Gender and Justice in Multicultural Liberal States

MONIQUE DEVEAUX

OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP

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Published in the United States
by Oxford University Press Inc., New York

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First published 2006

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British Library Cataloguing in Publication Data

Data available

Library of Congress Cataloging in Publication Data

Deveaux, Monique.
Gender and justice in multicultural liberal states / Monique Deveaux.
p. cm.
Includes bibliographical references and index.
1. Women's rights. 2. Minorities—Civil rights. 3. Pluralism (Social sciences)
4. Multiculturalism. 5. Culture conflict. 6. Toleration. 7. Social justice.
8. Sex role. 9. Liberalism.
I. Title.
HQ1236.D48 2006
305.48—dc22 2006019917

Typeset by SPI Publisher Services, Pondicherry, India
Printed in Great Britain
on acid-free paper by
Biddles Ltd., King's Lynn, Norfolk

ISBN 0–19–928979–4 978–0–19–928979–0

1 3 5 7 9 10 8 6 4 2

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1

Introduction

Much normative political theory of the 1980s and 1990s emphasized the importance of citizens' group-based cultural differences, and the need to recognize and formally accommodate cultural minority groups in liberal democratic states.[1] The current mood, by contrast, reflects a preoccupation with the *internal* differences of social and cultural collectivities, and with whether and how such differences should affect the status of their claims for greater accommodation. This altered focus is due in part to political theorists' embrace of a more fluid and complex understanding of cultural identities, a consequence, perhaps, of what has been called the 'Geertz-effect' in political theory.[2] Increasingly, cultural identity has come to be viewed as a dynamic and changing phenomenon, and cultural practices and arrangements are recognized as sites of contestation. This intensified attention to the internal differences of social and cultural communities may also reflect a growing awareness of the political character of cultural identities, and of cultural justice struggles generally, in plural liberal democracies. From disagreements within Native American communities over membership rules, to disputes among South Asian immigrants about norms and rules governing arranged marriages, these struggles increasingly reveal the strategic and contested nature of group identities, and the sometimes fractured solidarities of ethnic, linguistic, and religious minorities in multicultural liberal polities.

Wider recognition of the fact of disagreements and conflicts within minority cultural groups has in turn focused attention on the potential for mistreatment of vulnerable members of such communities.[3] This is the problem

[1] I use the term 'cultural groups' to cover a broad range of groups whose members share an identity based on ethnic, linguistic, racial, or religious characteristics, and for whom these aspects strongly shape the self- and ascriptive identification of individual members. Such collectivities are sometimes referred to as 'encompassing groups' or 'societal cultures' to indicate that they may shape not only the self-understandings of members but also their community contexts, opportunities, life choices, and so forth.

[2] David Scott, 'Culture in Political Theory', *Political Theory*, 31/1 (2003), 92–115, p. 111.

[3] The descriptor 'minority' refers here to the social and legal status of particular practices, not to whether they are practiced by few or many. This distinction is important because in some states, such as South Africa, 'minority' practices—for example, those concerning customary marriage—may actually be practiced by a majority of the population. I do not mean to suggest

of 'internal minorities', as Leslie Green has called it, or that of 'minorities within minorities.'[4] The more autonomy a group has over its practices and arrangements, and the more nonliberal the character of the group, the greater the risk that individuals may be subjected to rights violations.[5] National cultural and ethnic minorities who are accorded collective rights, and religious communities that enjoy special dispensation in order to accommodate their traditions and values, are among the prime subjects of concern here. Political theorists have pointed to the right of Orthodox Jews in Israel to maintain a system of personal law that prevents many women (but not men) from obtaining a divorce decree without their spouse's consent and the right of the Amish in the United States to remove their children from high school at age 15, as examples of how cultural rights can leave some group members susceptible to mistreatment. Immigrant groups whose cultural practices are largely unhampered by law are also sometimes accused of unjust customs, such as sex-segregated religious schooling that only prepares girls for traditional lives. Within both national minority and immigrant communities, the spectrum of vulnerable individuals is thus quite broad, and might include religious minorities within the group, gays and lesbians, individuals who resist particular conventions, and girls and women in general.

Against this political backdrop, calls by cultural minority groups for greater recognition and rights inevitably raise questions about the proper scope and limits of such accommodation. Posing the greatest challenge are those demonstrably nonliberal cultural groups that adhere to practices that reflect and reinforce traditional and, by liberal lights, discriminatory, cultural or religious norms, roles, and worldviews. Where the customs and arrangements of traditional cultural communities stand in tension with the broader liberal norms of the society in which they live, how should multicultural, liberal democratic states respond? Should the (intolerant) practices of nonliberal groups be tolerated—if so, on what grounds, and to what effect? These questions acquire a special urgency when the norms and practices of cultural groups clash with individual rights protections guaranteed under liberal

that only the practices of cultural minorities should be subjected to critical scrutiny and potential reform; however, to the extent that a debate has risen within political theory regarding the ambiguous legal status of practices of such minorities, my intention is to try to steer this response in a more democratic direction.

[4] See Leslie Green, 'Internal Minorities and their Rights', in *Group Rights*, ed. Judith Baker (Toronto: University of Toronto Press, 1994), and *Minorities Within Minorities: Equality, Rights and Diversity*, eds. Avigail Eisenberg and Jeff Spinner-Halev (Cambridge: Cambridge University Press, 2005).

[5] The term 'nonliberal' is usually used by political theorists to refer to groups or practices that restrict individual liberty in very pronounced ways, and so risk violating liberal norms. I use the term similarly in this book, but also include communities and customs that stipulate rigid social hierarchies or prescribe sharply differentiated gender roles for men and women.

constitutional law, but they also arise in connection with more everyday social customs and arrangements.

By most accounts, nowhere is the tension between policies of multicultural accommodation and liberal principles and protections more apparent than in the area of women's rights and roles. In particular, the concern that special group rights and provisions for cultural minorities might undercut the rights of women group members, or even jeopardize liberal sex equality guarantees more generally, has recently emerged as a daunting problem for proponents of multiculturalism. Religious groups and ethnic minority (especially immigrant) communities, and indigenous groups that discriminate against women in some way, are a particular focus of concern. In some cases, the cultural practices and arrangements of groups are protected by customary systems of law or by sanctioned religious systems of family and personal law (e.g. in India, South Africa, and Israel) that may conflict with a constitutional commitment to sexual equality. The road to group accommodation is increasingly a legal and political minefield, then, and it is far from clear how customs that stand in tension with individual rights legislation, such as sexual equality protections, can be permitted—or, still less, protected—without undermining the universality of such rights.

Perhaps the central paradigm framing most current political, and to a lesser extent, scholarly discussion of what I call 'conflicts of culture' is that of liberal toleration, which generates the question, 'What should the liberal state tolerate, and what should it prohibit?' This emphasis on toleration is, as I shall shortly argue, highly problematic in that it cuts short a fuller discussion of group claims about identity and self-governance; of the many possible processes for the evaluation and reform of cultural practices; and of the power relationships between minority groups and the state. In effect, the litmus test for the soundness of arguments for policies of cultural accommodation thus becomes whether such arguments unwittingly permit individual rights violations, including sex-based inequalities, or whether proponents of cultural recognition seek to grant collective rights at the expense of vulnerable members (such as women). The questions are fairly posed, and I ask a version of them myself in the coming chapters. However, it is important to see how they can also rely on a dangerously false dichotomy, namely, that between cultural groups and their rights on the one hand, and women and their rights on the other. Yet women make up at least half of the cultural communities in question, and some, as we know, defend precisely those practices and arrangements that make liberals uncomfortable, like arranged marriage and polygyny. This is why, in my view, it is not really an option to be 'pro-women' and against cultural rights. Although our preferences and commitments should not always be taken at face value—particularly in highly constrained

circumstances—it is nonetheless unsatisfactory to merely set women's evaluative assessments aside where they stand in tension with liberal norms.

