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Women's Right of Choice?! A Reflection on Women's Rights, Cultural Toleration and Public Morality

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Abstract

Immigration has given rise to a debate in political philosophy about the extent to which a Western liberal state can accommodate the cultural claims of minority groups. Some cultural traditions of minority groups seem to violate some of their members' civil rights and liberties that liberal democracies are supposed to protect. In those cases, cultural diversification can lead to deep controversies. In 1997, a debate took place in the Netherlands that appears to be about such a case. In the debate about sex selective abortion, it was assumed that certain cultural minorities have a cultural preference for sons and that sex selective abortions may be wished on that ground. The question that arises is whether this cultural preference should be respected. This article presents an analysis of the debate, raising questions about women's rights, cultural toleration and public morality. It discusses how a diversity-based and an autonomy-based approach to toleration could balance these different values. In conclusion it is argued that although sex selective abortion is morally wrong, access to abortion should not be restricted.

1 Introduction

In 1997 a debate took place in the Netherlands about sex selective abortion for non-medical reasons. Sex selective abortion involves identification of the sex of the fetus using prenatal diagnosis, with abortion of the fetus if it is of the undesired sex. The overture to the discussion was a television programme implying that abortion is allowed far too easily in the Netherlands. Two abortion practitioners stated during the programme that they refrained from any moral judgement and accepted any motive underlying a woman's wish for an abortion. Moreover, if a woman chose to have an abortion purely on grounds of the sex of the fetus, this was not a reason for the doctors to refuse. The debate was given an extra impulse when the Minister of Health, Els Borst, intervened with a statement which made it clear that she considered sex selective abortion permissible in the Netherlands. The public debate then concentrated on the Minister's statement.

This paper presents an analysis of the debate, in which the questions of

women's rights, cultural toleration and public morality all come so strongly to the fore.[1] First, *women's rights*, because abortion is about a woman's right to self-determination, but also, where sex selective abortion is concerned, it is generally a fetus of the female sex that is not desired. So sex selective abortion is an infringement on the principal equality of men and women. Secondly, *cultural toleration*, because numerous immigrant groups have settled in the Netherlands of whom some, it is assumed by at least a section of the debaters, have a cultural preference for sons and who may therefore desire a sex selective abortion. This raises the question to what extent this cultural preference should be respected. Thirdly, *public morality*, because it is the Dutch government that has to answer this question. The Dutch government subscribes to all of the above mentioned values, however, the subject of sex selective abortion gives rise to tension between different values. This raises the question how these values could be balanced against each other and what consequences this could have for the law. Should Dutch abortion law be changed?

I regard sex selective abortion as one of a wider set of cultural practices of minority groups that pose restrictions on women's rights and liberties, others being virginity prerequisites and arranged marriages, which raise the question of toleration of non-liberal practices within a liberal democracy. As there is now a major debate in political theory about the extent to which a liberal state can or should accommodate the claims of cultural minority groups, it is to political theory that I shall turn to look for an answer. I shall concentrate on the liberal answer, because the political morality of all political movements in the Netherlands, including the Dutch women's movement, is to a large degree liberal. Moreover, it is precisely liberal political morality that has the ambition to offer a solution for problems of religious and cultural pluralism (cf. Musschenga 1993: 315). Within liberal theory there seem to be two rival approaches to toleration: 'diversity-based' and 'autonomy-based'. Thus the question becomes, how would they tackle the issue of sex selective abortion?

The paper is organized as follows: first, Dutch abortion law will be described as well as some facts, as far as these are known, concerning the occurrence of a cultural preference for sons (and about sex selective abortion as a way of realizing this preference). An analysis of the public debate follows: which arguments – pro and contra – were raised in the debate? Next, I will discuss what appears to be the sting in the debate on sex selective abortion: how can we weigh the values that are at stake in this question against what is called, in this, women's right of choice? With respect to the latter two questions, I will present the views of two political philosophers, Chandran Kukathas and Will Kymlicka, who represent the 'diversity-based' and 'autonomy-based' approaches to toleration, respectively, who differ strongly in their argumentation, but who, on this particular issue, arrive at rather similar conclusions. My discussion of both their perspectives makes clear that this is to do with a

fundamental problem of sex selective abortion concerning the autonomy of women, which makes it indeed a very 'hard case' to deal with for *any* liberal theory of toleration. Finally, I shall reflect on the response given by the Dutch Minister of Health, Els Borst, to the question posed in parliament as to whether the Dutch abortion law should be changed.

2 Dutch law on abortion

The Dutch law on abortion came into force in 1981 after years of heated political contention.[2] On the one side were the groups and political parties such as feminists and liberals who were, in principle, in favour of free abortion on the grounds of a woman's right to free choice ('Yes, provided that ...'). On the other side were the religious groups and political parties who argued that the need to protect unborn human life ruled out abortion except in extreme situations, such as when continuation of the pregnancy would endanger the woman's life ('No, except if ...'). The law that was eventually adopted is clearly a compromise solution. Abortion is permitted if there is a risk to the life or health of the woman or if there is a critical situation that cannot be solved in any other way, including psycho-social conditions. Thus, the law does not provide for free abortion depending only on the woman's wishes, but the distinction is a tenuous one. Since it proved impossible to formulate general criteria for the definition of a critical situation, the legislator sought refuge in procedural measures to guarantee cautious decision-making in individual cases. Determination of whether the situation is critical or not is left up to the joint responsibility of the woman and the abortion practitioner. The woman is legally obliged to take five days to reflect. Her practitioner informs her about alternatives to abortion and examines whether she is genuinely convinced that an abortion is the only way to resolve the problem. The practitioner only plays a procedural role. His opinion is not decisive; he can refuse to assist, but in that case another pratitioner is allowed to assist. So, in the end it is still the woman who decides.

