

With the support of the Simons Foundation, SFU students were invited by the Institute for the Humanities to submit written research proposals that focused on issues related to citizenship. **Sacha Ludgate** presented the following selected paper on November 15, 2007 at SFU Harbour Centre.

Sacha Ludgate is a master's student in psychology with a concentration in neuropsychology. She has a wide variety of interests, in addition to neuropsychology, that include women's issues, sociology, and theology. Sacha volunteers at WISH, an organization with the mandate of supporting working women in the downtown east side. Her involvement with WISH, in combination with her more general interests, culminated in the writing of a critical review of the effects of citizenship on women's issues. As a student of psychology, Sacha is able to offer a unique perspective on women's issues.

The Compromise of Canadian Multiculturalism Policy: Group Rights vs. Women's Rights

Introduction

This paper seeks to explore how group rights can conflict with women's rights within the Canadian framework of multiculturalism policy, using the case of the proposed recognition of Islamic law under the Ontario Arbitration Act as an example.

Citizenship can be loosely defined as an equal opportunity for protection under the charter of rights; however, how is this opportunity expressed in the context of multicultural communities? Some say that debate over how we as Canadians should accommodate other cultures is "multiculturalism bashing" posing as an academic and political discussion. Nonetheless, despite such claims, there already exist laws forbidding cultural practices that are not deemed acceptable according to Canadian values, such as polygamy and genital mutilation.

A working definition of multiculturalism in Canada is exemplified by the policy of legally recognizing and protecting the rights of diverse racial and ethnic minorities to preserve their cultural identities and ways of life. When the

underlying function of multiculturalism is to preserve minority cultures, what happens when the values of these minority cultures are not in congruence with gender equality? For example, it has been suggested by Susan Okin, in her essay *Is Multiculturalism Bad for Women?* that multiculturalism policy places too much emphasis on group rights at the expense of attention directed toward gender equality.

In the summer of 2004 the Ontario Arbitration Act, 1991, became newsworthy when members of the Islamic community sought to have Islamic law officially recognized under the Act. A newsletter published by the Canadian Council of Muslim Women states that, *"The issues of religious laws in public law, the jeopardy to women's equality rights, the use/abuse of multiculturalism and the argument of religious freedom have arisen because the Ontario Arbitration Act allows for private, legally binding arbitration agreements, using religious laws."* The Orthodox-Jewish Rabbinical court, Beth-Din and the Roman Catholic court are currently recognized under the Arbitration Act; however, the extension of the act to include Islamic law has been met by a lengthy and emotionally charged debate, both within and outside the Muslim community.

Although Islamic tribunals already exist in Ontario and across Canada, recognition under the Act would require that Ontario law sanction the principles and practices of Islamic law. As a result, the Arbitration Act is now under review by the Ontario government. The case study of Islamic law and the Arbitration Act provides insight into how the policy of multiculturalism can conflict with women's access to the charter of rights, and therefore as equal citizens in this country.

What is the relationship between citizenship and multiculturalism?

The concept of citizenship has undergone a process of evolution, increasing in complexity over time. The eminent sociologist T.H. Marshall wrote, in the mid 1900's, that the concept of citizenship is aimed at delineating rights in the civil, political, and social sphere. Political rights confer on an individual the ability to participate in the "exercise of political power". Political power can be expressed by a citizen when they choose to vote or run for public office. Social rights comprise basic economic welfare and security, as well as the individual's right to live in a dignified manner. And civil rights guarantee individual freedoms such as speech, thought, religion, and bodily integrity. In order to maintain civil rights it is necessary for a citizen to be able to initiate legal proceedings if they feel their civil freedoms have been violated. It is for this reason that women did not become citizens (in a complete sense) in Canada until the 1980's when women were given the right to charge their husbands with rape and to decide whether or not to keep a pregnancy (Smith, 1999).

Legal citizenship, on the other hand, can be thought of as participation or more specifically membership in a country, carrying with it certain rights as well as responsibilities. Since the formulation of the Citizenship Act in 1947, legal citizenship is regulated by the federal government in Canada and it regulates, among other things, the procurement or loss of citizenship, the administration of passports, and the right to vote and run for public office (Smith, 1999).

