

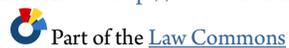
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## Seeing through the secular illusion

I Benson

*The University of Notre Dame Australia*, [iain.benson@nd.edu.au](mailto:iain.benson@nd.edu.au)

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Benson, Iain T<sup>1</sup>

## Seeing through the secular illusion<sup>®</sup>

### ABSTRACT

It is often said that we live in a ‘secular’ age and that the principles of ‘secularism’ lead to a ‘neutral’ public sphere. The central terms ‘secular’ and ‘secularism’ however, though they are often used are rarely examined. Related terms, relevant to their meaning, such as ‘faith’ and ‘belief’ are also seldom defined or compared alongside each other to evaluate how well they comply with principles of justice. In this paper, a development of others on similar themes, Professor Benson examines various definitions alongside contemporary topics and legal decisions to argue that an open public sphere requires re-thinking how many of the central terms are used.

Only when it is recognized that not all ‘faiths’ are religious and that all citizens operate out of some sort of faith commitments can we be properly in a position to evaluate non-religious faiths alongside religiously informed ones. This re-adjustment of the usual way of examining matters then should lead, Professor Benson argues, to a more accurate way of viewing current education and politics (and their areas of avoidance) as well as such things as fair access to the public square by religious believers and their communities. The long dominance of atheistic and agnostic forms of social ordering (including funding for such things as education and health care) is based, in part, on a belief that stripping religious frameworks from public sector projects is ‘neutral’ when it is not.

In addition, the focus on a rights based jurisprudence has a tendency to view rights such as the freedom of religion in individualist ways that ignore the communal importance of religion. The paper will suggest that moves to put pressure on the associational dimension of religions ignore the communal nature of certain forms of belief to the detriment of a more co-operative society and far from encouraging human freedom, actually reduce it.

In the long run, the importance of religions and their communities to the public sphere – which has been recognized by the Constitutional Court of South Africa – will be encouraged by this fresh and more accurate way of viewing belief systems and the communities that form around them. The more accurate way of understanding both the reality of and the need for more articulate public beliefs, will, Benson argues, provide a richer ground for such things as public school curriculum which often drift in the face of fears of moral imperialism and metaphobia (fear of metaphysics)

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<sup>1</sup> Professor Extraordinary, Department of Constitutional Law and Philosophy of Law, Faculty of Law, University of the Free State, Bloemfontein, South Africa; Senior Associate Counsel, Miller Thomson, LLP, Canada. The opinions expressed are those of the author and not necessarily those of his faculty or firm. Some of this paper is based upon a presentation for the XVII Plenary Session, The Pontifical Academy of Social Sciences, Vatican City, Universal Rights in a World of Diversity: The Case of Religious Freedom, 29th April – 3 May, 2011 as well as on a background paper for the Government of Canada’s Policy Research Initiative on ‘Religion and Public Policy.’ ‘Taking a Fresh Look at Religion and Public Policy in Canada: the Need for a Paradigm Shift’ (January, 2008, unpublished) and elsewhere as noted below. Some of this paper may be submitted as part of the author’s PhD for the University of the Witwatersrand. Address for correspondence: Ferme Loudas, Quartier Serres, 65270 St. Pé de Bigorre, France. iainbenson2@gmail.com

## INTRODUCTION

I would like to thank the organizers of this conference for inviting me to give this paper at what looks to be a very interesting international conference on religion in South Africa. Over the last decade or so I have been working on the various meanings given to terms such as 'secular' and 'secularism' with a view to understanding the role they have played in important court decisions in the area of constitutional and human rights law. It is my conclusion that many of the terms that are used, not only 'secular', 'secularisation' and 'secularism' but those that relate to them, 'believers/unbelievers' 'communities of faith' and the phrase 'religion AND the state' serve to give a certain tilt to the way in which we view the public sphere. When I started to look at the history of changes in the words 'secular' and 'secularism' and the other terms I've mentioned, and how those terms are used and operate together, I came to see not only that the current uses are largely inaccurate philosophically but that they are unwise culturally and end up creating the likelihood of unjust political and legal outcomes for religious believers and their communities.

How that came about historically has many aspects that cannot be dealt with in this paper but I hope that in what follows I will make a convincing case to suggest that there is a need to avoid the strongly bi-furcationist manner in which we separate religious believers from non-religious believers and religion from the public sphere – a sphere that the freedom of religion cannot help engaging when religion operates in its public dimension either personally or in community.

It is my view that more accurate terminology for the public sphere is needed and that a paradigm shift is not only possible in terms of religion and the state but that it has, at least since the Supreme Court of Canada decision in its 2002 decision in the *Chamberlain* decision<sup>2</sup>, already begun.

## PART ONE. KEY TERMS AND CONCEPTS: MODERN BELIEFS TAKE ON IMPLICIT FORMS

I would like to begin this paper with reference to an important insight of Michael Polanyi who once observed that human life is necessarily lived with 'faith' and 'belief' and that something interesting has happened in what he called 'modern beliefs' when he observed:

*Our objectivism, which tolerates no open declaration of faith, has forced modern beliefs to take on implicit forms... And no one will deny that those who have mastered the idioms in which these beliefs are entailed do also reason most ingeniously within these idioms, even while... they unhesitatingly ignore all that the idiom does not cover (Polanyi *Personal Knowledge*, 1958:288)(emphasis added).*

This paper will not try to spell out what sorts of implicit forms modern beliefs have taken on to avoid 'open declarations of faith' but will assert that modern beliefs are often, even usually, based upon implicit forms just as Polanyi says. Related to this, and central both to this paper and the paradigm it suggests is also underway, is the fact that explicit declarations of faith and belief have been often placed at a disadvantage by way of public exclusion as against the implicit forms of atheism and agnosticism. The analysis of a very important decision of Canada's highest court which formed a re-evaluation of the nature of the 'secular' will show just how such an exclusionary strategy was at work in a rather implicit way in the manner that

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<sup>2</sup> *Chamberlain v. Surrey School District No. 36* [2002] 4 S.C.R. 710 ('*Chamberlain*') (SCC).

the phrase 'secular principles' was being interpreted by the lower court in that case.

These implicit forms may often take the form of denying that faith or belief are involved at all and may, as we shall see, suggest that religious beliefs are non-rational. It is a fairly small step then to the usually implicit marginalization of religious beliefs in relation to those of contemporary agnosticism or atheism.

