SEXUAL ORIENTATION AND RELIGION: SORTING OUT POLICY CONFLICTS[1]

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ABSTRACT

Conflicts between religious rights and other Charter-based equality rights involve deep-seated matters of dearly-held and highly personal individual beliefs. This paper provides a survey of the cases in this area over the last decade across Canada, concentrating in particular on the Surrey book banning and the Saskatchewan marriage commissioner case. Rather than taking a philosophical, jurisprudential, or partisan political approach to Charter questions, this paper argues that the methods of democratic deliberation may provide an effective means of processing conflicts between religious rights and lesbian and gay rights. The paper concludes by considering some of the conditions that must be met for successful deliberation.

I. INTRODUCTION

Conflicts between religious rights and other *Charter*-based equality rights involve deep-seated matters of dearly-held and highly personal belief. Scholars in political and legal philosophy have long puzzled over how to reconcile seemingly irreconcilable rights conflicts and judges have been called upon to rule in disputes in which each side claims fundamental *Charter* values. In this paper, I present a brief overview of some of the key recent cases in this area. I argue that methods of democratic deliberation may complement litigation as a means for policy-makers to process conflicts between religious rights on the one hand, and lesbian and gay rights on the other hand.

II. RECENT CASES

Over the last fifteen years, there has been a stream of litigation pitting advocates of specific religious values claiming freedom of religion against advocates of lesbian and gay rights claiming equality rights under the Charter. Some of these issues have included the introduction of reading material depicting children with same-sex parents in elementary schools (the Surrey book banning in BC); teacher training for public schools (Trinity Western University case); the debate over the recognition of same-sex relationships and same-sex marriage (1995-2005); the Owens and Boissoin cases on speech; cases on employment discrimination (Heintz) and discrimination in the provision of services (Brockie) in Ontario; and the ongoing case of a Saskatchewan marriage commissioner who has refused to perform same-sex marriages (Nichols).

In each of these cases, Christian evangelicals claim that their freedom of religion is infringed by the assertion of same-sex equality rights. Two of the cases concerned the moral status of homosexuality itself, especially in relation to the education system. Other cases concerned the status of same-sex relationships and the legal recognition of such relationships in provincial and federal jurisdictions. The Boissoin and Owens cases concern the

publication of statements condemning homosexuality, the Heintz case concerns employment discrimination on the basis of sexual orientation, and the Brockie case concerns the refusal of service to a lesbian and gay organization.

This debate has more than two sides, however. In both the "religious" and 'lesbian and gay rights' camps, there are multiple voices with different stances across a range of current policy issues including education, free speech, and the administration of same-sex marriage. In Canada, religious opinion on same-sex marriage is divided, while, in the queer community, there are those who oppose the campaign for same-sex marriage as normalizing same-sex relationships and undermining distinctive urban queer cultures, while other same-sex couples favour state recognition of same-sex relationships and define the issue as one of fundamental human rights (Smith 2008). In the next two sections, I provide a brief overview of two important cases from different parts of Canada as exemplars of the types of rights conflicts that may arise.

A. SURREY BOOK BANNING, 2000

In the mid-1990s, gay teachers in the public schools of the Vancouver suburbs of Surrey and Port Coquitlam challenged their school board's decision to ban gay and lesbian-positive reading material in the elementary school classroom. Activist teachers put forth a counter discourse that challenged *heteronormativity,* or the assumption that heterosexuality is the norm from which lesbian, gay, and bisexual people "deviate." Heteronormative practices imply heterosexism, i.e. that is, they imply that heterosexual families and relationships are natural, normal and better than homosexual and lesbian relationships. Heteronormative practices oppress through silence and exclusion, while heterosexism refers to an overt valorization of heterosexuality over homosexuality (Peel 2001). The activism of gay teachers and the British Columbia Teachers' Federation (BCTF) on this issue was strongly opposed by the evangelical right wing in B.C. By the mid-nineties, evangelicals had organized to obtain seats in local government and had succeeded in dominating elections to the school board in the Vancouver suburb of Surrey. The Surrey School Board was at loggerheads with the BCTF, objecting to presentations on anti-racism in the schools and banning Gay-Straight Alliances, the only school board to do so in BC (BCTF 2000).

