Neutrality and Prayers

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Introduction

In the recent case of *Mouvement laique v. Saguenay* [*Saguenay*], the Supreme Court of Canada held that the recitation of a prayer, at the opening of a municipal council's public meeting, breached "the state's duty of neutrality" in matters of religion. The practice of reciting the prayer, said the Court, resulted in the effective exclusion of Mr. Simoneau (a self-described atheist and the complainant in the case) on the basis of religion and impaired "his right to full and equal exercise of his freedom of conscience and religion" (*Saguenay*, 64). The case was decided under the *Quebec Charter of Human Rights and Freedoms*. The Court, though, reiterated that the freedom of religion provision in the *Quebec Charter* should be interpreted in the same way as s. 2(a), the freedom of religion section, of the *Canadian Charter of Rights and Freedoms*.

Liberty and Equality

The Canadian courts had initially described s. 2(a) of the *Canadian Charter* as the liberty to hold, and live in accordance with, spiritual or other fundamental beliefs without state interference (*Big M*). Freedom of religion, understood as a liberty, precludes the state from compelling an individual to engage in a religious practice and from restricting his/her religious practice without a legitimate public reason. In later judgments, however, there was a shift, in the courts' description of the interest protected by the freedom, from liberty to equality. According to the courts, the freedom does not simply prohibit state coercion in matters of religion or conscience; it requires also that the state treat religious belief systems or communities in an equal or even-handed manner. The state must not support or prefer the religious practices of one religious group over those of another (religion or religious contest should be excluded from politics) and it must not restrict the practices of a religious group, unless this is necessary to protect a compelling public interest (religion should be insulated from politics). The neutrality requirement, said the

Court in *Saguenay*, "results from an evolving interpretation of freedom of conscience and religion (*Saguenay*, 71).

The requirement of state neutrality (that the state should take no position on religious issues) may be understood as simply a pragmatic recognition that religious issues are difficult to resolve within the political process and may generate significant social and political conflict and so are best removed from political contest. At a deeper level, though, the state neutrality requirement may be rooted in a particular conception of religious commitment or engagement. While religious commitment is sometimes described by the courts as a personal choice or judgment made by the individual that (even if deeply held) is in theory revisable, it is also, or sometimes instead, described as a cultural identity. Religious belief orients the individual in the world, shapes her perception of the social and natural orders, and provides a moral framework for her actions. It gives meaning or purpose to life. It ties the individual to a community of believers and is often the central or defining association in her life. The individual believer participates in a shared system of practices and values that may in some cases be described as "a way of life."

Freedom of religion, on this account, is a form of equality right — a right to equal treatment or equal respect by the state without discrimination based on religious belief or association. If religious belief/practice is a cultural identity – if it is central to the individual's sense of self and place in the world - then a judgment by the state that the beliefs or practices of one group are less important or less true than those of another may be experienced by the members of the first group as a denial of their equal worth and not simply as a rejection of their views and values. According to the Court in *Saguenay*:

> By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not

> individuals … On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society … (*Saguenay*, 74).

If religious association is an important part of the individual's identity, we may be concerned that the exclusion or marginalization of a religious group or belief system may negatively affect the adherent's social standing or sense of belonging or membership in the community. Or more positively, we may think it important that space be preserved for religious community, because it is a source of value and meaning for community members.

Neutrality between different faiths or belief systems can be achieved in a variety of ways. At an earlier time, it may have seemed possible to base public action on widely held religious beliefs and practices, although this "common religious ground" was bound to exclude some individuals or groups from its scope. In any event, with the growth of religious diversity and the rise of agnosticism/atheism and spiritualism, state reliance on common religious grounds, if it ever was an option, is no longer one. The state may also achieve a degree of neutrality by providing even-handed support to the different religious practices or institutions in the community as well as to nonreligious alternatives. Indeed, the Canadian courts have held that the *Charter* does not preclude the state from providing financial support to religious schools or acknowledging the practices or celebrations of different religious groups as long as it does so in an even-handed way (*Bill 30*, 62). However, the commitment to state neutrality toward different religious belief systems is most often understood as requiring the privatization of religion, both the exclusion and insulation of religion from political decision-making. The state, it is said, must advance civic or "secular", rather than religious, purposes, and it must not interfere with religious practices unless this is necessary to the public interest (*Saguenay*, 81).

