INDUCING FUNDAMENTALISMS: LAW AS A CULTURAL FORCE IN THE DOMAIN OF RELIGION

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ABSTRACT

This essay explores the possibility that the way that the constitutional rule of law imagines and analyses religion influences how religious groups present and, perhaps ultimately, understand their own beliefs, practices, and traditions. In particular, certain aspects of the current legal approach to religious liberty and equality claims encourage a kind of absolutism and "positional hardening" that deemphasizes the complexity and dynamism of religious traditions. In so doing, the law risks inducing a kind of fundamentalism incompatible with the openness and mutual regard necessary in a highly diverse society.

Religious fundamentalisms pose daunting problems for contemporary law and public policy. In a society with an extraordinary range of ways of being and visions of a just society we depend more than we recognize on the assumption that perspectives and practices contain a capacity for malleability. This tacit dependence on a degree of pliancy in commitments is particularly strong in the domain of religious and cultural difference. When we speak publicly of the need for tolerance and accommodation if we are to meet the challenges of deep diversity, we are addressing not only state agencies and public authorities but also – and importantly – the communities that comprise the realm of culture that we imagine the law is responsible for overseeing. In this call for tolerance and accommodation we can hear a plea for openness, a request that we all think of our ways and perspectives as including a principle of provisionality. This openness involves a commitment to the idea that part of what we hold dear about our cultural commitments is their capacity for change in light of the world in which we find ourselves, and the neighbours with whom we find ourselves living. If these are the tacit assumptions that govern our public sphere and our human rights practices, religious fundamentalism, understood as a rigid or absolutist fidelity to a particular interpretation of a tradition, poses obvious and obviously deep challenges.

This much should be relatively contentious. What is too often missing from this picture is the cultural nature of the rule of law itself. Public stories about multiculturalism and religious difference tend to imagine law in managerial or curatorial roles above the realm of culture, guiding discourse and smoothing out tensions from the comfortable heights of rational objectivity. As I have argued in detail elsewhere, this framing of the problem is seductive because it hides one of the greatest difficulties in thinking about the interaction of law and religion, namely that the law is itself a cultural actor and, as such, the interaction of law and religion is itself a cross-cultural encounter.[1] Resort to law is not a retreat into a neutral space in which the messiness of culture can be more sterilely assessed. Turning to the law is, instead, moving into a rich cultural framework in its own right. This is to say more than that public law in Canada pursues certain values that have a cultural and historical provenance, though that is both true and important. To confront law's cultural nature is to recognize that the very way that it sees and defines issues, the symbols and metaphors that it uses to frame problems, the assumptions it makes about what is of value and relevance, are themselves but one way of making sense of experience.

My principal purpose for this brief essay is to gesture towards how the cultural nature of law might contribute to

the problem of religious fundamentalisms with which I began this piece. In turning back to religion and asking what law's particular understanding of religion might mean for how religious individuals and groups interpret and present their own traditions, I want to raise the prospect that in unreflectively exerting its cultural force, law has the capacity to induce the very fundamentalisms that it then finds so challenging to address.

LAW IMAGINING RELIGION

Religion never simply appears before the law. With the first look of a legal gaze, religion is rendered into a form that is most readily digestible within the cultural commitments of the contemporary rule of law. This is a point to be neither applauded nor lamented. The fact that the law exerts its own categories of value and of relevance on the matters that appear before it is not a glitch in current legal analysis or a doctrinal error that stands in need of correction. If one takes seriously the proposition that the law is a rich way of imagining the world, of interpreting events and problems in a particular way that gives rise to particular imagined solutions, one must cede any ambition to make law more neutral, arid, or a-cultural. Indeed, it is the conceit of the cultural aridity of law that has allowed us to proceed under the more comfortable but less edifying story that, with time, law will get progressively better at accommodating and tolerating religious difference.

Understanding the interaction of law and religion as a cross-cultural encounter offers a better appreciation of how law *sees* religion. As I have argued elsewhere at length, a careful review of the *Charter* jurisprudence shows that when the courts assess religion, there are three classificatory dimensions that take on a prominent role.[2] First, law is overwhelmingly viewed as an individual, rather than a group, phenomenon. The priority that the contemporary constitutional rule of law places on the liberty and rights of the individual, rather than the group, has been widely recognized in areas such as equality, association, and expression. This strong priority for the individual – this atomism – is an outgrowth of enlightenment rationality and the individualism that is the mark of liberal modernity.[3] That it finds one of its principal expressions in the law should come as no surprise to us. Nor should it be surprising that this element of law's cultural imagination imprints on the way that law perceives and analyses religion. As a result, law is able to see claims of religious inequality and limits on liberty that touch upon the individual much more clearly than those that affect a group.

