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Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed

Benjamin L. Berger*

There is perhaps no more important access point into the key issues of modern political and legal theory than the questions raised by the interaction of law and religion in contemporary constitutional democracies. Of course, much classical political and moral theory was forged on the issue of the relationship between religious difference and state authority. John Locke's work was directly influenced by this issue, writing as he did about the just configuration of state authority and moral difference in the wake of the Thirty Years' War. Yet debates about the appropriate role of religion in public life and the challenges posed by religious difference also cut an important figure, in a variety of ways, in the writings of Hobbes, Rousseau, Spinoza, Hegel, and much of the work that we now view as being at the centre of the development of modern political philosophy.[1] Furthermore, the mutual imbrications of law and religion in the development of the western legal tradition are many and well established. At the structural level, Harold Berman famously traces the origins of modern western European legal systems to the Papal Revolution begun in 1075.[2] James Whitman shows the extent to which this mutual influence is (elusively) true of core doctrines of contemporary law, such as the principle of proof beyond a reasonable doubt.[3] The relationship between law and religion has been fertile soil for both the development of the modern legal system and the foundations of modern political philosophy.

Yet the claim at the outset of this article was that the questions generated by the interaction of law and religion are indispensible *contemporary* channels into the core questions of modern political and legal theory. Recent years have seen a migration of issues regarding religious difference and the nature and structure of the state back to the centre of legal and political theory. As western liberal democracies have been met with heretofore unprecedented degrees and forms of religious diversity, we have watched as diverse political and legal traditions have struggled mightily with the interaction among law, politics, and religion. The exigency and centrality of issues of law and religion to contemporary thinking about the just state is evidenced by a host of high-profile issues such as the Dutch cartoon controversy; the French political and legal response to the Islamic veil; U.S. debates over the presence of religious symbols, such as the Ten Commandments, in public space; and the hand-wringing of constitutional theorists about the appropriate role to be given to religion in the crafting of new constitutions for transitional states such as Afghanistan and Iraq. Given Canada's official state policy of multiculturalism, Canadian political and legal philosophy has long been consumed with issues of cultural difference and the law. Religion has found its way to the centre of conversations about multiculturalism, spawning a host of cases before the Supreme Court of Canada, a new body of legal scholarship, and a high-profile public commis-

sion looking at issues of the accommodation of religious difference.[4]

Put briefly, the interaction of law and religion is the field on which questions central to contemporary constitutional and political theory are being debated and worked out. The area is deserving of philosophical attention because, arguably more than any other contemporary issue in the law, debates about law and religion are exposing crucial fault lines in modern legal and political theory, some old and some rather new. The fraught contemporary relationship between law and religion raises issues about the nature of modern law, adjudication, and rights, and provides unique access to problems of community, identity, belonging, and authority that lie at the heart of contemporary democratic and political theory. Meaningful study of the relationship between law and religion also resists disciplinary boundaries, inviting and perhaps demanding the insights of history, philosophy, sociology, and anthropology.

This piece is intended to serve as a kind of philosophical or conceptual primer on a set of issues that, whether raised overtly in public debates or not, shape and suffuse conversations about the relationship between law and religion in the modern state. The concepts and debates raised are at work in many constitutional orders, and appreciation of these abiding issues is crucial to understanding the relationship between law and religion wherever it arises. Indeed, understanding these broader themes is invaluable in the comparative study of law and religion, a point that will be made below. Nevertheless, this short article specifically seeks to ground the examination of these issues in Canadian social and jurisprudential soil. In the end, the hope is not only to provide a broad mapping of certain central theoretical issues at the heart of the study of law and religion, thereby helping to orient a reader interested in this debate, but also to give a flavour of the way in which these issues offer uniquely valuable conduits into key questions in contemporary legal and political philosophy.

1. Defining "the secular"

Perhaps the key definitional issue at play in philosophical and legal debates regarding the interaction of law and religion is the issue of how one is to understand the idea of the "secular." The word "secular" circulates promiscuously in popular, political, and academic discussions of modern constitutional democracy, but its precise meaning and the implications of the concept for law and public policy are deeply uncertain and the root of much debate and conflict in this area. At its outer limits, the term is unproblematic; a secular state can be distinguished from a theocracy wherein there is no distinction between public authority and religious authority. Short of this bright line, however, one finds a spectrum of definitions and understandings of the meaning and demands of secularism. It would be comfortingly simple if one could attribute differences about the just relationship between religion and the law to the distinction between those who assert a commitment to secularism and those who disavow the concept. Instead, what one finds in the scholarship and jurisprudence is an enormous breadth of conceptions of the secular among those who agree that it is a concept of importance in modern constitutional and political thought.

Locke's *Letter Concerning Toleration* is an important touchstone for one vision of the secular.[5] Locke's preoccupation in the letter is to distinguish the jurisdiction of the church from that of the commonwealth. Locke famously wrote:

> [T]he church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and immovable. He jumbles heaven and earth together, the things most remote and opposite, who mixes these societies, which are, in their original, end, business, and in every thing, perfectly distinct, and infinitely different from each other.[6]

This vision of the separation of state authority from religious authority remains an influential conception of the meaning of the secular; a secular constitution is one that achieves a sharp division between church and state. When

religion mixes with the authority of the magistrate (to use Locke's term for the person wielding state power), one is faced with a breach of a particular understanding of the demands of a secular polity. One might point to the U.S. Constitution's doctrine of non-establishment as the quintessential modern expression of this vision of secularism. The first amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; and so in the U.S. context the movement of public funds from state to religion is intrinsically suspect. One commonly referenced counterpoint to the U.S. example is that of Germany, where religion receives all manner of state support, "establishing" religion in a number of ways that would be anathema in the United States. The picture is rather more complex, however, and this complexity is telling of an important point that has emerged in contemporary scholarship about the nature of secularism.

In an important article on comparative issues in law and religion, James Whitman demonstrates that although there is an institutional separation of church and state in the United States, there is a mixing of religion and politics and religion and law that would be offensive to European sensibilities.[7] By contrast, the European model mixes the institutions of government and religious institutions to a degree unacceptable to U.S. eyes, but is far stricter about the separation of politics and law from religious reasons and rhetoric. The inconvenient truth, as Whitman explains, is that "[b]oth represent forms of the separation of church and state."[8] Whitman's article points to an important insight that has been generated from contemporary scholarship regarding the concept of the secular: namely, that there are "secularisms" rather than a single configuration of the secular. A number of scholars working in religious studies and political theory have emphasized this point, tracking the diverse manifestations of the porous commitment to the "secular" in a variety of national traditions.[9] This scholarship shows that, short of serving to distinguish political orders from outright theocracy, the term "secular" serves, at most, as a placeholder for a set of possible institutional and social arrangements that seek to secure an appropriate role for religion in public life.[10] Accordingly, the term "secular" is a flag marking a site of debate about the scope and shape of this "appropriate role."

What, then, are some of the leading positions on the meaning of the "secular" as a legal and political concept? Locke's bare statement cited above reflects one still-influential conception of the proper place of religion in public affairs—that it ought to be confined to the private realm, ceding public space to language, arguments, and symbols that can attract the support and allegiance of any citizen, irrespective of his or her religious commitments. John Rawls stands as the most prominent and frequently invoked exponent of this position on the use of religious reasons in public decision-making.[11] One of his central arguments is that modern constitutional democracy requires individuals, as a matter of civic respect, to bracket their "comprehensive doctrines," including their religious perspectives, in favour of "public reasons"—reasons that can attract the overlapping consensus of all of those who view a matter with disinterested reason.[12] On this view, secularism inheres in the withdrawal of religion and religious reasons from the public sphere.[13] Applied to the interaction of law and religion, this vision of the secular requires the independence of law and legal decision-making from religious influences.

An alternative perspective on the meaning and implications of the idea of secularism understands the command that law and public affairs be conducted on a secular basis as a gesture towards a kind of pluralism or inclusiveness based on multicultural equality.[14] Those who take this view of the secular argue that it is not only impossible, but also undesirable, for a culturally diverse society to require that religion be bracketed when one enters into debate about law and public affairs.[15] Parekh, for example, while accepting a "weak" secularism that requires the separation of religious and state institutions, resists a "strong secularism" that would require that "political debate and deliberation should be conducted in terms of secular reasons alone,"[16] arguing that to do so is "unwise because it deprives political life of both the

valuable insights religion offers and the moral energies it can mobilize for just and worthwhile causes."[17] Although those who take this "pluralist" approach to secularism vary broadly on the limits that they might impose on the influence of religion on public decision-making, all agree that secularism does not demand the expulsion of religion from the public sphere.

I have focused thus far on the role that differing definitions of the secular may have on one's view of the appropriate role for religion in public decision-making. Yet the way one imagines the secular has implications for a host of legal issues with which courts have had to wrestle in recent years. One's view of the demands of secularism affects the propriety of the display of religious symbols in public space. Despite the vast differences between their traditions, both the U.S. and France have faced this issue in the display of the Ten Commandments and the wearing of "conspicuous" religious symbols in public schools, respectively. Whereas the issue is processed through the logic of non-establishment in the United States and through ideas of *laïcité*[18] in France, both are ultimately debates about the meaning of living in a secular constitutional democracy. One's approach to secularism may also affect the difficult legal question of the margin that ought to be afforded for religious law to operate independently of state interference—a matter that, in 2004, was debated in Canada in the form of controversy about Islamic law-based family arbitration.[19] Indeed, one finds—more or less explicitly—debates about the meaning and implications of secularism at the core of much constitutional adjudication about the limits of legal tolerance and the demand for accommodation of religious difference. A recent case heard by the Supreme Court of Canada led it to reflect explicitly on the meaning of the secular and the requirements of accommodation and tolerance in a multicultural society. In *Chamberlain v Surrey School District No 36*[20] the Court was asked to rule on the significance of a legislative mandate that public schooling be conducted in a "strictly secular" manner and what this meant for the religiously-motivated decision of a School Board to prohibit the use of books depicting same-sex parented families in a Kindergarten family education course. Chief Justice McLachlin explained as follows:

> The Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.[21]

One sees the complexity and tensions surrounding the idea of "the secular" described in this section reflected, albeit not resolved, in this quotation: on the one hand, "strict secularism" imposes real limits on the permissible forms of public debate and grounds for legal decision-making; on the other, it does not bar religion from law and public decision-making, and imposes obligations of inclusion and respect. Given an array of available and defensible options, how one understands the common injunction that a modern constitutional democracy must be "secular" is crucial in shaping one's ultimate sense of the just relationship between law and religion. It is to the related question of the nature of legal tolerance and accommodation that I now turn.

2. Multiculturalism, accommodation, and the limits of tolerance

"Every age," Paul Kahn writes in his essential study of contemporary liberalism, "has its own point of access to ethical and political deliberation. For us, that point is the problem of cultural pluralism."[22] The ur-case of cultural pluralism in modern political history is religious difference, but questions of cultural pluralism have expanded well beyond their religiously focused foundations; indeed, one might say that the religious roots of multiculturalism have been hidden by the many other forms of cultural diversity that have grown in countries like Canada, the U.S., the U.K., and France. Nevertheless, the imperative to create some form of accommodation or tolerance for beliefs and practices other than those of the majority culture continues to appear in some of its most challenging contemporary forms in matters of religious difference. Increasing quantities of ink are now being spilled on the application of doctrines of multiculturalism and accommodation to matters of deep religious difference. The concepts of tolerance, accommodation, and multiculturalism are wedded though distinguishable; multiculturalism designates a state policy towards cultural difference, whereas toleration and accommodation gesture to legal and policy responses to instances of difference. The expression of respect for multiculturalism and juridical and political recognition of the need for tolerance and accommodation is so prevalent as to seem anodyne. A recent decision by the Supreme Court of Canada on the permissible use of religious law in a secular society begins with the kind of statement that one could find in the judicial or political rhetoric of most modern western democracies: "Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected."[23]

The great difficulty concealed by these placid statements is that cultural and religious difference carries with it strongly-held normative views that may grate mightily on the values and moral positions of society at large, positions and values that are commonly embedded in and expressed through the law. Kahn reflects the true ethical and moral challenge of cultural pluralism:

> Lacking a conviction in the absolute truth of our own beliefs and practices, we are uncertain how to respond to those who live by different norms. We are all too aware that such differences exist, as we interact with cultures that put different values on life and death, family and society, religion and the state, men and women. We constantly confront the question of whether some of the practices supported by these values are beyond the limits of our own commitment to liberal moral philosophy and a political practice of tolerance. We worry about moral cowardice when we fail to respond critically, and about cultural imperialism when we do respond.[24]

Religious diversity poses these dilemmas starkly and confronts the law with the question to which I alluded in the discussion of secularism—what are the appropriate limits on religious difference in a liberal constitutional democracy committed to certain principles and visions of the good, but for which respect and tolerance for cultural difference stands as one such good?

Legal and philosophical scholarship has responded with a variety of attempts to articulate a basis for a workable approach to managing religious and cultural difference. At the more theoretical end of things, Charles Taylor has expounded an influential conception of multiculturalism that is based on a politics of mutual recognition.[25] In a similar vein, James Tully has wrestled with issues of deep cultural difference in the Indigenous context by developing a conception of treaty constitutionalism that, again, grounds legal and political relationships in recognition and reciprocity.[26] Taylor and Tully approach the matter from the perspective of political philosophy, seeking to develop a more robust ethical foundation for a meaningful form of multiculturalism. Where these theories have been thin on practical details, others have sought to work with concepts of multiculturalism in a manner that generates

principles that can guide the legal management of the line between tolerance and the protection of public values, the fraught line to which Kahn has pointed. Will Kymlicka's highly influential work is of this second type. Kymlicka's *Multicultural Citizenship* articulates a model of legal multiculturalism based on a distinction between internal restrictions (rules and norms of a community that bind members within the group) and external protections (principles imposed by society that seek to promote fairness between minority groups).[27] Kymlicka ultimately argues that "liberals can and should endorse certain external protections . . . but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices."[28] For Kymlicka, then, multiculturalism involves inter-group toleration but requires attention to intra-group liberty. More recently, Ayelet Shachar has suggested a form of religious multiculturalism that has as its centrepiece the concept of "transformative accommodation."[29] Shachar defends the importance of the accommodation of diverse religious cultures while identifying the ways in which women are particularly vulnerable in the private spheres, in which most models of secularism permit religion a robust autonomy. She uses the concept of jurisdiction as a means of providing a balance between respect for and tolerance of religious cultures and the protection of the rights of women within these communities. In her approach, neither religious groups nor the state would have a monopoly on decisional authority as regards the community; rather they would share jurisdiction with defined "reversal points" at which community members could choose to opt for the state's jurisdiction over that of the religious community. In the end, Shachar argues that such a model will provide a due degree of accommodation of difference while encouraging religious communities to tend to the interests of vulnerable subgroups, ultimately leading to the liberalization of orthodox communities.

However, features of the models suggested by both Kymlicka and Shachar point to an emergent and important strand of scholarship that questions the concept of toleration at a foundational level. Wendy Brown suggests that the idea of toleration has an ineradicable dimension of domination woven into its very fabric.[30] Toleration, Brown argues, is a means of inscribing and affirming the difference of minority groups (the tolerated) while preserving the power and privilege of the group that gets to do the tolerating. Brown's compelling study suggests that toleration is not, in the end, so tolerant—at least in the sense suggested in most political and legal rhetoric. Others have begun to take this insight and apply it to the practices of legal toleration of religious difference.[31] Guided by Bernard Williams' philosophical insight that true toleration involves ceding territory on matters of deep importance to oneself,[32] does the protection of religious freedom actually yield toleration of the kind promised in the story of legal multiculturalism? Carefully considered, legal toleration may amount to simply the recognition of those points at which the central values of a liberal constitutional democracy are not troubled or threatened by religious difference. When this line of indifference is transgressed, the law enforces its commitments and conceptions of the good. Are the limits of toleration precisely the boundaries of what truly matters to the law, with legal toleration of religion ultimately serving as a means of enforcing the liberal culture embedded in modern constitutionalism? This is arguably the underlying logic and effect of the models proposed by both Kymlicka and Shachar; and if this account of legal toleration is accurate, the tools of the law offer no easy escape from the multiculturalist conundrum that Kahn so poignantly exposes. In the end, the question of the politics of multiculturalism and toleration remains a substantial issue in the interaction of law and religion, one that points not only to the value-infused nature of legal culture, but also to the complex nature of legal rights and the adjudication of religion.

3. The nature of rights and the adjudication of religion

While contemporary scholarship has raised questions regarding the structure and nature of the legal toleration of religion, the adjudication of claims of freedom of religion has exposed issues about the nature of rights and adjudication

to which scholarship must now react. These issues are tied closely to the matters discussed thus far—the nature of the secular and the limits of toleration. Both secularism and toleration are, at base, proxy concepts for the line-drawing that seems intrinsic to the management of deep religious difference in contemporary constitutional democracies. The core task of constitutional adjudication of religious freedom—the central means by which the interaction of law and religion manifests in the modern legal arena—amounts to an exercise in defining the boundaries of religious liberty in light of the core values embedded in the public legal order. As courts have engaged in this boundary-drawing exercise, the adjudication of religious freedom has yielded lessons about the structure of rights and the nature of the adjudication of religious freedom. Consider two such lessons.