If sex selective abortion is to be applied, the sex of the fetus has to be determined first. Sex selective abortion is thus closely related to the rise of prenatal diagnosis (PND) in genetics. There are three techniques that can be used; identification of fetal sex is possible by chorionic villus sampling, amniocentesis, or ultrasound between approximately 10 and 16 weeks gestation. This means that if the fetus is not of the desired sex, a second-trimester abortion could be performed. In genetics, considerations about prenatal diagnosis and selective abortion are led by the wish to prevent illness. As some illnesses are sex-linked, the debate in medical ethics concerns what genetic diseases or congenital anomalies are so serious that they justify PND and

selective abortion. As the sex of a child in itself is not considered an illness, this can never be a justification for PND and abortion in medical ethics. The policy of the professional groups involved in PND in the Netherlands is therefore not to meet requests for sex selective tests.[3] However, it is still possible to discover the sex of the fetus. From the age of 36 years onwards, age is a valid medical indication for chorionic villus sampling or amniocentesis. It is common practice among genetic counsellors in the Netherlands to inform the woman of the sex of the fetus at the same time as she is told about the presence or absence of a disorder or anomaly. Ultrasound is only used in the regular healthcare on medical indication. Furthermore, it is not policy to disclose the sex of the fetus, because the sex can not be determined as reliably with ultrasound as with the other two techniques. Women of any age can also turn to a private clinic. These private clinics perform ultrasound scanning on request – a medical indication is not required – and are usually willing to disclose the sex of the fetus. These two practices hence make sex selective abortion possible within the current Dutch legislation. The next question is: are there people – in this case, cultural minorities – who actually request sex selective abortion?

3 Sex selective abortion: the people's opinion

Do cultural minorities have a culturally determined preference for sons, and are they thereby prepared to choose sex selective abortion? The report *Choice of Sex on Non-Medical Grounds. The Views of the Dutch Population* (Veldkamp 1996) provides a partial reply.[4] The inquiry revealed that the general Dutch population did not have any sexual preference (90%) and strongly disapproves of sex selective abortion (91%). The responses of cultural minorities were more differentiated. The research group consisted of Turks, Moroccans, Surinamese and Antilleans (the four largest minority groups in the Netherlands). The Turkish and Moroccan groups showed an evident preference for sons, as did the Surinamese Hindustani group. According to the report, all three groups also placed social pressure on women to produce sons; women are condemned if they have not (yet) produced a son. It is unclear whether they are prepared to accept sex selective abortion. The Moroccan and Turkish groups in particular are very unfamiliar with and fearful of medical technology, and in addition their religion discourages adoption of sex selective abortion because Islam does not allow abortion.[5]

In short, there is little information available, and what there is suggests that sex selective abortion may be an academic problem in the Netherlands for the time being. However, there is the suggestion that ignorance of medical techniques is an important reason why women from cultural minorities have

made little use of the possibility of sex selective abortion thus far. Yet, research from India, where sex selective abortion is carried out on a large scale despite legislation intended to curb it, suggests that more knowledge about the medical technology required for sex selective abortion can indeed lead to its increased use (Arora 1996; Parikh 1990). In a context where a son preference is already a fact, a choice for a sex selective abortion may even be perceived as a rational choice. As the billboards in India suggest: this technology makes it possible to achieve a small family norm and yet hope for a son and thus emancipate women from the burden of repeated pregnancies (Arora 1996: 420). So, what is at present largely an academic problem in the Netherlands, is a very real problem in other parts of the world and might therefore become so in the Netherlands. And so the moral problem remains on the agenda: should we tolerate culturally inspired motives for sex selective abortion?

4 The public debate in the Netherlands

According to Dutch law, abortion is only permitted if the woman finds herself in a critical situation, yet the law does not define what constitutes a critical situation. The question of whether the Dutch law on abortion is too liberal thus boils down to the question of whether the definition of a critical situation is too liberal. What constitutes a critical situation? The Dutch Minister of Health, Els Borst, intervened at this point in the discussion with a statement that she made in a television programme on 17 January 1997:

> I can imagine that a woman from a foreign culture finds herself in such a critical situation if she has a daughter for the third or fourth time and her marriage, or even her life, is at stake (De Volkskrant 17 January 1997).

She continued to abide by this statement during questions in parliament. Borst, as a reputed feminist and liberal, repeated: "I can imagine a critical situation like that, and it is not easy for me to say this" (De Volkskrant 22 January 1997).

