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Choice or Identity? Dilemmas of Protecting Religious Freedom in Canada

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Abstract

Until recently, freedom of religion was interpreted by Canadian courts primarily as an individual right to choose to follow or practice one's religious beliefs as long as doing so does not cause harm to others. The central value of religious freedom was often expressed as a right to choose one's religious beliefs, and the central risks were understood to be social coercion and legal prohibitions on religious practices. Here, I'll refer to this as the 'choice approach' and I distinguish the 'choice approach' from the 'identity approach'. According to the choice approach, the sovereign value that the right to religious freedom protects is the value of following the dictates of one's deepest and most personal religious commitments and thereby deciding for oneself what ought to guide one's conscience. In the mid-1980s, the grounds for religious freedom began to shift and arguments were introduced in law and politics that treated religion as an identity. According to these arguments, religion is considered part of a person's identity, similar to their ethnic background. As an identity, religious difference obligated states to ensure that individuals from different faiths have equal access to the benefits of citizenship even if ensuring this access goes beyond protecting their right to choose freely how to practice their faith. This paper examines this shift from religious freedom as choice to identity within Canada and also within the broader global context. It points to three implications this shift has for the treatment of religious minorities and the dilemmas for policy makers that follow from this shift.

Is Religion a Choice or is it an Identity?¹

Religious commitments are, in several senses, both choices and features of identity. The question addressed here is what are the political and legal consequences for public institutions, politics and pious citizens when questions of religion are framed as matters of identity rather

¹ In the context of Canadian jurisprudence, the choice and identity approaches to religious freedom have been explored by Richard Moon (2005: 201), who distinguishes between judicial decisions that consider religious freedom to be a matter of protecting autonomous judgment and choice, and religious freedom as part of an individual's 'deep-rooted cultural identity'. On Moon's view, the distinction belies the nature of religion itself and requires a rights model that can protect both dimensions of religious freedom. Here, the distinction between choice and identity is situated in a broader political context, which has changed how many rights are understood and applied in Canada and globally. As I show, the challenges and dilemmas that follow from these two approaches are emblematic of larger challenges found in the politics of diversity today.

than matters of choice. To answer this question first requires considering what distinguishes these two ways of framing religious rights.

When religious commitments are understood to be personal choices, the obligation of the state is to ensure that individuals are protected in choosing to follow their religious beliefs but the state is not obligated to protect them from all the costs of their choices. The costs of religious choices can arise for individuals who are members of minority religions, which have practices different from those of the mainstream, or as a result of the state supporting the religious practices of some religious groups but not others. The choice approach does not prohibit the state from supporting one set of religious practices over others as long as that support does not constitute coercion towards unsupported groups. Richard Moon illustrates the distinction between choice and identity in Canadian court decisions over Sunday closing laws. In 1985, the Supreme Court of Canada heard a case involving *The Lord's Day Act*,² a national law that required businesses to close on Sundays. The law was challenged for being religiously discriminatory against non-Christians because it imposed costs on Jews, Muslims and other religious minorities, whose Sabbath falls on Saturday or Friday, and who were thereby required to close their businesses two days a week. According to Moon, had the Court applied the choice approach, it would have found that the *Lord's Day Act* does not violate religious freedom because the Act does not prohibit those who hold Saturday or Friday as the Sabbath from closing their businesses on these other days as well. As long as the law did not coerce or prohibit anyone from following their religious practices, but instead only required them to close on Sundays in addition to any other day they choose to close, it did not violate religious freedom. The choice of some people to follow their religious practices may, in some cases, require them to absorb additional costs (Moon 2008: 222-27).³ But, as some judges observed,⁴ the state cannot be expected to bear the costs of the choices its citizens make: "The economic harm suffered by a Saturday observer who closes shop on Saturdays is not caused by the ... *Act*. ... It results from the deliberate choice of a tradesman who gives priority to the tenets of his religion over his financial benefit."⁵ According to the choice approach, freedom of religion does not require that lawmakers eliminate every state-imposed cost associated with the practice of religion or that all religious faiths are treated the same by the state. Nor does the approach prohibit public practices or laws that favour one religious group over another as long as these practices and laws do not prevent anyone from following their religious faith.⁶ In a religiously diverse society, freedom to choose one's faith often involves costs and, unless these costs are covert obstacles to prohibit people from practicing their religions, citizens should not expect the public purse to subsidize our choices.

In contrast, when religion is treated as an identity the significance of religious belief and practice to democratic citizenship shifts from being a matter about preserving everyone's choices to becoming a matter about including and respecting a religiously diverse citizenry. As an identity, religious practice cannot be regarded as a choice whose costs must be absorbed by the individual without treating some individuals as less than equals. If religion is considered to be an immutable, non-negotiable feature of a person, like one's ethnic background, the law

² The *Lord's Day Act* was struck down in *Big M Drug Mart* [1985] 1 SCR 295.

