Taking Pluralism and Liberalism Seriously: The Need to Re-understand Faith, Beliefs, Religion, and Diversity in the Public Sphere

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Abstract

How we understand the nature of the public sphere and the fact that all citizens are believers and have faith (but not necessarily religious beliefs and faith) is important to treating all beliefs (including religion) fairly in the public sphere. This article argues for a re-understanding of foundational (but often unexamined) ideas such as "secular" and "secularism", "faith," "beliefs," "diversity" and "liberalism." It argues that an atheistic or agnostic dominance of the public sphere is unfair and, when the principles are understood properly, unconstitutional. The article examines the law and recent cases in South Africa and Canada against a backdrop of each country's constitutional provisions, as well as recent philosophical arguments, to suggest that key terms and phrases such as the "separation of church and state" and the relationship between religion and equality need to be re-understood in order for pluralism and liberalism to be properly related to human freedom (understood in its personal and communitarian dimensions) and to be properly protected and encouraged by law and politics.

Introduction

The title chosen for the conference panel at which this article was first presented, "Public Faith and the Politics of Faith," is a good one as it leads us to ask "what is public faith" or, perhaps, "why public faith?" Both of these questions might well be prompted by an implicit idea that "faith," meaning "religious faith," is

or ought to be private. The holding together of "faith" with "public," however, suggests that their separation is not as obvious as it may seem at first.

This article examines the public sphere as one that involves "faith" and "belief" as necessary for everyone, not only the religious. It suggests that some of the key ways in which we use the concept of the "public" – most significantly how we speak of "the secular" – are erroneous and misleading. This is based on the argument that "faith" is foundational for all human endeavour, whether public or private. By drawing on a number of legal decisions in South Africa and Canada, the article analyses the potential manner in which religion can be located within the public sphere. These two countries were chosen because their constitutions are only a few years apart, their courts cite each other's decisions and what they have said and have not said in relation to the public dimension of the freedom of religion provides a useful framework to examine the main points of this article.

The article argues that basic re-understanding of the key terms and concepts of belief, faith and the public sphere is critical in order for the public sphere to treat all believers (religious and non-religious) and their communities fairly in societies dedicated to maintaining pluralism and diversity as essential to human freedom and part of the constitutional arrangement of each country.

The Necessity of Re-Understanding the "Secular" and "Secularism"

The Importance of Religion to Society

The legal judgments in South Africa have recognized the importance of religion to South African society. They have done so in a language far more encouraging of the importance of religion than one would find in legal judgements elsewhere in the world, such as Canada. A judgment exemplifying a positive conception of the role of religion to South African society is a decade-old decision in the case of *Christian Education v. The Minister of Education* from the Constitutional Court of South Africa. Though it was referred to more recently in a Supreme Court of Canada decision touching on religious rights, the following critical passage was not referred to:

> For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of hu-

> man rights. It affects the believer's view of society and founds the distinction between right and wrong.[1]

The South African Constitution stipulates the freedom of religion (Section 15, clause 1) of all living in South Africa and recognises everyone equal before the law, with no unfair discrimination on the grounds of "religion" (Section 9, Clause 3). It specifies that "religious observances may be conducted at state or state-aided institutions," provided that the events are held on an equitable basis between all forms of religious affiliation and attendance is voluntary (Section 15, Clause 2). Members of a religious group may not be denied the right to practice that religion and to form religious communities (Section 31, Clause 1), yet no religious practice may oppose the Bill of Rights. In Canada, the Charter of Rights and Freedoms is based on principles "that recognise the supremacy of God and the rule of law," and stipulates the freedom of conscience and religion (Section 2). This includes the provision that everyone is equal before and under the law, regardless of religion (Section 15 (1)). Both the Canadian and the South African constitutions (and their respective case law under the relevant provisions) recognize that these rights may be limited. The South African limitation clause (Section 36) states that rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Canadian *Charter* (Section 1) limits the range of all rights, including the freedom of conscience and religion by stating that it is "subject ... to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." While these provisions spell out how both constitutions recognise foundational rights, these rights in terms of religion may be recognised in other ways as well, One recent example in terms of religion in South Africa, and its public aspirations, is current work being done on the South African Charter of Religious Rights and Freedoms, currently emerging from a civil society initiative in South Africa.

The South African Charter of Religious Rights and Freedoms

Section 234 of the South African Constitution provides that additional "Charters of Rights" may be drafted to supplement or give greater detail to the Constitution. To date the provision has not been used. An initiative to create the first Charter under Section 234 has, however, been ongoing for the last few years in South Africa. The idea of a charter of religious rights was commented upon some years back by Albie Sachs, later appointed as judge of the Constitutional Court, who put religion forward as example of a subject matter that lent itself to a charter:

> Ideally in South Africa, all religious organizations and persons concerned with the study of religion would get together and

> draft a charter of religious rights and responsibilities ... it would be up to the participants themselves to define what they consider to be their fundamental rights. (Sachs 1990: 46-47)

The Continuity Committee for the South African Charter of Religious Rights and Freedoms has attempted to develop a Charter of Religious Rights and Freedoms over the last few years.[2] In continuing the work on the draft Charter, the Committee was tasked with liaising with every major religion in the country, with major NGOs and with numerous other groups.[3] In addition, it carried the responsibility of bringing together a set of core principles that the religions themselves believe important into a list in the Charter to represent the more detailed aspects of the freedom of religion.

The idea of the drafters of the Constitution for Section 234 was to provide space for a "civil society" response to the development of the Constitution. The proposed Charter of Religious Rights and Freedoms will be its first instantiation.[4] The aim of the drafters of the Charter is to present it to the government for review and enactment into law. The exercise has been an extraordinary example of diversity in action and proof that religions can co-operate over matters that they believe important to society.

