# RELIGIOUS DIFFERENCE, LAW, AND THE SILENCES OF MULTICULTURALISM

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Multiculturalism depends for its cogency and normative appeal on a particular vision of the character and operation of law. That this understanding of the character of law in a liberal constitutional order is fundamentally naïve does not compel the abandonment of the goods associated with multiculturalism, particularly when compared with many of its historical alternatives. It is, however, cause for demanding clear-sightedness about what the limits – both descriptive and prescriptive – of multiculturalism in certain domains may be.

The domain that interests me in this short essay is multiculturalism's relationship to religious difference. And the limit at issue is that multiculturalism turns out to have said little of interest, and provided little of use, on the most difficult questions raised by religious pluralism in a modern liberal state.

The appeal and importance of multiculturalism as it relates to religious difference is in establishing the state's baseline commitment to equal regard for religious groups, and a background sense that the polity is strengthened by the sociological fact of a broad range of beliefs, tastes, and pursuits. In matters of religion, this broad posture of equality is meaningful. It forecloses a confessional state committed to the dominance of a single religious culture, calls for a basic form of toleration toward difference, provides an ideological warrant to root

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out instances of state-imposed disadvantage and unfair privilege, and is at odds with more anti-religious, *laic* forms of secularism (including the form of the secular being advanced in Quebec through its legislation regulating religious symbols and clothing).

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In this, multiculturalism says certain important things about the state’s posture vis-à-vis different cultural groups. Indeed, in its early religious freedom cases under the *Charter*, the Supreme Court of Canada appealed to multiculturalism precisely to underwrite this posture of equality and toleration.[1] But such questions of intolerance and evenhandedness as among cultural groups are no longer – if they ever were – the deeper problematics presented by religious difference. As I will explain, viewed from the perspective of the constitutional contestation over religious freedom, the most vexing contemporary questions raised by religious difference and pluralism are about contesting the boundaries and limits of public normativity, a normativity that law expresses and projects. “Multiculturalism” has offered little to the legal analysis of these problems. The result is that responses to religious difference voiced from the register of multiculturalism turn out to be both prescriptively anemic and endemically disappointing for religious groups that diverge significantly from the metaphysical and normative mainstream.

Multiculturalism’s descriptive and prescriptive deficits in respect of religious difference are incorrigible features, not implementational defects. This fact is traceable to a gap between the cultural character of liberal constitutionalism and the role that multiculturalism assigns to law. Multiculturalism presupposes/desires the existence of a tool that can embody and implement it, but that is not itself also a problem of intercultural encounter. It hopes that law will be that tool. It is not. Otherwise put, multiculturalism’s muteness on the challenging issues of religious difference is intrinsic to a flawed casting of law in the logic of multiculturalism.

## CONSTITUTIONALISM IN THE DOMAIN OF CULTURE

> **“The conceit of law’s distance and autonomy from culture renders multiculturalism mute on the most difficult issues of religious freedom. ”**

The account of law that underwrites both popu-

1 See e.g., *R v Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 [Big M]; *R v Edwards Books*, [1986] 2 SCR 713. The Court has continued to use multiculturalism as rhetorical underpinning for religious freedom (see, e.g., *Syndicat Northcrest v Amselem*, 2004 SCC 47; *Multani c Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6) but also sometimes as a concept that circumscribes the scope of the right (see, e.g., *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12).

lar and most academic treatments of religion and multiculturalism places it on a managerial perch above the cultural fray.[2] From this view atop culture, law is positioned (constitutional commitments to religious freedom and equality in hand) to assess and address the points of friction that arise from religious difference, and to do so in a manner informed by the dual commitments to evenhandedness and toleration that multiculturalism counsels. But this view of law's relation to the domain of culture is fundamentally naïve, and the conceit of law's distance and autonomy from culture renders multiculturalism mute on the most difficult issues of religious freedom. This view fails to acknowledge the way in which liberal constitutionalism is itself a thick cultural form, understood as a framework of precommitments, ideas, and practices used to make sense of experience.

