

2013

The attack on Western religions by Western law: re-framing pluralism, liberalism and diversity

I Benson

The University of Notre Dame Australia, iain.benson@nd.edu.au

Follow this and additional works at: https://researchonline.nd.edu.au/law_article



This article was originally published as:

Benson, I. (2013). The attack on Western religions by Western law: re-framing pluralism, liberalism and diversity. *International Journal of Religious Freedom*, 6 (1/2), 111-125.

Original article available here:

http://www.iirf.eu/fileadmin/user_upload/Journal/IJRF_Vol6-1.pdf

This article is posted on ResearchOnline@ND at https://researchonline.nd.edu.au/law_article/55. For more information, please contact researchonline@nd.edu.au.



This article originally published in the *International Journal of Religious Freedom*.

Benson, I. (2013). The attack on Western religions by Western law: re-framing pluralism, liberalism and diversity. *International Journal of Religious Freedom*, 6(1/2), 111-125.

Retrieved from http://www.iirf.eu/fileadmin/user_upload/Journal/IJRF_Vol6-1.pdf

The attack on Western religions by Western law

Re-framing pluralism, liberalism and diversity

Iain T. Benson¹

Abstract

This paper discusses how law is increasingly being used to attack religious associations under the guise of “equality” advancement and “non-discrimination” restrictions. I explore two important insights: first that the concept of “transformation” has been distorted, to shelter approaches to law that fail to respect properly associational diversity. When misused, “transformation” seeks to change the moral viewpoints or religious beliefs of religious associations by force of law. Second, the paper discusses the expansion of law so that it becomes a threat to associations. The “goods of religion” and the “limits of law” need to be more widely recognized and understood both by religious communities and by those involved in law, politics and the media. These insights demonstrate how “equality activists” employ a rhetoric of “equality” to produce inequality, “diversity” to produce homogeneity and “non-discrimination” to discriminate against religious communities and religious beliefs. Several solutions for identifying these errors and resisting them are outlined in brief.

Keywords Law and religion, definitions of liberalism, pluralism, diversity, transformative constitutionalism, political theology, civil religion, constitutional theocracy, law as religion, freedom of association, values versus virtues, homophobia, heterosexism, civic totalism, egalitarian absolutism, holistic pluralism.

1. Introduction: Minimizing the public place for religions and law becoming *like* a religion

Many people are aware that with secularism, understood as an anti-religious ideology rather than in some of its more benign forms,² we can see a movement that seeks to

¹ Iain T. Benson (* 1955), BA (Hons.) (Queens), MA, (Cantab), JD (Windsor), PhD (Wits) Barrister & Solicitor, Extraordinary Professor of Law, Department of Constitutional Law and the Philosophy of Law, University of the Free State, Bloemfontein South Africa; Research Associate, South African Institute for Advanced Constitutional, Human Rights, Public and International Law, Johannesburg; Senior Research Fellow, Chester Ronning Centre for the Study of Religion and Public Life, Alberta, Canada. I would like to acknowledge Shaun de Freitas who reviewed this article and offered helpful suggestions. Article received: 14 May 2013; Accepted: 21 Sept. 2013. Contact: Iain T Benson, Ferme Loudas, 65270 St. Pé de Bigorre, France, Phone +33 (0) 5 62 41 84 67, Fax +33 5 62 32 87 40, Email: iainbenson2@gmail.com.

² Some wish to speak of “open secularism” etcetera as if the term “secularism” can be given a more pleasant face. For reasons I have set out elsewhere, I believe this strategy to be mistaken and that the term

minimize the public place and relevance of religion. What is less recognized, however, is that certain contemporary approaches to law wish to extend law and make it serve the function, increasingly, *of a religion with one moral viewpoint*. By doing so, these approaches attack religious associations themselves and usurp the proper social roles that religions play including diversity in relation to moral debates of the day. This tendency needs to be understood and this article hopes to assist in its recognition and in arguments to counteract the apparent legitimacy of such approaches.

Litigation over recent decades in North America, the United Kingdom, Europe and South Africa has become more and more dominant as a forum not only for legal battles but for “resolving” disputed social issues.³ What many are not so aware of is the extent to which law has become dominated in a large part by highly secularized elites who function with concepts that are, whether they realize it or not, deeply antagonistic to the properly public place for religious involvement and the nature and role of diversity in a free and open society. Though many in these elite groups use terms such as “equality”, “non-discrimination”, “diversity” and “pluralism” giving the impression that their theories will respect rights, pluralism and diversity, what they mean by them is very different from what religious believers and their religious associations might imagine these terms to mean in relation to the freedoms of religion and association as long understood.