Her statement provoked a lot of reactions; I have examined the reactions in three national daily newspapers, which, when taken together, offer a reasonable picture of the political spectrum in the Netherlands: *Trouw* (Christian), *De Volkskrant* (social democratic) and *NRC* (liberal). In addition, I consulted the reactions in *Contrast*, a weekly magazine on the multicultural society; an *Open Letter* dated 20 January 1997 sent to the Minister by the Women's Council on Development Aid, Aisa, Targuia and Tiye International, which together form the most important national organizations of and for black, migrant and refugee women; lastly, the reaction of the Pro Life Consultative Platform (PLOP) contained in a letter dated 29 August 1997 sent to the Permanent

Parliamentary Commission on Health in connection with the investigation commissioned by the minister on whether there is any need to tighten up the law on abortion. The majority of anti-abortion groups are represented in PLOP. Since this article is about the arguments themselves and does not go into questions such as which arguments are used where, how often and by whom, there is no need to specify the individual sources each time.

Not surprisingly, the reactions to Borst's statement are predominantly negative. I have found only three arguments that can be considered to be in support of Minister Borst's position. The first is that abortion protects a child against a loveless start, while children, including girls, have the right to a warm welcome, so it may be considered better for them not to be born. The second argument is that one should not apply a double standard; if a woman who becomes pregnant in the course of an extra-marital affair is entitled to an abortion, a woman who fears the anger of her husband in bringing another girl into the world should therefore be entitled to the same right. The third argument is that it is not Minister Borst who should be criticized, but the law or some of the women who ask for an abortion. After all, the law specifies that in the last resort it is the woman herself who decides whether the situation can be regarded as critical, so the minister cannot be blamed, the argument runs, for letting women make use of the provisions of the law. Therefore, the indignation should be directed not at the minister but at the law if it is too liberal or at the women who sometimes want an abortion for trivial (or otherwise questionable) reasons. At the same time the third reaction stressed that women do not usually take the decision to have an abortion lightly.

In my opinion, the first argument is irrelevant because the law on abortion is not about the well-being of the child but about the critical situation of the woman. The second and third arguments are relevant, but that does not answer the question raised by the television programme and by Minister Borst's remark: should abortion be allowed in all cases, or are there motives, especially culturally inspired motives, that are unacceptable? What do the opponents have to say?

It is only to be expected that the strict Christians reject the practice of abortion. Their position is that abortion should not be allowed, or only if the life of the woman is at stake. In their eyes, the case in question is yet another example of the deficiencies of the legislation to protect life. The PLOP calls for more stringent compliance with the procedures laid down by the law to guarantee that the decision is taken with care and that the situation is as critical as envisaged by law. The PLOP also opines that there is room for improvement in the provision of information about alternatives to abortion. Surprisingly, at least at first sight, in view of the wave of moral indignation that went through the country, is that the CDA, the (not so strict) Christian party which shared the responsibility for the passing of the law in 1981, makes a constitutional

point. Kees Klop, a prominent CDA politician, points out that at the time his party made a compromise for the sake of the unity of the constitutional state. Now it appears that one cannot expect the rival parties to show any loyalty to the compromises and the CDA feels betrayed (Trouw 12 January 1997). Hence, for the CDA this new debate is a sharp reminder of the tension inherent in this party's double commitment to both its religious doctrine and its political ideology that requires loyalty to the nation's unity.

Dr. Beekhuizen, president of the Dutch Society of Abortion Practitioners, points out that moral dilemmas about abortion are closely related to developments in prenatal diagnosis. The society would therefore prefer a broad public debate about abortion. Beekhuizen opines that when prenatal testing is done, only medical relevant information ought to be transmitted to the woman, which would generally not include the sex of the fetus. Because of his strong-fast belief in sexual equality, he finds sex selective abortion difficult to perform (Trouw 25 January 1997).

Numerous other participants in the debate identified that a boundary had clearly been overstepped by the minister's policy. The arguments that they advanced pointed to the fact that whilst some migrants may prefer a son to a daughter, this does not lead to the contemplation of abortion. In summation, their opinion is that the situation in question does not appear to occur in practice. An editorial in *Contrast* (30 January 1997) reads: "Do many migrants take their preference so far that they are prepared to consider an abortion? MR-70, the biggest abortion clinic in the Netherlands (...) has never come across a case like this." The magazine adds other corrective facts:

> Although 43% of abortions are performed on migrant women, they are primarily Surinamese or Antilleans, followed by Turkish and Moroccan women. That is not a consequence of different views on sex selection, but above all of taboos about sexuality and ignorance about contraception.

Contrast calls for more sex education for these risk groups. Similar views are expressed by various columnists and by the womens organizations that wrote the *Open Letter*, as well as the Dutch Muslim Council and the National Platform of Arab Women.

In connection with the previous point, it has been alleged that Minister Borst's statement contributes to stereotypes that encourage intolerance. Although unproven by facts, the statement suggests that migrants, in this case Muslims, abuse the liberal Dutch law on abortion by choosing for anti-emancipatory sex selection. The remarks by Farah Karimi, AISA coordinator and one of the signatories to the *Open Letter*, in an interview in *Contrast* (30 January 1997) are probably made in the same spirit. She claims that aborting female embryos can certainly not be considered a part of Islamic tradition because Islam prohibits abortion. She also points out that the prophet

Mohammed had daughters but no son. I take the latter remark to mean that according to Islamic doctrine it is by no means scandalous to have only daughters.