The Limits of Neutrality

The Canadian courts, though, have not enforced the neutrality requirement in a consistent way. The problem is not simply that religious beliefs involve claims about what is true and right, which must be viewed as a matter of judgment (rather than cultural practice) and open to contest within the public sphere. The more fundamental difficulty with the requirement of state neutrality is that religious beliefs sometimes have public implications. Religious belief systems often say something about the way we should treat others and about the kind of society we should work to create. Religion may be viewed through two lenses -- as both a cultural identity that should (sometimes) be excluded and insulated from politics and as a set of judgments made by the individual about truth and right that must (sometimes) be subject to the give-and-take of politics. The challenge for the courts is to find a way to fit this complex conception of religious commitment and its value into a constitutional framework that relies on a distinction between individual choices or commitments that should be protected as a matter of liberty (subject to limits in the public interest) and group attributes or traits that should be respected as a matter of equality. The constitutional framework (and perhaps more deeply our conception of rights) imposes this distinction, between judgment and identity, on the rich and complex phenomenon of religious commitment.

The neutrality requirement is workable only if its scope its limited in significant ways. First, the courts have recognized that religious practices have shaped the traditions or customs of the community and cannot simply be erased from the public sphere. According to the Supreme Court of Canada, "the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage" (*Saguenay*, para. 116). The Canadian courts have not demanded that governments (literally or metaphorically) sandblast religious symbols and practices from physical and social structures, some of which were constructed long ago. However, it may often be difficult to determine when the use of religious symbols or practices by that state is simply an acknowledgment of the country's religious history, and when it amounts to a present affirmation of the truth of a particular religious belief system. This point is made by the

Supreme Court of Canada:

> [T]he Canadian cultural landscape includes many traditional and heritage practices that are religious in nature. Although it is clear that not all of these cultural expressions are in breach of the state's duty of neutrality, there is also no doubt that the state may not consciously make a profession of faith or act so as to adopt or favour one religious view at the expense of all others (*Saguenay*, 87).

Second, the courts have recognized that religion is important in the private and communal lives of citizens. If a large part of the population is Christian, it is difficult to see how the state could not take the practices of this group into account, when, for example, it selects statutory holidays or establishes a "pause day" from work (*Edwards Books*). As long as religion remains part of private life, it is bound to affect the shape of public action.

The third and most significant "exclusion" from the neutrality requirement involves religious "values". In *Chamberlain v Surrey School District*, the Supreme Court of Canada held that elected officials may draw on their religious values (or the religious values of their constituents) when making political decisions (*Chamberlain*). Chief Justice McLachlin recognized that "Religion is an integral aspect of people's lives, and cannot be left at the boardroom door" (*Chamberlain*, 19).

While the courts have held that the state must not support particular religious practices, they have also said that religious values are not constitutionally excluded from political decision-making. But this distinction between religious "values", on the one hand, and religious "beliefs" or "practices", on the other, turns out to be difficult to draw. If the state were to support (or compel) Sunday Sabbath observance or a particular form of prayer or the wearing of hijab or if it were to oppose (or ban) the consumption of pork, it would be seen as supporting a spiritual practice contrary to section 2(a) of the *Charter*. But what about a state restriction on same-sex relationships or public nudity, which might be supported by political actors for religious reasons?

The distinction the courts seem to rely on, if only implicitly, is between, on the one hand, beliefs or actions that address civic or worldly matters (values) and, on the other, beliefs or actions that concern the worship or honouring of God (beliefs or practices). A religious belief should not play a role in political decision-making if the action it calls for is spiritual in character (if it relates simply to spiritual concerns, involving the worshipping or honouring of God). Such an action will be seen as a "private" or personal matter or a matter internal to the religious group, and labelled as a religious "practice" or "belief". However, if the belief or "value" relates to a civic matter (such as individual rights or collective welfare), then it may play a role in political decision-making, and the action it calls for will be viewed as public action rather than religious practice. A religiously motivated action will be viewed as a practice — as the worshipping or honouring of God — if non-adherents cannot understand it as addressing civic concerns, such as public health and safety. When there is no parallel secular argument supporting a religious practice or activity, then it will almost certainly be viewed as exclusively religious – as concerned simply with honouring God's will. Where the line is drawn by the courts will reflect their views about the ordinary forms of religious worship, the nature of human welfare, and the proper scope of political action – but, of course, these are matters on which there may be no broad agreement.

Is Neutrality Neutral?

At an earlier time, when all or most community members adhered to some form of religion, it could be claimed that the exclusion of religious practice from the political sphere was neutral or even-handed between different religious belief systems. (In practice, of course, an imperfect form of neutrality was advanced in Western democracies not by excluding religious practices but rather by relying on "non-sectarian" or shared Christian practices). Secularism, understood as the ordering of public life (politics) on the basis of beliefs or practices that are not explicitly religious, is generally treated as a neutral ground that lies outside religious controversy. It provides the baseline for determining whether the state has compelled or restricted religious beliefs and practices or whether it has treated different religions unequally.

