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Between Exclusion and Assimilation: Experimentalizing Multiculturalism

Faisal Bhabha*

With increasing frequency, members of cultural minorities are demanding not only equality and non-discrimination as individuals, but also the legal recognition of their collective identities. Their claims to cultural protection and accommodation are necessarily philosophical, political, moral, and (both constitutionally and normatively) legal. This paper is a reflection on the last dimension, the legal axis. The author sets out to delineate the descriptive, interpretive, and normative scope of section 27 of the *Canadian Charter of Rights and Freedoms*. He is influenced by the approaches to constitutional innovation expounded by theories of democratic experimentalism.

The first part of the paper outlines the textual and normative framework of the *Charter's* multiculturalism provision. Section 27 creates two distinct types of interests that give rise to claims: one individual and one group-based, described respectively as "accommodation" and "autonomy".

The second part of the paper applies the normative framework to two case studies: female genital cutting and sharia tribunals. These examples provide a setting in which to explore the potential of section 27 to address the cultural demands in ways that go beyond conventional doctrinal and normative understandings. The author suggests that an experimentalist interpretation of multiculturalism under section 27 would create a space in which different approaches and institutional arrangements could be tried in order to determine the best practices for handling difficult, highly contextual questions. Instead of limiting possibilities by adopting restrictive approaches that extinguish cultural claims and risk radicalizing groups, the author argues that the normative force of section 27 includes an imperative to create the institutional conditions within which measures can be tried and tested, with the expectation that benchmarks will emerge through practice.

Les membres des minorités culturelles demandent, de plus en plus fréquemment, non seulement l'égalité et l'absence de discrimination en tant qu'individus, mais aussi la reconnaissance par le droit de leurs identités collectives. Leurs revendications de protection culturelle et d'accommodation sont philosophiques, politiques, morales et juridiques. Cet article est une réflexion sur l'aspect juridique de ces revendications. L'auteur cherche à délimiter l'étendue descriptive, interprétative et normative de l'article 27 de la *Charte canadienne des droits et libertés*. Il est influencé par les approches de l'innovation constitutionnelle mises de l'avant par les théories de l'expérimentalisme démocratique.

Dans la première partie de l'article, l'auteur traite du cadre textuel et normatif de la disposition de la *Charte* sur le multiculturalisme. L'article 27 crée deux types d'intérêts distincts qui donnent lieu à des revendications : un intérêt individuel et un intérêt collectif, désignés respectivement par les termes «accommodation» et «autonomie».

Dans la seconde partie, l'auteur applique le cadre normatif à deux études de cas : la coupe génitale féminine et les tribunaux de la charia. Ces exemples offrent un cadre d'analyse pour étudier la possibilité d'utiliser l'article 27 dans le but d'aborder les revendications culturelles en allant au-delà des approches doctrinales et normatives conventionnelles. L'auteur suggère qu'une interprétation expérimentaliste du multiculturalisme créerait un espace au sein duquel des approches et arrangements institutionnels divers pourraient être essayés afin de déterminer les meilleures pratiques. Au lieu de limiter les possibilités en adoptant des mesures restrictives qui mettent fin aux revendications culturelles et risquent de radicaliser certains groupes, l'auteur soutient que la force normative de l'article 27 inclut l'impératif de créer des conditions institutionnelles propices à l'essai et au test de pratiques, avec l'idée que des standards émergeront de la pratique.

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Multiculturalism is a relationship between Canada and the Canadian people. Our citizenship gives us equal rights and equal responsibilities. By taking an active part in our civic affairs, we affirm these rights and strengthen Canada's democracy, ensuring that a multicultural, integrated and inclusive citizenship will be every Canadian's inheritance.¹

The time has come for Canadians to be weaned off the teat of multiculturalism as a primary source of sustenance and self-identity.

Surely, in the 21st century, we are more than the sum total of our diverse parts and hyphenated definitions.²

Introduction

Has multiculturalism gone too far? This question has resounded in the streets and editorial pages of Western Europe and North America in recent years, especially in the tense period since 11 September 2001. It was a question on many people's minds in the summer of 2006, following the arrest of eighteen young men from the Toronto area on suspicion of plotting a terrorist attack on the Parliament buildings in Ottawa.³ It is a question that motivated Quebec to appoint a Royal Commission on Reasonable Accommodation in 2007.⁴ Multiculturalism has been blamed for creating discord everywhere from public roads⁵ to neighbourhood gyms,⁶ from polling stations⁷ to hospital

¹ Canada, Department of Canadian Heritage, *Canadian Multiculturalism: An Inclusive Citizenship* (Ottawa: Department of Canadian Heritage, 2007), online: Department of Canadian Heritage <http://www.pch.gc.ca/progs/multi/inclusive_e.cfm>.

² Rosie DiManno, "Sharia Solution a Fair One, and Not Racist" *The Toronto Star* (16 September 2005) A2.

³ See Timothy Appleby, "Terrorism Raids Sweep Toronto: At Least 8 Suspects, Reportedly Muslims, Are in Police Custody" *The Globe and Mail* (3 June 2006) A2.

⁴ The Royal Commission was formally known as the Consultation Commission on Accommodation Practices Related to Cultural Differences and was co-chaired by Professors Charles Taylor and Gérard Bouchard. See online: Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles <www.accommodements.qc.ca/index-en.html>.

⁵ See Kirk Makin, "Ontario Court Rejects Religious Exemption to Motorcycle Helmet Law" *The Globe and Mail* (6 March 2008), online: [globeandmail.com](http://www.theglobeandmail.com/servlet/story/RTGAM.20080306.whe/me+06/BNStory/National/home) <<http://www.theglobeandmail.com/servlet/story/RTGAM.20080306.whe/me+06/BNStory/National/home>> (regarding a Sikh man who unsuccessfully challenged mandatory helmet legislation in Ontario on the basis of religious freedom; Sikhs in Manitoba and British Columbia are already accommodated by way of an exemption).

⁶ See Ingrid Peritz, "Gym, Jews Don't See Eye to Eye: Y's Workout Warriors Protest Frosted Glass Installed at Behest of Synagogue Members" *The Globe and Mail* (8 November 2006) A1 (regarding a dispute between some members of a Montreal YMCA and a neighbouring Orthodox Jewish synagogue after the YMCA installed frosted windows in the exercise room to block synagogue members and children from viewing women exercising in the gym).

⁷ See CBC News, "Muslim Women Will Have to Lift Veils in Order to Vote in Quebec Election" (23 March 2007), online: CBC.ca <<http://www.cbc.ca/canada/quebecvotes2007/story/2007/03/23/qc-niqab20070323.html>> (regarding the controversy that erupted when Quebec's chief returning officer

cafeterias.⁸ Its most contentious and litigious impact has been in the arena of public education. Consider the Sikh teenager who litigated all the way to the Supreme Court for his right to attend school donning a kirpan, the ceremonial dagger worn by religious Sikh men;⁹ the Quebec schoolgirls who won their battle to attend school wearing the hijab, a head cover worn by many Muslim women;¹⁰ or the Jewish parents who argued unsuccessfully for their right to public funding for parochial schools,¹¹ but managed to get the Lord's Prayer out of public school classrooms.¹²

Controversies surrounding multiculturalism are neither unique to Canada nor new.¹³ However, their recent prominence, and a growing hyper-consciousness of culture in the public realm, reveals the profound underlying social cleavages of our modern, multi-ethnic society. Members of minority cultures are increasingly demanding not only equality and non-discrimination when integrating into the dominant culture but also that their collective identity be made a matter of public importance and accommodation. Claims can be complex and confusing; distinctions between groups and individuals are often muddled. For instance, during the now infamous sharia controversy in Ontario, the most acute debate raged between different factions of the same minority community. One segment was claiming, on behalf of all "devout" Muslims, a right to establish a tribunal to adjudicate personal law matters in accordance with Islamic legal principles.¹⁴ The opposition claimed to speak on behalf of the "silent majority" of moderate Muslims—and especially on behalf of vulnerable community members, such as women and children—who wished to enjoy the benefit of the same legal process as all other Canadians.¹⁵ These opposing views encapsulated the tension underlying multicultural accommodation between the desire of minority groups to preserve and to enhance their status through the

reversed an earlier decision to accommodate Muslim women who wear face veils; the decision would have allowed these women to vote without exposing their faces).

⁸ See "Quebec's Healthy Identity Debate", Editorial, *The Toronto Star* (19 August 2007) A18 (mentioning a decision by the Quebec Human Rights Commission to award a non-Jewish ambulance driver \$10,000 in damages for his ejection from a publicly funded Jewish hospital for eating non-kosher food in the kosher cafeteria).

⁹ *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, 264 D.L.R. (4th) 577 [*Multani*].

¹⁰ See Sheema Khan, "Why Does a Head Scarf Tie Us in Knots?" *The Globe and Mail* (26 September 2003) A27 (regarding the 1994 case of the 12-year-old Quebec schoolgirl who successfully complained to the Quebec Human Rights Commission for her right to wear a hijab to public school).

¹¹ *Adler v. Ontario*, [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385 [*Adler*].

¹² *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641, 52 D.L.R. (4th) 577 (C.A.).

¹³ Canada is unique in that it was the first country in the world to have legislated an official multiculturalism policy: *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Supp.), c. 24.

¹⁴ Syed Mumtaz Ali, President of the Canadian Society of Muslims, asked: "Do you want to govern yourself by the personal laws of your religion, or do you prefer governance by secular Canadian family law?" (Rabia Mills, "Interview: A Review of the Muslim Personal/Family Law Campaign" (Canadian Society of Muslims, August 1995) at 1, online: Library of Congress Internet Archives <<http://wasearch.loc.gov/sep11/20011126034606/http://muslim-canada.org/pfl.pdf>> [Mills, "Interview"]).

¹⁵ See Alia Hogben, "Should Ontario Allow Sharia Law? No: The Laws of the Land Must Protect All of Us, Irrespective of Gender or Religion", Editorial, *Toronto Star* (1 June 2004) A19.

establishment of exclusive spheres of authority, and the goal of many individual group members to gain admittance as equals in mainstream society. These two types of interests—the group’s desire to separate and the individual’s desire to integrate—are not as categorical or clearly distinguishable as they may seem. The fact that not all Muslims supported the sharia tribunal undermined the proponents’ claim that it represented the desires and needs of the community as a whole. The fact that some people, including “vulnerable” women, supported the tribunal undermined the opposition’s position that it was bad for Muslims and for Canada.

Members of minority groups struggle to navigate the territory between their interests as individuals within their communities—ethnic, cultural, or religious—and these communities’ collective goals, which transcend individual interests. Claims to cultural protection and accommodation are necessarily philosophical, political, moral, and (both constitutionally and normatively) legal. This paper is a reflection on this last dimension, the legal axis. Despite the rich body of interdisciplinary theoretical scholarship on multiculturalism, scholars and judges have devoted little work to developing an understanding of section 27 (as opposed to multiculturalism theory in general) within the framework of the *Canadian Charter of Rights and Freedoms*.¹⁶

In his study tracing the historical roots of Canadian multiculturalism policy, Joseph Eliot Magnet identifies “freedom from discrimination and group survival” as the two constitutional principles that formed the backdrop to the entrenchment of multiculturalism in section 27 of the *Charter*.¹⁷ These two principles informed the four initiatives that were embraced in Canada’s 1971 multiculturalism policy: (1) to “assist all Canadian cultural groups ... to develop a capacity to grow and contribute to Canada ...”; (2) to “assist members of all cultural groups to overcome cultural barriers to full participation in Canadian society”; (3) to “promote creative encounters and interchange among all Canadian cultural groups in the interest of national unity”; and (4) to “continue to assist immigrants to acquire at least one of Canada’s official languages ...”¹⁸ These four initiatives set the early benchmarks for a transformative multiculturalism—enshrined in section 27—that is prophylactic and preservationist, as well as proactive and experimentalist. This dual-track approach of protecting from discrimination while actively ensuring cultural preservation gives rise to the twin interests of “accommodation” (individual anti-discrimination) and “autonomy” (group survival).

In this paper, I delineate the descriptive, interpretive, and normative scope of section 27. I am influenced by the approaches to constitutional innovation expounded by theories of democratic experimentalism. The experimentalist project seeks to explore institutional alternatives within the liberal-democratic constitutional structure

¹⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

¹⁷ “Multiculturalism and Collective Rights” (2005) 27 Sup. Ct. L. Rev. 431 at 441.

¹⁸ *House of Commons Debates* (8 October 1971) at 8546 (Rt. Hon. P.E. Trudeau).

with a view to broader, equality-enhancing transformations.¹⁹ Contrary to classical liberal accounts, which view rights as inherent and non-negotiable, the experimentalist agenda reflects the reality of institutional, social, economic, and political constraints that, in practice, make constitutional rights contingent, inconsistent, and indeterminate. Embracing rather than denying such indeterminacy, the experimentalist project puts rights negotiation into the hands of stakeholders and local actors, working in conjunction with policy makers and public institutions, to define constitutional rights by trial and error. A court (or agency) monitors this process.

In practice, constitutional experimentalism operates when the court prescribes general parameters for the enjoyment of a constitutional right or interest but leaves it to the stakeholders to negotiate and to articulate the specifics. Experiments are carried out at the local level and best practices emerge in time, with coordination and enforcement from the judiciary. The role of the court as a bestower of general principles and as an overseer of locally driven experiments gives the process a more democratic—not to mention pragmatic—flavour than the usual form of judicial intervention in rights disputes.²⁰

In applying experimentalism to section 27, I have divided this paper into two parts. In the first part, I outline the textual frontiers of the *Charter's* multiculturalism provision and postulate that this provision creates two distinct types of interests that give rise to claims: one individual and one group-based. I describe these interests as “accommodation” and “autonomy”, respectively. The identification of these two interests gives rise to the normative framework that I employ throughout the paper. In the second part, I apply this framework to two case studies: genital cutting and sharia tribunals. These difficult examples enable an exploration of section 27's potential to address the demands of culture in ways that go beyond the conventional doctrinal and normative approaches. I suggest that an experimentalist interpretation of multiculturalism under section 27 would create a space in which to try different approaches and institutional arrangements in an effort to determine the best practices for handling difficult, highly contextual questions. I argue that the normative framework of section 27 does not mandate restrictive approaches to multicultural accommodation that extinguish cultural claims and risk radicalizing groups. Instead, section 27 includes an imperative to create the institutional conditions within which different approaches can be tried and tested, with the expectation that benchmarks will emerge through practice rather than through inflexible rule-making.

¹⁹ See Michael C. Dorf & Charles F. Sabel, “A Constitution of Democratic Experimentalism” (1998) 98 Colum. L. Rev. 267.