³ For a philosophical defense of a choice-centered approach to cultural and religious diversity see Barry (2002).

⁴ Also see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713

⁵ *Ibid.*, para 168.

⁶ In this sense the Canadian approach is different from the approach taken in the United States which includes an 'anti-establishment' provision.

must treat that religion with respect in order to respect the person whose identity is informed by it. Using an identity approach, religion becomes part of ‘who I am’ rather than ‘what I choose to believe’.⁷ A law that privileges the practices of one religious group over others, such as a law that requires businesses to close on Sundays, may violate religious freedom if it appears to expose minorities to disrespect or disadvantage, or is viewed as denying them dignity as members of a particular group. According to Moon, if religious belief is part of the individual’s identity “then its unequal treatment may be experienced by the individual as an interference with his or her dignity and as a failure to treat him and his (*sic*) group with equal respect.”⁸ According to the ‘identity approach’, the state may not impose costs on some religious faithful, if those costs have the effect of alienating or marginalizing some citizens.

Moon recounts that, in Canadian jurisprudence, a shift from choice to identity can be traced back to the first freedom of religion cases decided by the courts using Canada’s Charter of Rights and Freedoms, which was entrenched in the Constitution in 1982. In the 1985 case discussed above, *Big M Drug Mart*, the majority of the Court adopts the identity approach by recognizing that laws that favour mainstream religious groups can have the effect of displaying disrespect for individuals outside the mainstream. The shift from the choice approach to an identity approach is articulated by Chief Justice Dickson who writes the decision for the majority:

In proclaiming the standards of the Christian faith, the [*Lord’s Day*] *Act* creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians.... The theological content of the legislation remains a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, dominant religious cultures.⁹

This shift marks a transition in Canadian jurisprudence on religious freedom. Whereas the choice approach, which dominated jurisprudence before 1985, focuses on assessing individual freedom by protecting the individual’s deep personal choices from coercion or legal prohibitions, after 1985 and *Big M Drug Mart*, the court began to consider the identity approach which aims at inclusion and equal respect for religious minorities, and extended recognition to the religious freedom of collectivities.¹⁰

Explaining the Shift

The shift from choice to identity can be detected in Canadian, American and European jurisprudence on freedom of religion,¹¹ but it is far from complete or uncomplicated. More often than not, Canadian courts refer to both individual choice and religious identity in their reasoning, and Canadian judicial majorities continue to frame many of their decisions as affirmations of religious choice. From the individual’s perspective, religious freedom is about

⁷ Also see Waldron (2000) and Weinstock (2006)

⁸ Moon (2008) *supra* note 7 at 232.

⁹ *Big M Drug Mart* at para 97-98. Also see para 134.

¹⁰ *Ibid* at para 98.

¹¹ See, for example, the dissenting opinion of Justices Malinverni and Kalydjieva in *Lautsi and Others v Italy*, ECHR 30814/06, 2011.

both choice and identity, and prohibitions on religious practices, or state regulations which favor the practices of some religions over others, can be experienced by members of religious minorities both as impositions on individual choice and as a form of exclusion and disrespect. That said, the two approaches are not always mutual reinforcing. When they are understood as two different frameworks for understanding religious freedom, they can lead to markedly different conclusions about what is at issue in a conflict that involves religious freedom and how to resolve it.

To understand the full extent of the distinction between these frameworks, it's worth considering why this shift occurred in the first place. The shift found in Canadian decisions in the mid-1980s took place in the context of a broader global shift in political activity and struggle, in which a diverse array of groups became mobilized and politicized around features of identity, including gender, race, language, ethnicity, sexuality, religion, and indigeneity. Since the 1970s at least, various groups in the West have increasingly made claims before domestic and international courts for the recognition or protection of some aspect of their identity, in many cases to contest the ways in which they have been incorporated into the state. The claims of Indigenous peoples and linguistic minorities in this period are prime examples. Indigenous peoples have mobilized on the basis of indigenous identity perhaps more effectively in the last few decades than ever before to contest their treatment by colonizing states, including the neglect of historical treaties and the absence of protection for their lands and practices, by arguing for the protection of their identity. Linguistic minorities have also contested the terms by which they have become incorporated into larger states without adequate linguistic protection, and have used their linguistic identity to consolidate nationalist political struggles in Quebec, Wales and Catalonia, to name three examples.

