TWO APPROACHES TO FREEDOM OF RELIGION IN CANADA

The Quebec Court of Appeal rendered judgement in March on an *Act respecting the laicity of the State*, commonly referred to as Bill 21. The complexity of the case before the Court cannot be overstated. Opponents of Bill 21 did a thorough job in challenging the legislation, but with one exception – the right of elected members of the National Assembly to wear religious symbols – none of the arguments succeeded.

The purpose of Bill 21 is reflected in the Act's preamble, "to determine the principles according to which and manner in which relations between the State and religions are to be governed in Québec."

This is an extraordinary statement by the National Assembly. Constitutionalists will argue that these principles are enshrined in the fundamental freedoms enumerated in section 1 of the *Canadian Charter of Rights and Freedoms*, and the attending jurisprudence handed down over the years by the Supreme Court of Canada. Others will argue, again in the words of the Act's preamble, that "the Québec nation has its own characteristics, one of which is its civil law tradition, distinct social values and a specific history that have led it to develop a particular attachment to State laicity."

At issue is how the state manages religious neutrality. Professor Bruce Ryder of Osgoode Hall Law school described to distinct approaches: neutrality between religions as reflected in Canadian legal doctrine and neutrality about religion that emerged from the American and French revolutionary experiences.

Neutrality between religions, "allows churches and their members to play an important role in the public space where societal debates take place" with, the state acting "as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)* 2004 SCC 48 at para 67)." We can recognize how this approach is consistent with the doctrine of multiculturalism, and its emphasizes on the value of respecting and preserving the distinct identities, customs, traditions, and perspectives of different cultural groups.

Neutrality about religion on the other hand is best summed up and understood by the principle of separation of church and state. Most people will be familiar with this approach from hearing about debates in the United States regarding public funding of religious schools. Neutrality about religion fits with the idea of interculturalism, which emphasizes the exchange and interaction between cultures as a means of fostering unity and shared experiences. In American parlance, a society that is a 'melting pot'.

Another layer of complexity is the theory that the Canadian Charter emphasises a classical liberal approach to human rights, with an emphasis on the individual, rather than a common good approach reflected in republicanism. However, the right and freedoms contained in the Canadian Charter are not absolute. They are subject in section 1 to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Finally, part of the debate over Bill 21 is over the supremacy of the legislative branch of government. Both the federal and provincial governments have adopted a Westminster system of parliamentary government. A feature of this system of government is the doctrine of parliamentary supremacy (or parliamentary sovereignty), which amongst other things historically meant that a valid act of the legislature could not be questioned by the courts. Constraints on legislative power have always existed,

however, the introduction of the Canadian Charter in 1982 imposed written constitutional constraints, and section 24 gave the courts a role to play in enforcing these provisions. Many provinces objected to these limits on legislative power, which is why we have section 33 of the Charter, the notwithstanding clause, also known as the override. Section 33 permits the legislative branches to protect laws from the protections afforded certain rights and freedoms in the Charter.

Quebec pre-emptive use of the notwithstanding clause in Bill 21 and 96 is an exercise of the doctrine of parliamentary supremacy. From Bill 21's preamble,

> "AS, in accordance with the principle of parliamentary sovereignty, it is incumbent on the Parliament of Québec to determine the principles according to which and manner in which relations between the State and religions are to be governed in Québec."

In effect, the National Assembly has cut the courts out of the discussion by invoking section 33. Bills 21 and 96 have been particularly troublesome for religious and linguistic minorities in Quebec, not only because of the legislations' substantive provisions, but because both acts removed judicial constraints on the power of the government. Liberal democracies put these constraints in on purpose. The courts are a branch of government where size does not matter, and where minorities are most likely to seek and find protection from the excesses of the majority.

In summary, there now exist two approaches to state neutrality towards religion in Canada. Neutrality between religions and this approaches link to multiculturalism, and neutrality about religion in support of interculturalism. Which is why this is more of political challenge than a legal question.

This post is adapted from a working paper by Stephen Thompson, LLM

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