

Political Theory and Minority Groups: An Assessment of Liberalism's Commitments

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Abstract

The thesis assesses the legitimacy of liberal political theory relative to two major theoretical features that it advances: consent theory and neutrality. The essay considers these two constituent traits in light of protections, restrictions, and accommodations made for minority groups. The primary objective of this work is to illustrate both how and why liberal political theory is compromised by its focus on the individual, and more specifically political obligation and neutrality. I counter the fundamentally liberal conception of the individual, which is understood as an autonomous being characterized by individual freedom. Individual freedom involves two major claims: (1) freedom from coercion, interpreted in my paper as a commitment made by individuals to obey the laws of the state and thereby act freely from coercive state measures; and (2) moral self-determination, based on an individual's right to pursue his or her well-being. The liberal commitment to the individual seems to make consent a workable means of acceptance of the state; however, consent theories prove generally unfeasible, but specifically for minority groups. Consent theory is analyzed into three types (i.e., actual/express, tacit, and hypothetical). The second source of criticism, neutrality, is sometimes offered by liberal political theorists as a way to resolve the dilemmas of consent, as well as the deep conflicts in pluralist societies by various groups. I review and assess John Rawls' formulation of neutrality in most depth. As conceived by liberal political theory, consent and neutrality necessitate reconsideration because of the absence of provisions for minority groups. My thesis reveals that in order for liberal political theory to succeed in its claims of universality and fundamental rights, it must properly address the position of minority groups within society.

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Introductory remarks

Political obligation has been an ongoing favorite topic of discussion for political philosophers since Aristotle. However, political obligation discussed in terms of pluralistic societies has been comparatively neglected. On the other hand, minority rights as part of political discourse, whilst maintaining a pluralistic view of society, have received quite a bit of attention. One of the reasons for this situation is the turmoil concerning minority rights which has occurred in recent years with more frequency. Recently, Kosovo has become a great example for advocates of secession as a right that minorities have under specific condition.

However, the counter-part of minority rights, namely the political obligations of minority groups and immigrants have not been given an equal amount of consideration. One of the reasons for this lack of pursued interest lies in the fact that obligations entailed by these groups seem, at least intuitively, clear-cut. Voluntaristic accounts of acquiring political obligation are generally thought to be justification enough for the authoritative and coercive nature of the state for national minorities and immigrants. I will argue against this approach. If indeed voluntaristic theories fail in anchoring political obligation then the justification of the duty to obey the law must lie elsewhere.

Further, I propose a discussion of different theories of political obligation and specifically apply them to the case of national minorities. I suggest embarking on a different path in approaching political obligation theories, early-modern, modern and contemporary from this seemingly contentious position.

Most political philosophers take the state as the primary unit of analysis for building theories irrespective of their vision for grounding political obligation. Choosing to see the state

as a homogenous unit may be simplifying but it is also simply empirically erroneous. Throughout the course of this paper I keep the boundaries of states intact, as arbitrary as they might be, but choose to look at the heterogeneity of societies and so perhaps dismantle the seemingly solid block of the state in terms of shared values.

The discussion of neutrality comes about when approaching the issue of pluralism within societies. Neutrality is the liberal response to pluralism and the way in which liberals seek to reach agreement given the plurality and diversity of different conceptions of the good. For the most part I will discuss the conception of John Rawls of neutrality and public reason since his oeuvre has had an unquestionably profound influence on the work of many philosophers.

For the specific case of minorities neutrality is of crucial importance. Does neutrality succeed in addressing the claims of minority groups? I will argue that Rawls's vision of neutrality is in need of refinement if it wants to accommodate the specificity of claims for cultural recognition by minority groups. In order to do so I will rely on the arguments of other authors and my own perspective and arguments on the issue at hand.

It becomes clear from these brief first statements that I want to look at political obligation theories from a particular angle, namely a pluralistic vision of society and discuss whether or not liberal neutrality is best suited to provide a proper framework in accommodating minority groups.

Main purpose and rationale

Central to liberalism is an emphasis on the individual seen as an autonomous being, characterized by individual freedom. I take individual freedom to be a combination of two major claims—freedom from coercion and moral self-determination. The latter claim is based on a right to the pursuit of individual happiness. Given a pluralist vision of society the necessary

condition that stems from achieving this liberal aim is a commitment to tolerance and neutrality between different conceptions of what happiness and the good life entail.

In the words of Will Kymlicka liberalism is "primarily concerned with the relationship between the individual and the state and with limiting state intrusions on the liberties of citizens"¹. The former claim concerning freedom from coercion is interpreted in my paper as a commitment made by individuals of obeying the laws of the state. This promise incurs the political obligation of individuals by absolving it from its potentially coercive nature and thus legitimizing the authority of the state.

However, the legitimacy of the liberal state is compromised precisely by its focus on the individual and more specifically on the two grounds discussed above: individual commitment and neutrality. Individual commitment brings forth the question of the possibility of consent, under its multiple forms, as it is described by many political theorists, while neutrality brings with it questions about solving the conflict, characteristic of pluralist societies, between diverse conceptions of the good.

The rationale underlying a discussion of consent theory under the general spectrum of liberalism is that consent theories are essentially liberal theories inasmuch as they demonstrate a particular preference towards individual commitment over unavoidable benefits or protection of interests.²

The rationale underlying a more narrow discussion of political obligation focused on the political obligations of minorities stems from their unique position inside plural societies. What is particular to the case of ethnic/national minorities is the impossibility of relying on even intuitive claims regarding the obligations owed to the government. I refer mainly to the absence

¹ Will Kymlicka, "Liberalism, Community and Culture". Oxford: Oxford University Press, 1989, 1

² A. John Simmons, "The Consent Tradition" in *Moral Principle and Political Obligation*. Princeton: Princeton UP, 1979, 69

of that which Jeremy Waldron calls “the moral force of *my* country”. Not only do liberal theorists have to face the “classical” problems which stem from relying on consent theory but also specific criticism which is particular only to the group I propose for discussion. This is critical for a theory which is based on providing justification for the legitimacy of the liberal state to each and every individual.

Finally, the politics of liberal neutrality deal specifically with minority rights and thus the choice of discussing specifically the case of minority groups seems less controversial and in lesser need of justification.

Definition and classification of minority groups

Throughout the course of this paper I shall make references to the case of minority groups and I believe that given the complexity of the concept a working definition is needed if this project is to be successful. For a proper definition and classification of minority groups I will mostly rely on probably the most influential vision, that of Will Kymlicka, who has made a vital contribution to minority rights theories and whose work has become essential reading for political scientists interested in the subject area.

Kymlicka differentiates between two types of ethno cultural groups - national minorities in multination states and ethnic groups in polyethnic states. However, a state doesn't have to fit necessarily within one group or the other. In fact, most states present features from both groups and it can be, as is the case with Canada, that the state is a mixture of the two categories.

According to the definition provided by Kymlicka a national minority is “a historical society, with its own language and institutions, whose territory has been incorporated (often

involuntarily, as in the case with Quebec) into a larger country”³. The national minority could have achieved its status either involuntarily, through conquest, colonization, or expansion, or through a voluntary agreement of entering a federation with another or more nations or cultures.

In contrast with this first category of minority groups, Kymlicka argues that immigrants are by and large ethnic groups, whose participation in a given state is voluntary. The political status of refugees is discussed separately from that of immigrants. Further, Kymlicka argues that although immigrants may desire to preserve some aspects of their culture, they also generally wish to integrate into the society and the culture that they enter.

In a nutshell, the main difference between the first and the latter group discussed by Kymlicka is that national minorities forming a community, as opposed to immigrant groups, provide their members with a “societal culture,” an extensive context of choice which offers its members a variety of meaningful options “across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres”⁴. Stemming from this vision, Kymlicka advocates for a more extensive scheme of rights for national minorities in order to protect their societal cultures from the “disintegrating effects” of the choices of the dominant cultural community⁵.

Kymlicka assesses the situation of immigrant groups from a different stand point than that of national minorities and for the purpose of my paper I choose a similar position. Immigrant groups stand in a specific relation in the context of discussing political obligation inside liberal frameworks and particularly when discussing consent theories. The case of immigrants falls, in my opinion, under the spectrum of actual consent. The reason for this claim lies in the

³ Will Kymlicka, “Finding Our Way: Rethinking Ethnocultural Relations in Canada. Toronto”, *Oxford University Press*, 1998, 2

⁴ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Oxford University Press, 1995, 76

⁵ Will Kymlicka, “Liberalism, Community and Culture”, 198

particularities of acquiring political obligations by immigrants: the voluntaristic nature of becoming a member of a state, the free choice, the informed decision that immigrants make before coming to a country, the oath of abiding and upholding the states' Constitution.

These are all relevant characteristics for the nature of the political obligations of immigrants. The interesting aspect which follows from this claim is the effect and potential reassessment of the theory of one of the most influential philosophers who have dealt with matters of political obligation, and in particular criticized the social contract theory, David Hume.