Second, the law casts religion as a fundamentally private, rather than public, phenomenon. Liberal political theory has imagined that the key boundary over which the law would serve as sentry would be the public/private. From matters of search and seizure to questions of expression, the private has been the realm that the law has imagined being the quintessential domain of interest and preference – it is the arena in which the logic of the law has the least purchase. By contrast, the public sphere is the realm of reason, stripped to the extent possible of idiosyncratic worldviews and comprehensive doctrines. The corollary is that the law has an intrinsic scepticism when private interest erupts into the public sphere. This is very much true of law's treatment of religion. The law imagines religion as a quintessentially private matter. Belief is more digestible than conduct – this legal axiom is one potent expression of law's commitment to religion as a private matter.

The final dimension of law's understanding of religion is arguably the most potent and certainly the most significant for this paper. Religion is viewed by the law as, at core, a matter of autonomy and choice. The overwhelming focus on religious freedom rather than religious equality is an artefact of this powerful aspect of law's way of seeing religion. For the law, religion seems to take its core value as an expression of the autonomous will of the individual agent. Any dignity or privilege accorded religion flows from the fundamental place that it holds in the individual's set of choices around living a good life. It is for this reason that one sees the caselaw so fiercely protecting autonomous decision-making (or the future capacity for such decision-making).[4] Of course, for many religious individuals, religion is more linked with identity than choice and the religious dimension of one's life is simply part of how one finds oneself in the world.

Those who come to the law may understand the stakes of their religious claim dominantly in terms of group identity, and as much about public conduct as private belief. However, law will render the religious claim in terms of its cultural filters for value and relevance, naturally testing the religious issue against a picture framed by individual autonomy and the public/private divide. Seeing this possibility for interpretive divergence is an important part of understanding the interaction of law and religion as a cross-cultural encounter. But the insight and implications go further, affecting our understanding of how legal tolerance and practices of accommodation really shape up. Briefly put, the more that a religious claim comports with the way that the law imagines religion – as an individual and private expression of autonomy – the more it is fit for legal tolerance.[5] The guarantee of religious freedom and equality will be readily enforced to protect religion that already comports with law's cultural commitments; when religion grates on one of these dimensions of law's imagination it begins to feel intolerable. It is at this point that we begin to speak in terms of the limits of religious freedom. In this way, the limits of legal tolerance and

practices of accommodation also turn out to be fundamentally cultural, tracing their way back to a particularly legal way of valuing human experience and imagining the world.

RELIGION IMAGINING ITSELF

Having argued that law's particular way of seeing religion impacts on the manner in which it treats issues of religious freedom, equality, tolerance and accommodation, I want to refract the question. I want to gesture to the possibility that law's rendering of religion, law's ways and assumptions, affect how religious groups and individuals in contemporary Canadian society imagine and present themselves to the law. My suggestion is that the particular way in which law values and analyses religion has powerful "back stream effects," becoming highly influential and even potentially authoritative within religious culture.

Some such back stream effects are readily identifiable. The subjective sincerity test that has been adopted as the means of defining what "counts" as religion for the purposes of Canadian rights jurisprudence[6] has the capacity to intervene in the internal dynamics of religious groups. Rather than adopting an objective test of what is "religious", one that might be based on tradition or authoritative interpreters, and instead asking simply whether a claimant sincerely believes that the practice or belief in question has a nexus with religion, the law empowers the idiosyncratic religious believer within a tradition. Of course there is no way to avoid such influence. The alternative – to recognize history, orthodox interpretation, or some objective reference as the standard for the "religious" – would be to undergird existing authorities within a community by lending them the definitional support of the state.

What is of most interest to me, however, is the ways in which the definitions, values, and analyses of the law can produce what might be called "positional hardening" among religious groups. Perhaps the only safely generalizable statement within religious studies is that religious traditions are in a constant state of change and adaptation in response to their surrounding social conditions. Religions are constantly in flux, redefining their practices and beliefs in dialogue with their local, historical, and social milieus. Whole libraries can be filled with religious studies texts showing the *dynamic* genius of religious belief. Missing this fluidity is the mistake into which fundamentalisms tend to fall. They are moment-in-history interpretations of a moving and dynamic tradition.

Aspects of the approach to religion in the constitutional rule of law have the potential to incentivize and reward religious fundamentalisms of various sorts. Consider, for example, the test currently being offered by the Supreme Court of Canada as the central metric for testing the strength of a rights claim based on religion: does this interference deprive the individual of his or her meaningful choice to practice the religion?[7] This test encourages religious claimants to think of each and every aspect of their religious traditions as definitive of the whole. In this way, the law encourages a kind of practice of synecdoche in which each part of the religion must be capable of standing in for the whole. If the practice is merely one mutable, though perhaps treasured, component of a vast constellation of interlocking symbolic expressions of a tradition (as it almost always is), the claim will simply not fare as well in a rights analysis as if the claimant presents the practice as definitional, core, and immutable.