First, with respect to the structure and nature of rights, the adjudication of claims of religious freedom has shown that it is much more difficult to "take rights seriously" than is imagined by those, like Ronald Dworkin,[33] who have advocated for an understanding of constitutional rights as trumps—as legal principles whose vindication over other public policy matters is assured by their status as "rights." Adjudication of matters of religious freedom has put this conception of rights under serious stress. The normative and ontological "thickness" involved in religion has made the adjudication of claims of religious freedom particularly adept at challenging this understanding of rights. Religious beliefs and practices are invested with ideas about and attitudes towards the world, ideas and attitudes that are both central to the religious culture and can be at odds with other constitutionally protected goods and weighty matters of public policy. The Supreme Court of Canada has put the difficulty as follows: "In judging the seriousness of the limit [on freedom of religion] in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs."[34] In Canada, freedom of religion jurisprudence has been one of the leading contemporary sources of cases showing the potential for the conflict of rights, cases in which a claim of freedom of religion comes into conflict with another constitutional guarantee, frequently the protection of equality. What should be done when the protection of religious freedom conflicts with the protection of equality on the basis of sexual orientation? Such cases have demonstrated that the protection of rights is rarely, in practice, a matter of "trumps."[35] Conflicts between rights and serious conflict between religious freedom and pressing public interests are the rule, not the exception. As such, freedom of religion cases have been particularly important in putting to the philosophic community the challenge of thinking about rights as markers for a set of interests (among many) rather than as non-negotiable imperatives. The dominant theoretical and jurisprudential answer to this practical reality has been to argue that the key task of constitutional adjudication is that of the balancing of rights and interests through proportionality tests.[36] One scholar has gone so far as to characterize proportionality balancing as the "ultimate rule of law"[37]—a far cry from the idea of rights as trumps.

Scholars have pointed to a second lesson about the nature of adjudication and the structure of the right of religious freedom that appears to emerge from the jurisprudence and, in particular, the boundary-drawing that seems inherent in the concepts of both secularism and legal toleration. This incipient line of argument suggests that the adjudication of religious freedom inevitably involves the imposition of some juridical conception of what religion is, or what about religion really matters, and, in so doing, imposes a legal filter on what "counts" as protected religion. Writing from the U.S. setting, Winnifred Sullivan has put the argument most starkly in her book *The Impossibility of Religious Freedom*.[38] The essence of Sullivan's position is that the use of any concept of religious freedom requires a definition of religion and in this very act of defining religion certain orthodoxies are imposed while other dimensions of lived religion and the variety of modes of being religious are diminished or excluded from legal protection. "Crudely speaking," Sullivan

argues, forms of religion that are private, voluntary, and believed rather than practiced (forms she refers to as "protestant") are "free" whereas other forms of religion are "closely regulated by law."[39] I have argued that adjudication of religion requires the imposition of a definition of religion and that this definition is informed by the cultural commitments of the constitutional rule of law itself, a culture of law's rule that is deeply indebted to and contiguous with core components of the political culture of liberalism, which privileges autonomy and choice over identity, the individual over the group, and insists on a more-or-less stable division between the public and private dimensions of human life.[40] "Law shapes religion in its own ideological image and likeness and conceptually confines it to the individual, choice-centred, and private dimensions of human life."[41] Adjudication of rights-based claims cannot be insulated from the informing culture of law's rule and, as such, involves the imposition of a particular set of beliefs about what is of value in the human being and the shape of a good society—matters on which religious communities hold strong commitments of their own.

4. Why protect religion?

Attention to the difficulties involved in the adjudication of religious freedom claims, including the manner in which freedom of religion seems readily to fall into conflict with other rights, gestures to a final—and fundamental—question raised in the scholarship regarding the interaction of religion and modern constitutionalism. The variety of claims made under free exercise or religious freedom clauses, the challenges that these claims pose for reconciliation with public policy, and the manner in which they have drawn civic debate into questions of the degree of moral difference tolerable in a secular society, all suggest a foundational question—why do we single out religious belief and practice for special constitutional protection? The obvious follow-up is "and should we continue to do so?" To reach back to the discussion of secularism, in his magisterial study of the concept and nature of secularism, Charles Taylor explores three ways of thinking about "the secular."[42] One model of secularism involves the retreat of religion from public spaces (secularism 1); another is the general decline of religious belief and practice in society (secularism 2). But Taylor's argument is that the essence of modern secularism is best understood as the comparatively modern shift "from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others" (secularism 3).[43] There is a great deal to commend this understanding of secularism, but it raises the difficult question that is the final conceptual fault line in the interaction of law and religion that I wish to explore: if religion has become one possible means of human flourishing among many other options, why do constitutions continue to single out and protect religion?

One forceful answer that has emerged in the scholarship is that "[t]here is simply no good reason for offering religion a priority over other deep passions and commitments."[44] Larry Sager and Christopher Eisgruber have been the leading and most explicit proponents of this view.[45] Reflecting on the U.S. context, Eisgruber and Sager have argued that there is no defensible basis for affording religious beliefs and actions a particular constitutional privilege. Their argument is not that religious beliefs and actions are undeserving of constitutional regard. Rather, their thesis is a kind of levelling move, suggesting that the reasons for protecting religious freedom can be fully accounted for through more generally applicable constitutional principles of equality and liberty. A combination of basic equality considerations and a general liberty principle—a combination that Eisgruber and Sager call the principle of "Equal Liberty"—is sufficient to take full account of what animates our instincts to protect religion. The protection of religious freedom is nothing more, in short, than a particular application of constitutional protections available to all, irrespective of the specifically religious dimension of their beliefs, identity, or actions.[46]

To the question of why we find specific reference to religious freedom in constitutions around the world if the "problem" of religious

freedom is wholly answerable with a generally applicable Equal Liberty principle, Sager and Eisgruber answer by noting that history has shown that religion is "especially vulnerable to hostility or neglect."[47] Specific protections of religious freedom are, on this view, simply markers for a basis on which the Equal Liberty principle has often been breached. There is nothing, however, distinctively valuable about the "religion" in freedom of religion that attracts (or ought to attract) constitutional protection.

Other scholars have offered a very different answer to the question of why constitutions specifically protect religion, explicitly rejecting the idea that abstract principles of equality and liberty give sufficient account for the special regard that constitutions give to religious freedom. "[W]e are fooling ourselves," one author writes in direct response to Sager's argument, "if we think we can define a coherent conception of freedom of religion without recognising that the freedom presupposes an affirmative valuing of religion. If we attempt to do so, we almost always end up smuggling in a covert valuing of religious practice."[48] In the constitutional protection of religion one finds an abiding sense that religious views have a special place in the way in which a person makes sense of his or her world and that religion speaks to a dimension of human existence deserving of regard and respect. Although equality and liberty are necessary aspects of the constitutional protection of religious belief and practice, freedom of religion cannot be accounted for separate from a societal recognition of the unique depth and importance that religion continues to hold for fellow members of our political community. Certain writers take a more utilitarian approach, emphasizing the goods that religion (perhaps uniquely) brings to society, benefits that better explain why religion is and ought to be given distinct constitutional regard. Although recognizing its potentially pernicious faces, Parekh notes that religion has historically served as an important counterweight to state authority, animating a number of emancipatory movements, "nurturing sensibilities and values the latter ignores or suppresses,"[49] and providing a host of other benefits to society.

Yet separate from (if related to) these moral and utilitarian answers to the question, "why protect religion?", there is also a tantalizing ontological possibility: does freedom of religion serve as a marker for a kind of anxiety about metaphysical certainty within the law? Perhaps the special protection given to freedom of religion flows in part from a recognition that religion asks the kinds of questions and affords forms of answer to which the law is neither inclined nor equipped to respond. And if these questions and answers are both important and unanswerable within the law, freedom of religion may be a cautionary principle—an expression of law's modesty about what it can say about the structure of things and meaning of an individual or community's experiences.

5. Concluding comments

The select key theoretical issues canvassed in this piece demonstrate the manner in which the interaction of law and religion has emerged as a uniquely valuable contemporary site for reflection on questions central to the philosophy of law. Be it the nature of adjudication, the structure of rights, the role of law in contemporary public life, or issues of law's relationship to moral and cultural diversity, cases and controversies about religion and religious freedom arising in modern western constitutional orders have afforded invaluable avenues into central questions of social and legal philosophy. The interaction of law and religion has provided unique traction to scholars working on basic issues in religious studies, political theory, legal philosophy, and jurisprudence. In concluding this piece, I wish to gesture to an issue that sits at the foundation of all of these questions.

Any or all of these various lines of inquiry opened up by attention to the modern political and juridical interaction between law and religion ultimately require reflection on a fundamental question in legal theory, the nature of "the rule of law." It is a precious conceit of modern constitutionalism that law enjoys autonomy from culture. Its role is to sit above the realm of the cultural, curating but not itself participating in the world of vying ontologies, epistemologies, and metaphysics that is incum-

bent in a society marked by deep cultural and religious difference. This conceit is an aspect of law's fierce commitment to its own neutrality as the ground for its authority. Yet each of the veins of inquiry identified in this piece—the meaning of the secular; the limits of legal tolerance; the structure of rights and nature of adjudication; and the basis for the protection of religion—destabilizes the separation between the role and function of culture and the rule of law. As one digs deeply into each or any of these issues, the nature of the constitutional rule of law as one means of ordering experience, of making sense of the world, of providing a horizon within which to interpret human affairs, becomes more and more difficult to ignore. In this, one sees that the great richness of the study of the interaction of law and religion lies not solely in the study of identity and diversity or in what it suggests about religion in the modern constitutional democracy; enormous challenge and edification inhere in what the study of law's relationship with religion suggests and invites by way of reflection about *the nature of law* itself.

Notes

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1 See Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (New York: Alfred A Knopf, 2007).

2 See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983); Harold Berman, *The Interaction of Law and Religion* (Nashville and New York: Abingdon Press, 1974).

3 James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008).

4 See Gérard Bouchard & Charles Taylor, *Building The Future: A Time for Reconciliation* (Québec: Consultation Commission on Accommodation Practices Related to Cultural Difference, 2008). The Government of Québec established the Commission that authored this report in 2007 in response to public concerns regarding the accommodation of religious difference, including controversies regarding decisions of the Supreme Court of Canada on cases originating in the Province of Québec. The Order-in-Council establishing the Commission described its mandate as follows: to "a) take stock of accommodation practices in Québec; b) analyse the attendant issues bearing in mind the experience of other societies; c) conduct an extensive consultation on this topic; and d) formulate recommendations to the government to ensure that accommodation practices conform to Québec's values as a pluralistic, democratic, egalitarian society."

5 John Locke, "A Letter Concerning Toleration," in *The Works of John Locke: A New Edition, Corrected*, vol VI (London: Tegg et al, 1823) 2.

6 *Ibid* at 21.

7 See James Q Whitman, "Separating Church and State: The Atlantic Divide" (2008) 34:3 Historical Reflections 86 [Whitman].

8 *Ibid* at 90. Whitman's central argument in this piece is that the reason for this difference between the approach to the separation of church and state in the United States and that found in northern continental countries is not (as is conventionally asserted) the Protestant influence in the United States and that of Catholicism on the Continent. Rather, the explanation is found in the fact that, in northern European countries, "the state, over many centuries, has gradually assumed many of the historic functions performed by the medieval church," whereas, in the United States, "historic church functions have generally either been left to the churches, or else they have died out entirely" (at 91–92).

9 See, e.g., Janet R Jakobsen & Ann Pellegrini, eds, *Secularisms* (Durham: Duke University Press, 2008); José Cassanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994).

10 Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

11 See also Robert Audi, "Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality Toward the Good" (2005) 19 Notre Dame Journal of Law, Ethics & Public Policy 197. For a debate regarding the role of religious considerations in public debate and politics, see Robert Audi & Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Public Debate* (Lanham, Md: Rowman & Littlefield, 1997).

12 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).

13 In *Formations of the Secular*, *supra* note 10 at 199, Talal Asad critically observes that "[f]rom the

point of view of secularism, religion has the option either of confining itself to private belief and worship or of engaging in public talk that makes no demands on life. In either case such religion is seen by secularism to take the form it should properly have. Each is equally the condition of its legitimacy."

14 See Tariq Modood, *Multiculturalism: A Civic Idea* (Cambridge: Polity Press, 2007); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge: Harvard University Press, 2000) [Parekh].

15 See, e.g., Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004); Michael J Perry, *Under God? Religious Faith and Liberal Democracy* (Cambridge: Cambridge University Press, 2003); Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54:1 University of Toronto Faculty of Law Review 1.

16 Parekh, *supra* note 14 at 322.

17 *Ibid* at 324.

18 The term *laïcité* refers to an approach to religion and the public sphere that, rather than emphasising state neutrality and free exercise, focuses on the complete separation of politics and religion and the creation of a common (and secular) public identity. For accounts of this concept of *laïcité*, see Whitman, *supra* note 7 at 93; Yolande Jansen, "*Laïcité*, or the Politics of Republican Secularism" in Hent de Vries & Lawrence Sullivan, eds, *Policial Theologies: Public Religion in a Post-Secular World* (New York: Fordham University Press, 2006) 475; Talal Asad, "Trying to Understand French Secularism" in Hent de Vries & Lawrence E Sullivan, eds, *Political Theologies: Public Religion in a Post-Secular World* (New York: Fordham University Press, 2006) 494.

19 See Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women" (2004) 1 Muslim World Journal of Human Rights 1022.

20 [2002] 4 SCR 710, 2002 SCC 86 (CanLII).

21 *Ibid* at para 19.

22 Paul W Kahn, *Putting Liberalism in its Place* (Princeton: Princeton University Press, 2005) at 1 [Kahn].

23 *Bruker v Markovitz, [2007] 3 SCR 607, 2007 SCC 54 (CanLII)* at para 1.

24 Kahn, *supra* note 22 at 1.

25 Charles Taylor, "The Politics of Recognition" in *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) 225.

26 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

27 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

28 *Ibid* at 37.

29 Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

30 Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton and Oxford: Princeton University Press, 2006).

31 I did so in Benjamin L Berger, "The Cultural Limits of Legal Tolerance" (2008) 21:2 Canadian Journal of Law and Jurisprudence 245.

32 Bernard Williams, "Tolerating the Intolerable" in Susan Mendes, ed, *The Politics of Toleration in Modern Life* (Durham: Duke University Press, 1999) 65.

33 Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

34 *Alberta v Hutterian Brethren of Wilson Colony,* [2009] 2 SCR 567, 2009 SCC 37 (CanLII) at para 90.

35 See, e.g., *AC v Manitoba (Director of Child and Family Services)*, [2009] 2 SCR 181, 2009 SCC 30 (CanLII); *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, 2006 SCC 6 (CanLII); *Trinity Western University v College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31 (CanLII).

36 See, e.g., Robert Alexy, *A Theory of Constitutional Rights*, trans by Julian Rivers (Oxford: Oxford University Press, 2002); Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006).

37 David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

38 Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton and Oxford: Princeton University Press, 2005).

39 *Ibid* at 8.

40 I advanced this argument in Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall Law Journal 277.

41 *Ibid* at 310.

42 Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007).

43 *Ibid* at 3.

44 Lawrence G Sager, "The Moral Economy of Religious Freedom" in Peter Cane, Carolyn Evans & Zoe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 16 at 18 [Sager].

45 Christopher L Eisgruber & Lawrence G Sager, *Religious Freedom and the Constitution* (Cam-

bridge: Harvard University Press, 2007). For other arguments seeking to establish an approach to religious freedom that does not depend upon a distinctive valuation of religion, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001); Michael W McConnell, "The Problem of Singling out Religion" (2000) 50 DePaul Law Review 1; Michael W. McConnell & Richard Posner, "An Economic Approach to Issues of Religious Freedom" (1989) 56 University of Chicago Law Review 1.

46 See also Martha C Nussbaum, *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (New York: Basic Books, 2008). Nussbaum similarly emphasizes a general ethic of equality, rather than a specific valuation of religion, that animates the U.S. protection of religious freedom.

47 Sager, *supra* note 44 at 34.

48 Jeremy Webber, "Understanding the Religion in Freedom of Religion" in Peter Cane, Carolyn Evans & Zoe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 26 at 27. See also Jeremy Webber, "The Irreducibly Religious Content of Freedom of Religion" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: University of British Columbia Press, 2006).

