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Pluralism and Public Decision-making in Canada: What Does Success Look Like?

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Abstract principles remain mere aspirational ideals without policies to apply them within political and social life and without institutions to interpret principles in ways that are meaningful to members of different ethnic and religious communities within a pluralistic society. But how can we ensure that our courts, legislatures and bureaucracies interpret the normative principles embodied by individual rights, equality and multiculturalism in a manner that is evenhanded across different cultures, religions, and classes, and mindful of the experiences, histories and priorities of minorities, as well as dominant groups? How can we create in our public institutions the capacity to interpret the rights guaranteed by Canada's constitution in a manner that not only reflects the perspectives of dominant groups about the lessons to be learned from our history of colonialism, sexism, racism, and religious discrimination, but also draws on the experiences of minority groups?

These questions became important in the 1990s, when it was common for the strained relations of Canada's English majority and French and indigenous national minorities to be expressed in terms of a tension between individual and collective rights and values. Many elites from English, French and indigenous communities agreed that the tension between 'individualism' and 'collectivism' defined the main tensions between Canada's French and indigenous national minorities – which were broadly 'collectivist' in orientation – and the anglophone majority – which was broadly 'individualistic' in orientation. In an ultimately unsuccessful effort to rectify the situation constitutionally, political leaders introduced an amendment to the 1982 Constitution through the Charlottetown Accord to recognize the existence of both individual and collective rights.[1]

At a practical level, the real issues in these debates had less to do with any tension between the abstract values of individualism and collectivism but with the different priorities of communities that found themselves in dissimilar circumstances. The minority groups favoured so-called collective rights, not because they were more authentically collectivist

than the majority. They favoured them because their ways of life were less secure and they worried more about the survival of their languages and cultures. Similarly, no group failed to recognize the value of individual freedom. But the minority national groups differed significantly in living under conditions whereby their members could enjoy this value and participate in shaping how it is publicly understood without putting their community's language or way of life at risk. The majority seemed more individualist only because it could secure all sorts of collective goods – linguistic security, recognition as a distinct society, protection of cherished practices – just by being a democratic majority.

In at least two ways, the 'individual versus collective' framework distorted the political tensions between Canada's national groups. First, the framework emphasized differences in values that were not really there. In some ways, indigenous communities are profoundly individualistic, not collectivist, and in some ways, the English majority has strong collectivist values. Second, the framework implicitly suggested that a key reason why minorities were disadvantaged in Canada is because they are collectivists whereas the majority is individualistic. This second distortion was especially significant in relation to indigenous peoples because, in this context, the framework rendered a brutal history of colonial domination into a benign problem of difference between the abstract values of different cultural groups (see Eisenberg 1994 and 2001). The enduring legacy of colonial injustice was explained in terms of a tragic clash of abstract values.

The 'individual versus collective' framework exaggerated the importance of some differences in values but then failed to capture others. A better framework would put the abstract claims of collectivism and individualism aside at least long enough to interpret the claims of each group concretely and pragmatically.[2] The point of such a new framework for resolving group-based conflicts would not be to abandon individual rights in favour of collective values, but to ensure that rights are interpreted in a way that is sensitive to the circumstances and experiences of different communities. If rights are shaped by the preoccupations of an exclusive set of dominant groups and are then imposed on minorities without regard to what is deeply important to them, they will appear to be biased in favour of majority interests and rejected by minorities as useless to them or ideologically motivated. Similarly, if rights are interpreted in a way that only reflects the preoccupations that arise from one particular and unjust set of power relations, they will appear to be impotent, despite their potential value to address the concerns of those whose disempowerment has causes which are otherwise and have been ignored.