“secularism” should be used when we mean the essentially anti-religious ideology for which the word “secularism” was coined in 1851 by George Jacob Holyoake. A similar problem exists with some uses of the conception of “secular”. See: Iain T. Benson Notes towards a (re)definition of the secular (2000) 33 *UBC Law Rev* 519 and Considering secularism, in D. Farrow, (ed.), *Recognizing religion in a secular society* (Montreal: McGill-Queens UP, 2004) 83-98. See also, arguing for what it calls “open secularism”, Jocelyn Maclure and Charles Taylor (trans. Jane Marie Todd), *Secularism and freedom of conscience* (Cambridge: Harvard UP, 2011) 58-60. What the authors describe as “open secularism” and support as “neutral”, however, would be less confusingly described as “non-establishment.” “Secularism” has an origin that is, in fact, anti-religious and understanding this and reserving the term to describe this phenomenon serves a useful purpose. Nothing is added to “non-establishment” by employing the confusing term “open secularism”. The authors’ claim that “open secularism” is a “liberal-pluralist model” that has, in Quebec, “achieved a satisfying balance, at least in comparative terms, between respect for individual rights and freedoms and the imperatives of life in society” (60). This claim seems extraordinary in light of the stream of litigation from that province by individuals and communities who argue that their religious rights are being unfairly restricted. The legal facts deny the theory being put forward by Maclure and Taylor. Their volume provides a good example of why the term “open secularism” should not be used.

³ I have put the word “resolving” in quotation marks here because it is widely recognized that the legal process is far from an ideal way of building social consensus. Judicial review tends to produce “winners” and “losers” and does not tend to be suitable (to say the least) for the forming of compromises. The larger the scope that law takes on for this form of “resolution”, the greater the temptation for politicians to try and avoid “hot potato” issues by, in effect, delegating them to the courts. Neither suit the ongoing purposes of a thriving constitutional order that respects the proper role of civil society and the right of citizens to dissent and form associations of like-minded people around differing beliefs. See: Charles Taylor, *The malaise of modernity* (Toronto, Anansi, 2001) 114 ff.

2. Identifying “pseudo-liberalism”, “civic totalitarianism”, “egalitarian absolutism” and making law into a religion

When examined closely, many contemporary conflicts, such as those involving religions and disputes over sexual conduct and marital status, exhibit a “trump rights approach” that would give one side greater weight than the other rather than strive to examine context so as to ensure proper protection of diversity, dissent and difference. Such accommodation and toleration is necessary in order to safe-guard the importance of the context for rights in a constitutional democracy – that is, the diversity which such theorists say that they support. It is important to recognize the divergence between a theory that says it is “liberal” and “tolerant” with forms of academic or practical advocacy that show by what they seek to accomplish that they are neither “liberal” nor tolerant.

What happens when one viewpoint seeks to dominate others without allowing places for dissent (on such issues as sexual conduct or the status of marriage or beliefs about gender roles between men and women) is that we see law being used as the means of forcing one set of beliefs to be dominant. There are signs that law is being used to usurp the role of religious associations. Recent writings by legal scholars refer, approvingly, to both “constitutional theocracy” and “political theology” in which it is observed that law and politics can become theological in practice. Such developments, of course, are a variant of the long history of ideas in relation to “civil religion.”⁴ Still other scholars have written of the risk of human rights being viewed as an “idolatry” or, on the other hand, observing that human rights is “the new secular religion of our time” and do so without rejecting this new extension.⁵

The threat comes not only from this sort of divinization of law or politics but also from a diminution of the protections that exist in law for religious diversity. Thus, one recent book, published in Canada, views both “accommodation” and “tolerance” as

⁴ See, for example, Ronald Weed and John von Heyking, (eds.) *Civil religion in political thought* (Washington D.C.: The Catholic University of America Press, 2010)

⁵ See: Irwin Cotler, Jewish nongovernmental organizations, in John McLaren and Harold Coward, (eds), *Religious conscience, the state and the law* (New York: SUNY Press, 1999) 77 – 96 at 77. Cotler was formerly Canada’s Federal Minister of Justice as well as being a noted human rights expert. Taking a very different approach to Cotler is fellow Canadian Michael Ignatieff, Human rights as idolatry, in Amy Gutman ed. *Human rights as politics and idolatry* (Princeton: Princeton UP, 2001) 53. Ignatieff writes that: “[h]uman rights is misunderstood, I shall argue, if it is seen as a “secular religion.” It is not a creed; it is not metaphysics. To make it so is to turn it into a species of idolatry: humanism worshipping itself. Elevating the moral and metaphysical claims made on behalf of human rights may be intended to increase its universal appeal. In fact, it has the opposite effect, raising doubts among religious and non-Western groups who do not happen to be in need of Western secular creeds.” Human rights, like all areas of law, needs to develop a richer conception of context within which to interpret vague and powerful terms such as “equality” and “non-discrimination” – much greater attention needs to be paid to differential contexts such as those represented by religions. Respect within law and politics for a robust conception of associational diversity and difference is essential to human freedom.

