

# Book Review: Religion and the exercise of public authority

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A group of Canadian scholars from a variety of disciplines (law, religious studies, philosophy, social sciences, anthropology and theology) have produced a volume with the primary aim of exposing the legal and political assumptions underlying the concept of state neutrality and its limits as a governing ideal. The limits and assumptions of state neutrality are exposed and discussed by way of its interaction with religious diversity where it is most controversial – in public spaces and in the performance of public duties. This is done in eleven chapters that discuss the topic within various settings – the courtroom, the magistrate’s office, the hospital, the school, and the lawyer’s office. This interaction between religion and assumed notions of state neutrality can range from a public official wearing a religious symbol, to a public official refusing to register a civil union of a same-sex couple (based on the religious and conscientious objections of the official). As mentioned by the editors themselves: “These issues have exposed the difficulties engendered when civic officials engage with religion – both as a fact of social life and as an aspect of their own identities – while discharging their public responsibilities” (1).

In the editors’ introduction entitled, *Religious neutrality and the exercise of public authority*, the concepts used to manage religious diversity – neutrality, secularism and tolerance – are laid bare and a deeper discussion of them is invited. Tolerance, for example, although used as a way to manage religious diversity, has in reality often been experienced as a method of exclusion and marginalisation. In the same manner, the concept of ‘secularism’ is broadly applied, glancing irresponsibly over the various existing types of secularism and the fact that not all types have resulted in a positive response to the protection of religious diversity. In fact, many applications of tolerance and secularism have led to quite the opposite: feelings of exclusion and marginalisation based on one’s religious distinctiveness. The book furthermore highlights the controversial aspects surrounding the popular use of the concept of ‘state neutrality’ in national and international courts. Interpretations of state neutrality can range from precluding the state from taking any position on the question of the common good in society, to merely

exercising even-handedness between religious and non-religious ways of life, while pursuing some notion of the common good of society. Between these different notions of state neutrality, one finds different and inconsistent applications of the concept with regard to public officials and their religious expressions and freedom. In addition, the ‘state’ is not an abstract concept; rather, it is made up of individuals and organisations with specific religious and non-religious orientations, which inevitably have an effect on public or state action. The discomfiting aspect is that, in many instances, the ‘state’ has formed and emerged *from* certain religious and belief structures, and it is extremely difficult, if not almost impossible, for a state to dismantle itself completely from these structures and become neutral. Such attempts to dismantle the state from religion bring to the fore issues about the “complexity of identity, the nature of the liberal state, and the challenges of public life in a condition of deep religious pluralism” (9).

In the first chapter, *The meaning and entailment of the religious neutrality of the state: The case of public employees*, Jocelyn Maclure opens the debate about the different meanings of state neutrality and the implications of those different meanings. The general argument used against public officials wearing religious attire is that public-sector employees must reflect and instantiate the neutrality of public institutions (14). Maclure discusses the different arguments that support this broad statement. The first argument concerns the more moderate one from the Bouchard-Taylor Commission supporting the notion that such a ban should only pertain to public officials of a “higher degree”. She refutes the other two arguments that the religious neutrality of the state is analogised with the political neutrality of public administration, and the “reasonable sacrifice” argument. The Bouchard-Taylor Commission rejected the idea that the appearance of neutrality justified a general ban on religious signs of all personnel in public organisations, but recommended a compromise, namely a ban for positions such as, for example, judges, police officers and prison guards that embody the authority and coercive power of the state in the highest degree (15-16). Regarding other public officials, the Commission argued that they should be evaluated on the basis of their actions and the neutrality of their professional conduct; not neutrality in the way they express their religion. Maclure argues that it is doubtful that the importance of neutrality or the appearance thereof is sufficiently weighty to justify interference with the freedom of religion of candidates for the positions of “higher degree” (16). Therefore, the compromise proposed by the Commission will not stand up to critical scrutiny. Maclure continues to discuss the final two arguments about justifying the general ban on visible religious signs for public-sector employees. She argues that neither of these arguments is valid. The first justification for the ban of religious symbols is the “analogy between religious and political signs” (12). In this instance, an analogy is drawn between political and religious symbols. It is argued that the state can legitimately ask employees not to express their political opinions and their religious opinions and expressions in the exercise of their duties (17). However, Maclure argues that there is a

fundamental difference between the state-political allegiance and the state-religion relationships: there is no complete separation between the state and political ideology; the government, as a crucial organ of the state, must be elected on the basis of a political programme.

