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## Religious Authority in Public Spaces: The Challenge of Jurisdictional Pluralism

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## Religious Authority in Public Spaces: The Challenge of Jurisdictional Pluralism

### Abstract

The new significance of religion in Australian politics raises serious questions about how our politics is conceived and conducted. Liberal theorists have proposed three successive approaches to resolving the problem of religious disagreement in a diverse society. The first was to propose that reason, rather than religion, should bind the society together; that individuals should be free to continue to practice their religion privately, but that religion must no longer play a guiding role in public life. The second liberal solution was to extend the prohibition to all 'comprehensive doctrines', whether religious or secular, and to insist that state power must only operate on the basis of 'public reasons' that any sensible person could in principle understand and accept. The third liberal solution is to propose that secular reason and religious conviction operate in a deliberative dialogue with each other, in which each recognises its limitations and its reliance on the other. However, relationship between religion and politics is today being challenged by a new development that neither of these approaches can really address. This development is the emergence and intensification of legal and jurisdictional pluralism. Jurisdictional pluralism challenges the liberal settlement, not by threatening to 'take over' the state as such, but by developing alternative forms of public order that exist alongside those of the state. This development requires us to think about the relationship between religion and the state in a different way: one in which religion doesn't simply inhabit spaces that are private while the state possesses monopolistic control over the public sphere. In the new religious politics, religion seeks to define, create and inhabit spaces that are just about as public as those governed by the secular state. This is a situation that our politics has only just begun to think about.

### Cover Page Footnote

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## Religious Authority in Public Spaces: The Challenge of Jurisdictional Pluralism

Nicholas Aroney\*

### I. Introduction

As in most western countries, the proportion of Australians who identify themselves as Christian has declined significantly over the last fifty years or so. Does that mean that Australia is becoming more secular? It might seem so. For while there have been increases in the numbers of people who identify themselves with other religions—such as Buddhism and Islam, the largest increases have been among those reporting no religion.<sup>1</sup> And yet, religion seems to have a significance in Australian politics that it did not have three or so decades ago.<sup>2</sup> Indeed the very decision of the Australian Bureau of Statistics to put the option ‘no religion’ above the other religious affiliations in the 2016 census gave rise to significant controversy in the context of what proved to be a very poorly administered census.<sup>3</sup>

The religious orientation of our political leaders has become an important issue in public debate. Some tried to link former Prime Minister John Howard with the religious right, a theory that rests on a modicum of truth, provided that some of the wilder conspiracy theories are duly discounted.<sup>4</sup> Responding to the view that conservative Christians were tending to vote in favour the Coalition,<sup>5</sup> former Prime Minister Kevin Rudd presented himself as a Christian socialist who looked to figures such as Dietrich Bonhoeffer for inspiration.<sup>6</sup> Upon becoming Prime Minister in 2010, Julia Gillard was immediately asked about her stance towards religion, and her response that she did not have any personal religious faith was deemed significant enough to make front page news.<sup>7</sup> Former Prime Minister Tony Abbott’s Catholic faith was frequently the subject of discussion, even though Abbott himself tended to play down its significance for his politics.<sup>8</sup> The religious orientations of current Prime Minister Malcolm Turnbull and Opposition Leader Bill Shorten have been less

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<sup>1</sup> According to the 2016 Census, 52.1% reported Christianity as their religion, 30.1% reported ‘no religion, and 8.2% reported some other religion. Of those reporting Christianity the proportions among the denominations were: Roman Catholic (22.6%), Anglican (13.3%), Uniting (3.7%), Presbyterian and Reformed (2.3%), Eastern Orthodox (2.1%), Baptist (1.5%), Pentecostal (1.1%) and Lutheran (0.7%). Among the non-Christian religions the proportions were: Islam (2.6%), Buddhism (2.4%), Hinduism (1.9%), Sikhism (0.5%) and Judaism (0.4%). See *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016 (2011.0): Religion in Australia* (Australian Bureau of Statistics, 2016).

<sup>2</sup> See Stephen Mutch, ‘Religion in Australian politics: a surfacing debate’, *AQ: Journal of Contemporary Analysis*, 2004 (September-October): 15-20.

<sup>3</sup> Andrew West, ‘The war over “no religion” on the 2016 Australian Census’, *ABC Religion and Ethics Report*, 2 September 2015.

<sup>4</sup> E.g., Marion Maddox, *God under Howard: The Rise of the Religious Right in Australian Politics* (Sydney: Allen & Unwin, 2005).

<sup>5</sup> See Clive Bean and Ian McAllister, ‘Voting Behaviour: Not an Election of Interest (Rates)’, in Marion Simms and John Warhurst (eds), *Mortgage Nation: The 2004 Australian Election* (Perth: API Network, 2005).

<sup>6</sup> Kevin Rudd, ‘Faith in politics’, *The Monthly*, October 2006, 22-30.

<sup>7</sup> Joe Kelly, ‘Julia Gillard respects religious beliefs but will not “pretend” to have faith for votes’, *The Australian*, 29 June 2010.

<sup>8</sup> Tony Abbott interview with Laurie Oakes, *Channel Nine Today Program*, 6 December 2009.

prominent in public discussion,<sup>9</sup> but religion itself has continued to be a significant issue in Australian politics.

There have been several important ‘academic’ forays into the issue. John Warhurst has drawn attention to several factors: the changing denominational composition of the political parties; the public presentation of religious beliefs; the appointment of religiously-affiliated individuals to public office; the role of religious convictions in public policy debates and conscience votes in parliament; faith-based delivery of government services; the electoral success of religiously-associated political parties; and special issues faced by particular religious groups in Australia, such as what he called the ‘politics of Islam in Australia’.<sup>10</sup> Roy Williams recently documented the religious faith of Australia’s Prime Ministers since Edmund Barton.<sup>11</sup> Important work by Stephen Chavura and Ian Tragenza has re-examined the nature and significance of secularism and secularisation in Australia.<sup>12</sup> Judith Brett has underscored the role of religion and culture, rather than class, in the development of Australia’s mainstream political parties.<sup>13</sup> Anna Crabb has drawn attention to an increased use of religious content in speeches delivered by Australian federal politicians.<sup>14</sup> Gregory Melleuish, building on this, has drawn attention to a corresponding ‘cultural turn’ in the academic discussion of Australian politics, a development that is closely associated with religion.<sup>15</sup> All of this has placed ‘received’ conceptions of the separation of church and state under sustained pressure.<sup>16</sup> Thus, two of the most significant decisions brought down by the High Court in recent years concerned a constitutional challenge to the federal government’s national school chaplaincy program.<sup>17</sup> In this climate, several prominent religious leaders have addressed the question of religion and politics in one way or another. George Pell, Cardinal and then Archbishop of Sydney, published a collection of essays discussing the role of Catholic faith and doctrine within the modern and post-modern conditions of contemporary Western societies.<sup>18</sup> Tom Frame, the Anglican Bishop to the Australian Armed Forces, similarly defended a carefully-defined role for religion in public life.<sup>19</sup> Jesuit Priest

