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Civil Religion and Human Rights in Canada¹

John von Heyking²

The Political Preconditions for Tolerance

Vadim Rudolfovich Dubichev, the Head of the Information Policy Department for the Governor of Sverdlovsk Region, explained to the conference participants that the inhabitants of the Ural region gain their respect for human rights from their historical experience of fleeing religious and other forms of persecution. He explained that, as a region of migrants, they have a pioneer spirit like the “wild west of the United States,” whereby its inhabitants have learned the precious arts of combining self-reliance and mutual cooperation. As a result, civil society institutions are more developed here than in other parts of Russia.

It pleases me to speak to you today, and to have the opportunity to visit the Urals region. My home is in the Canadian province of Alberta. It is the Canadian “wild west” that shares the same pioneer spirit that sustains respect for human rights and pluralism. One of the reasons why religious pluralism flourishes to the degree it does in Canada and the United States is because, as immigrants, we have inherited a cultural attitude of healthy skepticism toward what politics can achieve. We have a cultural inheritance of recognizing that religious persecution is frequently the result of attempts by political rulers to establish political uniformity with dubious and overreaching civic ideals. We

¹ Presented to the Conference on “Freedom of Speech, Freedom of Conscience, Right for Unification: International and Russian Experience of Application: The 60th Anniversary of the Universal Declaration of Human Rights. Ekaterinburg, Russia.

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have a cultural inheritance of recognizing that human happiness is better achieved within religious communities, through education, than in larger political communities where those ideals are enforced with the sword. In short, we have a cultural inheritance of recognizing the limits of state power and laws to promote public morality, which sustains a public understanding of the limits of what politics can achieve in promoting human happiness and virtue.

This healthy skepticism toward politics, instead of undermining public morality, actually promotes it. It promotes greater respect for one another, and a certain appreciation of minority views that, at times, can appear as maverick.³ At the same time, this skepticism promotes a spirit of volunteerism and self-government that encourages us to “roll up our sleeves” to assist in community-building projects. A society of minorities is one that cultivates mutual help and trust among its constituent members.

Tolerance Becomes a Prejudice in Canada

Canadians are not consistent in their commitment to pluralism. Pluralism depends on a self-confident culture where habits of self-government are inculcated. Cultures that feel themselves under siege from foreign influences, or cultural influences they regard as corrupting, will not encourage pluralism as much. In Canada, one of the key threats toward religious freedom has, ironically, come under the banner of tolerance.

Historically, tolerance has been an ideal that has defended minorities against ethnic,

³ Alberta is the land of ranching. A “maverick” is a range calf without an owner. Historian and novelist Aritha Van Herk applies the term to Alberta, and therefore to its traditions of pluralism: “Especially appropriate for a collective resistance to being caught, owned, herded, taxed, or identified” (*Mavericks: An Incurable History of Alberta*, (Toronto: Penguin Books, 2001), 394). A more comprehensive account of this type of limited politics can be found in Michael Oakeshott, *On Human Conduct*, (Oxford: Clarendon, 1975). On the importance of religious and other forms of civil associations for the practice of self-government, see Alexis de Tocqueville, *Democracy in America*, trans., Harvey Mansfield and Delba Winthrop, (Chicago: University of Chicago Press, 2000), especially I.2.4, II.2.5.

religious, ideological, and other forms of prejudice. Tolerance has historically been identified with Enlightenment and understanding. However, in Canada, the attack on tolerance that has been conducted under the banner of tolerance, has been conducted by transforming tolerance itself into a prejudice. Tolerance has been turned in on itself. As a result, religious minorities find themselves confronted by state agencies, human rights lawyers, journalists, and academics for failing to be sufficiently tolerant. For example, the Roman Catholic bishop of Calgary, Fred Henry, is a critic of the Canadian government's plan to legislate same-sex marriage. For his efforts, he was threatened by the Canadian tax agency with revoking the Catholic church's tax-exempt status.⁴

There are two basic reasons why, in Canada, toleration has been turned against itself, or why it has become a prejudice. First, tolerance contains an ambiguity. Tolerance requires a "live and let live" attitude toward others. It regulates the relations among individuals and groups. However, the idea of tolerance requires attention to the beliefs and habits that exist within those individuals and groups. For example, one would not expect a militant Islamist, who believes violent jihad is one of the pillars of Islam, to be tolerant of others. Similarly, one would not expect a communist, promoting the "immiseration of the proletariat," to be tolerant of capitalists or even proletariat who do not seem themselves as "immiserating."

