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## **The legal revolution against the accommodation of religion: the secular age versus the sexular age**

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### 3 BEFORE THE REVOLUTION: RELIGION'S UNIQUE PLACE IN LIBERAL DEMOCRACY

#### 3.1 Introduction

If we apply Kuhn's model to the law, religion's special treatment in the law represents the established or "old" paradigm which is now verging on crisis.<sup>120</sup> To understand how existing accommodations came to be the accepted paradigm is complex. There is no single or short answer. Rather, there are multiple answers or, at least, reasonable explanations that involve history, practical politics, and philosophy. This section will examine those explanations and articulate the unique place of religion in Western democracies, with particular emphasis on the Canadian context.

#### 3.2 The Search for Meaning and Purpose

The special status of religion in the law is rooted in what it means to be human.<sup>121</sup> The law, after all, reflects the society that it governs, and society is the product and producer of the human quest for meaning. "This world's no blot for us," declares poet Robert Browning, "Nor blank; it means intensely, and means good: / To find its meaning is my meat and drink."<sup>122</sup> Indeed, ontological and epistemological questions of identity and knowledge – *what do I know? How can I know that I know? Who am I? Where did I come from? What is my purpose? Where am I going?* – are fundamental to human existence and coexistence.

Recent scholarship suggests that from a very early age, human beings search for meaning and purpose.<sup>123</sup> "Not only do kids look for purpose in human-made things (artifacts) like forks and pipes," explains psychology professor Justin L. Barrett, "but also in natural objects like rocks and rivers, and plants and animals."<sup>124</sup> Children also can understand the concept of causation. According to Barrett, "[t]his tendency to easily find agents (sometimes without large amounts of evidence) persists into adulthood and make the discovery of gods not only possible but likely."<sup>125</sup>

There is then an inherent desire or a teleological reasoning process that helps us comprehend purpose, design and function.<sup>126</sup> That is not to say "that religion in is 'hardwired' or 'innate' – rather that children have propensities to believe in gods because of how their minds naturally work."<sup>127</sup>

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<sup>120</sup> However, as explained below, in the grand scheme of things, religious freedom and the protection of religion in Western democracies is a relatively new development in the history of human civilization. It is the result of the Protestant Reformation and the ensuing Age of Enlightenment. But it is this liberal democratic view that is being challenged.

<sup>121</sup> Justice Harry Blackmun said that law and religion "are an inherent part of the calculus of how a man should live," foreword to John Witte Jr. & Frank S. Alexander, eds, *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta: Scholars, 1988), ix. Justice Ivan Rand, as noted in this book, saw religious freedom as an "original freedom."

<sup>122</sup> Robert Browning, "Fra Lippo Lippi," in *My Last Duchess and Other Poems* (New York: Dover Publications, 1993), at 44, lines 313-315.

<sup>123</sup> Justin L. Barrett, *Born Believers: The Science of Children's Religious Belief* (New York: Free Press, 2012).

<sup>124</sup> *Ibid* at 44.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid* at 45.

<sup>127</sup> Justin L. Barrett, "Let's Stick to the Science," *The Guardian* (29 November 2008), online: <<https://www.theguardian.com/commentisfree/2008/nov/29/religion-children>>.

Our search for meaning has had a profound impact on the place of religion within our legal framework. The historical record indicates that religion was included in the constitutions of liberal democracies not by chance, but by design.<sup>128</sup> This is not to suggest that religion was a political invention designed to manipulate colonial populations, nor simply a calculated “means of pinning down and managing the ideas and practices”<sup>129</sup> for the best interests of the West. Rather, religion’s special treatment in the law is the combined result of human events and philosophical inquiry. Religion has always had, and continues to have, a key role in assisting humanity in understanding the world, particularly one person’s duty toward the other in alleviating suffering. While it is certainly true that individuals may show compassion or generosity on secular moral grounds, religion has long provided the ethical and spiritual impetus for philanthropy and social justice, especially on a communal scale. Indeed, religion is a special kind of experience, incomparable with other phenomena, as recent research makes clear.

### 3.3 The Tale of Two Sovereignties

#### 3.3.1 What is Religion?

Western democracies specifically included religion<sup>130</sup> as a protected head in their constitutions; such treatment presupposes that religion is inherently valuable. It merits protection. However, the state cannot protect religion unless it knows what religion is. The citizen cannot hold the state accountable until the boundaries of protection are clear. Therefore, it is imperative for a liberal democracy to articulate a definition of religion. However, the complexity of defining religion is daunting, especially since connotations have shifted considerably over time.

For instance, in the Western context, “religion” in the law historically referred to Christianity – with a further distinction between Protestantism and Roman Catholicism. So, for instance, the 1688 *Bill of Rights* in England guaranteed deliverance “from the Violation of their Rights ... and from all other Attempts upon their Religion Rights and Liberties,” but explicitly stated that any who “shall professe the Popish Religion shall be excluded”.<sup>131</sup> Today, of course, references to religion encompass a much wider array of belief systems. However, the fact remains that the Christian faith in particular has been highly influential on Western legal traditions. As Justice Ivan Rand of the Supreme Court of Canada stated, “The Christian religion stands in the first rank of social, political and juristic importance.”<sup>132</sup>

The second challenge in defining religion is identified by Slotte and Arsheim, who note:

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<sup>128</sup> Consider the full debate over the First Amendment in the US Constitution so aptly retold in John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder, CO: Westview Press, 2000) at 64-86.

<sup>129</sup> Derek Peterson & Darren Walhof, eds, *The Invention of Religion: Rethinking belief in Politics and History* (Rutgers University Press, 2002), 7.

<sup>130</sup> It has been, in the West, the Christian religion that has had the most profound impact on our law. “Freedom of religion,” must be understood in the context of the “Christian” West. Over time the term “religion” within the law has come to mean not just the Christian religion but religion in general.

<sup>131</sup> *Bill of Rights* (UK), 1688, 1 Will and Mar Sess 2, c 2, online: <[http://www.legislation.gov.uk/aep/WillandMarSess2/1/2#commentary-M\\_F\\_9ca4e9d8-06b9-44aa-c5d2-e536b3f77e06](http://www.legislation.gov.uk/aep/WillandMarSess2/1/2#commentary-M_F_9ca4e9d8-06b9-44aa-c5d2-e536b3f77e06)>.

<sup>132</sup> *Saumur*, *supra* note 6 at para 88.

A key issue ... is the distinction between the 'inside' and the 'outside' of religion; should religious traditions be conceptualized according to their own categories, vocabularies, and forms of reasoning; or should they be approached from the outside, using 'neutral' categories, not derived from any particular tradition, but rather from neighbouring scientific disciplines?<sup>133</sup>

Internal and external definitions are further complicated by attempts to conform with what the law considers religion. This is because there are significant legal protections and accommodations granted to individuals if their beliefs and practices accord with generally applicable legal norms.

Finally, although such bifurcation may not reflect the experiences of religious adherents themselves, from a legal standpoint "religion" is defined as being private in nature.<sup>134</sup> This definition emphasizes the individual's autonomy and choice. Religion has been given a broad scope in the law, since the law avoids interfering with the individual's beliefs. As discussed below a strong argument can be made that all our rights derived from the grant of religious freedom.

The law's competence is said to be in regulating religious practice (which is thereby in the public realm and fair game for law's regulation), ensuring that such practice<sup>135</sup> comports with the values of "a free and democratic society."

The inclination to fit under religion's tent suggests that the law might be best served in addressing such debates with an articulate theory of why religion is protected. Such a theory would make clear what is meant by the term "religion." But is religion best served by a theoretical understanding of the concept, or would a more practical definition be appropriate? As Arnal and McMutcheon point out, "no statement about what religion *is* can avoid at least partially explaining what religion *does*, where it comes from, and how it works."<sup>136</sup>

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<sup>133</sup> Pamela Slotte & Helge Arsheim, "The Ministerial Exception—Comparative Perspectives" (2015) 4:2 Oxford J. L. & Rel. at 172.

<sup>134</sup> In *Amselem*, *supra* note 7 at para 39, the SCC stated: "In order to define religious freedom, we must first ask ourselves what we mean by 'religion'. While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to *one's self-definition* and spiritual fulfilment, the practices of which allow *individuals* to foster a connection with the divine or with the subject or object of that spiritual faith" (emphasis added). See also Benjamin Berger: "From the perspective of the adherent, religion cannot be left in the home or on the steps of Parliament. The religious conscience ascribes to life a divine dimension that infuses all aspects of being. The authority of the divine extends to all decisions, actions, times, and places in the life of the devout. Unlike the powers of a liberal state, the religious conscience is profoundly jurisdictional" in B. Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 Can. J.L. & Soc. 39 at 47 ["Limits of Belief"].

<sup>135</sup> *TWU* 2001, *supra* note 26 at para 36: "Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them."

<sup>136</sup> William E. Arnal & Russell T. McCutcheon, *The Sacred Is the Profane: The Political Nature of "Religion"* (Oxford: OUP, 2012).

### 3.3.1.1 The Religion Debate

The current legal revolution against the law's special treatment of religion is occurring on the heels of a fierce debate about religion's place in society and in the context of a post 9/11 upheaval of religious extremism that has gripped the imagination of society at large. Several authors of considerable academic credentials suggest that religion is inherently destructive to individuals and society. These include Sam Harris,<sup>137</sup> Richard Dawkins<sup>138</sup> and Daniel Dennett.<sup>139</sup>

Jonathan Haidt calls them the New Atheists who claim "to speak for science and to exemplify the values of science – particularly its open-mindedness and its insistence that claims be grounded in reason and empirical evidence, not faith and emotion."<sup>140</sup>

However, Haidt, a scientist in his own right as a professor of psychology, challenges their dismissive attitudes toward religion. Haidt takes a middle of the road approach toward religion, recognizing its positive contributions to society – particularly the ability to bind strangers together (therefore making society a cooperative venture) and eliminating the "freerider" problem,<sup>141</sup> i.e. those who would take from society's benefits without contributing. At the same time, Haidt is also mindful of religion's capacity to obscure its followers' vision, resulting in selfish hypocrites who put on a mere show of virtue.<sup>142</sup> According to Haidt, "Morality binds and blinds." The morality commitments of religious communities create a contextual framework that has the effect of establishing moral boundaries and thereby pressuring outliers to come into conformity with the majority.

The New Atheists define religion, as does Brian Leiter who is discussed below, as irrational.<sup>143</sup> Harris describes religion or "faith" as "belief in, and life orientation toward, certain historical and metaphysical propositions." In other words, "'an act of knowledge that has a low degree of evidence.' ... [Being] the majority of the faithful in every religious tradition."<sup>144</sup> He claims, "faith is what credulity becomes when it finally achieves escape velocity from the constraints of terrestrial discourse – constraints like reasonableness, internal coherence, civility, and candor."<sup>145</sup>

While the New Atheists may be considered "new," their anti-religious arguments rhyme with the past. Consider US Justice John Paul Stevens' reference to Clarence Darrow: "the distinction between the religious and the secular is a fundamental one. To quote from ... Darrow's argument in the Scopes case: 'The realm of religion ... is where knowledge leaves off,

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<sup>137</sup> Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (New York: Norton, 2004); *Letter to a Christian Nation* (New York: Knopf, 2006); *The Moral Landscape: How Science Can Determine Human Values* (New York: Free Press, 2010).

<sup>138</sup> Richard Dawkins, *The God Delusion* (Boston: Houghton Mifflin, 2006).

<sup>139</sup> Daniel C. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (New York: Penguin, 2006).

<sup>140</sup> Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012) at 249.

<sup>141</sup> *Ibid* at 257.

<sup>142</sup> *Ibid* at xv, 248.

<sup>143</sup> There is a fideistic tradition within Christian theology that does not consider irrationality as negative. "Credo quia absurdum" is attributed to Tertullian. However, that characterization may not be a fair reading. See Peter Harrison, "'I Believe Because it is Absurd': The Enlightenment Invention of Tertullian's Credo" (2017) 86:2 Church History, 339-364, doi:10.1017/S0009640717000531.

<sup>144</sup> Harris, *End of Faith*, *supra* note 137 at 65.

<sup>145</sup> *Ibid*.

and where faith begins....”<sup>146</sup> One must ask what makes Darrow an authority on religion and knowledge that would be sufficient for the US Supreme Court to adopt his proposition that religion is not knowledge? This lack of critical analysis about religion by the Court suggests a dismissive attitude toward religion.