Consider also the emphasis on weighing and proportionality in the law's treatment of religious freedom and conflicting rights. The Supreme Court of Canada has recently stated that, rather than focussing on minimal impairment (the *Charter* analogue to reasonable accommodation), most claims of religious freedom and equality should be determined at an overall weighing of the harms suffered by the religious claimant over against the benefits derived from the legislative policy or practice in question.[8] As I have elsewhere explained, the benefit of emphasizing concepts like minimal impairment is that it focuses attention on the reasonableness and respectfulness of the government's measures – the extent to which those responsible for policy wrestled seriously with and attempted to be responsive to differing cultural communities.[9] Stressing, instead, a general balancing of harms and benefits encourages communities to respond to any and every interference with their religious belief and practices as a devastating blow to the religion, deemphasizing the tradition's capacity for adaptation, adjustment, and change.

Think, finally, about the focus on the public/private divide in law's understanding of religion. As I have explained, to the extent that religious claimants are able to explain their religion in purely private, internal terms, they will more readily fit law's understanding of religion and more readily attract its protective practices. One risks losing law's regard by admitting to historical engagement with external social forces and, as the *Wilson Colony* case showed, community interconnectedness. Adaptation to the modern market and involvement with modern technologies is precisely what led the majority of the Court in *Wilson Colony* to question whether the autonomous nature of this Hutterite colony was really all that central to the religion. Had the Wilson Colony been *more* insular, more private, it seems it would have fared better in Court.

Even in this brief sampling of certain aspects of law's understanding of and approach to religion shows ways in which one cross-cultural effect of the encounter of the modern constitutional rule of law and religion might be to

distort the very way in which religion is presented in public policy debates. Through the force of its cultural understandings, law may encourage religious claimants to think of their traditions as less complicated, more fragile, and more insular than might otherwise be. In short, the law might induce a kind of religious fundamentalism. It can invite distortions of religion that make legal and policy solutions more difficult to solve. If unreflective about its cultural force, in the very effort to attend to religious freedom and equality, law has the capacity to make its engagement with religion more fraught and to make compromises more difficult to identify.

CONCLUSION: PRIVILEGING DYNAMISM AND REGARD

The story of religion is, in substantial part, the story of adaptation and response to changing social worlds and, for centuries, the law has been one important figure in this dynamic history. Law has not just struggled with questions of religious freedom but has challenged religion to test the resiliency, complexity, and resources of its own traditions. An important challenge for contemporary human rights law is to ensure that it continues to encourage this dynamism rather than serving as a freezing agent.

How might this be done? Allow me to venture just two preliminary ideas, hoping to suggest areas for further thought and exploration. First, awareness of the issues explored in this paper should make one wary of adopting tests in the law that encourage individuals or communities to identify an unchanging "core" in their tradition. Second, perhaps we should be skeptical of general balancing tests, weighing costs and benefits, which encourage claimants to catastrophize interferences with religious beliefs or practices. The gravamen of most rights claims is some failure of regard. The focus is, thus, more productively placed on the extent to which the authority or government actor took genuine and sensitive regard of the religious community in forming policy.

Respect for religious tolerance and equality imposes obligations on public law to think critically about its assumptions, commitments, and demands. The law must look for ways to adjust and adapt in order to give genuine regard to differing conceptions of the good life, while remaining faithful to key public values such as equality and inclusion. Yet the exigencies of living in a deeply diverse society mean that individuals and cultural groups also bear an obligation to explore their own resources for the adjustment and adaptation. When the law induces fundamentalisms it frustrates this shared obligation for dynamism and regard on the part of state, individual, and religious groups alike, which is the ethical heart of a tolerant and pluralistic society.

NOTES

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1 Benjamin L. Berger, "The Cultural Limits of Legal Tolerance" (2008) 21:2 Can. J. L. & Jur. 245.

2 Benjamin L. Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall L.J. 277.

3 See, e.g., Charles Taylor, *Modern Social Imaginaries* (Durham and London: Duke University Press, 2004).

4 One sees this commitment to autonomous decision-making particularly clearly in cases involving children or youth whose capacity for such rational authorship is an open question. See, e.g., cases involving blood transfusions for Jehovah's Witness children. For a recent case involving a mature minor, see *A.C. v. Manitoba (Director of Child and Family Services),* [2009] 2 S.C.R. 181.

5 See "The Cultural Limits of Legal Tolerance", *supra* note 1; Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton and Oxford: Princeton University Press, 2006).

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

7 See *Alberta v. Hutterian Brethren of Wilson Colony,* [2009] 2 S.C.R. 567 [*Wilson Colony*].

8 *Wilson Colony*, supra note 7.

9 Benjamin L. Berger, "Section 1, Constitutional Reasoning, and Cultural Difference: Assessing the Impacts of Alberta v. Hutterian Brethren of Wilson Colony" (2010) 51 Supreme Court Law Review (2d) 25.