49 Parekh, *supra* note 14 at 328.

Judges and Religious-Based Reasoning

Diana Ginn* and David Blaikie**

Is it ever acceptable for a judge in a secular liberal democracy[1] to rely on, and explicitly refer to, religious-based reasoning[2] in reaching a decision? While it is unlikely that many Canadian judges will be seized with the desire to include religious-based reasoning in their judgments, we raise this issue because it allows us to examine the appropriate role of religious-based discourse in a challenging context, where arguments about unconstitutionality are strongest. In a previous article, we concluded that there are no ethical impediments to citizens using such discourse in discussing public affairs. We argued that it is no less virtuous (although it may sometimes be less persuasive) to reason from one's religious convictions than from any other comprehensive set of values, when advocating for or against public policy alternatives.[3] We would suggest that this is generally also the case for elected representatives. Thus, in our view, it would be perfectly acceptable for a member of a legislature to buttress a call for increased funding for social services by reference to Proverbs 19:17: "One who is gracious to a poor man lends to the Lord."[4] However, it is unconstitutional for a legislature to pass legislation for a religious purpose[5]; therefore, legislators must recognize the distinction between advocating legislation designed to achieve a religious purpose and using religious arguments to support or oppose legislation designed to achieve a public purpose.[6]

The question we address here is whether it would be acceptable for a Canadian judge to use religious-based reasoning and, if so, what parameters might need to be placed on the use of such reasoning. We conclude that the use of religious-based reasoning would be acceptable, but only where the law is underdetermined; that is, where the relevant constitutional principles, legislation and case law do not resolve the issue, and where substantial interpretation and development of the law is required in order to decide the matter before the judge. We would add the further important proviso that the reasoning must conform to the constitutional requirement that the state remain neutral as among different religions and as between religion and non-religion.

We begin our discussion by outlining what we mean by legal underdeterminacy, and then respond to various arguments against allowing religious-based reasoning by judges, with a particular focus on arguments relating to unfairness and unconstitutionality.

When is the law underdetermined?

We start from the premise that where the law is clear, there is no room (or reason) for a judge to turn to his comprehensive set of beliefs—religious or not—to reach a conclusion. For example, consider a situation where a statute states that it is an offence to drive faster than 110 km/hour. If the evidence makes it clear that the accused did so, and there are no valid defences put forward, the judge must find the accused guilty; the law is settled and reaching the appropriate verdict requires no reference to extra-judicial fundamental beliefs. Consider another example. A First Nation in Canada makes a land claim based on Aboriginal title. The Supreme Court of Canada has set out a test, based on historic use and occupation of the land, for determining the existence of Aboriginal title. While it may be difficult to decide whether the test has been met in a particular situation, the test itself is clearly

stated in the law. Therefore, it is the test that any lower court must work with, and a judge cannot turn to her religion—or to any other comprehensive set of values—to craft a new test for determining the existence of Aboriginal title. Nor may judges use their religious—or other—beliefs to undermine the legal system they are part of. For instance, a judge could not refuse to follow the rule of law because it did not conform with her religious beliefs. If the fundamental principles of the legal system are incompatible with a judge's core beliefs, then she should step down.

Even within an established system of law, however, there will be times when the law is underdetermined. As an example, consider a 1999 decision of the Supreme Court of Canada, *Dobson (Litigation Guardian of) v Dobson*,[7] where the Court was called on to develop new legal principles in order to resolve a difficult and significant issue. In *Dobson*, the Supreme Court of Canada addressed the question of whether a child could sue his mother for harms caused by the mother's negligence during pregnancy. Although previous case law dealt with related issues, there was no Canadian jurisprudence directly on point.

Mrs. Dobson, five months pregnant, was driving her car on a snowy winter day. Her car skidded; there was an accident and her son, Ryan, was born prematurely. Ryan has cerebral palsy; he is profoundly disabled and requires lifetime care. Ryan sued his mother, alleging negligence. If Mrs. Dobson had been found negligent, then her insurers would have had to make a substantial payment to Ryan. First, however, the Supreme Court of Canada had to decide whether Mrs. Dobson was liable in law. Could Ryan sue his mother on the grounds that her negligence during pregnancy caused him harm?

The Supreme Court of Canada was in uncharted legal waters. This was the first time that the Court had been called upon to answer this question and neither the Constitution, relevant legislation, nor case law provided a clear-cut answer. The Court had to decide which of the competing public policy alternatives should prevail, and choosing among those alternatives required making value judgments about how the law could best serve the interests of society, as well as its individual members such as Ryan and his mother.

The majority of the Court refused to extend established principles of tort law in order to allow Ryan to sue his mother. Their decision was based on public policy concerns regarding the privacy and autonomy rights of women, and on the difficulties inherent in articulating a judicial standard of conduct for pregnant women. The two dissenting judges held that concerns about autonomy could not justify placing the rights of a pregnant woman above that of her child. They went on to say: "To grant a pregnant woman immunity from the reasonably foreseeable consequences of her acts for her born alive child would create a legal distortion as no other plaintiff carries such a one-sided burden, nor any defendant such an advantage."[8]

In *Dobson*, neither the majority nor the dissenting judgment referred to religious beliefs or values at all—but what if they had? What if the judge writing for the majority had related the public policy argument about autonomy to a religious belief that God has created all of us, male and female, as equal and autonomous beings, equally deserving of respect and dignity? What if the dissenting judges had based their decision on a belief in God's concern for the vulnerable and the powerless? The outcome of the case would have been the same, but the analysis would have been explicitly grounded in religious belief and reasoning. Would express reliance on religious-based reasoning be acceptable in a case such as this?

The arguments against religious-based judicial reasoning

The key arguments against the explicit use of religious-based reasoning by judges involve concerns about inherent dangers in religious-based reasoning; inconsistency with the role of the judge in a democracy; unfairness to litigants; and threats to freedom of religion. We address each of these, with a particular emphasis on fairness and freedom of religion.

Inherent dangers in religious-based reasoning

The argument that religious-based reasoning is inherently more dangerous than other kinds of value-based reasoning seems to encompass three strands: that religious belief requires a leap of faith and thus any reasoning based on religion is inherently more risky than reasoning based on a secular, rational approach; that religious-based reasoning is inherently more divisive than other kinds of argumentation; and that religious-based reasoning is inherently more likely to lead to bad results.[9]

With regard to the first strand, we acknowledge that religious belief involves a leap of faith. By "leap of faith" we mean accepting as true something that is not empirically provable. Rejecting religious-based reasoning on this ground raises the larger epistemological question of whether there are justifiable grounds for saying that certain ways of knowing are superior to others.[10] There is also the more pragmatic point that the leap of faith argument simply does not work as a means to distinguish religious reasoning from secular reasoning. We take it as given that most people's conclusions about what is right or wrong, what is just, or what course of action is the better one, are grounded in some sort of comprehensive set of values—that is, by fundamental assumptions about the nature of reality, whether religious or secular.[11] We argue that leaps of faith are required for any such fundamental assumptions and, therefore, this is no different for religion than for other comprehensive belief systems. For instance, it is a core premise of liberalism that all people are entitled to equal rights—presumably because at some fundamental level, all human beings have equal intrinsic value, unrelated to their social status, wealth, character, accomplishments, contributions to society or physical or mental attainments. There is no way of empirically proving this inherent equal value: a leap of faith is required.

Further, while we accept that religious belief is grounded on a leap of faith, when we speak of judges using religious-based reasoning, our emphasis is as much on "reasoning" as on "religious." Whatever fundamental principles form the bedrock of a judge's worldview, judges must reason and analyze—and this is never more so than when the law is underdetermined and it is necessary to turn to extra-judicial values in order to choose between different approaches to the issue in dispute. Even if it is acceptable for judges to make explicit reference to religion when faced with a situation of underdeterminacy, there is still the expectation that reasoning is involved. Thus, we distinguish between a judge moving directly from her understanding of divine will to the outcome (as in "God told me to decide for the plaintiff")[12] and a judge, faced with underdeterminacy, using principles derived from his religious beliefs as a starting place for the analysis.[13] A well-known example of the latter kind of reasoning is found in the landmark case of *Donoghue v Stevenson*,[14] where the House of Lords was called on to set the parameters of liability in the newly-emerging field of negligence. The existing law did not provide a clear answer, so Lord Atkin turned to the Golden Rule, stating:

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[15]

A second danger sometimes attributed to religious-based reasoning is that it is inherently disruptive. Thus, Richard Rorty claims, "[W]e shall not be able to keep a democratic community going unless the religious believers remain willing to trade privatization for a guarantee of religious liberty."[16] We addressed this argument in our previous article,[17] and so we need only canvas it briefly here. In short, our response is that religious beliefs are no more divisive than many other strongly held convictions. To understand the absurdity of Rorty's claim we need only substitute another comprehensive, but secular, world view: "We shall not be able to keep a dem-

ocratic community going unless libertarians are willing to trade privatization for a guarantee of freedom of conscience."

The final strand of the argument that religious-based reasoning is inherently dangerous focuses less on the reasoning process, or on the reactions of others to that reasoning, and more on the outcomes that are assumed to follow from such reasoning. This fear seems to proceed from the assumption that all individuals of faith hold similar views on social issues—an assumption that is clearly untenable in light of the great diversity of religious beliefs—and that these views are harmful to society. We reject the position that reasoning based on religious beliefs is inherently more likely to lead to bad results than reasoning based, for instance, on conservatism, libertarianism, feminism, or some other secular philosophy. While we acknowledge "the demonstrated, ubiquitous human propensity to be mistaken and even to deceive oneself about what God has revealed,"[18] we are convinced that humans are equally capable of using secular reasons to delude themselves into doing terrible things in the name of a greater good. Thus, as "so much of the twentieth century attests, … one need not be a religious believer to adhere to one's fundamental belief with closed-minded or even fanatical tenacity."[19]

The role of judges in a democracy

Would express use of religious-based reasoning by judges where the law is underdetermined erode the role of judges in a democracy? Democratic values require that a judge be "principled, independent and impartial"[20] and have a strong respect for the rule of law.

In the context of judging, we take "principled" to mean following and applying accepted legal norms, and deciding on the evidence and argument before the court, rather than deciding on a whim or out of expediency or self-interest. There is no reason to assume that reasons grounded in religious belief would be any less principled than reasons grounded in any other set of comprehensive values.

Independence demands that judges not allow themselves to be pressured by outside entities (including government) into deciding a case in a particular way; to allow external pressure to affect a decision would diminish independence. Judicial independence would certainly be compromised if a judge could be dictated to by a religious organization or faith group. However, allowing a judge to refer explicitly to religious reasoning where the law is underdetermined does not automatically compromise judicial independence.

Impartiality requires that a judge be neutral as between the parties; that is, she cannot be predisposed to favour one party over the other. Certainly, this value would be undermined if a judge, consciously or unconsciously, favoured litigants of a particular religion, or favoured religious litigants generally over non-religious litigants. Again, however, allowing for explicit reliance on religious reasoning where the law itself does not offer sufficient guidance does not lead inevitably to such favouritism. There seems no more reason to assume that judges would allow themselves to be biased on the basis of religion than on the basis of culture, ethnicity, gender, or class. Therefore, the dual response to concerns about bias should be the same for each of these examples: a requirement that judges be self-aware and alive to the possibilities of bias, however unintended; and a concerted effort to appoint a diverse judiciary.

The rule of law is shorthand for a number of concepts limiting the arbitrary power of the state. The most famous expression is that of Dicey, who described the rule of law as requiring the following:

1. the supremacy of regular law as opposed to the influence of arbitrary power, excluding the existence of arbitrariness, prerogative, or even of wide discretionary authority on the part of the government;

2. equality before the law, excluding the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens;

3. the law of the constitution is not the source but the consequences of the rights of individuals as defined and enforced by the courts.[21]

Judicial use of religious-based reasoning where the law is underdetermined would not necessarily increase the arbitrary powers of the state, reduce the obligation of public officials to obey the law, or leave individual rights more vulnerable to state encroachment.

A more modern description of the rule of law is as follows:

> The rule of law presupposes that laws will usually be obeyed, that breaches of the law will usually meet with enforcement, that government will be limited in its powers, and that courts and the legal profession will be independent of government and of powerful private interests.[22]

Generally, none of these principles would be diminished if a judge employed religious-based reasoning in the context of legal underdeterminacy; in particular, such reasoning would not make courts more susceptible to pressure from government or private interests. One concern might be that individuals opposed to the particular religious beliefs relied upon, or to all religious beliefs, might then view the law as less legitimate and so be less inclined to obey it. While not dismissing this argument out of hand, we would suggest that the same concern could arise whenever citizens are unhappy with the value system underlying a particular judicial approach; in other words, this is not a concern limited to religious-based judicial reasoning.

Unfairness

Leaving aside questions of constitutionality, which are discussed below, is it unfair to litigants if a judge makes explicit reference to religious-based reasoning, particularly if relying on a religious tradition not shared by the litigant? Some would argue that religious-based reasoning is unfair because it is inaccessible to those of another religion, or of no religion. We canvassed these arguments in our previous article;[23] briefly, we suggest that characterizing religious reasoning as inaccessible confuses accessibility with persuasiveness. It is perfectly possible to understand a public policy argument derived from fundamental beliefs which we do not share—we just may not be persuaded by it.

Would express reliance on religious-based reasoning where the law is underdetermined be unfair because it would require appellants, or future litigants in similar cases, to make religious-based arguments even if they did not wish to? It has been argued that "subsequent litigants in analogous hard cases would have to challenge both the court's comprehensive conviction about authentic human existence and its analysis of legal principles in order to prevail."[24] Arguably, however, by referring to his religious beliefs a judge is simply explaining why he chose one approach over another in a context where the relevant constitutional principles, legislation and case law did not provide a clear guide. Those religious beliefs do not, by virtue of having been referenced in the decision, now become part of the law. If the losing party wished to appeal, she would argue that the lower court decision was wrong in law, but would not need to rebut the lower court judge's "comprehensive conviction about authentic human existence."

This distinction can be seen if we turn again to the issues litigated in the *Dobson* case. Let us assume that a lower court judge had found against Ryan Dobson because of concern for the autonomy of pregnant women. There are enough statements in the law regarding autonomy of the person for the judge to conclude reasonably that this is a core principle of the legal system; however, she would still have to decide how to balance the mother's autonomy against the harm done to the child, and at the time *Dobson* was decided, the law had not yet struck that balance. In deciding that concerns for the mother's autonomy outweighed other arguments, the judge might refer explicitly to her belief that God created men and women equal. Since individual autonomy is a core value of Canada's legal system, on appeal Ryan Dobson would have had to argue that women's autonomy would not be undermined by allowing a child in his situation to sue, or that autonomy for the pregnant woman is outweighed by other equally core values. He would not have to persuade the appeal court that the lower court judge was wrong in her conviction that God created men and women equal.

Perhaps the unfairness stems not from concerns about religious-based reasoning becoming

part of the law, but from the fact that the law can coerce the individual, and that a coercive outcome is illegitimate if it is reached through reasoning from values that the individual does not share. Thus, it has been suggested that "it is fundamentally unfair to coerce people, or to use the corporate authority and power of the state, when the grounds for doing so are not ones that those affected could be expected to accept if they made reasonable judgments."[25]

The idea that state action should be founded on grounds that all reasonable people would accept calls to mind Robert Audi's stricture that, in public debate, virtuous citizens should "seek grounds of a kind that any rational adult citizen can endorse as sufficient to the purpose."[26] This requirement would suggest that public reason is, at a minimum, reasoning that is likely to be seen as persuasive or at least reasonable by a broad range of individuals. But is Professor Audi's approach helpful when applied to judges, particularly in a situation of legal underdeterminacy? The very fact that the law is underdetermined suggests that the issue before the courts is a difficult and complex one, involving competing public policy arguments; certainly this was so in the *Dobson* case. This complexity in itself lessens the likelihood of finding one perspective that is widely accepted. Further, even if wide agreement could be found on an important social issue where the law is still unsettled, this agreement is likely to be at the level of general principles that may not give much assistance in real-life decision making. According to Greenawalt, certain statements such as "happiness is better than pain" seem so widely accepted that someone who rejected them "would seem not to be of sound mind."[27] This may be so, but, in any real-life clash of interests—which is, after all, what court cases are about—a judge is going to have to consider more pointed questions: In whom do we create happiness? And how? And at what expense to others? What if doing right entails pain? What if all the options available will cause pain or loss to some individual or group and the difficult question is how to allocate that pain? Once a judge is required to answer these more pointed questions, it seems inevitable that the reasons for her decision will be persuasive to some, but completely unpersuasive to others.

