

Is Constitutionalism Bad for Intersectional Feminists?

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ABSTRACT

Being a country that espouses both sex equality and multiculturalism in its entrenched *Charter of Rights and Freedoms*, Canada has experienced significant tensions between these two values. These tensions should not surprise feminists. In 1998, Susan Muller Okin asked: "Is Multiculturalism Bad for Women?" Her objective was to critique Will Kymlicka's liberal justification of special group rights for cultural minorities. Claiming these rights "may not be in the best interests of the girls and women of the culture" Okin argued that they should not be granted unless young women (older women being already co-opted!) "are fully represented in negotiations about group rights". Accordingly, those who share Okin's views should disapprove of the Canadian *Charter* because it addresses to multiculturalism without unambiguously ascribing priority to sex equality.

Okin did not lack critics. For instance, Leti Volpp rejected Okin's approach of positing multiculturalism and feminism as oppositional. Volpp argued that this binary discourse "obscures the forces that actually shape culture, hides what forces beyond culture impact women's lives, denies that women have agency within patriarchy, and elides the level of violence intrinsic to the United States" (2001: 1185). Her objective was to enhance our understanding of multiculturalism by portraying cultures as not only "patriarchal – not more or less so, but differently patriarchal" but also "characterized by resistance to patriarchy" (2001: 1217). In addition, she sought to "broaden and shift" (2001: 1184) feminist values by challenging feminists to abandon their notion of the "unitary female subject" (2001: 1199) and their "strong desire for innocence" (2001: 1214). Effectively, supporters of Volpp's argument would also disapprove of the Canadian *Charter* because it contains no reference to the possibility of collapsing sex equality into multiculturalism, even of only in "particular contexts" (2001: 1127).

Another critic, Madhavi Sunder, argued against assigning priority either to human rights law (including sex equality) or to "religion – and its attendant category, culture" (2003: 1401). First, she condemned human rights law for treating religion "as a sovereign, extralegal jurisdiction", that is as "natural, irrational, incontestable, and imposed" (2003: 1402). Human rights law wrongly defers to this construction of religion as "other" (2003: 1402), accepting and expecting inequality. "In short, human rights *law*, not religion, is the problem" (2003: 1403). On the other hand, Sunder also criticized religious and cultural authorities who fail "to imagine religious community on more egalitarian and democratic terms" (2003:1403). Ultimately, however, her objective was constructive. She lauded the women's human rights activists in Muslim countries who "increasingly refuse to choose between religion and rights and demand

both” (2003: 1412). I refer to these women as intersectional feminists and ask: in the diaspora, is it possible for them to have both? For example, is Canada’s *Charter* designed to protect sex equality and multiculturalism simultaneously? Or, is constitutionalism bad for intersectional feminists?

To explore these questions I propose to revisit three studies that I conducted recently. In 2005 I participated in research that analyzed the constitutionality of criminalizing polygamy, in addition to reviewing the consequences of failing to recognize valid foreign actually polygamous marriages (Bailey, 2005). Later, I explored the constitutional justification for proscribing faith-based family arbitrations (Baines, 2009a). Most recently, I examined the constitutional implications of adopting a second guarantee of sex equality to limit the accommodation of cultural differences (Baines, 2009b).

Canada is a federal state and the three controversial laws were enacted by three different governments. The Canadian (national) government had enacted the criminal law prohibiting polygamy almost 120 years ago. The Province of Ontario proscribed faith-based family arbitrations three years ago. Last year Quebec entrenched the second sex equality guarantee in the provincial constitution with the objective of imposing limits on cultural accommodations. All three laws impact on multicultural citizens who are religious believers – specifically but not only Muslims. To date their constitutional arguments have relied primarily on freedom of religion with multiculturalism added for emphasis.

Only the polygamy issue is currently before the courts in a constitutional challenge – one launched not by Muslims but by Christians, specifically members of the Fundamentalist Church of Jesus Christ of the Latter Day Saints, a breakaway sect of the Mormon Church. Since the faith-based family arbitration law proscribes civil enforcement of arbitration awards that are not consistent with secular family law, Jews with Beis Din awards might bring a challenge based on deprivation of a process to which they previously had access, whereas most Muslims (Ismailis aside) never resorted to civil enforcement of arbitration awards.

In each of the foregoing contexts, the challengers would be religious believers. Women who wished to intervene on the ground of sex equality would have to shut up and shelter under the government’s justification for the legislation, viz. polygamy is prohibited to protect women and children; faith-based family arbitrations are proscribed to protect women and children. While sex equality seeking women could not be parties (absent intervener status), in other words, courts would likely hear their arguments, albeit as voiced by governments. In contrast, there is no mechanism that requires judges to hear the arguments, let alone the voices, of intersectional feminists. Although the Supreme Court of Canada frequently proclaims there is no hierarchy of rights, intersectional feminists understand this rhetoric does not extend to not choosing between rights.

Would the situation be any different in Quebec given that the second sex equality provision was adopted to protect women from practices put in place to accommodate cultural differences? The answer is that it depends – on two factors. First: are the practices prohibitive

or permissive? For instance, are public school teachers prohibited from veiling, or permitted to veil? Are birthing mothers prohibited from demanding a female obstetrician or permitted to have one? Second, who are the women who are entitled to protection under the second sex equality provision – secular feminists (who give priority to sex equality over religious freedom), religious/multicultural feminists (who give priority to religious freedom over sex equality), or intersectional feminists (who give the same priority to both rights, refusing to choose between them)?

In sum, in these studies I concluded that the Canadian (and Quebec) *Charter(s)* did not protect intersectional feminists. More specifically, Canadian constitutions are not designed to empower intersectional feminists to enter rights conflicts. Intersectional feminists do not wish to choose between their religious and cultural beliefs and their belief in sex equality. Would all written constitutions force this choice upon them? Are there ways to redirect, even subvert if necessary, these constitutions to secure respect and protection for the citizenship of intersectional feminists whether it is in the context of the veil, obstetrics, faith-based family arbitration, polygamy, etc? Is a second sex equality provision the answer, or is this answer more responsive to secular feminists?

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