CONSTRUING RIGHTS: MAJORITARIANISM AND THE SCOPE OF RIGHTS PROTECTION

Anver M. Emon is an Assistant Professor at the University of Toronto's Faculty of Law, where he specializes in Islamic legal history and theory. He is the founding editor of Middle East Law and Governance: An Interdisciplinary Journal, and is the author of Islamic Natural Law Theories (Oxford University Press, 2010).

ABSTRACT

This paper argues that human rights claims are delimited by majoritarian values and interests and that this provides insight into how competing claims will be balanced.

The determination of a right and its scope of protection are not simply posited or given. Rather, they are constructed in order to maximize the scope of individual freedom in a way that works to the benefit of the state. In other words, to protect individual rights is very much connected to the welfare of the state. Consequently, while rights may operate as checks against state machinery, rights are nonetheless defined by officers of the state (i.e. judges) to support and further the interests of the social polity at large. In this sense, a distinction is made between the government of a particular state and its citizen-polity. Rights may limit government action, but they do so in the interests of the citizen-polity as a whole. As such, we cannot afford to ignore how a right is thereby defined by reference to the aims of the citizen-polity, and the extent to which the content of a right is delimited by majoritarian values and interests. In other words, while a right is designed to protect the individual from the state, the content of the right may be defined pursuant to majoritarian values. Consequently, where rights are in conflict with one another, on balance we can expect that the conflict will be resolved against minority groups making claims in light of values that are viewed as counter to the majoritarian values, which provide content to the rights at issue.

The contribution of majoritarian values to defining the content of a given right become problematic when the majority undervalues the aims and aspirations of those not in the majority. This difficult dynamic is evident in cases involving claims by religious minorities who engage in practices that the majority finds distasteful at best, offensive at worst.

For instance, in a 2007 French Conseil d'Etat decision, a covered Muslim woman was denied citizenship on the ground that she did not fully assimilate into French society, namely that she did not embrace French core values such as gender equality. The court did not articulate what gender equality means, nor did it identify any other "core value" that animated its decision. Rather, it defined French core values in negative fashion, by saying what they are not – they are not the values a covered Muslim woman embraces. To make its case, the government relied upon various pieces of evidence, such as:

- "attended the prefecture several times for interviews, and each time she appeared wearing clothing in the style of women in the Arab Peninsula: a long dark or khaki one-piece dress down to her feet, a veil covering her hair, forehead and chin and, in combination with the veil, another piece of fabric covering the entire face except for her eyes which showed through a slit, which in this area is called the Niqab."

- "did not wear the veil when she lived in Morocco and indicated clearly that she only adopted this garment after her arrival in France at the request of her husband. She says that she wears it more out of habit than conviction."
- "leads a life that is almost reclusive and removed from French society. She does not have any visitors at her apartment; in the morning she does her housework and goes for a walk with her baby or children, and in the afternoon she goes to visit her father or father-in-law… [S]he is able to go shopping on her own, but admits that usually she goes to the supermarket with her husband."

From these facts, the government commissioner concluded that the claimant had not adopted or otherwise acquiesced to the core values of the French Republic, in particular gender equality. Of particular interest is the way in which the commissioner uses the claimant's veiling habit to characterize the quality and content of her values: "She lives in complete submission to the men of her family, which is demonstrated by the clothing that she wears, the organization of her daily life and the statements that she made…showing that she finds this normal."

After reviewing the submissions and evidence, as well as taking into account the European Convention of Human Rights and Fundamental Freedoms, the Conseil d'Etat upheld the government's decision to reject the claimant's application for citizenship. The Conseil held that she adopted "radical religious practices" *(une practique radicale de sa religion)*, which counter the "essential values of French society" *(valeurs essentielles de la communauté française)*, with special reference to gender equality.[1] It agreed with the government that her religious values were contrary to the core values of the society and therefore were an obstacle to her application for citizenship.

A critical analysis of this opinion reveals certain peculiarities about the evidence garnered against the claimant, and its interpretation by the government commissioner. For instance, the commissioner noted that while the claimant can go shopping on her own, she would rather go with her husband. This particular evidence can be understood in different ways. It may be that she would rather shop with her husband because she enjoys her husband's company and might otherwise find shopping alone less enjoyable. Maybe he helps carry any merchandise or groceries that she purchases. The government commissioner, on the other hand, understood this piece of evidence to suggest that the claimant is not an emancipated woman; has not embraced her independence; and therefore has not fully incorporated gender equality as a core value in her life. But even if we stereotypically presume that the claimant's husband is a domineering spouse, we cannot escape the conclusion that the government imposes on her a further cost of not standing up to him.

In this case, the claimant seeks a grant of citizenship. She is not, therefore, making a rights claim. Ironically, though, the core values of French society, such as gender equality, which are the basis for rights claims are the very values used to deny her citizenship. In this case, the values underpinning rights claims are utilized against the petitioner. They can only be used in this fashion, though, by operating on unstated assumptions of what freedom, independence, and gender equality *look like*. In this case, the claimant's appearance, demeanor, and comportment do not conform to those assumptions.

Perhaps the silent operation of such assumptions is inescapable in a heterogeneous society. For, as long as we aspire to govern with regard to majoritarian values, minorities will always suffer, especially in times of national crisis. We cannot ignore that the covered Muslim woman is scrutinized in an increasingly security-conscious world. With the threat of terrorism and the seeming futility of capturing terrorists such as Bin Laden, the covered Muslim woman offers an easy target for pacifying our anxieties about the unseen, undetected, and unexpected terror threat. Whether the language is "security", or in this case "equality", both are postulated as core values without which the particular society will not survive. Consequently, in any conflict of interests or rights, particularly where a minority claimant makes claims upon or against a government body, we can expect that such conflicts will be resolved against minority parties who are viewed as adhering to values that run counter to the majoritarian values that, although often unstated and unnamed, nonetheless inform the assumptions and claims judges can and do make about the common good.

NOTE

[1] For a statement of the case, the relevant legislation, and the conclusions of the government commissioner, see the decision of the Council of State, Case #286798 at: http://www.conseil-etat.fr/ce/jurispd/index_ac_1d0820.shtml (accessed on September 23, 2008).