This book tries to move away from the paradigm of toleration, and to focus instead on how we might democratically mediate the tensions between the claims of cultural and religious minorities with respect to women's rights and roles, and the demands of liberal democratic states. Here my concern is tensions that arise as a direct result of claims for formal rights and protections for cultural or religious norms and arrangements, not the difficulties that arise when a member of a distinct group simply invokes a 'cultural defense' to excuse an action or to plead extenuating circumstances.[6] On the whole, political theorists writing on issues of cultural diversity have been slow to ask about the implications of cultural group rights and accommodation for gender equality, or for gender justice more broadly. As feminist thinkers have long noted, it is precisely because sex roles and arrangements are often seen as private, and so excluded from the realm of politics, that framing gender issues as problems of justice is so difficult; sex inequalities are in a sense unnoticeable because they are such a pervasive part of community life. Where liberal political theorists have directly addressed this issue, they have tended to leverage liberal norms as a litmus test for assessing the claims of cultural minorities, without good justification (or results). As I argue in Chapter 2, this approach is an overly blunt instrument for dealing with the challenges posed by cultural minority practices and arrangements; as such, it risks unjustly prohibiting practices that ought to be allowed, and at the same time, ignores forms of sexual injustice that escape the rights frame (such as restriction of girls' educational and occupational opportunities through cultural pressures). Human rights frameworks, which I discuss in Chapter 3, fare somewhat better in that they appeal to a broader range of human needs and possible forms of harm. However, human rights are far from dispositive when trying to resolve disputes over gendered cultural roles, practices, and arrangements, as cultural group rights are also often defended in the language of human rights.

It is not only liberal political theorists' responses to this problem that have fallen short. The relationship between cultural group accommodation and sex equality also presents a formidable challenge to deliberative democracy, as I argue in Chapter 4. A deliberative democratic approach to conflict resolution that purports to secure respect for cultural pluralism, as mine does, will require changes which traditional cultural collectivities may vehemently

[6] See especially Alison Renteln, *The Cultural Defense* (Oxford: Oxford University Press, 2004). Instances of the latter are growing in number and significance, and have been the subject of considerable recent scholarship.

reject, thereby rendering the prospect of moral consensus impossible. In particular, a deliberative democratic approach to resolving disputes about the value and status of cultural practices will require that female members of cultural groups have a voice in evaluating and deciding the fate of their communities' customs, both by including women in formal decision-making processes and developing new, more inclusive, forums for mediating cultural disputes.[7] To accomplish this greater enfranchisement of women in both formal and informal democratic spaces, we will need to examine the practical impediments to their empowerment in their communities, and the cultural barriers to their participation in public life.[8]

* * *

When cultural practices and arrangements that are protected by policies of multicultural accommodation stand in tension with constitutional guarantees of sex equality, or when social practices are internally contested within communities, difficult conflicts of culture emerge that usually involve the liberal state at some level. This conflict and its challenges are the subject of this book, which takes as its focus three main tasks. In the first place, I aim to reframe the disputes over so-called nonliberal cultural practices and arrangements, highlighting their intragroup and strategic, political character. Second, I offer an analysis of illustrative instances in which cultural group practices and individual rights protections have clashed in South Africa, Canada, and Britain, providing a contextualized discussion of this pervasive normative and political dilemma. And third, I develop an approach to mediating cultural conflicts over women's rights and roles which foregrounds the deliberative judgments of cultural group members themselves, as well as strategies of bargaining and compromise. This approach, which insists on norms of democratic legitimacy and political inclusion, is broadly situated within deliberative democracy theory. Crucially, however, it depends on a greatly expanded conception of 'the political', one that includes not simply formal political deliberation but also informal spaces of democratic activity and expression. It also accords particular attention to the need to empower

[7] Other political theorists have also stressed the importance of including female members of cultural groups in decisions about contested practices. See Susan Moller Okin, 'Is Multiculturalism Bad for Women?' and 'Reply', in *Is Multiculturalism Bad for Women?*, eds. Joshua Cohen et al. (Princeton, NJ: Princeton University Press, 1999); and Jeff Spinner-Halev, 'Feminism, Multiculturalism, Oppression, and the State', *Ethics*, 112 (2001), 84–113, p. 108.

[8] The cultural obstacles to women's participation in public life are not always obvious. For instance, Sawitri Saharso has written of the internalized psychological barriers to autonomous behavior or action, which are common among women 'raised in a culture that does not value autonomy.' See her 'Female Autonomy and Cultural Imperative: Two Hearts Beating Together', in *Citizenship in Diverse Societies*, eds. Will Kymlicka and Wayne Norman (Oxford: Oxford University Press, 2000), p. 228.

vulnerable members of cultural communities by shifting power away from those community leaders who try to silence and intimidate them, and expanding opportunities for critique, resistance, and reform.

My approach to mediating the phenomenon of cultural conflicts shares with other democratic theorists the intuition that the insights of deliberative democracy theory can and should be applied to problems of intercultural justice. Seyla Benhabib, Joseph Carens, Bhikhu Parekh, James Tully, and Iris Young have all argued for dialogical and deliberative approach as a response to cultural minorities' claims for recognition and accommodation, and as a means of grappling with specific conflicts of culture.[9] While sharing these authors' intuition that inclusive political deliberation must precede policy decisions about cultural conflicts, my perspective differs in important respects. As suggested above, unlike these thinkers, I argue that cultural conflicts involving cultural minorities are primarily political in character, and while they include normative dimensions, they do not necessarily entail deep disputes of moral value. This reframing of cultural disputes has implications for how liberal states should attempt to mediate such conflicts. Rather than exclusively foregrounding moral argumentation aimed at reaching normative consensus, I argue that *strategically* focused deliberation—in which participants seek negotiation and political compromise—is oftentimes a better solution to tensions between contested cultural practices and sex equality protections, both normatively and practically. The ensuing strategic agreements are often temporary, as they are contingent upon agents' shifting interests and assessments of practices, as well as upon social relations of power more broadly. Yet I argue that even these negotiated agreements and compromises can come to take on a settled normative quality, sometimes reinforcing thicker (and more durable) forms of moral assent. And finally, I contend that questions surrounding the legitimacy of contested cultural practices need not be resolved through formal political deliberation alone: certain types of informal democratic activity, such as forms of cultural resistance and reinvention, also speak to the validity of disputed customs, roles, and arrangements. Moreover, these informal sources of democratic expression can and should be introduced when citizens deliberate on the status and possible reform of contested cultural practices.

[9] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002); Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, MA: Harvard University Press, 2000); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); and Iris Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000).

The task of reframing the problem of cultural conflicts in multicultural liberal states is, in my view, an urgent one. Conflicts between cultural rights and sex equality are often addressed as part of a broader dilemma of liberal toleration that asks 'Should the intolerant be tolerated?' Yet to understand conflicts between liberal democratic norms and the cultural practices of nonliberal minorities in these terms is deeply problematic. From the start, the toleration framework places the issue solely in the hands of the state, viewing cultural conflicts as primarily about shoring up the security and authority of the state, and only secondarily about delivering justice to minorities.[10] This state-centric view is rarely justified as such, but merely assumed, particularly by liberal theorists writing on cultural minority rights. As Rita Dhamoon has argued, this focus necessitates a view of culture in which only (ostensibly) discrete, highly bounded cultures are seen as worthy of notice, because only these can challenge the authority of the state. Such a move both ignores sources of cultural injustice suffered by groups who do not fit this description (such as gays and lesbians), and exaggerates the boundedness of cultural groups and their importance to political life in plural democratic states.[11]

In foregrounding the perspective and status of the state in this way, the liberal toleration paradigm also assumes that the main conflict is between the state and the cultural group in question. Yet as I argue, oftentimes the heart of the dispute lies within the cultural or religious community itself, even if it may first be brought to light—or compounded—by broader legal and social structures. Through its focus on the state–group schism, the toleration framework overlooks important democratic responses within cultural communities to their own contested cultural practices. As a result, the ways in which individuals resist, revise, and reinvent their social customs and traditions drop from view. Yet these informal instances of democratic practice reveal much about the nature of the conflict: why a particular custom or arrangement is contested; how its practitioners attempt to change, or to resist its change; and who supports which version of a custom, and why. These responses can, moreover, also contribute to an evaluation of the validity or nonvalidity of contested customs and arrangements by helping to inform institutionalized forums of political deliberation. Such forums, often directed by cultural group members themselves, can become critical vehicles for determining the validity and future status of controversial cultural practices in liberal democratic states.