Religious minorities have also been mobilized during this era of identity politics in distinctive ways. In many cases, new immigrant groups, especially Muslims, have been at the forefront of these struggles in the West, but in some cases, long-standing religious groups have recently become politicized (or re-politicized) to contest the terms of their access to the benefits of citizenship. Together, these groups have contested state prohibitions on wearing headscarves and kirpans, the censorship of blasphemous cartoons, the criminalization of polygamy, and restrictions on religious arbitration in Canada, France, Britain, Denmark, the Netherlands, the United States, Germany amongst other states. In these contexts, religious groups have raised questions about whether state laws treat them disrespectfully¹² and whether states are obligated to accommodate particular religious practices in order to treat pious citizens as equal citizens. In the context of many of these struggles, individual choice is only partly at issue and instead minorities have argued that the recognition, protection and accommodation of some aspect of their distinctive identity is a requirement of justice and a requirement of democratic and inclusive community.

So, the shift in Canadian decision making from a choice to an identity approach occurred at a time when numerous groups throughout the world were becoming engaged in what has come to be known as identity politics. And just as many states responded to identity politics by revising their constitutions and developing international protocols to protect rights and freedoms related to these identity claims, so did Canada. In the last 30 years, over 40 state constitutions have been amended in order to offer protection for different kinds of identity-based claims¹³ and numerous transnational and international covenants and conventions have

¹² For an assessment of respect in relation to religious controversy see Mahmood (2009)

¹³ Explicit mention of 'identity', or articles that directly address cultural rights or 'indigenous identity', can be found in the constitutions of Argentina, Belize, Bolivia, Brazil, Bulgaria, Croatia, Ecuador, Guatemala, Kosovo, Mexico, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Slovakia, Slovenia, Venezuela, as well as statutes passed by

been created in which the protection of some feature of identity figures prominently. In 1982, the Canadian constitution underwent major reform and several provisions of the newly entrenched *Charter of Rights and Freedoms* reflected a politics of identity in the sense that they linked the protection of individual rights to group identity. For instance, the Charter's Section 15 guarantees equality on the basis of several identity categories including sex, race, ethnicity, religion, sexual orientation, and disability; Sections 16-22 recognize the linguistic rights of French and English minorities; Section 27 requires rights to be interpreted in a manner consistent with the multicultural nature of Canadian society; and another revision, section 35, recognizes the rights of Aboriginal people. In short, Canada's constitutional revisions were carried out in an atmosphere of political optimism about the potential democratizing effect of using identity to advance individual freedom, equality and group emancipation.¹⁴ For Canada, this was the first time that political and civil rights had been entrenched in the constitution, but for many other polities, these new constitutional provisions and protocols added a layer of protection to what rights already offered and, in doing so, broadened the application of rights to include matters relevant to groups and connected to the recognition and respect for different aspects of identity.

The net effect of these changes has yet to be fully understood, but what was clear, even at the inception of these new rights, was that these changes were bound to introduce challenges to public institutions, especially for judges and legislators, who had to devise transparent ways to respond to the claims of the many groups that mobilized to advance claims for the protection and accommodation of their identities. The shift from individual choice to identity as a means of reorienting rights protection in general illuminates some of the leading challenges western courts have confronted in the last 30 years and many of these challenges relate directly back to the emergence of an identity approach to religious freedom.

Three Implications of the Shift from Choice to Identity

The first implication and central benefit of an identity approach is that it is more effective than the choice approach at tracking social exclusion and historical injustice towards groups.¹⁵ In part, this is because those who use the approach are more inclined to treat certain features of a group's religion, such as a particular practice or commitment, as an immutable part of the group's identity and therefore significant to what is required to treat a group respectfully. The practice or commitment is then used to identify laws or policies that have restricted them which are then examined to determine if these restrictions constitute unfair discrimination. Using an identity approach, Canadian courts have become willing to consider the connection between the prohibition of a group's practices and state-driven discrimination against the group. This connection, between the restriction on a group's practice and damage to a group's identity, is drawn in several cases where religious groups contest legal restrictions on their practices.

regions in Italy, Spain, and Germany (Lander). In most cases, these provisions have been entrenched in the last thirty years (Ruggiu 2012: 219-24 and 224-33)

¹⁴ The Charter initially generated several critical assessments as well, beginning with Banting and Simeon (1983), Mandel (1989) and Bakan (1997), all of which quickly became basic reading for scholars interested in Charter politics. Accounts of the Charter's impact on minority rights also include Cairns (1992) and Hein (2000).

¹⁵ A shift to an identity approach in legal and political advocacy can be traced for many groups including Indigenous peoples, cultural minorities and religious minorities. A study documenting this shift in political advocacy by people with disabilities in Canada is Vanhala (2011), especially, on the subject of Charter rights, pp. 57-61.