How such contemporary concepts as 'the dignity of the person' referred to by courts in equality cases are derived or provable is never spelled out but that the concept is important to the rhetoric of contemporary law is undeniable. Note, in that quotation from Polanyi, how what he calls the idioms of the contemporary belief are said to 'unhesitatingly ignore all that the idiom does not cover.' Recognition of the force of this paradigm shift is important to counteract both the pre-emptive silencing of religious voices (usually under the rubric of 'secular') and their exclusion from their just public dimensions (usually under the rubrics of 'secularism' 'separation of church and state' or similar concepts).

## EVERYONE HAS FAITH AND EVERYONE IS A BELIEVER: THERE ARE, THEN, NO 'UNBELIEVERS'

I would like to introduce here to introduce an insight from John Henry Cardinal Newman written about as far away from Polanyi in time as Polanyi was from ours. Newman in his 'Tamworth Reading Room Letters,' recognized that everyone who acts must take matters on faith and wrote:

Life is for action. If we insist on proofs for everything, we shall never come to action: to act you must assume, and that assumption is faith.<sup>3</sup>

Finally, a scholar of an earlier generation and who spent a considerable part of his life living and working in South Africa, R.F.A. Hoernlé, noted that:

Every bona fide judgment is characterized by belief... [and] if 'faith' is firm belief, conviction of truth, then faith, in this context is indistinguishable from knowledge.<sup>4</sup>

Against these insights about both the inevitability of belief and faith for human beings, is the current denial of belief. This denial seems to take two main forms. First the denial that one has any beliefs at all (favoured by contemporary popular atheists such as Christopher Dawkins or Christopher Hitchens) or, second, that atheistic beliefs or agnostic beliefs are somehow more rational than those emanating from religious pre-suppositions. This latter category is evident from time to time in legal decisions.

Here is how Christopher Hitchens has described his position and those of his fellow popular atheist writers:

And here is the point, about myself and my co-thinkers. *Our belief is not a belief. Our principles are not a faith.* We do not rely solely upon science and reason, because these are necessary rather than sufficient factors, but we distrust anything that contradicts science or outrages reason. We may differ on many things, but what we respect is free

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3 See *Discussions and Arguments on Various Subjects* (London: Longmans, 1899) at 295.

4 R.F.A. Hoernlé, 'Knowledge and Faith' in D.S. Robinson (ed.) *Studies in Philosophy* (Cambridge: Harvard University Press) pp. 55-61 at 55.

inquiry, open-mindedness, and the pursuit of ideas for their own sake. We do not hold our convictions dogmatically<sup>5</sup>(emphasis added).

To claim as Hitchens does, that his belief is not a belief and that the atheistic principles he endorses are not a 'faith' is bad philosophy but helpful since it shows rather well how far such thinkers (and they are the intellectual end of what is a very widely representative popular set of misconceptions) have come from their own roots. George Jacob Holyoake, after all, writing in the 19<sup>th</sup> Century, and the man credited by the *Oxford English Dictionary* with coining the term 'secularism' recognized the more basic truth of the matter when he subtitled his important book on secularism a 'Confession of Belief' (Holyoake 1896).

There is an exclusionist attitude in many countries towards religious believers. Those with religious belief instead of atheist or agnostic belief are discriminated against as their beliefs apparently falling outside of the 'secular' and hence 'rational' realm of thought. However, much of this discrimination rests on the understanding of secular and the place of belief within society. Two things need to be recognised – 1. That we are all believers in something, it is not a question of whether we believe, but what we believe in. 2. That the secular sphere, correctly understood as it is now under Canadian Law, is inclusive of people of religious belief and that they therefore should have equality under law and be placed at no disadvantage as against non-religious believers.

The fair treatment of religious communities in the contemporary world depends, in part, on obtaining a fair hearing about the fact that atheism and agnosticism and their projects should not be overtly or covertly given stronger public positions than religious communities and their projects. That is what was at issue in a landmark case in Canada a few years ago that touches directly on this discussion of the need for a new and more accurate means of describing religion and the nature of the public sphere.

So atheists are men and women of faith in many ways like the rest of us. Their dogmas are different but they are dogmatic (in that their beliefs emerge from the first principles of their faiths). True, in many things their faiths are different but they are still faiths and their beliefs are still beliefs no matter how much Hitchens and those like him wish it was different. Humans are stuck being believers and that is all there is to it. Being dogmatic does not necessarily mean being rude and it certainly does not equate to understanding what dogma is. That is why so many atheists and men and women on the street, think, like Hitchens, that they don't believe anything: but they do.

Perhaps one of the implicit forms or modern 'beliefs' is hidden in the idea of the 'religious free secular?' That would fit with what the philosophers and theologians have suggested. This is the climate in which people so readily speak and write of themselves being 'unbelievers' in a public order characterized by a religion-free (but not, as I have argued, faith-free) public sphere. The public sphere, if the writers quoted are correct, is necessarily a realm of 'faith' whether or not such faith draws its inspiration from religious presuppositions.

More recently, philosopher, the late Thomas Langan, has written on the idea and importance

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<sup>5</sup> Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Warner Books, 2007)

Introduction, emphasis added. I have developed this analysis further in Iain T. Benson 'Taking Pluralism and Liberalism Seriously: The Need to Re-Understand 'Faith', 'Beliefs', 'Religion' and 'Diversity', in the Public Sphere', *Journal for the Study of Religion, Special Issue: Public Faith and the Politics of Faith*, Volume 23, Numbers 1 & 2, 2010 at 17-41.

of the category of 'natural faith' which is, as it were, a means of overcoming these dualistic and false constructions to show that everyone is a believer and necessarily has faith of some sort<sup>6</sup>. Again, we need to recall that not all faiths are religious faiths.

This article then is a counter-reading to this common and, I argue, erroneous construction of the public sphere. If 'secular' means 'the opposite of religious' or 'non-religious,' and if the public realm is defined in terms of the 'secular,' then the public sphere has only one kind of believer removed from it – the religious believers. I suggest that this way of using 'secular' is deeply flawed and will tend to lead us in the direction of religious exclusivism. An express meaning to 'secular' or 'public' that rules out religion without arguments based on fairness and justice leaves those realms distorted in relation to principles of accommodation. If we start off with an implicit idea that the public is secular, thus 'non-religious,' then it is difficult to balance or reconcile the various interests held by religious claimants and others in a public setting.