In *Of the Original Contract*, Hume criticizes the actual consent theory which claims that citizens have a duty to obey the law because they have freely and autonomously consented to it. Hume, along with other political philosophers, questions the idea of a contract between the state and individuals that simply does not, or rarely exists, and moreover points to the historical inaccuracy of the "original contract". In his own words actual consent theory is fundamentally flawed because:

Human affairs will never admit of this consent, seldom of the appearance of it; but that conquest or usurpation--that is, in plain terms, force--by dissolving the ancient governments, is the origin of almost all the new ones which were ever established in the world. And that in the few cases where consent may seem to have taken place, it was commonly so irregular, so confined, or so much intermixed either with fraud or violence that it cannot have any great authority.⁶

The case of immigrant groups which is anything but a small phenomenon contradicts Hume's claim. To exemplify the relevance of this group the numbers speak for themselves: in the United States official figures show annual permanent immigration averaging around one

⁶ David Hume, "Of the Original Contract" in *Essays, Moral, Political, and Literary*, ed. T.H. Green and T.H. Grose (London, 1875), 191

million people a year, while in July 2007 alone more than 460,000 people filed naturalization applications according to the *Migration Policy Institute*, Fact Sheet No. 21, February 2008. This is a category of minority groups for which political obligations arise from actual consent and which represents a prominent characteristic of the modern world. However, for the remainder of my paper I will not focus on the issue of immigrant groups although in a discussion of tacit consent theory their case will become relevant, but instead focus on minorities within multination states.

Structure and methodology

From here on my paper is divided into two main chapters each containing two sections and a final conclusion. The first chapter is devoted to a discussion of consent theories. The purpose is to show why consent theories fail in legitimizing the authority of the liberal state for national minorities. In section one I propose a discussion and a criticism of actual/expressed and tacit consent theories and their application to the case of national minority groups.

In section two I discuss theories of hypothetical consent, by relying mostly on Rawls's conception and provide for a criticism of his theory. This will make for a smooth transition towards the second chapter of the thesis which will, for the most part, be centered on a criticism of Rawls.

The second chapter is focused on a discussion of liberal neutrality. The first section of the second chapter is an introduction to concepts of liberal neutrality by revising the progress of the idea from its origins up to its contemporary vision and a general discussion of the claims that this theory advances.

In the second section I will try to show why liberal neutrality is ill-equipped to handle the case of minority nationals and why it is in need of refinement. I will argue against a Rawlsian

conception of neutrality in the political sphere, which I attempt to prove not workable or at least problematic for the case of national minority groups. Finally, I dedicate the last part of my thesis to a revision of the main arguments of the previous chapters and conclusion remarks.

For accomplishing the task that I have set for myself I will use as research methods the tools of politico-philosophical analysis: logic, moral and ethical argumentation, exegesis, and empirical examples. The sources of my research will mostly consist of books and articles written by political philosophers on consent theory, multiculturalism, minority rights and liberal neutrality.

1. Consent theories

1.1. *Actual and tacit consent*

Finding justification for political obligation and the authority of the state has been a particularly difficult task and one that has aroused much debate and conflict among philosophers. In this section I offer an incursion inside consent-based theories of political obligation. Since the literature is so vast on this topic I will explore actual and tacit consent theories through the work of Jean Hampton and A. John Simmons.

In *Political Philosophy*, Jean Hampton discusses political obligation and political authority, making a clear distinction between power and authority and grounding this distinction in entitlement. That is to say that those who have authority have a right to rule.

Furthermore, Hampton claims that the existence of an authority implies the existence of a correlative obligation to comply with its directives, hence the obligation to obey. This obligation is content-independent, it applies to all directives of the authority, not just the ones that we have independent reasons of our own to obey. The fact that a directive comes from the appropriate authority is itself the reason why we should comply with it. Moreover, the existence of an authority is said to provide preemptive reasons to comply with it that normally override all considerations to the contrary and include not just the right to issue directives of all sorts but also to enforce them through coercion.⁷

Consent-based theories start with Thomas Hobbes and the perspective on political authority changes significantly from early pre-modern theories of political obligation. First, Hobbes rejects Aristotle's 'natural subordination' theory on the grounds of rough equality between people, thus an equal vulnerability and lack of natural entitlement to rule.⁸ Rough

⁷ Jean Hampton, *Political Philosophy*. Boulder: Westview Press, 1998, 5.

⁸ Jean Hampton, *Political Philosophy*, 42.

equality applies both to physical and mental capacities and means that while we can acknowledge the differences between individuals, there is no superman or superwoman who can dominate any or all of us through their extraordinary powers.⁹

Hobbes's theory is a variant of consent-based theories that derive political obligation from the consent of those under the obligation. It is a so-called alienation theory of social contract, in which the conferral of the authority to rule is irrevocable. In order to secure peace and cooperation and leave the state of nature where people inevitably come into conflict with one another, individuals create and maintain political institutions. In Hobbes's construal the only form of political organization that can achieve in giving people assurance and establishing harmony and collaboration among them is absolute and irrevocable sovereignty. The authority of the ruler to rule is based on its service to the well-being of individuals.

The problem with this theory, which Hampton points to, is that if individuals judge the rules to be in fact life-threatening, they must be able to act against it. Thus, Hobbes's alienation theory must break down. Furthermore, Hobbes must be able to show two things: that even absolute monarchy is rationally preferable to the state of nature and that limited government is impossible and at least the second condition cannot be met.

Locke's agency theory of social contract is discussed by Hampton insofar that conferral of authority is revocable and conditional on the ruler, as agent, acting in accordance with the terms of authorization by the people, as principal.¹⁰ The difference between Hobbes's theory and Locke's lies in the political remedy for the conflictual state of nature between individuals, which is not as radical as in Hobbes's case. Hence, the political authority is in this case limited. According to Locke two-pronged agreements must exist: first, to form a political society, and

⁹ Hampton, 43.

¹⁰ Hampton, 62.

then to create a government. The government is necessary because left to themselves people may differ as to how to interpret and implement the laws of nature. Therefore, they create an impartial judge.

The problem with Locke's theory, as stressed by Hampton, is that the first agreement, creating political society itself, appears to be one of alienation, irrevocability and this is problematic for the same reasons as Hobbes's. Moreover, ownership of land is prior to the existence of political authority. But then, when one decides to emigrate, one must leave behind his land. A question arises: how can Locke's theory of property and authority be made compatible? Also, Hampton points out the problem of stability, basically that if political authority is genuinely revocable, it will be inevitably unstable.

Furthermore, the problem of respecting contracts applies to the contract by which the government itself is created. Finally, the actuality of the consent is also a problem; it is no good to recoil to hypothetical consent, because hypothetical consent can only generate hypothetical obligation. We can thus conclude that in Hampton's view, which I find convincing, early modern theories of political obligation fail to find justification for the authority of the state in their particular theories.

The consent theory of political obligation is also discussed at great length by John A. Simmons in *Moral Principles and Political Obligation*. He explains the basis of the consent thesis by grounding the political obligations of citizens in the personal performance of a voluntary act, which is the deliberate undertaking of an obligation. The act must not only be voluntary, it must also be directed specifically at undertaking an obligation.¹¹

According to Simmons there are three criteria that any consent theory must meet: generality, particularity and stringency. The assumption of Simmons's argument is that human

¹¹ John A. Simmons, *Moral Principles and Political Obligation*, 57

beings are naturally free. This is taken to mean that they have a natural right to freedom, i.e. a right that is ascribed to them just in virtue of their humanity, and not instituted by any institutional relations. In the consent-theory construal the state is an instrument for serving the interests of its citizens, but this is not the source of its authority. Only by giving his consent and so indicating his belief that the government serves his interests does someone become obliged. The claim is that one need not consent even to a perfect government. What the consent theory protects are not the interests of the individual but his autonomy and freedom.¹²

Simmons asserts that the strength of this theory rests in that deliberate undertakings are surely a straightforward way to acquire obligations. Furthermore, the particularity requirement is easily met and it respects and maximizes the individuals' freedom. In contrast, the weakness of consent-theory lies in the failure to meet the generality requirement, or else risks to show that no government is legitimate. Furthermore, if it seeks to remedy this by relying on tacit consent, it will get more than it bargained for, because instead of a theory that shows all states to be illegitimate, it will end up with one showing all states as legitimate.

Moreover, Simmons argues that recoiling into an account of hypothetical consent is also ineffective because hypothetical consent can generate hypothetical obligation only. Hypothetical consent cannot be the ground of obligation; at best, it is a heuristic device to discover what obligations we have, independent of our consent, what rational and appropriately motivated persons would consent to.¹³

While the theories presented above seemingly leave the issue of pluralism in modern societies at the margins they are nonetheless important for a proper assessment of consent-based

¹² Ibid., 54-62

¹³ Ibid.

theories and in the following I shall narrow down the discussion to addressing issues that are particular to pluralist societies, namely those concerning national minorities.