obstacles standing in the way of “deep equality”. The volume suggests that it is necessary to move beyond both concepts in order to achieve a “cohesive” society!⁶ All of these moves show a failure to understand the proper jurisdictions of law and religion and exhibit an insufficient grasp of history and political theory and the dangers to culture when religions are suppressed and the law becomes, in essence, “theocratic.”⁷

The late legal historian, Harold Berman, rejected what he referred to as “a form of secular religion or idolatry” which involved “. . .the worship of a constitutional principle for its own sake, coupled with a high degree of scepticism concerning any justification for such worship other than immediate self-interest, whether individual or collective.”⁸ According to Peter Berger, a leading sociologist of the last half century:

There exists an international subculture composed of people with western-type higher education, especially in the humanity and social sciences, that is indeed secularized. This subculture is the principle “carrier” of progressive, enlightened beliefs and values. While its members are relatively thin on the ground, they are very influential, as *they control the institutions that provide the “official” definitions of reality, notably the educational system, the media of mass communication and the higher reaches of the legal system.*⁹

What this means is that when we are dealing with the law and the media we must recognize that these sectors are heavily over-represented by those, such as many Western journalists, judges and lawyers, who have little time for religion at best and actively wish to attack it at worst. It means, as well, that many simply do not appreciate its importance and this is evident in their coverage and decisions.¹⁰ Ours is increasingly a “show me” age in which empiricism matters increasingly to poli-

⁶ See: Lori Beaman, (ed) *Reasonable accommodation: Managing diversity* (Vancouver: UBC Press, 2012) the concept of “deep equality” that wishes to view both “accommodation” and “tolerance” as passé is in opposition to a richer understanding of multi-culturalism and diversity that could be called “deep diversity”; only diversity is consistent with freedom.

⁷ Giorgio Agamben, (trans. Leland De la Durantaye), *The Church and the Kingdom* (London: Seagull Books, 2012) in his most penetrating reflection of the role of the Church in relation to time and pilgrimage, has noted the extension of law as follows: “With the eclipse of the messianic experience of the culmination of the law and of time comes a most unprecedented hypertrophy of law - one that, under the guise of legislating everything, betrays its legitimacy through legalistic excess” (40).

⁸ Harold Berman, *Faith and order: The reconciliation of law and religion* (Grand Rapids: Eerdmans, 1993) 218.

⁹ Peter L. Berger *The de-secularization of the world* (Grand Rapids; Eerdmans, 1999) 34 (emphasis added). Such presence within the forces that give the most present cultural *descriptions* (education and media) and *decisions* (politics and law) goes some way to explain the dominance of the wide-scale belief in “secularization” despite not only the lack of an empirical base to support it but greater empirical proof for its *opposite* - the truth that religions are more significant world-wide not less.

¹⁰ See, on the empirical claims for the goods of religion, Brian J. Grim *Religious freedom: good for what ails us?* (2008) 6 *Rev Faith and Int'l Aff* 3-7.

tics and law. For this reason we must pay attention to the facts of the *goods that religions serve* as well as the theoretical arguments for their respect. In this article I will give some recent examples of the language and strategy of attacks on religion and how a better understanding of key terms can serve to resist such attacks.

3. Culture needs religions: Law and politics are not proper replacements for religious associations

For reasons that follow, the best view is that all these conceptions of law as a replacement for religion should be rejected since law is not capable of doing what religions do culturally. Whether these attempts to mimic the roles and powers of religion in law and politics are called “civil religion,” “constitutional theocracy,” “political theology,” “human rights idolatry” or “deep equality,” all should be rejected as inappropriate usurpations of the public role of religions in culture and an over-extension of laws that need to allow space for differing conceptions to co-exist. Religions, which, by definition, believe different things are likely to conflict with each other which is why associational independence is important not only to freedom but to peaceful co-existence. Religions understood properly as associational are diverse and therefore stand necessarily “outside” the public, the political or the legal (while they may overlap with each of these spheres and with other religions).

The quest to establish civil religion or to make an idol out of human rights or the constitution is doomed to failure for several other reasons: briefly stated here are three:

1. *Religious associations are joined* (or have a significant voluntary dimension) whereas, usually, citizens do not join a state in the same way. The boundaries of the state are much more formal and difficult to change;
2. *Religions maintain allegiance through binding by affection*; the state and the law do this in different ways. Related to this, religions seek to share their faith in their project with others. The law and the state do not do this to the same degree, nor should they; and
3. *Religious associations are genuine communities with their own rules based on transcendental commitments – the law functions differently*. While there may be similarities in that both have rich symbolic languages, there are important distinctions between law and its “community” of lawyers, judges and academics and those who live in religious communities. First, the law is there for everyone and must be administered impartially between all sub-communities that make up the wider culture and its common symbols should give fair access to all, not preferred membership or voice to some. Religious symbolism and life does not operate this way. Superficial similarities between a “sacred text” and the authority of law, or the idea of legal judges as “high priests”,

should not be over-extended to draw a parallel between religion and law where the social functions are so different and the effects of jurisdictional blurring are negative.

