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Four Stages In Assessing Liberal Neutrality

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Abstract

La notion de neutralité, bien que référent central au sein d'un État libéral, est souvent invoquée de manière imprécise et contradictoire dans le discours public. Proposant que cela résulte en partie des limites inhérentes à une compréhension abstraite et uniforme de ce concept, le présent article exposera comment l'idéal de neutralité libérale doit plutôt s'inscrire et s'évaluer par le biais de quatre étapes successives. Les quatre étapes en question dépassent la simple herméneutique philosophique du libéralisme en trouvant déjà des assises dans le droit ; elles seront dès lors illustrées tout au long du texte à l'aide des décisions pertinentes de la Cour Suprême du Canada.

1. Philosophical overview

1.1 *An untenable principle?*

A common critique of the idea of neutrality as put forward in liberalism is that neither collective norms nor public policies can be truly neutral in their origins or their effects. After all, one cannot find any institution that would survive the test of absolute neutrality, as any rule at the very least discriminates against the criminal who breaks it. Thus, were not all criminals' life choices conveniently omitted when we devised our institutions? Therefore, even before

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pointing out the fact that our institutions were largely devised by rich white Christian men, as many philosophers and legal thinkers set out to demonstrate in the last decades, neutrality seems untenable as a principle.

But there are good reasons to believe that this involves a “straw man” argument, as the idea of neutrality was never intended to have such an absolute and metaphysical interpretation. Nonetheless, attempts to encompass everything we associate with this principle in simple phrases such as “neutrality of intentions, not neutrality of effects” are not too successful in convincing the critics. Indeed, while such definitions can, in many cases, provide adequate guidelines for action, it is hard not to view them as incomplete. Sometimes, it just feels like we must look even at the unintentional results of a norm in order to avoid blatant injustice. Furthermore, when the legitimacy of the liberal framework as a whole is questioned, these general slogans are not sufficient and we need to broaden their philosophical scope.

In this paper, after a brief philosophical overview, I intend to depart from the usual abstract lines of reasoning in order to describe how liberal neutrality can be reasonably orchestrated in our societies. More specifically, I will demonstrate that satisfactory liberal neutrality can be assessed in four practical “stages” of inquiry. Despite the last two being recent and still disputed, I will argue that taking account of these four stages instead of repeating some monolithic definition of neutrality is essential, as each of these stages is meant to tackle the complex problem of the excessive and unequally shared burden of collective decisions and social practices on individuals in a different ways. Therefore, the scope I adopt envisions the idea of neutrality as reaching far beyond the state; hence the appellation “liberal neutrality” in place of the more common “neutrality of the state”. The decision to refer to the different aspects of that project as “stages” instead of “ways” is not benign either, as the inquiries and actions they imply are best understood in a logical succession¹.

To illustrate this understanding of the project of liberal neutrality, I will rely on a number of decisions by the Supreme Court of Canada.

¹ It is important to stress that “stages” should in no way be interpreted through a historical or deterministic conception in which a given society would be in the fourth stage while another would be in the first. The stages are steps in a normative inquiry, not categories in a sociological portrayal.

This way, I hope to clearly show what sort of complex yet limited neutrality is sought by liberals there and elsewhere, and also through which processes it can be attained in practical dilemmas. In a few words, the four stages proposed are: (1) The rejection of norms creating unequal burdens without a relevant goal; (2) the complex appraisal of the legitimacy of a norm when a relevant goal is present; (3) the choice not to change a norm or practice, but rather to compensate its effects at another level; (4) the idea that, when a discriminatory rule is recognized as necessary and if the method of the third stage cannot apply, it is then possible to alter its general application for some individuals in some specific case.

1.2 The difference between ends and means

In 2007, amongst public unrest around the notion of “reasonable accommodation”, the government of the province of Quebec launched a public commission to monitor the situation and make recommendations. During its inquiries, it became necessary to better define the notion of “neutrality of the state”, which was invoked, along with “secularism”, both to protect religious differences and to forbid religious expressions. While working on this matter, the commission came out with the idea that two elements (the neutrality of the state and the separation of church and state) were best described as institutional means leading to the accomplishment of their real purpose (the values of equality and autonomy). However, given its public nature, it had to concede that it was also possible to see the two means as ends in themselves, as is common in the French model of republican *laïcité*:

We can essentially envisage it as a relationship between aims and means, while recognizing that the means here are indispensable, or we can consider these four facets, both neutrality and separation and the two purposes, as values in themselves. This is a philosophical difference that we do not have to settle here. The fact remains that, considered

in either manner, the four principles can come into conflict and engender dilemmas that must be resolved².