Dobson is a good example: the reasoning of both the majority decision and the dissent, although secular, would be hotly contested by some Canadians. There could be significant dispute as to how to weigh and prioritize the competing claims of autonomy versus allowing those who have been harmed by negligence to demand compensation. Thus, we would argue that efforts to find public reasons—that is, reasons that will be widely "endorse[d] as sufficient to the purpose"—are not likely to be successful, once one moves beyond broad generalities.[28] If that is so, then it seems that fairness, in the context of judging, must mean something other than a requirement that judges who are deciding novel issues of law find grounds for their decisions that will, *in fact*, be seen as reasonable by everyone, including the losing party.[29]

Unconstitutionality

Even if our arguments about fairness are accepted, it is still necessary to explore whether reliance by judges on religious-based reasoning when the law is underdetermined would violate section 2(a) of the *Canadian Charter of Rights and Freedoms,* which states:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion.[30]

In other words, even if we cannot hold judges to the standard suggested by Audi for virtuous citizens (by demanding that the basis for their decisions be acceptable to all rational individuals), do constitutional difficulties arise if the coercive power of the state is grounded on reasoning based on religious faith rather than on a secular set of comprehensive values? Is it constitutional for a feminist judge to draw upon his feminism in deciding a new legal issue (even if the losing litigant is profoundly opposed to all feminist principles) but unconstitutional, because of the protection given in section 2(a) of the *Charter*, for a religious judge to draw upon her faith in deciding an equally novel issue?[31]

Distilling the case law and academic commentary, freedom of religion in Canada includes both a positive aspect ("freedom for religion") and a negative aspect ("freedom from

religion").[32] The positive aspect of freedom of religion, that is, the right to worship and live out one's religion as one wishes, so long as this does not harm another's rights, has been described by the Supreme Court of Canada as including "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination"[33] and the right not to have one's "profoundly personal beliefs"[34] interfered with. Would the positive aspect of section 2(a) of the *Charter*—freedom for religion—be infringed if the judges in the *Dobson* case reasoned from a religious basis in deciding whether a child could sue its mother for harm caused by the mother's negligence during pregnancy? Religious-based reasoning would not have interfered with the litigants' "profoundly personal beliefs" or undermined their right to manifest those beliefs.

The negative aspect of section 2(a), "freedom from religion," protects individuals from direct and indirect coercion.[35] This aspect of freedom of religion has been interpreted broadly, and it requires the state to be neutral among religions and between religion and non-religion. More specifically, it is unconstitutional for the state to act for a religious purpose, as the Supreme Court of Canada made clear by striking down legislation intended to enforce a Sunday Sabbath.[36]

Where the law is underdetermined, if a judge places some reliance on her religious beliefs in choosing between available options, does that create a form of unconstitutional coercion for the losing litigant who does not share those religious beliefs? Or, taking this further, does it undermine the freedom of religion of citizens more generally—those citizens who do not share the judge's religious views, yet will be affected by the development in the law? We see this as potentially the strongest argument against religious-based reasoning, and we take seriously the need to ensure that judicial reasoning does not fall short of the requirement for neutrality both among religions and between religion and non-religion.

Returning again to *Dobson*, a judge could place significant weight on the autonomy of pregnant women for secular reasons or for religious reasons. Similarly, a judge could place significant weight on protecting the unborn for secular reasons or for religious reasons. Whichever the outcome, would the judge have acted constitutionally where secular reasoning was used but unconstitutionally where religious-based reasoning was used? By using his religious faith as a starting place from which to work through the weighing of competing principles in a particular factual context, would the judge have failed the requirement to be neutral among religions or between religion and non-religion? It is hard to see how the requirement of neutrality would have been breached. The state would not have set one religion above another, nor would it have privileged religion above atheism or agnosticism. Nor would the state be acting for a religious purpose.

The issues may become somewhat more nuanced, however, if religious belief plays some part in the dispute itself or if the case involves issues on which at least some religions have specific teachings. Consider the case of *Brockie v Brillinger*,[37] which involved both these aspects. Mr. Brockie, the owner of a printing company, refused to print letterhead and other materials for the Canadian Lesbian and Gay Archives, an organization committed to enhancing the position of gays and lesbians in society by providing "public access to information, records and artifacts, by and about lesbians and gay men in Canada."[3] Mr. Brillinger, the president of the Archives, brought a complaint under the Ontario *Human Rights Code*[39] of discrimination on the basis of sexual orientation. At the hearing, Mr. Brockie stated that he had no objection to serving gay or lesbian individuals but that his religious beliefs prevented him from printing material for an organization that advocated for gay and lesbian rights. The adjudicator upheld the complaint and required Mr. Brockie to print the material and to pay $5,000 in damages.

Assume that this decision was appealed to the court; the judge hearing the matter would be faced with the difficult matter of balancing two conflicting rights-based claims: Mr. Brillinger claimed that he was being discriminated against on the basis of sexual orientation and

Mr. Brockie claimed that any attempt by the state to force him to act against his religious principles would violate his freedom of religion. The current law in Canada provides very little guidance as to how these kinds of competing rights claims should be resolved. What if the judge canvassed all relevant constitutional principles, legislation and case law, but none proved conclusive as to which right should trump the other? In deciding which of the rival claims to privilege, it is quite likely that a judge would have to turn (as presumably the adjudicator did, although not explicitly[40]) to an extra-judicial set of values. Would the constitutionality of the judge's reasoning depend on whether those values were religious in nature?

One could imagine a judge deciding either way, based on secular grounds: "Creating a just society requires that close attention be paid to the need to uphold the dignity of all individuals, particularly those, like gays and lesbians, who have historically faced oppression and exclusion"; or "A liberal democratic state requires a healthy dose of self-restraint on the part of government and courts; therefore, courts should be very wary of forcing individuals to act against their core beliefs."

It is also possible to imagine a judge deciding either way using religious-based reasoning. Here, however, it may be useful to consider different religious-based formulations and re-emphasize the requirement that legal reasoning of any sort involve actual reasoning rather than simply the stating of conclusions. In deciding for Mr. Brillinger, a judge might start his analysis from the position that "All individuals are part of God's creation and, therefore, in weighing these claims before me, significant weight must be given to safeguarding the dignity of each individual." Another judge might state: "God particularly loves the dispossessed, so the claims of gays and lesbians must always take priority over freedom of religion claims." In deciding for Mr. Brockie, one step in the judge's reasoning might be as follows: "As a believer myself, I understand that Mr. Brockie cannot simply set aside his religious beliefs while operating in the work-a-day world. So, while giving serious weight to the harm done to Mr. Brillinger if his business is refused, I will also give serious consideration to the harm caused by forcing an individual to act in opposition to their religious convictions." On the other hand, a judge might decide for Mr. Brockie on the basis that "The Bible prohibits homosexuality and so claims based on sexual orientation must always be subordinated to other claims."

Arguably, the second approach in each pair is problematic in that it suggests the automatic privileging of one kind of claim over another. Such an approach fails to reflect the fact that the law in Canada protects both sexual orientation and religious freedom, and it comes perilously close to deciding a case based on who the parties are rather than on an analysis of the issues at stake. Rather than using one's religious convictions as a lens through which to evaluate competing legal principles, a certain religious belief is substituted for legal analysis.[41] Further, at least one of these formulations—"The Bible prohibits homosexuality and so claims based on sexual orientation must always be subordinated to other claims"—conflicts with the constitutional requirement of neutrality because it favours one religious doctrine over other possible interpretations of the Bible and over religious teachings from other faiths. Or, to state it differently, the judge could be seen as acting for a religious purpose; that is, deciding in a particular way so as to implement a particular religious rule.

Conclusion

In this article, we have argued that, within certain parameters, it is acceptable for a judge in a secular liberal democracy to include religious-based reasoning in a judgment. Perhaps a prior question is whether it is even possible for a religious person to set aside his or her beliefs when making certain sorts of decisions. We are of the view that, on issues of any significance, no one can "bracket" their most fundamental beliefs (whether those are of a religious nature or based on a secular set of core values) when having to choose between two or more available outcomes.[42] This would suggest that where the law is underdetermined, religious judges will inevitably be influenced by their

religious beliefs, just as liberal judges will be influenced by their liberalism, humanist judges influenced by their humanist philosophy, and so on. Some authors, such as Mark Modak-Truran, acknowledge "the necessary reliance on religious convictions" where the law is underdetermined,[43] but argue that this reliance should not be made explicit. We would argue in favour of transparency.

While religious-based reasoning is not inherently dangerous or problematic, the use of such reasoning by judges does raise questions about the role of judges, fairness, and constitutionality, which must be taken seriously.

We conclude that reference to comprehensive values, including religious values, would not undermine the proper role of the judiciary, so long as this reference is limited to situations where the law truly is underdetermined, and so long as there is actual reasoning, not simply a jump from a religious premise to a conclusion. In our view, if these conditions are met, there is nothing in religious-based judicial reasoning that inherently conflicts with the requirement that judges be principled, independent and impartial and have a strong respect for the rule of law.

So long as the same limits are observed, such reasoning is not, in our view, unfair. We reject the notion that there exists some form of "public reason" that would be acceptable to all reasonable individuals. Thus we consider it unrealistic to suggest that fairness requires judicial decisions to be grounded in reasons that would be considered satisfactory by all, including the losing litigants. Where the underdetermined nature of the legal issue at stake requires judges to turn to extra-judicial values as a starting place for their analysis, it is no more unfair to the litigant who does not share the judge's worldview if that analytic framework is based on religious grounds than if it is based on a secular philosophy such as libertarianism or communitarianism.

We also conclude that section 2(a) of the *Charter* is not automatically violated by religious-based judicial reasoning, assuming the parameters set out above are observed: the judge may only turn to extra-judicial comprehensive values when the law is underdetermined, and must engage in actual analysis and reasoning. The losing litigant's rights "to manifest religious belief by worship and practice or by teaching and dissemination,"[44] and "not to be compelled to belong to a particular religion or to act in a manner contrary to one's religious beliefs,"[45] would not be eroded simply because the judge reasoned from a faith-based worldview. Nor does using such a worldview as the starting place for judicial analysis necessarily depart from the requirement of state neutrality regarding religion and thus result in unconstitutional coercion. We do recognize, however, that certain kinds of religious reasoning could indeed fall short of the constitutional requirement that the state remain neutral among different religions and between religion and non-religion. If a judge used her religious convictions to always side with religious litigants over non-religious litigants, or to side with litigants of a particular faith, this would violate section 2(a) of the *Charter* (as well as violating more generally the judge's duty of impartiality, not to mention failing to live up to the expectation that judicial reasoning involves actual reasoning). Further, a judge who decided in a certain way so as to uphold a particular tenet of his faith would violate litigants' freedom of religion. If judges are alert to these potential pitfalls, however, we would argue that there is no constitutional breach if a judge relies on religious-based reasoning when faced with a novel question of law to which constitutional principles, legislation and relevant case law provide no answer. In such a situation, a judge must inevitably turn to some set of comprehensive values as a starting place for his analysis of competing public policy arguments and, if the restrictions set out above are adhered to, it is no more inherently dangerous or problematic if those values arise from religious rather than secular convictions.

Notes

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1 We accept Kent Greenawalt's description of a liberal democracy as having the following characteristics: "democratic governance, equality of citizens, freedom of expression and religious exercise, respect for the dignity and autonomy of all people, and the rule of law." Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995) at 21 [Greenawalt].

2 For a definition of religious-based reasoning, we find Jonathan Chaplin's discussion helpful, although he is referring to arguments made by citizens and legislators, rather than judges: "The term 'religiously-based arguments' refers to political [we would add 'legal'] arguments whose grounding in religious beliefs is made clear in advancing them. I am not referring therefore to arguments about *religion*, but to arguments about *politics and law*, rooted in some religious conviction" [emphasis in original]. Jonathan Chaplin, "Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy" (2000) 33 University of British Columbia Law Review 617 at 620 [Chaplin].

3 David Blaikie & Diana Ginn, "Religious Discourse in the Public Square" (2006) 15 Constitutional Forum constitutionnel 37 [Blaikie & Ginn]. For further discussion of these issues in the Canadian context, see Chaplin, *supra* note 2; for American writing on the subject, see, among others: John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005); Robert Audi & Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Public Debate* (Lanham, MD: Rowman & Littlefield, 1997); and Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Toronto: Random House, 1994) [Carter].

4 *New American Standard Bible* (Chicago: Moody, 1995).

5 *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 [*Big M*].

6 Stephen L Newman describes tax reform initiated by a conservative Republican governor. The reform (which, had it passed, would have shifted some of the tax burden from the poor to rich) was based on Governor Riley's belief that oppressive taxing of the poor was unchristian. Newman argues that:

> It in no way diminishes the public character of the state's fiscal policy that Riley and conceivably a significant portion of Alabama voters viewed his tax plan as a practical expression of the biblical injunction to succor the poor. It would be a different story if Riley's plan gave preferential treatment to Christians; but the mere fact that a public official and ordinary citizens choose to interpret a legitimate government objective in light of their private religious convictions has no bearing on its political status. Nor did Riley's religious motives in introducing the tax plan undercut its legitimacy. So long as the policy objective is within the scope of the state's authority, its sponsors' motives are irrelevant.…
>
> [W]hat is truly key is that public policies serve a legitimate civil interest and do not aim at securing a spiritual benefit…. [I]f it is conceded that the ends of a proposed policy are legitimate, what does it matter that the reasons given in support of the policy are private rather than public in Rawls's sense?

Stephen L Newman, "God, Taxes and 'Public Reason'" (Winter 2004) 51 Dissent 64, online: Dissent Magazine <http://www.dissentmagazine.org/article/?article=401> at 65–66.

7 1999 CanLII 698 (SCC), [1999] 2 SCR 753 [*Dobson*].

8 *Ibid* at para 130.

9 For further discussion of this argument, although not in the context of judging, see Blaikie & Ginn, *supra* note 3.

10 For a critique of the characterization of religious claims as irrational, see Francis J Beckwith, "Must Theology Always Sit in the Back of the Secular Bus?: the Federal Courts' View of Religion and Its Status as Knowledge" (2009) 24 Journal of Law & Religion 547. For an opposing view, see Suzanna Sherry, "The Sleep of Reason" (1996) 84 Georgetown Law Journal 453.

11 Support for this position can be found in the "cultural cognition" theory developed by Dan M Kahan and Donald Bramar ("Cultural Cognition and Public Policy" (2006) 24 Yale Law & Policy Review 149). Based on their research, Kahan and Bramar conclude that individuals' views on issues of public policy are influenced by (and can be predicted by reference to) their world view; that is, each individual holds a particular worldview and it is that worldview that causes a person to accept or reject competing claims about the risk or efficacy of public policy proposals. Thus, according to Kahan and Bramar: "culture is prior to facts in the cognitive sense that what citizens believe about the empirical consequences of … policies *derives* from their cultural worldviews" (at 150). Building on the work of others, Kahan and Bramar classified their research subjects' worldviews as falling along two dimensions—individualistic versus communitarian and hierarchic versus egalitarian (at 157).

12 As Wendell L Griffen, a judge and Baptist pastor who supports the use of religious-based reasoning by judges, notes in "The Case for Religious Values in Judicial Decision-Making" (1998) 81 Marquette Law Review 513 at 520 [Griffen]: "The devout judge who relies on religious conviction as the sole basis for judicial decision-making is acting as a prelate, not as a jurist."

13 Jonathan Chaplin, *supra* note 2, seems to be making somewhat the same distinction when he distinguishes between what he calls "confessional discourse" and "political discourse," defining the former as discourse that "proclaims or argues for (religious or secular) doctrines" and the latter as "addressed to the specific content of law and public policy" (at 642). According to Chaplin, judges have a "constitutional duty … to adopt an impartial attitude to different confessional viewpoints. This does not mean, however, that judges may not be materially led towards a particular legal interpretation by confessional considerations (whether 'religious' or 'secular'), but that their public reasoning must always be sufficiently justifiable by appeal to matters of fact and law" (at 643). He then gives an example based on a particular secular worldview: "a judge who was 'confessionally' committed to secular libertarianism should not allow controversial assertions about the absolute moral autonomy of individual human beings to intrude into her decisions, but rather confine herself to arguments soundly rooted in law and legal principle" (at 644).

14 1932 SC (HL) 31, [1932] AC 562 (BAILII).

15 *Ibid* at 580.

16 Richard Rorty, *Philosophy and Social Hope* (New York: Penguin, 1999) at 170.

17 Blaikie & Ginn, *supra* note 3. See also Chaplin, *supra* note 2.

18 Michael J Perry, *Religion in Politics: Constitutional and Moral Perspectives* (New York: Oxford University Press, 1997) at 75.

19 Michael J Perry, *Under God?: Religious Faith and Liberal Democracy* (Cambridge: Cambridge University Press, 2003) at 42.

20 Rosalie Silberman Abella, "The Judicial Role in a Democratic State" (2001) 26 Queen's Law Journal 573 at 580.

21 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan, 1959) at 202–3.

22 Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 University of Toronto Law Journal 715 at 716.

23 Blaikie & Ginn, *supra* note 3.

24 Mark Modak-Truran, "The Religious Dimension of Judicial Decision Making and the De Facto Disestablishment" (1998) 81 Marquette Law Review 255 at 285 [Modak-Truran].

25 Greenawalt, *supra* note 1 at 72. Note that Greenawalt does not take this position, but simply raises it.

26 Robert Audi, "The State, the Church, and the Citizen" in Paul J Weithman, ed, *Religion and Contemporary Liberalism* (Notre Dame, Ind: University of Notre Dame Press, 1997) 38 at 48.