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<sup>9</sup> Andrew West, ‘What role will religion play in the upcoming federal election?’ *ABC Religion and Ethics Report*, 12 May 2016 and ‘The Religious Lives of Malcolm Turnbull and Bill Shorten’, *ABC Religion and Ethics Report*, 16 June 2016.

<sup>10</sup> John Warhurst, ‘Religion in 21st Century Australian National Politics’, Australian Senate Occasional Lecture, Parliament House, 5 May 2006. See also Farida Fozdar, ‘The ‘Choirboy’ and the ‘Mad Monk’: Christianity, Islam, Australia’s Political Landscape and Prospects for Multiculturalism,’ *Journal of Intercultural Studies* 32.6 (2011): 621.

<sup>11</sup> Roy Williams, *In God They Trust?: The Religious Beliefs of Australia’s Prime Ministers 1901-2013* (Bible Society Australia, 2013).

<sup>12</sup> Stephen Chavura and Ian Tragenza, ‘Introduction: Rethinking Secularism in Australia (and Beyond),’ *Journal of Religious History* 38.3 (2014): 299.

<sup>13</sup> Judith Brett, ‘Class, Religion and the Foundation of the Australian Party System: A Revisionist Interpretation’ *Australian Journal of Political Science* 37.1 (2002): 39.

<sup>14</sup> Anna Crabb, ‘Invoking Religion in Australian Politics,’ *Australian Journal of Political Science* 44.2 (2009): 259.

<sup>15</sup> Gregory Melleuish, ‘Australian politics in the Australian Journal of Political Science: A review,’ *Australian Journal of Political Science* 50.4 (2015): 719.

<sup>16</sup> Darryn Jensen, ‘Faith and Politics: The Rhetoric of Church-state Separation,’ *Australian Religion Studies Review* 18.1 (2005): 25-47.

<sup>17</sup> *Williams v Commonwealth (No 1)* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

<sup>18</sup> George Pell, *God and Caesar: Selected Essays on Religion, Politics & Society*, M. A. Casey (ed.) (Washington DC: Catholic University of America Press, 2007).

<sup>19</sup> Tom Frame, *Church and State: Australia’s Imaginary Wall* (Sydney: UNSW Press, 2006).

and Professor of Law at Australian Catholic University, Frank Brennan, has likewise proposed a ‘responsible’ engagement between religion and politics in his recent book.<sup>20</sup> Marion Maddox, despite her misgivings about certain kinds of religious influence, has similarly argued for ‘more’, not ‘less’, religion in Australian politics.<sup>21</sup>

The resurfacing of religion in Australian public life is not unrelated to global developments. The general trend towards secularisation in Western countries is proving more complicated to analyse than once thought,<sup>22</sup> and what we mean by ‘secularisation’ and ‘secularism’ is being scrutinised anew.<sup>23</sup> Francis Fukuyama’s argument that the collapse of communism in Eastern Europe meant the triumph of democratic capitalism on the global stage was soon challenged by Samuel Huntington’s equally controversial ‘Clash of Civilisations’ thesis.<sup>24</sup> As Jürgen Habermas has argued, the ‘epochmaking’ events of 1989-90 unveiled a world in which religion, religious difference and religious tensions would once again take centre stage.<sup>25</sup> It is no longer possible to assume an inevitable secularisation. The re-emergent role of religion raises very important questions about how our politics is conceived and conducted.

## II. Objections to religion

One way of portraying the debate over the role of religion in Australian political life is to connect it with two fundamental principles of our constitutional system. Drawing on the example of the U.S. Constitution, the framers of the Australian Constitution chose to insert a constitutional guarantee that the newly-created Commonwealth of Australia would not have power to make laws for the purpose of either ‘establishing any religion’ or ‘prohibiting the free exercise’ thereof.<sup>26</sup> It is not my present concern to discuss the legal meaning of these guarantees,<sup>27</sup> but rather to draw attention to the two underlying principles with which they are more or less associated.<sup>28</sup>

What might be called the ‘non-establishment principle’, on one hand, centres on the legitimate use of the coercive force of government. In a democracy, it is pointed out, political

<sup>20</sup> Frank Brennan, *Acting on Conscience* (St Lucia: University of Queensland Press, 2007).

<sup>21</sup> Marion Maddox, ‘An Argument for More, Not Less, Religion in Australian Politics,’ *Australian Religion Studies Review* 22.3 (2009): 345-367.

<sup>22</sup> Peter L. Berger (ed), *The Desecularization of the World: Resurgent Religion and World Politics* (Grand Rapids, MI: Eerdmans, 1999); Jürgen Habermas, ‘Notes on a post-secular society,’ *New Perspectives Quarterly* 25.4 (2008): 17-29.

<sup>23</sup> Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press of Harvard University Press, 2007); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003).

<sup>24</sup> Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992); Samuel P. Huntington, ‘The Clash of Civilizations?’ *Foreign Affairs* 72.3 (1993): 22-49; Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996).

<sup>25</sup> Jürgen Habermas, ‘Religion in the Public Sphere’ (2006) 14(1) *European Journal of Philosophy* 14.1 (2006): 1-2.

<sup>26</sup> Australian Constitution, section 116. See Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906* (Melbourne University Press, 1976).

<sup>27</sup> On which, see Gabriel Moens and John Trone, *Lumb and Moens’ The Constitution of the Commonwealth of Australia Annotated* (7th ed: Sydney: LexisNexis Butterworths, 2007) §116; Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 338-355.