For example, in a recent case about the criminal prohibition of polygamy in Canada,¹⁶ the Fundamentalist Latter Day Saints (FLDS) in Bountiful, British Columbia presented evidence to show that the criminal prohibition of polygamy has been used historically as a tool by the state to expose members of their community to disrespect and discrimination. The FLDS community submitted historical evidence and political analysis to support their claim that the criminal law prohibiting polygamy was initially designed to dissuade the break-off Mormon sect from immigrating to Canada, and then to stigmatize, marginalize and exclude the group from the benefits of citizenship in Canada and the United States. Women in the community stated in interviews that, even if they choose not to enter a polygamous marriage, they feel stigmatized by the law, along with all the other members of their community. On their view, the criminal prohibition exposes all members of the community to disrespect by prohibiting a practice that is emblematic of the group's identity.¹⁷ Whereas the criminal prohibition impedes individuals in the community from choosing to follow one of their religious commitments, the injustice the community claims to experience is not simply a matter of having the choices of their members restricted. The argument made by some members of the group is that the prohibition on polygamy today fits into a group-based history of social exclusion and a narrative of persecution that is far more profound to the group's sense of dignity than what a snap shot assessment of individual choice reveals.

As the Bountiful case illustrates, some disputes about religious freedom can be framed both as disputes about the conditions for political equality and as disputes about state interference in matters that ought to be left to individual choice. Judges are, unsurprisingly, aware of the complicated relation between religious choice and identity, and the Canadian court, in particular, has recently commented on this relation in the following way:

Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice.¹⁸

But, even in recognizing the complicated, choice-identity nature of religious commitments, the court's decisions nevertheless signify an identity approach by recognizing that the law has placed individual choice in tension with democratic inclusion. Consider, for example, the case of *R v NS*, about a law that requires women to remove their niqabs in order to give testimony as witnesses during a criminal trial.¹⁹ According to the dissenting opinion of Justice Abella, the problem with this law is that it requires some members of a religious minority to choose between participating as citizens in the polity and adhering to their deeply-held religious commitments: "...sexual assault complainants... will be forced to choose between laying a complaint and wearing a niqab, which... may be no meaningful choice at all."²⁰ Such a decision draws on features of both choice and identity but it frames the choice on offer – between rights of citizenship and religious commitments – as beyond the boundaries of what is fair because the religious commitment is treated as immutable and non-negotiable. By invoking this choice in

¹⁶ Reference re: Section 293 of the Criminal Code of Canada 2011 BCSC 158 (hereinafter *Bountiful*).

¹⁷ Campbell (2009: 221). Campbell was one of the witnesses whose testimony was used during the case.

¹⁸ *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37, 2 SCR 567 at para 89.

¹⁹ *R. v N.S.* 2012 SCC 72. See Abella's opinion starting at para 80.

²⁰ *Ibid.*, para 96.

these terms, Abella's position signifies the shift identified here from a choice to identity approach. In her view, the rights of citizenship and democratic inclusion are now considered reasons to oppose the legal prohibition of particular religious practices. The question shifts from one about whether people want to choose to be so pious or not to a question of whether individuals have 'meaningful choices', where 'meaningful' is interpreted broadly to exclude circumstances that expose the individual, whatever her religious choices, to disrespect and disadvantage in the public sphere and as a citizen. The significance of the shift in frameworks is thereby not located in the use of the term 'choice' or 'identity' by a court or legislature, but in the broader framework employed by public institutions in which what matters about religious freedom is its relation to citizenship, mutual respect and the quality of democracy.

Amongst the leading cases in Canada on religious freedom in the last 10 years, *Multani v Commission scolaire Marguerite-Bourgeoys*²¹ exemplifies the identity approach because of how it frames religious freedom in relation to democratic inclusion. In *Multani*, a Quebec school board prohibits a Sikh boy from wearing his kirpan to school. According to the school's no weapon's policy, the kirpan is to be considered a weapon whereas, according to the Sikh boy and his family, it is to be considered a central article of faith. The Supreme Court rules that the school's policy unfairly denied Multani's religious freedom in part because it potentially exposes religious minorities to disrespect:

If some students consider it unfair that G may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to instill in their students this value that is at the very foundation of our democracy. ... Accommodating G and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities.²²

If the decision in *Multani* had been framed only in terms of individual choice, the Court would have focused not on respect, but rather on deciding whether the school's no weapons policy undermined Multani's right to exercise his choice about practicing his religion. Did the school's no weapons policy deny the right of Sikhs to choose their religious commitments or was the problem that the policy imposed costs on orthodox Sikhs that required them to choose between sending their children to public schools where kirpans were prohibited, and private schools where they would be allowed? Whether or not these questions would have led the Court to decide in favour of Multani is unclear, but clearly it would not have led the Court to consider how restricting kirpans in public schools might expose Sikhs, and other religious minorities, to disrespect in Canadian society. Like other recent cases, *Multani* illustrates that even if a religious conflict can be framed in terms of a denial of an individual's freedom to practice their religion as they choose, many cases are not framed this way and instead engage the question of whether restricting a religious practice undermines the equal citizenship and democratic inclusion of the minority. The identity approach alone directs us to consider these features to a conflict. Under the framework of identity, the assessment of religious freedom can involve tracking social exclusion and historical injustice towards religious groups and sometimes this entails assessing whether the law has prevented the access of a religious minority to the benefits of citizenship by placing them in a position of making an unacceptable choice – between commitments related to their sense of themselves, i.e. their identity, and features of citizenship.