If we want to affirm that a country such as South Africa or Canada does not have a sectarian government then we should say so; this is different than using the concept of 'separation of Church and State' which, in one reading of its American formulation would preclude the 'co-operation of 'Church' and State' which is the better model for the relationship that obtains in countries such as South Africa and Canada.<sup>7</sup>

## THE MEANING AND NATURE OF THE 'SECULAR'

The term 'secular' has changed its meaning over the last one hundred and fifty years. The term in general usage now means, essentially, *free from* religion as in 'we ought to keep religion out of the schools because they are secular.' This was not the original meaning.

The original and older uses of secular as *saeculorum* meaning in relation to 'the age' or 'the times' or 'the world,' in contradistinction to eternity and did not necessarily import a de-sacralised conception of the public sphere; but this has certainly changed in commonly understood usage today. Indeed, in Roman Catholic terminology, both the clergy and certain sorts of institutes have been understood to be properly 'secular' in this earlier use. Thus the clergy are divided between 'secular' and 'regular' clergy and there can be 'secular institutes' none of which are non-religious. This shift from a former religiously inclusive secular to a religiously exclusive one, therefore, is of the utmost importance at a time when the term secular is being used so widely in relation to the public sphere. We would do better, in fact, to banish the use of the term secular entirely when what we really mean is the public sphere and the relation of religion to the sphere. The term 'secular' with its deeply ambiguous usages in our contemporary age simply confuses our analysis at the outset.<sup>8</sup>

We must be careful to guard against definitions that build into their use an assumption that is unexamined. Just as this has happened where convergence pluralism can look like diverse pluralism (when they are very different) so, too, how we define what we mean by the term 'secular' is also important.

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6 Thomas Langan, *Being and Truth* (Missouri: 1999) and with A. Calcanio, *Human Being* (Missouri: 2009).

7 *Big M Drug Mart*, [1985] 1 S.C.R. at 339. In this decision, Chief Justice Dickson stated, '[i]n my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the *Charter*' at 341.

8 I have written about this in '*Towards a (Re) Definition of the Secular*' University of British Columbia Law Review (2000) 33 at 519-549 (cited with approval by Gonthier J. in Chamberlain).

In fact, this more recent use of 'secular', which we may justly call the atheistic or agnostic interpretation, is seldom viewed alongside alternate understandings. This is not helpful since an atheistic definition, if used as the meaning for a central term such as 'secular', fails to give a proper place to religion in the private and public dimensions of society. The atheistic 'secular' becomes, in effect, a blueprint for the naked public square. A more informed historical understanding, built upon a richer philosophical ground, better reflects both the reality of beliefs in society and the principles of freedom that ought to undergird a properly civil society.

If we start off with the assumption (building into our use of the term 'secular' for example) that religion has no place in 'the secular', then, of course, we will tend to diminish the role of the religious in civil society and drive religion into the private sphere. But this is really to adopt implicitly or explicitly the ideology of atheistically driven 'secularism', because the 'secular', viewed historically, does not require such a removal of the sacred dimension from all aspects of life or their privatisation. The secular is, properly understood, a realm of *competing faith/belief claims*, not a realm of 'non-faith' or 'non-belief' claims because, strictly speaking, there can be no such realm.

In contemporary usage, 'secular schools', 'secular government', etc. are generally understood to mean non-religious or not influenced by religion or religious principles. I suggest that this is because we have adopted a secularist (which may be atheistic, agnostic or even religious) definition of 'secular' rather than a richer and more properly inclusive conception.

The historical shift in the use of 'secular' should be recognized. It is tempting to glance off the historical critique by continuing to use the term 'secular' and 'religious' as if they describe different worlds. But they do not describe different worlds; they describe different functions. When we are tempted to use the term 'secular' when we mean 'the public sphere' or 'the state' we would be better to *say that* as these are free of the religiously *exclusive* baggage that currently encumbers use of the term 'secular'.

When the British Columbia Court of Appeal, in the decision in *Chamberlain v. Surrey School Board*, overturned the newer atheistic use of 'secular' and affirmed the secular as a realm that has, properly, a place for beliefs that emerge from religious commitment, it was performing just the sort of linguistic reclamation argued for in this paper. The Supreme Court of Canada upheld the Court of Appeal on this religiously inclusive 'secular' a finding of central importance for considerations of Government policy in the future.

When the case reached the Supreme Court of Canada all nine judges agreed with the reasoning of McKenzie J. as to the religiously inclusive meaning of 'secular' so that term in Canada now means religiously *inclusive* not *exclusive*.<sup>9</sup>

At the Supreme Court of Canada, Mr. Justice Gonthier for himself and Justice Bastarache, giving the majority judgment of the Supreme Court of Canada on this point, would have upheld the elected public school Board's decision to keep certain same-sex parenting books out of the classroom and therefore wrote in dissent on that part of the decision, said this about the 'secular':

137 *In my view, Saunders J. below erred in her assumption that 'secular' effectively meant*

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<sup>9</sup> Supra. note #1 above. Madam Justice McLachlin, who wrote the decision of the majority, accepted the reasoning of Mr. Justice Gonthier on this point thus making his the reasoning of all nine judges in relation to the interpretation of 'secular.'

'non-religious'. This is incorrect since nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the Charter itself establishes that '... Canada is founded upon principles that recognize the supremacy of God and the rule of law'. According to the reasoning espoused by Saunders J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has 'belief' or 'faith' in something, be it atheistic, agnostic or religious. To construe the 'secular' as the realm of the 'unbelief' is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.

[emphasis added] Needless to say, it will take some time before the full implications of this judgment are understood in relation to the wider public policy in Canada or elsewhere but the principled re-configuration, being based on superior philosophy, history and legal principles, could become more widely known in time.

## CONFUSIONS REGARDING SECULARISM AND ECULARIZATION

As with secular, the term 'secularism' is conspicuous by its general non-definition. Almost everywhere the term is used at variance with its origins in the work of George Jacob Holyoak, the man who is credited by the *Oxford English Dictionary* with defining the term in 1851. In Holyoak's understanding, secularism was a project designed to reconstruct the public order on a 'material' basis to free it from the non-empirical risks inherent in any projects in which metaphysical claims that were not empirical would have a place. In particular, Holyoak sought to replace religious understandings with 'material' ones.<sup>10</sup>

Like the term 'secular' 'secularism' has been used by others in a bewildering variety of ways some open to religious involvement and some diametrically opposed. As with the term 'secular', therefore, 'secularism' is not a particularly helpful term to use in discussing the role of religions in the public sphere. Joining 'secularism' with such terms as 'open' further confuses the matter. Given its origins and the purpose of the man who founded the movement and his followers, it would be wiser to limit secularism to the ideology that is, in fact, anti-religious and speak of an *open public sphere* as the framework within which a contemporary political order is best grounded.