²⁰ See e.g. Jamison E. Colburn, “Democratic Experimentalism: A Separation of Powers for Our Time?” (2004) 37 Suffolk U.L. Rev. 287; Michael C. Dorf, “Legal Indeterminacy and Institutional Design” (2003) 78 N.Y.U.L. Rev. 875.

I. The Textual and Normative Framework of Section 27

A. Multiculturalism Defined

Multiculturalism has vastly different meanings across jurisdictions and societies. When multiculturalism was enshrined in the *Charter*, it had already been an official national policy for over a decade, articulated in Canada's 1971 multiculturalism policy, the first of its kind in the world.²¹ Section 27 provides: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."²² Read on its face, section 27 is an interpretive provision, providing context to our understanding of both the scope and the limits of the *Charter's* application. It stands alongside other interpretive sections, which focus on minority language rights, religious education rights, Aboriginal rights, and the separation of powers. These other interpretive provisions are framed solely in "defensive" terms to preserve the balance created by the historical compromise that led to Confederation.²³

Commentators have noted similar defensive features of section 27, which is drafted in the remedial spirit of preservation and survival. Together, section 27 and the section 15 equality guarantee combine the twin goals of protecting against discrimination and pursuing group amelioration.²⁴ The power to strike down discriminatory laws and the protection afforded to affirmative action under section 15 emphasize the provision's remedial nature.²⁵ Others have pointed to a category of *Charter* provisions that can be understood as the "bundle" of equality rights, including section 15 equality, section 27 multiculturalism, and section 28 gender protection.²⁶ This bundle could also include section 23 official minority language rights and section 25 Aboriginal rights. For the purposes of this paper, which aims to delineate the scope of section 27 and to consider how this provision might inform

²¹ See Magnet, *supra* note 17 at 440 (discussing the history of Canada's multiculturalism policy).

²² *Charter*, *supra* note 16.

²³ Magnet, *supra* note 17 at 435.

²⁴ The *Charter*, *supra* note 16, provides as follows:

15. (1) 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.

(2) Subsection (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.

²⁵ See Magnet, *supra* note 17 at 435.

²⁶ Walter S. Tarnopolsky, "The Equality Rights (Ss. 15, 27 and 28)" in Walter S. Tarnopolsky & Gérald-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 395.

current debates about multiculturalism, I will not offer a substantial treatment of these related equality provisions.

The emergence of theories and, to a lesser extent, legal doctrines of multiculturalism, gives rise to unexplored equality implications. Culture can span numerous conventional grounds, including (among others) ethnicity, religion, race, national origin, and language. Read more broadly, culture could also encompass political opinion, socio-economic status, or sexual orientation. Yet, the notion of *culture as such* is not a ground of protection recognized under the *Charter's* equality guarantee. With developing intersectional approaches to section 15,²⁷ it is likely that cultural claims could emerge through equality doctrine. At present, however—and notwithstanding the collective interests embodied in section 15(2)—the equality guarantee remains an *individualized* protection within a classical liberal rights paradigm. Section 27 has the potential to go beyond such conceptions and to allow for greater experimentation with institutional frameworks.²⁸

The wording of section 27 refers to the “multicultural heritage of Canadians.” This phrase does not necessarily frame multicultural rights as justice between groups or as protections for minorities against the majority. Rather, it suggests that cultural diversity and pluralism are part of the shared, common heritage of all Canadians.²⁹ In philosophical terms, the wording of section 27 is based on the notion that diversity is a human good in itself.³⁰ It is worth emphasizing that the *Charter* not only *defends* culture through preservation, but also *promotes* it through the “enhancement” mandate.

²⁷ See e.g. Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 C.J.W.L. 37; *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481, 212 D.L.R. (4th) 633 (C.A.).

²⁸ However, before the equality implications of cultural claims can be adequately explored within the context of section 27, it is necessary to understand the legal implications of including section 27 in the *Charter*. For this reason, I will leave it to others to develop and to analyze further the sites of potential tension between section 27 and the other equality-oriented provisions of the *Charter*, such as sections 23, 25, and 28.

²⁹ The notion of a shared multicultural heritage is also found in the more fulsome elaboration of government policy contained in the *Canadian Multiculturalism Act* (*supra* note 13), according to which the policy of the Canadian government is to “recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to *preserve, enhance and share their cultural heritage*” and to “recognize and promote the understanding that *multiculturalism is a fundamental characteristic of the Canadian heritage* and identity and that it provides an invaluable resource in the shaping of Canada’s future” (paras. 3(1)(a)-(b) [emphasis added]).

³⁰ See Susan Wolf, “Comment” in Charles Taylor, *Multiculturalism and “The Politics of Recognition”*, ed. by Amy Gutman (Princeton: Princeton University Press, 1992) 75 (stating not only that all people have the same interest in the protection of *each* culture but that *particular* cultures have value). See also Denise G. Réaume, “Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation” (1995) 29 U.B.C.L. Rev. 117 at 119.

From this textual analysis of section 27, it can be deduced that multiculturalism as conceived by the *Charter* takes integration and inclusion, rather than separation and self-government, as its defining features. In this sense, Canadian multiculturalism is pluralistic rather than particularistic. The language of section 27 implies that the cultural uniqueness of each person and group forms a constituent part of the collective multicultural heritage of Canadians rather than pockets of disconnected communities.

B. Accommodation and Autonomy: Individual and Group Interests

Multiculturalism creates two types of interests, individual and collective, which must be understood as distinct but interrelated. These interests give rise to potential rights claims. The two forms of rights that can be said to be protected by the *Charter* are the right to cultural “accommodation” for individuals and the right to “autonomy” for cultural groups. These two types of right are not expressly stipulated within the *Charter*, but can be derived from reading its text in light of historical circumstances and existing constitutional jurisprudence. Justices Cory and Iacobucci (in dissent, though not on this point) did so in *R. v. Zundel*, finding that multiculturalism

... recognizes that all ethnic groups are entitled to recognition and to equal protection. It supports the protection of the collective rights, the cultural integrity and the dignity of Canada’s ethnic groups. In doing so it enhances the dignity and sense of self worth of every individual member of those groups and thereby enhances society as a whole.³¹

Here we find the three dimensions of multiculturalism laid out and linked together: the recognition and protection of ethnic *groups*, the advancement of *individual* dignity, and the enhancement of *society as a whole*. The failure of courts to elucidate a clear doctrine of multiculturalism under section 27³² is no reason to distance ourselves from the starting point offered by Justices Cory and Iacobucci.

In the sections that follow, I shall offer a series of observations about the weight that multiculturalism may carry as a normative *Charter* value. In so doing, I rely on the twin policy objectives of protection from discrimination³³ and the right to cultural

³¹ [1992] 2 S.C.R. 731 at 817, 95 D.L.R. (4th) 202.

³² Commentators have noted that section 27 has rarely if ever been deployed as a free-standing, rights-bearing provision. Its most common use has been in interpreting other rights, particularly under the limitation analysis in s. 1. See generally Gerald L. Gall, “Multiculturalism and the *Canadian Charter of Rights and Freedoms*: The Jurisprudence to Date Under Section 27” in Lilian Ma *et al.*, eds., *Taking Stock: The Jurisprudence on the Charter and Minority Rights* (Ottawa: The Canadian Ethnocultural Council, 1991) 73; Gerald Gall, “Jurisprudence Under Section 27 of the *Charter*: The Second Decade” (2002) 21 Windsor Y.B. Access Just. 307; Vern W. DaRe, “Beyond General Pronouncements: A Judicial Approach to Section 27 of the *Charter* [forthcoming?]” (1995) 33 Alta. L. Rev. 551; Magnet, *supra* note 17 at 453-79).

³³ This objective is found in the *Canadian Multiculturalism Act*’s promise to “promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and

and community survival,³⁴ which are identified in the 1971 multiculturalism policy and further developed and enshrined in the *Canadian Multiculturalism Act*, and together serve as the interpretive backdrop to section 27.³⁵ It is from these objectives that I have derived the two distinct forms of rights claims under section 27: the individual cultural right to accommodation and the group right to autonomy.

I use the immanent constitutional principle of equality as my frame of reference for developing these two forms of rights into an institutional model for recognition and protection. Distinguishing this model from conventional approaches, I argue that the most appropriate forum for, and means of, giving life to these multicultural interests is the public arena. It is through public discourse, regulation, and adjudication where necessary, that our institutions of multiculturalism can best promote the integration of cultures. Policies that foster isolation should be avoided. This approach is consistent not only with the equality mandate to promote inclusion,³⁶ but also with the conception of cultural pluralism as a public good that is part of the shared (and therefore necessarily) public heritage contemplated by section 27.

In this vein, I further suggest that the right to cultural autonomy does not necessarily imply a right to self-government for ethnocultural minorities under section 27. The principle of “autonomy without self-government” helps ensure that members of cultural minorities are fully integrated into the public fold as equals, rather than institutionally segregated in the name of cultural accommodation. This principle also ensures that the status of “minorities within minorities” remains a central public issue and that the treatment of internal minorities is not left without entrenched means of internal protection to the exclusive discretion of cultural groups.

To this end, I develop a balancing theory that uses the unwritten constitutional principle of the protection of minorities³⁷ as a mechanism for ensuring that internal minorities can secure their independent constitutional rights within the cultural group to which they belong. The development of a theory of internal protections rejects the conventional liberal view that internal minorities are adequately protected by the so-called “right of exit”.³⁸ The right of exit is a defensive principle used to assuage

shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation”, and to “ensure that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity” (*supra* note 13 at paras. 3(1)(c), 3(1)(e)).

³⁴ As expressed in the pledge to “recognize the existence of communities whose members share a common origin and their historic contribution to Canadian society, and enhance their development”, and to “foster the recognition and appreciation of the diverse cultures of Canadian society and promote the reflection and the evolving expressions of those cultures” (*ibid.* at paras. 3(1)(d), 3(1)(h)).

³⁵ The current multiculturalism policy is laid out in ten paragraphs under s. 3(1) of the *Canadian Multiculturalism Act*, *ibid.*

³⁶ See e.g. *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67, 142 D.L.R. (4th) 385.

³⁷ See *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 79ff, 161 D.L.R. (4th) 385.

³⁸ The right of exit is embraced by many liberal theorists, including Will Kymlicka and Seyla Benhabib. For a strident defence of the right of exit, see Chandran Kukathas, “Are There Any Cultural

concerns about the devolution of authority to cultural subgroups: the group will be empowered on the condition that individual members retain the right to leave the group freely at any time. My critique, further developed below,³⁹ is that the right of exit fails to promote the inclusive, public form of multiculturalism envisaged by the *Charter*. Any protective mechanism that fits this form must promote justice and equality in all three relevant dimensions of the multicultural matrix: between groups, between the state and groups, and within groups.

C. Enforcing Equality Through Multicultural Accommodation

Liberal approaches to multiculturalism include competing conceptions of equality and of the place of equality within the rubric of multiculturalism policy. Conventional liberal formalism adheres to a principle of non-involvement—what I will call the “laissez-faire” approach to culture.⁴⁰ This view holds that culture as a “right” need only be “protected” through the removal of obstacles to individual self-fulfillment and expression. There is no protection or facilitation of “group rights” beyond ensuring basic freedom of association. In no way can there be positive obligations on government to promote cultural expression or survival. The state’s only obligation is to be neutral and to keep out of people’s private affairs.

Substantive equality principles hold that a laissez-faire approach is usually insufficient to ensure non-discrimination and equality between individuals and groups. Treating people equally is not synonymous with treating people identically; differential or special treatment is sometimes required.⁴¹ In such circumstances, favouring members of disadvantaged groups is not the same as enforcing status quo power imbalances by favouring the majority or dominant groups. Liberal multiculturalists distance themselves from the formal equality, laissez-faire approach.⁴² They recognize that it is not sufficient to create neutral, free space for individuals to do what they want without state interference, nor is it beneficial to grant formal recognition through self-government.

Rights?” (1992) 20 Pol. Theory 105 at 116, 128 [Kukathas, “Cultural Rights”]. See also Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003).

³⁹ See *infra* note 67.

⁴⁰ See Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001) (outlining the liberal critique of multiculturalism as being overly communitarian and undemocratic).

⁴¹ See Bruce Ryder, Cidalia Faria & Emily Lawrence, “What’s Law Good For? An Empirical Overview of *Charter* Equality Rights Decisions” (2004) 24 Sup. Ct. L. Rev. 103 at 108.

⁴² See e.g. Martha Minow, “The Constitution and the Subgroup Question” (1995) 71 Ind. L.J. 1 at 8 (“Simply calling for neutrality by the state does not tell us what the starting point is ... The state must *not* be neutral, in the sense of doing nothing to accommodate those with religious beliefs, where the state’s own starting point excludes or burdens them” [emphasis in original]).

The accommodation approach looks for a middle way between laissez-faire neutrality and self-rule.⁴³ It is premised on the principle of equality and implies public intervention when necessary to safeguard rights of inclusion and equal access for internal minorities. For instance, where people are prevented from accessing public services, education, health care, or employment by virtue of personal, immutable characteristics, the doctrine of the duty to accommodate has been developed to ensure that barriers are removed, subject to reasonable limits, and that such claims are not only a matter of public policy but are also justiciable in the courts.⁴⁴ Similarly, if individuals of particular cultures are obstructed from enjoying the reasonable practice of their culture, the principle of accommodation up to the point of “undue hardship” (a standard that includes considerations of public, group, and competing individual interests) is reflected in the equality guarantee of section 15⁴⁵ and can inspire the development of principles of multicultural accommodation under section 27.⁴⁶

In calling for the “enhancement” of multiculturalism through the application of the *Charter*, section 27 includes “a seeming reference to positive action.”⁴⁷ The requirement of positive action would be limited by the undue hardship standard to the extent that the request for accommodation might affect other people’s *Charter* rights. It would also allow for a consideration of competing demands for government resources allocated to cultural accommodation and multiculturalism policies.

⁴³ The legal duty to accommodate can be said to be rooted in John Rawls’s concept of distributive justice: *A Theory of Justice*, revised ed. (Cambridge, Mass.: Harvard University Press, 1999) at 3-10, 76-77 (defining distributive justice as the theory that all social values, including opportunity and wealth, are generally to be distributed equally). As a legal doctrine, the duty to accommodate was imported by the Supreme Court of Canada from the United States, where the theory of “disparate impact”, or “adverse effects discrimination”, demanded an effective remedy. See Michael Lynk, “A Hardy Transplant: The Duty to Accommodate and Disability Rights in Canadian Labour Law” (1998) 49 Lab. L.J. 962 at 963.

⁴⁴ See *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union*, [1999] 3 S.C.R. 3 at para. 54, 176 D.L.R. (4th) 1 [BCGSEU].

⁴⁵ In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 169, 56 D.L.R. (4th) 1, the Supreme Court of Canada observed that “the accommodation of differences ... is the essence of true equality.”