<sup>28</sup> I do not mean to suggest that this is the *best* way to understand the issues, but that the idea that there are two distinct principles shapes the way in which the issues are often thought about in Western countries such as Australia. I will return to this tendency in the conclusion.

debate and decision-making determines when and for what purposes the coercive power of government will be exercised. Concerned that the exercise of such power must be legitimate and widely accepted in a religiously plural society, it is argued that religious convictions have no legitimate role to play in justifying the use of government force.<sup>29</sup> The ‘free exercise principle’, on the other hand, asserts that religious freedom is a fundamental right of citizens. It is argued, on this basis, that religious citizens should be as free as secular citizens to engage in political discourse without having to abandon their deepest held personal convictions.<sup>30</sup>

When put this way, the non-establishment and free-exercise principles appear to conflict with each other. One suggests that religious convictions have no legitimate role in public discourse, the other suggests that that religious citizens have a right to express their convictions in political debate. How is this tension to be resolved? To address this question it is necessary to understand the nature and grounds of the objection to the use of religious convictions in liberal politics.

The underlying objection to religion proceeds on at least four levels. At its most visceral and primeval level, the objection rests on the view that religion is in some fundamental way inherently pernicious and evil. The view here is that religion, by creating false hopes of reward in an afterlife and encouraging false certainties in the truth of particular beliefs, encourages fanaticism, persecution and a gullibility that enables powerful vested interests and political demagogues to manipulate, control and tyrannise entire societies. One version of this line of argument was advanced by Karl Marx, who said that religion is the ‘opium of the people’ and that the ‘abolition of religion as the illusory happiness of the people’ is required for their real happiness.<sup>31</sup> While they would want to distance themselves from the horrible measures taken against religion in Stalinist Russia, Maoist China and Pol Pot’s Cambodia, several proponents of the ‘new Atheism’ engage in this kind of argument.<sup>32</sup>

A second, somewhat less extreme objection to religion focuses on its ‘irrationality’: that it inculcates false beliefs and undermines scientific inquiry and rational decision-making, with the implication that, although it might be tolerated for the weak-minded, religion should be excluded from the pursuit of science, philosophy and public affairs.<sup>33</sup> Thirdly, and relatedly, religion is objected to as inherently sectarian: it divides us when we should be recognising what we have in common, with the implication that religion should especially be excluded from the exercise of public power and the coercive powers of the state.<sup>34</sup> Fourthly,

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<sup>29</sup> See, e.g., John Rawls, *Political liberalism* (Columbia University Press, Paperback ed, 1996) 137; Robert Audi, ‘The Separation of Church and State and the Obligations of Citizenship,’ *Philosophy and Public Affairs* 18 (1987): 259, 277-86. See also Nicholas Aroney, ‘The Constitutional (In)validity of Religious Vilification Laws: Implications for Their Interpretation,’ *Federal Law Review* 34 (2006): 287, 297-303, discussing *Harkianakis v Skalkos* (1999) 47 NSWLR 302.

<sup>30</sup> See, e.g., Nicholas Wolterstorff, ‘Freedom for Religion’ in Nicholas Wolterstorff and Terence Cuneo (eds), *Understanding Liberal Democracy: Essays in Political Philosophy* (Oxford University Press, 2012) 298; Thaddeus J Kozinski, *The Problem of Religious Pluralism: And Why Philosophers Can’t Solve It* (Lexington, 2013) 38.

<sup>31</sup> ‘Introduction’ to Karl Marx, *Critique of Hegel’s Philosophy of Right* (Annette Jolin and Joseph O’Malley trans, Cambridge University Press, [1843] 1970).

<sup>32</sup> E.g., Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (Norton, 2004); Christopher Hitchens, *God Is Not Great: How Religion Poisons Everything* (Twelve, 2007).

<sup>33</sup> E.g., Richard Dawkins, *The God Delusion* (Bantam, 2006).

<sup>34</sup> E.g., John Rawls, ‘The Idea of Public Reason Revisited,’ *University of Chicago Law Review* 64 (1997): 765, 781.

religion is sometimes seen as ‘other worldly’ and thus irrelevant to the affairs of this present world. On this view, religion is not only excluded from public life, but religious people who understand their own religiosity in this way voluntarily withdraw themselves from public affairs, since they regard their religion as properly contemplative, mystical, spiritual, personal or private.<sup>35</sup>

### III. Liberal Prescription A: Reason

The basic fear that drives the argument that religion should have no role in democratic politics is that religious pluralism can lead to intractable conflict. The standard account of this focuses on the post-Reformation division of Europe into warring camps, Catholic and Protestant, as well as Lutheran, Calvinist and Anabaptist, and the infamous ‘wars of religion’ which raged across Europe during much of the sixteenth and seventeenth centuries. The English civil war (1642-1651), although in form a conflict between the King and the landed gentry in Parliament, can similarly be characterised as a war between an established Anglicanism of an Anglo-Catholic sentiment against a ‘lower church’ Protestantism consisting of Presbyterians, Puritans and Separatists. While there is reason to doubt the simplicity of this story, its influence on liberal thought is abundantly clear.<sup>36</sup>

The original liberal solution to this problem of seemingly intractable conflict, pioneered by figures such as the English philosopher, John Locke, was one of rational Enlightenment and an appropriate moderation of the fervour and conviction with which we hold beliefs about which we are less than rationally certain.<sup>37</sup> To put the point broadly, the general background was that European society, as most societies before it, had seen religion as an essential binding force that held society together. But when conditions of religious diversity developed after the Reformation, the foundations of European society were placed in jeopardy, grounded in conflict between proponents of alternative religious visions. Against this, philosophers proposed that ‘reason’—rather than religion—should bind society together; that individuals should be free to continue to practice their religion privately, but that the practice of religion must be removed out of the sphere of ‘public’ life—out of politics and government—and relegated to the ‘private’ spheres of religious community, home life and individual conscience.

This view took hold of the imagination of the intellectual leaders of Western Europe during the period we know as the Enlightenment, and the idea that religion should be relegated to the private sphere soon became a fundamental article of faith among the ‘enlightened’. However, we don’t today live in the heady days of the Enlightenment. We live, it is said, in a post-modern society in which a naïve faith in ‘Reason’ and a ‘Rational Politics’ have faded, at least for many, although they continue to influence many others.

This loss of faith in reason has at least three fundamental causes. The first is that the Enlightenment is now seen to be itself a kind of dogmatism that enshrined ‘human reason’ as a kind of secular God. In our post-modernity, we find it hard to maintain an uncritical faith in reason. The second cause is that the Enlightenment faith ended up producing a whole range

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<sup>35</sup> See Ernst Troeltsch, *The Social Teaching of the Christian Churches* (Olive Wyon trans, George Allen & Unwin, 1931) 743-6, 800-802; H Richard Niebuhr, *Christ and Culture* (Harper & Row, 1951) Pt 2: ‘Christ Against Culture’.

