rights second. Normative arguments about rights tend to argue from the existence of moral rights to their protection by law, including the creation of legal rights. However, statements about what legal rights there are, and who has them, are descriptions of what a legal system recognizes as such. They typically don't involve claims about the moral validity or force of those rights.⁶ A legal right may protect, or help protect, a specific moral right.⁷ It need not do this directly, however. Just as

⁶ I am following one interpretation of the Sources Thesis, “that the existence and contents of the law can be determined without resorting to moral argument”: see Raz, “Legal Rights” (1994: 266).

⁷ Just as moral rights “are unlikely to stand in a simple one-to-one relation with duties” (Waldron, 1993: 212), they are just as unlikely to stand in a simple one-to-one relation with *legal* rights, immunities, privileges, claims, etc.

rights aren't strictly correlative with duties, legal rights may protect moral rights indirectly: for example, parents have a legal right to child support, but the moral right in question (the interest served) arguably belongs to their children.⁸ Equally, a legal right may have no moral foundation whatsoever (e.g. a legal right to bear arms or to kill with impunity).⁹ Hence, if the law recognizes states and corporations as rights-holders, we needn't understand this as a claim, either that their legal rights protect moral rights or that, if they do, the moral rights in question *belong* to those entities.

(ii) the rights of states and corporations as group rights

Secondly, the analogy between corporations and states, on the one hand, and social groups, on the other, is problematic. Corporations and states are artificial persons, not groups *per se*: their personality exists separately from the group of natural persons whose actions are referable to it.¹⁰ This personality, moreover, is constituted entirely by law according to clear and determinate criteria.¹¹ As Waldron notes, "there may be no such criteria and no such agreed upon rules for the groups, peoples, nations, and communities alluded to in third generation rights talk" (362).¹² For an extensive discussion of this problem in respect of cultural groups see Chapter 3. For these

⁸ Equally, the existence of a duty or prohibition doesn't entail the existence of a corresponding *legal* right *per se*. For example, we would say that the legal prohibition against damaging a traffic sign gives rise to duties, but it seems implausible to claim that there are legal *rights* that correspond with these duties. As Hartney points out, "it is one of the weaknesses of the Hohfeldian analysis of rights that all duties must correlate with rights and therefore be owed *to* someone [original emphasis]" (1995: 225, n23).

⁹ This is slightly simplistic and misleading. As Raz explains, the creation of a legal right may give rise to a moral right that didn't exist (1994: 271-272). See also Waldron's discussion of newly-created rights (1988: 113-114). Broadly speaking, then, it may well be unusual to find a legal right that doesn't have a moral foundation, or at least some moral dimension.

¹⁰ Additionally, in respect of corporations, it is usually possible to have a one-person company. Corporations or companies are, in this sense, merely the legal framework for limiting the personal liability of directors and shareholders, alienating ownership to the company itself. Their *raison d'être* is to make possible investment on a much greater scale than is practicable under traditional forms of ownership. As such, it seems difficult to draw a useful analogy between the aggregate interests of shareholders, on the one hand, and the sort of communal interests that arise from social groups, on the other.

¹¹ This is wholly true of corporations. The recognition of states under international law also follows agreed criteria. However, one criterion is that a state is recognized by other states, which introduces an element of subjectivity (in the sense that states may take different views on this question: e.g. Taiwan).

¹² *My thesis, of course, is that all the criteria we do have is deeply unsatisfactory as a basis for distributing rights: see Chapter 7.*

reasons, we shouldn't rely too heavily on the example of the legal rights of states and corporations as evidence for the existence of the moral rights belonging to groups.¹³

(iii) the point of rights

So, to return to our initial question, can groups have (moral) rights? Following one point of view, the basic concept of a right is to protect the interests of *individuals* against collective political action by majorities. Consider Dworkin's well-known definition: "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them" (1978: xi).

This account appears to pit the notion of rights firmly against the possibility of group rights. On Dworkin's view, to describe any aggregate preference or collective interest as a right - capable of outweighing a particular individual right - negates the very purpose of the latter:

If we now say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sorts of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the latter rights (Dworkin, 1978: 194).

As Waldron puts it: "If the whole point of rights for individuals is to place limits on the pursuit of some collective goal, it will hardly do to characterize that goal as a community right which may then conflict with, and possibly override, the rights of individuals" (1993: 364).

However, as Waldron also points out, we needn't take this view as wholly definitive. If one takes rights as protecting interests in terms of their own inherent importance rather than relative to some collective end, then any conflict between the rights of a group and an individual "would simply be a clash between the importance

¹³ At the same time, this example can't be entirely dismissed out of hand: if multinational corporations are allowed to be rights-bearers, notes Waldron, "it seems a bit harsh to deny that status to the

of different sorts of interests” (365).¹⁴ This does raise the question of how we resolve conflicts between rights *inter se* but that question is certain to arise in any event, even if we are committed to the notion that only individual rights exist.¹⁵

(iv) groups and interests

However, it is still necessary to settle the question of whether it is *plausible* to talk of groups having rights. This means establishing, first of all, whether a group can have interests. Secondly, are these interests of the sort that can be protected by rights? Thirdly, even if it makes sense to think of groups having interests that *can* be protected by rights, there may yet be other (substantive, rather than conceptual) reasons against adopting the terminology of group rights.

First, can groups have interests? When we speak of a group as having an interest, is this merely a shorthand for the *aggregate* of the interests of its individual members, or does it refer to some interest that inheres in the group *distinct from* the individual interests of its members? Writers on collective rights are frequently unclear about these sorts of distinctions.

If we are speaking simply of the aggregate interests of individual members, then the concept of group rights fails at the first hurdle. The aggregate might be the sum of all the individual interests that each member has in some collective good, but that doesn't alter the fact that the interests concerned belong to the members, not the group itself (see section 2 below). It might equally be that individuals have interests *qua* members of groups that they don't have otherwise, which suggests an argument for the concept of group-differentiated rights (see section 3 below). But, so long as the interests attributed to cultural groups are wholly reducible to those of their individual members, using the language of group rights (or group-differentiated rights) adds nothing to our understanding.

community of French-speaking Canadians or the people of Malawi; certainly it would be pedantic to do so on purely verbal grounds”. See also Dworkin (1978: 91).

¹⁴ Note that Dworkin rejects this view of rights (1984: 164-165). Note also that Dworkin's conception of rights as trumps only operates relative to the collective interest being one of *general utility*: see Waldron (1993: 365). It remains open whether an individual right could be trumped or at least weighed in the balance against a non-utilitarian general end.

¹⁵ On some views, conflicts between rights are by definition impossible, e.g. Nozick's view of rights as side-constraints (1974: 28-35) or in Hillel Steiner's account under the Choice theory (1994). However, I follow the thesis that such accounts either tightly constrain the sorts of interests that can be protected *or* even ignore the actual existence of moral conflicts: see Waldron (1993: 210).

If, on the other hand, we're referring to some interest of a group existing *apart* from those of its individual members and not entirely reducible to them as individuals then the idea of groups having rights seems more plausible. It is still necessary to show, however, that groups *can* have such interests and, next, whether these interests can be protected by rights.

Hartney sets out two possibilities for groups having interests: the first, “an interest of a group over and above the interests of its members”; and second, “an interest shared by members of a group in such a way that the interest is non-individualizable” (209). I will discuss each of these in turn.

First, Hartney suggests that, in order for there to be a group interest ‘over and above’ the interests of its members, it must be one capable of conflicting “with the interest of *most* of the members of the group” (209) [original emphasis].¹⁶ That is, in order to distinguish a group interest from an aggregate interest of individual members, it has to be *possible* for the group to have an interest against those of its members:

Now it is true that it makes sense to say that something is for the good of a group even if it is not for the good of its individual members. That the group continues to exist, or that it increases in size, appears to be good for the group (whether or not its members benefit). (207)

The objection to groups having interests in *this* sense isn't conceptual, however, but moral.¹⁷ Specifically, it would violate the requirements of a humanistic morality, such that “the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality” (Raz, 1986: 194).¹⁸ Although we can talk (conceptually) of a group having an interest

¹⁶ Note that it is entirely possible for the aggregate interest of a group's members to be in conflict with any individual members interest. It is impossible, however, for the aggregate interest to be in conflict with that of the *majority* of members.

¹⁷ There is also a possible ontological objection to groups themselves having interests, which is that it seems to attribute to groups the status of conscious entities. To be fair, consciousness doesn't seem to be a necessary feature of being able to have an interest. However, the capacity for consciousness might be: see n19 below.

¹⁸ See also Hartney: “only the lives of individual human beings have ultimate value, and collective entities derive their value from their contribution to the lives of individual human beings” (1995: 206). Hartney terms this value-individualism, the proposition that “all goods are good to the extent that they contribute to the well-being of individual human beings”. He notes that value-individualism doesn't imply either ontological individualism, “i.e. the view that groups are reducible to their members” (208) or what Raz calls moral individualism: the proposition “which does not recognize any intrinsic value in

wholly separate from that of its members, we don't regard such interests as being moral ones.¹⁹ And, therefore, we can't regard those interests as capable of being rights.

This objection doesn't bar the second sort of group interest, however. This is because a nonindividualizable interest – an interest held in common by members of a group that can't be (entirely) reduced to the individual interest of each member – is nonetheless *referable* to its value to individuals. While humanism commits one to the view that only individual human beings are of ultimate moral value, it doesn't entail that the only morally relevant interests that individuals have are individualizable ones. Thus an interest that belongs conceptually to a group of people may be capable of being protected as a right. Even though the moral importance of the interest can't be (entirely) expressed by referring to its aggregate value to each member as an individual, its moral importance might still derive from its contribution to the lives of individual members.²⁰

The most plausible case for groups having rights, then, lies in showing that members of groups hold interests of sufficient moral weight that aren't individualizable, that they hold an interest collectively as members that they can't as individuals generally. This brings us to the debate over rights to public goods. Many writers see a connection between the nature of the interest and the nature of the good, arguing that the only plausible rights to such goods must take the form of group rights or group-differentiated rights. If group rights exist, therefore, they depend on showing (a) the existence of nonindividualized interests in public goods and (b) that such interests can't give rise to *individual* rights. I will examine each of these ideas in turn.

any collective good Individualistic moralities are humanistic moralities which hold that collective have instrumental value only" (1986: 198).

¹⁹ See also Kymlicka: "Groups have no moral claim to well-being independently of their members – groups just aren't the right sort of beings to have moral status. They don't feel pain or pleasure. It is individual sentient beings whose lives get better or get worse, who suffer or flourish, and so it is their welfare that is the subject matter of morality" (1989: 241-242).

²⁰ Although, as I argue below, we also have to bear in mind the interests of nonmembers as beneficiaries.

2. Rights to public goods

Can there be rights to public goods? This depends, as I've stated, on making clear the nature of the interests that people have in such goods. And this involves making clear what is meant by 'public goods'.

Public goods may be defined in several ways.²¹ Raz gives the central feature of public goods as *nonexcludability*.²² As he puts it, "a good is a public good *in a certain society* if and only if the distribution of its benefits in that society is not subject to voluntary control by anyone other than each potential beneficiary controlling his share of the benefits [my emphasis]" (Raz, 1986: 198). A public good is a collective good if it is *inherently* nonexcludable: that is, if it is logically impossible for its distribution to be controlled.²³ The sorts of goods that Raz has in mind as collective goods are what he terms "general beneficial features of a society":

It is a public good, and inherently so, that this society is a tolerant society, that it is an educated society, that it is infused with a sense of respect for human beings, etc. Living in a society with these characteristics is generally of benefit to individuals. (Raz, 1986: 199)

As a general statement, though, this seems false. For there are obviously societies in which such goods haven't been or aren't generally distributed. For example, a society can be tolerant in certain respects and deeply intolerant in others (e.g. a policy of religious toleration that excludes Catholics), or hold it to be true that all men are created equal but deny equal treatment to women and blacks.²⁴ Raz allows that "one

²¹ Waldron notes that, "although 'public good' is a technical term, it is associated in the economic literature with a cluster of criteria (which seem to operate in a sort of 'family resemblance' way) rather than a single criterion" (1993: 348).

²² See Hartney (1995: 207). Note also another characteristic of public goods, often tied to nonexcludability, is that they are 'non-rival' in consumption: its enjoyment by one person doesn't detract from its enjoyment by others: see Réaume (1988).

²³ Goods such as clean water or clean air are typical example of contingent public goods: even if their distribution is in fact uncontrolled, because it would be possible (even if only theoretically) to impose control over their supply (Raz, 1986: 198-199). However, Waldron notes that contingent public goods like clean air are in a practical sense an inherent public good. (1993: 348). The feasibility (practical, technical, or economic) of exclusion is a major consideration in determining excludability: see Réaume (1988).

²⁴ Of course, those who distribute the good may respond – following Walzer (1983) – that the good is relative to the social meanings of each society. Thus, from their (internal) point of view, it is entirely consistent for tolerance not to extend to Catholicism, or equal treatment not to extend to women or slaves. And from an external point of view, the goods in question wouldn't be understood as proper

can exclude individuals from benefiting from such goods by excluding them from the society to which they pertain” (1986: 199), which is clearly true but misleading, for the same reason as before – you can obviously inhabit the same society and be subject to intolerance.

Inherently public goods, then, aren’t inherently public. Rather, the publicity of goods is a matter of degree. As Réaume points out, “the designation of a good as public requires a prior delineation of the body or group for whom it is public” (1988: 19). She suggests that the idea of nonexcludability “takes for granted a background framework of rights and duties. Given that one has certain rights which prohibit some means of exclusion, a public good is one from which one cannot otherwise be excluded” (Réaume, 1988: 4). However, while I agree that rights and duties can be relevant to determining entitlement, I think it would be more accurate to understand the inherent excludability of these sorts of goods as a function of membership in a group or category, which doesn’t always entail a background of rights and duties. This is entirely consistent with Réaume’s own analysis of the relationship between groups and goods, such that “once we know the boundaries of the group, we know for whom the good is public, and this group may not include the entire society” (1988: 21).²⁵ This understanding is also reflected in Waldron’s definition of nonexcludable goods: “A good is nonexcludable, *relative to a group*, if it is the case that, if it is to be supplied to any member of the group, it cannot be denied to any other member of the group (the benefit of a lighthouse is a good example) [my emphasis]” (348).

Another feature associated with public goods is *jointness of production*: “A good is jointly produced to the extent that it cannot be produced by the cooperation of all or most members of the group (clean air in a residential suburb is a good example)” (Waldron, 1992: 348). However, jointness of production isn’t a necessary feature of public goods: as Réaume points out, many private goods “require either onerous undertakings of others or the participation of many” (1988: 6).²⁶ Also, as Waldron makes clear, nonexcludability and jointness of production are conceptually distinct:

tolerance or equal treatment. However, the external point of view is parasitical on some ideal distribution of the good in question (tolerance or equal treatment), hence it doesn’t seem incoherent to describe the goods in question as less than generally distributed.

²⁵ Indeed, the group among whom a good is shared may be larger than a single society: for example, the eradication of smallpox.

It is possible for a good to be nonexcludable but privately produced (a privately built lighthouse warning ships away from dangerous reefs is the best example); and it is possible for a good to be jointly produced but excludable (a system of public honours, for example). (348)

Another type of public goods are what Réaume terms *participatory* goods (10). Not only is the good dependent on the involvement of many for its production (i.e. it is jointly-produced), but such participation is part of the value of the good. As Hartney puts it, “some goods consist in a *collective activity*: the good is not some end-product of the activity, but the very activity itself” [emphasis in original] (207). Examples of such goods are things like games or, in Réaume’s example, the good of a cultured society:

A cultured society is a complex package of goods. But the package has a core upon which all others are dependent. These core aspects of culture are such that each individual *needs others in order to enjoy them*, not merely in order to produce it [my emphasis]. (1988: 9)

Close to Réaume’s notion of participatory goods is Waldron’s idea of *communal* goods (1992: 355). These are goods that, in addition to being nonexcludable and jointly produced, cannot be enjoyed except “as a participant member of a group to which the benefit of the good accrues at a collective level” (355). In this sense, they come very close to Réaume’s account of participatory goods, except that the emphasis is placed on collective enjoyment rather than collective activity. Examples of communal goods given by Waldron include things like “fraternity, solidarity, conviviality, a shared language, culture, and traditions” (358). In each case, Waldron argues, any account of their enjoyment by each individual is unintelligible “apart from their reference to the enjoyment of others” (355). In this sense, one can distinguish between participatory goods and communal goods, in that one can selfishly participate in a game, but you can’t selfishly enjoy fraternity or solidarity.

The debate over rights to public goods centres upon the nature of the interests that people can have in such goods. In particular, there is an argument that there can

²⁶ Réaume gives the example of a gourmet meal or a tower block.

be no individual rights to public goods because there are no individualizable interests in such goods. This is frequently accompanied by an argument in favour of group rights or group-differentiated rights in order to protect such interests. However, it is clear from the brief analysis above that public goods aren't all public in the same way. Specifically, different arguments over rights to public goods turn on different features of so-called public goods.

Raz's principal argument against individual rights to public goods is that, although many people have an interest in such goods, "the interest of no single member of [a] group in [a] public good is sufficient *by itself* to justify holding another person to be subject to a duty [emphasis added]" (208). However, this view doesn't bar the possibility of rights to public goods altogether. Whereas the interest of any individual member taken by itself is inadequate to ground an individual right to the good, Raz thinks the "cumulative interest of many individuals" (209) is sufficient to justify the existence of a *collective* right. Such rights protect "the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interests as members of the group" (208).

However, it's important to note that although Raz identifies nonexcludability as the distinguishing feature of public goods, his argument against individual rights to public goods is based on the costs of their production. He bases his argument on a conceptual claim that rights to public goods impose widespread and significant burdens on others to support those goods and a substantive claim that no individual's interest in a public good taken by itself can be of sufficient moral importance to justify imposing such burdens on others. However, as Réaume points out, (a) "not all public goods require either the imposition of duties on large numbers of people or peculiarly onerous duties" and (b) many private goods entail duties that are weighty and broadly-based:

Raz's argument does not centrally turn on the kind of good a public good is, or even the kind of interest one can have in its provision, but on the relative importance of an individual's interest and the onerous duties imposed on many others. This means, however, that whether an individual can have a right to a public good does not depend on anything peculiar to public goods (1988: 6).

Réaume argues that the argument against individual rights to things like a cultured society isn't based in their publicness but in their *participatory* character. She proposes that the test of whether one can have an individual right to a good, "depends on whether it is one which is individualizable ... that is, whether it is a good the enjoyment of which should, and therefore can, be satisfied even at the expense of some interest of everyone else" (1988: 8). By this test, of course, individual rights to some public goods are plausible: goods that are nonexcludable and jointly produced whose importance can nonetheless be expressed entirely in terms of their value to each individual separately (Réaume uses the example of clean air). By contrast, a good that is constituted by participation - such as the good of living in a cultured society - can't be the object of individual rights because, according to Réaume, "it cannot be enjoyed as an individual. If it could be provided to a single person it would be worthless to him. Sharing cultural experiences is the most important part of the benefit of having them" (1988: 11).

However, it isn't obvious why the participatory nature of a good prevents somebody from holding an individualizable interest in it. For example, at least part of my interest in playing tennis is playing against an opponent so, to that extent at least, tennis is a participatory good. (Even if there were such a thing as a computer that played tennis as well or better than a human, or some machine that replicated the experience of playing tennis against a human, I assume that people would still want to play against other people, just as playing another person in chess is participatory in a way that playing against a computer isn't.) Nonetheless, although the good of playing tennis against another person is *inherently* mutual in a way that other nonexcludable, jointly-produced goods aren't, my interest in playing tennis is still my own. Even though production and enjoyment of the good are of a piece, even though the good is jointly produced *and* jointly enjoyed, the value of playing tennis can nonetheless be expressed entirely in terms of its value to each individual player separately without any difficulty. On this view, interests in participatory goods aren't any less individualizable than interests in other jointly-produced, nonexcludable goods like clean air.

It might be argued that this is only true of purely competitive forms of participatory goods (like tennis) and not at all true of most other examples of participatory goods (like friendship or living in a cultured society) which are entirely

cooperative in character.²⁷ However, Hartney makes a similar point using the example of belonging to an orchestra as a participatory good:

it is hard to see why the actual (or potential) members of the orchestra do not have an interest *as individuals* in the existence of the orchestra. If the orchestra ceases to exist, their lives are impoverished, as are those of the members of the potential audience. The fact that the good is participatory for one class of persons and not for the other does not affect the nature of their interest in the good if its value consists in its contribution to the well-being of individuals. Whether this contribution is joint or separate is irrelevant to the fact that people's lives are enriched by it. Furthermore, it may cease to be in the interest of one of the members of the orchestra to belong to it, while the interest of the others remains unaffected: in that sense, the interest of one member is severable from that of the others [original emphasis] (1995: 209).

None of this denies the possible existence of nonindividualized interests nor is it meant to dispute the intrinsic value of public goods. Nonetheless, if such interests are possible, their existence isn't established by showing that any particular good is a participatory one.

As I noted above, Waldron's description of communal goods involves similar claims to Réaume's account of participatory goods. Both stress the fact that such goods are enjoyed collectively, rather than individually. Both claim that the nature of such goods prevents there being individualizable interests in them. However, the emphasis that Waldron places on communality of enjoyment suggests an *additional* criterion above and beyond a good being participatory. With a participatory good, enjoyment of the good is inherently collective in the sense that (a) the good is inherently jointly-produced and (b) production and enjoyment are inseparable from one another. With a communal good, enjoyment is inherently collective in a further sense: (c) it is contingent on the conscious reciprocity of enjoyment. That is, although I can't enjoy a participatory good without the participation and hence the enjoyment of others, I can still be indifferent to their enjoyment. However, as Waldron suggests,

²⁷ If that were the case, Réaume's characterization of participation would still be misplaced. This distinction would make nonindividualized interests contingent on cooperative participatory goods *only*, not participatory goods simpliciter.

it isn't possible to enjoy a communal good and be indifferent to others shared enjoyment: "the enjoyment I experience is not just a satisfaction or a warm glow that can be predicated of me alone; it is something which in its felt character looks beyond its embodiment in me to its embodiment in others" (356). It's this feature of communal goods that Waldron argues makes them inappropriate as a basis for individualizable interests:

A purely reductive analysis would make the value of [a communal good] a function of the values of the individual experiences of which it was composed. That would be an unsatisfactory account since ... each of these experiences refers beyond itself to the wider group, and the account given by any of the individuals concerned of the value of the experience *to him* would make immediate reference to its value and importance for the others. An account, then, of the value of these things that was sensitive to what it was like to enjoy them would have to focus on their communal character [emphasis in original] (357).