In parallel with the passage cited above from the *Christian Education* decision, the proposed Charter speaks of the contribution that religions can make to the whole of South Africa. The Preamble of the draft Charter declares the "spirit of mutual respect and tolerance among the people of South Africa" and the pursuit of "the common good," and focuses on the community aspect of religious liberty as well as its individual dimension. The draft Charter refers to duties as well as rights. On a principled basis, it deals with various concerns expressed by the religions and with particular challenges (both anticipated and experienced) to religious liberty within South Africa as well as across the world on a variety of issues (such as the protection of the freedom of conscience for those involved in health care, or the access to sacred burial places and to the media, three examples of concerns expressed during discussions with the various interest groups in South Africa).

The question for our purposes relates to how we might best regard the two important principles of accommodation and diversity in contemporary constitutional democracies. This is important because, as I shall show, there are various ways to approach each of these terms and not all actually further living together and the noble goals of the proposed Charter.

New Definitions and Re-understandings

This section offers a critique of some of the common terminology that is frequently used to describe religion in relation to the state. In various ways these

terms tend to assume that all "faith" is religious and that religion is or should be *private*. In addition, the terminology tends to be both bifurcative, driving a wedge between religions and the public sphere, and inaccurate by failing to view agnosticism and atheism as belief systems. The combined effect of these two tendencies is to leave religious belief systems at a public disadvantage (in terms of such things as public funding) in relation to the unexamined faiths of atheism and agnosticism.

Drawing upon some recent legal cases in Canada and South Africa, I suggest that, for the reasons just given, we are at a time when the settled understanding of "secular" as "non-religious" needs to be revised. In Canada, the law changed in 2002 to recognize that "faith" is not restricted to religion and in consequence that the public sphere must accommodate citizens of all faiths, whether religious or non-religious. Yet, this shift in understanding has been so radical that even now, some eight years later, the new interpretation of "secular" for the purposes of Canadian law is not widely known in Canada.

In addition, the fact that there is no such thing as a non-religious secular can be somewhat threatening to those who have assumed this unquestioningly. The recognition that all positions, including atheism and agnosticism, are positions of "faith," even though not of religious faith, can prompt a re-understanding of the public sphere in a more accurate manner. How this happens depends on the definition of the public sphere as this determines how we eventually accommodate or fail to accommodate differing beliefs, regardless of whether these beliefs are religious or non-religious in nature. The principles of accommodation and diversity, both well established and recognized in the law, are of practical importance in terms of how they work out in culture and politics.

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

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

This article is a counter-reading to this common and, I argue, erroneous

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

In contrast to this exclusivist position, this article suggests a different approach, that of "religious inclusivism." Only within an inclusivist approach can accommodation and diversity have their proper application and meanings. Proper understanding of the public sphere requires a more explicit acknowledgment of the beliefs of those within it, whether these beliefs come from religion or not (Benson 2008). As with the term "secular," the concept "secularism" can be wrongly equated with neutrality.[5] It is important, therefore, to examine what we mean when we use terms such as "secular" or "secularism," since an unquestioning use can predispose us to unfair outcomes.

The term "secularism" was coined in about 1851 by the English agnostic George Jacob Holyoake (OED). From its inception English secularism, as articulated by Holyoake, aimed to provide the theoretical basis for a recasting of public life on what he termed a "material" basis. A study of Holyoake's published writings show that his theory of "English Secularism" was not, as many dictionaries and encyclopaedias claim, a "neutral" system since it sought to replace religious conceptions and to banish religions and religious belief from any public influence. It disparaged religious claims and sought their replacement by "better," "material" ones. It is striking to note how often usage of the term today has lost the historical knowledge of its anti-religious origins or purpose (Benson and Miller 2000; Benson 2004).

A decision by the Canadian courts is an illustrative example of the new way in which the term "secular" can be understood since it shows the development from the common definition of "secular" to one that is more accurate and fair. At the same time, however, the decision handed down by the Supreme Court of Canada in the case of *Chamberlain v. Surrey School Board* (2002, "*Chamberlain*") still failed to address properly the concept of "secularism," a term it seemed to endorse when doing so was inconsistent with how it reconfigured the understanding of the term "secular".

In an attempt to achieve a fairer and more accurate result, the Supreme Court of Canada overturned the reasoning of a trial judge who had espoused what for many would be the common use of the term "secular" as meaning "non-

religious": this involved re-understanding and, in effect, re-defining the meaning of the term "secular." In *Chamberlain,* the Supreme Court of Canada drew on a definition of the "secular" that had been put forward by Justice McKenzie, for the first time in any legal judgment, in the first appeal ruling by the British Columbia Court of Appeal. This definition succinctly encapsulated the pluralist or inclusive sense of the "secular":

> In my opinion, "strictly secular" in the *School Act* can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of a conscience that is religiously informed or not. The meaning of strictly secular is thus pluralist or inclusive in its widest sense. (paragraph 33)[6]

On this reading, convictions emanating from religious beliefs ought to be at no disadvantage in terms of public access and respect to those beliefs of others that do not emanate from religious convictions. The Supreme Court of Canada majority agreed with the reasoning of Justice Gonthier in dissent on another aspect of the decision as to the religiously inclusive meaning of "secular." The term in Canadian law, therefore, now means religiously inclusive, not exclusive. Justice Gonthier gave the following reason for his position:

> In my view, Saunders J. [of the British Columbia Supreme Court where the case was heard at trial] below erred in her assumption that "secular" effectively meant "non-religious". This is incorrect since *nothing in the* [Canadian] *Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy*. I note that the preamble to the *Charter* itself establishes that "... Canada is founded upon principles that recognize the supremacy of God and the rule of law". According to the reasoning espoused by Saunders J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has "belief" or "faith" in something, be it atheistic, agnostic or religious. To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of

> pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism. (paragraph 137, emphasis added)[7]

On this reading, convictions emanating from religious beliefs ought to be at no disadvantage in terms of public access and respect to those beliefs that do not emanate from religious convictions. As a result, the term in Canada now means religiously inclusive, not exclusive. The approach of the Supreme Court of Canada that a public school must accommodate a variety of beliefs is at stark variance with the approaches taken by countries such as France in which the notion of "strict separation" is framed on the basis of exclusivist secularist presuppositions.