The terms 'secular' and 'secularism' and to a lesser extent 'secularization' are useful only if properly and clearly defined within their context but, it is suggested, would be better *left unused* if clarity and engagement are the purposes of our analysis since their clear definitions seem well beyond capture now that the uses are so confused.

<sup>10</sup> See Iain T. Benson 'Considering Secularism' in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill-Queen's University Press, 2004) at 83-98. See also, Iain T Benson 'That False Struggle between Believers and Non-Believers'; 'Le faux combat entre croyants et non-croyants'; 'Quella falsa lotta tra credenti e non credenti' Invited Article in the English, French, Italian, English-Urdu and English-Arabic editions of *Oasis*, (Venice, Marcianum Press, 2011) Year 6 No. 12, December 2010.

'Secularism' is not a principle that, properly understood, forms or should form part of our national understanding as it is also deeply ambiguous and from its inception anti-religious. I have written critically of Canadian philosopher Charles Taylor's employment of the concept of 'open secularism'. I argue that this term is mischievous and confusing.<sup>11</sup>

The term 'secularism' is not often examined but when it is I would argue that its historical meaning is such that we should challenge fundamentally any idea that 'secularism' is a valid principle upon which to base an open and democratic societies such as Canada. I have written about this historical background elsewhere<sup>12</sup> and will not repeat that analysis here except to note that 'secularism' is not a term that, properly understood, furthers the kind of religious inclusivity or relation between the state and public policy that we need to embrace in constitutional democracies dedicated to the freedom of religion and the rule of law. Alternative terminology can and should be found in place of this term, laden as it is, with particular anti-religious intent and deep contemporary ambiguity. Secularism from its inception in the mid 19<sup>th</sup> century was set up as a movement to exclude religious influence from the public square. As such it is not neutral or fair with respect to religion and religious believers.

Why did the majority judges in *Chamberlain* seem to embrace 'secularism' and what did they mean by it? This is not possible to say since, unlike 'secular' (which was argued and was central to the decision) they did not define secularism. Neither did the term appear in the provincial *School Act*, the Reasons for Judgment under review or the arguments of counsel before it. Despite this, it was referred to numerous times in the Supreme Court's reasons as if it was a principle of Canadian constitutionalism. With respect, the Court erred in doing so.

Significantly, the dissenting judges, who gave the analytical framework of the whole court on the meaning of 'secular' as religiously inclusive, did not use the term 'secularism' in their analysis. They were right to avoid it.

The recent work of the Taylor/Bouchard Commission in Quebec has chosen to define 'secularism' as equivalent to 'the separation of Church and State.'<sup>13</sup> This is not a usage of the term that fits with its historic meaning and I do not think that the principle of secularism should be used as something positive in Canada. Further, we should not enmesh ourselves in the language of the 'separation of ambiguity to confusion.

I suggest that this term (secularism) and other terms related to it ('open secularism' and 'radical secularism') ought *not* be used when what is sought is the idea that the State does not recognize any established religion. A better term to describe the State is 'non-religious' or 'non-sectarian'. A 'non-sectarian' State is one thing, a 'secularist' State quite another and we would

11 Iain T. Benson, *Living Together with Difference: Pluralism, the Secular and the Fair Treatment of Beliefs by Law* (Ballan, Australia: Connor Court Publishing, 2012). Charles Taylor's analysis in relation to recent anti-religious developments in the Province of Quebec, is discussed and criticized as being sanguine and ignoring the social and legal realities there (footnote 6, p. 42).

12 Iain T. Benson, 'Considering Secularism' in, Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill/Queens, 2004) 83 – 93

13 The Consultation Document for the Commission may be seen at: <http://www.accommodements.qc.ca/documentation/document-consultation-en.pdf> where the definition of 'secularism' in the Glossary defines the term as meaning the equivalent to the French *laïcité* or, as it says, 'the separation of church and state.' Elsewhere the Document defines 'open secularism' and 'radical secularism' but, with respect, the definitions fail to analyze secularism itself as 'anti-religious', 'separation of church and state' as a valid concept that does not preclude co-operation and do not sufficiently locate religious beliefs within the public sphere in the manner anticipated in *Chamberlain*.

do well to keep the terminology clear in this complicated area.

## Secularisation

Secularisation is commonly understood as captured in this definition by Brian Wilson as:

the process in which religious consciousness, activities and institutions lose social significance. It indicates that religion becomes marginal to the operation of the operation of the social system, and that the essential functions for the operation of society become rationalized, passing out of the control of agencies devoted to the supernatural.<sup>14</sup>

Such a definition obscures the anti-religious dimension of secularism by describing its results without reference to their cause – for ideological secularism is indeed prominent among the causes of the process here indicated. Moreover, it falsely suggests that the process is natural, inevitable and all in one direction.

## SEPARATION OF CHURCH AND STATE VERSUS CO-OPERATION OF CHURCH AND STATE

The separation of church and state is a jurisdictional distinction important to both the church and the state. A valid separation should not preclude a valid *cooperation* between church and state. Most religious groups in the west, for example, do not in fact want the state to run ‘the church’ or vice versa.

Yet this separation is often used to justify a stripping of the public dimension of religion that is recognized elsewhere in the law. Both ‘secularism’ and ‘separation’ are, as noted above, historically complicated and ‘secularism’ is, in fact, found to be an expressly anti-religious ideology when examined properly. Neither the Supreme Court of Canada, nor the Taylor/Bouchard Commission which was set the task of examining accommodation in relation to religion in the Province of Quebec, examined the problems with the category of ‘secularism’ and the importation of American conceptions (rejected by the courts in both South Africa and Canada) of ‘the separation of the Church and State.’ This was a missed opportunity.

As suggested elsewhere in this paper, we would do well, in light of both the South African and Canadian history, particularly in relation to education and health care (and their constitutional provisions) to recognize that the more appropriate formulation of our relationship is ‘the co-operation of church and state.’