Nonetheless, in the minds of two of the commission's expert consultants, Charles Taylor and Jocelyn Maclure, it was already clear which option was the best one. In their own book, Maclure and Taylor revealed their true colors by saying that neutrality of the state has to be seen as only a mean to the values it brings. They went on in characterizing the other option, associated with French public culture, as a historically understandable yet deplorable "fetishism of the means" (*fétichisme des moyens*)³. Therefore, when one is to tackle a question such as the wearing of religious symbols by public officials, it makes no sense to come to a complete interdiction in the name of absolute neutrality. On the contrary, the correct inquiry would be to check the balance between ends such as the free expression of the official's religious convictions and the public's trust that the institution is not biased against them. To be sure, a vast number of officials should be allowed to express their convictions because they are not, in any way, infringing on the capacity of others to trust them or to equally follow their convictions.

This idea that neutrality matters only through the effects it brings is not a novel idea. The most compelling justifications for neutrality usually involve the modern and liberal desire to reasonably allow every individual to pursue his own conception of what is a good life, coupled with the observation that collective decisions and actions are the sources of many breaches in this ideal. If we believe a just order is one in which individuals can reasonably follow their own paths, then neutrality matters. In an excellent overview of neutrality, Roberto Merrill points out that in addition to this moral justification, one can also find epistemological (we cannot know what a good life is for sure) and pragmatist (whatever morality entails, non-neutral norms create conflicts) reasons⁴.

² Consultation Commission on Accommodation Practices Related to Cultural Differences. (2008), *Final Report*, p. 137.

³ Cf. Maclure, J. and C. Taylor (2010), *Laïcité et liberté de conscience*.

⁴ Cf. Merrill, R. (2007), "Neutralité politique". All these justifications are not mutually exclusive, in fact they reinforce each others, but I will stick to the moral one in this paper.

Liberalism is therefore a limited but far-reaching project in terms of neutrality, as its underlying concern, while non-absolute, nevertheless goes beyond the direct activities of the state to affect many social practices. Indeed, a vast number of implicit or explicit norms and practices exist outside of the State. Amongst these, many are not neutral because they favour or penalize some life choices or some people's capacity to follow theirs. If we care about equality, this is a problem. However, this is not enough to state that these norms and practices must all be modified or eliminated. This is, of course, because many of them are meant to fill legitimate collective roles and have no reasonable or concrete alternatives that would also do better in terms of neutrality. This understanding of neutrality might surprise many philosophers who have accepted the mantra that neutrality is for the state and not for society. Was I just saying that this is not the case? Well, yes and no. On one hand, I believe that general and absolute rules like "neutrality is solely for the state's institutions" are guidelines that should be overlooked if we find strong reasons to do so, since a good reason can defeat another depending on the context⁵. On the other hand, I recognize that we nevertheless have such strong reasons in favour of differentiating between the duty of neutrality in the basic institutions, the duty of a widespread and mandatory social practice and the duty of a voluntary association⁶. If this paper brings the notion of neutrality beyond the strict limits of state action, it is because the ideals of equality and freedom to pursue one's conception of a good life cannot suddenly vanish when we go from a state norm to a social norm. In fact, this rejection of the dogma of neutrality limited to the state is not without precedents. As we will see, the Supreme Court's decisions mentioned in the following pages will come from a variety of contexts : state laws,

⁵ This understanding of morality is sometimes called *weak contextualism*. It should not be confused with *consequentialism*, as the reasons involved in a contextual inquiry may be deontological in nature and are not limited to the maximisation of a given good, as in *utilitarianism*. Since the thesis of value pluralism may explain this importance of the context, the next section should make things clearer.

⁶ For example, I see a lot of wisdom in Rawls's focus on the basic structure as the prime subject for an ambitious program of justice ; see Rawls, J. (1971), *A Theory of Justice*.

private contracts, school board decisions, corporation practices, etc. But, of course, stating that breaches in neutrality outside the state institutions matter does not entail a verdict in favour of applying identical measures of neutrality everywhere and with the same rigour.

1.3 *Value pluralism*

In order to better understand this paper's philosophical background, it is useful to spend some time examining the thesis of value pluralism. This thesis is first and foremost a description of the nature of value⁷. It argues that goods worth pursuing do not only seem plural in their achieved forms, but that their roots are themselves plural and often conflicting. There can be just or good reasons to both do and not do something, since self-contradiction is a perfectly plausible result of ethics, even when only one person is involved. Therefore, a value pluralist, in opposition to a value monist, will not try to encompass all desired goods under one supreme notion such as equality or freedom. The practical consequence of this metaethical thesis is to shift the focus, when one attempts to solve a moral or political dilemma, from the discovery of a true or higher principle toward the appraisal of the valid claims on both sides of the conflict. Of course, value pluralism does not necessarily imply that the validity of moral claims is impossible to assess or is purely subjective, nor does it mean that there can be no qualitative differences between multiple goods. For example, we may be justified to assign less importance to efficiency than to freedom of speech, even though we still value both. The main point made by value pluralists is that we would make a wrong assumption in thinking that most ethical debates can be solved easily by discovering which side is right in pointing out the only valid principle to which other reasons must yield.