27 Greenawalt, *supra* note 1 at 27.

28 Further, such efforts may also cause us to forget that even the most widely held views can be tragically wrong. If the goal of judging is to seek the best, the most just solution from among those legally available—rather than simply the most popular—then perhaps we need to avoid privileging widely held views over more contentious approaches. After all, in various times and places, the inferiority of women and the legitimacy of slavery have been widely accepted.

29 If the test is only that those affected *should* (if they made reasonable judgments) find the grounds acceptable, this does not seem to get us very far. After all, who is going to decide on the reasonableness of the individual's judgments (unless we accept the shaky proposition that reasonable means accepted by the majority)?

30 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(a).

31 Griffen, *supra* note 12 at 514 suggests that many "hold the notion that religious values are somehow more offensive to the way that judges decide than economic values, social values, political ideology, or other secular values that influence the way that judicial decisions are reached."

32 *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650 (CanLII) [*Témoins de Jéhovah*]. See also David M Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 University of British Columbia Law Review 551.

33 *Big M*, *supra* note 5 at para 94.

34 *R v Edwards Books and Art Ltd*, 1986 CanLII 12 (SCC), [1986] 2 SCR 713 at para 97.

35 *Big M*, *supra* note 5 at paras 94–95.

36 *Ibid*.

37 *Brockie v Brillinger* (No 2) (1999), 37 CHRR D/12 (Ont Bd Inq).

38 *Ibid* at para 4.

39 *Human Rights Code*, RSO 1990, c H19.

40 The adjudicator referred to community stan-

dards—i.e., the fact that Canadian society provides protection against discrimination based on sexual orientation—thus justifying her decision on ostensibly objective standards. Yet, as Iain Benson and Brad Miller point out in their analysis of the case ("The Diminution of Freedom of Religion" *LexView* (2000) 38, online: Cardus Centre for Cultural Renewal <http://www.cardus.ca/lexview/article/2256>):

> The adjudicator must inevitably rank or prioritize rights which appear to be in conflict. This prioritization is not a judgement which is simply handed to the adjudicator as "publicly-arrived-at community standards embodied in the *Code*," but can only be the result of the adjudicator's moral reasoning, however rigorous or deficient it might be. The bare fact that "Canadian society" has "seen fit … to protect the rights of its lesbian and gay members" is no more determinative of this dispute than the bare fact that "Canadian society" has also seen fit to protect the religious convictions of its members; the rights claims conflict and the adjudicator must inevitably reason about the limits and relative importance of each.

41 Presumably too, an automatic privileging or subordinating of certain claims would be equally flawed if it proceeded from a secular basis. See, e.g., Jonathan Chaplin's comments in note 13, *supra*.

42 Griffen, *supra* note 12 at 514, argues that demanding such bracketing "dehumanizes religiously devout judges by requiring them to either abandon the role of religious faith in their concept of moral knowledge or falsely mask the operation of that faith in the deliberative process". See also Carter, *supra* note 3 at 213–32.

43 Modak-Truran, *supra* note 24 at 284.

44 *Big M*, *supra* note 5 at para 94.

45 *Témoins de Jéhovah*, *supra* note 32 at para 65.

The Politics of Hate Speech: A Case Comment on Warman v Lemire

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In September 2009, the Canadian Human Rights Tribunal waded into a highly public and acrimonious debate about the role of human rights tribunals and commissions, especially in policing hate speech. In *Warman v Lemire*,[1] the Tribunal held that section 13(1) of the *Canadian Human Rights Act*[2] (*CHRA*), which prohibits the communication of hate messages, infringed the constitutional guarantee of freedom of expression, section 2(b) of the *Charter of Rights and Freedoms*.[3] The decision added to a firestorm of media, political and academic debate about whether anti-discrimination statutes should prohibit hate speech. The *Warman* decision is complicated by a twenty-year-old Supreme Court ruling, in a 4–3 decision, that a predecessor provision in the *CHRA* is constitutional.[4]

In this article, I argue that the Tribunal's decision is logically unsound and likely the result of ends-based or teleological reasoning. In my view, ends-based reasoning does not assist in *Charter* analysis as it produces decisions that call into question the legitimacy of the courts. This article first outlines the facts in *Warman* and the Tribunal's holding on the constitutional issues. It goes on to survey the legal and constitutional background to the *Warman* decision and discuss the *Taylor* precedent. It then describes the Tribunal's reasoning on constitutional issues, including the *Taylor* decision and amendments to the *CHRA* after *Taylor*. Finally, it criticizes the Tribunal's ends-based reasoning and argues that this type of reasoning is illegitimate in constitutional decision-making.

Background

Richard Warman filed a complaint with the Canadian Human Rights Commission alleging that Marc Lemire communicated hate messages over the Internet in breach of section 13 of the *CHRA*. Warman is an Ottawa-based lawyer and a former employee of the Commission. He has filed eleven other complaints against individuals and groups he accuses of communicating hate in breach of section 13, all but two of which have resulted in a finding of discrimination by the Canadian Human Rights Tribunal.[5] Marc Lemire is the former leader of the Heritage Front, a white supremacist organization.[6]

Warman alleged that Lemire is the owner and webmaster of Freedomsite.org, and that comments posted on Freedomsite's message board were hate messages.[7] At the Tribunal hearing, Warman and the Commission expanded the complaint to allege that: (a) Lemire was also the registered owner of JRBooksonline.com, and hate messages had been posted on JRBooksonline's message board; and (b) Lemire posted hate messages on Stormfront.org's message board.[8]

Lemire admitted to being the webmaster and owner of Freedomsite.org. In 2006, the Tribunal found that Craig Harrison had posted messages to the Freedomsite message board that were in breach of section 13.[9] A number of other people, including Lemire, posted messages on Freedomsite.org that Warman and the Commission argued were discriminatory. There were also a number of anonymous articles posted on Freedomsite.org. Warman alleged that

Lemire posted hate messages on Freedomsite.org, that Lemire and Harrison were working in concert in respect of Harrison's postings, and that Lemire incited Harrison and others to discriminate by setting up Freedomsite.org. The Commission supported these arguments and also argued that Lemire was liable in his capacity as website administrator for Freedomsite.org, or vicariously liable for Harrison's conduct. Warman and the Commission made similar allegations about content posted on the JRBooksonline.com website, though Lemire denied being its owner or webmaster, and there was no evidence that Lemire posted messages or content to the website. In respect of Stormfront.org, Warman alleged that Lemire posted a poem on the website that was inflammatory and derogatory towards non-white immigrants, and created a tone of hatred and contempt towards that class of persons.[10]

Lemire defended these allegations on the basis that he was not the owner or webmaster of JRBooksonline.com; that he cannot be liable for other persons' postings on Freedomsite.org; and that his postings on Freedomsite.org and Stormfront.org are not hate messages. Lemire also argued that sections 13, 54(1) and 54(1.1) of the *CHRA* violated his rights under section 2(a), 2(b) and 7 of the *Charter* and his rights under the *Canadian Bill of Rights*,[11] though he did not make any submissions on the latter issue.[12]

On the merits, the Tribunal found that Lemire had breached section 13 of the *CHRA* with his poem on the Stormfront.org website and the anonymous postings on the Freedomsite.org website, which only he could have posted as he was the website's webmaster.[13]

On the freedom of expression issue, the Commission and the Attorney General of Canada conceded that section 13 of the *CHRA* breached section 2(b) of the *Charter*. In considering whether section 13 minimally impaired freedom of expression, the Tribunal held that recent amendments to section 13 removed the "remedial, preventative and conciliatory" nature of the provision.[14] As such, the Tribunal held that section 13 cannot be justified as a reasonable limit on the section 2(b) right.

The Tribunal dismissed Lemire's section 2(a) claim, saying that there was no evidence that Lemire or anybody else made postings as a matter of conscience or their religious practice.[15] The Tribunal similarly dismissed Lemire's section 7 claim on the basis that there was no evidence of his life, liberty or security being infringed.[16]

Statutory and constitutional framework[17]

Section 13 of the *CHRA* prohibits the communication of messages that are likely to expose a person to hatred or contempt on the basis of a prohibited ground of discrimination, either by telephone or by the Internet:

> **13.** (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> (2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.
>
> (3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.[18]

Section 13(2) of the *CHRA* was amended in December 2001 as part of the *Anti-terrorism Act*.[19] The new section 13(2) was linked to the "war on terrorism" by the federal government in two

ways: prohibitions on hate speech would both reduce the risk of terrorism and protect ethnic and religious minorities from persecution in the event of a terrorist attack.[20]

Sections 54(1) and (1.1) provide for remedies for breaches of section 13, including cease-and-desist orders, compensation to the victim up to $20,000, and a penalty of not more than $10,000. In determining whether to order a penalty, the Tribunal must consider: (a) the nature, circumstances, extent and gravity of the discriminatory practice; and (b) the willfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person's ability to pay the penalty.[21]

Section 54(1) was amended in 1998 to expand the order-making power of the Tribunal in section 13 cases. Prior to the 1998 amendments,[22] the Tribunal was restricted to ordering the respondent to cease and desist his conduct, and awarding the victim up to $5,000 in compensation for hurt feelings.

The *Charter*'s section 2(b) guarantees to everyone "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[23] In *Montréal (City) v 2952-1366 Québec Inc*,[24] the Supreme Court of Canada described the legal test for determining whether a law violates section 2(b) as follows:

> (a) Does the communication have *expressive content*, thereby bringing it within section 2(b) protection?
>
> (b) If so, does the *method or location* of this expression remove that protection?
>
> (c) If the expression is protected by section 2(b), does the impugned law *infringe* that protection, either in purpose or effect?[25]

Section 2(b) is subject to section 1 of the *Charter*, which states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[26]

In *R v Oakes*,[27] the Supreme Court established the legal test for determining whether a law that breaches a *Charter* freedom or right may be limited pursuant to section 1:

> (a) Pressing and substantial objective: the objective of the law must relate to pressing and substantial concerns of sufficient importance to justify limiting a constitutional right or freedom;
>
> (b) Rational connection: the law must be carefully designed to achieve the objective, and not based on any arbitrary, unfair or irrational considerations;
>
> (c) Minimal impairment: the law should impair as little as possible the right or freedom; and
>
> (d) Proportionality: the effect of the law must not be disproportional to the objective.[28]

Canada (Human Rights Commission) v Taylor

In 1990, the Supreme Court of Canada considered the very issue before the Tribunal in *Warman*: does the hate message provision of the *CHRA* violate freedom of expression? In 1979, the Tribunal found that John Ross Taylor and the Western Guard Party breached section 13 of the *CHRA* by instituting a telephone service whereby any person could dial a telephone number and listen to a pre-recorded message that said Jews were conspiring to control and program Canadian society, including its books, schools and media.[29]

Despite the Tribunal's finding and a cease-and-desist order, Taylor and the Western Guard Party continued the telephone service. They were subsequently found in contempt; the Western Guard Party paid a fine and Taylor was imprisoned. After Taylor's release, he and the Western Guard Party resumed the telephone service. The Commission sought a contempt order to imprison Taylor. In their defence, Taylor and the Western Guard Party relied on the *Charter*'s freedom of expression provision, which had been proclaimed in the interim.[30]

The Federal Court and the Federal Court of Appeal dismissed the application to strike down section 13 of the *CHRA* as unconstitutional.[31] At the Supreme Court, the Commission conceded that section 13 breached freedom of expression. The Supreme Court was divided 4–3 on the issue whether section 13 was a reasonable limit on that freedom.[32]

The Court unanimously held that section 13's objective was "the promotion of equal opportunity unhindered by discriminatory practices."[33] However, it divided on whether section 13 was rationally connected to that objective. The majority held that section 13(1) "operates to suppress hate propaganda" and reminds Canadians of the "fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance."[34] The dissenting reasons held that section 13, especially the words "hatred" and "contempt," were vague and overly broad.[35] The dissent also took issue with the absence of any defences to a section 13(1) claim.[36] The majority held that importing a truthfulness defence or a subjective intention requirement would run contrary to the objective of human rights legislation generally.[37] As a result, the Supreme Court upheld section 13(1), and the cease-and-desist order continued against Taylor and the Western Guard Party.

The tribunal's reasons on the constitutional issues

As in *Taylor*, the government in *Warman* conceded that section 13 breached Lemire's freedom of expression. The issue was whether the infringement could be justified under section 1.

The Tribunal began by noting that since *Taylor* was decided, sections 13 and 54(1) had been amended:

> Since *Taylor*, there have been a number of significant changes to s. 13 and its remedial provisions set out in s. 54(1). Under the version of the *Act* examined by the *Taylor* decision, the Tribunal could only make an order referred to in s. 53(2)(*a*) of the *Act* after finding a s. 13 complaint substantiated. Thus, a person who engaged in this form of discriminatory practice could only be ordered to cease that practice (commonly referred to as a "cease and desist order") and take measures in consultation with the Commission to prevent the same or similar practice from occurring in the future. In 1998 (S.C. 1998, c. 9, s. 28), s. 54(1) was replaced with a provision stating that the Tribunal could not only issue a s. 53(2)(*a*) order, but it could now also order a respondent
>
> - where the discrimination was willful or reckless, to compensate a victim who was specifically identified in the hate message with special compensation of up to $20,000, pursuant to s. 53(3), and
> - to pay a penalty of up to $10,000.
>
> In addition, s. 13 was amended in 2001 (S.C. 2001, c. 41, s. 88) to insert a paragraph (the current version of s. 13(2)) clarifying that the discriminatory practice set out in s. 13(1) applies to communications by means of a computer or group of interconnected or related computers, including the Internet.[38]

Before embarking on the section 1 analysis, the Tribunal made clear that it was bound by *Taylor*, and Lemire could only succeed in his challenge if *Taylor* could be distinguished by reason of these amendments.[39]

In respect of the provision's objective, Lemire argued that the amendments were made as part of the *Anti-terrorism Act*, and thus demonstrate that section 13(1) is not intended to prohibit discrimination, but instead "is part of the State's strategy to eradicate terrorism, and protect the political, social and economic security of Canada."[40] The Tribunal dismissed this argument, finding that section 13(1)'s objective remained, notwithstanding the amendments, to protect against discrimination in Canadian society.[41] Lemire also argued that *Taylor* was wrongly decided, because the Supreme Court based its finding on section 13(1)'s objective on the *Report of the Special Committee on Hate Propaganda in Canada* (Cohen Report), which Lemire rebutted using expert evidence.[42] The Tribunal dismissed this argument as well, finding that *Taylor* identified section 13(1)'s objective from the whole of the Act, and the expert's criticism of the Cohen Report was not a new fact that justified revisiting this issue from *Taylor*.[43]

On the issue of rational connection, the Tribunal held that section 13(1) remained rationally connected to the provision's objectives, even with the amendments. Lemire had argued that section 13(1) was irrational because it penalized the communication of hate messages over the Internet, but not in any other form (such as if the text was available in a bookstore or library). The Tribunal dismissed this argument, observing that discriminatory texts in a bookstore or library may be subject to provincial human rights statutes and, moreover, the Internet assists in hate messages being "repeatedly" communicated.[44]

In analyzing whether section 13(1) minimally impaired Lemire's freedom of expression, the Tribunal revisited the analysis in *Taylor*. It concluded that the terms "hatred or contempt" were no more vague or broad than the Supreme Court found in *Taylor* and there was no basis to displace that finding.[45]

The absence of any requirement that the offender "intended" to communicate the hate messages caused the Tribunal pause in light of the new sanctions in sections 13(1) and 54(1). It noted:

> The fact that the cease and desist order was the only available remedy was identified as characteristic of the conciliatory, preventative, and remedial nature of s. 13, upon which the Supreme Court based its determination that the provision minimally impacted on the freedom of expression. However, the state of affairs in this respect has significantly changed since then, with the inclusion of the penalty provision. The potential "chill" upon free expression may have consequently increased. As a result, the Court's findings regarding whether the absence of an intent condition transgresses the minimal impairment requirement can be revisited.[46]

The Tribunal found the penalty provisions "inherently punitive" and outside the scope of the Tribunal's responsibilities under the *CHRA*.[47] The Tribunal was also concerned that Tribunal proceedings are civil in nature, meaning that the burden of proof is lower and there is a lack of institutional safeguards, such as proof of intent and strict application of the rules of evidence as in a criminal proceeding.[48] The Attorney General argued that the penalty was "administrative" not penal, and intended to ensure compliance with the Act.[49] The Tribunal dismissed this argument on the basis that a breach of section 54(1) can result (and has resulted) in incarceration for contempt.[50] Further, the imposition of a penalty under section 54(1) requires consideration of contextual factors, not unlike sentencing in the criminal context, and is not a mathematical administrative calculation.[51]

The final issue that concerned the Tribunal is that *Taylor* was premised on the Supreme Court's finding the *CRHA* enforcement of the *CHRA* was conciliatory and less confrontational that traditional litigation. The experience of section 13(1) runs counter to that view—the Tribunal found that only 4 percent of section 13(1) cases were settled, and in Lemire's case, Warman refused to mediate or conciliate the dispute.[52]

As a result of these distinctions, the Tribunal concluded that section 13(1) did not satisfy the *Oakes* minimal impairment test.[53] Given this finding, the Tribunal did not consider the absence of defences to section 13(1) in considering whether the provision was a minimal impairment or the "proportional effects" leg of the *Oakes* test.[54] The Tribunal dismissed the complaint against Lemire.