However, the state can be independent from religion. For a civil servant or public employee to wear a visible religious symbol does not imply that the laws have a religious grounding or that the state identifies with a religion (18). Politics and religion can consequently not be conflated and they have different reasons for being protected.

If freedom of conscience and of religion is specifically protected, rather than being subsumed under the right to freedom of expression, it is because meaning-giving beliefs and commitments deserve special legal protection (19).

The second justification for the ban is the “reasonable sacrifice argument” and the “new religious correctness” (19). In this instance, it is reasonable to demand that believers put away their religious symbols when they are at work. Such a view of religious symbols emanates from the Protestant Reformation – religion is to be anchored on the purity of intentions and not on symbols. This form of religiosity fits well with liberal principles of rational moral autonomy. However, many believers, Christians included, do not see religious rituals and symbols as mere superficial or optional external manifestations of their faith (20). “[T]he acceptance of a single legitimate way of being religious would advance an impoverished understanding of freedom of conscience and religion” (20).

Following Maclure’s overview of the main arguments against and for public officials wearing religious attire, Benjamin L Berger continues the discussion in *Against circumspection: Judges, religious symbols, and signs or moral independence*. This chapter considers the interpretation of signs and symbols. It argues that the debates have proceeded along the line of a misleadingly simplistic approach to understanding the meaning of signs of religious belonging and identity. Such simplistic approaches thwart the opportunity to develop a deeper understanding of the virtues one hopes to find in public officials. In 2013, the *Parti Québécois* government advanced the “Charter of Quebec Values” prohibiting public employees to wear “conspicuous” religious symbols. It had a very different vision to the one urged in the Bouchard-Taylor report. Charles Taylor himself (from the Bouchard-Taylor report) condemned the Charter’s exclusionary and closed vision of secularism. Although there are remarkable differences between the two reports, both assume that the place to begin when “addressing the issue of the just management of religious difference in contemporary society is with a set of claims about the nature and demands of ‘the secular’” (25). Berger argues that appeals to the nature and demands of broad concepts such as secularism draw attention away from the complicated “social, historical, and political facts associated with religious difference in a given society”, clearing the way for policy prescriptions to

have exclusionary effects (26). Arguing for a ban of specific public officials, he states, is not defensible. Berger contends that the argument that judges and police officials are involved in sentencing and punishing, and hence the display of their religious attire or symbols might lead others to believe that they are basing their actions or judgements on religious authority and beliefs cannot be valid (28). Yet, the act of sentencing is one of the most violent expressions of the authority of the state matched with discretion afforded to the decision-maker. Judges are bound to bring certain personal instincts and perspectives into sentencing. The whole person of the judge is drawn into an encounter with the person of the offender.

[I]deas that the judge is simply a speaker of state law within the sentencing environment ... there is, in the sentencing and punishment decisions, no plausible retreat to the conceits of legal formalism. Sentencing is one place where it is very difficult not to accept that who the judge is – the content of her conscience and philosophy of crime and punishment – matters deeply (30).

When delivering his verdict, a judge should be impartial between the accused and his antagonist, the prosecuting authorities. In light of this, it is not moral independence that is required from the judge, but rather that he is independent from the interests or will of the government. In fact, the judge's view as an actual buffer between government and accused renders a more positive view of judges with visible religious affiliations. Although nothing assures that religion will always lead to a more merciful or mitigating position, there is also no assurance that a judge without any religious commitment or with other political or philosophical commitments will do so. Berger does not advocate that the wearing of religious symbols will always be a positive requirement. Rather, what should be attractive is the "appearance of various moral touchstones and resources in the aggregate picture of the judiciary, because this helps to mark the judiciary as a collegium of ethical reasoners who enjoy moral independence from the claims of government authority alone" (37).

