How we implicitly assess identity all the time: the case of religious arbitration in Ontario

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Reasoning about minority identity is a common feature of understanding and resolving conflicts which involve minority rights and accommodation. But there is much to worry about in relation to this aspect of public decision-making. These concerns include, for instance, how public institutions assess the identities of groups, how well they are able to do so given the resources available to them, whether their assessments are consistent across different groups, and what consequences follow from making decisions about minority rights by reasoning closely about what a group's identity is said to consist in.

Instead of tackling these kinds of concerns, the current scholarly infatuation with identity politics (and the role of 'culture' in minority rights discourse[1]) has given rise to heightened collective anxiety that perhaps identity-related considerations ought to have no role in political and legal claiming. In short, many scholars want 'identity' off the public table. From liberal, democratic and post-modern perspectives, scholars argue that identity politics is deeply problematic. In part, these anxieties imagine identity politics giving rise to collective entitlements that condone a form of state non-intervention into the lives of minority groups no matter how repugnant – i.e. sexist, racist, homophobic - the values of these groups happen to be. Identity politics is also accused of crowding out other concerns of justice, like poverty and racism.[2] It is said to heighten social conflict as well either because it gives added legitimacy to the different and divisive values of minorities or because it places what is perhaps the most precious and least negotiable aspect of a conflict – namely its relation to a group's identity - at the centre of debate.

Yet, it seems something of a trick to imagine some controversies involving minority rights divorced from their important identity-related elements and from the careful consideration of these elements. Does it not matter, in the case of *Multani*,[3] that according to Sikhism, the kirpan should be made out of metal rather than paper?; in the case of *Ford*,[4] whether or not French is, in fact, threatened by English streetscapes in

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[1] See Scott 2003

[2] See Banting and Kymlicka 2004 for a description of the 'crowding out' and misdiagnosing criticisms sometimes leveled against multiculturalism. For some classic discussions of the argument that multiculturalism tends to crowd out considerations of class and poverty, see Barry 2001, Fraser 1997: chp 1 and Gitlin 1996. For discussions of a similar kind that link multiculturalism and racism, see Barry 2001, Day 2000, Dhamoon, forthcoming 2006.

[3] *Multani v Commission scolaire Marguerite-Bourgeoys and AG Quebec* [2006] SCC 6.

[4] *Ford v AG Quebec* [1988] 2 SCR 712.

Montreal?; in the case of *Van der Peet*,[5] whether or not trade in salmon has been part of the Sto:lo way of life? Some people argue that these considerations do not matter, that the practices of minorities are a kind of theatre in which majorities can easily reassert their dominance, and that identity-related considerations obscure more than they reveal about how to secure justice or fair relations between minorities and majorities. Here I argue that this position is misleading and mistaken. It is misleading because it suggests that public institutions can avoid the assessment of minority identity in making decisions about minority accommodation. It is mistaken because, despite the good reasons to be aware of the problems associated with the public assessment of identity and to be critical of decisions that are made poorly in this respect, the ability of public institutions to make such decisions in a transparent, fair and reasonable manner is a central feature of democratic relations in diverse societies.

Here I examine the controversy over whether Canadian courts should endorse the decisions of Muslim arbitration panels which apply Muslim personal law known as shari'a, to resolve problems that arise in the context of marriage, divorce and custody arrangements. The controversy helps to show how reasoning about identity is a pervasive and unavoidable feature of minority rights. When this aspect of a controversy is not addressed directly, publicly and according to reasonable, transparent and balanced criteria, it ends up being addressed implicitly using unchecked and private discretion. In the absence of such fair and transparent criteria, judges, legislators and publics are left on their own to make sense of conflicts. Sometimes, they make good sense of conflicts and use their discretion to import into decision-making reasonable and fair-minded suppositions about minority identity and values. But sometimes they import unfair, inconsistently applied and ill-informed suppositions. The Ontario controversy relied on implicit assessments of Muslim identity which entered the debate as unreasonable suppositions about Muslim identity, largely based on misinformation and Western stereotypes of Islam rather than reliable information about shari'a, its character and role in Islam and its impact on Muslim women. The assessments were also unbalanced in the sense that they reaffirmed a false impression of Western identity as modern and egalitarian in relation to marriage and divorce practices.

In part, what makes this controversy particularly interesting is that the debate was framed in terms of multicultural values. When coupled with the false suppositions about community identities at play in this case, this framing helped to convey the impression that the problem here was based in a tension between mainstream egalitarian practices and values, which were favoured by Canadian society and aimed to protect individuals and women, and the inegalitarian practices of traditional minority communities, such as Muslims. The Ontario debates were widely understood as exemplary of multiculturalism's flaws, namely that multiculturalism privatizes the sexism of minority communities and covers up the racism of the mainstream communities.

Here I argue that the problem central to the Ontario debates is not multiculturalism per se, but rather a failure to realize that multicultural values rely on making reasonable, fair, transparent and balanced assessments of identity. Assessments of identity are largely unavoidable in public decision-making about minority rights. The choice that is open to decision-makers (including publics) is not **whether** to incorporate

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[5] *R. v Vanderpeet* [1996] 2 SCR 507.

identity assessments but rather **how** to incorporate such assessments. I begin by briefly outlining what an approach that considers identity in the context of such disputes entails. I then examine the Ontario controversy and the ways in which the identities of both the minority and majority were implicitly assessed in this debate and used in decision-making. I conclude by suggesting how an identity-based approach might have made a difference to the outcome.

Assessing identity in minority rights disputes
To frame a conflict in terms of identity-related considerations involves asking five kinds of questions. The first kind are questions about the role of a practice in the identity of a minority group. In some cases, these are the sorts of questions one would expect to ask simply in order to understand what a practice is all about and how important it is to a group. For example, what role does a disputed practice play in the group's system of beliefs?; is the group's survival or well-being jeopardized in the absence of having access to the practice? A second kind of question is meant to explore the extent to which practices are flexible and might be the subject of compromise. For instance, does variation exist in the way that a practice is understood or applied?; what accounts for this variation? A third kind of question aims at revealing the extent to which the practices are linked to other contentious issues in the community. Do those considered members of the community disagree about the importance or desirability of the practice?; and does any relevant dispute exist about who counts as a member of the community? The primary purpose served by these questions is to expose some information about what is at stake for a community in relation to a disputed practice. A secondary purpose is to ensure that information of this sort which is false or irrelevant will be crowded out as public attention becomes critically trained on subjecting claims to fair standards of assessment.