The arguments of the case went beyond the simple demand for inclusion by raising the issue of heteronormativity and pointing to the costs for lesbians and gays themselves of the "enforced visibility" of exclusion and silencing. Chamberlain and his allies argued that treating lesbian and gay behaviour as if it is something that can only be tolerated in the private realm is oppressive because it erases lesbian and gay people from the school and from the family. This erasure is deeply stigmatizing for children with same-sex parents and creates another generation who view lesbian and gay life as deviant from the heterosexual norm. This issue was directly joined in the legal debate as the Christian right claimed the protection of religious freedom, arguing that including the books in the classroom or as approved learning resources would send the message that homosexuality was condoned by or encouraged in the school system. Of course, this is the precise message that activist teachers wanted to send. By arguing that lesbian and gay-positive reading material should be introduced at the elementary level, activist teachers were seeking to challenge the socialization of the next generation and to normalize lesbian and gay life (Fisher 2002; GALE 2000).

B. *NICHOLS V M.J.*, 2009

In 2005, following the legalization of same-sex civil marriage in Canada, Orville Nichols, a marriage commissioner in Saskatchewan, launched a human rights complaint arguing that his freedom of religion would be violated if he were asked to marry a same-sex couple. This complaint was dismissed by the Saskatchewan Human Rights Commission in 2006. At around the same time, a gay man ("M.J.") applied to get married in Saskatchewan and Nichols refused to perform the marriage, stating that it was against his religious beliefs. M. J. filed a human rights complaint against Nichols, which was adjudicated in M.J.'s favour by a Saskatchewan human rights tribunal in 2007. Nichols was ordered to pay $2,500 and to perform marriages of same-sex couples when called upon to do so under his duties as marriage commissioner. Nichols in turn appealed the ruling of the tribunal but lost his case in the Saskatchewan Court of Queen's Bench in July, 2009. In explaining his religious beliefs, Nichols stated that the Bible teaches him that "God hates homosexuals" (CBC News 2009; see also CBC News 2008).

In this case, Nichols's freedom of religion was pitted against his duties as a marriage commissioner performing civil marriage under Canadian law. The right to same-sex marriage would be meaningless if access was restricted because of the refusal of marriage commissioners to perform the ceremony. As the determination of the capacity to marry is a federal power, federal jurisdiction would also be undermined if the provincial power over the administration of marriage was used to circumvent a federal law. Further, it is very clear that the state's recognition of marriage in Canada is a civil, not a religious matter, as the legislation states: "nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs

and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs (*Civil Marriage Act,* S.C. 2005, c. 33)." Further, the Charter's protection for religious officials who refuse to marry same-sex couples on religious grounds was upheld by the Supreme Court of Canada in the reference case of 2004 (*Reference re Same-Sex Marriage* 2004). Nonetheless, some have argued that individual marriage commissioners should be able to pass the duty of performing same-sex marriages on to other commissioners if they have a religious or conscientious objection.

III. DELIBERATIVE DEMOCRACY

These cases demonstrate that there are strong views on different sides of the issue. However, litigation is an adversarial system in which there are winners and losers, each of which defines a position in jurisprudential terms. In contrast, a deliberative approach recognizes issues are by definition multifaceted and that they may be defined in terms of the voices of the stakeholders as well as the general public. From this perspective, the law itself is seen as mutable and solutions to interpretative conflicts over balancing religious rights and equality rights are not to be found in black letter constitutional law. Although deliberation emphasizes the importance of active listening and participating, it is based on the political idea that there is more than one way to balance rights that come into conflict.

Deliberation brings the stakeholders and policy-makers into conversation with each other through mechanisms such as citizen juries, consultative fora, or citizens' assemblies (Fishkin and Luston 2003; Gastil 2000). When we are discussing issues that are deeply held reflections of personal identity and belief, a deliberative forum can provide the opportunity for deeply entrenched opponents to listen respectfully to each other and to walk in each other's shoes. When given the opportunity to enter into conversation on the basis of mutual respect, what may appear to be two sides of an issue may transform into many sides and, out of many sides, a compromise position may be found which, while it is not the first choice of either side, may be minimally acceptable. These solutions may be seen as more legitimate and just, rather than remedies imposed by courts, and may open up new policy pathways for governments who are considering how to manage diversity conflicts (see the discussion in Warren 2006).

