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Trinity Western… Again

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I can't stop thinking about the law society decisions on Trinity Western University (TWU). Part of the reason for that is the complexity and difficulty of the substantive issue raised by TWU's proposed law school: the proper resolution of an irreducible conflict between equality rights and freedom of religion (I discuss that here). But as I spent the last few weeks teaching administrative law procedural fairness, I realized that the other thing bothering me about the law society decisions is the process used to reach them.

As far as I can tell, each law society that has independently considered TWU's application for accreditation (or is likely to; Alberta delegated its decision to the Federation of Law Societies) has proceeded by way of a quasi-legislative process: TWU and other interested parties make submissions to a meeting of benchers, who then debate the question and vote. In April British Columbia benchers voted 20-6 against a motion barring TWU graduates from admission – a decision the benchers reversed in October following a referendum of its members. In Ontario benchers voted 28-21, with one abstention, to reject TWU's application for accreditation (its process is discussed here). In Nova Scotia benchers voted 10-9 to make accreditation conditional on TWU withdrawing the community covenant which precludes LGBT students from attending.

New Brunswick had a vote of it membership, with 137-30 members voting in favour of a resolution directing the Law Society of New Brunswick not to accredit TWU. As noted, British Columbia has also made a decision based on a vote of its members.

The result of these decisions is that in some provinces we have a majority of elected benchers, or law society members, who do not think TWU ought to be accredited. What we do not have is any clear articulation of the reasons for those decisions, or their basis in law or fact.

That absence of articulated reasons is understandable and reasonable for an administrative body making a quasi-legislative decision. Such decisions involve matters of policy, and decide "polycentric" questions dependent on the balancing and resolution of a variety of competing factors. They are directed at no person in particular but rather at broader problems affecting people (or groups of people) in general. Such decisions do not properly require an evidentiary hearing before an impartial decision-maker who issues reasons; indeed, that sort of process would be inappropriate – it would be obtaining the wrong sorts of information and asking the wrong sorts of questions to determine public policy and to balance multiple concerns in the way that legislatures do.

But the decision on whether to accredit TWU is not a legislative or quasi-legislative decision. It is a decision directed at a specific party and determining the legal meaning and effect of that party's conduct. It is at its heart adjudicative. A decision that TWU ought not to be accredited involves this sort of reasoning process:

1. Law societies ought not to accredit schools that discriminate (or: law societies have the legal authority not to accredit schools that discriminate and ought to exercise that authority);
2. Discrimination is defined as violating equality rights regardless of a claim of religious excuse;
3. TWU is discriminatory;
4. Therefore TWU ought not to be accredited.

That type of decision – identifying the applicable legal standard, specifying the meaning of that standard and applying it to a particular case – is what *judges* do, not what legislatures do. It ought, therefore, to be made in accordance with the kind of process appropriate for judicial or quasi-judicial decision-makers: a hearing before a relatively (this being administrative law) impartial decision-maker who issues reasons explaining its decision.

It may be that for statutory reasons law societies felt compelled to use the type of process that they did. TWU may also have acquiesced in it. Law societies may additionally have been relying to some extent on the Federation of Law Societies' earlier more adjudicative process.

A more adjudicative process at the law societies rejecting TWU's application would, however, have had considerable advantages. If nothing else, it would have clarified exactly what definition of discrimination the law societies are using, and the way in which TWU contravenes it. That, in turn, would have clarified the substantive issues before the court on judicial review and allowed the court to determine whether that definition is reasonable (or correct, if that is the applicable standard) and within the legislative authority of the law society to apply. The court could consider, as it ought to do when giving deferential judicial review, whether the reasons offered by the law societies are transparent, justifiable and intelligible.

Instead, a court considering TWU's application for judicial review will have nothing to go on other than the submissions made by parties to the law societies and to the court; a transcript of a debate; the question asked and the tally of the resulting vote. And in the case of New Brunswick and British Columbia, a vote of the membership is all that it will have. That means that even if it ostensibly applies a deferential standard, the court will end up having to essentially make its own decision on the record and the law. What choice will it have? There are no reasons for it to defer to, no decision for it to assess as justifiable, transparent and intelligible.

I have been quite critical of the law societies' assumption of the jurisdiction and authority to define the appropriate balance between equality rights and freedom of religion, suggesting that human rights tribunals or legislatures are more appropriate institutions to make that assessment. However, had the law societies in fact taken on the task of articulating their jurisdiction over law school discrimination, had defined what constitutes discrimination at a law school and explained why TWU's conduct is discriminatory, and had done so with relative impartiality and after a full evidentiary hearing, my concerns would be considerably ameliorated. Even if I did not agree with the result, I would understand and respect the authority of the law societies to reach it.

Instead the debate over TWU can only focus on the result, rather than on the reasons that underlie it. And I retain an uneasy feeling that law society benchers and members have decided based on their intuitions and perceptions about what discrimination is and looks like, rather than on the fair and impartial application of a legal standard to a set of facts. Everyone here – TWU's supporters and its opponents – deserves better than that. And the proper functioning of our legal system requires it.

An earlier version of this post appeared on *Slaw*.

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