4. Law as “constitutional theocracy” and politics as “political theology” or “civil religion” should all be rejected

Canadian scholar Ran Hirschl, in his recent work with a most telling title, is correct to refer throughout his book *Constitutional Theocracy*, to the “high priests of the civil religion in Johannesburg” (187); “the high priests of constitutionalism” (citing, particularly, South Africa and Canada as examples, 203); “today’s philosopher king judges” (240); and in his reference to “the religion-like nature of the constitutional scripture” (249). He is correct to do so if we speak of how some look at law but not, however, if we accept (as he seems to) this as an *appropriate* view of the law.

Another temptation is to urge citizens to embrace the return to singular conceptions such as *a* political theology or *a* civil religion or *a* constitutional theocracy.¹¹ In each case, these singularities will be oppressive of the diversity of belief and opinion that associational life alone provides. What is needed for the claims of those who support civil religion or a “global civil religion” is not a civil religion at all, but an approach to the appropriate delineation and furtherance of religions (plural) within the civil and global settings. The law should be in the business of superintending, to the minimum degree, the conflicts that extend beyond what is acceptable between the communities. There are limits to religion and what an association may wish to do, as there are for all areas of human endeavour. The articulation of the limit, however, must recognize the limitations of law itself, something that law has been rather weak at doing.¹² Like “civil religion” we need to be wary of these attempts to divinize or idolatry law and human rights or politics and explain why they are inappropriate usurpations of the role properly played by religions in societies.

5. What about claims that law can be “transformative”?

It is common to hear that law can be in the business of social “transformation”; are all such claims illegitimate? In what way may we speak meaningfully about law

¹¹ Ran Hirschl, *Constitutional theocracy* (Cambridge: Harvard U.P., 2010); the sort of error committed, in a different way by Paul Kahn in *Political theology* (New York: Columbia UP, 2009) and the latter’s former student at Yale, Canadian academic Benjamin Berger, who, while he superbly explains why law “fails to appreciate religion as culture” comes very close to suggesting that law constitutes both a “community” and a “culture” of its own; see: Benjamin Berger, Law’s religion, in Richard Moon, (ed.), *Law and religious pluralism* (Vancouver: UBC Press, 2008) 264 at 288.

¹² See Francis Lyall, Religious law and its application by civil and religious jurisdictions in Great Britain, in Ernest Caparros, (ed.), *Religion in Comparative Law*, (Brussels: Bruylant, 2000) 253; Michael J. Perry, *The political morality of liberal democracy* (Cambridge: Cambridge UP, 2010) 75.

as transformation? The answer is that we *may* speak of law as having ambitions to transform society *only if* such legal ambitions respect adequately the basic conditions of a free and democratic society including respect for both associational diversity and associational integrity. Law and politics must not unduly interfere with religious associations and should, ideally, co-operate with them. Seeking some kind of homogeneity or convergence in which religious communities are bleached out is inconsistent with constitutional freedoms properly understood. What do we mean by “undue” interference? Law or politics interfere inappropriately or unduly when they attempt to force the beliefs or conscience of citizens to change, *in relation to matters that are openly contestable*, in ways that are not chosen by the citizens themselves. This places real and necessary obstacles in the way of quests for “transformation” that seek to crush religious diversity on certain matters.

There are many debates in contemporary society that raise controversial questions and that have irreconcilable philosophical or moral frameworks. Such matters as medical ethics in relation to abortion, euthanasia and a health care worker’s “duty to refer” for example, or what matters will allow dissent in relation to controversial forms of marriage (same-sex marriage comes to mind) are not reconcilable given the divergent starting points for analysis. Those who seek to change society should do so through the co-operation of civil society properly respecting its diversity yet the temptation is to do so through the violence of law. To choose law for wholesale reform *over against religious diversity* is to threaten freedom itself and so such approaches cannot properly be considered transformative or acceptable. This is why religious employers *must* be allowed to discriminate (i.e. make distinctions) in favour of religious employees or rules and why such distinctions are not “unfair” discriminations with which the law should interfere as long as they are done with sufficient notice and consistent practice and so on.¹³

What this says about “transformative constitutionalism”¹⁴ is that ambitions towards reformation of society will have to take different forms with foci in different places than the current focus on rights-based litigation which tend to create winners and losers, not the conditions of accommodation and diversity which involve co-existence

¹³ Failure to grasp or accept the structural and contextual nature of distinctions so that not all distinctions or discriminations constitute “unfair” discriminations may be seen in various recent writings. See, for example David Bilchitz, *Why courts should not sanction unfair discrimination in the private sphere: A reply* (2012) *SAJHR*, 296 discussed further below and, generally, the collection of essays edited by Lori Beaman, (ed.), *Reasonable accommodation* (2012), note #5 above.

