RELIGION AND MULTICULTURALISM

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ABSTRACT

This article focuses on the constitutional protection of religion (the Preamble and section 2(a)) and multiculturalism (section 27) in the Canadian Charter of Rights and Freedoms. It also examines the religious nature or content of many contemporary issues in Canadian society. These include the issue of religiously based arbitrations, the Hérouxville controversy, the protection of religious minorities and its effect on gender equality and the use of cultural/religious defenses in criminal law.

The paper illustrates how religion is the central or core component in many contentious issues confronting policy-makers.

There are many contemporary issues that have arisen as a consequence of living in a society that values multiculturalism. Although some individuals may reluctantly accept or even deny this *de facto* and *de jure* reality, Canada is a truly a multicultural nation. In terms of its demography and in terms of its constitutionally entrenched principles, the Canada of 2007 is a country that embodies diversity in its national fabric.

Religion is, for many, a deeply personal conviction that reflects individual commitment to a set of principles and values. For some, even in North America, religion is an integral part of a political movement. In some nations, religion is the embodiment of that nation's culture and that nation's culture is an embodiment of its religious underpinning.

Daily newspapers present the surprising reality that there are myriad news stories, commentaries and opinions with religious content. There is the ongoing tensions and warfare between Sunnis and Shiites in the Middle East. In Pakistan, a prominent female activist was recently murdered because she refused to wear a veil in public. One reads of the practice of female circumcision in some countries and, on occasion, the possibility that some people might be contemplating similar practices in Canada. There is the influence of religious groups in U.S. politics, the debate over so-called intelligent design and the controversy over the use of stem cells in scientific research.

In Canada, religion remains largely a personal matter that serves as a guide for life and living. But the relationship of an individual to one's deity, as personal as that relationship seems, is arguably being transformed in terms of its societal implications. Recently in Quebec, a soccer referee ruled that an eleven year old girl could not play in a tournament unless she removed her hijab, a decision that was supported by the Premier of that province but not by the International Football Association Board (IFAB). In Bountiful, British Columbia, a breakaway sect of the Mormon church practicing polygamy defends its practice as a tenet of its religious dictates. Elsewhere, there has been much written about the perennial controversy concerning the Gideon International in Canada issuing Bibles to students in public schools. And, of course, there is the seemingly never-ending debate over the issue of same sex marriage.

This paper will explore several instances where contemporary religious issues have had consequences for a multicultural Canadian society.

The Multicultural Heritage of Canadians: Section 27 of the Charter of Rights

Demographically, Canada has undergone changes as a result of government policies that encourage increased immigration. And unlike the United States, which promotes the concept of a population 'melting pot', Canada encourages all citizens to preserve their heritages as part of our cultural mosaic.

Since 1982, we have had a constitutional guarantee of multiculturalism. In particular, section 27 of the *Canadian Charter of Rights and Freedoms* requires that when interpreting and applying other rights and freedoms in the Charter, our courts are required to do so in a way that "preserves and enhances the multicultural heritage of Canadians".

Section 27 does not in and of itself grant any rights, but rather, is an adjectival section. That is, section 27 serves to assist the courts in the interpretation of rights contained elsewhere in the Charter. Even though this use of the multicultural guarantee is of somewhat limited value, it does serve to reaffirm multiculturalism as a Canadian value whenever the section is used. How then has it been used?

During the first decade of Charter experience, from 1982-1991, section 27 was used quite frequently, particularly in cases testing the assertion of freedom of religion, freedom of expression, egalitarian or equality rights and other miscellaneous parts of the Charter.

During the second decade of Charter experience, although the use of section 27 declined, it was still employed in a number of ways. Section 27 was invoked in some cases promoting egalitarianism. It was also used in relation to the legal rights sections of the Charter with respect to those persons in contact with the criminal justice system. One example of this is the right of an accused person to understand the language in which a trial is being conducted. As well, many lawyers added section 27 to their Charter arguments in a last ditch effort to win a case. However, in virtually all of these latter cases, the courts did not even consider the multicultural argument.

