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The Rule of Liberal Legalism: The Challenge of the Normativities of Multiple Modernities and Religious Diversity

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**THE RULE OF LIBERAL LEGALISM:
THE CHALLENGE OF THE NORMATIVITIES OF
MULTIPLE MODERNITIES AND RELIGIOUS DIVERSITY**

NOORJAHAN PIRANI HIRJI

**A THESIS SUBMITTED TO THE
FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF LAWS**

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ABSTRACT

In Canada profound diversification of multiple moral, political and normative commitments of a multiplicity of communities is unstoppable. Its historically liberalized, modernized and secularized law dominates principles of procedural justice in expressing the monistic liberal theory of rights now entrenched as individual rights within its charter. For religious believers, basing legal and political life on moral behavior acquired through generations of norms is integral to both security of state, and integrity of multiple communities. Tension exists between religious rights, demands of different visions of the good life, secular politics and the slow reshaping of liberal constitutional law in recognizing religious pluralism in the context of freedom of religion guarantees. The greatest challenge in liberal freedom of religion jurisprudence is to balance equality and difference and attain judicial consistency. If conflicting normative systems are not able to combine their respective power and co-exist, the potential of conflicts to escalate is serious.

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GLOSSARY OF ACRONYMS

General

CCL - Constitutional Law Group, *Canadian Constitutional Law* (3rd) (Toronto: Emond Montgomery Publications Limited, 2003)

SCC – The Supreme Court of Canada

Legislation

Charter – *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being *Schedule B* to the *Canada Act 1982* (UK), 1982, c 11.

LDA - *Lord's Day Act*, RSC 1970, c. L-13, s 4

Jurisprudence

A.C. - A.C. v Manitoba (Director of Child and Family Services), [2009] 2 SCR 181.

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

Big M. - R v Big M Drug Mart, [1985] 1 SCR 295.

Edwards Books - R v Edwards Books and Art Ltd., [1986] 2 SCR 713.

Hutterian Brethren - Alberta v Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567.

Multani - Multani v Commission Scolaire Marguerite-Bourgeoys, [2006] 1 SCR 256.

Oakes - R v Oakes [1986] 1 SCR 103.

INTRODUCTION - The Limits of Modern, Secular Liberal Legalism: Restraining Different Ethics in the Context of Equal Religious Citizenship

“In a plural world, law is an ongoing process of articulation, adaptation, re-articulation, absorption, resistance, deployment, and on and on. It is a process that never ends ...; study the multiplicity and engage in the conversation rather than impose a top-down framework that cannot help but distort the astonishing variety on the ground.”¹

A. Overview: The monistic claims of modern, liberal, and secular values

Today, the modern Western democratic state broadly engages in the rule of, and the organization of, social life by a set of fundamental liberal rules and principles as set out in its constitution. The notion of the rule of liberal constitutional law—the normative political philosophy of all modern Western states—describes a purposive and an effective legal system that: respects individual identity; is generally obeyed and breaches of which are enforceable by the state; limits government powers; and is itself independent of the other branches of government and powerful private interests.² Western secular law is part of this liberal modernity. This systematic liberal political philosophy that is dominated by an individualistic, secularist, universalistic and rationalistic framework is a product of Western European legal tradition and culture that was voluntarily adopted by Western countries as legal modernity.³ Constitutional law now consists of statute law and precedent (*stare decisis*) and in the West, it is part of the democratic system.

However, the current age is of a multiplicity of modernities, the next *avatar* of

¹ Paul Schiff Berman, “A Pluralist Approach to International Law” (2007) 32 Yale J Int L 301 at 328 [hereafter Berman, “A Pluralist Approach”].

² The Constitutional Law Group, *Canadian Constitutional Law* (3rd). (Toronto: Edmond Montgomery Publications Limited, 2003) at 2 [hereafter CCL]; Wagner, Peter. *A Sociology of Modernity: Liberty and Discipline* (London & New York: Routledge, 1994) at xi [hereinafter Wagner, *A Sociology of Modernity*].

³ Wagner, *ibid.* The European ideology of classical liberalism grew out of struggles for liberation from Stuart Kings in England. It was due to revolutions in Europe, the Glorious Revolution in 1688 in England and the *Declaration of the Rights of Man* in 1789 that power shifted to parliament with public and political authority finally resting in the people as democratic rights.

this liberal modernity. There is therefore a co-existence within Western plural societies of a multiplicity of meaning systems leading to multiple truth claims.⁴ In the West now, there are spaces of forced coexistence of an “astonishing variety” of primary sources, including of moral standards.⁵ The dominant and firmly rooted Western liberal secular legal system is now required to lend order to plural normative lives in their midst.

In Canada, in 1982, the *Canadian Charter of Rights and Freedoms (Charter)* was enacted as a basic feature of the Canadian constitution.⁶ Although, since 1982, these values have been reassessed and even restructured with complex politics and philosophies about multiculturalism, disagreements on major social transformations are highly divergent. In globalization, although epistemic theories about personal freedom remain central in providing organization and focus of problems, explanations and interpretations,⁷ the formation of modernity generally is not a uniform process of

⁴ Roger Ballard, “Common Law and Common Sense: Juries, Justice and the Challenge of Ethnic Plurality” in Prakash Shah ed, *Law and Ethnic Plurality: Socio-Legal Perspectives* (Leiden, Boston: Martinus Nijhoff Publishers, 2007) at 23 [hereafter Ballard, “Common Law”]. For relevant works on pluralism and the law, see Meena Bhamra, “On Cultural Diversity: The Importance of Normative Foundations for Legal Responses” in Prakash Shah ed, *Law and Ethnic Plurality: Socio-Legal Perspectives* (London: Glass House Press, 2005) at 24; John Griffiths, “What is Legal Pluralism?” (1986) 24 J Legal Plur Unoff Law 1 at 38 [hereafter Griffiths, “What is Legal Pluralism?”]; Prakash Shah, *Legal Pluralism in Conflict* (London: Glasshouse Press, 2005) at ix [hereafter, Shah “Legal Pluralism in Conflict”].

⁵ Berman, “A Pluralist Approach” *supra* note 1. For further development of pluralism in a societal context, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) [hereinafter Kymlicka “*Multicultural Citizenship*”]; Timothy Macklem “Faith as a Secular Value” (2000) 45 McGill LJ 1; Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004) at 5 [hereafter Taylor, *Modern Social Imaginaries*]; Paul Schiff Berman, “Global Legal Pluralism” (2006-2007) 80 S Cal L Rev 1155 [hereinafter Berman, “Global”].

⁶ CCL, *Supra* note 2. See *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 [Charter].

⁷ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 2nd ed (Cambridge: Cambridge University Press, 2006) at 3.

secularization.⁸ I hope to show that the interactive space—the sociocultural space—is currently a terrain of contestation precisely because the space for normative difference does not seem to exist. Because a sociocultural space without meaningful values and norms is a space of conflict—divisions in terms of rights and obligations, and the creation of hierarchies, in the current globalized age, how egalitarian are the claims of liberal values? How can this modern liberal secular state encourage religious diversity, pluralism and the common good? And in Canada, as an offshoot of the Western liberal secular modernity—although its liberal democratic philosophy is admirable—how effective is the interactive space in this modern liberal secular and democratic society for both a plurality of religions and liberal law to co-exist in the governance of a multiplicity of lifeworlds and where legal resolution is free from arbitrary interference?⁹

Does Canada’s constitution sufficiently prohibit the state from favouring any one religious community, and does it protect religious freedom for all? In the context of normative pluralism and the dominance of the universalized agency of the liberal individual, are religious individuals forced to choose between the tenets of their faith and full participation in society?

For at least the last two hundred years, the central aspects of Western liberal modernity have been the ongoing global normative concepts that continue to drive the evolution of reason defined as instrumental rationality. Master theories about liberal institutional and cultural progress from pre-modernity to modernity were based on the works of Marx, Tönnies, Durkheim, Simmel, Parsons and others.¹⁰ These theorists

⁸ Wittrock, Björn. “Modernity: One, None, or Many? European Origins and Modernity as a Global Condition.” (2000) 129:1 *Daedalus* 31 at 32 [hereinafter Wittrock, “Modernity”].

⁹ The concept of secularism will be defined in Chapter II.

¹⁰ See Wagner, *supra* note 3, also generally, *supra* note 4.

focused on economic growth, specialization, rationalization, individualization and so on as crucial to the processes of liberal modernization.¹¹ Liberalization was coupled with the process of secularization, a process that separated religion from law and for Knights, as part of freeing the Christian religion from legal and political rule, Christianity was separated from the territorial state.¹² These secularized socio-political claims functioned as a form of morality and eventually became law that was equipped to interpret the positions of the secular liberal judiciary.¹³ The instrumental rationale of liberal modernity, as structured within its political systems and egalitarian ideals, supposedly ensures that the rule of secular liberal law would not be domineering and public regulation would not constrain the liberties of individuals.¹⁴

The singularly determining centre of society—the rule of constitutional law, based on the modern Western secular form of liberty—may not be capable of shaping the entirety of social relations. There is “reciprocal influence” that exists within human sociabilities, human hierarchies and human relations.¹⁵ The sociological dynamics of group relations, of power or not, continue to be shaped by socio-political collectivities by, for, and of, group processes. Humans are ultra-socialites, no matter what their surroundings. Humans are consistently engaged in highly coordinated relationships of all kinds, be they face to face or not. The tasks humans are involved in are related to survival, the provision of resources, and reproduction. And for these endeavours, the

¹¹ *Ibid.*, also see Wagner, *supra* note 3 at x to xi.

¹² Samantha Knights, *Freedom of Religion, Minorities, and the Law*. (London & New York: Oxford University Press, 2007) at 1.36.

¹³ Warwick Tie, *Legal Pluralism: Towards a Multicultural Conception of Law* (England: Ashgate Publishing Company, 1999) at 102.

¹⁴ *Ibid.* also *Supra* notes 4 & 5.

¹⁵ Dacher Keltner, Gerben A. Van Kleef, Serena Chen, and Michael W. Kraus. “A Reciprocal Influence Model of Social Power: Emerging Principles and Lines of Inquiry” (2008) 40 *Advances in Experimental Social Psychology* at 155.

human is basically constantly involved in navigating through myriad relationships of anthropological groups.

Many questions arise: Is there such a thing as a coherent sense of self? A coherent sense of self would point to an ability of the self to identify and govern themselves as completely aligned with a particular ethos, theory, concept, philosophy, norm, or theology, that is so balanced, so lucid, so comprehensible, so logical, so complete that it is possible to both, on the one hand be explained to others as truth, and simultaneously, be understood by all as totally justified. In effect, can humanity—in the form of a community, nation, or world—be cohesive such that it is unified, consistent, organized, and solidly interconnected with interrelations that logically complete each other? Generally, it is known that ideas of coherence or so called rationality: of self, of community, of nation or of world, are a fallacy.

Although constitutional values respect the equality and human dignity of individuals, interpretation, or institutional responses—the final arbiter being the high courts—include a variety of secular visions of social justice based on liberal strategies. Forms of secularized liberal legalism have constitutional recognition and democratic legitimacy in modern states. The aim of these strategies is to create stable and lasting political identities linked to concepts of social good and political rights or positive rights such as the right to vote and participate in politics, freedom of thought, conscience and of association, freedom of movement, and free choice of occupation and the protection of the rule of law.¹⁶ As part of this political ideology relating to personal freedom, the established liberal legalism with rational values further stresses human dignity and

¹⁶ CCL, *supra* note 2. Also see generally *supra* note 4 & 5. The 18th century positivist approach attempts to strip all subjective considerations from the scientist for objective value free investigations.

autonomy: liberty, relating to limited government; equality of right, relating to obeying similar laws enforced by the state; and critical thought, relating to the consent of the governed.¹⁷ However, whether the multiplicities of modernities are committed to the existing liberal or non-liberal norms, they all have numerous open interpretations of the good life.

A powerful theme for all faith-based cultures globally is that the role of the ethical imagination in legal expressions of the civil is fed by religious and cultural narratives as sources of the self. What therefore are the capacities of the already conflicted liberal logic and norms? Can liberal law be redefined to make it more hospitable to diversity without compromising its commitment to universal liberal principles? Again, as Berger insists, modernity does not interfere with religious beliefs but secularization and the pluralizing modernities make the task of uncovering religious truths more difficult.¹⁸ And Parekh laments that the logic of liberalism tends to view human beings as completely constituted by their culture where culture is a superstructure interacting with an unchanging and identical human nature.¹⁹

I also hope to show that the classification of different categories of class, citizenship, religious believer, consumer and producer can be constrained by liberal legal doctrines as dominated by this individualistic, secularist, universalistic and rationalistic framework. Communities have always survived in worlds where cultural mediums give rise to the law—jurisgenesis—and where intelligible normative behaviour and stronger

¹⁷ Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (New York: Palgrave MacMillan, 2006) at 338 [hereafter Parekh, *Rethinking Multiculturalism*]. Also, see generally *Supra* notes 4 & 5.

¹⁸ Linda Woodhead, Paul Heelas, and David Martin. *Peter Berger and the Study of Religion* (London & New York: Routledge, 2001) at 3 [hereinafter Woodhead et al, “*Peter Berger*”].

¹⁹ Parekh, *supra* note 17 *Rethinking Multiculturalism*.

bonds are in context.²⁰ Narratives, prescriptive or adjudicatory, are normative commitments—the law. Robert Cover will tell us in Chapter 5, that there is a constant construction of law through various norm-generating communities.²¹ And Falk-Moore will tell us in the same Chapter that heterogeneities are self-regulated.²² The sociocultural space is consistently normatively full. Also, multiple modernities are not openly critical of Western modernity “as a metanarrative but as a vehicle of Western domination.”²³

In particular, in a survey of jurisprudence on freedom of religion in Canada, I found that freedom of the individual was a paramount value as guaranteed in s. 2 (a) of the *Charter*—which states that as part of the fundamental freedoms, “everyone has the freedom of conscience and religion.” The Supreme Court of Canada (SCC), in the *Big M.* case—a part of the case study herein on freedom of religion jurisprudence in Canada—in effect confirmed, per Dickson J., that the individual is the central bearer of rights.²⁴ Could this be a problematic form of liberalism that the Western secular and normative philosophy embodies?

In terms of freedom of religion, for recent theorists such as Charles Taylor, Robert Cover, Griffiths, Tie, Menski, and many others, despite the fact that liberal law

²⁰ Robert Cover, “The Supreme Court 1982 Term – Foreword: Nomos and Narrative” (1983) 97 *Harv L Rev* 4 at 11 [hereafter Cover, “The Supreme Court 1982”].

²¹ *Ibid.* Cover “The Supreme Court” at 48.

²² Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7:4 *Law & Soc’y Rev* 719 [hereinafter Moore, “Law and Social Change”] at 722.

²³ Lee, R.L.M. “Reinventing Modernity: Reflexive Modernization vs Liquid Modernity vs Multiple Modernities.” (2006) 9 *Euro Jnl Soc Theor* (3) 355-368 at 350 [hereinafter Lee Reinventing”].

²⁴ In *Big M.*, *infra* note 272, per Dickson, J. ... “an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government” at para 122.

purports to have the ability to account for religion amongst many other norms, including non-liberal norms, the standardization, uniformity and even the secularization thesis of liberal modernity are all to be now considered as received differently in different contexts around the globe.²⁵ The ambit of the protection of the law has to consider the historical, sociological, political and the religious contexts.²⁶

In this age of intense plurality, Ryder confirms that multiplicities of citizens seek equal rights, including “equal religious citizenship”, under the rule of the established modern Western secular law.²⁷ Globally, cries for civil toleration of all other religions remain consistently alive in a variety of modern democratic political documents—from the *First Amendment* to the United States Constitution²⁸ to the 1948 *Universal Declaration of Human Rights* issued by the United Nations.²⁹ I would argue that currently, because the globe is in an epoch of voluminous interconnections due to the impacts of globalization, and although Western liberal secularized democracies are being emulated around the globe, in the West now, there are a large number of possible varieties in cultural patterns, religious beliefs, and commitments to both liberal and non-liberal norms—all aiming at “institutional specificity.”³⁰

The ideology of legal pluralism is therefore central to my thesis; liberal freedom

²⁵ See *Supra* notes 4 & 5, 7 also *infra* notes 17, 20, 22, 23, 31, and 38.

²⁶ Knights, *supra* note 12 at viii.

²⁷ Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) [hereinafter Ryder, “The Canadian Conception”] at 87.

²⁸ Congress shall make no law respecting religion, or prohibiting the free exercise thereof.... U.S. Const. amend. I.

²⁹ Article 18 of the United Nations, *Universal Declaration of Human Rights* states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

³⁰ Wittrock, “Modernity” *supra* note 8 at 32.

of religion jurisprudence is only one legal technology; there are other instruments that protect basic human rights and happiness.³¹ Although, liberal legalism both supports and limits pluralism, and there are provisions for toleration of others, the current Canadian national identity is based on majoritarian political views, in turn, based solely on Western forms of liberty, and further based on presuppositions connected to the concepts of secularism related to the protection of the Christian faith only.

However, demands for recognition go beyond toleration; recognition has to include legitimacy of and social respect for difference. Shah sums up: “liberalism *as a practical attitude*, rather than as a focus of sophisticated philosophical debate, has become deeply impoverished...socially ignorant and ethically barren.”³² As a consequence, liberalism, and its broad legal approach with its many merits, has gradually been challenged by the multiplicity of the modern to reexamine its, liberal legalism’s, very fundamentals. Liberal legalism, as the main force of liberal modernity, may be a force that is unable right now to accommodate modernism’s incarnation/*avatar*; the multiplicity of the modern.

In that judges have a political function in creating, applying and interpreting the law by specialized political and legal techniques, Shapiro denotes this as “a myth of speciality” and that law is not an independent area of substantive knowledge.³³ If every constitutional question has to be considered in traditional legal analysis terms, and if the rule of constitutional law is not an all-encompassing philosophy, based as it on historically and politically universalized and secularized principles, how do Canadian

³¹ Peter C Sack, “Legal Pluralism: Introductory Comments” in Peter Sack & E.J. Minchin eds, *Legal Pluralism: Proceedings of the Canberra Law Workshop VII*. (Australia: Australian National University, 1986) at 14.

³² Shah, “Legal Pluralism in Conflict”, *supra* note 4 in foreword by Cotterrell, R. at ix.

³³ Martin Shapiro, “Political Jurisprudence.” (1963) 52 Ky LJ 294 at 295.

courts distinguish religion from non-religion? Is state law equipped to transcend difference in freedom of religion cases? Is the state normatively prone to validate equality more than equity? And in terms of national identity, do religions have a role in society?

In consideration of all my questions and given that liberal law presides over the management of society, I needed to understand the following in the Canadian context: the concepts of the primacy of legal rights attached to the autonomous liberal individual; the concept of secularism and the application of the process of secularization in jurisprudence; and the prospects for the cumulative plurality of law, and in particular, the rights of the increasing diversity of religious adherents in the West given the current globalization and rapid immigration that continues to occur.

In recognizing that the modern liberal consciousness is a social construction, I also needed to understand the appeal of this liberal modernity and its effects on individuals, institutions and societies. However, in that the shifting condition of modernity is now a multiplicity of modernities in their current empirical and real situations, how does the prevailing legal system—constitutional law—identify and negotiate social and cultural differences? The aim is to examine the possibilities for peaceful coexistence of state law—understanding that its liberalized and secularized constitution has to limit the full extent of religious freedoms—with the norms and customs of the multiplicity of modernities in Canada.

1. The political power of constitutional authority as legitimated by the processes of modernization, liberalization and secularization

It was during the 17th century Whig tradition of liberty under law as part of the

process of liberal modernization that the word “*liberal*” was coined.³⁴ It comes from the Latin, “*liber*”, meaning “free.”³⁵ The conception of freedoms of the citizen stems from this root of classical liberalism of Christian Europe as part of classical modernization.³⁶ Liberal modernization has been a progressive process from traditional monarchy to legal authority and legitimacy of people living together under the same laws or rules of conduct; a democracy requires the rule of law. The ideology of liberalism is therefore central to the onset of legal authority as human emancipation and as understood in a modernizing and predominantly Christian Western Europe.

When classical jurists began to reflect scientifically on the European doctrine of liberalization, they presupposed a certain internal coherence within the rule of liberal law that was separate from religious authority.³⁷ In this shift towards rationality and secular approaches to the liberalization of the individual, Western liberals began to believe that society would achieve material and political progress if science would focus on, and critically examine, ‘man’ and society to yield a general knowledge about the natural principles of law, morality, myths, superstitions, religious dogma, other traditions and customs.³⁸ However, the process of secularization does not succeed in completely relegating religion to the confines of the “private” sphere and there are many

³⁴ Hugh Trevor-Roper, *Lord Macaulay: The History of England* (London, England: Penguin Books, 1986).