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

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

> in a constitutional realm based on accommodation of diversity. (paragraphs 94-98, emphasis added)[8]

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

The characterization at the very outset of this passage in the judgment of a division between the "secular" and the "sacred" does not assist this later conceptualizing since, for a religious citizen, the public order of the State, too, has its own sacred dimension (everything within creation being, in a some sense, "graced" or "holy"). Such citizens are perfectly entitled to function fully within the public sphere and be accommodated and offer others accommodation there. In fact, if we wish those who hold public office or positions to act conscientiously, and their consciences are formed by their beliefs which may well be informed by what they believe to be true about religion, then such public officials must necessarily bring their religious beliefs into the public sphere with them *in some manner*. We cannot properly seek to have conscientious public officials whom we urge to act differently than their religions dictate when they are at work. That is why the principle of accommodation exists: because we do not (except in unusual circumstances) want to force people to leave their beliefs at the door to their work-place. To argue the opposite is to set the groundwork for a requirement of public hypocrisy, hardly what people who recognize the link between religious beliefs and ideas of right and wrong would want.

If we imagine the accommodation of religious clothing or such religious or cultural indicators as a nose-stud as in the recent decision of *MEC for Education, Kwazulu-Natal & others v Pillay*,[9] we see that accommodation is a necessary aspect of life in community (which has public and private dimensions). Where the personal is political the personal religious is in the public political; it will always be a question of principled accommodation not simple exclusion; the co-operation of religious belief and public systems is not, as it is sometimes mis-formulated, the "strict separation" of the two.

Accommodation of differing beliefs is a required principle of the law in relation to religious beliefs as will be seen in some of the decisions cited below (Lenta 2008). To deduce from the examination of the "secular," this article argues that the public is best understood as a realm of competing belief systems: the public realm contains believers of all sorts, whether they be atheist, agnostic or religious. The role of the law is to order or reconcile the relationships when conflict arises between believers or groups of believers and to do so according to the principles of justice, trying wherever possible to give maximum scope to religious association and participation rather than taking a crabbed and narrow

approach such as obtains when the public sphere is said to be non-religious meaning "excludes religious believers and their communities" from active public involvement. As the common usage of the term "secular" refers to the "public" as well as the non-religious, I argue that it would aid clear thinking if the term "public" was used rather than that of the "secular."

Consequences of an Inclusivist "Faith": The Co-operation or Separation of Church and State?

Having established that fairness of treatment requires religious involvement in the public sphere and the possibility of co-operation and that "strict separation" approaches are inconsistent with this inclusivity, we shall now examine the language that is commonly used when a "separation of Church and State" is the dominate language trying to explain the nature of the public.

The jurisdictional distinction between religions and the state can be understood in various ways, but there are two main approaches. The first allows for the *co-operation* of religious organizations and the state and the second precludes such co-operation. I argue that the co-operation model (which is found practically, if not theoretically, in most countries) is superior because it allows for the practical recognition and encouragement of the many religiously motivated projects that contribute so much to charitable activities, volunteerism, membership, education and health care. The separation model is based either upon an undue scepticism (whether religious or non-religious) about the capacity of the religions and the state to order their relationship in respectful ways or upon a secularist understanding of the state as necessarily opposed to the public involvement of religions.

One area where these principles have particular relevance relates to the possibility of public funding for religious projects (such as those involving health care and education to name but two). A public sphere that includes religions on a co-operative basis should make public finances equally available to them as to non-religious projects yet this is rarely the case. All too often what is represented as "neutral" because it is not expressly religious masks the exclusion of religious projects from the public list. To exclude religious projects from public funding has the effect of giving a grant or special licence to atheist and agnostic projects or those that are often unclear about or obfuscate their ideological basis. In co-operative models, the question is where to draw the line between the public and the religions communities that, in large part, make up the public. Part of this search for fairness is to determine the reasonable and unreasonable demands in relation to the provision of state funding and support. The essential point, however, is that this exercise of fairness cannot properly begin until all the players are, as it were, present and accounted for.

Re-Understanding "Diversity" and "Liberalism"

The issue of fairness isn't simply with broad contextual terms such as secular but also with the very approach we have to law and politics under the rubric of "liberalism." How we shall deal with accommodation in the public sphere relates to how we view concepts such as "liberalism" and "diversity" as well. Despite the centrality of such terms in the writing of many commentators, there is a marked failure to define them and a corresponding assumption in most cases that there is but one meaning to such terms.

The English philosopher John Gray identified a version of "liberalism" that poses a threat to genuine liberalism (which is defined in contrast to the sort that threatens proper freedoms). Rather than endorsing living together with disagreement, this version of liberalism risks moving towards "one size fits all" or convergence (Gray 2000: 105; see also Benson 2004, 2008). Genuine liberalism, on the other hand, which Gray calls "modus vivendi," involves rejecting the assumption that tolerance will eventually bring us all to agreement (using law as the means of effecting convergence).