Today, it appears that section 27 has continued to decline as a useful and effective tool in reaffirming an important Canadian value.

In the mid-eighties, there had been a case where accused individuals charged with assault wanted to wear their *kirpans* in court. The *kirpan* is a ceremonial dagger that Orthodox Sikhs are required to wear. In that case, the courts decided against the wearing of the *kirpans* in the courtroom, but the case did not reach the Supreme Court of Canada level.

However, more recently, an important case was decided by the Supreme Court of Canada. The Multani or so-called *kirpan* case focused on freedom of religion and dealt with the issue as to whether a local school board could prohibit a Sikh student from bringing a *kirpan* into a school. The Supreme Court supported the position that to deny a Sikh student permission to bring a *kirpan* into school constituted a deprivation of that student's freedom of religion.

Clearly, this case stands out as a strong statement in favour of minority religious freedom. This is important to all religions, especially where the numbers are few and the fight for religious freedom is an ongoing concern.

What is the significance of this case, apart from the obvious victory for freedom of religion? Does the case serve to buttress the legal recognition of multiculturalism in Canada?

Although the case was decided on the basis of freedom of religion, many hailed it as a victory for multiculturalism. In criticizing the decision, one columnist in the *Globe and Mail* described the case as "multiculturalism gone wild".

Significantly, there was reference in that decision to the notion of multiculturalism. However, section 27, our constitutional guarantee of multicultural diversity, was not even used by the Court.

What does this tell us? It tells us that diversity endures as an important Canadian value but also that the usefulness of section 27 as a constitutional guarantee of multiculturalism is questionable. In short, the preservation and enhancement of multiculturalism might not over time be significantly advanced by the use of section 27, but rather, will depend almost entirely on the use of other sections of the Charter.

Section 2(a) of the Canadian Charter of Rights and Freedoms

Section 2(a) of the Charter provides that everyone is entitled to freedom of conscience and religion. While this is the first substantive right set out in the Charter, it is preceded by a Preamble recognizing the supremacy of God.

Obviously, then, religion (and culture in the context of section 27 of the Charter) occupy a significant position in our 1982 constitutional framework. Moreover, the Constitution Act of 1867 has important provisions in relation to separate, religiously-based schools. So religion and the Canadian constitution are interrelated components of our nationhood.

However, returning to section 2(a) of the Charter, since 1982 we have witnessed numerous cases decided under the section. Charter interpretation, however, is a two step process. A litigant who alleges that a law, a regulation, a policy or practice conducted pursuant to law is violative of the Charter must support the allegation. Subsequently, the Crown or the government may attempt to justify the Charter violation under section 1 of the Charter, the so-called limitations clause. Section 1 provides that a law may abrogate or infringe a Charter right if that law is a reasonable limit as can be demonstrably justified in a free and democratic society. To justify the violation as a reasonable limit, the Crown must establish that the law is necessary in order to achieve a pressing and substantial state objective. It also must establish that the means chosen to achieve that objective are rational, non-disproportionate and minimally intrusive. With respect to section 2(a) violations, Canadian courts have adopted an almost absolutist approach to the issue, choosing to accept that almost anything constitutes a religion and that any law that restricts or infringes a religious practice is a violation of section 2(a). That being the case, most section 2(a) cases are determined on the basis of a section 1 analysis as to whether the violation can be justified as a reasonable limit.

There have been dozens of significant cases employing this analysis. These include, for example, the constitutionality of the Lord's Day Act mandating Sunday closing as well as the issues of religious instructions and prayers in public schools. Another case concerns whether a teacher certification agency can prohibit accreditation of teachers who graduated from a teacher-training institution that compelled its student body to adhere to strict religiously based guidelines.

The number of Charter cases invoking section 2(a) is significant. Also of note, however, is that many of these cases have also considered section 27 of the Charter (multiculturalism) in support of a religiously based assertion.