Beliefs lead to action, says Harris: “A belief is a lever that, once pulled, moves almost everything else in a person’s life.”<sup>147</sup> Beliefs “define your vision of the world; they dictate your behaviour; they determine your emotional response to other human beings.”<sup>148</sup> For Harris, religion is a form of possession – one so captivated by religion is incapable of critical thought and inquiry.

Dawkins’ description of the ‘God Hypothesis’ is that “there exists a superhuman, supernatural intelligence who deliberately designed and created the universe and everything in it, including us.”<sup>149</sup> This God, says Dawkins, “is a delusion; and, as later chapters will show, a pernicious delusion.”<sup>150</sup>

These definitions highlight a belief in the supernatural that then leads to a host of damaging acts. Such beliefs are irrational and not subject to evidence.

Haidt argues that there is more to religion than believing and doing – the missing element of the New Atheist analysis, he notes, is the notion of belonging. He insists, “You’ve got to look at the ways that religious beliefs work with religious practices to create a religious community.”<sup>151</sup> Since religions are social facts, says Haidt, religion cannot be studied in lone individuals any more than a bee can be isolated from the hive.<sup>152</sup>

Rather, one must view it as a collective phenomenon that also has individual dimensions. As Durkheim observed, humans are homo duplex. We exist at two levels “as an individual and as part of the larger society.”<sup>153</sup> We have a “profane” realm (Haidt calls it the “chimp” domain) where we are concerned with day-to-day worries about wealth, health, and reputation. But we experience a nagging sense of something missing, something of greater importance.<sup>154</sup> Most of our time (90 percent) is spent in the profane. The other realm is “higher” – it is the “sacred” space where the collective (Haidt calls it the “bee” domain) temporarily pulls us away from the profane to the spiritual. Haidt suggests that religion has a “hive switch” that causes us to switch back and forth. So, we are 90 percent “chimp” and 10 percent “bee.”<sup>155</sup>

This has implications for understanding what aspects of religion the law protects. While most legal theorists see the law’s protection of religious freedom as an individual (“chimp”) right, and indeed it is, it is also more than that – it is the right of a religious community as well. The Supreme Court of Canada is now becoming reacquainted with religion as a communal

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<sup>146</sup> *Wolman v. Walter* 433 U.S. 229 (1977) at 265.

<sup>147</sup> Harris, *End of Faith*, *supra* note 137 at 12.

<sup>148</sup> *Ibid.*

<sup>149</sup> Dawkins, *supra* note 138 at 31.

<sup>150</sup> *Ibid.*

<sup>151</sup> Haidt, *supra* note 140 at 250.

<sup>152</sup> *Ibid* at 248, 227.

<sup>153</sup> *Ibid* at 225.

<sup>154</sup> *Ibid* at 226.

<sup>155</sup> *Ibid* at 189-220.

experience<sup>156</sup> (i.e. the “bee” nature of religion) which has lain dormant in the shadows of the judicial preoccupation with individual religious freedom.

Haidt calls on scientists to broaden their study of religion beyond the emphasis on individuals and their supernatural beliefs to “groups and their binding practices.”<sup>157</sup> Otherwise, the description of religion as solely an individual pursuit is not accurate. His recommendation is applicable to the legal field – the communal reality of religious freedom has long been overlooked and the emphasis on the individual has led to unfortunate results.<sup>158</sup> And, it necessarily engages the debate over the public/private and belief/action dimensions of belief systems.<sup>159</sup>

With this in mind, Haidt recommends Emile Durkheim’s definition of religion:  
[A] religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and surrounded by prohibitions – beliefs and practices that unite its adherents in a single moral community called a Church.<sup>160</sup>

What Durkheim says next is telling: “The second element that takes its place in our definition is therefore no less essential than the first: demonstrating that the idea of religion is inseparable from the idea of a church suggests that religion must be something eminently collective.”<sup>161</sup> Indeed, while religion involves an individual belief in the supernatural, it also involves a community of believers who share the same moral and worldview commitments that reinforce individual beliefs, providing a shared social context.

For the New Atheists, religion is little more than a noxious disease.<sup>162</sup> Their hostility is vividly expressed by Richard Dawkins who said, “I despise people who whose belief in religion

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<sup>156</sup> Justice Bertha Wilson, speaking in partial dissent, in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*], at para 207 noted, “Yet it seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group.” It was not until 2009 that the group right of religious freedom was again recognized in a serious way by the SCC when Justice Rosalie Abella, speaking in dissent, recognized the “dual nature of freedom of religion” in *Hutterian Brethren*, *supra* note 5, at para 130. In *Loyola High School v. Quebec (AG)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para 33 [*Loyola*], Justice Abella, speaking for the majority noted, “I recognize that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice, such as the transmission of their faith.” Additionally, Chief Justice McLachlin and Justice Moldaver, in the *Loyola* decision at para 91, stated, “The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola.”

<sup>157</sup> Haidt, *supra* note 140 at 248.

<sup>158</sup> This was the case in *Hutterian Brethren*, *supra* note 5, where the SCC refused to grant the Hutterian Brethren exemption from the government’s requirement that they have a photo taken for their driver’s license – even though they had the exemption for 29 years prior to the litigation. Justice Rosalie Abella’s dissent in that case rightly, in my view, recognized that religion was a communal affair and the court’s decision, “severely compromises the autonomous character of their religious community” (at para 114).

<sup>159</sup> Of course, our context (post-9/11) has created a fear of the bonding factor of religion. Some religious communities bond so well that they exclude themselves from mainstream society. That’s why J. S. Mill wanted a “Religion of Humanity” and why the French have their *laïcité*, or secularism. See Linda C. Raeder, *John Stuart Mill and the Religion of Humanity* (Columbia, MO: University of Missouri Press, 2002).

<sup>160</sup> Haidt quotes from a different translation than I have used. However, I find this 2001 translation by Carol Cosman more compelling: Emile Durkheim, *The Elementary Forms of Religious Life* (Oxford: Oxford University Press, 2001), 46.

<sup>161</sup> *Ibid.*

<sup>162</sup> Dawkins, *supra* note 138 at 176.



is so firm and so unshakable that they actually think it justifies killing people.”<sup>163</sup> Haidt sums up the post-apocalyptic overtones of the New Atheist position, explaining that:

If religion is a virus or a parasite that exploits a set of cognitive by-products for its benefit, not ours, then we ought to rid ourselves of it. Scientists, humanists, and the small number of others who have escaped infection and are still able to reason must work together to break the spell, lift the delusion, and bring about the end of faith.<sup>164</sup>

There is another story, different from the New Atheist position, that is gaining ground in the scientific study of religion. While Scott Atran and Joe Henrich generally agree with the evolutionary premise described by the New Atheists, they suggest “religions are sets of cultural innovations that spread to the extent that they make groups more cohesive and cooperative.”<sup>165</sup> What evolved was religion, not people or their genes. Religion makes civilization possible. However, there is a dark side to religion – the very cohesive nature of religious identity is also the source of conflict, especially conflicts with other groups. In a pluralist society, such as Canada, we have to find harmony in overarching principles. Those principles must be common to humanity, not just one religious (or indeed, non-religious) community.

According to Ara Norenzayan, “[r]eligion appears to be both a maker and an unmaker of conflict.”<sup>166</sup> While our knowledge is limited, those who study this phenomenon suggest three reasons why this is the case. First, the “Big Gods” concept – the idea of the omniscient, omnipotent, omnipresent God who watches over the affairs of everyone (“supernatural monitoring”) – builds trust and cooperation among strangers who are also of the same view of God. At the same time, this is the source of intergroup conflict, since “social cohesion inevitably involves setting up boundaries between those who can be trusted and those who cannot.”<sup>167</sup> Those who are not following the same norms or believing in the same god are excluded because they cannot be trusted.

Second, the religious practices and rituals that build social cohesion also exclude those who do not take part. This is referred to as the social solidarity hypothesis. The evidence for that is, according to Norenzayan, more convincing than the religious belief hypothesis which argues there is “something about religious belief itself [that] causes intergroup hostility.”<sup>168</sup> This is contrary to Harris’s “belief as lever” claim noted above. Norenzayan suggests that the religious belief hypothesis lacks scientific evidence and involves polemical debate.

The studies suggest that “[r]eligious participation cements social ties and binds group solidarity. But when groups are in conflict, this solidarity translates into the willingness to sacrifice to defend the group against perceived enemies.”<sup>169</sup> It is not belief alone that results in religious violence against outsiders, but the participation in group religious activities that make

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<sup>163</sup> “Richard Dawkins, ‘Somebody as intelligent as Jesus would have been an atheist’,” *The Guardian*, (27 October 2011), online (video): <<https://www.youtube.com/watch?v=dQ5QG3MUTtg>>

<sup>164</sup> Haidt, *supra* note 140 at 254-255.

<sup>165</sup> *Ibid* at 255, referring to the study, Scott Atran & Joseph Henrich, “The Evolution of Religion: How Cognitive By-Products, Adaptive Learning Heuristics, Ritual Displays, and Group Competition Generate Deep Commitments to Prosocial Religions,” (2010) 5:18 *Biol Theory*.

<sup>166</sup> Ara Norenzayan, *Big Gods: How Religion Transformed Cooperation and Conflict* (Princeton and Oxford: Princeton University Press, 2013), 160.

<sup>167</sup> *Ibid*.

<sup>168</sup> *Ibid* at 163.

<sup>169</sup> *Ibid* at 164.

the difference. Norenzayan studied Palestinian suicide bombers in the West Bank and found that those who attended mosques often were twice to three-and-a-half times more likely to support suicide attacks. The frequency of prayer was statistically unrelated.<sup>170</sup> This supports the view that it is not only belief but belief and social context that may lead to violent acts.

Third, the sacred “values” of religions make it virtually impossible to compromise. As Norenzayan explains, those of us in the WEIRD (Western, Educated, Industrialized, Rich, and Democratic) countries are said to operate based on the rational actor paradigm that assumes we are motivated by self-interest and use a cost-benefit analysis as to what we support.<sup>171</sup> Our public policy mechanisms make decisions based on this paradigm. However, non-WEIRD countries may best be described as using the devoted actor paradigm that rejects personal self-interest but holds uncompromisingly to strong moral convictions on the issues at hand.<sup>172</sup>

The Western frame of reference does not appreciate the sacred teachings and principles of the non-Western world, which is a formula for disaster in intercultural relations. Material incentives do not make for reconciliation. In fact, trying to convince non-Western people by means of material incentives risks insulting them. There must be, says Norenzayan, a “recognition of the other’s suffering, or appreciating their core values, even if we on this side do not share them” in order to transform the dynamic of conflict.<sup>173</sup>

Norenzayan’s research provides a persuasive counterweight to the negative view of religion held by the New Atheists. It also gives us important clues as to why Christianity has had such an impact on Western law. Christianity is among the few religious movements on earth “that won in the cultural marketplace.”<sup>174</sup> It has been successful in organizing the West into a “large, anonymous, yet cohesive and highly cooperative”<sup>175</sup> society just as other Big God religions<sup>176</sup> have done in their respective social contexts.

The Christian religion provided the moral framework and the founding mythology that bound the different language and cultural groups of Western democracies together. The modern age, being the era that commenced in the aftermath of the Reformation, provided a unique conceptualization of governance that put individual liberty, autonomy and choice at its centre. The individual became the focal point, with the state kept at bay by means of constitutional documents that recognized individual primacy. Religion, having both individual and communal aspects, would play a major role in the realization of individual rights.

Despite this heritage, liberal democracies have drifted from reliance on their Christian ideological foundations to an increasingly non-religious perspective. From all popular accounts, religious influence in society is in a marked decline.<sup>177</sup> This has meant a growing socio-political and legal inability to comprehend the basic religio-legal axioms that we have inherited from an era of greater understanding between Christianity and the law.<sup>178</sup> This was evident in the Canada Summer Jobs Program (CSJ) controversy of 2018.

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<sup>170</sup> *Ibid* at 163.

<sup>171</sup> *Ibid* at 166-167.

<sup>172</sup> *Ibid*.

<sup>173</sup> *Ibid* at 168. As will be noted below, the SCC’s failure to equally appreciate the deep cultural commitments of TWU played a major role in rejecting TWU’s law school bIbid

<sup>174</sup> *Ibid* at 2.