Third, it has been pointed out that Minister Borst's opinion betrays a misplaced cultural relativism. It is claimed in the *Open Letter* from the women's organizations that the right to self-determination and the principle of non-discrimination on the basis of sex are universal. Their first argument is that it is not the culture but the woman herself who should decide, while their second argument is that to abort a fetus because it is a girl is discrimination against women. Consequently, whenever a local culture or tradition is in conflict with these principles, the principles should be respected more greatly than the tradition. The signatories to the *Open Letter* add that the statement betrays a rigid notion of culture: that cultures cannot change or that everyone thinks about his or her culture in the same way, or that minority women do not oppose certain misogynous traditions within their own cultures. The statement, according to the *Open Letter*, is thus "a smack in the face for many women in the Netherlands who campaign for gender equality and equivalence in their own community."

A columnist in the *NRC*, Anil Ramdas, puts forward a different argument: it is as if individual freedom (the woman decides, for example, not to have a daughter) clashes with the principle of equality between men and women in this case. But, he says, that is only appearance. If a woman does not want a child because she does not want to disturb her career, or because she is unemployed and will have to take care of the child entirely by herself, the individual experiences these as critical situations. Whatever we think about these personal motives is irrelevant: "If the motive is serious enough for her, who are we to contradict her?" The situation is different in the case of a Muslim woman who does not want any more girls. In that case, "it is not a matter of an individual wish, but of a culturally imposed demand: thou shalt bare males." We should not sympathize with this. This wish is the result of the "male chauvinism of Islam", and should thus be rejected. What is more, by showing sympathy, "the Minister abandons Islamic women and sticks a knife into the back of the incipient emancipatory movement in that culture" (NRC 25 January 1997). So, although he follows a somewhat different route, Ramdas comes to the same conclusion as the signatories of the *Open Letter*. The opponents of Borst's cultural relativism are also in agreement with regard to the solutions. The *Open Letter* from the women's organizations calls for policy that tackles the underlying cause of the desire for abortion. This cause lies in "a situation of injustice and discrimination against women and girls." Arnold Koper, a columnist in *De Volkskrant* (25 January 1997), does not beat about the bush and firmly states that if a culture is sexist, it should be opposed.

These last criticisms of cultural relativism seem the most pertinent in this

matter. They make clear that the crux of the debate on sex selective abortion consists of two aspects.

First, the women's organizations that are signatories to the *Open Letter* want the right to self-determination to remain intact, but they also believe that the principle of the equality of men and women may not be made relative. Since sex selective abortion is the expression of a view that women have a lesser value than men, this argument runs, sex-selective abortion should be prohibited in the Netherlands. In that case, however, the right to self-determination is no longer taken into account, and vice versa. In short, a choice has to be made between two principles: the principle of the equality of men and women, and the principle of autonomy and freedom of choice.

Second, Anil Ramdas argues that if a woman decides that she does not want a girl, that is not a free decision, but one imposed on her by her culture. However, this is like saying, if a woman takes a decision that runs counter to our sense of what is right and just, it cannot be her own decision, but one that something or somebody else – her husband, her culture, her religion – has forced upon her. Therefore, we do not need to take her wishes seriously, although those of a woman who arrives at them under the pressure of poverty, for example, such as Ramdas's example of an unemployed woman, should be taken seriously. This raises the question, when do we consider that a decision has been taken freely? What conditions must it satisfy? I shall return to this question presently.

5 Cultural toleration: 'diversity-based' versus 'autonomy-based' liberalism

During the discussion mentioned above, minister Borst said: "I can imagine a critical situation like that, and it is not easy for me to say it." So why did she say it? We can assume it is because, as a minister, she has to respect the employment of the law, but probably also because central to the idea of toleration is that we may find others' beliefs or conduct unacceptable yet, at the same time, feel it is necessary that we respect them.[6] Liberal morality tells us that people have divergent views about what constitutes a good and valuable life and that people are entitled to live according to these views. Yet, while liberalism intends to offer people as much freedom as possible, this freedom is not unlimited. A classical statement in this matter is that each should be accorded as much freedom as is compatible with equal freedom for all. A second complication is that the right to live according to one's own conception of the good applies to individuals just as it applies to social groups. So, if there is a group that believes that its religious doctrine prescribes that women do not hold political positions, that homosexuality is sinful or that, on Sundays,

playing soccer is not allowed, this group has the right to believe this and to live accordingly. Such groups exist; these examples are taken from Dutch society. As the goverment may not impose its view of the good life on people, neither the government nor a minister can impose by decree that people should respect women just as much as men. And so, there are groups in the Netherlands, indigenous and immigrant, that assume the principle of inequality between men and women.

As counter-argument one could point out that liberalism surely intends to protect the freedom of the individual. Should children sometimes not be protected against their parents or women against their husbands or, as Ramdas argues, the cultural community they represent? How about the rights of the individual as opposed to those of the group? The issue of sex selective abortion thus draws attention to the in-built tension between liberalism's twofold commitment to both the autonomy of the group and individual liberty. Two competing views in liberalism have arisen on this issue: the 'autonomy-based approach' and the 'diversity-based approach'.[7] While the former's conception of liberal justice rests on personal autonomy and individual freedom of choice as core values, the latter tries to find a conception of justice that is not grounded in assumptions about autonomy and individuality, because these are not equally valued in all cultures. Hence, the latter claims to be a better friend of cultural diversity than the autonomy-based approach (cf. Gutmann 1995: 559).