Firstly, actual consent theory can arguably fail to ground the political obligations of national minorities for the “traditional” arguments which I have discussed in the above presentation. What can be added for the case of minority national groups is that in some cases the adherence to the state has not been made through coercive measures for which the situation of actual consent seems clear-cut and naturally to its detriment, but by voluntary agreeing to enter a federal state. In this situation what needs assessing is the existence of an actual contract between members of the minority and the state.

By a stretch of the imagination assuming that this contract or some form of it does exist, the question of why would anyone be bound by a contract made by his/her ancestors still remains. No historical tie could bind the later generations of these original contractors so much so as to derive actual moral and political obligations from this agreement. The personal facet of consenting would still be missing. This line of thought would be inconsistent with the original claim of consent-based theorists stating that no man or woman can be bound to a government except through personal consent. Inasmuch as there is no personal, individual consent to obeying the laws of the state the fact that other people have consented to it, even ones who it may be said have a special status by virtue of their membership, is not sufficient to bind their descendents to the law. Furthermore, this particular social contract if it were to have existed would have been made by the representatives of the minority group. The authority of the representatives is questionable inasmuch as it potentially leaves the issue of minorities within minorities and their claims outside the political debate.

However, what remains is that, in the majority of cases, the incorporation of minorities within states has in fact been the result of the use of coercive power through pressure, conquest and/or colonization.

In order to solve the fact that most societies have not been established through a social contract some liberals have turned towards tacit consent theory. Locke has provided a strong argument in favor of tacit consent but one that is still insufficient for grounding political obligations. The criticism of A. John Simmons to tacit consent theories seems convincing but it doesn't properly address the issue of immigration and the contemporary problems that it raises. Locke's theory may have been properly anchored within the time of his writing but for the present situation the perspective is significantly different. The criticism following this account rests on the impossibility for immigrant groups to choose not to adhere to a given political order.

Characteristic of the present political situation and of significant importance to political obligation theories is the absence of unoccupied land. Given that all the territory of the world has been claimed by one country or another, individuals are forced into a pre-established political order and do not have the option to create their own. Locke uses the expression *in vacuis locis*, as an alternative to the established political order, meaning "in empty places", but there is no longer such an option for those who are not willing to join an existing government.

In the time of Locke's writings there were such empty spaces and Locke makes references to America so as to exemplify his claim. However, the situation is nowadays radically different when even if there are some inhabited places they are nonetheless annexed to some state.¹⁴ For those who do not wish to live in any established society there is no alternative.

¹⁴ Tyson Mohr, "Locke and the Contemporary Situation", *Aporia A Student Journal of Philosophy*, Vol. 16, number 2-2005, pg. 5-6

Locke's recommendation for individuals who find themselves in the above situation or who disapprove of the political order under which they reside is to create a new society, but this is no longer a viable solution in the contemporary state of affairs. The only alternative that remains for individuals is to choose the society they most favor and follow the laws recognized by its majority. There is still a choice under the contemporary circumstances, but it is not between starting a new society altogether or remaining in the current one but rather between which form of society we can consent to obey.

As a result, following from Locke's theory, we have to accept the status quo of some current state. This also limits the ability of leaving ones' society whilst diminishing the impact that a minority can have over their government given not only the lack of unoccupied terrain but also the general trend of increased number of states experiencing growth in population. These features of our contemporary situation have the effect of diminishing the amount of freedom an individual can have under Locke's theory, thus making the whole of his theory less relevant for liberalism with a strong feature of individualism.¹⁵

In addition to the criticism above and Simmons's criticism of tacit consent, namely claiming that tacit consent would render practically all governments legitimate, this form of consent poses other sets of problems for national minorities. Continued residence for the category of people to which I make reference is mostly a matter of convenience, of going along with an established political order or the only available solution. Furthermore, the majority of people do not know fully and objectively what they agree to in tacitly consenting to a government and its laws. To better address the specificity of political obligations for minority groups under tacit consent I provide a hypothetical illustration.

¹⁵ Ibid.

Take the example of country Aqua. Country Aqua has an ethnic minority, the aqis, which has been recently granted the status of national minority through constitutional means. Now consider the fact that the aqis have been discriminated against throughout most of the history of Aqua and the new provisions made to accommodate their needs through procedural mechanisms inside state policies achieve a formal inclusion of the aqis. Can continued residence for the aqis be seen as tacit consent to the government of Aqua? I believe the answer is no.

Discrimination against the aqis may not be a current feature of the present regime but the history of discrimination by Aqua is still a part of the aqis's shared history. There are mostly instrumental reasons why the aqis would continue to reside in Aqua. Having been granted national minority status secures the aqis with a baseline of protective rights that are not available in any other country. Further, costs of emigration would be very high especially when considering that, due in large measure to the relatively recent discriminating mechanisms of Aqua the aqis did not have equal opportunities for instance, to receiving education. This has lead to a general negative perception of the aqis not only within Aqua but generally, outside of its borders.

Aqua may acknowledge the injustice that is has done to the aqis and try to seek reparation by adopting positive discrimination laws to secure the employment of the aqis, but outside Aqua's borders it would be hard for an aqi to surpass the obstacles that the lack of education and general negative perception bring about. Emigration is an exit option but the costs associated with re-locating (i.e. financial, emotional) makes it a prohibitive one for the aqis. These considerations amount to the fact that continued residence for the aqis cannot be

interpreted as tacit consent since the rationale behind this decision are based on different grounds than necessary for deriving moral obligations.

In conclusion, opposite to actual consent, tacit consent legitimizes practically all political arrangements. Taking the Lockean understanding of tacit consent would mean that just by virtue of residing within the boundaries of a state an individual is said to have consented to it. Consent becomes unintentional in this sense and even automatic. For national minorities in a hypothetical situation this would mean that even a regime of tyranny which came to power by force, which might try and annihilate its culture or would deny all rights to language or freedoms, would still be one that is legitimate by virtue of the consent of all residents within the state, including that of the minority group.

The solution of redeeming tacit consent while maintaining its intent of legitimizing governments and its individual, voluntaristic component is to adopt the vision of A. Simmons and grant that consent may be a necessary but not a sufficient condition for acquiring political obligations.¹⁶ A question arises: Are politics of neutrality and toleration the other conditions which would make the liberal state legitimate and bind all citizens to its laws? An answer to this question will have to be given, but only after the discussion and proper assessment of neutrality designed for the second chapter.

¹⁶ John Simmons, "The Consent Tradition", 86

1.2. Hypothetical Consent

In a discussion of consent theories one cannot help but make connections between various forms of consenting employed by liberal philosophers in order to overcome difficulties arising from adopting one theory of consent over another. Hypothetical consent derives from actual consent as a potential solution of overcoming its main problem—its virtual inexistence in the real world. In order to solve this “real world” problem, philosophers have adopted a hypothetical, abstract account of political obligation. However, hypothetical consent does not seek to rest obligation on consent, whether be it express or tacit, but on the reasons that one would have to actually consent. Therefore, the ground of the obligation is the reasonableness of consenting to something, not whether or not it actually happens, expressly or tacitly.

Further, the difference between actual and hypothetical consent stems from the dominant or secondary role assigned to the *will* of the individual. If the *will* of the individual were to play a dominant role, then only an actual, expressed consent would be grounds for the legitimacy of the government. However, if a secondary position were assigned to the role of the *will* then the possibility of imagining people giving their consent to the state would be reason enough to legitimize its actions.¹⁷

This is a double shift that moves the focus away from the will of individuals and onto the reasons, the rationale behind consenting, and thus answering the question of what *would* individuals consent to. The criticism of this assertion is contained in its implication of a sort of rationality from the part of the individuals that may not have an equivalent in the real world. This is to say that since individuals often do not act according to *would* or *ought* then the reason why liberals would presuppose a homogeneity of beliefs especially when their out-spoken

¹⁷ Jeremy Waldron, “Theoretical Foundations of Liberalism” in *Liberal Rights*. The Philosophical Quarterly 37, no. 147 (April. 1987), 51

commitment is in complete opposition to any such homogenous view of people and in fact geared towards a plurality of beliefs is a sign of inconsistency. .

The best way of answering the above is by assessing Rawls's conception of hypothetical consent and particularly one aspect of it—the focus on primary goods. The primary goods are those that following Rawlsian lines all individuals can consent to wanting, whatever else they want. Rawls draws on Kantian lines and develops in *A Theory of Justice*, the hypothetical consent idea in order to explain notions of justice. His position is that the formation of just societies requires people, who are naturally equal, to choose those institutions that will reproduce, and further fairness and equality.¹⁸

According to Rawls, a just act is what a reasonable and appropriately motivated person would do under suitable circumstances. There is no independent criterion to judge whether an arrangement is just. The “suitable circumstances” are defined by the original position in which the participants select principles of justice; the participants act under a veil of ignorance regarding their social position, gender, race, talents, skills, interests, and their goals. These conditions are said to guarantee that the selection procedure is fair, i.e. to exclude bias and arbitrary inequalities.