Using a framework that highlights identity as a means to understand and resolve minority rights conflicts also involves asking a fourth kind of question about how practices might affect the identities of other groups. The aim of these questions is to trace and expose the interdependence amongst groups. Minorities and majorities develop practices as a means of responding to each other, or surviving in relation to each other. Their practices are either oppositional, in the sense that groups develop practices and values which distinguish them from each other, or they are reinforcing in the sense that majority values are reinforced by minority practices and vice versa. An approach that frames conflicts in terms of identity aims to reveal the ways in which this interaction affects disputes. The best way to do this is to expose the ways in which practices impact the identity-related values of other relevant groups.[6]

A fifth kind of question asks how a disputed practice has an impact on the individual's identity. In this respect, an approach that focuses on identity considers some matters in relation to individual identity as distinct from elements that inform collective or group identity. An identity-based approach asks, for instance, whether a practice provides individuals with a way of connecting to their communities and families or whether it has coercive and invidious effects; whether it undermines the individual's

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[6] For an interesting discussion of this dynamic and different models of majority-minority interaction in relation to identity-related practices, see Song 2005.

capacity to develop a distinctive sense of her/himself or whether it enables individuals to embrace and enjoy choices that would otherwise be unavailable to them?[7]

These are not the only questions that arise which are related to identity but they are the key ones in so far as they capture the relation between a practice and a group's immediate well-being, the risks or costs to others, including dissenters, of accommodating the group, and the prospects for compromising a practice should risks or costs be found. These are also not questions that are easy to address nor questions that allow for straightforward, uncontroversial, fact-based answers. Nor do the answers to these questions lead unambiguously to particular and well-defined resolutions to ethnic conflicts. Rather, the process of answering such identity-based questions meets an intermediate set of objectives. Considerations of identity are an important part of trying to understand conflicts and the five kinds of questions identified above touch on five different ways in which identity-related considerations are implicated in many disputes. We consider claims in relation to their impact on collective or individual identity in order to figure out what might be at stake for those involved in them. In framing these claims in terms of identity, the approach establishes a common normative currency whereby competing claims might be compared and weighed against each other. However, at least in the first instance, rather than pointing straight from conflict to solution, these questions point to the kinds of considerations that will make a difference in decisions about whether public laws ought to be amended to accommodate a minority. Decision-making relies on information about what is stake for communities and what is at stake for individuals. This information is not decisive, but it fills a gap in our understanding of minority conflicts which is crucial to decision-making. Moreover, sometimes it paves the way to easy solutions. For instance, it matters whether, on balance, a practice is likely to have a high impact on the capacity of some individuals to develop a healthy sense of themselves yet assumes a negligible and easily revised role in the community's way of life. Framing conflicts in terms of identity is a means of establishing the terms for these kinds of individual-group comparisons.

The Ontario controversy

Information about the identity-related role of a disputed practice also makes a difference to decision-making in the sense that the failure to systematically consider the 5 kinds of questions outlines above leads to uncritical and unbalanced assessments of identity which are then imported into decision-making processes. Often conflicts which obviously implicate the identity of minority groups fail to engage directly the difficult questions about identity and instead are framed as matters of competing rights. The conflict that arose in Ontario about whether publicly to legitimate and legally recognize shari'a-based arbitration decisions made by Islamic arbitration tribunals offers a good

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[7] Many of the considerations to which this fifth set of questions appeals overlap with those connected to individual rights. While identity-related and rights-related considerations are not the same, an overlap between them should be unsurprising since one of the primary aims of the fundamental freedoms to which liberal democracies have traditionally been committed is to protect values that liberals think individuals need in order to develop health identities. For example, rights that protect dissent entail, in part, the commitment that individuals ought to be able to lead their lives according to their own self-understanding. Notwithstanding some important overlap, liberal rights have other purposes as well and, in any case, may provide an incomplete list of the sort of values important in relation to developing healthy identities. For a fuller discussion of this point see Eisenberg 2003, pp. 53-4.

example of a debate in which no sustained or systematic assessment of the identities of the groups involved informed the debate. Instead, the debate was framed according to the terms of multiculturalism.

The controversy arose when an Ontario-based Muslim organization called the Canadian Society of Muslims (CSM) proposed to establish an Islamic arbitration tribunal which would allow Muslims living in Ontario to resolve their disputes using the principles of shari'a, which is Islamic personal law. Unlike other provinces in Canada, Ontario has allowed, since 1991, private, legally binding arbitration over family-related disputes.[8] The legislation, which followed a trend found in other western democracies, was motivated not by the principles or values of multiculturalism or religious diversity, but rather by the prospect of making arbitration less costly and less adversarial for members of the public.[9]

By 2003, some religious communities –Mennonites, Catholics, Jews as well as Ismaili Muslims– had already organized arbitration services for their members. The proposal to do so for the general Muslim community through the CSM's Islamic Institute of Civil Justice (IICJ) (see Mumtaz Ali 2004) was, in one sense, consistent with what other communities had been doing for some time. Nevertheless, the Ontario public, including many people within the Muslim community, strongly objected to the proposal, specifically in the area of family law and in relation to policies governing divorce and custody. The protests against the IICJ's proposal led the Ontario government to commission a report, to be written by Marion Boyd, which was to be the product of extensive public consultation on the issue (Boyd 2004). After receiving input from over 40 public interest groups and hundreds of individuals, the Boyd report recommended that religious arbitration continue in Ontario along the lines it had been allowed in the past with some modest reforms.[10] In response to the report, the protests intensified. In 2005, the government relented to the pressure and, against Boyd's recommendations, amended its Arbitration Act in a manner that, it claimed, banned private arbitration over disputes within the area of family law.[11]

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[8] The Arbitration Act, 1991 SO 1991, c17 allows anyone in the province to designate a third party as an arbitrator to resolve their civil disputes including commercial disputes, construction disputes, rental disputes, intellectual property issues and, in the area of family law, matters arising as the result of marriage breakup such as spousal support and the division of matrimonial property. The Act does not allow private arbitration over any matter that would affect the civil status of an individual nor does it include any matter that falls within criminal law. Moreover, the Act stipulates that consent is a necessary condition for establishing binding arbitration: "'arbitration agreement' means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them." (Arbitration Act, 1991 SO 1991 c. 17, s1)

[9] For discussion of the general movement in western democracies towards alternative dispute resolution, see

[10] For a concise description of the proposed reforms, see Boyd 2006.