Analyzing the tribunal's decision

The Tribunal's decision exposes the fault lines in the debate over section 13(1) of the *CHRA*. The debate has been exacerbated by recent complaints at the Tribunal and in other jurisdictions against Ezra Levant, Mark Steyn and *Macleans* for inciting hatred against Muslims. These complaints have been sensationalized by the respondents and by the media.[55] Though the complaints were all dismissed or withdrawn, they resulted in a major review of section 13(1) by the Commission. In my view, the Tribunal's decision reflects a policy view of section 13(1) but not a constitutional view. The logical inconsistencies in the decision suggest that the Tribunal adopted an ends-based approach, which

risks undermining the legitimacy of the court system.

Judicial decisions are sometimes subject to criticism that they are the product of "ends-based" or teleological reasoning, as compared to "means-based" reasoning.[56] Ends-based reasoning seems to have been adopted in Canada's *Charter* jurisprudence as early as 1985, when the Supreme Court determined that the courts should apply a broad, purposive approach to interpreting rights and freedoms.[57] The ends-based approach to constitutional decision-making has been criticized in both Canada and the U.S. The main arguments against ends-based reasoning are: (a) principled or means-based decision making serves to justify the judiciary as the final word on the constitutionality of laws; (b) the courts are only legitimate if they employ a reasoned and principled judicial method; and (c) a principled decision will stand the test of time.[58] In my view, the ends-based approach is too susceptible to politicization and, as a result, can require judges and quasi-judicial decision-makers to be part of the political process. *Warman* seems to have been decided without sound legal reasoning and, as a result, it brings into question whether the Tribunal was deciding the law as it is, or as it should be based on the current debate. Though the purposive approach does not necessarily lead to ends-based reasons, decision-makers risk logically unsound decisions when they rely too much on "context" in reaching their conclusions. In this case, the Tribunal erred in wrongly applying *Taylor* and it seems to have done so because of the heated criticism of section 13(1).

The Tribunal's decision fails to distinguish between the constitutionality of section 13(1), which remains unchanged by subsequent amendments to the *CHRA*, and sections 13(2) and 54, which were added after *Taylor* was decided.[59] *Taylor* upheld section 13(1), and the decision of the Supreme Court of Canada is binding on the Tribunal, so the Tribunal's decision appears wrong on its face. The Tribunal distinguished *Taylor* by holding that the absence of any penal provisions was "characteristic of the conciliatory, preventative, and remedial nature of s. 13."[60] According to the Tribunal's reasons, the Supreme Court based its finding that the legislation minimally impaired freedom of expression on this unique characteristic of human rights legislation, which is intended to encourage the parties to acknowledge the principles of equality and non-discrimination.

This reading of *Taylor*, in my view, is simply incorrect. In *Taylor*, Chief Justice Dickson, writing for the majority, applied the minimal impairment test by analyzing four arguments for striking down the provision: (1) the phrase "hatred or contempt" is overbroad and excessively vague; (2) the *CHRA* does not provide for an exemption to protect freedom of expression, like other anti-discrimination statutes do; (3) section 13(1) is overbroad because it lacks an intent requirement or does not provide for the defence of truthful statements; and (4) the restriction on telephonic communications is an intrusion on individuals' privacy rights. The Chief Justice dismissed each of these arguments as insufficient to render section 13(1) disproportional to the Act's objectives.[61]

The only reference to the penalty associated with section 13(1) was Taylor's argument that his one-year sentence was too severe a response to a breach of section 13(1). Chief Justice Dickson dismissed that argument as well, on two grounds. First, the penalty was for a contempt order that flowed from Taylor's failure to obey a cease-and-desist order made under the *CHRA*. Second, the Chief Justice disagreed that there was a chilling effect on freedom of expression, as imprisonment only flowed from an intentional breach of section 13(1): a contempt order can only be made if the respondent continues to disseminate the hate message in the face of a finding that the message constitutes hate speech.[62]

In my view, a potential fine of $10,000 is insufficient to take section 13(1) outside the reasoning in *Taylor*. First, the fine is relatively insubstantial. In *Hill v Church of Scientology of Toronto*,[63] the Supreme Court declined to set aside an $800,000 damages award in a defamation case. If the Supreme Court was not concerned that such an award would have a chilling effect on free speech, it seems incorrect to conclude that a penalty of $10,000 or a maximum award of $30,000 would have such an effect.

Second, the only added penalty is monetary—the threat of imprisonment remains the same as before the 1988 amendments, and flows only from a contempt finding. Finally, the new penalties have to be reviewed in light of the addition of section 13(2), which recognizes the impact of the Internet on the dissemination of information, especially hateful information. It is telling that none of the recent hate speech cases deal with telephonic communications, but rather with Internet postings or print media that is accessible online.

The insufficiency of the Tribunal's reasons in *Warman* coincides with a very public debate about section 13(1) and similar provisions in other jurisdictions. In light of the logical inconsistencies in the Tribunal's decision, my view is that the Tribunal must have taken into account the debate around section 13 in reaching its decision.

In February 2006 the *Western Standard*, which was published by Ezra Levant, printed cartoons depicting the Muslim prophet Mohammad.[64] The Islamic Supreme Council of Canada and the Edmonton Council of Muslim Communities complained to the Alberta Human Rights and Citizenship Commission that the *Western Standard* breached the hate speech provisions in Alberta's anti-discrimination law. In December 2007, the Canadian Islamic Congress filed complaints against *Macleans* and Mark Steyn to the Canadian Human Rights Commission, and in Ontario and British Columbia, alleging that the magazine published Islamophobic articles, including a column by Steyn.[65]

Though these complaints were eventually dismissed, they garnered significant press and prompted political responses. In January 2008, a Liberal Member of Parliament introduced a private member's motion to repeal section 13.[66] In 2009, the House of Commons Standing Committee on Justice and Human Rights Committee investigated the Canadian Human Rights Commission's mandate, specifically with respect to section 13.[67]

Against this backdrop, the Commission asked Professor Richard Moon to consider "the most appropriate mechanisms to address hate messages and more particularly those on the Internet, with specific emphasis on the role of section 13 of the [*CHRA*] and the role of the Commission."[68] He recommended that section 13 be repealed. Sections 318 and 319 of the *Criminal Code*[69] make it an offence to advocate genocide or to incite hatred against a group or to willfully promote hatred against a group on the basis of colour, race, religion, or ethnic origin. Section 320.1 of the *Code* allows a judge to order the seizure and deletion of hate propaganda found on the Internet. Professor Moon argued that the *Criminal Code* provisions are sufficient to enforce the prohibition on hate speech in Canadian law. He states: "Hate speech is a serious matter that should be investigated by the police and prosecuted in the courts and should carry a significant penalty."[70]

Conclusion: *Warman* and the risk of ends-based reasoning

The logical inconsistencies in the Tribunal's decision in *Warman* can only be explained, in my view, by an ends-based approach to judicial decision-making. By declaring section 13 unconstitutional, the Tribunal has taken the debate over section 13 out of the hands of the media and politicians and thrust it upon the courts, with a focus on what the law *should be* as opposed to *what it is*.

This type of reasoning is dangerous. It undermines the legitimacy of the court system and constitutional democracy by suggesting that the constitutionality of legislation depends on the policy or political views of a particular time. The risk for constitutional decision-making more broadly is that it makes the courts and tribunals susceptible to arguments of judicial activism. Though such arguments are usually made by same groups and individuals that might support the Tribunal's decision in *Warman*, my view is that the courts (and the Constitution) are not served by suggestions that their decisions are made with one eye on public opinion.

Ends-based reasoning is that much more dangerous in the context of debates around freedom of expression. In *R v Zundel*, the Su-

preme Court held that the purpose of section 2(b) is to promote "truth, political or social participation, and self-fulfillment."[71] That purpose is contrasted with the promotion of equal opportunity unhindered by discriminatory practices, which underpins section 13 of the *CHRA* and is a principle embodied in section 15 of the *Charter*. In balancing these two important constitutional or quasi-constitutional objectives, decision-makers have to be careful not to favour one set of rights over the other. Ends-based reasoning may achieve a particular purpose—in this case, making section 13 inoperative, which seems to be an outcome favored by politicians, the media and some academics—but the decision risks being attacked as illegitimate if the decision-making logic is unsound. The danger in section 2(b) cases is that decisions risk favoring majoritarian views or popular opinion, which is one of the very outcomes that section 2(b) is intended to protect against: "[T]he guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event."[72] Though this type of reasoning may ultimately be the byproduct of a purposive approach to the *Charter*, constitutional decision-making should still be grounded in principled and logical legal reasoning if it is to mean anything to the people affected by those decisions.

Notes

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1 2009 CHRT 26 [*Warman*]. The Canadian Human Rights Commission has applied to the Federal Court for judicial review of the Tribunal's decision.

2 RSC 1985, c H-6 [*CHRA*].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 *Canada (Human Rights Commission) v Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892 [*Taylor*].

5 See *Warman v Kyburz*, 2003 CHRT 18, 46 CHRR 425 (CanLII); *Warman v Kulbashian*, 2006 CHRT 11, 56 CHRR 340 (CanLII); *Warman v Winnicki*, 2006 CHRT 20, 56 CHRR 381 (CanLII); *Warman v Harrison*, 2006 CHRT 30, 58 CHRR 414 (CanLII) [*Harrison*]; *Warman v Kouba*, 2006 CHRT 50 (CanLII); *Warman v Western Canada for US*, 2006 CHRT 52 (CanLII); *Warman v Tremaine*, 2007 CHRT 2, 59 CHRR 391 (CanLII); *Warman v Wilkinson*, 2007 CHRT 27 (CanLII); *Warman v Beaumont*, 2007 CHRT 49, 62 CHRR 261 (CanLII).

6 Jonathan Kay, "How to turn a Neo-Nazi into a free-speech martyr" *National Post* (25 March 2008), online: National Post <http://www.nationalpost.com/story.html?id=327a3a0f-3031-4ae3-9deb-e1a2e12c2ac1&k=97808>.

7 *Warman*, *supra* note 1 at para 11.

8 *Ibid* at para 12.

9 *Harrison*, *supra* note 5.

10 *Warman*, *supra* note 1 at paras 20, 30, 50, 62, 79–138, 145.

11 RSC 1960, c 44.

12 *Warman*, *supra* note 1 at paras 3–4, 305.

13 *Ibid* at paras 57, 212.

14 *Ibid* at para 279.

15 *Ibid* at para 296.

16 *Ibid* at para 303.

17 Some of the provincial human rights statutes also prohibit hate speech: *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-14, s 3(1)(b); *Human Rights Code*, RSBC 1996, c 210, s 7(1)(b); *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 14(1)(b); *Human Rights Act*, SNWT 2002, c 18, s 13(1)(c).

18 *CHRA*, *supra* note 2, s 13.

19 SC 2001, c 41, s 88.

20 Jane Bailey, "Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda" (2003) 49 McGill Law Journal 59 at 67.

21 *CHRA*, *supra* note 2, ss 53(3), 54(1)–(1.1).

22 *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, SC 1998, c 9, s 28.

23 *Charter*, *supra* note 3, s 2(b).

24 2005 SCC 62, [2005] 3 SCR 141 (CanLII).

25 *Ibid* at para 56 [emphasis in original].

26 *Charter*, *supra* note 3, s 1.
27 1986 CanLII 46 (SCC), [1986] 1 SCR 103.
28 *Ibid* at paras 69–71.
29 *Taylor*, *supra* note 4 at 903–04.
30 *Ibid* at 905–06.
31 *Canada (Human Rights Commission) v Taylor* (1984), 6 CHRR D/2595 (FCTD), affirmed [1987] 3 FC 593, 37 DLR (4th) 577 (CA).
32 *Taylor*, *supra* note 4 at 914.
33 *Ibid* at 918.
34 *Ibid* at 923–24.
35 *Ibid* at 960–69.
36 *Ibid* at 966–67.
37 *Ibid* at 939.
38 *Warman*, *supra* note 1 at paras 218–19.
39 *Ibid* at paras 216, 221.
40 *Ibid* at para 230.
41 *Ibid* at para 231.
42 *Ibid* at para 234. See Department of Justice, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) [Cohen Report].
43 *Warman*, *supra* note 1 at para 236.
44 *Ibid* at paras 245–46.
45 *Ibid* at paras 252–53.
46 *Ibid* at para 262.
47 *Ibid* at para 263.
48 *Ibid* at para 265.
49 *Ibid* at para 273.
50 *Ibid* at para 275.
51 *Ibid* at para 276.
52 *Ibid* at para 285.
53 *Ibid* at para 290.
54 *Ibid* at paras 291–94.
55 See e.g. Ezra Levant, *Shakedown: How Our Government Is Undermining Democracy in the Name of Human Rights* (Toronto: McClelland & Stewart, 2009); Joseph Brean, "Hate speech law unconstitutional: rights tribunal" *National Post* (2 September 2009), online: National Post <http://www.nationalpost.com/news/story.html?id=1954734>; Jesse McLean, "Hate-speech law rejected in rights ruling" *Toronto Star* (3 September 2009), online: thestar.com <http://www.thestar.com/article/690252>; Susan Krashinsky, "Hate-speech law violates Charter rights, tribunal rules" *Globe and Mail* (2 September 2009), online: The Globe and Mail <http://www.theglobeandmail.com/news/national/hate-speech-law-violates-charter-rights-tribunal-rules/article1273956/>.
56 Rainer Knopff & FL Morton, *Charter Politics* (Toronto: Nelson Canada, 1992); Paul Weiler, "Two Models of Judicial Decision-Making" (1968) 46 Canadian Bar Review 406 [Weiler].
57 *R v Big M Drug Mart*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 (CanLII)at para 116. See also Jonathan L Black-Branch, "Constitutional Adjudication in Canada: Purposive or Political?" (2000) 21:3 Statute Law Review 163 at 165–166.
58 See e.g. Weiler, *supra* note 55; Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method* (M. Phil. Thesis, Oxford University, 1983) [unpublished].
59 See generally Ankur Bhatt, "*Warman v. Lemire*: The Constitutionality of Hate Speech Legislation" *The Court* (22 September 2009), online: The Court <http://www.thecourt.ca/2009/09/22/warman-v-lemire-the-constitutionality-of-hate-speech-legislation/>.
60 *Warman*, *supra* note 1 at para 262.
61 *Taylor*, *supra* note 4 at 926–39.
62 *Ibid* at 933.
63 1995 CanLII 59 (SCC), [1995] 2 SCR 1130.
64 Kevin Steel, "Drawing the Line" *Western Standard* (27 February 2006) 15, online: Western-Standard.ca: <http://www.westernstandard.ca/website/article.php?id=1473>.
65 See e.g. "Writers call for probe into human rights commission" *CBC News* (6 October 2009), online: CBC News <http://www.cbc.ca/news/canada/story/2009/10/05/human-rights-commission.html>.
66 House of Commons, *Notice Paper*, 39th Parl, 2nd sess, No 41 (31 January 2008), M-446 (Keith Martin).
67 House of Commons, Standing Committee on Justice and Human Rights, *Review of the Canadian Human Rights Act (Section 13),* 40th Parl, 2nd sess (Ed Fast, Chair).
68 Canadian Human Rights Commission, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* by Richard Moon (Ottawa: Canadian Human Rights Commission, 2008) at 1 [Moon Report].
69 RSC 1985, c C-46.
70 Moon Report, *supra* note 68 at 31.
71 1992 CanLII 75 (SCC), [1992] 2 SCR 731 at 732.
72 *Ibid* at 753.

McIvor v Canada *and the 2010 Amendments to the* Indian Act: *A Half-Hearted Remedy to Historical Injustice*

Sarah E. Hamill*

Introduction

2010 saw the twenty-fifth anniversary of two important legal developments in Canada: Bill C-31, which significantly amended the existing *Indian Act,* and the coming into effect of section 15 of the *Charter of Rights and Freedoms*.[1] Section 15 was partially responsible for the introduction of Bill C-31. The Canadian government introduced Bill C-31 to address, among other things, gender discrimination in the system of Indian status. Bill C-31, however, fell short of its goal of introducing a gender-neutral system of Indian status under the *Indian Act*.

