TRYING TO PUT AN OCEAN IN A PAPER CUP: AN ARGUMENT FOR THE "UN-DEFINITION OF RELIGION"

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ABSTRACT

Critiques of Canada's legal definition of religion run in opposing directions. Some argue that the definition is too wide and lacks an objective aspect; others claim that the definition is too narrow and fails to capture religion's cultural aspects. The author suggests that religion may not be susceptible to a comprehensive definition, and argues that an approach that draws on analogies would be more appropriate. Such a methodology is familiar to common law reasoning, and would lead to a more flexible and capacious understanding of religion. Indeed, decisions of the Human Rights Tribunal of Ontario have successfully employed this technique.

INTRODUCTION

The Supreme Court of Canada has adopted a highly individualistic and subjective definition of religion. This definition has been criticized in two opposing directions, with judges and commentators arguing alternatively that it is too wide and too narrow. Those who claim the definition is too wide argue that it should have an objective aspect, or fear that the state will not be able to "reliably weed out persons with 'fictitious' or 'capricious' claims" (Charney, 2010, p. 50). Those who claim that the definition is too narrow argue that the highly individualistic definition can substantially impoverish understandings of religion (Berger, 2007), neglecting its collective, communal and cultural aspects.

This paper suggests that legal definitions of religion have been found wanting because the lived religious experiences of individuals and communities are so diverse that a single encompassing definition is impossible. This paper examines whether it is possible to have a coherent law of religious freedom that does not adopt an *a priori* definition of religion.

The paper begins by canvassing existing definitions of religion in Canadian case law and legal scholarship. Then, based on scholarship in religious freedom and multiculturalism, it argues in more detail that religion is not susceptible to a comprehensive definition. In the final section, drawing on recent decisions of the Human Rights Tribunal of Ontario and the Ontario Human Rights Commission's policy on creed and the accommodation of religious observances, this paper demonstrates that it is possible for justice institutions to function without setting out to comprehensively define religion.

DEFINITIONS OF RELIGION

The leading definition of religion in Canadian law comes from the majority decision of the Supreme Court of Canada in *Syndicat Northcrest v. Amselem* (2004). There, the majority held:

> *Defined broadly, religion typically involves a particular and comprehensive system of faith and worship... 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 (para. 39).*

Though this definition deliberately speaks in broad strokes, it is notable for its individualistic treatment of religion. It relies on the concepts of "*freely*" held convictions (implying an individual choice), *individual* self-definition, and *individual* connections to the divine or spiritual realms (see Berger, 2007).

Palpably absent from this definition is any notion of community. This was a point of division for the Court. In a dissenting judgment, Justice Bastarache held that "a religion is a system of beliefs and practices based on certain religious precepts" (*Syndicat Northcrest v. Amselem*, 2004, para. 135). These precepts serve two principal functions for Justice Bastarache: first, they are objectively identifiable, making the limits of religious freedom protections more predictable. Moreover, by connecting practices to these religious precepts, "an individual makes it known that he or she shares a number of precepts with other followers of the religion." In other words, sharing one's beliefs and practices with a community is, for Justice Bastarache, an essential element of religion. These definitions of religion diverge sharply, and lead to different legal consequences. Justice Iacobucci's definition renders religion entirely subjective, with the sincerity of an individual's belief becoming the touchstone for analysis. Justice Bastarache's approach would have required claimants to prove the objective existence of a religious precept in order to benefit from the protection of religious freedom.

Notably, both these diverging definitions adopt a general definition of religion before resolving the dispute at hand. This is a familiar practice in law, particularly in constitutional reasoning. While, for the purposes of a particular discipline of inquiry, it may make sense adopt a specific definition of religion (Modak-Truran, 2004, p. 721), there is more at stake when a court or tribunal, bearing the coercive and symbolic power of the state, makes decisions about religious freedom or discrimination.