[10] For a parallel argument, see Barbara Arneil, 'Cultural Protections vs. Cultural Justice: Postcolonialism, Agonistic Justice and the Limitations of Liberal Theory', in *Sexual Justice/Cultural Justice: Critical Perspectives in Theory and Practice*, eds. Barbara Arneil, Monique Deveaux, Rita Dhamoon, and Avigail Eisenberg (forthcoming 2006, Routledge).

[11] See Rita Dhamoon, 'Shifting from Culture to Cultural: Critical Theorizing of Identity/Difference Politics', forthcoming, *Constellations* 13/3 (2006).

Not surprisingly, the state-centric liberal toleration framework, which I take up in Chapter 2, has generated inflexible responses to cultural practices ostensibly in conflict with liberal norms, ultimately yielding recommendations that states prohibit offending customs.[12] And indeed, some practices are clear candidates for restriction rather than deliberative resolution, such as infanticide, sati, and 'honor killings'.[13] Nor, in liberal democratic states, do these practices have defenders as such, although there is some dispute about the proper understanding of these customs and the best practical responses to them. Where harm or danger exists and subjects do not consent, decisions by liberal states to restrict or limit particular practices are mostly uncontroversial. Applying what I call a 'moral minimum' to an analysis of disputed practices will certainly support the prohibition of customs that result in serious physical harm, or which require outright coercion. Yet beyond these obvious cases, demands by traditional cultural groups for special accommodation may raise many more formidable challenges for government policymakers for which prohibition is not an adequate response. Nor will mere prohibition of certain customs—combined with appeals to liberal individual rights—automatically protect the internal minorities of cultural communities. Attempts to restrict controversial cultural practices through legal and coercive means can also fail to protect vulnerable members of such groups, such as women, by leaving certain individuals more exposed to private forms of oppression.[14] It is thus no surprise that the zero-tolerance response to problem of tensions between collective cultural claims and individual rights advanced by some liberal thinkers, such as Brian Barry, Will Kymlicka, and Susan Moller Okin,[15] has come under criticism.

A different response by liberal political theorists to tensions between gender equality and cultural protections urges a largely laissez-faire approach. In Chapter 2, I discuss the work of Chandran Kukathas, who opposes formal

[12] See for example Brian Barry, *Culture and Equality* (Cambridge, MA: Harvard University Press, 2001).

[13] So-called 'honor killings' involve the assassination of girls or women deemed to compromise a family's honor through sexual infidelity (real or suspected) or their refusal to marry a marriage partner chosen by the family. These killings are usually carried out by a male family member (father, brother, or even uncle or cousin). Cases of honor killings are reported annually in Britain, for example, in communities of Middle Eastern, North African, and (Muslim) South Asian descent.

[14] See the discussion by Jacob Levy, who also makes this point in *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000), pp. 53–62.

[15] See Kymlicka's *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), and *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001); Okin, 'Is Multiculturalism Bad for Women?'; and Okin, 'Feminism and Multiculturalism: Some Tensions', *Ethics,* 108 (1998), 661–84.

cultural rights. Kukathas nonetheless believes that in liberal societies, the state is not warranted to meddle in the affairs of citizens' cultural arrangements, since to do so would violate the rights of freedom of association and freedom of conscience.[16] Some cultural rights proponents also adopt a hands-off position: Jeff Spinner-Halev, for example, contends that as a matter of equal justice, the liberal state should not determine the internal arrangements and personal laws of religious groups. He is especially concerned about the injustice of imposing external reforms on oppressed groups, and argues that the liberal state's role should be limited to the practical construction and implementation of communities' personal laws, but should not include the selection or reform of those laws.[17] Yet granting cultural communities near-complete autonomy over the allocation of rights and benefits to group members overlooks the harm that may befall vulnerable group members (notably women), as well as the impact on prospects for societywide policies of gender equality.

Another liberal approach to conflicts of culture, which intersects with those sketched above, is the 'women's rights as human rights' paradigm, which appeals to human rights norms to justify protection from cultural and religious practices that harm or discriminate against women. Two normative liberal theories that employ a broadly human rights-based perspective are the philosopher Onora O'Neill's neo-Kantian perspective, which focuses on agents' consent and its requirements, and Martha Nussbaum's 'capabilities approach'.[18] As I discuss in Chapter 3, however, these perspectives are of limited use when it comes to hard cases of cultural conflict that involve socialization more than overt force. Nussbaum, with her Aristotelian-inflected liberalism, argues that customs common in traditional societies—such as arranged marriage and polygyny—should be prohibited because they undercut capabilities for human functioning.[19] Numerous problems arise, however, when an account of capabilities embedded in a conception of human flourishing is used to judge the validity and permissibility of contested practices across different cultures. Nussbaum's claim that a capabilities approach is 'sensitive to pluralism and cultural difference' is put into serious question given the liberal perfectionist framework that undergirds her theory.[20]

* * *

[16] See for example Chandran Kukathas, 'Are There Any Cultural Rights?', *Political Theory*, 20 (1995), 105–39.

[17] Spinner-Halev, 'Feminism, Multiculturalism, Oppression', esp. pp. 86 and 107–9.

[18] See especially Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), and Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

[19] Nussbaum, *Women and Human Development*, esp. Ch. 4.

[20] Ibid., p. 81.

As this brief overview of recent responses to the problem of cultural conflicts suggests, political theorists need to think much harder not only about *how* such conflicts might be resolved, but about how they should best be *understood* in the first place. This book is in the first instance an attempt to reframe tensions between cultural and sexual equality as problems of power and democracy, and specifically, as problems of democratic practice. The main questions posed in the book are *how should cultural disagreements and conflicts about women's status, roles, and arrangements be understood, and how should they be mediated or resolved in democratic societies?* However, once we look at specific cases of cultural conflicts, we quickly see that many additional questions need to be asked. Rather than asking what the liberal state ought to tolerate, I suggest that we pose questions that might help to reveal the social, cultural, and political meanings and purposes of practices: Why has a particular custom or arrangement come under fire now? Who is supporting it and who is opposing it? What are the relative power positions of the supporters and dissenters? What channels are available for dissent, and for reform? How has the state impacted the conflict, and are there ways in which the state (and semi- and nongovernmental organizations, or NGOs) can support the safe articulation of dissenters' criticisms and demands for reform?

In my view, these questions are best answered through contextual discussion of concrete instances of conflicting equalities. My point of departure in two of the country case studies (those of South Africa and Canada) is the tension that exists between constitutional protections for sex equality, on the one hand, and formal protections for cultural groups and recognition of a parallel system of religious or customary law, on the other. In a third example I explore, that of the issue of arranged and forced marriage among some South Asian communities in Britain, a conflict is ostensibly presented between the custom of arranged marriage and liberal norms of choice and autonomy. Although these examples may seem unique to the states in which they arise, these kinds of tensions are, arguably, likely to increase in scope and occurrence with efforts to expand cultural rights and protections in liberal democracies. Political theorists can help to illuminate the points of friction between cultural group norms and liberal democratic principles, and suggest some ways of mediating these. We can also draw attention to power struggles within communities, and reflect on the role of the state in either shoring up cultural power structures or, conversely, democratizing power more broadly.[21]

[21] For example, anthropologist Unni Wikan discusses Norwegian officials' reluctance to challenge the newly increased power of male immigrants over their families in their host society, in *Generous Betrayal: Politics of Culture in the New Europe* (Chicago and London: University of Chicago Press, 2002), p. 5.