<sup>36</sup> For a trenchant critique of these arguments, see William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford University Press, 2009).

<sup>37</sup> See Nicholas Wolterstorff, *John Locke and the Ethics of Belief* (Cambridge University Press, 1996).

of incompatible moral and political doctrines, themselves embroiled in a kind of intellectual conflict as intractable as the conflict between incompatible religious beliefs.<sup>38</sup> Worst of all, the twentieth century witnessed three major secular politico-economic doctrines literally at war with each other: fascism, communism and capitalism. And even among liberals, there was a proliferation of liberal political schemes: Locke, Smith, Kant, Bentham, Madison, Jefferson, Mill, Hayek, Berlin, Popper, Rawls, Dworkin, Nozick, Kymlicka—the list goes on. The third cause of the loss of faith in Enlightenment reason is that the twentieth century also saw what pragmatic reason could do: among other things, it could invent nuclear weapons and provide rationalisations for the use of indiscriminate bombing of civilian populations as ostensibly ‘legitimate’ and ‘necessary’ wartime measures.

#### IV. Liberal Prescription B: Public Reason

Against this background, the prevailing liberal approach to these matters had to change. It was now obvious that religion itself was not the only problem. Not only religious doctrines but also secular doctrines could be the cause of social division, intractable conflict and the infliction of untold political harms and military atrocities. And thus John Rawls, perhaps the most influential English-speaking political philosopher of the second half of the twentieth century, came to conclude that the problem lay not with only ‘religious’ convictions in politics but with any ‘comprehensive doctrine’ that sought to muscle its way into politics—whether that doctrine be religious or secular in character.<sup>39</sup>

This was a necessary but critical step for Rawls to take, for in denying that the problem lies with ‘religion’ per se, and in acknowledging that the doctrines of the Enlightenment are as comprehensive as the religious doctrines they sought to displace, it became impossible to rely on the distinction between ‘the religious’ and ‘the secular’ to demarcate the bounds of acceptable political reasoning.<sup>40</sup> For Rawls, the crucial point was to distinguish ‘comprehensive doctrine’ on one hand and ‘political reason’ on the other. What did this distinction mean?

Rawls argued that a mere *modus vivendi*—an uneasy truce between fundamentally conflicting viewpoints—is insufficient.<sup>41</sup> It is not enough merely to recognise that neither side in the culture wars is going to prevail (for the time being, at least) and that we all just have to ‘get along’. Without wholehearted support for a liberal democratic order, the system will never be stable and enduring. Should one party gain the upper hand they will be inclined to impose their dominance on the whole political order. What is required, Rawls argued, is that partisans on all sides recognise not just the pragmatic necessity of playing by the rules of the democratic game, but embrace what he called the obligations of ‘democratic citizenship’.<sup>42</sup>

According to Rawls, a liberal society must be grounded upon the agreement of those who adhere only to *reasonable* comprehensive doctrines: that is, doctrinal positions that

<sup>38</sup> Alasdair MacIntyre, *Whose justice? Which rationality?* (University of Notre Dame Press, 1988).

<sup>39</sup> Rawls, n 29, xxvi-xxviii. On Rawls’ transition from the comprehensive liberalism of *A Theory of Justice* (1971) to ‘political liberalism’, see Peter Sedgwick, ‘The Public Presence of Religion in England: Anglican Religious leaders and Public Culture’ in Nigel Biggar and Linda Hogan (eds), *Religious Voices in Public Places* (Oxford University Press, 2009) 238-9.

<sup>40</sup> Rawls, n 34, 775.

<sup>41</sup> *Ibid* 780-82.

<sup>42</sup> *Ibid* 766-7.

forswear the goal of subordinating the political order to their particular comprehensive worldview and which accept the basic values of a constitutional, liberal-democratic regime. Rawls wrote as if we all adhere to a comprehensive doctrine of one kind or another, whether that worldview be religious, moral or philosophical in character, but a *reasonable* adherence to such doctrine allows us to be committed, at the same time, to the duties of democratic citizenship. Those who find themselves in a ‘relentless struggle to win the world for the whole truth’ or who are zealous ‘to embody the whole truth in politics’ hold positions, he said, that are incompatible with this principle.<sup>43</sup>

On Rawls’ view, the principle of democratic citizenship requires participants in public debate to limit themselves to the use of reasons that all persons, no matter what their comprehensive doctrines, can reasonably accept. These reasons, which Rawls referred to as ‘public reasons’, can be presented in a manner that is independent of any particular comprehensive doctrine. An individual may hold a certain political position for some specific reason associated with that person’s own comprehensive commitments. But the ethics of liberal democracy require the responsible citizen to present reasons that all reasonable people can, in principle, accept.

What are these public reasons? In short, they are based on distinctively liberal political principles, values and conceptions of justice. These principles are concerned with the basic political institutions of a society; they can be presented independently of any particular comprehensive doctrine; and they can ‘be worked out from fundamental ideas seen as implicit in the public political culture of a constitutional regime, such as the conceptions of citizens as free and equal persons, and of a society as a fair system of cooperation’. According to Rawls, to engage in public reason is to appeal to these principles and ideas. Rawls admitted that the ethics of democratic participation allowed citizens to introduce into public discussion their particular comprehensive doctrines, but only if in due course ‘properly public reasons’ are offered to provide principled support for any particular political stance advocated in the public arena.<sup>44</sup>

## V. Scrutinising Public Reason

Rawls said that public reason is a kind of reason that can be presented independently of comprehensive doctrine and can be worked out from fundamental ideas implicit in the public political culture of a democratic constitutional regime. However, public reason is a mirage: it is either too abstract and vague to be of any use in resolving contested political issues or else too concrete and specific to be the object of general consensus and agreement. For when we consider the nature of political debates over particular policies and laws, it becomes apparent that comprehensive doctrines of some kind are necessary to generate the level of specificity that is needed to address the issues in a decisive manner.