## THE STATE DOES NOT HAVE ‘ONE’ VIEW ON MOST MATTERS

The State (as law and politics) exists to maximize diverse ways of living (within certain limits) rather than to enforce conformity. Mediating institutions such as the family, community associations of all sorts, and religions must be allowed to exist in a wide variety of forms. The idea of a singular ‘State’ with ‘a’ set of views, on legally contestable matters, that must govern on all topics, is an abstraction and an inaccurate one. Both the temptation to ever extend the State for this or that purpose as with the temptation to reduce the diversity of beliefs that must exist *within the State*, must be carefully guarded against.

Strictly speaking, ‘the State’ has no beliefs. It is a formal set of inter-locking rules and principles cordoned round by laws many of which admit of great and necessary diversity themselves.

14 B.R. Wilson, ‘Secularization,’ in Eliade, *The Encyclopedia of Religion*, 15: 160

The existence of administrative discretion in many areas speaks to a certain capacity of flexibility that is necessary. Similarly, the State resiles from stating (as some would wish it did) certain conclusions in certain areas. Thus, to take a controversial but current example, the same-sex marriage issue has raised the question of whether Marriage Commissioners should have their conscience views respected as ‘public office holders.’ Both views, for and against accommodation, though in conflict, are ‘legally contestable’ because, as a country, we allow divergence of beliefs as to what constitutes the meaning of marriage. I use this example as it neatly frames how the extension of a Constitutional recognition in one area does not preclude the freedom of citizens to hold other viewpoints on the matter. This is so for many issues in Canada today.

It follows from what I have argued that since there is and should be no one ‘State’s view’ of the matter regarding marriage, the accommodation of divergent views should allow people to perform as Marriage Commissioners who may have a personal conscientious or religious objection to certain kinds of marriage. As long as the objections are clearly set out in a civil manner, it would seem to me we ought to be culturally robust enough to accommodate such diversity of agreement into our laws at whatever level. This view, favourable to accommodation of divergent beliefs seems to have the dominant support in the academic literature in this area but does not seem to have found similar judicial support.<sup>15</sup>

On the other hand, the State must be able to interfere with beliefs of citizens (religious or not) at the margins where there are genuine concerns about threats to life or property or ‘civil order’ that require intervention by courts on review.<sup>16</sup> Both International Documents and South African and Canadian jurisprudence recognize such marginal limitations on beliefs.

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15 Against the position I am taking here, see: Bruce MacDougall, *Refusing to Officiate at Same-Sex Civil Marriages*, 69 Sask. L. Rev. 351,353–54 (2006). Professor MacDougall notes that Prince Edward Island and New Brunswick have amended their Marriage Acts to provide the right of refusal and lists British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan as Provinces that have policy statements denying the right to refuse. at 353 n.11. In favour of my position, see: Lorraine P. Lafferty, *Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-sex Marriage?*, 85 Can. Bar Rev. 287, 307–312 (2007) (arguing that tolerance implies disagreement and requires accommodation and public officials should be entitled to refuse) and Geoffrey Trotter, *The Right to Decline Performance of Same-sex Civil Marriages: The Duty to Accommodate Public Servants – A Response to Professor Bruce MacDougall*, Vol. 70 (2) Sask. L. Rev. (2007) 365-392 (deals with issue as a ‘collision of rights’ the ‘duty to accommodate’ requires the ability to decline; does not deal with the problem of viewing ‘the state’ as having one viewpoint on the matter). The Saskatchewan Court of Appeal (leave to appeal was refused by the Supreme Court of Canada) adopted an approach to ‘public’ roles that was inconsistent with the logic of the approach to ‘secular’ accepted by the Supreme Court of Canada in *Chamberlain*. The clarity of the courts’ reasoning was not helped by the fact that the many counsel before the court failed completely to argue in their written arguments, the relevance of the *Chamberlain* decision for a richer understanding of a shared public sphere. *Chamberlain* and its historical significance and jurisprudential relevance to such cases as the Marriage Commissioner’s case appears to be largely unrecognized by the learned members of the Bar as well as the judges of the Saskatchewan Court of Appeal: see, *In the matter of the Marriage Commissioner, Appointed under the Marriage Act, 1995 S.s. 1995, C.M-4.1 2011 SKCA 3* (January 10, 2011). See also, Kevin Boonstra, Lexview No. 720. ‘Does the Charter Excuse the Government from Accommodating Religious Belief’ May 18, 2011 (‘The Court placed insufficient weight on the rights and dignity of the Marriage Commissioner’) <www.cardus.ca>.

16 We have seen much litigation to determine where the line exists in this area and one need only think of such issues as ‘blood transfusions’, ‘Sunday closing’, ‘turbans in the R.C.M.P.’, ‘kirpans in schools’ ‘the conscience of physicians and pharmacists in relation to abortion’ to recall how these matters have forced, and are forcing, Canadians to come to terms with divergence in our plural society.

Article 18 (3) of the 1948 *Universal Declaration of Human Rights*, to which Canada is a signatory, states that:

Freedom to manifest one's religion or beliefs, may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

This limitation formulation was incorporated in the key passage to date in Canadian Charter jurisprudence dealing with the freedom of conscience and religion in Section 2(a). In an attack on the constitutionality of the *Lord's Day Act* by several retailers who were convicted for opening their businesses on Sunday, Chief Justice Dickson, in agreeing that the Act was unconstitutional because it compelled religious observance, held that the essence of the freedom of religion is:

Freedom [of religion] in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to be forced to act in a way contrary to his beliefs or his conscience.<sup>17</sup>

The focus on the public dimension of the freedom of religion as articulated in the earliest, and still centrally cited, decision of then Chief Justice shows that religion cannot properly be read merely into the private realm with no relevance for public policy. Its public dimension requires public consideration *and* accommodation.

The recognition that all positions, including atheism and agnosticism, are positions of 'faith', even though not of religious faith, can prompt a re-understanding of the public sphere in a more accurate manner. How this happens depends on the definition of the public sphere as this determines how we eventually accommodate or fail to accommodate differing beliefs, regardless of whether these beliefs are religious or non-religious in nature. The principles of accommodation and diversity, both well established and recognized in the law, are of practical importance in terms of how they work out in culture and politics.

Much of the language that is used to characterize the public sphere virtually insulates it from religion and insulates religion from its proper public influence. Thus, if 'secular' is equivalent to 'non-religious' and 'secular' means all those public things like government, law, medical ethics, public education and so on, then these major aspects of culture are outside religion and religion is outside them. This important aspect of the foundational language is rarely commented upon and shows the dominance of the exclusivist (religion excluded from the 'secular' as public) position.