Faith-based Arbitration and Canadian Law

One of the major developments in the Canadian legal system over the past two decades is the tremendous growth of alternative dispute resolution (ADR) mechanisms. ADR serves as an adjunct or complementary means of resolving disputes in a process operating parallel to that of the traditional court system. ADR applies the tenets and traditions of Canadian law in an expeditious and less formal fashion than through the regular courts. A unique

characteristic of arbitration is that disputing parties must agree to submit to the arbitration process and be willing to be bound by its result. So a key issue that emerges is whether all parties to a particular dispute have freely consented to submit to the process without undue pressure.

Over the past three years, much has been written about the move to employ *Sharia* law, the Islamic legal tradition, as a method of settling disputes among Ontario Muslims. *Sharia* dates back more than 1,200 years and is derived from the Qu'ran. The objections most often raised against the application of *Sharia* in ADR relate both to the possible disadvantaged position faced by Muslim women under that legal tradition coupled with the attendant pressure in Muslim families to settle disputes using *Sharia*.

This use of *Sharia* to settle matrimonial and inheritance related disputes is a form of ADR that would operate under the provisions of Ontario's *Arbitration Act*. It has also been suggested that *Sharia* might be employed in other provinces with similarly drafted arbitration acts, such as Alberta.

The Islamic Institute of Civil Justice and the Islamic Supreme Council of Canada are highly supportive of this initiative.[1] In a report to the Ministry of the Attorney General and the Minister Responsible for Women's Issues studying the use of arbitration and family law, former Attorney General Marion Boyd recommended that family law arbitrations based upon religious law be permitted provided certain safeguards be put in place.[2]

Proponents of the use of *Sharia* point to the existing use of similar ADR mechanisms to settle disputes among other faiths, including the application of principles of *Halachah*, in *betei din* or religious courts, by some Orthodox Jews, also under the provisions of the *Arbitration Act*.

The issue then arises as to whether the dictates of *Sharia* or *Halachah*, or whatever law and related values that govern, are appropriate under the circumstances. With respect to *Sharia*, there have been infamous cases in Nigeria of women being sentenced to death by stoning for committing adultery. With respect to Jewish law, there have been recent cases involving the sometimes coercive withholding of the *get*, or consent to divorce, in resolving some matrimonial disputes in Canada.

One should not, of course, equate these extreme penalties to the use of religious-based principles that would be applied in dispute resolutions under the *Arbitration Act*. Rather, the fundamental issue to consider relates to the use of law that is separate and distinct from the law that would otherwise be applied to the vast majority of Canadians. Namely, is there one law for all Canadians or do we fragmentize our legal system and permit the use of different laws to be applied separately to different segments of society?

In a sense, we have already done so to a limited degree in our criminal justice system. As will be mentioned below in the discussion of so-called 'cultural defenses', there is a provision in the Criminal Code that specifically mandates courts to take into account the Aboriginal heritage of an accused as part of the sentencing process. And, in certain cases involving First Nation offenders, the sentencing circle can be used as a form of restorative justice. This addresses both the unique heritage as well as the historical disadvantage that Aboriginal persons have experienced in Canadian society.

But the debate about the use of religion-based ADR underscores the notion that we may be moving away from a uniform legal system toward the application of specialized law to select groups. While this may be somewhat troublesome, at the same time, it is also further recognition that Canada is a multicultural society and that meaningful multiculturalism is more than simply a demographic reality. It may manifest itself in many ways, including having an impact on our traditional legal system.

> In Canada, religion remains largely a personal matter that serves as a guide for life and living. But the relationship of an individual to one's deity, as personal as that relationship seems, is arguably being transformed in terms of its societal implications.

After considerable controversy, the issue was, in part, put to rest with the enactment in Ontario of the *Family Statute Law Amendment Act*, S.O. 2006, c. 1 (Bill 27). This legislation precludes the use of religious law in all family law arbitrations.[3] Although it seemed to cease or at least slow down the move to adopt *Sharia*, it did not put a complete end to the matter. Many Muslims voiced objection to the legislation and many Orthodox Jews were offended that the new law would end the use of *Halachah* or Jewish religious law in formal arbitrations.

