

Reasonable Accommodation and Common Citizenship

Iain McKenna
University of Ottawa

In Quebec, along with many other parts of the world, people are questioning to what extent minority cultural practices ought to be accommodated by social and political institutions. Most commentators accept that fundamental principles of democratic justice should not be compromised. However, beyond these side constraints there is significant space for discussion and disagreement. This paper entitled, "Reasonable Accommodation and Common Citizenship", criticizes the position that minority cultural practices ought to be accommodated by a policy of differentiated citizenship and argues that there is the potential for sufficient accommodation within common legal and constitutional frameworks.

The consideration of reasonable accommodations has generated two competing theoretical approaches to multicultural public policy. One approach focuses on accommodating minority cultural practices by providing special status or differentiated citizenship to members of minority groups. A criticism of this approach is that it violates the principle of civic equality. Although this objection is strong, it can be answered by the claim that there are times when political values conflict and the compromise of civic equality can be justified by the promotion of another compelling value.

The focus of this paper is a stronger criticism of differentiated citizenship that is based on the problem of defining cultural membership. If we implement cultural accommodations through differentiated citizenship then we must know who belongs to what group. However, as many identity theorists have convincingly argued, cultural groups are not clearly delineable wholes. If defining cultural membership is as difficult as some such as Seyla Benhabib, Kwame Anthony Appiah, and Patchen Markell suggest (and I suspect it is), then proponents of differentiated citizenship face a whole series of problems beyond those of determining whether a particular cultural practice ought to be accommodated. In response to the problem of defining cultural membership, I argue that we can sidestep the issue of cultural membership altogether by focusing on the practical consequences of cultural practices (as opposed to membership) within a common legal and constitutional framework.

Background

In January 2007 Hérouxville, a small town in rural Quebec (a province of Canada), caused an international furor by publicly posting on a billboard a code of conduct that discouraged cultural practices like wearing veils, carrying kirpans and religious animal slaughter. The code also perpetuated negative cultural and religious stereotypes with references to stoning women and other practices that are abhorrent to any reasonable person, regardless of culture. The town councilors who wrote the code utilized the all-too-common strategy of holding up the best practices of their own culture against a caricature of the worst practices of other cultures in order to present an argument in favour of assimilation. Although its code of conduct is fundamentally flawed on several levels, Hérouxville successfully initiated a public dialogue in both Quebec and the rest of Canada concerning the limits of cultural accommodation.

Should the public institutions of a host society be expected to accommodate the cultural practices of new citizens? If so, what kind of practices should be accommodated and how should accommodations be made? I suggest that there are compelling reasons for accommodating some kinds of cultural practices as long as they do not violate basic political and human rights.¹ However, we should resist the strategy of accommodation through culturally differentiating citizenship because of the problem that cultural identification poses for legislators. It is my position that the best way to approach cultural accommodation is to re-evaluate the structures and rules of existing public institutions in light of the novel demands of a changing citizenry.

What is universal citizenship and why is it important?

To begin, it is worth asking why universal citizenship is important. Why should we be wary of differentiated citizenship? The short answer is that historically differentiated citizenship has taken the form of privileging some individuals or groups of individuals for morally arbitrary reasons. Laws that discriminate according to morally arbitrary characteristics such as race, religion, gender, and sexual orientation are not justifiable. As a normative political principle, universal citizenship is, in part, a protection against arbitrary treatment by the government and fellow citizens. The concern of difference-blind liberals such as Brian Barry and Ronald Dworkin (and to some extent myself) is that differentiating citizenship along cultural lines is morally arbitrary in the same way that unjust discriminatory laws are. However, critics of difference-blind liberalism such as Charles Taylor and Iris Marion Young insist that in some cases culture is a morally relevant organizational category. I will concede the claim that there may be some times when culture is a morally relevant category but with

the proviso that this concession does not necessarily mean that differentiated citizenship is the best way to deal with cultural issues.

Why accommodate cultures?

Why should minority cultural practices be accommodated in a liberal society like Quebec? Why is it unfair to expect newcomers to follow the established rules of the host society? One might argue that if someone chooses to immigrate to a country then he or she is obligated to assimilate to the rules and regulations of that country. The argument for assimilation presupposes that, a) every immigrant chooses to immigrate and, b) citizens ought not seek to change rules or regulations that they believe to be flawed in some way. However, many immigrants do not choose to immigrate. War and political instability often force people to leave their country of origin. But even for those who do choose to immigrate, there is no reason to assume that they do not have the right to question rules and laws. In a free and democratic society, all citizens have the right to challenge laws and regulations that they judge to be flawed. Not all challenges will necessarily be successful but the merit of a challenge is independent of one's right to make a challenge. In light of this, the argument for assimilation is unconvincing.