But what about the beliefs of the citizens who are in government, law, medicine and public education? When the 'secular' is read as 'non-religious' in its exclusivist position, then the beliefs of atheists and agnostics, who define themselves as 'non-religious', are accorded representation, but those who define themselves as 'religious' are not. This is neither representative nor fair, yet it is the dominant and largely unexamined result of assuming the 'public' as 'secular', and the 'secular' as 'non-religious'.

This article is a counter-reading to this common and, I have argued, erroneous construction

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17 *R. v. Big M Drug Mart, Ltd.*, [1985] 1 S.C.R. 295, 336 (Can.) at 353 – 54.

of the public sphere. If 'secular' means 'the opposite of religious' or 'non-religious,' and if the public realm is defined in terms of the 'secular,' then the public sphere has only one kind of believer removed from it - the religious believers. I suggest that this way of using 'secular' is deeply flawed and will tend to lead us in the direction of religious exclusivism. An express meaning to 'secular' or 'public' that rules out religion without arguments based on fairness and justice leaves those realms distorted in relation to principles of accommodation. If we start off with an implicit idea that the public is secular, thus 'non-religious,' then it is difficult to balance or reconcile the various interests held by religious claimants and others in a public setting.

In contrast to this exclusivist position, this article suggests a different approach, that of 'religious inclusivism.' Only within an inclusive approach can accommodation and diversity have their proper application and meanings. Proper understanding of the public sphere requires a more explicit acknowledgment of the beliefs of those within it, whether these beliefs come from religion or not<sup>18</sup>

The Constitutional Court of South Africa has also recognized different spheres but, in common with general usage and the all too common judicial dicta, placed 'sacred' and 'secular' in unhelpful opposition. Despite this, Fourie, in understanding the public realm as an area of 'co-existence' between different spheres, moved towards a richer and more nuanced understanding. In the words of Justice Sachs:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other [...]. The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.* [...] It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity (Paragraphs 94-98, emphasis added).<sup>19</sup>

In line with the argument above, however, it would have been better to describe the relationship between the state (law and politics) and religious believers as part of a relationship in which, despite the jurisdictional separation, there is co-operation within 'the same public

18 See: Iain Benson, 'The Case for Religious Inclusivism and the Judicial Recognition of Associational Rights: A Response to Lenta. Case Comment.' *Constitutional Court Review*, 1, pp. 297- 312 (2008).

19 *Minister of Home Affairs and Another v. Fourie and Another (with Doctors For Life International & Others, Amici Curiae) and Lesbian & Gay Equality Project & Eighteen Others v. Minister of Home Affairs* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) ('*Fourie*') In *Fourie*, Justice Sach's conception of differing beliefs co-existing within the public realm is of signal importance and sets the stage, along with the approach of Justice Gonthier in the *Chamberlain* case, for a redefinition or, better yet, *re-understanding* of what might be termed central public terminology.

realm' without reference to the 'secular' and the 'sacred.'

## THE NEED TO MOVE AWAY FROM 'RELIGION AND THE SECULAR'

For many people, including politicians and religious leaders, the phrase 'religion and the secular' contains the implicit assumption that whatever the 'secular' is, it is somehow completely separate from religion. Yet, if religion (religious persons and their communities) are to have a role in the public sphere (that includes, at the very least, public education, medical ethics, politics and law themselves), then a bifurcation of this sort is destructive to the idea of an interpenetration between religion and the wider culture that we have seen in the legal decisions just referred to, that the law has begun to recognize.

Prior to *Chamberlain*, it was not uncommon (and still is not in general usage) to see comments from the judiciary that drew a sharp line between the 'secular' and the sacred and between intellect and faith. Consider the following passage from a leading decision on Catholic denominational rights from 1999:

A non-believer would necessarily teach the subject *from an intellectual rather than a faith-based perspective*. Separate [religious] schools do not aim to teach their students about these matters from a neutral or objective point of view. Separate schools explicitly reject that secular approach...<sup>20</sup>

Note how faith here is viewed as distinct from 'intellectual' and the secular is insulated from the religious perspective. *Chamberlain*, if its implications are worked out consistently therefore, will mark a revolutionary paradigm shift with major legal and cultural implications.<sup>21</sup>

## RELIGION NOT JUST A PRIVATE RIGHT; THE PUBLIC PLACE OF RELIGION IN BOTH SOUTH AFRICA AND CANADA; 'SEPARATION OF CHURCH AND STATE' AND LAICISM REJECTED; CO-OPERATION OF RELIGIONS AND THE STATE AFFIRMED IN BOTH CANADA AND SOUTH AFRICA:

It had been commonly understood, at least since the *Big M Drug Mart* decision of the Supreme Court of Canada (1985), that the essence of the freedom of religion was not just the right to have a religion in private but '... the right to declare religion openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by

20 *Ontario (A.G.) v. Daly* (1999) 38 O.R. (3d) 37 at para. 65 per Sharpe J emphasis added.; upheld by [1999] 172 D.L.R. (4th) 241 (Ont. C.A.), leave to appeal refused 21, Oct. 1999, S.C.C.A. No. 321.

21 A good example of a learned exchange that fails to show any appreciation of even the possibility of the religiously inclusive secular is one between Professors Sajó and Zucca (though many other authors could provide illustrations of the point): See, András Sajó 'Preliminaries to a concept of constitutional secularism' I•CON, Vol. 6, Number 3 & 4, 2008 pp. 605-629 and Lorenzo Zucca 'The crisis of the secular state-A reply to Professor Sajó' I•CON, Vol. 7, Number 3, 2009, pp. 494 – 514. Professor Zucca's generally strong rejoinder to Professor Sajó would have been much more effective had he not accepted the former's (and most people's) discussion of '...conflicts between religion and the secular state...' (at 514). We do need, as Professor Zucca suggests '...to modify the attitude with which the secular states respond to diversity and the fact of pluralism' (at 514) but, ironically, the most likely way of doing this is to stop characterizing the public spheres and states as 'secular' when they are very much something else - - *states made up of competing belief systems* that can and should expressly include the *public* dimensions of religions. Until these deeper epistemological waters are navigated we shall never properly deal with the relationships between law and religion or the state and beliefs including the religious.

teaching in dissemination'.<sup>22</sup>

Note that the words employed are active, public words – 'declare', 'manifest', 'practice', 'teaching', 'dissemination'.