⁴⁶ The most significant recognition of cultural accommodation under the *Charter* thus far has been in the context of s. 2(a) freedom of religion claims. For instance, in the context of education, the Supreme Court of Canada held that a Sikh student could not be barred from wearing a kirpan to school: *Multani*, *supra* note 9. In the workplace, the Court held that accommodation requirements can trump collective agreement provisions where hours of work conflict with religious obligations: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, 95 D.L.R. (4th) 577. The Court exempted religious Jews from contractual obligations that obstructed religious practice: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, 241 D.L.R. (4th) 1 [Amselem].

⁴⁷ *Magnet*, *supra* note 17 at 435. *Magnet* appears to equivocate, at once stating that section 27 “seems to contain independent substance” (at 436), but also that “it is not free-standing, but must be applied as an interpretational tenet” (at 452).

D. Group Rights and the Equality Paradox

Classical liberal accounts acknowledge the individual liberty of people to express their culture as individuals or as groups of individuals. This form of simple cultural liberty includes aspects of free speech, association, and religion. Some contemporary approaches go further by recognizing that groups have status *as groups* to make claims for collective cultural expression. Such claims are what I call autonomy-based assertions of multiculturalism, which go beyond simple liberty or non-interference, and necessitate facilitation and financial support from the state.⁴⁸

While empowering groups of free-willed individuals to express themselves collectively through publicly supported cultural initiatives may find some liberal justification, feminist critics argue that any benefit is outweighed by the attendant problem of in-group subordination.⁴⁹ This “paradox of multicultural vulnerability”⁵⁰ is created when the result of “empowering” cultural groups through multiculturalism policies is to entrench oppressive elements of cultural traditions, placing internal minorities—especially women—in a worse position than they would be in without such official group recognition. A disproportionate burden is placed on vulnerable group members in order to ensure the protection of the group at large.⁵¹ Such a result is contrary to principles of equality and offends the basic values of liberal democracy.

The approach pioneered by Will Kymlicka seeks to avoid and to resolve the tension between core liberal values and the accommodation of cultural practices. Responding to feminist concerns, Kymlicka pre-empts charges that multiculturalism could institutionalize gender inequalities. He develops a paradigm of “restrictions” and “protections” designed to better articulate and resolve potential rights conflicts. He argues that a liberal society can support “external protections” designed to ensure

⁴⁸ Kymlicka argues that cultural membership is the most common basis for self-identification and thus defends state promotion of access to a “societal culture”, which he defines as “a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres” (Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 76 [emphasis omitted]).

⁴⁹ Susan Moller Okin writes: “I think we—especially those of us who consider ourselves politically progressive and opposed to all forms of oppression—have been too quick to assume that feminism and multiculturalism are both good things which are easily reconciled” (*Is Multiculturalism Bad for Women?*, ed. by Joshua Cohen, Matthew Howard & Martha C. Nussbaum (Princeton: Princeton University Press, 1999) at 10).

⁵⁰ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001) at 3 [Shachar, *Multicultural Jurisdictions*].

⁵¹ Radical feminists are skeptical of liberal feminist claims to protect vulnerable women through the application of universal norms. They worry that feminist liberation in practice translates into a form of cultural imperialism (see generally Sherene Razack, “Geopolitics, Culture Clash, and Gender after September 11” (2005) 32:4 Soc. Just. 11; Sherene H. Razack, “Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages” (2004) 12 Fem. Legal Stud. 129).

fairness and equality between cultural groups and to protect minority communities from encroachments on their cultural autonomy by society at large.⁵² For example, measures such as legal exemptions from dress codes, public funding for heritage language programs, and special group representation in political institutions, are some ways in which minority groups can be afforded special protections to help equalize their status in the broader society. While empowering minority groups vis-à-vis the majority, Kymlicka maintains that the state must be sure not to endorse “internal restrictions” enforced by dominant group members or by the group as a whole on other members of the group in the name of cultural preservation.⁵³ While public reports often highlight extreme examples of oppressive practices, Kymlicka notes that very few mainstream immigrant organizations in Western democracies actually seek such power.⁵⁴

Conceived in this manner, liberal multiculturalism endorses collective autonomy subject to the principle that groups cannot suppress the individual freedoms of group members. When the rights of the group conflict with the rights of an individual within the group, liberalism demands that the rights of the individual prevail. This response to the issue of in-group subordination illustrates a problem with liberal theories of multiculturalism. Because these theories rationalize their embrace of group rights with the language of individualism, they encounter an impasse when the individual appears to be at risk from the group. For the liberal multiculturalist, the interest of the group can seldom, if ever, trump that of the individual.

E. Autonomy Without Self-Government

One way of avoiding or minimizing the problem of in-group subordination is to devise inclusive public institutions that enhance group autonomy without giving groups the power to restrict the freedoms of internal dissenters. I call this approach the principle of “autonomy without self-government”. The problem with viewing culture through the “internal restrictions and external protections” paradigm is that it risks presenting a false choice between isolation (self-government) and assimilation (non-accommodation). This false choice is neither self-evident nor necessary to sustain a model of cultural equality when responding to the claims of ethnocultural minorities. The conception of multiculturalism under the *Charter* is not premised on structured separation as a means of protection. On the contrary, the shared “multicultural heritage of Canadians” requires a public and inclusive approach.⁵⁵ The goal of a public model of cultural equality is to foster the integration, not the segregation, of the group.⁵⁶ For this reason, the autonomy interest included under

⁵² Kymlicka, *supra* note 48 at 36.

⁵³ *Ibid.* at 37.

⁵⁴ *Ibid.* at 41.

⁵⁵ See Adler, *supra* note 11.

⁵⁶ At this juncture, it is useful to recall that we are limited to discussing ethnic minority communities that are typically scattered throughout the country, though they may have some areas of geographical

section 27 should not be read as a right to self-government. Rather, autonomy can be ensured through other institutional guarantees that promote a greater voice for members of cultural communities as individuals and as groups of individuals in concert.

There are numerous problems with self-government. Not only does it fail to promote the goals of multiculturalism adequately, but it can also operate to obstruct the multiculturalism project itself. To begin with, self-government presumes that established cultural groups have the institutional capacity and the necessary degree of legitimacy within their membership to self-govern. While this may be true for some ethnocultural groups or subgroups, it is not the case for many others. Many if not most cultural distinctions are malleable, and cultural groups are increasingly porous. It is difficult, if not impossible, to identify clearly contained groups with established, universally recognized boundaries and leadership, except in the case of some religious communities that have an established clergy and leadership hierarchy with legitimacy to speak for the group. Such communities, however, are in the minority. In the poly-ethnic world, it is the members who form and constitute the group. Membership is more a matter of self-ascription than of admittance. As a result, the potential for cultural group proliferation is massive, which is both desirable in a liberal democracy that sees diversity as a good in itself and a challenge in terms of defining what constitutes an ethnocultural group. It is necessary to develop limiting principles to ensure that cultural protections are not devalued by spurious, indecent, or insincere claims of cultural formation and membership. Such limiting principles could be established by devising a test inspired by the approach to equality, whereby claimants must establish membership in an enumerated or analogous group.⁵⁷

In any case, the goal is to develop a legal interpretation of multiculturalism that does not atomize society or entrench a flawed conception of discrete and insular cultural groups. Self-government promotes this flawed conception of self-contained cultural groups that are necessarily defined and formalized according to institutionalized criteria and are not free to evolve and to develop through generations

concentration. This line of reasoning does not apply to historical national minorities or Aboriginal communities.

⁵⁷ It is beyond the bounds of this paper to offer a developed theory of how such a test could be framed doctrinally. Presumably, courts applying s. 27 would elaborate criteria for determining the scope of the provision's protection. By way of general observations, as I have suggested, an appropriate and historically contextualized reading of the text implies that s. 27 is designed to protect cultural and ethnic minorities that do not enjoy other constitutional protection (that is, those that are not Aboriginals, or English or French linguistic minorities). For greater elaboration of this topic, see Faisal Bhabha, "Navigating the Spheres of Multiculturalism, Bilingualism and Federalism: Theoretical, Doctrinal and Constitutional Perspectives on the 'Reasonable Accommodation' Debate" (2008) 43 Sup. Ct. L. Rev. (2d) 499 [Bhabha, "Navigating the Spheres"].

of shifting identities. As such, self-government has the potential to cater to and to strengthen the most retrograde segments of the subgroup.⁵⁸

Equality principles do not require self-government as a vehicle to promote the multicultural heritage of Canadians. Moreover, any attempt to devolve authority and jurisdiction could undermine the very cultural rights that are to be protected. To the extent that self-government promotes essentialism and, as a result, the fossilization of culture and cultural affiliations, it runs contrary to the substantive equality and multicultural values of the *Charter*. Therefore, while self-government is one form of autonomy, it is not a necessary corollary to autonomy. Disaggregating autonomy from self-government provides the basis for ensuring the protection of group-based cultural claims without feeding the essentialist conceptions that can inadvertently support the forces of conservatism and thereby give rise to the dilemmas facing multiculturalists: “This focus on autonomy at the group level provides ... the ingredient needed to justify protections for particular cultures without relying on the existing character of the community in any static sense that might buy into fundamentalist argument.”⁵⁹

The central features of cultural autonomy are that the group is entitled to determine its cultural direction for itself, to make choices about the practices that constitute its culture, and to enjoy the conditions that allow for creative debate—including dissent—about the community’s future.⁶⁰ Autonomy also requires that communities be able to rely on institutional safeguards as a protection against the threat of assimilation. These safeguards come in the form of established practices and structures in the social and political framework of the society, and can include measures such as collaborative participation in education policy, exemptions from certain general obligations, official recognition of distinctive practices and rites, and public support for minority cultural institutions.⁶¹

Of course, while avoiding self-government and accounting for the non-essentialist nature of cultural groups may help minimize the vulnerability of internal minorities, these measures do not entirely resolve that concern. What is needed is a theory that can justify a minimum-standards approach to regulating intra-group matters.

⁵⁸ See Gila Stopler, “Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women” (2003) 12 *Colum. J. Gender & L.* 154 at 202-205. Stopler argues strongly against the devolution of self-governing power to minority groups on the basis that it harms the minority community itself, especially women within the community. She writes that “[b]y granting communities internal control over matters, such as family law, that are essential for the leaders of the community to demarcate the boundaries of the community and maintain power over it, the leaders of the state can control the various communities at what is perceived to be a very low cost for the state, albeit it at a high cost for women” (*ibid.* at 207).

⁵⁹ Réaume, *supra* note 30 at 135.

⁶⁰ *Ibid.*

⁶¹ See Leslie Green, “Internal Minorities and Their Rights” in Judith Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994) 101 at 105.

F. Internal Protections for Vulnerable Members of Minority Groups

The distinction between internal restrictions and external protections is only relevant or necessary when multiculturalism is coupled with self-government.⁶² Concerns about the precarious status of minorities within minorities are not raised in the same way when representatives of minority communities are not granted state-endorsed decision-making power over other group members. However, notwithstanding the avoidance of formal, jurisdictional problems involving the protection of internal minorities, the problem of vulnerable members of cultural groups remains. This problem is not created by multiculturalism policies; it is rather a consequence of long-standing, entrenched social hierarchies. The concern arises within multiculturalism debates when the liberal state considers delegating authority to minority elites to self-govern, only to find itself potentially complicit in the oppression of vulnerable internal minorities.

While the avoidance of self-government helps avert most problems affecting internal minorities, there may still be situations in which the accommodation of groups or individuals creates competing interests.⁶³ In order to address such cases, it is necessary to devise a balancing mechanism that will accompany policies of accommodation in order to catch any potential claims of internal minorities adversely affected by the recognition of group autonomy. Rather than only distinguishing between external protections and internal restrictions, it is helpful to think about “internal protections.”⁶⁴ The right of exit, commonly cited as the liberal response to the need for internal protections,⁶⁵ is insufficient.⁶⁶ As a shared heritage and a public

⁶² Kymlicka recognizes that collective cultural rights can be protected not only through self-government, but also through other mechanisms, such as financial support, legal protection, and special representation, including guaranteed seats in public institutions. He argues that self-government is appropriate for national minorities and Aboriginal communities but not for ethnic minorities. The distinction between “national minorities” (such as Aboriginals and French Canadians) and “ethnic minorities” (that is, immigrants and their descendants) is a critical part of Kymlicka’s theory. While the rights of national minorities are fixed and enshrined in the constitution, claims for formal recognition by ethnic minorities demand different solutions: Kymlicka, *supra* note 48 at 11-15. See also Bhabha, “Navigating the Spheres”, *supra* note 57.

⁶³ Such problems are discussed in greater detail in Part II, below, where I examine the particularly controversial cultural claims surrounding genital cutting and religious family law.

⁶⁴ This term is a reconstruction of Kymlicka’s phraseology. Kymlicka expressly distances himself, and liberal theory generally, from the possibility of public regulation of internal relations within the group.

⁶⁵ See *supra* note 38.

⁶⁶ My challenge to the “right of exit” is not in any way addressed to the legitimate and necessary right of individuals to leave groups voluntarily to which they belong by birth or by choice but with which they no longer wish to be associated. There can be no justification for compelled adult membership in a minority group under any liberal multicultural model. My critique rather goes to the insufficiency of an “either/or” choice between retaining group membership and protecting rights. The constitutional norm of multiculturalism surely demands a more contextualized and meaningful response to the problem of in-group subordination.

good, diversity needs to be fostered within both the minority and dominant cultures. Providing a choice between conformity to group norms and exit from the group is not a satisfactory response to the dilemma of internal dissent and in-group accommodation.⁶⁷ Moreover, the idea of “exit” itself is in tension with the fluid, porous nature of culture. In much of today’s world, people move between various communities and navigate multiple and complex identities on a daily basis. How one understands and projects one’s own culture stems from the individual experience of these overlapping identities and communities. It is difficult to imagine how one can “exit” one’s own culture.

Notwithstanding the pervasive liberal discomfort with state regulation of the internal affairs of groups of citizens, where the state has indirectly empowered a group to impinge on the rights and freedoms of its members, equality principles, coupled with a normative imperative to promote diversity, require that multiculturalism extend its reach to protect all minorities from direct and indirect state-sanctioned subjugation.⁶⁸

G. Dignity as a Limiting Principle for Group Rights

To achieve the goal of protecting minorities both internally and externally, it is helpful to begin with the value of human dignity as embraced by the conception of equality in the *Charter*. Dignity is a core constitutional value that necessitates not only redressing past wrongs, but also ensuring recognition and protection in the future.⁶⁹ Conventional *Charter* application requires government action in the form of a limitation on a protected right in order to trigger judicial review.⁷⁰ In the case of the

⁶⁷ Green notes that

the mere existence of an exit does not suffice to make it a reasonable option. It is risky, wrenching, and disorienting to have to tear oneself from one’s religion or culture; the fact that it is possible to do so does not prove that those who do not manage to achieve the task have stayed voluntarily, at least not in any sense strong enough to undercut any rights they might otherwise have (*supra* note 61 at 111).