<sup>175</sup> *Ibid* at 3.

<sup>176</sup> That is, Judaism and Islam.

<sup>177</sup> Clarke & Macdonald, *supra* note 31.

<sup>178</sup> See for example the SCC’s note about the change in understanding of the term “marriage” in the law. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para 22 [*Same-Sex Marriage*].

The CSJ provides government summer employment funding to charities, non-profits, and small businesses for students. The 2018 summer application demanded applicants attest to the government's position that abortion was a constitutionally protected right and that the employment would not violate that right nor undermine other "values underlying the Canadian *Charter of Rights and Freedoms*." This, despite the fact that no such positive right to abortion exists and, in any event, the *Charter* protects citizens from government action. It is nonsensical to demand such an attestation when private citizens and corporations are not state actors subject to the *Charter* as is the government.<sup>179</sup> Hundreds of religious charities refused to agree and were denied funding despite requests for accommodation based on their religious convictions.

Remarkably, Prime Minister Justin Trudeau saw no contradiction in denying funding to religious groups because they did not accept his party's view on abortion; yet provided funding to environmental groups that opposed the government's plan to approve the Alberta oil pipeline to British Columbia. In his words, "We will not remove funding from advocacy organizations because we as a government happen to disagree with them."<sup>180</sup> His justification for denying the religious groups was that they did not abide by the principles of the *Charter*.<sup>181</sup>

The result is paradoxical. On the one hand, there is increased scientific proof backed by critical analysis of the important role religion plays in supporting societal cohesion: shared faith increases the bond between strangers while addressing the free-rider problem. On the other hand, there is developing within the legal and political community of Western liberal democracies an opinion that religion's special status is no longer needed and can be avoided whenever politically expedient to do so. Instead, there is an argument that the law takes the place of religion itself.<sup>182</sup>

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<sup>179</sup> See Barry Bussey, "What the fuss about ticking a box on the Canada Summer Jobs application is about," *Canadian Lawyer Magazine* (20 February 2018), online: <<http://www.canadianlawyermag.com/author/barry-bussey/what-the-fuss-about-ticking-a-box-on-the-canada-summer-jobs-application-is-about-15341/>>

<sup>180</sup> *House of Commons Debates*, 42-1, No 285 (April 25, 2018) at 18759 (Rt. Hon. Justin Trudeau), online: <<https://www.ourcommons.ca/Content/House/421/Debates/285/HAN285-E.PDF#page=9>>. See also John Ibbitson, "Trudeau's student-grant kerfuffle is the latest act that could alienate Manley Liberals," *Globe and Mail* (26 April 2018), online: <<https://www.theglobeandmail.com/opinion/article-trudeaus-student-grant-kerfuffle-is-the-latest-act-that-could/>>.

<sup>181</sup> Later he noted, "the Liberal Party of Canada is the party of the *Charter of Rights and Freedoms*, and we will always stand up to defend Canadians' *Charter* rights. Organizations that cannot ensure that they will abide by the principles in the *Charter of Rights and Freedoms*, and that indeed will work to take away the *Charter* rights of Canadians, will not get funding from this government" (*House of Commons Debates*, *supra* note 180 at 18759.)

<sup>182</sup> See, for example, Philip R. Wood, *The Fall of the Priests and the Rise of the Lawyers* (Oxford & Portland, Oregon: Hart Publishing, 2016). As discussed elsewhere in this dissertation, the idea that "law" can replace religion is dubious. It assumes that "law" has an ability to provide the same binding nature and social benefits that religion has in bringing people together. That is a tall order, as Norenzayan and Haidt's research sheds light on the complexity of religion's societal impact. Such a novel concept may be the result of a fractured civic society that Putnam observed some time ago. (Robert D. Putnam, "Bowling Alone: America's Declining Social Capital," (1995) 6:1 *Journal of Democracy*, 65-78.) He feared the loss of "social capital" ("shorthand for social networks and the norms of reciprocity and trust to which those networks give rise") which would inevitably lead to a diminished society where trust in institutions and others is lost. While the "9/11 generation" appears to be more engaged in civic society than their parents, social capital is still not where it once was. (Thomas H. Sander & Robert D. Putnam, "Still Bowling Alone?: The Post-9/11 Split" (2010) 21:1 *Journal of Democracy*, 9-16). In an age of uncertainty and with limited social capital there is a gravitational pull toward

The argument for law as the replacement for religion presupposes that law has the capability to answer humanity's struggle for cooperation and cohesion between strangers. It also presupposes that law and religion are interchangeable. According to the research of former Chief Justice of Canada, Beverley McLachlin, law and religion are two competing, absolute claims upon individual citizens.<sup>183</sup> "There is *no part* of modern life," she quotes Yale Professor Kahn, "to which law does not extend." Kahn is "describing the way in which, from the subjective viewpoint of the individual, the rule of law exerts an authoritative claim upon all aspects of selfhood and experience in a liberal democratic society."<sup>184</sup>

Likewise, "There are no limits to the claims made by religion upon the self. Religious authority, grounded as it is in basic assumptions about the nature of the cosmos, impinges upon all aspects of the adherent's world."<sup>185</sup>

There is then a dialectic – law and religion – which must seek a synthesis. In McLachlin's assessment:

...[T]he synthesis of the rule of law with seemingly contradictory religious belief systems has always been a matter for the courts. Case law has not been limited to the protection of minority interests; it has included those cases in which the sources of authority and content of religious conscience actually clash with the prevailing ethos of the rule of law. I wish to call this tension between the rule of law and the claims of religion a "dialectic of normative commitments." What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical commitments. Where this is so, two comprehensive worldviews collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable. What is more, both lay some claim to the whole of human experience. To which system should the subject adhere? How can the rule of law accommodate a worldview and ethos that asserts its own superior authority and unbounded scope? There seems to be no way in which to reconcile this clash; yet these clashes do occur in a society dedicated to protecting religion, and a liberal state must find some way of reconciling these competing commitments. ...

For society to function properly it must be able to depend on some general consensus with respect to the norms that should be manifested in law. The authority of the rule of law depends upon this. On the other hand, in Canadian society there is the value that we place upon multiculturalism and diversity, which

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that which is (or at least seems to be) certain – thus if religion is uncertain then law, being certain, is more attractive. There are many problems with this idea as just mentioned. This innate desire for bonding also has philosophical roots in liberalism. John S. Mill called for a common "Religion of Humanity" that removed reliance on religious dogma and supernatural myths and, in its place, offered a rational religion that emphasized common humanity as a means of bonding. Mill wanted to purify religion, not eliminate it. In his view, "the human race should be striving towards 'spiritual perfection,'" where "people's spiritual nature would still be cultivated and expressed, and their religious needs would still be met." (Timothy Larsen, *John Stuart Mill: A Secular Life* (Oxford: OUP, 2018), 197). However, what Mill did not account for was the fact that religion works as a bonding agent precisely because of the metaphysical, transcendent dimension.

<sup>183</sup> Rt. Hon. Beverley McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective," in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004), 12. Emphasis added.

<sup>184</sup> *Ibid* at 14.

<sup>185</sup> *Ibid* at 15.

brings with it a commitment to freedom of religion. But the beliefs and actions manifested when this freedom is granted can collide with conventional legal norms. This clash of forces demands a resolution from the courts. The reality of litigation means that cases must be resolved. The dialectic must reach synthesis.<sup>186</sup>

The court then is to “oversee those points in public life where there is a clash between religious conscience and society’s values as manifested in the rule of law.” In providing a space for religious expression, McLachlin maintains, the law must not compromise “core areas of our civil commitments.”<sup>187</sup>

From McLachlin’s point of view, law and religion are interchangeable in the sense that they are both normative commitments that claim total allegiance. However, because we live in a liberal democracy, the law must make room for religion as long as the accommodation does not interfere with the “core areas of our civil commitments.” The Supreme Court of Canada continues to work out what precisely those “core areas” or “national values” are.<sup>188</sup> However, as we will see, the Supreme Court in the TWU Law School Cases has taken the position that even in the private religious university setting where the *Charter* does not apply, those “core areas” or “*Charter* values” will take precedence over religiously inspired admissions requirements that students refrain from sexual relations outside of traditional marriage.<sup>189</sup>

Jean Bethke Elshtain cautions against McLachlin’s view of the law. Elshtain points out that:

where the rule of law in the West is concerned, there is a great deal about which the law is simply silent: the “King’s writ” does not extend to every nook and cranny. Indeed, a great deal of self-governing autonomy and authority is not only permitted but is necessary to a pluralistic, constitutional order characterized by limited government. In other words, the law need not be defined as total and comprehensive in the way the Right Honourable Chief Justice claims.<sup>190</sup>

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<sup>186</sup> *Ibid* at 20-21.

<sup>187</sup> *Ibid* at 22.

<sup>188</sup> They include “equality, human rights and democracy,” see *Loyola, supra* note 156 at paras 46-47.

<sup>189</sup> J. S. Mill suggests that “while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself” (John Stuart Mill, *On Liberty and The Subjection of Women* (New York: Henry Holt and Co., 1879), online: *Online Library of Liberty* <<http://oll.libertyfund.org/titles/347>> at 101-102 [*On Liberty and Subjection*]). In a liberal state you leave people as free as possible. Religious communities (like TWU), maintaining traditional perspectives on fundamental human life issues, such as heterosexual, monogamous marriage, are one of the “experiments of living” that liberal democracies would do well to continue permitting. Mill’s quest for the truth of things is a far cry from our current context. Dr. Ronald Osborn rightly observes how far we have come from Mill’s ethic, such that today, “To impede—or even to call into question—someone else’s self-expression, whatever that expression might be, is to commit a kind of violence against their personhood.” (Ronald E. Osborn, “Donald Trump: the president of expressive individualism,” (31 October 2018), *America: The Jesuit Review of Faith and Culture*, online: <<https://www.americamagazine.org/politics-society/2018/10/31/donald-trump-president-expressive-individualism>>)

<sup>190</sup> Jean Bethke Elshtain, “A Response to Chief Justice McLachlin,” in D. Farrow (ed), *Recognizing Religion in a Secular Society* (Montreal: McGill-Queens, 2004), 36.

Elstain's admonition is worth serious consideration, especially in light of the Supreme Court of Canada's 2018 decisions on TWU. The notion that law can displace religion lacks an appreciation for the work of Durkheim and the emerging science of Haidt, Norenzayan and Atran. It also lacks an historical understanding of liberal democratic government, never mind that which the courts have long recognized as the role of religion in making liberal democracy possible to begin with.<sup>191</sup>

Atran's analysis of the evolutionary development of religion suggests that there is: ...no other mode of thought and behavior [that] deals routinely and comprehensively with the moral and existential dilemmas that panhuman emotions and cognitions force on human awareness and social life, such as death and deception. As long as people share hope beyond reason, religion will persevere. For better or worse, religious belief in the supernatural seems here to stay. With it comes trust in deities good and bad, songs of fellowship and drums of war, promises to allay our worst fears and achieve our most fervent hopes, and heartfelt communion in costly homage to the absurd. This loss and gain persist as the abiding measure of humanity. No other seems able to compete for very long. And so spirituality looms as humankind's provisional evolutionary destiny.<sup>192</sup>

The suggestion, therefore, that law and religion are interchangeable is suspect. News of religion's demise and law's attempt to take its place is reminiscent of the cable Mark Twain sent to the press that had mistakenly announced his death. He wryly quipped, "The reports of my death are greatly exaggerated."<sup>193</sup>

### 3.3.1.2 Does It Have To Be So Complicated?

The nuanced complexities of the debate over defining religion tend to create confusion. Yet I am not convinced that the answer to the question "What is religion?" must inevitably be so complicated, especially given the history, politics and philosophical primacy of liberalism in the West. For centuries, we have been able as a civilization to understand what we mean by "religion" in the law. That ability has been due in no small part to the fact that the Western world has been dominated by the Judeo-Christian religious story.

Indeed, Yossi Nehushtan in his work does not define "religion" since he is of the view that it is impossible to do so satisfactorily.<sup>194</sup> Nehushtan decides to short circuit the "what is religion" debate to conclude that "religion" is that which looks like Judaism, Christianity and Islam since they are "the paradigms of religion."<sup>195</sup>

While Nehushtan's approach may be practical, it is not complete. For example, he is apparently unaware of the ongoing academic debate about Islam. Some authors claim that

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<sup>191</sup> Chief Justice Dickson observed, "It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition" in *Big M Drug Mart*, *supra* note 4.