Concern for beliefs and habits within individuals and groups has a long philosophical lineage. The philosopher Socrates argues in Plato's *Republic* that a city cannot be just unless the souls of its citizens are also just. One finds a similar idea in *Towards Perpetual Peace* by German philosopher Immanuel Kant. Kant argues that

⁴ "Revenue Canada Threatens Henry," *Western Catholic Reporter*, November 1, 2004 (<http://www.wcr.ab.ca/news/2004/1101/henry110104.shtml>).

perpetual peace is impossible unless the states of the world have adopted the republican form of government. For Kant and many Enlightenment philosophers, monarchs are more likely to wage war. Thus, the rules governing relations among nations depend on the rules governing within those nations. Of course, not all rules are adequate.

The second reason why tolerance has been turned into a prejudice in Canada gets us closer to why I chose to include “civil religion” as part of my title. According to many thinkers of the philosophical Enlightenment (including Immanuel Kant), history moves in a progressive direction. Societies become more egalitarian and democratic as they become more secular. This is known as the secularization or modernization thesis. In radical forms of the Enlightenment, that of Auguste Comte or Karl Marx for example, religion gets dismissed as the “opium of the masses” or simply as a stage where humanity is backwards and savage. Humanity is said to be advanced when at the later stages of history, when science and technology are said to guide society. As Eric Voegelin demonstrates, belief in progress is a form of religious belief, although the object of worship is not a transcendent god.⁵ Yet, it is a form of belief because it makes a claim, formed only by an act of faith, concerning the end of time. One cannot know the end of time unless one has stepped outside of it, which the human intellect cannot do. Tolerance and freedom of religion cannot be sustained when people believe that religion is withering away, and when one regards religious believers as backwards obstacles to the march of history. This is when secular becomes secularism, and science becomes scientism. Russia is filled with the graves of too many religious believers who were

⁵ Eric Voegelin, *Modernity Without Restraint: The Political Religions; The New Science of Politics; and Science, Politics, and Gnosticism, Collected Works of Eric Voegelin*, vol. 5, ed., Manfred Henningsen, (Columbia, MO: University of Missouri Press, 2000); *History of Political Ideas, Collected Works of Eric Voegelin*, vols. 19-26; *Order and History*, vols. 14-18.

killed by those of that opinion. In Canada, the corrosion of tolerance toward religious groups is nowhere as brutal as was the case under communist Russia. However, the Canadian case follows the same formal logic of how persecution develops.

In Canada, the transformation of tolerance into prejudice that corrodes religious freedom occurs because 1) the tolerance that is meant to regulate relations among groups becomes an imperative for the state to regulate what goes on within groups, and 2) this turn is motivated by a progressive understanding of history that leads its adherents to regard religious believers as reactionary and in the grip of numerous irrational “phobia”. I turn now to consider how Canadian law handles this prejudice while striving to maintain religious freedoms.

Canada’s Myth of Ever-Expanding Egalitarianism

The transformation of tolerance into a prejudice takes its bearings from the place that the Canadian Charter of Rights and Freedoms holds in society’s imagination, especially among elites in law, academia, journalism.⁶ The Charter is the Canadian equivalent to the Bill of Rights in the United States, as it outlines the various rights and freedoms Canadians are accorded under the law. Just as the U.S. Bill of Rights is the source of that country’s “rights culture,” the Charter informs the political terminology and expectations of a large number of Canadians. Its influence can be said to take the form of a myth, or civil religion. It should be noted that this essay focuses on the expectations Canadians place on the Charter, not on the document itself.

⁶ For further details on these stakeholder groups, see Rainer Knopff and F. L. Morton, *The Charter Revolution and the Court Party*, (Toronto, ON: Broadview Press, 2000).