Twenty-five years after Bill C-31, the federal government has been forced to amend the *Indian Act* again, after the British Columbia Court of Appeal found that Bill C-31 preserved aspects of the sexism of the previous system of Indian status, and as such discriminated on the ground of gender.[2] The case which forced the 2010 amendments to the *Indian Act*, *McIvor v Canada*,[3] dealt with the criteria for Indian status as set out by section 6 of the Act. The B.C. Court of Appeal found that Bill C-31 preserved some of the explicit gender discrimination of the pre-1985 system of Indian registration. It has been known for at least twenty years that Bill C-31 fell short of its stated goal of removing gender discrimination from the *Indian Act*,[4] yet it took until 2007 for McIvor's challenge to receive a court ruling.[5]

Prior to Bill C-31, Indian status could be gained or lost in a number of ways which disproportionately affected women. The focus of this article is on the gender inequality of the pre-1985 system of Indian status and the attempts to remedy that discrimination. Prior to 1985, a woman with Indian status would lose status and band membership if she married a non-status man; a woman without Indian status would gain it if she married a status man. Those women who lost status would not regain it upon divorce, and those women who gained status would keep it if they got divorced. The only way a woman could change her status was if she remarried. Male status was unaffected by marriage. Bill C-31 made Indian status permanent for both men and women, and had provisions allowing for the restoration of status to those women who had lost it through marriage.[6]

The gender discrimination of the *Indian Act* will not be removed by the 2010 amendments. The B.C. Court of Appeal granted a narrower remedy than the B.C. Supreme Court had granted at first instance,[7] and declared that only part of section 6 of the *Indian Act* was invalid instead of the entire section.[8] While the federal government decided not to challenge the Court of Appeal's decision, the plaintiff in the original case, Sharon McIvor, tried to appeal the case to the Supreme Court of Canada. McIvor attempted to appeal the decision because the Court of Appeal only addressed the gender discrimination suffered by McIvor, and not by First Na-

tions women more broadly.[9] The Supreme Court of Canada denied leave to appeal in November 2009,[10] clearing the way for the more limited 2010 amendments to the *Indian Act*.

McIvor is the latest case in the battle for equal rights for the women of Canada's First Nations when it comes to the inheritance and permanence of Indian status. The court cases began in 1969 with *Re Lavell and Attorney General of Canada*,[11] and went on to be fought before every level of court in Canada, with one case, *Lovelace v Canada*,[12] even being taken to the United Nations Human Rights Committee (UNHRC). Both of these cases dealt with First Nations women who had lost their Indian status through marriage, then had subsequently divorced and wished to return to their home reserves. Lavell lost her case, but in *Lovelace*, the UNHRC criticised Canada for the gender discrimination in the *Indian Act* and in the system of Indian status. The *Lovelace* case and subsequent international censure provided a further impetus for the Canadian government to reform the *Indian Act* and Indian status, ultimately leading to Bill C-31. Despite Bill C-31 and the 2010 amendments, gender discrimination in the *Indian Act* and in the system of Indian status remains, and thus Indian status continues to violate section 15 of the *Charter*.

The issues raised by the Court of Appeal's judgment in *McIvor*, Bill C-31, and the 2010 amendments to the *Indian Act* are complex. The complexity is often framed as the need to balance the individual rights of First Nations women with the collective rights of the First Nations to self-government.[13] Within the First Nations, both sides to the debate accuse each other of perpetuating colonialism as they fight for their rights. The First Nations women challenging the discriminatory provisions of the *Indian Act* in the courts are accused of using the "master's tools" in their fight,[14] whereas the First Nations women accuse the male-dominated First Nations governments of being "neo-colonial."[15]

This article will explain the background to the *McIvor* cases and the changes the 2010 amendments have introduced to the system of Indian status. It is clear that gender discrimination in the *Indian Act* remains, and that the federal government seems reluctant to grant a more comprehensive redress than that suggested by the B.C. Court of Appeal in *McIvor*. In refusing to properly address the gender discrimination of the *Indian Act*, the Government of Canada has been accused of neglecting its obligations under international human rights law.[16] Given the length of time that it has taken to get any kind of remedy for the gender discrimination in the system of Indian status perpetuated by Bill C-31, and the potential catastrophic effects of Bill C-31 for the First Nations as a whole,[17] the partial remedy provided by *McIvor* and the 2010 amendments is unacceptable. This article focuses on the relationship between First Nations and the federal government with respect to Indian status and as such it will use a narrow definition of First Nations to refer to individuals with Indian status who are members of recognised Bands. It will use the term Aboriginal as a more inclusive term, which includes status and non-status Indians.

McIvor and Indian Status

Prior to the 1985 amendments to the *Indian Act*, Sharon McIvor was not registered as an Indian. McIvor was of First Nations descent on both her mother's and father's sides: her maternal grandmother was a status Indian and her paternal grandmother was entitled to be registered. Both of McIvor's grandmothers lived with, but did not marry, non-status men and had children with these men. McIvor's parents were also unmarried.[18] In theory both of McIvor's parents could have been registered as Indians under the pre-1985 *Indian Act*. The pre-1985 Act[19] allowed the illegitimate children of status women to be registered as Indians so long as no-one protested the registration of the child because of non-status Indian paternity.[20] Thus McIvor herself could have been a status Indian before 1985.

However, McIvor married a non-status man, and under the 1951 version of the *Indian Act* women with status lost their status when they married a non-status man. Upon her marriage, McIvor lost any entitlement she had to be registered under the 1951 Act.[21] With the introduction of Bill C-31, which stopped women from gaining or losing status upon marriage

and allowed those who had lost status through marriage to regain it, McIvor applied for status for herself and her children. In order to understand the issues in *McIvor* it is necessary to explain what Bill C-31 changed.

The Background to Bill C-31

Bill C-31 was the result of a lengthy period of consultation with First Nations groups.[22] The gender discrimination of the 1951 Act had long attracted criticism, but it was the arrival of the *Charter* in 1982, and the *Lovelace* case, that provided the impetus for amendment. Under the 1951 Act, women automatically acquired the Indian or non-Indian status of their husbands. Women without Indian status gained it when they married a status man, and women with status lost it when they married a non-status man. The loss or gain of status was not altered by death or divorce. The only way an Indian woman could regain status was to marry a status man.

The government of Canada explained the loss of a woman's status upon marriage to a non-status man as a way to prevent the non-status man from getting access to land reserved for the First Nations.[23] The status regime was not just about protecting reserve lands. The idea of Indian status is older than Canada itself, and the colonial governments hoped that the status regime would help assimilate the First Nations.[24] The colonial government intended Indian status to be a temporary measure, a stepping stone on the way to First Nations becoming fully Anglicised or Canadianized. The Victorian roots of Indian status ensured that First Nations women, like their British counterparts, were viewed as the property of their husbands.[25]

Arguably, the status regime had a further way of assimilating the First Nations, beyond turning their societies into patriarchies. The assimilationist aims of the status regime were furthered by the removal of First Nations women from the reserves and the introduction of non-Native women to the reserves. Scholars have pointed out that within many, if not all First Nations, women play a key role in transmitting their culture to the next generation.[26] Likewise, the late nineteenth century and early twentieth century women's movement viewed women as playing a key role in protecting Anglo-Canadian culture.[27] These non-Native women may have been seen as vehicles for assimilation within the reserves themselves. Given the lack of First Nations ancestry of these women, it is hard to see how they could have passed on First Nations culture to their children.[28] Meanwhile, removing First Nations women from the reserves and stripping them of status made it both difficult and illegal for them to pass on their cultural practices to their non-status children.[29] The removal of Indian status meant that First Nations women could not exercise their rights to hunting and fishing without breaking the law. For example, McIvor could not fish with the rest of her First Nation because she lacked Indian status.[30]

As a result of the pre-1985 *Indian Act*, only men with Indian status could automatically pass status onto their children. There was one exception to this rule, however, and it is this exception which proved crucial in *McIvor*. The exception was known as the "Double Mother Rule." The Double Mother Rule meant that if a child's mother and grandmother only had a right to Indian status because they had married status Indians, that child would lose Indian status at the age of twenty-one.[31] The Double Mother Rule introduced a blood quantum for "Indianness": in order to be an Indian before Bill C-31, you had to have more than one status Indian grandparent.[32]

Bill C-31 changed the laws on Indian status so that no-one would gain or lose status because of marriage, or because of the old Double Mother Rule. Bill C-31 made Indian status something you had or were entitled to at birth, and if you had status it was yours for life. However, the changes to the regime of Indian status were just a part of the overhaul of the *Indian Act* that Bill C-31 represented.

The system of Indian status and Indian government created by the *Indian Act* had long been unsatisfactory to members of Canada's First Nations. The First Nations, however, did not agree on how best to reform the *Indian Act*. The movements for reform that emerged from within the First Nations can be divided into two

main groups: the women's rights movement, and the Aboriginal rights movement.[33] The latter movement wanted greater self-government for the First Nations and control over band membership, while the former wanted an end to the discrimination against women in eligibility for status and band membership.[34]

These two movements clashed over the reinstatement of women. Several First Nations worried that the reserves would be flooded if all those who had lost their status were reinstated, placing already tight band resources under even more stress. In addition there were some First Nations who feared that returning members would alter the culture of the bands; some even worried that it would result in cultural genocide.[35] For many First Nations individuals, having Indian status formed a crucial part of their identity, but bands worried about the effects that a sudden post-Bill C-31 influx of members would have on their band identity, as well as on First Nations identity more broadly.

Consequently, the process which resulted in the passing of Bill C-31 took a long time. The trial judge in *McIvor* provided an overview of the process, which involved the federal government consulting with various First Nations groups. As part of the consultation process, the federal government allowed the First Nations to provide feedback on the proposed amendments.[36] The Assembly of First Nations (AFN) wanted individual bands to have control over the reinstatement of women, while the Native Women's Association of Canada (NWAC) wanted women to be reinstated to band membership before greater powers of self-government were granted.

As a result, Bill C-31 was a compromise, and as with most compromises, it was unsatisfactory to both sides. The Sawridge Band of Alberta launched a challenge against the constitutionality of Bill C-31 because it denies First Nations total control over their membership.[37] The Sawridge claim is still working its way through the courts.[38] Meanwhile, First Nations women quickly realised that the provisions of Bill C-31 perpetuated the gender discrimination of the 1951 Act.[39]

Bill C-31 allowed First Nations to draw up their own membership codes, which could be more restrictive or permissive than the criteria for Indian status.[40] Bill C-31 also restored the status of those First Nations individuals who had lost status under the 1951 Act; for example, women who lost status upon marriage to a non-Indian man had their Indian status restored.[41] As a result of the changes to Indian status that Bill C-31 introduced, band membership and Indian status are no longer complimentary. There are now significant numbers of status Indians who are ineligible for band membership, and most of these "band-less" Indians are the descendents of women who lost status under the 1951 Act.[42]

In the aftermath of Bill C-31, there are two main categories of status under the *Indian Act*, commonly known as section 6(1) status and section 6(2) status.[43] The major difference between the two is that those with section 6(1) status can automatically pass status on to their children, whereas those with section 6(2) status can only pass status to their children if they have children with another status Indian. Thus to have Indian status today, an individual needs to have at least two status grandparents, perpetuating the blood quantum of the old Double Mother Rule.

McIvor and Gender Discrimination

After the passage of Bill C-31 in 1985, Sharon McIvor applied for Indian status on her own behalf and on behalf of her children. Understandably, there was a large backlog of cases given the numbers of people applying for status and, as such, it took until 1987 for the Registrar to rule in McIvor's case.[44] The initial ruling was that McIvor was entitled to section 6(2) Indian status, which meant that she was not automatically entitled to band membership and that her children were ineligible for Indian status.

McIvor protested the Registrar's decision, arguing that she was entitled to be registered under section 6(1)(c) as she was "the illegitimate daughter, born before 1951, of an Indian woman eligible for status."[45] It was 1989 before the Registrar replied to McIvor, upholding the earlier decision. Consequently, McIvor appealed

the Registrar's decision to the courts, and then launched a *Charter* challenge to Bill C-31 in 1994.

It took almost twenty years for the *Charter* challenge to actually come to trial, and just before the case was due to be heard the Registrar accepted McIvor's argument and granted her section 6(1) status and her children section 6(2) status.[46] The Registrar altered the status of McIvor based on technicalities over her parents' entitlement to registration.[47]

Nonetheless, McIvor continued her fight as the changes to Indian status introduced by Bill C-31 put her and her descendents in an unequal position compared to that of her brother and his descendents. The inequality between male and female siblings in the same family was obvious from the moment Bill C-31 was introduced.[48] Put simply, Sharon McIvor's grandchildren were not automatically entitled to status, but her brother's grandchildren were.

The reason why McIvor's grandchildren were not automatically entitled to status, while her brother's grandchildren were, was the end of the Double Mother Rule. If we look at the facts of *McIvor* but make McIvor a man the following results: a status Indian man marries a non-status woman and the woman gains status under the 1951 Act. The children of this marriage also have status, and all will have section 6(1) status. If the children of this marriage also marry non-status people, their children will have section 6(2) status, whereas under the 1951 Act they would have lost status at age twenty-one. If the section 6(2) grandchildren have children with non-status people, these children will be ineligible for status under the second generation cut-off introduced in Bill C-31.

The inequality resulting from the abolition of the Double Mother Rule would only apply during the transition period from the 1951 Act to the current *Indian Act*. The result was that the second generation cut-off took effect one generation earlier for descendents of Indian women than for descendents of Indian men. McIvor argued that this inequality was a result of gender discrimination and as such violated section 15 of the *Charter*.[49]

The B.C. Supreme Court agreed with McIvor and declared all of section 6 of the *Indian Act* "of no force and effect insofar, and only insofar, as it authorizes the differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status."[50] The federal government appealed this decision, and on April 6, 2009 the British Columbia Court of Appeal delivered their judgment.

The Court of Appeal found that the trial judge had granted too broad a remedy.[51] While the court agreed that the *Indian Act* violated section 15 of the *Charter*, they found a much narrower violation than the trial judge. The court found that section 6 of the *Indian Act* resulted in gender discrimination by granting enhanced status to children who claim First Nations descent from one male grandparent compared to children who get their First Nations heritage from one female grandparent.[52] The court found that while many of the differences in the ability to transmit status discriminated on the grounds of gender, the discrimination was justified in all cases except where Bill C-31 had granted enhanced status to those previously subject to the Double Mother Rule.[53]

Due to the finding of a much narrower *Charter* violation—namely that the violation was the enhanced status Bill C-31 granted to those who would have lost status under the old Double Mother Rule, rather than the gender discrimination that remained unaddressed by Bill C-31—the Court of Appeal only declared sections 6(1)(a) and 6(1)(c) of the *Indian Act* to be of no force and effect insofar as they grant greater rights to those who would have been subject to the Double Mother Rule. The Court suspended the declaration of invalidity for one year to allow the federal government to amend the Act.[54]

Following the announcement that the federal government would not challenge the Court of Appeal's ruling, Sharon McIvor was hailed as a hero.[55] Yet McIvor herself tried to appeal the judgment to the Supreme Court of Canada. She pointed out that the Court of Appeal's remedy only ended part of the gender discrimination

under the *Indian Act*. For example, the Court of Appeal's remedy did not address the historic discrimination suffered by First Nations women. Nor did it address women who lost status in ways other than marriage.[56] McIvor hoped that the Supreme Court of Canada would clarify the steps Parliament needed to take to redress the ongoing gender discrimination under the *Indian Act*.[57] When McIvor's application for leave to appeal to the Supreme Court of Canada was denied, it cleared the way for the federal government to amend the *Indian Act* to make it comply with the Court of Appeal's judgment.

The 2010 amendments to the *Indian Act*

In keeping with the narrow declaration of invalidity of the Court of Appeal's judgment, the 2010 amendments to the *Indian Act* only deal with the enhanced status that Bill C-31 granted to those who would have been subject to the Double Mother Rule. The result of the 2010 amendments is to put women like Sharon McIvor on an equal footing with their male siblings when it comes to passing Indian status to their grandchildren. The 2010 amendments preserve the second generation cut-off of the current *Indian Act* which continues to cause "deep anguish across communities of First Nations" because it seems to signal the end of the First Nations themselves.[58] The second generation cut-off rule, if is it not changed, could result in a situation where there are no longer any status Indians in Canada.[59] The lack of status Indians does not automatically mean the end of the First Nations; it is possible that there would still be people entitled to band membership even if they did not have status. However, given that bands are funded according to the number of status Indians they have as members, the second generation cut-off rule raises questions about how bands will be funded in the future if they no longer have any status Indians as members.[60]

The 2010 amendments are not without controversy. Although the federal government publicised the proposed amendments in a discussion paper to allow First Nations and other interested parties to comment on them, the amendments did not go through a proper consultation process.[61] The Congress of Aboriginal Peoples (CAP), a group that represents off-reserve and non-status Indians, criticised the government for failing to properly consult the First Nations over the amendments.[62] They also criticised the government for not offering a comprehensive redress to all forms of gender discrimination under the *Indian Act*.[63] The AFN were critical of the government's failure to properly consult the First Nations about the 2010 amendments.[64] They argued that the solution to the ongoing discrimination was to allow First Nations to decide who their citizens are.[65] The NWAC was critical of the 2010 amendments because the amendments do not address all of the gender discrimination under the *Indian Act*.[66] The NWAC was also concerned about the decline in the number of First Nations individuals who would be entitled to status.[67] The Métis National Council urged the government to undertake serious reform of the system of Indian status, including provisions to allow individuals to have their names struck from the registry; they also echoed the AFN's comments on granting First Nations and Métis groups control over their own citizenship.[68]

The B.C. Court of Appeal judgment only gave the federal government one year to amend the *Indian Act*; as such, the government did not have the time to undertake a comprehensive consultation process. Nor did the federal government show any desire to undertake such a process of its own accord, which suggests that they wished to avoid a discussion that could lead to a significant overhaul of the status regime. A skeptical reading of the federal government's treatment of Sharon McIvor suggests that the government was trying to avoid a trial on the issue of gender discrimination under the *Indian Act,* as the trial may have forced the government to undertake a complete overhaul of the system of Indian status. For example, their last-minute granting of status to McIvor's children could be construed as an attempt to persuade McIvor to drop the case.