Hence, Waldron claims, it is possible for a good to be "valuable for human society without its value being adequately characterizable in terms of its worth to any or all of the individual members of the society considered one by one" (358). He suggests that the sorts of goods that Raz has in mind as inherently public goods are in fact communal goods, such as "the value of a cultured society, a tolerant society, and a society where there is a general sense of respect for persons" (ibid.). This also includes things like "a shared language, culture, and tradition".

Whether all those things are in fact communal goods, it is likely that at least some of them are. And I think it is the *communal* nature of those goods that prevents people having individualized interests in them, rather than their nonexcludability, jointness of production, or participatory nature. Although the beneficiaries of such goods are all individuals, no one recipient would be able to identify themselves as having an interest separable from any other. Of course, people's interest in goods that are strictly private in nature (i.e. excludable, nonparticipatory) may well be accompanied by an equal concern in securing the same goods to others. The point is that, unlike communal goods, this isn't a *necessary* feature of their interest, one that is intrinsic to the nature of the good.

In section 1, I suggested that the existence of group rights depended not only on showing the possibility of nonindividualized interests but also on establishing that individuals *can't* have rights to such goods. Put simply, in the absence of individual rights to communal goods, the case in favour of group rights to such goods is much stronger.²⁸ The most plausible argument has been that, if the justification for an individual right is to show that a person's interest in a good, taken by itself, is of sufficient moral importance to justify others being placed under duties to protect that interest, then individual rights to communal goods can't be justified because individuals don't have interests in such goods *qua* individuals. But this argument doesn't address the notion that individual rights can be justified by means other than the importance of individualized interests in the good. Specifically, it isn't implausible that an individual's right to a good can be justified, not only on the importance of their own interest, but also by reference to the protection it gives to the *nonindividualized* interests of others.²⁹ If this is correct, then establishing the existence of group rights requires showing that individual rights to a specific (communal) good are implausible on these grounds as well.

For obvious enough reasons, arguments for rights to things like culture and language and so on are typically made in the context of arguments over group rights, and rights to collective or communal goods. But if individual rights to public goods and communal goods are plausible, if something like an individual right to culture is conceptually possible, then it remains open that their *distribution* may be group-specific or group-based. This raises a third sense of 'collective rights' in that we may be describing the distribution of individual rights to members of a particular group (or specific sort of group), rather than generally.

As we will see, the idea that people have interests as members of groups, in addition to those they have as individuals generally, is central to the concept of group-differentiated rights. However, as we will also see, the concept is a new one and not thoroughly defined. In particular, it's unclear what relationship the category of group-differentiated rights stands in relation to the notions of rights to communal goods,

²⁸ Recall that the existence of an individual right and a group right to the *same good* would seem to nullify the existence and the point of having individual rights in the first place.

²⁹ Note that this is a different argument from that of the universalizability of individual rights, which "guarantees that if any individual has a right to some good then all individuals (or all like him in the relevant respect) have a right to a good like that too" (Waldron: 1992, 347).

individual rights and group rights. It may also be that the idea of group-differentiation still fails to capture some important distinctions in the nature of certain sorts of rights.

Most of all, the idea of group-differentiation raises a difficult normative question about how and among whom rights ought to be distributed, both as between groups and between individuals. In short, although the notion of group-differentiation was intended to side-step the shortcomings of the existing debate over those concepts, it isn't clear that it succeeds.

3. Group-differentiated rights

The concept of group-specific or group-differentiated rights is a very recent one. It begins with Kymlicka's claim that the language of collective rights is inadequate to describe the sorts of rights that attach to members of minority cultural groups. His first point – that the term “collective rights” is equivocal between different concepts – is one we have explored already.³⁰ More importantly, Kymlicka argues, the term “suggests a false dichotomy with individual rights” (1995: 45). Because collective rights are usually interpreted as rights belonging to collective entities, they are regarded as incompatible with the exercise of individual rights. But, as Kymlicka points out, categorizing rights as ‘collective’ or ‘individual’ is of little help in understanding something like language rights which may involve both rights exercised by individuals (e.g. the right to use one's language in court proceedings) and to the group generally (e.g. the right of a minority language group to their own school). Kymlicka describes as “sterile” the debate over the categorization of such rights, “because the question of whether the right is (or is not) collective is morally unimportant” (45). The real question, he argues, “is why certain rights are group-differentiated – that is, why the members of certain groups should have rights regarding land, language, representation, etc. that the members of other groups do not have” (46).

His own answer, however, is inadequate. Although Kymlicka devotes a great deal of argument to showing why certain cultural interests ought to be protected by rights, he fails to show why those rights should be *group-differentiated* ones. Specifically, the ‘real question’ is why rights to good X are good only for members of

group A but not groups B or C; why the distribution of such rights *ought* to be group-specific rather than general.

This is, however, but part of a more general failure by Kymlicka to provide an account of the *concept* of group-differentiated rights. Although it was meant to avoid the equivocality of ‘collective rights’, the language of group-differentiated rights seems equally ambiguous. For a start, it isn’t immediately clear whether group-differentiation is meant as a descriptive category or a normative concept. Applied as the former, group-differentiated rights are simply those legal rights that are distributed to a particular group or category of persons, rather than generally. So, for example, the right to vote is a characteristically group-differentiated right, because no state allows *all* its residents to vote.³¹ It is irrelevant to the description, ‘group-differentiated’, that a particular state distributes the right to vote in an illiberal manner (e.g. all white male Protestant land-owners) as opposed to what we would term democratically (e.g. all residents over 18 years old). In each case, describing the right as group-differentiated needn’t involve a normative claim about the distribution of the right.

More problematically, it isn’t obvious whether the idea of group-differentiated rights is meant to describe those rights distributed to classes or categories of person, as opposed to sociological groups (insofar as the two can be distinguished).³² For example, the right to treatment for AIDS or to income support while unemployed can typically be understood as general rights, or at least as instances of specific rights that can be derived from general rights. But it is also clear that they can be understood as group-differentiated rights, i.e. they attach to some people and not to others and there is a specific group of people to whom they attach (i.e. people with AIDS; the unemployed). The point here isn’t the usual one about the generality of the language of moral rights as opposed to the more specific rights statements that they can generate,³³ it is about the generality of the language of group-differentiated rights. Given that generality - that the category of group-differentiated rights is as ‘large and

³⁰ See Chapter 2. The term covers at least two distinct concepts (i.e. rights belonging to collective entities, rights to collective goods).

³¹ Children below a certain age, the mentally ill, and prisoners are usually excluded. Note that it is also group-differentiated in the sense that the right is always relative to some particular legislature.

³² The distinction between a category and a sociological group is that members of the latter *recognize* one another as members of the group, whereas there is no requirement that members of a category do so. Obviously, sociological groups may arise from the widespread social recognition of certain characteristics (e.g. skin colour).

³³ See Hare (1963: 38-40).

heterogeneous' as that of collective rights (1995: 35) - it isn't clear what makes group-differentiation a particularly salient feature of *cultural* rights.

Understanding group-differentiation as a normative concept seems more plausible. In this sense, describing a right as 'group-differentiated' entails, in addition to the importance of the interest at stake, the claim that that sort of distribution of rights is morally desirable or just. It may also involve the more general claim that certain sorts of goods have this kind of moral configuration: that distributing rights according to membership in groups rather than uniformly is entailed by the nature of (people's interests in) such goods.³⁴ So, for example, when Kymlicka approves of the rights of French Canadians to minority language education, he is making both the specific and general claims: (1) the interest in education in French is of sufficient moral importance to constitute a right; (2) the particular distribution of this right among French Canadians only is just or desirable; and (3) the distribution of rights to (cultural) goods like education in minority language X ought to be group-differentiated rather than uniform.³⁵

However, making a normative claim for a group-differentiated right clearly requires justification, not simply for the right itself but its particular distribution. And, as I've already pointed out, the key question is why the distribution of the right ought to be group-specific rather than general. Ideally, a claim for a group-differentiated right needs to provide an account of some *internal* relationship between membership of the group and having some morally important interest; between the specific group and the specific good in question. Specifically, why is membership of this (sort of) group relevant to having this (sort of) interest and hence this (sort of) right?

The biggest difficulty for such accounts, and for the concept of group-differentiated rights generally, is to show why *membership* in a particular sort of group is a morally relevant characteristic for distributing rights. The concept of group-

³⁴ It might be that group-differentiated rights *only* protect those goods that are *necessarily* group-differentiated. However, although this might be consistent with some people's ideas about culture (i.e. that people *ought* to belong to different cultures), I don't think Kymlicka goes so far as to make this claim.

³⁵ Kymlicka, however, doesn't distinguish between the normative and descriptive elements of the concept. Instead, his argument combines conceptual analysis of existing laws (e.g. the minority language education provisions in s. 23 of the Canadian Charter of Rights and Freedoms are group-differentiated rights) with normative argument (the interests of French Canadians require group-differentiated rights, such as those in section 23 of the Charter). Kymlicka does note that some distributions of rights among minority groups could be unjust or illegitimate, e.g. where there is no actual disadvantage with respect to cultural membership (1995: 109-110). But he doesn't advert to any general distinction between the two aspects of group-differentiation.

differentiated rights relies on the idea that people have rights *qua* members of particular groups that they don't have as individuals generally. But, while the association between having a particular interest and belonging to a particular group is a fairly ubiquitous one, it isn't necessarily anything more than an association. In order to establish that someone has a right *qua* a member, it also has to be established that membership is the morally relevant characteristic.

Returning to the two examples of 'group-differentiated' rights noted above, the right to treatment for AIDS or to income support while unemployed, the notion that someone has a right *qua* a member of either relevant group (people with AIDS, the unemployed) is tautological: the moral importance of each person's interest (in their health or employment) can be expressed without reference to a group. This is true even where the good in question may prove to be public rather than private, i.e. nonexcludable. And so it is true of many rights that are apparently group-based, the predicate of membership in a group is simply irrelevant to the justification of the rights themselves.

By contrast, our discussion of rights to communal goods above suggested that the moral importance of each person's interest in such goods *can't* be properly expressed without reference to the interests of others. Doesn't this suggest that membership in a group sharing a communal good is a necessary feature of having a (nonindividualized) interest in, and hence a right to, such a good? The answer is 'no'. Clearly, being a member of such a group is one way of having an interest in a communal good, but it isn't the only way. The idea that only people who have interests in communal goods are those members of groups among whom they are distributed confuses the actual distribution of a good for its just distribution. If, for instance, we take tolerance as an example of a communal good, it cannot have been the case when, in 17th century England, the dominant conception of religious tolerance was extended only or primarily to Protestant forms of Christianity, that the only people who had a morally important interest in toleration were those who were already tolerated.³⁶ If it is true that certain goods, both public and private, are also primary goods (i.e. central to human well-being), then it seems plausible that certain

³⁶ More generally, in respect of cultural goods where much of the argument concerns the importance of transmitting culture to children and preserving it for future generations as yet unborn, it seems incoherent to rest such arguments on the idea that the only people who have an interest in culture are those who already have it: see also Chapter 7.

communal goods also belong in this category. Accordingly, we would argue that their distribution *ought* not be group-differentiated.

As we will see in the next chapter, my point here relates to a central argument in my thesis: that if there *are* rights to culture, they are most likely to be general rather than special or group-differentiated. Although some writers allow for the possibility that nonmembers could have interests in cultural goods, none have taken this as a basis for a general distribution of rights to such goods.³⁷ However, I don't intend to go into the particular moral arguments concerning distributions of cultural rights until the next chapter. Instead, my concern in this section is to show the *conceptual* difficulties associated with the idea of cultural rights *qua* group-differentiated rights. So far I have argued that claims for such rights need to set out some internal relationship between being a member and having the right. And I've also pointed out that, even in relation to communal goods, being a member may only be one way of having the right, i.e. membership may be a sufficient but not a necessary condition of having a morally important interest in a communal good.

However, although his concept is far from clear, there are two important arguments raised by Kymlicka in favour of group-differentiated rights. The first is that we can already find the concept at work in most liberal conceptions of citizenship rights. The second is that we shouldn't confuse equal or general distributions of legal rights with *just* distributions. The first is essentially a claim about the concept of citizenship; the second, a claim about the requirements of 'ethnocultural justice'.

First, it is part of Kymlicka's argument in favour of minority cultural rights that states already *do* distribute rights according to membership in groups i.e. rights of citizens as opposed to noncitizens. "Citizenship", he argues, "is an inherently group-differentiated notion" (1995: 124). That is, where states distribute rights and benefits on the basis of citizenship, they are treating people "differentially on the basis of their group membership" (125) because no state distributes citizenship to "all persons who desire it". Moreover, Kymlicka maintains, this practice is something that is accepted as sound by most writers in the liberal tradition:

³⁷ See Tamir (1993: 46), Margalit and Raz (1994), Kymlicka (1995: Chapter 3). See also Miller, who notes that, if cultures were considered as public groups, "individuals might be tempted to free-ride, enjoying the benefits of cultural membership without paying the costs involved in sustaining the institutions through which the culture is transmitted" (1995: 147).

Liberal theorists invariably limit citizenship to the members of a particular group, rather than all persons who desire it. The most plausible reason for this – namely, to recognize and protect our membership in distinct cultures – is also a reason for allowing group-differentiated citizenship within a state [I]n so far as liberal theorists accept the principle that citizenship can be restricted to the members of a particular group, the burden of proof lies on them to explain why they are not also committed to accepting group-differentiated rights within a state (1995: 125-126).

In support of this argument, Kymlicka also volunteers the observation that liberals “implicitly assume that people are members of societal cultures, that these cultures provide the context for individual choice, and that one of the functions of having separate states is to recognize the fact that people belong to separate cultures” (ibid.). Citizenship rights, then, are most plausibly understood as group-differentiated rights.

There are, however, many reasons why states limit residency and citizenship, and it seems doubtful that they are all congenial to liberals or to liberal theory. Many states, after all, have used immigration and citizenship laws to keep out people from specific racial and ethnic groups, which hardly seems an example to count in favour of the concept generally. Nor is it clear why citizenship – rather than residency or common humanity - should be the ‘inherent’ basis for distributing rights and benefits to things like education or housing. The obvious difficulty with Kymlicka’s argument here is that merely showing that citizenship *is* or may be group-differentiated cannot establish that it *ought* to be.

As to the claim that most liberals accept that citizenship ought to be group-differentiated, and that the implicit reason for their acceptance is for the sake of protecting people’s membership in different cultures, it seems difficult to square this with the earlier claim by Kymlicka that the liberal political tradition has been mostly silent on such matters (see e.g. 1995: 2-3; 49-50). Nonetheless, if there is any consensus among liberals about immigration and citizenship, it would be the wholly pragmatic one that, living as we do in a world composed of rival and competing states, no state can afford to open its borders to all comers unilaterally and hope to sustain the sort of welfare provision that most liberals associate with residency or citizenship.

That this is a practical (rather than an inherent) limitation doesn't make the morality of limiting citizenship or residency any more obvious, however. There is nothing in the nature of being a resident or citizen of a country that suggests *ceteris paribus* that some people are more entitled to it than others.³⁸ And it is certainly open to question whether citizens of a country have a more compelling moral interest in enjoying the rights of citizens than noncitizens, any more than occupants of a lifeboat have a greater interest in not drowning than the people still in the water. Equally, where citizenship is the relevant characteristic for distributing rights *within* a state, it is open to question why the status of *citizen* should count for more than the fact of residency (whether legal or illegal).³⁹ These are meant to be no more than brief remarks, however, as to why citizenship is unsatisfactory as a conceptual example of group-differentiated rights.

Second, Kymlicka argues that distributions of rights to specific groups are consistent with an egalitarian liberal theory of justice. Again, his argument is almost entirely substantive rather than conceptual, concerned with making a specific case for minority cultural rights. Nevertheless, he makes the general point that an unequal (i.e. non-uniform) distribution of legal rights can be consistent with the equal protection of moral rights.

His argument is partly historical, suggesting that the modern liberal emphasis on 'equal rights' isn't consistent with earlier liberal conceptions of minority rights in 19th and early 20th century political thought (1995: 50-57, 108); and, in particular, that the impact of *Brown v Board of Education* in the United States marked a rising antipathy towards notions of 'separate but equal' treatment that group-differentiation seems to involve (ibid.: 58-60). All of which may be true but, like the argument from actual practice above, historical consistency isn't itself much of an argument in favour of unequal treatment.

³⁸ This view would obviously be challenged by those who stress the importance of protecting particular historical communities, such as nations or cultures. Equally, a strong conception of republican virtue might emphasize that some people are more deserving of citizenship by reason of their loyalty and allegiance. The most neutral consideration is one of stability – the fact that people base their plans on the expectation of continued residence gives them an interest in maintaining that feature.

³⁹ This tracks the debates in many countries over the importance of citizenship, e.g. the dispute in California over Proposition 113, limiting provision of services to noncitizens. See also the decision in *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1 and R Sharpe, "Citizenship, the Constitution Act 1867, and the Charter" in Kaplan (1993). The Canadian Supreme Court in *Andrews* favoured the view that the equality provision in the Charter meant that citizenship was an unnecessary requirement to impose on practising lawyers. Interestingly, Kymlicka takes the dictum of the court that

More conceptually, Kymlicka seems to suggest that group-differentiated rights are just (1) where members of the group suffer some unfairness or disadvantage related to membership, or (2) where their morally important interests are threatened or undermined by the political decisions of the majority (1995: 108-109).⁴⁰ Thus, his conception of group-differentiated rights is justified by reference to a notion of equality between members of different groups in respect of the protection of their interests. Thus, in respect of minority cultural rights, Kymlicka states that the “equality-based argument will only endorse special rights for national minorities if there actually is a disadvantage with respect to cultural membership, and if the rights actually serve to rectify the disadvantage” (1995: 109-110).

This seems a much more plausible basis for a non-uniform distribution of legal rights, save that it has to be shown that (1) the interests in question are morally important; (2) the unfairness or disadvantage suffered is related to membership, rather than some other characteristic; and (3) the interests concerned are those that belong specifically and exclusively to members, rather than generally. The challenge, then, for Kymlicka and others is to show not only that there are cultural rights, but that they are group-specific ones.

Against the view that “true equality requires equal rights for each individual regardless of race or ethnicity” (108), Kymlicka indicates that minority cultural rights belong to a more general category of rights that protect the group-based interests of individuals. Protecting cultural membership by means of group-differentiated rights, “is one of many areas in which true equality requires not identical treatment, but rather differential treatment in order to accommodate differential needs” (1995: 113). The case for minority cultural rights, he suggests, is analogous with affirmative action for women or people with disabilities, in that they also involve group-specific distributions of rights. Indeed, “[m]any group-specific claims can be seen in this way – that is, compensating for the disadvantages and vulnerabilities of certain groups within the structure of common individual rights” (1995: 222, note 8).

However, even Kymlicka concedes that these latter examples involve some “very different kinds of injustices” from those involving culture membership. We can point to three reasons in particular. First, affirmative action claims are rather bitterly

“the accommodation of differences is the essence of true equality” to support his argument in favour of group-differentiated citizenship rights (see 1995:108).

contested within liberal states precisely because they appear to represent an unjust distribution of rights. Secondly, the specific examples of women and the disabled suggest forms of disadvantage that may be more physically-based (for example, compensating for maternity-related career breaks or ameliorating problems of access) than social (such as straightforward sexism, racism, or prejudices involving disabled people). In this sense, this form of affirmative action is no more group-based than is hospital treatment for the sick, or housing benefit for the homeless – they have very little to do with ‘membership’ and everything to do with specific expressions of general rights. Thirdly, affirmative action programmes typically exist in relation to ensuring equal treatment and access to general goods such as education or employment, rather than the protection of a distinct and separate good. They are group-based rights of women and the disabled to the same goods in the same society as able-bodied men.

Again, my comments here are not meant to address the substantive arguments that are raised in favour of cultural rights *qua* group-differentiated rights, but to point to certain difficulties with the concept itself. Our conclusion, then, is that although such rights seem conceptually possible, it is entirely unclear whether there *are* any group-differentiated rights (that is, whether there are specific cases where the distribution of certain rights to people *qua* members rather than *qua* persons is morally justified). This is partly a matter of description, depending on one’s view of what membership involves, but it is also a matter of establishing that members and only members have a morally important interest in the particular good in question. This burden, I will argue, can’t be discharged in the case of minority cultural rights.

Earlier in this chapter, I suggested that the case for *group* rights (i.e. rights exercised by groups) depended on showing the absence of individual rights to the same good, including the absence of group-differentiated rights exercised by individuals. However, the same questions that I have raised about the relationship between groups and nonindividualized interests apply *mutatis mutandis* to group-differentiated rights exercised by groups. That is, assuming that there are certain sorts of goods it makes no sense to have an *individual* right to - such as the good of self-determination - it has to be shown why it is just for the good to be distributed to

⁴⁰ The distinction between (1) and (2) relates to the nature of the good. In (1) it would appear to be general whereas (2) would appear to be a specific good.

specific sorts of groups and not others, and how this is consistent with the nonindividualized interests of members and nonmembers to be able to share in it.