CULTURAL CONFLICTS: POLITICAL NOT METAPHYSICAL?

In discussions of cultural practices that are, or appear to be, at odds with liberal norms, the liberal toleration framework emphasizes the 'otherness' of the custom or group in question. Sometimes this characterization is used to justify the prohibition of a practice. Equally, however, it can lend an unwarranted reverence to customs that are actually questioned, ignored, or rejected by group members, thereby exaggerating the importance of a custom within a cultural community's life. Discussing practices in abstraction from the social and political relationships that sustain them, as the toleration frame tends to do, also leads to a curious conflation and even distortion of customs. For example, customs such as 'clitoridectormy, polygamy, [and] the marriage of children' are run together in a list of dubious illiberal traditions that liberal societies ought vigilantly to guard against, or else condemn when practiced in nonliberal societies.[22] This abstracted view of social practices treats customs as more static than they really are, erasing the multiple meanings and forms that any given practice or cultural arrangement (like arranged marriage) may take. Moreover, such an approach to social traditions imputes a coherence and fixity to social *identities* that may not be warranted, and which social and cultural anthropologists increasingly reject as false. As Clifford Geertz writes:

> The view of culture, *a* culture, this culture, as a consensus on fundamentals—shared conceptions, shared feelings, shared values—seems hardly viable in the face of so much dispersion and disassembly; it is the faults and fissures that seem to mark out the landscape of collective selfhood. Whatever it is that defines identity in border-less capitalism and the global village it is not deep-going agreements on deep-going matters, but something more like the recurrence of familiar divisions, persisting arguments, standing threats, the notion that whatever else may happen, the order of difference must be somehow maintained.[23]

The recognition that cultural traditions—like social and cultural identities—invariably take different and often conflicting forms, and have varied and contested interpretations at any given time, has recently begun to inform the way that political theorists think about social practices.[24] This recognition has not been much in evidence, however, in the writing of thinkers keen to portray dilemmas posed by certain cultural traditions and belief systems as

[22] Okin, 'Is Multiculturalism Bad for Women?', p. 14.

[23] Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton, NJ: Princeton University Press, 2000), p. 250.

[24] David Scott ('Culture in Political Theory') argues that political theorists who advocate cultural group recognition have tended to appropriate anthropologists' more recent conception of culture as porous and contested without submitting this account to critical questioning.

formidable but ultimately indefensible challenges to liberal rationalism. Samuel Huntington's clash of civilizations thesis, which predicts that 'the great divisions among human kind and the dominating source of conflict . . . will be cultural . . . [and not] primarily ideological or primarily economic',[25] is perhaps the most extreme example. Cultural relativists may reify social groups as much as cultural absolutists, however: '"cultural relativists"' tendency to describe differences in terms of simple opposition—Western versus non-Western—without exploring how specific cultural practices are constituted and justified "essentializes" culture itself.'[26] At the other end of the spectrum, religious traditionalists sometimes emphasize the incommensurability of their own belief systems with dominant liberal paradigms precisely to resist demands for change from dissenters within their communities as well-concerned outsiders. Leaders of national ethnic groups seeking some degree of legal and political autonomy from the liberal state may also have a strategic interest in presenting their social identities as continuous and unchanging. As one anthropologist notes, 'Ironically, just as the older concept of culture seems less appropriate for contemporary society, it is being vigorously re-appropriated by indigenous peoples in search for sovereignty and self-determination.'[27]

The oversimple contention that many nonliberal, non-Western cultural practices are basically incompatible with, and pose a potential threat to, liberal constitutional norms and ways of life is closely related to another assumption that I challenge in this book. This is the claim that conflicts between a group's cultural practices and particular liberal principles are essentially deep conflicts of moral value between one (minority) culture and another (dominant) culture. Both the 'deep values' understanding of the nature of cultural conflicts and its attendant thesis of moral incommensurability are evident in writings by both liberal political theorists and proponents of deliberative democracy. Some scholars, however, are beginning to challenge these twin assumptions. James Johnson, for example, argues that while proponents of cultural accommodation may acknowledge the ways in which individuals construct social meaning, they 'typically forget that neither we nor others make meaning in a naive or disinterested way'; in so doing, 'they neglect the

[25] Samuel Huntington, 'The Clash of Civilizations', *Foreign Affairs* (Summer 1993), 22–49.

[26] Tracy Higgins, 'Anti-Essentialism, Relativism, and Human Rights', *Harvard Women's Law Journal*, 19 (1996), reprinted in *International Human Rights in Context: Law, Politics, Morals*, eds. Henry Steiner and Philip Alston (New York and Oxford: Oxford University Press, 2000), p. 407. Uma Narayan also makes this point in her essay, 'Essence of Culture and A Sense of History: A Feminist Critique, of Cultural Essentialism', *Hypatia*, 13/2 (1998), 80–100.

[27] Sally Engle Merry, 'Changing Rights, Changing Culture', in *Culture and Rights: Anthropological Perspectives*, eds. J. K. Cowan, M. B. Dembour, and R. Wilson (Cambridge: Cambridge University Press, 2001), p. 42.

inevitable politics of culture'.[28] Social anthropologist Unni Wikan rejects accounts of immigrant cultures in Europe that emphasize their otherness vis-à-vis the wider society. Indeed, given cultures' fluidity, the impact of social and political processes on cultural forms, and the vicissitudes of individual differences, Wikan argues that it no longer makes sense to speak of the 'transmission from one generation to another as the distinguishing mark of culture'.[29]

Following in this vein, a central argument of this book is that disputes about cultural roles and practices most often arise from disruptions to social power relationships and hierarchies, which often get played out as struggles over which identities, roles, arrangements, and practices ought to prevail and which ought not to. Cultural roles, identities, and customs may thus be the *occasion* for intragroup social and political confrontations without necessarily being the underlying *source* of conflict. But equally, the very definition of social and cultural identities is a contested process and may generate ongoing intragroup conflict, particularly during times of rapid political change. As Amélie Rorty reminds us, 'cultural descriptions are politically and ideologically laden'; moreover, she adds, '[t]he implicit cultural essentialism of a good deal of celebratory multiculturalism disguises the powerful intra-cultural politics of determining the right of authoritative description.'[30] Similarly, Johnson argues that the 'salience' of 'any social and political identity' is 'itself typically a strategic artifact', the result of actions by reasoning agents who can anticipate the consequences of particular presentations of identities—including influencing the actions of other actors.[31]

To claim that conflicts of culture are very often intracultural and political in nature is of course not to deny the extent to which external factors shape the internal debates about customs. Quite the contrary: such factors can escalate existing internal contestations of traditions as well as give rise to new ones. Decolonization, economic globalization, increased migration, and a host of other factors have contributed to the kinds of rapid social changes that in turn exert pressures on any number of traditional cultural practices, from the domestic division of labor to marriage customs and inheritance rules. Political demands for change from 'host' society (or majority) institutions can also exert pressures on members of cultural minority groups, which can

[28] James Johnson, 'Liberalism and the Politics of Cultural Authenticity', *Politics, Philosophy, and Economics*, 1/2 (2002), 213–36, pp. 217–18.

[29] Wikan, *Generous Betrayal,* p. 80.

[30] Amélie Rorty, 'The Hidden Politics of Cultural Identification', *Political Theory*, 22/1 (1994), 152–66, p. 158.