Canadians view the Charter as addressing two unresolved impasses in Canada's constitutional order: 1) whether Canada is a secular country (the Charter myth is an attempt to make it secular), and 2) whether Canada is a unified country with a common civic vision (instead of being divided between English-speaking Canada and French-speaking Quebec, or divided among several regions). The lead figure behind the creation of the Charter, Pierre Trudeau, thought the Charter could be used by the Supreme Court and its attendant legal, political, academic, and journalistic elites to heal both sources of the legitimacy crisis. He thought the Charter could secure the secularization, that is, removal of religious influence from Canadian public life, and he thought creating a nation of rights-bearing citizens would overcome Canada's chronic regionalism to create a pan-Canadian political culture. Neither transformation is complete, if indeed it can be completed, and the resulting uncertainty explains much of our country's "culture wars."

The peculiar piety these stake-holder groups display toward the Charter and the Supreme Court expresses the attempt to resolve this crisis of legitimacy. For instance, former Justice Minister Irwin Cotler, also a famous international human rights lawyer, proclaimed "human rights has emerged as the new secular religion of our time."⁷ Editorialist Jeffrey Simpson states with some irony, "The Charter of Rights and Freedoms is the closest thing Canadians have to a canon these days with the Supreme Court justices as legal cardinals."⁸ One finds more serious references to the "nation's new secular religion" in legal literature.⁹ Pollster Allan Gregg criticizes secular liberals for avoiding

⁷ Irwin Cotler, Speech to Parliament of Canada, *Hansard*, (37th Parliament, 2nd session) October 28, 2002 (http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/016_2002-10-28/han016_1355-E.htm).

⁸ Jeffrey Simpson, "Leave the Prayerbook at Home, Stockwell," *Globe and Mail* (Toronto), March 31, 2000, A15.

⁹ Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion," *Supreme Court Law Review*, 2005, 29(2d): 175.

moral and political philosophy to discuss major cultural issues. They instead hide behind procedure and sovereign commands by the Supreme Court, in a manner consistent with what Thomas Hobbes refers to the sovereign as a “mortal god.”¹⁰ For Gregg, their “secular fundamentalism” is no less “fundamentalist” than those who resort to divine commands found in Scripture.¹¹ Among Charter-skeptics and critics of the Court, Robert Ivan Martin refers to the Supreme Court as a theocracy of relativism “in the grip of a secular state religion,” with the Supreme Court as its rulers.¹²

Many comparisons of the Supreme Court as a “theocracy” or as “high priests” are polemical, though have a grain of truth insofar as the Charter, the Court, and its decisions are considered sacred and beyond contestation. Part of this reverence is par for the course in a constitutional democracy in which the Supreme Court is regarded as the final arbiter of rights and freedoms that must be protected from majority power. However, the Charter myth moves discourse beyond merely respecting rights. Chief Justice Beverley McLachlin expresses this added piety when she describes the Charter as the authoritative statement of the “hypergoods” to which Canadian society subscribes, and views the Supreme Court as the primary arbiter between the “total claim” the law makes upon citizens and the “total claim” religion makes on its believers.¹³ Whether either law or religion makes a “total claim” upon individuals can be seriously questioned. Even so, the Chief Justice misstates the problem. While the Court has the constitutional authority to

¹⁰ Thomas Hobbes, *Leviathan*, XVII.

¹¹ Allan Gregg, “The Christian Comeback,” *Saturday Night Magazine*, November 2005, 22. A scholarly analysis of “secular fundamentalism” can be found in Paul F. Campos, “Secular Fundamentalism,” *Columbia Law Review*, 94(1994): 1814-27.

¹² Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy*, (Montréal-Kingston: McGill-Queens University Press, 2003), 1.

¹³ The Right Honourable Beverley McLachlin, P.C., “Freedom of Religion and the Rule of Law: A Canadian Perspective,” in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*, ed., Douglas Farrow, (Montréal-Kingston: McGill-Queens University Press, 2004), 12-34.

adjudicate the claims a religious tradition places on one (e.g., whether the sick children Jehovah's Witnesses should be forced to receive a blood transfusion), it is misleading to characterize either the claim made by religion or by the state as "total." As Jean Bethke Elshtain observes in her rejoinder to McLachlin's essay, religion and state only make partial claims, referring to the injunction of Jesus Christ to give to God what is God's, and to Caesar what is Caesar's.¹⁴ Casting the task of constitutional adjudication as one of balancing "total claims" already distorts the way religious freedoms will be assessed. Because an arm of one of those "total" claimants, the Supreme Court, is doing the balancing, religious freedoms will necessarily lose out.