[11] The legislation, though presented by the government as a 'ban on religious arbitration' (see "Ontario bill bans faith-based tribunals" Nov 15, 2005), does nothing of the sort. Private parties are still free under the Ontario law to exempt themselves from the provisions of the Act and govern their relationship contractually by incorporating any norms they choose, including religious ones (Ontario 2005). The government could have argued that the amendments to the Act built on the recommendations of the Boyd report, which proposed similar conditions, and laid out some conditions and constraints that family law arbitration awards must meet to be enforceable by the courts. Instead, it chose to frame its legislation and intent in terms of a ban on arbitration.

The issue at the centre of the public debate that ensued in Ontario about shari'a and religious arbitration, and the one that framed the contributions of its proponents and opponents, involved a public disagreement about the nature and limits of multiculturalism (see Tibbetts 2004: A5 and Rutledge 2005). On one side of this debate, some Muslim advocates for religious arbitration made the unlikely argument that multiculturalism is meant to allow cultural groups autonomy over important aspects of their collective life, even, in some cases, aspects that conflict with the values of mainstream Canada. The problem in this case, they argued, was that Muslims were being denied what other religious groups enjoyed within the context of Canadian multiculturalism.

For instance, the leading advocate from the CSM, Mumtaz Ali, consistently framed his comments in terms of either multiculturalism's relation to group autonomy or multiculturalism's promise of inter-group equity. He urged the government commission to pay more than simply lip service to the 'principles of multiculturalism'. In his lengthy submission on behalf of the Canadian Society of Muslims to the Boyd commission, Mumtaz Ali reiterated the Muslim perspective on multiculturalism and the expectation on the part of minority communities that the multicultural principle be extended to all cultural groups "instead of confining it only to the three charter groups: British French and Aboriginal peoples" (Mumtaz Ali, 1994: 3). "In the barnyard of democratic multicultural Canada," he wrote, "some are more equal than others" (Mumtaz Ali, 1994: 2). Once the government report came out, he commended the commissioner's recommendations that religious arbitration be allowed by pointing out how they sustained a vision of multiculturalism: "the Ontario government is the most enlightened in the world. This is the multiculturalism of my friend Pierre Trudeau" (as quoted in Hurst 2004: A01).

On the other side of the debate, opponents from within Ontario's Muslim community did not challenge Mumtaz Ali's understanding of multiculturalism for the most part.[12] Instead, they concurred with his characterization and argued, on that basis, that multiculturalism was partly to blame for the conflict in the first place. Some opponents of private arbitration argued that multiculturalism ought to be abandoned as Canadian policy because it allows groups autonomy over their own affairs. Many others argued that multiculturalism goes too far when it allows groups to opt out of adhering to Canadian values like gender equality. And furthermore, multicultural commitments ought to be abandoned because they were inherently destabilizing and conflicted with the principles guaranteed in Canada's constitution of sexual equality.

For instance, Tarek Fatah, a founder of the Muslim Canadian Congress, denounced the Boyd report as "multiculturalism run amok" (Eltahawy 2005). Several critics claimed multiculturalism could be contrasted with a 'one law for all' model. Instead it rested on a radical legal pluralism which sometimes allowed religious doctrine

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[12] There are two notable exceptions to this. First, I found one newspaper discussion (Wente 2004) which quoted a member of the Canadian Muslim Women's Congress who claimed that the conservative Muslims were misusing the term multiculturalism. The comment was not the subject of the general commentary in this article. Second, the Boyd report included a significant response in its section on multiculturalism to the argument made by Mumtaz Ali that because multiculturalism allows Aboriginal people special rights, it ought to allow Muslims such rights as well. The Boyd report responded to this argument by contending that comparisons between the autonomy afforded to Canada's First Nations and the Muslim community were 'problematic and unjustified'; "From my perspective," Boyd claimed, "comparisons in this direction are erroneous at best" (Boyd 2004: 87,88).

to stand in for the rule of law: "the civil law must bend and bend again to accommodate religious differences—even where those religious differences violate the spirit of Canadian equality"(Lithwick 2004).[13] Because multicultural values overrode the 'spirit of Canadian equality', the doctrine heightened the vulnerability of Muslim women. This contrast, between multiculturalism and the values of sexual equality, was played up, especially in the American and international news coverage. But it also found a receptive audience in Canada. As one member of the Canadian Muslim Women's Council was reported to say: "I chose to come to Canada because of multiculturalism. But when I came here, I realized how much damage multiculturalism is doing to women. I'm against it strongly now. It has become a barrier to women's rights" (Homi Arjomand as reported in Wente 2004).