<sup>192</sup> Scott Atran, *In Gods We Trust: The Evolutionary Landscape of Religion* (New York: Oxford University Press, 2002), 280.

<sup>193</sup> *New Dictionary of Cultural Literacy*, 3rd edition, (Houghton Mifflin, 2005) sub verbo "the reports of my death are greatly exaggerated," online: *Dictionary.com* <<http://www.dictionary.com/browse/the-reports-of-my-death-are-greatly-exaggerated> (accessed: June 13, 2017).

<sup>194</sup> Nehushtan, *supra* note 11 at 68.

<sup>195</sup> *Ibid* at 68-69.

Islam is not a religion but a totalitarian ideology that should not be treated as a religion.<sup>196</sup> Further, Nehushtan fails to make the distinction between monotheistic religions (as in Judaism, Christianity, and Islam) and non-theistic religions (as in Buddhism, Pantheism, Hinduism, Nature).<sup>197</sup>

As noted above,<sup>198</sup> the definition of religion in Canadian jurisprudence leaves us uncertain as to whether a non-theist personal conviction or belief is a “religion” to be protected by the *Charter*. The Supreme Court of Canada’s general description that religion “*tends to involve belief in a divine, superhuman or controlling power*” connotes an openness to non-theist religion. However, in earlier, pre-*Charter* jurisprudence<sup>199</sup> the SCC was more emphatic in clarifying that religion was what Canadians understood to be “religion” – in other words, theistic faith as exemplified in the Christian belief system.<sup>200</sup>

Broad respect for religious rights is deeply rooted in the traditional and important place of the Christian faith in Canadian history. Justice Rand in *Saumur v. City of Quebec* provides a brief history of this fact in Canadian law.<sup>201</sup> From 1760, religious freedom has been recognized in the Canadian legal system “as a principle of *fundamental character*.”<sup>202</sup> That the “untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.”<sup>203</sup>

Further, Justice Rand suggested that freedom of religion was among the “original freedoms” that was a necessary attribute and mode of human self-expression which forms the primary conditions of “*community life* within a legal order.”<sup>204</sup> Rand not only saw the importance of the religious life of the individual, but also understood the “communal” aspect of religion that has a powerful impact on society as reflected in the law.

The legal imposition of distinctly Christian norms, as seen in the former Sunday legislation, is no longer given the same recognition in Canadian law.<sup>205</sup> This is true, for that

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<sup>196</sup> Paul Cliteur, *The Secular Outlook: In Defense of Moral and Political Secularism* (Oxford: Wiley-Blackwell, 2010), see 69-102 [*Secular Outlook*].

<sup>197</sup> *Ibid* at 4 notes that the percentages of the world’s total population are as follows: Christianity 32%, Islam 21%, Non-religious 15%, Hinduism 12.5%, Primal religions 5.5%, Chinese traditional 5.5%, Buddhism 5.5%, Sikhism 0.35%, Judaism 0.25%, other 2.4%.

<sup>198</sup> See note 88.

<sup>199</sup> *Walter et al. v. Attorney General of Alberta et al.*, [1969] S.C.R. 383, per Martland, J., at page 393, the Court stated, “Religion, as the subject-matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship.”

<sup>200</sup> It seems reasonable, therefore, given law’s recognition of religious conscience that “religion” also includes non-theistic belief systems. However, it is beyond the purpose of this work to delve in that issue.

<sup>201</sup> *Saumur*, *supra* note 6.

<sup>202</sup> *Ibid* at para 89 (emphasis added).

<sup>203</sup> *Ibid* at paras 89, 96 (emphasis added).

<sup>204</sup> *Ibid*.

<sup>205</sup> In *Big M Drug Mart*, *supra* note 4 at 337, Chief Justice Brian Dickson, rejecting the constitutionality of *The Lord’s Day Act*, stated:

“To the extent that it binds all to a sectarian Christian ideal, the Lord’s Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-

matter, in most other Western democracies as well.<sup>206</sup> However, there are vestiges of that heritage that remain in the law. In Canada, for example, Roman Catholic elementary and secondary schools in the Province of Ontario still retain government funding<sup>207</sup> because of the provisions of the *Constitution Act, 1867*.<sup>208</sup> Philosophers such as Jürgen Habermas continue to observe the pivotal role Christianity has played in laying the foundation of our current liberal democracy.<sup>209</sup>

It is worth noting that Habermas' view is restricted to Christianity and not to religion in general. Habermas sees Christianity as the normative force in modern self-understanding and more than a mere precursor or a catalyst.<sup>210</sup> Egalitarian universalism and ideas of freedom, individual rights, human rights, and democracy directly flow from the Judaic ethic of justice and the Christian ethic of love.<sup>211</sup> He sees no alternative, and we continue to draw on this heritage. For Habermas, "Everything else is just idle postmodern talk."<sup>212</sup> Religion, for Habermas, must be given a place in the public sphere with the proviso that it not be sectarian but address common concerns with a vocabulary that is universally understood.<sup>213</sup>

While Christianity continues to influence cultural and legal norms, there are alternate schools of thought seeking to dismantle and remove all vestiges of Christian normativity. A key manifestation of that opposition is directed at the Christian practice of heterosexual marriage on the basis that it discriminates.<sup>214</sup> It is unlikely that the current radical definition of equality will stop at opposing heterosexual marriage. As Professor Bruce MacDougall noted in 2003, "[a]s gay and lesbian unions are being legally recognized, so rules respecting other forms of

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believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture. Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the state requires all to remember the Lord's Day of the Christians and to keep it holy. The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity" (emphasis omitted).

<sup>206</sup> Consider, for example, the changes in the U.K., which has relaxed blue law restrictions on larger stores: "Trading Hours for Retailers: The Law" (last accessed October 2018), online: *Gov.UK* <<https://www.gov.uk/trading-hours-for-retailers-the-law>>.

<sup>207</sup> This was upheld by the SCC as late as 1996 in the case *Adler v. Ontario*, [1996] 3 S.C.R. 609 [Adler].

<sup>208</sup> *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, Reprinted in RSC 1985, Appendix II, No 5; see also *Adler*, *supra* note 207. These provisions were not without controversy. During the legislative debate in the Province of Canada on February 8, 1865, George Brown, not a fan of religious schools, supported the s. 93 constitutional provisions on education on the basis that it treated both Roman Catholics and Protestants in English and French Canada equally. However, he was mindful that "there lay the great danger to our educational fabric, that the separate system might gradually extend itself until the whole country was studded with nurseries of sectarianism, more hurtful to the best interests of the province...." See Janet Ajzenstat, et al, eds, *Canada's Founding Debates* (Toronto: Stoddart, 1999), 336-337.

<sup>209</sup> Philip S. Gorski, ed, *The Post-Secular in Question: Religion in Contemporary Society* (Brooklyn, NY: NYU Press, 2012).

<sup>210</sup> Jürgen Habermas, *Time of Transitions*, edited and translated by Ciaran Cronin & Max Pensky (Cambridge: Polity Press, 2006), 150-51.

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> Jürgen Habermas, "Religion in the Public Sphere" (2006) 14 *European Journal of Philosophy* 1, 10; "Notes on Post-Secular Society" (2008) 25 *New Perspectives Quarterly* 17, 28

<sup>214</sup> Bruce MacDougall, "The Separation of Church and State: Destabilizing Traditional Religion-based Legal Norms on Sexuality" (2003) 36 *U. Brit. Colum. L. Rev.* 1 ["Separation of Church and State"].



unions, polygamous, incestuous, and so on will be re-examined.”<sup>215</sup> MacDougall’s prescient voice is noteworthy as there are indeed voices calling for a re-examination of the monogamous definition of marriage in light of the reality of polyamorous relationships.<sup>216</sup> Indeed, polygamy is already becoming an issue in European countries.<sup>217</sup>

The considerable pressure on the Christian monogamous, heterosexual norm raises the question as to whether religious communities who adhere to it are still entitled to maintain that standard in a very revolutionary social context – the social context that informs the question on religion’s place in the law which this book explores.

For the purposes of this study, therefore, given the context of liberal democracies, “religion” is recognizable in Canadian law as being primarily concerned with the Judeo-Christian religion as manifested primarily in Catholic and Protestant denominations. Those religious groups, their theology, their religious practices, and their public influence formed the legal framework of English common law’s conception of “religion” and how the law related to religion. Rightly or wrongly, it is through that lens that our law and the justification of treating religion as special begins. Any new religion that must be adjudicated under the Constitution, such as the Canadian *Charter*, is analysed through the long-held view of this already established, Judeo-Christian understanding of religion. Given the rise of multiculturalism and increased immigration from non-Judeo-Christian religions, there can be no doubt that the constitutional rule of law will be profoundly impacted by such cultural influences in the future. However, to be clear, we must understand the word “religion” in our Constitution as being rooted primarily in the Judeo-Christian tradition.

Professor Paul Cliteur notes that there are four dimensions of monotheistic religions – as in Christianity. They are:

First, religion as text – “A religion is what is written about in the holy book....”<sup>218</sup>

Second, religion as what the majority of adherents believe and do – “what the believers act upon.”<sup>219</sup>

From these two dimensions, there “is no mysterious entity ‘religion per se’ distinct from the texts of the holy book and the behaviour of its devotees.”<sup>220</sup>

Third, religion as authoritative interpretation. In this view, only what God commands is morally right or wrong; “[t]here is no independent or ‘autonomous’ ethical good, but morality is ultimately founded in the will of God.”<sup>221</sup>

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<sup>215</sup> *Ibid* at 5; see also *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (re-evaluating a rule respecting polygamous unions, as MacDougall predicted, in a judicial reference decision the Province of British Columbia asked for); *R v. Labaye*, [2005] 3 S.C.R. 728, paras 3, 62, 71 (upholding consensual group sex and “swinging” as not violating the Canadian Criminal Code).

<sup>216</sup> See Alison Crawford, “Canadian polyamorists face unique legal challenges, research reveals” (14 September 2016), *CBC News*, online: <<http://www.cbc.ca/news/politics/polyamorous-families-legal-challenges-1.3758621>>; also consider the recent litigation over child custody in *B.D.G. v. C.M.B.*, 2016 BCPC 97.

<sup>217</sup> Judith Bergman, “Polygamy: Europe’s Hidden Statistic” (5 June 2016), online: *Gatestone Institute International Policy Council* <<https://www.gatestoneinstitute.org/8199/polygamy-europe>>.

<sup>218</sup> Cliteur, *Secular Outlook*, *supra* note 196 at 91.

<sup>219</sup> *Ibid*.

<sup>220</sup> *Ibid*.

<sup>221</sup> *Ibid* at 205.

Fourth, religion as “morality touched by emotion.”<sup>222</sup> God is the eternal power that “makes for righteousness”.<sup>223</sup> God’s nature is inferred from the believer’s own moral views. Therefore, religion changes as do the progressive moral views of the believers that make up that religion.

The fourth dimension, while insightful, does not appear to consider that within such religions, as Christianity, there is often a debate about the evolution of religion. The “progressive” Christians, for example, will be at odds with the “conservative” Christians over fundamental life issues such as marriage, abortion and end of life. The conservatives tend to maintain traditions and principles of the faith that have guided the faith for millennia.

The law protects, to varying degrees, all four of Cliteur’s dimensions. First, as a text the Bible continues to be used in our legal settings as that by which a witness swears his oath of truth; second, the religious acts of believers are what is protected by our constitution; third, the morality of God’s commands in the Bible was at one time revered in Western law (particularly in the criminal law setting) and though diminished, it continues to have an influence; and fourth, constitutional law protects the individual’s understanding of her religiously moral obligations *vis a vis* the state.<sup>224</sup>

Religion’s special treatment by the law is based on the presupposition that religion is valuable – or, at least, it must be respected even if it does not have a value *per se*. One could argue that it is the protection of religion in and of itself that is to be valued, and not necessarily religion. Thus, religion is protected for the sake of civil peace, diversity, and liberty. This may therefore lead to a practical reality about the protection of religion that is key here. Lawmakers, public policy makers, opinion leaders and society at large have held either view over the years, and have still concluded that religion must be given special recognition as a result. The next section will demystify why the law has so tenaciously protected religion as part of the liberal democratic legal framework.