In *Religious lawyering and legal ethics*, Faisal Bhabha continues the discussion about the presence of religious symbols in legal professions. It is emphasised that lawyers are not "empty vessels or simple technicians". They are moral actors and their work is never morally neutral. This chapter investigates how lawyers incorporate personal moral decision-making into their professional role, with specific focus on religious lawyering. Bhabha specifically focuses on issues where religion is a constitutive aspect of the lawyer's approach to legal practice. Sometimes, the demands of practice can present an irresolvable tension with the requirements of professional legal conduct. Traditional views on professional legal conduct require lawyers to relegate religion to the private life while maintaining the façade of the irrelevance of faith to professional behaviour and decision-making. However, for the "faith-driven religious lawyer, faith is the source of inspiration and normative understanding of every aspect of the role of lawyering" (47). Where there is a conflict with professional requirements, such a lawyer will not compromise on a matter of faith. These lawyers

also belong to broader communities of similar lawyers generating new normative views of what it means to be a lawyer. Bhabha mentions that the contribution these communities can make to legal ethics remains under-explored. Greater exploration and integration of these perspectives can lead to a more pluralistic understanding of the legal profession. However, pluralism presents the danger of undermining the posture of professional uniformity that legal societies try to project through accreditation and regulation. Such a danger is also posed by non-religious subgroups such as, for example, social justice lawyers, lawyering with some moral framework within which they believe. They are subject to the same ethical tension as religious lawyers and it is clear that ethical tension alone cannot defeat the desire for religious lawyering. If religious lawyering is allowed, it should be acknowledged that it will have an effect on the legal profession. The question is whether such an effect will threaten or detract from the professional role. With regard to the influence of religion in the legal profession, Bhabha directs the reader to the notion that it has become fashionable to exaggerate religion as a source of danger and diminish its potential as a source of good. In this instance, the legal battle concerning the accreditation of the Trinity Western University (TWU) (private) law school (and its requirements for students to adhere to Christian views on sex) is used as an example. The danger that such a law school may pose to the rights of the LGBTQ community was exaggerated and the possible sources of good thereof diminished. What is proposed is that a reasonable approach will focus on evaluating the merits of a lawyer's professional conduct and not ethical motivations or beliefs. Lawyers from different religious or non-religious backgrounds may be motivated differently and from different ethical compulsions to perform legal-aid work at a legal-aid clinic – yet, both seek work that will enable them to play a particular lawyer's role that is "similarly infused with moral commitments, even if the particular motivation differs" (58). In this instance, sustainable integrity is proposed as a valuable instrument for all lawyers to practise their duties, irrespective of their religious motivation. Hence, faith can offer meaningful and self-fulfilling professional lives for religious lawyers.

In *Managing and imagining religion in Canada from the top and the bottom: 15 years after*, Paul Bramadat reflects on the lessons he has learned during 15 years of working with opinion-makers struggling to engage meaningfully with religion in their work. The 28-21 majority rejection of TWU's proposed law school reflects a pile-on effect in professional or public discourse. One should reflect on the problematic features of the inflammatory rhetoric in which it was framed. If the university's public and legal defence of their position has demonstrated a refusal to change their views, it should be viewed in light of the observation that, when one becomes a subject of the law, it has a tendency to induce fundamentalism by establishing an arena in which participants are required to present themselves in auto-caricatured manners (72). In a way, presuppositions have already posited TWU in a specific role – one of fundamentalism. Inflammatory rhetoric and presupposed criteria have set up the "fundamentalist" group against the liberal group. The debates

persistently called for a “yes” or “no” response, positioning religion as a non-negotiable or static social force. Yet religion is no more a fixed or stable entity than law is.