The federal government has long been aware of the gender discrimination in the *In-*

dian Act. In 2008 the Canadian government received international censure over the continued discrimination against Aboriginal women.[69] While some of the criticism dealt with discrimination in the Indian registration system, the rest of the criticism over Canada's treatment of Aboriginal women dealt with issues that were not mentioned in *McIvor*. These issues include the fact that Aboriginal women living on reserves have less legal protection than those who live off-reserve, and the disproportionate number of Aboriginal women in prison.[70]

Canada has been receiving international censure over its treatment of Aboriginal women since Sandra Lovelace took her case to the United Nations. In 1980 the Canadian government agreed that the *Indian Act* that was then in force needed reform, but said that internal divisions within the First Nations would make it difficult to amend the Act.[71] Given the continuing conflict within First Nations over individual and Aboriginal rights it is likely that the federal government will continue to use this division to avoid addressing the issue.[72]

More than one scholar has pointed out, however, that the Canadian government cannot avoid its obligation to uphold women's rights.[73] As convincing and correct as the argument that the federal government has a duty to end discrimination against Aboriginal women is, it does oversimplify the issue. Val Napoleon has pointed out that the problems of the First Nations will not be fixed by human rights legislation.[74] However, the issue of the ongoing gender discrimination under the status regime can be fixed without touching issues such as band membership.[75] While ending gender discrimination under section 6 of the *Indian Act* would not address all forms of discrimination suffered by Aboriginal women, it would end the gender discrimination in the "special relationship between [Aboriginal] individuals and the federal government" that Indian status represents.[76]

Sharon McIvor and her son testified as to the traumatic effects of not having status on their lives, saying that they felt as though they were not treated as "real Indians" by other members of their family.[77] Their lack of status meant that they were ineligible for the post-secondary education funding and health care benefits that those with status were and are entitled to.[78] While the 2010 amendments address McIvor's situation, they do not, as McIvor herself pointed out, address the historical injustice that the status regime is responsible for. The B.C. Court of Appeal said that the *Charter* was not meant to apply retroactively but that it does apply to continuing government action.[79] The court said that it "would not be appropriate for the Court to augment Mr Grismer's [McIvor's son] Indian status [as] there is no obligation on government to grant such status.... In the end, the decision as to how the inequality should be remedied is one for Parliament."[80] The court did not, however, order the federal government to address the continuing inequality of Indian status. The court said that Bill C-31 "does treat Mr Grismer in a manner with the legislative regime going forward" and because of this the discrimination of Bill C-31 is proportional to the "pressing and substantial objective that it set out to serve."[81] The message is clear: as important as Indian status might be to individuals of Aboriginal descent, it serves a government purpose which takes precedence over status's importance to the First Nations and others of Aboriginal descent. The implication is that when the government decided to move the system of Indian registration forwards it was acceptable to leave some of the previous system's wrongs in place.

Conclusion

The *McIvor* case points to the urgent need to address the ongoing issues surrounding status and the *Indian Act,* but it also points to the federal government's reluctance to undertake the in-depth consultation process that a complete overhaul of Indian status would require. It has been twenty-five years since Bill C-31 and the Bill's reinstatees are aging.[82] Soon the second generation cut-off rules will start affecting descendents of First Nations men and women. As far as the First Nations are concerned, the survival of status through the generations is of the utmost importance. For some, "the limits placed on transmission of status are experienced as an act of genocide."[83]

Bill C-31 has been recognised as flawed since the moment of its enactment and Bill C-3 does not address all of Bill C-31's flaws, but the federal government seems reluctant to do anything to remedy the situation. Consequently, gender discrimination in the system of Indian status remains and is perpetuated.[84] The *McIvor* case took over two decades to reach a conclusion, and the First Nations do not have two decades to wait for another case to work its way through the courts and force further amendments to the *Indian Act*. Given the current disadvantages faced by First Nations women, the federal government does, however, have a role to play in discussions over Indian status, such as whether and how it should be continued. The voices and opinions of First Nations women, including those who are not currently entitled to status, need to be heard in any future discussions about Indian status and making sure they are heard is the duty of the federal government.

Notes

* Ph.D Candidate, University of Alberta, Faculty of Law. I would like to thank Val Napoleon for her thoughtful comments which challenged me to write a better paper. I would also like to thank Ken Dickerson for his helpful editorial suggestions. All errors and omissions are my own.

1 RSC 1985 c I-5 [*Indian Act*]; *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*].

2 *McIvor v Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153 (CanLII) at para 165 [*McIvor* (BCCA)]. For the 2010 amendments, see *Gender Equity in Indian Registration Act*, 3rd Sess, 40th Parl, 2010. This Act entered into force on 31 January 2011 and will have retrospective effect. *Gender Equity in Indian Registration Act* SC 2010, c 18.

3 *McIvor* (BCCA), *supra* note 2.

4 Joan Holmes, *Bill C-31: Equality or Disparity? The Effects of the New Indian Act on Native Women* (Ottawa: Canadian Advisory on the Status of Women, 1987) at 2 [Holmes].

5 *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, [2007] 3 CNLR 72 (CanLII) [*McIvor* (BCSC)]. The case has a lengthy history which is outlined in depth at paras 103–15. The original action launched by McIvor in 1989 was an appeal of the Registrar's decision, but in 1994 McIvor filed a *Charter* challenge of the *Indian Act* as amended by Bill C-31. The *McIvor* decisions result from the latter court action.

6 For an overview of gender discrimination in the pre-1985 system of Indian status and the changes brought by Bill C-31, see *McIvor* (BCSC), *ibid* at paras 47–87.

7 *Ibid* at para 351.

8 *McIvor* (BCCA), *supra* note 2 at paras 152–61.

9 McIvor's original statement of claim makes her aim clear: "First Nations women have historically been discriminated against on the basis of sex. For example, pursuant to the various *Indian Acts*, prior to 1985, First Nations women registered as Indians who married ... non-Indians lost their Indian status, band membership, and Indian rights." *McIvor* (BCSC), *supra* note 5 at para 104.

10 *McIvor v Registrar, Indian and Northern Affairs Canada and Attorney General of Canada*, 2009 CanLII 61383 (SCC).

11 (1971) 22 DLR (3d) 182 (Ont Co Ct).

12 *Sandra Lovelace v Canada*, Communication No R6/24, UN Doc Supp No 40 (A/36/40) [*Lovelace*]. *Lovelace v Canada,* UN Petition R 6/24 (1981) *Report of the Human Rights Committee,* UN GAOR, 36th Sess, Supp No 40, UN Doc A/36/40 (1981); *Lovelace v Canada,* 24/1977, UN Doc CCPR/C/13/D/24/1977 (1981).

13 See generally, Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 Queen's Law Journal 279 [Moss]. The exact nature of the collective rights of the First Nations varies from nation to nation but some commonalities are the right to self-government as well as rights to land, and hunting and fishing rights.

14 Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16 Canadian Journal of Women and the Law 106 at 111 [McIvor, "Aboriginal Women"].

15 *Ibid* at 128.

16 Moss, *supra* note 13 at 282. Of particular relevance to the gender discrimination suffered by First Nations women is *Convention for the Discrimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, A/RES/34/180 (accession by Canada 10 December 1981). For the most recent report on Canada see United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination*

Against Women, UN Doc CEDAW/C/CAN/CO/7 (7 November 2008) [CEDAW]. CEDAW mentions the *Indian Act* and the gender discrimination inherent in the current Indian status regime at para 17.

17 Sebastien Grammond, "Discrimination in the Rules of Indian Status and the *McIvor* Case" (2009) 35 Queen's Law Journal 421 at 432 [Grammond].

18 *McIvor* (BCSC), *supra* note 5 at paras 88–93.

19 *Indian Act*, SC 1951, c 29.

20 *Ibid* at s 12(1a) as am by SC 1956, c 40.

21 *McIvor* (BCSC), *supra* note 5 at para 93.

22 *Ibid* at paras 47–79.

23 *Ibid* at para 21.

24 *Ibid* at para 13.

25 *Ibid* at para 12; Jo-Anne Fiske & Evelyn George, *Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization Through Customary Law* (Ottawa: Status of Women Canada, 2006) at 4 [Fiske & George].

26 Holmes, *supra* note 4 at 10.

27 Margaret Jane Hillyard Little, *'No Car, No Radio, No Liquor Permit': The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Oxford: Oxford University Press, 1998) at xiii, 21.

28 Holmes, *supra* note 4 at 10.

29 For example, Sharon McIvor testified that her father was arrested for hunting: *McIvor* (BCSC), *supra* note 5 at para 127.

30 *Ibid* at para 280. Since Bill C-31 there have been a series of court cases which have extended hunting rights and other Aboriginal rights to non-status individuals.

31 *McIvor* (BCCA) *supra* note 2 at para 5.

32 The American test for Indian status has a blood quantum element, but this element is under attack and the amount of Indian blood required has varied over the years. Weston Meyring, " 'I'm an Indian Outlaw, Half Cherokee and Choctaw': Criminal Jurisdiction and the Question of Indian Status" (2006) 67 Montana Law Review 177.

33 I use "Aboriginal" here as that is the terminology used by the B.C. Supreme Court to describe the movement: *McIvor* (BCSC), *supra* note 5 at para 40. I use "Aboriginal rights" when referring to greater group rights for the First Nations.

34 *McIvor* (BCSC), *supra* note 5 at paras 39–40. I am not, of course, suggesting that there is anything wrong with the lack of consensus among the First Nations over the *Indian Act* reforms; a lack of consensus is not problematic in a democracy, a point the Court of Appeal seemed to overlook, *McIvor* (BCCA), *supra* note 2 at para 27.

35 Holmes, *supra* note 4 at 35–36; *McIvor* (BCSC), *supra* note 5 at para 44.

36 *McIvor* (BCSC), *supra* note 5 at paras 47–72.

37 *Sawridge Band v Canada,* 1995 CanLII 3521, [1996] 1 FC 3, [1995] 4 CNLR 121. This decision was reversed by *Sawridge Band v Canada*, 1997 CarswellNat 936 with additional reasons in *Sawridge Band v Canada*, 1997 CanLII 5294, [1997] 3 FC 580. A full history of this court action is beyond the scope of this paper but the trial decision has been repeatedly reconsidered and there are endless motions and appeals connected with the evidence given in this trial. When referring to the ongoing court cases unless I am specifically citing to one judgment in the saga I will refer to the series of court actions as *Sawridge Band.*

38 *Sawridge First Nation v Canada*, 2008 FC 322 (CanLII) at paras 226–27.

39 Holmes, *supra* note 4 at 22–26.

40 *Indian Act, supra* note 1 at s 10.

41 *Ibid* at s 6.

42 *McIvor* (BCSC), *supra* note 5 at para 87.

43 Section 6(1) also has several sub-categories of status but each sub-category has the same rights and entitlements.

44 *McIvor* (BCSC), *supra* note 5 at paras 98–99; for information on the backlog see Holmes, *supra* note 4 at 30–31.

45 *McIvor* (BCSC), *supra* note 5 at para 101.

46 *Ibid* at para 113.

47 *Ibid* at para 122.

48 Holmes, *supra* note 4 at 22–23.

49 *McIvor* (BCSC), *supra* note 5 at para 5.

50 *Ibid* at para 351.

51 *McIvor* (BCCA), *supra* note 2 at paras 95, 152.

52 *Ibid* at paras 154–55.

53 Parliamentary Information and Research Service, *Bill C-3: Gender Equity in Indian Registration Act* by Mary C. Hurley (Ottawa: Library of Parliament), 40-3-C3-E (18 March 2010) at 10; *McIvor* (BCCA), *supra* note 2 at paras 95–101, 123–151, 154–55.

54 *McIvor* (BCCA), *supra* note 2 at paras 161, 165–66.

55 Green Party of Canada, "Green Party Commends Sharon McIvor as a Champion for Women's Rights" (9 April 2009), online: <greenparty.ca http://greenparty.ca/en/media-release/2009-04-09/green-party-commends-sharon-mcivor-champion-women-s-rights>; Public Service Alliance of Canada, "Justice for Sharon McIvor and all First Nations women – at last!" (4 June 2009), online: psac.com <http://www.psac.com/news/2009/issues/20090604-e.shtml>.

56 For example, illegitimate male descendents of a status Indian got status pre-Bill C-31 but illegit-

imate female descendents did not. Following Bill C-31, the illegitimate daughters of men with Indian status were granted section 6(2) status and not the section 6(1) status their brothers had. House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd sess, No 008 (13 April 2010) at 3 (Sharon McIvor).

57 "Sharon McIvor's Response to the August 2009 Proposal of Indian and Northern Affairs Canada to Amend the 1985 Indian Act" (6 October 2009), online: UBC Feminist Legal Studies < http://faculty.law.ubc.ca/cfls/feminist_legal_studies/pdf/Sharon's%20%20McIvor%20Response%20to%20INAC%20Proposal.pdf> [McIvor's Response].

58 Holmes, *supra* note 4 at 52.

59 Elizabeth Jordan, "Residual Sex Discrimination in the *Indian Act*: Constitutional Remedies," (1995) 11 Journal of Law and Social Policy 213 at 226 [Jordan]; Fiske & George, *supra* note 25 at 21, 45; Grammond, *supra* note 17 at 432.

60 Jordan, *supra* note 59 at 226.

61 Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians, "Discussion Paper: Changes to the *Indian Act* affection Indian Registration and Band Membership, *McIvor v. Canada*" (2009), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/br/is/mci-eng.pdf>.

62 Congress of Aboriginal Peoples, "Response to Canada's Engagement Process Affecting Indian Registration and Band Membership" (November 2009), online: abo-peoples.org <http://www.abo-peoples.org/images/pdf/resources/mcivor%20eng.pdf>.

63 House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence,* 40th Parl, 3rd sess, No 008 (13 April 2010) at 15–16 (Betty Ann Lavallée).

64 Assembly of First Nations, Special Chiefs Assembly, "Federal Approach to the McIvor Decision of the BC Court of Appeal" Resolution no. 38/2009 (December 2009), online: afn.ca <http://www.afn.ca/resolutions/2009/38.pdf>.

65 House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence,* 40th Parl, 3rd sess, No 009 (15 April 2010) at 1–3 (Jody Wilson).

66 Native Women's Association of Canada, "Aboriginal Women Lose in Dismissal of McIvor Decision" (6 November 2009), online: nwac.ca <http://www.nwac.ca/media/release/06-11-09>.

67 House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd sess, No 008 (13 April 2010) at 7–8 (Jeannette Corbiere Lavell).

68 House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd sess, No 009 (15 April 2010) at 12–13 (Kathy Hodgson-Smith).

69 CEDAW, *supra* note 16.

70 *Ibid* at paras 19, 43.

71 *Lovelace, supra* note 12 at para 5.

72 Many Aboriginal scholars have pointed out that this division is a false dichotomy: McIvor, "Aboriginal Women," *supra* note 14; Val Napoleon, "Aboriginal Discourse: Gender, Identity and Community," in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Criticial Perspectives* (Oxford: Hart Publishing, 2009) 233.

73 Joyce Audry Green, *Exploring Identity and Citizenship: Aboriginal Women, Bill C-31 and the Sawridge* Case (Ph.D Thesis, Department of Political Science, University of Alberta, 1997) at 194 [Green]; Moss, *supra* note 13 at 282.

74 Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16 Canadian Journal of Law and Society 113 at 141.

75 McIvor's Response, *supra* note 57 at 5–7.

76 *Ibid* at 5.

77 *McIvor* (BCSC), *supra* note 5 at paras 280, 137.

78 Holmes, *supra* note 4 at 30–31.

79 *McIvor* (BCCA), *supra* note 2 at paras 47–48.

80 *Ibid* at para 160.

81 *Ibid* at paras 144–150.

82 Green, *supra* note 73 at 146.

83 Fiske & George, *supra* note 25 at 21.

84 McIvor's Response, *supra* note 57 at 8–10.