### 3.4 State Sovereignty & Religious Sovereignty

“Sovereign is he who decides on the exception.”<sup>225</sup>

That classical definition by Carl Schmitt is an appropriate place to start the discussion about sovereignty. Where does the “buck” stop? Who is the authority that has the ultimate say on ultimate things? These questions bedevil us.<sup>226</sup>

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<sup>222</sup> *Ibid* at 239. Cliteur gets this concept from Matthew Arnold, *Literature and Dogma: An Essay towards Apprehension of the Bible* (London: Watts and Co., 1887), 47.

<sup>223</sup> Cliteur, *Secular Outlook*, *supra* note 196 at 239.

<sup>224</sup> *Amselem*, *supra* note 7 at para 43, “claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.”

<sup>225</sup> Carl Schmitt, *Political Theology* (Chicago: University of Chicago Press, 2005), 5.

<sup>226</sup> F. H. Hinsley, *Sovereignty*, 2nd edition (Cambridge: Cambridge University Press, 1986); Dieter Grimm & Belinda Cooper, *Sovereignty: The Origin and Future of a Political and Legal Concept* (New York: Columbia University Press, 2015); Robert Jackson, *Sovereignty: Evolution of an Idea* (Cambridge: Polity Press, 2007); Hent Kalmo, Quentin Skinner, eds, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010).

Schmitt noted that an exception to a legal norm is not contained in the norm.<sup>227</sup> It can only be permitted by the sovereign – the one who has “the authority to suspend valid law.”<sup>228</sup> That is “unlimited authority.”<sup>229</sup>

Said Schmitt, “[w]hether God alone is sovereign,” in the form of God’s representative on earth, “...or the emperor, or prince, or the people ... the question is always aimed at the subject of sovereignty, at the application of the concept to a concrete situation.”<sup>230</sup> The interplay between law and religion that is addressed by this book involves concrete realities of how the body politic will deal with non-conformist religious entities who claim allegiance to a sovereign beyond the political sovereign.

In the case of religion, sovereignty is bifurcated into political and spiritual sovereignty. Indeed, Schmitt noted that:

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.<sup>231</sup>

Every person is faced with two claims (or spheres) of loyalty or allegiance: state and religious. Both claim sole allegiance. The first claim is the state where one lives and/or has citizenship – it may be called “the secular claim of sovereignty.” The state did not always consider itself “secular” (religiously neutral).<sup>232</sup> Rather, the state has often claimed to be divine, thereby having ultimate authority. The other claim of sovereignty comes from within the personal conscience. It is separate from the state and is referred to as the private realm. It often has a personal and/or communal conception of the divine or Supreme Being. This is the religious<sup>233</sup> claim of sovereignty.

Professor Dr. Iain T. Benson frames this discussion thus: “[l]aw has practical and theoretical limits to its proper role and function in a society, and these limits determine its jurisdiction or proper scope.”<sup>234</sup> He continues with this very important point: “[t]he recognition of jurisdiction for law is also a recognition that errors of overreach by law pose a threat to the proper ordering of a society.”<sup>235</sup> Throughout this work I maintain that the legal revolution, as described below, is indeed an overreach by law and is fully exposed in the SCC *TWU* 2018 decisions.

Throughout history there has been a constant struggle between the two claims of sovereignty.<sup>236</sup> The state, in whatever form, has often sought to impose its authority on the

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<sup>227</sup> Schmitt, *supra* note 225 at 6.

<sup>228</sup> *Ibid* at 9.

<sup>229</sup> *Ibid* at 12.

<sup>230</sup> *Ibid* at 10.

<sup>231</sup> *Ibid* at 36.

<sup>232</sup> Even the claim that there is such a thing as “religiously neutral” is not without its critics.

<sup>233</sup> In this context “religious” is also applicable to the atheist or non-believer (the “nones”). Each person is to decide whether the state is sovereign or the individual conscience (this is the religious question I refer to).

<sup>234</sup> Iain T. Benson, “Foreword: The Limits of Law and the Liberty of Religious Associations,” in Iain T. Benson & Barry W. Bussey, eds., *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis, 2017), xxii [“Foreword”].

<sup>235</sup> *Ibid*.

<sup>236</sup> B. Berger, “Limits of Belief,” *supra* note 134 describes “the clash between conflicting sources of ultimate authority” (at 40) and notes “the religious life posits sources of authority utterly beyond the reach of the state

individual conscience. The one consistent exception to that general rule is the modern liberal democratic society. Even when liberal democracies have failed to protect the individual conscience, they did so knowingly and in exceptional circumstances, with the specific promise that restricted freedoms would be monitored in accordance with democratic principles and restored in due course.<sup>237</sup> The fact that liberal democracies have gone to great lengths to explain why individual conscience had to be violated in a given situation is, in and of itself, a recognition of the importance of the concept.<sup>238</sup>

Despite their differences, law and religion must cooperatively coexist in order to make liberal democracy work. Because both claim sole allegiance, they are required to arrive at a détente on the issue of sovereignty. Liberal democratic society works best when sovereignty is bifurcated in two spheres. One is temporal sovereignty, or the duty to follow the law of the land. This refers to human-made law, or “positive law,” as defined by legislatures, courts, and custom. The second is spiritual sovereignty, or the duty to follow the law of God. This refers to the non-human-made law that is defined by holy books or divine revelation, or “natural law,” as understood by the individual conscience. The current battles between law and religion are analogous to the ancient battles over sovereignty. Some two thousand years ago, it was stylized this way by Jesus: “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”<sup>239</sup>

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and, at the same time, asserts the complete pervasiveness of this transcendent principle. Individuals possessing a religious conscience – a disposition towards life animated by religious conviction – cannot by definition accede to the authority of the state where it is discordant with their religious beliefs” (at 46).

<sup>237</sup> On June 18, 1940, Rt. Hon. MacKenzie King, Prime Minister of Canada, introduced the *War Measures Mobilization Act*, to authorize government to take all necessary means to fight Germany in WWII including the imposition of conscription and the right to expropriate property for the war cause. He said in the House of Commons, “It must be kept in mind that we shall be administering this legislation not as a body of dictators, free from any kind of control, but as a responsible government, responsible to the House of Commons and, through the House of Commons, to the people. If we bear this all important fact in mind, then I think it will be found that there is ample security as to the way in which the government may exercise the powers given it under the legislation.” Further, King recognized that his government would honour Canada’s historical commitment to religious groups not to force them to bear arms for their settling in the country: “I wish solemnly to assure the house and the country that the government have no desire and no intention to disturb the existing rights of exemption from the bearing of arms which are enjoyed by members of certain religious groups in Canada, as for example the Mennonites. We are determined to respect these rights to the full.” (*House of Commons Debates*, 18-1 vol 1 (18 June 1940) at 903-4). Note he did not commit to those religious groups who had no such agreement with the government. However, eventually the government did provide a means for other religious groups to obtain religious exemptions from having to bear arms. See Barry W. Bussey, “Humbug! Seventh-day Adventist conscientious objectors in WWII standing before the Mobilization Board,” (Summer 2012) 6.3 Diversity Magazine, online: <<http://www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/humbug-seventh-day-adventist-conscientious-objectors-wwii-standing-mobilization>>.

<sup>238</sup> Consider this editorial from the Hamilton paper *Spectator*, June 11, 1940, describing the justification of interning perceived enemies within the country during WWII: “It is not the wish of those in charge of the Defense Corps to stampede our citizens at a time like this, but there is definitely a very serious danger. Our local and federal authorities are fully aware of the existence of Fifth Column elements in our midst. In times of peace democratic people will not stand for the strict police surveillance and curtailment of civil liberty that become necessary in crises such as the present.” Quoted by Angelo Principe, Roberto Perin, & Franca Iacovetta, *Enemies Within: Italian and Other Internees in Canada and Abroad* (Toronto: University of Toronto Press, 2000), at 99.

<sup>239</sup> Matthew 22:21 (King James Version).

For a liberal democracy to work, both law and religion must have one common objective: to provide the most effective means whereby the individual has the greatest amount of freedom to pursue happiness as he or she defines it while at the same time maintaining civil peace in the political community. This will be referred to as the “Liberal Democratic Project.” The Reformation and its aftermath provided the West its paramount ideological truth: freedom is of the individual.<sup>240</sup> The individual is responsible to obey the respective sovereign demands of the state and his or her religious or conscientious conviction.

The specific combination of factors that stimulated freedom in the West forms our cultural identity and has laid the foundation for our current system of law. Contemporary iconoclasts want to destroy this framework and replace it with something else. We have, yet, no idea whether the revolutionaries’ proposal is a better plan than the inheritance we currently hold.<sup>241</sup> The traditional paradigm has given us much for which to be thankful including, but not limited to, the entire liberal democratic project. This book takes the position that prudence suggests we best be wary about hasty “improvements” which have not stood the test of time. Lucius Cary, 2nd Viscount Falkland’s sage counsel is apt: “Where it is not necessary to change, it is necessary not to change.”<sup>242</sup>

Dutch Christian politician Abraham Kuyper argued for “a free church in a free state” that allowed the two entities to correspond with each other on a regular basis.<sup>243</sup> His notion of “sphere sovereignty” has God over the entire “cosmos,”<sup>244</sup> under which three areas or “spheres” have sovereignty to act: the state, the society and the church.

The state is a necessity only because of humanity’s “fallen nature”. The original plan of God for humankind did not include the state. But it is now necessary to deal with the problem of evil. The basic principle of governance is that “no ruler can ever be truly an absolute sovereign over his people.”<sup>245</sup> This is because ultimate sovereignty remains with God. There is, in Kuyper’s view, no right form of government as that depends on history, culture and circumstances of each locale. Whatever form of governance a state may have, it is required not to violate divine sovereignty in administering justice.

Kuyper saw the sphere of society as having many groups including family, business, science and the arts. In turn, each of those have their own spheres of sovereignty with which the state has no authority to interfere. It is to work alongside them in carrying out the public

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<sup>240</sup> Alister E. McGrath, *Christianity’s Dangerous Idea: The Protestant Revolution – A History from the Sixteenth Century to the Twenty-first* (HarperOne, 2007).

<sup>241</sup> The sentiment is similar to Edmund Burke when he said, “With [your politicians] it is a sufficient motive to destroy an old scheme of things, because it is an old one. As to the new, they are in no sort of fear with regard to the duration of a building run up in haste; because duration is no object to those who think little or nothing has been done before their time, and who place all their hopes in discovery,” in *Select Works of Edmund Burke*, vol. 2 *Reflections on the Revolution in France, 1790* (Indianapolis: Liberty Fund, 1999), 183.

<sup>242</sup> J. A. R. Marriott, *The Life and Times of Lucius Cary Discount Falkland*, (London: Methuen & Co., 1907), 332.

<sup>243</sup> Abraham Kuyper, *Our Program: A Christian Political Manifesto*, Abraham Kuyper Collected Works in Public Theology (Lexham Press, Kindle Edition), Kindle Locations 2-5. “Accordingly, to our way of thinking the separation of church and state stands for three things: (1) the political unity of our nation is no longer coupled to any church unity; (2) church and state each command a unique zone in life where each functions as a minister of God and is debarred from using compulsion on the other’s zone; and (3) the relation between the two should be defined bilaterally in the form of regular correspondence” (at Kindle Locations 6924-6927).

<sup>244</sup> Irving Hexham, “Christian Politics according to Abraham Kuyper,” (1983) 9:1 CRUX, 2-7, online: <<https://people.ucalgary.ca/~nurelweb/papers/irving/kuyperp.html>>.