In the introduction to this chapter, I suggested that there were three distinct senses in which a right could be said to be collective: (1) that the right belongs to a group rather than an individual (i.e. group rights); (2) that it is a right to a public or a communal good; or (3) that the right is distributed among members of specific groups rather than generally (i.e. group-differentiated rights). I began with the notion that all rights are justified by reference to morally important interests. Rejecting the idea that groups had interests independently of their members, I argued that the case for showing that groups have rights relied on establishing that their members had morally important interests that couldn't be protected by means of individual rights. Next, I submitted that there is nothing incoherent or implausible in the idea of individual rights to public goods or even communal goods, although the nonindividualized nature of people's interests in the latter suggests that their distribution is necessarily communal in character.

Lastly, I looked at the concept of group-specific rights and observed that the language of group-differentiation seems no more analytically perspicacious than that of collective rights. I suggested that, although there is nothing illogical about the idea of individuals having rights *qua* members of specific groups, it may be very difficult to show that only members have morally important interests in certain sorts of goods. In this sense, the central difficulty with most existing conceptions of collective rights is that they may not be collective enough. Having established the conceptual framework in this chapter, I will now evaluate critically the substantive arguments in favour of cultural rights *qua* group-differentiated rights, and develop an argument for cultural rights *qua* general rights.

Chapter Seven

Culture and the General Good

In the last chapter, I looked at the conceptual problems associated with cultural rights *qua* rights. In this chapter, I will argue that the justifications put forward for cultural rights *qua* group-differentiated (GD) rights in particular are inadequate and that, if they can be justified at all, cultural rights are only justifiable *qua* general rights.

My argument in this chapter runs briefly as follows. In the first section, I look at the idea of culture (and particular cultures) as the *object* of rights, particularly as a collective or communal good. Section 2 looks at the adequacy of the concept of cultural membership as a means of identifying both the interests that people have in culture; and who can be said to possess such interests. Together, sections 1 and 2 summarize much of the argument set out in Chapters 1 to 3. In section 3, I draw these points together, arguing first that the morally important interests that people have in culture aren't determined by their membership in specific groups *or* their own personal identity and preferences; and secondly the interests that people *do* have as a consequence of their membership *or* their preferences aren't sufficiently compelling to entail limits on the freedom of others.

1. Culture as a good

The case for cultural rights requires showing that culture is a good. The sorts of cultural rights there are depend on the sort of good that culture is shown to be, and the different kinds of interests it gives rise to. But what sort of good is culture?

(i) culture as a package of goods

The first point is that culture is best understood not as a single good but, in Réaume's phrase, as "a complex package of goods".¹ This is especially true if we adopt some of the more comprehensive views of culture discussed in Chapter 2.² The more we build

¹ See Chapter 6 above.

² On these views, human culture entails every sort of social good and every human society. Although it's important to be clear about the cultural nature of social goods, such holistic accounts are useless to analytical discussions of a right to culture.

into our concept of culture, the greater the complexity of goods that it is likely to entail.³ However, it is also true even when we look at particular instances of culture.

For instance, let us take Tolstoy's *Anna Karenina* as an example of a cultural good. It is primarily a private, individual good: i.e. it is excludable in its distribution, and typically enjoyed by individual readers separately. Each reader benefits qua an individual through having read it; (1) in terms of their aesthetic enjoyment and (2) in terms of the exposure they gain to possible values, beliefs, goals and options.⁴

Now, alongside the contribution that having read *Anna Karenina* makes to each person, there are certain public and communal aspects to the good. First, although it is a private good (i.e. excludable), there is nonetheless a degree of publicity in the distribution and availability of literature: not just via markets, but through schools, libraries, and universities; through translation and, by way of adaptation, newspapers, websites, magazines, theatre, film, video, television and radio.⁵ Thus, in the case of *Anna Karenina*, the transmission of the work from writer to reader takes place against a complex background of cultural practices, traditions, and institutions.⁶ In this sense, readers benefit not just from the existence of novels themselves, for example, but from a *milieu* that supports the practice of reading novels and enjoying cultural works generally.

Secondly, there is a sense in which *Anna Karenina* is not purely an individualized good: part of a person's enjoyment of the novel looks beyond the solitary experience of reading to the shared experience of the same work by others. This, to be clear, is only a part of one's enjoyment in that we characterize the benefits of reading as largely private and individual. Nevertheless, there is a communal aspect to having read *Anna Karenina* in the sense that people's shared experience of a literary work (and, by extension, any cultural material) is valuable in itself *and* it is

³ This is a separate question, however, from whether there is a single ultimate value served by the good of culture or a plurality of values. And these are themselves separate from the question whether *morality* is monomic or polynomic. Note that we are assuming that morality is separate from culture.

⁴ Note, of course, that there are a plurality of possible individual benefits that come from having read *Anna Karenina* but these are the most important for our purposes. Nor is it the case that a novel or any cultural work need be purposely didactic or 'improving' in order to confer such benefits. That would involve a simplistic understanding of either the mimetic and didactic qualities of cultural materials generally. Even if a person were to dislike a work on aesthetic grounds they would still have benefited from having interpreted it, i.e. being forced to make judgements according to certain values and beliefs.

⁵ Clearly, each translation, adaption and choice of medium affects the nature of the cultural good. Nonetheless, it is arguable that it does not usually make a significant difference to the value of the good. Indeed, adaption and revision can improve as well as weaken cultural materials.

difficult to characterize the value of this common ground in terms of the individual payoff to each reader separately.

Note, however, that the communal good of sharing cultural materials *isn't* (as is usually assumed) that it entails shared values and beliefs among those who share them but that it forms a basis - a common point of reference - for people's discussions about what is valuable. The communal good that reading *Anna Karenina* involves, then, is clearly bound up with the individual good of being exposed to possible values, beliefs, goals and options; and the public good of a framework of practices, traditions, and institutions that support the availability of cultural materials. All this shows that even at an atomic level it's implausible to regard culture as a single good, at least not without severely distorting our understanding of it.

(ii) particular cultures as goods

The second point is that it's important to distinguish the idea of culture as a package of goods from the idea that culture exists *qua* particular cultures which are goods in themselves. The argument for particular cultures as goods was discussed in Chapter 2. The principal claim is that elements of culture don't develop and exist in isolation but as parts of coherent and pervasive systems of cultural materials, practices, traditions and institutions that are embodied in particular societies and ethnic groups. Hence, if culture is a good, it is a good in terms of particular cultures rather than particular elements of culture: the good of the latter necessarily looks towards and forms part of the former.

As Chapter 2 made clear, this argument involves several errors. First, if all culture exists in the particular and all culture originates within a specific context of other cultural elements,⁷ it is still false that all cultural elements necessarily form part of some original group or society. The claim ignores the fact that a great deal of culture is inadequately described in terms of national or ethnic origin. Asking whether

⁶ Note, however, my remarks in Chapter 3. The practices and institutions in question aren't necessarily local but typically heterogenous, crossing national and linguistic boundaries. Nor do they *determine* what people find valuable or meaningful *contra* Kymlicka.

⁷ By agreeing that all culture is formed within a social context, I don't mean to suggest that such social contexts are themselves pre-cultural. The view being put forward here is that culture develops dialogically. The deeper questions raised by biological anthropologists concerning the role of culture in human evolution and *vice versa*, including whether there was a point at which humans but not culture existed, are well beyond the scope of this thesis. See e.g. Geertz (2000).

Shakespeare in Love counts as a British film, for example, is an empty question: however interesting its discussion might be, there is in the final analysis no criterion that can be applied to the issue to provide an outcome that is not in some way arbitrary.⁸ Even where the origins of culture are straightforward, however, they are frequently trivial: many elements are disseminated far beyond their original social context.

Secondly, it is false that societies and some ethnic groups form distinct, coherent and pervasive cultures. Having coherence or integrity suggests that groups and societies don't simply possess distinct values, beliefs, practices and traditions but that these cultural elements are of a piece, that they "speak with one voice".⁹ Conversely, integrity requires that descriptions of societies and groups can't contain elements of culture that are inconsistent or incompatible with one another. As such, the thesis that societies and groups have coherent cultures is false. Although inhabitants and members may offer interpretations of particular elements as forming coherent systems, groups and societies themselves contain a plurality of cultural elements, including many that are rival and impossible with one another (e.g. faith and atheism, monogamy and polygamy, capitalism and communism).¹⁰

Pervasiveness and integrity are mutually supporting. Without integrity, the notion of pervasiveness is of relatively little importance. Even so, the idea that the same group or society gives rise to cultural elements which extend "across the full range of human activities" (Kymlicka, 1995: 76) or "penetrate beyond a single or few areas of human life, and display themselves in a whole range of areas" (Raz, 1995: 129), suggests cultural autarchy to an improbable degree. The concept of groups and societies as culturally hermetic is undermined by the fact that most elements of culture are to some degree exogenous.

⁸ For the notion of empty questions see Parfitt (1987: 260). *Shakespeare in Love* was filmed in Britain with a British director, American producers and a cast of both American and British actors, with a screenplay by an American and an English writer of Czech origin. Like *The English Patient* before it (an American-produced film adapted from a novel by a Sri-Lankan born, Dulwich-educated, Canadian writer in which a Hungarian dying in an Italian monastery is mistaken for an Englishman), the film was the subject of considerable debate within the British media and film industry as to its 'Britishness' see e.g. 'Bard to worse at the multiplex', *The Guardian* 5 February 1999, p.19. It's also clear that many American films use British actors, directors and crew and a significant number of American films are actually filmed at British sound stages like Elstree and Pinewood.

⁹ See Raz, "The relevance of coherence": The idea of 'speaking with one voice' entails identity and consistency between different elements at the same time, and identity with previous elements and non-contradiction over time (1995: 311).

¹⁰ Nor does the fact that groups and societies frequently repress such pluralism establish that they actually possess cultural integrity or coherence.

Thirdly, there is no reason to think that a coherent, homogeneous and pervasive culture would be a good in itself. Recall that the good of culture lies in the contribution it makes to the well-being and personal autonomy of individuals (whether by themselves or *qua* members of groups). However, it seems deeply unlikely that a coherent, pervasive and homogeneous set of cultural elements could accommodate either social pluralism (“the existence of a plurality of inconsistent views on moral, religious, social and political issues”) or value pluralism (“a plurality of irreducibly distinct and competing values”).¹¹ Maintaining such a framework, moreover, would involve some means of repressing or excluding incompatible and exogenous elements of culture. In each case, particular cultures bearing these features would be antithetical to the personal autonomy of their inhabitants or members. Hence, there’s no reason to suppose that particular cultures would constitute distinct goods, above and beyond the particular good of the elements they variously contained.

(iii) culture as a general good

So far we’ve shown that (1) each element of culture is capable of supporting a package of goods and (2) particular cultures aren’t goods in themselves. It remains an open question at this point as to what interests that people have in culture and who has those interests. Our answer to this question matters because, as we saw in Chapter 5, it determines the distribution of any rights that might protect those interests.

The answer, in outline, to the first part of the question is that the good of culture lies in constituting meaningful goals and options for people to exercise their autonomy and to enrich their individual well-being. People have an interest in culture because they have an interest in leading autonomous lives. If culture is good in this way, then to have access to culture must count among everyone’s most compelling interests. It is, in this sense, a primary or a universal good.¹² This, in turn, supplies the answer to the second part of the question which is that all people have an interest in

¹¹ The definitions of social and value pluralism are taken from Raz (1994: 316). See Chapter 2 above.

¹² See Rawls (1972, 94) and Kymlicka (1989: 58) for problems with Rawl’s characterization of primary goods as means rather than ends. See also Kymlicka “I believe that, in developing a theory of justice, we should treat access to one’s culture as something that people can be expected to want, whatever their particular conception of the good [emphasis added]” (1995: 86). My own argument is that we should treat access to culture in general as a primary good.

culture. Like people's interests in things like food, shelter, due process and free speech, it is a fundamental human interest.

The logical corollary of all this is that, if there are rights to culture, all people have such rights equally *qua* human beings. However, having given an outline of my claims, the burden of showing the argument for them lies in the next two sections.

2. *What interests do people have in culture?*

The main criticism of the argument outlined above (which favours a uniform distribution of any cultural rights) is that it ignores the importance of cultural membership: people don't exist in relation to culture in general, but as inhabitants of particular societies and as members of particular ethnocultural groups. Regardless of whether they actually inhabit cultural frameworks that are coherent, homogeneous and pervasive, people nevertheless *perceive themselves* as belonging to a particular culture with particular values, beliefs, traditions and institutions.

Nor is this sense of attachment to a group or society an incidental feature of people's lives. Membership defines them, so the argument goes, it is the source of their identity or at least a significant part of it. As such, they have a greater interest in some particular elements of culture than in others. As members, they also have an important interest in the survival of the group or society that is the source and embodiment of that culture.

However, there are severe problems with using the idea of cultural membership as a means to identify either the interests that people have in culture or who has those interests. This section sets out these problems, drawing arguments made in previous chapters together with new ones.¹³ These run as follows: there is a distinction between membership and personal identity. Most accounts, though, take membership to imply identity (in particular, the idea that pervasive and coherent cultures are constitutive of personal identity).¹⁴ They downplay the *equal* importance

¹³ Earlier criticism of cultural membership were made in Chapter 4, which looked at difficulties with defining membership, and an important distinction between social membership and personal identity. Chapter 5 looked at the different sorts of cultural rights-claims that arise from the interests associated with cultural membership and identity. It noted that most cultural rights claims were vulnerable to the extent that they relied heavily on the view that people are members of particular groups, and members have special interests.

¹⁴ As Waldron puts it: "it is often thought more important (from the point of view of respecting a given individual, X) to find out (a) which culture X's identity was forged in, than to find out (b) what particular identity X forged as an individual within that culture. Indifference or misapprehension at

of exogenous and indigenous elements to members and nonmembers respectively. More generally, such accounts tend to exaggerate the importance of *identity* with particular elements of culture. The idea that people might benefit from culture without necessarily *identifying* with it is consistently overlooked.

(i) the inadequacy of membership

The early chapters of this thesis argued for two important distinctions: between personal identity and group membership, on the one hand; and between groups and cultures, on the other. First, there's a distinction between a person's *identity* (how they perceive themselves and what they believe is valuable) and their group membership (how they are perceived by others in terms of their group-based characteristics and/or affiliations). Secondly, there is a distinction between a *cultural group* (a group based around particular values and beliefs, practices and traditions) of which people are or can be members, and their culture (all the diverse elements of culture, good and bad, indigenous and exogenous, that comprises their *milieu* or *ethos* by being available to them).

The relationship between these concepts (identity, membership, cultural group, culture) runs like this: all people are born into a particular *society* (with common legal and political institutions) and as members of particular *groups* (with their particular elements of culture). More generally, however, all people are born into a cultural *milieu*: an array of diverse and plural values, beliefs, practices, traditions and institutions that necessarily includes more than just those values and beliefs sanctioned by their particular group, and more, even, than the set of compossible options made available by their particular society.

People develop their personal identity, including their evaluative beliefs, not merely against the immediate background of family and education, neighbourhood and economic class; not merely against the particular ethnocultural groups they are identified with; not even against their particular society and language, but within a broader culture that contains all the diverse cultural elements which may contribute possible values and beliefs, goals and options.

level (a) is often thought to be a much worse affront to X's dignity than indifference or missapprehension at level (b)" (2000: 158).

Most accounts of cultural membership, by contrast, render a picture of personal identity that is highly distorted. They begin with the assumption that the relevant context for personal identity is the group rather than the culture as a whole.¹⁵ They proceed on the basis that members draw their evaluative beliefs only or largely from those cultural materials and elements indigenous to the group. As such, being a member of a cultural group is deemed to form an important aspect of how people perceive themselves, and how others perceive them. All of which supports the received view that cultural groups are made up of people who share the same values and beliefs, practices and traditions.

Such accounts, though, have it backwards. So long as membership is a matter of *recognition* (i.e. perception by others) on the basis of unchosen features like ethnicity, first language, or religious upbringing, then concluding what somebody's personal beliefs are from their external characteristics will always be a matter of inference and presumption. Certainly, many people do in fact adopt values and beliefs endorsed by their cultural group, but it's a logical error to take a possible relationship (membership can be important to one's identity) for a necessary one (membership is *always* important to one's identity).

Nor is it clear why the relevant context for personal identity should be the group rather than the broader society or the culture as a whole. It cannot be that elements of exogenous culture are unavailable, in the sense that members have literally no knowledge of other values, options and ways of life existing within the same society as their own. This would imply that cultural groups were literally divorced from reality, which is implausible as a description of any cultural group in the modern world.¹⁶ Nor can it be that knowledge of other values and beliefs existing outside the group is irrelevant to the evaluative beliefs of members. Just as an involuntary action (X) becomes voluntary when the option to do Y is introduced, so it

¹⁵ This is obviously supported by the idea that each cultural group comprises a coherent and pervasive culture: one containing a single consistent set of values and beliefs that speak to the full range of human activities. Were cultural groups less coherent or pervasive, then it would be correspondingly more difficult to find the necessary identity of views and beliefs that are presumed characteristics of culture.

¹⁶ To be separated from the world or the broader society means more than merely expressing one's distaste for it, or being physically remote or isolated. Although many cultural groups profess disdain for their broader society and the other ways of life it contains, almost all their members interact with nonmembers on a daily basis. More extreme examples of groups that actively shun the outside world nonetheless possess an awareness of it, including the existence of different possibilities from those offered by the group. In almost every case, groups have a tendency to exaggerate their isolation from others.

is too with personal identity. Regardless of which values and beliefs one arrives at, the formation of personal identity within a multicultural context is qualitatively different than it is within a culturally homogeneous one. It is also inescapably different, such that members of cultural groups cannot pretend that the other, exogenous options do not exist.¹⁷

The usual counter argument is to point to the dialogical and unchosen nature of personal identity. Because people's self-perceptions are always based (at least partly) on how they are perceived by others, and because membership is based largely on unchosen characteristics, then membership is necessarily an aspect of personal identity.¹⁸ This too, however, presents a simplistic picture. The dialogical nature of personal identity means that we don't arrive at our particular sense of identity *de novo* but in relation to an existing framework of values and beliefs. Our background, including our unchosen characteristics, provides us with a starting point within this matrix. The important point is that, although these aspects of our self-perception are unchosen, they don't determine the adoption of specific values or beliefs. The relevant core of our personal identity – our evaluative beliefs – is unconstrained.

If we accept this view of personal identity, then the view of cultural groups as made up of people who share the same fundamental beliefs becomes untenable. People who share a common ethnic origin, nationality or language can't be presumed to hold the same set of comprehensive values for that reason alone. Such characteristics are inadequate to identify those who share the same values and beliefs, practices and traditions. It also means that, whatever interests people may have in

¹⁷ See e.g. Berlin, "it may be asked ... why cannot we reproduce, let us say, the conditions of the fourteenth century, if we should wish to do so? True, it is not easy to upset the arrangements of the twentieth century and replace them by something so widely different; not easy, but surely not literally impossible?" (1997: 10). Berlin was concerned to address what constituted our 'sense of reality'. The answer is, I think, the same as above: although we might physically reproduce the conditions of the fourteenth century, we could not unlearn what we know about the subsequent centuries. Because our 'sense of reality' isn't constituted by our material culture but also by our knowledge and our sense of options, then an imitation fourteenth century would be inescapably different from, lack the reality of, the original. As Bernard Williams puts it: "there is no route back from reflectiveness This phenomenon of self-consciousness, together with the institutions and processes that support it, constitute one reason why past forms of life are not a real option for the present, and why attempts to go back often produce results that are ludicrous on a small scale and hideous on a large one" (1993:163-164).

¹⁸ See e.g. Raz, "[s]ince our perceptions of ourselves are in large measure determined by how we expect others to perceive us, it follows that membership of [distinctive] groups is an important identifying feature for each about himself." (1995: 131). I have discussed Raz's account in Chapter 4 above.

particular cultural elements, they don't have them *qua* members of particular cultural groups.

If there are any interests that *do* arise from membership, therefore, they will only be those that arise from people having a distinct social identity rather than sharing values and beliefs in common. Of course, it seems clear from our discussion in Chapters 4 and 5 of non-discrimination and affirmative action rights that such interests are not always negligible. Nonetheless, although the interests underlying these rights appear to be group-based, it is also apparent that they arise from goods that aren't specific to any given group. That is, the interests that members of particular ethnocultural groups have in being treated as equals derive ultimately from the importance of equal treatment as a *general* good, one in which all people have an identical interest. There don't, in conclusion, seem to be any interests that arise from membership which are both morally important *and* truly group-specific.

(ii) the inadequacy of personal identity

The driving assumption behind the idea of cultural membership is that it tells us who – which individuals and which groups of people - identifies with which elements of culture. I hope that I've shown that it is inadequate to perform that task. Nonetheless, although I've denied that membership implies identification, I haven't yet considered the issue of identification itself. In particular, what does identification with culture amount to and what interests arise from it? Equally, are there any interests that people might have in particular elements of culture, *irrespective* of any personal identification?

Unlike membership, identification with culture is a subjective matter, internal to each individual. It is, moreover, deeply idiosyncratic and quite opaque. If, for example, members of the same family raised in the same social environment can arrive at radically different political and/or religious affiliations, then it seems fair to conclude that the process of identification is wholly or at least heavily dependant on experiences and psychological features particular to each individual.¹⁹ These

¹⁹ See e.g. Kymlicka, "I suspect that the causes of this attachment [that people have to particular cultures] lie deep in the human condition, tied up with the way humans as cultural creatures need to make sense of their world, and that a full explanation would involve aspects of psychology, sociology, linguistics, the philosophy of mind, and even neurology" (1995: 90).

experiences and features guide the formation of each person's evaluative beliefs in respect of the cultural *milieu* in which they live.

People's identifications, their recognition of specific values as their own, are a subset of their evaluative beliefs. To identify with something excludes certain sorts of value judgements, such as indifference or dislike.²⁰ At the same time, such identification doesn't entail blind devotion or unquestioning love. Rather, it "includes much less intense and less exclusive attitudes" (Raz, 1986: 91). Identification can also involve attitudes of considerable complexity: to identify with an action by a person, but not their general character, is one example; to identify with the ideals of the French Revolution but not the Terror that followed it is another.