³⁵ *Ibid.*

³⁶ Elizabeth Deeds Ermarth ed, *Rewriting Democracy: Cultural Politics in Postmodernity* (England: Ashgate Publishing Company) at 3.

³⁷ David Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000” Trubek & Alvaro Santos eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) at 25.

³⁸ Brian Z Tamanaha, “The Perils of Pervasive Legal Instrumentation”, online: (SSRN, 2005) 1 Montesquieu Lecture Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=725582> [hereafter, “Perils of Pervasive”] at 12.

combinations of ‘the secular.’³⁹ Although the emergence of Western thoughts about law initially emphasized natural law, these thoughts later included Latin Christianization.⁴⁰ Natural law, or inherent law, lies at the intersection of theology (concerned with the transcendental), and philosophy (concerned with notions of the world and the temporal).⁴¹ Although in liberal secular modernity, interpretation of belief is left to the believer, Christianity was seen by 18th and 19th century philosophers as akin to liberalism’s secular surrogate. Liberalism’s moral and social role is tied to the centuries old Christian faith.⁴² Liberalization is therefore steeped in the image of Christianity by way of: language, categories, thought, self-understanding, and life.⁴³

Currently, secular institutions organize life “in this world” as opposed to reference to the religious or the transcendent.⁴⁴ Freedom of religion is two pronged: to free public life from religion and to open a space for continuous dialogue among religious traditions and between the religious and the secular. For a “self-sufficient social [and modern] morality without transcendent reference” reason is independent of Godly Revelation so that this former ‘morality’ is supposedly devoid of other inconsequential non-contributing elements.⁴⁵ However, Taylor insists that both these dimensions of life are indispensable in society.⁴⁶ Again, as Taylor points out, even if good religions and good public remain the exclusive pervue of the autonomous individual, the confusion arises in that it is now

³⁹ Gérard Bouchard & Charles Taylor, “Building the Future: A Time For Reconciliation” online: (2008) Government of Québec <<https://www.mce.gouv.qc.ca/publications/CCPARDC/rapport-final-integral-en.pdf>> [hereafter Bouchard & Taylor, “Building the Future”].

⁴⁰ Menski *supra* note 7 at 130.

⁴¹ Charles Taylor, “The Polysemy of the Secular” (2009) 76:4 Social Research 1143 [hereafter Taylor, “The Polysemy”].

⁴² Parekh *Rethinking Multiculturalism* at 33, *Supra* note 17.

⁴³ *Ibid.*, Parekh, at 33.

⁴⁴ Taylor, *supra* note 41 at 1147.

⁴⁵ *Ibid.* at 1148.

⁴⁶ *Ibid.* at 1147.

a separation of religion and state and no longer the Christian church and state as the scientific rational definition of secularism and as identified with modernity.⁴⁷ What is a fair and harmonious mode of coexistence between religious communities without, as evolved, Western connotations of the secular?

For Taylor, secularism is not about state and religion, it is about the democratic state and diversity and the goal is to protect people in belonging and to practice freely their outlook thus treating people equally whatever their option.⁴⁸ In that modern democracies have to be secular, plurality necessarily requires neutrality making secularism a complex requirement of balancing social goods. For human rights, equality, the rule of law, and democracy, state neutrality in effect protects any basic position, religious or not. Yet, religion continues to be pitted against secularity.⁴⁹

However, Christianity remains at the heart of Western thought in general and in law in particular. And although normatively, the question of whether religion should be confined to the private sphere is heavily contested in public forums, the current form of modernization, secular and liberal, carries with it the assumption that secular liberal ideology contains truths for the regulation of the good life.⁵⁰ However, despite the fact that modern constitutional law is ever-changing, redirected and regulated towards positive ends and equality of opportunity within society, religions such as Islam continue to face tremendous pressures to be removed completely from the public sphere, particularly within Western contexts. The most important facet of Western liberal secular modernity is that in a democracy, sovereignty resides in the will of the people; the

⁴⁷ *Ibid.* at 1148.

⁴⁸ *Ibid.* at 1153

⁴⁹ *Ibid.* at 1156

⁵⁰ Prakash Shah, ed *Law and Ethnic Plurality: Socio-Legal Perspectives* (Netherlands: Martinus Nijhoff Publishers, 2007) at 1 [hereinafter, Shah, “Law and Ethnic Plurality”].

numerical majority of an organized group can make decisions binding on the whole society.⁵¹ Coupled as part of modernity with this democratic ethos, the Eurocentric processes of secularization and liberalization were mostly unalterable within Western states as were they in their “empires.” These assumptions about the processes of liberalization and secularization still extend globally with points of interconnections in the now intercultural capitals of Europe, United States and Canada.⁵² Uninterrupted, the above assumptions, empowered as they are by politics, continue to be essentialized and reproduced within modernizing constitutions.

Again, not only are centralization and universalization of human rights, both international and domestic, having stemmed from particular universalistic explanations for events based on presuppositions of theorists from classical liberalism, they are also based on various Christian conceptions of liberty. And generally, respect for equality, human dignity, and other good moral values are part of natural law. However, social arrangements, including those that are meaningful and that seek to identify with different terms and conditions of citizenship, are susceptible to conscious human engineering by the instrument of the rule of liberal legislated law.⁵³

As will be seen in the discussion of case law on freedom of religion, there are limitations in values that are in effect admitted; constitutional arrangements can be authoritatively justified as reasonable by the commitment of judges to the democratically instituted constitution.⁵⁴ In a democracy, the boundaries between the private and the public are variable according to the political will of the citizens, the authority of the judge

⁵¹ Parekh, *Rethinking Multiculturalism*, *supra* note 17 at 7.

⁵² Menski, *supra* note 7.

⁵³ Moore, *supra* note 22 “Law and Social Change” at 723.

⁵⁴ Raymond Plant, “Citizen, Religion and Political Liberalism” in Nigel Biggar & Linda Hogan eds, *Religious Voices in Public Places*. (New York: Oxford University Press, 2009) at 49.

is limited by democratic choice. And juridical outcomes may result from a flawed understanding of the meaning of secular. In that it is now a secular, liberal democratic constitution that legitimates political authority in an environment of legal and religious pluralism, specific sociopolitical questions are translated into legal issues left to the discretion of judges who are bound by the limited set of general ideas aimed at protecting individuals from state control.⁵⁵ As the historical processes of secularization become firmly installed, the identification of religion as akin to an irrational force, tends to become stronger. The shared sense of public and political reason is predisposed to public controversy. What is apparent is that urbanization and fast paced global movements are profoundly secularizing forces that erode traditional bases of legitimation.⁵⁶ Although the processes of liberalization and secularization are fluid, they are also fragile and contested. How can these processes be both, fortified yet, less controversial?

Canada, for instance, is now composed of cultures, groups, associations and institutions that are culturally and ethnically diverse. Currently, the state also has many groups of religious believers that are seeking recognition in concrete sociopolitical and sociolegal arrangements. Canada is a liberal democratic state and since the enactment of the *Charter* within its constitution in 1982, equitable justice and substantive equality are supposedly furthered.⁵⁷ The rule-based conception of liberal constitutional law, particularly in the post-*Charter* era, has the power to determine how the law is imagined, and there is a “concrete impact of legal arrangements on the distribution of power and

⁵⁵ Roderick R Macdonald, “European Private Law and the Challenge of Plural Legal Subjectivities.” (2004) 9:1 Eur Leg 55 at 63.

⁵⁶ David Trubek, “Toward a Social Theory of Law: An Essay on the Study of Law and Development” (1972) 82 Yale LJ 1 at 34:n 106 [hereafter Trubek, “Toward a Social Theory”].

⁵⁷ Hughes, Patricia, “Recognizing Substantive Equality as a Foundational Constitutional Principle.” (Fall,1999) 22 Dalhousie L.J. 5.

rewards among the various elements in...society.”⁵⁸ As a basic element of the Canadian Constitution, the *Charter* has even given legal *and* political powers to its courts thus affording them a certain equal partnership to the legislature in ordering society.⁵⁹ Although the *Charter* was a product of, and a part of, the responses to the increasing plurality within Canadian society, in the liberal interpretation of constitutional values related to equality rights, there is tension between the *Charter* and the current nature of Canadian pluralism. Case law that will be discussed in Chapter III will show interpretations that unjustly fail to recognize the economic and social rights of minorities. The greatest challenge for liberal modernity and legalism is to balance equality and difference. To what extent can questions of identity, including that based on religious adherence, be effectively addressed within its liberal democratic and legal frame?

It is understood that in the accommodation of religious freedoms of minorities, the reach of religion encompasses theological, philosophical, anthropological, sociological, psychological and other possible dimensions. Religion is very difficult to define as it entails these aspects of social, cultural and normative human behavior that goes beyond liberal politics. It is therefore not only difficult to limit, it cannot be interpreted accurately from any one point of view. Further, the rule of liberal secular constitutional law tends to consider other forms of modernization as subject to its political and legal accommodation.⁶⁰ Are religious values subordinated or is this a reflection of a desire to not elevate some religious beliefs at the expense of others? Does accommodation address pre-existing disadvantage, inequality and inclusiveness of other

⁵⁸ Shapiro, *supra* note 33 at 295.

⁵⁹ *CCL*, *supra* note 2 at 3.

⁶⁰ James Tully, *Strange Multiplicity: Constitutionalism in an age of Diversity*. (Cambridge: Cambridge University Press, 1995) at 5 [hereafter Tully, *Strange Multiplicity*].

forms of institutions?⁶¹ Is the Western human rights tradition aimed at the accommodation of pluralism, including religious pluralism?

2. The interaction of liberal political and legal tradition of the autonomous individual, and the morals of a multiplicity of modernities

Liberal modernity, liberal legal doctrines and practices, based on the autonomous individual, are now required to interlink with other aspects of dynamic life.⁶² The reproduction, complexity and dynamics of liberal modernity presently are represented by the relentless magnification, hybridization, traditionalisation, homogenization, and pluralizations of knowledge of global cultures and religions.⁶³ These interrelated and simultaneous processes form the very essence of globalization and suggest a model of liberal modernity in its multiplicity. Lee too confirms that the concept of a multiplicity of modernities is that of cultural diversity that disputes the universality based on the Western experience.⁶⁴ I maintain that the current age, globally, is of a multiplicity of modernities, the next *avatar* of modernity. But the space of forced coexistence of a variety of moral standards in the West—particularly of the dominant and firmly rooted liberal secular legal system in ordering plural normative lives—is now a terrain of contestation because liberal legalism both supports and limits pluralism.

However, a reconstruction of modernity—now a multiplicity of normative communities—is urgently needed; there is a need to understand different perceptions as part of the dynamics of social change in more empirically realistic and metaphysically

⁶¹ Richard Devlin, “Jurisprudence for Judges: Or, Why Legal Theory Matters for Social Context Education” (2001) 27 Queen’s LJ 161 at 162.

⁶² Menski, *supra* note 7 at 7.

⁶³ See generally Wittrock, “Modernity” *supra* note 8.

⁶⁴ Lee “Reinventing” *supra* note 23 at 358.

open terms.⁶⁵ The political concept of liberty, as attached to the liberal culture of secularization, has penetrated legal theory, and this “law” generally has become state law. Because current majoritarian political views on liberty are based on presuppositions that are no longer neutral, it will be argued that classification of different categories of class, citizenship, religious believer, consumer and producer can be constrained by liberal legal doctrines. Given that Western law is characterized and governed by the rule of constitutional law as fundamental to Western liberal modernization and secularization, how well can it accommodate the multifaceted social and religious base of believers who are most unlikely to treat their religious convictions as purely private or personal matters? For example, in Islam, just as in Christianity, the role of the ethical imagination in legal expressions of the civil is fed by religious and cultural narratives as sources of the self; this is a vital theme for all faith-based cultures globally. Again, the fact that the modernity of Islam is already diverse within itself compounds the complexity in coming to grips with plural modern Islamic ethnicities in countries such as Canada.

Historically, religious believers have had the power to resist legally ordered strategies that coerced and conflicted with their essential moral codes. The liberal political tradition based on liberal modernity and secular law may be in danger, not from hostile extraneous forces so much as from its own naïve emphasis on individualism and from its own tendency to naturalize and thus universalize solutions that are noticeably uninformed. The legal concept of equality between individuals tends to obscure more substantive questions of difference: the plurality of religious beliefs and practices, ethnic identifications and historical patterns of collective experience. Contemporary liberal law dominates liberal social theory; seems to have proclaimed its superiority over other

⁶⁵ See generally Berman, “A Pluralist Approach” *supra* note 1.

cultures and religions so that only Western liberal ideals are recognized in the public and political sphere; and has curtailed the power of certain transcendent religions to morally order the lives of believers and thus of society at large in the public and political sphere.⁶⁶

The dominant rights-based regime, coupled with the common law consisting of “rules springing from the social standard of justice, or from the habits and customs from which that standard has itself been derived” may not be representative of a growing multiplicity of changing and overlapping normativities.⁶⁷ The constitution is in effect the ultimate word in all facets of social life, particularly as interpreted by judges on specific issues. In that human rights and basic freedoms are deemed to be guaranteed by the rule of liberal constitutional law, this ideology also assumes that social diversity is represented by the liberal legislature. In Canada, if disagreeing normative systems are not able to combine their respective power and co-exist, serious social and political conflicts will escalate.

In the 21st Century, is the secular liberal justice, based on its own historical fundamentals and law, therefore the legitimate authority to recognize differences? Is there a model of liberal legalism that can allow a co-existence of a plurality of norms, including diverse religious orders, within liberal democracies? What are the possibilities of peaceful co-existence of religious normativity and authoritative normativity in Canada, in the 21st century and beyond? How can the legal constructs of myriad cultures legitimately be distinguished from the locus of the popular, dominant and certified legal

⁶⁶ Charles Taylor, “The Politics of Recognition” in *Multiculturalism and The Politics of Recognition* (Princeton: Princeton University Press, 1992) at 27 [hereafter Taylor, *Multiculturalism*].

⁶⁷ Brian Z Tamanaha, “The Realism of the ‘Formalist’ Age”, online: (2007) St John’s Legal Studies Research Paper No 06-0073 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985083>, quotes Carter, J. C. “The Ideal and the Actual in the Law” 24 *American L. Rev.* 752 (1890) at 11.

order that imposes its own limitations and that are not able to admit change at the required speed? How do individual groups legally express their distinctive worldviews, such as religious beliefs, that lend them a sense of well-being and belonging within a larger evolving political association and a wider field of legal regulation? In Canadian terms, in an age of globalization, is there a legal space wherein models of liberalism itself can allow a co-existence of a plurality of religious norms in the country?

B. Research objective

This LL.M. thesis will attempt to explore the movements of modernization and secularization that define individuated freedoms in liberal constitutional democracies. Individual freedoms are paramount in liberal constitutions and secularity is central to modern liberal democracies. It is important to understand that due to the impacts of globalization, growing pluralism exposes the limits of liberal modern secular constitutions; in particular the existence of normative pluralism shows that secularity is one among many worldviews and that liberalization—an ideology that is to be admired—should not be ignored in an age of a multiplicity of modernities. The complexity of the tension between religious rights and secular politics is akin to a tug of war between the principles of legitimation and the principles of justice wherein the principles of religion are subjected to intense manipulation. There is a difference between fact-finding and evaluation; the separation of fact and value with an emphatic commitment to empirical inquiry may not be objective.

Trubek points out that social science is a multidimensional activity in which considerations of a general and metaphysical nature are as important as specific empirical findings and in which all levels, from the most basic presuppositions about social life, to

the minutest empirical findings, have their independent yet related places.⁶⁸ Also, political jurisprudence cannot be a complete philosophical system at any given time because jurisprudence expands with political science as judicial and legal facets are integrated into political life. Judicial realism is a growing socio-political science. A secure space for normative difference is missing.

The aim of this thesis is to further explore the extent to which normative pluralism, emerging from specific religious beliefs, is accommodated by Canadian courts pursuant to the guarantee of religious freedom in the *Charter* under s. 2(a). Other *Charter* guarantees also protect religion from state discrimination, however, problems arise frequently when state legislation fails to consider the perspectives of religious claimants and often sets limits that produce conflicts with individual beliefs as will be illustrated in case law in Chapter III.

I maintain that the focus has to be not on an obligation to respect complex and historic public policy, or on the levels of decision-making processes, but on the changes in the social and ethical values that are being contested within a shared social space. For Shah, there is a contest in defining the concepts of equality and tolerance in liberty.⁶⁹ Again, can liberal law be redefined to make it more hospitable to diversity without compromising its commitment to universal liberal principles?

Plurality, including a variety of moral and religious orders will not disappear in Canada; neither will the interaction between myriad normative orders and their many institutions of origin. Since Canadian constitutionalism recognizes and fulfils the desire

⁶⁸ David M. Trubek, “Max Weber’s Tragic Modernism and the Study of Law in Society” (1986) 20 L & Soc’y Rev 573 at 2 [hereinafter, Trubek, Max Weber].

⁶⁹ Prakash Shah, “Religion in a Super-Diverse Legal Environment: Thoughts on the British Scene” in Rubya Mehdi, *et al* eds, *Law and Religion in Multicultural Societies* (Copenhagen: DJØF Publishing, 2008) at 63 [hereafter, Shah, “Religion in a Legal Environment”].

of the individual as the highest good—a political ideology of liberal modernity—not all liberal values that underlie social and economic human rights are associated with human dignity. The constitution may be inadequate in acknowledging difference. Difference is supposed to result only from rational choices pursued by individuals, voluntary acts. But liberal law inevitably denies the relevance of some distinctiveness making governance through rules questionable.⁷⁰

C. Methodology and the structure of the thesis

Although the focus of this LL.M. thesis is on fundamental democratic rights and just law in the face of diverse norms and legal pluralism in contemporary Canadian society, it is specifically centered on the possibilities of a peaceful co-existence between the rule of liberal law and the norms of plural religions in post-*Charter* Canada. To understand current history on the management and accommodation of religious diversity in constitutional law and practice in Canada, an examination of recent freedom of religion jurisprudence in the post-*Charter* era will reveal the responses and the built-in limitations of liberal law to the claims for equality of differing and competing norms of a multiplicity of modern citizens—multiple modernities. This examination concerning freedom of religion as guaranteed in the *Charter* will serve as a study highlighting the tension between the slow development of legal outcomes that are supposed to be guided by values essential to a free and democratic society that respect different beliefs and practices of diverse peoples, and the needs of the rapidly increasing number of religious persons living as minorities in Canada. This thesis hopes to demonstrate the significance and the durability of the different forms of normative ordering in contemporary Canadian

⁷⁰ Roger Cotterell, “Foreword” in Shah Prakash ed, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London: Glasshouse Press, 2005) at ix.

society. It will also argue that a problem of escalating and violent conflicts related to fundamental democratic rights and just law in the face of diverse knowledge and diverse religions may be imminent in Canada.

The ideology of legal pluralism is necessarily valuable in Canada; it supports the concept that there are different ways of being for which different adjudicative bodies can be organized. Again, the ideology of legal pluralism is therefore central to this thesis because freedom of religion jurisprudence is only one legal technology, there are other instruments that protect basic human rights and happiness.⁷¹ And demands for recognition go beyond toleration; recognition has to include legitimacy of and social respect for difference.

D. Chapter breakdown

This thesis will consist of six chapters inclusive of the introduction and the conclusion. The Introduction is an overview of the thesis concerning arguments on the limits of liberal legalism and the restraints on equal religious citizenship. It also provides the general framework of the thesis. Chapter I will elaborate on this clash of liberal legalism and religious diversity. The chapter will highlight the conflict between the historical theoretical presuppositions within modernity and liberal legalism, and the current plural sociolegal perspectives that now represent the citizen in Canada. The aim is to point out, philosophically, the possible mistakes in the presuppositions about liberal law and to demonstrate the urgency of addressing conflicts. Chapter II will elaborate on and explain the misconceptions of the concept of secularism and the aggressive form of secularism that is now dominant within liberal law, and of the relationship between

⁷¹ Sack, *supra* note 31 at 14.

politics and secularity. Chapter III is a review of freedom of religion jurisprudence in the post-*Charter* era with a view to illustrating the impasse caused by the failure of courts to definitively resolve religious values of multiple modernities within the liberal rights perspective based on individual liberty. In particular it will serve to show that legal relationships are complex wherein courts are having “difficulty distinguishing between treating people as equals and changing them into different people.”⁷² Chapter IV will explore the possibilities of coexistence of liberal law and religious pluralism amongst the multiplicity of the modern in Canada in the 21st century and beyond. The final chapter will conclude the thesis.