The Canadian Charter of Rights and Freedoms, on the other hand, extends rights to citizens and *non*-citizens. Indeed when citizenship is conceived as an individual's responsibility to contribute and participate in their community, the discussion is directed at rights and duties that are not reserved solely for citizens (Smith, 1999). According to van Walsum and Spijkerboer (2007), "Immigration

law and notions of social citizenship are related, since immigration law regulates legal admission to a national society." As an example of how the selection process for weeding out potential immigrants is influenced by the concept of social citizenship, individuals with a criminal record are often not permitted entry into the country.

Until 1967 the selection process for potential immigrants was far from merit based. In fact the official policy seemed to be directed at maintaining the country as white and British. In 1967 a point based system was implemented, and along with the Immigration Act of 1978, reduced discrimination by encouraging "more migration by non-Europeans, who were less likely to be Caucasian." (Hiller, 2006, p.182) The new immigration policy, however, was not conceived solely for the benefit of potential migrants. The policy was motivated by Canada's sense of responsibility to economic and political refugees, as well as its inclination for cheap labor and "capital investment" by immigrant entrepreneurs. The reasoning behind the immigration policy has generated many questions about the type of immigrant favoured in the selection process (Hiller, 2006).

In order to deal with the flux of immigrants into Canada, and a population growing more diverse over time, the Canadian Multicultural Act was passed in 1971 and finalized in 1982. The purpose of officiating multiculturalism in Canada was to remove the country from its image of "Britishness" and to distinguish the country from the US policy of the "melting pot" (Dupont & Lemarchand, 2001). According to official multiculturalism all cultures are seen as having equal value in contributing to the "mosaic" quality of the country, and it is the immigrant's choice how to express their ethnic origins and/or how

they would like to integrate into the society as a whole (Dupont etc). According to a United Nations Habitat Report (2004) Secretary-General Kofi Annan:

Multiculturalism is an urban phenomena that enhances the fabric of societies and brings colour and vibrancy to every city it touches... policy-makers need to plan for “cities of difference” that are open to all and exclude none, and which are able to capitalize on the benefits of a multicultural existence. This requires the engagement of all non-governmental and community stakeholders, on the basis of legislation that guarantees citizens’ right to the city, and judicial systems that enforce those rights.

Despite the victories of multiculturalism- increased awareness of other cultures, increased opportunity to learn about other art and philosophical perspectives, Canada’s leading reputation regarding research into ethnic diversity- the practice and theory of multiculturalism is rife with contradictions. As globalization increases the diversity of peoples within a given country, specifically in urban centers, managing this diversity has become an urgent task for governments.

A survey conducted in 1993 questioning Canadians about their opinion on official multiculturalism gave an unexpected view of how the policy was viewed by the general public. A surprising 72 percent of Canadians either strongly or mildly believed that the Canadian policy should be replaced by the American ideal of the “melting pot” (Dupont & Lemarchand, 2001). It has been argued that “multicultural communities” are largely a creation of the Canadian state and that this construct of multiculturalism relies heavily on stereotypical assumption about the minority community. These assumptions in turn abrogate the presence

and expression of ethnic groups outside those spaces (Khan, 1995). Some practical ways in which this may be encouraged arises from the creation of the Federal State Ministry of Multiculturalism in 1972. Money from this ministry is directed towards publications regarding cultural diversity, cultural associations and ethnic language teaching programs. An article in the Globe and Mail quotes the Toronto Metro councilor Gordon Chong as saying, "There are grants being given out by all levels of government that tend to keep specific groups within their own communities at public expense." (Dupont & Lemarchand, 2001, p. 309) In fact, Canada's integration of multiculturalism into the Charter of Rights in Article 27, which states that the Charter of Rights should be interpreted in a way that is compatible with the policy of multiculturalism, has generated concern over whether or not individual rights are being superseded by group rights (Dupont & Lemarchand, 2001).

How can multiculturalism and citizenship clash in a gender specific way?