Take the contested issue of abortion for example. We may all agree about the right to life possessed by all human beings, as well as the right of every woman to control her own body. But these very abstract principles, although *prima facie* ‘liberal’ in character, do not resolve the question about whether abortion is justified, in what circumstances it might be justified, and to what extent it should be regulated by law. Our comprehensive doctrines do the real work here: our deeper conceptions of what a human being is; our deeper beliefs about personal autonomy and responsibility; and our approaches to how these should be understood in relation to one another. These fundamental orientations are the really determinative factors

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<sup>43</sup> Ibid 766-7.

<sup>44</sup> Ibid 776.

in the debate.<sup>45</sup> There is no ‘public reason’ as Rawls defines it that is able to resolve the issues that arise in questions of life and death. Rawls later recognised this, and said that all that was to be done was for citizens simply to vote for the position that they ‘sincerely think the most reasonable’.<sup>46</sup> But Rawls was not willing to acknowledge that citizens will come to their views based on their comprehensive doctrines about human personhood and individual autonomy.

Not only do our positions concerning particular contested issues turn on our comprehensive doctrines, but an insistence on public reason seems to be contrary to the principle of freedom of religious expression in the first place. As Nicholas Wolterstorff and others have argued, for many religious persons their religious faith applies to their whole lives, including their political lives, and it is a matter of religious conviction that they participate responsibly in political debate. Moreover, some religious citizens are simply unable to translate their religious reasons into public reasons while remaining true to their religious convictions, for their religious convictions dictate that they ought to base their political opinions on their religious convictions and articulate those opinions openly and honestly.<sup>47</sup> In these circumstances it would be unfair to require religious citizens to abandon their convictions while liberal citizens are able to insist on theirs. Wolterstorff therefore concludes that citizens should be free to articulate whatever kinds of reasons they wish in public deliberation, and political issues should be resolved, ultimately, by majority vote.

## VI. Liberal Prescription C: Reason and Religion in Dialogue

The debate over the role of reason and religious faith in public discourse seems recently to have entered a third phase constituted especially by revised positions on the matter articulated by leading German political philosopher, Jürgen Habermas, as well as others, such as American political philosopher, William Connolly.<sup>48</sup> Habermas, noting the arguments of Wolterstorff and others, has conceded that religious citizens can’t necessarily translate their religious reasons into public reasons while remaining true to their religious convictions and that it would be unfair to require them to do so. Moreover, in the course of a dialogue with then Joseph Cardinal Ratzinger and later Pope Benedict XVI, Habermas has also gone close to conceding that public reason alone may not be sufficient to resolve our political debates and that the kinds of insight and moral challenge delivered by comprehensive religious doctrines may be necessary ingredients of an inclusive and vital public discourse.<sup>49</sup>

In Habermas’s account, both reason and religion have their own inherent limitations that need to be acknowledged and addressed, and that proponents of both points of view

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<sup>45</sup> Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 65, put it this way: ‘Metaphysical commitments that are formally inadmissible find their way in through abstract but vacuous concepts such as freedom and equality. The substantive content of these notions is necessarily comprised of theological, ideological, and other comprehensive “perspectives” that secular reason has supposedly forsworn.’ See also Steven D Smith, *The disenchantment of secular discourse* (Harvard University Press, 2010) 26-38.

<sup>46</sup> Rawls, n 29, lv (‘Introduction’ to the Paperback Edition).

<sup>47</sup> Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square* (Rowman and Littlefield, 1997) 105.

<sup>48</sup> Jürgen Habermas, *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (Ciaran Cronin trans, Polity Press, 2010); William Connolly, *Why I Am Not a Secularist* (University of Minnesota Press, 1999). For another account that calls for forms of ‘conversation’ or ‘engagement’ see Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy and Tradition* (University of Notre Dame Press, 1990).

<sup>49</sup> Jürgen Habermas and Joseph Ratzinger, *Dialectics of Secularization: On Reason and Religion* (Brian McNeil trans, Ignatius Press, 2006).

should be open to the insights offered by the other side. Naturalistic worldviews, he points out, do not enjoy any *prima facie* advantage over religious worldviews, or vice versa; there is an ultimately ‘inconclusive’ confrontation between ‘self-critical reason’ and ‘contemporary religious convictions’.<sup>50</sup> On the ‘reason’ side, in particular, philosophy has had to recognise its own ‘religious-metaphysical origins’, including the assimilation by modern western philosophy of certain distinctively Christian ideas which have left an enduring mark on many of the most important concepts in contemporary political and legal thought.<sup>51</sup> Indeed, against a ‘blinkered enlightenment which is unenlightened about itself and which denies religion any rational content’,<sup>52</sup> he asserts that the secular reason enshrined in the comprehensive doctrines of Enlightenment rationalism must recognise its limitations and that these limitations need to be supplemented by the comprehensive doctrines of religious faith. As Habermas puts it:

[p]ostmetaphysical thinking cannot cope on its own with the defeatism concerning reason which we encounter today both in the postmodern radicalization of the ‘dialectic of the Enlightenment’ and in the naturalism founded on a naive faith in science.<sup>53</sup>

Moreover:

practical reason fails to fulfil its own vocation when it no longer has sufficient strength to awaken, and to keep awake, in the minds of secular subjects, an awareness of the violations of solidarity throughout the world, an awareness of what is missing, of what cries to heaven.<sup>54</sup>

On the other hand, Habermas insists that religious doctrine also has its limitations—in particular, that each religion is sectional, and unable to provide the ‘glue’ that is needed to keep an entire modern democratic society together under conditions of radical religious and secular diversity. He therefore continues to insist, in classically liberal terms, on the requirement that the exercise of coercive government power be based only on public or secular reason.

Nonetheless, the point remains that Habermas is concerned lest what he calls ‘asymmetrical obligations’ be imposed on religious citizens, and he concedes that the liberal state cannot legitimately demand of them anything ‘which cannot be reconciled with a life that is led authentically “from faith”’.<sup>55</sup> The ‘integral role that religion plays in the life of a person of faith’, he notes, means that many religious citizens are unable to undertake any ‘artificial division’ in their minds between secular and religious reasons, for this ‘totalizing

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<sup>50</sup> Habermas, *Dialectics of Secularization*, 51; Habermas, *Awareness*, 18.

<sup>51</sup> Habermas, *Dialectics of Secularization*, 38, 44; Habermas, *Awareness*, 17; Habermas, ‘Religion in the Public Sphere’, 16-17. Habermas later puts it this way: modern science must come to understand itself as ‘resulting from a history of reason that includes the world religions’: Habermas, ‘Religion in the Public Sphere’, 19. See, likewise, George Pell, *God and Caesar: Selected Essays on Religion, Politics & Society* (Catholic University of America Press, 2007) 61, who observes: ‘Enlightenment modernity fails to understand itself fully unless it acknowledges its Christian roots and context: How can we understand Hume without the background of Calvinist faith and ethics to which he is responding? The French Enlightenment without Jansenism?’.