I shall now reflect on two political philosophers, Chandran Kukathas and Will Kymlicka, who represent, respectively, a diversity-based and an autonomy-based approach to toleration. We will discuss how each embraces the relation between the individual's freedom of choice and the cultural claims of the group, and how they attempt to balance equality against autonomy.

5.1 Kukathas: 'take it or leave it'

Chandran Kukathas defends the position that cultural minorities should have great freedom to curtail their members' liberties. He basically offers two reasons for this.[8] The first is that he recognizes that there are many cultures that do not value personal autonomy, because they hold other values in higher esteem and expect individuals to uncritically accept the cultural traditions of the group. For example, the Aborigenes hold a worldview which holds that their path in life is pre-destined and that the individual is expected to follow that path. In such a worldview, conformity rather than critical reflection is valued, and how you live is not a matter of personal choice, it is handed down by tradition. So, Aboriginal culture involves a conception of the person that is incompatible with that of the autonomous individual. To enable groups like the Aborigines to live in accordance with their culture, one can not demand of them that they allow

their members personal autonomy. Besides, it is not for the state to determine what values its members should accept as the state has neither the right nor the duty to promote the good. If people want to live in a community that does not value their autonomy, they have the right to do so.[9]

Kukathas' second reason has to do with a general wariness of state intervention in minority groups' cultures. He points out that established authorities have often used the images of cultural minorities as proponents of horrible practices, in order to justify persecution (cf. in the Netherlands the image of muslims as oppressors of women). He recognizes, however, that there are cases in which there is clear evidence of oppressive practices by the group against individual group members or against internal minorities, like women or children. He mentions clitoridectomy as one such oppressive practice. But even in those cases, he thinks, there are good reasons not to intervene, for persuasion is always better then force. He prefers a government to persuade a group that women and men are equal than to force that group to treat men and women equally. He acknowledges that the drastic reticence that he demands of the government can lead to a situation of "islands of tyranny in a sea of indifference" (Kukathas 1997: 89). But in his view the alternative is the abuse of power by the state; interference is still what he prefers, for he opines that "while all power tends to corrupt, absolute power corrupts absolutely" (ibid.).

This then leads Kukathas to a notion of toleration whereby it suffices for the individuals who partake in a particular culture to acquiesce to it. However, group members who would like to live differently, should have the right to leave the group. Hence, if a cultural community cannot count on the broad support of its members, it will become empty (Kukathas 1992a: 117). For Kukathas, therefore, the right of exit is a substantial right and it is what guarantees that the group members who live by its cultural norms do so by free choice. Conversely, the community should have the right, if individual members are not prepared to live by its norms, to throw them out (Kukathas 1997: 90).

5.2 Kymlicka: 'autonomy first'

For Will Kymlicka (1992; 1995a) individual autonomy is the core value of liberalism.[10] Although he is not insensitive to the fate of minority cultures – on the contrary, his work is born out of a great concern for the cultural needs of minority groups – the right of autonomy is what defines the limits of toleration for him. He opines that it cannot be tolerated that cultural groups impose restrictions on their members' autonomy. For, "what distinguishes *liberal* tolerance is precisely its commitment to autonomy" (Kymlicka 1995a:

158, his emphasis) and hence he thinks it neither possible nor just to respect all cultural claims equally. Hence, in reply to Kukathas he writes that a liberal theory "will not justify (...) special rights for a culture against its own members [for] liberals are committed to supporting the rights of individuals to decide for themselves which aspects of their cultural heritage are worth passing on" (Kymlicka 1992: 142). In a later publication he explicitly states that "minority cultures do not have the right to restrict the ability of individuals within the group (particularly women) to question, revise, or abandon traditional cultural roles and practices" (Kymlicka 1997: 29). Nor are we to interprete these individual freedoms in a purely formal or legalistic way and "I would consider (...) domestic oppressions (...) as paradigmatic examples of the sorts of 'internal restrictions' which liberals must oppose" (Kymlicka 1997: 29). Moreover, for the right of personal choice to be a substantial right, certain preconditions are required. One cannot make a meaningful choice, if one is oblivious of alternatives. One should not be deprived, therefore, of education, or the freedom to learn about the outside world. If minority groups do not offer their members this substantial right of autonomy, and if dialogue and persuasion have failed, interceding in a minority group's culture may, in Kymlicka's opinion, be justified (Kymlicka 1995a: 165-170).

Kymlicka hence defends a notion of toleration that takes personal autonomy to be of paramount importance.[11] This defines for him the limits of toleration. Individuals must be able to choose for themselves how they want to live. Therefore, minority cultures cannot be allowed to impose internal restrictions on their members' liberties, and domestic oppression is explicitly recognized as an essential part of such internal restrictions. Moreover, a substantial right of choice requires that one is informed about other ways of life.

6 Where does this lead us?

With respect to sex selective abortion there are three alternatives: either a woman does not want it, or she is pressured to agree to it, or she chooses it herself.

