LEGAL FRAMEWORKS: THE RECONCILIATION MODEL

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ABSTRACT

The author proposes a method of reconciling "rights in tension" (a phrase the author prefers to "competing rights"), recognizing that sometimes rights claims will be too antithetical to the rights of others or to societal values to permit reconciliation. She discusses three examples of religious and equality rights in tension.

I. INTRODUCTION

The international emergence of "rights" was reinforced in Canada by the *Canadian Bill of Rights*, human rights legislation and the *Canadian Charter of Rights and Freedoms*. Individual (or group) rights dominate the discourse, encouraging the "pitting" of rights against each other or against broader societal concerns.

In addressing "competing" rights claims, it is preferable to consider how to reconcile or balance claims. Balancing may have the connotation of "trumping", but "reconciling" sees rights as having softer contours because different rights find their meaning in the same overall understanding of the relevant legal document or in the overriding values of society (Iacobucci, 2003; cf. *Kapp* (2008)).

Since "competing" rights connotes an adversarial process, I use the term "rights in tension". Nevertheless, recognition of both rights, even modified, may not be possible because one right is antithetical to the other or to societal values. Then the label "competing" might ultimately be appropriate. I use "interests" (with a moral or other status), as well as "rights" (which have legal recognition).

Rights recognize the complexity of human interaction, reflecting the need for "freedom" and "belonging" Tully (2002). Reconciling "rights in tension" requires defining the nature of society, one which acknowledges that we be mindful of the impact of our individual exercise of individual rights on others. Reconciliation reflects a pluralist view of Canadian society: characterized by recognition of the complexity of interests, by a system of values transcending the individual rights and by a means of accessing these rights.

The process of reconciling rights in tension requires two major inquiries:

- To what extent does one right interfere with the enjoyment of the other right? The more one right infringes the other, the less likely that a rights claim can be recognized in its existing form.
- To what extent are the rights or interests consistent with or apparently antithetical to broad societal values or interests? The greater the dissonance, the less likely a right claim will be recognized, *especially when it denies the rights of others.*

To be clear, not conforming to significant societal values or interests is not by itself a reason to deny a rights claim. In a pluralist society diverse viewpoints are part of the fabric of the society.

Guidance for a reconciliation approach may be found in section 9.1 of the Quebec *Charter of Human Rights and Freedoms*: "[i]n exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec." Section 1 of the *Canadian Charter* places the onus on the state to justify the limitations on rights; individuals are to accept limitations

imposed on them, rather than explore themselves how the exercise of their rights affects others in the community. The idea of "reconciliation" suggests the idea of "rights as relationship" (Nedelsky, 1996), rather than rights as individual "property".

II. ILLUSTRATIONS

Freedom of religion and equality (including religious equality) illustrate how rights may be said to "compete".

A secular and pluralist country faces two interrelated challenges in its treatment of religion: how to protect the private exercise of religious beliefs and how much it will allow or facilitate their public exercise; and the legitimacy of state condonation of religious practices contrary to other widespread values such as equality. The difficult challenge arises when groups with views opposing mainstream values seek positive endorsement by the state of their internal practices or when they want to influence the mainstream society's approach to certain issues.

Below I discuss three illustrations.

1. RELIGIOUS CLAIMS AND EQUALITY OF THE LGBT COMMUNITY: PRIVATE OR PUBLIC?

Trinity Western University sought approval of its teaching program. It required teachers, students and others to sign a code setting out community standards, including refraining from "homosexual" conduct which it described as a "sin". In considering whether TWU discriminated, the Supreme Court of Canada held that the equality concerns of students, described as shared by society, were not infringed because the code did not translate into discrimination in the classroom, in word or deed. The Court limited its analysis to the university/school context and thus to the extent homosexuals were harmed, it is that they would not feel welcome at TWU.

This analysis does not consider that state tolerance of discriminatory codes itself might harm those whose conduct is said to be "sinful". However tolerated in a private context, once the state approves the organization's public participation, the state's commitment to certain values comes into play, including the equality interest of "homosexuals" in being presented as full members of Canadian society. The Code now becomes, albeit inferentially, a state sanctioned document that needs to be assessed against the right to be portrayed as equal members of society.

The religious-based claim at issue in *TWU* could have been better framed as whether the right, on the basis of religious belief, to harm members of a group by assumptions and words about their moral worth could be reconciled with the equality right not to be the subject of words that might cause "damage … of grave psychological and social consequence" (*Keegstra*, 1990, para.60).