<sup>52</sup> Habermas, *Awareness*, 18.

<sup>53</sup> Habermas, *Awareness*, 18; cf Habermas, ‘Religion in the Public Sphere’, 16.

<sup>54</sup> Habermas, *Awareness*, 19.

<sup>55</sup> Habermas, *Awareness*, 21; cf Habermas, ‘Religion in the Public Sphere’, 8, 11.

trait of a mode of believing ... infuses the very pores of daily life', including political life.<sup>56</sup> Accordingly, Habermas concludes—and this time contrary to Rawls—that ordinary citizens ought to be free to contribute their own religious reasons to political debate without necessarily 'translating' those reasons into 'publicly accessible reasons'.<sup>57</sup>

Habermas's grounds for these conclusions are thus both principled and functional. On the functional side, secular citizens may have much to learn from the insights and contributions of religious citizens, whose language and traditions 'have a special power to articulate moral intuitions, especially with regard to vulnerable forms of communal life'.<sup>58</sup> And it is for precisely this reason that secular citizens have good reason to open their minds to the 'possible truth content' that may be found in religious statements.<sup>59</sup> On the other hand, however, Habermas also insists—this time contrary to Wolterstorff and others—that policies and legal programs must only be enacted by legislators and implemented by holders of public office on the ground of public reason, and never solely on the basis of comprehensive religious doctrines, for to do so would be to proceed contrary to the principle that the state must remain 'neutral towards competing worldviews'.<sup>60</sup> Majority rule, he argues, turns into 'repression' if the majority deploys solely religious arguments to support state-sanctioned policies.<sup>61</sup>

And yet, Habermas does not end with a reiteration of the call for liberal restraint. As he notes, theologian John Milbank denies modern liberal rationalism any 'intrinsic right' to pronounce upon the propositions of a political theology that uses the tools of deconstruction to expose the religious-metaphysical roots of liberal reason.<sup>62</sup> And, as a consequence, Habermas concludes that 'the debate has to be conducted on the respective opponent's playing field', such that 'theological propositions can only be countered by theological arguments, and historical or epistemological propositions by historical and epistemological arguments.'<sup>63</sup> Significantly, Habermas thus seems to recognise the existence of separate spheres of epistemic and normative authority.

But what are the *spaces* in which these authority structures operate? And what if the *spaces themselves* overlap?

## VII. Towards Phase D: The Problem of Jurisdictional Pluralism

The question of religious engagement in the 'public square' is a characteristically 'liberal-democratic' or 'Western' problem. It has occurred within the context of a modern state system in which centralised institutions of government possess what Max Weber called

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<sup>56</sup> Habermas, 'Religion in the Public Sphere', 8, citing Nicholas Wolterstorff, 'The Role of Religion in Decision and Discussion of Political Issues' in Robert Audi and Nicholas Wolterstorff (eds), *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Rowman and Littlefield, 1997) 105.

<sup>57</sup> Habermas, 'Religion in the Public Sphere', 8-9

<sup>58</sup> Habermas, 'Religion in the Public Sphere', 10.

<sup>59</sup> Habermas, 'Religion in the Public Sphere', 11.

<sup>60</sup> Habermas, 'Religion in the Public Sphere', 9.

<sup>61</sup> Habermas, 'Religion in the Public Sphere', 12.

<sup>62</sup> Habermas, 'Religion in the Public Sphere', 19, citing John Milbank, *Theology and social theory: Beyond secular reason* (Basil Blackwell, 1990); John Milbank, Catherine Pickstock and Graham Ward (eds), *Radical Orthodoxy* (Routledge, 1999).

<sup>63</sup> Habermas, 'Religion in the Public Sphere', 19.

a ‘monopoly of the legitimate use of physical force within a given territory’.<sup>64</sup> For, as Nicholas Wolterstorff has pointed out, the legitimate use of coercive force is an underlying concern in the debate.<sup>65</sup> But it’s not only the question of *coercion* that matters; it is the state’s *monopoly* over this power that is also at stake.

In the philosophy of law much attention has been given to the legal structure and conditions of this monopoly, and especially the way in which modern legal orders are premised on certain ideas—such as ‘sovereignty’, ‘*grundnorm*’ or ‘rule of recognition’—which are meant to guarantee the unity of the law within a state: as a hierarchical system in which every rule or norm derives its validity from a higher authorising rule, at the apex of which is a final institution, rule or norm that authenticates the entire legal order.<sup>66</sup> However, just as the existence and persistence of ‘deep, multidimensional plurality’ in religious matters has challenged the Enlightenment faith in reason,<sup>67</sup> so the emergence and intensification of legal and jurisdictional pluralism is now challenging the state’s territorial monopoly.<sup>68</sup> This pluralism comes about in diverse ways, whether it’s through supranational political structures like the European Union, or through demands for regional autonomy and/or secession by ‘subnational’ units; and it includes social and religiously grounded pluralism, as when religious communities call for measures of independent self-government. The state’s monopoly over the determination of what constitutes binding law is challenged by these various forms of legal pluralism. And when the pluralism concerns religious communities, it poses yet another challenge to the role of public reason. But this time the issue is not whether a particular religious group is going to ‘take over’ the state, but rather the emergence of alternative forms of non-state public order that compete with the state. Let me explain.

For its adherents, religious conviction is not simply a matter of individual conscience and private belief, but is expressed in communal norms and authority structures that play a role that is very difficult to contain within purely ‘private’ and ‘personal’ spaces or realms. The accommodation of *Shari’a* within western legal systems raises this question very squarely, not least because in Islamic thought the practices that are followed by the faithful Muslim are routinely translated, not merely as ‘morality’, but as ‘law’, and are comprehensive in scope.<sup>69</sup> Christian formulations, while usually less oriented to ‘law’, are often similarly comprehensive.<sup>70</sup> The claims of religious communities to measures of self-governance and autonomy which flow into public expressions of religious ethos and culture

<sup>64</sup> Max Weber, ‘Politics as a Vocation’ in H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press, 1946) 77. On coercion, see Rawls, n 34, 767.