In order to address the tensions between different societal groups, Canadian decision-makers thus had to abandon the 'individual versus collective' framework and resist interpreting conflicts between majorities and minorities as ones that rest on irresolvable tensions between abstract values purportedly embraced by majorities and minorities respectively. Instead, decision-makers needed to respond to minority claims on their own terms, in an evenhanded manner, and to consider minority perspectives when interpreting the fundamental principles and values of Canadian society. Put differently, the just interpretation of rights and other fundamental normative values depends on the recognition

and protection of certain features of individual and group identity, and therefore on public institutions that have the capacity to assess the identity claims of minority groups in a fair and transparent manner.

Identity claims and public decision making

The success of a pluralist society depends partly on it having institutions with the capacity to assess what I call 'identity claims'[3] which are claims made usually by minorities for entitlements, resources or opportunities on grounds that appeal to something distinctive and important about their cultural, religious or indigenous identities which may be jeopardized in the absence of political or legal accommodation. A pluralist society depends on public decision-makers who have the capacity to listen to and consider identity claims in a fair and transparent manner. It does not require that every identity claim is accommodated but it does require sincere attention and consideration of these claims by public institutions and their capacity to distinguish between claims that merit special entitlements and resources and those that do not.

In one sense, there is nothing new about identity claims or the groups that advance them. Canadian judges and politicians have, since before Confederation, considered the claims of linguistic communities, and Catholic and Protestant religious communities for accommodation and protection. State institutions have a long and continuous history of considering these claims. For example, today, when religious minorities make claims for the legal accommodation of their practices, the Supreme of Canada assesses these claims to determine whether they are religious in nature and deeply important to the religious beliefs and traditions of those making them (i.e. sincerely held). Similarly, when an indigenous community seeks to establish an Aboriginal right to hunt or fish, its claim is assessed by the Court as an identity claim which, if successful, exempts the community from state law that otherwise regulates fishers and hunters in order to protect something distinctive and integral about the community's identity.

While there is nothing new about groups making identity claims, in the last 30 years the number and intensity of conflicts about these claims have increased. Multiculturalism has invigorated identity claiming and heightened public awareness about some of the challenges associated with these kinds of claims. In Canada, a large and growing scholarship points to many cases in which public decision-makers have failed to assess claims fairly. For example, indigenous scholars are unanimous in arguing that the Supreme Court imposes unfair criteria when assessing whether an indigenous practice is distinctive and important to a community's identity. Feminists have protested against the use of gendered, cultural and often racist stereotypes in decisions to reduce the criminal sentences of individuals who commit crimes against women. Many people worry that taking seriously the distinctive identities of religious and cultural groups will legitimate sexism within these communities, and privilege the role of a male elite to define the group's identity. So despite the ubiquity and longstanding nature of identity claims, no consensus exists about how such

claims ought to be assessed, and numerous concerns have been raised about the risks and challenges they pose. According to some critics, the risks are just not worth the benefits.

The rationale for reasoning about identity

I think a wholesale rejection of identity claims is unfounded and misses the point of what it means to realize the promise in Canada of multiculturalism and multinationalism. There is no denying that what counts as cultural or religious identity is often ambiguous and that state institutions have an imperfect track record when it comes to assessing claims based on identity fairly. But three considerations lead me to conclude that the best solution is for public institutions to develop criteria by which to assess these claims fairly and transparently: (1) the need for institutional humility, (2) the need to combat stereotypes, and (3) and the requirement to respect persons.

Institutional humility

The first reason to ensure that public institutions have the capacity to assess identity claims is that this capacity will engender institutional humility about the fairness of public practices and inclusiveness of values related to decision-making. Over the course of history within any society, legal entitlements, political values, and institutions have been shaped by the experiences and interpretations of dominant groups. So majority identity is already deeply entrenched within the public practices, norms and decision-making of any society. Sometimes the cultural values of the majority are so deeply entrenched in social, political and legal norms that these norms are not recognized as culturally specific at all. Decision-makers who are reflective of the dominant majority position can display hubris and arrogance about the essential soundness of their interpretation of basic values and they can be blind to the ways in which unacknowledged assumptions about identity are at work in their decisions.