These examples tend to suggest that the typical picture of cultural identity - a high degree of self-identification with *all* the cultural elements of a particular group - is at the very least misleading. It excludes the possibility that many people only weakly (if at all) identify with many elements of their group's culture. The examples also suggest that, in many ways, it is difficult to distinguish identification from straightforward evaluation. To *like* something is at some level to identify with it, at least in the sense that it reflects or embodies values one has.²¹ The principal difference, I think, lies in the degree of reflexivity involved: the process of identification (as opposed to evaluation in general) implies the *conscious recognition* of certain values as one's own.

Now, it is regularly claimed that identification with culture gives rise to certain interests. Specifically, it matters to individual dignity and to the exercise of personal autonomy. First, identification implies that a person's sense of self-respect is bound up with the esteem given to their culture generally: where it is denigrated, then the well-being of those who identify with it is also affected (Raz, 1994: 134). Secondly, identity with a particular element of culture also entails identification with the goals and options it makes available: where these are prohibited or made more difficult, then the autonomy of people who identify with them is harmed (Raz, 1986:

²⁰ By contrast, it *is* possible to dislike one's unchosen features (e.g. one's height or accent) or be relatively indifferent towards them (e.g. one's eye colour or nationality). This tends to illustrate how self-perception based on unchosen characteristics, although it entails evaluation, doesn't entail any values or beliefs in particular.

²¹ Obviously, this is using 'identify with' beyond its normal sense of 'recognizing something as like oneself' to include as well, 'recognizing something as desirable'. For example, belief in God typically entails identification with God's will. This doesn't imply that a person who believes in God thinks of themselves as godlike, but only that they recognize serving God's will as part of their own values.

382; Tamir, 1993: 41; Kymlicka, 1995: 90-91). Each of these interests, moreover, would appear to be among the most important that people have.

However, although identification is obviously relevant to one's sense of self-respect and autonomy, it is questionable whether it has quite the importance suggested in many accounts. I don't mean that there are *no* special interests that arise from identification, but that any such interests are weaker than is usually claimed, and weaker than the general interest that *all* people have in the existence of a multicultural *milieu*. This latter claim is based on the view that it is possible to have interests in goods that one doesn't necessarily identify with. That is, if the importance of particular elements of culture lies in the goals and options that they make available, *and* it is also important for people to have an adequate range of options to pursue, then the existence of various cultural elements is of benefit to individuals, regardless of whether or not they value the goals or pursue the options they make available.

(iii) the importance of pluralism

One difficulty with this view, however, is that it involves an objectivist conception of people's interests: that something can be in someone's interests whether or not they themselves prefer it and, in some cases, even contrary to their actual preference.²² As such, it runs up against the thesis of transparency which insists the opposite: that people only have interests in those goods for which they hold a preference.²³ Now, one reason that some writers prefer such a subjectivist conception of people's interests is that it is consistent with the liberal idea that persons tend to be the best judges of their own good. Another is that, as Berlin warned over and over, a strong objectivist

²² For a discussion of the relationship between interests and preferences see Waldron (1988: 87-89). I am assuming that people's preferences track their evaluations and identity, and *vice versa*. Clearly, there are cases where people don't identify with their preferences or desires, i.e. their first- and second-order desires conflict (Frankfurt, 1971). However, I don't think these cases have much significance for the question under discussion.

²³ There are different versions of this thesis, which involve varying degrees of sophistication. The version I have given is a heavily simplified one. See Raz for a more thorough example: "Intrinsic values are transparent. That is, (i) the features of a state of affairs which make it intrinsically valuable are features which make it good for some agent or other, and (ii) a feature is intrinsically good only if, under normal conditions, the person ... for whom it is good is content with its presence and prefers it to its absence" (1986: 269). Raz proceeds to develop a distinction between self-interest and well-being that suggests the falsity of this thesis.

conception of people's interests may allow others to disregard their actual preferences, licensing coercion and tyranny.²⁴

However, the principal concern that Berlin had with such conceptions of people's interests was not that they were objectivist but that they were monistic: that what was good for any person was incapable of conflicting with what was good for anyone else (Berlin, 1969: 154, 170-171). By contrast, the claim that people have interests in the presence of diverse and incompatible cultural goods implies strong value pluralism. These interests flow directly from the importance of pluralism (specifically, the existence of distinct and competing values which inform different goals and options) to autonomy itself. What, then, is the relationship between autonomy, pluralism, and the notion of transparency?

In my view, the most plausible relationship runs as follows: leading an autonomous life involves making choices and pursuing goals according to our beliefs about what is valuable. Our perceptions of value, however, aren't premised entirely upon our own evaluations: that is, we are guided by the belief that at least some things are independently valuable. Part of *seeking* what is good requires that we admit to ourselves the possibility of being mistaken in what we value. However, as Kymlicka points out:

while we may be mistaken in our beliefs about value, it doesn't follow that someone else, who has reason to believe a mistake has been made, can come along and improve my life by leading it for me, in accordance with the correct account of value. On the contrary, no life goes better by being led from the outside according to values the person doesn't endorse. My life only goes better if I'm leading it from the inside according to my beliefs about value (1989: 12).

Thus, although the value of goods is mostly independent of people's valuation of them, there is no value in being coerced to follow a specific good.²⁵ Thus, there is no

²⁴ See Berlin (1969: 145-154). But see also Lukes: the "ominous progression" depicted by Berlin from the doctrine of freedom to the doctrine of authority and tyranny, "is neither logically compelling nor in itself relevant to the consideration of the idea of the autonomy of the individual. All ideas can be put to evil uses" (1973: 56).

²⁵ See also Raz (1986: 291-292). Waldron maintains that Locke's argument from the irrationality of persecution itself isn't effective: i.e. our reason for not coercing people isn't, as Locke supposed, that coercion would necessarily be useless in promoting the proper beliefs (1993: 109).

need to insist upon a condition of transparency as a bar to potential tyranny. According to the conception of autonomy being followed here, cultural goods mostly benefit people *through* their beliefs about what is valuable: even though, for example, a person might be better off (i.e. more successful) pursuing a career as a doctor than as a lawyer, success as a doctor (relative to success as a lawyer) can contribute to that person's sense of well-being *only* if they themselves believe that it is a valuable goal (Raz, 1986: 292).²⁶

Taken together, the importance of leading a life according to one's evaluative beliefs *and* the possibility that those beliefs may be mistaken entail that, if people are to be free to seek what is good, they must be free not only to make choices and pursue goals according to their evaluative beliefs but also to question and to revise those beliefs. As was argued in Chapter 3, the ability to revise beliefs is as central to the autonomous pursuit of the good life as the ability to make choices and to pursue goals. Someone who, having begun a career as a lawyer, is forced to pursue it despite having reached the conclusion that it isn't a worthwhile goal can't be said to lead a properly autonomous life.²⁷

The conception of autonomy being set out here is bound up with the concept of moral pluralism or value pluralism²⁸, which claims the existence of distinct and competing moral values.²⁹ The existence of many such goods entails the importance of allowing individuals a significant degree of choice in terms of their goals and

²⁶ This example assumes that being a lawyer and being a doctor are each independently valuable goals. Being a successful in itself can't contribute to someone's well-being if it were not also independently valuable, e.g. being a successful hitman. The use of the term 'success' isn't meant to denote financial success, but the best use of one's talents and abilities. The example assumes that people have particular talents for particular goals; and that these are knowable independent of any attempt. I don't propose to defend these hypotheticals as necessary to my overall argument.

²⁷ Of course, the fact that a pursuit was originally chosen means it can't be regarded as morally identical to a wholly unchosen pursuit. All choices entail forgoing the alternatives available, and all commitments (e.g. promises and contracts) involve the assumption of certain risks, including the possibility of mistaken beliefs about value (although not those brought about by fraud or deception). Nonetheless, in addition to the virtues of loyalty and promise-keeping, morality also recognizes the longer-term interest of people not to be bound irrevocably into commitments that are contrary to their own well-being.

²⁸ See Chapter 2 for a discussion of some of the many different versions of pluralism.

²⁹ The term 'values' refers to independent moral values, rather than values relative to a person or culture (see Raz: 1986, 397). As with my argument concerning autonomy, I have drawn heavily on the account of value pluralism given by Joseph Raz: "A moral theory which recognizes the value of autonomy inevitably upholds a pluralistic view. It admits the value of a large number of greatly differing pursuits among which individuals are free to choose" (1986: 381). However, my account here is a simplified one and doesn't rely on some of the particular features that Raz uses to establish value pluralism (e.g. the existence of incommensurable comprehensive goals).

options.³⁰ It also implies the importance of ensuring that people have access to sufficient cultural resources so that they may form and, if necessary, revise their plans and beliefs.³¹ If value pluralism is correct, then each of these features (options, resources) are essential conditions of autonomy. As Raz puts it:

An autonomy-sustaining common culture is a presupposition of the freedom of one and all. People concerned with their own autonomy must be concerned with the flourishing of the common culture. They must be concerned with the one major condition for the autonomy of all (1995, 122).

Now, if we accept that autonomy is central to individual well-being, then it follows that all people have a fundamental interest in the conditions of autonomy. My point is that people have *these* sorts of interests, regardless of their particular values and choices, and even contrary to their actual preferences. To return to our very schematic example, a person who chooses to be a lawyer might happily forswear the option of ever becoming a doctor. And, so long as that person has no desire to be a doctor, their well-being is not affected by not being a doctor. But it is *also* true that they continue to have an interest in the possibility of being a doctor: first, because the autonomous character of their initial choice to be a lawyer was constituted by the option of being a doctor – part of freely choosing X was freely refusing Y; second, because autonomously pursuing a career in law depends on the *continuing* existence of such options – whether or not a person becomes dissatisfied with their goal.³² Although it

³⁰ For instance, to use the familiar example, one can lead a life of action or a life of contemplation but - much as one may well try to combine them - one cannot capture *all* the virtues of *both* ways of life. See Raz: “Belief in value-pluralism is the belief in several maximal forms of life” (1986: 396). It also entails the existence of “an adequate range of options” (ibid: 373-378).

³¹ Kymlicka regards these as two essential preconditions for leading a life that is good: “one is that we lead our life from the inside, in accordance with our beliefs about what gives value to life; the other is that we be free to question those beliefs, to examine them in the light of whatever information and examples and arguments our culture can provide [my emphasis]” (1989: 13).

³² The notion that the ability to revise is valuable is often criticized as incoherent. Sandel famously argued that such a person would be incapable of having strong goals and attachments, because “no commitment could grip me so deeply that I could not understand myself without it No project could be so essential that turning away from it would call into question the person I am” (62). In his view, imagining a person incapable of constitutive attachments “is not to conceive of an ideally free and rational agent, but to imagine a person wholly without character, without moral depth. For to have character is to know that I move in a history I neither summon nor command, which carries consequences none the less for my choices and conduct” (179). Against this view (that the possibility of revising one’s goals presupposes an inability to be wholly committed to them), Waldron argues, “In modern experience, intensity, whole-heartedness, and the sense of having identified comprehensively with a project or relationship are as much features of the commitments that people *choose*, the ones

may seem counter-intuitive and perhaps even absurd, the interests that people have in their own autonomy are very often opposed to their particular preferences in this way.³³

(iv) autonomy as a general good

The argument that people have an interest in the conditions of their autonomy brings us full circle to the good of culture. My argument is that, if culture contributes to autonomy in the manner suggested, then the inhabitants of multicultural societies have a fundamental interest in the presence of diverse elements of culture. They have these interests equally, regardless of their particular membership and identifications, because they all have an identical interest in leading autonomous lives.

Now, although the identification of multiculturalism with value pluralism seems a rather obvious one, there has been a striking reluctance among writers on cultural rights to adopt this view.³⁴ This reluctance might be intelligible, moreover, if it were based on a denial of either the existence of value pluralism or the importance of autonomy, for each of these ideas are themselves far from uncontested.³⁵ But this isn't the case here. Liberal arguments for GD rights take as premises both the existence of a plurality of cultural goods and the importance of these goods to personal autonomy. Rather, they are based upon denying that people could have general (rather than group-based) interests in culture.

But the arguments supporting this latter view fall apart when looked at closely. The most widely accepted argument – that people's interests are based on their membership of cultural groups – appears spurious once we recognize that membership doesn't imply identity. The most plausible argument – that people's

they could give up *if* they wanted to, as of the commitments people *discover* they have and find they cannot question [emphasis in original]" (1993: 390-391). See also Kymlicka (1989: 50-59) and my discussion in Chapter 3.

³³ People's plans and goals may change over time, often radically, and this extends to their cultural context: people change or lose religious beliefs, their nationality and even their language.

³⁴ Waldron (1992; 1996) has argued for the importance of a multicultural framework to autonomy. Nussbaum (1996) also argues for the importance of such a framework, though from a more general ethical perspective, rather than from the importance of individual freedom *per se*.

³⁵ Challenges to the idea of autonomy were discussed in Chapter 2. There are different conceptions of what moral pluralism might entail, and there is broad disagreement over its normative implications. More generally, pluralist accounts of value are opposed by monistic accounts: see the discussion in Steiner (1994) for how this debate works itself out in terms of concepts of rights.

interests in culture are transparent – is fundamentally at odds with the premise that people benefit from the existence of culture regardless of their particular preferences.

This is because the idea of culture as a good is inherently (if very broadly) a perfectionist one: to express the value of culture purely in terms of valuation is precisely to ignore the manner in which it is valued: i.e. as being intrinsically valuable. Therefore, in appreciating *Anna Karenina*, the *Mabharata*, or *The Arabian Nights*, we are sensible of valuing something not simply because we happen to find it valuable, or because it helps to shore up our sense of identity, but because of qualities that exist independently of our recognition of them.³⁶ And the specific contribution of culture from a liberal perspective is that it is constitutive of personal autonomy, that it exposes people to possible values and beliefs and forms a basis for discussing goals and options.

Whatever the difficulties with this view (and they surely do exist), it is entirely consistent with the arguments from supporters of cultural rights. For example, Kymlicka suggests that, “in developing a theory of justice, we should treat access *to one’s culture* as something that people can be expected to want, whatever their particular conception of the good [my emphasis]” (1995: 86). Now, although Kymlicka argues that members generally have a deep bond with their group’s culture, he never claims that they identify with all aspects of their group’s culture equally. Instead, he makes a point of emphasizing that the importance of culture lies in providing “a meaningful context of choice for people, without limiting their ability to question and revise particular values or beliefs” (93), that it is valuable for members to “move around within one’s societal culture, to distance oneself from particular cultural roles” (91), to “stand back and assess moral values and traditional ways of life” (92). However, these roles, values, and ways of life must presumably be there for people to retreat from: their existence is partly constitutive of the context of choice that is so valuable to members, notwithstanding their apparent desire to be rid of it.

³⁶ Some aspects of culture are clearly more emotive than others. Nonetheless, we wouldn’t readily describe the value of *Anna Karenina* as a novel, for example, in terms of satisfaction (i.e. it makes readers happy) or in terms of identification (i.e. it makes readers feel Russian or makes Russians feel good about themselves). In describing its merits, we are presumably advancing *reasons* for why it is good (or bad), reasons that look to something else than one’s purely personal enjoyment or approval. On a pluralist view, therefore, something can therefore be intrinsically good, even if it manages to gravely offend many people (cf. J.S. Mill (1912: Ch. 2), Waldron (1993: 131-133)). There are, of course, some minimal conditions of transparency – it can’t be that something is intrinsically good wholly independent of anyone’s evaluation whatsoever. Conversely, simply because something is liked or enjoyed doesn’t guarantee that it is intrinsically good.

Indeed, Kymlicka elsewhere admits that “the importance of cultural pluralism for a theory of liberal equality lies below, or prior to, the value attached to it in any of the particular conceptions which are contained in [a] culture” (1989: 97, n.4). So the way in which Kymlicka characterizes the importance of culture would be incoherent if it were based entirely on what particular members actually wanted.³⁷

Tamir is even more explicit: the plurality of cultures is intrinsically valuable (1993: 30), although she suggests that there are gradations of interest between participants (whom she terms members) in a culture; potential users of a culture; and all others.³⁸ Though not all people identify with a specific culture, all are capable of being enriched by it: “Preserving the plurality of cultures”, she suggests, “is thus a valuable resource to all human beings” (1993: 32).

Tamir denies, however, that nonmembers could have a morally important interest in cultures that were not putatively ‘their own’. Any “right to culture”, she argues, “ought to be justified [only] in reference to its value to members” (ibid: 47). Otherwise, Tamir agonizes, “we might find ourselves in the paradoxical situation of granting the right to culture to individuals who, in fact, wish to waive it” (ibid, 46). However, the argument *against* the existence of rights from the *possibility* of waiver is a peculiar one for Tamir to make, especially given the emphasis she places on the importance of individual choice (ibid, 31-32). The traditional choice-theory view of rights has always argued that the possibility of waiver was an essential *element* of a right, because on the choice-theory view, rights protect people’s choices rather than their interests *per se*.³⁹ If a person couldn’t waive their right, they effectively had no choice to protect.⁴⁰ On the interest-theory view, however, reliance on objectivist notions of people’s interests makes it less important to look for the possibility of

³⁷ See my discussion of Kymlicka and Réaume (1995) in Chapter 5 above.

³⁸ Potential users are “those who may choose to assimilate in a particular culture, or may learn from it, borrow from its norms and values, imitate its rituals, and use it as a trigger for reflecting on their own”; the category of all others includes “nonmembers who do not view the culture as an option for assimilation [but] for whom the experience of any culture enriches their own experience of what it means to be human” (1993: 32).

³⁹ The example of property rights, which are typically described as exclusive control over land or things, best reflects this idea, reflecting the possibility of freely granting others licences and rights, and also the alienability of property. For a discussion of the relationship between these elements see Waldron (1988), Ryan (1984).

⁴⁰ Obvious areas of disagreement were the idea of unwaivable rights, the argument over whether one could freely become a slave, and the rights of those who either lacked the ability or even the capacity to make rational choices (e.g. children). For a very sophisticated defence of the choice-theory view of rights, including an argument for the necessity of waiver, see Steiner (1994).

waiver to support the existence of a morally compelling interest justifying another's duty.

Now, it isn't entirely clear which view of rights (if any) Tamir prefers, although her arguments seem to rely more heavily on an interest-based conception of rights (1993: 42-46) than a choice-based one. Still, her argument from waiver seems deeply confused from either perspective. If the importance of culture lies in its contribution to individual well-being, then the distribution of a *right* to culture must reflect that. Membership doesn't describe such a distribution because, even on Tamir's view, the culture of a group benefits nonmembers as well as members. Nor is the mere possibility of waiver by some nonmembers a sound reason to deny the right to others.

If, however, the importance of culture lies in its contribution to individual *choice* (and note that this is still compatible with the interest-theory of rights)⁴¹, then Tamir's argument seems even more bizarre. The possibility of waiver is a necessary element of having a choice. And Tamir's apparent paradox extends to members themselves: granting members the right to culture entails granting them the freedom not to have it. On either view, therefore, Tamir's argument against nonmembers having rights seems incoherent. If "the right to make cultural choices is only meaningful in a world where the plurality of cultures is protected" (ibid, 30), then it follows that all people have the same interest in the existence of the cultures that constitute their various choices.

More generally, writers justify GD cultural rights not only by reference to the interests of existing members, but also for the benefit of children and future generations: categories of persons who don't have significant preferences.⁴² Charles Taylor, for instance, acknowledges that the interests of existing French speakers in Quebec are by themselves insufficient to justify imposing restrictions on nonmembers for the sake of protecting the French language:

⁴¹ See e.g. Raz: "The right-holder's interest in freedom is part of the justification of most rights and is the central element in the justification of some. It is, of course, particularly prominent in the justification of the great civil liberties. Freedom of religion, freedom of speech, freedom of association, of occupation, of movement, of marriage, and the like, are all important not because it is important that people should speak, should engage in religious worship, should marry or travel, etc., but *because it is important that they should decide for themselves whether to do so or not* [my emphasis]" (1995, 49). The view being followed here is that it is in one's interest to have choices, and that being autonomous contributes to individual well-being. See also Hartney (1995: 225, n.28) and the arguments in Chapter 3 and Chapter 6 of this thesis generally.

[Quebec's language policy] involves making sure that there is a community of people ... in the future that will want to avail itself of the opportunity to use the French language. Policies aimed at survival actively seek to create members of the community, for instance, in their assuring that future generations continue to identify as French-speakers. There is no way that these policies could be seen as just providing a facility to already existing people (1994: 58-59).

It is not clear, however, why nonexistent people should have a greater interest in speaking French as opposed to any other language (the particular excellence of that language notwithstanding). It is even unclear why children of members should only have interests in the existence of their parent's group's culture.⁴³ If we accept the intrinsic value of a plurality of cultural goods, as proponents of cultural rights argue, then the inhabitants of multicultural societies must have an equal interest in the existence of those goods. To argue otherwise from the premise that pluralism is essential to autonomy is incoherent.

In this section, I have made spectacularly heavy weather of my main point: that people's morally compelling interests in culture are general in nature, not specific. Although people undoubtedly have particular interests that arise from their actual choices and particular identifications, they also have a prior and more fundamental interest in being autonomous, in being free to so choose and so identify. If diverse elements of culture are intrinsically valuable, then they are so not just for specific groups but for all inhabitants of a given society.

3. What's wrong with minority rights

I've already argued in the previous section that the argument for group-differentiated cultural rights is incoherent. Taking cultural rights seriously entails their general distribution, rather than one relative to particular groups. In this section I argue that the idea of minority cultural rights isn't simply incoherent but also misconceived.

⁴² See e.g. Taylor (1994), Tamir, (1993:110-111), Johnston (1995) but see *contra* Kymlicka (1995: 121-123).

Liberal conceptions of GD cultural rights are typically justified by the importance of cultural membership to individual freedom. My argument here is that the actual effect of such rights would be contrary to their intended effect.

(i) what's wrong with membership

The starting point for any distribution of GD cultural rights is to identify cultural groups and their members. Now, if the existence of such groups is a social fact then it seems sensible to accept, as many proponents of GD rights do, the criteria for membership used by the groups themselves, i.e. the characteristics by which members recognize other members. However, although this seems based in good sociological common sense, it involves at least three problems.