The public assessment of multiculturalism, along the terms sketched above, provided one of the main frameworks in which this debate was conducted. Other kinds of information, including general information about the structure of shari'a law and several examples of how shari'a has an impact on marriage and divorce, were the subject of some limited discussions in newspapers, public forums, and in the government commissioned report. However, this information was not treated as central to decision-making and more often than not, it was ignored. One explanation for this is because the information did not fit the primary framework of the debate, namely the general nature and limits of Canadian multicultural principles. In so far as information didn't fit this main framework, it didn't seem to become a substantive aspect of the dialogue amongst participants. For instance, in relation to the importance of shari'a to Muslims, early in the debate, Mumtaz Ali advanced the provocative position that Muslims "place their spiritual and social lives in dire peril" when they are required to submit to laws other than those which Allah has ordained.[14] He offered no evidence to back up this statement nor was this claim reiterated by others who spoke out in favour of shari'a-based arbitration. Moreover, on more than one occasion, Mumtaz Ali offered an impression of sharia that seemed to contradict this initial statement: shari'a, he argued, "has elasticity to adjust itself" and "I draw the line where the Canadian law asks me to do certain things. I have to obey Canadian law" (Krauss, A4). Commentators, including opponents of shari'a arbitration from within the Muslim community, largely ignored these statements and the apparent contradiction they gave rise to. Nor did they pick up on the general question about whether or not private arbitration in family law was central to the religious life and identity of devout Muslims.

Indeed, one of the frustrating features of the Ontario debates is that these questions were hardly addressed at all. Amidst all the rhetoric of multiculturalism, there was little discussion of the good reasons why, one suspects, proponents might want access to religious arbitration within their communities in the first place.[15] Is religious arbitration in the area of family law central to the Muslim system of beliefs or way of life? Is the survival of the community jeopardized in the absence of access to such services? Are all aspects of religious arbitration similarly central and if not which ones

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[13] For a more reasonable and illuminating contrary view of legal pluralism, see Macdonald 2005.

[14] Mumtaz Ali 1994, p. 3

[15] Given that all groups in Ontario already had access, proponents of shari'a-based arbitration must have wondered in the first instance why they should be prohibited when all others are allowed. The onus was on the government to come up with a good reason. However, these terms of the debate quickly shifted to draw into question all types of religious arbitration over matters under family law. Once this shift occurred, the question of why a community wants or needs access to private arbitration should have become central.

are the most important and which ones might be compromised? While the answers to these questions would not necessarily decide the matter, they would serve three important purposes.

The first purpose of kinds of questions is to determine what is at stake for the community in either allowing or prohibiting the practice and to determine the extent to which the practice is amenable to compromise. The second and more crucial purpose is that the systematic and critical scrutiny that these questions would introduce into the debate one means of avoiding the fear mongering and inflated rhetoric that otherwise informed part of the public discussion. Mainstream newspapers printed editorials, for example, which compared shari'a to incest, claimed that it endorsed chopping off people's hands, and that it treated women as chattel. Most of these claims were rhetorical. But this is precisely the problem. This kind rhetoric was allowed to fill the gap left by information about the nature of shari'a and its role in Islam. Public debate was framed in a manner that treated questions about the role of shari'a in Muslim identity as besides the main point of the debate. Therefore, responding to this rhetoric meant responding to a side-issue rather than engaging with the main problem. What seemed to 'really' matter was whether multicultural commitments would or should prevail.

In addition, although one hopes that few non-Muslim Canadians took seriously this rhetoric, it certainly had an effect on the Muslim community which, but for a few bold commentators, largely withdrew from offering any substantive information about Islam or shari'a (which seemed after all besides the point given that the debate was about multicultural principles), including information about the problems with the discretionary ways in which private arbitration worked within some parts of the Muslim community. As described by one commentator, Canada missed a "golden opportunity to shine light on abuses [within the religious Muslim community] masquerading as faith" as well as to fight against the fear mongering and inflated rhetoric against Muslims that was otherwise allowed to reign in the public debate (Khan 2005).

The identity gap in liberal multiculturalism
It might seem though, that this analysis slides past a more obvious and immediate problem with the debate as described above and that is the manner in which Canada's multicultural commitments were understood by participants on both sides of the issue. As Will Kymlicka notes, in a paper presented at a forum organized by the Canadian Council of Muslim Women, Canada's multicultural policy is liberal in inspiration and design. Historically, it "was seen as a natural extension of this liberal logic of individual rights, freedom of choice, and non-discrimination" and in this sense is distinct from policies that enable "a group to maintain its inherited practices even if they violate the rights of individuals" (Kymlicka 2005: 2). In so far as Kymlicka's description of Canadian multiculturalism is accurate (and I think that it is), one might argue that the controversy over private arbitration was blown out of proportion partly because Canadians don't really understand Canada's multicultural commitments. Had they understood Canadian multiculturalism accurately, for instance, they would have realized that the violation of individual rights, including one supposes, the right to freedom of choice, and to be treated as an equal regardless of gender, overrides any private arbitration arrangements.

Highly unlikely and here is why. The invocation of multiculturalism largely begs the question, which is closer to the centre of this controversy, of whether shari'a-based

private arbitration over marriage and divorce is a natural extension of 'the liberal logic of individual rights, freedom of choice, and non-discrimination' or instead a violation of this logic. What asking this question reveals is that, even at the level of abstract theory, multiculturalism requires, indeed relies upon, prior assessments of the identities of minorities and majorities when disputes arise.

This reliance on identity is apparent, for instance, in Will Kymlicka's arguments for liberal multiculturalism. According to Kymlicka, liberal multiculturalism is premised on the importance of individual autonomy which requires that individuals lead their lives 'from the inside' and thus according to their own lights.[16] Individual autonomy does not exist in a vacuum, however, but rather always in a 'context of choice' which provides individuals with a range of meaningful options from which to choose. Respecting individual autonomy involves both ensuring that individuals have the capacity to make autonomous choices, such as choosing whether or not to identify with any particular practice or value of their cultural community, and ensuring that the conditions are in place to help communities thrive so that they are able to provide individuals with a decent range of options from which to choose.

In some cases a conflict may arise where a practice that is central to a community's way of life and therefore integral to the way in which it thrives conflicts with what an individual's autonomy requires. For instance, if religious arbitration is important to ensuring that the Muslim community thrives but, at the same time, imposes restrictions on Muslim women in a way that compromises their autonomy, then, according to liberal multiculturalism, it ought to be restricted. If, on the other hand, religious arbitration is important to the community, in the sense that it is integral to the way in which the community provides a meaningful context of choice for its members, and it does not restrict the autonomy of women (or others) then perhaps it should not be restricted.[17] The problem that arises though is how do we arrive at answers to these questions which often involve finely textured judgments of what counts as autonomy or what bestows meaningfulness on a context of choice? This problem is especially acute in cases where practices can be interpreted as both restricting autonomy to some degree and protecting the community to some degree.