E. Literature review

1. The possibility of reinterpretation of liberalism at the intersection of secularism, freedom of religion guarantees and religious identity

Although, classical liberalism was initiated to smooth out conflicts between Christian religious groups and politics, many inadvertently believe that it has in effect displaced religion altogether.⁷³ Laws—by collective agency—may be passed for supposedly “neutral” secular reasons.⁷⁴ However, as the diversity of immigrant populations increases, instrumentalized state responses that have the effect of limiting freedom of religion, including of different Christian faiths, are challenged as they tend to be coercive, as will be reflected in freedom of religion jurisprudence.⁷⁵ Freedom to choose normativity is in effect imposed by the abstract and codified classification of the

⁷² Guido Calabresi & A Douglas Melamed. “Property Rules, Liability Rules and Inalienability: One View of the Cathedral” (1972) 85:6 Harv L Rev 1089 at 1128.

⁷³ Taylor, “The Polysemy” *Supra* note 41 at 1148.

⁷⁴ *Ibid.* at 1158.

⁷⁵ Canadian freedom of religion jurisprudence, including justification of limitations will be discussed in Chapter III.

liberal identity regardless of myriad social interactions of the same identity.⁷⁶ In that civic authority and political power are established and legitimated by constitutional law, different religious claims are seen as complex and demanding autonomy.⁷⁷ In a system of well-entrenched individual rights, group rights tend to be subordinated; inherited culture becomes subjected to Western legal culture and in particular, courts are constrained by this Western tradition. However, state intervention is not only about regulating and managing intercommunal conflict; it is also about moral obligations. Political justice does not consider moral arguments that can be shared. A theological critique of the dominance of secularity is missing. Yet, plurality is a by-product of modernity itself.

In Canada, at the intersection of liberal law, plural religious beliefs, citizenship and religious identity, because state responses are based on the modern liberal definition of secularism that is further based on freedom of individual conscience and a structured form of freedom of religion, the purpose of freedom of religion as guaranteed under s. 2(a) of its *Charter* is not to maintain a particular religion but instead to protect and continue a culture of liberalization and secularization.⁷⁸ Any future arrangements for social diversity to exist must be open to different group rights so that deep democracy is reflected within the Canadian population. Interconnectedness breeds dynamism and dynamism necessarily feeds off of interconnectedness. It may be time to reinterpret liberalism in the context of the multiplicity of the modern and the evolving legal norms, for the optimum development of the multifaceted individual in Canada. Or, as Parekh

⁷⁶ Macdonald, *Supra* note 55 at 56.

⁷⁷ *Ibid* at 56.

⁷⁸ *Charter supra* note 6 at S. 2 (a) states: “Fundamental Freedoms” – Everyone has the following fundamental freedoms: (a) freedom of conscience and religion...”

states generally, what we need is a *liberal theory of multiculturalism*.⁷⁹

2. The role of law in a globalizing world of interacting normativities

As stated, globalization highlights the challenges of inter-normativity reflecting differentiated forms of law. The globe has now been communicating intensely in significant ways. As the structures and dynamics of globalization continue to evolve, the closely knit worldwide society of migrants and immigrants also continue to maintain their connections to their places of origin; they particularly continue to observe the tenets of their religions, which many consider to be the final authority for human conduct. Each event, relationship or individual has distinct features and reflects a desire for self-rule, the oldest political good in the world. However, multicultural groups also seek to participate in existing institutions of dominant societies, but in ways that recognize and affirm, rather than exclude, assimilate and denigrate their culturally diverse ways of thinking, speaking and acting.⁸⁰ But “a treatment can be differential without being preferential.”⁸¹

For Arthurs, globalization necessarily changes social values at its foundation so that the role of law changes.⁸² The law also identifies and negotiates differences.⁸³ However, if laws differ, for Trubek, rationalization of the law and the creation of general rules will not be able to emphasize decision of specific cases that take “account of political, ethical and other affective dimensions of conflict.”⁸⁴ For Trubek (falling back on Weber’s arguments), formal law maybe unavoidable and its bureaucracy can create for itself “an iron cage”...“a shell of bondage which [powerless people] will perhaps be

⁷⁹ Parekh, *Rethinking Multiculturalism* *Supra* note 17 at 104.

⁸⁰ Tully, *Supra* note 60 at 14.

⁸¹ Bouchard & Taylor, “Building the Future” *supra* note 39 at 162.

⁸² Harry Arthurs, “Law and Learning in an Era of Globalization.” (2009) 10 *Ger Law J* 629 at 632.

⁸³ Berman, “Global”, *Supra* note 5 at 1156.

⁸⁴ Trubek, “Max Weber” *Supra* note 68 at 9.

forced to inhabit some day.”⁸⁵ And Berman states that any adjudication of conflict will lead to “jurispathic activity” (meaning law that “kills” all alternative interpretation of norms by offering only one normative worldview).⁸⁶ For Berman, the multifold interactions between different governance structures that further generate norms are “a space for the ‘jurisgenerative’ interplay of multiple normative communities and commitments.”⁸⁷ This is a social need. For Berman, to manage hybridity, attention has to be paid to a pluralist framework to be able to comprehensively conceptualize a world of hybrid legal spaces—a wide variety of transnational and international regulatory problems can be conceptualized in managing hybridity.⁸⁸

The primary purpose of equality rights is to protect the individual human interest in belonging, simultaneously, to several communities. And for Cotterell, legal theory needs to be conceptualized with the content of social relations of community and the combinations of networks within which they exist.⁸⁹ For the relation of law and culture and for the interpretation of interests, intentions and causations, different abstract types of communities should be distinguished—the institutionalized and the non-institutionalized.⁹⁰ And to that extent, if human rights are being reconceptualized in the context of legal pluralism globally, do important jurisgenerative changes in Canada need to be framed from an alternative plural perspective? Again, the post-*Charter* era is also an era of intense global communications and migration that represent a “tremendous body

⁸⁵ *Ibid.* at 10.

⁸⁶ Berman, “A Pluralist Approach” *supra* note 1 at 328.

⁸⁷ Berman, “Global” *Supra* note 5 at 1156.

⁸⁸ *Ibid.* Berman.

⁸⁹ Roger Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (London, UK and Burlington, USA: Ashgate, 2006) at 59.

⁹⁰ *Ibid.* Cotterell at 2.

of rules that envelop any social field.”⁹¹ Generally, “normative conflict among multiple, overlapping legal systems is unavoidable and might even sometimes be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations.”⁹²

In Canada, accommodation of religious practices is reluctantly offered to individual adherents as and when they require exemption. It will be seen that the sharp balance between competing rights of individuals and groups in the context of freedom of religion is a constant theme in case law. The impasse that is caused by the inability of courts to resolve specific struggles involving accommodation of religious values are *explained* as a plurality of contests over recognition politics and the limits of recognition centering on the liberal rights perspective based on individual liberty and secularism.⁹³ For legal pluralists, intercultural normativity includes the inner dynamics and value systems of the ethnic minorities as crucial in analysing the character of legal reconstruction for improved social conditions.

F. The Focus of this thesis

Although freedom and equality are central to liberal law, neutrality cannot be absolute. In the multiplying base of moralities, perhaps a new conception of a political moral order in society would require that state law allow the believer to live according to her/his own specific convictions, both, those perceived as rational and those perceived as “irrational.”⁹⁴ Different norm systems of multiple other modern identities are interplaying with each other with complex results. In that guaranteed rights remain

⁹¹ Moore, *supra* note 22 at 729.

⁹² Berman, “A Pluralist Approach” *supra* note 1 at 321

⁹³ Tully, *Strange Multiplicity* *supra* note 60 at 54.

⁹⁴ Bouchard & Taylor, “Building the Future” *supra* note 39 at 2.

limited and abstract, the legitimacy and existence of specific religions depends not only upon state laws that are at the discretion of judges focused on individual autonomy, but also where individuals, as members of their cultural communities, engage with plural norm systems (their own consciences, and a variety of other plural community conventions).

This thesis focuses on the consistent failure of the rule of liberal legalism in post-*Charter* Canada to evolve at a pace that enables it to recognize and accommodate the ongoing plurality of normative material and systems, including religious diversity or different ways of ordering of life of its rapidly-expanding diasporic populations. If conflicting normative systems are not able to combine their respective power and co-exist, the potential of conflict to escalate is serious. Finally: no single position has successfully exhausted truth.

CHAPTER I - The Clash of Modern Liberal Legalism and Religious Diversity: Historical Presuppositions and Current Plural Perspectives

What are the possibilities for conflicting norms to coexist in a shared space of power to order moral conduct? This chapter is a theory-based literature review of the politics of recognition of the plural sociolegal perspectives, that is, the different norms and conventions, including religious beliefs and tenets, of intercultural communities in modern Western secular liberal states. Generally, legal prescriptions are located in discourses of history.⁹⁵ A brief outlay of the history of modernization, liberalization, secularization and globalization will help in understanding the following terms that appear within the literature: “classical modernity”, “liberal modernity”, “multiple modernities”, “the rule of liberal legalism”, “secularity and modernity”, “modernity and globalization.” This same history will serve to outline the philosophical presuppositions of the current liberal modern law. As part of the processes of modernization and liberalization, at least in the last two hundred years, religion was removed from political rule; church and state were separated for the purposes of freedom of religion.

In outlining the presuppositions of liberal secular modernity and liberal law in the context of the politics of recognition generally, this chapter will highlight the dominance of Western liberal secular modernity and its rule of liberal constitutional law in highly diverse societies such as in Canada; the rule of law is a collectively accepted centralized structure of political and legal authority. The fact that the rule of constitutional law is based on Western liberal classical roots and experience contributes to its comparative homogeneity in a world of multiple normativities. For example, although Islam is determined by an ongoing interplay of multiple cultural, linguistic and religious

⁹⁵ Cover, *supra* note 20, “The Supreme Court 1982 Term” at 5.

expressions going back 1428 years—based on conquests upon vast geographical spans acquired at different historical times—today in the West, Islam, as a civilization, is politically homogenized causing the Muslim identity to be feared in the West. Is the Western liberal and secular state law therefore inadequate in the protection of the norms of a multiplicity of citizens in its current history as impacted by globalization and migrational encumbrances?

Since at least the beginning of the 20th century, with accelerating global interconnections everywhere, differently manifest laws are being constantly negotiated in theologically and culturally specific contexts.⁹⁶ Because the judicial systems of Western countries are based on liberal secular fundamentals, their systems are challenged by the ways different social groups continue to organize human lives given their own different and sometimes traditional conceptions of the good life.⁹⁷ It will be seen that liberal modernity, politically and legally, takes limited account of the fact that different societies understand and structure human interaction differently, cultivate different capacities and virtues and assign different meanings and worth to human activities and relationships. In the West generally, since liberal secular modernity limits its own capacity to normatively recognize different values, or does not react fast enough to social changes, there is therefore a forced co-existence of a variety of moral standards in their midst.

As a consequence of the last seventy years of global interconnections, it might be argued that the latest incarnation of modernity consists of ‘multiple modernities’, or a plurality of evolving human cultures having plural sociolegal perspectives and

⁹⁶ Menski, *supra* note 7 at ix & 184.

⁹⁷ *Ibid.* Also Parekh, *Rethinking Multiculturalism*, *supra* note 17 at 270.

developing in significantly different ways in different contexts.⁹⁸ Multiple modernities refer to specific norm-generating enclaves that are both traditional and modern; there are many such constellations that exist globally and in the West.⁹⁹ The multiple moral and political contexts and normative commitments of the intercultural multiplicity may lead to peaceful coexistence or produce conflict depending on the capacities and flexibilities of modern liberal law itself.

A. A glimpse at the development of normative political philosophy: modernization, liberalization, and secularization since the 18th century

As stated, theoretically, if Western states are liberal modernities, they are based on the themes of rationalism, secularism, individualism, human rights, democratic governance and most recently, globalization, all of which play a foundational role in any discussion of Western modernity and its cognates, such as modernization.¹⁰⁰ The conceptions of liberality that are combined to legally define the good life go back to the classical era of the Greek Stoics who influenced Western moral liberal thought.¹⁰¹ However, it was in the 18th century Whig tradition of liberty under the law when classical liberalism began to grow that prominent Whigs such as John Locke, Adam Smith, David Hume, Thomas Jefferson, and James Madison illustrated a fusion of economic and political liberalism in their writings.¹⁰² These thinkers and their followers such as J. S. Mill, Locke, Montesquieu and Alexis de Tocqueville drew on Greek rationalism and

⁹⁸ Christian Smith, “On Multiple Modernities: Shifting the Modernity Paradigm.” (2006) Unpublished paper, University of Notre Dame, Center for the Study of Religion at 1 [hereafter, Smith, “On Multiple Modernities”] at 2.

⁹⁹ *Ibid.* See also generally Sally Engle Merry, “Legal Pluralism” (1988) 22 *Law & Soc’y Rev* 869.

¹⁰⁰ *Ibid.*

¹⁰¹ Wayne Morrison, *Jurisprudence: From the Greeks to Postmodernism*. (London: Cavendish Publishing, 1997) at 26.

¹⁰² *Ibid.*

Christian universalism, both of which stressed monism and a form of centrality of reason that arrived at a vision of the good life based on such values as critical rationality, choice and personal autonomy.¹⁰³

Classical liberalism accepted four principles of liberty: personal freedom; limited government; equality of right; and consent of the governed. In this context, personal freedom refers to no coercion in the way of life of the individual, limited government means the state is only an instrument of society, equality of right means that everyone abides by the same rules that the state enforces with impartiality, and consent of the governed comes from the people to create a certain form of popular democracy. Free choice became the foundation of the self-worth of the individual. Concern for the freedom of the individual gave rise to the demand that government be bound by law—the modern constitution began to take root but religion began to lose the value of its common public goods.

The process of secularization initially occurred as a response to fierce religious wars between Protestants and Catholics and which could not be controlled.¹⁰⁴ A part of the Western World's ideals for social order that is supposedly based on absolute truths and rational planning was that liberal law also separate from religious interest. Secularization would be the mechanism that curtailed the power of all transcendent religions to morally order formal society. Religious freedoms are now special guarantees by the Western state. American colonies further developed this Western political theory of modernization based on the concept of secularism. This moral monism as combined

¹⁰³ Menski, *Supra* note 7; Trevor-Roper, *Supra* note 34; Parekh, *Rethinking Multiculturalism*, *Supra* note 17 at 33.

¹⁰⁴ Knights, *supra* note 12 at 1.03. Also, online Encarta Dictionary defines this as religion existing outside the material universe and so not limited by it. See *Encarta Dictionary*, 2d ed, *sub verbo* "religion".

with classical liberalism and secularism when further combined with the Anglo-American idea of modernization, fortified the belief that a single set of values is the most high and other values are merely a means to the only one rational and true way to a collectively accepted and centralized structure of political and legal authority.¹⁰⁵ Because this secularized form of liberal modernization holds on to the assumptions that it produces predictable patterns of uniformity and standardization of knowledge production, there is now a continuous commitment of Western liberal and secular law of “equating unity with homogeneity, and equality with uniformity.”¹⁰⁶ Are the bearers of collective rights of particular communities therefore unfettered from following their customs and practices in Western liberal modern secular states?

Because the claims of freedoms of numerous communities are complex and difficult to evaluate, particularly in terms of the weight given to differing empirical evidence; the internal rationality that has developed differently and is differently expressed in societies can often be missed by outsiders. In particular, attempts at interpretation of ancient religious texts by human rationale are often not extensive enough. The formal interpretation of religious texts by human rationale also brings into question the motivation and the qualifications of the interpreter. How important is the concept of religion in claims of freedom of religion? The politics of recognition associated with judicial constraints in freedom of religion jurisprudence, I maintain, are apparent within the limiting measures of the institutions of liberal secular modernity: weak judicial review processes, failed political actions and insufficient philosophical reflection.

¹⁰⁵ Wittrock, *Supra* note 8.

¹⁰⁶ Parekh, *Rethinking Multiculturalism* supra note 17 at 9.

If the monistic liberal law is instrumentally manipulative in an undemocratic manner, as Tie thinks, and if liberal claims of justice tend to be homogeneous, then the results have to be confusing.¹⁰⁷ And for Menski, different ideologies, politics, economics, sociocultural factors and religions play a critical role in shaping legal systems everywhere.¹⁰⁸ The law cannot be a closed system as legal doctrines and practices have to be interlinked with other aspects of life.¹⁰⁹ Law everywhere is plural, inherently dynamic, takes many different forms, is flexible and has different sources.¹¹⁰ In an age of globalization, with rapid convergence of a plurality of cultures in Western societies, whether a particular knowledge instrument is adequate to provide ordering for the good life is in doubt. In the relationship of the rule of liberal law and a multiplicity of norms, can ways of life be hierarchically graded by the modern liberal and secular constitution that presides?

1. Liberal secular modernity: rising from classical roots to current modern globalized societies and plural sociolegal interconnections

The institutions of the classical modern state in the West arose gradually from absolutistic monarchy as did economic organization from the mercantilist economy. Absolute monarchy had the power and authority to enforce rules of conduct and to create, amend or repeal law and the power to raise revenue via taxation. In Europe, up until the 16th century this absolute and perpetual power was accountable ‘only to God.’ In 1688 England, the Stuart Kings’ claims to this absolute monarchy were defeated in the *Glorious Revolution* and parliamentary sovereignty, defined as the Commons, Lords and the Crown, all held to act together under certain procedures. Supreme authority now

¹⁰⁷ Tie, *supra* note 13 at 4.

¹⁰⁸ Menski *supra* note 7 at 176.

¹⁰⁹ Menski *ibid.* at 7

¹¹⁰ The works of legal pluralists will be discussed in Chapter IV.

resided in the people but could be delegated in a modern democratic form. Classical modernization and secularity called for explicitly structured patterns of persistent integration so that steady progress of the liberal secular modernity would develop through defined stages and without variation on this course.¹¹¹

From the 16th century to the latter part of the 20th century—and Ermarth’s dates go even as far back as 600 years ago, to the time of the European Renaissance and Reformation—the classical theory of modernity sought to understand the institutional and cultural transformations in the processes of ‘modernization’.¹¹² These were times of empire-building and modernization was essential to Western colonialism for exploitative purposes. In Europe trade flourished after merchants and traders were able to unify rules and customs that were common to them. Classical trading principles evolved as a self-standing system of usages, customs, and practices enforceable by merchant courts. This law of commerce administered by merchants themselves functioned in deciding cases without interference from local authorities.¹¹³ In 1648, the European Treaty of Westphalia authenticated national boundaries; the nation state developed further territory for transformation and modernization.¹¹⁴

Also in the 17th century, American colonies further developed modern Western political history by shunning traditional monarchies with new systems of legal authority based on the separation of church and state. Together, the Anglo-American philosophers

¹¹¹ *Supra* note 3 generally.

¹¹² Ermarth, *supra* note 36 at 2. The Renaissance was a movement that spanned the 14th to the 17th century, beginning in Florence in the Late Middle Ages and later spreading to the rest of Europe. Changes across Europe were not uniform: the growth of literature, science, art, religion, politics, and learning were based on classical sources. It is viewed as a bridge between the Middle Ages and the Modern era.

¹¹³ See generally *Supra* note 3, and Morrison, *Supra* note 101.

¹¹⁴ Ermarth, *supra* note 36.

politicized that they had fully developed human rationality to the point that it was possible to judge different religions, societies and historical epochs, and that only they possessed the true 'religion.'¹¹⁵ Other ways of life such as those that were community-centered and other non-Christian religions were ruled out. Classical modernism and law began to emerge from Christian law.

Because classical liberalism drew on a rationalism that accorded with Eurocentric Christian universalism, it broadly rationalized a harmony between reason and Christian morals. Christian thinkers arguing for modernization and liberalization felt that their vision of the good life was within the moral reach of all human beings.¹¹⁶ Religious normativity was removed from political rule to curb the ongoing political conflicts within Christian religious groups. Church and state were separated for the purposes of freedom of religion. The purpose of this process of secularization was to set the morality of the Christian faith as a stand-alone and an important force within society. The acceptance of the truth of religion and religious freedom occurred at a time when virtually whole societies practiced some form of Christianity. Although the original harmonized rationalization favoured Christianity, it too was eventually relegated to the realm of the private. It was when Eurocentric political debates concerning modernization and liberalization through public reason and individualistic construction of autonomy began that the communal, social and moral dimensions of religion began to be reduced to a private and an arbitrary choice; religion therefore began to be ignored in the public.¹¹⁷ The processes of secularization gave rise to the ever-expanding political, scientific and

¹¹⁵ Wittrock *Supra* note 8 at 54.

¹¹⁶ Parekh, *Rethinking Multiculturalism*, *Supra* note 17.

¹¹⁷ John von Heyking, "The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada." (2000) 33 UBC L Rev. 663-697 at 4.

legal revolutions within modern societies.