First, it wrongly assumes that there exists a single conception of membership that is shared by all members. There is no obvious reason to believe why this should be true and, in fact, many cultural groups are marked by well-known disagreements over who is a member.⁴⁴ As such, the notion that there is *always* a single “internal point of view”⁴⁵ within each group, able to speak with a single voice to the issue of membership, is a chimerical one. This suggests that questions such as who *really* is Jewish or Irish or Maori or Quebecois are empty questions, not because any answer is as good as any other (which would be absurd), but because any particular answer is bound to produce an arbitrary result.

Alternatively, such an approach may involve the equally mistaken assumption that, where members of the same group do hold different conceptions of membership, only one is correct and the others are mistaken. Again, it isn't clear on what basis this could be true. When Germans disagree about whether *gastarbeiter* are German, for example, their disagreement isn't one that can be settled by showing that *gastarbeiter* don't share a common descent with other Germans. That would simply presuppose

⁴³ Indeed, if it is the case that the parents themselves have no special interest in it, then *a fortiori* the children would not.

⁴⁴ See Chapter 4.

⁴⁵ For discussion of the notion of an internal point of view see Hart (1961: 86-88), Dworkin (1985), Williams (1993: 142-143), Raz (1994), et al. At best, identification of an internal point of view is (once again) a matter of common sense, rather than empiricism: if you want to determine the rules of a game, you would do well to ask its players. The analogy suggested is that, if you can identify members of a group, you can obtain the internal point of view as to how members in general are recognized. The point at which this all breaks down is where there is a great deal of contention over who is a member. In such cases, the notion of a unified ‘internal’ point of view may be chimerical.

the truth of the ethnic definition of membership. Neither is their disagreement resolved by pointing out that, as yet, German law doesn't recognize *gastarbeiter* as citizens.⁴⁶ Again, it only begs the question of what the law should be.

The point here is that cultural membership is a normative concept: it describes not only who is a member but who *ought* to be a member.⁴⁷ It follows that disagreements between conceptions of cultural membership generally concern values rather than facts.⁴⁸ Therefore, where two members of a cultural group hold contradictory views about who is a member, it doesn't entail that one is mistaken. Rather, they simply are said to hold rival conceptions of cultural membership.⁴⁹

Each of these points (members of groups disagree about membership, and no single conception of membership is necessarily correct) makes the concept of GD rights protecting cultural membership deeply problematic. As we have seen, proponents of GD cultural rights place great emphasis on the idea of membership and its importance to personal identity. Equally, the idea of membership is bound up with the integrity of cultural groups, for without clear markers between member and nonmember, groups would be unable to maintain their distinct identity. It follows that any account of GD cultural rights that is concerned with protecting cultural groups as distinct goods in themselves must take cultural membership seriously, and not merely some or other conception of it, but the particular conceptions of members.⁵⁰

If it is true, however, that many groups are marked by rival and incompatible conceptions of cultural membership, then a theory of GD rights will be unable to meet one of its most important objects. This is because, where there are rival conceptions of membership in a group, proponents of GD rights are faced with a choice between options that are impossible. No account of GD rights can adopt any particular conception without disowning its rivals as well. In short, no account of GD rights can give equal protection to all the conceptions of membership, all the values and beliefs,

⁴⁶ As of May 1999, the German government changed its longstanding ethnic conception of citizenship: see Chapter 4 above.

⁴⁷ See Chapter 4: they are statements from a point of view.

⁴⁸ See Colin Renfrew: "Every nation likes to look back on its past and emphasize that it has a path of its own. But ethnicity – the notion of who a people are – is not to be demonstrated or proved by something deep in prehistory. *In fact, it is very much what a people want it to be* [my emphasis]" *The Guardian*, 19 August 1999.

⁴⁹ For the same reason, showing that *gastarbeiter* do in fact share *kultur* with other Germans can't be a knockdown argument against ethnic conceptions of membership. The ultimate disagreement is one of values, not facts.

held by members of the group. If we are to take seriously the relationship between cultural membership, personal identity and cultural integrity, it is a serious flaw.⁵¹

Some writers argue the contrary, that what must be protected by theories of GD cultural rights aren't the conceptions of particular members but the decision-making procedure of the group. "The protection of the existence of [a] culture", says Réaume, "must embrace the protection of the concrete practices the community has chosen to adopt, adapt or reaffirm" (1995: 129-130).⁵² However, this assumes that cultural groups, as opposed to formal associations, have procedures for making decisions. It also tends to assume that any such decision-making procedures that do exist are procedurally fair, and that the decisions themselves are just as between all members (or, indeed, possible members).⁵³ Certainly, the procedures involved in many ethnonational groups seem less democratic (i.e. a procedure that recognizes the equal weight to be given to the views of each individual), than theocratic or oligarchic.

But adopting the point of view of even a majority of members would itself be unsatisfactory for at least two reasons: first, it is logically incoherent – it presupposes taking a vote among the members of set X, precisely for the purposes of identifying set X; secondly, it isn't at all clear why a majoritarian process ought to be used to settle the distribution of minority rights. If the purpose of minority cultural rights is to protect minority cultural interests against majoritarian rule, then that rationale must apply *a fortiori* to the interests of minorities in minority cultural groups.

This brings us to the second problem for a liberal theory of GD rights: that, internal disagreement notwithstanding, most cultural groups distribute membership using criteria that seem morally irrelevant.⁵⁴ For example, ethnicity is the *sine qua non* for membership in most groups. Yet ethnicity is a matter of descent. If either

⁵⁰ I rejected the view of cultural groups as distinct goods in themselves in section 1(ii) above. For views of the importance of protecting particular associations, see Pogge (1997:198-199), Kukathas (1992, 1995), Levy (1995).

⁵¹ See Chapter 4. Recall that a member's conception of his or her group is likely to be one that goes deep to his or her own sense of personal identity.

⁵² See also Green (1995).

⁵³ Of course, this leaves open the logical possibility that a decision by a group concerning its membership ought to be respected where it is both fair and just. However, what counts as 'just' in such circumstances requires spelling out some moral principles concerning the distribution of membership. So, it can only beg the much larger question of what those principles are.

⁵⁴ On the face of it, the idea of groups distributing membership seems inconsistent with the idea of disagreement. However, this is a misleading view. The idea of disagreement is consistent with there being a dominant conception of membership i.e. one held by most members or those claiming

culture or cultural membership is as fundamental a good as we are meant to believe then it makes as much sense to use ethnicity as a basis for distributing it as it does to use blood type as a basis for distributing food and shelter. Ethnicity is the essence of a morally arbitrary characteristic.⁵⁵ In light of this, some writers have suggested developing liberal criteria for membership, rather than taking those of the group at face value. As Kymlicka suggests:

[D]escent-based approaches to national membership have obvious racist overtones, and are manifestly unjust. It is indeed one of the tests of a liberal conception of minority rights that *it defines* national membership in terms of integration into a cultural community, rather than descent. National membership should be open in principle to anyone, regardless of race or colour, who is willing to learn the language and history of the society and participate in its social and political institutions [emphasis added] (1995: 23).

A critical problem is, of course, that a truly liberal conception of membership might not be accepted by any actual member. Consider the example of indigenous peoples. Native groups such as the Inuit, Maori or Pueblo are by definition ethnic groups,⁵⁶ which is only to say that an overwhelming proportion of members seem to regard the ethnic conception of membership not as some incidental aspect of being Inuit or Pueblo but as central to their collective self-definition, their sense of themselves.⁵⁷ Again, their normative beliefs about what it means to be Maori or Inuit seem to be an intrinsic part of their conception of the group. Therefore, if the justification for GD

authority to speak for the group. It is a brute fact that, if such conceptions are held by most members, then that will be the basis according to which most of the benefits of membership will be distributed.

⁵⁵ The only point at which ethnicity could become morally relevant is when, as I argued in Chapter 4, it is the source of *disadvantage* in respect of access to common goods.

⁵⁶ Again, this seems inconsistent with the possibility or the fact of disagreement. Again, what is meant is that the dominant conception of membership within these groups is an ethnic one (see above). This doesn't mean that some Inuit, Maori or Pueblo can't disagree with the ethnic conceptions of their group identity; or that nonmembers can't participate in such communities. It is also worth repeating the point *ad nauseam* that membership doesn't imply identity: i.e. although the ethnic conception of membership is in fact a strongly held one, this doesn't mean that each Inuit, Maori, or Pueblo necessarily identifies strongly or at all with their membership.

⁵⁷ By contrast, the national identity of the United States would conceivably persist, for example, even if all descendants of the *Mayflower* were wiped out. This suggests that a truly civic conception of national identity is ethnically-transitive: i.e. one which doesn't assume the importance of any particular ethnic group dominating. See e.g. "California to Be First Big State With Majority of Non-Whites", *The New York Times*, 4 July 2000, "California now a 'minorities' state" by Martin Kettle, *The Guardian*, 1

cultural rights is protecting cultural membership and the integrity of actually existing cultural groups, then a ‘liberal’ conception of cultural membership is entirely alien to this end. As such, liberal accounts of GD rights are torn between the irreconcilable ends of protecting minority cultural groups as they are, on the one hand, and recognizing them as they ought to be, on the other.

The third problem arises out of the need for any theory of GD rights to give some account of an *internal* relationship between being a member of a cultural group and the interest protected. To paraphrase Margalit and Raz, any such account must “identify groups by those characteristics that are relevant to the justification of the right” (1995:129). The problem is that there is no internal relationship between cultural membership and the (morally compelling) interests that people have in culture. Membership as a characteristic is morally irrelevant to the justification of cultural rights.

This is part of my general argument throughout this chapter, but it is important to see it here as an *ad hominem* argument: proponents of GD cultural rights tend to favour distributing rights according to membership, not for its intrinsic value (whatever that may be), but because they assume that members identify strongly with the group’s culture. The moral argument for cultural rights, in other words, relies on the idea that identification (not membership *per se*) with culture gives rise to morally important interests.

However, if the initial premiss that membership implies identity is itself mistaken (as I’ve argued fairly relentlessly) then proponents of GD cultural rights face a dilemma. If the relevant characteristic for the justification of cultural rights is *identity* with culture, then the predicate of membership is – strictly speaking – irrelevant to their distribution. Specifically, if the morally compelling interests that people have in culture are those which arise from their own personal beliefs, then to insist on recognition as a *member* of a cultural group seems a wholly unnecessary requirement.

The dilemma for proponents of GD rights is that the group of people who actually identify with a particular set of cultural elements may include many nonmembers, and leave out some of those typically considered members (those indifferent to the group). It would, moreover, resemble a fluid and open-ended

September 2000: demographers estimate that white non-Hispanics now make up slightly less than 50%

category of persons, rather than a stable group with clear boundaries (because people's identifications are subject to change, and exist in varying degrees of strength). The dilemma is that, although this distribution would reflect the proper spread of people's interests in a culture, and accommodate their willingness to participate in a group, it would be thoroughly inimical to most conceptions of cultural integrity (Réaume, 1995: 136-139).⁵⁸ As Walzer claims:

The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people ... seem to believe, then closure must be permitted somewhere (1983: 38).

Indeed, from the perspective of existing members, allowing people to claim rights on the strength of their identification with a culture implies that they will more or less be able to *insist* on recognition – a right to culture yielding a right to membership. It is extremely doubtful that *this* outcome would be something favoured by most proponents of GD cultural rights.⁵⁹

(ii) what's wrong with GD cultural rights

Although I hope I've demonstrated the inherent flaws in using cultural membership as a basis for distributing GD rights, in this section I mean to put forward arguments against any group-based distribution of cultural rights *per se*. In my view, if the ultimate premiss of cultural rights is to protect individual autonomy, then the distribution of those rights cannot be group-differentiated. Equally, if autonomy is the

of the population of California.

⁵⁸ Of course, states might vet those claiming rights to particular culture, in the same way that states have vetted those claiming to be conscientious objectors in times of war. The problems with such systems are well-known: it would involve the state or some other body defining what it means to have an authentic interest in a particular culture. As such, it would merely reproduce the same problems as above – where there are different conceptions of what a particular culture is, a state or some other body would merely be favouring some particular view over others.

⁵⁹ It takes very little familiarity with the communitarian drift of much writing on cultural rights to appreciate the irony of individuals claiming a right to culture against a group: rights are popularly seen as antithetical to communal bonds, and presuppose an alienation from community (Marx, Sandel) As one writer observes: "To stand on one's right is to distance oneself from those to whom the claim is made; it is to announce, so to speak, an opening of hostilities; and it is to acknowledge that other warmer bonds of kinship, affection, and intimacy can no longer hold. To do this in a context where adversarial hostility is inappropriate is a serious moral failing" (Waldron: 1993: 373).

ultimate good served by cultural rights, then it cannot be used to justify group-based claims for exemptions, separate institutions and group self-government.

Recall that GD rights are essentially an unequal (i.e. non-uniform) distribution of certain goods. Their justification lies in remedying disadvantage in respect of some other good, in this case, culture. The deeper reason for ensuring this is that, if people are to be equally free, they must have equal access to the good of culture. So, from the liberal point of view, the ultimate justification for GD cultural rights lies in protecting individual freedom. Without such rights, the argument goes, certain people would be less able to lead autonomous lives.

As we saw from the discussion in Chapter 4, different kinds of GD cultural rights-claims involve distributions of different kinds of goods.⁶⁰ The same minority culture may be protected in one way through exemption claims, involving the unequal distribution of negative liberties, and another through assistance claims, involving the support of distinct institutions, such as schools. More generally, self-government claims can cover a wide range of different arrangements: from the creation of separate political institutions, to control over specific territory within a state. Lastly, there is the general distinction raised by Kymlicka: whether a culture was protected by regulating the behaviour of members (internal restrictions), or by limiting the freedom of nonmembers (external protections).⁶¹

I have already suggested some conceptual problems with these rights-claims in Chapter 4.⁶² My argument here is that they are fundamentally at odds with the premiss of protecting individual autonomy. Proponents of GD cultural rights typically argue that limits on the liberty of nonmembers are a necessary part of protecting the culture of minority cultural groups: otherwise the notion of external protections is unintelligible. Taylor, as we have already seen, argues that the importance of protecting the existence of the French language in Québec justifies limiting the freedom of expression of English-speakers. Equally, Kymlicka envisages that self-government rights for indigenous groups would involve preventing nonmembers from being allowed to vote or own property in certain territories (1989: 186; 1995: 109). The objection I want to pursue at this juncture isn't the obvious one that people's

⁶⁰ Recall that affirmative action claims weren't seen as genuinely group-differentiated because they involved securing access to general goods, rather than the support of special goods.

⁶¹ The relationship between self-government and these two classes of rules is discussed in Chapter 4.

interests in goods like free expression, political participation or private property may simply trump cultural integrity.⁶³ Equally, I'm not concerned to raise the question of whether group-based distributions, separate institutions, and other 'external protections' actually protect the integrity of cultures or cultural groups, whatever that may amount to.⁶⁴ My objection is that, if cultural rights are meant to protect individual autonomy by ensuring the availability of culture, then any notion of group-differentiation or 'external protection' is utterly inconsistent with this end, because such distributions and protections are equally limits on the availability of culture to nonmembers.

As we have seen, the idea that pluralism is intrinsically valuable is something readily accepted by proponents of GD cultural rights. The presence of diverse cultural materials, values and beliefs are regarded as important conditions for the pursuit of an autonomous life. This is something, moreover, that all people have a fundamental interest in, whatever their particular identifications and preferences. So, even if we were to regard particular cultures as distinct goods in themselves (something which I rejected at the beginning of this Chapter), everybody - members and nonmembers alike - would still retain an equal and compelling interest in their availability.

By contrast, GD rights are inherently exclusive. Their distribution is, by definition, a partial one. This also marks a crucial distinction between cultural rights-claims generally: some (most notably affirmative action and certain types of assistance-claims) are consistent with different elements of culture made available as a general good; others (exemption claims, assistance claims for distinct institutions, and self-government claims) are *necessarily* group-differentiated. If, for example, an exemption claim existed as a right available to all rather than a GD right, then the original general rule would be unworkable as a law. Instead, one would simply have a different general rule. The same is true of claims for distinct institutions available

⁶² To précis: exemption claims are inconsistent with the principle of equal liberty; assistance claims are ambiguous between general and GD distributions; and the claim that self-government is necessary to protect individual autonomy is implausible.

⁶³ In fact, my argument below is that any such trumping would be incoherent: there are no morally important interests in culture that can be harmed by free expression and political participation.

⁶⁴ As I indicated in Chapter 5, the idea that some interests always trump others is a suspect one. The more plausible argument is that put forward in section 1: that no actual cultures have cultural integrity, that it would be almost impossible to achieve, nor would it be worth achieving. Protecting the integrity of cultural groups, on the other hand, can only mean protecting the sensibilities of some members as to what the composition of the group should be.

only to members; were they open to all, they wouldn't be distinct in the same way.⁶⁵ Lastly, the right of self-government (as opposed to self-rule) necessarily defines itself against some existing political authority, and against some existing population who are meant to be excluded from participating in the newly formed institutions.⁶⁶ Consistent with such differentiation is the 'external protection' of a given culture by limiting the freedom of nonmembers, not just in the obvious ways of curtailing their right to vote or to speak certain languages, but by denying them access to the good of the culture itself.

As I've already shown, proponents of cultural rights generally hold an objectivist view of peoples' interests in culture. And I hope also to have shown that the interest that people have in the availability of diverse cultural goods is among their most fundamental of interests: it is, in Raz's words, "the one major condition for the autonomy of all" (1995:122). This, too, is accepted by most writers who argue for cultural rights. My thesis, therefore, is that GD cultural rights can't be justified by reference to the need to protect the conditions for individual autonomy. Such a justification would be incoherent, given that GD rights involve inherent limits on the

⁶⁵ This *doesn't* mean that all such institutions must be identical: the argument isn't that there can't be French-speaking schools or English-speaking schools, for example, but that they should be open in principle to whoever wants to avail themselves of the good of either language. This isn't the case in Quebec, for example, where the right to education in a particular language is governed by the civic status and language of parents (immigrants don't have the same rights as citizens in this respect).

⁶⁶ As I suggest in Chapter 5, there is a moral argument for separatism only where there is continuing and serious denial of self-rule to a group under such circumstances that seeking to modifying the existing state is no longer viable as a political objective. The sort of situation I have in mind is the 1776 American War of Independence or the creation of the State of India in 1948. The point is that such entities exist because of the denial of self-rule, i.e. their inhabitants were denied the basic right to

availability of culture to nonmembers. If one takes either culture or autonomy seriously, then group-differentiated distributions of cultural rights must be seen as antithetical to their protection.⁶⁷

participate in government, and the existence of continuing bad faith by the colonial power (Britain) made it necessary to seek independence rather than self-rule.

⁶⁷ The problem for Kymlicka is that the sorts of minority cultural groups he is concerned with protecting do not define themselves in terms of voluntary integration, nor would they be able to sustain their particular sense of identity if they did. The alternative - an inclusive approach to national identity - cannot be consistent with the notion of the protection of cultural membership, or giving access to culture, in any recognizable sense. This is because the limitations that Kymlicka envisages as 'external protections' for minority groups are equally limitations upon voluntary integration and participation.

Chapter Eight

A Cosmopolitan Conception of Cultural Rights

My argument thus far has been that, if there are rights to culture, they are rights that all people have equally *qua* human beings, rather than differentially *qua* members of particular groups. In this chapter, I address the question of what a general right to culture might look like. I will explore two main aspects of this question, with each aspect involving discussion of some very different issues: (1) What is the relationship between the obligation on states to ensure cultural diversity, and liberal conceptions of state neutrality? Is the state required to support or permit all culture equally? If not, on what basis should the state distinguish between different cultural elements (including different languages, religions, ethnicities, and national groups)? How should the state distribute culture, or regulate the distribution of culture by others? (2) What is the conceptual relationship between the right to culture and existing conceptions of human rights? In particular, what are the relationships between the rights to free association and free expression and the right to culture?

I regret that I lack the space to address each of the issues to the level of detail which they deserve. Instead, what follows is merely a sketch of how a general right to culture might be understood. The general view put forward here is that, although culture is too vague and too broad a good to become justiciable in its own right, it has significant consequences for how we understand existing human rights. In particular, I argue that the concept of a right to culture underlies much of what we regard as valuable about the good of free expression.¹

More generally, however, the importance of securing cultural diversity gives rise to some very important obligations on states, groups and individuals. Supporting the existence of a multicultural society means adopting a certain framework of laws and institutions capable of supporting the availability of a diverse range of cultural elements and allowing the pursuit of a diverse range of options and goals. It also entails giving people the freedom and the resources they need to revise their views about what is valuable. Conversely, it rejects the adoption of laws, institutions and

¹ Equally, I reject an interpretation of the right to association put forward by Chandran Kukathas (references), supporting self-government claims of minority cultural groups, on the grounds that it is inconsistent with the premise of protecting autonomy. See my argument in section 2 of this Chapter below.

communal goals that would restrict the availability of diverse cultural elements, or deprive people of the ability to revise their beliefs about what is good.

1. Multiculturalism and state neutrality

If the good of culture is as fundamental a condition of human autonomy as is argued, then it suggests that the state has an important role to play in making culture available, or at least in not restricting its availability. However, any role the state has in supporting cultural diversity should be considered in light of the concept of political, or ‘state’ neutrality.² This concept has been expressed in different ways, but most usually it concerns the notion that the state is obliged to remain neutral between the pursuit of different values or goods by different individuals. The reasons given for this requirement and the consequences that are thought to follow from it, though, vary widely. As Waldron points out, “we talk about the liberal view and the doctrine of liberal neutrality, but ... there are in fact several such views, each based on premises and yielding practical requirements that differ substantially from those involved in each of the others [original emphasis]” (1993:143). It is not my purpose here, however, to argue between different conceptions of state neutrality, but instead to show how they might relate to the concept of cultural diversity, and the obligation upon states to ensure this diversity.