The principles that the parties in the original position select are principles for institutions, or more precisely for the basic structure of society. The two principles of justice in Rawls's perspective are the liberty principle and the difference principle. The liberty principle states that: “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.”¹⁹, while the difference principle claims that: “social and economic inequalities are to be arranged so that offices and positions are open

¹⁸ John Rawls, *Theory of Justice* (New York: Belknap Press, 1971), 17

¹⁹ John Rawls, *Theory of Justice*. Revised Ed., 53

to everyone under conditions of fair equality of opportunity and they are to be of the greatest benefit to the least-advantaged members of society”²⁰.

Rawls introduces a moral division of labor to the effect that it is the task of institutions to uphold just arrangements among members of the society, and individuals are only bound to support institutions, insofar that they are reasonable just. The basic institutions of society occur out of a hypothetical agreement of free and equal people, and these people will choose institutions that instantiate autonomy and equality along economic, social, and political lines.²¹

Further, Rawls focuses on primary goods so that the theory can rely on a common ground of interests and beliefs between individuals, who after the attainment of these primary goods can pursue their particular conception of the good life. The underlying presupposition is that all individuals regardless of their commitments can agree on the commonality that there is something like pursuing a conception of the good life.²² Once again this can be interpreted as a liberal appeal at the reasonability of individuals. Considering as a whole the two liberal appeals at reason encountered thus far, the original liberal claim results in an attempt at answering what individuals would reasonably consent to in order to pursue their conceptions of the good.

According to Rawls, the answer should be the same for all individuals: primary goods, basic liberties. However, it rests on the two major suppositions of people acting on what constitutes as *would* and a common ideal for individuals of pursuing a particular conception of the good life. The assumptions made by Rawls on behalf of individuals show their problematic aspect when discussing the case of minority groups.

Rawls writes: “It may be objected that expectations should not be defined as an index of primary goods anyway but rather as the satisfactions to be expected when plans are executed

²⁰ John Rawls, *A Theory of Justice*. Revised Ed., 266

²¹ John Rawls, *A Theory of Justice*, 55.

²² Ronald Dworkin, *Liberalism*, 191

using these goods. (. . .) Justice as fairness, however, takes a different view. For it does not look beyond the use which persons make of the rights and opportunities available to them in order to measure, much less to maximize, the satisfactions they achieve. Nor does it try to evaluate the relative merits of different conceptions of the good.

Instead it is assumed that the members of society are rational persons able to adjust their conceptions of the good to their situation. . . . Everyone is assured an equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands.”²³

By making the primary goods the focal point of the theory he proposes, Rawls stays true to the conception of the priority of right over the good. Rawls grants that individuals may have conflicting views about what constitutes a good life, given that they have different ideals and goals. Therefore, what people can feasibly agree upon given the hypothetical situation that the original position entails is not a detailed social contract in its content or substance regarding what constitutes as a meaningful life. It is precisely for this reason that the primary goods idea becomes crucial. It allows for a relatively pluralist view that Rawls supports, while resting in the same time on a minimum set of shared beliefs. However, the concept is far from being safe from criticism specifically when taking into account a pluralist standpoint.

The primary goods are defined as “things which it is supposed a rational man wants whatever else he wants”. Among the primary goods, Rawls lists "basic rights, liberties, and opportunities," along with "all-purpose means such as income and wealth" that can be used to further citizens' various interests and projects²⁴. The theory is vulnerable to two sets of criticism.

²³ John Rawls, *A Theory of Justice*, 80

²⁴ John Rawls, *Political Liberalism*, New York: Columbia University Press, 1996, 178-90

A first set of criticism takes note of the fact that Rawls makes reference to multiple primary social goods, but doesn't offer a viable solution for determining how much of primary goods overall one has. An attempt at commensurability is made when Rawls speaks about an index of primary goods. However, Rawls never truly embarks on this quest and doesn't provide the reader with an index because it would involve a ranking of individual primary goods that would be detrimental to his theory. The reason why ranking would not offer a proper assessment of primary goods is that it entails precisely an evaluation of the values and benefits attached to obtaining these goods.

This line of argument would run counter to other Rawlsian claims about the equal worth of pursuing one's conception of the good and the necessary avoidance of any sort of evaluation between such conceptions. Further, it would beg the question of how one decides, given that there are several basic liberties, how to trade off one against the other. The answer is that, in the absence of an index of primary social goods, which Rawls cannot provide lest his theory become inconsistent, the theory of justice will at least experience difficulties in answering the above question.²⁵ The incommensurability of primary goods makes the assessment of their worth to individuals an impossible task and raises significant problems when considering the equal distribution of primary goods between individuals.

A second set of criticism rests on the fact that the pluralist account of political obligation stands on grounds that are difficult to meet by the universality that Rawls assumes of individuals. The "reasonableness" he appeals to by using the concept of primary goods is a liberal reasoning that could not accommodate a different perspective on values. It is particularly difficult for

²⁵ Richard Arneson, "The Original Position Philosophy. A Brutally Short Summary, *Journal of Philosophy*, no. 167, 3

individuals in a pluralist society to accept the same form of social justification, as Rawls would have it, given the diversity that this type of society necessarily entails.

Rawls aims at a minimal “reasonableness” and a “thin” theory of the good but when applying that vision to pluralistic accounts of society that “thinness” becomes more than an individual might accept.²⁶ The objection that this perspective raises is that Rawls introduces ideas that are not universally shared, but are in fact biased towards a particular conception of the good, namely a liberal account since the primary goods may not be as valuable for all life-styles and ways of life.

Kymlicka discusses in *Individualism and Neutrality* this position admitting that “there may be some ways of life which are not aided by increased amounts of Rawls’s primary goods. Rawls cites the case of religious lifestyles which include a vow of personal poverty”²⁷, but quickly disregards this criticism. His argument rests on the Rawlsian principle of individual responsibility, assuming a standard of individual entitlement which holds equal weight for individualistic people or materialistic as for communally oriented individuals.²⁸

Regardless of whether or not Kymlicka is right, the proposition I put forward for thought and appraisal aims at something different. In a theory concerned with minority groups, an issue that I believe to be pertinent shifts the focus from Kymlicka’s criticism of communitarianism onto the conflicting attachments and the possibility of overriding commitments which minorities might experience and which has bearing both on the legitimacy of the state and the political obligations of minority groups. My position will become clearer as I develop this perspective in the next fragment.

²⁶ Jeremy Waldron, *Liberal Rights*, 56

²⁷ Will Kymlicka, “Liberal Individualism and Liberal Neutrality”, *Ethics*, Vol. 99, No. 4 (Jul., 1989), The University of Chicago Press, 889

²⁸ Ibid.

The non-universality of Rawls's conceptions becomes apparent when considered from the vantage point of strong, communal ties within a minority group. Most such minority groups establish their own spaces and areas within the larger community. When this occurs, the ties between minority group members strengthen, and develop a greater affinity and identification with the group itself. They are united by a common purpose that can, for example, amount to the preservation of the group's values and culture. The life of the group becomes intertwined with the lives of individuals. This is especially apparent when one considers the size of a minority community relative to the majority within a society. Such comparison reveals the types and differences of bonds formed between individuals qua individuals, and those with society understood more generally.

The history of the national minority plays a significant role in that it offers individuals a sense of identity. A history of oppression, of sacrifice, a myth of suffering, a sense of resistance, a sense of being wronged, unites people and particularly minority communities. The community gives them a sense of "we" as opposed to, an often times imaginary enemy, "them", which is in many cases embodied in the majority population. Hence, a situation when community ties override considerations that stretch the commonality feature that Rawls envisages for all individuals is not implausible.

I believe the shared history of people forming a national minority provides for a reasonable explanation of why individuals who are part of minority groups might first identify with being members of the particular ethnic or cultural/religious category and only secondly identify as citizens of one state or another.

In many instances where the affiliation between minority group members and the minority group itself is stronger than their connection with the state, there is one fundamental

issue at work: the real (or perceived) illegitimacy of state action vis-à-vis minorities. The state has adopted policies, overt or otherwise, that disallow minorities or preference the majority. Such institutional acts undermine the most basic obligations of state to its citizenry; furthermore, certain types of violations perpetrated by a state can violate basic moral norms. Illegitimacy in either of these two cases arises not from the state's unresponsiveness alone, but also from its violation of those rules, principles, or duties that otherwise confer its legitimacy and justification.

There are two key parts to the above claim: empirical and normative. The empirical is not the focus of this work, but is an important part of determining whether the state, given real circumstances, has violated the fundamental rights of its citizens. The normative part concerns not only state action, but also what recourse a minority group has in light of the illegitimate acts. This should be considered along with the persistence and severity of abuse or neglect. With a high-degree of plausibility, it can be said that the continued or even sporadic but intense, denial of basic rights gives minorities more reason to disassociate from the state.

The above is one interpretation but a shift in focus can provide another, namely that the sense of priority given to ones' own communal group as opposed to ones' state may not seem to directly affect the legitimacy of the government, but it does nonetheless have the potential of undermining its authority by potentially destabilizing its force. A crucial role that the government fulfills is that of stabilizing the country—by creating a sense of identification between citizens of the country and the states' "problems" and/or perceived "enemies". This is in an ongoing state-building process, its aim being that of achieving the perfect identity between the nation and the state. National minority groups don't fit into this model.