⁶⁸ In the Canadian context, such a positive-equality rationale could be defended on the basis of s. 15(2) of the *Charter* (*supra* note 16), which shields affirmative action programs from constitutional scrutiny.

⁶⁹ See Lorraine E. Weinrib, “Human Dignity as a Rights-Protecting Principle” (2005) 17 N.J.C.L. 325 (describing human dignity as a defining feature of the postwar model of human rights protection, shared by Canada and many other liberal democracies whose constitutional structures tend toward communitarianism, multiculturalism, welfarism, and legal pluralism).

⁷⁰ There has been some recognition in the Supreme Court of Canada’s jurisprudence of limited positive obligations on the government mandated by the enforcement of a *Charter* right. See e.g. *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 [*Eldridge*] (provision of interpretive services for hearing-impaired hospital patients); *Vriend v. Alberta* [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 (inclusion of sexual orientation as a protected ground under provincial human-rights legislation); *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 (extension of parental benefits to a natural father); and *Gosselin v. Quebec (A.G.)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221

“interpretive” provisions, however, the potential scope of application may be wider. For instance, courts can apply section 27 as a dignity-preserving lens in their interpretation of all other *Charter* rights and possibly even in cases where the *Charter* is not directly raised. It may also be possible for courts to read the multicultural constitutional values enshrined in section 27 into human rights legislation that prohibits discrimination and mandates accommodation.⁷¹ This approach could help ensure some degree of horizontal protection against encroachment by fellow citizens where the state has indirectly sanctioned measures that undermine the dignity of internal minorities.

A twin feature of equality is that minorities must be not only accommodated but also protected. Protection can be defensive in nature or can require positive action.⁷² Much attention has been devoted within liberal discourse to the question of whether survival is an appropriate goal of multiculturalism policy. While liberal purists tend to reject such “collective” goals and to see no role for government in facilitating group survival,⁷³ modified liberal approaches have acknowledged the fact that, since 1971, Canada’s multiculturalism policy has included the survival of culture as a central aim.⁷⁴ Some Canadian courts have endorsed the modified liberal stance that, in certain cases, the state is responsible for ensuring a culture’s survival. For example, in *Lalonde v. Ontario*, the Ontario Court of Appeal applied the unwritten constitutional principle of the protection of minorities in a positive manner to proscribe government action that would have dismantled an important institution of the French-language minority in Ontario. In so doing, the court ruled with the mandate of ensuring that community’s “survival”.⁷⁵

The survival mandate can be extended not only to ensure diversity and cultural pluralism in society at large but also to protect diversity *within groups*. If the protection of minorities within minorities were incorporated directly into the understanding of multiculturalism itself, potential internal tensions could be resolved within the multicultural model and would not have to be seen as a conflict between culture and gender, or between multiculturalism and equality. Equality and the protection of minorities—both internal and external to the cultural unit—are important principles in this multiculturalism model. By applying section 27 as an

D.L.R. (4th) 257, Arbour J., dissenting (contemplation of positive obligations under the s. 7 right to “life, liberty and security of the person”).

⁷¹ The Supreme Court of Canada’s conception of s. 15 equality has been used to shape the interpretation of statutory anti-discrimination provisions that apply horizontally between individuals but not vertically between the state and citizen (see e.g. *BCGSEU*, *supra* note 44).

⁷² See *Eldridge*, *supra* note 70 at para. 73.

⁷³ See Barry, *supra* note 40 at 146.

⁷⁴ See generally Kymlicka, *supra* note 48 at 84-93 (arguing that the preservation of cultural groups is an important public objective because people are deeply connected to their own culture, and because cultural membership contributes to individual autonomy).

⁷⁵ *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2002), 56 O.R. (3d) 505 at para. 187, 208 D.L.R. (4th) 577 (C.A.).

enhancement provision, along with the unwritten constitutional protection of minorities as a limiting or defensive provision, the courts could develop the necessary legal framework for adjudicating and overcoming the problems facing internal minorities wherever such problems might arise.

The combination of a regime of autonomy without self-government, and a legal framework for adjudicating the grievances of internal minorities, should provide the institutional protections necessary to allay concerns about “strong” multiculturalism policies eroding the constitutional guarantee of equality or the liberal foundations of our political order. By institutionalizing the processes by which such tensions are resolved in the public realm, it is likely that multiculturalism (defined as the accommodation of minority cultural interests) and equality (in the sense of promoting inclusion and anti-discrimination) can be reconciled and thereby mutually enforced.

II. Multiculturalism Applied

I have offered a view of multiculturalism that is descriptive as well as normative, and that establishes a mandate for both accommodation and autonomy. I have outlined a number of conclusions about the meaning of accommodation and autonomy, which may illuminate the guiding principles underlying section 27. I have suggested that accommodation is an *individualized* cultural right while autonomy is a *collective* right. With respect to the latter, my central normative observation has been that multiculturalism should not be interpreted to create a mandate for self-government. I have, however, embraced the exploration of creative possibilities as advocated by democratic experimentalists, who propose the development of institutional mechanisms designed to enable a continual process of exploration through tinkering with various means of achieving constitutional goals.⁷⁶ I will now examine the application of section 27 to two case studies in order to illustrate better the propositions that I have made up to this point.

The first example, genital cutting,⁷⁷ is one of accommodation because it would involve a claim by an individual, either on her own or, more likely, by a parent on her behalf, for an exception to a widely enforced norm militating against the practice with

⁷⁶ See Dorf & Sabel, *supra* note 19 at 451-64.

⁷⁷ I have opted to use neutral phraseology, notwithstanding the prevalence of other descriptive terms such as “female circumcision” or “mutilation”, or of technical terms such as “clitoridectomy”, “excision”, or “infibulation”. In 1990, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children in Africa adopted the term “female genital mutilation”, which is commonly used by international organizations and non-governmental activists working to eradicate the practice. See Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the United Nations Seminar on Traditional Practices Affecting the Health of Women and Children*, UN ESCOR, 1991, UN Doc. E/CN.4/Sub.2/1991/48 at para. 136(5). See also L. Amede Obiora, “Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision” (1997) 47 Case W. Res. L. Rev. 275 at 289-90 (discussing the phraseology debates).

regard to women in Canadian society. Looking at this example, I hope to demonstrate how a potential claim could be brought under section 27, what its basis would be, how it might implicate other *Charter* rights, and whether section 27 would do any work that is not already done by other rights-conferring sections of the *Charter*. I will then offer a theory of how the case could be adjudicated, drawing from the textual, theoretical, and doctrinal framework that I outlined in the first part of this paper.

The second example, sharia tribunals, is one of autonomy because it would involve a claim by a community, or a segment of a community, for institutional-legal recognition of a collective initiative that would be applicable and enforceable only against members of the community at issue. In this instance, I wish to demonstrate ways in which the group claim could be supported without imperilling the rights of internal minorities. This analysis involves looking at creative mechanisms of group autonomy. I pick up on my earlier comments distinguishing autonomy from self-government and illustrate how the normative weight of Canadian multiculturalism does not necessitate self-government. I suggest that the greater challenge is rather to use deliberation and experimentalism as strategies for identifying public institutional arrangements that are capable of promoting cultural autonomy within the shared multicultural space of the broader society.

A. Accommodation: Genital Cutting

Admittedly, I have selected a case study that is charged and controversial. For the purposes of paradigmatic testing, the value of studying not only easy cases but also hard ones is that the latter make it easier to distinguish the principles from the policies at stake.⁷⁸ The methodology that I use to assess how an individual rights claim pertaining to female genital cutting would be adjudicated under section 27 is largely normative and speculative, given that no such claim has ever been brought. I suggest a test for determining whether a particular government measure imposes a burden on the exercise of an individual's culture in a way that undermines the shared "multicultural heritage of Canadians." Fidelity to the text and spirit of section 27 requires that this test involve both subjective and objective elements. *Charter* claims typically involve both elements, though the Supreme Court of Canada was divided on this issue in *Amselem*.⁷⁹ For the majority, freedom of religion is triggered where a claimant sincerely believes in a practice or belief that has a nexus to religion, even if it is a heterodox variation or is practised only by a minority of religious group members. Concerned about the indeterminacy of potential claims, the minority would have required some objective corroboration of the practice to attract *Charter* protection.

Because multiculturalism is not framed in section 27 as an individual "freedom", but rather as a descriptor of Canada's heritage, it may be appropriate to adopt the

⁷⁸ See generally Ronald Dworkin, "Hard Cases" (1975) 88 Harv. L. Rev. 1057.

⁷⁹ *Supra* note 46.

minority's approach in *Amselem* and consider both subjective and objective elements in the analysis. Thus, while not as robust as freedom of religion in terms of an individual rights-based analysis, section 27 could nonetheless give rise to a fair and fulsome judicial contemplation of an array of individual and societal cultural interests. In the event that the government-imposed restriction is found to be in breach of section 27, the adjudication process must balance governmental objectives against the individual interest that inheres in the exercise of one's culture.

1. Female Genital Cutting as a Cultural Practice

Female genital cutting refers to a range of practices concentrated mainly in Africa but also found in some Asian countries.⁸⁰ The common feature of the practices is that they involve the cutting, to varying degrees, of young females' genitalia. Female genital cutting almost always occurs prior to adulthood, though not in early infancy.⁸¹ It is practised by members of a wide range of cultural, religious, and ethnic groups, across geographical and political boundaries.⁸² The practice repulsed early European colonizers but did not receive widespread international condemnation until it was picked up as a *cause célèbre* among liberal feminists and human rights advocates beginning in the 1980s. Since at least the early 1990s, there has been a growing international consensus, both among official institutions and within the human rights movement, that "female genital mutilation" (FGM), as it has widely come to be known, is a form of discrimination and violence against women and girls.⁸³

⁸⁰ Female genital cutting is practised to varying degrees among the populations in more than 20 African countries, as well as in Oman, Yemen, the United Arab Emirates, Indonesia, and Malaysia. More than 80 per cent of women in Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Sierra Leone, Somalia, and Sudan are believed to be circumcised. The World Health Organization estimates that between 100 and 140 million women have undergone some form of genital cutting, including more than 3 million girls per year, most under the age of 15: "Female Genital Mutilation (FGM)", online: World Health Organization <<http://www.who.int/reproductive-health/fgm/index.html>>.

⁸¹ The four forms of genital cutting usually mentioned are: (1) clitoridectomy (also known as "sunna"), whereby the clitoral prepuce is cut and all or part of the clitoris is removed; (2) excision, whereby the clitoris and all or parts of the inner labia are removed; (3) infibulation (also known as "pharaonic mutilation"), whereby the clitoris and most of the labia are removed and what remains is stitched so as to leave a small opening for urine; and (4) pricking the clitoris and/or labia, sometimes accompanied by stretching of the clitoris and/or labia (see Angela Wasunna, "Towards Redirecting the Female Circumcision Debate: Legal, Ethical and Cultural Considerations" (2000) 5 McGill J. Med. 104 at 106).

⁸² According to Wasunna, "[i]t is believed that clitoridectomy was an original African institution adopted by Islam at the conquest of Egypt in 742 A.D. Though it is worth noting that female circumcision is not practised in most Islamic countries and, in fact, it is not in accordance with the Koran" (*ibid.* at 106 [references omitted]).

⁸³ See *Declaration on the Elimination of Violence Against Women*, GA Res. 48/104, UN GAOR, 48th Sess., Supp. No. 49, UN Doc. A/Res./48/104 (1993) 217 at 217 (defining "violence against women" as including "female genital mutilation and other traditional practices harmful to women"). On the choice of phraseology, see *supra* note 77.

With waves of immigration to Europe and North America from the countries where female genital cutting is performed, cutting is no longer seen as an issue solely to be addressed abroad but as one of increasing social importance in the heart of Western democracies. Unsurprisingly, evidence has emerged that genital cutting is being practised within immigrant communities in Europe and North America, and that it is either being “medicalized” and performed in local health facilities, or that members of immigrant communities take their young daughters abroad to have genital surgeries performed.⁸⁴ This evidence provoked a strong governmental will to curb the practice. Multiculturalism and liberal values were in apparent conflict, and the overwhelming response was that there is a baseline of Western values that cannot be compromised in the name of cultural accommodation.

2. Criminalization: Rationalizing Assimilation?

The approach adopted by most Western democracies was to criminalize non-medical genital surgeries on girls. In 1997, the Canadian government tabled Bill C-27 to amend the *Criminal Code* so as to include express reference to female genital cutting as a form of aggravated assault.⁸⁵ The legislation was intended to curb the “medicalization” of the practice by putting physicians at risk of criminal prosecution for performing genital surgeries on children. It also targeted parents considering taking their daughters abroad to have surgeries performed.⁸⁶

⁸⁴ See Ontario Human Rights Commission, *Policy on Female Genital Mutilation (FGM)* (Toronto: OHRC, 2000) at 11, online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/resources/Policies/PolicyFGM2/pdf>> [OHRC, *Policy on FGM*]; Omayma Gutbi, *Preliminary Report on Female Genital Mutilation (FGM)* (Ontario Violence Against Women Prevention Section of the Ontario Women’s Directorate, 10 April 1995) [unpublished].

⁸⁵ The *Criminal Code*, R.S.C. 1985, c. C-46, as am. by S.C. 1997, c. 16, s. 5 provides:

268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant. ...

(3) For greater certainty, in this section, “wounds” or “maims” includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where

(a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or

(b) the person is at least eighteen years of age and there is no resulting bodily harm.

(4) For the purposes of this section and section 265, no consent to the excision, infibulation or mutilation, in whole or in part, of the labia majora, labia minora or clitoris of a person is valid, except in the cases described in paragraphs (3)(a) and (b).

⁸⁶ Pursuant to the *Criminal Code*, any person who takes steps for the purpose of removing a girl to have genital surgery performed on her in another country is subject to criminal prosecution and imprisonment for up to five years (*ibid.*, s. 273.3).

Opposition to genital cutting is grounded in evidence—which some say is controversial—about the adverse physical and psychological consequences of the procedure.⁸⁷ In addition to the health risks, the practice has been blamed by liberal feminists and human rights defenders for entrenching and advancing patriarchy.⁸⁸ This argument holds that cutting female genitalia amounts to stripping girls and women of their sexual identity and relegates them to a life of male-dominated, pleasureless baby-making.