Deliberation may be organized in many different ways and deliberative exercises vary according to the nature and range of participants, the length of the deliberative process, the extent of its institutionalization, and the framing and resources of the participants. One of the most important questions is, who participates in the deliberation? Is the deliberative exercise organized for the mythical 'ordinary' citizen? Or, is the exercise organized for stakeholder groups? Do individuals speak for themselves or do individuals speak on behalf of groups? Related to this is the question of how individuals or groups are selected to participate in the process. Some of the mechanisms, such as the citizen jury, are institutionalized means of bringing a sample of mythical 'ordinary' citizens into the policy process to consider an issue of public policy. Other concepts, such as citizen engagement, seek to bring citizens together for consultation or in particular policy areas.

Political theorist Archon Fung has provided a parsimonious scheme to understand different types of deliberation. His schema considers a range of options along three different dimensions: who participates, how communication and decisions occur, and the link between deliberation and authoritative decisions (i.e. law-making and implementation) (Fung 2006). Fung provides numerous examples of deliberative exercises from the U.S., many of them based in urban areas around issues such as policing, arguing that "[c]itizens can be the shock troops of democracy. Properly deployed, their local knowledge, wisdom, commitment, authority, even rectitude can address wicked failures of legitimacy, justice, and effectiveness (Fung 2006: 74). Fung also makes clear, however, that successful deliberation consumes an incredible amount of time and energy from those who participate as well as the commitment of government and agency officials to crafting rules and procedures for successful communication and decision-making. Many of his examples are core issues of the implementation of public policy and public administration, rather than constitutional and jurisprudential questions such as the balance of religious freedom and equality rights, as we are dealing with here. Can the lessons of public administration be applied successfully to the conflicts between deeply held religious beliefs and equality rights?

I would argue that, in specific cases, stakeholder consultation based on deliberative principles can provide a useful complement to the adversarial structure of litigation. In public policy, controversies such as the debate over the marriage commissioners, a deliberative consultation held by human rights commissions can provide the means for different stakeholders to convey nuanced and diverse views on the issues. Deliberation creates a civil space which, unlike the disconnected postings of lone bloggers, adversaries must listen to each others' views and arguments in the same room. The creation of a civil space in which advocates of very different views agree to come together is one of the advantages of face-

to-face deliberation.

Deliberative exercises must be based on agreed-upon rules of personal conduct and even pre-determined limits on forms of speech such as blanket condemnation of all religions and religious people or statements that gay men and lesbians are seeking sexual access to children. Furthermore, the playing field must be level in terms of economic resources for deliberation. The economic costs of participation must be recognized, as well as the costs of developing deliberative expertise among stakeholders.

Much of Archon Fung's framework is also based on bringing groups of citizens into dialogue with state agencies; however, in the case of religion and sexual orientation, we need to bring groups of citizens into *dialogue with each other* in a context in which state agencies are providing the structure and the economic resources for democratic dialogue. Neutral third parties must manage the process and all sides must buy in to the structure of the deliberative exercise.

Finally, deliberation over these kinds of issues must be based on recognition of the different power relations that underpin the resources and historical position of the stakeholders. Christianity has been the dominant religion in Canadian society since European settlement. While Canadian society has undergone substantial secularization over the last forty years, Christian churches in Canada command impressive economic and financial resources, institutional infrastructure, constitutional guarantees of publically funded religious education, tax exempt status and direct access to politicians and government. In contrast, Canadian lesbian and gay organizations are poorly resourced and organizationally fragmented. As a long stigmatized minority group, some lesbian and gay citizens have hardly come out and may hardly have come to terms with their sexual identity, while Christians enjoy a long-dominant social identity, which is well integrated in most Canadian communities. In the recent past, lesbians and gay men in Canada have been jailed, bullied, physically assaulted, and subjected to systematic discrimination in every area of life, from the most intimate areas of sexuality, relationships, and parenting, to the public arenas of politics and employment. Any deliberative exercise must take these inequalities in power relations into account in its design of the three key elements identified by Fung: participation, communication, and authority.

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NOTE

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