2. The development of liberal secular democracy and the channelling of liberal legalism

As the liberal secular democracy developed, the requirement of a judicial system to interpret and apply the secular aspect of law also developed within the same frame.¹¹⁸ Towards the 18th century, courts generally began to be more concerned with enforcing a rigid separation of church and state than with protecting the free exercise of religion. In the development of liberal thought, religious institutions began to be regarded as a threat that could destroy the liberties of people. The West now regards religion as a private matter of tradition that should not intrude into the public sphere.¹¹⁹ Various forms of secularism and liberalism are now the chief features of a modern liberal democracy.

However, at the end of the 19th century, when a reformed liberalism had begun to emerge in attempts of a more democratic liberalism, society became a means of enabling individuals to satisfy their desires in a *laissez-faire* ethos concerning economic well-being and equality of opportunity.¹²⁰ Not only was the theme of this liberal modernity viewed as superior, uniform, predictable, and coherent, but having developed in Western Europe, the fulfillment of individual desire for economic growth became the highest good within both classical and reform liberalism. Different governments now tend to tilt towards either form of liberalism.

Because liberalism resulted in a fusion of economics and politics throughout the 18th and early 19th centuries, and classical liberalism identified personal freedom with a

¹¹⁸ *Ibid.*

¹¹⁹ Taylor, "The Polysemy" *Supra* note 41.

¹²⁰ Heyking, *Supra* note 117.

free market, the *laissez-faire* economy has become firm.¹²¹ However, long before the political theory of liberalism had matured into democratic liberalism, and long before equality of political participation based on all people having an equal voice, the equivalents of social sciences and scientists had a supposed “master theoretical frame to organize their focus, problems, explanations, and interpretations...the idea of modernity...around the pre-modern/modern divide.”¹²² As stated previously, processes through which all societies were supposedly to have passed in order to develop and modernize were explored by mid 20th century sociological works such as of Marx, Tönnies, Weber, Durkheim, Simmel, Parsons, and many others.¹²³ In their quest to transform and modernize the ‘rest of the world’, the dynamics of their theorized process of modernization centered on systematic and universal ideas of classical modernity of economic growth, differentiation, rationalization, individualization, urbanization and so on. Until the 1970s, the above mentioned theorists and their economic and social development notions for understanding Western modernity with themes from classical modernization dominated the entire economic, social and legal development industry globally.

Towards the latter part of the 20th century, at the end of colonialism, reform modernism and universalistic explanations for events based on presuppositions of theorists from classical liberalism began to be critically scrutinized; these theorists were not necessarily “unsullied by political and cultural aspirations” of conquest.¹²⁴ Liberal legal discourses of rights, inclusion and equality coexisted with the legitimization of

¹²¹ Kymlicka, “*Multicultural Citizenship*” *Supra* note 5.

¹²² Smith, “On Multiple Modernities, *Supra* note 98 at 1.

¹²³ *Ibid.*

¹²⁴ Tie, *Supra* note 13 at 12.

colonial policies of exclusion and discrimination by the presumption of differences between different types of individuals.¹²⁵ The historical channeling of secularized liberal legalism by an instrumental and practical view of knowledge has had the theoretical resources and the opportunity to establish hierarchy among different ways of life.¹²⁶ Currently, monistic morals continue to be engaged in vigorously distinguishing liberal modernity and its ideology from global opposition with a vision of sustaining itself as a vibrant liberal moral culture.

The rule of liberal constitutionalism remains dominant as modernization's expansive and transient quality and has manifested in most cultures across the globe.¹²⁷ However, the increasing multiplicity of modernities in the West: the plurality of religious orders and different moral doctrines indicate that multiplicities of worldviews and lifestyles—containing the original “DNA” of the liberalized and secularized modernity—also have claims that respect different traditional obligations for the common good than the duty to individual autonomy. However, liberal secular modernity and legalism, and its individual agent, continues in a global scope with vigorous interconnections in the now intercultural capitals of Europe, Britain, United States and Canada; capital cities such as London, New York, and Toronto are highly populated with multiple modern people.

3. Multiple modernities and a heterogeneity of legal orders

There are many ways of understanding modernity, but the fact that the definition of ‘the modern’ is diffuse, elusive and difficult to comprehend is well illustrated by

¹²⁵ Ratna Kapur, “The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion” (July 2007) 2:8 *Theor Inq Law* at 7.

¹²⁶ Parekh, *Rethinking Multiculturalism Supra* note 17.

¹²⁷ Kapur, *Supra* note 125.

Berman:¹²⁸

The maelstrom of modern life has been fed from many sources: great discoveries in the physical sciences, changing our images of the universe and our place in it; the industrialization of production, which transforms scientific knowledge into technology, creates new human environments and destroys old ones, speeds up the whole tempo of life, generates new forms of corporate power and class struggle; immense demographic upheavals, severing millions of people from their ancestral habitats, hurling them halfway across the world into new lives; rapid and often cataclysmic urban growths; systems of mass communication, dynamic in their development, enveloping and binding together the most diverse people and societies; increasingly powerful national states, bureaucratically structured and operated, constantly striving to expand their powers; mass social movements of people, and peoples, challenging their political and economic rulers, striving to gain some control over their lives; finally, bearing and driving all these people and institutions along, an ever-expanding, drastically fluctuating capitalist world market.

Complex but different historical modes, procedures and institutions make it very difficult to define modernities in their specificity. Friedman attempts to define modernity as a process, anywhere, a powerful current of historical condition that combines to produce sharp ruptures from the past that range widely across various sectors of a given society.¹²⁹ The change knits together the cultural, economic, political, religious, familial, sexual, aesthetic, and technological and so forth and can move in both utopic and dystopic directions with “shattering” “velocity”; the changes are “across a wide spectrum of societal institutions...”¹³⁰ Modernity everywhere is also relational; it is not a past versus the present, or science versus wisdom. The major rupture—from what came before—opens up the possibility for polycentric modernities and modernisms at different points of time and in different locations. In the history of civilization, eruptions of

¹²⁸ Suha Taji-Farouki & Nafi Basheer eds, *Islamic Thought in the Twentieth Century* (London, New York: Tauris & Co. Ltd, 2004) at 1. In particular, Taji-Farouki & Basheer make reference to the post-modern work of Marshal Berman, *All that is Solid Melts into Air: The Experience of Modernity* (New York: Simon & Schuster, 1982) at 16.

¹²⁹ Susan Stanford Friedman, “Periodizing Modernism: Postcolonial Modernities and the Space/Time Borders of Modernist Studies (2006) 13 *Modernism/Modernity* 425-443 at 433.

¹³⁰ *Ibid.* at 433.

different modernities often occurred in the context of empires and conquest such as the Tang Dynasty in China, the Abbasid Dynasty of the Muslim Empire and the Mongol Empire, all of which predate Western modernity.¹³¹ For Said:

... such movement into a new environment is never unimpeded. It necessarily involves processes of representation and institutionalization different from those at the point of origin. This complicates any account of the transplantation, transference, circulation, and commerce of theories and ideas.¹³²

The transformation of ideas—interpretation for instance—into new positions in time and space, partially or fully, is gradual. “Hostile soil does not allow transplantation; conversely, the practices that take hold in their new location are changed in the process.”¹³³ Although liberal modernity is characterized as a break from tradition, a tear-off from its own continuous time, it in effect invents tradition as part of its own rupture from its past. The process of modernization and traditionalisation can never end. For instance, to declare the end of colonialism as synonymous with the end of modernism is, as Friedman states, “like cutting off the modernisms of emergent modernities.”¹³⁴ Modernisms as the creative forces within other modernities, such as the writers, the artists, the musicians, the dancers, the philosophers, the critics, and so forth, are engaged in producing their own modernisms that accompany their own particular modernities.¹³⁵ So, multiple modernities create multiple modernisms. And, as Goankar states in Friedman:¹³⁶

to announce the general end of modernity even as an epoch, much less as an attitude or ethos, seems premature, if not patently ethnocentric, at a time when

¹³¹ *Ibid.* Friedman at 433.

¹³² Edward Said, “Traveling Theory,” *The World, the Text, and the Critic* (Cambridge, Mass.: Harvard University Press, 1983) at 226 in Friedman, *supra* note 118 at 430.

¹³³ Friedman, *Supra* note 129 at 431.

¹³⁴ *Ibid.* at 427.

¹³⁵ *Ibid.* at 427.

¹³⁶ *Ibid.*, Friedman quotes Goankar at 425.

non-Western people everywhere begin to engage critically in their own hybrid modernities.

Modernism did not come to a close. Indeed, it cannot come to a close as alluded to in the idea of post-modernism. As did the creative agencies in the colonies, newly emergent nations are now exhibiting differentiated modernizations. The nationalist movements and liberations from political dimensions of colonial rule are central to the story of their modernities. In that modernity invents tradition, suppresses its own continuities with the past, and longs for what has been seemingly lost, multiple modernisms need “respatializing” and therefore “reperiodizing.”¹³⁷

As noted, liberalism broke with monarchy and also with religion. Some want to promote the modern and others want to restore an *imagined* and often idealized past; the secular liberal democracy tends to live in an idealized imagined past. The struggle between the modernizing and traditionalizing forces, particularly of religious values within Canada, are indicative of a defining characteristic of the current liberal modernity. Both, the past-orientated traditionalism and liberal democracy are as much a feature of modernity as modernization. I agree with Friedman: “hidden continuities” “buried within the radical ruptures from the past,” refuse to change or cannot change and often have to do with the uneven distributions of power and violence in the past, present and particularly in the future.¹³⁸

But institutional changes depend not only upon a transformation in how we view modernity and individual rights, that is, the relationship between democracy and human rights, but also upon an agent that can effect such a transformation. For social change, what is required is a deeper understanding of democracy and a different agency of social

¹³⁷ *Ibid.* Freedman at 427.

¹³⁸ *Ibid.* at 434.

transformation in order to institutionalize respect for human rights. The agency of modernity is not autonomy and freedom to act unimpeded by others; *it is a drive to be able to name one's collective and individual identity and to negotiate the conditions of history at the zones of encounters of interculturality.*¹³⁹ It is this incarnation of modernism that supports the unfolding universe where the unfolding happens within a specific civilizational context; it is this *avatar* of modernity, this pluralization of modernity, these alternate modernities, these polycentric modernities, these contemporary multiple modernities, that have, collectively, gone beyond liberal modernity's narrow mindedness into a dimension of modernity that suggests imaginative, creative and moral meaning-making forms and cultural practices that engage in substantial and different ways with the historical conditions of a particular modernity.

The essence of multiplicity of modernity is creativity. But the creative agency of modernity is in the West; the West perpetuates itself as innovative and the rest of the world as traditional, as raw for creative appropriation and transmutation into 'modern': modern art, for instance, or culinary cuisine. *The creative agency of plural law has been largely ignored.* This exclusion of the juridical agency of multiple modernities deeply affects the definitional projects of modernism. In effect, multiple modernities also produce polycentric *law*, or a multiplicity of legal orders in which providers of legal systems compete or overlap in a given jurisdiction.

In the West, liberal law is the sole provider of homogeneous law. However, law is instituted by a heterogeneity of normative claims that are consistently formed in specific contexts, independent of the state. Political conflicts are inherent in social interactions as cultures are internally heterogeneous entities. Law is constantly

¹³⁹ Friedman, *ibid* at 428.

constructed through the contest of various norm-generating communities that prescribe or adjudicate normative commitments.¹⁴⁰ Norm-generation is part of jurisgeneration; “pluralism observes [that] various actors pursue norms and it studies the interplay [without proposing] a hierarchy of...norms and values.”¹⁴¹ In a situation of legal pluralism, the interrelations between different laws are of special importance. “Law and the social context in which it operates must be inspected together.”¹⁴² In a world of hybrid legal spaces, a wide variety of transnational and international regulatory problems can be conceptualized in managing hybridity. How do we balance complexity and essence, particularity and overlap *and* hybridity?

A closer look at the new geography of modernism will reveal many centres of modernity across the globe that throw light on intercultural traffic and their multiple interpretations that are linked to the circuits of reciprocal influence and transformation that take place within highly unequal states relations.¹⁴³ Multiple modernities are already exhibiting pluralities of space and time based on global linkages with contemporary societies. Each new manifestation of modernity is distinctive and yet, affiliated thorough global linkages to other modernities or societal formations. Each such manifestation of ‘modernity’ is located in a series of historical processes that brought relatively isolated societies into contact with others.¹⁴⁴ However, a central facet of *liberal* modernity is that people ought to be governed by the rule of law and citizens are under the law that is rationally standardized.

¹⁴⁰ See generally Cover, “The Supreme Court 1982”, *supra* note 20 at 43.

¹⁴¹ Berman, “Global” *Supra* note 5 at 1155.

¹⁴² Moore *Supra* note 22 at 719.

¹⁴³ See generally Parekh, “*Rethinking Multiculturalism*” *Supra* note 17

¹⁴⁴ Friedman, *supra* note 129 at 435.

B. Constitutional democracy: modern liberal secular law as state political, economic and social order

The ethics of law, politics and religion were initially separated as a Eurocentric instrumentalist means toward the larger end of protecting true religious freedom based on the liberal notions of equality and neutrality.¹⁴⁵ Natural law principles and religious principles were to exist independently of any human law-making agency and therefore the liberal state may not alter them. Although historically, law was not a major aspect of Western society and was shaped by customs, classical modernists began to perceive that purposive rules and public state institutions of social control and authority were necessary. The rule of liberal law started as a slow and historically prolonged sociopolitical aspect of modernity but since the 19th century modernity and liberal legalism have been rapidly swallowing up the globe. According to Thompson, human law became an instrument of imperialism and found its way around the globe.¹⁴⁶ Globally, democracy has now come to imply certain freedoms: political, economic and social rights and the rule of the many. The idea of a modern liberal democracy—constitutional democracy—that is cohesive entails legally homogenizing concepts for the supposed stability and security of the individual and in the interrelationships and interactions between individuals and groups within the secular democratic state.

Theoretically, constitutionalism is a set of fundamental liberal rules and principles as shaped by the evolving but homogenized ‘manmade’ law and by which a limited state broadly engages in the rule of, and the organization of, social life in modern liberal

¹⁴⁵ Heyking, *supra* note 117.

¹⁴⁶ Thompson, E. P. “The Rule of Law” in *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975) 135 at 135.

states.¹⁴⁷ Constitutional law, as part of rule of state law, along with an independent judiciary and respect for minorities, orders society politically.

The constitution is based on national political identity—autonomy of the individual—but emphatically not on religious identity. The rule of liberal law is a shield that protects citizens against the abuse of power and is unconditionally connected to individual freedom. Generally, constitutionalism, in its association with the modern secular state, was initially concerned with limits of power and the rule of law; democracy and human rights are its later additions. It is the very ideals of human rights and the rule of liberal law that logically lead to constitutionalism and the limited state. In effect, popular democracy, where the will of the majority is accepted, becomes a legitimate form of government only when it is united with the traditional Western ideals of constitutionalism, rule of law, liberty under the law and limited state.¹⁴⁸ Because the characteristics of modern liberal constitutional law are that it is: a system of rules; a form of purposive human action; and concurrently autonomous from and a part of the modern liberal state, the rule of constitutional law is subject to the limits of state goals of stability.¹⁴⁹

A liberal constitution may be changed but the rule of liberal law requires that amendments be made according to recognized procedure. The well entrenched citizen rights are extremely difficult to retract.¹⁵⁰ According to Thompson, liberal law is part of a “superstructure” that supplies the “necessities of an infrastructure of productive forces and productive relations”; if we judge the “culture of constitutionalism” in terms of its

¹⁴⁷ Heyking, *supra* note 117.

¹⁴⁸ Morrison, *supra* note 101.

¹⁴⁹ Trubek, “Toward a Social Theory” *supra* note 56 at 4.

¹⁵⁰ Plant, *supra* note 54.

own self-sufficient values “we are imprisoned within its own parochialism.”¹⁵¹

Limitations on what modern liberal constitutional law perceives as controversial religious norms frustrates the ability of government officials to take actions on accommodating these norms and misinterpretation sometimes leads to compromise in democratic law-making. The singular rule of liberal constitutional legalism continues to ground our legal definitions of personal, social and political life *globally*.¹⁵² According to Hogg and Zwibel, this purposive law can be influenced by the decision-making of courts and public officials.¹⁵³ The protection of religious life is questionable.

How general, systematic, predictable and effective is this rule of constitutional law? The rule of constitutional law is fundamental to Western liberal democracy and the rule or convention plays a significant role in the exercise of power.¹⁵⁴ Currently, the definition of the rule of liberal law is not fixed; it is open ended and is extensively debated; however, at minimum, the rule of liberal, constitutional, law “must be set forth in advance, be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms.”¹⁵⁵ The rulers and the ruled are to obey predictable and supposedly impartial rules of conduct. The rule of liberal law functions as a restraint on government by requiring officials to comply with the existing law and by curbing their law-making power. Restraining law-making power is a restraint on the law itself so that even a legitimate law-making authority is limited. Government actions therefore must be

¹⁵¹ Thompson, *supra* note 146 at 130.

¹⁵² Ermarth, *supra* note 36.

¹⁵³ Peter W Hogg & Cara F Zwibel, “The Rule of Law in the Supreme Court of Canada” (2005) 55:3 UofT LJ 715 at 719.

¹⁵⁴ *Ibid.*

¹⁵⁵ Brian Tamanaha, “A Concise Guide to the Rule of Law”, online: (SSRN, 2007) Legal Research Paper Series, Paper #07-0082 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051> [hereinafter “A Concise Guide”] at 2.

positive legal actions and no government action may contravene a legal prohibition or restriction.¹⁵⁶ However, the government is not the controlling or coercive force of society but an instrument within it; the norms that take precedence in public life are those that are grounded in abstract philosophical principles that lie behind historical liberal reflections that are secularized. In that the liberal theory of law is reduced to a rigid structure of a rational force, encumbered with homogenized values, it is not value-free.

1. Secularity : a central value in the protection of freedom of religion

It is now taken for granted that the political and the secular are a standard liberal correlation because they are central features of modernity, and within liberal law, secularity is restricted to a particular constitutional value.¹⁵⁷ Since the 19th century, ideas about the rights of individuals in liberal democracies, that have been abstracted into constitutional values, explicitly assume that equal rights have now been ingrained as automatic methodology.¹⁵⁸ A form of voluntary choice-making in the structure of the guarantee of freedom of conscience and therefore of the practice of religion, is now treated as an intentional act wherein the liberal individual is free to make moral considerations in their everyday social interactions.¹⁵⁹ Moral considerations that are recognized by the law are intentions, actions and decisions that fit the public moral code on proper behaviour and good character. Liberal law now protects the rights of the abstracted individual believers and their particular moral codes as a constitutionally protected identity that is supposedly free to practice his or her faith. This blanket guarantee of a positive right is in keeping with the purpose of all modern secular liberal

¹⁵⁶ Tamanaha, "A Concise Guide" *ibid* at 3.

¹⁵⁷ Secularism will be discussed in the next Chapter.

¹⁵⁸ William Ewald, "The Jurisprudential Approach to Comparative Law: A Field Guide to 'Rats'" (1998) 46:4 Am J Comp L at 701.

¹⁵⁹ Trubek, "Max Weber" *supra* note 68 at 5.

constitutional governmental structures and institutions including courts to secure social order for the autonomy, happiness, dignity and the benefit of all citizens. But in an age of globalization, the guarantees of negative rights are challenged by multiple modernities that refer to different concepts on what they feel constitutes good behaviour to be good citizens. For many, secularity is not a central feature of the good life. In Canada, there are examples of misrecognition by courts of group identity in freedom of religion jurisprudence despite the claimed virtues of the entrenched *Charter*.¹⁶⁰ The most basic problem for liberal law, and the most difficult, is to balance equality and difference given the multiplicity of difference within the modern.

2. Equality and difference: the politics of subordination within an absolutizing legal system

Although restraints are imposed by the constitution on democratic institutions, the rule of liberal constitutional law is not a protection against bad laws. The ability of the majority to take away the formal expression of language, religion, and laws of a minority, has continued from 18th century Europe when whole societies were homogeneous.¹⁶¹ The will of the majority cannot be legitimate unless the majority is restrained by an expansive constitution. Difference needs to be protected against the dominance of liberal modernity. The imposition on difference to have ‘blind faith’ in liberal modernity is risking loss of essential values. Studies of various diaspora in Britain conclude that communities have not abandoned their cultures, or their religions, but have reconstructed their own cultures to develop informal mechanisms.¹⁶² For Bhamra, the sociopolitical reality of the immigrant experience does not accord with the idea of assimilation into

¹⁶⁰ See Chapter III.

¹⁶¹ Menski, *supra* note 7.