However, the complainants in most of the recent cases, in which state support for religion has been challenged, have been agnostics or atheists. Their complaint in these cases is not that the state is supporting one religion over another, the religion of the majority over a minority belief system, but rather that it is supporting religious belief or practice generally and imposing religion on them, or treating them unequally. If atheism (or agnosticism) is understood as a position, world-view, or cultural identity equivalent to religious belief, then its proponents may feel excluded or marginalized when the state supports even the most ecumenical forms of religious practice.

But, by the same token, the complete removal of religion from the political sphere may be experienced by religious adherents as the exclusion of their world-view and the affirmation of a nonreligious or agnostic/atheist perspective — the culture or identity of a particular segment of the community. If the basis for excluding religious practice from the political sphere is that atheists or agnostics represent a(n identity) group that should be treated with equal respect, then excluding religion (even without an explicit denial of its truth) may be viewed as a preference for the beliefs or world-view of the atheist or agnostic community (*Niagara*; *Saguenay*). Ironically, then, as the exclusion of religion from the political sphere, in the name of religious freedom and equality, becomes more complete, secular politics will appear less neutral and more partisan. What is for some the neutral ground upon which freedom of religion and conscience depends (secularism as a political doctrine involving the separation of religion and politics) is for others a partisan, anti-spiritual perspective.

In *Saguenay* the Supreme Court of Canada responded to this concern. "[A]bstaining", said the Court, "does not amount to taking a stand in favour of atheism or agnosticism" (*Saguenay*, para.133). The Court insisted that it would also be objectionable, and a breach of the state neutrality requirement, for the state to deny the existence of God. Yet, from the perspective of a believer in God, the exclusion of all mention of religion in the political sphere, can be understood as supporting the idea that belief is just a private preference and that agnosticism is the appropriate stance in political life.

There is, I think, an answer to this. As earlier noted, the Canadian courts have not interpreted section 2(a) as excluding religion entirely from the political sphere. First, the courts have said that the state may support religious practices and institutions provided it does so in an even-handed way, and (in the case of schools and other services) ensures the availability of a nonreligious option. Second, the courts have said that the state may acknowledge the religious history of the community and that state action may sometimes be shaped by the religious practices of community members (for example, the selection of statutory holidays). Third, the courts have said that while the state must not support or prefer the *practices* of a particular religious belief system, it is not precluded from relying on religious *values* when making political decisions. If the neutrality requirement does not exclude reliance on religious values ("public" or civic concerns) in political decision-making, then there is less force to the claim that "secularism," the exclusion of religion from the political sphere, marginalizes religious belief systems or communities and amounts to an affirmation of an agnostic world-view.

The Application of the Neutrality Requirement in Saguenay

The Supreme Court in *Saguenay* held that the prayer recited at the opening of the Saguenay town council meeting breached the requirement of state neutrality, which the Court described as a "corollary" of the fundamental freedom of conscience and religion protected by the Quebec and Canadian Charters. The mayor, using a microphone, would recite the following prayer (along with council members and member of the public): "[*translation*] O God, eternal and almighty, from Whom all power and wisdom flow, we are assembled here in Your presence to ensure the good of our city and its prosperity. We beseech You to grant us the enlightenment and energy necessary for our deliberations to promote the honour and glory of Your holy name and the spiritual and material [well‑being] of our city. Amen." (*Saguenay*, 7).

Just prior to reciting the prayer, the mayor would make the sign of the cross, and invoke the Christian Trinity - "in the name of the Father, the Son, and the Holy Spirit". He would

again make the sign of the cross at the end of the payer. A number of others present at the meeting did the same. After the decision by the Quebec Human Rights Tribunal that this practice breached the Quebec Charter, the municipal council passed a by-law that made minor changes to the wording of the prayer (the new prayer still invoked the name of God in its opening line) and provided that the formal meeting would not begin until a few minutes after the conclusion of the prayer.

According to the Court, the test for determining whether the neutrality requirement has been breached depends on whether the complaint relates to a legal rule (such as a statue, regulation, or by-law) or to a state practice. A statutory or other legal provision "will be inoperative if its purpose is religious and therefore cannot be reconciled with the state's duty of neutrality … The legislative objective cannot be to impose or favour, or to express or profess, one belief to the exclusion of all others" (*Saguenay*, 81). However, in a case in which the complaint concerns a "state practice", the test has an additional step. The complainant must establish "that the state is professing, adopting or favouring one belief to the exclusion of all others … and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion" (*Saguenay*, 83). More specifically it must be shown that the state practice impedes "the individual's ability to act in accordance with his or her beliefs" (*Saguenay*, 85).