Another reason why cultural accommodations should be considered is that in order for public institutions to be fair they must be impartial. Although we have left the question of whether culture is always morally arbitrary unanswered there are some cases when, clearly, it is. For example, when a patient is brought into an emergency room with serious trauma it would be wrong for a doctor to refuse to treat the patient because he or she was a member of a particular cultural group. Civic equality as a political right guards against this kind of treatment and is instantiated in section 15. (1) of Canada's Charter of Rights and Freedoms.²

Although impartiality is essential to just public institutions, in practice no public institution can be completely culturally impartial. For the sake of factors such as time, efficiency, and cost, public institutions operate in a limited number of languages, recognize a limited number of holidays, deploy a limited number of symbols, etc. Furthermore, it is inevitable that because of historical contingencies, only certain cultural practices will become imbedded in public institutions. Consequently, in a culturally diverse society like Canada, equal treatment according to a single standard or set of rules inevitably imposes undue burdens on only some individuals.³ For example, norms of dress have become codified in public institutions according to particular cultural standards and traditions. This has led to conflicts such as the famous petition by a Sikh Royal

Canadian Mounted Police officer to be allowed to wear his turban with his dress uniform.

The fact that particular cultural practices are imbedded in Canadian public institutions to the exclusion of others has led some to argue that given the culturally diverse population in Canada, civic equality construed as equal treatment in principle fails to bring about equality in practice. The argument is that outcomes of equal treatment sometimes end up falling short of what the spirit of the principle of equality intends.⁴ In order to address this concern section 15. (2) of the Canadian Charter of Rights and Freedoms (the Charter) is a provision that allows for special treatment if its purpose is to ameliorate disadvantageous conditions that are the result of choice insensitive circumstances such as ethnicity, gender, sexual orientation, or religion.⁵

Another reason to accommodate cultural practices is that the kinds of things that are often associated with cultural groups have the potential to be sources of violence. Religious freedom is one political right that developed out of the desire to end violent conflicts between religious groups. I am not suggesting that a government should allow itself to be blackmailed by potentially violent groups. However, there have been many instances where otherwise peaceful populations have become violent when issues involving cultural identity are not adequately addressed.⁶ Given how easy it seems to be for cultural groups to engage in violent conflicts it is prudent to at least take the possibility of cultural accommodation seriously.

Accommodation through Differentiated Citizenship

If we accept that there are some cases where minority cultural practices should be accommodated by public institutions, what form should these accommodations take? One answer, given by proponents of multiculturalism such as Chandran Kukathas is to give some degree of autonomy to cultural groups to administer and regulate certain aspects of the lives of group members. An example of this would be the recent request in Ontario to allow for marital disputes between Muslims to be resolved with Shariah law. The proposal was rejected by the Ontario government and the religious arbitration of other faiths which had been allowed was also prohibited on the grounds that such religious arbitration threatened the separation of church and state.⁷

Although religious groups might pose a problem for secular governments, cultural autonomy can entail differentiated citizenship along cultural lines without invoking religious doctrine. For example, Canada already has formal differentiated citizenship for individuals who are politically recognized as Aboriginal Canadians. Because of historical treaties made between

aboriginal groups and colonial governments, those who are identified as Aboriginal are granted rights and freedoms that go beyond those that are granted to non-Aboriginal Canadians. One suggestion is that multicultural citizenship might work in a similar way.

One serious drawback to differentiating citizenship along cultural lines is the issue of cultural membership. If a government is to grant special rights to certain citizens based on cultural membership, it must be able to determine who exactly belongs to a particular cultural group. However, this raises several difficult questions. How does one draw cultural boundaries? Who decides on the rules of membership? Can individuals be identified as members against their will? To return to the example of Aboriginal Canadians, there is an ongoing issue over defining "Indian" status according to descent. Current membership rules entail that two generations of intermarriage (marriage between status and non-status individuals) will result in future descendants being ineligible to apply for Indian status.⁸ This means that those who have status face a pressure to only have children with other status Indians in order to insure that future generations will be entitled to the political rights associated with being recognized by the government. Clearly, this represents an unwarranted intrusion into the private life of citizens.