Of course, not all difficult decisions stem from value pluralism. For example, two groups valuing the same territory can enter in conflict to take it over. If they both make the same claim (for

⁷ See Berlin, I. (1969), *Four Essays on Liberty*; Nagel, T. (1979), "The Fragmentation of Value"; Galston, W. (2002), *Liberal Pluralism* and Galston, W. (2005), *The Practice of Liberal Pluralism*. In an earlier form, see Weber, M. (2004), *The Vocation Lectures: Science As a Vocation, Politics As a Vocation*.

example that it is their holy land), it can be extremely difficult to decide in favour of one of them, even though only one philosophical principle of ownership is at stake. In such a case, some external facts of the world such as limited resources and lands are responsible for the difficulty, despite unanimous agreement over what is important and how one can claim it. However, the thesis of value pluralism hints at a much deeper internal difficulty, which involves fundamental disagreements on the very question of what is to be valued the most.

This idea of multiple, conflicting yet often equally important values is illuminating in the case of neutrality, as it reinforces its status as a mean toward complex goods which sometimes require amending the scope and application of neutrality itself. If we do not accept any form of pluralism, we are likely to think either that neutrality necessarily is (or produces) the supreme value to which every other concerns must yield, or that it is a completely erroneous conception. This can be shown to be very problematic, for example when it comes to the institution of public education. If neutrality is supreme, there can hardly be a satisfactory public education, as fundamentalists of all kinds can point out the unequal burden imposed to them by the transmission of basic principles like toleration of differences, equality of all humans or the primacy of science in describing the physical world. They would be factually right in their grievance, as it is true that these contents impose an unequal burden on those whose deep beliefs point toward a different thought system. But neutrality is not meant to be the sole and absolute criterion in a just education. The aforementioned principles taught in our schools all participate from values we recognize as important enough to justify a rupture with strict or absolute neutrality⁸.

Some authors have argued that political liberals should refrain from endorsing such a thesis as “value pluralism”, since it is a “comprehensive” doctrine, one that causes unnecessary divisions outside of the goals of policy-making⁹. As such, we should limit

⁸ On the tension between religious fundamentalism and political liberal neutrality, on matters of education, see Macedo, S. (1995), “Liberal Civic Education and Religious Fundamentalism: The Case of *God v. John Rawls*?”.

⁹ See the arguments made using Rawls’s work and his own in Larmore, C. (2008), *The Autonomy of Morality*.

ourselves to the simple observation that a reasonable pluralism exists, without attempting to explain its existence with a theory about the nature of value itself. I, for one, find myself endorsing strongly both the theses of political liberalism and value pluralism. In order to be coherent, in this paper, I propose that admitting value pluralism is, to my knowledge, the best way to make sense of how we operate when it comes to the principle of neutrality, although it is still possible for others to reconcile the four stages of liberal neutrality with their own monist or non-conflicting conception of value¹⁰.

In the end, there are good reasons to believe that the exaggerated focus on a perfect definition of the principle of neutrality and the dissatisfaction with its current definitions both come from an expectation that opposes the thesis of value pluralism. Indeed, most difficulties seem to stem from the idea that such a principle, if correctly formulated, could and should encompass all desired goods in all contexts, without ever entering in conflict with other recognized principles about how to orchestrate collective actions in a just manner. On the contrary, once one accepts, in line with value pluralism, that a principle such as neutrality is rather meant to help us in the difficult process of deciding between valid – but in some cases conflicting – values, one can better accept the tensions and limits found in our formulation of the principle of liberal neutrality.

2. Two classical stages

2.1 Stage 1 – If it's bad, it's bad

As promised, this paper will now put aside the abstract debate over the principle of neutrality in order to show how it can be used to shape liberal policies and institutions in a contemporary democratic state aiming for justice. In doing so, I hope to lay to rest some of the concerns about this notion by showing that it really possesses the

¹⁰ Of course, there are some liberals who simply reject the thesis of political liberalism and therefore have no problem arguing for value pluralism as the best explanation for our moral world. See the discussion in Galston, W. and al. (2006), “A propos de ‘The Practice of Liberal Pluralism’ de William Galston, un dialogue avec l’auteur”.

potential to say something meaningful in debates about our public policies.

The first stage proposed is inspired by a 1985 decision by the Supreme Court of Canada concerning the *Lord's Day Act*. At the time, the existing law forbade the opening of a business on Sunday. A case was brought to the Supreme Court when a business found guilty under the law contested its legitimacy. The Court stipulated that, before there can be any discussion on the effects of the law, it had to pass an initial test :

The initial test of constitutionality must be whether or not the legislation's purpose is valid ; the legislation's effects need only be considered when the law under review has passed the purpose test. The effects test can never be relied on to save legislation with an invalid purpose¹¹.