<sup>245</sup> Kuyper, *supra* note 243, at Kindle Locations 544-547.

good. God “did not give all his power to one single institution, but he endowed each of those institutions with the particular power that corresponded to its nature and calling.”<sup>246</sup> As long as each sphere carries out its responsibilities then there will be harmony. However, there are times when the failure in one means there is a requirement for another to assist. For example, as I understand Kuyper, if a family fails to care for a child the state will have to temporarily intervene for the sake of the child. It is not because the state’s sovereignty gives it sole authority over the child but that the family, through neglect or inability, was unable to carry out its sovereign responsibilities.<sup>247</sup>

Applying Kuyper’s philosophy to the legal revolution against the accommodation of religious practices, the state has no sovereign authority to interfere with TWU’s religious practices. It can only assist in the work of the religious community if that community fails to properly carry out its sovereign responsibilities.<sup>248</sup> A religious body is a unique body, different from other civic organizations.<sup>249</sup>

The uniqueness of religious organisations, such as churches, denominations, and their constituent parts such as universities, is that they are composed of religious individuals that identify with a deep conscientious belief in, and an obligation to, the divine. Kuyper notes that the:

conscience is the immediate contact in a person’s soul of God’s holy presence, from moment to moment. Withdrawn into the citadel of his conscience, a person knows that God’s omnipotence stands guard for him at the gate. In his conscience he is therefore unassailable. If government nevertheless dares to push through its abuse of force, the end will be a martyr’s death. And in that death government is beaten and conscience triumphs. Conscience is therefore the shield of the human person, the root of all civil liberties, the source of a nation’s happiness.<sup>250</sup>

Kuyper’s position is shaped by the anvil of Reformation history. In his home country, the Netherlands, religious strife was not uncommon as the region came to terms with the struggle between religious conscience and the state. Kuyper was willing to put up with strange

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<sup>246</sup> *Ibid*, at Kindle Locations 1524-1527.

<sup>247</sup> The various entities—human persons first of all—which God called into being by his creative powers and to which he apportioned power, are almost all, in whole or in part, of a moral nature. There is a distinctive life of science; a distinctive life of art; a distinctive life of the church; a distinctive life of the family; a distinctive life of town or village; a distinctive life of agriculture; a distinctive life of industry; a distinctive life of commerce; a distinctive life of works of mercy; and the list goes on. Now then, next to and alongside all these entities and ever so many other organizations stands the institution of the state. Not above them, but alongside them. For each of these organizations possesses sphere-sovereignty, that is to say, derives the power at its disposal, not as a grant from the state but as a direct gift from God.” *Ibid*, at Kindle Locations 1532-1539.

<sup>248</sup> “...thinking the separation of church and state stands for three things: (1) the political unity of our nation is no longer coupled to any church unity; (2) church and state each command a unique zone in life where each functions as a minister of God and is debarred from using compulsion on the other’s zone; and (3) the relation between the two should be defined bilaterally in the form of regular correspondence.” *Ibid*, at Kindle Locations 6924-6927.

<sup>249</sup> “Our position is that the churches are unique bodies that cannot be compared to other associations. Churches can lay claim to separate treatment in the law, hold sway over their members even before any action of their will, ought to be subject to special regulations, and are not to be regarded as incidental but as one of the highest and most essential expressions of the life of the nation.” *Ibid*, at Kindle Locations 6935-6938.

<sup>250</sup> *Ibid*, at Kindle Locations 1582-1587.

oddities that may come from the state protecting individual consciences that, for the majority, may seem quirky. “Ten times better is a state in which a few eccentrics can make themselves a laughingstock for a time by abusing freedom of conscience,” said Kuyper, “than a state in which these eccentricities are prevented by violating conscience itself. Hence our supreme maxim, sacred and incontestable, reads as follows: as soon as a subject appeals to his conscience, government shall step back out of respect for what is holy.”<sup>251</sup> In Kuyper’s assessment, then “it will never coerce. It will not impose the oath, nor compulsory military service, nor compulsory school attendance, nor compulsory vaccination, nor anything of the kind.”<sup>252</sup>

This strong endorsement of conscience allows for separate organizations to be governed by strong religious conscience rather than by the views of the state as understood by the judiciary, legislators or otherwise. The state has no sovereignty in the internal workings of religious communities, governed as they are by conscience.

Any disruption to the delicate balance between the two spheres of sovereignty ultimately results in the modern state’s attempt to dominate both. This happens because the state has executive power; that is, an army and a police force that it can use to enforce its dictates. In Western democracies, religions do not have armies.<sup>253</sup>

While some militias have co-opted religious mantras over the years for their own secular purposes, as in Northern Ireland for example,<sup>254</sup> the reality is that throughout the modern period, meaning post-Reformation, Western religious groups have not taken up arms to enforce their edicts on society.<sup>255</sup> This crucial fact has not received much attention from Western critics of religion.

This is to say, using Professor Cliteur’s second dimension of monotheistic religion: religion is what the majority of the believers believe and do. For example, Jitzak Rabin’s murder by a religiously motivated Jigal Amir is an exception in contemporary Judaism. Similarly, Scott Roeder’s shooting of Dr. George Tiller is an exception in contemporary Christianity. Christianity, as a faith community, has eradicated the use of violence as an appropriate means of dealing with those outside.<sup>256</sup>

Therefore, critics of Christianity such as Leiter and Nehushtan would have to go a long way back, for instance to the Crusades, to make the claim that Christianity is violent despite

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<sup>251</sup> *Ibid*, at Kindle Locations 1590-1595.

<sup>252</sup> *Ibid*, at Kindle Locations 1595-1597.

<sup>253</sup> Perhaps the criticism of Christianity is due, in no small part, because of the fear of ISIL-like religion.

<sup>254</sup> John D. Brewer, David Mitchell Gerard Leavey, eds, *Ex-Combatants, Religion, and Peace in Northern Ireland: The Role of Religion in Transitional Justice* (New York: Palgrave Macmillan, 2013), at 13 notes that “political and religious leaders who viewed politics as a religious battle succeeded in inspiring their followers to see the national cause with a similar intensity of conviction, whether or not those people shared the leaders’ religious beliefs.”

<sup>255</sup> We have come to realize, in Western religious thought, that it truly is absurd to think that violence is the means to advance a religious cause. Consider the pacifists groups like the Quakers and the Mennonites, or groups like Seventh-day Adventists with their refusal to bear arms in war. Even the mainstream Christian & Jewish groups eschew force. William T. Cavanaugh, *The Myth of Religious Violence* (Oxford: Oxford University Press, 2009) makes a convincing argument on this point. The view that religion in the West is “dangerous” and should therefore be removed from the public is a myth, says Cavanaugh. Rather, the myth becomes a justification for the violence of western democracies against Muslim societies. Today’s violence of the West is seen as “secular, rational, peace making, and regrettably necessary to contain their violence. We find ourselves obliged to bomb them into liberal democracy” (at 4).

<sup>256</sup> Ruud Koopmans, “Religious Fundamentalism and Hostility against Out-groups: A Comparison of Muslims and Christians in Western Europe” (2015) 41:1 *Journal of Ethnic and Migration Studies*, 22-57.

what some see as violence in the Christian scriptures.<sup>257</sup> William T. Cavanaugh challenges the argument that religion “is necessarily more inclined toward violence than are ideologies and institutions that are identified as secular.”<sup>258</sup> Cavanaugh argues that the current view that religion is absolutist, divisive and irrational while secular ideologies are not has the effect of marginalizing religious groups, and legitimizes violence against them.<sup>259</sup> While that may seem oversensitive and perhaps melodramatic, it is worth noting that there can be no comparison between Christianity today and the modern, atheistic and anti-religious totalitarian regimes of Stalin, Hitler, Pot, or Mao, which murdered and brutalized millions of innocent people.

In the West, law and religion have an unequal power relationship. The state can always enforce its laws, if it so chooses, at the expense of religion. However, for the most part, the liberal state has allowed religion to maintain its own sphere of influence with very little hindrance. That indifference of the state, as we already noted and will explore further below, is changing, particularly on the fundamental human life issues.

Once the state takes over both spheres of sovereignty, it takes on “divine” characteristics, meaning that it seeks to become omniscient and omnipotent. It assumes it can determine for the individual what will ultimately be sovereign.<sup>260</sup> At that point, the liberal democratic society that places high value on individual autonomy is in severe crisis and may, in fact, be over. This is the modus operandi of dictatorships. Therefore, the bifurcation of sovereignty forms the very foundation of liberal democratic theory and requires the continuation of the unique status of religion.

To suggest that religion is not special is to deny the collective experiences of the West that suffered the negative consequences of those polities that refused to bifurcate sovereignty. Our history, the legal history of the West, demonstrates the unique character of religion in our law.

### 3.5 The Three Realities of Western Experience

The formation of the current paradigm of liberal democratic support of religion arises from that set of presumptions and interpretative principles that permitted the legal/political development to allow unprecedented peace and stability, leading to expansive personal and economic freedom. That formula is the rebuttable presumption that religious belief and practice should be as maximally accommodated as can be reasonably expected in the circumstances. This formula is the result of the three realities of the collective experience of Western democracies: the historical, the practical, and the philosophical.

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<sup>257</sup> Jack Nelson-Pallmeyer, *Is Religion Killing Us? Violence in the Bible and the Quran* (Harrisburg: Trinity Press International, 2003); Eric A. Seibert, *The Violence of Scripture: Overcoming the Old Testament's Troubling Legacy* (Minneapolis: Fortress Press, 2012); Charles Selengut, *Sacred Fury: Understanding Religious Violence* (Toronto: Rowman & Littlefield Publishers, 2003).

<sup>258</sup> Cavanaugh, *supra* note 255 at 5.

<sup>259</sup> *Ibid* at 6.

<sup>260</sup> See, e.g., *Declaration of the Rights of Man and Citizen* art. 3 (approved Aug. 26, 1789), Avalon Project at Yale Law School trans., online <[http://avalon.law.yale.edu/18th\\_century/rightsof.asp](http://avalon.law.yale.edu/18th_century/rightsof.asp)> (last visited Feb. 6, 2016) (“The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation”).



### 3.5.1 Historical Fight Between Church and State

Western history is replete with the ebb and flow of the state demanding ultimate allegiance from its citizens. From the ancient Roman emperors onward, there have been examples of states demanding capitulation of religious sovereignty in their favour. The liberal democratic project gave the West a reprieve from state domination over the individual religious conscience.

The use of religion as a means of cementing loyalty to the state has a long pedigree. Polybius, after living seventeen years in Rome, wrote in 150 BCE, “The quality in which the Roman commonwealth is most distinctly superior is, in my judgment, the nature of its religion. The very thing that among other nations is an object of reproach – i.e., superstition – is that which maintains the cohesion of the Roman state.”<sup>261</sup> As we will see, such misuse of religion led to great abuse and we would do well not to repeat it.

Western democratic thought has been profoundly influenced by at least three major civilizations – Israel, Greece and Rome.

In the ancient Roman Empire, the two sovereignties were combined. The sovereignty of man and the sovereignty of the divine were united in the personhood of the emperor.<sup>262</sup> Emperors claimed divine titles such as Dominus et Deus Noster.<sup>263</sup> The emperor was both the king of man and God of man—the ultimate authority.<sup>264</sup> The temporal and divine authorities were personified in the emperor.

The advent of the Christian religion saw sovereignty bifurcated to the temporal and the divine. The emperor was merely human and not a deity. Divinity existed only in the Christian God, expressed in the three Persons of the Godhead – that is to say, the Father, the Son, and the Holy Spirit. Christianity took the issue of sovereignty further to the point of the individual. The individual, made in the image of God, was equal with the emperor. In fact, all human beings were equal, as proclaimed in Galatians 3:28. Hence, “the metaphysical conception of the implicit transcendent worth of each and every soul established itself against impossible odds as the fundamental presupposition of Western law and society.”<sup>265</sup>

However, Constantine’s conversion put in process the “syncretism of Roman and Christian beliefs” that “subordinated the Church to imperial rule.”<sup>266</sup> State domination of the Roman Catholic Church continued until the Papal Revolution in the late 11th century when Pope Gregory VII led the clergy to throw “off their civil rulers and established the Roman

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<sup>261</sup> Polybius, *Histories* VI, Loeb Classical Library (Cambridge: Harvard University Press, 2012), 56, quoted in Will Durant, *Caesar and Christ* (New York: Simon and Schuster, 1944), at 93.

<sup>262</sup> Indeed, even before Rome the ancient Greeks recognized their kings as divine. Numa Denis Fustel de Coulanges describes it this way: “A king was a sacred being; βασιλεὺς ἄεροι, says Pindar. Men saw in him, not a complete God, but at least ‘the most powerful man to call down the anger of the gods; the man without whose aid no prayer was heard, no sacrifice accepted.’” Numa Denis Fustel de Coulanges, *The Ancient City: A Study of the Religion, Laws, and Institutions of Greece and Rome* (New York: Dover Publications, 2006 – a reprint of Willard Small’s translation published by Doubleday, 1955), p.178.

<sup>263</sup> “Our Lord and God,” claimed by Domitian, quoted by Durant, *Caesar and Christ*, *supra* note 261 at 292.