<sup>65</sup> Nicholas Wolterstorff, ‘The Paradoxical Role of Coercion in Political Liberalism,’ *Journal of Law, Philosophy, and Culture* 1.1 (2007): 135. See also Nicholas Wolterstorff, ‘Why Can’t We All Just Get Along with Each Other?’ in Nigel Biggar and Linda Hogan (eds), *Religious Voices in Public Places* (Oxford University Press, 2009) 17.

<sup>66</sup> H. L. A. Hart, *The Concept of Law* (Clarendon Press, 1961); Hans Kelsen, *General Theory of Law and State* (A Wedberg trans, Harvard University Press, 1945).

<sup>67</sup> Connolly, n 48, 186.

<sup>68</sup> Cf Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003); Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001).

<sup>69</sup> For a profound challenge to this conception of law and ethics in Islamic thought, see Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (Oxford University Press, 2009). On the comprehensiveness of *Shari’a*, see Abdullahi Ahmed An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, 1996) 11; Tariq Ramadan, *Islam, the West, and the Challenge of Modernity* (Islamic Foundation, 2001) 33-34; Wael Hallaq, ‘“Muslim Rage” and Islamic Law,’ *Hastings Law Journal* 54 (2003): 1705, 1716.

<sup>70</sup> E.g., Oliver O’Donovan, *Resurrection and Moral Order: An Outline for Evangelical Ethics* (Eerdmans, 2nd ed, 1994) 200.

add a layer of complexity to the issue that cannot be avoided. This additional layer of complexity arises because on most liberal accounts, religious believers are perfectly free to order their personal lives, their families and their religious communities on the basis of their religious convictions. But in the self-conceptions of many religious believers, the demands of community are not easily restricted to the otherworldly, the personal or the private. For them, religious community life is emphatically also public, and even political.<sup>71</sup> As William Connolly puts it (but without really grappling with the issue): the ‘multiple loyalties’ of these individuals and groups ‘transcend the boundaries of the state itself’.<sup>72</sup>

The debate over the accommodation of *Shari’a* within Western legal systems has brought this issue to the fore. In Jocelyne Cesari’s words: ‘Islam’s arrival has reopened a case previously considered closed: the relationship between church and state’.<sup>73</sup> Except that what is at stake is not simply the question whether religious convictions should have a role in the determination of how the state’s monopolistic coercive powers should be exercised, but rather the extent to which the law internal to religious communities should have an external and public expression and effect.

The classically liberal approach is to understand religious communities as legitimately formed through voluntary decisions made by individuals in exercise of their right to freedom of association. The classically liberal response to the question of accommodating *Shari’a* or other religious laws within Western legal orders is to insist on its voluntariness and thus, by implication, its limitation to individuals who freely volunteer to be part of a particular religious community. That way, there is thought to be no question (formally at least) of any coercion, and thus the line between the coercive powers of the state and the consensual grounds of voluntary religious association is maintained.

But the issue is never so simple as this, for the voluntariness on which the liberal principle is predicated may not always apply—perhaps cannot apply—to the way in which personal identity is formed within densely religious communities.<sup>74</sup> Religion for many is something one is born into—one is nurtured and educated into the faith by family, school, church, temple and mosque. How far will a liberal state allow religious communities such as these to define their own standards and express them in various public ways? The negative response of the Canadian province of Ontario to the call for *Shari’a* adjudication under the provincial arbitration law is an instructive illustration of the very real limits that liberal states may be prepared to impose.<sup>75</sup> The decision of the European Court of Human Rights to uphold the dissolution of the Turkish *Refah Partisi* (Welfare Party) on the ground of its support for *Shari’a* is another case in point.<sup>76</sup> As John Finnis has shown, the decision amounted to an

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<sup>71</sup> For representative samples of Christian political theology, see Oliver O’Donovan and Joan Lockwood O’Donovan (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought, 100-1625* (Eerdmans, 1999) and William T Cavanaugh and Peter Scott (eds), *The Blackwell Companion to Political Theology* (Blackwell, 2004).

<sup>72</sup> Connolly, n 48, 95.

<sup>73</sup> Jocelyne Cesari, ‘Islam and the Secularized Nation’ in Nigel Biggar and Linda Hogan (eds), *Religious Voices in Public Places* (Oxford University Press, 2009) 286, 288.

<sup>74</sup> Communitarians have long questioned the liberal conception of the self. See Michael J Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 1998). Cf also Charles Taylor, *Sources of the self: The making of the modern identity* (Harvard University Press, 1989).

<sup>75</sup> See Jean-François Gaudreault-DesBiens, ‘Religious Courts’ Recognition Claims: Two Qualitatively Distinct Narratives’ in Rex Ahdar and Nicholas Aroney (eds), *Shari’a in the West* (Oxford University Press, 2010) 59.

<sup>76</sup> *Refah Partisi (Welfare Party) and ors v Turkey* (2003) 37 E.H.R.R. 1

assessment that the advocacy and intention to introduce *Shari'a* or a kind of Millet system in which *Shari'a* would apply to all Muslim citizens is inherently illegitimate because it is incompatible with democracy, the rule of law, and the European Convention on Human Rights.<sup>77</sup> And here in Australia, the President of the Australian Federation of Islamic Councils made a submission to a public inquiry in which he called for the establishment of a form of 'legal pluralism' under which Australian Muslims would be able to govern themselves in a kind of Millet system.<sup>78</sup> Like previous proposals for *Shari'a* in Australia, the suggestion was immediately rebuffed—by the Attorney-General, by media commentators, and by many within the Islamic community itself.<sup>79</sup> There is strong public opposition to *Shari'a* in Australia, while at the same time, as in most Western countries, Muslims are in fact free, within the general limits of the law, to conduct their own affairs in terms of their particular religious convictions, just as all religious groups are.

Now, each of these cases was about *Shari'a*, but in different ways. The Ontario and Australian cases concerned religious arbitration—an ostensibly voluntary and private process; the Turkish case concerned the policies of a political party—a very public and political matter. We might therefore be inclined to classify them separately. But I am not so sure.

Undoubtedly, one of the central worries in the Ontario case was the potential for religious arbitration, especially when applied to marriage, divorce and custody questions, to operate in a discriminatory way against women.<sup>80</sup> The rights of women was a driving concern. But accompanying this was a second worry—which I suspect was at least an equally powerful motivation. This was that religious arbitration by *Shari'a* tribunals would have the tendency not only support the separate existence of Muslim communities as insular minority groups within the province, but also the very public character that this expression of Muslim religiosity might increasingly take. Religious practices and expectations would have a tendency to expand into more and more forms of public expression, shaping the public spaces in which all citizens have to live.