Further insight about the public nature of religious freedom may be found in South African jurisprudence. There it has been recognized that religion is not always merely a matter of private individual conscience or communal sectarian practice. Thus, Justice Sachs has stated that:

Certain religious sects do turn their back on the world, but major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytize through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution.<sup>23</sup>

In another decision, the same judge stated:

One cannot imagine in South Africa today any legislative authority passing or sustaining laws which suppressed central beliefs and practices of Christianity, Judaism, Islam or Hinduism. These are well-organised religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections<sup>24</sup>

Neither country accepts the American conception of 'separation' (as that has come to be defined) nor the French conception of *laïcité*. This does not mean, however, that arguments based in whole or in part on these concepts are not made in courts or heard in political or popular rhetoric; they, and comments regarding the equally misunderstood concepts of 'secularism', are as ubiquitous as they are confused and confusing.

Neither South Africa nor Canada has been subject to the kind of inter-religious battles that one observes in other countries. This is not to say, however, that religious persons and their communities are sanguine about their position within contemporary Canadian or South African culture. The litigation examples, upon which I shall draw, below, show that here, as in other areas eternal vigilance (and litigation) have often been the price of religious liberty.

## RELIGION IS RECOGNIZED AS BEING IMPORTANT TO SOCIETY MORE IN SOUTH AFRICAN CASE-LAW THAN CANADIAN

The legal judgments in South Africa have recognized the importance of religion to South African society. They have done so in a language far more encouraging of the importance of religion than one would find in legal judgements elsewhere in the world, such as Canada. A judgment exemplifying a positive conception of the role of religion to South African society is a decade-old decision from the Constitutional Court of South Africa in the case of *Christian*

<sup>22</sup> *R. v Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336 (SCC).

<sup>23</sup> *Christian Education*, 2000 (10) BCLR 1068.

<sup>24</sup> *Prince v. President of the Law Society of the Cape of Good Hope and Others*, 2002 (3) BCLR, 289.

*Education v. The Minister of Education*. Though it was referred to more recently in a Supreme Court of Canada decision touching on religious rights, the following critical passage was not referred to by the Canadian judges:

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.<sup>25</sup>

Note here that religion is recognized as having a social dimension as well as a personal or individual dimension. This is important as some commentators (and a few Canadian legal decisions) have suggested that the right of religion is essentially individualistic. The passage above shows a greater awareness of the social importance of religion.

Nowhere can a passage be found in a Canadian Supreme Court decision, or any other Canadian decision with which the author is familiar, that says the sort of thing referred to above from the *Christian Education*-decision in South Africa. Canadian judges, and those in other countries, are much less confident about the important cultural role of religion or, alternatively, do not speak in such encouraging terms about it. This hesitance does not assist the public respect for religions or a richer conception of pluralism including religious pluralism.

## QUEBEC COMPULSORY COURSE ON ETHICS AND RELIGIOUS CULTURE AND REFUSAL TO GRANT EXEMPTIONS TO STUDENTS OF OBJECTING PARENTS

A recent controversy in the Canadian Province of Quebec, a province known for its particular concerns about religion during and since 'the quiet revolution,' a mandatory course entitled 'Ethics and Religious Culture' (ERC) has been created for all schools, public and private, confessional and non-confessional. Despite many hundred (some have said as many as two thousand) requests for exemptions from parents and from at least one Catholic High School, the Province has refused to grant exemptions.

The Supreme Court of Canada, in a surprisingly short decision (it had been reserved for almost a year and had a very large number of interveners when the matter was argued) ruled in favour of the Province holding that the parents had failed to satisfy the preliminary test that their religion had been harmed. The court held that the parents must show that their ability to pass on their religion to their children had been proven 'on a balance of probabilities' and this the parents had not done. The decision has caused considerable concern as the court seemed to depart from earlier decisions in which 'sincerity' of the belief, not anything as invasive as showing the very harm the parents wished to avoid – was the test.<sup>26</sup>

<sup>25</sup> *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC), paragraph 36; referred to in the judgment in Canada on the case *Braker v. Marcovitz* 2007 SCC 54. For the scope of freedom of religion in South Africa, much of which was based on Canadian decisions, see Iain Currie and Johan de Waal *The Bill of Rights Handbook* (Cape Town: Juta, 5th ed. 2005) at 336-357.

<sup>26</sup> *S.L. and D.J. v. Commission scolaire des Chênes and Attorney General of Quebec, S.L. et al, v. Commission Scolaire des Chênes* 2012 S.C.C. 7 (February 17, 2012). I declare an interest. I was counsel in that case for two intervener associations, the Canadian Council of Christian Charities and the Canadian Catholic School Trustees Association. Prior to this it was settled law in Quebec that no child could be

## FAILURE TO GRANT EXEMPTIONS FROM MANDATORY ERC COURSE TO CATHOLIC HIGH SCHOOL OVERTURNED: DECISION IN THE APPEAL COURTS.

In parallel proceedings a Catholic High School has successfully overturned the Province's failure to grant it an exemption from the course when the Minister failed to consider a Catholic course on world religions and ethics 'equivalent' to the required course.<sup>27</sup> In various statements, the Assembly of Quebec Bishops adopted a conciliatory 'wait and see' approach and said that it had 'some concerns' about the curriculum. The Assembly, however, failed to make any statements about the importance of exemptions or alternative delivery of valid program goals and, in so doing, was taken by the trial judge to have endorsed the matter from a Catholic perspective. Statements by a Catholic theologian (also not referring to parental exemptions) bolstered the judge's view that the Catholic Church endorsed the program. A much stronger statement citing the importance of parents as primary educators and the Province's duty to consider exemptions or acceptable compromises (i.e. alternative delivery to valid Provincial goals) was in order but was not forthcoming.

## DIRECTIVES THAT RELIGIOUS DAY-CARE SCHOOLS CEASE TEACHING RELIGION OR HAVING RELIGIOUS OBSERVANCES

Recently a Directive from the Quebec minister de la Famille Mme. Yolande James, instructed all subsidized religious day-cares in the Province to cease giving any religious instructions in religious day-cares. The Minister indicated that for reasons of socialization those between 0 and 5 years of age would no longer be permitted to be exposed to any religious activities '... par exemple, la récitation répétée de prières, la mémorization de chants religieux ou l'apprentissage de gestes religieuses.'<sup>28</sup> The justification rests upon the claim that there is a difference between teaching religion and celebrating a cultural tradition. Christmas trees and the songs of Bing Crosby may be allowed to remain as long as the songs are of a non-religious sort.