One widely-cited premiss for state neutrality is that of equal treatment: on this view, the state does not treat its inhabitants as equals where it gives greater support to some goods than others, making it easier to pursue some ends relative to others. In the same way, equal treatment isn’t achieved where a state burdens or penalizes some goals relative to others, making their pursuit more difficult for inhabitants.³ However, the obligation to treat people as equals needs justification of its own, the most

² I use the term ‘state neutrality’ to point to the fact that the obligation to behave neutrally falls upon the *state* in most conceptions. Others refer to ‘neutral political concern’, ‘moral neutrality’ or ‘liberal neutrality’, which are less likely to be confused with quite different ideas of state neutrality, i.e. those concerned in international relations.

³ Note that there are at least two ways a state’s actions can involve unequal treatment: by actively hindering one ideal relative to others, or by simply not helping relative to others. Dworkin: “Since the citizens of a society differ in their conceptions [of the good], the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or powerful group” (1985: 191).

plausible of which is that each individual is, in themselves, a choosers of ends.⁴ In other words, the ultimate premiss for this view of neutrality is an argument to respect the autonomy of each inhabitant equally.⁵ Other premises offered for state neutrality include the intrinsic value of pluralism (that adopting nonneutral policies by the state tends to diminish the availability of distinct cultural elements); the irrationality of coercion (where nonneutral policies are intended to prevent people from adopting certain goals, they are unlikely to succeed); and moral skepticism (that there are no grounds for the state to prefer one set of goals or values to another).

This plurality of conceptions makes for a great deal of ambiguity. First, although I've framed the issue as one of state neutrality, this is by no means the only way of looking at it. Some writers have been concerned with particular aspects of state action (e.g. the actions of legislators), while others have extended their discussion to include the possible obligations of other political actors (e.g. individual voters).⁶ Secondly, the issue of the sorts of entities in respect of which neutrality is required is equally ambiguous: neutrality between values or ideals may be very different from neutrality between specific goals or cultural groups.⁷ Lastly, there is confusion over neutrality *simpliciter* – what it *means* to be neutral between two or more factions or ideas or whatever is itself unclear.

An important part of this latter issue is whether the requirement upon states to act neutrally means neutrality as to the state's reasons for acting or neutrality as to the effects of its actions.⁸ The first formulation merely requires that the state should act

⁴ See e.g. Nozick, "To use a person [for the good of others] does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. He does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him – least of all a state or government that claims his allegiance (as other individuals do not) and that therefore scrupulously must be *neutral* between its citizens" (1974: 32-33) [original emphasis]; Dworkin: legislators "must be neutral on what might be called the question of the good life, or what gives value to life" (1985: 191).

⁵ This is more implicit in Nozick, who argues for neutrality from the importance of individual freedom, than of Dworkin, who argues from the premiss of equal treatment: "the issue at bottom ... what is the content of the respect that is necessary to dignity and independence" (1985: 143). The difficulty with equal treatment as a premiss in and of itself is that it isn't clear why treating people with equal concern and respect means respecting their particular conceptions of the good, unless there is something important about how those conceptions are developed, that interfering with them would cause them harm.

⁶ Dworkin, for example, focuses on the requirement of *legislators* to be neutral (1985: 191); Raz discusses whether individuals are obliged to adopt neutral political concern (1986: Ch 5).

⁷ As Waldron puts it: "an adequate liberal theory has to indicate why neutrality is required. Apart from this vital task, an adequate theory also has to explain two other things. (1) It has to explain exactly *who* is required to be neutral ... (2) It has to explain *who* or *what* exactly the legislator (or whoever) is required to be neutral between [original emphasis]" (1993: 153).

⁸ My discussion here follows Waldron's distinction between neutrality as to *intentions* and neutrality as to *effects* (1993: 149-150).

only for reasons that are neutral between different ideals.⁹ On this view, the same law (e.g. a rule against slaughtering animals) would be legitimate if adopted for a neutral reason (e.g. public health) but not if adopted for some nonneutral one (e.g. to prevent a religious group from observing its rituals).¹⁰ The second formulation, by contrast, would require the state to refrain from acting where its actions would result in some goals being easier or more difficult to pursue, relative to others, even where it has a valid, neutral reason for so acting.¹¹

A further distinction is that offered by Raz as between narrow and comprehensive conceptions of political neutrality (1986: 116-117). As he makes clear, “neutrality is neutrality between parties in relation to some issue regarding which the success of one sets the other back” (122).¹²

Comprehensive neutrality consists in helping or hindering the parties in equal degree in all matters relevant to the conflict between them. Narrow neutrality consists in helping them or hindering them to an equal degree in those activities and regarding those resources that they would wish neither to engage in nor to acquire but for the conflict.

Raz describes the second formulation (neutrality of effect) as a principle of narrow neutrality (117). However, as he argues, the sort of competition between ideals that occurs amongst different inhabitants of a state is a comprehensive one: “There is nothing outside it which can be useful for it but is not specifically necessary for it. The whole of life, so to speak, is involved in the pursuit of the good life”(123-124). Moreover, where the state owes obligations to its inhabitants, “failure to help is hindrance” (124) in respect of such conflict. Therefore, Raz suggests, the state can be comprehensively neutral in such circumstances “only if it creates conditions of equal opportunities for people to choose any conception of the good, with an equal prospect of realizing it” (124).

⁹ This seems to be Nozick’s view (1974: 271-273) and possibly Dworkin’s as well; see also Waldron (1993: 151); and Raz (1986: 116).

¹⁰ I owe this example to Waldron, who takes it from Locke.

¹¹ However, a strictly consequentialist conception of state neutrality might allow a state to act for *nonneutral* reasons so long as it had *no* effect on the relative availability of options, etc.

¹² See also Waldron: “a policy of neutrality in one dispute does not commit a party to a policy of neutrality in all disputes; it does not even commit him to a policy of neutrality in other disputes in which one of the belligerents in the dispute in which he is neutral is involved. (A may be neutral in the conflict between B and C, but not in the conflict between B and D)” (1993: 165-166).

Understood this way, comprehensive neutrality is not simply a doctrine of restraint, but also gives rise to an obligation to act to ensure a particular state of affairs: namely, the rough equality of the parties in respect of their pursuit of the good.¹³ On the other hand, no such obligation arises if one's conception of neutrality is concerned only with the essential propriety of the state acting for certain sorts of reasons, rather than the outcome of its actions *per se*.¹⁴ This would seem to be the case with justifications for state neutrality that involve moral skepticism or that take the view that coercion is either irrational or intrinsically wrong.

The concept of *cultural* diversity has added a further dimension to this debate. By pointing to a pervasive and often trivial conception of culture where every element is organized (usually according to ethnic origin) into distinct cultures or cultural groups, writers have argued the impossibility of any state remaining neutral between different cultures.¹⁵ Tamir argues that:

The cultural essence of the state comes to the fore in its political institutions and in the official language, as well as the symbolic sphere, in the selection of rituals, national heroes, and the like. Attitudes towards the political system, the psychological orientation towards social objects, political norms of behaviour, the interpretation of history promoted by the governing history, all unavoidably reflect a particular culture [my emphasis] (1993: 148).

What, though, is the nature of all this unavoidability? Tamir actually puts forward two arguments which are, between themselves, mutually contradictory: the first is that a culturally neutral state is technically possible but undesirable; the second is that a culturally neutral state is actually impossible. Her first claim is that a state could develop a structure that was culturally neutral, although only “at the risk of alienation and irrelevance” (149). The legitimacy of a state, she argues, relies on the ability of its inhabitants to identify with its structure and institutions. By implication, a state whose

¹³ “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” (1986: 116-117). Note that Raz doesn't himself argue for neutrality as an obligation: I look at this view in more detail below.

¹⁴ Raz argues that the first formulation (neutrality of intentions) properly understood isn't a principle of neutrality, but an argument for the exclusion of ideals from deliberations over political action (116).

¹⁵ Kymlicka's concept of a 'societal culture', for example, incorporates, “social, educational, religious, recreational, and economic life, encompassing both public and private spheres”: see my discussion in Chapter 3 above.

inhabitants are unable to do so risks its own existence.¹⁶ But the need to maintain legitimacy per se doesn't make it unavoidable for the political institutions of the state to embody a particular culture. Indeed, it is far from clear that institutions that are culturally particular would give rise to less alienation among all the inhabitants of a state taken as a whole than culturally neutral ones.¹⁷

Tamir's second argument appears more valid. Her claim is that "[since] those who create the political system, legislate its laws, occupy key political positions, and run the state bureaucracy have a culture that they *cannot avoid* bringing into the political domain, the separation of state and culture is revealed as an impossible endeavour" (149). On this view, the state necessarily reflects a particular culture, because it is run by people with a particular culture. What happens, though, when the people who run the state don't all share the *same* culture (or why it might be unavoidable that they should) Tamir doesn't manage to address.

Her theme of unavoidability, however, is taken up by Kymlicka who argues the point in greater detail. He claims that any notion of separation between state and culture (or as he himself describes it, 'state and ethnicity') is "not only mistaken, but actually incoherent" (1995:107). The incoherence arises, in Kymlicka's view, because a great many state actions "*unavoidably* involve recognising, accommodating, and supporting the needs and identities of particular ethnic and national groups" (107). He claims that, with respect to the choice of official language, the language of public schooling, the drawing of political boundaries, and the particular division of powers in federal systems, "there is no way to avoid supporting this or that societal culture, or deciding which groups will form a majority in political units that control culture-affecting decisions regarding language, education, and immigration" (113). The pervasiveness of culture, suggests Kymlicka, makes it impossible for a state to avoid decisions that involve the establishment of particular cultures. As he comments:

¹⁶ Unfortunately, Indonesia, the example Tamir uses to illustrate this point, has enjoyed less than two years of democratic rule and several decades of military-backed authoritarian rule since independence from the Netherlands in 1954. As such, it is a decidedly flawed and ambiguous case with which to illustrate the failure of Indonesians to identify with the structure of their government.

¹⁷ Tamir also mistakenly assumes that there will be a high degree of unanimity *within* a culture over the proper way to embody its culture in institutions: she does not consider the view that at least some members will themselves favour culturally neutral institutions, or neutral between different interpretations of the culture. See Chapter 5.

It is quite possible for a state not to have an established church. But the state cannot help but at least give partial establishment to a culture when it decides which language is to be used in public schooling. The state can (and should) replace religious oaths in courts with secular oaths, but it cannot replace the use of English in courts with no language (1995: 111).

This seems a more persuasive argument against the concept of cultural neutrality, one that neatly dovetails the claim that GD rights are necessary to protect minority cultures against a disinterested or hostile majority.¹⁸ It isn't simply that governmental decisions and legislation are likely to reflect the points of view of the majority of inhabitants, but also that the constitutional features of the state and its institutions are bound to be culturally specific.

However, the thesis that the structure of any state unavoidably reflects a particular culture involves at least two mistakes. The first is a mistake about the manner in which the decisions of inhabitants guide the structure, institutions and actions of a state; the second is an error about the nature of the outcomes of such decisions.¹⁹ First, although it is true that the structure, institutions and actions of each state exist as specific instances of culture, it does not follow from this that they all reflect those of a particular culture, to the exclusion of others.

Such an outcome is only possible where either (i) all the ideas and practices that are available to guide peoples' deliberations on the matter all come from a single culture; or (ii) where a majority of inhabitants have available ideas from different cultures but take it upon themselves to consider only those from a specific culture. As I argued in section 1 of this chapter, model (i) presupposes a degree of isolation that is technically impossible in the modern world, whereas model (ii) is a possibility, but a relatively unlikely one and certainly not unavoidable. It would require *inter alia* that the majority did not have any false beliefs about the cultural origins of particular ideas (i.e. to consider only those ideas that were in fact indigenous), and that they also

¹⁸ See discussion of justification for GD rights in Chapter 6.

¹⁹ Strictly speaking, the first error does not relate to cultural neutrality, save in the sense of neutrality of *intentions* – what Raz describes as the exclusion of ideals. My argument is that Raz is correct to claim that it is incoherent to exclude ideals about the good life from deliberations, that this isn't something states are required to be neutral about. However, I also make the point that there is a confusion between ideals and cultures, such that it can't always be said that deliberations about ideals are necessarily nonneutral between cultures, either because some ideals have ambiguous cultural origins or that they are shared by several cultures, or because some cultures put forward different and competing ideals.

ignored those ideas whose origins were trivial, those that were identical to those in other cultures, or were indeterminate (e.g. the idea of a popular representative assembly). It is far more likely that inhabitants will have available ideas from many different origins, and that this diversity will be reflected in their deliberations.

The thesis of unavoidability also assumes that the preferences of each inhabitant will reflect their membership of particular cultural groups. Where there is a majority culture, the argument goes, members of minority cultures will “inevitably be outvoted on a number of issues” (Tamir, 1993: 70). According to my analysis of the concept of membership, however, there is no reason for this to be true. Indeed, in a plural society, the deliberations of each individual are bound to be influenced by the presence of different ideas and practices.²⁰ The ideal approaches something of a “free marketplace of ideas” from which ideas, practices and institutions may be adopted or even synthesized.²¹ On this view, the only thing which is unavoidable is that the outcome of deliberations will reflect the views of inhabitants. It does not follow from this that those views will necessarily reflect, or be determined by, their membership of particular groups. On the contrary, where the decisions of a state or legislature are the outcome of deliberations involving many views and ideas, it is much less likely that they will reflect only the content of one culture.²²

This suggests that the *manner* in which a state’s structure, institutions or actions are determined *need not* reflect that of a particular culture. However, it doesn’t address (at least not directly) the argument that the *outcome* of such decisions must unavoidably favour some cultures over others. This brings us to the second error in the thesis of unavoidability, which is that it misapprehends the necessity of many specific decisions.

Kymlicka appears to believe, for example, that a state must have an official language (or at least some official languages). But, if this is his claim, it is patently false. The United States of America, for example, has no official language, despite an

²⁰ See Waldron referring to the relationship between individual and group synthesis of ideas: “According to Mill’s model, quite incommensurable ideas may have a dialectical effect on one another, so that something better emerges in the discussion, even though the ‘adjustment’ between the various views has not been made by the deliberate synthetic activity of an ‘single mind’” (1997: 346-347).

²¹ See also my discussion below re free expression.

²² Equally, it is not open for members of a particular cultural group to complain that its views have not been respected *simply by virtue of the fact* that a specific outcome was not reached, so long as those views were represented in the political process. See Waldron: “Unless we want to say that each group and each individual has whatever rights it thinks it has, we must accept that claims of rights will have

overwhelming *de facto* use of English in its public life and despite considerable pressure from conservatives to quell the increasing use of Spanish in some areas.²³ Equally, the absence of an official language is reflected in the provision of public education, most notably the Los Angeles school district whose schools (until very recently, at least) provided education in approximately 137 languages. Of course, there is much to be said as to the desirability of having a common language, either in terms of the provision of public education or government services in general,²⁴ but it is mistaken to argue as Kymlicka does that the adoption of a particular language is something a state *must* decide on. True, the state cannot replace the use of English in courts with no language, but it can certainly accommodate the use of many languages as an alternative to the provision of services in only one.²⁵

This points to one way in which the thesis of unavoidability is exaggerated, but there are others. In terms of internal political boundaries, for example, a state could resolve to adopt a set of administrative units that did not reflect the predominance of any particular cultural group.²⁶ In terms of symbols and rituals, a state could either synthesize those of existing groups (e.g. the Union Jack) or establish new ones entirely (e.g. the Canadian flag, the US flag).²⁷ The point of these examples isn't to make claims about their success *vis-à-vis* more sectarian alternatives, or to argue for a general approach to such matters, but to refute the claim that those sectarian alternatives are somehow unavoidable.

However, although I have argued that the thesis of unavoidability is in general a mistaken one, it is true that there *are* decisions about the structure, institutions and actions of a state that (a) are unavoidable and (b) have the effect of curtailing certain

to be subject to political decision of one sort or another, and that some of them may have to be rejected as ill-founded" (2000: 166).

²³ See e.g. Crawford (1992): 21 states have so far adopted official language legislation.

²⁴ See Hobsbawm (1996). The argument for an official language is more plausible in limited, particular cases: e.g. the making of legislation would benefit if legislators agree on a common working language, but this doesn't entail that only one version is authoritative: in the European Union, for example, different institutions have different working languages (the ECJ works largely in French, the commercial departments of the Commission work largely in English, and so on) but there are no less than twelve official languages, equally authoritative.

²⁵ See Réaume (2000) for a contrary view: note that the right to due process in most western states is interpreted to require a right to an interpreter where the defendant cannot speak the language used by the court.

²⁶ Barry gives the example of the system of *départements* adopted in France following the Revolution, "roughly equal in size regardless of their population" (1998: 307).

²⁷ It might be argued that none of the flags mentioned are examples of *neutral* symbols. In this sense, a better example might be the proposal to rename the (sectarian) 'Royal Ulster Constabulary' the 'Police Service of Northern Ireland'.

culturally-defined goals and options. These involve the constraint of *compossibility*: that there are certain options that no state can give effect to within the same set of legal and political institutions. For example, inhabitants of State P may drive on the left, while inhabitants of State Q may drive on the right, but the requirements of road safety make it *impossible* for State X to allow its inhabitants both options. Less trivial examples concern the regulation of certain practices: State A may prohibit abortion, whereas State B may allow it subject to certain regulations, but State C cannot both prohibit and permit abortion, nor can it simply abstain from regulation in the same way that a state can abstain from adopting an official language, for example.

This sort of unavoidability is qualitatively different from that described by Kymlicka and Tamir in that it is a matter of probability rather than logic. Whereas both writers claim that certain features of the state are necessarily culture specific (e.g. language), the sort of unavoidability we are concerned with arises from the overwhelming likelihood of political disagreement among inhabitants who identify with different elements of culture. That is, although we cannot know which features of a state will involve a decision between impossible options in advance of knowing the contents of particular cultures, it seems likely that at least *some* such features will have the effect of necessarily limiting the availability of certain goals and options. If, for example, the members of cultural group Q believe that it is essential to the survival of their culture that they have an established church, then this will necessarily conflict with a state whose constitutional structure forbids any such establishment.²⁸

In conclusion, the thesis of unavoidability as put forward by Kymlicka and others is an exaggerated one. It uses a trivial conception of culture to establish the impossibility of a strict separation between state and culture, although it is unclear that any liberals have ever claimed the contrary. It adopts a simplistic model of political deliberation to claim the inevitability of certain outcomes under majoritarian decision-procedures. And it conflates a fact about the limits of compossibility (that the options which any individual state can allow are limited by their joint practicability) with a false claim about the unavoidability of cultural particularity (that certain features of each state necessarily reflect a particular culture). As such, their

²⁸ As Rawls remarks, “[n]o society can include within itself all forms of life. We may indeed lament the limited space, as it were, of social worlds, and of ours in particular; and we may regret some of the

conclusion as to the incoherence of cultural neutrality is invalid and, in several respects, false.

Of course, showing that cultural neutrality is in some respects possible does not establish that it is either necessary or desirable in each (or any) of those respects. It may be that the state has good reasons to act, and that these considerations can trump those concerned with the availability of particular goals and options. This is at least my argument. For example, where the state makes it illegal to ride a motorcycle without a helmet, it makes riding motorcycles more difficult for those whose religious beliefs *inter alia* oblige them to wear bulky headgear as a general rule.²⁹ Arguably, at least, lowering the considerable number of cases of paraplegia and quadriplegia that result from motorcycle accidents is a more important goal for the state to pursue than maintaining the freedom to ride motorbikes in a manner consistent with one's religious beliefs.³⁰ Nor does it seem correct to claim that the state should only act for reasons that are neutral between different cultural elements. Where, for example, a state prohibits slavery or polygamy or female circumcision, its reasons are specifically nonneutral towards the cultural practices in question.

My point here is that these are not cultural practices which we should expect a state to be neutral towards, because the conception of culture we are concerned with is not one that is neutral with respect to autonomy. To explain: the obligation upon the state to support a diversity of cultural goods flows from its obligation to promote the autonomy of its inhabitants. It is among the state's most important functions. The state, therefore, can't be required to refrain from acting where its inaction would allow the continuance of a cultural practice that violates the autonomy of some inhabitants, no matter how important others regarded it. On the contrary, it is obliged to act to end the practice. Therefore, if the ultimate value served by the good of cultural diversity is that of autonomy, then it seems clear that the obligation upon the

inevitable effects of our culture and social structure But these social necessities are not to be taken for arbitrary bias or injustice" (1994: 197). See also Nozick (1974).

²⁹ It also makes riding motorcycles more difficult for those who would otherwise prefer to go bareheaded. The argument put forward in Chapter 5 is that it is not obvious why religious preferences are given special protection, over non-religious preferences not to wear a helmet. A deeply held but non-religious preference may be no less central to someone's sense of self than a weakly held religious preference.

³⁰ This is the point made by Barry (2000). Equally, the argument could be put the other way. But, on that view, one would need an account of why certain religious beliefs in particular count for more than, say, a secular lifestyle preference for going bareheaded at high speeds.

state to support cultural diversity does not entail strict or comprehensive cultural neutrality.³¹

Similarly, just as the obligation to support cultural diversity doesn't require states to tolerate cultural practices that are harmful, it seems deeply implausible that states should be required to support every non-harmful element of culture to the same degree. The obligation to support multiculturalism is an obligation to support a diversity of valuable goals and options that are the general conditions for autonomy. Culture, however, includes the good and the bad, the valuable, the harmful and the morally indifferent. Therefore, the obligation upon states to support multiculturalism can only extend to those elements which are intrinsically valuable, not any element of culture *per se*.³² A plausible account of state neutrality is, therefore, that the state is required to be neutral only between those elements of culture that it deems worthy of support as valuable goals.