²¹ [2006] 1 SCR 256.

²² See *Multani*, introductory remarks to majority opinion. Respect is also discussed in *Multani*, para 79.

Following from this, a second implication of the shift from choice to identity is that it can shift the focus of debate from a concern about injustice done to individuals to a concern about groups, and this can have both benefits and risks. One benefit is that the approach tracks the way in which exclusion may have been engineered by past state policy, which restricted important group practices. In general, the claim that some groups have been historically excluded or subjugated by prohibitions on their practices is not especially new or controversial. For instance, it is widely acknowledged that colonial state agents restricted Indigenous practices, such as the potlatch and Spirit Dancing festivals, as a means to subdue and subjugate Indigenous people, and to destroy their communal and kinship bonds. Similarly, religious groups have claimed they have also been the target of strategic state restrictions, for instance, through restrictions on polygamy, on veiling, on using peyote, or on proselytizing to name a few examples.

In relation to these kinds of cases, the identity approach helps to connect individuals to groups through collective practices and, through these collective practices, to a history of legal and social exclusion of the group from the benefits of citizenship. Whereas social exclusion and discrimination may be considered unjust only because they are experienced by individuals, a policy or rule can be considered unjust not only because it impairs an individual's freedom to follow a religious practice or value that is meaningful to her but also because the restriction targets a religious group and marginalizes its members. Evidence about the meaning and importance of the practice to the group helps to illuminate this collective dimension, which can be overlooked by assessments that narrowly focus on whether an individual believer was free to choose.

Whereas a shift from issues of individual to group injustice broadens the kinds of cases that might be taken seriously using an identity approach, the risk of this shift from individual to group is that it can place pressure on groups to present themselves as unified and homogeneous rather than pluralistic and heterogeneous with respect to how members participate and are committed to the group and thereby who counts as a member (or a member in good standing). In order for groups to make persuasive claims for the protection of their practices, they are better off providing state decision makers with convincing evidence that tracks the social exclusion and injustice which the group has suffered historically because of its practices, as the FLDS attempted to do. For religious groups to provide such evidence, it helps if the group is clearly identifiable through its practices or other visible features of its 'groupness', because only if the group can be defined precisely is it possible to track the way in which the group has been treated or to connect the group to a practice. For instance, despite the recognized legal principle of individual 'sincerity of belief' as the only legitimate test for the authenticity of religious practice, the conflict in Quebec over whether Sikh boys should be allowed to wear real kirpans strapped to their bodies when they go to public school turned in part on whether wearing a symbolic replica of the dagger on a necklace was sufficient to meet Sikh religious obligations. Is wearing a real kirpan indeed an authentic requirement of Sikhism or an excessive display of religious orthodoxy? Similarly, one of the main hurdles encountered by the FLDS in making their case about polygamy was, first, to convince the court that, whereas people outside their community may practice polygamy, their group is distinctive because of the important role polygamy plays in its religious beliefs and way of life, and second, to show that, even if FLDS members are free to choose not to live in polygamous relationships, those who make this choice are not fulfilling their religious obligations (Campbell 2009: 197-9). By clearing these hurdles, the FLDS creates visible and stable features of group identity in light of the inevitable pluralistic nature of individual practice within and outside the group. When religion becomes an identity and religious claims are advanced on this basis, it is in the interests of religious groups also to advance a stable and definitive understanding of who counts as a (good) member of their

group and what counts as the group's core beliefs or practices. The more fluid or variable a group's membership or practices, the more difficult it will be to present a case that convincingly uses a practice to trace exclusion or historical discrimination back to the group making the claim.

If an identity perspective treats a group's identity as immutable, static, and non-negotiable, it can constrain individuals and groups by tying them to static understandings of their identity and, in some cases, entrenching stereotypes about their identities or deepening internal hierarchies that are associated with the group's identity being defined in particular ways. This can occur with the (unintended) help of conservative judges or when misinformation about the group is used to make decisions that concern them, but it also occurs because groups self-essentialize. Groups have a stake in how they are defined by outsiders and this can lead them to exaggerate the importance of their practices or the unqualified unity and uniformity of the group in hopes that doing so will enhance their chances of winning legal recognition and protection for some aspect of their identity.²³ Consequently, when an identity perspective is adopted in order to interpret religious freedom, it will carry the risk of reinforcing stereotypes about a group and potentially making more rigid static boundaries about who counts as a member (or a member in good standing) of the group.²⁴ In addition, group leaders may present particular religious commitments as central and integral to the group's identity in order to define the group and unite it in particular ways and thereby to protect a favored understanding of the group's identity, which also happens to protect the leadership positions of a group of elites.