¹⁶² Ballard, “Common Law” *supra* note 4.

mainstream society; it is “analogous to the choice to take a vow of perpetual poverty and enter a [cultish] religious order.”¹⁶³ Some can make explicit choices and leave their own culture or religion; however, it does not follow that it is desirable or legitimate to require individuals to abandon their own cultures by tacit assumptions given the seriousness of the consequences of the choice: permanent subordination.

The point of theorizing differences, Razack states, “is not for the sake of inclusion but for the sake of ant subordination.”¹⁶⁴ Consensus based on the principles of justice is difficult. In the relationship between judicially enforced rights and democracy, any misrecognition by courts implies social subordination of group identity. In Canada, the individual has freedom of conscience and religion as guaranteed in s. 2(a) of the *Charter*. Case law that will be discussed in Chapter III will show that because religion is individual as well as communitarian, there is state interference with minority religious practice; individuated rights are protected and valued ahead of the need for social cohesion of whole religious communities with different rationales. The limitation of religion is justified within the legal bounds of toleration and explained as a commitment to a single democracy, liberal democracy.¹⁶⁵ Chapter III will also show that courts can be authoritarian and legal discourse has the power to colonize others. We live in an age of confused democracy that provides citizens the freedom to make choices among various options that are supposed to be legitimate and meaningful and, at the same time, require many citizens to create makeshift meanings out of their own cultures, beliefs and practices. A democratic state that imposes equal obligations yet denies equal rights

¹⁶³ Bhamra, *supra* note 4.

¹⁶⁴ Sherene Razack, “Between a Rock and a Hard Place: Canadian Muslim Women’s Responses to Faith-Based Arbitration” in Rubya Mehdi, *et al* eds, *Law and Religion in Multicultural Societies* (Copenhagen: DJØF Publishing, 2008) [hereinafter Razak, “Between Rock”] at 170.

¹⁶⁵ *Charter* S. 1 limitations of the Canadian *Charter* will be discussed in Chapter III of this thesis.

forfeits its legitimacy.¹⁶⁶

For Mouffe, an infallible test for political freedom is the legitimacy of opposition; freedom only to agree is no freedom.¹⁶⁷ In a liberal democracy, opposition must operate within ‘the rule of law.’ But freedom is meaningful only if it constantly renews its rationale of a moral vision of a good legal system and extends to those whose opinions differ from the opinions of those in authority. As Keating states, “the real intellectual problem arises from the doctrine of the unitary or uniform or mechanical state in which every deviation from uniformity has to be justified by reference to a general and universalizable rule.”¹⁶⁸ Because the liberal democratic tradition treats the cultural differences of multiple modernities as particularist trends or deviations, and because just dialogue is precluded by the conventions of modern Western constitutionalism, the current liberal state is gradually losing control over rights and the construction of new spaces of democratic discourse.

Vargish stresses that the ultimate agenda of the absolute system of liberal democracy is self-perpetuation. I agree with Vargish and in particular, the functional bottom line of the absolutizing legal system of liberal democracy is, in the first instance, not the perpetuation of the values it appears to embody and uphold—for example, liberty, equality, fraternity, God’s will, Jesus, history as a determining force—but “*order and power to impose it.*”¹⁶⁹ Shah eloquently sums up: “liberalism as a practical attitude, rather than as a focus of sophisticated philosophical debate, has become deeply

¹⁶⁶ Parekh, *Rethinking Multiculturalism* supra note 17 at 90.

¹⁶⁷ Chantal Mouffe, “Democracy and Postmodernity” Elizabeth Deeds Ermarth ed, *Rewriting Democracy: Cultural Politics in Postmodernity* (England: Ashgate Publishing Company, 2007).

¹⁶⁸ Michael Keating, “So Many Nations, So Few States: Territory and Nationalism in the Global Era” in Alain-G Gagnon & James Tully eds, *Multinational Democracies* (Cambridge: University of Cambridge Press, 2001) at 64.

¹⁶⁹ *Ibid.*

impoverished...socially ignorant and ethically barren.”¹⁷⁰ As a consequence, liberalism, and its broad legal approach with its many merits, has gradually been challenged by the multiplicity of the modern to reexamine its, liberal legalism’s, very fundamentals. Liberal legalism is the main force of liberal modernity and a force that is unable to accommodate modernism’s incarnation/*avatar*; the multiplicity of the modern.

Berman confirms that “a pluralist perspective on...law provides a powerful critique to the latest incarnation of realism—rational choice theory.”¹⁷¹ The confinement of religious diversity within the liberal form of individual legal agency entails conflict.¹⁷² The questions of social justice in modern liberal states go beyond liberal debates about whether abstract rights should take precedence over a collective conception of the social good. Social justice cannot be reduced to an abstract legal form; the danger is that, as equality slides into sameness, difference becomes weak in standing up for inequality or injustice—the strength within difference will weaken if we continue to advocate for inequality.¹⁷³ An essential part of legitimate authority is considerations of fairness; this entails equal distribution of political power particularly in a democracy where the law is supreme.

In the sociolegal context, Shah states that diasporic minorities are not taken seriously and are perceived as if they are demanding special treatment.¹⁷⁴ Also, the presence of numerous groups, both within, and external to Western states is perceived by the proponents of liberalism to be threatening to its fundamental ideals of authority.

¹⁷⁰ Shah, “Legal Pluralism in Conflict”, *supra* note 4.

¹⁷¹ Berman, “A Pluralist Approach” *supra* note 1 at 301.

¹⁷² Shah, “Religion in a Legal Environment” *Supra* note 69 Shah at 71.

¹⁷³ Fran Tonkiss, “Re-writing Equality: Difference, Social Justice and ‘Postsocialist’ Politics” in Ermarth, Elizabeth Deeds ed, *Rewriting Democracy: Cultural Politics in Postmodernity* (England: Ashgate Publishing Company) at 72.

¹⁷⁴ Shah, “Law and Ethnic Plurality”, *supra* note 50 at 3.

Religious difference is particularly feared. Because liberal democracy is identified with “a reality that is universal, inviolable, complete, supreme, and, above all, single and monological”, mainstream legal analysts in the fields of—feminism, critical race theory, gay/lesbian legal studies to name a few—have heralded, what Cotterrell calls, a new ‘jurisprudence of difference’, which asserts that the social environment of law can no longer be thought of as made up merely of individuals addressed equally by law.¹⁷⁵

3. The post-20th century emblem of the modern Western state

We have seen that although the idea of modernization is commonly associated with the West, modernization in its multiplicity has been occurring in all societies at different points of time and in different locations, and, since the 16th century, it has *created* the context of globalization. For more than four centuries, modern liberal constitutionalism has been developing with two forms of recognition: the equality of independent, self-governing nation states and the equality of individual citizens.¹⁷⁶ It has developed with imperialism wherein European nations constructed their own imperial systems over the non-European world. In most of the post-colonial world, modern constitutionalism is now fashionable among the so called equal and independent constitutional nation states. State institutions of modernization and liberalization have become emblematic of the modern world at large. However, the argument is that if modernism and liberal legalism is defined in terms of the prevalence of a few key societal institutions of the political and economic Western order than modernism is reduced to the West only and that too as is applicable to the early part of the 20th century. Everywhere,

¹⁷⁵ Thomas Vargish, “Self-qualifying Systems: Consensus and Dissent in Postmodernity” in Elizabeth Deeds Ermarth ed, *Rewriting Democracy: Cultural Politics in Postmodernity* (England: Ashgate Publishing Company) at 120.

¹⁷⁶ Tully, *Strange Multiplicity* supra note 60 at 24.

there is a spectrum of reinterpretation and reconstruction of the constitutional program of liberal modernity and of the construction of multiple modernities and its diverse interpretations. Many multicultural and multiethnic movements are attempting therefore to redefine the discourse of particularistic modernity in their own terms. Although modernization is not now Westernization, it was considered essential to Western nationalism for social control and for colonialism for exploitative purposes and as a development strategy applied to the Third World.

4. Relativized knowledge: ongoing modernization and globalization are not westernization

Every diasporic community globally has been exposed to some form of Western modernization either pre-migration or post-migration to the West. If, as Eisendadt suggests, “modernity and Westernization are not identical,” even though modernities continue to refer to the Western historical precedence.¹⁷⁷ The changed cultural condition and human interconnections suggests that the bases upon which liberal-modernities are lodged needs to be redefined in the context of the role of law in its various social contexts. For peaceful co-existence, a dialogue of difference has to be a normative effort in order to appreciate the relevance of the historical and civilizational interpretation and commitment of the other. Legal analyses could be pluralist in nature. Again, in the analysis of legal pluralist, Robert Cover, the rules and principles of justice as instituted in formal law and conventions of social order, though important, are only a small part of the normative universe that ought to claim our attention. “We inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and

¹⁷⁷ Eisendstadt, S.N. “Multiple Modernities” (2000) 129 Daedalus 1:1 at 2 and 3.

unlawful, of valid and void.”¹⁷⁸ Those citizens (for instance, Aboriginal peoples, women, linguistic and ethnic minorities, intercultural groups, religious organizations and other multiplicities) whose customs and traditions have been excluded or suppressed by the politics of recognition of modern constitutionalism of the modern nation state are struggling for equal recognition.

For Tully, the politics of the recognition of cultural identities continue in a post-imperial age of modern liberal constitutionalism.¹⁷⁹ The modern constitution ought to be removed “from its imperial [Western] throne,” because “constitutions are not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements in accord with, and violation of the conventions of mutual recognition, continuity and consent.”¹⁸⁰ For Tully, in the interest of justice, Western constitutional theory is amendable.¹⁸¹

For Said, there is no culture, civilization, or nation that can truly separate itself into a pure and an impure or hybrid culture; there are no insulated cultures or civilizations, nor in fact have there ever been.¹⁸² Any attempt to separate them into “water-tight compartments” does damage to their variety, to their diversity, their sheer complexity of elements and their radical hybridity.¹⁸³ And, as Kymlicka wrote in 1989, culture is more accurately understood as a continual process of “renegotiation, re-evaluation and reconstruction;” it is never finished, and it is not possible to finish it.¹⁸⁴

¹⁷⁸ Cover, “The Supreme Court 1982” *supra* note 20 at 2.

¹⁷⁹ Tully, *Strange Multiplicity* *supra* note 60.

¹⁸⁰ Tully, *ibid* at 183 & 184.

¹⁸¹ *Ibid*.

¹⁸² Edward Said, “Citizenship, Resistance, and Democracy” in Elizabeth Deeds Ermarth ed, *Rewriting Democracy: Cultural Politics in Postmodernity* (England: Asghate Press, 2007) at 24.

¹⁸³ Said, *ibid* at 25.

¹⁸⁴ Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) at 167.

All modernisms develop as forms of cultural translation or transplantation produced through intercultural encounters and the constant making and remaking of boundaries, and their practical implications for law exist in all societies. Intermixing cultures are not unidirectional; they are multidirectional. They are not linear influences but reciprocal ones. They are not passive assimilations, and, depending on the adaptability or resistance, they transform actively. Although the scientific, industrial and political revolutions succeeded in emerging in the West, others, such as China, India and the Muslim world, have been influential on the world stage in global thoughts in many areas such as physical and natural sciences to architecture, art, commerce, and social and political thought. Western accomplishments are inextricably linked to those of others. The economic, techno-scientific and civic modernity occurred in the West. But there cannot be a *new epoch* in human experience that is *universal*. If all knowledge and public institutions were relativized, would citizenship be tenable? On the flip side, what if there was a return of religion to the public sphere often with singular truth-claims? But in a democracy, law is supposedly an aspect of the socio-cultural diversity it administers.

The interpenetration of civilizations and cultures is the hallmark of democracy in the 21st century. A world civilization would not be worthy of its name if it could not do justice to the individuality of different spheres of culture and civilization. The larger problem is the failure of the democratic institution to recognize its relationship with the current critique of modernity. There is a clear indication that modern liberal democracies in the 21st century are in trouble.

Although liberal modernity has multiple interfaces, it fails to converse fully with modernities that are firmly attached to religious values as part of life. The failure of

liberal modernity to recognize multiple modernities and to deal only superficially with new developments has led to a head-on collision of what I call ‘a clash of modernities.’ The singular liberal modernity that appears to be most conspicuous is the hegemony of the United States, followed by Western Europe and Canada. In their quest to follow and emulate the powerful, all other modernities, liberal or not, secularized or not, are complicit in the clash.

C. A space of opportunity: an enhanced model of liberalism

Parekh advocates freedom to research and to explore the elements of liberalism with a combination of elements drawn from other sources. Due to the complexity of multicultural populations everywhere, the West needs to break away from its obsession with the Western culture of liberal essentialism, finality, and intellectual rigidity.¹⁸⁵ Mohanty’s statement, as quoted in Razak, about the liberal form of ‘inclusion’ as a “harmonious, empty pluralism echoes the lament of some critical pluralists previously mentioned, some are listed here;¹⁸⁶” Tully, the diverse ways citizens in the West are culturally constituted by legal and political institutions to adhere to the norms of uniformity remain unexamined;¹⁸⁷ Sen, the privileging of legal regulation and adjudication in political liberalism raises what he refers to as a question of capabilities and chances, and this is a challenge to liberal conceptions of legal equality;¹⁸⁸ and Parekh, liberalism, with its essentialism, closure, system building and intellectual rigidity, marginalizes values such as human solidarity, equal life chances, selflessness, self-

¹⁸⁵ Parekh, *Rethinking Multiculturalism* supra note 17 at 369.

¹⁸⁶ Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 9 quoting Mohanty, C.

¹⁸⁷ Tully, *Strange Multiplicity*, supra note 60 at 55.

¹⁸⁸ Amartya Sen, *Development as Freedom* (New York: Random House Press, 2000).

effacing humility, and contentment.¹⁸⁹ Liberalism creates skepticism about the pleasures and achievements of human life as “it is not sufficiently sensitive to and cannot give coherent accounts of culture, tradition, community, a sense of rootedness and belonging.¹⁹⁰” I am convinced that the larger framework of liberal constitutionalism in Canada therefore has limited legal capacity to balance individual freedoms against the maintenance of different authentic cultures, religions or races. The limits are due to reluctance, according to Lee, to confront uncertainty and he adds that it is not fatal to accept uncertainty because it can be pragmatically managed as “part of self-monitoring activities...[so that] theories as applied to social change... attempt to bring to realization a sustainable economic and political environment under the aegis of modernity”¹⁹¹

The liberal traditional values such as human dignity, equality, critical rationality, respect for others and toleration can only be enhanced with the intercultural multiplicity and diverse intellect that obviously has no determining centre. And, according to Kaya, no centre of society is capable of shaping the entirety of social relations.¹⁹² He argues that modernity is open-ended enough to allow spaces for multiple interpretations.¹⁹³ Multiple modernities are therefore not based on a centre that determines any activity and sphere in the social world. A concealment of the immense variety of cultures, of peoples, of religions, historical traditions and historically formed attitudes remains open to disputes over the common good or the good life.¹⁹⁴ Benhabib defends constitutional and

¹⁸⁹ Parekh, *Rethinking Multiculturalism* supra note 17 at 369.

¹⁹⁰ Parekh, *ibid* at 339.

¹⁹¹ Lee *supra* note 23 at 357

¹⁹² Ibrahim Kaya, “Modernity, Openness, Interpretation: A Perspective on Multiple Modernities” (2004) 43:1 Soc Sci Inf 35-57 at 47.

¹⁹³ *Ibid.* Kaya at 37.

¹⁹⁴ Seyla Benhabib, *The Claims of culture: Equality and Diversity in the Global Era* (Princeton University Press, 2002) at viii.

legal universalism at the level of polity but within a “deliberative democracy” of legal pluralism and institutional power-sharing.¹⁹⁵ And the space of culture, or religion, or language or history, whose importance is no less than that of the power of rationality, provides opportunities to interpret imaginary significations of modernism in multiple ways.

Studies of the plurality of civilizations confirm that many of the cultural, legal, political, and scientific forces in people’s lives move in competing and often inconsistent directions. Multiplicity is inherent in modernity. The plurality of the cultural worlds is irreducible. Intercultural multiplicity and diverse intellect are therefore inevitable. The intense multiplicity of the current complex epoch reflects a modernity in which tensions, contradictions and dualities are much more evident and openly expressed. There is no coherence in the current world and the conflicts within the diversity of myriad interpretations indicate the radical pluralism of the cultural and theological worlds.¹⁹⁶

To continue to call Canada a liberal society is to homogenize and oversimplify contemporary society; it also gives liberal Western societies a moral and cultural monopoly that treats non-Western societies as illegitimate and troublesome intruders. For Parekh, paradoxically, it is the glory of liberal society—tolerant, open, and free—that it is *not*, and does not need or even seek to become, exclusively or entirely liberal, that is, committed to a strong sense of autonomy, individualism, self-creation et cetera.¹⁹⁷ This permanent inner logic and strength in liberalism has been misunderstood by philosophers of all stripes until recently.¹⁹⁸ This logic stems from his argument that liberalism views

¹⁹⁵ *Ibid.* Benhabib at ix

¹⁹⁶ Kaya, *Supra* note 192 at 38.

¹⁹⁷ Parekh, *Rethinking Multiculturalism supra* note 17.

¹⁹⁸ *Ibid.* Parekh.

human beings as wholly constituted by their culture where culture is a sort of superstructure, resting on, and interacting with, an unchanging and identical human nature. The fact that this human nature shapes human beings and defines the nature and content of the good life is not appreciated as a source of significance of religious diversity. When religion serves to keep the divisions between the modern and the traditionalist intact, an extremely important aspect of a modern society is sidetracked.

D. Conclusion

In the last 50 years, many, many millions of refugees, movements of peoples by choice from country to country, immigrants, displaced peoples and others have crisscrossed over to different cultures. In Canada, its Eurocentric value system with its universal code of liberal modernity, however, clashes with the practical and legal needs of the multiplicity of modernities. If the challenge of human rights and social justice is not confronted, struggles could potentially erupt into violence. In particular, there is a persistent non-acknowledgement of religious differences and historical and legal frames of all available systems of values, beliefs and practices, giving rise to conflicts.

The ideology of liberal legalism developed from Locke's classical liberalism to Mill's more reformed liberalism, and its amplification, modification and sometimes even reduction, has struggled through parliament with Stuart Kings, the Glorious Revolution of 1688, the establishment of supremacy over monarchy, to where the people now have a moral right to establish the rule of law.¹⁹⁹ From a sociohistorical vantage point, ideologies are not static, timeless systems of ideas. As a general rule, the quality of the outputs of any system reflects the quality of its inputs; a system of constitutional

¹⁹⁹ Morrison, *supra* note 101.

supremacy has to be based on the value choices of the multiplicity. Agreement on political matters and social justice need not exclude recognition of difference. This is most crucial in recognition of religious scriptures. And law may not be the only system available for social justice. The treatment of “equality” is a societal value as an essential part of the constitutional framework. Normative refinements of the liberal democratic theory would view pluralism as a value worth protecting and not simply as a fact to be tolerated.

The term ‘multiple-modernities’ acknowledges the relevance of many versions of modernity and lived experiences that are culturally and historically contingent. Currently, the world at large is rooted in liberal politics and integrating people into changing markets with a dangerous abandonment of the democratic commitment to equality. “There is no universally valid mediating frame: no common denominator, no constant, especially not time and space to act as the common basis of resolution in a universally valid discourse.”²⁰⁰

²⁰⁰ Ermarth, *supra* note 25 at 15.

CHAPTER II - The Secular Legal Order: Misconceptions within Liberal Law of the Relationship between Politics and Religion

In the contemporary West, due to a steady influx of immigration and a growing base of standards of morality, the relationship between religion and law reflects a plurality of rationales, all of which are simultaneously looking for answers to questions of authority, justification of universal rights, and *rational* answers to questions of code of conduct in everyday life. However, the theory of secularization also reflects the relationship between current law, politics and religion that exposes the now—given a multiplicity of legal regimes—weakens foundations on which modern secular constitutional democracies are based. The secularized relationship between plural religions, constitutional law and politics may be illogical and legal resolution on religious issues is difficult.

This chapter will explore what the possibilities are of expanding the boundaries of liberal secular modernism and whether law is able to recognize and accommodate a further multiplicity of authentic normative orders. Is liberal law: neutral towards religion, anti-religion, or non-religious? Is the scope of the authority of each, the public and the private spheres, religion and law, distinct and unfettered? Can the state itself be allowed to continue to have a specific conception of the good, in this case, rational secular morality? Given the plurality of moralities, how can a liberal secular state and society encourage religious diversity, pluralism and the common good? If morality is an important characteristic within multicultural societies, what is the role of religion in guiding public morality in such societies? According to Parekh, reason can “suffer from limitations” leading to widespread differences of views and sometimes clouded by

emotion.²⁰¹ What are the possibilities of faith and reason to interact in these modern societies for a moral and judicious political life? Is it possible to have a universal value system that is applicable to the beliefs and practices of a multiplicity of modernities in a liberal democracy?