Consider again, the example of religious arbitration which often functions to protect communities by regulating the terms – i.e. rules – by which families form and break-up. The rules of private religious arbitration are usually connected to the project of protecting the community from assimilating into the mainstream. As Ayelet Shachar (2001) explains, religious law allows communities to create circumstances in which children can be brought up in a context more likely to ensure the continued existence of

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[16] Kymlicka's insistence on the individual's capacity to revise her attachments is highlighted in his criticisms of Rawls's position, taken in "Justice Political, not Metaphysical," that some religious commitments are neither revisable nor autonomously affirmed. See Kymlicka 1995: 158-63.

[17] According to Kymicka, the liberal state is not obliged to protect the practices of polyethnic minorities because these minorities are not societal cultures in themselves but rather left societal cultures in which they were a majority in order to come to a place with a different societal culture. Yet, even though the liberal state may be under no obligation to protect the practices of immigrant minority groups, the important role of a practice in the community's identity and therefore the individual's life may still be important to individual autonomy. The point here is if shari'a is crucial to Muslim identity, then this counts as one of the good reasons why Muslims might want religious arbitration services. Understanding this factor is also crucial in order to understand the consequences of prohibiting a practice.

the community and thus more likely to protect the community from assimilating into the mainstream. But these rules work primarily by restricting individuals, and especially women, in relation to who they can marry, how their children gain membership, and what consequences they will suffer if they dissolve their marriages. In these senses, membership rules are notoriously both protective and restrictive. Most cultural and religiously-inspired practices are similar in this respect largely because what is required in order to protect communities from assimilation usually involves restricting their members by prohibiting them from particular activities – e.g. working on the Sabbath – or requiring of them particular practices – e.g. wearing a veil (see Spinner-Halev 1994). The question that often arises when applying the norms of liberal multiculturalism to cultural conflict is not **whether** a practice is an internal restriction or external protection but rather whether it is **more** an internal restriction or **more** an external protection.

To answer this question requires determining, on one hand, the extent to which the practice has the effect of protecting the community and, on the other hand, the extent to which it has the effect of restricting individual autonomy. It thereby requires some understanding of the function and centrality of the practice which would, in turn, require some fine-grained assessments of group and individual identity. For instance, with respect to the group, one wants to understand the role a disputed practice plays in the group's system of beliefs and whether a group's survival or well-being is jeopardized in the absence of having access to the practice. What role does a practice play in sustaining the community? Is it central or peripheral? How central is it and what will happen if it is abandoned? What will happen if it is altered? With respect to the individual, one wants to understand the role that a practice plays in sustaining or undermining individual autonomy, that is, in sustaining or undermining the individual's capacity to reflect upon and choose amongst a range of viable options that are meaningful to her, and in sustaining or undermining the individual's capacity to reflect on her attachment to the community. Is adhering to the practice voluntary? Does adhering to the practice merely inconvenience individuals or does it cut individuals off from the main sources from which it is reasonable to suppose that they build and sustain a healthy sense of themselves? These are questions related to identity.

It is important not to exaggerate the benefits to be derived by posing these questions. These questions will not magically resolve conflicts nor will they generate uncontroversial and full information about individual and group identities nor answers to which minorities and majorities will always agree. After they are answered, the liberal multiculturalists must still determine whether a practice is a crucial external protection or whether it restricts individuals within the community in a way that makes a significant difference to their autonomy. Nonetheless, these kinds of questions related to identity must be addressed one way or another before it is even possible to determine whether liberal principles, as Kymlicka has interpreted them, have been violated.

By 'one way or another' what I mean is that these questions must be addressed implicitly or explicitly. In *Multicultural Citizenship* (1995: 163-70), for instance, they are sometimes implicitly addressed. This occurs when Kymlicka explains how liberal multicultural ought to respond to illiberal minority practices such as discrimination against religious dissenters in the Pueblo Indian community, discrimination in some communities against providing girls with education comparable to boys, and denying women the right to vote or hold office in Saudi Arabia. These practices are characterized

presumptively as ones that "*do not protect the group from the decisions of the larger society*" (Kymlicka 1995: 153, emphasis mine) and therefore ones that cannot count as external protections. He subsequently refers to them as 'unjust practices'. Yet, to presume that these practices are 'unjust' and that they play no role in protecting groups from the decisions of the larger society quickly and easily dispenses with what is often a core problem, namely, who determines what role a problematic practice plays in a group's identity and how do they go about evaluating these practices. It is easy to suggest that if practices mistreat individuals and have no role in sustaining the group's identity, then they ought to be abandoned. Indeed it is too easy to suggest this. The problem is that such conclusions are often disputed both within groups and between them. If a consensus existed that a particular practice was indeed unjust, then it would hardly be necessary to impose liberal principles on communities which hold the practice; they would change the practice voluntarily.

The gap in liberal multiculturalism is filled by assessing the identity claims of those involved in conflicts. Liberal multiculturalism must require that the process of deciding whether an individual's autonomy is impaired turns partly on understanding what the identity of the individual and her community consists in and how prohibiting or allowing a practice affects the vitality and viability of the minority community, including the community's capacity to provide its members with a viable context of choice. In this regard, Rainer Forst suggests that Kymlicka should be less concerned about a context of choice than with a 'context of identity' because what matters about cultural membership is not the number of choices one's culture provides but the 'the historically grown, particular "meaning" a culture bestows on the ethical options open to a person as a member of that culture" (Forst 1997: 66). How else can this meaning be understood, assessed and weighed against potential restrictions on individual autonomy, other than by examining the role that a practice plays in the community's identity and the effects it has on the autonomy of individuals, including their autonomy to make meaningful choices within the context of their communities? Kymlicka's normative conclusions about the illiberal nature of some community practices) – that they are unjust and ought to be prohibited - is not disputed here. These are also my intuitions and intuitions that are shared by many people in liberal societies. However, what is disputed is the manner in which drawing this conclusion is left to the private, unguided discretion of decision-makers. This reliance on private discretion is a high risk strategy whose success relies too heavily on how reasonable and informed decision-makers happen to be. It is far more desirable to address these questions using transparent, fair and reasonable guidelines than to leave them to private discretion.