The Court was well aware that many reasons can be given in favour of a mandatory closing day. For example, the desire to secure some relief for the workforce could at least be taken seriously as a cause for a breach of freedom. But in the case of the *Lord's Day Act*, the relevant purpose was to guarantee the observance of Christianity, which is an unacceptable infringement of neutrality :

The Lord's Day Act cannot be found to have a secular purpose on the basis of changed social conditions. Legislative purpose is the function of the intent of those who draft and then enact the legislation at the time and not of any shifting variable¹².

Therefore, according to the Court, the only outcome possible was to acquit the defendant and eliminate the law altogether.

This ruling is important, because it hints to the argument presented in this paper. First, a rule must have a legitimate purpose - something a law made only to bolster the majority's conception of a good life does not have. If the intent is unacceptable, there is not

¹¹ R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

¹² *Ibid.*

even need to prove that it is discriminatory to some conceptions of a good life. Hence the section title : “If it’s bad, it’s bad”.

It is worth explaining that this rejection of an illegitimate purpose does not happen according to an undisclosed *a priori* conception of what is legitimate and illegitimate. Indeed, it should rather be interpreted as something like Rawls’s *considered judgments*¹³. These judgements have no ontological or epistemological priority, but they allow us to progress in a moral inquiry. In the case of bolstering the majority’s religion, we can rely on the experience of the religious wars between Catholics and Protestants to reasonably justify a rejection. But of course, without such a repeated experience of tragic outcomes, doubts could remain and we could find ourselves without sufficient “provisional fixed points” to state that the purpose is illegitimate. Therefore, the idea of a legitimate intent has to be understood in a limited way : is there, at this time, reasonable jurisprudence or public recognition to establish that a given purpose is invalid? If there is, the first stage can settle things. If there is not, as in most cases, then other stages intervene.

As we will soon see, the problem posed in the first stage is the only one that can be solved by focusing solely on the intent of a norm or practice. In our common sense, we often think and act according to the idea that behind any bad result, there is a culprit, a mastermind who intended it precisely that way. Unfortunately, this line of reasoning is detrimental to the correct understanding of the principle of neutrality, as the majority of its infringements are *unwanted results* of norms intended for something worthwhile. Therefore, the Supreme Court of Canada, following what they believed was at the core of the country’s public values, did not limit itself to such a neutrality of intention, although it has been sufficient in this particular ruling, and went on to develop other tests aimed at tackling cases where something like the neutrality of effects was involved.

¹³ A central concept in Rawls, J. (1993), *Political Liberalism. The John Dewey Essays in Philosophy*.

2.2 Stage 2 – Deciding with ingenuity and proportionality

As we have seen so far, it is unthinkable for a norm to be absolutely neutral regarding every single life choice. Furthermore, the majority of collective norms and practices hold some merit, since we choose to enact or prolong them to pursue a valid goal, even at the price of creating an unequal burden on some individuals. Of course, some distinctions can help us choose between reasonable and unreasonable life choices, as in Rawls's political liberalism, thus allowing us not to care so much about infringements of criminal or racist life choices¹⁴. But even after taking that step, it still feels like we should not always rest on the mere fact that a valid goal was pursued when there is an overwhelming restriction on one's capacity to follow his reasonable life choices. After all, we started caring about neutrality as a mean to transform our society toward, amongst other things, a greater capacity for everyone to follow their own path. The question is therefore : how could we appraise conflicting values and come to a decision when there is both a relevant intent (often a collective goal worth pursuing) and an important burden on some individuals (often an inability to follow one's religious or non-religious beliefs)? In *R. v. Oakes*, the Supreme Court of Canada recognized that collective goals can limit even the rights and freedoms at the core of most liberal Constitutions :

The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance¹⁵.

Having said that, the Court went on to devise the "Oakes test", which enjoyed a wide popularity in subsequent rulings, even outside of Canada, and inspired the second stage of liberal neutrality assessment presented in this paper.

¹⁴ Rawls, J. (1993), *Political Liberalism. The John Dewey Essays in Philosophy*.

¹⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103. Interestingly enough, this case was not about freedom of religion or the neutrality of the state, but rather about possession of illicit drugs and the presumption of innocence.