A. Regulating religion: Eurocentric tensions between religious rights and secular politics

In the West, as part of the force of Eurocentric modernity, the theory of liberal secularization was conceptualized to transform and completely differentiate the spheres of the religious and the secular. It originated to liberalize and to remove religion from legal and political rule. The freeing of religion from Christian politics and civil unrest, religious wars and revolutions was to legally solidify Christianity's moral force within civil society.²⁰² As a single process of differentiation of the various institutional spheres—from early modern to contemporary societies—secularization is understood as a defining characteristic of processes of modernization and liberalization that guarantee the individual citizen freedom of religion.²⁰³ For Casanova, this process has remained uncontested; what needs to be opened up is an exploration of Christian historicity of Western Europe along with a multiple other different historical patterns of secularization in other civilizations and world religions.

In the discourse between state law and religion—religious legislation attached to constitutional values—there is often disadvantage or exclusion of some religions and faith practices and in particular those which are not of the established, official or

²⁰¹ Parekh at 53, *Rethinking Multiculturalism*, *supra* note 17.

²⁰² Heyking, *supra* note 117.

²⁰³ José Casanova, "The Secular and Secularisms" (2009) 76:4 Soc Res 1049 at 1050.

recognized religions.²⁰⁴ It is argued that the moral fibre and the good within civil society are inspired by religious traditions and doctrines.²⁰⁵ It is further argued that all citizens have multiple and distinct identities that they choose at will, much like chameleons and they ought to be allowed to participate in the public sphere with their key aspects intact if the modern liberal state itself is to remain comparatively free of moral chaos manifesting in multifaceted conflicts.

For instance, in a 2009 freedom of religion case involving *A.C.*, a mature but minor Jehovah's Witness, refused to accept blood transfusion as her religious tenet.²⁰⁶ The criteria that the majority at the SCC used, in the process of reasoning, and choosing and explaining this particular religious tenet, was what constitutes a liberal legal category and classification. But the court was also required to deliberate upon the capacity of the adolescent to understand her personal normative subjectivity to a religious tenet. It was an ingrained, sincere, belief of *A.C.* that if she accepted blood transfusion, she would be damned for eternity. But the analysis of the case was synthesized into a body of previously derived secular legal principles and constitutional limitations. The court was in effect required to manage religious tenets within a specific new realm, the realm of private values in a public forum; a constraint that is self-imposed on the secularized system. The moral, deeply held religious beliefs, and the political contexts are most times confused with the claims of justice.

1. Secularism as a definitive characteristic in the progress of modern liberation

²⁰⁴ Moon, R. (ed.). "Introduction" in *Law and Religious Pluralism in Canada* (Vancouver, B.C.: UBC Press, 2008), [hereinafter Moon, "Introduction"] at 3.

²⁰⁵ Dane, P. "Constitutional Law and Religion" in Patterson, D. (ed.). *A Companion to Philosophy of Law and Legal Theory* (Cambridge, MA: Blackwell, 1996).

²⁰⁶ *A.C.* *infra* note 346.

Liberation and separation of religion from the state were to benefit politics, law and morality.²⁰⁷ The secular referred to state law, policy, and economy and the religious included mostly various Christian churches. The definition of secularism was first coined in 1851 by Holyoake; it was formally published in the *Oxford English Dictionary* in 1911.²⁰⁸ The rationale then was focused on neutrality: secularism “neither affirms nor denies the theistic premises of religion” but it does replace the “uncertainties of theology” and it is “founded on considerations purely human.”²⁰⁹

The process of secularization progressed in the human and societal development to what is perceived as from the primitive ‘sacred’ to the modern ‘secular.’²¹⁰ The social and political order shifted gradually from the “hand of God, to the hands of men of God, to the hands of many, many, ordinary men” who would undertake a secular order that is supposedly virtuous.²¹¹ In other words, Western societies and social order evolved from a theological reference to God and blind faith, to a metaphysical stage wherein human reason questions and investigates the religious authority.²¹² This is an abstract stage. The final abstraction from religion is where the process of secularization is the Anglo-American scientific process that supposedly has answers to moral questions everywhere generally, and in particular in the rule of law.

The process of secularization has been structured as parallel to the political

²⁰⁷ Ian T Benson, “Considering Secularism” in Douglas Farrow ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen’s University Press, 2004) at 88.

²⁰⁸ *Ibid.* Benson at 86. G. J. Holyoake was instrumental in founding the National Secular Society in 1866 asserting that “supernaturalism is based upon ignorance and is the historic enemy of progress.”

²⁰⁹ *Ibid.* Benson at 86.

²¹⁰ Taylor, “The Polysemy” *supra* note 41.

²¹¹ Heyking *supra* note 117.

²¹² *Ibid.* Heyking.

process of Western modernization and liberalization. In the continuing evolution of processes from pre-Enlightenment theological roots where man and society deferred to unquestioned natural principles of law, morality, religion, myths and traditions, to a metaphysical stage of the justification of universal rights so that the authority of religion became questionable, to a further stage where scientific reason and generalization of these principles of law became paramount for the achievement of material and political progress for self-fulfilment, liberal legislators and courts generally began to be more concerned with enforcing a rigid separation of church and state than with protecting the free exercise of religion.²¹³ Today, the claim of liberal neutrality defines the process of secularization as the process in which religious consciousness is not essential in the operations of social systems. Although there are many variations of secularism, the term “secular” has become synonymous with the construction, codification, grasp and experience of a realm of reality that is differentiated from “the religious.”²¹⁴ It is simply a statement that: this is different from religion. Globally, faith-based practices are now often considered to be hostile to political secular liberty.

In contemporary legal reality, the secular non-religion liberal order is now understood as a normal human condition, as if God does not exist, in the public sphere.²¹⁵ And it is the application of the contemporary category of the secular, godlessness, that defines the legal and political identity of the liberal secular state and its society and that lends liberal legalism both its legitimacy and autonomy. This monistic liberal ideology of rights has remained steadfast in Western sociology and social sciences despite thorough contestations by legal, feminist, race and other critics. More importantly, the

²¹³ *Ibid.* Heyking.

²¹⁴ Casanova, *supra* note 203 at 1049.

²¹⁵ Taylor, “The Polysemy” *supra* note 41.

complex relationship of religion and modernity may leave spaces for contestation such that radical ideologies may gain legitimacy within societies where governance fails. With increasing plurality, the territory which lies in-between religion and politics is difficult to regulate. In Canada, the legal foundation for the private-public divide is not always clear.

2. Secularization, Christendom, and Religious Identity: in the separation of church and state or religion and state, where is (a) freedom of conscience, (b) equality, and (c) neutrality?

The 2008 *Bouchard-Taylor Report* commissioned by the Government of Quebec in 2007 found that secularism is generally regarded as a “straightforward, unequivocal principle that prescribes the separation of church and state, state neutrality and, by extension, the confinement of religious practice to the private sphere.”²¹⁶ However, for Bouchard and Taylor, the “declaration of independence” by the state from the church is not clearly distinguished.²¹⁷ There is confusion in the total separation of *church and state*, from that of *religion and state*, the latter being a political arrangement.

The Report defines current understanding of secularism in Canada as:

A system based on four constituent principles: two profound purposes (freedom of conscience, and the equality of deep-seated convictions); and two structuring principles the separation of Church and State, and State neutrality).²¹⁸

The Report concludes that within this perspective, current accommodation for religious reasons is perceived as being incompatible with secularism. The Report determined that secular systems should achieve a balance between four principles: the moral equality of persons; freedom of conscience and religion; separation of church and

²¹⁶ Bouchard-Taylor Report, *Supra* note 39 at 133.

²¹⁷ Taylor, “The Polysemy” *supra* note 41.

²¹⁸ Bouchard-Taylor Report *supra* note 39 at 289.

state; and state neutrality in matters of religious and deeply-held convictions.²¹⁹

However, the idea that reason can fulfil its emancipating function solely if it is free of any religious faith is also debatable; a person can certainly use his/her reason in the conduct of their life while maintaining a place of faith.²²⁰ The faith adherent's identity is tied not only to his/her religious community; it is also tied to his/her social, psychological and economic self in significant ways. If identity is non-existent, meaningful relationships would not exist. Virtually every aspect of good human conduct is capable of being the subject of religious belief, and moral considerations would require the state be neutral in the public sphere in accommodating all authentic religious groups.²²¹ Is absolute *state* neutrality even a practical possibility?

The hard anti-religious sentiments within the modern state are difficult to disentangle. For Taylor, “nothing this hard and fast exists in any other human culture in history” rather, the distinction between a higher being and ordinary beings exists universally.²²² Again, when combined with the political understanding of the secular self, it is argued that liberal law requires that all citizens ignore at least part of their identities in order to be citizens but at the same time recognize that complete separation will be impossible.

Also, Christian morals have remained integral as a code of conduct of civic life despite secularist processes. But generally, “law and religion are each obsessed with questions of right and wrong, sin and crime...and both set that inquiry into a larger,

²¹⁹ *Ibid.*, Bouchard-Taylor Report at 20.

²²⁰ Taylor, “Polysemy” *supra* note 41 at 1145

²²¹ *Ibid.*

²²² *Ibid.* at 1145.

structural, often hierarchical frame.”²²³ Both are acquired and held by a collectivity on the basis of a certain morality. In particular, religious beliefs and practices have been acquired and held by a collectivity on the basis of religious scriptures and faith. Because in reality the secular always overlaps with the religious, and it is becoming progressively very difficult to access the realm of the religious by minority religions in the public domain in the West, “any genuine freedom-of-religion law must protect not only individual belief, but the institutions and practices that permit the collective development and expression of that belief.”²²⁴ The preservation of the choices and therefore the rights of each individual will preserve the individual as a ‘holistic’ entity. The challenge to rational liberal secularized constitutions is that often, decision-makers universalize different interests of society as if they are acceptable to a specific individual.

Generally, the presence of numerous different moralities, both within, and external to Western states is perceived by the proponents of liberalism to be anti-law and threatening to its fundamental ideals. This may lead to a misunderstanding as to the reality of the hard fusion of the religious and the secular in different supposedly non-liberal spheres. Religious communities in Western secularized states are required to either adapt to Western modernity or reject traditional values. Empirical linkages between modernity and secularity may not be prominent but the removal of religion from public life and the creation of a space for the toleration and freedom of religion from discrimination are now expressed in secular terms and as a political guarantee.²²⁵

Given this contemporary, more political, understanding of the separation of church and state and given the guarantee of freedom of religion in liberal law, can newer

²²³ Dane, *supra* note 205.

²²⁴ Macklem *supra* note 5 at 25.

²²⁵ *ibid.*

moralties that overlap be generalized and incorporated into universal principles of liberal legalism and by way of consensus? Or is liberal law theorized as primarily a political design for governance on principles that consider only the secular rights of individuals and not other principles that the same individual may need to adhere to, such as, the needs of faith organizations that the individual belongs to? In the rapid advancement of modernity and secularization globally, religious influence seems to be weakening. Who then controls all aspects of social needs of the individual?

B. The role of religion in society

The importance of religion in society is its role.²²⁶ Although religion—a discourse with diverse and contested meanings—cannot be an adequate analytical category for public normativity, it is a source of self-dignity and self-identity. Different faiths consider religion as a way of life and binding religious principles are an integral part of the governance and conduct of the self and in the improvement of the quality of their lives. Believers are not exempt from existentiality: family, community, and commercial life. Although different civic realities are experiences and expressed differently in various modern contexts, religion continues to feed the moral and permissible mindfulness that consistently formulates these expressions of the believer civil citizen.²²⁷

Parallel and correlated to these realities are transformations of numerous religious and secular lives in an age of rapid cross-cultural exchange of human relations and norms.²²⁸ There is a risk of totally erasing peoples' roots. However the role and function

²²⁶ Shah, "Religion in a Legal Environment" *supra* note 69 at 63.

²²⁷ Parekh, *Rethinking Multiculturalism*, *supra* note 17.

²²⁸ Kymlicka, "Multicultural Citizenship", *supra* note 5.

of religion in society, and the degree to which religion is valued and protected is persistently invoked by the rule of liberal secular law in the consideration of national identity. Freedom of conscience and therefore of choice of religious belief is supposedly protected by liberal constitutional law. But, again, constitutional law continues to build on the weak foundations of the public-private divide. The protection of religious interests is sometimes confused with the protection of cultural interests, particularly of the majority; the guarantee of freedom of religion is confused with other rights such as cultural equality and respect.²²⁹ The progressive sophistication of the politics of modern liberalism includes a form of non-religious morality that is oblivious to the inner aspects of humanity and, at the same time, is very concerned with worldly interests of the individual.²³⁰

In Canada, because liberal constitutional law considers religion to be a private matter that cannot be allowed to infringe upon the public sphere, we need to consider this: the interpretation of both, religion and liberal secular rationalism, rest on human reason, an important, necessary, and the only available faculty to human disciplined and *moral* thinking.²³¹ Can what a multiplicity of practitioners of different faiths believe to be the supremacy of God be given constitutional meaning or would this in effect be a threat to the values of a free and democratic society as understood within liberalism? The rationalist liberal makes the finite, and fallible, human reason, the basis of the rule of law. However, human reason, for the religious person, relies on the “infinitely superior and

²²⁹ Richard Moon, “Government Support for Religious Practice” Robert Moon ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) [hereinafter Moon, “Government Support”] at 217.

²³⁰ Taylor, “The Polysemy” *supra* note 41.

²³¹ Parekh, *Rethinking Multiculturalism* *supra* note 17.

infallible divine reason.”²³² Rational constitutionalism is, for the believer, procedural, methodological and guided by evidence but religion or faith is committed to a substantive body of beliefs that involve the place of “emotions, spontaneity, intuitions and gut feelings.”²³³ A dynamic modernism, I maintain, goes into an expanded horizon of rationality that includes the construction of quality social consciousness. However, this quality is subject to interpretation; the acceptance of fallibility can only lead to an energetic search for truth as no single position exhausts truth.²³⁴

Although interpretation of religion is key, in the rapidly pluralizing state, the public right to freedom of religion in Canada’s *Charter* therefore remains one of the most controversial of rights. It is the liberal moral foundation of freedom of religion—the fact of the value of faith understood as a mode of belief distinct from reason—that supposedly has the capacity to contribute to human well-being.²³⁵ Secularism regards faith as valuable only in the recognition of the fact that a secular society has guaranteed freedom of religion. The guarantee of freedom of religion is the most prominent and yet the most vulnerable site for the pursuit of faith.²³⁶ In Canada, current democratic rights and protections afforded to the practice of religion may not be within reach for the believer for certain frames of moral and ethical behavior.

Religious beliefs and practices are consistently at the centre of freedom of religion jurisprudence. Canadian cases concerning the carrying of religious objects such as the

²³² Bhiku Parekh, *A New Politics of Identity: Political Principles for an Independent World* (New York: Palgrave Macmillan, 2008) at 132 [hereafter Parekh, *A New Politics*].

²³³ *Ibid.* Parekh, *A New Politics* at 133.

²³⁴ *Ibid.*

²³⁵ Macklem *supra* note 5.

²³⁶ *Ibid.* Macklem.

kirpan,²³⁷ a religious symbol for many centuries in India for Orthodox Sikhs, is compared to a commission of a crime of possession of a dangerous weapon; or the covering of the body or face for religious discipline is debated against the identity of the individual for security of others, or that a *Sikh* male's *turban* is a legal contravention of uniformity or a safety hazard against the individual himself.

Accommodation of religious practices is reluctantly directed to individual adherents as and when they require exemption. Generally, courts almost always uphold restrictions on religious practice. The existence of a large diversity of possible meanings for the concept of religion in the contemporary West is always considered in the context of its supposed opposite; the secular. However, the lived experiences of immigrants continue to reproduce the diversity of deeply-held legal or normative systems as multiple populations grow.²³⁸ All normative systems revolve around liberal rules to make claims to authority. Because the bewildering multiplicities of religious beliefs that are rooted in plural claims to authority are required to cohabit within the supreme state law that pervades all aspects of life, the overlap between law and religious practice of individuals is potentially conflictual.²³⁹

Historically, religion has always been the cause of conflict, but it has also always been a source of good public values for society. The liberal state may lose some benefits from, for example, faith-based institutions and organizations such as schools, hospitals, social service agencies, charitable and other organizations, all of which may contribute financial and other resources to societies. As stated, to start with, church and state in the West were not separate. For centuries, religion and religious activity have been both a

²³⁷ *Multani v Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256 [*Multani*].

²³⁸ Kymlicka, "*Multicultural Citizenship*", *supra* note 5.

²³⁹ Moon, "Introduction" *supra* note 204 at 2.

divisive and a cohesive force in society. Spiritual belief has inspired us for immense good but it has also been responsible for mass persecution, intolerance of difference and abuse of the rights of others.²⁴⁰ Although 4th century Christianity kick-started the concept of secularism, it was a series of events during the Reformation in England in the 1530s, during the reign of Henry the Eight, that is responsible for modern secularism.²⁴¹

C. The modern state: its emergence and developing theory of liberal secular law

In the 16th century, King Henry broke away from the authority of the Pope by separating the Roman Catholic Church and the Church of England. He not only established himself as the head of the Church of England, but also as the ultimate arbitrator of doctrinal and legal disputes.²⁴² Because England was predominantly Protestant, Catholics were discriminated against and Protestantism became intertwined with national identity. There was a long and bloody period of religious and political persecutions.²⁴³ Diverse religious groups were subjected to laws that were contrary to their beliefs and practices. Tolerance of religious minorities such as Catholics and Jews was rare in England. Religious minorities had to hide their religious identities and which restricted their ability to seek new converts or to seek political power.²⁴⁴ In the 16th and 17th centuries, European fear and hostility to religious plurality was at its worst. It was not until after the “Glorious Revolution” in 1688 that religion first became separated from law. A church polity was established but Catholics in England continued to be discriminated against; their civil liberties were severely curbed. The liberation of the

²⁴⁰ Knights, *supra* note 12.

²⁴¹ *Ibid.*

²⁴² *Ibid.* Knights.

²⁴³ Trevor-Roper, *supra* note 34.

²⁴⁴ *Ibid.*

Christian religion from the politics of civil strife, political rule, wars and revolutions followed in the 17th century.²⁴⁵ In effect, Catholic Church organizations were considered illegal until the 19th century.

As the modern secular state was emerging and disputes finally began to be resolved starting in the 17th century, religion began to be removed from law and politics in Europe generally. In 1689, the English parliament enacted the *Toleration Act* granting some religious freedoms, particularly to Protestants.²⁴⁶ In 1789, the French declared the *Rights of Man* that involved religious freedoms.²⁴⁷ In the struggle for political supremacy, many functions, properties and institutions of church control were transferred out to non-church laymen: “a rearrangement of the furniture in a civilization whose basic features remain unchanged.”²⁴⁸

Although secularization refers to the actual historical patterns of transformation and differentiation of the institutional spheres of the ‘religious’ from early modern to contemporary societies, the general theory of secularization is still developing within Western sociology.²⁴⁹ Secularization that was conceptualized within the European historical transformations later became increasingly globalized as part and parcel of a general teleology of conquest by the West, globally. By 1791, two guarantees, freedom of religion, and the prohibition of establishing of religion, were entrenched in the Constitution of the United States as fundamental rights, now within its *Bill of Rights*.²⁵⁰ Courts in all liberal democracies were also undergoing changes in empirical sciences

²⁴⁵ Knights, *supra* note 12.

²⁴⁶ Macklem, *supra* note 5.

²⁴⁷ *Ibid.*

²⁴⁸ Taylor, “The Polysemy” *supra* note 41 at 1144.

²⁴⁹ Casanova, *supra* note 203 at 1062.

²⁵⁰ Macklem, *supra* note 5.

towards more rational and progressive legal systems. Currently, in the separation of the traditional role of religion and faith-based values as vital protectors of public morality from politics, liberal legalism has become unable to fully understand religion.²⁵¹

1. The position of privilege of secular law and potential conflict

It is now understood that the political and practical, epistemological privilege granted by Western liberals to the Anglo-American jurisprudence of secular modernity, or liberal secular legalism, suppresses multiple forms of knowledge and other, what are perceived to be 'non-scientific' moral codes.²⁵² Because the principles, including moral codes for any liberal modern political system are agreed upon, and religion is defined as individual conscience, and because these consensus-based principles are detailed and have to be timeless, they tend to be rigid. Again, individuals are deemed to be autonomous moral agents, free to adopt their own conception of what a successful life is; the communal and social dimensions of religion are reduced to an arbitrary choice. In this Western-historical connection between liberal law based on Christian morals, other established religions and the value of their faiths are deprived of a voice in the ordering of a multicultural public.