The vision which attempts at assessing the ties between the individual and the community in which he/she is a member is reflected in the work of Michael Sandel. He makes an argument

for communitarianism by arguing that peoples' commitments can be intrinsically bound to their community and that the community may not necessarily have the liberal form that Rawls envisages.

Furthermore, the argument incorporates the idea that the concept of plurality may not only be a feature of societies but of the individual as well. Sandel refers to a plurality of selves within a single individual human being which he calls the intrasubjective conception, a concept which Rawls doesn't openly reject, but that given the implications of an assumed single set of desires for all individuals could not be easily incorporated inside his theory.²⁹ This particular aspect stems from the individualistic characteristic of Rawls's theory which underlies his conception of the self. The Rawlsian self is an antecedently individuated subject always situated at a distance from the interests he pursues.³⁰ The fixed identity of the individual that this conception implies leaves the subject beyond the reach of any sort of commitment or experience and renders claims like the plurality of the self outside of the general theory.

Sandel makes a strong and original argument against Rawls by claiming that the theory of justice offered by him rules out the possibility of common purposes and ends. As it is often the case within minority groups people might have in common ends which truly define a community in the constitutive sense. Relative to a community which can define not only its objects but its subjects as well the identity of the individual does not stand outside of that societal group.³¹ This is a view which I find convincing especially for my purpose of assessing pluralism within the framework of liberal theory.

It may seem that the discussion above has shifted focus from hypothetical consent which is the topic proposed for discussion in this section. Hypothetical consent as a theory which aims

²⁹ Michael Sandel, *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, 1988, 63

³⁰ Ibid., 62

³¹ Sandel, *Liberalism and the Limits of Justice*, 62

at justifying the acquisition of political obligation by individuals is flawed, for reasons that I have presented when discussing Simmons's *Moral Principles and Political Obligation*, a theory which I found convincing at least on this account. As a reminder, Simmons argues that hypothetical consent can only create hypothetical obligations. Thus, hypothetical consent cannot be the foundation on which political obligations can rely on, being that it can only offer a heuristic device by which people can discover what rational and properly motivated persons would consent to.³²

Ronald Dworkin has a similar position directed specifically at Rawls: "hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all"³³.

Further, regarding the obligations that are supposedly generated by hypothetical consent, Dworkin asserts:

It may be that I would have agreed to any number of rules if I had been asked in advance.... It does not follow that these rules may be enforced against me if I have not, in fact, agreed to them. There must be reasons, of course, why I would have agreed if asked in advance, and these may also be reasons why it is fair to enforce these rules against me even if I have not agreed. But my hypothetical agreement does not count as a reason, independent of these other reasons, for enforcing the rules against me, as my actual agreement would have³⁴.

However, the worth of hypothetical consent theory cannot be disregarded so easily. For instance, Rawls's theory of justice, which is based on a hypothetical situation and a thought experiment, is a work that has undeniably been incredibly influential for theorists of political obligation and cannot be overlooked because of its recourse to a hypothetical position.

³² Simmons, *Moral Principles and Political Obligation*, 52-64

³³ Ronald Dworkin, "The Original Position," in *Reading Rawls*, Norman Daniels, ed. (New York: Basic, 1975), 17-18

³⁴ *Ibid.*, 18

Moreover, discussing Rawls's theory without taking into account and assessing some of its key components, other than the hypothetical device offered through the usage of the original position would be in my opinion faulty. Further, the more generous discussion offered in the above section has served another purpose, namely that of familiarization with the Rawlsian theory of justice and its critiques which is a necessary endeavor given that the next chapter will rely heavily on the reading of his oeuvre.

2. Liberal neutrality

2.1. *A general discussion*

Minorities' rights seem best protected by liberal theories that advocate for the primacy of toleration. However, liberalism is not without its vulnerabilities even from this pluralistic account of political thought. The most prevalent criticism of liberalism has been one that challenges precisely the idea that toleration should be given primacy. The argument goes as follows—if toleration is the most valued concept for liberals then tolerating non-toleration seems an impossible task. The main problem regards the interaction between liberal and non-liberal societies. Although toleration for non-liberal societies seems an easy answer, the problem arises when considering the ever hot topic of human rights. This is the moment when liberal neutrality seems to lose its at first glance understandable appeal.

Much of the liberal foundation rests on Kant. The liberalism I choose to discuss is a deontological liberalism that has as core values justice, fairness and individual rights. For deontological liberalism justice is prior to all other moral or political ideals. The heart of this thesis can be stated in the following—in a pluralist society, persons will have different goals, desires and conceptions of the good. This particular society will function best if it is ruled by principles which do not in themselves presuppose one conception of the good over another.

The primacy of justice as more than morals but the “determining ground” of moral law is best described by the words of Kant: “The concept of good and evil is not defined prior to the moral law, to which, it would seem, the former would have to serve as foundation; rather the

concept of good and evil must be defined after and by means of the law”.³⁵ From the Kantian perspective, two conceptions follow: the right is prior to the good and justice is an end in itself.

Deontology opposes consequentialism from a moral sense—certain categorical duties and prohibitions stemming from a first-order ethic take unqualified precedence over other moral and practical matters. Also, deontology opposes teleology from a foundational sense—justification comes from principles that are independent from human goals or ends or any conception of the good.³⁶

The Kantian view stands in opposition to the kind of liberalism that John Stuart Mill purports. From Mill’s utilitarian conception principles of justice are not prior, but there is the possibility that “some other social duty is so important as to overrule any one of the general maxims of justice”. This perception comes from Mill’s belief in happiness as the ultimate end and desire of individuals.³⁷

Kant’s criticism of Mill stems from this very notion of happiness as the ultimate goal of persons. He asserts that people will have diverse opinions about what happiness consists of and any attempt at making one specific conception of happiness the rule would be a violation of peoples’ freedom, it would be coercive and unfair and will ultimately justice suffer. „Men have different views on the empirical end of happiness and what it consists of, so that as far as happiness is concerned, their will cannot be brought under any common principle nor thus under any external law harmonizing with the freedom of everyone”³⁸

The Kantian claim that the right is prior to the good is further completed by the notion that the subject is prior to its ends. “It is nothing else than personality, i.e., the freedom and

³⁵ Immanuel Kant, *The Critique of Practical Reason*, 1788, 65

³⁶ Michael Sandel, *Liberalism and The Limits of Justice*, 3

³⁷ John Stuart Mill, *Utilitarianism*, 1863, 469

³⁸ Immanuel Kant, *Kant’s Political Writings*, 1793, 73-74

independence from the mechanisms of nature regarded as a capacity of a being which is subject to special laws (pure practical laws given by its own reason) ”³⁹

John Rawls is, like Kant, a deontological liberalist and takes justice as the primary virtue. “Justice is the first virtue of social institutions, as truth is of systems of thought,” he wrote. “A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Being first virtues of human activities, truth and justice are uncompromising.”⁴⁰ The change proposed by Rawls comes from a reformulation of the subject, which is in his case detached from “transcendental idealism” which was one of the major criticisms of Kant’s work from an empirical perception.

Setting aside for now this subject matter, whether a Kantian metaphysical one or one based on more empirical grounds would be better suited for a theory of justice, it is important to note that this approach of liberalism with a contractarian sub-base is rooted not only in the work of John Rawls, but Brian Barry and Charles Larmore to name a few. Under the umbrella of pluralism and in a brief assessment these theorists propose that given different meanings and beliefs about the good and potential disagreement about the concept of good, the liberal approach for principles of justice is a neutral conception.

Moral disagreement entails some sort of an action by the state. There is an outlined taxonomy of possible responses, which granted, are in no way exhaustive, but are available to the state: institutional response, cultural response or avoidance.⁴¹ Obviously the latter response is

³⁹ Immanuel Kant, *The Critique of Practical Reason*, 1788. pg:89

⁴⁰ John Rawls, *A Theory of Justice*, 1971, pg: 3-4

⁴¹ Simon Caney, *Liberal Legitimacy, Reasonable Disagreement and Justice*, Richard Bellami, Martin Hollis *Pluralism and Liberal Neutrality*, 1999, pg: 20

the one that liberals are mostly concerned with and the one I choose to discuss further. However, I will briefly go through the first two for clarification.

The institutional response entails a procedural approach that requires the design of institutions for accommodating moral disagreement in order for all parties to be given respect and consideration so that the stability of the state doesn't suffer. Examples of state action from this perspective range from consociational arrangements, federalization of the state up to the most severe—secession, but regardless they all entail the institutional and procedural means of dealing with moral conflict in a fair style.