Of course, this raises the vexed question of how a state determines what is valuable in a multicultural context. This is clearly a much larger question than I can hope to answer in this thesis, let alone this section. As such, I don't intend to deal with it here, except to outline very briefly three relevant considerations.³³ First, the decision of a majority of inhabitants can't be regarded as absolutely determinative, even though it may ultimately be decisive in certain cases. If the objectivist account of the good is correct, such that it is possible for an individual to be mistaken about what is valuable, it must also be possible for a group to be mistaken as well. The best that can be said for such procedures is that a decision about value is less likely to be mistaken where each inhabitant deliberates in good faith about the general good,

³¹ See Taylor, "[L]iberalism can't and shouldn't claim complete cultural neutrality. Liberalism is also a fighting creed" (1994: 62).

³² Clearly, the valuation of culture is bound to be a politically-contested question, and one that raises considerable problems. The point is that it is as problematic internally as it is cross-culturally. As Taylor makes clear, the judgement of value cannot be an *a priori* one: "That is, if the judgement of value is to register something independent of our own wills and desires, it cannot be dictated by a principle of ethics. On examination, either we will find something of great value in culture C, or we will not. But it makes no more sense to demand that we do so than it does to demand that we find the earth round or flat, the temperature of the air hot or cold" (1994: 68-69).

³³ These considerations are not exhaustive, but they do provide a rough outline of the approach that states should take to the support of cultural diversity. I discuss some further considerations in relation to the interpretation of existing human rights concepts in the following section.

rather than where each inhabitant blindly or selfishly pursues their own cultural preferences.³⁴

This, in turn, prompts the second consideration, which is that if the multicultural thesis is correct *and* if inhabitants deliberate in a proper manner, we should expect to find a plurality of valuable goals and options from diverse cultural sources.³⁵ In this way, the thesis of multiculturalism suggests that the deliberations of representatives should involve a form of reflective equilibrium.³⁶ the state is obliged to support what is good, but it should also be guided by the idea that each culture is likely to contain much which is valuable and which is deserving of support. It should serve as a warning, therefore, that where elements of minority cultures are consistently marginalized, or where elements of a certain culture are accorded a privileged place above all others, proper consideration is not being paid to the importance of maintaining a diverse cultural *milieu* that is essential to autonomy.

The third consideration to be borne in mind is the essential *publicity* of cultural goods: this is what distinguishes a general rights approach to cultural rights from the group-differentiated approach. Following the GD rights approach, the good of each culture is described in terms of its importance to people *qua* members. Following the general rights approach, however, the good of a cultural element is understood in terms of its importance to all inhabitants. Therefore, it is wholly inconsistent with the nature of such goods for their distribution to be restricted to certain groups within a society.³⁷

Having outlined some of the considerations in relation to the obligation of the state to *support* cultural diversity, it is also important to have regard to the obligation on states to *allow* inhabitants the negative freedom to pursue goals and options that are themselves either morally indifferent or even (in some cases) morally wrong. One idea is that this requirement stems from the *value* of having options that are bad or indifferent: in particular, the notion that one must have bad in order to select the good. However, this is not logically compelling, at least on a pluralist view which sets out

³⁴ See Raz: “The fact that the state considers anything to be valuable or valueless is no reason for anything. Only its being valuable or valueless is a reason. If it is likely that the government will not judge such matters correctly then it has no authority to judge them at all” (1986: 412).

³⁵ This is similar to Taylor’s suggestion of a presumption of value: (1994: 68) and above n 33.

³⁶ The idea of a ‘reflective equilibrium’ is explained by Rawls (1972: 48-51).

³⁷ As we will see in the next section, this consideration helps to explain why religious groups don’t qualify for positive support in a multicultural society, although they can clearly qualify *qua* their cultural roles e.g. the provision of religiously founded hospitals and schools that are open to all.

the importance of choice not as between good and bad but between different goods.³⁸ Another argument for this requirement is that of skepticism, not about the existence of goods, but about the state's *ability* to select good. On this view, then, the state is simply not well-placed to make correct decisions about what is valuable.

In my view, however, the most plausible reason for the requirement that the state should permit inhabitants to pursue what they perceive is good, even though they may be mistaken, is a claim about the limits of state coercion. Specifically, although there is nothing intrinsically valuable about allowing inhabitants to pursue goals and options that are bad or morally indifferent, neither is there anything valuable in being *forced* to pursue only what is good: coercion is itself a violation of people's autonomy. This refers us back to Kymlicka's remarks, about the importance of leading one's life from the inside, the notion that "no life goes better by being led from the outside according to values the person doesn't endorse" (1989: 12).

By the same token, this emphasis upon autonomy suggests the one exception upon the use of coercion: that the state is justified in employing coercion to prevent harm to others.³⁹ Or, as Mill far more eloquently put it, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (1966: 13).⁴⁰ My argument here clearly involves arguing for a version of Mill's Harm Principle. In particular, I follow the view of Raz and others that it is consistent with an autonomy-based account of freedom.⁴¹ I don't mean, however, to explore all the potential problems that implementing the harm principle can involve. Rather, I am concerned to indicate how the obligation to support a multicultural society (which is itself derived from the value of individual autonomy) involves a requirement to tolerate elements of culture that are neither intrinsically valuable nor inherently harmful.

In this section I have looked at the relationship between the obligation to support a multicultural society and the doctrine of state neutrality. I've suggested that

³⁸ See Raz: "Since autonomy is valuable only if it is directed at the good it supplies no reason to provide, nor any reason to protect, worthless let alone bad options" (1986: 411). This is true even though, as Raz explains, the existence of bad options is consistent with the exercise of autonomy: "A person is autonomous even if he chooses the bad" (ibid).

³⁹ It is open to question whether all limits on autonomy are 'harm', as such. I am not concerned to explore this point here, I would draw an important distinction between 'harm' and 'offence'.

⁴⁰ The possibility of coercion for paternalist reasons is an obvious qualification of Mill's principle: nonetheless, it is consistent with an account of the harm principle based on the importance of autonomy.

⁴¹ See Raz (1986: 412-420), Waldron (1993).

the most plausible account of state neutrality is one that is quite limited in scope: that the state should be neutral only between those elements of culture that are worthy of support as valuable goals.⁴² I noted that there are a number of issues arising from the obligation to support a multicultural society that I could not address in the space of this section, this chapter, or indeed this thesis. However, one area I do wish to consider in further detail is the relationship between the idea of a general right to culture and existing conceptions of human rights. As we will see from the next section, there is a plausible argument for understanding existing human rights as protecting inter alia the interests that people have in cultural diversity. In particular, I will argue that the emphasis that some accounts place on the right to free expression provides an important model for understanding a general right to culture.

2. Human rights as cultural rights

The previous section addressed the general principles involved in the obligation upon states to support cultural diversity. This section looks at the relationship between existing human rights and a general right to culture: in particular, to what extent does a general right to culture inform existing conceptions of human rights? As we will see, this depends very much on the different sorts of cultural elements involved.

i. Cultural groups and free association

It is useful to begin this discussion by looking at an argument put forward by Kukathas to the effect that many rights-claims made by minority cultural groups, including those relating to self-government, can usefully be protected by the right to free association. He argues that liberals must respect the claims of members of minority cultural groups to enjoy self-government, “not because the culture has the right to be preserved but because the individuals should be free to associate: to form communities and to live by the terms of those associations” (1995: 238). Expressed in this manner, the right of free association protects the *negative* freedom of members of

⁴² This is quite distinct from the idea that the state should only support those elements of culture that *it deems* valuable: the fact that the state deems something valuable is not determinative of anything much.

cultural groups to live as they please without interference from the wider society, rather than any right to *positive* support as such.

In Kukathas's view, the importance of allowing each group to pursue their own values means, moreover, that there is no particular requirement that minority communities be liberal ones, "they may indeed be quite illiberal" (1995: 238). Nor can the wider society intervene in the workings of the group to ensure that the rights of members are respected,⁴³ save that each member has "an inalienable right to leave – to renounce membership of – the community". This is because the basis of authority within each cultural group is not the importance of protecting the group's culture, "but the acquiescence of its members" (1995: 239). Members have no rights against their groups, as such, but they do have the right to renounce their membership and find their freedom in the larger society. As Kukathas describes it, his "is a theory which sees a liberal society as one that need not be made up of liberal communities" (1995: 249). Instead, it merely requires that the larger society itself guarantees the full range of liberal rights, for those who are .⁴⁴

Kukathas's account is an interesting one, if only because it turns the good of free association from being one important good among many, into perhaps the defining value of liberal theory.⁴⁵ His larger argument is, of course, one of cultural toleration (1997: 78-79), and insofar as Kukathas is simply not committed to the importance of things like culture or autonomy then his account seems reasonably coherent. As I understand his argument, however, the value of autonomy is not something Kukathas disputes. On the contrary, what he appears to argue is that cultural toleration (i.e. non-interference) is precisely what respect for autonomy requires (1997: 78-86). If this correct, I want to suggest that his argument is actually incoherent.

First, it seems implausible for Kukathas to claim that guaranteeing the right of exit for people in illiberal minority communities is enough to make his theory a liberal one. It is a bizarre version of a liberal society that upholds the authority of groups to

⁴³ According to Kukathas, the wider society have no right "to require particular standards or systems of education within such cultural groups or to force their schools to promote the dominant culture" (1995: 238).

⁴⁴ See also Kukathas: "The larger point ... is that the state should not be viewed as a group in the way that other associations are. To be sure, the state is a community of sorts, but as a community of communities its concern is with the terms of association among different groups and not as its own claim as a group" (1997: 97).

violate the rights of individual members, until such time as those members can escape. As Leslie Green points out, “If a certain social structure is unjust, it cannot become just merely by becoming avoidable” (1995: 266).⁴⁶ However, even if one takes a right to exit seriously, it is clear that any such right would be a nonsense without precisely the sort of intervention by the wider society that Kukathas would forbid. In particular, if a state has no right to intervene in the education of members of minority cultural groups (1995: 238), then it has no means by which to ensure that those members are able make an informed choice about whether to remain in their communities or not – in other words, whether those members in fact enjoy a “*substantial* freedom to leave” [original emphasis] (252).⁴⁷ Equally, unless those members have available to them the same sorts of educational opportunities as those elsewhere, unless they are capable of pursuing the full range of goals and options offered by the broader cultural *milieu*, then a right to exit would mean only the right to be internally displaced; to work in the sweatshops and sleep beneath the bridges of the wider society.

Secondly, the degree of non-interference that Kukathas envisages minority communities enjoying under his account of the right to free association makes it disingenuous for him to claim that his account avoids the problems he identifies in respect of GD cultural rights, i.e. that they would lead to oppression within cultural groups (1995: 230-238). Specifically, non-intervention requires more than the simple forbearance of the wider society. It would involve passing laws granting exemptions to members, laws recognizing the authority of the group over its members (essentially powers to make laws in respect of those members) and, quite possibly, granting the minority group control over certain territory and resources (because, in each case, a group that lacked control over its own members, laws, territory, or resources, would be bound to complain at each turn that it was not being left free to pursue its own way

⁴⁵ Most recently, Kukathas (1997) offers an interpretation of toleration as the fundamental liberal value. See Kymlicka (1995: Chapter 8) for a brief survey of this debate. See also Levy (1997).

⁴⁶ Equally, as Nozick remarks, “Friends of liberty never thought that the existence of America made legitimate the practices of Czarist Russia. Why should there be a difference of kind in the case of communities?” (1974: 324).

⁴⁷ Nor does Kukathas give any analysis of the considerable costs of exit: even the endurance of oppression within a group can seem favourable to the loss of emotional and financial support that exit would entail, and the relatively few opportunities that members would have in a wider society. See Green: “the mere existence of an exit does not suffice to make it a reasonable option. It is a risky, wrenching, and disorientating to have to tear oneself from one’s religion or culture; the fact that it is possible to do so does not show that those who have not managed to achieve the task have stayed

of life). In short, although cultural groups often characterize their claims as simply to be “left alone”, the reality of such ‘non-intervention’ would in most cases be almost indistinguishable from positive recognition, and would involve implementing group rights in very much the form that Kukathas criticizes.⁴⁸

However, these two points relate only to the practical inconsistencies of Kukathas’s account. My third claim is that the justification that Kukathas gives for non-intervention is also incoherent. Specifically, although he claims that toleration is intrinsically good (79), his arguments against state intervention are by and large concerned with the consequences of state action. Recall that Kukathas thinks that it is always wrong for the state to intervene forcibly in the practices of a cultural group even where those practices violate the autonomy of some of its members. It is important to be clear that this argument for toleration is not a skeptical one, at least in the sense of moral skepticism: Kukathas is happy to acknowledge that some cultural practices involve oppression to individuals (1997: 88), and that such practices are ‘terrible’ (89). But, despite acknowledging the wrong that such practices involve, Kukathas argues that state intervention is still worse. Chiefly, he thinks states are ill-placed to determine whether a cultural practice is good or bad, and that where states are able to intervene to promote what is good, then this makes it more likely that they will intervene to cause oppression too. (1997: 88-90)

Neither of these empirical claims are especially compelling, however. First, it isn’t obvious why states are necessarily or generally worse than cultural groups at identifying the good, and there is good reason to think that a multicultural society would be better at the task than a repressive cultural group. Secondly, if Kukathas’s concern is to prevent oppression in general, then it is incoherent to be concerned only with the possibility that state intervention could be oppressive, without considering that its *failure* to intervene could be equally (if not more) oppressive.⁴⁹

Finally, it is simply unclear how either free association or cultural toleration could be intrinsically valuable: that is, valuable *independent* of the specific good or goods which the association protects or pursues. If we follow the view set out in the

voluntarily, at least not in any sense strong enough to undercut any rights they might otherwise have” (1995: 266).

⁴⁸ It is also open to question how happy some cultural groups would be with recognition of self-government but no resources to govern.

⁴⁹ Such interventions might even be to the benefit of the majority of members of a cultural group i.e. where they are being persecuted by a very powerful minority (e.g. the situation in South Africa during the Apartheid regime).

previous part of this chapter, toleration is a purely negative feature of respect for autonomy. Accordingly there is no requirement to respect a cultural practice which causes harm to others. It is therefore impossible to understand how tolerating such harm could ever be *intrinsically* good, at least not without severely modifying our view of autonomy and the requirement of equal respect for persons that it entails.

Thus, I think a liberal society that took seriously its obligation to promote autonomy (including the obligation to give effect to a general right to culture) would be obliged to understand the good of free association very differently from the way in which Kukathas presents it. Schematically, free association is valuable for at least two reasons. First, groups are better able to secure the sorts of individualizable goods that are important to human flourishing (i.e. primary goods) than are individuals by their separate endeavours. Secondly, there are certain classes of goods whose production and/or enjoyment are impossible, either practically or necessarily, outside of groups (i.e. public, participatory and communal goods). This suggests that association is valuable not only instrumentally but intrinsically as well, i.e. that it is constitutive of certain sorts of goods. Given this relationship between groups and goods, it is not difficult to understand association as something that is important to human flourishing, and something sufficiently important to count as a human right.

However, these grounds do less to explain the importance of *free* association *per se*.⁵⁰ Again, the stress upon voluntary association derives from the value of autonomy: if it is true that the good life is one that is led from the inside rather than from without, such that it is a mistake to force people to pursue what they don't perceive to be valuable, then the same must apply to the collective pursuit of goods. From the choice of one's friends, one's work, neighbourhood, college, political party, football team and so forth, our sense of the value of any particular association is bound up with the idea that our membership is voluntary rather than coerced.⁵¹

Among the preferences that people have for the enjoyment of certain goods, however, are preferences about who they share them with.⁵² It matters, in other words,

⁵⁰ In other words, association that is voluntary as opposed to involuntary. Another possible interpretation of 'free' association is association that promotes autonomy, as opposed to that which does not.

⁵¹ Of course, the degree of choice varies according to the particular sort of group concerned: one has a far greater degree of choice in respect of one's friends, for example, than one does over one's fellow workers or one's neighbours. The point remains that one retains a basic element of choice in respect of where you live and what you do for a living.

⁵² A deeper question is how far free association goes: does it extend to disassociation? I don't intend to discuss this issue here, except to say there is a moral argument for separatism only where there is

that we often wish to share goods with some people rather than others: e.g. a meal with friends, communion with fellow Catholics, the French language with other francophones, and so on.⁵³ And it seems arguable that giving effect to these sorts of preferences is part of the exercise of free association. They are similarly bound up with notions of freedom of conscience, free expression and privacy, in the sense that our choices about who we associate with are typically expressive of our individuality and beliefs. Without the ability to *disassociate*, to a certain degree exclude others, we lose a basic means of self-expression. As Mill put it:

We have a right ... in various ways, to act upon our unfavourable opinion of any one, not to the oppression of his individuality, but in the exercise of ours. We are not bound, for example, to seek his society; we have a right to avoid it ... for we have a right to choose the society most acceptable to us (1966: 95).

This points to a tension between the importance of association as an expression of individual choice, and the importance of association as a basis for distributing goods. On the one hand, giving absolute weight to individual and collective decisions about association would involve at least two kinds of harm: the first is the kind of oppression described above, where groups come to enjoy an unfettered authority over their members, such that exit is the only option available to dissenters; the second is the situation where people are excluded from the distribution of morally important goods because they are not members of certain groups.⁵⁴ On the other hand, there are many circumstances in which interfering with someone's choice of society or company would amount to an intolerable intrusion on their autonomy and the free expression of their personality.⁵⁵ Clearly, pursuing either value (protecting individual choice, securing the distribution of certain goods) to the exclusion of the other would be unpalatable.

continuing and serious denial of self-rule to a group under such circumstances that seeking to modifying the existing state is no longer viable as a political objective. See my remarks in Chapters 5 and 7.

⁵³ I am not suggesting that there is anything necessary about these preferences – there are no particular limits to the sorts of preferences that people have in this regard, whether selfish or altruistic.

⁵⁴ As Walzer reminds us, membership is “[t]he primary good that we distribute to one another”, one which “structures all our other distributive choices: it determines with whom we make those choices, from whom we require obedience and collect taxes, to whom we allocate goods and services” (1983: 31).

⁵⁵ See also Chapter 7 re the problems with interfering with people's conceptions of membership.

Supporting a general right to culture means supporting a framework in which diverse cultural goods are available to all on an equal basis. Supporting a general right to culture thus requires a balance to be struck between protecting the interest that people have in being able to freely associate with others and their interest in being able to share in the distribution of diverse cultural goods.⁵⁶ State interference in the internal rules of any association must, therefore, turn on two main considerations: the nature of the group and the moral importance of the good or goods it distributes. As we will see, these considerations help to determine not only *when* the state may or ought to interfere, but also *how* it may do so.

The latter consideration is relatively straightforward: the greater the moral weight of a particular good, the more important it is that the state ensure that it is distributed fairly among inhabitants.⁵⁷ The nature of a group, by contrast, is a more ambiguous matter. Specifically, it isn't obvious why the sort of group should be treated as a distinct consideration, independent from the importance of the good in question. For example, one reason why interfering in informal, small-scale groups might be thought a bad idea is because they typically don't distribute goods of sufficient importance to justify such interference (e.g. conviviality at a party). However, this isn't necessarily the case.

For the sake of example, let us assume that we could show that a given person X would be significantly better off if they were a member of a specific small-scale informal group, such as a family or a group of friends. It might be that membership of that group was the basis for distributing a substantial fortune, not to mention a strong sense of fraternity. At once, one can point to an immediate distinction, in the sense that it is far more difficult for the state to interfere with the distribution of a communal good (i.e. fraternity) than an individualizable one (i.e. property). Granted that this is

⁵⁶ On the one hand, there is the harm to people's sense of autonomy that tends to flow from the forcible inclusion of members into certain associations, and on the other hand, the harm that results to people because of their exclusion from the distribution of certain goods. My argument against GD cultural rights can be understood as a corollary of this claim: not only would GD rights make one's access to specific cultural goods dependant on one's membership of specific groups, they would also distribute other goods (e.g. rights to political participation) on the same basis. At the same time, a general right to culture doesn't involve forcing a liberal conception of membership upon particular associations, because it doesn't presuppose membership as a basis for distribution of cultural goods.

⁵⁷ The corollary of this suggests a *de minimis* argument: the state shouldn't involve itself in the distribution of relatively unimportant or trivial goods.

so, such interference is nevertheless not impossible.⁵⁸ Why, then, would we regard this particular *kind* of intervention (forcing a specific group to accept X as a member) as intolerable?

The reason, in my view, is the nature of the group. In respect of the example given, a group of friends is an association constituted by preferences of each member that one assumes to be directly expressive of their individual personalities.⁵⁹ As such, any interference by the state with the membership of the group would be a significant interference with its members' autonomy. Similar considerations arguably apply, however, to other groups besides the small-scale, face-to-face variety - in particular those based upon the pursuit of shared values and beliefs: e.g. religious groups.⁶⁰ Indeed, the best argument against interfering in the internal workings of religious groups is that, unlike other sorts of cultural groups, they are necessarily based on shared values and beliefs.⁶¹ As such, for the state to become involved in doctrinal questions (e.g. who is Jewish, who is entitled to receive Communion) would amount to a direct interference not only in the interest of members in free association, but also in their arguably more compelling interest in freedom of thought, conscience and religion.⁶²

However, the nature of the group as a relevant consideration doesn't preclude a state from interfering in the internal workings of a group *in toto*. Rather, it merely constrains the state from interfering in the *membership* of certain sorts of groups (i.e. those constituted by the personal preferences or evaluative beliefs of members). For example, although states do not interfere directly in the composition of private groups, it quite obviously governs the distribution of property within families, it regulates contracts between friends, etc. Although the private nature of religious

⁵⁸ Nor is it true that communal goods can only be distributed on the basis of one's preferences (tolerance, for example, is a communal good, but one does not tolerate what one doesn't like). One can coerce people to behave in a certain way, with a view to cultivating certain attitudes and beliefs.

⁵⁹ Of course, friendship is voluntary in a way that families are not. The relevant point is that both are based on strongly affective relationships.

⁶⁰ Ideological non-religious associations also fall into this category.

⁶¹ In Chapter 4, though, I offered several arguments against this view, at least in the sense of inferring belief from membership. In most places, membership of religious communities is more a matter of upbringing than choice. Equally, one's choices may be dictated by tactical considerations: i.e. Rushdie's example in *The Satanic Verses* of the Hindu untouchable who converts to Islam in order to be able to draw water from the well.