The application of faith-based arbitration invites consideration as to whether our legal system should remain a homogeneously applied entity or whether it should demonstrate a flexibility permitting the law to address diverse values and needs within Canadian society.

The Hérouxville Controversy

Section 27 is, in law, an integral part of Canada's constitution and reflects a national value of importance to Canadians and to Canadian life. Notwithstanding this, on occasion there is a backlash to Canadian multiculturalism, a discomfort experienced by some who either are not committed to the principle or who feel that multiculturalism serves to alienate or distance them from their own traditional view of Canadian society.

This is the story of Hérouxville, a small Quebec community. The Hérouxville backlash seems to be directed both at immigrants, generally, and Muslims as well as other religious minorities, in particular. The Municipal Council of the Town of Hérouxville established a set of rules or guidelines for new arrivals.[4] Some of these standards are set out below.

- We would especially like to inform the new arrivals that the lifestyle that they left behind in their birth country cannot be brought here with them and they

would have to adapt to their new social identity;
- …[W]e consider that killing women in public beatings, or burning them alive are not part of our standards of life;
- Please note that there is no law voted democratically that prohibits a woman treating a man and a man treating a woman. In our hospitals woman doctors can treat men and women and the same for the men doctors. This same principle applies for nurses, firemen and women ambulance technicians;
- In our schools the children cannot carry any weapons real or fake, symbolic or not;
- For the last few years to draw away from religious influences or orientation, no locale is made available for prayer or any other form of incantation. Moreover, in many of our schools, no prayer is allowed. We teach more science and less religion;
- You may not hide your face as to be able to identify you while you are in public. The only time you may mask or cover your face is during Halloween;
- No law or work condition imposes the employer to supply a place of prayer or the time during the working day for this activity;
- If our children eat meat, for example, they don't need to know where it came from or who killed it.

One of these standards relates to news stories abroad about the beating of women for religious reasons. Another relates to culturally-based practices in connection with the relationship of men and women. Yet another is a reference to the Multani case, mentioned below, on the wearing of a *kirpan*,[6] or ceremonial dagger, by Orthodox Sikhs in public schools.

Clearly, some religious practices or, more accurately, those involving violence or killing in the name of God have no place anywhere. All persons, for example, must respect the provisions of the Criminal Code, for example. However, all Canadians must also respect the multicultural heritage of new Canadians. For example, in contrast to one of the guidelines set out in the Town of Hérouxville, there are many schools in Canada that provide special rooms for prayer by Muslims during Ramadan.

The Hérouxville standards represent an exaggerated reaction to perceived religious and/or cultural stereotypes and practices attributed to new Canadians.

Conflicting Rights: Religious Minorities and Gender Equality in a Multicultural Society

Most Canadians would subscribe to our constitutionally entrenched values of freedom of religion (including its concomitant notion of respect for religious minorities) and multiculturalism. At what price, however, do we seek to promote those values when they conflict with another constitutionally entrenched provision, namely, that of egalitarianism?

The issue of equality is, in itself, a sensitive issue that challenges many tenets of many of the major organized religions. For example, in recent years, Catholicism has struggled with this issue with respect to the admission of women into the priesthood. And, throughout the Jewish world, there are similar issues regarding the role of women, particularly in traditional branches of that faith community.

Rather than focusing on this deeply felt and contentious matter, this paper is more concerned with how the issue of minority religious freedom has come into conflict with the notion of gender equality in the context of contemporary Canadian society.

Ironically, equality, freedom of religion and multiculturalism are all integral parts of the *Canadian Charter of Rights and Freedoms*. On occasion, these rights are the subject of cases before our courts. For example, in the *Multani* case,[7] the Supreme Court of Canada recognized the right of orthodox Sikh adherents to wear the *kirpan*, or ceremonial dagger, while attending public schools.