The second reaction of the state—the cultural response entails a certain type of behavior that presupposes character traits akin to decency. Respect for the other party with whom there is disagreement requires a political dialogue free of contemptuous or insulting language.⁴²

Finally, the liberal response promotes neutrality and gives preference to no vision of the good more so than another. Will Kymlicka presents neutrality as the view that “the state should not reward or penalize particular conceptions of the good life but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued.”⁴³

Brian Barry's *Justice and Impartiality* and Andrew Mason's, *Explaining Political Disagreement* make for good sources for drawing liberal principles that seem to be encompassing for liberal thought. The argument that both Barry and Mason make goes, in a nutshell, along these lines—reasonable people have different conceptions of the good and since principles of justice should be justified to all reasonable people then principles of justice should refrain from passing judgments about different conceptions of the good and remain neutral.

⁴² Ibid.

⁴³ Will Kymlicka, “Liberal Individualism and Liberal Neutrality”, *Ethics* 99, no. 4 (July 1989), 883.

From this particular vision two principles of liberal political thought emerge: P1: Principles of justice may only be based on a reasoning approach which cannot be reasonably rejected by anyone. P2: Reasonable persons do not necessarily agree in their estimation of the worth of different principles of the good. The conclusion of these two principles can be summed up in: C: Principles of justice should not be based upon assessments of the worth of different conceptions of the good.⁴⁴

John Rawls's claims in *Political Liberalism* are similar to the two principles stated above. Further, Rawls asserts that principles of justice should be free-standing and he defends this claim by deferring to "reasonable pluralism" meaning that principles should be independent of controversies, be embedded in political culture and appeal to public reason. Charles Larmore and Brian Barry make similar claims, so the two principles above hold largely the same core position as they do for Rawls⁴⁵. Further, the appeal to public reason will be the focus of my criticism of Rawls in the section to follow.

The above serves as an introductory look and the conceptual background which any discussion of liberal neutrality must entail. The discussion will become narrower in the sections to follow. I will attempt to show that the concept of neutrality is in need of refinement if it is to properly incorporate in its workings a pluralistic view of society.

2.2. A critique of liberal neutrality

Given the fact of pluralism, neutrality is a crucial feature of any liberal framework. In the following I will focus on Rawls's conception of neutrality and public reason. Within the Rawlsian construction, pluralism is understood as a plurality of conceptions of the good.

⁴⁴ Simon Caney, "Liberal Legitimacy, Reasonable Disagreement and Justice," in *Pluralism and Liberal Neutrality*, Eds. Richard Bellamy and Martin Hollis (London: F. Cass Press, 1999), 21.

⁴⁵ Ibid.

Neutrality aims to reconcile the consensus needed for the legitimacy of the state and moral disagreements about what constitutes a worthwhile life.⁴⁶ However, many authors have argued against the concept of neutrality and its implications in pluralist societies. For example, Derick van Heerden holds that applying neutral liberal principles in deeply pluralistic societies such as South Africa would result in the homogenization of culture. This is coupled with Van Heerden's claim that cultural uniformity of this sort leads to conflict if minorities attempt to resist and demand protection of their particular cultures.⁴⁷

Monique Deveaux in *Cultural Pluralism and Dilemmas of Justice* pursues a line of argument similar to Van Heerden's. She questions whether Rawls's ideas regarding principles of justice are universal, particularly in pluralistic societies.⁴⁸ Deveaux holds that neutrality in political life combined with a stark division between public and private spheres creates social tensions in pluralistic societies. She wonders if a cultural minority group should be marginalized in politics simply because its public practices and political styles do not conform to the terms of neutral justification.⁴⁹ A large part of her argument focuses on Rawls's admission that liberalism can tend to marginalize particular groups whilst benefiting particular ways of life more than others. That being said, Rawls pursued the matter no further and completed his vision with an ungrounded statement: "No society can include within itself all forms of life. We may indeed lament the limited space, as it were, of social worlds . . . and we may regret some of the inevitable effects of our culture and social structure."⁵⁰

⁴⁶ Rawls, *The Domain of the Political and Overlapping Consensus*, New York University Law Review, 64, 1989, 233-55

⁴⁷ Derick van Heerden, *Liberal Neutrality and Cultural Pluralism*, South African Journal of Philosophy 13, no.2, 1994, 97

⁴⁸ Monique Deveaux, *Cultural Pluralism and Dilemmas of Justice*, Cornell University Press, 2000, 98

⁴⁹ Ibid.

⁵⁰ John Rawls, *The Priority of the Right and Ideas of the Good*, 265

In spite of this weak defense, Rawls is an adamant proponent of neutrality. His advocacy rests on the claim that neutrality would be a principle that rational agents would choose under ideal circumstances. Rawls makes a case for what he calls the “overlapping consensus”, which can be briefly stated as the means by which “a consensus of reasonable (as opposed to unreasonable or irrational) comprehensive doctrines” can be achieved. To reveal such a consensus, the conception of justice that regulates society “should be, as far as possible, independent of the opposing and conflicting religious and philosophical doctrines that citizens affirm.”⁵¹

Such consensus is joined by a commitment to justifying the political principles of society to every individual: “Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as basis of public reason and justification.”⁵² Underlying this conception of justice lays an appeal to the reasonableness of individuals. Two conceptions of neutrality follow. The two conceptions are—neutrality of aim and neutrality of procedure. The latter category refers to those procedures that must be justified without appeal to moral values, or in any case justified by appealing to neutral values such as impartiality or equality of opportunity for persons presenting their claims.⁵³

Rawls opts for the first category—neutrality of aim. This is different from neutrality of procedure because at its core is a vision of institutions and policies that are “neutral in the sense that they can be endorsed by citizens generally as within the scope of a public political conception.”⁵⁴ Neutrality of the public domain is the logical consequence of neutrality of aim, which is in essence a way that reasonable pluralism can be accommodated. Rawls believes that

⁵¹ John Rawls, *Political Liberalism*, 9

⁵² John Rawls, *Political Liberalism*, 137-144

⁵³ *Ibid.*, 191

⁵⁴ John Rawls, *Priority of the Right*, 262

justifying “reasonable, comprehensive doctrines” and accommodating the fact that justifications must be addressed to others, requires a basis of “shared, fundamental ideas implicit in the public political culture.”⁵⁵

Although Rawls does not offer many details, a shared public political culture presupposes practical constraints aimed at achieving the neutrality of the public domain. Rawls finds such constraints a necessary component of his vision of justice as fairness in pluralist societies to work. It is important to notice that when discussing the public political realm, Rawls is very careful about making one clear division; namely, that “the public vs. nonpublic distinction is not the distinction between public and private.” He avoids making this separation in public-private terms because of the individualistic, non-associational connotations of the word “private.” He maintains that “there is no such thing as private reason.”⁵⁶ Rawls settles on the term nonpublic because it best represents the various forms of association, often referred to as “social unions,” without importing the connotations of ‘private.’

This particular provision has been made by Rawls in order to address various criticisms, especially from supporters of feminism. In this regard, and after these newly added characteristics, family as well as all kinds of voluntary associations in civil society, such as clubs, churches, and universities were included.⁵⁷

Rawls makes a crucial division between public and nonpublic “uses of reason.” The nonpublic uses include the “social,” the “familial,” and the “individual.”⁵⁸ In clear opposition to nonpublic reason, public reason is a normative ideal. The judiciary system, political officials, the executive branch, and also the citizens who “engage in political advocacy in the public forum”

⁵⁵ John Rawls, *Political Liberalism*, 100

⁵⁶ *Ibid.*, pg. 220

⁵⁷ *Ibid.*, 520-529

⁵⁸ *Ibid.*, 220

and vote on issues that relate to "constitutional essentials and matters of basic justice" are the main target of neutrality of the public domain.

More specifically, neutrality in the public sphere demands that moral, religious, philosophical views "are not in general to be introduced into political discussion of constitutional essentials and the basic questions of justice."⁵⁹ Determining whether views are comprehensive in the aforementioned ways is a test for whether they are to be a part of public reason (i.e., if they can justify political decisions and principles). The test is a device by which disagreement on moral issues may be addressed. However, moral diversity becomes restricted under a position where certain comprehensive views are to be left out of the political (especially when considering that the relation between them can be fairly direct).

For the case of national minorities specifically, the constraints of neutrality in the political domain can be to the detriment of minority groups claiming recognition of their culture. With his stark division between non-political and political spheres, and when political views cannot originate from deeply rooted religious beliefs, the test of public reason can prove to be insurmountable. Since the stakes are very high for minorities when it comes to the recognition of their cultures, making appeal to more than what is held to be common shared fundamental ideas does not seem to be an exaggerated claim. In theory, liberalism supports the diversity of distinct ways of life but frowns upon allowing minorities to express their claims for recognition in ways that reflect their beliefs and their own style of deliberation.

The rationale that underlies the liberal position described above is the commitment to a policy of avoidance. In this case those which must be avoided are political arguments which have the potential of leading to confrontation and disagreement. This might be a disservice or more

⁵⁹ Rawls. *Political Liberalism*, 215-16

drastically a severe limitation to democratic procedures? I will comment more on this issue later on in this paper.