Compared to Kymlicka, Kukathas offers minority groups more space to live in accordance with their own cultural norms. If their (female) members acquiesce in it, they may, as far as he is concerned, respect women less than men and hence welcome daughters with less joy. He considers the personal freedom of choice sufficiently guaranteed by allocating dissident members the right to leave. So, a woman who refused to have sex selective abortion, might be able to recount her tale, but presumably not within her own community. The question remains whether personal freedom of choice is indeed sufficiently guaranteed by the right to exit. This is most probably not the case.[12]

Kukathas is aware that the exit option may bring costs to the individual that are too great to bear and hence he does not think that the right of exit "will always give individuals the de facto ability to question communal authority" (Kukathas 1992b: 678). Yet, when faced with a choice between either the group's autonomy or that of the individual, he opts for the first ("I ... accept that to refuse to interfere is to go along with possible injustices or with illiberal practices" [ibid.]). So, Kukathas seems to minimize the problem that often individuals will not have a substantial right of exit and are hence unable to leave their community.

Compared to Kukathas, Kymlicka offers women more protection against oppression by their own community. Personal freedom of choice requires for him that a group does not restrict its members in this and that it allows its members to inform themselves about the outside world. Following him, women would be able to say in all freedom in their community, that they do not want a sex selective abortion to be performed on them.

Group pressure to agree with a sex selective abortion is for Kukathas probably permitted, as long as a woman has the possibility to leave. Moreover, if the choice is between oppression by the state – which would be the case if the state intervened to prevent enforced agreement to a sex selective abortion – or by the group, he would opt for the latter. Kymlicka chooses precisely the opposite. Group pressure that restricts the autonomy of the individual is unacceptable. If necessary he is indeed prepared to intervene.

Finally, in reflecting on the situation in which a woman agrees to a sex selective abortion of her own free will, it would entail, according to Kukathas, that if we are to respect a more or less enforced choice, we should certainly respect a free choice for a sex selective abortion. Also, when we take a different route we end up with the same answer. A group that assumes a fundamental inequality between the sexes, has, in Kukathas's opinion, the right to do so. Kukathas thereby presumes that the female group members also acquiesce in this inequality, otherwise they would leave the group. Again, this makes it conceivable that a woman will choose freely for a sex selective abortion. As personal autonomy is of paramount importance for Kymlicka, one would expect that he would also be of the opinion that we should tolerate a choice for a sex selective abortion. Kymlicka, however, as a member of the staff of the Canadian *Royal Commission on New Reproductive Rights*, has declared himself strongly against it.[13] The Commission states:

> We are aware that the preference for sons is strong among some Canadians and that members of some ethnocultural groups in Canada value sons more highly.[14] [...] However, to allow couples to identify and abort female fetuses because of a cultural preference for sons would devalue all women and jeopardize the achievement of sexual equality in this country. [...] It is important [...] to ensure that the ideal of

> respecting cultural differences is not used to rationalize coercion against vulnerable members of the group or the oppression or subordination of women generally. [...] Respect for cultural diversity must be situated within the context of Canada's fundamental principles [...] These principles include respect for sexual equality and the protection of the vulnerable. [...] The Commission therefore rejects the use of (prenatal diagnosis) with sex selective abortion as inconsistent with our guiding principles (Proceed with Care: 899).

So the Commission gives priority to sexual equality. In its opinion, however, the balance does not have to be found between sexual equality and autonomy, but rather between sexual equality and respect for cultural diversity. The principle of autonomy is not considered. It seems that Kymlicka cannot imagine that a woman would decide for a sex selective abortion of her own free will and is perceived as a victim of internal represssion ("coercion against vulnerable members") or perhaps he thinks that a woman can only decide for such a thing out of ignorance. In that case it would no be a question of free choice, because the condition of an informed choice is not met.

7 Conclusion

Should Dutch abortion law be more restrictive in order to prevent sex selective abortion? If we follow Kukathas' arguments the answer is: no. He places more value on the freedom of cultural minorities to live according to their own norms; the principle of sexual equality is for him subordinate to this. Following Commission member Kymlicka's argument, on the other hand, the answer would be yes, because the Commission rejects sex selective abortion. Surprisingly, however, the Commission is against restricting the right of abortion. The Commision states that: "Any attempt to limit abortion for sex-selective reasons would prove impossible to enforce and would risk eroding other aspects of women's reproductive autonomy" (*Proceed with Care:* 916). The argument is thus partly pragmatic: it is impossible to guarantee compliance with the law. In part the argument is also based on principle: from the context it is clear that the latter, somewhat cryptic phrase means that restricting the right to abortion would be harming the autonomy of a much larger group of women that may wish an abortion for other, more 'acceptable', reasons.[15] So, at the end of the day, for Kymlicka the principle of sexual equality loses to the principle of autonomy after all.

To return to the situation in the Netherlands: the Dutch minister, Els Borst, promised in the debate in parliament that followed her statements on television that she would investigate whether abortion clinics have intolerably stretched the notion of a 'critical situation'. That investigation has since been

completed and there appears to be no question of an intolerable stretching, the procedures are correctly employed, and hence there is no reason to tighten liberal Dutch abortion law (Insepctie voor de Gezondheidszorg 1997).