The Oakes test starts after a positive answer is given to the question of the legitimate intent of a law, as exposed in *R. v. Big M Drug Mart Ltd.*, and focuses on assessing its proportionality. This is mostly done in three steps. First, the means employed must be rationally connected to the objective that was found to be legitimate. Although it sounds like a truism, in our societies, there are a number of norms that appeal to a valid objective but nevertheless impose burdens that serve that objective in no way¹⁶. Second, there must be as little infringements of rights as reasonably possible. This allows the examining of other alternatives in order to find if the same objective could be reached while creating a lesser burden. Third, the infringement must be proportional to the objective, for, even in the absence of better alternatives, abstention can be a sound choice if pursuing a minimally important objective involves the creation of a massive burden.

This test is interesting as it gives a well-constructed prototype intended to treat hard cases in which we feel there are conflicting yet legitimate values on both side. We may wish to add more steps to the test in order to use it in the wider context of neutrality, instead of confining ourselves to the context of constitutional rights, but the intent stays the same : showing ingenuity when making a decision is hard.

In opposition to the simplicity and ease of the first stage, this second stage is both complex and tragic. I say tragic because the losing side of a decision nevertheless brought legitimate arguments. In the hardest cases, extremely important values like equality can end up on the losing side of a decision. As I said earlier, the acknowledgement that there can be a tragic loss in a sound moral decision is at the heart of value pluralism¹⁷. A recurrent critique I received, when I started working on the idea of taking into account the consequences of value pluralism in our understanding of

¹⁶ A famous case in which this was found to matter was *R. v. Morgentaler*, [1988] 1 R.C.S. 30, in which a law against the practice of abortions was found to present a legitimate intent, protecting the foetus and the woman's health, but an irrational connection between that intent and its means.

¹⁷ At least in Isaiah Berlin's work, as some authors do not believe that value pluralism involves conflicts and tragedies, but only a harmonious fragmentation.

neutrality was that, in doing so, I retreated from the true nature of moral reasoning¹⁸. For many philosophers, there has to be underlying principles to decide what we ought to do, or else we cannot make a moral decision. In their eyes, value pluralists just retreat too early in their task of identifying what value should rightfully and consistently win over others. For example, freedom of speech should come before public order in all cases or in no case at all. Nothing else is acceptable as a moral decision (although it could go differently in a legal or political decision). In that view, it simply cannot be that freedom of speech could be deemed morally more important up to a certain point but not after.

If there was such a durable order governing values, then the tragic dimension of morality would be alleviated, for conflicts of values would be objectively resolved and we would not dirty our hands in decision-making. However, sadly, nothing in the experience of moral conflicts, from the day to day life to the higher questionings, seems to corroborate this idea that value pluralism could be satisfactorily dissolved in an objective and durable list of priorities. We may try and build general guidelines of priorities, such as Rawls's lexical priority of the first principle over the second, but it is only a temporary beacon. It is possible that, in a given situation, sticking to that priority becomes impossible in regard to our moral reasoning. Therefore, in this paper, I propose to recognize the limitations of this method of seeking universal orders of values and to work, instead, on a line of reasoning that can help us move forward even in the absence of clear priorities.

¹⁸ This argument was presented to me by Philippe Van Parijs over an earlier version of this paper. His argument was that there had to be simple principles to resolve the so-called "hard cases", which simply couldn't be "hard" in this sense. We can be corrupted or unwilling to act, but we cannot find ourselves without uniform principles to apply, if we think things through. For example, we had to be missing something like a constant priority of safety over religious belief in the *Multani* ruling (studied in the last section of this paper), rather than having to weight each against the other. Van Parijs summarized his point as follows : although applying morality can be complex and difficult in some cases, morality itself is simple. On the contrary, I argue that both morality itself and its application are inextricably complex and conflicting.

Although I present the thesis of value pluralism as the best explanation and horizon of our real-life normative inquiries, and although I draw my inspiration from rulings of the Supreme Court of Canada, it does not mean that legal thinkers and law practitioners, in opposition to philosophers, accept it. In fact, more often than not, the more a court's decision relied on such an admission of a hard case with equally strong arguments on both sides, the more it is disliked. Many in that field also believe that a correct decision – if not in politics, then at least in law – is one founded on one clean principle or right that should transcend the others in all contexts. But if there is a number of conflicting yet equally important values put into proportion, then they also understand that the result is somehow tragic and uneasy. In a way, there is no point in blaming readers for feeling discomfort with this second stage, since discomfort was present from its very inception. But, perhaps because the duty of a supreme court is to decide absolutely, whereas philosophers and politicians can refuse to settle, the Court was at least able to alleviate some of our discomfort in hard cases by bringing, in the form of legal reasoning and tests, as much guidance as possible in order to come to a better decision.