This dominant understanding of both law (*qua* referee) and religion (*qua* stable producer of timeless beliefs and practices) not only leads to overly fixed views of religion, but also insufficiently critical perspectives of our own institutions and history (74).

Inflammatory debates are usually conducted to “send a message” (76), making it difficult to tell more complicated truths about the fluidity of religion and the operation of political and cultural power in society (77).

In *God keep our land: The legal ritual of the McKenna-McBride Royal Commission, 1913-16*, Pamela Klassen argues that public exercise of authority depends on storytelling, ritual and law. The story, law and ritual should keep stable the cultural underpinnings of public authority and its claims to territory. The McKenna-McBride Commission expressed the social institution of colonial property ownership through acts rooted in state and religion. This reminds one of the inconvenient fact about the formation and history of the contemporary structure of the state that is expected to conform to the ideal of neutrality (5). The Commission was charged with expanding and consolidating Indian “reserve” land and made cosmological claims that had Christian contours. These claims were in direct competition with indigenous cosmologies (5), once again challenging the notion of state neutrality and posing the question: “Whose state neutrality?” In the McKenna-McBride Commission, groups had to orientate their comments through pre-established images of the “Crown”, the “Indian”, “God” and “reserve”. Westernised and secular understanding of state neutrality in Canada sits squarely within social images that are not neutral.

Amélie Barras, Jennifer Selby and Lori Beaman consider how categories and boundaries such as the separation between church and state, the “public” and the “private”, appear in the working lives of public servants who self-identify as Muslim. The chapter *In/Visible religion in public institutions: Canadian Muslim public servants* stems from qualitative interviews considering the negotiation of religious difference in seemingly “non-remarkable” situations (96). The narratives in these interviews expose the presumptions and power dynamics in the delineations of “neutrality”. Islam is often identified as challenging the secular narrative – a narrative that presumes itself to be stable, fixed and timeless. Based on interviews with Muslim public servants in Canada, this chapter concludes that Canadian public institutions are not neutral. It is not the Christmas celebrations in public offices that offended the Muslim officials there, but rather the lack of acknowledgement that Christianity is not in the private, that it is not only Islam that is hyper visible and that there are amounts of Christian privilege in the public office. Hence, it was the denial that the public office was not neutral and the pretention that Christianity was not visible in the public space that posed a problem. On the other hand, Muslim interviewees

indicated that there was a constriction of identity toward a singular focus on their religious identity in scholarship and public discourse. Their religious identities are hyper visible and the foreground part of their interactions at work affect employment and status at workplaces in a negative way (the irrational rejection of the hijab) (103). In general, this chapter highlights the ambiguity of neutrality in public institutions and how religious minorities view secularism as attributing visibility to Islam, but not to Christianity. Christianity, under the guise of neutrality and impartiality, continues to structure time, space and social relations in the work lives of public servants. The interviews point to “continuous, but flawed organisation around a public/non-religious and private/religious dichotomy” (109).

In *The Prayer Case saga in Canada: An ‘expert insider’ perspective on praying in the political and public arenas*, Solange Lefebvre discusses the Canadian courts’ deliberation on whether prayer has a discriminatory effect on members of the public present at municipal council meetings, as well as on the question of state neutrality. She cites two cases. The Court of Appeal for Ontario (1999) required municipalities to cease the recitation of the ‘Lord’s Prayer’ at public assemblies and suggested a more inclusive prayer. The Ontario Superior Court (2004) allowed the recitation of a prayer in line with the guidelines by the Court of Appeal. In this instance, Lefebvre indicates that a decision on public prayer and state neutrality can only be understood by a court if it understands the character of religious ritual. Lefebvre concludes that this is something courts are not equipped to do (7).