<sup>264</sup> Speaking of Augustus, Edward Gibbon writes, “Augustus permitted indeed some of the provincial cities to erect temples to his honour, on condition that they should associate the worship of Rome with that of the sovereign.” Edward Gibbon, *The Decline and Fall of the Roman Empire*, vol 1 (Everyman’s Library, 1993), 91.

<sup>265</sup> Jordan B. Peterson, *12 Rules for Life* (Toronto: Random House Canada, 2018), 186.

<sup>266</sup> Witte Jr., *supra* note 121, at 11.

Catholic Church as an autonomous legal and political corporation within Western Christendom.”<sup>267</sup>

The push for extremism as exhibited by Gregory VII leads to a form of theocracy. On the opposite end of the spectrum we have state dictators such as Josef Stalin who wanted the religious world controlled by the state.<sup>268</sup>

Over time the ascendance of the church brought the temporal and the divine back together in the office of the Roman Pontiff who “claimed the supremacy of the spiritual sword over the temporal,” though he claimed to do so indirectly.<sup>269</sup> Christendom combined church and state, with the pope presiding over the territorial kings.<sup>270</sup>

The church developed its own system of canon law administered by its courts, registered citizens by baptism, taxed by tithes, conscripted through crusades, and educated the populace in its schools.<sup>271</sup> In short, the church was the first modern state in the West.<sup>272</sup> Granted, it did not have the same freedoms we associate with a modern state, but it had a form of the executive, legislative, and judicial branches that we find familiar in today’s states.

Of course, the church did not totally dominate the state in all situations, nor did the state dominate the church in all contexts. Which institution dominated was complicated by the personalities involved, the issues to be decided, and the territories concerned. Both clergy and lay – the spiritual and the secular – were ostensibly working for the salvation of embodied souls.<sup>273</sup> However, corruption was rife; both spheres were caught up with avarice, nepotism, and abuse of power.

The Reformation led to the Thirty Years War (1618-1648) which was the costliest conflict in Europe until World War One began in 1914.<sup>274</sup> Though it started as a religious conflict, it took on a deeper political significance. Its end led to the making of what we now recognize as Europe. Nation-states were born. With the state came the recognition that the way out of religio-political conflict was the elevation of the individual. According to historian Brad Gregory, “Christianity as an institutionalized worldview would be abandoned.”<sup>275</sup> Ultimately, in Gregory’s view, this led to the secularization of our society.<sup>276</sup>

The horrifying destruction of life and property brought on by that religious war continues to have a profound impact on Western consciousness. Hardly any anti-religious polemicist doesn’t take the opportunity to raise the spectre of animosity that lingered even

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<sup>267</sup> *Ibid* at 12.

<sup>268</sup> Paul Cliteur, “State and religion against the backdrop of religious radicalism” (2012) 10:1 International Journal of Constitutional Law, 127-152.

<sup>269</sup> Berman, *supra* note 46 at 115.

<sup>270</sup> A. McGrath, *supra* note 240 at 326.

<sup>271</sup> Witte Jr., *supra* note 121, at 15.

<sup>272</sup> Berman, *supra* note 46, at 113.

<sup>273</sup> Brad S. Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Belknap Press, 2012), 132.

<sup>274</sup> Indeed, Peter H. Wilson suggests that the Thirty Years War may be “the most destructive conflict in European history.” See *Europe’s Tragedy: A New History of the Thirty Years War* (Penguin Books Ltd. Kindle Edition, 2010), Kindle Locations 13770-13771.

<sup>275</sup> Gregory, *supra* note 273 at 166.

<sup>276</sup> *Ibid* at 179: “Christianity had been before the Reformation the principal bearer of moral norms, virtues, and behaviors in Europe. The control of the churches by sovereign states and the subsequent separation of politics from religion also meant the separation of politics from morality – or rather, a transition from a Christian ethics of the good to a secular ethics of rights in combination with a distinction between public and private spheres in conjunction with the privatization of religion.”

after the war ended. The Protestant-Catholic hostility remains with us still in some circles. The atrocities of war resulted in a diminishing of institutionalized religion and led to a “turn to a naturalistic science [which] was to eliminate or at least moderate this conflict.”<sup>277</sup>

Nevertheless, the Reformation was a catalyst for greater scientific discovery with the hegemony of institutionalized religion at an end.<sup>278</sup> The Reformation’s search for religious “truth” would also harmonize, to some extent, with the search for scientific truth. As the emphasis on science developed, it transferred the attributes of God to “making man or nature or both in some sense divine.”<sup>279</sup> The individual again became the focus.

Christian faith was now privatized and made subject to individual preference in Western nation-states. Not only would citizens believe and worship as they pleased, but they would be obedient to the state’s laws.<sup>280</sup> A symbiotic relationship was established – individual religious freedom was granted in return for peace and stability. However, as Gregory noted, “obedience to laws per se cannot replace the practice of virtues regardless of how thoroughly early modern rulers might have succeeded in ensuring the behavioural compliance of their subjects.”<sup>281</sup>

The Reformation confirmed what had been developing for some time: that the individual was not solely a citizen of the state but of two distinct spheres, one being the kingdom of God, for which the individual has a direct relationship with God;<sup>282</sup> and the other being the kingdom of man as represented by the king (or the earthly authority). These concepts would have profound practical political implications.

### 3.5.2 Practical Politics

When confronted with an obstinate citizenry, Western states could not force religious belief or practice without being willing to let rivers of blood, fear, and suffering flood the streets.<sup>283</sup> Nor did the state have the resources to ensure that all citizens believed and practiced the state religion.

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<sup>277</sup> Michael Allen Gillespie, *The Theological Origins of Modernity* (Chicago: U of Chicago Press, 2009), 274.

<sup>278</sup> The search for the “true conclusions about the physical world,” as told by Gauch, did not begin at the Reformation but had a long pedigree beginning at least since Aristotle of the 4<sup>th</sup> Century BCE. Indeed, the medieval scholars had developed: experimental methods, an extension of deductive and inductive logic, a keen criterion to choose a theory, presuppositions without theological underpinnings and a concept of scientific truth that was broad, fitting and obtainable. See Gauch, *supra* note 65 at 39-41.

<sup>279</sup> Gillespie, *supra* note 277 at 274.

<sup>280</sup> Gregory, *supra* note 273 at 167.

<sup>281</sup> *Ibid* at 161.

<sup>282</sup> That include the belief that there is no God. The point being that the individual came to be sovereign of herself.

<sup>283</sup> This remains with us today. Canadian authorities tried to convince Mennonites to agree to alternative service camps under military control in light of the Mennonites’ refusal to bear arms in WWII. At one point during the negotiations Maj.-Gen. L. R. La Fleche, then deputy Minister of the National War Services, stated in frustration, “What’ll you do if we shoot you?” Jacob H. Janzen, a Mennonite who had escaped the Bolshevik Revolution in Russia, replied, “Listen, Major General, I want to tell you something. You can’t scare us like that. I’ve looked down too many rifle barrels in my time to be scared in that way. This thing is in our blood for 400 years and you can’t take it away from us like you’d crack a piece of kindling over your knee. I was before a firing squad twice. We believe in this.” William Janzen, *The Experience of Mennonite, Hutterite, and Doukhobor Communities in Canada* (Toronto: U of Toronto Press, 1990), at 207.

What was a state to do with a religious person or group of persons who refused to follow the social and legal norms because those norms violated their religious sensibility? While extreme methods such as burning heretics at the stake for translating the Bible or drowning those who insisted on adult baptism were used during the Reformation as a means of keeping order, they were ultimately found ineffective for maintaining civil peace. Freedom for the unpopular and even the most eccentric religious views was deemed the best way forward.<sup>284</sup>

Law is very much a pragmatic endeavour. As part of the liberal project, it is tasked with ensuring that societal rules are making peace, order, and good government possible. Allowing the individual the maximum amount of freedom in his or her religious pursuit, as long as it did not disturb the peace, provided general stability. Experience had taught liberal democracies that religion was to be accommodated. When the majority in society developed an orthodox position on views of the transcendent and codified them into law, it created a conflict with the religious conscience of minority and dissenting views.<sup>285</sup> The emotive content of the ensuing clash of wills resulted in bloodshed.<sup>286</sup> That experience, along with the growing philosophical understanding that the human heart could not be forced to believe that which it found repugnant, and the theological view that God did not require forced obedience to the truth, permitted society to adopt an accommodating stance toward religious dissenters.<sup>287</sup>

The state could no longer be sovereign in transcendent issues. It was finite. In matters of conscience it had to remain silent, and it had to accept diversity. Religious warfare had run its course. "A yearning for peace led to a new emphasis on toleration," Professor Alister McGrath explains, "and growing impatience with religious disputes."<sup>288</sup> By 1700 the religious wars were at an end and the Enlightenment<sup>289</sup> made the case that religion had to be a private matter, otherwise it would be a source of conflict.<sup>290</sup> It became evident that the search for truth was an ongoing project.<sup>291</sup> It had no end; therefore, individuals and religious communities

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<sup>284</sup> Brian Tierney, "Religious Rights: A Historical Perspective" in Noel B. Reynolds & W. Cole Durham, Jr., eds, *Religious Liberty in Western Thought* (Grand Rapids: Wm. B. Eerdmans Pub, 2003), 29.

<sup>285</sup> For example, the taking of an oath was often seen as a requirement for a witness to give evidence or for a public official to take office because it induced "the fear and reverence of God, and the terrors of eternity." John Witte Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids: Eerdmans, 2006), 181. However, as Witte noted this requirement was eventually dropped to accommodate the religious minorities (at 182).

<sup>286</sup> Early in the Reformation period violence broke out between the state authorities and the emerging Protestants. The Anabaptist uprising in Germany of 1525 was at a cost of some 100,000 lives. James M. Stayer, *The German Peasants' War and Anabaptist Community of Goods* (Montreal: McGill-Queen's University Press, 2003), 20. French Huguenots were attacked in March 1562 in France when Francois, duke of Guise opened fire on some 500 whose only infraction was holding an illegal worship service. Diarmaid MacCulloch, *The Reformation: A History* (Viking Adult, 20014), 296–97, 483. These events only increased in intensity in the coming decades. August 24, 1572 some 5,000 Huguenots suffered execution in the St. Bartholomew's Day massacre. A semblance of peace arrived with the Peace of Westphalia when church and state recognized that "crusades simply had not worked" in maintaining a united church (at 483).

<sup>287</sup> Nicholas P. Miller, *The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State* (Oxford: OUP, 2012).

<sup>288</sup> A. McGrath, *supra* note 240 at 143.

<sup>289</sup> While it is a common thing for many writers today to criticize the Enlightenment project, I am of the view that its early development was very positive for religious freedom and the place of religion in the law.

<sup>290</sup> A. McGrath, *supra* note 240 at 144.

<sup>291</sup> This is readily seen in Thomas Jefferson's writing of Virginia's "A Bill for Establishing Religious Freedom." The Bill noted, "that truth is great and will prevail if left to herself; that she is the proper and sufficient

would be granted the space to practice their own understanding of how to obey the Sovereign God as they understood Him. The state had no jurisdiction in such matters.<sup>292</sup>

However, as Roland Bainton, a historian of Protestant history, points out, religious freedom “has come to depend upon a diversion of interest.”<sup>293</sup> As long as a religious practice and belief is of no consequence to the state, the liberal state will not hinder its practice. However, the moment a religious practice or belief becomes politically salient to the affairs of the state, one can always expect the liberal state to interfere in its own self-interest.

Bainton’s observation would explain the liberal state’s treatment of religious sensibilities on sexual equality, including marriage. When traditional heterosexual marriage was not considered to be of any political import, the state willingly allowed religions to carry on with their practices in their own institutions and among their constituency.

There are many examples that one can give which illustrate this practical reality of religion that Western democracies must reckon with. An apt case is the 1990 *Smith*<sup>294</sup> decision of the US Supreme Court that removed the state obligation to use the least restrictive means to carry out its policy in order to accommodate a religious practice that was adversely affected by a neutral, generally applicable law. In other words, if the government did not intentionally discriminate against religion when it passed its law then the religious had no right to claim accommodation on the basis that there was a substantial burden on their exercise of religion.