⁶² The peculiar character of religious groups - i.e. that they are comprehensive and mutually exclusive in a way that ethnicity, language and nationality are not - also suggests why they are not eligible for state support in the same way as other groups: for the state to support (as opposed to merely accommodate) particular religious beliefs as against others is incompatible with supporting a society that is culturally diverse.

groups obliges the state to refrain from interfering in issues of membership, the same argument cannot be extended to cases where religious groups distribute non-religious goods, e.g. employment, education, property, civil status, etc.⁶³ People's interests in such goods are not any less compelling by virtue of their membership in private or religious groups (or lack thereof). Nor can any state be expected to remain neutral in the face of harm to those interests. Put another way, although the state ought as far as possible to refrain from adjudicating issues of membership, the act of distributing primary goods takes groups out of the private sphere within which they enjoy substantial protection from interference, and into that public sphere within which groups are subject to state regulation.⁶⁴

The same argument applies *a fortiori* to other sorts of cultural groups. Where cultural groups get into the business of distributing primary goods, including public rights and duties, the cultural character of their association cannot be used to shield unequal distributions from state interference. That is, groups cannot deny members access to education or healthcare, for example, nor unfairly deprive members of property or employment. Nor is it proper for any cultural group to be ceded public authority in order to penalize either members or nonmembers in terms of things like voting rights, right of abode, or language use. However important our interest in choosing the society most acceptable to us may seem, we violate the autonomy of others where we exclude them from the distribution of such primary goods and otherwise ignore their compelling moral interests.⁶⁵

In conclusion, protecting the right of free association is an essential part of supporting a plural society. Among other things, it makes possible the pursuit of

⁶³ See Greenawalt (1998). Greenawalt suggests that the same considerations that apply to religious groups (because they are necessarily associations based upon the commonality of specific values) apply to other ideological associations: e.g. political groups.

⁶⁴ For an opposing view, however, see Réaume:

Until proven otherwise, every culture should be presumed rich enough to create internal space for dissent and creative debate about its future. Those who represent embattled causes within their own community and yet resent external interference testify to this richness. The Catholic who thinks divorced teachers should not be fired from separate schools, and yet thinks the hired teacher is wrong to bring unjust dismissal proceedings ... demonstrates her faith in the internal capacity of her community to permit fair and free discussion and deliberation of these issues. Outsiders may facilitate such discussion where possible, but they should not interfere to determine the outcome of the debate (1995: 140-141).

⁶⁵ This gives a partial answer, in a roundabout way, to the question posed by Nozick: whether it is just to exclude people to make members of a group better off (1974: Ch 10). For a state to allow a group to exclude individuals from the distributions of such goods in order to make its own members better off would violate its own obligation to support the autonomy of each inhabitant equally.

certain public, participatory and communal goods that are independently valuable. And, as we have seen, it is an important part of the free expression of an individual's tastes, values and beliefs. Thus, by extension, it is an important part of personal autonomy – people's ability to pursue different valuable goals and options. Free association is not an absolute right, however, and its protection must be consistent with other rights that people have. In particular, free association cannot shield groups from legitimate state action concerned with protecting the compelling moral interests of each inhabitant or, indeed, the interest of all in the general availability of diverse cultural goods.

ii. A general rights approach to language rights

In this final section of this chapter and this thesis, I mean to address the relationship between the idea of a general right to culture and the idea of language rights. Specifically, to what extent do our ideas about the importance of culture and the good of free expression involve the state being under an obligation to promote, regulate or prohibit the use of particular languages?

The general approach I've argued for is that the obligation to support culture derives from the extent to which it is intrinsically good and sufficiently public. The use of any specific language, however, need not meet these conditions: as mediums for the transmission of other cultural materials, their value seems primarily instrumental.⁶⁶ As Brian Barry points out, "it can be said of language as of no other cultural trait, that it is a matter of convention".⁶⁷ Nor, where a language is spoken or used by only a handful of people, could it be said to have met the condition of publicity.

Against this, there is the close relationship between language and individual expression and the cost to individuals in learning and using more than one language. Equally, the dominant role that language plays in the transmission of cultural materials, information and ideas is reason enough to take rights to language use seriously.⁶⁸

⁶⁶ I've also argued that cultural goods are transparent, rather than language-bound: see Chapter 3.

⁶⁷ "No doubt every language has its own singular excellencies, but any language will do as the medium of communication in a society so long as everybody speaks it" (1998: 316).

⁶⁸ I've already adverted elsewhere in this thesis, to the thickness of the relationship between culture and expression. In more senses than one, 'culture' can be said to consist in the expression (in the broadest

These are the broad considerations involved in considering rights to language. What, then, are the specific interests at stake? The difficulty lies in identifying a morally compelling interest that neither obtains too narrowly in a particular group (giving special resources to those who choose a particular form of expression over others), nor one that is too general (so that there is no protection for the use of any particular language). There are the interests of those who use a particular language for whom learning another is difficult (e.g. the old), in expression and communication with others, as against the evident role that a state has in encouraging public mediums for the transmission of ideas and cultural materials, (e.g. educating the young in the use of a common language), and the interests that individuals themselves have in being able to communicate with others. Lastly, there are the (more indirect) benefits of linguistic diversity, in the sense that individual *languages* are improved by interaction with others, and that cultural diversity is richer as a result.

Let us begin with the premise that, whatever languages are spoken by individuals, it must be wrong for the state to persecute them for that. The idea that people have a compelling interest in expressing themselves in the language of their choice seems obvious enough, but there is no shortage of states in which the use of specific languages is itself sanctioned in certain contexts.⁶⁹ This is, however, less than the claim that people have a *right* to language use: the liberty in question obtains in their right to free expression, because one's choice of language (in several senses) is an intimate aspect of expression. A right to language *use*, however, runs more broadly – it envisages situations in which individuals have not only a liberty to express themselves in the language of their choice, but also a right to require others to use the same language in certain contexts. That is potentially broader than merely the right to be able to receive information, because *that* right (part of the right to free expression) obliges the person who is under the duty merely to ensure that the right-holder enjoys *understanding* of the language used: for example, if A knows that B understands A sufficiently well in language X but that B prefers to use language Y, then A's obligation to explain something to B does not necessarily extend to A using the

sense) of different ideas, values and beliefs. And the importance of culture to human development, I have argued, lies very much in its transmission, in making known to others the possibility and the value of different goals and options. Expression, in this sense, is essential to culture.

⁶⁹ Leading examples here are the use of Kurdish dialects in Turkey (regulated in political speech and broadcasting), the use of Macedonian in northern Greece, and various dialects in Central and Eastern Europe. More generally, many native language speakers were penalized under colonial rule for use of their indigenous tongues.

language B prefers. Of course, there are often good reasons for A using the language B prefers (e.g. good manners), but that is not itself entailed by A's obligation to B. In this way, we can see that A's obligations to B where B has a right to use language Y are potentially much more extensive, than where A has obligations to respect B's right to free expression (e.g. to ensure that B is able to receive certain information).

It's also important to understand how other general rights may involve the accommodation of linguistic diversity: the right to a fair trial, for instance, typically requires that a defendant be able to understand the proceedings – specifically to understand questions put to him or her, to have exchanges between others explained, to have the judge's statements translated, and so forth. Fairness to the defendant also requires that what she or he says is understood by the court. This means that, where it isn't practicable for the court to hold its proceedings in a language understood by the defendant, translation must be provided. More generally, regardless of the official language of a state (if any), it is obliged to provide certain services in other languages in order to ensure the provision of basic needs: e.g. housing, welfare, public health.⁷⁰

This, in turn, obliges the state to determine in good faith what languages its inhabitants use and understand. For example, if it is apparent that many people in a particular region are monolingual in a minority language, it is irrelevant that the state is determined to provide services only in the language of the majority – its obligation must be to ensure that those inhabitants enjoy government services to the same degree as those in the majority language.⁷¹ Nonetheless, this is not identical with the idea of language rights per se: although expression and communication are protected within these particular contexts, there is no compelling interest that justifies non-basic services to be provided in the language of someone's choice.⁷² In order for the state to

⁷⁰ The point is that people should not themselves have to bear additional costs of translation, etc., because of the particular language they happen to speak or understand. Access to services (e.g. health, legal information) is, in this sense, a primary good, something in respect of which people should not be disadvantaged by reason of their language.

⁷¹ This raises a threshold viability problem: the state must expend proportionally more resources per person to provide the same resources. A 'minority' language, such as Kurdish, whose population may run to several million speakers is in this sense more viable, whereas a truly minority language e.g. a tribe with a handful of members, is proportionately more expensive. See Raz "Here (as in education) the policy calls for allocation of public resources. In competition for them the size of the groups concerned is an important factor. It works in two ways. By and large it favours the larger groups with a more committed membership. But it also calls for disproportionate support for small groups which are strong enough to pass the viability test. Given that the overheads are significant, the per capita cost of support for small viable cultural groups is greater than for large ones" (1995: 190).

⁷² For example, it is less than a right to governmental services and public education in one's language – that would require some determination about what one's *own* language is. This isn't an issue for monolingual people, but for those who understand more than one language. Why, for example, should

be obliged to support language use to this degree, it must be shown to be *viable*. This can be understood as a corollary of the requirement of publicity mentioned earlier – the idea that, in order to be eligible for public support, a good must be sufficiently public (i.e. available in principle to all) to benefit others.

The question of viability, however, brings into sharp focus the issue of language education. This is because public support for minority language education to a large extent ensures its continuing viability.⁷³ At the same time, choices about language education are less straightforwardly an expression of individual preferences for language use – to those who prefer to express themselves in a particular language, public support may be heartening, but it is strictly speaking irrelevant to their own decision. People’s preferences about language education generally concern not so much the language they themselves use but the language they wish others to use – especially their children.

Preferences about language education are complicated by several features:

(1) For most people, language acquisition is a function of their upbringing and education. In this sense, it is involuntary. Some people may choose to learn another language at a later stage, and might even prefer to live in it, but this is fairly unusual.

(2) People can be raised and educated in more than one language. For many people in many countries, this is the norm.⁷⁴ Where this happens, use of any particular language is voluntary, and people may be expected to understand a language other than the one they themselves use.

(3) In different circumstances, parents may hold strong preferences for their children to learn particular languages. However these need not be for the language

it be a *right* - as opposed to one interest among others - for a fluently bilingual person to have government services in the language of their choice? My point is that the viability of the language is an independent constraint on language use - for example, if someone is fluently bilingual in Spanish and Tibetan, it would be unreasonable to insist on being served in Tibetan in Miami.

⁷³ See e.g. Kymlicka “it is very difficult for languages to survive in modern industrialized societies unless they are used in public life” (1995: 78). At the same time, there are languages denied public support which are clearly viable: e.g. there are 12 million Kurdish speakers in Turkey, notwithstanding the prohibition against Kurdish in broadcasting and political speech.

⁷⁴ A child might learn (*not* be taught - teaching only matters to reading and writing, spoken language is the most easily acquired) one language at early infancy and gain another when they go to school (as is the case in many immigrant families), whether or not that is the language of instruction or simply part of a State’s policy towards bilingualism (Canada, Switzerland, Belgium). Many children begin learning second languages at their parents’ behest (i.e. before they have a choice), although ability between students becomes more of a difference as age progresses. In truth, in many parts of the world, the number of languages in active competition is more than two - in India, China or Sub-Saharan Africa, a number of languages criss-cross a given population and people speak more than one, and comprehend several. In this sense, it is multilingualism that is almost involuntary, rather than monolingualism.

that they themselves use: an immigrant parent may wish his or her children to learn the majority language, because they view that as a means to improving their position; an indigenous person may wish his or her children to learn the indigenous tongue, even though they themselves do not speak it, because they regret its passing.⁷⁵ In other circumstances, the preference of the parent may simply be for their child to learn the language that they themselves use.

(4) It is generally the case that children will understand their parents' language if those parents speak it at home.⁷⁶ In this sense, parents' preference for public education in that language is less about securing their children's ability to use and understand it per se, than about ensuring that their children are able to take advantage of opportunities within that language, and to ensure its general viability.

I believe that our assumptions about public support for language education are guided by two intuitions that can and do conflict. The first is the view that children shouldn't be disadvantaged in respect of their ability to pursue a meaningful life within the broader society. Where a society contains more than one language, public education is obliged to promote mutual comprehension as far as possible – including ensuring competence in a common language.⁷⁷ As Barry maintains:

Equality of opportunity is ... a criterion on which a society can properly be judged. But it should be construed as an opportunity to acquire the country's language, to achieve educational success in that language, and to gain employment on the basis of those qualifications without suffering discrimination [T]he provision of genuine equality of opportunity without

⁷⁵ In many cases of minorities, one is properly speaking of the *preferences* of parents to pass on a language that they themselves may not speak and certainly never read and wrote - this is the case with Maori and many native American tongues - where in many cases the ethnic language is taught as a first language to the children of those whose first or dominant language is either English or French, in some cases for several generations.

⁷⁶ We have not considered the possibility of bilingual families (which are not that uncommon). It seems where parents endeavour to use both languages on an equal basis, that children will acquire both languages (although comparative fluency will certainly fluctuate according to a child's growing and developing environment). Else, one language may predominate and in a few cases the (preferred) language of one parent will not be passed on (generally from a deliberate choice, although it may equally be a consequence of one parent being the primary care-giver). Fluent bilingualism may equally develop where the language used at home is different from that of the majority (in which case, the child will learn both with fluency for a while). We can at least agree that parents have a right to teach their children their own language and can insist upon its use at home (with varying degrees of success).

⁷⁷ Where appropriate, this may be a majority language.

linguistic assimilation would be, if not impossible, fantastically burdensome (1998: 316)

Against this, there is the intuition that, although language use is in one sense of purely instrumental value, linguistic diversity is valuable in its own right, and worth supporting for the benefits it brings to all inhabitants. All this tends to suggest that the appropriate course for a state to adopt is to ensure education in the majority language, but to make provision for bilingual education in minority languages that are otherwise viable.⁷⁸ This provision should be based on parental choice, as is consistent with a general rights approach to language provision – as opposed to a GD-rights approach which would presumably involve restricting access to minority language education based on criteria of ‘membership’ of a minority language community. As noted above, the viability test should not be used to exclude the provision of bilingual education in small minority languages (as opposed to those languages used by substantial minorities), but merely to ensure that the state does not expend resources supporting private language use for its own sake. There must be some interest in supporting the minority language that is sufficiently public, one that is consistent with making the opportunities it contains and the cultural materials it supports available to all.

⁷⁸ However, I also think it is best to treat the feasibility of language education as a question of fact: if it is clear that *ceteris paribus* it tends to disadvantage its students vis-à-vis students educated in the majority language, then this presents a compelling argument against continuing it. The autonomy of individuals is more important than survival of particular languages. See e.g. “Increase in Tests Scores Counters Dire Forecasts for Bilingual Ban” by Jacques Steinberg, *The New York Times*, 20 August 2000.

Chapter Nine

Conclusion

The good of culture can be characterized in many ways. A useful metaphor, though, is that of a library. Let us assume that this library contains books by many authors, from many backgrounds, in several languages. The users of the library have various tastes and preferences: for certain authors, genres, languages, and so on. Some prefer to read widely, while others are content to know a particular genre or tradition well. The point is that, no matter what kind of books a user is interested in, the *existence* of the library itself is a general good, one shared equally by all readers.

Throughout this thesis I have argued that people benefit from culture in the same way. Whether or not they always realize it or appreciate it, people benefit from having a diversity of cultural materials available to them in their society, because it illuminates different ways of living and dealing with the world, and different ideas about worthwhile goals and options. As Barry puts it, “The chief beneficiaries of the world’s literature, philosophy and science are those whom it enables to break out of the limited range of ideas in which they have been brought up” (2000: 23).

The way in which we characterize culture as a good matters to the way in which we understand the possibility of *rights* to culture. The central focus of this thesis has been the claim that special cultural rights are needed to protect the interests that people have in particular cultures, because existing liberal conceptions of uniform human rights are inadequate to the task.

In the course of my discussion of these claims, I suggested that proposals for special cultural rights suffered from a number of difficulties. First, there is no obvious case for claiming that people *need* such a thing as a coherent, homogenous culture in order to lead meaningful, autonomous lives (Chapter 3). Secondly, I expressed doubt that there even *are* such things as coherent, homogenous cultures. Thirdly, I maintained that the notion that people had significant interests in cultures *qua* members misunderstood the relationship between people’s sense of personal identity, on the one hand, and their membership of cultural groups, on the other (Chapter 4). If *identification* with culture is what matters, then the emphasis that most writers give to the social characteristic of membership is misplaced.

In the course of this thesis, I also looked at specific proposals for special cultural rights (Chapter 5), together with the conceptual plausibility of cultural rights *qua* rights (Chapter 6). But the central theme of my argument has been that, if our interest in culture is general, so too should the distribution of rights to culture (Chapter 7). The central paradox in accounts of special cultural rights seems to be that particular cultures are sufficiently important to justify the existence of rights, but not sufficiently important to justify the existence of general rights.

To return to my earlier point, the problem stems from the way that supporters of special cultural rights have understood – or rather misunderstood – culture and its value to individuals. In placing the emphasis on the cultural materials of particular groups, they appear to assume that culture is in some sense architectonic, i.e. that cultural materials that share the same social origin form somehow a coherent system. But this seems to me a fanciful and simplistic idea. It is like supposing that Shakespeare is only meaningful insofar as we understand him to express through his works a consistent point of view. Certainly, we shouldn't suppose that, in order for cultural materials to be meaningful, particular *cultures* need to be coherent or have integrity.

Nonetheless, supporters of special cultural rights seem to take such a conception of culture as the basis for their claims. To return to the analogy of the library, the argument for special cultural rights is akin to the claim that, because the works of Jane Austen contribute to their well-being, readers of Jane Austen are entitled to a particular share of the library's resources. Worse still, it is like the members of the Jane Austen Society arguing that they are entitled to determine which library users may borrow her novels, and even to restrict those users from reading the works of rival novelists.

At the same time, I am conscious that I have offered only the briefest sketch of what a cosmopolitan conception of cultural rights might look like (Chapter 8), in respect of free association and free expression. Clearly there is a great deal more work that could be done, many more issues that need to be addressed, and further clarification to the principles involved. I have tried in the space available simply to clarify something of our notions about the importance of culture, about what rights to culture might involve, and how general distributions of such rights seem more consistent with liberal egalitarian principles.

There are at least three criticisms of cosmopolitanism that may be briefly mentioned at this point. The first is that it denies the importance of special attachments in people's lives, those to their family, friends, neighbourhoods and their particular cultural affiliations like ethnic group or nation. The second criticism is tied in with the first, that it is unrealistic to promote a cosmopolitan framework because our sympathies are limited by our membership of existing cultural communities. In other words, it is too difficult to achieve the kind of generosity of spirit that a truly cosmopolitan society would need to underwrite its institutions. A third criticism is simply that cosmopolitanism itself is unattractive. According to different writers, it is variously too shallow, too eclectic, too impersonal and too inauthentic, in comparison with those political communities built upon genuine, deeply-rooted cultural communities.

The short answer to each of these in turn is first that there is no inevitable conflict between a cosmopolitan approach to rights and the emphasis that people attach to their personal affiliations, any more than having rules against nepotism in public office denies the importance of family ties. The criticism becomes more accurate if we understand it as a complaint that these special attachments are not given special weight in the distribution of rights and primary goods. The point here, though, is precisely the one I have made at length in previous chapters, which is that to do so would be to breach egalitarian principles.

The second criticism is that such a framework is unrealistic. Certainly, I think it would be naïve to suppose that adopting a cosmopolitan approach to the issues discussed here would somehow efface the tensions that are endemic to multicultural societies. But the point of cosmopolitanism isn't conflict management *per se*. Regardless of whichever approach is taken, it seems clear that different cultural groups will seek policies and resources for the benefit of their members first and foremost. And indeed, as Raz notes, this seems a natural consequence of competitive pluralism. The state, in its role as a glorified library committee, will still have to manage all the competing demands on its limited resources. The basic point here is that, although some of the details are more novel, the task is ultimately little different from the task that modern states have to cope with under conditions of ordinary, garden-variety pluralism. It should not stretch the imagination too much, then, to see states coping with a cosmopolitan framework.

The final criticism of cosmopolitanism I have mentioned is that it is an unattractive ideal. I have little to say in answer to this because I am not sure what might be said to make it more appealing. It seems to me that most of the interesting cultural developments in human history have always developed from an interchange of ideas between different worlds, and that the best art and the best literature has never been parochial in scope, but that may simply be a matter of opinion. I would simply say that inhabitants of a cosmopolitan society are not expected to like everything that is available: a culture is no less flourishing because it contains both football and opera, science-fiction and poetry. As Appiah suggests, cosmopolitanism is, like patriotism, more of a sentiment than an ideology (1997: 23). It involves, then, an appreciation of the framework, if not for the diverse elements of culture it allows to compete and coexist, then at least for the breadth of worthwhile goals and options that it makes available. This makes inhabiting a diverse cultural milieu count among any person's most important interests,¹ even where in perhaps the great majority of cases the fact of that diversity goes largely unnoticed and its importance unacknowledged.

Rousseau's criticism of cosmopolitans was that they sought "far in their books for duties that they neglect to fulfil towards those around them. Such philosophers love the Tartars so as to be spared from loving their neighbours" (*Émile*, Bk I). "The essential thing", he counselled, was "to be good to the people with whom one lives". In the modern world, however, the people with whom one lives (i.e. shares a state) are likely to include people of different ethnicities, nationalities, religions and languages. In light of Rousseau's injunction, then, one may consider that the fault of special cultural rights is not that they are communal or collective rights, but that they do not seem to be collective enough.

¹ Whether or not it has always been so, I am not certain, but it seems clear that this is at least true of the modern world, i.e. in a world where the daily movement of ideas, people, goods and services across borders is the global norm. Perhaps in pre-modern societies, being cut off from the world and its ideas mattered less to individual well-being, although this seems unlikely in my view.

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