In contrast, when a group's identity is publicly recognized to be pluralistic, fluid, and hybrid it is much more difficult for judges and other public decision makers outside the group to endorse conservative, essentialized or stereotypical understandings about how best to protect that identity, or for elites within the group to present the group's identity as uniform and uncontested.²⁵ Yet, as the second implication of the identity approach shows, sometimes, without these more static understandings, of who counts as a member of the group or what practices are central and integral to the group's identity, courts are unable to track the ways in which groups have been exposed to social exclusion or even to identify stable formations of the group itself to which discrimination may or may not have been directed. In short, where religion is treated as an identity, groups are caught in a dilemma between, on one hand, providing public decision makers with a realistic sense of the group that is fluid with respect to membership and that includes contested practices, but that provides a weak means to trace social exclusion and unjust treatment, and, on the other hand, an essentialist sense of the group even if this means entrenching internal hierarchies that define the group's identity in static and stereotypical ways that exclude and disadvantage some members. Whereas courts might find it helpful to use a particular religious commitment or practice to trace social exclusion, the real world political dynamic created by an identity perspective that invites courts to do this may effectively strengthen a narrow and essentialized understanding of group identity that marginalizes some members of the group.

²³ The tendency to self-essentialize in order to help one's case is illustrated by a leading advocate of religious arbitration in Ontario, who stated that "Muslims place their spiritual and social lives in peril when they are required to submit to laws other than those that Allah ordained" (Ali 1994). For a critical assessment of the incentive to self-essentialize, see Povenilli (1998: 575-610).

²⁴ For an elaboration of the risks of essentialism, see Eisenberg (2009: 61-2 and chp 6). See also Phillips (2007).

²⁵ The Ontario debates about religious arbitration provide an excellent illustration of the impact that publicity can have on the ability of religious elites to define religious identity statically for large groups. For an assessment of the identity politics in these debates, see Eisenberg (2009: 45-51).

Finally, the third implication of a shift from choice to identity is that the identity approach increases the pressure on public institutions to provide a stable and publicly acceptable means of assessing when and how the state ought to accommodate religious practices and values. Insofar as the identity approach exposes exclusion and marginalization, it demands that states respond by re-negotiating the terms of citizenship and establishing a more inclusive public sphere. In Canada, 'reasonable accommodation' is the interpretative framework used to facilitate this process of renegotiating inclusion by assessing how religious practice will be regulated in the public sphere. The principle idea behind reasonable accommodation is that "[f]acially neutral rules that have adverse effects on the basis of creed or religion are a violation of the right to religious equality unless the employer has taken reasonable steps, up to the point of undue hardship, to accommodate religious observance" (Ryder 2008: 90).

The identity approach necessitates the legal obligation to accommodate religious practice publicly because only where religious belief and practice is considered to be an immutable, non-negotiable feature of a person's identity, as opposed to a choice the individual has made, will the exclusion of a religious practice be viewed as the exclusion of the person or group. So the ascendancy of reasonable accommodation – or reasonable adjustment as it is sometimes called – as an important legal standard that helps sort out which religious practices are allowed and which are not, and thereby how religious freedom is experienced and understood in the public sphere, follows directly the shift from choice to identity in how publics understand religious freedom.

In Canada, reasonable accommodation became a legal standard at approximately the same time as the identity approach emerged in jurisprudence, that is, in the 1980s, through human rights cases about religious discrimination in the workplace.²⁶ Reasonable accommodation required that employers adapt workplace rules and practices so as to accommodate the religious commitments of their employees within the limits of what is reasonable and short of undue hardship.²⁷ Since then, reasonable accommodation has become the primary means of thinking about how to sort out conflicts that involve controversial religious practices in the public sphere. For instance, in 2008, Gerard Bouchard and Charles Taylor issued a Report for the Quebec government on the 'Accommodation Practices Related to Cultural Differences' that examined the principle of reasonable accommodation, or what they also called 'concerted adjustment'. The principle, they explained, reconciles public rules to religious minority practices and thereby provides equal access to the public sphere, especially to employment, housing, and public services, in full light of religious differences (Bouchard & Taylor 2008: 161). As they observe, seemingly neutral rules can disadvantage some religious groups without intending to do and the solution is to adjust the rule to accommodate the difference. In their formulation, which follows how the legal standard is used in Canada and elsewhere, the aim of reasonable accommodation and the mode by which it translates the abstract ideals of religious freedom into real world practice require publics not to abandon their rules but to mitigate their discriminatory effects by making provision for an exception to the rules or a specific adaptation of the rules up until the point of undue hardship.