Religious Freedom as Individualistic

In the first seminal case on religious freedom under the Charter, *R. v. Big M. Drug Mart* (1985), the Supreme Court set the tone for future freedom of religion cases by collapsing religion into conscience, despite the Charter's wording of "freedom of conscience and religion."¹⁵ Then Chief Justice Dickson wrote: "What unites enunciated freedoms in the American First Amendment, s. 2(a) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental

¹⁴ Elshtain elaborates that because of these partial claims, it follows that practical, not legal, judgments made by legislative bodies is the appropriate manner to negotiate the two claims (Elshtain, "A Response to Chief Justice McLachlin," 35-40).

¹⁵ *Canadian Charter of Rights and Freedoms*, Schedule B of the *Constitution Act*, 1982 (U.K.), 2(a) [hereinafter *Charter*]. *R. v. Big M Drug Mart Ltd.*, (1985) 1 S.C.R., 295 [hereinafter *Big M.*]. Supreme Court rulings can be found at: <http://scc.lexum.umontreal.ca/en/index.html>.

intervention to compel or to constrain its manifestation.”¹⁶ Freedom of conscience is fundamental because it accords with the ability of “each citizen to make free and informed decisions” and with “basic beliefs about human worth and dignity.” While his definition of freedom of religion in terms of conscience is true as far as it goes, it is essentially an individualistic reading of freedom of religion, and ignores the communal aspect of religion that is so important to many religions including Judaism, Islam, or Roman Catholicism. Dickson’s definition treats religion as an essentially private matter, which informs the Charter’s later decisions.

The limitations of this approach become evident in subsequent cases where the Supreme Court had to arbitrate between the rights of a religious group and an internal minority who invokes s. 15 of the Charter to contest the group’s right to remove rights and privileges from that minority, as well as to set the terms of how a religious group engages with the broader society.¹⁷ The Court’s decisions illuminate the extent to which religious organizations have the freedom to organize themselves free from governmental regulation and interference. In cases subsequent to *Big M*, the Court has either upheld the right of religious organizations to discriminate according to “bona fide occupational requirements” (BFOR), or it has attempted to minimize the conflict between the two stake-holders in a way that diminishes the profundity with which each side regards its own position; it recognizes one by recognizing none.

¹⁶*Big M*. at 346.

¹⁷ This discussion summarizes a more extended argument I have made elsewhere (John von Heyking, “Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada,” *University of British Columbia Law Review*, 33 Special Edition (2000): 663-98). Iain Benson provides a more recent overview (“The Freedom of Conscience and Religion in Canada: Challenges and Opportunities,” *Emory International Law Review*, 21(1) Spring 2007: 111-65).

Lower courts and tribunals have generally accepted BFORs by religious institutions, and their reasons for doing so have been largely consistent with the Supreme Court's prudential approach to religious liberties. For example, the Manitoba Human Rights Commission ruled in favor of a Mennonite College who fired a secretary after she converted to Mormonism.¹⁸ However, as Alvin Esau observes, the BFOR approach insufficiently protects associations because BFOR depends on individual judges and not on law. Instead, he advocates statutory "exemptions to preserve religious associational life" over BFOR.¹⁹ The idea of BFOR requires religious organizations to put themselves before the bar of virtue in the modern republic, and, in that sense, it presupposes that the rights of those religious organizations flow from the state instead of presupposing that the individuals and groups (along with the rights and commitments inherent to them) are prior the state, as is the case of traditional liberal democratic theory. BFOR thus presupposes the existence of civic virtue that judges religious organizations.

Religious Freedom Clashes With Emergent Rights

Trinity Western University v. the British Columbia Council of Teachers is so far the most significant case involving the rights of a religious organization that the Supreme Court has yet heard.²⁰ The British Columbia Council of Teachers (B.C.C.T.), the provincial agency that accredits teacher education programs to ensure graduates are

¹⁸ *Schroen v. Steinbach Bible College*, (1999), 35 C.H.R.R. D/1 (Man. Bd. Adj.), Mr. Donald Knight, Q.C., Board of Adjudication, July 21, 1999 [hereinafter *Schroen*].