¹⁴ As with other terms such as “liberalism”, “pluralism”, “equality” and so forth, the concept of “transformative constitutionalism” is multi-valent and so a variety of interpretations are possible. Not all will be subject to the claim I make about “law becoming a form of religion” which I reject. See, generally, on multi-valence, Malise Ruthven, *Fundamentalism: A very short introduction* (Oxford: Oxford UP, 2007) 5ff.

with *disagreement*.¹⁵ Moving the focus of transformation from law to civil society (including but not limited to politics) will, ideally, gradually shift the focus from litigation as a means of forced outcomes. This form of more consensual development will perhaps, in some ways, result in slower forms of social development, to the chagrin of activists, but in the long run it will provide a more meaningful form of social change or understanding and avoid the risks of backlash that unjust approaches will produce.

The advancement of minorities and developments in relation to equality and non-discrimination will continue but the focus will change direction and face, rather than the courtrooms, the more appropriate chambers of change – legislative chambers and associational meetings and the usual repertoire of active civil society driven political frameworks. The emphasis will be less on legal challenges and outcomes where the advancement of particular agendas rather than associational diversity is presumed to be the important principle. The focus will and should be, increasingly, on political and civic discourse and debate seeking to change the minds of those in different associations towards larger conceptions of shared goods. Also, and this is key, the search for justice, when it is in the courts (as it will sometimes rightly be) will involve the use of presumptions such as one *that needs to be created in favour of associational diversity* with a view to preserving and encouraging diversity within appropriate legal limitations. Such presumptions may be rebutted but the onus is on those who challenge associational and religious diversity, not on the associations as is currently the case.

6. Understanding varieties of pluralism and liberalism and rejecting false versions of both

All terms can contain ambiguity and multiple meanings. Similarly, there are a variety of meanings and possible interpretations for most concepts. In relation to “liberalism” and “pluralism”, however, it is important to choose conceptions of central terms that respect and encourage diversity, and, as far as possible, independence. Some tend towards greater understanding of associational diversity and robustness, and others leave that sort of question undeveloped. Still others are aggressively arrayed against religious diversity and assume, if they do not express it openly, that law and politics should help particular viewpoints to triumph publicly. Some go so far as to suggest that other viewpoints than their own should be “attacked” legally and religious believers and their associations “coerced” by law to change their “hearts and minds.”¹⁶ On sexual matters,

¹⁵ I have written about the theory underlying this and the tensions in various approaches to liberalism in Iain T. Benson, *Living together with disagreement* (Ballan Australia: Conor Court, 2012).

¹⁶ Two examples supporting “attack” and “coercion” are as follows: in the first, urging legal “attack” on traditional views of heterosexual marriage and the other suggesting that religions should lose in conflicts with “equality” (particularly in relation to sexual orientation claims) and that law should “coerce

religious viewpoints are stigmatized as “homophobic” or “heterosexist” and said to be “abhorrent.” People who use this form of argument have no respect for others who hold different viewpoints and would seek to force the alternative viewpoints on sexual morality to be treated as equivalent to racism – which, of course, sexual views are not, since race is not a choice but sexual conduct (heterosexual or homosexual) is.

7. Towards “holistic pluralism”

A better approach to pluralism than these false and aggressive ones is a recent call to recognize what its author refers to as “integral” or “holistic pluralism.” Fred Dallmayr seeks to overcome the extremes of either radical fragmentation or monistic unification by a quest for an understanding of mutual relatedness and engagement.¹⁷ Dallmayr’s insight into the development of “integral pluralism” is important:

One might say that, whereas in traditional monism (as well as dualism) the unifying structure is imposed from the top down, the linked quality of integral pluralism emerges from the bottom up - in a way that can never be fully predicted or exhaustively mapped.¹⁸