Because all of the discussion around genital cutting has centred on the adverse health and equality concerns, there is little in the literature about the countervailing cultural importance of the practice. Attempts to acknowledge the cultural centrality of genital cutting in some communities are dismissed as misguided forms of “[c]ultural [r]elativism”.⁸⁹ However, contrary to the line taken by feminist critics, who focus on the worst instances of female victimhood and frame genital cutting solely as male domination and violence, the reality is that the cultural context in which cutting occurs is nuanced and complex.⁹⁰ In fact, studies demonstrate that the practice is overwhelmingly urged by mothers, performed by female practitioners, and reinforced by women as a condition of entry into the community of women.⁹¹ Liberal feminists dismiss such reports as evidence of the extent of male co-option and domination not

⁸⁷ The adverse health effects of female genital surgeries, especially the more invasive forms of cutting, are well reported. Consequences can include hemorrhaging, infection, and urinary retention, which can be fatal if untreated. Longer-term complications include blocking of the vaginal opening by scar tissue, as well as chronic infections, obstetric complications, and increased sexual transmission of HIV (Wasunna, *supra* note 81 at 107). Carla Makhoul Obermeyer, a medical anthropologist and epidemiologist at Harvard, published a review of the existing medical literature on the alleged adverse reproductive and sexual-health consequences of female genital cutting in Africa, in which she concludes that many of the claims of the anti-FGM movement are exaggerated and potentially untrue: “Female Genital Surgeries: The Known, the Unknown, and the Unknowable” (1999) 13 *Med. Anthropology Q.* 79. For a synthesis of Obermeyer’s article, see Richard A. Shweder, “‘What About Female Genital Mutilation?’ and Why Understanding Culture Matters in the First Place” in Richard A. Shweder, Martha Minow & Hazel Rose Markus, eds., *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (New York: Russell Sage Foundation, 2002) 216 at 227-29 (arguing that the data most commonly cited about the adverse health effects of female genital alterations are “fatally flawed”).

⁸⁸ See e.g. OHRC, *Policy on FGM*, *supra* note 84 at 5-6 (“Since the sole function of the clitoris is sexual stimulation, the main purpose of the practice is to control female sexuality, ensure chastity until marriage and to render young women more desirable for marriage purposes”).

⁸⁹ Patricia A. Broussard, “Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture—Shaming, Blaming, and Utilizing the Convention Against Torture” (2008) 15 *Duke J. Gender L. & Pol’y* 19 at 35. Broussard writes: “No matter how many terms one conjures to lessen the impact of the horror visited upon women in the name of culture, mutilation is mutilation; it cannot be diminished by semantics. In addition, I *am* my sisters’ keeper; their pain is my pain. I have an obligation to use my words to speak truth to power in their name” (*ibid.* at 19).

⁹⁰ See Shweder, *supra* note 87 at 226-35.

⁹¹ See Wasunna, *supra* note 81 at 107.

only of women's bodies but also of their minds.⁹² The views of women who defend and practise genital cutting are thus sidestepped in the interest of universal liberal values.

The criminalization of genital cutting gives rise to interesting questions from a multiculturalism perspective. Does criminalization represent Canada standing in solidarity with women in the developing world who are trying to effect change from within their societies, or is it evidence of an assimilationist policy that directly targets members of minority cultures? Does it promote gender equality by undermining cultural equality? Do liberal values have to bend to cultural demands? Should conflicts surrounding the practice be resolved with particularistic accommodation or with universalistic proscription? Does the criminalization of female genital cutting, but not of male genital cutting (circumcision), impermissibly disadvantage one cultural practice relative to an analogous one, and does this disadvantage constitute gender discrimination?

The liberal-feminist approach posits that female genital cutting is an especially barbaric practice that victimizes women and must be systematically eradicated. This view gives no weight whatsoever to cultural considerations, the broader social and cultural context, or even the desires of women themselves.⁹³ It considers a parent's desire to circumcise his or her daughter only as grounds for triggering criminal prosecution and child-protection intervention by the state. Liberal opponents of the practice contend that women ought to be treated as legally incapable of giving informed consent to genital cutting under any circumstances,⁹⁴ and that in the interest of protecting the best interests of children, parents cannot be entitled to "consent" on behalf of their child.⁹⁵

On the other side, proponents of a culturally sensitive or critical feminist approach argue that female genital cutting is an integral part of many cultures and that, while it may be incomprehensible or even offensive to people of other cultures,

⁹² As Okin states, "Unless women—and, more specifically, young women (since older women often are co-opted into reinforcing gender inequality)—are fully represented in negotiations about group rights, their interests may be harmed rather than promoted by the granting of such rights" (*supra* note 49 at 24).

⁹³ For Okin, there is little reason to believe that minority rights can be part of the solution for women when dealing with an especially patriarchal minority culture. In such cases, "no argument can be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in [the culture's] preservation. Indeed, they *might* be much better off if the culture into which they were born were either to become extinct ... or, preferably, to be encouraged to alter itself so as to reinforce the equality of women ... " (*ibid.* at 22-23 [emphasis in original]).

⁹⁴ The *Criminal Code* does not go this far, as it allows a woman over the age of 18 to consent to non-medical genital surgeries (*supra* note 85, s. 268(3)(b)).

⁹⁵ Yael Tamir wonders whether even "consent" could make the tradition defensible: "Women 'consent' to such practices because the alternative is even more painful—a life of solitude, humiliation, and deprivation" ("Hands Off Clitoridectomy: What Our Revulsion Reveals About Ourselves" *Boston Review* XX1:3 (Summer 1996) 21 at 21).

cutting must be understood within its cultural context. They may point to the essentializing, stereotyping, and neo-colonialist assumptions underlying Western feminist opposition to female genital cutting,⁹⁶ which often overemphasize female sexual pleasure as a “good” and even as a fundamental “right”, when in truth it is a patriarchal, male-oriented standard.⁹⁷ They may also point to the prevalence of aesthetic surgeries such as liposuction, breast enhancement, and facial reconstructions in the West, which may be equally incomprehensible and even offensive to people of other cultures.⁹⁸ The question comes down to how we distinguish between improving the body and mutilating it, and this question necessarily has a cultural dimension.

A further question—the central question that I wish to address—is whether some cultural practices are so fundamentally offensive that it is not enough to criticize them because criminal prosecution of those who practise them is warranted. Does section 27 mandate a distinctive treatment of this question? Does it result in unique constitutional hurdles that Canada, as compared to other liberal democracies that do not have constitutionally entrenched multiculturalism, must overcome in legislating against cultural practices?

3. Applying the Section 27 Lens to the Problem

Section 27 does indeed provide a lens through which to examine the question of female genital cutting. It is clear that, in the push toward criminalization, concerns about multiculturalism were deliberately set aside: female genital cutting was seen as being beyond what a liberal state can accommodate.

⁹⁶ As Homi K. Bhabha states:

Okin is in danger of producing the monolithic discourse of the cultural stereotype. Cultural stereotypes may well have the ring of truth and accurately register aspects of a cultural tradition. However, they are reductive insofar as they claim, for a cultural “type,” an invariant or universal representability. Stereotypes disavow the complex, often contradictory contexts and codes—social or discursive—within which the signs and symbols of a culture develop their meanings and values as part of an ongoing, transformative process (“Liberalism’s Sacred Cow” in Okin, *supra* note 49, 79 at 81).

⁹⁷ As Yael Tamir has written,

Referring to clitoridectomy, and emphasizing the distance of the practice from our own conventions, allows us to condemn *them* for what they do to *their* women, support the struggle of *their* women against *their* primitive, inhuman culture, and remain silent on the status of women in our society ...

One cannot help thinking that the gut reaction of many men against clitoridectomy reflects the fact that in our society the sexual enjoyment of women is seen as a measure of the sexual power and achievements of men. Men in our society are more intimidated by women who do not enjoy orgasms than by those who do. In societies in which clitoridectomies are performed, men are more intimidated by women who do enjoy their body and their sexuality. In both cases, a masculine yardstick measures the value of female sexuality (*supra* note 95 at 22 [emphasis in original]).

⁹⁸ Richard Shweder calls this reaction the “mutual ‘yuck’ response” (*supra* note 87 at 222).

It is easy to sympathize with the liberal-feminist absolutist stance. Most Canadians understandably recoil at the thought of a prepubescent girl being subjected to the surgical alteration or removal of her genitals. Such a practice may indeed seem barbaric and pointlessly brutal, even if performed in a safe hospital setting. In the case of children (who form the majority of those undergoing genital surgeries), the irreversible nature of the procedure seems to justify the limit on parental prerogatives.⁹⁹ But what about the case of adult women?¹⁰⁰ At what point does government intervention to protect the vulnerable become discriminatory infringement of a woman's autonomy over her own body? The *Criminal Code* creates an exception to the absolute ban in the case of a woman who has reached the age of eighteen and who gives informed consent to undergo the procedure. This exception pre-empts potential challenges by adult women who wish to undergo the procedure voluntarily. However, it runs into a problem of gender discrimination since boys are not legislatively protected against being circumcised as children by their parents. Viewed differently, girls are effectively barred from the freedom to experience a childhood rite of passage, while boys are not. Is this apparent legislative inconsistency a case of discrimination? Does section 27 suggest an approach different from a simple discrimination analysis?

Looking at genital cutting within the constitutional framework of shared heritage, there are two possible ways that the conundrum can be assessed. First, we can think about shared heritage as privileging male circumcisions. There may be historical, moral, cultural, or other reasons for this privilege. Whatever the reasons, there appears to be a consensus, whether arrived at through conscious reflection or by mere historical circumstance, that male circumcision, but not female genital cutting, is a practice to be embraced by the community as a part of the shared heritage of Canadians.¹⁰¹ The question, then, is whether there is a way to admit a “new” practice

⁹⁹ See Martha Minow, “About Women, About Culture: About Them, About Us” in Shweder, Minow & Markus, *supra* note 87, 252 at 262 [Minow, “About Women”] (discussing the issue of government attempts to “protect” immigrant children against the cultural practices of their parents).

¹⁰⁰ Shweder recounts the story of Fuambai Ahmadu, an anthropology student originally from Sierra Leone who grew up in the United States and who, at the age of 22, returned to her country of birth to undergo a genital alteration. She then delivered a paper to the American Anthropological Association Meetings in Chicago in November 1999 in which she described her experience, in opposition to contemporary human rights discourse, as an empowering rite (*supra* note 87 at 217-18).

¹⁰¹ It is interesting to note that male circumcision has not always been tolerated in Western society. In eighteenth-century Enlightenment Europe, “ritual mutilation” was associated with the practices of the despised Jewish minority, even among liberal thinkers like Voltaire (Sander L. Gilman, “‘Barbaric’ Rituals” in Okin, *supra* note 49, 53 at 53). There has in recent years emerged a small but vocal movement in Canada and abroad calling for the eradication of male circumcision (dubbed “Male Genital Mutilation”, or MGM) on the basis of fundamental human rights (Arif Bhimji, “Infant Male Circumcision: A Violation of the Canadian Charter of Rights and Freedoms”, online: (2000) L. & Governance <<http://www.longwoods.com/product.php?productid=16398&page=1>>). See also Avshalom Zoosmann-Diskin [Executive Director of the Israeli Association Against Genital Mutilation], “Male Genital Mutilation in Any Society Is Surely Abhorrent Too” (2000) 321 Brit. Med. J. 571.

into the protective sphere of shared heritage. Are there conditions of admission? If there are conditions, then is the process of admission not just another way of imposing a false neutrality—assimilation disguised as universalism?

A second manner in which we can approach the conundrum is to ask whether there is a place for exceptionalism within the concept of shared heritage. Could there be room for deviations from the generally accepted norms where individuals can make persuasive cases for accommodation? Is exceptionalism a way to experiment with practices as a process of incremental admission to shared heritage? How would such accommodation be adjudicated?

4. Toward a Methodology of Multicultural Accommodation

I would suggest an approach that begins with a presumption in favour of accommodation after the claimant meets a low preliminary standard. For instance, once a claimant is able to demonstrate a bona fide cultural practice for which she or he is seeking accommodation, the burden would shift to the denying authority to justify the denial. The claim of cultural protection pursuant to section 27 would then be weighed against any countervailing claim of protection for vulnerable internal minorities, such as women or children. The countervailing interests could themselves be grounded in other equality-enhancing provisions of the *Charter*, including sections 15 (equality) and 28 (gender equality). A section 27 claim could also be weighed against direct societal considerations, such as public or personal health and safety. In certain matters concerning children—including religion, education, and other, related areas of private, family interest—there would be strong public-policy reasons to defer to parental preferences.¹⁰²

A multicultural approach with internal protections, as described earlier, would balance the harms of the cultural practice with the value ascribed to this practice by the culture at issue. This balancing attention to the practice's cultural context is critical: ascribing value is almost never neutral, but the multicultural imperative requires that the best possible efforts are made to understand practices from the perspective of the person and group at issue. Balancing does not mean pitting the

¹⁰² Minow highlights the question of “children’s rights” as one of the most challenging issues in liberal democracies. State intervention in family life—historically shielded from the reach of the law—helps protect children from abusive parents; parental prerogatives defend against unwieldy state power. Parental control, however, remains the norm and state intervention the exception. Minow argues that it is sensible that

democratic legal systems expect parents and immediate communities to be the frontline providers for children ... This acknowledges that nurture is a face-to-face task and that parents are the ones most likely—though not universally—able and motivated to do what is best for their children. This also establishes a framework of pluralism and avoids state standardization of children; and it privatizes most decisions about children (Minow, “About Women,” *supra* note 99 at 262-63).

person against the group; rather, I suggest that a complete picture of all relevant factors must be assembled in order to weigh the harm and value of the practice. This test in its entirety is necessarily a hybrid subjective-objective test.

As to female genital cutting, it may be that the end result of this balancing is the conclusion that total criminalization goes too far. Criminalization could open the door to *Charter* challenges grounded in freedom of religion, or in equality on the basis of sex (given that circumcisions are available to underage males but not to underage females), or of race or national or ethnic origin (given the ban's disparate impact on people of particular backgrounds). Section 27 may be invoked in support of an argument that an absolute ban that fails to account for cultural factors denies recognition of Canada's shared multicultural heritage by privileging some cultural practices over others. An absolute ban may also be deemed too blunt an instrument to guard against the identified harms of female genital cutting, including harm to children. The age of consent, set at eighteen, could be challenged to the extent that it imposes a burden on girls but not on boys, and on parents of girls but not on parents of boys. Even if an age of consent is affirmed, the selected age could raise criticisms about cultural appropriateness. In many cultures, for instance, the age at which girls are considered to enter womanhood is associated with puberty. This paradigm loosely corresponds to Canadian law, under which girls may consent to sex as early as age twelve¹⁰³ and to marriage at age sixteen.¹⁰⁴ Thus, age eighteen may itself be challenged as inappropriate, either in respect of the girl/woman's ability to make choices about her body, or with respect to her parents' "right" to make decisions about their child's religious or cultural upbringing. From the other side, some may argue that even a "consenting" adult woman may be prevented from exercising real choice by virtue of "false consciousness".¹⁰⁵ Inevitably, the lens through which we view such issues will be shaped by our own experiences, prejudices, and values. Endeavouring to escape from an ideological framework that prevents us from seeing the "other" as a moral equal might widen the scope for creative institutional thinking.