It is clearly stated in the Charter of Rights that there should be no discrimination based on "race, national or ethnic origin, religion, gender or age" (Dupont & Lemarchand, 2001). However, when it can be argued that one outcome of multiculturalism is to preserve the group rights of minority cultures, what happens when these minority cultures clash with gender equality? T.H. Marshall's conceptualization of citizenship allows for a dynamic examination of how women have historically been excluded from citizenship. Logically, this exclusion means that citizenship evolved conceptually and legally without women in mind. (Lister et al., 2007). As women were prohibited from the civil benefits accorded to their male counterparts, citizenship was designed for men and their experiences, not those of women. The famous feminist Mary

Wollstonecraft suggested that perhaps women's inherent differences from men needs to be acknowledged in any attempt to redefine certain aspects of citizenship (Smith, 1999).

The concept of social citizenship is one area where it can be argued that women still do not have equal standing with men. As mentioned earlier, social citizenship refers to an individual's ability to access resources at the social and economic level; resources which are necessary for social security and equality. Putting into policy that "race, national or ethnic origin, religion, gender or age" should not be a basis for discrimination may place individuals on an equal footing under the law, however, this means little when "unequal social and economic conditions limit for some the capacity to exercise their civil and political liberties" (Kershaw, 2005).

The promise of social citizenship has not been fulfilled because of the failure of the welfare state to acknowledge and incorporate into its institutions the obligations and aspirations that citizens have regarding reproduction and caregiving. The public sphere of the labor market allows individuals to access resources (ie. salary, pension, worker's compensation) that cannot be accessed through the private reproductive sphere. In fact, women who are immersed in caregiving receive little support from the welfare state (van Walsum & Spijkerboer, 2007) In the context of multiculturalism this issue is particularly relevant as many women migrate for reasons of family unification and/or work, particularly in the care field. (Lister et al., 2007).

Why are women negatively impacted by multicultural policies?

The number of women migrants has slowly increased over time and in some developed countries their numbers may equal those of men (van Walsum

& Spijkerboer, 2007). Susan Okin (1999), in her essay *Is Multiculturalism Bad for Women?* suggests that multiculturalism places too much emphasis on group rights and detracts attention from gender equality. While some critique Okin for being a universalist, basing her ideas of multiculturalism on an euro-centric theory of feminism, she raises the important question of how the state will reconcile group rights with women's rights when discrepancies arise. Cultural practices such as unequal access to health care, ownership rights, educational opportunities and political participation between men and women are not uncommon and are inconsistent with the idea of gender equality (Cohen, Howard, Nussbaum, 1999).

In discussing the impact of multiculturalism on women it is important to highlight the women most likely impacted by multicultural policies in Canada. Immigrant women as a group are a particularly vulnerable minority within Canada. Immigrant women face particular disadvantages that make them less independent than their male counterparts and therefore more reliant on their family for support. Difficulties with the native language, poor education, and reproductive responsibilities compose a picture that results in their isolation from the broader society. Difficulty with the English or French language also makes it challenging for these women to understand their rights under Canadian law (Hiller, 2006).

Multiculturalism policy also serves to enhance the diverse cultural and religious values of the Canadian citizenry and because of this it is necessary to locate the role of women in culture. According to Nira-Yuval-Davis and Floya Anthias (2000), women participate in ethnic processes in five key ways: as biological reproducers; as reproducers of the boundaries between ethnic and

national groups; as transmitters of culture; as symbolic signifiers of ethnic and national differences; and as participants in the political struggle of their particular group. In these ways women are typically expected to contribute to the preservation of a group's culture and identity. Susan Okin (1999, p.13) reminds us that religious and cultural groups,

are particularly concerned with 'personal law'- the laws of marriage, divorce, child custody, division and control of family property, and inheritance. As a rule, then, the defense of 'cultural practices' is likely to have a much greater impact on the lives of women and girls than on those of men and boys, since far more of a women's time and energy goes into preserving and maintaining the personal, familial, and reproductive side of life.

