SHARED CITIZENSHIP AS THE CONTEXT FOR COMPETING HUMAN RIGHTS CLAIMS: TOWARDS A SOCIAL POLICY FRAMEWORK

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ABSTRACT

This paper argues that shared citizenship provides the context and the means for differently situated persons to advance competing human rights claims and that this shared citizenship can be a resource for Human Rights Commissions in Canada to develop social policy that frames competing human rights claims.

I. INTRODUCTION

Competing human rights claims pose a multitude of difficult and pressing challenges. Some challenges are philosophical in nature: should all human rights claims be given equal weight? Other challenges are juridical in nature: how should judges decide cases where competing human rights are at issue? Still other challenges revolve around social policy: can we be proactive and reduce the likelihood of competing human rights claims arising in the first place? How can persons with competing human rights claims reconcile with each other? Can civil society or state institutions be designed that facilitate processes and provide remedies when human rights conflict?

This paper attempts to meet some of the challenges in developing social policy for addressing competing human rights claims. It assumes a *social constructionist* engagement with human rights. Social constructionism is a sociological theory of knowledge that considers how social phenomena develop in social contexts; and seeks to explore rigourously the nuances, contingencies, contestations and meanings that are part and parcel of the social construction of reality. Within constructionist thought, rights are considered as a construct or 'artifact' that is dependent on contingent variables of our social selves. There is now a substantive body of literature examining various aspects of the social practice of human rights. Here, rights are not simply given as divine will, or as transhistorical being, or as universal ontology – but are considered products of human social interaction with all its imbalances and imperfections. From this perspective, human rights are invariably the product of the balance of power between

normatively-oriented social actors in a social-historical context. The argument advanced here is that shared citizenship provides the context for competing human rights claims in Ontario and that this context can provide the Ontario Human Rights Commission (OHRC or Commission) with direction for the development of a social policy framework that addresses competing human rights claims.

II. SOCIAL CONSTRUCTIONIST INSIGHTS FOR HUMAN RIGHTS SOCIAL POLICY DEVELOPMENT

The idea of the 'universality' of rights, argued Malcolm Waters (1996:593), "is itself a human construct." This insight has major implications for human rights social policy development. The social constructionist approach examines what actors actually do with human rights in everyday life, in institutional-settings, and in other specific fields of political contestation. In developing a framework for understanding the social construction of rights, research has begun a move toward foreclosing on the age-old philosophical and ontological status-debates, and focusing on the investigation of their meaning, use and mobilization. Moreover, by declaring an interest in the 'indeterminacy' of rights, social constructionist research is well-placed place to investigate the shifting dynamics of rights disputes, or *competing human rights claims;* which are becoming increasingly prevalent in our transnational and multicultural world. By investigating the social relationships, practices and struggles that mobilize right claims and rights talk, and animate rights disputes, the social constructionist approach can 'bracket' the prevailing dominant discourses and provide a more dynamic and textured understanding of rights.

From a social constructionist perspective, human rights claims should be seen as the product of a particular place and time, and in this respect, historically and socially contingent. This observation is significant in a number of ways. First, rights are not simply inalienable or natural; they are not necessarily beneficial for the rights holder to exercise. Second, human rights were invented in the modern age both as a product of the exercise of a particular type of political power and as a response to a particular form of power (Hunt 2007). Contrary to Lockean political philosophy, 'rights' and 'freedom' were not in existence before 'power', but rather are the distinctive products of the 'new mode of life' that is modern global capitalism (Woodiwiss, 2005: 32). They have a paradoxical nature in that they allow us to challenge inequalities whilst contributing to the production of social divisions. Third, although human rights typically find expression in law, they have a life in society outside the law and do not rely solely on the juridical sphere to dictate their meaning. For this reason, the doctrine of human rights can go beyond law and form a fundamental moral basis for regulating contemporary social order.

Finally, and most importantly, in our society, human rights are a constitutive component of full citizenship and rights claims are an expression of that shared citizenship. In a social constructionist ideal world, social actors go through human rights discourses to get to citizenship. In this ideal world, the mutual recognition of others as human rights bearers is a function of shared citizenship, which shifts the terms of debate from the problems of balancing or reconciling competing human rights claims to their democratic citizenship potential. Here, competitive practice and conflicting rights claims at the individual and collective levels are conceived as disciplinary threads in weaving the social fabric of a fulsome and expanded "social citizenship" (Marshall 1964). This ideal state is an emergent reality that extends the meaning of citizenship rights beyond conventional notions of legal and political equality to encompass social equity rights, including the right to a minimum level of economic security and social welfare assured by the state. These emergent social citizenship rights refer to guarantees of equal opportunity for socially disadvantaged groups, such as women, Aboriginal peoples and other people of colour, to participate fully in the public as well as economic life and to expect a reasonable level of respect and recognition from others. In this ideal social constructivist world, the task of state and institutional social actors, the courts and human rights commissions, is to move democracy forward by increasing the access-avenues to justice. Shared citizenship provides, in other words, the context for these actors to advance competing human rights claims against each other and the state.

III. THE NEW MANDATE OF THE ONTARIO HUMAN RIGHTS COMMISSION

The social constructionist ideal world of competing human rights claims can be shown to fit well with the new mandate of the OHRC given by the *Human Rights Code Amendment Act*, 2006. The new mandate requires the Commission to bridge the gap between public policy and justice administration. Thereby, the Commission is now responsible for developing public policy, as well as, addressing tension and conflict in the province, in order to bring people and communities together to help resolve differences. This new mandate bestows the unique capacity to address multi-faceted social issues with a broad range of processes – those both rule and policy-based, and those left to discretionary decision makers.

