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Substituting "Values" for Law: Warnings from Canada

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Several decades ago, a paper was delivered at an annual meeting of the Canadian Political Science Association that advocated the legal and social adoption of something called "constitutional values." This struck me then, as now, as confusing constitutional law with more general norms of human conduct, and so conflating two radically different aspects of human life.

Unfortunately, what I thought of then as an egregious error is now becoming a legal norm. The notion of "constitutional values," or "Charter values," is now shaping court decisions and government policy in Canada, and may also threaten to do so in the United States.

The case of Trinity Western University (TWU) illustrates how this erroneous notion has played out in practice. In 2012, TWU, which is the largest private Christian university in Canada, proposed starting a law school. Canada's Supreme Court ruled in 2018 that because the school since its founding had upheld a traditional Christian view of marriage, its law school graduates could be barred from legal practice.[1]

"Charter Values"

In a remarkably similar case in 2001, the very same Supreme Court held that TWU's school for training teachers, then under similar challenge because of the university's view of marriage, should be accredited. Despite its 8-to-1 decision in favor of TWU in 2001, the court abandoned this strong precedent in 2018 and instead held that a decision by bar associations to deny accreditation to TWU law school graduates was reasonable because promoting equality required equal access to the legal profession.

In order to avoid following an obviously relevant Supreme Court precedent, the Court resorted not to constitutional law per se, but instead said that the government and government-accredited bodies must be concerned not only with rights under Canada's Charter of Rights and Freedoms but also

with what it called "Charter values." (The Charter refers to the 1982 Canadian Charter of Rights and Freedoms). The Court ruled that "Charter values" are "accepted principles of constitutional interpretation." Why the Court did not apply these "accepted principles" in 2001 is unclear, but, of course, therein lies part of the problem.

Difference Between Values and Rights

Some clarity as to what this might mean was provided in a 2019 ruling by the Ontario Court of Appeals, one level below the Supreme Court. In the *McKitty v. Hayani* decision [2], Justice Bradley Miller wrote that "Charter values are not Charter rights by another name or in a different setting; they are a different juridical concept." As this court noted, "there is no set list of *Charter* values, or canonical formulation of them. The category of *Charter* values is extremely broad, including human goods derived from the enumerated rights and freedoms, from s. 1's principles of a free and democratic society, and entailments from even more abstract principles, such as human dignity…." The Court added that "There is a concern that although the concept of *Charter* values is intended to reduce judicial subjectivity in moral reasoning, the selection of *Charter* values and their prioritization are both unavoidably idiosyncratic…. There is no methodology to guide the degree of abstraction at which they are formulated, or to resolve claims of priority when they conflict."[3]

Some Canadian courts have tried to ground their interpolation of "Charter values" into law by a spurious grounding in common law. Certainly, common law derives law not (only) from statute or constitution but from the history, tradition, and customs of law that have arisen in communities, deriving from their belief about what is legally right and just. But common law has not been about what is right or wrong per se, but on what is *legally* right and wrong. Not on what is good or bad, but on what should be allowed or forbidden by law. It is a matter of law, not values. For example, one might rightly condemn both *gossip* and *defamation*, but only the latter is addressed by law. The underlying distinction is critical to constitutional government.

Unfortunately, Canada's Supreme Court has elided this distinction and in the notion of "Charter values" has claimed the authority, regardless of statute and perhaps of the Charter/Constitution itself, to outlaw what it thinks violates unenumerated "Charter values," i.e. what the Court thinks is wrong.

In the TWU case, the Court found that the various Provincial Law Societies that accredit lawyers were entitled, as a matter of public interest, to promote "equality" by ensuring equal access to the profession, and by preventing harm to LGBTQ law students, and thus, to reject any future TWU law school graduates.[4] One result was that unenumerated "Charter values" – that are *not* listed in the Charter – can be used as a justification to override a right to religious freedom, which is the *first* right listed in the Charter.

In another example, the Canadian Government gives funding to organizations that provide summer jobs for students. One of the funding criteria has been that the organizations support "Charter values." This funding has depended not on what the organization would actually use the funds for, something in which the government clearly has a legitimate interest, but rather on what the organization believes. This means that the government will discriminate in its distribution of state funds based on a judgment about whether the recipient agrees with current government "values" and policies. In many settings, this could be called corruption—a government using state funds to

reward those who support its views and deny them to those who do not. But in this case "Charter values" provide a verbal – and, in effect, a legal – shield.[5]

The Danger of "Values" Per se

Further problems stem from the very notion of "values."