change in [the] hearts and minds” of believers, see: Pierre de Vos, Same-sex sexual desire and the re-imagining of the South African family, (2004) 20(2) *SAJHR*, 179 at 187 and David Bilchitz, Why courts should not sanction unfair discrimination in the private sphere: A reply (2012) *SAJHR*, 296 at 314. Both writers would call themselves “liberals” yet more accurate assessments would reject their perspectives, at least on these issues, as constituting “civic totalitarianism” not liberalism since they allow no space for diversity and have no respect for alternative moral viewpoints other than their own. On the nature of “civic totalitarianism” and why it applies to claims that religions should not be entitled to have alternative viewpoints in relation to controversial matters, see William Galston, Religion and the limits of liberal democracy, in D. Farrow (ed.), *Recognizing religion in a secular society* (Montreal: McGill-Queens, 2004) 41-50 at 43-44, 49. The claim, implicit but clear, that religious viewpoints that say same-sex sexual conduct is immoral should be challenged by law, and stigmatized as “homophobic” or “heterosexist” (both terms which Pierre de Vos and David Bilchitz and others, use) effectively suggests that only the sexual moral views of those who accept the moral legitimacy of same-sex conduct should be accepted. With this presupposition the stage is set to “coerce change” by force of law. Of course, matters of sexual morality are precisely the sort of things about which reasonable people (and institutions) ought to be able to disagree. That “sexual orientation” has more or less successfully come to be viewed by a generation of jurists, lawyers and journalists, as conveying the right to *act on that orientation* in all settings (including religious ones) is one of the unusual aspects of the current time. Religions, of course, place restrictions on *heterosexual orientation* as well as homosexual orientation (consider the prohibitions on “fornication” or “adultery” and rules involving marriage that apply to heterosexuals as well as homosexuals) yet this is virtually never discussed because to do so would suggest, rightly, that religious viewpoints are not “homophobic” but have a different view of sexual morality for everyone no matter what their “orientation.” In this area, rhetoric trumps logic and the terminology is as slippery as the tactics that are often employed to win arguments or court cases.

¹⁷ Fred Dallmayr, *Integral pluralism* (Lexington: University Press of Kentucky, 2010) 9.

¹⁸ *Ibid* at 9

A pluralistic universe of the sort Dallmayr envisions, “is more like a federal republic than an empire or a kingdom.”¹⁹ Again, quoting William Connolly, Dallmayr draws on the ethical and political implications of mutual connectedness and engagement, and quotes Connolly when he writes: “pluralism, particularly of the multi-dimensional, embedded variety supported here, requires a set of civic virtues – in fact, pluralist virtues – to sustain itself.”²⁰ What this means is the search for a “public ethos” that “solicits the act of cultivation of pluralist virtues by each faith [or group] and a negotiation of a positive ethos of engagement between them.”²¹ Dallmayr invokes the importance of forbearance and a “presumed generosity in a larger ethos of pluralism.”²² The essence here is co-operation, not domination and certainly not “attack” or “coercion.”

8. Religions have work to do in order to understand and live within pluralistic societies

Dallmayr criticizes religion for erecting three obstacles in the way of integral pluralism:

1. *The recruitment of religion for strictly worldly purposes*, that is, its enlistment in the pursuit of power, wealth and domination – possibly hegemonic or imperial domination (the “politicization of religion”);
2. *The retreat of religious faith into a purely inward or “private” disposition*, shunning all involvement in social affairs – this is the opposite of no. 1 and may be referred to as the “privatization of religion;” and
3. *A quasi-Manichean division between good and evil, religious and non-religious motives* – in the sense that an ethical or religious disposition is narrowly confined to private life, while politics, especially international politics, is viewed as being entirely in the grip of immoral power politics.²³

¹⁹ Here Dallmayr is quoting William James at 9.

²⁰ *Ibid* at 11. The importance of re-understanding “virtues” rather than the common but shallow and confusing language of “values” has been discussed by many contemporary philosophers and their work is reviewed in detail in Iain T. Benson, Do “values” mean anything at all?: Implications for law, education and society” (2008) *Journal of Juridical Science* 33 (1): 117-136. This distinction between “virtues” and “values” goes to the root of the moral language of religion and society in our day. Despite this, some religious writers fail, without any serious analysis, to appreciate its importance: see, for example, John G. Stackhouse Jr. *Making the best of it: Following Christ in the real world* (Oxford: OUP, 2008) 337 n.20. The issue is a deep one and of critical importance as it goes to the heart of not only moral language but the relationship between philosophy and theology. Similar unwillingness to engage the problems of using “secularism” and “secular” incorrectly is also, unfortunately, a notable feature of our times.

²¹ *Ibid*

²² *Ibid*

²³ *Ibid* at 18

To get beyond these obstacles, Dallmayr calls for ethical engagement and “lateral embroilment.” This involves the work of “dialogue and interrogation.” Dallmayr draws upon a wide variety of influences in order to describe this new approach to pluralism and holism and notes:

Clearly, religious and ethical teachings are bound to impact contemporary politics - not with the aim of solidifying a monistic power structure but with the intent of promoting human self-rule and responsible democratic agency, an agency that remains open to the demands (and plural interpretations) of ethics and religion. Differently phrased, the task of religion and ethics in our time is not to buttress but to contest or critique sovereign political power; for this reason, their locus of activity is mainly on the level of “civil society” or the “public sphere” rather than that of government.²⁴