In the Ontario debates, three purposes would have been served by focusing on questions of minority identity. First, framing the debate in terms of identity would have fulfilled the requirement of liberal multiculturalism that individual autonomy be understood in relation to the context of choice. In short, multiculturalism implies the need to understand what counts as a meaningful choice and a viable option within different cultures. These understandings may not be decisive factors in determining whether or not to accommodate a minority practice. Yet they capture the good reasons, which liberal multiculturalism fully recognizes, for why accommodation is important for some minorities. These reasons are the means to understanding what is at stake for individual autonomy and what is at stake for communities when important practices are restricted.

Second, and in the context of the Ontario dispute, framing the debate explicitly in terms of identity would have generated some reasoned discussion about the requirements of Islam and the role of shari'a. This would have in turn closed the space available for rhetorical claims about Islam that may have served to increase the anxiety in Ontario over multicultural accommodation and certainly had the effect of isolating and silencing the Muslim community.

And third, focusing explicitly, transparently and in a reasonable fashion on questions related to identity mighthave been a means to diminish the social conflict that arose in relation to this debate. In this connection, it is interesting to note that one of the anxieties about identity politics is that it has the potential to exacerbate social conflict by placing at the centre of public debate what is doubtlessly a fragile, precious and deeply personal matter, namely the identity of an individual or group or a practice that is integral to that identity. Daniel Weinstock argues (2006), in this respect that because identity is integral to a person's sense of self and to a group's self-conception, when it becomes the subject of public deliberation the result is usually unreasonable debate and heightened social conflict. This is especially a risk in cases where minorities already feel threatened, as in the case at hand. The Muslim community has been especially vulnerable to racism and persecution in western states since 9/11. The atmosphere in the west has been characterized as Islamaphobic not only because of the private racism, but also because of publicly endorsed racial stereotyping of Muslims in relation to public security measures. The public assessment of Muslim identity in Canada entails, in part, asking non-Muslims to assess Muslim practices and values in order to determine how important they are to Islam. This kind of project might only heighten the edgy and threatening environment in which these groups already co-exist.

But two considerations divert Weinstock's concerns. First, as the case examined here indicates, it is mistaken to suppose that identity doesn't inform most public debates about minorities whether or not identity claims are 'officially' scrutinized in the course of debates. Indeed, as the conflict in Ontario suggests, the real danger for minorities is not **whether** their identity is public assessed but **how**. The problem is not a public that takes their identity claims seriously but rather a public that makes no space for a reasonable discussion about their claims and stands by as rhetoric dominates reality. Although Weinstock and others (see Johnson 2000, Brubaker and Cooper 2000) focus on the problem of how minorities may use their identity strategically in order to advance claims for their accommodation, the problem from which most accusations of racism emerge is that majorities use claims about minority identity all the time in heated debates as a means to undermine minority claims.

This is not to suggest that identity politics never involves strategically framing claims or counterclaims about a group's identity. But purely strategic framing or strategic framing that is obviously harmful or unfair tends to work best if identity claims are treated as beyond question from the start or if claimants and respondents expect their claims to be thus treated. For this reason, the public anxiety over identity politics is, ironically, a self-fulfilling prophecy. Identity politics only gives rise to minority entitlements that condone a form of state non-intervention into the lives of minority groups no matter how repugnant the values of these groups happen to be if publics refuse to engage with these identity claims. If public institutions developed a means to assess fairly considerations related to identity and were required to weigh these considerations

against the good reasons that prohibit sexist, racist and homophobic practices, then non-intervention would be less of an issue. If public institutions are willing to investigate, even to a limited extent, the centrality and importance of particular practices to a religious or cultural system of beliefs, then the posturing behaviour of groups like those that Weinstock is concerned about is less likely to arise in the first place.

Constructing the mainstream identity

So far, I have argued that the assessment of identity is an unavoidable feature of some minority rights conflicts and, furthermore, that attempts to ignore this feature can lead to processes that import false and misleading information about groups into debates, including stereotypical characterizations of minority groups which are at least misleading and sometimes racist. The alternative to relying on implicit and private discretion is to ensure that identity-related claims are explicitly assessed and that such assessments are guided by fair and transparent criteria. This alternative serves three purposes, which are discussed above. First, it raises the salience in the debate of what is at stake for the communities involved in either allowing or prohibiting a disputed practice, and it provides some information relevant to determining the extent to which the practice is amenable to compromise. Second, the systematic and critical scrutiny of identity-related considerations may be one way to avoid the fear mongering and inflated rhetoric that otherwise may inform public discussion. This rhetoric creeps into debates in order to fill the gaps left by lack of full information about a practice and its identity-related role in the identity of a minority community. Third, framing conflicts in terms of identity is a means of diminishing the opportunities of minorities and majorities to use identity claims strategically and in a manner that exacerbates social conflict.

One concern that might be raised against the sort of identity-based approach that I am describing is that it gives credence to claims and traditions that are themselves discriminatory. Some minority practices and rules are sexist, racist and homophobic. In the Ontario debates, one of the primary concerns was that shari'a arbitration was sexually discriminatory. These practices, so the criticism would go, should be eliminated regardless of how important they are to the community in question.