What Gray accomplishes in describing two major sorts of liberalism is a useful approach, as well, to other concepts such as "diversity" and I would like us to keep both liberalism and diversity in mind as we consider the appropriate nature of accommodation. South African jurisprudence tends to favour both a religiously inclusivist conception of the public sphere (which I shall discuss further in a moment) and a plural conception of the public sphere along the lines that Gray urges with reference to *modus vivendi*. For example, Albie Sachs, until recently a judge of the South African Constitutional Court, described the Court's reasoning in a judgement on the constitutional rights of same-sex marriage in the following way:

> .... there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different". In each case, space has been found for members of communities to depart from a majoritarian norm. (paragraphs 60-61)[10]

Of course, where accommodation and diversity are at issue, the problem is not simply majoritarian versus minority status but, rather, whether the person will

be accommodated within a group that does not acknowledge her viewpoint (whether this happened to belong to the majority or the minority). While majority/minority evaluation has some role to play in assessing such things as historic exclusion, it ought not to deflect us from the important task of determining whether a particular claimant is not being accommodated, regardless of whether that claim emanates from a minority or majority viewpoint or from a position of historic disadvantage. In fact, a strong argument can be made that too robust a focus on minoritarian status or historic disadvantage converts a minority claim *for access* into a minority claim *for dominance* or a more recent claim into a privileged position by virtue of its being more recent and therefore less recognized. Such a chronological squint is hardly the thing that should be sheltered as important for acknowledging diversity and pluralism.

In this context it is important to unpack the concept of neutrality to understand it properly and to identify wrong interpretations of it. It is possible, for example, to reject the French version of "neutrality," in which all displays of religious symbols are banned, as not neutral, yet fail to recognise that what undergirds such a false conception of "neutrality" is actually the ideology of "secularism." This ideology is most accurately understood historically as an anti-religious ideology with a particular exclusionary goal and effect.

Where there is a realm of competing belief systems (including atheism and agnosticism alongside religions) the removal of religious expression or practice leaves agnosticism and atheism publically validated but under the guise of "neutrality" and almost invariably "invisible." Such an implicit hegemony is anything but neutral. Though the rationale for such "neutrality" is sometimes described as a response to historical religious strife what this "neutrality" results in can be seen not to be neutral at all once atheism and agnosticism are viewed, as they should be, as belief systems. Under the false neutrality of "secularism" (as defined by the man who coined the term) it is then a virtual open season on the public sphere involvement of religions.

Judges and politicians should guard against the tendency of law and politics to "know what is best" from a position outside of the community that holds to different mores and rules. The temptation is often to impose one set of standards (such as in relation to the roles between men and women or attitudes towards legally contestable sexual matters) against groups who hold to different beliefs. The claim that everyone should endorse, say, a particular view on a controversial area such as "same-sex marriage," if accepted, leads to increasing attacks on the personal and associational freedoms of those who have a legal right to hold alternative views. This has been made amply clear in the litigation history in recent years in both South Africa and Canada as seen in the cases touched upon in this article. Many religious communities now express that they feel themselves under attack in ways unimaginable even decades ago.

A similar error, evident in the most recent decision of the Supreme Court of Canada touching on religion, is to fail to investigate the principles of accommodation properly – in this instance, whether alternative means of ensuring identification could be used by the state.[11] Taking pluralism or diversity seriously means maximizing the ability for different belief systems to have an active public as well as private presence. This will involve a more sensitive approach than has been witnessed in some of the decisions in both South African and Canadian courts of late.[12] The question of identity in relation to driver's licences reappears in a different context but requiring similarly nuanced understandings in relation to a recent decision of the French administrative court. In this decision, the wearing of a *niqab*, which conceals the face except for the eyes, was a ground for denial of citizenship as it is "inconsistent with Republican values" (Bennhold 2008). Where facial contact can be said to be necessary for identification (such as for voting, or airport security) or job-function (such as in banks, airports, or perhaps even schools), then a veil covering the face might be ruled out for good and practical reasons. In addition, if evidence should emerge that face-veil wearing is coerced and demeaning, then one could imagine principles being invoked which would provide relief from such coercion. Where, on the other hand, a simple head-covering (but not face-covering) is what is sought and the face is open, one cannot imagine why accommodation would not be possible in most cases as it has been with respect to other religious identifiers (yarmulkes, turbans, etc.) in other countries such as, for example, Canada.

The Public Rejection of Racism as Opposed to Public Openness about Discussions of Acceptable Sexual Conduct, Gender Roles or Religious Beliefs

Other examples of the failure to accord appropriately nuanced analysis to the debates involving diversity may be seen with respect to many discussions recently surrounding same-sex marriage. What is sometimes argued is that the failure to accept same-sex conduct is akin to racism. What is assumed is that rejecting what others believe about human sexuality equates to a fundamental rejection of the person. Sexual orientation is directly equated with race in these arguments. I believe this analogy is too quick and masks some important distinctions which, if understood, can help us better understand the principles of accommodation and diversity in relation to sexual orientation or religion today.

The appropriate analogy to sexual orientation is religion not race. We are not sure what factors nurture people into their religious or sexual conduct beliefs. Race is not chosen. It should be no more acceptable to force acceptance of one sort of sexual belief (with certain narrow exceptions such as those relating to age or assault which may legitimately be restricted by criminal law) than it is to force

acceptance of the beliefs of one sort of religion. It is not so with other beliefs where we are able to say, for example, "we as a society will actively suppress racism and allow it no place for public debate." Simply put, the claims by some that sexual conduct choice criticisms are akin to racism are wrong. When the analogy is correctly drawn we can observe that it is permissible to disagree about which conduct (religious or sexual) is better or worse. Properly understood such disagreements about my sexual or religious beliefs are not, as with racism, an attack on my fundamental dignity as a person.

A confusion on this point (some of it carefully crafted by the rhetoric of litigation and political debate) has led to the situation where some claimants say, in effect, "if you disagree with my views on sexual conduct you reject my dignity." Substitute the word "religious" for the word "sexual" in the above sentence and you can see the fallacy which seeks to make rejection of certain sexual conduct choices akin to racism (which is a wholesale rejection of persons not based upon conduct). It is possible to respect a person while disagreeing with their sexual or religious choices.