Nonetheless, it is fair to say that on the issue of disallowing comprehensive views in the political sphere, Rawls did make some revisions later on in *Political Liberalism*. In an attempt at answering criticism, he allows for reasonable comprehensive doctrines to “be introduced into public reason at any time, provided that in due course public reasons, given by a reasonable political conception are presented sufficient to support whatever the comprehensive doctrines are introduced to support.”⁶⁰ This is not a major accommodation for minorities inasmuch as reasonable comprehensive views are those which are in tune with the public reason. Nevertheless, there is a persistent question regarding how to determine what is a reasonable comprehensive view, and how this is to be decided prior to reaching agreement.

Two matters are unclear at this point under the liberal framework. Firstly, determining what is reasonable when it comes to comprehensive doctrines. Secondly, how can minorities make appeal to the public political domain concerning matters which are specific to their culture and affect it directly and exclusively? I will proceed in discussing these two aspects of liberal neutrality in the following.

The concept of reasonable comprehensive doctrines is based on the assumption that “citizens have two views, a comprehensive and a political view.” It is, at least for me, very difficult to imagine how people with very strong religious or moral beliefs could even be able to make this distinction. The two concepts seem intimately tied. The allowance of comprehensive views requires of people the use of a specific language and an appeal to widely believed set of norms and convictions if it is to enter the political domain and fulfill the conditions of reasonableness. The general aim is the reach of consensus and agreement between different

⁶⁰ John Rawls, *Political Liberalism*(introduction)

views about the good but lies on the assumption that people will firstly agree on the standards of liberal neutrality. The sacrifices of meeting the conditions imposed by the concept of neutrality seems to tip the balance of power in favor of those whose beliefs are either widely spread or completely absent.

This can arguably be seen as some sort of a “punishment” for either believing in something else, or believing in different norms than the majority in society. However, this perspective runs counter to any claims of commitment to a diversity of beliefs which liberals seem to profess. Some may say that the sacrifice neutrality requires isn’t all that great but if that sacrifice is required only from a specific group then the outlook changes. Further, in all likelihood the group in question may already be faced with battling discriminating behaviors. Therefore, it is not unreasonable to deduce that the system perpetuates the kind of discrimination that allegedly it should be fighting against.

For the sake of the argument let’s imagine that for decades a group of people was prohibited from practicing its religious beliefs. The group may be allowed to do so now, although the very usage of the term of allowance or toleration seems to me quite derisive and filled with negative connotations, but it requires an alteration of their claims so as to meet the general view on religion. Under this scenario the consequences of following the liberal conditions so as to maintain neutrality may have consequences which distort the perspectives of the minority group. This distortion seems in need of justification. However, the justification is not required from the part of those who impose the norms; in fact quite the opposite of that is true.

The reason for this situation follows the same rationale that liberals appeal to when they try to justify their reliance on shared sets of beliefs (i.e. a preliminary agreement between individuals),

namely for the sake of reaching a general consensus. However, fear of disagreement, controversy, debate, and argumentative stands may have the negative effect of transforming the political scene into a force of oppression, and without trying to sound too drastic, basically a chopping board for what Rawls calls comprehensive views. In turn, this may potentially lead to either political apathy among the minority groups in question or a sense of being wronged once again.

For liberals such as Rawls some views are either not fit to enter political debate or they have been settled upon and thus have no place on the deliberative political scene. Rawls provides an example in support of this claim, which leaves outside of the public arena certain subject matters—his example is slavery. However, it is useful to remember that at one historical moment slavery was considered a relevant topic on the political agenda. In fact, Michael Sandel uses the same example in order to counter the minimalist liberal argument asserting that the neutrality of the state not only benefits but is a necessity if social cooperation is to be achieved.

Sandel's argument stems from the interpretation of John Rawls's theory of political liberalism as in line with the minimalist argument. He comes to the conclusion that from a Rawlsian viewpoint in a plural society people's moral and religious beliefs differ, therefore the reasonable way of reaching agreement is from a neutral framework of principles of justice.

Sandel uses the debate between Stephen Douglas and Abraham Lincoln on slavery as an example of a situation where moral views outweigh such considerations as social cooperation. Furthermore, Lincoln's opposition to slavery contained substantive moral judgment. Sandel is arguing, for example, that Lincoln's political stand against slavery developed from a moral and religious position. Lincoln's argument stemmed from the belief that slavery is violating God's purposes of making all men equal. Further, Lincoln's arguments sustained that the government

should treat slavery as a moral wrong and proscribe its expansion. Hence, Sandel presents a case, in fact the same as Rawls, where a comprehensive conception was appropriately used within a political debate in order to oppose slavery.⁶¹

Sandel draws a parallel between liberals today maintaining that the government should hold back from passing judgment on the morality of abortion and Douglas's insistence that we respect "the right of each state and each territory to decide these questions for themselves."⁶²

On this note, Sandel has described Rawls's vision of liberal toleration as "non-judgmental" and has argued against it in favor of judgmental toleration⁶³. In Sandel's view, non-judgmental toleration allows different practices without considering the moral value of the practice. According to Sandel, Rawls's theory of justice presents a good example of this notion of toleration because Rawls argues that principles of justice should not be justified in terms of any particular substantive moral or religious viewpoint.

Sandel disagrees with two arguments of liberal toleration, one being the minimal argument presented above and the other the voluntarist argument. According to the voluntarist claim, the law should be neutral among substantive moral and religious views in order to respect persons as free and independent selves, capable of choosing their ends for themselves⁶⁴. Sandel argues that voluntarism doesn't achieve a high level of toleration inasmuch as its aims are not geared towards weakening or even challenging the public perception on different practices that are tolerated. The objection to the voluntarist argument has two components. To begin with, the first objection states roughly that the voluntarist principle entails the right to autonomy and the

⁶¹ Michael Sandel, *Liberalism*, 200

⁶² Ibid

⁶³ Michael Sandel, *Judgmental Toleration in Natural Law, Liberalism, and Morality*, Ed. Robert George, (Oxford: Clarendon Press, 1996).

⁶⁴ Michael J. Sandel, "Democracy's Discontent: America in Search of a Public Philosophy," *Stanford Law Review* 49, no. 5 (May 1997), 1271-1291.

appeal to autonomy is insufficient in maintaining social cooperation without some agreement on the moral permissibility of the practice to be tolerated. Moreover, Sandel believes that the voluntarist argument can only deliver a very weak form of toleration, inasmuch as it does not seek to undermine the unfavorable view of the practices tolerated.

The example he provides the reader with is that of homosexual relationships. Within the liberal framework, homosexual practices are protected but not on the grounds that they achieve some human good, but because they articulate the preference of autonomous persons. This fine distinction has substantial consequences inasmuch as it leads to a form of weak toleration. Furthermore, Sandel points out that arguments stemming from comprehensive religious or moral conceptions should be used in political debates because it would be detrimental for all participating parties not to do so. As a consequence, the Rawlsian formulation of public reason is damaging overall because it prohibits arguments in favor of the moral validation of homosexuality and viewpoints that oppose such arguments.

The two examples used by Sandel are very compelling and Rawls has made some alterations to his original viewpoint in order to answer these types of possible objections. However, to what degree he was successful is at best unclear. In *The Limits of Public Reason*, Rawls distinguishes within his conception of public reason between an exclusive and an inclusive view. The exclusive view prohibits the introduction within public reason of arguments that rely on comprehensive doctrines. The inclusive view allows for introducing comprehensive doctrines within the political so long as they are used to reinforce the very idea of the public reason itself. Further, Rawls claims that:

Under different political and social conditions with different families of doctrine and practice, the ideal must surely be advanced and fulfilled in different ways, sometimes by

what may look as the exclusive view, at others by what may look like the inclusive view.⁶⁵

The provisions made by Rawls so as to further the advancement of comprehensive views as political values are insufficient inasmuch as they only amount to an instrumentalization of comprehensive beliefs to further the ideal of public reason. The actual value, moral worth and most importantly the role that they might play in political debates remains unaddressed.

For the specific situation of national minorities this point is crucial. Without making appeal to comprehensive views, arguments for cultural recognition would be stripped out of most of their substantive content (i.e., out of the particularity of minority claims and of the reasons that justify them). The liberal rationale, which underlies Rawls's claims, is that the ideal of public reason aims at creating a common ground and a universalizing and justificatory scheme of political debate. Further, by limiting itself to values that are exclusively political, the theory provides a satisfactory foundation of legitimization for citizens in pluralist societies. But, how limiting are the limitations of public reason and neutrality?

For the case of national minorities the answer differs on a case-by-case basis but it can result in negative consequences by exercising a limiting force on the pool of reasons and justificatory mechanisms that the minorities have access to. Moreover, the limitations put forth under the framework of public reason and neutrality can result in obstructing channels of communication between minorities and the general public, namely society at large. Further, separation from comprehensive views may result in two extremes: either alienation from the political life for those minorities who find their views to be deemed unfit for public debate, a possibility which explains the political apathy of many minority groups, or extreme frustration with the political realm which can lead to conflict or protest.

⁶⁵ John Rawls, *Political Liberalism*, 248.