I agree that practices which are clearly sexist, racist and homophobic ought to be reformed. An approach that highlights the identity-related considerations is not meant to devalue the normative values that are often viewed as more important than these practices. But the question is, how do we decide when a practice violates such fundamental values and therefore needs to be reformed? An approach predicated on introducing into decision-making considerations of identity asks that we consider, first, what is at stake for minority communities in such disputes and do so in a way that gets beyond the rhetoric which usually guides majority assessments of minority identities. Second, an identity-based approach seeks to ensure that practices are not misinterpreted, oversimplified, or presumed to be immoral (e.g. sexist, racist, homophobic) when they are not or not in all contexts.[18] The point here is to highlight the diverse ways in which different communities might give practical expression to values such as autonomy and equality.

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[18] The veiling controversy provides an excellent illustration of a complicated practice that may not be inherently sexist or whose sexism is comparable to a large array of dress practices in western and non-western societies.

Third, an identity-related approach will draw into consideration the ways in which the identities of other communities are implicated in a dispute. In the Ontario dispute, for instance, this would mean that careful consideration would be devoted to how other groups are affected by having access to private arbitration. To some degree, this consideration did inform the public debate and the Boyd Report since Jews, Ismaili Muslims and Mennonites had already set up arbitration and mediation services for their members. Far less attention was paid to what was at stake for the mainstream community. The debate not only failed to offer any critical scrutiny of mainstream practices and values, but it also fortified a false picture of the mainstream community's commitments as egalitarian and modern (as opposed to traditional). The rhetoric of the debate suggested that Muslim values contrasted with majority secular values. But the reality is that religious arbitration complemented and reinforced many of the values and traditions of the mainstream community.

For example, Ontario laws governing divorce set out a set of default rules regarding property division, custody and support which applies to couples unless they opt out of the default and agree to an alternative way of handling such situations. While it is certainly true the default arrangements have progressive elements, including some acknowledgement of the financial consequences following marriage breakdown for (mostly) women who stay at home, it is misleading to suppose that the default reflects mainstream values while the opt out provisions are hostile to or distinct from mainstream values. There are two aspects of this mistake. First, it is a mistake to suppose that the point of default rules is to ensure that all couples adhere to the values reflected in these rules. Default rules do not set the standard, but rather establish a default. This default is necessary primarily because most couples do not think about setting terms of divorce before or during their marriages and are in a poor position to agree to such terms when the marriage dissolves. While the character of the default arrangements are more progressive than some of the arrangements adhered to under the opt-out provisions, a second mistake is to suppose that these values express the values that the Canadian mainstream embraces in the first instance. As many feminist organizations pointed out before the Boyd commission, feminist interest groups have struggled for years and against stiff opposition to shape these default arrangements so that they move 'far beyond regarding the traditional role of [the] stay-at-home wife as a choice for which husbands bear no financial responsibility upon marriage breakdown" (Macklin 76). One can suppose that had no opt-out arrangements been in place, the opposition would have been stiffer and the feminist struggles to shape these rules would have been longer and less successful. In this sense, the default arrangements do not establish a normative standard to which other arrangements must ascribe. Rather, the opt-out and default arrangements work in tandem and reflect a form of political compromise.

What sets the standard, to a considerable degree, is the presence of voluntary choice in the matter of how divorce settlements are arbitrated.[19] The presence of voluntary choice was a central concern in relation to Muslim arbitration. In the Ontario controversy, Muslim women were said to be in a particularly vulnerable position because, as a group, they were more likely to be uneducated, unemployed, and for these reasons reliant on their families and communities for sustenance. The concern was that their

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[19] Limits are also set as to what can be the subject of arbitration. Status cannot be the subject of arbitration and couples may not opt out in a way that violates any aspect of Canadian criminal law.

consent to opt out of the default arrangements was not likely to be voluntary in the requisite sense. But as Audrey Macklin explains, in relation to domestic contracts such as pre-nuptial agreements, the Canadian courts endorse, in no uncertain terms, a 'zero-sum approach to autonomy and consent: if the circumstances do not amount to 'duress, coercion or undue influence' in law… then the context is irrelevant to assessing the fairness of the agreement and the irrebuttable presumption is that both parties acted with equal autonomy" (Macklin 77). This standard has been used to enforce pre-nuptial agreements between spouses under circumstances that, though perhaps lacking in direct duress, coercion and undue influence, certainly find one party to the contract in vulnerable circumstances. Moreover, inevitably, the vulnerability of these circumstances is shaped by cultural and social factors connected to the secular majority's way of the life – especially with respect to the relation between working and caring for children.[20]

The suggestion here is not that Ontario's *Arbitration Act* was intended as means to allow couples to substitute sexist standards and values for those which would have otherwise guided the arbitration of their conflicts in public courts.[21] Rather, my suggestion is that the *Arbitration Act* and many alternative dispute resolution mechanism do in fact provide a means whereby couples – whether secular, religious, majorities, or minorities - can substitute sexist standards and values for those which would otherwise guide the settlement of their disputes and this possibility is partly what sustains the default rules. Therefore, it is misleading to suppose, as Marion Boyd stated, that Muslim Arbitration gave rise to a 'basic tension inherent in multiculturalism', namely 'how to balance the rights of minority groups within a multicultural society and yet protect the rights of individuals who are members of those minority groups" (Boyd 2006: 72). Rather, the multicultural angle of this dispute, because it was informed by unscrutinized discretionary assumptions about the difference between Muslim and mainstream values in relation to divorce, served the purpose of conveniently deflecting the public's attention from the fact that any couple has the right to choose mediation or arbitration regimes that include sexist values to settle disputes that arise when marriages dissolve. Therefore, the

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[20] For instance, Macklin explains the case of *Hartshorne v Hartshorne*, where a pre-nuptial agreement, which was ultimately upheld by the Supreme Court of Canada, had been prepared by the man, presented to his future wife on their wedding day and signed by her despite her protests and despite the independent legal advice she received that the agreement was unfair in comparison to what default entitlements would allow her. The couple already had one child and, unbeknownst to either spouse, the women was pregnant with their second child. The Supreme Court of Canada upheld the agreement largely on the basis of the women's voluntary consent to it.