A free society permits a wide variety of choices about some sorts of beliefs but not about others. Religion, gender roles and sexual conduct (within certain limits) are matters about which people are free to offer publicly contestable and publically financially assisted viewpoints – racism is not. Groups dedicated to racialist presuppositions may exist, but their claim to any state support (funding or tax benefits) can be denied legitimately.

Evaluating the Religious Employer: "Diversity" in Action

A further useful illustration of how law and politics have struggled to find an appropriate manner to deal sufficiently in a nuanced way with balancing or reconciling rights in relation to religion may be seen in legal decisions involving the religious employee or the religious employer. Here many of the principles discussed above (discrimination, accommodation, associational rights versus individual rights etc.) and the assumptions made about religious communities are brought out in sometimes stark fashion.

In most contemporary human rights regimes, discrimination on the basis of religion is allowed for religious employers. They are allowed to discriminate in favour of co-religionists. But how far does such an exemption go? Should a "religious employer" be allowed to discriminate at large or only with respect to "religious" positions within the religious organization that are sufficiently connected to what a judge thinks is religiously "core"? The law on this area is unclear and how the tests are to be settled again calls for a nuanced application of the principles.

The "ordinary employee" category – by which a religious employer would be

allowed on a case by case basis to discriminate in favour of a co-religionist candidate on account of *the job duties of a position* – can fail to appreciate that some sorts of work-places are permeated by a religious ethos so that parsing job duties fails to satisfactorily recognize and protect that shared ethos. Focus by a court or tribunal on too narrow an aspect (say, the particular job duties) can distract from what might well be a more appropriate focus – that being the overall religious self-understanding of the employer and the employees of the project.

The case law in relation to this is emerging and the principles from place to place are rather contradictory and turn, in part, on whether religious organizations are going to be required to establish a religious purpose for each and every position or not and whether that is even the correct question to be asking (Lenta 2009, Woolman 2009).

What occurred in the important ruling in the recent Ontario decision in a case called *Heintz* was that education and proselytizing were applied as the relevant framework standard in a *non-educational* setting involving an evangelical employer that ran group homes for developmentally challenged adults. The principal parties have decided not to appeal. Had they done so, an argument on the appeal could well have been that the Court on review asked itself the wrong question by inquiring whether the employee, who had breached a religious conduct clause by living openly in a lesbian relationship in an evangelical Protestant group home, was involved in education or proselytizing. That question, relevant in an educational context (such as *Caldwell*), was not appropriate in a "religious ethos" case such as *Heintz*.[13]

Thus the appeal decision of the Ontario Divisional Court in *Heintz v. Christian Horizons*,[14] while it purports to uphold the very important decision in *Caldwell v. Stuart* – where the Supreme Court of Canada allowed a Catholic school to refuse to re-hire a teacher who had married a divorced man in a civil ceremony in breach of Church teaching – did not do so in the rather literalistic manner in which that case was applied in *Heintz*. Again, nuance is avoided to the detriment of the protection of religious associational rights. As I have argued elsewhere (Benson 2007), and Professor Lenta notes, religion is an equality right itself and religious people are entitled to non-discriminatory treatment *in terms of their religion* as well, so placing equality and non-discrimination over against religion or placing some forms of non-discrimination (say, sexual orientation) as things more important than the religious person's freedom against non-discrimination is an error – though an all too common one. In other decisions the overall ethos of the religious institution rather than the specific job functions of the employee in question have enabled religious-based discrimination to be upheld. Here, again, a nuanced application of the principles is essential to give maximal protection and scope to the contending rights.

Evaluating Religions: How to Deal with Calls for Equality of the Sexes?

Another illustration of how to approach associational rights in relation to religion relates to when it is and is not appropriate to ask the courts to intervene on what might be termed "internal matters" within a religion. This is an area where the line between church and state needs to be articulated carefully in relation to recent calls for the courts to force so-called "constitutional values" on religious associations. In Canada, for example, one approach has suggested that the courts should use arguments based upon "equality" to overturn the discriminatory treatment of women in relation to congregational rules in conservative Judaism or the qualifications for the male-only Priesthood in Roman Catholicism.

What exactly is the line between appropriate and inappropriate state invigilation of what might be called by some (but not by others) "internal religious rules"? This debate is very much underway in both South Africa and Canada as the previous section of this article attempted to show. An interesting example of the call for greater state supervision and intervention in relation to religion is provided by Canadian academic Professor Janice Gross Stein.

Professor Stein has written of her inability to convince her Rabbi that she should be counted as a member in order to determine whether a congregation is present. She acknowledges that there are a variety of alternative expressions of Judaism available but wishes to have the courts imprint a "public" model on her synagogue. She concludes her article by asking rhetorically:

> Are discriminatory religious practices against women a matter only for religious law, as is currently the case under Canadian law which protects freedom of religion as a charter right? Or should the equality rights of the charter have some application when religious institutions are officially recognized and advantaged in fundraising? Does it matter that the Catholic Church, which has special entitlements given to it by the state and benefits from its charitable tax status, refuses to ordain women as priests?

How can we in Canada, in the name of religious freedom, continue furtively and silently to sanction discriminatory practices? This issue was at the core of the debate in Ontario about Shariah law and Orthodox Jewish courts within the framework of state-sanctioned arbitration. (Stein 2006).

There are many errors in how this argument is formulated. As argued above, there is not and ought not to be one public viewpoint, a "one size fits all," on any legally contestable matter (and religious rules relating to the religious roles

of men and women are surely that). The implicit suggestion that it should be illegal to maintain gender distinctions within religions is promulgated on the argument that any gendered distinction are suspect and wrong.