However, in recent years, our courts have had to deal with situations where one constitutional right comes into conflict with another constitutional right. This issue of conflicting rights has surfaced not only in terms of cases before the courts, but it also has arisen in respect of various incidents occurring primarily in the province of Quebec. These situations focus on the conflict between the constitutionally protected rights afforded religious minorities and those seeking gender equality.[8]

This clash of rights has centered on the notion of 'reasonable accommodation'. In law, reasonable accommodation is actually quite complex. However, in the present context, this concept addresses the obligation of modern Canadian society to take measures that are necessary in order to accommodate the practices and/or the lifestyle of members of religious minorities.

There have been a number of instances demonstrating the effect of reasonable accommodation upon issues involving gender equality in the Jewish community in Quebec. For example, there is the recent controversy surrounding a YMCA facility being asked and agreeing to cover the windows of its exercise room so that students at a nearby Hasidic (Orthodox Jewish) boys' school would not observe women working out in the gym. Another example is an internal police newsletter suggesting to female officers that it is best that male police officers deal with Hasidic men. There is also the practice that, upon request, only male driving testers be used to evaluate the driving of Hasidic men.

These examples highlight the effect of a policy of reasonable accommodation on societal notions of gender equality, even if the policy is not formally mandated by law. Clearly, reasonable accommodation as a means to protect the Orthodox Jewish religious minority in Quebec has trumped gender equality in the hierarchy of protected rights. And although the above instances relate to the Jewish community, there are other examples of similar conflicts of rights in respect of other religious minorities in Canada.

Our national political leaders have recently expressed opinions on this apparent conflict between reasonable accommodations of religious minorities on the one hand, and gender equality, on the other. Prime Minister Stephen Harper suggested that, while we must encourage diversity in Canada, we must also respect the secular value of gender equality. Similarly, Opposition Leader Stéphane Dion

acknowledged that, while we as a society must be open to the needs of religious minorities, religious minorities must in turn be cognizant that we live in a secular society.

Predictably, some of these matters will end up in court and, no doubt, we will receive some guidance from forthcoming judicial decisions. But in the absence of judicial guidance, society will be left to deal with this dilemma on an issue by issue basis as they inevitably occur.

Cultural Defenses

In some recent criminal cases, cultural/religious defenses have been used, particularly in the context of the sentencing process. Sentencing is a matter falling within the prerogative of the judge seized of a particular case. The Criminal Code expressly specifies that sentencing is a discretionary matter (excepting those instances of offences carrying mandatory minimum). But, the Criminal Code also provides that there are circumstances which must be taken into consideration in the sentencing process. More specifically, section 718.2 of the Code lists several aggravating as well as mitigating factors to be taken into account. These include whether a particular offence was motivated by bias, prejudice or hate (section 718.2 (a)(I)). The section also provides, again in the conduct of sentencing, whether "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders" (section 718.2 (c)).[9] The latter is an express requirement to which a judge must adhere in the sentencing of aboriginal offenders and is a specific invocation of a so-called cultural defense. See, for example, *R. v. Gladue*, [1999] 1 S.C.R. 688 in which the Supreme Court of Canada commented that

> ... [i]t is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

However, there are other instances, not specifically mandated by the Code, in which judges have permitted the use of a cultural defense.[10] In *R. v. Lucien*, (1998), A,Q. No. 8, two black men were convicted of sexual assault of a black woman and were given a conditional sentence requiring 18 months to be served in the community, including 100 hours of community service together with a daily curfew. The maximum sentence for the crime committed was 14 years of imprisonment. The judge commented on the lack of remorse on the part of the accused and the sentence imposed. The judge stated as follows:

> In this case, the absence of remorse of the two accused seems to me to arise more from a particular cultural context with regard to relations with women than to a real problem of a sexual nature.

This decision eventually led to complaints made to the Quebec Judicial Council. However, the Council did not reprimand the judge.

In the case of *R. v. Nouasria*, 500-01-003139-927 (Cour du Québec), a Muslim man was convicted of 4 sexually-related offences committed on his spouse's daughter and a relatively mild sentence was imposed. The judge explained that

> [t]he mitigating factors are… the fact that the accused did not have normal and complete sexual relations with the victim, that is to say, vaginal sexual relations, to be more precise, so that he could preserve her virginity, which seems to be a very important value in their religion. We can say that, in a certain way, the accused spared his victim.