Secularism's view that religion is merely a private and arbitrary choice makes it easier to suppress religion, whether by limiting religious freedom or by defining it in exclusively secular terms. This form of secularization undermines perhaps the most basic freedom upon which liberal democracy lies.²⁵³ Truths that are external to secularity and liberal rights do not matter in deliberation. This defies the sentiment that generally, religion offers the citizen a sense of well-being, and therefore any support for values of faith is in effect supporting the original agenda of

²⁵¹ Taylor, "The Polysemy" *supra* note 41.

²⁵² Yash Ghai, "Globalization, Multiculturalism, and the Law" in de Sousa Santos, Boaventura ed, *Another Knowledge is Possible: Beyond Northern Epistemologies*. (London: Verso, 2007) at 404.

²⁵³ Heyking, *supra* note 117 at 665.

secularism itself; the protection of all religions.²⁵⁴

No European society or political system is truly secular.²⁵⁵ For Parekh, this is “Western moral engineering.”²⁵⁶ If, as Heyking states, the process of liberal secularization is “a by-product of an untenable account of Western political discourse grounded in Christendom and an Enlightenment account of the autonomy of reason”²⁵⁷, and, if the Christian heritage continues to shape the vocabulary, self-understanding, institutions, ideas and practices of liberal modernity and law, are the ideas of human dignity, equal human worth and unity of humankind to draw their moral energy from this heritage that always reappears in the secularized liberal form?

Many of its current laws and practices and even such things as treating Sundays, Christmas Day, New Year’s Day, and Easter, as public holidays, are all further examples of the continuing influence of Christianity. In effect, legislation providing Sunday as a universal day of rest, has survived. It is considered a universal secular principle (not everyone accepts this).²⁵⁸ The historical roots could be forgotten, but even if Christianity survives only as Western culture and thought, its religious basis or overtones do not go unnoticed by non-Christians. *If the state holds a particular view of religion, or it views the morals of a particular religion as paramount, it is deemed to have entered the realm of ideology.* Not only does there seem to be privilege granted to well-recognized religions despite the rule against the establishment of any religion,²⁵⁹ but as will be discovered in case law in Chapter III, the privilege is in effect legally justified in some

²⁵⁴ Macklem, *supra* note 5.

²⁵⁵ Parekh, *Rethinking Multiculturalism* *supra* note 17.

²⁵⁶ *Ibid.*

²⁵⁷ Heyking, *supra* note 117 at 5.

²⁵⁸ *Infra* note 342, constitutional validity of Sunday closing legislation is discussed in Chapter III in *Edwards Books*.

²⁵⁹ Macklem, *supra* note 5.

cases. In an age of mass migration, legal resolution of conflict between particular normative frames of religion and state law will be increasingly difficult if the provision of freedom of religion in most liberal constitutions is not neutral.

Again, the tendency to dismiss the ‘non-liberal’ as atypical, unimportant and transitory, often results in arguments and considerations of the socio-legal realities of minority groups as making claims for special treatment. That modern liberal law tends to marginalize religion altogether makes it a form of political law.²⁶⁰ Throughout the West, discrimination against many other religious groups continues in a variety of ways. Minority religions are considerably weakened by secularized powers.²⁶¹ In Canada, for instance, practitioners of faith are finding that the law determines truths for whole groups of believers; the law decides which religious practices are acceptable and what sources of normative order are to be respected. Conflict may be inevitable.

If the purpose of the concept of liberal secularism and law is really of servitude to the greater goal of religious liberty that would be achieved through accommodation and neutrality of religious belief, then this purpose of the separation of private and public law, having acquired a position of privilege, is misleading.²⁶² In terms of the protection of the interests of the religious adherent by the guarantees of freedom of religion in liberal constitutions, there is confusion on whether the process of secularization is a political process that lies within the framework of law or whether it is a sociological phenomenon that is embodied in individual conceptions of the world and different lifestyles.²⁶³ It is understood that the state, and not society, is called upon to serve and to enhance the

²⁶⁰ Shah, “Legal Pluralism in Conflict” *supra* note 4 at 2.

²⁶¹ Moon, “Government Support”, *Supra* note 229 at 219.

²⁶² Rex Adhar & Ian Leigh, “Is Establishment Consistent with Religious Freedom?” (2004) 49 McGill LJ 635 at 646.

²⁶³ Moon, “Government Support” *supra* note 229 at 222.

promotion of genuine religious observance; it is also understood that the state is a political and not a religious institution and it cannot coercively enforce any religion.

2. Canada: Misconceptions and discrimination within liberal rational secularity

In Canada, upon application by the Muslim population to the Government of Ontario for faith-based arbitration in 2005, the government in effect permanently excluded all faith-based arbitration long permitted in the province.²⁶⁴ This was based on a misguided fear that Muslim populations will use the opportunity to introduce *Shari'a* law against vulnerable Muslim women and that the stoning of women could become legalized.²⁶⁵ It was feared that Muslim women may not have the ability to choose a liberal format for their marital disputes. And in France, its “*morale indépendante*” continues in contemporary politics as the concept of *laïcité*—freedom from a rival religious morality—and this is evident, for example, on bans on the Muslim headscarf in the country.²⁶⁶ In Canada, in the relationship between religion and liberal law, the rule is that the state cannot establish religion so that the separation between church and state is supposedly firm. However, there seems to be less concern for failing to understand that rejection of deeply-held beliefs of others is a form of discrimination and that this is related to imbalances in social equality.²⁶⁷

For Razack, the responses to *Shari'a* law by threatened Canadian feminists (both Muslim and non-Muslim) reinstalled the modernity/pre-modernity divide and the secular

²⁶⁴ “Faith-based Family Arbitration”, online: (2005) Uniform Law Conference of Canada Civil Section < <http://www.ulcc.ca/en/2005-st-johns-nf/254-civil-section-documents/750-faith-based-family-arbitration> >

²⁶⁵ Razack, “Between Rock” *supra* note 164 at 83.

²⁶⁶ Taylor, “The Polysemy” *supra* note 41.

²⁶⁷ Moon, “Introduction” *supra* note 204.

over the religions distinctions without hesitation.²⁶⁸ Canadian feminists utilized the power of the state to stigmatize and police Muslims and to reproduce the citizen as unconnected to community. The power of fundamental Islam does oppress women but, in Canada, it would have been possible to get safeguards within the *Arbtration Act* for the protection of Muslim women. However, the *Boyd Report* concluded that tolerance and accommodation of minority groups who seek to engage in alternative dispute resolution must be balanced against a firm commitment to individual autonomy; it also found that secular state laws do not treat everyone equally because people's individual backgrounds lead to differences in the impact of these laws.²⁶⁹ Formal equality and liberal essentialism therefore decontextualize *subjective* interpretation or *particular* interpretations of religious ideology. Again, the next chapter will confirm Casanova's observation that the liberal constitution itself decontextualizes, interpenetrates and mutually constitutes law in decision-making processes concerning freedom of religion.²⁷⁰

For Casanova, there seems to be a misunderstanding in the connection between the political objectives of a liberal modernity and the historical concept of secularism: is secularism a principle of modern statecraft or is secularism an ideology?²⁷¹ To maintain liberal democracy and order, the legitimacy of a norm on religious freedom cannot rely on the internal truths, revelations or beliefs of any one system of faith such as it does of Christianity. However, the ethical and moral standards of liberal law purport to operate without reference to any specific religion. Religion is now perceived solely as a certain

²⁶⁸ Razack, "Between Rock" *supra* note 164 at 92.

²⁶⁹ Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion", online: (2010) Government of Ontario
<<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>>.

²⁷⁰ See case law in Chapter III.

²⁷¹ Casanova, *supra* note 203 at 1069.

ideology connected to faith. The misconception within liberal law of the relationship between politics and secularity has incapacitated state law to recognize religious norms as significant social norms of multiple modernities.

In Canada, that the modern liberal state tends to interpret secularity as non-religious is represented in the 1980 case: *Big M Drug Mart* challenged the constitutionality of the *Lord's Day Act* in terms of the guarantee of freedom of religion in s. 2 (a) of the *Charter*. The Act made it an offence punishable on summary conviction to carry out business on Sunday, a day specifically enacted for the Christian Sabbath. In *R. v. Big M. Drug Mart*,²⁷² the SCC set a precedent strangely interweaving individual rights and religious guarantees; individuals are free to engage in religious practice and the state cannot impose engagement in religious conscience and practice. However, Dickson, C.J. also held that freedom of religion and conscience prohibits state coercion in matters of faith.²⁷³ He also stated that “the *Charter* has become the right of every Canadian to work out for themselves what his or her religious obligation, if any, should be and it is not for the state to dictate otherwise.”²⁷⁴ The purpose of the legislation has to be secular. The impugned legislation, the *Lord's Day Act*, infringed on the *Charter* rights of not only a plurality of deeply-held convictions and norms of multiple other individuals, but also on the freedom to refuse to participate in a religious practice—Sunday as a Lord's Day. The legislation was seen as coercive to others who were not religious and it was struck down. A corporate entity was able to claim rights under the *Charter* to overturn the non-secular spirit of the law. In that religion is in effect being bundled up with many different beliefs and convictions, perhaps even with simple and fleeting figments of individual

²⁷² *R v Big M Drug Mart*, [1985] 1 SCR 295 [*Big M*].

²⁷³ *Ibid.*

²⁷⁴ *Ibid. Big M* at para 351.

imagination, freedom of religion loses its “God-given” importance.²⁷⁵

3. A critique of the secularized legislative purpose as applied to individual moral values

The ultimate purpose of secularism, along with freedom of conscience and religion is the “recognition of the equivalent moral value of each individual.”²⁷⁶

However, an ethic that demands human solidarity has to acknowledge that human life is not only essentially moral but inherently purposeful. It underpins the development of all human cultures. Purposefulness and morality are corollaries; authentic religions draw our attention to this fact. And many would argue that every civilization has been created by religion. The nation-state—secular, democratic, theocratic or even atheist—has some semblance of a religious heritage. There has to be respect for the common fundamental truths of human existence. However, religious obligations conflict with state interest realized through legislative purpose. The purpose is that government may not coerce individuals to affirm a specific religious belief; neither can the government endorse a specific religious belief.

If religion is now expressly part of freedom of conformity to religious *dogma*, and it seems to be bound up with a multiplicity of other non-religious consciences and convictions, Macklem questions the relevancy of the guarantee of freedom of religion and whether it has been rendered empty by the recognition of other rights and freedoms; the content of freedom of religion is not independent.²⁷⁷ Macklem therefore asks:

If the guarantee retains independent content what is the proper justification for the freedom which that independent content confers? Does that justification, if available, warrant the extension of the distinctive protection of freedom of religion to institutions and practices that are not animated by ideas of the divine,

²⁷⁵ A secular objective was not initially contemplated by the legislators in the *Lord's Day Act*.

²⁷⁶ Bouchard & Taylor “Building the Future” *supra* note 39.

²⁷⁷ Macklem, *supra* note 5 at 5.

given that the moral outlook that must justify that freedom is necessarily secular, that is to say, is not drawn from the tenets of any particular religion or religions, and thus is detached from religious doctrine? Or are there secular reasons to restrict the guarantee of freedom of religion to activities that are shaped and informed by contact with the divine?²⁷⁸

A theological critique of the dominance of secularity is missing.

4. Secularized courts: ambiguities and confusion in safeguarding freedom of religion guarantees

Can the observance of traditional, organized and firmly fixed religions that millions adhere to be reduced to a liberal choice? In 2002, the Canadian society was still confused on issues of non-religion and secular in the public sphere as shown in the case of *Chamberlain v. Surrey School District No. 36*.²⁷⁹ This case originated when the disapproval of the school board trustees, of three school books showing same-sex parents, became the subject of a petition by various groups that included gay advocacy. The B.C. trial court held that the trustees had breached the statutory requirement of strict adherence to secular and non-sectarian principles when applied to educational concerns. The B.C. Court of Appeal found the trial judge's "secular principles" placed the beliefs of religious citizens at a disadvantage in terms of the beliefs of non-religious citizens.²⁸⁰ The SCC unanimously overturned the decision of the Court of Appeal in favour of the lower court judgment. Although the SCC dismissed the board's concerns that children would be misled by classroom information about same-sex parents, the court left untouched the finding of the lower court that secularity means non-religious. The SCC also made no attempt to define "secularism."²⁸¹ However, the SCC determined that using the term

²⁷⁸ Macklem, *ibid.*

²⁷⁹ *Chamberlain v Surrey School Board* (2000), 80 B.C.L.R. (3rd.) 181 (C.A.), reversing (1998) 60 B.C.L.R. (3rd.) 311 [*Chamberlain*].

²⁸⁰ *Ibid. Chamberlain.*

²⁸¹ *Ibid.*

“secular” to mean “non-religious” is erroneous in law, and that religious believers have the right to function in society according to their beliefs and that religious institutions have equal rights as do non-religious institutions.

...the Court [of Appeal] interpreted the concept of secularism not to preclude at all that a public institute, like a school board, passes resolutions “motivated in whole or in part by religious considerations,” while it requires that “no single conception of morality can be allowed to deny or exclude opposed points of view.” The obligation of secularism placed on the school board is “aimed at fostering tolerance and diversity of views, not at shutting religion out of the arena.” ...It does not limit in any way...the freedom of Board members to adhere to a religious doctrine that condemns homosexuality but it does prohibit the translation of such doctrine into policy decisions by the Board, to the extent that they reflect a denial of the validity of other points of view.²⁸²

However, the confusion in the interpretation of “secularism” persists. In that the modern secular state and society tend to interpret secular as non-religious as opposed to being neutral, the attempts to neutralize religion in the public sphere, as in the *Chamberlain* case in Canada, may have failed. In this case, limits on religious freedoms by secular principles indicate legal and political tensions due to resistance to differing norms.²⁸³ There is no expansive “baseline against which religious restriction, compulsion and inequality are measured.”²⁸⁴ Ambiguities and uncertainties are ever present in liberal courts dealing with freedom of religion guarantees.²⁸⁵

Since the *Chamberlain* case, the secular principles of Canada legally relegate both religious and non-religious moral consciences to the realm of the private in keeping with the claim of modern and secular liberal law generally. However, any consideration of

²⁸² *Ibid.* per McLachlin, CJ at para 86.

²⁸³ Robert A Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker” (1957) 6 J Pub L 279; Ostberg, C. L.. “Models of Judicial Behaviour in the Canadian Supreme Court.” In *Attitudinal Decision Making in the Supreme Court of Canada*. (Vancouver, BC: UBC Press, 2007).

²⁸⁴ Moon, “Government Support”, *supra* note 229 at 220.

²⁸⁵ Moon, *ibid* at 218.

secularism has to take into account the intention of the historical ideology of secularism: “to exclude religion from all public aspects of society.”²⁸⁶

Increasingly, migrants, particularly staunch believers who refer to religion as a way of life, may feel considerable social isolation and exclusion by restrictions on their civil liberties. In Canada, courts are constrained by the non-neutrality of the process of public secularization itself.²⁸⁷ In the relationship between religion and citizenship, where religion, law and politics intersect, there is uncertainty, fragmentation, and disorder. The misunderstanding of the intended process of secularization in relations between religion and politics in liberal democracies is even greater given the pluralization of society. In Berger’s view, the dilutions of transcendence have resulted from misguided attempts at liberal modernization; this is particularly so in the transformations of religions in modern societies.²⁸⁸ The process of secularization was to realign religious affiliations and identities.²⁸⁹ Not a redefinition of identity. The tendency is to understand secular as non-religious when the correct understanding of it ought to mean no preference is given to any one religion.²⁹⁰ However, the tension as to the concept of religious nationality in Canada and numerous views on the code of human conduct has historical roots.

In that there is confusion between the historic and monistic presuppositions of classical liberalism of anti-religious secularism and the more recent and progressive classification of the secular as occurred in the *Chamberlain*, and *Big M*. decisions, the phantom individual remains paramount. The individual has moral, civil and constitutional rights. All religions are without political authority and are therefore

²⁸⁶ Benson, *supra* note 207 at 85.

²⁸⁷ Moon, “Government Support” *supra* note 229.

²⁸⁸ Woodhead et al. *supra* note 18, “Peter Berger” at 3.

²⁸⁹ Heyking *supra* note 117 at 4.

²⁹⁰ Taylor, “The Polysemy” *supra* note 41.

‘fundamentalist.’ Courts in Canada may have inadequately handled the relationship between not only the *Charter* and religion but also aggravated the relationship between religion and politics.²⁹¹

The scientific or rational sense in which secularism is closely identified with progressive modernity accommodates religion, but there is also another non-Western meaning of secularism where it seeks dialogue among religious traditions and between the religious and the secular.²⁹² According to Taylor, the “formulae for living together have evolved in many different religious traditions, and are not the monopoly of those whose outlook has been formed by the modern, [West], in which the secular lays claims to exclusive reality”²⁹³ Taylor therefore advocates that the distance between the religious and the secular has to be not only neutral but in a plural society, it has to be a “principled distance.”²⁹⁴ However, although Canada has a written constitution that takes precedence over other laws, the goals of democratic governance: social justice, multiculturalism, prohibition of the state from favouring any one religious community and allowing maximum religious freedom for all, are not safeguarded because there is no strict or formal separation between church and state in the *Canadian Constitution Act, 1982*. The introduction in 1982 of various constitutional guarantees concerning freedom of religion also complicated this relationship and generated discord in Canada's constitutional order.

D. Conclusion

In Canada, despite the institution of the *Charter* which specifically guarantees

²⁹¹ Heyking, *supra* note 117 at 1.

²⁹² Taylor, “The Polysemy” *supra* note 41.

²⁹³ Taylor, “The Polysemy” *ibid* at 1150.

²⁹⁴ *Ibid*. Also see Rajeev Bhargava, “What is Secularism for?” in Rajeev Bhargava ed, *Secularism and its Critics* (Delhi: Oxford Univ Press, 1998) at 493-4 and 520.

individual rights for all Canadians to the full extent of its diverse populations since 1982, it will be evident in case law outlined in Chapter III of this thesis, that Canadian courts, in their judicial interpretations of different ways of life of myriad ‘culture-based’ normative communities, appear to be ineffective in handling plural moralities that are integrally significant in the lives of multiple modernities. The presence of multiple modernities in society reflects legal pluralism, diverse knowledge, and most importantly, multiple dimensions of individual liberty that are not limited to the single Western form of law based on the Eurocentric concepts of liberalism and secularism.

In the question of neutrality, a judge is admittedly constrained by the enforcement of constitutional norms. Again, it is understood that historically misrepresented tenets of particular faiths, tenets that are naturally abhorrent to humanity, can not only infringe on the rights of other more authentic tenets but can complicate the task of the judge. Albeit, Canada is now confronted with a growing multicultural social base and a majority of which has always considered religion as central to their ways of life. This citizen base is rapidly increasing in a manner similar to many European countries. For instance, Germany, France and England now have the religion of Islam as the fastest growing religion; a large percent of the population of Germany now adheres to and practices Islam. Germany has more Muslims than Lebanon and there is an indication that the increasing distribution of Islam could have a profound influence on public policy in attempts by Western governments to reach out to Muslims.²⁹⁵ The increasing distribution of Islam in the West is having a profound influence on public policy in attempts by Western governments to reach out to Muslims. In Canada, the fast-growing and altering

²⁹⁵ Peter Beaumont, “One in Four People is Muslim, says Study”, online: (8 October 2009) The Guardian < <http://www.theguardian.com/world/2009/oct/08/muslim-population-islam-survey>>.

sociolegal perspectives that contribute to a dynamic diversity of ethnoreligious norms cannot be ignored by the pre-existing legal edifice in Canada.

CHAPTER III - The Juncture of Freedom of Religion and Secularization: A Review of Canadian Jurisprudence and Policy Before and After the *Charter*

As stated in previous chapters, the relationship between liberal law and society—the ideal of liberal modernism and secularism—is now specifically explained as a relationship that contains the democratically proclaimed values of freedom, equality before the law, participation, and shared rationality. In particular, secularity—the separation of religion and politics—legitimizes this modern liberal ideal. Legislation and particularly its application in courts of judicial proposals and principles are considered as crucial in achieving and maintaining this Western liberal ideal for a free, secular and democratic society. Canada’s legislation is structured on a majority rule system wherein individual conscience and judgment lie at the heart of this democratic political and judicial tradition. The 1982 Canadian *Charter of Rights and Freedoms* was produced by this positive law and sets out its political and legislative principles that also have to defer to universal principles of equality before the law.²⁹⁶

In effect, the Canadian *Charter* was instituted for the very purpose of further enhancing recognition and accommodation of diverse cultures, particularly of religions, in a multicultural society. Freedom to practice religious belief is fundamental to secular liberal politics and gives rise to the very purpose of the universalized legislation on freedom of religion and conscience. But constitutional rights and freedoms are subject to legal limitations that can be justified if the law is shown to have compelling governmental interest. Although the law is required to accommodate minority religions,

²⁹⁶ David M Brown, “Where Can I Pray? Sacred Space in a Secular Land” (2005) 17 NJCL (2005) at 121. Positive law is enacted in a jural society wherein manmade privileges are bestowed upon individuals by the state.

this dominant legal construction in the form of accommodation is not able to address historical disadvantage, inequality and completeness of other forms of institutions.