But this assertion is far from clear as a legal proposition given, on the one hand, the law's historic reticence to rule on internal religious matters and, on the other hand, the recognition that differential gender roles are very much private matters in human relations. Like families, churches are free to have their own views about the roles of men and women. In addition, the state provides financial support to families as well, many of whom might well have different views about the role of men and women, and no one has yet suggested that the state's concern about "gender roles" extends all the way into domestic settings (or that there is one settled "State's view" of the matter), yet the application of just such invigilation should logically follow from what Professor Stein is advocating.

Different beliefs about the nature of marriage (whether it could include same-sex couples for example) serves as another example of a category that the state (in law and politics) should not attempt to force agreement on across all associations. In the case *Syndicat Northcrest v. Amselem*, Justice Iacobucci framed the matter in the following way on behalf of the Supreme Court of Canada:

> The State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. *Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.* (paragraph 581, emphasis added)[15]

Second, it is an error to maintain that the "freedom of religion" is in conflict with "equality rights" or, as Stein suggests, that religion is somehow "opposed to the Charter" (Stein 2007). Third, it is implied in Stein's article that these discriminatory rules will necessarily change and that the change it is just the matter of a "new social consensus" emerging. There are four reasons why these formulations are erroneous. First, while many religions discriminate against people from other religions or those who do not follow the dictates of that particular religion, people are free to refrain from practicing a religion or from being part of it. If a particular person finds a particular religious practice discriminatory then he or she is free to leave and find the truth elsewhere. This is preferable to imposing her views on others (perhaps a majority or a substantial minority) who do not feel that they are being discriminated against. To assume, as Stein does, that the flow of time will make religions change does not recognise how dogmas internal

to religions change. Indeed, while some dogmas may change over time, others do not. The assumption that "consensus" will change is not in itself how religions view dogmatic truth or its development. Second, differentiation does not necessarily amount to discrimination. It is only discrimination if it undermines a particular person's dignity and conceptions of "dignity" like "equality" may be allowed to differ in a constitutional democracy as these concepts are in some sense context specific.[16]

Third, religion provides structure and organisation and interfering with it may destabilise particular segments of society. In addition, holding particular religions to ransom may be discriminatory in itself as the state may be showing preference for some religions as opposed to others. Lastly, religion itself is also an equality ground so there is no simple claim that religion is necessarily opposed to equality (as Stein suggests).[17] Removal of charitable status or public benefits (by direct funding or tax exempt status, for example) ought not to be held as a threat over the heads of religious groups that have different views respecting the roles of men and women (and differing conceptions of all sorts of matters which flow from their religious pre-suppositions).

This is not to suggest that in every case line-drawing is going to be easy, but the suggestion above, that internal religious rules ought to be subjected to judicial review, would be chilling to many religious (and other) organizations that seek to establish in their own practices what may not comport with majority views on the matter.[18] The concept of voluntary entrance and non-persecutory exit from religions, combined with the maintenance of spaces for freedom of expression and association in relation to legally contestable ideas (many of which are controversial, and some highly so), are hallmarks of free societies which celebrate genuine diversity and respect for cultural and ethnic differences.

As William Galston has noted with respect to the related idea of autonomy, divergent views are to be expected and should be respected:

> Autonomy is one possible mode of existence in liberal societies – one among many others. Its practice must be respected and safeguarded, but the devotees of autonomy must recognize the need for respectful coexistence with individuals and groups that do not give autonomy pride of place. (Galston cited in Lauwers 2007: 45)

The same must be said for alternative conceptions of such things as approaches to certain kinds of medical ethics and understandings of the relationships between male and female within different cultural groups. With respect to medical practice, for example, one group's "access to choice" on abortion, after all, is another group's "murder of the innocent," and one group's concern that referrals for certain medical procedures (such as in relation to abortion) are not

taking place is another group's concern that such referrals are even considered as required. Similarly, one person's claim for sexual orientation recognition may be viewed by others (say, in a religious workplace where the ethos might be one opposed to recognizing the validity of same-sex conduct) as a threat to religious associational autonomy.

This latter recognition, about differing views on gender or sexual orientation is likely to draw into sharp resolution the difference between what I have called "convergence liberalism," or "one size fits all," and the idea of mutual co-existence between different and differing communities of belief where the starting assumptions – legal to hold – preclude a predetermined agreement on the outcomes.

Conclusion

Questions around accommodation are very much to the fore in many countries. Whether these questions relate to religion and its many different beliefs or to other kinds of beliefs, they will frame our analysis of accommodation in the future.

To list a few that are current at the moment consider the following: Muslim head-coverings and their permissible extent and scope; same-sex marriage and school curriculum or whether marriage commissioners paid by the state should be able to opt-out of performing such marriages; whether there is a right to dissent from what medical personnel would consider as necessary medical services in relation to the provision of "morning-after" pills, abortion, or euthanasia.

In both Canada and South Africa a more nuanced conception of pluralism is being advanced, though, as we have seen, not always consistently and not without significant opposition. Better conceptions of the public sphere can be imagined and created than a "one size fits all" conception of the public sphere such as one sees in France or, to a lesser degree perhaps, in the United States. The manner in which issues are treated in the public – whether they are accepted as legally contestable or not – like the characterization of the sphere in which the debates are occurring (see the discussion of the nature of the "secular" or the "co-operation of Church and State" above), will go a long way either to foreclose debate or to allow it. In many instances, allowing public contestation is the very hallmark of a free and democratic society. One of the first things that dictatorial or totalitarian regimes remove is the public ability to contest "received truths." It follows that the category of non-contestable "truths" should be kept as limited as possible and the debates about what is true maximally encouraged. One way of encouraging this open-textured search for truth is, paradoxically, to maximize the differing associations that contest it.