The appeal to public reason requires a consideration of justifications that all individuals might accept. However, this is not the same as considering what each individual might accept. Further, although the goal is to reach consensus based on shared, common beliefs the commonality of the beliefs that liberals appeal to is not outside of being questionable. For instance, the liberal rationale of separating the political from the comprehensive may not be aimed at removing all controversy from the public political sphere, but at securing basic liberties.

However, Rawls doesn't seem to consider that many such basic liberties, which he considers as settled, are in fact highly controversial—freedom of speech is a good example with debates about pornography and defamatory language still being at the root of much deliberation and disagreement.⁶⁶ Thus, the universality of Rawls's conception is challenged to the extent that his assumptions concerning individuals' shared vision of basic liberties is less than homogenous.

The principle of neutrality may cause tensioned relations amongst people with strong cultural views or religious beliefs because of the stark division between the public and the private that neutrality entails.⁶⁷ In the context of political debates the purposefulness of avoiding "private" issues in order to avoid antagonism might have precisely that effect. This is especially true for national or ethnic minorities trying to make claims regarding the recognition of their culture and/or religion. Further, it is unclear why views that are not unreasonable (I doubt that there would be voices saying that all views which differ from that of the majority are unreasonable or dangerous) would have to necessarily be avoided or ignored within political debates. For example, if the difference between the minority group and the majority lies in a dissimilarity of political styles or public practices then the liberal justification for marginalizing

⁶⁶ Monique Deveaux, *Cultural Pluralism and Dilemmas of Justice*, 98

⁶⁷ Ibid.

those groups seems to be at a loss for explanations.⁶⁸ To put it more simply—the liberal “punishment” doesn’t seem to fit the “crime” of the minorities’ claims—and there is no crime to begin with.

Rawls admits to the fact that liberalism might marginalize some groups while advantaging others but firstly he doesn’t treat the problem with much consideration and secondly he claims that any advantage or disadvantage is incidental. It is strange for a theory that claims to profess a commitment of securing justice for all and every individual that concerns for national, ethnic, cultural or religious minorities are left at the margins, while other ways of life are encouraged.⁶⁹ In this regard Rawls writes:

The principles of any reasonable political conceptions must impose restrictions on permissible comprehensive views and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether...Now, the encouraging or discouraging of comprehensive doctrines comes about in at least two ways: those doctrines may be in direct conflict with the principles of justice; or else they may be admissible but fail to gain adherents under the political and social conditions of a just constitutional regime...Examples of the second case may be certain forms of religion.⁷⁰

A possible solution or at least a refinement of this liberal theory would seek to incorporate the moral and political concerns of citizens and thus achieve a higher level of attunement with people’s actual sentiments and beliefs. In line with this argument lies the theory proposed by Amy Gutmann and Dennis Thompson, who argue for more moral disagreement in politics than liberals allow at present.⁷¹ They propose so-called “principles of accommodation” as opposed to “principles of preclusion” that would allow for the institutionalization of more

⁶⁸ Ibid.

⁶⁹ Ibid. 99-100

⁷⁰ John Rawls, *The Priority of the Right and Ideas of the Good*, 264-265

⁷¹ Gutmann and Thompson, *Moral Conflict and Political Consensus*, 64-65

diverse conceptions, viewpoints, and political styles. As a result these principles of accommodation would allow for the inclusion of a greater range of cultural communities.⁷²

An interesting point raised by Monique Deveaux questions the way in which people come into politics. She argues that sometimes citizens may enter the realm of politics precisely as representatives of cultural, gender, linguistic or ethnic groups rather than as individuals supporting neutrally justified policies. If the aim of these individuals is to counter politics of marginalization of the group they are members of then their less than neutral position should be justifiable. However, this is not the case within liberal politics centered on the principle of neutrality.

Minorities may be granted a formal inclusion through constitutional means but associating that formal inclusion with the public blindness that neutrality and the idea of public reason purports makes the actual inclusion of national minorities a far away concept. This follows Amartya Sen's definition of inclusion as both a capability and an acquisition, meaning it is not enough to have a right to legal rights but also the capability of making use of those rights as opportunities and resources.⁷³ Granting a national minority status with the rights associated is a necessary but not a sufficient condition. Further, asking from the part of the national minority group to set aside more comprehensive views is a requirement that not only is hard to justify for the reasons presented above but also it is very difficult. Much of the groups' identity is strongly connected with these views and they cannot be dismissed easily.

Furthermore, on a more general note, having to keep what is an essential part of a persons' identity aside from the public arena seems to perpetuate the kind of discrimination that minorities have suffered from throughout history. It is perpetuating the feeling that one should

⁷² Monique Deveaux, *Cultural Pluralism and Dilemmas of Justice*, 105

⁷³ Amartya Sen, "Well-being and Freedom", *Journal of Philosophy* 82, 1985, 199

hide their true beliefs and conceptions about what it means to lead a worthy life. It adds insult to injury inasmuch as many minority groups have experienced years of oppression and discrimination. It harms people by requiring them to hide their true beliefs and thus creating a feeling of having to feel ashamed and of being humiliated. Finally, by stripping away from the individual his or her status of a member within a minority group reinforces the feeling of being discriminating against since much of a groups' history of discrimination has precisely nothing to do with the individual as such but with him or her being a part of that minority. And yet, formal inclusion is based solely on individual rights.

Granted, I do not mean to say that this is the case for all national minorities; rather I am simply suggesting that there are groups which either fit into the above description from an empirical standpoint or theoretically a situation fitting these profile may hypothetically be constructed. What can be said with more precision is that Rawls doesn't seek to make incorporate or explicitly include minorities into political life nor does he support a deliberative approach of accommodating differences stemming from comprehensive views, whether be religious, moral or cultural, within politics which is important for properly addressing pluralism.⁷⁴

Further, by adopting this view, Rawls becomes an advocate for the *status quo* which is meant in this case as supporting those values which have already been deemed as "fitting" or have already been chosen by the large public. This in turn has the effect of an extrapolation of the idea of public blindness to blindness towards other means of addressing issues on the political agenda or the possibility of choosing different inputs for debating so that different outcomes may result as possible solutions for reaching agreement. Thus, a limitation of both

⁷⁴ Monique Deveaux, *Cultural Pluralism and Dilemmas of Justice*, 105

inputs and outcomes can be experienced by following Rawlsian lines which is neither for the benefit of the minority groups nor the majority within pluralist societies.

The criticism of neutrality that I proposed does in no way suggest that the principle of neutrality should not be used as a feature of political deliberation, rather that its core position inside liberal political debates should be polished so as to provide for an accommodation of the needs of national minorities groups. Further, although it may be argued that neutrality is a necessary condition for the advancement of consensus among different conceptions of the good it is not a sufficient condition, especially when considering the case of minority groups.

Concluding remarks

The discussion presented above serves as a basis for challenging liberalism and its manifestations in pluralist societies. The two features of liberal theory analyzed—consent and neutrality—are in many respects fundamental to the liberal commitment to the individual. Freedom from coercive actions of the state and freedom to pursue one's own conception of the good are professed aims of liberalism, but at a minimum this essay has illustrated that the realization of these objectives by liberal political theory is far from certain.

In order to reveal the ways in which the attainment of liberal aims is faulty, I showed that consent theory has distinct consequences for national minorities. The political order that liberals commit to uphold has to be justifiable to all members within it or affected by it. Given the criticisms that I leveled against liberalism's capacity to achieve public justification, the problems that minority groups confront—exclusion, and so forth—reveal one reason why the legitimacy of the liberal state can and should be questioned.

As discussed, actual and tacit consent theories are fundamentally flawed, but hypothetical consent is no consent at all. One consequence of these flaws is that the putative political obligations of minority groups cannot be grounded on actual/express or tacit consent, and hypothetical consent is generally insufficient for grounding political obligations. The combination of the absence of a clear, unhindered contractually obligating mechanism, makes establishing the duties of minorities to the larger state hinge on coercion, repression, or denial of granted rights. This does not conform to any liberal conception in theory, but is nevertheless a result of liberalism's flaws and manifestations.

Neutrality is even more connected to the situation of minority groups. Inasmuch as liberal political theory professes to protect peoples' rights generally and minorities specifically, it

might seem to be fertile ground for addressing some of the dilemmas of consent. However, neutrality is vulnerable to many objections particularly from the standpoint of claims of cultural recognition by minority groups. Further, an important aspect of politics of neutrality—political deliberation—seems limited under Rawls’s framework and especially under his concept of public reason. Regarding this aspect, the Rawlsian theory is in need of change if it is to incorporate the particular needs of minority groups.

Thus, I have looked at political obligation theories prominent in liberal accounts from the particular angle of pluralist societies and found them lacking in many respects, and I illustrated that liberal neutrality may not be the best suited model to provide the proper framework in accommodating the needs of minority groups. The conclusion stemming from this served the purpose of challenging the legitimacy of the liberal state by assessing liberalism from the perspective of minority groups. It is from this vantage point, a minority one that the dominance and popularity of liberalism must continue to be confronted if freedom for all is to be attained.

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