In its demands for equality, Katha Pollitt's (1999) essay *Whose Culture?* reminds us that feminism sets itself in opposition to virtually every culture on earth. You could say that multiculturalism demands respect for all cultural traditions, while feminism interrogates and challenges all cultural traditions. Feminist arguments discuss how women, as the result of hegemonic discourses, become the *bearers* of cultural identity by their own communities, preserving traditions and reproducing culture in the domestic sphere, while at the same time encouraged by the dominant culture to be *symbols* of their culture and identity as a token of multiculturalism (Mohanty, 2003). In order to acquire and maintain their autonomy it is important that all women have the opportunity to support themselves independently of their family, have access to social benefits, and have control over their reproductive abilities (van Walsum & Spijkerboer, 2007). For women, some cultures are more accessible in this way than others.

The Ontario Arbitration Act

The case study of Islamic law and the Arbitration Act, 1991, provides insight into how Canada defines multiculturalism and how these practices are perceived to either contribute or detract from a national cohesion. Within this debate, there is the central concern for women's rights, specifically under Islamic law, but in a broader sense, the issue can be extended to the reconciliation of women's rights with all group rights.

In 1990, Ontario adopted the International Commercial Arbitration Act and in January 1991 the Arbitration Act came into force for domestic arbitrations. Arbitration allows for an alternative to litigation, and is an effective, cost-efficient, and binding method for achieving resolution of disputes. Under the Act, an arbitrator's award is enforceable through the court as though it were a court order. By extending the Arbitration Act to cover civil disputes, Ontario sought to streamline its overloaded court system and to save money. Anyone, including former judges, lawyers, or religious leaders can act as an arbitrator; and this was seen as another means of empowering communities to settle disputes in accordance with their culture's values, thus enhancing multiculturalism. The Arbitration Act, 1991, deals with civil law matters including property, marriage, divorce, custody and inheritance. The parties involved in a dispute must voluntarily authorize a third party to decide the dispute after hearing both sides of the argument. After the tribunals make a decision it is often sent to a provincial judge for official endorsement. Findings and procedures of arbitration must be in accordance with the Charter of Human Rights and Freedoms and this theoretical safety check in the procedure of arbitration acts as a provincial stamp of approval. However, enforcement in this

area is difficult as arbitration findings can be oral which makes practical scrutiny of the process and procedures of tribunals difficult (Barin, Little & Pepper, 2006).

The Ontario Arbitration Act, permits Orthodox Jews and Catholics to submit to voluntary faith-based arbitration. Secular civil courts then ratify these agreements so long as rulings conform to Canadian law, and both parties are willing participants (Barin, Little & Pepper, 2006). While arbitrations using the fundamentals of Islamic law have been used informally by parties in Canada, it was not until recently that the Islamic Institute of Civil Justice- an Islamic judicial tribunal composed of a thirty member elected council- asked that Islamic law be recognized under the Arbitration Act. At this time the issue of faith-based arbitration was raised for debate in Canada (Canadian Council on American-Islamic Relations, 2004).

Islamic law is based on Islam's holy book, the Qu'ran, and the Sunnah, sayings of Prophet Muhammad. Islamic law comprises a set of principles that a Muslim should use to guide decisions and affairs in his or her life. A centuries-old system of justice, it includes general provisions for the importance of justice and equality, but as practiced throughout the world it has been used to justify stoning, the flogging of rape victims, public hangings, and various types of mutilation (Cohen, Howard, & Nussbaum 1999). Under Islamic law, only men can initiate divorce proceedings, and fathers are virtually always awarded custody of any children who have reached puberty. According to Islamic law, a woman's testimony counts for only half that of a man. So in a disagreement between husband and wife, the husband's testimony will normally prevail. In inheritance daughters receive only half that of sons. Under Islamic law, arbitrators of justice can be imams, Muslim elders, or lawyers (Ali, 1986).