Here, indicating that the project of integral pluralism is not utopian, is Dallmayr’s recognition that “...unified harmony is bound to be accompanied by tension, disharmony, and struggle, a fact that is one of the hallmarks of integral pluralism.”²⁵

The vision that Dallmayr develops of a pluralistic society committed to dialogue and engagement, fully cognisant of the ongoing reality of disagreement and conflict, is one that clearly rejects, *and calls for legal response in rejecting*, movements towards monistic domination of the sort just referred to. It is that monistic domination, although phrased in the common but ambiguous language of “furthering equality” or “improving dignity” or rejecting “discrimination” or pursuing “transformative constitutionalism” that needs close scrutiny. *When methods are proposed, that in each case fail to respect difference and diversity, these lofty goals are no longer useful to a just application of the law and are not justifiable.*

9. Conclusion: Law should view religions more positively, recognize their importance to the common good and society and say so in legal judgments

Here and there a legal judgment may stand out as a beacon of insight in the rather bland landscape of contemporary judgments that misunderstand religions and fail to accord them respect. One notable exception to the general trend towards tepid and unenthusiastic treatments of religion is the recently retired judge of the South African Constitutional Court, Justice Albie Sachs. Here is what he said about religion and community and culture in a leading case on religion in South Africa. I know of no decision like it anywhere else. Sachs wrote:

²⁴ *Ibid* at 19

²⁵ *Ibid* at 20

[F]reedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. *Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.*²⁶

The Canadian Supreme Court, which has had ample opportunity to say comparably strong or even encouraging things about the importance of religion, has never done so. It has, nonetheless, recognized a relationship between society and the freedom of religion as follows:

[the] freedom of religion is a fundamental right and represents a major triumph of our democratic society. The philosophical and political values underpinning Canadian democracy recognize the need to respect the diverse opinions and beliefs that guide the consciences and give direction to the lives of all members of our society.²⁷

Freedom of religion then is not just the right to have beliefs privately but the right to engage in the public dimensions of manifestation, declaration and teaching. What has occurred from time to time in Canada though, has been a caving in to a reduction of the freedom of religion in two main ways: individualism and privatization. Sadly some scholars have also been guilty of these errors. Thus, there are theories of rights in Canada and South Africa that are reductive of the communitarian conceptions of rights contrary to the importance, in relation of religious rights particularly, of their community and public dimensions.²⁸

²⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 36, (emphasis added) per Albie Sachs J. ("*Christian Education*").

²⁷ *Congrégation des témoins de Jéhovah de St. Jérôme-Lafontaine v Lafontaine (Village)*, (2004) 2 SCR 650, para 64 per LeBel J. dissenting. On the essence of the freedom of religion see: *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 353-354.

²⁸ Unacceptably "individualistic" reading of rights and particularly religious liberty may be found all too easily in scholarly work in this area, see: Lorraine E. Weinrib, Ontario's Sharia law debate, in Richard Moon (ed.), *Law and religious pluralism in Canada* (Vancouver: UBC Press, 2008) 239, 246-247.

Three contemporary writers offer important insights. Oxford philosopher Joseph Raz, himself not a theist, has rightly viewed religions as a key means of further conceptions of the common good which can act as a check on the fragmenting tendencies of individualism.²⁹ Another leading contemporary non-theistic philosopher, Jürgen Habermas, has noted the importance of religious voices in the political public sphere, in a way that would apply to the legal sphere, and adds an important caution about their truncation:

For functional reasons, we should not over-hastily reduce the polyphonic complexity of public voices, either. For the liberal state has an interest in unleashing religious voices in the political public sphere, and in the political participation of religious organizations as well. It must not discourage religious persons and communities from also expressing themselves politically as such, for it cannot know whether secular society would not otherwise cut itself off from key resources for the creation of meaning and identity. . . *Religious traditions have a special power to articulate moral intuitions, especially with regard to vulnerable forms of communal life. In the event of the corresponding political debates, this potential makes religious speech a serious candidate for transporting possible truth contents, which can then be translated from the vocabulary of a particular religious community into a generally accessible language.*³⁰

What the current situation shows is that law is being used in many instances to attack and undermine the respect that should be owed to religious associations. As I have demonstrated, resources exist within contemporary theory to challenge these attacks on religion *so long as religious leaders and their lawyers are made aware both of the nature of these challenges and the best theoretical arguments with which to expose and resist them*. Claims for “equality,” “non-discrimination” or “transformation” that are premised openly or covertly on getting rid of and attacking diversity, particularly religious diversity, must be recognized for what they are – threats to the open society functioning under an appropriate approach to constitutional principles. No one should be fooled any longer: the claims by egalitarian absolutists and civic totalists are illiberal and dangerous to ordered freedom and need to be understood for what they are and challenged with more just arguments that give place to contending viewpoints in a genuinely liberal manner that allows for diversity and co-existence.