The identity claims advanced by minority groups can provide a perspective from which decision-makers can detect deeply entrenched cultural and religious biases with in these norms. To assess minority identity claims, judges and other agents of the state must grapple with how minorities perceive and experience political institutions and this can reveal inequalities in the ways that majorities and minorities fare in light of seemingly neutral values. Allowing identity claims to be directly addressed by public institutions can reveal these biases and thereby engender a healthy degree of institutional humility.

To illustrate, consider two different approaches to interpreting conflicts that involve religious practices, such as those about whether the state should accommodate veiling, turbans, kirpans, religious arbitration, arranged marriages, polygamy and others in the public sphere. The first approach to resolving these disputes tries to avoid assessing identity claims and instead requires that judges interpret the right to freedom of religion so as to guarantee that all similar practices are treated approximately the same. So the first approach aims at extending protections to minority religious practices in so far as they are similar to

practices already protected. For instance, if Catholic religious arbitration is legally recognized, then according to this first approach, Muslim and Jewish religious arbitration should also be recognized. If children are not allowed to carry concealed knives while at school, then Sikh children should not be allowed to carry kirpans while in school.

At the heart of the first approach is the value of equal treatment. The advantage of this approach is that it aims to ensure that all people are treated the same. But the disadvantage is that the approach uses the status quo as the standard to assess whether minority practices ought to be accommodated. Only if a minority practice is similar to an established practice is it eligible to be protected. So this first approach can avoid requiring that courts consider questions about whether a religious practice is deeply important to the religious identity of a claimant, and ought to be accommodated on that basis. But the cost of avoiding questions about identity is that religious freedom will be interpreted in a manner that entrenches the status quo and likely favours the longstanding practices of dominant groups.

The second approach to religious freedom asks that the court assess the importance of a disputed practice to the religious identity of adherents and thereby raises the question of whether a disputed practice, in fact, denies to people the kinds of values that individual rights are meant to protect. The driving idea behind the second approach is that controversial practices, such as veiling or arranged marriages, can often just as easily be interpreted to be consistent with individual rights and equality as can mainstream practices.[4]

This is not to suggest that interpretations of individual rights are culturally relative. But the distinction between better and worse interpretations of abstract commitments such as individual rights does not arise because there exists a single and uncontroversial interpretation of what these commitments mean. The question is not whether the same practice is protected across different groups, but whether practices, whether similar or not, that are profoundly important to the identities of religious claimants receive similar protections. Where public institutions keep identity off the table, as it were, they can engender a false and exaggerated sense of confidence in the adequacy of status quo values and institutional responses to diversity. In the absence of identity claims, institutions have no incentive to consider more expansive interpretations of what a right like freedom of religion means from different perspectives.

Combating stereotypes

The second reason to develop public institutions with the capacity to consider and assess identity claims is that, in the absence of procedures which deal with identity claims directly according to transparent and fair criteria, the risk is that decision-makers will fall back on stereotypes in order to fill in their understanding of the nature of a minority practice and the consequences of protecting it. In the absence of a process that requires religious and cultural practices to be assessed on the basis of evidence, decision-makers may have little choice but to rely on their own hunches about a practice, based on personal or social

prejudices. This risk is especially great when disputed religious and cultural practices have been the subject of extensive media hype or public prejudice, as in the case of many Muslim practices that involve the treatment of women.

Stereotypes are often entrenched because of the absence of careful assessments of religious practices. We see this, for example, in the 2004 debates about the legal recognition of religious arbitration in Ontario. The public debate in Ontario was mainly focused on the nature of Canada's multicultural values (see Tibbetts 2004: A5 and Rutledge 2005). Advocates, on one side, argued that Canada's multicultural commitments allowed cultural groups autonomy over important practices of their collective life, including religious arbitration, even if these practices conflict with the values of mainstream Canada. They argued that Muslims were being denied what other religious groups enjoyed, and they urged the government to pay more than simply lip service to the 'principles of multiculturalism'.