It is worth quoting at length from the perspicuous writings of Canadian philosopher George Grant in which he addressed this matter half a century ago: "[W]hat would North American rhetoric be without the word 'values'? But even those who use the word seriously within theoretical work seem not to remember that the word was brought into the center of western discourse by Nietzsche and into the discourse of social science through Nietzsche's profound influence upon Weber. For Nietzsche the fundamental experience for man was apprehending what is as chaos: values were what we creatively willed in the face of the chaos…."[6]

"Everybody uses the word 'values' to describe our making of the world: capitalists and socialists, atheists and avowed believers, scientists and politicians. The word comes to us so platitudinously that we take it to belong to the way things are. We have forgotten that before Nietzsche and his immediate predecessors, men did not think about their actions in that language. They did not think they made the world valuable, but that they participated in its goodness."[7]

"Values" treats questions of right and wrong, good and evil, as subjective preference, choices, or assertions that we will in the face of an uncaring universe. Thus, the "values" part of "Charter values" vastly reinforces what had already become a highly subjective and plastic idea. Legal treatment of religious institutions that do not adhere to the prevailing values in Canada has been, and is likely to remain, ground-zero for exposing the profound error of interpolating values into law.

Conclusions

One deleterious result of conflating norms of human conduct, subjectivized as values, with constitutional law is that persons and non-governmental institutions are thought normatively to be subject to the same rules as the government itself. Societal institutions come to be considered as governments writ small.

Thus, if the government is believed, correctly, to be forbidden to discriminate on the basis of religion, then the corollary is that other institutions should not be able to do so either, especially if they receive government funding or relief from taxes. This fundamental error is beginning to surface as a major issue in the United States. Consider, for example, how former presidential candidate 'Beto' O'Rourke urged removing tax exemptions from those who disagreed with his political views. One might argue that similar ideas surfaced in U.S. courts more than 50 years ago when Justice William O. Douglas, writing for the majority of the U.S. Supreme Court in *Griswold v. Connecticut*, stated that "specific guarantees in the Bill of Rights have *penumbras*, formed by *emanations* from those guarantees that help give them life and substance" (*emphasis* added).[8]

One of the reasons for forbidding government discrimination on matters such as religion is precisely so that private institutions will be able to discriminate, appropriately and justly, according to their own particular beliefs as to what supports their distinctive mission. Governmental neutrality is intended to be a foundation for a lively and diverse societal pluralism, not for society to become a mirror of the government itself. As the Canadian Supreme Court stated in its 2001 TWU decision:

"The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected." [9]

The push for "constitutional" or "charter" values leads to a deracination of the meaning of public law and to blurring the distinction between governmental limits and private freedoms. It tends to treat societal organizations as simply quasi-government agents and, in a soft totalitarianism, eradicates the diverse and distinctive freedoms that are required in a pluralistic society.

Endnotes

[1] See my article on TWU, "Canada's Supreme Court Ruling Is a Grave Blow to Religious Freedom–Not Only in Canada," *Providence Magazine*, Washington, D.C.: The Institute on Religion and Democracy, June 18, 2018, https://providencemag.com/2018/06/canada-supreme-court-ruling-grave-blow-religious-freedom-trinity-western-university/; and the case, *Law Society of British Columbia v. Trinity Western University and Brayden Volkenant* (2018), No. 37318. Supreme Court of Canada, https://www.canlii.org/en/ca/scc/doc/2018/2018scc32/2018scc32.html. For good background, see Barry Bussey's blog at https://www.cccc.org/news_blogs/author/barry/.
[2] *McKitty v. Hayani*, (2019), Ontario Court of Appeals, 805. https://www.ontariocourts.ca/decisions/2019/2019ONCA0805.htm.
[3] Ibid.
[4] *Law Society of British Columbia v. Trinity Western University and Brayden Volkenant.* (2018), No. 37318. Supreme Court of Canada. https://www.canlii.org/en/ca/scc/doc/2018/2018scc32/2018scc32.html.
[5] See Barry Bussey's instructive blog on the summer jobs program and much else, "Canada Summer Jobs 2020: Coming Soon! Canadian Council of Christian Charities. Elmira, Ontario, https://www.cccc.org/news_blogs/barry/2020/01/15/canada-summer-jobs-2020-coming-soon/.
[6] George Grant, *Technology and Empire: Perspectives on North America* (Toronto: Anansi, 1969) 38-39.
[7] George Grant, *Time as History* (Toronto: Canadian Broadcasting Corporation, 1969), 44-45.
[8] *Griswold v. Connecticut*. https://www.oyez.org/cases/1964/496.
[9] *Trinity Western University v. College of Teachers,* (2001), No 27168. Supreme Court of Canada. https://www.canlii.org/en/ca/scc/doc/2001/2001scc31/2001scc31.html.

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