Turning to the protection of the religious freedom of public officials such as physicians, Bruce Ryder investigates the physician’s right to conscientious objection as opposed to the rights of patients to equal access to medical services and to be treated with equal dignity. In *Physicians’ rights to conscientious objection*, it is argued that similar to the position of religious lawyers, as discussed earlier, the professional duties of a physician can come in conflict with religious convictions and religious conscience. The problem is that conscientious believers sincerely believe that they are bound to comply with their beliefs in all spheres of their lives, both private and professional. It can be argued that allowance of conscientious objections poses a significant risk of harm to others. Conscientious objectors do not have the right to prevent others from engaging in lawful activities, but they do have a right to be protected from forced personal involvement. The personal involvement they are seeking to avoid must be more than trivial, otherwise conscientious rights can be used to object to simply having to live or work in environments shaped by norms. Therefore, Ryder suggests that the conversation should be about reasonable limits on the various rights, and not whether or not they should exist. Physicians stand in a position of authority in the sense that patients are dependent on their expert services and are as such vulnerable. Their objection to helping them can cause not only material harm, but also harm to the dignity of the patient when they experience rejection based on reasons such as abortion. There is a need for a nuanced

and respectful reconciliation of the situation – not emotionally charged and polarising debates.

Richard Moon continues the discussion on conscientious objections in *Conscientious objections by civil servants: The case of marriage commissioners and same-sex civil marriages*. In Canada, when the definition of civil marriage was changed to enable same-sex couples to marry, some provinces agreed to accommodate the commissioners' religious objections and excuse them from performing same-sex marriage ceremonies, while other provinces were unwilling to do so. In most cases in Canada, the issue is framed by the courts as a contest between religious freedom and sexual orientation equality that must be resolved through the balancing of these competing interests. In most cases, the court strikes the balance in favour of sexual orientation equality. Moon argues that there is no freedom of religion interest to be balanced against the right to sexual orientation equality. The religious objection of the marriage commissioner falls outside the scope of freedom of religion, because it involves a belief about how others in the community should behave and be treated. Moon argues that the personal lives of the commissioners should be separated from their duties in the public sphere, where their interactions with others should be subject to public norms.

The final two chapters of the book discuss the topic of religion and the exercise of public authority in education. Daniel Weinstock discusses *A freedom of religion-based argument for the regulation of religious schools*. He argues that restricting religious freedom may be the only way to take parents' religious freedom seriously, while respecting the child's right to an open future. He argues that the right to an open future of a child involves the right not to be raised in unacceptably asymmetrical ways, although it does not rule out the parents' right to raise children in acceptably asymmetrical ways. The question whether children are being raised in acceptably or unacceptably asymmetrical ways depends on the way in which they are raised by the conjunct of school, civil society, and home. This responsibility should not be laid only at the door of parents, as schools are best equipped to fulfil and administer this function.

In *'Open house'/'Portes ouvertes': Classrooms as sites of interfaith*, Shauna Van Praagh concludes this volume by illustrating ("through an imagined open house that juxtaposes diverse institutional settings") how the encounter of religion and state changes shape across classrooms and through corridors (186). Van Praagh investigates less formal or explicit narratives that emerge through the activities of teaching and learning. This chapter invites one to imagine the everyday happenings inside the school and "shows at each turn that public education involves all manner of productive encounters with and judgement about religion, religious identity, and religious practice" (7). Praagh argues that public school education is an intrinsically interfaith enterprise.

Although mostly written from a Canadian perspective, this book does offer scholars in law, social sciences and philosophers around the globe

a resource to explore the controversial debates concerning religious distinctiveness in the public sphere in general and, more specifically, as pertaining to public authorities. The book also provides for an entry point to start further discussions and deeper examinations of “the concepts we use to organise and manage religious diversity – concepts such as tolerance, secularism and neutrality” (2). However, it pushes beyond the general concepts used to manage religious diversity (such as state neutrality and secularism) and also focuses on the social facts of religious difference, bringing to the fore the social and political complexities of religious diversity in the state. The reader is reminded that religion plays an inevitable role in the contemporary experience of the state and that state engagement with religion is inevitable. It also highlights the conceptual unsteadiness of separating that which is religious from non-religious and asking the state to distinguish between them, and state officials to divide these two aspects within themselves (9).