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forced to attend religious instruction contrary to the wishes of his or her parents. See: *Chabot c. School Commissioners of Lamorandière* (1957), 12 D.L.R. (2d) 796 (Que. C.A.). See, for a South African comparison respecting the denominational nature of religious schooling and a rejection of three leading Canadian cases (a rejection the author believes is justifiable) *Wittmann v. Deutscher Schulverein, Pretoria and Others* 1998 (4 SA 423 (T) (Transvaal Provincial Division) per. van Dijkhorst J. who distinguished *Adler v. Ontario* (1996) 3 SCR 609, *Canadian Civil Liberties Association v. Ontario* (1990) 46 CRR 316 and *Zylberberg v. Sudbury Board of Education* (1988) 34 CRR 1 all of which rejected exemptions as satisfactory in the face of religious education and opening exercises.

27 *Loyola High School v. Courchesne*, Superior Court (S.C.) Montreal, QC, Canada, 500 – 17 – 045278-085, Justice Gérard Dugré (June 18, 2010) Reported at 2010 QCCS 2631. This matter has been argued before the Quebec Court of Appeal but at the time of writing no decision has been released.

28 Centre de presse. Quebec Met fin A L'Enseignement Religieux Dans Les Services de Garde Subventionnés, Monreal le 17 decembre 2010 see: <http://www.mfa.gouv.qc.ca/fr/ministere/centre-presse/communiqués-famille> Press reports have pointed out the public concerns about the government's new Regulations and noted the irony that manger scenes may still be allowed but that those who run the schools may not name the figures. In addition the Minister explained that while Imams, rabbis or ministers may visit the religious day-cares they may not speak about religion. See: Lysiane Gagnon, 'Lose Religion or the Subsidy' *Globe and Mail*, Tuesday December 28, 2010 p. A17; Editorial, 'Religion in Retreat' *The National Post*, Thursday December 30, 2010 p. A10; Ingrid Peritz, 'Quebec Curbs Religion in daycare; Policy triggers emotional debate over how inspectors will differentiate between religious conviction and cultural values' *The Globe and Mail*, Wednesday, December 22, 2010 page A4.

The breadth and depth of this concern is not something that any citizen should take lightly given the important role that religious beliefs play in society. It remains to see what the Assembly of Bishops of Quebec, or any individual Ordinary will say publicly in relation to this most recent over-reach by the Province of Quebec.

We are at a stage of development in the jurisprudence of both Canada and South Africa (and the same holds true for other countries) where, as we have seen in the decisions referred to above, from time to time, the courts under either the South African or Canadian constitutions have had to wrestle with the appropriate line between judicial interpretation and the lives of those persons living under a religious order.

In a decision from 2006, the Chief Justice, giving the reasons for the majority of the Supreme Court of Canada, noted that both the state and the law should be reticent to delve into personal matters that are related to the nature of religious belief, because:

The state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, 'obligation', 'precept', 'commandment', custom or ritual. *Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.*<sup>29</sup>

This is exactly correct but one wonders if the recent decision in the Drummondville parents' case or the actions of the Quebec government are consistent with the respectful approach set out in the earlier decisions and approaches; it would seem not.

The frame, therefore, is established between religion as having a necessarily but limited 'outside' public dimension (the Big M Drug Mart decision of the Supreme Court of Canada, above) and the same court's reticence to get 'inside' religions and their dogmatic 'private' determinations (Amselem). A similar insight has emerged from the Constitutional Court of South Africa. This court has also recognized different spheres but, in common with general usage and the all too common judicial dicta, place 'sacred' and 'secular' in unhelpful opposition. Despite this, the Fourie decision, in understanding the public realm as a sphere of 'co-existence' between different spheres moves or should move us towards a richer and more nuanced understanding in line with the comments set out above.<sup>30</sup>

This paper, has examined the framework language used to discuss religion and law and suggested that many of the key terms are deeply confused, misleading and that they create what is, in effect, an illusion. Thus, a re-thinking which recognizes that all persons are believers (it is not whether they believe but what they believe in that is the proper description of things) and that all are in some kinds of communities of faith and belief goes some way to identifying the all too common (and implicit) dominance of atheism and agnosticism in the current age.

The re-configuration of the meaning of the 'secular' (which marks a kind of shift of the usual paradigm of separation and exclusion that has been in place for a very long time) may be said

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29 *Syndicat Northcrest v. Amselem* [2004] 2 SCR 551 at para. 50 (emphasis added)

30 *Fourie* above, note #19, at para.s.94-98 (emphasis added). Justice Sachs' conception of differing beliefs co-existing within the public realm is of single importance and sets the stage, along with the approach of Justice Gonthier in the Supreme Court of Canada Decision in *Chamberlain*, for a redefinition or better yet a 're-understanding' of what might be termed central public terminology.

to have most clearly begun in the Canadian Supreme Court decision in *Chamberlain*. Since the fuller implications of that decision are poorly understood even in Canada, it is no surprise that it is not getting noticed elsewhere. The decision and its central holding about the nature of the inclusive public sphere needs to be more widely understood and applied.

Law has its public role but so does religion – yet they are different. Speaking truth to power is influenced by the means chosen to do the speaking. Theocracy seems to corrupt religious proposition by using the instruments of coercion that are essential to law in service of religions which should be about witness not coercion. On the other hand, when law extends beyond its proper boundaries into the areas that should be reserved for families and associations in relation to religious liberty, it too is corrupted.

The current phase in constitutional democracies is one of a kind of tug-of-war between convergence and accommodation of difference, between subsidiarity and statism. For this reason there is a co-operation that is both practical and principled. Practical because the concerns of any threatened *subsidiium* is a concern of all, and principled because the affirmation of freedom and conscience demands respect for others. Learning to live together with disagreement and respect is an achievement that will require better frameworks than we are employing currently.

#### **KEYWORDS**

Definitions of 'secular' 'secularism' and 'secularization'

Freedom of association

Freedom of religion

Nature of public sphere

Constitutional law and freedom of religion

Iain T. Benson,  
Ferme Loudas,  
St. Pé de Bigorre  
France