Like other approaches by which states sort out how to manage the identity claims of minorities, reasonable accommodation can have significant drawbacks, including that its application can activate a conservative impulse in those who may be required to accommodate

²⁶ See Gwen Brodsky, Shelagh Day, and Yvonne Peters (2012), who trace the Canadian jurisprudence on accommodation.

²⁷ In Britain, reasonable adjustment was recognized as a legal duty in disability discrimination law in 1995. Elsewhere in Europe, though not recognized explicitly as a duty, a human rights duty to accommodate can be traced in the reasoning of the European Court of Human Rights in many cases about religious belief and disability.

minorities unless they can show that accommodation will cause them undue hardship. In effect, this means that the more fundamental a rule or norm is to the employer's way of doing things, the less likely accommodation will appear to be reasonable even if it causes minorities serious disadvantage. This problem has been illustrated in several cases about employment decisions and has been commented on by the Supreme Court of Canada on more than one occasion. For example, the Chief Justice McLachlin writes that in the absence of legal interpretation which aims at transforming the disputed standard, "[t]he right to be free from discrimination is reduced to a question of whether the 'mainstream' can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right."²⁸ In McLachlin's view, the presence of undue hardship on the majority can be a poor test of whether accommodation is 'unreasonable' and, instead, may indicate the degree to which the dominant group's position of power is written into the way that social institutions work or are viewed as working well.²⁹ On this view, the framework of legal accommodation can preserve and protect dominant and unfair norms,³⁰ in part because it invites respondents to make a case, if they can, for undue hardship. Undue hardship to the status quo, rather than culture justice, becomes the standard used to renegotiate the terms of citizenship and access to the benefits of the public sphere when reasonable accommodation is the approach taken.

This concern about reasonable accommodation illuminates yet another risk of the identity approach. In courtroom contexts, the limit to accommodation expressed through the idea of 'undue hardship' works as an invitation for employers to convince the court that they will experience undue hardship if required to accommodate. Employers have to show not only that accommodation will require them to change their rules or expend resources to change the workplace but also that these changes and expenditures constitute *undue hardship* by jeopardizing the very enterprise the employer is engaged in (e.g. the financial solvency of the business). So, employers have an incentive to highlight and even exaggerate the close connection between potentially discriminatory rules and the essential nature of their workplace so as to convince the judge of the threat of accommodation – for instance, that it will cost too much and thereby threaten their business or that it will compromise safety and thereby undermine the capacity of employees to perform their jobs in a safe environment.

More broadly, where 'reasonable accommodation' is adopted as the publicly accepted means to guide conflict resolution about religious practices and thereby to renegotiate the terms of democratic inclusion, the incentive may also exist for publics that resist accommodation to highlight the undue hardship that they will experience to the very enterprise they are engaged in as a collective if accommodation is required of them. If this seems correct, then it should be no

²⁸ See *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union* [1999] 3 S.C.R. at 42, also known as *Meiorin* about whether a fitness test for firefighters discriminates against women. Also see *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, where the issue is whether a standard set for healthy vision unfairly discriminates against employees with vision impairment who can nevertheless pass the driving and road safety test required by the employer. The ideals spelled out by McLachlin CJ in these two earlier decisions have recently been reiterated by the court in *Moore v BC (Education)* 2012 SCC 61 at para 61 and 62.

²⁹ See Iris Young's (1990: 200-6) discussion of construction of merit as a social exclusionary value.

³⁰ A more conservative interpretation of reasonable accommodation is also reflected in legal argumentation that establishes the grounds for accommodation on the basis of comparator group analysis which has the effect of entrenching dominant group norms as the standards against which minority practices are assessed. See Brodsky, Day and Peters (2012: 33-36 and fn 104).

surprise to discover that the most recent campaign in Quebec to pass a *Charte des valeurs*,³¹ which defines as unreasonable the accommodation of ostentatious religious symbols and denies wearers of these symbols government services and jobs in the public sector, should follow a series of high profile conflicts and debates in Quebec about reasonable accommodation, including the Supreme Court's decision in *Multani* about accommodating kirpans in public schools, and after the Bouchard-Taylor Report on reasonable accommodation. According to advocates of the *Charte*, including the governing party at the time, the Parti Québécois, accommodating religious symbols is not just a matter of religious inclusion or 'concerted adjustment'; it is a departure from Quebec's distinctive public culture built on a historical rejection of religion in the public sphere.