Finally, in spite of the fact that the proportionality test is a recent Canadian invention, it is still relevant to think of this second stage as an important part of the general application of liberal neutrality everywhere, since liberals have always been through a somewhat similar reasoning – if not in abstract matters, at least in real-life decisions – to weight the creation of general goods against the emergence of unequal burdens on individuals. The Supreme Court of Canada has devised a really concise and helpful test, but for better or worse, we have always found and will always find ways to evaluate such public dilemmas. It is the reason why, even though there are always disagreements over which results to reach in a particular case, it is safe to say that this stage is – at least unconsciously – widely accepted in practice. The next two stages brought forward in this paper, on the contrary, are more debated, as a number of authors and political actors are not only challenging their philosophical justifications, but also their very implementation.

3. Two recent and contentious stages

3.1 *Stage 3 - Reverse discrimination as a compensation*

The third stage starts after the second stage has settled that a non-neutral norm or practice should nevertheless be kept, given its relevant and proportional effects. Although we are often satisfied with this conclusion, there are some cases in which our “moral sense” is still tingling. Fortunately, the evolution of liberalism and social policies in the 20th century has brought new recourses in order to come closer to neutrality and its goals, instead of simply giving up on our feelings of injustice at this point.

The first example of these recourses would be positive discrimination. In Western societies, there is a complex history and, sometimes, a deeply-embedded web of implicit norms that bolster discrimination in wages and opportunities for a group. In North America, this has been found to be especially the case for women, African Americans and Native Americans¹⁹. Of course, the first two stages of liberal neutrality can help us identify and remove many of these sources of discrimination. But, at the end of the day, it is impossible for us to eliminate them all, as it would be disproportionate to control every actions, preferences and criteria present in the general population that might be detrimental to these groups. Yet, by renouncing to act, we infringe on neutrality by leaving the members of these groups with an unequal capacity to follow one’s conception of a good life. Positive discrimination is a remedy for such a situation as it brings the compromise of compensating for an unequal burden created at a reasonably untouchable level with an

¹⁹ In Canada, the presence of the Québécois nation adds another level of diversity with its own history of abuses. But the question of stateless nations or multinational states largely falls outside the notion of neutrality, even given the wide spectrum of analysis adopted in this article. Indeed, nothing in this notion can allow us to trace the frontiers or determinate the relations between political communities. Although this four stages method could help identify and remove discriminations faced by a national minority, the demands for the minority’s assymetry, autonomy or independance cannot be put forward or refuted with this notion. Indeed, such national claims may still be relevant without any discrimination.

advantage at another, in order for the two to cancel each other and for neutrality to be maintained. This conception of equality has been disputed by many people who simply cannot accept that this concept may involve differentiated treatment in terms of employments, opportunities or direct compensations such as scholarships. However, most of us have come to understand that, as surprising as it sounds, it is nonetheless the correct extension of the underlying goals of neutrality. In the *Canadian Charter of Rights and Freedoms*, it is thus explicitly stated that equality before and under the law does not preclude :

[...] any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability²⁰.

This idea of a compensation for an unequally shared burden created by norms, institutions and practices we cannot or would not change can also be mobilized outside the matters of historical minorities to give a justification for the idea of redistributing wealth in a liberal society²¹. Although it is limited in all sorts of ways, the market economy is still a major institution in a liberal society. One can argue that there would be many reasons to keep this institution through the tests of the first two stages of liberal neutrality, given its relative efficiency in bringing together the preferences of the consumers and those of the producers, as well as its close relationship with values of freedom and equal chances. Nevertheless, a market economy creates an environment in which the real capacity to pursue one's conception of a good life is greatly and unequally impaired²².

²⁰ “Canadian Charter of Rights and Freedoms”, *Constitution Act* (1982). Section 15, subsection 2.

²¹ This justification is but one of the many available and might only justify a minimal redistribution. But it is worth mentioning, if only to break the artificial wall between matters of neutrality and identity on one hand and matters of economics and redistribution of wealth on the other.

²² Because of the differences in upbringing and concrete opportunity, this stays true even if one accepts that effort should indeed be a determining factor in equality and that, as such, we do not have to care about choosing

In a similar fashion, but with the poor as the intended group, a case can be made for redistribution of wealth or the availability of free services and institutions to be collectively – and thus unequally – paid for. These measures of social justice can be presented as just compensations for the involuntary yet decisively non-neutral characteristics of the economical institutions we deem to be the best possible at this time.

3.2 *Stage 4 – Reasonable accommodation*

The fourth stage of liberal neutrality assessment is orchestrated around the notion of *reasonable accommodation*, a parallel creation of both the US and Canadian Supreme Courts²³. Often misrepresented in the media as an incoherent product of judicial activism, it is in fact a direct consequence of the values of equality and freedom involved in the notion of neutrality. Basically, a reasonable accommodation is a way to alleviate an intense discrimination by reasonably altering the application of a general rule on specific individuals. As such, it is not recognized by the Supreme Court of Canada as a caprice or a luxury, but rather as a duty inherent to the notion of equality and an implicit consequence of the pre-existent laws of non-discrimination²⁴.

norms neutral toward the conceptions of a good life of lazy and unproductive individuals. Therefore, this view does not entail the adoption of such theories as “real libertarianism”, nor does it refute them. On the question of the factors determinative of equality, see, amongst many, Van Parijs, P. (1998), *Real Freedom for All: What (if anything) can justify capitalism* and Heath, J. (2006), “On the Scope of Egalitarian Justice”.