The Court found that the practice (and the later enacted by-law) had a religious purpose. The Court was helped to this conclusion by the mayor's public statements that the prayer was being said and defended by the council because "we have faith". The mayor's comments confirmed that the prayer was not simply the "expression of a cultural tradition" but "was above all else a use by the council of public powers to manifest and profess one religion to the exclusion of all others" (*Saguenay*, 118). Furthermore said the Court, the practice amounted to a substantial interference with Mr. Simoneau's freedom of religion. The practice caused him to experience " a strong feeling of isolation and exclusion" (*Saguenay*, 121).

Yet, this second element of the test seems redundant. When the state institutes a practice

that favours one religion over another then, it may always be said that the non-believers who witness the practice will feel excluded or marginalized. Of course, this second subjective element of the test may give the courts some discretionary space to find that a religious practice does not breach s. 2(a), without having to specify reasons for this conclusion. If the second element of the test is not simply redundant and it is open to the courts to find in a particular case that a religious practice does not interfere with the religious freedom of dissenters, it is difficult to predict when the courts will make such a finding.

I can think of at least two reasons why the Court might have added this second element to its test. One possibility is that the Court is unwilling to fully embrace the neutrality requirement. The second element of the test – proof of a more individualized harm or injury -- suggests that the wrong is not simply exclusion or preference and continues to be linked to state coercion and interference with liberty. The other possibility is that the Court is anticipating the issue of civil servants wearing religious dress or symbols. Under the two-part test, the Court's response to a claim that a civil servant who wears the hijab, for example, is breaching the neutrality requirement might be that even though her practice indicates support for one religion over another, it does not interfere with anyone's religious freedom. Yet this response seems to get things backwards. There is no "interference" with religious freedom in the hijab case, because there is no state act of religious favouritism. The resolution of such a case must be based on a distinction (which may not always be easy to make) between the individual's personal religious practice or expression and the performance of his or her civic or public responsibilities.

The preamble

The municipality argued that since the 1982 Constitution includes a reference to God, the invocation of God in the town's prayer could not be unconstitutional. The Court treated this argument as peripheral, but struggled to answer. The preamble of the 1982 constitution says that "the constitution of Canada is founded on the rule of law and the

supremacy of God".

The Court's response is an assertion dressed up as an argument. First said, the Court, the reference to God in a prayer does not itself breach the Charter. It will only do so if, as part of a religious practice, it has the effect of excluding some community members. The Court insisted that "[our conclusion] is not limited to a single reference to God in the prayer. On its own, that reference is not determinative. Rather, the analysis concerns the state's observance of a religious practice. The moral source of that practice, whether divine or otherwise, is but one of the contextual factors that make it possible to identify the practice's purpose and its effect" (*Saguenay*, 146). But if the right to religious freedom requires the state refrain from supporting one religion over another or religion over non-religion, it is difficult to see how any state reference to God (unless hollowed of spiritual meaning) would not breach the right.

Second, said the Court, the preamble, including the reference to God, articulates the "political theory" behind the Charter and the rights it protects – and that the reference to God should not used to read down the proper scope of those rights (*Saguenay*, 147). But of course the scope or meaning of those rights is precisely what is at issue. The preamble might properly have been used by the courts in deciding how to interpret the right to freedom of religion.

The better answer might be that the courts, or the political community, are no longer willing to see the Charter of Rights or the constitution, more generally, as founded upon a specifically monotheistic or divine order. The meaning of the word God in the preamble might instead be opened up or enlarged beyond the claim that truth and right emanates from a divine power. The rights and freedoms of individuals and communities are not simply derived from the will of man, but rather from an objective moral order that we as citizens in a democratic political community seek to identify and follow. The law should seek to advance what is right and just – even if as citizens we sometimes disagree about what justice requires.

Cases:

Chamberlain v. Surrey School District No. 36, 2002 SCC 86 [*Chamberlain*].

Loyola High School v. Quebec (Attorney-General), 2015 SCC 12 [*Loyola*].

Mouvement laique v. Saguenay (City), 2015 SCC 16 [*Mouvement laique*].

RC and SC v. District School Board of Niagara, 2013 HRTO 1382 [*Niagara*].

Reference re Bill 30, An Act to Amend the Education Act (Ontario), [1987] 1 SCR 1148 [*Bill30*].

R. v. Big M Drug Mart Ltd., [1985] 1 SCR 295 [*Big M*].

R. v. *Edwards Books and Art Ltd*. [1986] 2 SCR 713 [*Edwards Books*].

S.L. v. Commission scolaire des Chenes, 2012 SCC 7 [*SL*].