In this respect, the case was not so much unlike that of the *Refah Partisi*. For what the Turkish law did was to dissolve the party and distribute its assets—a measure aimed at what is in law an entirely voluntary association—but an association whose explicit goals were to engage in politics and shape public policy at the highest levels of the polity. It was the enforcement of *Shari'a* as a matter of public law that was the central worry motivating the decision to dissolve the party and the determination of the European court upholding that decision. As Paul Taylor has pointed out, the Grand Chamber of the European Court of Human Rights declared that all religions must be limited to 'the sphere of private religious

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<sup>77</sup> John Finnis, 'Endorsing Discrimination between Faiths: A Case of Extreme Speech?' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) 430. See also Rex Ahdar and Nicholas Aroney, 'The Topography of Shari'a in the Western Political Landscape' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press, 2010) 1, 21-3.

<sup>78</sup> Australian Federation of Islamic Councils, 'Embracing Australian Values, and Maintaining the Rights to be Different' (Submission to the Inquiry into Multiculturalism in Australia, Joint Standing Committee on Migration, Parliament of Australia, 4 April 2011).

<sup>79</sup> Patricia Karvelas, 'Imam wants sharia law here, but A-G says no way', *The Australian*, 18 May 2011; Chris Merritt, 'It was a mistake to mention sharia law, admits Australian Islamic leader', *The Australian*, 17 June 2011.

<sup>80</sup> Ayelet Shachar, 'State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press, 2010) 115.

practice’,<sup>81</sup> whereas the *Refah Partisi* was proposing, through a renewed Millet system, a fundamental change to the ‘organisation and functioning of society as a whole’.<sup>82</sup> As the Grand Chamber put it, while an individual has the right to ‘observe in his private life the requirements of his religion’, the government of Turkey is entitled to ‘prevent the application within its jurisdiction of private law rules of religious inspiration prejudicial to public order and the values of democracy’.<sup>83</sup> Such freedoms, the Court continued, ‘cannot encroach upon the State’s role as the neutral and impartial organiser of the exercise of religions, faiths and beliefs’.<sup>84</sup> The state’s monopolistic final say over the exercise of coercive force was thus emphatically affirmed.

It is in this context that the Australian government response to the proposal of a modified Millet system in Australia needs to be understood. As the Attorney-General put it, while religious groups are free to use voluntary, informal dispute resolution methods to resolve controversies in matters of private life, these most emphatically remain subject to Australian law, for when it comes to the ‘legal system’ itself there can be only ‘one culture’ and one system of law, with the implication that *Shari’a* principles can have no place in shaping the constitutional structure of the legal system as a whole.<sup>85</sup>

As these three cases illustrate, the *Shari’a* question is not only an issue about the private expression of religious convictions but is also about the public expression of religious beliefs and practices. The Western liberal settlement of religious difference has not only depended upon an (ever-shifting) conception of ‘reason’ or ‘public reason’ as offering a common ground between religions, but also upon a paradigm of democratic practice consisting of open, peaceable contestation of political views. This paradigm of democratic contestation is challenged by the development of religious enclaves—pertaining to *any* religion—that are thought to be ‘closed’ and ‘authoritarian’ rather than ‘open’ and ‘egalitarian’. What possible role can liberal, non-sectarian ‘reason’ play in a context such as this? This is the deep worry, I suspect, that lay behind the decision of Ontario to close down state support for religious arbitration of all kinds—whether Islamic, Jewish, Christian or otherwise.

## VIII. Conclusions

I draw attention to these issues not with the intention of wanting to curtail religious expression and practice—far from it. Nor is it my intention to offer ready solutions to these issues. But it does seem to me that these issues are interconnected in ways that we haven’t quite articulated to ourselves. This is because we continue to think, instinctively, in terms of the liberal distinction between the private and the public, and so we tend to classify questions about the role of religious reasons in public affairs into one category (‘non-establishment’), and questions about religious expression within the private spheres of conscience, family, school and religious community into another (‘free exercise’). But precisely because from the standpoint of at least some religious perspectives there is no hard and fast line to be drawn

<sup>81</sup> *Refah Partisi (Welfare Party) v Turkey* (2003) 37 E.H.R.R. 1, para 125.

<sup>82</sup> Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005) 316-8.

<sup>83</sup> *Refah Partisi (Welfare Party) v Turkey* (2003) 37 E.H.R.R. 1, para 128.

<sup>84</sup> *Refah Partisi (Welfare Party) v Turkey* (2003) 37 E.H.R.R. 1, para 128.

<sup>85</sup> Hon Robert McClelland, ‘Interview on Australian Agenda with Peter Van Onselen’, 22 May 2011 <[http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Transcripts\\_2011\\_SecondQuarter\\_22ndMAY2011-InterviewonAustralianAgendawithPeterVanOnselen?open&query=sharia](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Transcripts_2011_SecondQuarter_22ndMAY2011-InterviewonAustralianAgendawithPeterVanOnselen?open&query=sharia)> (accessed 13 July 2011).

between the private and the public the categorisation breaks down. The *Shari'a* issue is not simply about the tension between the group rights of communities to govern their own internal affairs versus the individual rights of women and other vulnerable persons within those communities; it is also about the public scope of *Shari'a* and its effects on community life—its capacity to create and shape the public spaces and constitutional arrangements under which we all live. And this is not an issue about *Shari'a* alone. It is also about the application of *halakha* by Jewish *battei din* and canon law by the ecclesiastical courts of the Christian denominations, especially in the fields of marriage and divorce.<sup>86</sup> But if that is so, it gives us reason to anticipate that the adoption of same sex marriage in state law will not be the end point in the debate. For the existence of religious communities maintaining their own distinct views about marriage—as about much else—will continue to challenge the state's wish to supervise all spheres of 'public' life. The tension between those who govern one public space and those who govern another will continue, just in a different guise.

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<sup>86</sup> John Witte Jr, 'The Future of Muslim Family Law in Western Democracies' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press, 2010) 279; Michael A Helfand, 'Religious arbitration and the new multiculturalism: Negotiating conflicting legal orders,' *New York University Law Review* 86.5 (2011): 1231.