I develop and defend this claim and its consequences at length in *Law's Religion*,[3] noting the aesthetic, ritual, and ideological richness of the culture of Canadian constitutionalism. One element bears underscoring for the purposes of this essay. When we focus on how issues of religious freedom are analyzed in the jurisprudence, it becomes clear that religion never appears directly before the law. Rather, law exercises its power in thrall to a particular view of the essential nature and value of religion, a a view that is culturally rich, informed as it is by the history and commitments of liberalism. As I explain in *Law's Religion*, that rendering of religion understands its subject as essentially individual, an expression of autonomy and choice, and fundamentally private in nature. Religion that conforms with this understanding – liberal religion – is tolerable religion. It is the religion that is free.[4] But religion is not only what law imagines it to be. The adjudication of religion is, thus, something that takes place from within culture, not above culture.

Understanding law as itself a cultural form has several important consequences for our view of law and religious difference. Multiculturalism loses its acultural managerial tool and the encounter of law and religion shows itself as a cross-cultural encounter. But multiculturalism says little about the character or nature of this encounter. We also see that toleration is a more limited virtue than we might otherwise imagine, both bounded by law's ideas about the nature of religion and (with this) more invested with power and domination than we generally care to acknowledge.[5] We can begin to appreciate why the experience of law for some religious groups and individuals is of something far more assimilative and forceful than the story of multiculturalism can account for. And we see that the most difficult constitutional issues raised

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

3 Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto; Buffalo: University of Toronto Press, 2015).

4 Others have made sympathetic claims: see e.g. Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, N.J.: Princeton University Press, 2005).

5 Indeed, Canadian courts have increasingly moved away from toleration as the idea underwriting religious freedom, reaching instead for the concept of state neutrality. I discuss the reasons for this in Benjamin L. Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality," *Canadian Journal of Law and Society* 29, no. 1 (2014): 103–22.

by religious individuals and communities are not about their treatment by the state vis-à-vis other religions. They are about their challenge to legal culture itself.

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## THE MOST DIFFICULT QUESTIONS

The early years of constitutional debate about religious difference under the *Charter* largely focused on identifying and removing instances of the legal expression of Christian privilege in Canadian society.[6] Multiculturalism says something – in the register of equal treatment – about these kinds of matters, which surely still arise from time to time.[7] But today, the most vexing questions raised by religious freedom are about challenging the adequacy and universality of the culture of law’s rule and seeking a sphere of normative independence from public authority. Though sometimes presented as matters of equal treatment, their deep logic is a challenge to the reach and pervasiveness of law and public authority, rather than an appeal to them for regard and toleration. And on these matters – owing precisely to its studied naïveté about the character of law – multiculturalism is ill-equipped to assist.

Two examples from recent case law are vivid demonstrations of this deeper, more fundamental, kind of question posed by religious difference.[8] In the most recent instalment in the legal disputes prompted by Trinity Western University, the courts were called upon to decide whether a policy within TWU that discriminated against sexual minorities was a legitimate basis for law societies to refuse to accredit TWU’s proposed law school.[9] Ultimately, the legal issue crystallized around the question of whether the law societies’ refusal to accredit TWU’s law school was reasonable, reflecting a proportionate balancing of freedom of religion and the avoidance of discrimination. A majority of the Supreme Court held that it was. But the school was not seeking a fair balancing of public norms; rather, it was arguing for independence from those norms and to be allowed to operate beyond the reach of a legal system that channels and enforces them. This is not about evenhandedness or neutrality. This is, at its core, a demand for law and legal normativity to withdraw from itself to allow cultural independence – an extraordinarily complicated and challenging ask that is very much in tension with the way that law is imagined in the story of multiculturalism.

6 See e.g. *Big M, Zylberberg v Sudbury School of Education* (1988), 52 DLR (4th) 577.

7 See e.g. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.

8 For fuller discussions of these cases and how they mark out the frontier for religious freedom cases, see Benjamin L. Berger, “Liberal Constitutionalism and the Unsettling of the Secular,” in *Research Handbook on Law and Religion*, ed. Rex Ahdar (Northampton, Mass: Edward Elgar, 2018), 198–220.