Along with the controversial but important boundary between public and private life, there is also the boundary between members and non-members to consider. Membership boundaries are important to questions of justice because when making decisions about legal obligations, culpability, entitlements and rights, we must know exactly who is the subject of a decision. However, proponents of identity politics such as Benhabib and Appiah challenge the claim that cultural groups have clear boundaries. If it is the case that cultural groups are not clearly delineable then this poses a serious problem for the task of differentiating citizenship along cultural lines. This raises the question of whether a government can or should draw political boundaries along cultural lines. A common (but convincing) argument is that cultural identity is contestable in such a way as to make the boundaries of a cultural group indeterminable.⁹ Consequently, any attempt to clearly delineate cultural membership for the purpose of assigning political rights will inevitably marginalize vulnerable individuals and potentially ascribe cultural membership to some individuals against their will.

Another problem for proponents of differentiated citizenship is that legislating cultural membership according to fixed criteria may have the unintended and undesirable consequence of inhibiting positive social change and supporting the status quo. For example, during the middle of the 20th century

Quebec went through a process of secularization whereby the Catholic Church was removed from its traditional role of administering several public institutions. This change in the structure of political institutions reflected a change in attitude of a broad section of the population *vis-a-vis* the Catholic Church, and came to be known as the “Quiet Revolution”. Most in Quebec now view the Quiet Revolution as positive social progress. However, a policy of differentiated citizenship that tethered legal rights to cultural membership likely would have impeded the kind of grassroots movements that led to social and political changes. The worry here is that if special rights are distributed according to cultural membership then individuals may be more likely to maintain the status quo in order to hold onto their special political rights.

The position of those (like myself) who are suspicious of legally defining cultural membership is based on the following claims.

- 1) No culture is comprehensive. Individuals identify with multiple groups.
- 2) The boundaries of cultural membership are porous.
- 3) Cultural identities are ongoing dialogues through which the terms and conditions of membership are reaffirmed, refigured and contested.

If we take these claims seriously then cultural membership does not appear to be the kind of thing that should be legislated.

Evaluating Cultural Practices

An alternative to differentiated citizenship is an approach to cultural accommodation that focuses on cultural practices and leaves the problematic question of group membership unanswered. This approach resists what has become a popular move to tie demands for cultural recognition to political rights.¹⁰ Evaluating practices is a much more manageable task than recognizing “authentic” cultural identities that can yield the same result of redressing injustices faced by vulnerable cultural groups.

In order to determine whether a practice ought to be accommodated I suggest that we look to abstract moral principles such as liberty, equality and toleration for which we already have compelling reasons to value. The process of evaluating concrete cases in light of abstract moral principles is intended to insure that political and human rights are protected and that there is, in fact, consistent treatment of all citizens regardless of cultural differences.

If we accept that we can evaluate particular cultural practices according to abstract moral principles, how do we find answers to cases where two valuable

principles seem to conflict? We might follow Dworkin and attempt to articulate in a systematic way fundamental principles from which other principles are derived.¹¹ Or, if we cannot agree on a lexical order to moral principles we might instead look to the answers that are already given to dilemmas in analogous cases to guide use in new situations. This second strategy will not necessarily lead to the best answer to moral dilemmas but it will at least put vulnerable cultural groups on a more equal footing with the majority.

In the case of Canada, abstract moral principles are articulated in the Charter at a level of concreteness that speaks to particular social, political and historical contexts of Canada. Given this contextualization of abstract principles, it is possible that as social contexts change through immigration and significant social movements, the Charter may need to be revised in order to address novel situations. Likewise, laws and rules that have hitherto gone unchallenged may be shown to be unfair when faced with cultural practices that were unfamiliar to those who originally designed public institutions.

Experience shows that abstract moral principles do not always translate into perfect institutional arrangements. Political compromises and historical contingencies and tradition tend to muddy things up. So, along with evaluating cultural practices according to abstract principles, it is also important to compare such practices with analogous cases of practices that are already allowed in order to see how principles have historically been interpreted.