On the other side, opponents to religious arbitration argued that multiculturalism was partly to blame for the conflict in the first place because it sanctions group autonomy and, for this reason, ought to be abandoned as Canadian policy. They argued that multiculturalism goes too far when it allows groups to opt out of adhering to Canadian values like gender equality, and many criticized multiculturalism for destabilizing the country. Much like the 'individual versus collective rights' debates of the 1990s, both advocates and opponents of religious arbitration characterized the problem in terms of a clash between abstract values, in this case between multiculturalism and sexual equality, which stood in a zero-sum relation to each other.

What the debate lacked was a substantive discussion about the concrete issues related to the importance of religious arbitration to the religious identity of Muslims, including how the practice functions within Islam, whether it is threatened in the absence of legal recognition by the state, whether it is practiced with consent, and whether it places anyone at risk of harm. In the absence of such a discussion, it was relatively easy for some adversaries to play up the public stereotypes and racism against Muslims. Mainstream Canadian newspapers printed editorials that compared shari'a law to incest, claimed that it endorsed chopping off people's hands, and endorsed a view of women as chattel. The predictable effect of this campaign was that, except for a few bold commentators, Muslims withdrew from offering any substantive information about Islam or shari'a, including information about the problems with the discretionary ways in which private arbitration works within some parts of the Muslim community. Given the atmosphere created by the public debate, the risk was great that the effects of discussing the real problems that religious arbitration presents in the Muslim (and other religious) communities would further fuel the fear-mongering and racism in the public sphere.

On one interpretation, the Ontario debates illustrate that racist stereotypes thrive in the absence of substantive discussions about the concrete nature of minority practices. A similar point was made by Sheema Khan, an editorial writer for the Globe and Mail, who

has argued over the last few years that non-Muslim Canadians show little understanding of Muslim practices and for this reason are unable to assess reliably claims about the importance of Muslim practices or the risks they involve. During the Ontario debates, Khan argued that Canada missed a "golden opportunity to shine light on abuses [within the religious Muslim community] masquerading as faith" (Khan 2005) because the Canadian public had lacked the knowledge necessary to distinguish between faithful and abusive adherence to the practice. The Ontario government decided, in the end, to prohibit religious arbitration in the area of family law and, according to some commentators, in effect, has driven the practice underground where the women who are most vulnerable to 'abuse masquerading as faith' remain vulnerable.[5]

Some critics have argued that multiculturalism obscures racism (Bannerji 2000) and can entrench racial stereotypes because it heightens the salience of cultural difference and asks the public and decision-makers to see fellow citizens as 'defined by and definitive of their culture' (Phillips 2007: 85). For example, Anne Phillips shows that cultural defenses offer another way for defense lawyers to represent their clients as 'weak willed, led astray, or over influenced by their peers' (2007: 85). Phillips is concerned that multiculturalism encourages the public use of culture for all sorts of purposes and therefore, in a multicultural state, culture is more likely to be used for good or ill.

Yet, if racism and racist stereotypes already exist, how do we know whether multiculturalism entrenches or effectively challenges these stereotypes? What counts as evidence that multiculturalism worsens prejudice rather than exposes and challenges it? On this count, it's worth considering the 1998 case of *R. v Lucien* (1998 and 2000) in which two men are found guilty of sexually assaulting a woman. The victim and the convicted are members of Montreal's Haitian community. The judge attributes the absence of remorse in these two men to their "cultural context with regards to relations with women" and sentences them leniently. The incident leads to strong protests from the Haitian community in Montreal and ultimately to the demand by the Haitian Embassy for a public apology (Fournier 7). As one Haitian community leader put it, "I interpret what [the judge] says as it being normal for Haitian men to proceed with group rapes and then to have no remorse because it's normal to do this. I find this outrageous" (Fournier 19). The case seems to show how a misguided understanding of culture can entrench racist stereotype.