Again, a cultural/religious defense was successfully invoked. There were a number of complaints to the Quebec Judicial Council. The Council decided that no disciplinary action should be taken against the judge.

One could argue that these examples are more illustrative of sexist attitudes rather than consideration of cultural or religious imperatives.

The notion of a cultural defense is given limited recognition in the Criminal Code. Moreover, its use in particular cases is rare, attracts controversy when it is employed and, when the controversy is based on legitimate criticism, it leads to little consequence in terms of judicial accountability. It is difficult to predict whether there will be greater use of similar defenses in the future, however, precedents have been established. The central point is the use of religion/culture in a context not traditionally known to the Canadian legal system.

Conclusion

Clearly, religion is an issue that has significant legal and constitutional implications. Religion is also at the core of many contemporary issues that dominate the political and social arena. While occasionally it is argued that historically, Canada is a Christian nation, it is also claimed that modern Canada is, in reality, a secular nation. The truth is that however one characterizes the nature of Canada, its body politic and its courts are often engaged in addressing religiously-based issues. Perhaps the reference to the supremacy of God in the Preamble to the Charter, together with the later reference to multiculturalism, give us significant insight into the true nature of Canada and its underlying fabric.

Notes

[1] In an earlier example of advocacy in this regard, the Canadian Society of Muslims conducted a review of Ontario's justice system from a Muslim perspective and proposed the creation of new alternatives in resolving family law disputes based upon Muslim religious law. The Society advocated the establishment of a Muslim Arbitration Board. See Canadian Society of Muslims. (1994). *The review of the Ontario civil justice system*. Submission to the Ontario Civil Justice Review Task Force.

[2] Boyd, Marion. (December 2004). *Dispute resolution in family law: Protecting choice, promoting inclusion*. For several views on this issue, see also Saloojee, Riad. (2004, September 6). How Sharia Law could work in Ontario. *Calgary Herald*, Calgary, Alberta.(this article also advocated the use of safeguards in *Sharia*-based arbitrations); Thornback, James. (2005). The portrayal of *Sharia* in Ontario. *Appeal: Review of Current Law and Law Reform*, 10 Appeal 1-12; Morris, Catherine. (2006, January 25). Media's mediation and other matters: Faith-based dispute resolution in Canada. Speaking notes for panel presentation. ADR Subsection, BC Branch, Canadian Bar Association, Vancouver, BC, Canada; Bakht, Nathasha. (2004). Family arbitration using Sharia Law: Examining Ontario's Arbitration Act and its impact on women. *Muslim World Journal of Human Rights*; and Dondy-Kaplan, Polly and Bakht, Natasha. (2006). *The application of religious law in family law arbitration across Canada*. Women's Legal Education and Action Fund.

[3] For a critical commentary on this legislation, see Kutty, Faisal. (2006). Faith-based arbitrations in Ontario: a lost opportunity. *The Lawyers Weekly*.

[4] These standards have attracted international attention. For example, a B.B.C. news story titled, "No Stoning, Canada's Migrants Told", appeared on January 31, 2007.

[5] English translation

[6] See the section below on conflicting rights between the protection of religious minorities and gender equality in a multicultural society.

[7] *Multani v.Commission scholaire Marguerite-Bourgeouys*, [2006] 1 S.C.R. 256.

[8] This issue, in fact, has given rise to attention in the media, including articles appearing in the *Globe and Mail* and the *National Post* (February 3, 2007).

[9] See Rudin, Jonathan. (1999, February 9). Aboriginal offenders and the Criminal Code. *The Globe and Mail*.

[10] See Fournier, Pascale. (2002). *The ghettoisation of difference in Canada: 'Rape by culture' and the danger of a 'cultural defense' in Criminal Law trials*. 29 Man. L. J. 81.

[11] I wish to acknowledge the research assistance of two talented law students, Stephanie Chau, and Nigel Forster.