[31] James Johnson, 'Why Respect Culture?', *American Journal of Political Science*, 44/3 (2000), 405–18, p. 413.

issue in a defensive retreat into conservative cultural forms and identities—or, alternately, newly negotiated identities. While some community members will welcome such changes, others may have reason to deny that such an evolution is taking place, or to attempt to solidify practices into a more rigid form. The liberal state may also have the opposite effect on minority cultures: as Sarah Song has argued, we need to be 'attentive to how majority and minority cultures interact in hierarchy-reinforcing ways', and mindful of the fact that '[m]ajority norms and practices also pose obstacles to the pursuit of gender equality within minority cultures'.[32] Cultural conflicts about identities and practices may thus arise in response to new legal and political institutions that impact cultural arrangements in contentious ways. The self-definitions of group members will also change readily in response to such changes; as Rorty suggests, 'As a good deal of such characterization is dynamically and dialectically responsive to politically charged external stereotyping, intracultural self-definition often changes with extracultural perceptions (and vice-versa).'[33]

This rendering of cultural conflicts as primarily intracultural and strategic or political in character is one that I illustrate through discussions of such tensions in South Africa, Canada, and Britain, in Chapters 5 through 7. In cases where nonliberal cultural groups face a crisis over a particular contested custom, we often see that traditional leaders perceive their power base as under threat, either from within the community or as a result of some external change. These kinds of challenges in turn may give rise to a phenomenon in which 'powerful individuals and groups . . . monopolize the interpretation of cultural norms and manipulate them to their own advantage.'[34] New political frameworks—such as Canada's 1982 Charter of Rights and Freedoms or South Africa's 1996 Constitution—may also bring to light existing sources of friction between group factions. Vulnerable cultural group members sometimes seek the support of individual rights protections when their own leaders refuse to treat them fairly, as happened in the case of both black women in postapartheid South Africa and Native women in Canada during constitutional negotiations.

In arguing for an explicitly political and intracultural understanding of tensions between cultural rights and sex equality protections, I recognize that I am at odds with many democratic theorists writing about cultural

[32] Sarah Song, 'Majority Norms, Multiculturalism, and Gender Equality', *American Political Science Review*, 99/4 (2005), 473–489, p. 474.

[33] Rorty, 'The Hidden Politics of Cultural Identification', p. 158.

[34] Abdullahi Ahmed An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights', in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. A. A. An-Na'im (Philadelphia: University of Pennsylvania Press, 1992), pp. 27–8.

8

Conclusion: Legitimizing Democracy and Democratizing Legitimacy

In this final chapter, I want to revisit two of the most important challenges that greet proposals for a more democratic approach to resolving disputes about contested minority cultural practices and arrangements. The first objection suggests that it is not at all clear why the principle of democratic legitimacy should be widely acceptable in a culturally and morally diverse society. Why should a *democratic* conception of legitimacy prevail over other understandings of legitimacy, such as those that appeal to religious authorities? I call this the problem of *legitimizing democracy.* A second challenge is one that I have addressed in passing throughout the book, but warrants more focused attention here: if we democratize decision-making about contested cultural practices and arrangements, and foreground the deliberations of cultural group members themselves, how is it possible to protect and empower vulnerable individuals, such as women? If greater decision-making power is accorded to communities that are sexist and hierarchical, will this not leave women even less protected than before? These risks notwithstanding, I have argued that a deliberative democratic approach to mediating conflicts of culture makes it possible for women to contest and shape social practices through both formal and informal political means. In formal spaces of political debate, principles of nondomination, political inclusion, and revisability help to ensure that vulnerable group members can openly challenge practices and customs. Outside of such political deliberation, women can and do also contest and revise their cultural arrangements. To better support them in this, and to enable us to see the political and normative character of such interventions, it is important to expand our understanding of the basis of political legitimacy. Specifically, informal democratic expressions and activities should also be seen as bearing on the validity of social and cultural practices. I call this part of the project the challenge of *democratizing legitimacy.*

LEGITIMIZING DEMOCRACY

How should we define democratic legitimacy in culturally diverse societies? What makes a particular political process, or a particular outcome, valid from the standpoint of democratic legitimacy? There is of course a range of possible responses to these questions within political theory. Classical liberals, such as social contract theorists, locate legitimacy in the liberty-protecting state institutions to which citizens give their consent. Contemporary political liberals like John Rawls interpret the contractarian argument somewhat differently: Rawls locates legitimacy in the rationality and reasonableness of principles of justice as fairness, as well as in the claim that liberal principles and institutions resonate with citizens' normative intuitions about fairness and justice. Republicans such as Rousseau locate legitimacy in the expression of popular sovereignty. By contrast, some contemporary neorepublicans deny that democratic legitimacy is established by gauging the popular will; Phillip Pettit, for example, argues that democratic legitimacy requires instead that political processes be free from relations of domination, and that policies, laws, and institutions be democratically contestable.[1]

Taken alone, none of these accounts of democratic legitimacy seems adequate to the demands of culturally plural, liberal democracies. In Chapter 4, I argued that deliberative democracy theory comes closer to these other conceptions in imagining a robust and egalitarian account of democratic political legitimacy. But although proponents of deliberative democracy agree on a general ideal of political conflicts as best mediated through normative argumentation, they do not have a uniform understanding of democratic legitimacy. As we saw earlier, these thinkers alternately point to both the procedures and the outcomes of deliberative rationality in accounting for democratic legitimacy. We can in fact identify two main conceptions of legitimacy at work here, thick and thin. The thick account of democratic legitimacy is very demanding indeed, insofar as it holds both the procedures and the outcomes of deliberation to a number of conditions of normative validity. For reasons discussed earlier, in Chapter 4, this conception is not one that can be expected to have broad appeal among cultural minorities, most especially, nonliberal minorities. By contrast, the thin conception of democratic legitimacy focuses on the procedures, not the outcome, of deliberation. But even this thinner account needs to be amended if it is to enjoy wide normative appeal, and also

[1] Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford and New York: Oxford University Press, 1997).

if it is to reflect the diverse *sources* of democratic legitimacy in private and social life.

Let me briefly recap the thick and thin conceptions of legitimacy set out first in Chapter 4:

(a) *Thick:* Proponents of the thick view, such as Benhabib and Cohen, begin from the idea that free and reasoned deliberation is the basis of democratic legitimacy. However, they conceptualize deliberation as bound by strong normative constraints of egalitarian reciprocity, publicity, and reasonableness. Moreover, they argue that the outcomes that issue from deliberation should be subjected to a further test of legitimacy: outcomes are said to be legitimate if they are the product of deliberative communication constrained by norms of rationality and publicity, and if the agreements that participants reach *also* reflect these norms. For some proponents of the thick conception, deliberation should also aim to yield consensus on pivotal norms, which communicative agents must be able to endorse for the same, shared (normative) reasons.[2]

(b) *Thin:* On the thin account, a political procedure is democratically legitimate if all affected individuals are freely included in reasoned deliberation aimed at establishing *which* political principles or policies they and others should be bound by. Bohman argues that we should locate democratic legitimacy in the process of striving to reach free agreement through dialogical activity, and rejects strong constraints on deliberative outcomes, such as consensus.[3] Young also endorses a version of the thin conception of legitimacy, emphasizing the requirement of political inclusion.[4]

The project of legitimizing democracy, I argue, depends in part on rejecting the thick conception of democratic legitimacy. Only the *procedures* of political deliberation should be held to a test of democratic legitimacy, and a minimalist one at that; we must also ensure that the thin conception of democratic legitimacy does not smuggle in any strenuous and unnecessary normative constraints. At the same time, it is necessary to expand the thinner conception to include an account of how informal democratic activity and contestation by cultural group members affects the validity of social practices and arrangements. From South African women changing the customs surrounding lobolo and customary marriage, to Muslim women protesting the banning

[2] According to Jürgen Habermas, 'a rationally motivated (*Einverständnis*) consensus rests on reasons that convince all parties *in the same way*'. See his *Between Facts and Norms*, p. 166.