With that, the problem seems to be settled. Whichever way we argue, we all arrive at the conclusion that the right of abortion should not be restricted. Nevertheless, this article has highlighted that it does matter which route is taken. Kukathas and Kymlicka may arrive at a similar policy outcome, but they do so via very different routes. While Kukathas feels that the state should abstain from any moral judgement about sex selective abortion,in Kymlicka's opinion sex selective abortion is morally wrong and should be prevented, albeit not by restricting the right to abortion. In this case, Kukathas' diversity-based approach is indeed more able to accommodate the cultural demands of minority groups, but he leaves female group members and female fetuses virtually no protection. I find the autonomy-based approach as advanced by Kymlicka therefore more defensible. In the present situation, in which it proved impossible to formulate general criteria to determine whether an abortion is legitimate, I think that the best option is the policy followed both in the Netherlands and in Canada, which is to try to prevent sex selective abortion not by restricting access to abortion, but by restricting access to prenatal diagnostic technology that determines the sex of the fetus. If one would like to continue along this line other policy measures worth considering are only allowing ultrasound scans when there is a medical indication, or to follow Beekhuizen's suggestion, withholding the sex of the fetus during prenatal testing. The Canadian Commission actually considered this last option but wanted to uphold the principle of full disclosure of medical information in support of informed choice, and at the same time, wished to discourage misuse of non-medical information that is revealed by genetic testing. After considering several possibilities it settled on the recommendation that the woman should only be informed of the sex of the fetus upon her explicit request (*Proceed with Care*: 902-904). But as these requests are most likely to come from women who may be contemplating a sex selective abortion, this is not a very effective way to prevent it. All in all, preventing sex selective abortion by restricting access to prenatal diagnostic technology seems then to be a solution by default: there are no better alternatives. Nevertheless, I think there is a lot to be learned from this case.

The question of sex selective abortion is about values that are considered by all of the parties as general moral values (i.e., respect for cultural diversity, sexual equality, personal autonomy), whereby neither side appeals to a metaphysical worldview that is inaccesssible to the other. Sex selective abortion poses cruel choices between these values, entailing that the one inevitably infringes on the other. It therefore seems to be a typical example of a fundamental moral disagreement, where there is "a conflict between two or more all-

things-considered moral positions that is at present irreconcilable by our reasoning through the relevant considerations" (Gutmann 1993: 196). So, as the conflict over legalized abortion is a classic example of such a disagreement, is the debate stagnant? And yet, this question is different, because what is at stake is not 'pro life' versus 'pro choice' argumentations; the discussion is by and large within the 'pro choice' camp.[16] What this Dutch debate highlights, is that women's right of choice only works on condition that women are indeed able to act as autonomous individuals. We should recognize, however, that there are minority groups who assume a fundamental unequality of men and women, in whose culture personal autonomy is not highly valued and who may restrict their members' ability to dissent from the imperatives of their culture. That makes the foregoing premise one that no longer holds for all individuals equally. Liberal models of toleration, then, seem to have difficulty in capturing "the complexities of women's agency in contexts of power and culture that entail severe constraints" (Baum 1997: 243). The diversity-based approach, as defended by Kukathas, seems to overestimate the freedom of agency of the women in question, while the approach based on autonomy, as defended by Kymlicka, seems to underestimate their agency, thereby rendering them into mere victims of their cultures. The task hence seems to be to simultaneously recognize that there are conditions that severely limit women's capacity for autonomy, yet allow for their agency.

I could not even begin to devise a single solution here, but I will indicate some directions that our search for an answer might take us. It would seem significant, for instance, to find a conception of autonomy that is both worthy in the eyes of liberals and compatible with ethnic minority cultures.[17] Or it may be necessary, as Nancy Hirschmann (1996) suggests, to broaden our notion of negative liberty so as to include the idea that constraints to liberty can also be internal to the person and thus incorporate in it certain elements of positive liberty.[18] Further possible concerns weigh on policy practice. When we accept that autonomy and sexual equality are not equally valued in all cultures, this might call for policy interventions in minority group cultures to ensure that female group members do acquire the equal right and the equal capacity for autonomy. As the law does not constitute an appropriate arena for inherent cultural ideology to be reflected on, it seems advisable to start a dialogue with groups that do not acknowledge equality between men and women, to convince them of their wrong. So rather than view this public debate on sex selective abortion as the media hype it was opined to be by some commentators, I am inclined to see it as a way of advancing this multicultural dialogue.

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Notes

1. Some authors make a distinction between 'tolerance' and 'toleration' (cf. Van der Burg 1998), while others use the terms interchangeably (cf. Heyd 1996). By and large I used the word 'toleration' without attaching any particular meaning to it other than 'tolerance'.

2. For a full historical account of the Dutch abortion law, see Outshoorn 1986.

3. Cf. Trappenburg 1993: ch.3. This was also the thrust of the letter by the genticist Oosterwijk, that appeared in *Trouw* on 21 January 1997. Minister Borst made it clear again that the use of prenatal technology for sex selection on non-medical grounds is considered an undesirable development in the Netherlands with her decision in June 1998, that the gender clinic that offered sperm treatment with assisted insemination – another way to influence the sex of the fetus – had to be closed down.

4. The research consisted of a public inquiry: questionnaires were sent to 2000 households, 669 of which were returned. The response was corrected to represent the views of the Dutch population of 18 years and over. The views of cultural minority groups were researched by way of group discussions with 28 adults between the ages of 20 and 40 years old. The discussions were held during 4 sessions of two hours. Of course, no representativity can be claimed for the views expressed in the group sessions.

5. Or so it is believed, because there is no unanimity among the different law schools in Islam about the permissibility of abortion. While the malakitic law school forbids abortion, according to other schools it is allowed until 40, 80 or 120 days of pregnancy (cf. Jansen 1997: 156).