While it is tempting to refine existing legal definitions of religion, the lack of consensus on this definition may inspire a move in a different direction. Indeed, a more appropriate response may be to refuse to adopt a comprehensive, *a priori* definition of religion altogether. In the next section, I argue that attempts to define religion for the purpose of protecting religious freedom under the law ultimately stifle religious freedom, strengthening the claim that religion is simply not susceptible to a comprehensive definition.

IS RELIGION IMPOSSIBLE TO DEFINE?

Winnifred Fallers Sullivan argues that "legally encompassing the religious ways of people in an intensely pluralist society is most likely impossible" (2005, p. 138). She bases this argument in part on her experience acting as an expert witness in a lawsuit in Florida where a dispute arose over individuals' installation of graveside monuments in a publicly managed cemetery (Warner v. Boca Raton, 1999). As witnesses attempted to fit their actions into the prosecutor's idea of what religion was, she observed: "their religious lives could not be contained in legal language or in the legal spaces assigned to them in the cemetery" (p. 45).

This problem of defining religion may be part of a larger phenomenon. Drawing on the writings of Ludwig Wittgenstein, James Tully explains that words are "too multiform to be represented in a theory or comprehensive rule that stipulates the essential conditions for the correct application of words in every instance" (1995, p. 104). Instead,

> *understanding a general concept consists in being able to give reasons why it should or should not be used in any particular case by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents and drawing attention to intermediate cases (p. 108).*

In this view, general linguistic terms are likened to families. The more specific instantiations of those terms are the members of the family, and, like members of a human family, share family resemblances. Attempting to abstract a comprehensive and general definition of the family by reducing it to its essential traits hinders analysis; the more fruitful endeavour is to work case by case through constant comparison (p. 112-114).

While Tully (following Wittgenstein) makes the stronger claim that all general concepts operate in this fashion, I wish to make the smaller claim (following Sullivan) that at least the term "religion" does. When the Supreme Court set out to define religion in *Amselem*, it may have prejudged whether certain activities were "religious," excluding from the term practices that should be included. For example, the Court's individualistic definition of religion makes it more difficult to see the religious import of collective activities, brought to light in the lived practices of the Hutterian Brethren (see Esau, 2004). The Hutterite faith requires adherents to adopt a collective lifestyle and be as isolated and self-sufficient as practical necessities allow. But in *Alberta v. Hutterian Brethren of Wilson Colony* (2009), the majority of the Supreme Court of Canada refused to consider the communal religious practices of the Hutterites under the constitutional guarantee of freedom of religion, considering the impact on the Hutterite community only in assessing the proportionality of the impugned legislation. In so reasoning, the majority minimized the specifically religious import of the Hutterite practice of communalism. However, it is difficult to conceive of the

Hutterite commitment to communal living as anything but religious: it arises out of a particular interpretation of biblical texts, it is passed from one generation to another, deviation from the principle has consequences in this life and the afterlife, etc. Taking a more case by case approach and considering more seriously the perspective of the Hutterian Brethren, may have allowed the Supreme Court to treat religion as a more capacious and, in my view, more accurate concept. In the next section, I argue that the Ontario Human Rights Commission and Tribunal have done just that.

THE BUMBLEBEE FLIES ANYWAY: WORKING WITHOUT A DEFINITION

While the *Ontario Human Rights Code* does not define the term creed, the Commission has adopted a Policy that provides a definition (Ontario Human Rights Commission, 1996, p. 4-5). Though this definition resonates with *Amselem* by adopting a Policy of subjectivity, it does not set out to define religion by reference to the role it serves in people's lives, as the *Amselem* definition does. Instead, the definition draws on examples to explain what will and will not be considered religion. The Policy states, for example, that religion includes "non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures" (p. 4). However, the Policy also notes that religion excludes "secular, moral or ethical beliefs or political convictions" (p. 5). It is striking that, as in the Wittgensteinian family resemblance approach, when the Policy sets out to define creed and religion, it does not attempt to set out a number of criteria that a practice must fulfill in order to be considered religious. Instead, it reasons by analogy.