¹⁹ Alvin Esau, "'Islands of Exclusivity': Religious Organizations and Employment Discrimination," *University of British Columbia Law Review*, vol. 33, Special Edition 2000: 722. See his more extended analysis in *The Courts and the Colonies: The Litigation of Hutterite Church Disputes*, (Vancouver: University of British Columbia Press, 2004), 295-331.

²⁰ *Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R. 772 [hereinafter *Trinity*].

suitable to teach in the public education system, had refused to accredit TWU's teacher program on the grounds that the code of behavior that all students of this evangelical university must sign was deemed discriminatory against homosexuals and thus made graduates of its teacher program ill-equipped to deal fairly with homosexual students in public schools. The Court ruled in favor of Trinity Western University on the grounds that the B.C.C.T. had been unable to find instances of discrimination committed by TWU graduates. The Court generally recognized the value of religious associations as genuine contributors toward meaningful pluralism within civil society. It also observed that TWU is a voluntary organization that will not appeal to everyone. They thus decided the case in terms analogous to the BFOR, on the basis that internal minorities have the right to join or leave the institution. In doing so, the Supreme Court overturned a lower court decision that had ruled against TWU on a secularist basis. The lower court found that public schools, which TWU serves, are secular and therefore must exclude the viewpoints and perspectives of schools such as TWU. The Supreme Court considered this view of secular too restrictive, preferring instead to define secular in terms of pluralism whereby religious perspectives are included.

The Supreme Court's treatment of discrimination, or, more precisely, its failure to define it, is more troubling. The Court ruled in favor of TWU in part because the B.C.C.T. could not prove discrimination. However, the Court did not explain what it meant by discrimination. Inciting violence against and isolating homosexual students are blatant examples of unjustifiable discriminatory behavior. However, TWU, by setting up a code of behavior, views some forms of discrimination as justified. For instance, a graduate of TWU may wish to act upon those beliefs in the classroom. One can imagine

an example of a teacher or guidance counselor, out of sincere and thoughtful belief, counseling in a caring and inclusive way that respects the dignity of a homosexual student, while advising him or her of the teacher's opinion about the superiority of chastity and heterosexual relations. The B.C.C.T. would regard such behavior as unjustifiably discriminatory, but the Supreme Court left the issue hanging. By doing so, they failed to provide proper guidance on the extent of freedom of religious practices when those practices conflict with the Court's construction of selfhood for s.15 rights.²¹

Conclusion

Canada shows one possibility of what can occur with tolerance. Tolerance can be distorted to undermine pluralism, and to assert a worldview that undermines religious freedoms. Tolerance, which is meant to protect minorities against prejudices, can be transformed into a prejudice, though one that calls itself enlightened. Fortunately, this is a possibility, but not the fate, of tolerance, as seen in the Canadian Supreme Court's attempts to coordinate competing rights. Genuine tolerance can be sustained in a culture with robust religious organizations that can cooperate on common projects, and among citizens with habits of self-government and volunteerism. Canada possesses a tradition of individuals participating in civil associations, including religious organizations, that promote cooperation and trust. This tradition is rooted in its immigrant heritage. It is this heritage we see restraining attempts by the British Columbia Council of Teachers, with

²¹ In a related case, the British Columbia Court of Appeal, a provincial court subordinate to the Supreme Court, upheld the B.C.C.T.'s disciplining of a teacher who wrote letters to a newspaper critical of homosexuals (*Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 (CanLII)). (<http://www.courts.gov.bc.ca/jdb-txt/ca/05/03/2005bccca0327err1.htm>).

its secularist ideology, to discriminate against Trinity Western University. The judges of the Canadian Supreme Court saw the value of a pluralistic society, filled with a diversity of political, moral, and religious viewpoints, when they allowed Trinity Western graduates to participate in educating the children of British Columbia and the rest of Canada. Yet, work needs to be done. It is one thing for the Supreme Court judges to recognize the importance of civil and religious associations. It is another thing to formulate a principle to promote their participation. Canadians need a more effective way of justifying pluralism, including the freedom of religious organizations to craft their own approach to life within the broader pluralistic canopy of society. Canadians have a solid foundation of thinking about the rights of individuals, and even of the rights of various ethnic and cultural groups. They now need a proper defense of the rights of religious groups.