²⁹ Joseph Raz, *Ethics in the public domain: Essays in morality of law and politics* (Oxford: Clarendon Press, 1994) 121.

³⁰ Jürgen Habermas, Religion in the public square (2006) *European Journal of Philosophy* Vol. 14 No. 1, 1-25 at 10 (emphasis added). See also, Louis Dupré, The common good and the open society” (1993) 55 *The Review of Politics*, 687 at 707-8.

References

- Agamben, Giorgio. (translation, Leland De la Durantaye) 2012. *The Church and the Kingdom*. London: Seagull.
- Beaman, Lori. (ed.) 2012. *Reasonable accommodation: Managing diversity*. Vancouver: UBC Press.
- Berger, Benjamin. Law's religion: Rendering culture, in Richard Moon (ed.), *Law and religious pluralism*. Vancouver: UBC Press: 264-296.
- Berger, Peter L. 1999. *The de-secularization of the world*. Grand Rapids: Eerdmans.
- Berman, Harold 1993. *Faith and order: The reconciliation of law and religion*. Grand Rapids: Eerdmans.
- Benson, Iain T. 2000. *Notes towards a (re)definition of the secular*". 33 UBC Law Rev 519.
- Benson, Iain T. 2004. Considering secularism, in D. Farrow (ed.), *Recognizing religion in a secular society*. Montreal: McGill-Queens UP: 83-89.
- Benson, Iain T. 2008. Do "values" mean anything at all?: Implications for law, education and society. *Journal for Juridical Science* 33(1): 117-136.
- Benson, Iain T. 2012. *Living together with disagreement*. Ballan Australia: Conor Court.
- Bilchitz, David 2012. Why courts should not sanction unfair discrimination in the private sphere: A reply. *SAJHR*, 296-315.
- Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
- Congrégation des témoins de Jéhovah de St. Jérôme-Lafontaine v Lafontaine (Village)*, (2004) 2 SCR 650.
- Cotler, Irwin 1999. Jewish nongovernmental organizations, in John McLaren and Harold Coward (eds.), *Religious conscience, the state and the law*. New York: SUNY Press: 77-96.
- Dallmayr, Fred 2010. *Integral pluralism*. Lexington: UP of Kentucky.
- Dupré, Louis 1993. The common good and the open society. 55 *The Review of Politics*, 687 at 707-708.
- Galston, William 2004. Religion and the limits of liberal democracy, in D. Farrow (ed.), *Recognizing religion in a secular society*. Montreal: McGill-Queens: 41-50 at 43-44, 49.
- Grim, Brian J. 2008. Religious freedom: Good for what ails us? 6 *Rev Faith and Int'l Aff* 3-7.
- Habermas, Jürgen 2006. Religion in the public square. *European Journal of Philosophy* Vol. 14 No. 1, 1-25.
- Hirschl, Ran 2010. *Constitutional theocracy*. Cambridge: Harvard UP.
- Ignatieff, Michael 2001. Human rights as politics and idolatry, in Amy Gutman (ed.), *Human rights as politics and idolatry*. Princeton: Princeton UP: 3-98.
- Kahn, Paul 2009. *Political theology*. New York: Columbia UP.
- Lyll, Francis 2000. Religious law and its application by civil and religious jurisdictions in Great Britain, in Ernest Caparros (ed.), *Religion in Comparative Law*. Brussels: Bruylant: 251-268.
- Maclure, Jocelyn, and Taylor, Charles. (translated by Jane Marie Todd) 2011. *Secularism and freedom of conscience*. Cambridge: Harvard UP.
- Perry, Michael J 2010. *The political morality of liberal democracy*. Cambridge: UP.

- Ruthven, Malise 2007. *Fundamentalism: A very short introduction*. Oxford: Oxford UP.
- Raz, Joseph 1994. *Ethics in the public domain: Essays in morality of law and politics*. Oxford: Clarendon.
- Stackhouse, John G. Jr. 2008. *Making the best of it: Following Christ in the real world*. Oxford: Oxford UP.
- Taylor, Charles 2001. *The malaise of modernity*. Toronto: Anansi.
- R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295.
- Vos, Pierre de. 2004. Same-sex sexual desire and the re-imagining of the South African family, 20(2) *SAJHR*, 179-187.
- Weed, Ronald and von Heyking, John. (eds.) 2010. *Civil religion in political thought*. Washington D.C.: The Catholic University of America Press.
- Weinrib, Lorraine, E. 2008. Ontario's Sharia law debate, in Richard Moon (ed.), *Law and religious pluralism in Canada*. Vancouver: UBC Press: 239-263.



Guidelines for authors can be found at
www.iirf.eu/index.php?id=30