Charter reconstructs indecency standard

In two recent judgments, the Supreme Court of Canada redefined the Criminal Code's indecency standard to comply with Charter principles. This exercise in statutory interpretation reflects the strong influence the Charter extends over the full range of legal analysis, far beyond invalidating individual laws on the basis of specific rights claims.

The question before the court was the meaning of the Criminal Code's reference to indecency as it applied to two commercial ventures, which offered their clientele the opportunity to socialize with people who had gathered to engage in or watch group sex.

With almost no mention of the Charter, indeed with no specific Charter claim raised, the court sculpted a set of legal standards for indecency that reflect core principles. As one of the first major cases decided by a full bench that includes the two new Ontario appointees, Justices Louise Charron and Rosalie Abella, these judgments confirm the Charter's continuing transformative force.

R. v. Labeye and R. v. Kouri had none of the standard features of Charter litigation. They were criminal cases of keeping a common bawdy-house. There were no specific Charter claims analyzed, no application of the standard Charter methodology as to the infringement and justified limitation of a guaranteed right or freedom, and no public interest intervenors at hand to provide social science expertise, data, or comparative reference material.

Nonetheless, the majority of the Supreme Court invoked a number of principles embedded in the Charter to set aside the long-standing community tolerance test in favour of a harm-based approach. These principles included respect for individual autonomy, liberty, and human dignity as well as commitment to the rule of law.

These principles inform the new approach to indecency in two ways. First, the court's majority, made up of seven members including the two new appointees, affirmed the freedom of those who wish to engage in or watch group sexual practices even while acknowledging that many, perhaps most members of Canadian society, would condemn these practices as distasteful, offensive, or immoral.

This affirmation necessitated the abandonment of longstanding distinctions between public and private places. The majority concluded that the various techniques designed by the accused to ensure that their clientele were fully informed and disposed to the activities on offer rendered these spaces private rather than public.

Second, the majority affirmed the interest of others to be free from unwanted, unexpected, and even deeply offensive contact with the same activities in carrying on the functions of their day-to-day lives.

This consideration was the first of three standards of harm the majority laid out as indicators of indecency. It labelled this the harm of public confrontation, saying it was analogous to nuisance.

Next came the harm of incitation — attitudinal changes, such as perpetuation of negative and demeaning images of humanity, that might undermine respect for some members of society and lead to anti-social behaviour at their expense. Again, Charter principles were in the forefront of the analysis.

The final standard related to actual physical or psychological harm to the individuals engaging in the sexual activity. The majority explicated this standard with reference to criminal offences, such as acts of sexual, abuse or violence. In this instance, careful attention to the actuality of consent would be warranted to safeguard against victimization.

This harm-based approach also required abandonment of the community standard of tolerance test. That test had, in effect, prompted trials of fact and expert witnesses to impose their own subjective, personal views of sexual morality, which they took to be reasonable and representative. This dynamic had taken hold because Parliament had not provided the standard of indecency with any objective precision.

Social conservatives have condemned Labeye and Kouri for displacing democratic policy choices. In this instance, as in others, however, these critics put forward institutional arguments instead of social policy positions they know no longer reflect public support. They, like the court's two dissenters, would prefer the continued application of standards of criminality based on uninformed deliberations about social consensus, morality, and personal corruption.

The majority made clear that, while the harm-based approach had the advantage of an objective basis in formally affirmed, fundamental principles, subsequent cases would have to delineate its full parameters. Future cases would also have to consider a challenging second analytic stage of inquiry, unnecessary to the resolution of Kouri and Labeye, whether the degree of harm met the high threshold of 'incompatibility with the proper functioning of Canadian society.'

These judgments stand in a line of cases that have challenged Canadians to re-evaluate the place of traditional, often religious-based, moral standards in our legal system generally and, most importantly, in our criminal law.

These cases have made clear that it is the Charter, and other instruments reflecting fundamental principles, such as autonomy and respect for human dignity, that provide the tools for identifying criminal acts, not presumed social consensus and moral beliefs that belie the tolerance and diversity of our public sphere.

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