In *Reference re Same-Sex Marriage* (2004), the Court concluded, at para. 46, that "[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster." It is important to determine whether a claim not to be required to perform same sex marriage is *based on* denying some people the right of a state sanctioned practice in the hands of a state sanctioned official, a case in which beliefs are translated into action. While it is unlikely that a same-sex couple would choose to be married by someone with these views, it is the case that their desire to be married is not premised on denying marriage to others nor on not allowing others to hold certain religious views, while the refusal of someone to marry them on the basis of religious views is *premised* on the denial of the couple's equality rights. This is a nuanced distinction, but it is not an irrelevant one in thinking about how to reconcile apparently opposing rights in cases where reconciliation is difficult to achieve. (The right to refuse to marry same sex couples is the subject of a reference to the Saskatchewan Court of Appeal: (CBCnews, May 2010)).

2. RELIGIOUS CLAIMS AND GENDER EQUALITY: PROVOCATION

In *R. v. Humaid* (2006), Humaid admitted that he had killed his wife, but argued provocation. He believed that she had been unfaithful to him. He relied on expert testimony that in Islam infidelity, particularly by women, is "a very serious violation of the family's honour and worthy of harsh punishment by the male members of the family" (*Humaid*, para.67). Doherty J.A. commented on "the nub of the problem" raised by the argument that Humaid's "religious and cultural beliefs should have been factored into the 'ordinary person' test" relevant to the provocation defence. While these beliefs will be considered when the insult at issue is targeted at the accused's beliefs, in this case, the insult was not *targeted* at Humaid's beliefs; rather the argument is that it be given increased gravity *because of* his beliefs. Doherty J.A. sets the issue squarely at paragraph 93, commenting that Humaid's beliefs are premised on women's inferiority and acceptance or even encouragement of violence against women. He said, "These beliefs are antithetical to fundamental Canadian values, including gender equality. It is arguable that as a matter of criminal law policy, the 'ordinary person' cannot be fixed with beliefs that are irreconcilable with fundamental Canadian values."

3. THE INTERSECTION OF RELIGION AND EQUALITY: THE BURQA

Challenges to wearing the burqa, niqab or chador have been at the forefront in different countries. In the U.K., judges have discretion to decide whether lawyers and legal advisors and others are able to wear the niqab (full face covering) in court (JSB Equal Treatment Bench Book, 2007). In France, there have been proposals to ban the wearing of the burqa in public places. (CBCnews, January 2010). In Canada, the issue has arisen with respect to voting, being a witness and receiving or providing public services, as well as other contexts. The rights or interests are those of religion (although the burqa's religious status is debatable), of equality (of the women who wear it, apparently whether they say they choose to do so or not) and of societal interests such as security, the integrity of the election process or assumptions about appropriate court procedures. These interests are complicated since, for example, the women wearing burqas are claimed to have both religious and gender equality interests, depending on perspective.

What is it, then, that troubles us about the burqa? The wearer is unknown and unknowable. In western society, the covered face, apart from being covered as protection from physical danger such as cold weather, represents the desire to be secretive, in fun or in earnest. In a world where we are more and more open to public scrutiny, whether we wish to be or not, the woman wearing a burqa is able to maintain her privacy, even while she sees everything others see. It cannot be ignored, too, that the burqa carries a connotation of other beliefs that might be contrary or threatening to mainstream Canadian norms.

Are the tensions really about this subtext? Or about *real* interests that justify the limitation on women's religious freedom (if this is why they wear the burqa)? How do "we" decide whether prohibiting the wearing of the burqa limits or advances women's equality? Does gender equality work for or against women's "choice"? Are there practical solutions that might resolve legitimate concerns?

III. CONCLUSIONS

Rights do not exist in isolation, nor, in most cases, do those who make rights claims. They live in a society in which the rights of others and the broader interests of society as a whole may be affected by their claims. Conceptualizing different rights claims as "competing rights" sets the stage for an interpretation that results in the triumph of one right over another. Thinking about them as "rights in tension" permits a more nuanced assessment of how rights interrelate with each other and with broader societal interests. This does not mean that there may not be situations in which rights cannot be reconciled, in which "compromise" is asking too much of the claimants or constitutes too much of a challenge to societal interests. "Rights in tension" or "reconciling rights" does mean, however, that rights analysis is more reflective of societal dynamics – or of what those dynamics ought to be in a secular pluralist society.

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