Speaking practically in relation to the theories reviewed above, we should try

to avoid the "either/or" characterizations, such as between "secular" and "religion," or between "reason" and "religion," that I have argued are unfair or inaccurate. Many of the dualisms touched upon cause a great deal of confusion and run against the principles of inclusion, diversity, respect and accommodation that constitutional legal cultures claim to recognize. We must also be on guard against bleaching diversity out of the public sphere such as where there is said to be, for example, "one" conception of marriage or male and female relationships, or of views about abortion, as "public" statements. A variety of viewpoints are publically acceptable where matters have not been closed off in the public (such as they have been in the case of racism). In particular in morally contested areas, we must encourage civil debate and open expression as means of furthering greater understanding between citizens.

Thus, the public sphere should be understood as *inclusive* of all sorts of belief systems (whether atheist, agnostic or religious) rather than a-religiously "secular," where by "secular" we mean "stripped of religion." When the issue is accommodation, we ought not to be too concerned about minority/majority viewpoints, certainly not as a requirement for there to be accommodation.

The title of the conference that gave the occasion for this article, "In the Presence of Faith," calls us to reconsider, as I have argued, both what we mean by "faith" and "belief" and how we conceive of the nature of the "public." Faith and belief are not simply other words for "religion." In fact, many of those who do not believe that they possess "faith" in fact do so – they just believe in different things than those holding religious beliefs. Furthermore, belief in agnostic or atheist assumptions should give no greater access or privilege in the public sphere in such areas as access to the public sphere or funding. Similarly, scientific claims are, at the deepest level, also claims within faith systems, so that the empirical, important though it is, has no greater claim to public dominance than the non-empirical. Justice, after all, cannot be weighed and measured by the tools of science, and dignity cannot be doled out by the yard.

This does not mean, however, that the State (law and politics) cannot be justified in requiring certain minimum standards in terms of the common good. Thus, to give one example, in the area of public education, a very carefully crafted program on "civics" containing certain minimal requirements for civic recognitions and legal principles of nondiscrimination (properly presented) might well be required by the State as the *quid pro quo* for public funding. Such programs and regulations, however, must be very carefully drawn so as not to smuggle in claims for dominance under the guise of, say, "non-discrimination" or "equality" education. Attention to the point about diversity made above (in relation to religious or sexual orientation claimants) would need to be well understood as a limit on what can be claimed as a public requirement.

Secondly, the article has established a strong base for the idea of a religiously

inclusive public sphere that embraces both diversity and accommodation as aspects of *modus vivendi*. It has argued in light of the concern that a failure to address these can lead to the triumph of the default culture – which is one of convergence or "one size fits all" – when it manifestly does not.

One of the questions raised but not fully analysed by this article is why the dualistic language, that opposes the "secular" (when what is meant is the public) to the religious and which functions in many ways to exclude religion from full public participation, became so readily endorsed by religious leaders and individuals, many or most of whom came to speak of the public sphere as one insulated from religion. They came, in short, to speak the language of the public sphere as envisioned by secularism. That most of them also have little idea what "secularism" itself entails is a related issue of great importance but also one that awaits other forums.

A society dedicated to freedom should acknowledge that the essence of a liberal spirit is found in persons who appreciate liberty not just for themselves and their own group but for others and their groups as well: liberty of this sort is both universal and diverse and based upon a recognition of shared humanity expressing itself in a bewildering variety of ways. The use of law and politics to force the abandonment of cherished beliefs will often produce fear and violence. Co-existence with respect for others is not the same thing as understanding and agreeing with their conclusions. It may well be in the achievement of living together in pluralistic societies with puzzlement and disagreement (some of it vehement), but living together in harmony just the same, that liberty will find its only secure future.

Notes

[1] *Christian Education South Africa v. Minister of* Education 2000 (4) SA 757 (CC), paragraph 36; referred to in the judgment in Canada on the case *Bruker v. Marcovitz* 2007 SCC 54. For the scope of freedom of religion in South Africa, much of which was based on Canadian decisions, see Currie and de Waal (2005: 336-357).

[2] A few individuals, aware of the opportunity presented by Section 234 and believing that ad hoc litigation was not the best way to develop a richer understanding of the shared principles undergirding the freedom of religion, started drafting a Charter of Religious Rights and Freedoms for South Africa in late 2007 and early 2008. On 14 February 2008, this draft was officially presented to and discussed by a meeting of various religious groups in South Africa. The religious groupings represented included twenty one Christian denominations, among which were various denominations and African Independent churches including the ZCC, the Jewish and Muslim religions, and the SA Tamil Federation. The meeting also included representatives from various academic institutions and statutory bodies. After thorough discussion, the meeting referred the draft Charter to a Continuation Committee which the meeting appointed . This Committee consisted of the chairperson Prof. P. Coertzen

(theologian), Prof. Rassie Malherbe (Constitutional jurist at the University of Johannesburg), Dr. Chris Landman and Dr. Willem Langeveldt (both then Commissioners of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL)), Sheik Achmat Sedick, Rabbi Fox, Mr. Eric Jackson (Church of the Latterday Saints), and the present author. Dr. Nokuzola Mdende (then academic in African Indigenous Religions at the University of South Africa) and Rev. A. Knoetze (also Commissioner of the CRL) were co-opted to the Committee at later stages.

[3] While the Continuity Committee strove to meet with representatives from all religious communities, representing majority as well as minority opinions within religious traditions, the drafters of the Proposed Charter were acutely aware that their work could allow the estrangement and disenfranchisement of certain traits within religious traditions. Due to its aim and duty to draft an inclusive text, acceptable across the board to a wide range of religious groupings, and due to the fact that it is the representative voices within each tradition that will have to sign the final Charter, the Committee was not able to acknowledge all minority input into the draft Charter though all submissions received were taken into account and discussed extensively by the Continuity Committee and as much as possible dissentient voices considered in the drafting of the final provisions. International opinion was also sought, received and considered.