[3] Bohman, *Public Deliberation*, p. 34.

[4] Young, *Inclusion and Democracy*, p. 52.

of headscarves in French schools, and British South Asian women's activism around the issue of forced marriage, informal democratic activity can speak volumes about the legitimacy or illegitimacy of roles and customs. Formal political processes can and should incorporate evidence of citizens' democratic activity in deliberations about contested social practices.

The reconceived conception of deliberative legitimacy I have developed in this book aims to incorporate these neglected spheres and aspects of democratic activity. It also eschews strong norms of moral consensus and universalizability in public reason-giving, and rejects an idealized conception of moral discourse. My approach to mediating conflicts of culture emphasizes open deliberation, and proposes negotiation and compromise as tools for reaching resolutions. As such, the account of democratic legitimacy I am reaching for here cannot guarantee liberal outcomes: participants to deliberation may ultimately choose to preserve customs that are nonliberal in some regard (such as the decision not to prohibit polygamy in South Africa). Just as holding deliberative outcomes to a test of democratic legitimacy is intended to eliminate agreements that are not recognizably liberal, so are the normative constraints employed by most deliberative democrats expected to yield liberal results. Yet as I have argued, in plural societies with democratic constitutional frameworks, arguably there may exist policies that challenge liberal values but which are nonetheless valid outcomes of deliberation. For instance, we might imagine deliberation leading to policies in which certain substantive equality protections are deemed to take a back seat to collective Aboriginal rights and sovereignty. It seems unjust from the standpoint of democratic legitimacy to rule out *these* kinds of agreements a priori.

Idealized forms of deliberation, I argued in Chapter 4, are normatively problematic in the potential exclusions that they effect, and so are also of limited use in mediating conflicts in culturally plural societies. Such idealized accounts of deliberation pose similar difficulties when it comes to the task of *justifying* the principle of democratic legitimacy in diverse societies. A thin, procedural conception of democratic legitimacy seems more likely than the thick conception to meet with the provisional agreement of members of diverse communities. Although it surely will not win the allegiance of *all*, this account certainly expresses a widely held belief—by no means limited to liberal democratic societies—that people should have a say in establishing which practices, principles, and arrangements they are to be bound by. By contrast, a thick notion of deliberative legitimacy employs a sustantive ideal of communicative rationality, which requires that participants discuss disagreements in a process of moral argumentation. As we saw earlier, this view presupposes normative commitments to universalizability and public reason, and may also hold out moral consensus as the goal of deliberation. Yet

even proponents of deliberative democracy who reject idealized forms of deliberation claim, problematically, that certain substantive liberal principles must be taken as nonnegotiables in democratic discourse, or as normatively prior to deliberation. For instance, Amy Gutmann, who espouses an ideal of democratic constitutionalism, argues that liberal democracies should insist on core democratic principles of civic equality, equal freedom, and basic opportunity.

As the discussion of Native women in Canada and the reform of customary law in South Africa illustrated, however the stipulation of norms of reasonableness, egalitarian reciprocity (Benhabib), and publicity in advance of deliberation can make it difficult to reframe gender justice in terms other than liberal individual equality. Idealized versions of deliberative democracy stipulate that no reasons can be given, and no norms appealed to, which are not fully in keeping with the ideal of individual equality. Sometimes this requirement is construed merely as the recognition of interlocutors' equal worth and dignity—a norm of reciprocity, in other words. But from here, more substantive conceptions of equality quickly find their way into the formulation of deliberative democracy, thus opening up the possibility of incommensurability. For example, as we saw in Chapter 5, some Aboriginal peoples consider values such as social harmony as much more central to their way of life than individual equality. Legal scholar Mary Ellen Turpel writes that for many First Nations communities, '[e]quality is not an important political or social concept'.[5] In devising formal procedures for political deliberation about contested cultural practices, it seems both normatively unjust and counterproductive to begin by asserting *as background norms* ideals that are either controversial or open to widely conflicting interpretations. If a substantive ideal of equality is taken as an a priori norm of rational political discourse, it may place beyond the ambit of valid deliberation and decision-making those conflicts in which equality is precisely what is contested. Disputes about gender roles and arrangements, as well as about membership rules, fundamentally concern the social relationships of different individuals within the group, their relative positions of power, and so forth. Some of the arguments and reasons offered by factions within traditional cultural and religious communities are in effect claims about who matters most, and whose voice counts in political life; group members may justly reject the imposition of an a priori norm of equality on the terms and outcome of political debate. Consider, for example, the US Supreme Court's decision to uphold the Pueblo Indians' discriminatory membership rules disenfranchising women (but not men) who marry outside the band. Those who opposed the decision argued that

[5] Turpel, 'Patriarchy and Paternalism,' p. 179.

the state thereby perpetuated the unequal status of all Pueblo women.[6] By contrast, those who supported the decision claimed that it affirmed the cultural equality and sovereignty of the Pueblo nation. Yet had individual and sexuality equality been thematized more sharply as contested norms in more democratic deliberations about the issue of membership, perhaps the more controversial justifications for excluding women would have come to light.

Deliberative democrats and political liberals might say, in response to this point, that arguments by Native leaders in Canada and the United States aimed at excluding certain individuals from the benefits of membership rightly fail the tests of publicity and reasonableness. Claims that imply or assert women's inequality are unreasonable and so should be excluded from democratic deliberation. Yet if these beliefs, interests, and motives are crucial factors in the dispute, then they need to be put on the table where they can be discussed, evaluated, and contested. The belief that vulnerable group members, such as women, are best protected by always seeking to prevent the introduction of normatively unreasonable or unjust claims in political dialogue gambles that these ostensibly unjust reasons will cease to influence debate and decisions in important ways. Instead of insisting that arguments made in the course of deliberation must cohere with a particular conception of individual equality, then, it could be instructive and worthwhile to permit such beliefs to be presented and contested in political deliberation. As Dryzek notes, '[o]ne cannot abolish prejudice, racism, sectarianism, and rational egoism by forbidding their proponents from public speaking. A model of deliberative democracy that stresses the contestation of discourses in the public sphere allows for challenge of sectarian positions, as it allows for challenge of all kinds of oppressive discourses'.[7]

* * *

So far I have been concerned with what democratic legitimacy should *not* require. But what does it take to make deliberative procedures democratically *legitimate*? To recap the argument from Chapter 4, such processes must firstly ensure nondomination, by not violating the basic rights and freedoms of individuals, including the right to expression and the right to participate in political life free from intimidation or coercion. Second, democratic legitimacy requires that formal decision-making procedures meaningfully include all individual stakeholders who wish to debate and to try to impact particular proposals. Those who stand to be impacted more than others, and those who

[6] This case—*Santa Clara Pueblo* v. *Martinez* 436 U.S. 49 (1978)—is widely discussed in the literature on internal minorities. See for example Carla Christofferson, 'Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act,' *Yale Law Journal*, 101/1 (1991), 169–85.

[7] Dryzek, *Deliberative Democracy and Beyond*, pp. 168–9.

have in-depth experience of a particular practice, may have an even greater right to be heard and to influence decisions, as Ian Shapiro has argued.[8] The precise means through which members might make their political voices heard will vary depending on the kinds of lives they lead and the positions they occupy within their communities. Political participation and activity may also be informal, in democracy's expanded sites.