¹⁰³ In February 2008, the federal government amended the *Criminal Code* to raise the basic age of consent from fourteen to sixteen. However, exceptions exist where sexual partners are relatively close in age. For twelve- and thirteen-year-olds, consent is a defence where there is less than a two-year age difference, and for fourteen- and fifteen-year-olds, consent can be given where there is less than a five-year age difference: *supra* note 86, ss. 150-53, as am. by S.C. 2008, c. 6, s. 13.

¹⁰⁴ See e.g. *Marriage Act*, R.S.O. 1990, c. M.3, s. 5. The age of consent for marriage is determined by provincial legislatures. In Ontario, a marriage licence may only be issued to a sixteen-year-old with the written consent of both parents.

¹⁰⁵ Minow, "About Women", *supra* note 99 at 256:

Dueling accusations of false consciousness can escalate with no end. Indeed, here is a risk of infinite regression. You say that women in my culture have false consciousness, but you say this because of your own false consciousness—or I think this because of my own false consciousness, and so forth. These kinds of exchanges essentially are incorrigible. No facts of the matter can prove or disprove false consciousness without a prior agreement about what one ought to want.

5. Experimentalist Accommodation: Incremental Affirmation, Deferral, and Deliberation

There are both normative and instrumental reasons to consider experimenting with forms of accommodation for controversial practices like genital cutting. Room for experimentalism is created in the spectrum of options between the extremes of criminalization of any form of female genital cutting on one hand, and state-sanctioned infibulation¹⁰⁶ on the other. My purpose here is not to advocate in favour of the protection or eradication of the practice in any form. My intention is rather to explore the challenges presented by the fact that female genital cutting is a meaningful and significant practice for many individuals and families who are, in increasing numbers, citizens of Western democracies. Recognition of the value of the practice to potential claimants is critical to affirming the life experiences, needs, and aspirations of all people on equal terms. This recognition is mandated by the principle of substantive equality and by the avoidance of reductive, ethnocentric judgments, both of which are implied within the multiculturalism project.

The inquiry must adopt a subjective lens to examine the minority culture on its own terms; but at the same time, this approach can be complicated by internal movements for change, which must not be subverted. For instance, in regions of the world where female genital cutting persists, many women from within practicing communities have themselves been working for its eradication. In numerous instances, they have succeeded in persuading their governments to ban female genital surgeries while simultaneously working within communities to change cultural practices.¹⁰⁷ It could be argued that, while African countries are increasingly moving towards criminalizing female genital surgeries in an attempt to eradicate the practice in response to both local advocacy and international pressure, it is counterproductive and even obstructionist for a Western liberal democracy to adopt a permissive policy of experimenting with accommodation in the name of preserving immigrant cultures.

From an instrumental or tactical standpoint, if the goal is to reduce, to modify, or to eradicate a cultural practice like female genital cutting, evidence suggests that criminalization fails to achieve these objectives.¹⁰⁸ In fact, in some cases, attempts to use the law to eradicate a cultural practice can backfire and give buoyancy to a fading tradition by imbuing it with fresh and radical meaning as a manifestation of resistance and cultural survival. Ayelet Shachar gives the label “reactive culturalism” to this

¹⁰⁶ Infibulation is the most extreme form of female genital cutting (Wasunna, *supra* note 81 at 106).

¹⁰⁷ See *ibid.* at 108 (stating that while most anti-circumcision laws in Africa were passed by colonial powers and were rarely if ever enforced after independence, some states, such as Egypt, Sudan, the Ivory Coast, and Burkina Faso, have enacted specific legislation as part of a strategy to curb the practice).

¹⁰⁸ See *ibid.* at 108-109 (pointing to the African experience, the author argues that “it is unlikely that a purely legal solution to the problem of female circumcision, such as a prohibition on its practice, will bring this practice to a halt” and contends that education is a far more effective instrument of social change than is criminalization).

phenomenon, whereby a community that feels besieged by assimilationist policies clings to the practices it views as endangered—often its most regressive traditions—in an attempt to save its culture from the perceived threat of extinction.¹⁰⁹

But again we fall into the trap of constructing an unnecessary dichotomy between the two radical extremes of eradication and entrenchment.¹¹⁰ Within the shared-heritage tradition, accommodation could be seen not as the antithesis to eradication or the conduit to entrenchment. Rather, through the “soft” or “incremental affirmation” of an orthodox practice, accommodation could further the instrumental end of encouraging heterodox variations of that same practice. Such incremental affirmation may be able to provide opportunities for members of cultural minorities to experiment with orthodoxy within the shared space created by constitutional multiculturalism.¹¹¹

Deliberative projects, which operate to maximize public discourse and to enhance input by members of marginalized communities, can lead to public, dialogical exchanges in which minority communities are able to engage with others in a constructive, culture-defining process.¹¹² Out of this process can emerge a new consensus and fresh normative conceptions. For example, Joseph H. Carens and Melissa S. Williams, two theorists who endorse the deliberative-project approach, find that room for compromise about female genital cutting must be narrow. Nevertheless, they allow for some experimenting by providing that “the most prevalent forms of the practice to which the critics object should indeed be

¹⁰⁹ Shachar, *Multicultural Jurisdictions*, *supra* note 50 at 11. A good example of “reactive culturalism” is the cultural retrenchment among Muslims in France following the government’s banning of the hijab in public schools pursuant to its enforcement of *laïcité*, a policy roughly equivalent to the American anti-establishment principle but applied in a more anticlerical form. For an overview of the French hijab affair, see John R. Bowen, *Why the French Don’t Like Headscarves: Islam, the State, and Public Space* (Princeton: Princeton University Press, 2007).

¹¹⁰ Experience has shown that this dichotomy, usually constructed by liberal universalists and feminists, rarely achieves the objectives of its crafters. Fear that accommodation results in the entrenchment of retrograde practices leads universalists to call for absolute bans as the only method of eradication and progress. This approach fails to appreciate cultural context and can undermine internal movements for change. Forcing people—usually women—to choose between their rights (eradication) and their culture (entrenchment) leaves people with no meaningful choice at all and radicalizes the discourse.

¹¹¹ While some may dismiss the notion of incremental affirmation as unrealistically optimistic, it is worth recalling Kymlicka’s response to the problem of “illiberal cultures”. While arguing that “liberals cannot endorse cultural membership uncritically,” he goes on to state that the goal “should not be to dissolve non-liberal nations, but rather to seek to liberalize them. ... To assume that any culture is inherently illiberal, and incapable of reform, is ethnocentric and ahistorical” (*supra* note 48 at 94).

¹¹² Various deliberative projects are endorsed by theorists. See e.g. Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002); Shachar, *Multicultural Jurisdictions*, *supra* note 50; Joseph H. Carens & Melissa S. Williams, “Muslim Minorities in Liberal Democracies: The Politics of Misrecognition” in Rajeev Bhargava, ed., *Secularism and its Critics* (Oxford: Oxford University Press, 1998) 137. For further discussion of Shachar’s theory, as well as that of Anver Emon, see Part II.B.5, below.

prohibited, but that modified forms might be permissible ... ”¹¹³ Monique Deveaux pushes the deliberative experiment further and argues that if the process is sufficiently inclusive and meets a necessary standard of democratic legitimacy, even illiberal outcomes should be tolerated.¹¹⁴

Experimenting with accommodation can lead not only to incremental affirmation within the shared heritage model but also to a creative process of internally reshaping cultural practices.¹¹⁵ Without empirical data to support this theory, I offer only the unsubstantiated speculation that, in contrast to the effect of reactive culturalism, which tends to fossilize and to entrench the most conservative practices in a culture, experimentalist accommodation would tend to cultivate more progressive and liberal versions of cultural practices. This process of experimentation would in turn help the modified practice to secure legitimacy within the minority culture itself, and to gain admittance to the dominant, “shared” culture.

In light of global trends and the reality of widely divergent cutting practices across cultures, and even within cultures, it could be suggested that experimentation with this practice is already underway. It is therefore unfortunate that attempts to experiment with models of accommodating female genital cutting in the West have been met with ideological opposition. In one instance, a group of Somali immigrants living in Seattle sought to have their daughters symbolically circumcised by a state hospital.¹¹⁶ The hospital initially agreed to work with the families to accommodate their needs but later abandoned the initiative under tremendous public pressure. The procedure sought was not a traditional circumcision; rather, it was a compromise proposal that would have involved a slight incision on the hood of the clitoris, but with no tissue removal or scarring, and would have therefore posed little to no risk to the girls in question.¹¹⁷ Such attempts to explore creative compromises are especially relevant to the difficult issue of navigating between parental prerogatives and children’s interests. While it may be easier to reach general consensus on the freedom

¹¹³ *Ibid.* at 144.

¹¹⁴ “A Deliberative Approach to Conflicts of Culture” in Avigail Eisenberg & Jeff Spinner-Halev, eds., *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005) 340. Deveaux undertakes a fascinating study of the case of traditional practices under the South African Constitution. She finds that the compromises that emerged from the deliberative process in the form of the *Customary Marriages Act* were fair and legitimate, despite yielding illiberal outcomes like the legalization of polygyny and bride-wealth payment.

¹¹⁵ The more modified that genital surgeries become, the more the analogy to male circumcision takes hold. Wasunna has noted that the main qualitative difference between male and female circumcision—aside from the gendered differences in the genitalia themselves—is the amount of cutting. If the amount of cutting is reduced substantially in the female procedure, not only do the risks decrease, but the analogy in support of an anti-discrimination argument becomes more persuasive (*supra* note 82 at 107).

¹¹⁶ See Doriane Lambelet Coleman, “The Seattle Compromise: Multicultural Sensitivity and Americanization” (1998) 47 *Duke L.J.* 717 at 723.

¹¹⁷ See *ibid.* at 736-37.

of adult women to consent to surgical modifications to their bodies, the question of choice with respect to children is more troubling. If a “symbolic circumcision” is able to satisfy the cultural interests of the family while posing little or no medical risk to the child, it deserves to be explored seriously.

The fact that varying degrees of cutting currently exist across groups and regions suggests the potential for flexibility and modification. It may also be possible to support a move towards *deferring* the procedure. In the case of new immigrants without children or those with young children, deferral would provide an opportunity for the family to reorient itself in its new surroundings, with the possibility that its cultural priorities would change over time through the process of integration into the dominant culture. In the case of families for whom cutting remains an important practice, deferral could also lead to ways of reconciling parental rights with children’s choice. Deferring the procedure until early adolescence could include involving girls in the determination of which kind of procedure to undergo, even if parents would continue to exercise some influence on this decision. Experimenting with models of consultation and joint decision making involving the child, the family, and the state is just one possible way to reconcile the competing interests at stake.

In this context, a model that uses democratic institutions to engage the minority community in deliberation about the practice, both internally and with the broader community, can promote progressive voices from within communities in a collaborative endeavour with the dominant culture. Models that suppress and criminalize practices are likely to push them underground rather than to eradicate them. The democratic, collaborative system is not guaranteed to prevent abuses; but what can be hoped is that an accommodationist approach will enable important *internal* cultural debates, whereby dissenters are empowered to work for change within their communities and are supported by a society that recognizes both the importance of group cohesion and, significantly, the evolutionary nature of culture. Working from the assumption that culture is never static avoids the problem of essentializing cultures and overcomes the flawed dichotomy of “entrenchment versus eradication”. The imperative of a publicly conceived, shared multicultural heritage is to find a workable accommodation through minority deliberation in the public realm, in an effort to ensure the survival of cultures within the parameters of Canadian *Charter* values.

B. Autonomy: Sharia Family Law Tribunals

Section 27 can also give rise to claims by groups for special recognition. It is not controversial that the *Charter* protects collective as well as individual interests. Some rights can only be enjoyed communally and therefore have an inherently collective element. While the survival of ethnocultural groups is both an aspiration and a purpose of the *Charter*, it is unclear to what extent the courts will adjudicate claims

based on group autonomy where these claims do not raise specific instances of direct rights violations by the state. The issue of whether the *Charter* can oblige positive state action is prevalent in respect of all claims for positive rights,¹¹⁸ and present jurisprudence, at least, precludes a case that would compel the government to take proactive steps towards developing institutions in support of group-based autonomy claims. However, a *Charter* case resulting in obligatory, positive state action need not be considered beyond the realm of possibility in the future.

Moreover, beyond the question of justiciability, it is worth reflecting on the institutional obligations that might be created by the proclamation of multiculturalism within government policy and its entrenchment in the *Charter*. Specifically, I wish to assess an example of a claim made by a group for autonomous rights, and thereby to revisit the issue of whether self-government necessarily results from a claim for autonomy. This example—the launching of a sharia¹¹⁹ tribunal in Ontario—can be characterized as a regime of partial self-government. The sharia tribunal was indirectly authorized by the state and was intended by its crafters to operate as an autonomous, quasi-judicial body with binding authority over consenting parties. I will argue that the principal weakness of this regime as a form of multicultural autonomy—and a leading cause of its misunderstanding and ultimate defeat—can be traced to its features of minority self-government. In Kymlicka's terms, the model failed to delineate sufficiently the boundary between praiseworthy external protections (as an instance of group autonomy) and prohibited internal restrictions (as empowering the group to violate the rights of its members). The debate incorrectly focused on multiculturalism as the problem, rather than on the *model* of multicultural accommodation that was adopted. In the result, the progressive possibilities of multiculturalism were overshadowed by the spectre of multiculturalism gone awry.

In exploring this case study, I will attempt to apply the theoretical and textual understandings of multiculturalism under the *Charter* that I have developed up to this point, and I will treat such questions as: How should we respond to a cultural community seeking to operate a parallel legal system? Do principles of legal pluralism allow for or require the accommodation of a minority legal system within the existing liberal constitutional order? If pluralism is possible, how can conflicts between systems be avoided or resolved? How can we balance claims of autonomy

¹¹⁸ This obstacle is particularly notable in the realm of social and economic rights. A complete discussion of the issue, however, is beyond the scope of this paper.

¹¹⁹ There is no universally accepted definition of "sharia". It is generally understood to reflect a body of personal law inspired by scripture (the Quran) and by the recorded traditions or precedents of the Prophet Muhammad (the Hadith). The controversy arises in how these sources of law are developed and constituted into a coherent legal system (Anver Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation" (2006) U Toronto, Legal Studies Research Paper No. 947149 at 3-7, online: <<http://ssrn.com/abstract=947149>> [Emon, "Islamic Law"]). For a further discussion of Emon's argument, and for its extrapolation within the Singaporean context, see Anver M. Emon, "Conceiving Islamic Law in a Pluralist Society: History, Politics and Multicultural Jurisprudence" [2006] Sing. J.L.S. 331.

with the protection of vulnerable internal minorities? How can pluralism contribute to the shared multicultural heritage of Canadians, as envisaged under section 27 of the *Charter*?