Perhaps in part because of this Policy, when the Human Rights Tribunal of Ontario was required to decide whether an organization qualified as a "religious organization" in *Heintz v. Christian Horizons*, (2008) the Tribunal was able to reach a conclusion without citing a particular definition of religion. Instead the Tribunal was able to identify enough indicia in the organization's practices to reach, with "no difficulty", the conclusion that Christian Horizons was a religious organization, even in the face of an argument to the contrary. The Tribunal took a similar approach in determining whether Falun Gong was a religion in *Huang v. 1233065 Ontario Inc. (No. 3)* (2010), reasoning that "Falun Gong consists of a system of beliefs, observances, and worship" (para. 36); this statement implies an analogy to other religions. This shows that, in the tradition of the common law, it is possible to deal with cases one at a time, without attempting to set a "once and for all" definition of religion. This is a particularly prudent approach as understandings of religion vary across cultures and over time.

My research has not turned up any case in which the Tribunal rejected a claim that a particular belief or practice was religious. It is tempting to bring up examples of worldviews whose religious nature is controversial in order to put the theory of analogical (as opposed to comprehensive) definition to the test. However, in keeping with the common law approach of dealing with cases as they arise, I think it better to leave the door open so that the religious or non-religious nature of a particular practice or set of beliefs can be dealt with in a specific factual context.

CONCLUSION

I have argued that the criticisms of the Supreme Court's definition of religion cut in opposing directions, arguing that it is both too wide and too narrow. These contradictory currents stem from the more basic problem that religion is not susceptible of a comprehensive, *a priori* definition. Instead, I have argued for an approach that reasons by analogy, taking one case at a time, in the style of the common law and Wittgensteinian analysis. Indeed, the Ontario Human Rights Commission and Tribunal have shown through their policies and decisions that this approach can work in practice, allowing for justice to be done without relying on a set definition of religion.

NOTES

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1 Modak-Truran, for example, adopts Schubert Ogden's definition: "the primary form of culture in terms of which we human beings explicitly ask and answer the existential question of the meaning of ultimate reality for us." This definition, arguably, is appropriate for Modak-Truran's analysis of the extent to which judges' religious perspectives inform their legal reasoning. However, by Modak-Truran's account, the definition "not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory), communism, and other so-called secular answers to the existential question" (p. 725-726).

2 With concerns directed more specifically at American constitutional law, she also notes: "One reading of the First Amendment would suggest that when the government gets into the business of defining religion, it gets into the business of establishing religion. The result is necessarily discriminatory. To define is to exclude, and to exclude is to discriminate" (p. 100-101).

3 Notably, the dissenting judges and the judges of the lower courts did take this into account.

4 Discussion of the appropriateness of where the policy draws its line is beyond the scope of this paper.

5 Varied on appeal, but not on this point.

[6] In *Obdeyn v. Walbar Machine Products of Canada Ltd.,* (1982. at para 6358), an Ontario Board of Inquiry was assumed for the purpose of argument that communism fell within the meaning of "creed." In *Sauve v. Ontario (Training, Colleges and Universities)* (2009), the Tribunal refused to decide whether a belief in Tarot cards was a religious belief in the absence of evidence. In *Young v. Petres* (2011), the British Columbia Human Rights Tribunal rejected a claim that the beliefs of one of the parties were religious, but this was an unusual case. There, two employees claimed that their employer was imposing upon them his religious beliefs, which they called "a 'slurry' of Reiki, Taoism, and Shintoism" (para. 13). The employer denied that his beliefs were religious, and the Tribunal held that the employees had not brought any evidence to rebut this claim.

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A BIT OF HISTORY...

Discrimination laundering

The Commission is encountering a growing number of incidents of discrimination committed on behalf of clients by such intermediaries as employment agencies and management consultants. This practice constitutes, in effect, a "laundering" of discrimination in the sense that the employers themselves have no direct contact with the victims and thus do not appear to be acting in contravention of the *Code*, though clearly they are as responsible for discrimination as the agent who accepts the assignment ... Indeed, acts of discrimination of this kind are frequently so covert that the victim may not even know that he or she is being discriminated against.

Source: *Life Together*, 1977