9 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33.

In certain respects, the case of *Ktunaxa Nation v British Columbia*[10] shows even more starkly the heuristic and ethical limits of multiculturalism when set against the most difficult questions posed by religious diversity. Toward the end of a long process of negotiation and resistance surrounding the development of a massive ski resort in British Columbia, the Ktunaxa Nation chose to pose a freedom of religion objection. They argued that the state-authorized development of this ski resort would drive Grizzly Bear Spirit from the area, fundamentally impairing their religious beliefs and practices. On the strength of the case law to that point, the claim appeared compelling. However, this argument asked the courts to absorb a set of non-liberal metaphysical and ontological commitments into its analysis, and ones that, taken seriously, would put the shoe very much on the other foot: it would significantly impair Crown authority over, and use of, public land. The Court did not – it seems it could not – go there. The majority created a tortured doctrinal limitation to reject the claim as outside the scope of freedom of religion. A minority opinion acknowledged the fundamental breach of the Ktunaxa's religious freedom, but nevertheless held that the need to protect public authority over land outweighed even this evisceration of the right.

The Ktunaxa's religious freedom claim was, of course, the sublimation of Indigenous sovereignty claims – fundamental challenges to state authority – that have found little success elsewhere in our constitutional order. That religious freedom is a hospitable home for such claims is telling. As I have argued elsewhere, there is an abiding element of sovereignty at the heart of claims of religious freedom, something that reaches far beyond questions of equal treatment, toleration, and neutrality, and raises questions that are unsettling to liberal constitutionalism.[11] This fundamental contestation over sovereignty – or fundamental independence from state authority – is the deep logic of *TWU*, *Ktunaxa*, and the most difficult questions being raised by religious difference. It is also something about which multiculturalism has precious little to say.

## THE NEED TO SAY MORE

Despite valiant efforts to suggest otherwise,[12] multiculturalism is just not equipped to take us where we need to go in meeting the most urgent and vexing questions raised by deep religious difference. In this respect, as a concept, it is not unlike "secularism": both are expressions of a broader habit of hiding the unruly lived experience of religion and

10 2017 SCC 54. For a detailed discussion of the implications of this case for Indigenous religious freedom, see Benjamin L. Berger, "Is State Neutrality Bad for Indigenous Religious Freedom?" (July 1, 2019) in Jeffrey Hewitt, Beverly Jacobs, and Richard Moon, eds., *Indigenous Spirituality and Religious Freedom* (Toronto: University of Toronto Press, Forthcoming), Osgoode Legal Studies Research Paper, Available at SSRN. On the topic of Indigenous religious freedom in Canada more generally, see Nicholas Shrubsole, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto; Buffalo: University of Toronto Press, 2019).

11 Benjamin L. Berger, "Liberal Constitutionalism and the Unsettling of the Secular," in *Research Handbook on Law and Religion*, ed. Rex Ahdar (Northampton, Mass: Edward Elgar, 2018), 198–220.

12 See e.g. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*; Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Contemporary Political Theory (Cambridge, UK ; New York: Cambridge University Press, 2001).

modern constitutionalism under the tidy marquee of a principle. We are coming to appreciate how very little, indeed, broad invocations of legal principle or policy illuminate the social and political experiences of religious diversity and, moreover, how they can obstruct our view of the human and community bonds and relationships that subsist beneath such claims. We can be both multiculturalists, valuing the dispositions and postures toward difference that it encourages, and clear-eyed about its limits and blind spots.

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Global experience in matters of religious freedom teaches that there is no avoiding the difficult questions that circulate around the acceptable geography of state power. Our legal and political responses to religious freedom and equality claims must thicken up. From a starting point of acknowledging the cultural force of liberal constitutionalism, they must say much more about the substantive values the state ought to pursue and, most importantly, how far they can be pursued. In this, humility and perspicuity are key: humility born of an appreciation for the experience of communities with illiberal worldviews and normative horizons living within the culture of law’s rule, and perspicuity in respect of the cultural limits of legal toleration. Neither is a strength of multiculturalism.