1. Sharia Law in Canada?

In late 2003, a now well-known debate erupted when the Canadian Society of Muslims, led by a retired lawyer and long-time Muslim activist, Syed Mumtaz Ali, announced plans to launch an arbitration tribunal to adjudicate contractual and family law matters using sharia.¹²⁰ The tribunal, or *Darul Qada*, established under the name of the Islamic Institute of Civil Justice (IICJ), was set up for the stated purpose of meeting the religious needs of Muslims in Ontario by enabling Muslims to govern interpersonal matters according to the dictates of their faith. The tribunal's crafters positioned themselves as defenders of democracy and representatives of their community seeking the fulfillment of their collective right to self-government. The tribunal was established without direct government involvement or support. It offered services that its crafters claimed were in demand and essential to Canadian Muslims.

The authority for the establishment of a religious arbitration tribunal already existed under the *Arbitration Act (Act)*, which allows private arbitration for civil matters.¹²¹ The *Act* had been adopted in 1991, largely to lessen the load on the judicial system by allowing for alternative dispute resolution (ADR) in cases where both parties agree to be bound by a process of their own choosing. Through the 1990s, the system operated without much public attention, and consensual religious arbitration tribunals proliferated among Orthodox Jews¹²² and Ismaili Muslims,¹²³ among others. The relative quiet ended when the *Darul Qada* was launched, and a very public opposition quickly mobilized. The proposal to establish the *Darul Qada* gained notoriety across the country, and indeed the world, as its opponents and supporters

¹²⁰ See Marina Jimenez, "Islamic Law in Civil Disputes Raises Questions" *The Globe and Mail* (11 December 2003) A1. The *Family Law Act*, R.S.O. 1990, c. F.3 allows couples to enter into domestic contracts, which include marriage contracts, cohabitation agreements, and separation agreements. Domestic contracts specify the rights of the parties to the contract with respect to property, support, children, and "any other matter in the settlement of their affairs" (*ibid.*, ss. 52-54). Couples are then free to devise an arbitration agreement outlining the process they will use to resolve problems arising out of the domestic contract. Arbitration agreements must comply with the *Arbitration Act, 1991*, S.O. 1991, c. 17.

¹²¹ *Arbitration Act, ibid.*

¹²² Known as *Beis Din* (literally meaning "house of law"). See Ontario, Ministry of the Attorney General, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* by Marion Boyd (20 December 2004) at 55-56, online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd>> [*Boyd Report*]).

¹²³ Known as Ismaili Conciliation and Arbitration Boards (CABs) (*ibid.* at 57-59).

openly sparred in a tense public relations battle.¹²⁴ The debate was often polemical and reductive, and it did little to foster informed public discourse.¹²⁵ Opponents presented the issue as an institutional embrace of the archaic Islamic legal “code” in Canada, and argued that it would have the effect of undermining the *Charter* and putting Muslim women at risk of serious victimization.¹²⁶ On the other side, proponents gave misleading statements about the tribunal’s authority and about community members’ religious obligations while exaggerating the community’s need and demand for the system.¹²⁷

2. The Boyd Report

In June 2004, the government commissioned Marion Boyd, a former Attorney General and Minister Responsible for Women’s Issues, to investigate the use of family law arbitration in the province and to report back to the government with findings and non-binding recommendations.¹²⁸ Boyd’s mandate included extensive consultation with community members and interested groups. She was asked to investigate the prevalence of the use of arbitration in family and inheritance disputes, and the extent to which the courts had been used to enforce arbitral awards. She was specifically asked to examine the differential impact that arbitration could have on women or members of other vulnerable groups.¹²⁹ In her December 2004 report, Boyd summarized her findings and issued a number of recommendations. The *Boyd Report* affirmed the important role of voluntary ADR mechanisms like arbitration,

¹²⁴ See e.g. Margaret Wente, “The State Should Not Give Its Blessing to Muslim Courts” *The Globe and Mail* (23 December 2004) A23; Sheema Khan, “The Sharia Debate Deserves a Proper Hearing” *The Globe and Mail* (15 September 2005) at A21.

¹²⁵ See Haroon Siddiqui, “Sensationalism Shrouds the Debate on Sharia” *The Toronto Star* (12 June 2005) A17.

¹²⁶ Opponents went so far as to condemn the University of Toronto Faculty of Law for hiring two specialists in Islamic law in August 2005. Homa Arjomand, the coordinator of the International Campaign Against Shari’a Court in Canada (online: <www.nosharia.com>), described the hirings as “a green light to sharia” (Boyd Erman, “Islamic Law Course Hears Opening Arguments” *The Globe and Mail* (6 August 2005) M3).

¹²⁷ In an online interview, posted on the Canadian Society of Muslims’ website, the architect of the *Darul Qada*, Syed Mumtaz Ali, provides some background for the motivations and views behind the project: “We live in a non-Muslim country which subjects us to laws which, for the most part, do not allow us to live our faith to the best of our ability. ... As Canadian Muslims, you have a clear choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer governance by secular Canadian family law? If you choose the latter, then you cannot claim that you believe in Islam as a religion and a complete code of life actualized by a Prophet who you believe to be a mercy to all.” In response to a question about whether the tribunal would be obligatory for all Muslims, Ali responded: “Those Muslims who would prefer to be governed by secular Canadian family law may do so. It would be more preferable, however, for Muslims to choose governance by Muslim PFL [personal family law] for reasons of conscience” (Mills, “Interview”, *supra* note 14 at 4).

¹²⁸ See generally *Boyd Report*, *supra* note 122.

¹²⁹ *Ibid.* at 5.

including arbitration using religious law. It concluded that the accommodation of minority groups wishing to use ADR must balance the autonomy interests and rights of individuals within the minority group.¹³⁰ Boyd's recommendations included amending the *Act* to permit courts to set aside arbitral awards under certain circumstances.¹³¹ The most dramatic—and costly—recommendations came under the heading of “Further Policy Developments”. This section of the *Boyd Report* looked at longer-term goals, such as the professional regulation of arbitrators and a stronger mandate for judicial oversight of arbitral settlements and awards.¹³²

The *Boyd Report* was an example of positive public deliberation, and it offered an informed consideration of the issues. It could have—and should have—generated public dialogue among Canadian Muslims, and between Muslims and broader society, about the recognition of group autonomy and the place of legal pluralism in multiculturalism policy. On both sides of the controversy, there were legitimate claims and interests that deserved an informed public debate. Reasonable voices, however, were suppressed and overshadowed by poor public discourse and by the unquestioning reproduction of misinformation in the media.¹³³ As a result, to the extent that the Muslim public or the broader Canadian public engaged in the debate, such engagement was largely unconstructive—a perfect example of shoddy democratic deliberation. The public pressure on the government continued to escalate, and on 11 September 2005, Premier Dalton McGuinty announced that the *Act* would be amended to bring an end to the use of faith-based arbitration in the province.¹³⁴

¹³⁰ Boyd stressed that private arbitration could not and should not be used to promote a separate political identity, a separate form of citizenship, or separate legal system for Muslims, noting that Aboriginal peoples are the only minority group that have a defined right to negotiate with the government about political autonomy (*ibid.* at 87-88).

¹³¹ Boyd proposed that the parties should be unable to waive a court's ability to set aside an arbitral award under any of the following conditions: (1) if the award fails to reflect the best interests of any children affected; (2) if a party did not have or waived independent legal advice; (3) if the parties did not have a copy of the arbitration agreement and a written decision with reasons; or (4) if a party did not receive a statement of principles (*ibid.* at 134).

¹³² Greater government involvement and oversight trigger cost concerns, leading one commentator to predict that the public reaction would result in questions like “Why should *we* pay for *them* to apply their bad law?” (James Thornback, “The Portrayal of Sharia in Ontario” (2005) 10 Appeal 1 at 11 [emphasis in original]).

¹³³ See Siddiqui, *supra* note 125.

¹³⁴ *Family Statute Law Amendment Act, 2006*, S.O. 2006, c. 1. For a critical examination of whether the amendments do in fact create an absolute ban on religious arbitration, see Natasha Bakht, “Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective” (2006) 40th Anniv. Ed. Ottawa L. Rev. 67 at 79-82.

3. Making Sense of the Discourse

The public discourse surrounding the *Darul Qada* was remarkable in that both proponents and opponents employed the same essentialized, reductive interpretations of sharia. Boyd noted the controversial and politicized use of the word “sharia” in the submissions she received, and preferred the phrase “Islamic legal principles”. According to Anver Emon, Professor of Islamic Law at the University of Toronto, the debate was plagued by a fundamental misunderstanding and mischaracterization of sharia by both supporters and objectors:

whether one was an opponent or proponent of Islamic law, there was little effort by either party to think of Islamic law historically, methodologically, or as a rule of law system. The views were based on relatively synchronic, colonial and post-colonial paradigms of Islamic law without serious reference to Sharia as a rule of law system sensitive to doctrine, institution, and context. ... there was little detailed legal discussion about the kind of jurisprudence that could lead to a mutual accommodation of Sharia and *Charter* values.¹³⁵

While there was little the IICJ and the Canadian Council of Muslim Women (CCMW)—one of the *Darul Qada*’s chief detractors—agreed on, they both talked about sharia as a “legal code” that was somehow fixed and unchanging.

It may be helpful to look a bit more closely at the arguments the CCMW used against the *Darul Qada*. The CCMW appears to have had two principal concerns. First, it argued that, through the *Act*, the government had given legitimacy and authority to forms of private adjudication that would have binding force over participants and would operate without public oversight or review.¹³⁶ The second concern was that a largely misunderstood and controversial “system of law”, viewed by some as “immutably divinely ordained”, was effectively sanctified and institutionalized in the Canadian legal system.¹³⁷ It is notable that, on their face, these objections do not appear to entail an outright rejection of the possibility of religious communities engaging in dialogic processes with public institutions; nor is the CCMW position a rejection of any and all forms of experimentation with legal pluralism. As a progressive Muslim women’s organization, the CCMW might have been expected to welcome the opportunities that religious arbitration could present in terms of challenging orthodox doctrine and imagining the possibilities of

¹³⁵ Emon, “Islamic Law”, *supra* note 119 at 22-23.

¹³⁶ There were mechanisms for judicial review and appeal under the *Act* in some circumstances: *supra* note 116, ss. 6, 46, 48. The feminist critique was that either review or appeal would require knowledge by the party seeking judicial oversight—usually women, who in many cases would be the weaker, more vulnerable, and less knowledgeable party. The Canadian Council of Muslim Women made this point in “Submission to Marion Boyd” (30 July 2004), online: Internet Archive: <<http://web.archive.org/web/20040813162714/www.ccmw.com/In+The+Press/ShariainCanada/submission+made+to+Ms+Marion+Boyd.htm>> [CCMW, “Submission to Marion Boyd”].

¹³⁷ CCMW, *ibid.*

reinterpreting Islamic law.¹³⁸ The CCMW's concern appears not to have been with religion or religious principles per se, but rather with the institutional structure of the *Act*, which the CCMW feared would legitimize a particular, retrograde understanding of Islamic principles and law. The CCMW's opposition can be understood, then, as a plea for the government not to abdicate its duty to protect vulnerable minorities using the justification of the private law of contract.

One of the most prevalent slogans of the opposition movement was “[o]ne law for all.”¹³⁹ This slogan accompanied the notion that denying Muslims and other religious people the right to use private arbitration would have entirely equality-positive implications. Such logic ignored the discriminatory impact of arguing that family law arbitration should permit any rules of the parties’ choosing *except* religious rules. The “one law for all” movement failed to account for the reality that legal pluralism, whether formalized or not, is a fact of life in Canada, as in any multicultural society. It was clear that at least a portion of the Canadian Muslim population did sincerely desire to govern their personal lives and interpersonal relations in accordance with Islamic legal principles, and to have some formal recognition (and protection) of these systems of personal governance. Informal mediation and arbitration had been used widely in Muslim communities for many years. The *Darul Qada* was one response to the demand of the minority community for formal recognition. The amendments to the *Act* preventing the formalization of religious arbitration did not effect the disappearance of religiously inspired dispute resolution processes from Muslim communities in Ontario. Rather, it pushed those processes back to the informal level, where people—women and children in particular—are arguably at even greater risk of being victimized by unjust rulings than in a formalized system.¹⁴⁰ Thus, for the opponents of sharia, who focused only

¹³⁸ Some elements within the opposition movement seemed to operate on the assumption that religion is on its face bad for women. In contrast, the CCMW maintained in their Position Statement that:

The Canadian Council of Muslim Women, a pro-faith national organization, makes a clear statement that we are not against *Sharia*, as that would be too categorical a statement. However, we know that there is no uniform understanding, interpretation or application of the law which is complex, applied differentially in different countries, and in some instances the practices are detrimental for women. It is difficult to comprehend how it will be applied in Canada (Canadian Council of Muslim Women, *Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada*, 2 (31 March 2004)).

¹³⁹ See CCMW, “Submission to Marion Boyd”, *supra* note 132. Indeed, in the government’s announcement that the *Act* would be amended, Premier McGuinty invoked the “one law for all” mantra: “There will be no Shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians” (See CTV.ca News, “McGuinty Rules Out Use of Sharia Law in Ontario” (12 September 2005), online: CTV.ca <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126472943217_26/?hub=TopStories>).

¹⁴⁰ Law professor Julie Macfarlane notes:

on the content of Islamic law as the problem and failed to engage seriously with the question of how to improve the arbitration process and its institutions, their campaign may have been a pyrrhic victory for the vulnerable Muslim women who they sought to protect.

4. More Constructive Approaches

I will now turn to analyzing how the question of minority rights might have been explored had there been an opportunity for more thoughtful, good-faith public dialogue. Such dialogue could have given rise to two strong approaches as well as to a range of intermediary approaches. I will briefly summarize the two strong approaches and then sketch out some of the possibilities that exist between these two positions, tying in the normative imperatives created by section 27.

The first possible strong response to a request for particularist accommodation such as private religious tribunals is an outright and categorical refusal. There are different grounds for this response: aside from bigoted extremists, there is a solid contingent within liberal circles that views the devolution of power to any form of collective self-government for minorities as illiberal, undemocratic, and potentially unconstitutional.¹⁴¹ Members of this camp include those committed to public institutions and opposed to the privatization of the judiciary in any form, especially where privatization has the potential to empower illiberal minority groups. This view is shared by segments of the human-rights movement and, especially, by many liberal feminists who are skeptical of multicultural accommodation on the grounds that it is anti-egalitarian.¹⁴²

On the other end of the spectrum are those who would endorse measures designed to empower cultural minorities and to enable groups to govern themselves, especially in matters of personal law. This approach welcomes a degree of self-segregation and tolerates the possibility of in-group subordination, believing that the personal affairs and internal governance of members of cultural communities ought to

[I]mams and other leaders within the Muslim communities have continued to perform Islamic divorces, but with none of the public scrutiny or oversight that Marion Boyd proposed in her December 2004 report. Muslims still ask their imams to perform marriage ceremonies, marriage counselling where they face difficulties and sometimes to conduct divorce hearings, using arbitration or mediation (“Research Project to Explore the Many Forms of Islamic Dispute Resolution” *The Lawyers Weekly* (22 September 2006) 7 at 7).