The upshot of the *Smith* decision was that the US religious communities organized aggressively and sought legislative redress. They received it in the form of a Religious Freedom Restoration Act (RFRA) that was passed through Congress in 1993,<sup>295</sup> which restored the pre-*Smith* burden on government. However, the US Supreme Court ruled RFRA unconstitutional in so far as it applies to areas of State jurisdiction.<sup>296</sup> While RFRA remains in effect in federally regulated areas, the religious community has now turned its attention to the individual states to pass local RFRA to address the deficiency.

Considering the effective religious campaign for RFRA, legal academic Marci Hamilton noted that the religious community exerted “extraordinarily effective political pressure” that has led her to conclude “Religion is one of the most authoritative structures of human existence and holds great potential power to effect good and to effect bad.”<sup>297</sup>

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antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.” Thomas Jefferson, in *Writings* (New York: Library of America, 1984), 347.

<sup>292</sup> James Madison, “Memorial and Remonstrance against Religious Assessments,” in Amendment I: Religion (1785), *The Papers of James Madison*, vol 5, edited by William T. Hutchinson et al, (Chicago and London: University of Chicago Press, 1962-77), online: *The Founders’ Constitution* <[http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html)> (“We maintain therefore that in matters of Religion, no man’s right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”).

<sup>293</sup> Roland H. Bainton, *The Travail of Religious Liberty: Nine Biographical Studies* (New York: Harper, 1958), 15.

<sup>294</sup> *Employment Div. v. Smith* 494 U.S. 872 (1990)

<sup>295</sup> *Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

<sup>296</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>297</sup> Marci Hamilton, “The Constitutional Rhetoric of Religion” (1997-98) 20 UALR L. J. 619. Hamilton is no fan of RFRA and is of the view that it weakens religion and society. She is of the view that *Smith* properly saw religion as quite capable of looking after itself without the added “leg up” of forcing the state to justify an infringement of religious freedom. (“It is not a hothouse flower that must be carefully cultivated and shielded from every draft, but rather a hardy plant that can thrive even when planted in a rocky soil,” at 624). Rather

That is my point. Religion is powerful, given the right circumstances and, as we have seen in history, practical politics requires religion to be granted the space to operate in its own sphere. That is not to suggest that religion is “powerful” in a violent sense, though modern history has shown that with respect to some religious fanatics. Rather, within its sphere of influence, religion can motivate non-compliance with what it perceives as an unjust law, which can cause significant disruption to liberal democratic machinery. Given this history it remains to be seen what the end result will be of the recent pullback of the Supreme Court of Canada in the area of religious freedom as exemplified by the TWU law school case. The Court, in both the TWU law school and the Hutterian Brethren<sup>298</sup> cases, has allowed state actors to interfere with the private, internal workings of religious belief and practices in a way that was, until recently, an anomaly.

The practical implications of these moves, as discussed below, are yet to be felt. If the history of liberal democracies is any indication, state action against religious practice has consistently been met with religious opposition.

### 3.5.3 Philosophical Primacy of Liberal Thought

The liberal democratic project came to be recognized as the Western state allowing the individual the maximum amount of freedom while, at the same time, maintaining civil peace. This could only be possible when the state learned its lessons from earlier collective experience that there are areas of personal allegiance with which it cannot interfere, the most important being religious conscience.

Liberalism<sup>299</sup> is “the philosophical tradition that undergirds the Western ideal of a political democracy.”<sup>300</sup> It seeks to provide a basis for civil peace among the many varying, and often contradictory, ideas in society, thereby allowing for the maximum participation of individuals in society. Charles Larmore describes liberalism as “the hope that, despite [the] tendency toward disagreement about matters of ultimate significance, we can find some way of living together that avoids the rule of force.”<sup>301</sup>

And in the place of those authoritarian heads it seeks to build a political system on individual rights. However, there is a paradox, since “the privileging of individual rights means that the substantive commitments of no individual can be allowed to inform the body of law, which must be generally applicable; applicable, that is, to every citizen no matter what his or her beliefs and biases may happen to be.”<sup>302</sup>

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she is of the view that it is religion that must justify why it should be given an exemption from a neutral, generally applicable law.

<sup>298</sup> *Hutterian Brethren*, *supra* note 5.

<sup>299</sup> Benjamin Wiker notes that “Modern liberalism is a movement in politics and philosophy that cannot be given a fixed definition apart from the long history of its development.” See Benjamin Wiker, *Worshipping the State: How Liberalism Became Our State Religion* (Washington, DC: Regnery, 2013), 15.

<sup>300</sup> Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (New York: Oxford University Press, 2013), 51.

<sup>301</sup> Charles Larmore, “Political Liberalism” (1990) 18 *Pol. Theory* 339, 357; Ahdar & Leigh, *supra* note 300 at 39.

<sup>302</sup> Stanley Fish, “Religious Exemptions and the Liberal State: A Christmas Column,” *New York Times* (24 December 2012), online: <<https://opinionator.blogs.nytimes.com/2012/12/24/religious-exemptions-and-the-liberal-state-a-christmas-column/>>

Therefore, it is not surprising to see terms such as John Rawls' use of "full autonomy" to distinguish his version of liberalism from the "comprehensive liberalisms" views of Immanuel Kant and John Stuart Mill.<sup>303</sup> Rawls does not permit "comprehensive views" or a general philosophical moral doctrine of the good life into his "political liberalism," unlike Kant and Mill.<sup>304</sup> Other terms that emphasize individual rights include individualism, egalitarianism, universalism, and meliorism.<sup>305</sup> Robert Sharpe adds freedom and neutrality.<sup>306</sup> Law professors Rex Ahdar and Ian Leigh further suggest rationalism – the favouring of reason over emotion.<sup>307</sup> In reality, these characteristics have a degree of overlap with the core concerns of liberal theory.

As I see it, the primary focus of liberal theory is a quest to discover the rational explanation for the most effective relationship between the individual and the state that permits the greatest potential for self-realization in an atmosphere of civil peace. It is an explanation that trumpets neutrality, pluralism and tolerance. It is within that matrix that religion is to find its place in the relationship with the state.<sup>308</sup>

Religion has thrived within the liberal state as religious freedom has allowed for a plurality of religious groups to establish themselves. This plurality has kept religious communities nimble as the many factions with their different perspectives stimulate "innovation, which improves the religious product offered, which in turn translates into vibrant and vivified religion."<sup>309</sup>

Liberalism, as a philosophy, has evolved over the years, keeping in tune with the historical events and social realities of the culture. "The core of common culture," says Roger Scruton, "is religion. Tribes survive and flourish because they have gods, who fuse the many

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<sup>303</sup> John Rawls, *Political Liberalism*, Columbia Classics in Philosophy (Columbia University Press, 2005), 78.

<sup>304</sup> *Ibid* at 78, 145, 196.

<sup>305</sup> John Gray, *Liberalism*, 2nd ed, *Concepts in Social Thought* (University of Minnesota Press, 1995) at xii: "Common to all variants of the liberal tradition is a definite conception, distinctly modern in character, of man and society. What are the several elements of this conception? It is individualist, in that it asserts the moral primacy of the person against the claims of any social collectivity; egalitarian, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; universalist, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and meliorist in its affirmation of the corrigibility and improvability of all social institutions and political arrangements. It is this conception of man and society which gives liberalism a definite identity which transcends its vast internal variety and complexity."

<sup>306</sup> Robert Sharpe, *The Cambridge Lectures*, ed by Frank E. McArdle (1991), 265–66; Ahdar & Leigh, *supra* note 300, at 40. Freedom is the idea that the state's role is to maximize the human dignity, self-fulfillment, and autonomy while minimizing the interference with individual moral choice; neutrality—the state and law is to be neutral as to the conception of the good life.

<sup>307</sup> Ahdar & Leigh, *supra* note 300 at 40.

<sup>308</sup> For a very practical and informative guide on these issues see Sophie van Bijsterveld, *State and Religion: Re-assessing a Mutual Relationship* (The Hague: Eleven International Publishing, 2018).

<sup>309</sup> Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), 163. Eberle was recapping his understanding of Rodney Stark's view. Stark and Bainbridge state, "...[T]he natural state of the religious economy is pluralism. To the extent that religious freedom exists, there will be many organized faiths, each specializing in certain segments of the market. Moreover, this market will be dynamic, with a constant influx of new organizations and the frequent demise of others." See Rodney Stark & William Sims Bainbridge, *The Future of Religion: Secularization, Revival, and Cult Formation* (Berkeley and Los Angeles: University of California Press, 1985), 108.

wills into a single will, and demand and reward the sacrifices on which social life depends.”<sup>310</sup> Philosophy, as Will Durant saw it, is “the synthetic interpretation of all experience rather than the analytic description of the mode and process of experience itself.”<sup>311</sup> Liberalism is chameleon-like in that it is ever-developing and refining itself, keeping time with different historical and cultural realities. For example, “liberalism” in the philosophy of John Stuart Mill, in the 19th century, is remarkably different from the philosophy of William Eskridge of the 20th and early 21st centuries.

Professor Brian Tierney described the evolution of “freedom of conscience” as being based on “the natural rights of man, guaranteed by natural law and discernable by the ‘light of reason’ or ‘light of nature.’”<sup>312</sup> By the end of the seventeenth century, Tierney observes, the Western world had formulated “reasonably adequate theories of religious rights.”<sup>313</sup> These liberal philosophical theories of religious rights provided religion and its adherents a space in which to operate.

However, it is worth noting that in recent years there has been a worrisome resurgence of state claims to supremacy under new garb within the liberal framework. Professor Iain T. Benson aptly observes:

at a time when liberalism is becoming insecure about its capacity to generate binding commitments from the citizenry, certain approaches seek to give law or the state divine status. Whether expressed as “constitutional theocracy”, “political theology”, “human rights or political idolatry” or “civil religion”, these moves invariably clothe forms of politics and law with the mystique and authority of religion. This attempt is always dangerous because it provides no place outside of politics or law from which to argue for justice since politics and law, in such an idolatrized condition, are justice. The walls are much harder to scale when the castle is built so high.<sup>314</sup>

It is my contention that the removal of legal accommodation of religious practices as is evident in the SCC’s *TWU* 2018 decisions is a move that resurrects the ultimate sovereignty claim of the state. In essence, the state is denying any space for religious practice that supports traditional marriage (or other possibly contentious beliefs) within that religious community. The state is claiming complete control over how citizens ought to live. That is an overreach.

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<sup>310</sup> Roger Scruton, *An Intelligent Person’s Guide to Modern Culture* (South Bend, IN: St. Augustine’s Press, 2000), 5.

<sup>311</sup> Will Durant, *The Story of Philosophy* (New York: Garden City Publishing, 1943), at xvii.

<sup>312</sup> Tierney, *supra* note 284 at 54.

<sup>313</sup> *Ibid* at 55.

<sup>314</sup> Iain T. Benson, *An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion* (PhD Dissertation, University of the Witwatersrand, 2013) at 10. He cites the following sources: Ran Hirschl, *Constitutional Theocracy* (2010); Paul W. Kahn, *Political Theology* (2011); Leszek Kolakowski, *Modernity on Endless Trial* (1990) 146-161; Michael Ignatieff, in Amy Guttmann, ed, *Human Rights as Politics and Idolatry* (2001) 53 ff and, in particular, 77-92 which discusses the danger of human rights “idolatry” being based upon a genuine “spiritual crisis” in the West; Silvio Ferrari, “Civil Religions: Models and Perspectives” (2010) 749 – 763; also John von Heyking, “Civil Religion and Associational Life under Canada’s ‘Ephemeral Monster’” in Ronald Weed et al, *Civil Religion in Political Thought* (2010) 298 – 328; see, also, Ronald Beiner, *Civil Religion* (2011) 417 who wrongly views civil religion as a middle position between “liberal extremity” and “theocracy.” He misses “diversity pluralism” entirely so fails to see civil religion as a threat to associations.



### **3.6 Conclusion**

Through the developments of the early modern era, religion was granted public space to operate within the liberal political framework. Political philosophy informed by political experience with religion illustrated religion's individual and collective need for room to carry out the human purposes as taught by the faith. The theoretical basis for this arrangement was encapsulated in the idea that religious freedom was a basic birthright of every citizen, and that secular governments had to concede some authority to divine sovereignty. The political anvil played a practical and theoretical role, ensuring that religion was recognized as a deep, individual commitment that the state had to respect. This historical and practical reality of religious tolerance was then enshrined in the constitutions of Western democracies, and has formed the basis of the special nature of religion along with the state's need to tolerate. It is that understanding that is now compromised by the legal revolution against the accommodation of religion.