The controversy surrounding the government's consideration of sanctioning Islamic law by recognizing it under the Arbitration Act, 1991, caused divisions within the Muslim community in Toronto, particularly by those concerned with the rights of women. Proponents of the system argue that some people feel better discussing difficult personal problems with those who share a common cultural background and common values, such as religious leaders who are connected and have an intimate knowledge of their principles. Proponents of the system go on to argue that these arbitrations are done on a voluntary basis and that if a party to an arbitrated agreement is dissatisfied, she may ask the civil courts to overturn it. The bottom-line is that proceedings must be in accordance with the Charters of Rights and Freedoms. Most interesting and persuasive, is the argument that this is an opportunity to reform and revitalize Islamic law, by creating a hybrid of Canadian-style freedoms and traditional Islamic values (Lithwick, 2004).

Opponents of Islamic law being included in the Arbitration Act, 1991, argue that there is no such thing as purely voluntary arbitration: isolated immigrant women with limited English could easily be coerced into appearing before Islamic panels and are never advised of their rights within Canada. And the Canadian Council of Muslim Women announced they would like the same laws to apply to them as to other Canadian women (Lithwick, 2004). Decisions can be appealed to the regular courts, but for Muslim women, the pressures to abide by the precepts of Islamic law are immense. According to Homa Arjomand, coordinator of the International Campaign against Shari'a Court in Canada, "if the government allows Shari'a arbitration, it will push women to stay in abusive relations because the social pressure and influence of her religion

would oblige a woman to use arbitration” (Canadian Council of Muslim Women, 2004). Arjomand goes on to argue that Muslim arbitration in Ontario would mean that women will have no options. Even if they knew their rights, they would not speak up for fear of consequences such as isolation from their family and their community.

As is the case with many forms of religious law, there is little consensus on a standardized interpretation of Islamic law. This makes it difficult to advise women about their rights under a set of rules that are subject to reinterpretation. Mohammed Elmasry of the Canadian Islamic Congress, a group that endorses Islamic law in Ontario, stated that “there are only a handful of scholars in Canada who are fully trained in interpreting and applying Shari’a law- and perhaps as few as one.” He added to this that “the arbitrators use gut feeling, they use common sense, and in many cases they are successful.” (Trevalyan, 2004)

Pakistan-born broadcaster and political activist Tarek Fateh, leader of the Muslim Canadian Congress (MCC) argues that the Arbitration Act, 1991, is a substandard multi-tiered judicial process in matters of family law, which “is racist and unconstitutional”. The MCC goes on to argue that by authorizing and thus officially approving Islamic based tribunals, the Muslim community will be further “ghettoized” in the wake of an already highly racialized climate after 9/11. There is the added barrier that a Muslim cannot challenge the Muslim clerics: if they do, they are considered to be a bad Muslim, or a blasphemer (Trevalyan, 2004). This sentiment is echoed by Mumtaz Ali, leader of The Islamic Institute of Civil Justice, as he argues that Muslims cannot live under secular law because: “Every act of your life is to be governed by [Shari’a]. If you are not

obeying the law- you are not a Muslim. That's all there is to it." (as cited in Slate , 2004)

Reconciling Group Rights with the Rights of Women

It is most certain that there was a degree of racial profiling in the debate over Shari'a law this summer in Ontario. In fact, religious arbitration is already being conducted by several different faiths. Although some participants in the Review fear that the use of arbitration is the beginning of a process whose end goal is a separate political identity for Muslims in Canada, that has not been the result for other groups who use arbitration. Why is it that the Jewish-Orthodox court has been making binding decisions for over ten years, with little debate? According to a paper in the Jewish Virtual Library *Rabbinical Courts Versus Civil Courts* (2004), when a Jewish couple is about to divorce the husband generally requests for proceedings to happen in a Beth-Din while the wife prefers a civil court. This is because civil courts are known to be more generous to women than rabbinical courts. The debate here again, is on the reconciliation of women's rights with group rights.

Marion Boyd, Ontario's former Attorney General, a lawyer and former feminist activist was asked by the Ontario Premier Dalton McGuinty to review the Arbitration Act, 1991. Her main conundrum was (as cited in Trevalyan, 2004):

Our constitution guarantees equity on ethnic grounds, on religious grounds, on racial grounds, as well as gender grounds. If we are saying to groups that have been in existence for a long time, "it's ok to have rabbinical courts for this particular group" but it's not ok

for an avenue for private resolution of disputes in the Muslim community, what are we saying?