The third criterion for the democratic legitimacy of political processes requires that deliberative outcomes be revisable: political institutions and forms of governance decisions must always be open to discursive challenge, and ultimately, to revision. To some extent, of course, genuine political inclusion already depends on the possibility of such contestation; but where such inclusion is achieved, publicly articulated ideals, laws, institutions must be seen to be genuinely open to revision. In conceiving of the criterion of contestability, I borrow from Phillip Pettit's work on republicanism: Pettit argues that individuals must be free from relations of domination in both their public and private lives, where domination is understood as vulnerability to arbitrary interference and exploitation by the state or other individuals. But rather than arguing that nondomination depends on minimalist negative liberties as we might expect, Pettit claims that 'what is required for non-arbitrariness in the exercise of a certain power is . . . the permanent possibility of effectively contesting it'.[9] This criterion of contestability is thus in some ways the true mark of democratically legitimate decision-making procedures.

Similarly, I have argued that the legitimacy of controversial cultural practices is thus at least partly bound up with their contestability and revisability. Cultural group members must also be free to publicly criticize their customs and arrangements without fear of reprisals from the traditional leaders in their communities. A person cannot be said to readily accept or consent to an arrangement unless one could also reject it, as we saw in the discussion of O'Neill's thesis on 'possible consent', in Chapter 4.

Having whittled down the idea of democratic legitimacy to a more minimalist conception, the problem of justifying democratic legitimacy is somewhat simplified. Let me finally turn to the question, why democratic legitimacy? Why should the principle of democratic legitimacy, and decision-making processes based on this principle, be persuasive to members of communities with nonliberal and possibly deeply hierarchical social traditions within plural liberal states? I argued in Chapter 4 that the political inclusion mandated by the principle of democratic legitimacy is a normative requirement of genuinely democratic processes of decision-making. But there

[8] Ian Shapiro, *Democratic Justice* (New Haven, CT: Yale University Press, 1999), pp. 37–8.
[9] Pettit, *Republicanism*, p. 63.

is also a formal reason why even members of traditional or nonliberal cultural communities should agree to democratic legitimacy as a principle shaping political deliberation and decision-making. Appeals to the validity of cultural and religious forms of life, and to the importance of cultural self-determination, presuppose that group members have capacities for reason and autonomy. Cultural members are, after all, valuing agents, capable of forming judgments, and of understanding and arguing about the value of their cultural practices. There is no good reason to limit these capacities strictly to *non*political evaluative activity; political agency is a central part of what it is to have rational (nonidealized) autonomous agency.

As argued earlier, even nonliberal cultural minorities have cause to accept the principle of democratic legitimacy as broadly applicable to deliberation and decision-making for it will ultimately enable them to maintain a degree of self-determination as regards cultural reforms. Even within the most traditional cultural communities, there are competing interpretations of customs and variations on their practice; usually these differences are unremarkable and not a source of strife. But sometimes these differences manifest as disagreements with very concrete social and political consequences for group members. Attempts simply to suppress these disagreements within communities cannot really be in the interests of the group as a whole (or, arguably, the self-interest of leaders) over the long term. The cultural practices of traditional communities residing within liberal democratic states will continue to evolve, with or without the support of prevailing authorities. If cultural groups want to retain as much say as possible over the evaluation and reform of their own practices then democratizing their internal processes and agreeing to hold their social arrangements to a test of democratic legitimacy may actually be the best options available.

Habermas has remarked that 'When a culture has become reflexive, the only traditions and forms of life that can sustain themselves are those that *bind* their members, while at the same time allowing members to subject the traditions to critical examination and leaving later generations the *option* of learning from other traditions.'[10] There is ample evidence that nonliberal cultural groups ensconced within liberal democratic states frequently face formidable demands from within their own communities for reform, including more democratic methods of resolving disputes. In refusing to let their members adapt cultural practices to better fit their lives, or in refusing to let individuals opt out of

[10] Jürgen Habermas, 'Struggles for Recognition in the Democratic State', in *The Inclusion of the Other: Studies in Political Theory*, eds. Ciarin Cronin and Pablo De Greiff (Cambridge, MA: MIT Press, 2001), p. 222.

certain practices (such as arranged marriage), traditional leaders risk eroding their own bases of support and splintering their communities. Dissenting members may increasingly choose to exercise their right of exit in particularly confining contexts.

Religious groups pose a particular challenge to this argument for democratic legitimacy, since nondemocratic forms of decision-making and authority are often constitutive of their identity (e.g. the Roman Catholic Church and Orthodox Judaism) and central to the power of religious leaders. But even in these cases, it is possible for the liberal state to encourage more democratic means of settling disputes about the status and possible reform of contested cultural practices. When cultural rules, practices, or exclusions are protested by individual members as unjust, or else push against liberal norms and rights protections, it will usually be more fruitful to let those communities proceed with internal processes of reform, where these exist (provided they adhere to the principles of nondomination, political inclusion, and revisability). Where such internal processes are nonexistent or thin on the ground, the liberal state can and should encourage the development of other inclusive processes of debate, evaluation, and reform, and foster specifically *democratic* resolution of such conflicts. These processes will oftentimes include stakeholders from groups committed to, for example, legal reform and advocacy of women's rights, and may even include representatives from governmental and semigovernmental bodies.

Democratic processes for evaluating, and if necessary, reforming traditions from within, will require that those in positions of power in cultural communities not block their members' efforts to democratically negotiate and shape the terms of their own relationships to social practices and arrangements. Admittedly, this is a tall order—especially in the case of religious groups—and not easily brought about. Traditional cultural authorities may resist efforts at reform and resent any interference in the running of their communities. They may also try to marginalize internal critics by associating them with ideological agendas of those outside the group. Some liberal political theorists have at this juncture proposed that the state needs to reinforce opportunities for exit for group members who face discrimination or persecution. I agree. But perhaps more importantly, the liberal democratic state can and should support internal group processes for the reevaluation and reform of contested customs and arrangements, particularly for women. It can do so by reinforcing existing democratic expressions and resistance, and requiring that all stakeholders, including marginalized persons, be included in consultation processes regarding contested practices. Or, as Spinner-Halev has argued, where a largely autonomous ethnic or religious group is charged with reforming its own personal laws, the state can 'insist that these laws be

established by democratically accountable representatives, not just the traditional male religious leaders'.[11]

DEMOCRATIZING LEGITIMACY

Moving to more democratic methods of settling disputes about contested cultural practices, particularly those concerning sex roles and arrangements, raises questions about the internal power dynamics of cultural groups, as we have seen. Are not vulnerable members of nonliberal national, ethnic, and religious groups open to manipulation and harm in a more democratic setting—especially women? Moreover, might not women in highly constrained circumstances merely capitulate to the social roles that are most familiar to them, and which may offer them a modicum of protection? These two concerns, raised by such thinkers as Okin, O'Neill, and Nussbaum, do not in my view vindicate a liberal over a democratic approach to mediating conflicts about women's roles and arrangements. Okin and O'Neill are right to assert that coercion and manipulation undercut agents' freedom and capacity to resist and revise social practices, but both are overly pessimistic about the prospect for developing (and reforming) forums for democratic deliberation in minority communities. They also underestimate the extent to which women can and do contest and shape their roles and arrangements. Similarly, while Nussbaum's concerns about the adaptive preferences of women in traditional settings are warranted, this challenge, as argued earlier, is not best met by introducing a ranked (and controversial) list of necessary human capabilities as a means of determining which social practices to support and which to prohibit. Rather, by recognizing and supporting—both morally and materially—women's existing ways of shaping their cultural practices and arrangements, and by helping to empower women in both formal and informal democratic life, it becomes more possible to view women's stated preferences as valid.

These concerns raised by Okin, O'Neill, Nussbaum, and other liberals make it all the more necessary, however, to specify which cultural conflicts and decisions are good candidates for democratization, and which are not. In addition to cultural practices that are already prohibited by criminal laws (such as honor killings), sanctions can and usually ought to be applied in cases where members claim mistreatment or discrimination at the hands of their group. So, for example, this would suggest that in states where religious institutions are legally exempt from equality and nondiscrimination statutes

[11] Spinner-Halev, 'Feminism, Multiculturalism, Oppression', p. 108.