6. See Van der Burg (1998), where one can also find the main arguments for toleration such as the freedom and autonomy argument (beliefs can only be acquired in freedom) or the argument that the state should be ethically neutral. I draw on this last argument in this section.

7. I took this distinction from Galston (1995), but there are different ways to describe the contrast. The 'diversity-based' approach is sometimes also referred to as 'rights-based' (see Tamir 1995) or the contrast is described as one between 'political' liberalism and 'comprehensive' liberalism (cf. Gutmann 1995; Kymlicka 1995b: 15). The term 'political liberalism' is coined by John Rawls. As Kukathas thinks that Rawls's political liberalism still offers cultural minorities insufficient liberty (cf. Kukathas 1997: 72-78),

I did not want to make him a camp follower of Rawls and hence kept to Galston's distinction.

8. The first is to be found in Kukathas 1992a,b; the second in Kukathas 1997.

9. In another text he states again: "The liberalism presented here is the liberalism of the limited state. (...) Under the institutions of liberal society, in this view, ways of life that disvalue autonomy or indificuality may still flourish" (Kukathas 1998: 696).

10. Kymlicka makes a distinction between involuntary incorporated groups, like indigenous poeples (national minorities) and voluntary immigrants, whereby the main body of his work on cultural rights only applies to the first type of group. I leave this distinction out, because in the case of the Netherlands, with its history of colonialism and state organized labour migration, the line between the two is not very clear.

11. Kymlicka thus treats personal autonomy as a comprehensive moral ideal that is shared by all. This is one of the points of disagreement between him and Kukathas, for Kukathas argues that it is not shared by all, therefore implying that it is a particularist ideal. This would then be inconsistent with liberalism's ambition to represent a universal moral theory.

12. For example, for a woman that is married under Islamic family law, a divorce would mean that she would lose custody over her children. Most Moroccans in the Netherlands are married under Islamic family law. This has given rise to some tragic and juridically complex fights between the ex-spouses over custody rights.

13. The Commission's ethical framework was based on a research paper by Kymlicka (Overall 1996: 182). It was also he who proposed the Commission's guiding principles (Sumner & Boyle 1996: 182). From this I take it that he was one of the main architects of the Commission's Final Report.

14. Elsewhere, the Commission states that it "received testimony that the pressure to use sex selective abortion to avoid female offspring is particularly strong for some women who are members of certain cultural or ethnic minorities" (*Proceed With Care*: 887).

15. This is confirmed by Kymlicka in a personal e-mail correspondence dated 26 January 1999. In it he writes that the Royal Commission wanted to uphold the principle of autonomy by ensuring that women have the right to control their own bodies and that it was therefore against restricting access to abortion and chose instead to try to eliminate sex selective abortion by restricting access to PND technology.

16. This explains why in the debate a process of personification of the fetus could occur, as if it were a little girl, whereas the conceptualization of the human embryo as a person is normally tied to the rhetoric stategy of the 'pro-life' camp, where it is embedded in arguments about a general respect for human life and a moral duty to protect the vulnerable (cf. Sevenhuijsen 1994).

17. Which is what I tried to do in Saharso 1999.

18. The distinction originates from Berlin's famous essay *Two Concepts of Liberty*. Negative freedom is, according to Berlin, "the area within which a man can act unobstructed by others" (Berlin 1984[1969]). It thus presupposes an opposition between self and other/society, and constraints to liberty are thought to come from outside the self. Positive freedom is "the freedom which consists in being one's own master" (Berlin 1984[1969]: 23). It thus recognized (as a state of non-freedom) the

possibility that one is directed not by one's authentic desires, bu by desires that are determined by others/social context. Positive freedom hence conceives of the self as a socially constructed entity and constraints to liberty are thought to exist also within the self.

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Participate or Sink. Threshold Equality Behind the Dykes

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Abstract

The report 'From Sharing to Earning', published in 1997 by the Netherlands Scientific Council for Government Policy (WRR), may be regarded as representative of recent thinking on social policy reform in the Netherlands. It argues that it is both feasible and desirable to preserve the existing structure and levels of social benefits, and to maintain those levels over time, on condition that labour participation is increased durably over the next decades. To achieve this, the Council's recommended policies of active integration and *supplementation* aim at establishing a close link between social security implementation and labour market entry, in a contractual model of 'benefit trajectories'. These attempt to match the general rights of benefit-holders by a tailor-made specification of their work and training duties. In this article, the normative foundations of 'From Sharing to Earning' are analysed in terms of an egalitarian work ethic, in close connection with the economic reasoning underlying the drive for raising labour participation. I then argue that the recommended policies may fail where they are most needed. To successfully (re-)instate those who are far removed from the labour market may require adopting policies that provide some measure of unconditional security in the form of person-centered subsidies.

1 Introduction

The title of this article is not intended to suggest advance criticism of the official report under consideration below. It aims to convey a preoccupation, on the part of the authors of the report, with keeping the Dutch welfare state intact, through vigourous efforts to raise labour participation. This article aims to identify and discuss dominant strands in policy thinking on the normative foundations and sustainability conditions of the welfare state in the Netherlands during the last decade. Particular attention is paid to a series of well-articulated reports by the Netherlands Scientific Council for Government Policy.[1] My focus will be on the most recent of these reports, which was published in 1997. This work is entitled 'From Sharing to Earning' (WRR 1997). It deals with social security in the next century.