In her report, Marion Boyd (2004) concluded that the Arbitration Act should continue to allow disputes to be arbitrated using religious law as long as the 46 safeguards suggested in her report are observed. The accommodation of minority groups can be balanced against a commitment to individual rights and freedoms by, among other suggestions,

- imposing a duty on arbitrators to ensure that parties understand their rights and are participating voluntarily;
- providing for accountability by empowering courts to set aside arbitral awards for unjust decisions;
- public education and community development;
- expanded appeal opportunities

Protests were held against the Islamic law proposal in major Canadian cities, as well as in Paris, London and Vienna. Regardless of Boyd's recommendations, though, Ontario Premier Dalton McGuinty ruled against them in 2005. If the recommendation had been accepted, Ontario would have been the first Western jurisdiction to allow the use of Islamic law. McGuinty also announced that he would ban all religious arbitration in Ontario as has been done in other provinces (BBC News, 2005). This decision has been met with both approval and disapproval. Responses range from applauding the Premier's commitment to women's rights, to accusations of racism and discrimination.

Conclusion

It has been argued that making community-based arbitrations binding would be segregating communities into frozen constructs of culture; but other

aspects of multiculturalism have had many positive outcomes, such as rejecting intolerance for other ways of life and encouraging cultural diversity (Okin, 1999). Within multiculturalism, we can also ask- what is culture? Culture, is commonly understood to be the totality of socially transmitted behaviour patterns, including arts, beliefs and institutions. These subjects are broad, but their ambiguity and subjectivity are pertinent to understanding the potential problems of sorting out rights within multiculturalism

In Michael Ignatieff's (2000) book *The Rights Revolution*, he points out that "rights talk may even have become a substitute for reform." He goes on to use the example of Aboriginal discourse in Canada, wherein placing the emphasis on treaty rights and aboriginal self-government overshadows the "often appalling social conditions on reserves". Though he does not address the issue of women directly, the rights of women are often subsumed in negotiations in Aboriginal self-government talks. This point also applies to the broader picture of rights discourse in Canada, that the rights of groups can overshadow the rights of the individual, particularly the rights of women.

As has been discussed, social citizenship is an individual's ability to access social and economic resources which are necessary for social security and equality. The labor market allows individuals to access resources such as a pension, which cannot be accessed through the private reproductive sphere. In the context of multiculturalism this issue is salient as immigrant women face many challenges. As a result of both cultural expectations and/or work opportunities in Canada, they often occupy the reproductive sphere of childbearing and/or caregiving at higher rates than the general population of women. Although the concept of citizenship has been argued to disfavor

women in general for this reason, it can be argued that the high expectation in many minority cultures that women be the bearers of cultural identity via the reproductive sphere of childbearing and care, they are particularly disfavored.

Cultural influences where Muslims live have traditionally discouraged women from claiming their full rights under Islam and it was for this reason that many women's groups were outraged at the suggestion that Islamic law be recognized under the Ontario Arbitration Act. Although it was not recognized, the debate continues as to whether this decision was right or wrong. Susan Okin (1999) argues that the "subordination of women is often informal and private" and for this reason group rights should not be placed before individual rights. However, it could also be that by allowing Islamic law in Canadian arbitration courts Muslim women in Canada would have more control over how Islamic law was interpreted and put into practice thereby having a better chance to claim their rights as individuals as well as members of a minority community. Ultimately, when statements of the kind made by Mr. Mumtaz Ali, leader of The Islamic Institute of Civil Justice, have been interpreted as both a reason for allowing and a reason for disallowing Islamic law to be recognized under the Arbitration Act, the debate will continue for some time.

"...a Muslim who would choose to opt out at this stage, for reasons of convenience would be guilty of a far greater crime than a mere breach of contract – this could be tantamount to blasphemy-apostasy." - Mumtaz Ali as cited in a YWCA address to Maryon Boyd in December 2004.

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