¹⁴¹ See e.g. Barry, *supra* note 40.

¹⁴² See e.g. Okin, *supra* note 49 at 10 (“those of us who consider ourselves politically progressive and opposed to all forms of oppression ... have been too quick to assume that feminism and multiculturalism are both good things which are easily reconciled”).

be free from government interference.¹⁴³ Proponents of this view see public institutions as agents of the majority and therefore as inherently assimilationist.

The tension between these two extremes concretely illustrates the stark and unjust choice between assimilation and self-government that confronts minorities. Denise Réaume characterizes these two extreme responses as the “philosopher’s” model, which aspires to perfect universalism by eliminating cultural differences altogether, and the “extreme nationalist” model, which seeks to eliminate conflict between groups by eliminating contact between groups.¹⁴⁴ I have attempted to argue that the *Charter* envisages a model of diversity enhancement in the public realm that aspires neither to segregation nor assimilation, but instead offers a range of possibilities for accommodation and autonomy between these poles. Emphasizing the value of autonomy, Réaume advocates the development of principles that seek to regulate relations between cultural groups and between individuals, with a view to fostering a political culture that treats social diversity as an inherent good.¹⁴⁵ Concrete frameworks for such an experimentalist, accommodationist scheme are offered by Shachar’s “joint governance” model¹⁴⁶ and Seyla Benhabib’s “deliberative” approach.¹⁴⁷ Similarly, Suzanne Last Stone develops a model of “dialectical interaction” in her analysis of American and Jewish law,¹⁴⁸ while Veit Bader espouses an “associative democracy” model of institutional pluralism.¹⁴⁹

A constructive discussion about sharia must begin with recognition of the legitimacy both of the claim to autonomy issued by proponents of the cultural institution and of opponents’ concerns about coercion, women’s rights, and the lack of judicial oversight. This point of departure requires open-mindedness and willing understanding on both sides of the debate. It is not only the case that members of minority groups must accept that citizenship entails the responsibility to comply with liberal-democratic norms. There are also reciprocal responsibilities for the multicultural state, reflecting the fact that “before members of a liberal democratic polity such as Canada can truly understand what the values of liberty, equality and multiculturalism can and cannot accommodate, they must also make an effort to understand the Other that seeks accommodation.”¹⁵⁰ Part of understanding the Other—and therefore part of meeting the demands of equality and a shared

¹⁴³ For the communitarian version of this theory, see Avishai Margalit & Moshe Halbertal, “Liberalism and the Right to Culture” (1994) 61 Soc. Res. 491; for a libertarian version, see e.g. Kukathas, “Cultural Rights”, *supra* note 38.

¹⁴⁴ *Supra* note 30 at 117-18.

¹⁴⁵ *Ibid.* at 119, 141.

¹⁴⁶ Shachar, *Multicultural Jurisdictions*, *supra* note 50 at 5.

¹⁴⁷ *Supra* note 112 at 19, 114.

¹⁴⁸ Suzanne Last Stone, “The Intervention of American Law in Jewish Divorce: A Pluralist Analysis” (2000) 34 Isr. L. Rev. 170 at 190.

¹⁴⁹ Veit Bader, “Associative Democracy and Minorities Within Minorities” in Eisenberg, *supra* note 114, 319 at 319.

¹⁵⁰ Emon, “Islamic Law”, *supra* note 119 at 25.

multicultural heritage—is not creating institutions that empower some elements within a community over others.

5. Balancing Competing Normative Goals

We return to the normative conception of multiculturalism under section 27 as one that overcomes the liberal discomfort with regulating internal affairs between people and within groups. The sharia controversy highlights the problem with the state taking a laissez-faire approach. The liberal rights principle of state non-interference is tested by the women's rights principle that state neutrality and non-intervention can legitimize gender inequality. The idea of internal protections allows us to think about group autonomy and internal minority protection as complementary group rights, and not as being in necessary conflict with one another.¹⁵¹ Shachar emphasizes the need to give representation to disempowered voices, especially women, within communities.¹⁵² She argues that it is possible to design institutions promoting coordination between state and religious authorities in order to reduce the potential for gender inequality and thereby to avoid the unwitting role of the state in perpetuating internal injustice. She points to her joint governance approach as a way of addressing the dilemmas of religious tribunals, arguing that her model “creates a dynamic division of powers between competing authorities, and generates an impetus for both group and state to better serve their constituent members.”¹⁵³ In this power-sharing structure, Shachar offers three “core principles” that would govern the terrain between legal systems. These principles are: (1) clearly delineated zones of competence and authority for each legal system; (2) the “no-monopoly rule”, which holds that neither the state nor the group can ever acquire exclusive control over a contested social arena; and (3) the establishment of “reversal points”, allowing individuals engaged in the legal process to turn to the parallel system for a remedy where such a remedy is denied in the forum of first choice.

Shachar's approach offers a concrete and creative way of thinking about the challenges presented by religious arbitration, and specifically about the *Darul Qada*. However, her model has two potential weaknesses. First, on the question of authority and legitimacy, Shachar remains within the bounds of the *Act's* scheme, which she recognizes was not designed for the purpose of authorizing multicultural, autonomous regimes. Thus, the structure remains one that is expressly outside of the public law realm—it is created by contract—meaning that the parties are only bound by their voluntary accession to the terms by which they agree to be governed. Those terms are often safely guarded from state oversight or involvement. The lack of oversight may fail to ensure adequately broad representation from within the group, and can tend to

¹⁵¹ See the above discussion of the protection of internal minorities and in-group diversity as a mandate of multiculturalism under s. 27 at Part I.A, above.

¹⁵² “Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies” (2005) 50 McGill L.J. 49 at 52.

¹⁵³ *Ibid.* at 71.

privilege community elites. Joint governance within the framework of the *Act* would likely still be plagued by the inherent problems of using private contract models for adjudicating what are in many respects public law questions of religious pluralism. Joint governance within the existing arbitration framework of the *Act* offers few guarantees of power redistribution and of protection for internal minorities.

The second, related problem with Shachar's approach is that it is difficult to see how joint governance within the framework of Ontario's arbitration legislation will not fall into the kind of reductive, essentializing discourse that plagued the public debate and that has harmed public discourse about multiculturalism in general. Sharia will continue to be understood as a unified "code" of law, interpreted by an arbitrator playing the role of the qadi, or religious judge. A restrictive approach to the understanding of Islamic law would mean few, if any, opportunities to advocate progressive theories and to advance transformational doctrinal interpretations. The creative possibilities afforded to dissenting voices—especially women—would be outweighed by the risks of emboldening the orthodox elites. It is therefore difficult to see how there would be any substantive benefit to the Muslim who chooses to participate in an arbitration system under the joint governance approach other than having the option to exercise an institutionalized right of exit by virtue of reversal points. The result would effectively be the concretization of the unjust and unrealistic choice between one's culture and one's rights.

Emon develops an approach to religious arbitration that extends the ideas of joint governance or dialogical interaction into a model of cooperation between liberal governments and Muslim civil society organizations aiming to "create spaces for Muslims to engage in critical thought about the accommodation of Islamic law within national rule of law frameworks founded upon fundamental values of liberal states."¹⁵⁴ He proposes a "marketplace" concept whereby "Muslims who desire religiously-based family services would have different organizations to choose from, thereby giving them a choice between competing visions of Islamic law."¹⁵⁵ These community-based groups would be set up as non-profit "family service organizations". Through corporations law and tax law, the state would create institutional conditions allowing for the proliferation of multiple models of religious arbitration, all of which would compete for a share of the Muslim marketplace.¹⁵⁶ The goal would be to revive the tradition of an Islamic legal system that is doctrinally pluralistic, dynamic, and diverse.¹⁵⁷ Emon's model also incorporates a mechanism for judicial oversight through an appeal process, which would operate as an additional

¹⁵⁴ Emon, "Islamic Law", *supra* note 119 at 3.

¹⁵⁵ *Ibid.* at 26.

¹⁵⁶ Though Emon writes specifically about the Muslim community, this model could presumably be generalized to other religious and cultural communities.

¹⁵⁷ Emon, "Islamic Law", *supra* note 119 at 25.

forum for public deliberation about appropriate interpretations of Islamic law.¹⁵⁸ Through the development of a doctrine of review, the minority agencies and the government would reach a shared understanding about the role for Islamic law in the Canadian legal tradition.¹⁵⁹

The most attractive feature of Emon's model is that it aspires to create a level playing field on which different community groups with divergent views could deliberate with one another, and with the state, in a publicly regulated forum, thereby creating a "spectrum of choice" for Muslims seeking ADR services that reflect features of their faith. While Emon's proposal represents an instructive model for resolving some of the tensions inherent in creating space for multicultural autonomy within the liberal democratic state, issues remain that deserve further reflection. One question is whether extreme proliferation and an uncontrolled supply of religious arbitration services are necessarily public goods. While deliberative models do require as wide an array of perspective and choice as possible, there must be limits to the kinds of approaches that can be accommodated in the multicultural framework. Should private citizens be left to work out such limits for themselves when creating their family service associations? Will the "marketplace" be adequately self-regulated so that the availability of options will ensure real choice and not coercion?

Government involvement and strong judicial oversight are two features that were absent from the *Act's* regime, but which would be crucial in any resurrected model of multicultural group autonomy in family law. Although the *Darul Qada* never had the potential to be imposed on members of the minority group in the way that, for instance, First Nations legal tribunals have been, the concerns about coercion remain important. The technicalities of an institution's legal legitimacy and authority are irrelevant if there is a general perception that the institution represents a binding and mandatory authority. Any experimentation with religious pluralism within the framework of multicultural autonomy must neither impose a regime on groups nor create one that vulnerable group members perceive as being imposed on them. This imperative places responsibility on the government to ensure sufficient public awareness and education about any parallel legal systems available to members of minority communities. Any cultural benefits that members of minority communities may receive from autonomous regimes would be eclipsed by instances of coercion or misrepresentation on the part of dominant group members, who could mislead vulnerable members without a full and proper understanding of the choices available to them.

¹⁵⁸ While there is little precedent to support the involvement of secular courts in interpreting religious law, a recent judgment of the Supreme Court of Canada, which awarded a woman damages because her ex-husband refused to honour an agreement to grant a Jewish religious divorce, suggests that the separation of religious and secular law may be blurred where *Charter* equality considerations are at play: *Braker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, 288 D.L.R. (4th) 257.

¹⁵⁹ Emon, "Islamic Law", *supra* note 119 at 26.

The challenges that the Ontario government ultimately evaded in the sharia episode are not likely to disappear. The question of free choice and concerns about “false consciousness” remain inadequately resolved. Future deliberations on these issues will need to shift the questions away from what is wrong with religion—something that was particularly charged in the post-9/11 climate of rising Islamophobia¹⁶⁰—and toward a focus on what can be improved in the institutional and legislative frameworks that accommodate the aspirations of religious and cultural minorities. The challenge of such accommodation will be to realize the virtues of multiculturalism while protecting and strengthening the other rights and freedoms enshrined in the *Charter*.

Conclusion

The claims of culture will not be resolved solely by attempts to create rights and to seek their enforcement within the legal system. Legal instruments like constitutions and bills of rights do more than simply create legal causes of action. They are descriptive and normative, delineating the scope of the rights and immunities that regulate the relationship between the state and citizens. They can also be aspirational and imaginative, creating space for discursive practices that enhance core values such as democracy, diversity, and freedom.

Charles Taylor writes that “the modern democratic state needs a healthy degree of what used to be called patriotism, a strong sense of identification with the polity, and a willingness to give of oneself for its sake.”¹⁶¹ Some have suggested that the adoption of the *Charter* provided Canadians with such an instrument of social and political cohesion.¹⁶² The *Charter* transcends the many differences that compose the Canadian mosaic, giving Canadians something to admire, to cherish, to protect, and to develop—together. For many Canadians, it is the embracing of rights and freedoms, and the view that Canadians are united in their diversity, that define the new Canadian patriotism. As a matter of legal analysis, the *Charter* can be said to offer not only a declaration of how society is, but also a reflection of how society wishes to view itself. The *Charter* defines the relationships and maps the normative

¹⁶⁰ See Faisal Bhabha, “Tracking ‘Terrorists’ or Solidifying Stereotypes?: Canada’s *Anti-Terrorism Act* in Light of the *Charter*’s Equality Guarantee” (2003) 16 Windsor Rev. Legal Soc. Issues 95 at 117.

¹⁶¹ Charles Taylor, “Modes of Secularism” in Bhargava, *supra* note 112, 31 at 44.

¹⁶² Political scientist Alan C. Cairns emphasizes the unifying force of the *Charter*, especially for minorities:

The *Charter*, in other words, generates centrifugal pressures within provinces and a Canadian rights-bearing identity that transcends provinces. The possessors of *Charter* rights were labelled and came to see themselves as *Charter* Canadians—a phrase which indicated that their link to the constitution was through the *Charter*, and that as a result they had stakes in the constitution (“Searching for Multinational Canada: The Rhetoric of Confusion” (2001) 6 Rev. Const. Stud. 13 at 19-20).

ideals to which individual, group, and collective consciousnesses aspire. In that respect, the *Charter* is more than a simple legal text; it is a social compact that both defines and dreams. It says both how things are and how things can be.

If the democratic state needs something that citizens both identify with and are willing to give of themselves for, multiculturalism tests the terrain of what identification and sacrifice mean. As Martha Minow states, “we will have to acknowledge that debates over cultural conflict and assimilation are not just about women, and not just about immigrants, minority groups, or Third World nations; they are about all of us.”¹⁶³ This idea of shared investment in issues of cultural identity and pluralism is central to the *Charter*’s conception of multiculturalism as a form of shared heritage. The claims of culture are significant not only to the individuals and groups that assert interests in accommodation and autonomy but also as a part of the evolving, fluid, and intersecting cultural identities to which we all ascribe in some way or another. Embracing the possibilities that the *Charter* provides as an aspirational and experimentalist project affords dignity-enhancing opportunities to ethnocultural minorities, and it also helps to ensure that the *Charter* will fulfill its role as an instrument of national cohesion and pride.

¹⁶³ Minow, “About Women”, *supra* note 99 at 264.