[4] Personal communication, Leon Wessels, then Human Rights Commission member Pretoria, May 2008.

[5] Something of this sort occurred in Canada where a Commission made up of two academics including noted philosopher Charles Taylor endorsed "open secularism" and defined secularism at variance with its history (see Benson 2007a). As with the call for "open laicism" it is wiser to start afresh with better terminology. Particularly with respect to "secularism" the term is better avoided entirely. An "inclusive public sphere" is clear and makes sense and a much more historically viable term than "open secularism."

[6] *Chamberlain v. Surrey School Board* (2000), 80 B.C.L.R. (3d) 181; reversing (1998), 60 B.C.L.R. (3d) 311 (S.C.). ; For a detailed analysis of this decision see Benson and Miller 2000.

[7] *Chamberlain v. Surrey School District*, No. 36, [2002] 4 S.C.R. 710, 749.

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

[9] *MEC for Education, Kwazulu-Natal & others v Pillay* 2008 (1) SA 474 (CC). For detailed discussion of this decision see (Lenta, 2008).

[10] Fourie, note #8 above. For a discussion of this decision and the question of associational rights in general, see (Benson 2008).

[11] *Alberta v. Hutterian Brethren of Wilson Colony* 2009 SCC 37, [2009] 2 S.C.R. 567, the

most recent decision of the Supreme Court of Canada touching upon religion, ruled that Hutterites, who, for religious reasons, may not have their photographs used for identification purposes, must nonetheless comply with the provincial law for reasons related to the public interest in identifying individuals in relation to driving licences. The decision has been widely criticized for not considering sufficiently that other means (such as finger-prints) could have been used to achieve the state's purposes which would allow recognition of the concerns of the religious community. The decision was carried by a narrow majority, with three of seven justices in dissent. Two other significant decisions, one from South Africa and one from Canada and both involving the line between court determinations and religious rules (in both cases, Judaism) are: *Taylor v. Kurstag and Others* 2005 (1) SA 362 (W) the South African court declined to overrule a religious excommunication of a divorced husband for breaching a divorce agreement. In *Bruker v. Marcovitz* 2007 SCC 54 the court required a Jewish man to issue a *get* (divorce) that the Canadian Supreme court found he had promised contractually as part of settlement discussions.

12 For recent views on this and other decisions on maximising diversity, see Benson (2008), Lenta (2009) and Woolman (2009). Both Lenta and Woolman suggest that greater respect from the courts for associational differences (particularly with respect to religion) is needed, but the overall importance of their arguments is somewhat dulled by their failure to examine the more strident and threatening dimensions of anti-religious sentiment that can operate within definitional ambiguity. Clearly, academic commentary such as theirs is reaching toward, but is tentative about, identifying a "one size fits all" liberalism that has emerged and is skewing analysis in relation to organizations (such as religious associations) which function according to a religious ethos that will, almost by definition, not be understood outside the particular associational sub-grouping. Listening to religious groups of all sorts today one cannot help but be struck by how many religious communities feel themselves under a virtual siege of litigation and state-backed threats to religious autonomy (such as obtaining or maintaining charitable status in Canada). The use of the Section 234 South African Charter of Religious Rights and Freedoms initiative in South Africa is one sort of response from a wide variety of religious bodies all banding together to assert what they believe to be rights needing greater clarification and recognition. How far it is successful remains to be seen but the initiative itself is noteworthy.

13 Lenta (2009) and Woolman (2009) have written illuminatingly in this area, though neither could have dealt with the important Canadian appeal decision in *Heintz* (see next footnote) as that decision had not been delivered when they wrote. The South African decision which raises similar points, and the one reviewed by both the above authors is the Equality Court's judgment in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*, 2009 (4) SA 510 (EqC). Strydom (gay church organist). That decision and the Canadian decisions of *Caldwell* (Catholic teacher marrying in civil ceremony in breach of church rules) and *Heintz* (lesbian employee in home run by evangelicals for developmentally handicapped adults where religious conduct requirements precluded gay and lesbian conduct as well as other forms of sexual behaviour) should be reviewed together to understand the current tensions in the area of religious associational rights and employment discrimination.

[14] *Heintz v. Christian Horizons* 2008 65 C.C.E.L. (3d) 218, overturned in part on review by the Ontario Divisional Court in *Ontario Human Rights Commission v. Christian Horizons* 2010 ONSC 2105, Court File No.: 221/08, 14 May 2010 (not yet reported, available on Quicklaw [2010] O.J. No. 2059.). For a contrary example that gives greater recognition of religious associational rights by respecting an overall religious ethos, see *Schroen* v. *Steinbach Bible College* (35 CHRR D/1, D.R. Knight, Q.C. Board of Adjudication, 26 July 1999).

[15] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551.

[16] See *Harksen v. Lane NO and Others* 1997 (11) BCLR 1489 (CC), Paragraph 46, and *President of the Republic of South Africa and Another v. Hugo* 1997 (6) BCLR 708 (CC), Paragraph 41.

[17] Section 9 of the South African Bill of Rights deals with "equality" lists, and section 9(3) places "religion" alongside "gender" and "sex" as protected grounds against direct or indirect discrimination. The Canadian Charter of Rights and Freedoms lists "religion" and "sex" side by side as "equality rights" (Section 15).

[18] Two cases, one from Canada and the other from South Africa and both in relation to Jewish marriage rules, illustrate where the courts have drawn the line in relation to religious rules and the law (see Benson 2008: 308-312).

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