²³ But, in the US, the definition of what constitutes an *unreasonable burden* in a given accommodation is such that even the slightest financial cost tends to trigger it. Thus, the American creation is less promising regarding its underlying goal of fighting discrimination and restoring equality.

²⁴ For the whole history and logic of this concept in Canadian law, see Bosset, P. (2007), “Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable”, p. 4. Since they are deeply rooted in the value of equality, it would be erroneous to portray reasonable accommodations as a tacit acceptance of “multiculturalism”, especially when that term connotes the conflict between the Canadian and the Québécois models of integration. Indeed, cases dealing with handicaps call for reasonable accommodations without being related to discussions on the place

A famous case of reasonable accommodation, popularised as the “Multani affair”, involved a Sikh student who was denied the right to wear the *kirpan* at school. The *kirpan* being a knife, the governing board of the school refused to ratify the accommodation practice that was agreed upon on prior occasions. The previous compromise was that, in order for one to wear a *kirpan* at school, as dictated by his faith, the knife would have to be sealed inside an inoffensive container and made inaccessible to other students. There has been no case of assaults involving a *kirpan* in Canada, but it is still reasonable for a school to protect students from even a small possibility of harm. But the freedom of consciousness of the young Sikhs mattered too. The accommodation practice agreed upon in that case was able to reconcile both intents just by making a small exception and, therefore, the Supreme Court forced the hand of the school in ratifying it²⁵. Since then, it is still possible for a school to forbid knives at school, for it is a legitimate general rule. A school can even forbid a *kirpan* that is not properly handled, since safety matters. But it cannot refuse to compromise over a *kirpan* rendered reasonably inoffensive. Again, this ruling proves that reasonable accommodation is an obligation for which the limits are not our generosity or our approbation of the belief in question, but rather the reasonableness of its consequences in attempting to restore equality. If a *kirpan* could not be rendered reasonably inoffensive, the accommodation would arguably not have been reasonable. Even through the practice of reasonable accommodation, our commitment to neutrality and its underlying values must still face the limits of other equally important values such as public safety.

Another ruling of the Supreme Court of Canada worth mentioning as an inspiration for the crafting of this paper’s four stages and their interrelations is *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*²⁶. This ruling over

of diversity and inclusion of migrants. Obviously, both notions are attuned to contemporary liberal understandings, but still, one does not entail the other.

²⁵ Multani v. Commission scolaire Marguerite Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6.

²⁶ British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868.

a discrimination pertaining not to a belief but rather to a physical disability established that reasonable accommodation is not meant as a clever tool to keep in place an openly discriminatory norm, one that would otherwise fail the tests of the first two stages, following the reasoning that these are useless now that accommodation practices are available. On the contrary, the possibility of accommodation is but an addition to the wider project of reducing the unnecessary and unequal burdens put on members of our society. In this wider project, reasonable accommodation was intended for use only when a legitimate rule has intense and specific effect on one or a small number of unique individuals. Therefore, a recurrent critique according to which the notion of reasonable accommodation causes a loss in equality should be put to rest. We will not stop caring about fighting wide discrimination and laws with illegitimate intent, in order to focus all our efforts on multiplying individual, limited and sometimes inappropriate accommodations in every case²⁷. This is probably the kind of errors the Court had in mind when they reaffirmed, prior to the duty of accommodation, the need for such inquiries as those exposed in the first two stages of this paper.

The last remark on the articulation of the fourth stage with the first two brings us to the realization that there are also crucial differences between the third and fourth stages of liberal neutrality. These differences justify using the stages successively. Indeed, if the practice of positive discrimination took us away from a rigid conception of equality as identical treatment, the subjects of a differentiated treatment were still defined as an objective group often suffering from statistically quantifiable discriminations. Many have thus come to accept that women, aboriginal people, visible minorities, people with disabilities and, through different methods, the poor should somehow be compensated for the historic or systemic discriminations that we are not able to eliminate and that continue to this day to bring a difference in term of opportunities to follow one's conception of a good life. But a practice such as reasonable accommodation operates very differently by interfering

²⁷ For similar reasons, I doubt the relevance of an opposition between multicultural justice and redistributive justice. As if one was to replace the other and we had to choose wisely which it will be! See for example Barry, B. (2000), *Culture and Equality : An Egalitarian Critique of Multiculturalism*.

with the application of the law on a very subjective basis. Indeed, other individuals within the same group (or those treated in the same way by a norm or practice) will not be the subjects of a given accommodation if they are not suffering from the norm or practice in the same intensity. The possibility for an observer of the Sabbath to be given some flexibility around his day of rest in a big corporation does not extend to everyone for a day of their choice²⁸. Neither does it extend to non-practicing members of the same religious denomination or community. This is because the focus of the fourth stage is no longer to compensate individuals as a group but only the specific few who are intensively affected by a norm deemed reasonably inoffensive to the rest of the group. Here, the discrimination happens because it clashes with individual characteristics, from a specific handicap to a deeply-rooted belief, in absence of which neutrality would have been preserved.