A similar process of self-definition seems to have recently taken place at a national level in Canada where the prospect of reasonable accommodation has provided an invitation to the federal government, led by the Conservative Party of Canada, to emphasize Canada's distinctiveness by establishing highly visible boundaries of citizenship, in order to appeal to public sentiments which are resistant to accommodating religious and cultural minorities. For instance, recent legislative changes require women to remove their veils when they take an oath of citizenship and, as mentioned above, a recent Supreme Court decision sanctions the requirement that women remove the niqab when they give evidence as a witness during a criminal trial. Recent attempts have also been made to require that veils be removed in order to vote. Implicit in each of these state-led initiatives is a desire to define identity through Canadian citizenship against an implicit question about which religious practices ought to be accommodated and whether accommodation of some religious practices undermines features of the very project that is Canada. The same incentive at work in the Quebec debates to exclude and selectively include religious minorities for participation in public sector jobs as teachers, doctors, public servants, and day care workers, according to a standard that weighs accommodation against what the unique character of Quebec can bear, works to selectively provide access to the full rights of Canadian citizenship and access to the benefits of citizenship including the equal protection of the law.

In sum, the third implication of the identity approach presents a dilemma. States must devise stable and publicly accepted means to sort out reasonable accommodation, which paradoxically compels the state to respond to the historical exclusion of people on the basis of their religious practices and activates a latent dynamic that can encourage those who resist accommodation to prove to a court or convince a public audience of voters that they will experience undue hardship if required to accommodate. In most cases where such resistance is evident, employers, government officials and school boards argue that changes to their rules will jeopardize the very project that the rule supported. In a broader context, the risk is that the requirement to accommodate can be resisted by mainstream groups if they successfully raise the stakes by showing that accommodation threatens to undermine the ideals and identity of their citizenship. In this way, 'reasonable accommodation' can elicit a political dynamic on a national scale that limits the promise of the identity approach to religious freedom, as it has in Canada.

³¹The *Charte* was a central issue in the April 2014 Quebec election, where the incumbent Parti Québécois was defeated in part because the electorate rejected the Charter. See <http://www.nosvaleurs.gouv.qc.ca/en> for a description of its contents.

Conclusion

Like ‘identity politics’ more generally, the identity approach to religious freedom helps to illuminate injustices suffered by groups rather than individuals, and helps groups advance claims for the protection of their religious beliefs and practices as matters relevant to the rights of their members as citizens. The identity approach can help groups who wish to renegotiate the terms of their citizenship in the state because it provides an accessible, evidence-based means of tracing injustice. The approach binds persons to practices and thereby pressures states committed to democratic inclusion to make public space, i.e. to accommodate, a diversity of religious practices, and to change laws that seem to target practices as means to exclude, or selectively include, members of particular groups. This kind of renegotiation could not take place where religion is considered to be a matter of protecting individual choice alone.

But in real world contexts the risk of this shift from choice to identity is that it can make space for a new form of second-class citizenship. Publicly-endorsed systems of accommodation, such as ‘reasonable accommodation’, can be intrusive and conservative, and growing evidence shows that mainstream publics have become mobilized to define themselves as vulnerable to the changes minority accommodation might impose on them. Partly for this reason, the shift from a choice to an identity approach in Canada and elsewhere in Europe coincides with restrictions on religious minorities, especially Muslims, to basic rights of citizenship including voting, naturalization processes, and legal protections and, in some places, to public services, employment and public assistance. Citizenship is thereby re-shaped by a new form of selective inclusion whose origins lie with the state’s use of religion to re-inscribe its sovereignty.

None of this suggests that the shift to an identity approach to religious freedom will inevitably give rise to rules that establish second-class citizenship. There is no preordained logic that requires mainstream publics to react as they have in Canada and elsewhere in the world. And courts and legislatures, for their parts, could reject the identity approach and revert to an approach that treats religious commitments as fundamentally matters of choice for which the individual is entitled to no compensation. Indeed, the claims of equality-seeking groups, especially women, gays and lesbians, have acted as strong obstacles to the struggles of some religious groups for accommodation. Whether or not a return to a choice approach is occurring today partly as a response to these counter claims is a good question albeit one that cannot be addressed here. But to end on a speculative note, it seems unlikely that states can go back to the choice approach, or that going back to that approach will return western democracies to a period of relative quiescence regarding their relation with religious minorities and their obligation to protect religious freedom. Given the profound changes witnessed in the last 30 years in the activation of identity groups, the choice approach may now appear to instantiate its own form of second class citizenship, which many suspected it did in the past, and the way forward is not to return to the past but to return to the problem of how to make states responsive to the democratic and emancipatory aims of claims that groups have made, including those that are framed in terms of identity.

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