Under the mandate of the new *Act*, the Commission has the role of monitoring the state of human rights and to report directly to the people of Ontario. It has been given the power to:

- Expand its work in promoting a culture of human rights in the province
- Conduct public inquiries
- Initiate its own applications (formerly called 'complaints')
- Intervene in proceedings at the Human Rights Tribunal of Ontario (HRTO)
- Focus on engaging in proactive measures to prevent discrimination using public education, policy development, research and analysis

The interpretive principles governing the *Human Rights Code* have been left to the courts. But the new mandate shifts the institutional focus of the Commission from a more legalistic to a more social policy approach. In the words of the Attorney General of Ontario (2008), "[T]he Ontario Human Rights Commission works to promote, protect and advance human rights. Its main focus is to address the root causes of discrimination. Activities include research and monitoring, policy development, and education and training. The Commission also conducts human rights inquiries and may initiate human rights applications or intervene in important cases before the Tribunal. Through outreach, cooperation and partnership the Commission aims to advance Ontario's human rights culture."

In the old human rights structure, the issues of Commission gate-keeping and delay certainly reveal the limitations of the system. The challenge for the new Commission is effecting social policy by bringing people and communities together to help resolve differences, while being at risk of becoming an object of the tension and conflict they seek to resolve. Yet it must be said that, as sophisticated articulations of constitutionally-protected rights emanate from the courts and laypersons perceive a broad spectrum of wrong treatment as, at least potentially actionable discrimination or harassment, the commission system cannot be expected to bear the full weight of responsibility for achieving anti-discrimination social goals. Rosanna Langer (2006) has argued that government-sponsored anti-discrimination enforcement must be situated within a broader set of common practices such as municipal accessibility plans, e.g. those stipulated under the *Ontarians with Disabilities Act,* progressive employment legislation, in-house corporate and employer anti-discrimination and anti-harassment 'best practices," and community-based educational initiatives. A healthy network of anti-discrimination practices is the best insurance of a vital normative fabric of human rights protections.

Meanwhile, the pragmatism of seeking social policy solutions, as opposed to judicial ones, fits comfortably within the new mandate of the Ontario Human Rights Commission. Its new flexibility can also mean increasing the range and repertoire of remedies for fulfilling social justice goals. This includes, and also opens up, the possibility of incorporating Alternative Dispute Resolution (ADR) and 'win-win approaches', rights-based mediation, and the collaborative problem-solving techniques that integrate practical experience with theoretical knowledge.

ADR, for example, has experienced increasing acceptance and utilization primarily because of a perception of greater flexibility, costs below those of traditional litigation, and speedy resolution of disputes. In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster appropriate and effective dispute resolution. Some cases and some complaints are viewed to be appropriate for formal grievance or to go to court or to the police or to a tribunal, and the like. Other conflicts could be settled by the parties if they had enough support and coaching, and yet other cases need third party mediation or arbitration. Thus, ADR usually means a method that is not the courts, and involves processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. Dispute resolution considers all the possible responsible options for conflict resolution that are relevant for a given issue.

Ultimately, the social justice mandate of the OHRC is configured by the assurance of neutral (non-advocate, non-adversarial) communicative interactions, which open up the possibility for contextual problem-solving for the mutual empowerment of human rights bearers. In this world, access to justice ought not to require formal processes for its assurance. The ideal OHRC would be responsible for engaging the public interest goals in anti-discrimination beyond a formulaic rigidity of law, by broadening the constellation of remedies, and preventing the premature legalization of individual and social harms.

IV. IMPLICATIONS FOR A SOCIAL POLICY FRAMEWORK

It has been suggested above that one of the most fundamental insights of a social constructivist approach to human rights is an appreciation of the context in which competing human rights claims are made. In particular, in Ontario shared citizenship in an advanced capitalist global society provides the context and the means for differently situated persons to advance competing human rights claims. These competing human rights claims do

not reflect natural inequalities nor innate differences and conflicts between persons. They reflect instead power dynamics and socially constructed differences among people. But the fact that this conflict and competition is embedded in human rights discourse expresses the social fact that these individuals also share a common citizenship and this shared citizenship can be a resource for developing social policy that frames competing human rights claims.

This approach helps us to identify three important elements that should be considered in the development of a policy framework for the OHRC. The first element revolves around the centrality of the access to justice agenda in its new mandate. Social constructivism highlights the political and economic differences and ideological supports that have created the social cleavages which rouse human right movements in the first place. The OHRC, as an institution committed to human rights in Ontario, must in any balancing rights policy recognize the full continuum of social life, from competition to conflict, and the dimensions of power including their intrusion into the political and economic and ideological structures of society. Human rights discourse in the absence of a clear focus and understanding of differential access to power and resources loses sight of the principle of equality of citizenship. In other words, the policy framework must have integrated within it a component of access to justice.

The second element provides direction for the educational component of the policy framework. It is important that the educational component be organized around the significance of shared citizenship as a resource for mitigating against conflict and being proactive in ensuring that conflict does not escalate. Seeing different claimants as fellow citizens and viewing those citizens in a way that is empathetic holds much greater promise than an adversarial process where there are only winners and losers.

The third element requires accommodating for the social contingency of particular competitions between human rights claims. The challenge of a modern human rights system is to craft social policy in a way that recognizes the overriding importance of human rights protections, and that is flexible enough and fluid enough to allow for changing power dynamics within our society as well as evolving knowledge and new insights about human rights and discrimination.

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