

Charter precludes unequal regimes

The controversy that has raged over religious-based arbitration of family disputes involves the highest principles within the modern state. Despite the richness of the debate, the constitutional dimensions of the controversy were not fully clarified. These dimensions can help us understand the significance of rejecting this type of arbitration in Ontario and in Quebec. It also suggests ways to frame public policy in this area in the future.

The primary commitment of the constitutional state is to recognize and affirm the full personhood of every member of society. This premise displaces traditional modes of social ordering, often based entangled with religious teachings. Within traditional social ordering, privileges vested in certain individuals, including the power to dictate the terms and continuation of that privilege. This privilege took many forms, both private and public, and held tight to the substantive core of family law. It shaped our intimate relationships, set the terms of family formation and dissolution, and delineated the rules for participation in the public sphere.

The rejection of this regime of privilege has been a prolonged and arduous process, which began before the Charter and continues under it. The Charter gives express directives for this continuing process, by establishing as supreme law the entitlement to equal personhood for all members of Canadian society regardless of considerations such as gender, age, religion, disability, and sexual orientation.

This commitment to equality has reconfigured the relationship between religious precept, belief, and practice on the one hand, and the state on the other. We see this reconfiguration reflected in the Charter's text and interpretation. So, for example, the reference to the "supremacy of God" in its preamble yields to the stipulation that the Constitution of Canada is "supreme law."

The Charter's protection of freedom of conscience and religion dictates that religious precept, belief, and practice do not pre-empt individual conscience in the public sphere. The Supreme Court has elaborated that idea by observing that Charter protection extends to freedom of religion, freedom from religion, and the equality of all religions. In addition, the Charter prohibits state discrimination on the basis of religion and sex.

The Supreme Court has made clear that the Charter does not recognize as constitutionally legitimate any claim asserted by religious communities today to the extension of



Second Opinion

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pre-Charter benefits to particular religious communities.

The Charter's two main interpretative clauses also stipulate the predominance of individual personhood over religious life or communal membership. So, while charter interpretation must be consistent with the "preservation and enhancement of the multicultural heritage of Canadians," the reading of all Charter guarantees must effectuate their equal guarantee to men and to women.

This stipulation of gender equality operates notwithstanding any other Charter provision. Thus, it stands prior to any consideration of multiculturalism. It also precludes the state from justifying an encroachment upon gender equality on the basis that the encroachment respects or forwards multiculturalism.

To give Canadian courts authority to enforce arbitration orders determined according to religious law could undermine the Charter's clear construction of the state's relationship with all individuals, male and female, as unmediated by the legal precepts of a particular faith or the cultural norms of a faith community. This inhibition applies to majority religions as well as minority religions, as the recent debate on same-sex marriage affirmed.

The constitutional principles at stake do not arise only when harm is present or apprehended. Were the state to expend the utmost effort to reduce the likelihood of discernible, quantifiable harm, this relationship would be undermined. In any event, there is no way to study or measure the impairment of respect for full personhood of those directly or indirectly affected by such arbitration awards over time.

It is no answer to say participation in these arbitrations is based on voluntary commitment to the authority of religious precept in one's own life and to a faith or ethnic community. The state cannot: test the quality of consent; make assumptions about the authenticity of these precepts; or validate the work of the institutional delivery system within these communities.

The recent debate has raised important questions as to the mixing of cultur-

al and religious norms, the training and qualifications of community leaders, and the possibility of undue influence by family members, social networks, and community leaders.

There is no breach of freedom of religion in the denial of state enforcement of arbitral awards based on religious precept. Traditional religious communities tend not to afford women full access to education in the legal norms and social practices of their religious traditions or full participation in their formation, application, and evolution.

These communities often retain attitudes to equal personhood that are at odds with those entrenched in the Canadian legal system. For example, they may have different understandings of the autonomy of the female body, sexuality and sex education, courtship, intimate relations, child rearing and punishment, adultery, physical and sexual violence, polygamy, education and vocation, and participation in the public sphere.

The Constitution cannot permit the entry (or re-entry) of these understandings into the public sphere through state enforced faith-based arbitration. In the final analysis, the state can exercise its monopoly on coercion only to forward public values, not the aspirations of particular communities.

With the determination that courts will not enforce faith-based arbitration awards, attention must now turn to the safeguards appropriate to private ordering. It is important that all Canadian women have access to dispute resolution processes that respects their full personhood as well as their fidelity to their faith traditions and communities.

In the past, the federal and Ontario governments legislated to neutralize the power that Jewish law vested in husbands to withhold a religious divorce, because this power distorted the negotiating position of women in the resolution of property and custody disputes. Similar types of intervention might be appropriate in other communities.

It would be contrary to our constitutional framework to allow state endorsement of religious rulings that may undermine the full personhood of members of Canadian society. While the Charter affirms our relationship with received and chosen identity communities, it also respects, indeed insists upon, our full individuality in our interactions with the state. LT

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