(such as the United States, Canada, and Israel), it may be just to withdraw tax exempt status and other benefits where a religious group has consistently refused to redress claims of sexual or race-based discrimination. The backup protection that such a legal approach can offer vulnerable group members is not inconsiderable. However, such a strategy is by no means mutually exclusive with the more deliberative democratic approach that I argue it is still to be preferred, both within cultural communities and in groups' dealings with the liberal state. Whatever deliberative procedures are adopted, it is important to protect the rights of all group members to participate in the political process, advancing their own accounts, for example, of how particular customs do and ought to function, and how they might be reformed. Those who are most impacted by a custom, and those most likely to be silenced by power dynamics within the community, might even be given a more prominent role in deliberation where the process involves state institutions. Nor can this right to have a say in the customs and arrangements that one is to be bound by be permanently surrendered (except through exit, in some circumstances).

Aside from these protections, legitimizing democracy will ultimately require that we think a little differently about the concept of democratic legitimacy itself. In particular, we have seen that it requires that we expand our understanding of the *basis* of democratic legitimacy in culturally plural, liberal democracies, and to take a broader view of what makes a practice valid or invalid. Liberal and deliberative democratic accounts of legitimacy claim that particular political procedures and/or norms establish the legitimacy of decisions about contested policies or practices. Political procedures indeed play a central role in securing the legitimacy of a contested norm or practice, and writers such as Benhabib are right to try to conceive of ways to open up and democratize spaces of public deliberation.[12] However, I have also tried to show that such procedures do not exhaust the sources of democratic legitimacy in plural democratic states. As we have seen in the cases of South Africa, Canada, and Britain, *informal* kinds of democratic activity in private and social life may also be understood as speaking to the issue of a custom's legitimacy, or lack thereof. Democratic legitimacy, on this view, requires that debate and decision-making processes acknowledge the multiple sources of validity within cultural communities, the many points of contestation, and the undeniable fluidity of cultural practices.

Not all controversial cultural practices will become the subject of formal political debate and decision-making, let alone legislation. Nor should they: there are ways short of formal political procedures to help communities determine the democratic validity of customs. For example, one might ask

[12] Benhabib, *The Claims of Culture.*

whether group members seem to strongly identify with specific customs, and whether these are, by their account, central components of their lives. To what extent have group members tried to modify certain practices to better meet their own changing needs and circumstances, or to reflect the shifting or evolving shared understandings in their community? And finally, to what extent are practices and arrangements contested, and contestable, on the ground? Group members' responses to social practices may range from subtle subversions of customs, to the retrieval of forgotten but empowering social arrangements, to outright refusal of a tradition that some members find restrictive or demeaning. These responses can and do also occur even within very restrictive and traditional social contexts; indeed, in such contexts, informal resistance and ad hoc revision of practices may be all that is possible. Yet as I have argued, there are good reasons to view these individual and collective social responses as contributing to an assessment of the legitimacy or illegitimacy of customs, either taken alone, or used to inform more structured political deliberations on contested customs discussed earlier. Rather than viewing cultural change and contestation as signs that a custom lacks validity, then (as some argue), we might consider these as precisely markers of a vibrant and dynamic culture.[13]

Democratic theorists who endorse public deliberation as a means of mediating cultural conflicts have tended to ignore informal democratic activity as a source of normative validity. Benhabib argues in *The Claims of Culture* that we need to conceive of democratic forms of intercultural dialogue, but she conceives of these along the broad outlines of formal public deliberation.[14] Spinner-Halev also favors democratic decision-making procedures, but again, limits his discussion to institutionalized political processes. Both of these thinkers are surely right about the importance of fostering democratically inclusive, formal political deliberation and decision-making in trying to resolve conflicts of culture. However, as I have argued, it is also important to conceive of the sources of democratic expression much more broadly than do either Benhabib or Spinner-Halev.

Some deliberative democrats have urged the expansion of *formal* sites of political dialogue in contemporary democratic polities. For example, Bohman argues that a dialogical approach to deliberation requires the 'expanding (of) opportunities and access to deliberative arenas . . .'.[15] My own recommendation that democratic legitimacy should be seen as including informal

[13] As Alison Renteln writes, 'The denial of the existence of cultural traditions on the grounds of a lack of unanimitiy is manifestly absurd'. See *The Cultural Defense*, p. 12.

[14] Benhabib, *The Claims of Culture*, p. ix.

[15] Bohman, *Public Deliberation*, p. 36.

democratic activity is compatible with this general idea. Concretely, expanding sites of political dialogue might mean developing mechanisms to make sure that less powerful cultural group members can contribute to deliberations where contested practices are under discussion. Individuals whose voices are not readily heard within their groups' own political processes are still possessed of agency. It may also be possible to create new spaces for political debate that can help to empower such individuals, like special legislative advisory bodies, organized forums for immigrant youth, and so forth. But other forums can and should develop from cultural group's own structures for decision-making (e.g., in the case of Native peoples and some religious groups).

Deliberative democracy theorists should be thinking about ways to *expand* the ability and opportunities of less powerful citizens to influence decisions about contested social practices and arrangements outside formal political deliberation.[16] The liberal state can also help to amplify and give political clout to this informal democratic activity in numerous ways: the example of the British inquiry into arranged marriage shows how government consultations can help underscore the authority of community groups that are aiming to support cultural dissenters. It is most helpful, as I have argued, if these consultative processes focus on the practical needs and interests of group members, for a variety of reasons, not least because a practical focus invites cultural group members to talk about the ways in which social customs are evolving, or have already changed. Although legislation governing cultural practices and arrangements can also take account of the fluidity of traditions, it cannot do so without the input of community members who have local knowledge of those customs—or a 'lived experience' of practices.[17]

The deliberative democratic approach to cultural conflicts advanced in this book does not purport to guarantee liberal solutions, nor does it promise that deliberative outcomes will always be the most fair or just from the point of view of all concerned. But the procedures for evaluating and, if necessary, reforming contested cultural customs outlined here are democratic and practically grounded; as such, they can generate proposals that are both democratically legitimate and politically viable in their reflection of cultural

[16] Excluding coercive, violent, and outright manipulative forms of influence, of course.

[17] The liberal state can support formal and informal democratic activity in other ways. Better funding for cultural community and grassroots groups is one way to extend support, for example. Trusted arbitrators could be supplied to help foster fair decision-making within cultural groups when disagreement is acute. Legislative and judicial bodies in the broader society can also be made more open to democratic processes. In particular, courts could be made more receptive to culturally distinctive forms of argumentation and evidence-giving. See discussions by Iris Young and Angie Means, both of whom have advanced compelling arguments in favor of expanding democratic legal and political norms to acknowledge the authority of alternative cultural narratives.

practices and communities in flux. I have argued that a democratic, politically focused approach to resolving disputes about contested cultural practices is to be preferred over liberal juridical and toleration approaches as well as unmodified deliberative democratic approaches. This argument is grounded in a defense of the principle of democratic legitimacy, which I have said requires the meaningful political inclusion in decision-making of all those whose lives will be affected by deliberative outcomes. Legitimizing democracy in culturally diverse societies therefore requires that we take a much broader view of both legitimacy and democracy. It follows from this that any formal processes for determining the status of contested customs should acknowledge the diverse sources of democratic legitimacy; thus, the everyday ways in which cultural group members contest, revise, and shape their own cultural traditions and roles should move from the periphery to the foreground of debates about disputed customs. In recognizing the internally contested nature of so many cultural practices, we acknowledge that cultures evolve and change through individual and collective imagination, initiative, and agency.