Accommodating Kirpans in Schools

One reason why it is important to look at both abstract principles and analogous cases when evaluating cultural practices is that there is the danger that minority cultural practices might be held to a higher standard than those of the majority. Recently this issue came up when Gurbaj Singh Multani petitioned the Canadian Supreme Court to allow him to wear his kirpan (a ceremonial knife) to school. To justify its prohibition of kirpans on school property the Marguerite-Bourgeoys school board argued that the kirpan posed a safety risk that outweighed the religious freedom of Multani. In order to support its position the school board pointed out that in Canada and elsewhere there have been cases where potentially harmful religious practices have been prohibited on similar grounds.¹² However, on closer examination it is clear that the school board was holding Multani to a much higher standard than other students with respect to school safety. Rather than looking at what kinds of objects were already allowed at school in order to compare the new object (the kirpan) with what was allowed, the school board considered the kirpan in isolation. The fact that a hockey stick

or a pair of scissors – both objects allowed on school property – arguably pose a greater safety risk than a kirpan, was not considered.

In its ruling in *Mulani*'s favour the Canadian Supreme court stated that,

[t]he risk of G [*Mulani*] using his kirpan for violent purposes or of another student taking it away from him is very low, especially if the kirpan is worn under conditions such as were imposed by the Superior Court. It should be added that G has never claimed a right to wear his kirpan to school without restrictions. Furthermore, there are many objects in schools that could be used to commit violent acts and that are much more easily obtained by students, such as scissors, pencils and baseball bats.¹³

The court argued that objects that pose a risk that is similar to or even greater than that posed by a kirpan (worn in such a way as to restrict access) have been and will continue to be allowed at school. Given that the kirpan does not pose a greater risk than objects that are already allowed at school and given that religious freedom is viewed as a basic political right, kirpans worn with some restrictions should not be prohibited from publicly funded schools.

In the *Mulani* case there are two things that are noteworthy. First, in making its comparison the court focused on the level of risk that was already accepted by school policies rather than other religious practices. If the school implemented a level of security that was similar to that of an airliner or a prison, the kirpan would not be accommodated.

Secondly, although the religious significance of the kirpan was not considered to be enough to warrant a level of risk that was significantly higher than what was already tolerated at school, it did play a role in the judgment. In response to the worry that allowing kirpans would mean that every child would be entitled to bring a knife to school, it was acknowledged that some weight was given to the importance of religious practices. Just as crafts and sports are considered to be legitimate activities that justify the presence of dangerous objects like scissors and baseball bats, religious beliefs were recognized as being important enough to count as legitimate reasons to have a claim considered.

Conclusion

My conclusion is twofold. First, given the difficulties a government faces when attempting to determine cultural membership culturally differentiated citizenship is something to be avoided. I acknowledge that there may be times

when groups involved in ongoing violent conflicts need to be separated and this might require some form of differentiated citizenship. However, in the absence of such conflicts, differentiated citizenship is not justifiable.

Secondly, given that there may be times when accommodations ought to be made for cultural practices, the best way to approach such accommodations is to measure the practice in question against both abstract moral principles and what is currently allowed. The result of this approach is a common set of standards that grants a generous degree of freedom for individuals to engage in cultural practices without compromising political and human rights.

¹ I will not go into an extended discussion about justifying rights because it seems to me that there is sufficient agreement on at least a minimal conception of rights to allow me to put off such a discussion for another time.

² Section 15.(1) of the Canadian Charter of Rights and Freedoms reads;

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

³ The standard test for undue burdens is whether a person has chosen the circumstances that have led to his or her being burdened. Culture is in some cases viewed as an unchosen circumstance.

⁴ See Anne Phillips' *Which Equalities Matter?* Polity Press, Cambridge, 1999.

⁵ Subsection 15. (2) of the Charter reads;

(1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

⁶ See Amartya Sen's *Identity and Violence*, W. W. Norton & Company, New York, 2006.

⁷ CBC News, "Ontario Premier Rejects Shariah Law", 11 September 2005, retrieved 1 August 2007, <<http://www.cbc.ca/canada/story/2005/09/09/sharia-protests-20050909.html>>.

⁸ See the Canadian *Indian Act* (R.S., 1985, c. I-5).

⁹ See chapter 1 of Benhabib's *Claims of Culture*, Princeton University Press, Princeton, 2002.

¹⁰ For a critique of this approach see Patchen Markell's *Bound by Recognition*, Princeton University Press, Princeton, 2003.

¹¹ See Dworkin's *Is Democracy Possible Here?*, Princeton University Press, Princeton, 2006.

¹² For example, in cases where the religious beliefs of parents put their children at risk (such as with the refusal of life-saving blood transfusions) the courts of tended to favour the prevention of serious harm over religious freedom.

¹³ Canadian Supreme Court, *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [7].