[21] In fact, the rationale behind the legislation in 1991 had nothing to do with allowing religious groups to apply religious law in private arbitration and therefore, in this sense, probably failed to foresee the use of the Act by religious groups. When the *Arbitration Act* was introduced in 1991 into the Ontario legislature, it was supported by both the left and the right because each saw wisdom in allowing members of the public to opt for cheap, quick and less adversarial forms of dispute resolution. The legislation was part of a trend followed in other western democracies of creating alternative forms of dispute resolution. As Kymlicka explains, "for the right, it is a way of reducing government expenditures, by relieving pressure on the courts. For the left, it is a way of making dispute resolution more accessible to people who cannot afford the expense of normal litigation." (Kymlicka 2005: 12). Interestingly, from the start, women have been critics of this trend to favour alternative – read 'private' - dispute resolution in light of evidence which suggests that women fare less well under private arbitration. In addition, Kymlicka suggests that Ontario's *Arbitration Act* might violate Canada's multicultural policy because it was passed without due consideration of how the Act would affect the interests of immigrants or other vulnerable groups (2005: 13).

tension at the centre of the dispute is one that, in the first instance, is more familiar to conventional liberalism than to multiculturalism and involves asking whether the state can be used to respond to choices that individuals voluntarily make that may further entrench their vulnerable status. In this case, should the law be used to stop women from making autonomous choices which are sexist? As Audrey Macklin argues if the choice open to couples was either to have a judge apply "universally applicable rules about property division, spousal support, child custody and child support" or resolve the issues themselves using the rules but without litigating, the Islamic arbitration proposal would have been categorically rejected from the start (Macklin 76). But in reality, the problem was not multiculturalism or sexism within Islamic personal law, but rather, as Macklin puts it, 'the state's commitment to privatisation'(p. 75) and a more general commitment within liberal societies to allow individuals who are adults to make sexist choices in their private relation with others as long as they are not coerced.

One obvious conclusion to draw here is that mainstream communities also have practices which are sexist, racist and homophobic and these practices sometimes escape critical scrutiny when debates focus on cultural minorities as they often do when the multicultural framework is invoked. However, the conclusion here is not that multiculturalism is at fault. Multiculturalism provides a framework in which to understand how fair relations can be secured amongst diverse peoples in a democratic society. But, like most means of working out fair relations, it relies on the assessment of identities. Here I have tried to show where this reliance comes into play in relation to a gap in liberal multicultural reasoning. But my guess is that such a gap is pervasive in most approaches which aim to treat minorities fairly, whether they view themselves as liberal and multicultural or not.

Here I have argued that assessments of identity take place one way or another - either implicitly, based on the private discretion of decision-makers, or explicitly, guided by a series of questions and criteria that aim to be transparent and fair. The Ontario controversy over private arbitration in relation to the Muslim community displays what we should expect to happen sometimes when decision-makers rely on private discretion. This outcome should be especially anticipated in connection to groups which are or have been tied to each other through relations of imperialism and colonialism. In such circumstances, the identity of the minority is unsurprisingly used to fortify a false and flattering impression of the mainstream identity as being different– more modern, rational, and egualitarian – from the minority identity. In the Ontario debates, this impression portrayed the mainstream as putatively not wedded to religiously-inspired traditions, to patriarchal values, or to practices that left women destitute after divorce. Aided by this self-portrait, the mainstream community relieved itself of the burden of changing its own practices in ways that address the same concerns that were raised in relation to religious minorities, namely that private arbitration settlements will tend to violate gender equality.

Conclusion: Identity and the capacity of democratic institutions

Although considerations related to identity pervade many minority rights cases, this paper has devoted special attention to the controversy in Ontario and Canada over

whether to publicly sanction private arbitration decisions which apply shari'a law to family related disputes (marriage, divorce, custody). This controversy, involved a good deal of public debate and discussion, a government commissioned report, and a legislative debate. It illustrates that minority rights debates which claim to focus on competing matters of principle do not avoid issues of identity but rather invite participants to make sense of a minority's identity in the absence of more direct and transparent discussions. In other words, what we find in this controversy is not the absence of identity, but the absence of a careful, reasonable and fair consideration of identity.

Admittedly, there are many questions that are left unanswered by this analysis including how an identity-based approach might have made a difference to the outcome of this conflict. In this respect, one of the key conclusions to draw from this conflict is that minority accommodation is only partly about whether a particular practice is accommodated in the end.[22] A central element of the Ontario dispute is the manner in which the debate proceeded. Members of the public were invited to make sense of the dispute in terms of a framework that purported to be neutral about Muslim identity and instead focused on the nature of multicultural principles. While these principles were carefully scrutinized and debated, the questions about identity upon which the principles relied in order to be made concrete were not the subject of debate or much discussion. The inevitable result was that the public had to read into the debate their own interpretation of Muslim and mainstream identity including their own understanding of the nature of shari'a, its importance, its effects on the status of women in the community, and its relation to the standing and political voice of the community. In the end, even moderates within the Muslim community were struck by the way in which Islam and Muslims were caricatured and vilified in this debate.

Part of what it means to accommodate minorities is to design political institutions that have the capacity to recognize the politically significant claims of groups and to treat these claims fairly. This capacity depends on how the claims and the groups who make them are treated in decision-making processes rather than, merely, on the basis of outcomes. When groups detect that political institutions fail to have the required capacity, they understandably withdraw from the public debate and attempt to shield their internal controversies from public purview. This is likely to have serious consequences for the integration of minority groups and for attempts to reform practices that are controversial, inegalitarian or otherwise unfair within the minority or the majority communities. An identity-based approach which sets out the general questions and criteria that ought to be used to guide the assessments of minority rights conflicts is, in this sense, a means to expanding the vocabulary of public institutions and decision-makers. Its aim is to increase the likelihood that fair and transparent criteria are used in such assessments and replace our reliance on private discretion.

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[22] This seems especially well illustrated by the Ontario controversy given that the resolution hit upon by the Ontario government, as convoluted as it was (see fn 11 above), was endorsed by parties on both sides of the dispute and that notwithstanding their endorsement, the Muslim community – both the moderate and more fundamental parts of it – was alienated by the process.

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