But the scope is not the only difference between the third and fourth stages, since the corrective measures of positive discrimination and redistribution are generally not appropriate tools to restore equality at the fourth stage. Indeed, in the case of a diabetic child facing the general and very sound interdiction of bringing needles to school, it is clear that the problem cannot be solved by compensating him elsewhere with scholarships or alleviated criteria for admission. If such a situation bothers us, and it should, there is no roundabout way to go : the rule itself must be amended somehow. The same is true in the case of Sikh policemen whose uniforms prevented the wearing of the turban. No monetary compensation or promotions could serve as a functional equivalent to a compromise over the uniform itself. Although some authors have tried to establish a difference between handicaps and deep convictions, we must realize that this is a trait shared in most if not all demands for reasonable accommodation. It may seem to us that, while someone suffering from a medical condition has no choice, monetary compensations or opportunities – if we are willing to give any – should be plenty to compensate a religious individual for having to renounce the opportunity to follow his convictions, or a vegetarian for bringing himself to eat meat. But it is only because we do not share equally deep convictions on these

²⁸ As made explicit in the ruling Ontario Human Rights Commission. v. Simpsons-Sears, [1985] 2 S.C.R. 536.

matters that we believe that they are subject to trade-offs as are any ordinary tastes or preferences.

But a truly deep conviction about what constitutes a good life is not a simple preference, although some actions involved in following it will be. The difficulty is that it is very hard to know from the outside which acts are truly part of a conception of a good life and which can be reasonably disregarded in term of neutrality. In fact, the ruling made by the Supreme Court of Canada in *Syndicat Northcrest v. Amselem* wisely established that the relevant criterion to identify a deep conviction worth protecting is the sincere belief. In this particular case, there was much discussion over the fact that, although the defendants argued that they sincerely believed they had a religious duty to practice a Jewish ritual in their own *succah*, the relevant doctrine of Judaism might have been satisfied with a collective *succah*, a difference that mattered in this civil lawsuit. But since what is at stake is the capacity of an individual to follow his own conception of a good life, and not in any way the protection of religious orthodoxy in itself, the Court was right to establish that only the sincere belief mattered :

[...] the Quebec (and the Canadian) Charter does not require a person to prove that his or her religious practices are supported by any mandatory doctrine of faith. Furthermore, any incorporation of distinctions between “obligation” and “custom” or, as made by the respondent and the courts below, between “objective obligation” and “subjective obligation or belief” within the framework of a religious freedom analysis is dubious, unwarranted and unduly restrictive. On the issue of sincerity, the trial judge correctly concluded that the appellant A sincerely believed that he was obliged to set up a succah on his own property²⁹.

²⁹ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551. Of course, the fact that the relevant criterion to begin examining such an accommodation request is the sincerity of belief does not imply that any sincere belief will be accommodated. As always, a request has to be legitimate *and* reasonable in its application.

4. Conclusion

A political community is not neutral, neither are most of its institutions, norms and practices. This is a fact. However, the notion of neutrality found at the core of liberalism is still useful as a mean to inspect and alter these institutions, norms and practices in line with ideals such as the free and equal capacity to follow one's conception of a good life, given the fundamental conflict of values involved. By going through the four stages I presented, there are good reasons to believe that we can approach definite solutions in hard cases and come closer to these goals than by following the guidance of any abstract, absolute and one-sided definition of neutrality.

When faced with a norm that creates unequally shared burdens on members of our society, we shall first ask if the intention of that norm is legitimate. If it is, we shall move on to appraise the proportionality of that intention with its effects. If we are to rule that it is balanced and preferable to its alternative, we shall nevertheless try to compensate those who are the victims of its effects at another level. Finally, if the norm went through the first two stages and then was not or could not be compensated satisfactorily at the third, we shall try our best to create a very specific exception to its application in order to offer a reasonable accommodation for the few individuals disproportionately affected by it.

By putting forward some version of this four stages process, with changes pertaining to the different public cultures and values, I believe that liberals in most contemporary societies can make a stronger and much more attractive case for the principle of neutrality as an important factor in the founding and constant re-evaluation of a society aiming toward justice.

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