But it is difficult to understand how multiculturalism is the real culprit behind the judge's racist presumptions (or the judge's willingness to accept racist and sexist arguments from the lawyers of the accused). Multiculturalism aims to ensure that minorities can participate as equals in the public sphere and, in some circumstances, sanctions the recognition and protection of minority practices, beliefs and traditions in order to facilitate equality. Racism flourishes where groups are excluded from participating as equals in the public sphere. Whereas the question of whether or not multiculturalism successfully combats racist stereotyping is worth asking, the conclusion that it entrenches racist stereotypes in the course of enhancing the participation of minorities or because it recognizes deeply held minority practices is confusing and, in my view, unlikely.

A stronger argument is that racist stereotyping sometimes fills the gap left by the absence of substantive and informed assessments of minority practices, as we found in the Ontario case, and that racism flourishes where minorities are silenced, unable to contest how their identity is portrayed in the public sphere and thereby unable to protest against public decisions of the sort we find in the Montreal case. One way to address the disturbing tendency Phillips and others have pointed to, of public decision-makers who rely on racial stereotypes, is to design decision-making procedures that require them to assess transparently and directly claims related to the identities of cultural and religious groups, and to ensure that these assessments are guided by reasonable and fair criteria that target racist stereotypes.

Respect

A third reason why public institutions should develop criteria by which to assess identity claims fairly and transparently is because this capacity is an important way to show respect for people from different ethnic and religious communities. Public institutions which have the capacity to guide judges to listen attentively to and consider identity claims as one kind of reason for distributing opportunities, entitlements, and resources one way rather than another are thereby able to acknowledge the *prima facie* validity of distinctive ways of life and the practices and values deeply important to them.

In my view, the state is obligated to consider arguments for the recognition, accommodation and protection of minority practices, values and traditions, but not to accommodate all such claims. And in order to consider these claims fairly, state institutions require a guided set of normative criteria (see Eisenberg 2009). A multicultural state ought to have institutional mechanisms that encourage judges and bureaucrats to consider whether restrictive laws are morally unsound and unfairly exclusive of some societal groups.

Judges could refuse to hear arguments based on identity or require claimants to explain the importance of their claims for reasons other than because they are important to their identity or way of life. They could treat minority practices such as veiling, religious arbitration, kirpans and turbans (1) as constructed or invented responses to social and political circumstances, (2) as contingent on these circumstances, and (3) as therefore more flexible and revisable than claimants sometimes suggest. But, on one hand, there is no guarantee that failing to assess identity claims will thereby ensure that state agents do not make judgments about these claims and their nature and importance in more covert ways. On the other hand, there is still the pragmatic problem of how best to respond to claims individuals and groups make for the recognition and protection of some aspect of their identity. An approach that responds to the identity claims groups advance in a manner that can be applied by actual public institutions could be designed to enhance the capacity of public institutions to treat minorities with respect, to respond to racist or sexist stereotyping, and to ensure that longstanding political and legal rights are interpreted in an even-handed manner that considers the perspectives of those outside of dominant groups.

Conclusion

My purpose here has been to explain why I think that one of the most important indicators for the success of a pluralist society is that such a society takes the identity claims of groups seriously and develops institutions with the capacity to assess these claims in a fair and transparent manner. In Canada, we already have some institutions that do this, and we have to think more carefully about how well they are assessing identity and how they might do so better.

Endnotes

[1] These provisions were placed in the Charlottetown Accord's 'Canada Clause': "(f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people."

[2] This was eventually the course adopted by the Royal Commission on Aboriginal Peoples in its Report.

[3] We can call these cultural claims. I call them identity claims in order to include claims related to religious, cultural, indigeneity and potentially other dimensions of identity.

[4] For example, comparisons have been made between the practice of religious arbitration and prenuptial agreements in relation to protection for sexual equality (see Macklin 2006) and between polygamy and more casual multiple partner relations (see Modood 2007: 56).

[5] See Boyd 2007, 483. For a comparative perspective, see Anne Phillips (2007:172-6). Phillips argues that religious arbitration has been helpful and empowering for British Muslim women.

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