Section 2(a) of the *Charter* states that “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.” The purpose of s. 2 (a) of the *Charter* therefore implies that central to a good life is the right to practice one’s faith in the absence of coercion. But are freedom of religion and other rights of minorities constitutionally protected? Canada has—and is now—along with the rest of the West, been confronted with unprecedented levels of conflicting religious movements that are expressing mixed perspectives on life. These different perspectives are being consistently renegotiated socially and culturally. If the purpose of liberal law is justice for all, and if freedom of religion is firmly guaranteed within the liberal constitution on its own fundamentals, how can a secular state encourage rather than interfere with the increasing religious diversity, pluralism and a changing notion of the common good? How are judges, by way of judicial assessment, able to keep abreast of the rapidly transforming social changes and conditions that are different and at the same time be able to vary the intent and the effect of enacted legislation? In the modern liberal ideal of political legitimacy, including secularity, can a progressive politics of religious philosophy be accommodated without undue stress on the practice of religion?²⁹⁷ Is the practice of religion in Canada in effect free of both direct and indirect coercion in the right to manifest religious beliefs and practices? Are certain groups who order their lives by traditional values, particularly those values stemming from minority religion, forced to act in a way that is contrary to their beliefs and conscience? Does s. 2(a) withstand its

²⁹⁷ For a discussion on the concepts of the secular and the process of secularization see Chapter II of this thesis.

true test in a consistently changing society? Are religious freedoms progressively ineffective?

A. Universalized liberal law, religion and secular politics

The evolution of the key themes associated with the Western liberal philosophy: rationalization, secularism, individualism, human rights, and democratic governance have advanced gradually and continue in measured steps. Coupled with the overarching theme of globalization and the current rapid and increasing interaction of the traditional and the modern within the West, a reconstructed understanding of these key themes of liberal secular modernity confirms a multiplicity of the modern exhibiting multiple normativities which include different views also of the sciences, human rights, and *democratic* governance. Modern normativities, other than liberal normativities—norms of individuals, citizens and religious communities—too have a sense of a civic order and obedience based on different moralities.

In Canada, the fact that legal citizenship is based on the dominant and philosophically abstract reasons that are grounded within the political concepts of liberal modernity and secularism wherein the individual is defined as the central bearer of rights generally was confirmed by Dickson, C.J. in a leading SCC freedom of religion case, *Big M*, that will be briefly discussed further in this chapter:²⁹⁸

... an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.

Judges in Canada rely on this well-entrenched paramountcy of the liberal secular individual for achieving equal *political* citizenship. Liberal democracy interprets

²⁹⁸ *Big M*, *supra* note 274 at para 122.

different religious norms by reliance on the liberal political theory or what Dworkin calls “political morality.”²⁹⁹ By liberal law, religious believers are not fully members of the political community and therefore for courts, any form of state support for a particular religious practice constitutes coercion as the modern liberal state cannot coerce the conscience.³⁰⁰ The common good of religious minorities or organizations within particular social fields is thus limited to the realm of the private.³⁰¹

Again, because Canada has embraced Anglo-American liberalism, historical religious values rooted within the Christian faith have translated into positive law and subsequently have become binding on Christians and non-Christians.³⁰² It was seen in Chapter II above, that the presence of historically dominant forms of Christianity in positive law blur the ideal of secularism. Conceptually, Canadian secular law may have legitimate public purposes but in terms of practical authoritative outcomes of the purpose of s. 2(a)—political freedom to follow one’s conscience—state law seems to continue to support some religious values and practices and interfere with others.³⁰³

Freedom of religion jurisprudence that will be discussed in this chapter will reveal that due to the contradiction between the secular legal order and the liberal democratic ideal, the evolution of the themes concerning human rights are at an impasse. For example, in *Amselem*, another freedom of religion case, Iacobucci J. confirmed that:

... respect for religious minorities is not a stand-alone absolute right; like other rights, freedom of religion exists in a matrix of other correspondingly important rights that attach to individuals. Respect for minority rights must also coexist alongside societal values that are central to the make-up and functioning of a free

²⁹⁹ Ronald Dworkin, “Law as Interpretation” (1982), 60 *Tex L Rev* 527 at 528.

³⁰⁰ Moon, “Government Support” *supra* note 229 at 221.

³⁰¹ See Moore, *supra* note 22 for her definition of social fields.

³⁰² *CCL supra* note 2 at 846.

³⁰³ Moon, “Introduction” *supra* note 204 at 1.

and democratic society.³⁰⁴

Because constitutional rights and freedoms are not absolute, they can be justifiably limited.

B. Section 1 of the *Charter* and constitutional limits on freedom of religion

Generally *Charter* rights are also subject to the s. 1 limitation clause that states that:

The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Constitutional rights and freedoms are not absolute. Under s.1, the legislature is free to enact a law that justifies infringement on any of the guaranteed *Charter* rights provided the law is a “reasonable limit” on the right. Section 1 limitation is calculated to increase the net welfare; not all people will benefit as the costs are outweighed by the benefits to others.³⁰⁵ In the 1986 SCC case, *R. v. Oakes*, Dickson, C. J. pointed out, for a unanimous

³⁰⁴ *Syndicat Northcrest v. Amselem*, [2004] 2. S.C.R. 551 at para 1 [*Amselem*].

³⁰⁵ *CCL*, *supra* note 2 at 774. Judicial review on whether or not a violation of a right can be justified under s. 1 of the *Charter* proceeds in two stages (interpretation of the right and the justification of limits to rights) as developed by the SCC in the *Oakes* test, [1986] 1 S.C.R. 103 (S.C.C.). In the case of freedom of religion, in stage one, the court must decide whether the challenged law has the effect of limiting this guaranteed right. During this stage, the adjudicating court interprets and applies the provisions that define the guarantee of freedom of religion as outlined in s.2(a) of the *Charter*. The burden of proving the breach of freedom of religion rests on the party challenging the law and asserting such a breach. If the challenged law does breach the right, stage two will have been reached. The court must then define the protected right and decide whether the limit is a reasonable limit, as set out in s.1 and that can be “demonstrably justified in a free and democratic society.” The purpose of the law must be pressing and substantial. The burden of justification of reasonable limit to the freedom of religion then shifts to the government seeking to support the challenged law. The second stage is a proportionality analysis that involves inquiry into justification and application of s. 1 of the *Charter*. Canadian courts have a unique pattern of reasoning that takes into account both the guaranteed rights and the limitation clause of s. 1. If the law or policy discriminates against a category or group of people and the requirement that the government show that the violation is justified, in that the legislation achieves its goal without resulting in arbitrary or unfair treatment, the law will continue to stand. The legislation must have social significance such that it must violate the right as little as possible, and there must be proportionality between the effect of the legislation and the

court, that only the values of a free and democratic society would suffice to limit the guaranteed rights. The court suggested values such as:³⁰⁶

Respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

In assessing law and legislative purpose, courts scrutinize the aims and objectives of the legislature to ensure synergy with the guarantees enshrined in the *Charter*. However, jurisprudence to date indicates that the objective of the law most often overrides the limit to the rules as set by the *Oakes* justification test.³⁰⁷ Berger confirms that the assessment of the impact of legal limits obviously has to be in terms of *Charter* values: liberty, human dignity, equality, autonomy, and enhancement of democracy.³⁰⁸ In a free and democratic society, therefore, some rights can be justifiably limited. However, these terms are an intrusion and sometimes a burden on religious freedoms of both individuals and whole groups. If limits on freedom of religion can be justified as solid commitments of the rule of liberal law to public interest, what therefore is the place of the lived religion? What is the legal status of values and symbols that are publicly limited under s.1 analyses? Importantly, does the tradition of judicial review bypass individuals' religious liberties along with their choice of the lived internal social field as guaranteed by s. 2(a)?³⁰⁹ Is it possible that s.1 of the *Charter* can overtly contravene guaranteed

objective it is trying to achieve (a cost/benefit analysis). But in the process and sequence of the test, if the majority of the court dissents, the test ends and the legislation is declared invalid. If not, the legislation continues to stand or is saved despite the fact that it violates a *Charter* right.

³⁰⁶ *R v Oakes* [1986] 1 SCR 103 at para 136.

³⁰⁷ *CCL supra* note 2 at 844.

³⁰⁸ Benjamin Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 SCLR 25 at 36 [hereafter Berger, "Constitutional Reasoning and Cultural Difference"].

³⁰⁹ Moore, *supra* note 22 at 719 & 874.

rights under its s.2? And is this therefore a violation of s. 2(a) of the *Charter*? But for practical purposes, certain degrees of the burden on religious practice are not treated as a violation of s. 2(a) as justified under s.1 particularly under a cost benefit analysis. Do religions have a different role that the law recognizes in an era of rapidly changing ethnoreligious diversity? If the state legislative objective is justified under s. 1 to override an infringement on a s. 2(a) right guaranteed in the *Charter*, are then religious persons forced to choose between the tenets of their faith and full participation in the Canadian society? Does the *Charter* protect religious rights of minorities from majority rule? Currently, is the Canadian state sufficiently prohibited from favouring any one religious community and allowing maximum religious freedom for all?

C. Competing moralities: politically constituted conscience and religious beliefs

Although all belief systems of minorities, including those based on so-called divine and ancient scriptures, are characterized as non-religious, jurisprudence will show that the modern state has projected itself into the realm of the private by imposing the abstract political identity in the practice of religion and its social interaction.³¹⁰ However, highly educated judges constricted by commitment to constitutional values, are not always able to take into account the meaning of practices that subscribe to a lived religion of certain communities; these communities have their own internal social worldview and do not fit the liberal-legislated and secular understanding of life. Canadian courts therefore have to engage in the politically necessary analyses in each case of the relationship between the theological and the Euro-philosophical. In the contemporary juristic reality—conceptions of democracy and the rule of liberal constitutional law—

³¹⁰ Macdonald, *supra* note 55 at 56.

concerning the relationship between law and religion, majoritarian ‘legalized’ individuals assert their claims as against the claims of believers. For Shah, the problem is at the very heart of the conceptualization of the liberal constitutional law.³¹¹ Grave misunderstandings and injustices have resulted from the imposition of an abstract and historic concept of identity in the separation of church and state. The constitutional assumption on and the application of the concept of secularism may be miscalculated in Canada.³¹² Again, this nationalist moral identity, observed as a secular identity, is steeped in Christianity despite the fact that numerous Christians are not practicing Christians. The Christian Church also has the right to speak on important public matters.³¹³

There seems to be a conflict between equal rights of citizens and the right of the individual to be normatively different from legislated norms. However, no legislation can be universally valid for a dynamic multiplicity of social needs stemming from different and changing principles.³¹⁴

Individual citizens are now coming forward with their own identity characteristics that “nourish human interaction” and the abstract legal identity may become less relevant.³¹⁵ How do courts respond to the challenges of the liberal concept of the secular individual, including equality of rights, and competing moral and political agendas of the multiplicity of modernities?

In the relationship between liberal law and religion in Canada and in constitutional debates about the proper meaning of the right to freedom of conscience and

³¹¹ Shah, “Legal Pluralism in Conflict”, *supra* note 4 at 58.

³¹² Taylor, “The Polysemy” *supra* note 41.

³¹³ Heyking, *supra* note 117.

³¹⁴ SCJ Holmes, “The Path of the Law.” (1896-7), 10 Harv L Rev 469 at 469.

³¹⁵ Macdonald, *supra* note 55 at 63.

religion, what is normal and typical tends to depend on the legislator's or the court's vision despite stated *Charter* values. The principles that recognize which government objectives are important and that warrant overriding a constitutionally protected right has not been clearly identified for sustainable change. There is a growing burden on Canadian judges in assessing the constantly changing and complex social, cultural, and theological realities and their set liberal tools could be losing their relevance.³¹⁶ In Berger's eloquency, the perspective of law on the true nature and constitutional value of religion is always "rendered through the lens of the culture of the constitutional rule of law."³¹⁷ The subjugation of others is justified as is this ideological posture. Reiterating Razack, it would seem that: "[theorizing difference] is not for the sake of inclusion but for the sake of antistatization."³¹⁸

This chapter will survey and attempt to analyze briefly some freedom of religion jurisprudence in Canada pre and post-*Charter*. In that state political power and civic authority are legitimated by constitutional law, the liberty of the individual fuels political morality; a position of neutrality between different beliefs of collectivities is absent in judicial deliberations such as in case law that will be discussed in this chapter. Discussion on pre-*Charter* case law follows.

D. Freedom of religion jurisprudence in pre-*Charter* Canada³¹⁹

In Canada, legal protection for the practice of the Catholic faith goes back to the 1770s when Quebec was the first to be granted this liberal protection by the British

³¹⁶ Robert J Currie, "Whose Reality? Culture and Context before Canadian Courts" in Stephen Tierney ed, *Multiculturalism and the Canadian Constitution* (Vancouver: UBC Press, 2007) at 182.

³¹⁷ Berger, "Constitutional Reasoning and Cultural Difference" *supra* note 308.

³¹⁸ Razack, *supra* note 154 at 186.

³¹⁹ David M Brown, "Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of *Charter* Rights" (1999-2000) 33 U Brit Colum L Rev 551.

legislation even ahead of Catholics in England.³²⁰ It was not until 1852 that equality amongst other Christian denominations in Canada (or in the then old Province of Ontario) was instituted. Today, this legislation is effective in Ontario as the *Religious Freedom Act*,³²¹ this statute guarantees “the free exercise of... religious... worship without discrimination...” At Confederation, no religion was established or given prominence but the Roman Catholic and the Protestant denominations were guaranteed education rights under the *British North America Act, 1867 (BNA)*.³²² This protection for freedom of religion of minority denominational education rights was under s. 93 of the *Constitution Act*. Although there was no specific provision of a bill of rights within the *BNA*, or specific protection for freedom of religion, the *BNA* gave sufficient constitutional standing to the minority Roman Catholic and Protestant schools in Ontario and Quebec. That these two Christian groups have had a continuous guarantee of secure faith-based education is a privilege.³²³

However, there was hostility towards other religions, including towards other Christians. For example, during the 1930s Jehovah’s Witnesses in Quebec were in frequent confrontation with the provincial government, within the then predominately Catholic Quebec, for proselytizing. Evidence of collaboration between the Cardinal of the Roman Catholic Church and the federal government to suppress Jehovah's Witnesses is briefly stated:³²⁴ In the 1940s, the federal government passed an order-in-council declaring the Jehovah's Witnesses to be an illegal organization under the *War Measures*

³²⁰ Brown, *ibid* at 554.

³²¹ *Religious Freedom Act*, R.S.O. 1990, c. R-22. Originally enacted as 14 & 15 Vict., c. 175.

³²² *The Constitution Act, 1867* (U.K.), 30 & 31 Vict. C. 3, reprinted in R.S.C. 1985, App II, No. 5.

³²³ Brown, *supra* note 319.

³²⁴ *Ibid*.

Act.³²⁵ The religious activities of “other faiths” therefore were declared illegal by the Government of Canada. Also, pre-*Charter* jurisprudence shows that the then Province of Québec, under Premier Duplessis used coercion to break up Jehovah’s Witnesses’ religious services including those held in private homes.³²⁶ The SCC intervened and was instrumental in providing powerful protections of religious freedom in Canada.³²⁷ In the SCC case of *Roncarelli v. Duplessis*,³²⁸ Roncarelli an active member of Jehovah’s Witnesses and an owner of a small restaurant in Montreal furnished bail money for other Witnesses who had been wrongfully charged under the *Criminal Code* for various acts of dissemination of religious materials relating to their religion.³²⁹ In 1946, Duplessis ordered the Québec Liquor Commission to revoke Roncarelli’s liquor licence and which triggered litigation in the courts. At the SCC, it was concluded that Duplessis had acted without legal authority because Roncarelli’s religious activities were unconnected with the statute under which his liquor licence had been granted.

Subsequent pre-*Charter* litigation led to a constitutional alleviation of freedom of religion. In *Saumur v. City of Quebec*, Rand, J. stated in 1953³³⁰:

religious freedom...[is] a principle of fundamental character...the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

Freedom of religion was considered an inviolable right of the individual and a primary condition of community norms and life; a condition that “antecedes and does not depend

³²⁵ *War Measures Act*, R.S.C. 1927, c. 206.

³²⁶ *Roncarelli v Duplessis*, [1959] S.C.R. 121 at 131-133

³²⁷ Brown, *supra* note 289.

³²⁸ *Roncarelli v Duplessis supra* note 326.

³²⁹ *Criminal Code of Canada*, RSC 1985, c C-46.

³³⁰ *Saumur v. City of Quebec*, [1953] 2 SCR 299, [1953] 4 D.L.R. 641 (SCC), per Rand J at 668 [*Saumur*].

on positive law.”³³¹ Religious freedom, for Rand, J., was a foundational component of any political organization; in 1953, religious freedom was not a right to be conferred by legislation.

However, in 1960, when the *Canadian Bill of Rights* was enacted, this human rights charter applied only to federal law; it was difficult to obtain consensus across the provinces.³³² Many judges regarded the 1960 *Bill* as an interpretative tool only and the *Bill* therefore had weak constitutional value. In that s. 1 of the *Bill* included protection of freedom of religion, for instance, in a 1963 case, the SCC upheld the validity of the Sunday closing law thus reversing the protection of freedom of religion that was part of the unwritten court tradition since 1953 and that Rand, J. and others upheld as a natural right.³³³ This civil liberty was found to be contrary to liberal secular rationality which “imposed limitations on absolute liberty of the individual.”³³⁴ Freedom of religion was therefore no longer an inherent or natural right of citizens; these civil rights were now the subject of law and limited by liberal law. In particular the law rejected the practice and beliefs of certain religions. Equal religious citizenship was therefore not protected by civil law. Although it was felt that in pre-*Charter* decisions religious freedom enjoyed constitutional status and that all religions had equal standing, this guarantee had to be exercised within the legal limits of the law as was enacted.³³⁵ Specific religious liberty was limited by rational liberty of general application. And although courts were prepared

³³¹ *Saumur, ibid.* per Rand, J at 670.

³³² S. 1 of the *Canadian Bill of Rights*, S.C. 1960, c. 44 states: It is hereby recognized ... in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, color, religion or sex, the following human rights and fundamental freedoms, namely, ... (c) freedom of religion; (d) freedom of speech.

³³³ *Robertson and Rosetami v. The Queen* (1963), 41 DLR (2nd) 485.

³³⁴ Brown, *supra* note 319 at 559.

³³⁵ *Ibid*, Brown.

to shield religious liberty from laws which sought to limit the “professions and dissemination” of religious faith, case law herein will show that there is consistent interference with religious worship.

In the 1960s, the Canadian population was still relatively more homogenous and the laws which worked a less direct effect on religious practices were not viewed as jeopardizing religious freedom. In 1982, upon the repatriation of the Canadian Constitution, the *Canadian Bill of Rights* lost most of its importance; almost all the guarantees of fundamental freedoms have their counterparts in the *Charter*.³³⁶ The SCC now mostly does not follow its *Bill of Rights* decisions on similar points.

Although religious freedoms have evolved (the state is required to vigorously inquire whether there is coercion of religious obedience and belief) simultaneously with the evolution of liberal secular democracy, there may now not be more deference to religion under the *Charter* than there was under the *Constitution Act, 1867*.³³⁷ And, secularization of religion may not be the only way to realize freedom of religion. However, freedom of religion is now an integral part of the Canadian Constitution; it is one set of group rights that are contained in the now *Charter of Rights and Freedoms* itself under its s 2 (a).³³⁸

E. Freedom of religion jurisprudence in Canada in post-*Charter* era

Canada is a diverse society with questionable secularity. Canadian courts are charged with making some of the most complex, sometimes life-changing decisions for

³³⁶ *CCL supra* note 2 at 692.

³³⁷ *CCL ibid* at 837.

³³⁸ *Charter, supra* note 6.

people and for society.³³⁹ For the protection of individual rights and religious vitality that endures, courts are invariably required to adopt systematic strategies in interpreting the constitution. Because claims of religious freedom are complex and difficult to evaluate, particularly in terms of the weight given to differing empirical evidence, freedom of religion cases representing differing normativities tend to be hard cases. The interpretation of the moral and political concepts in freedom of religion jurisprudence tends to be inconsistent and vague.

The *Charter* grants religious freedom as a private and expressly not a public matter. Rights in the Canadian Constitution are therefore framed as highly general principles that leave considerable scope for debate as to their particular application. Does this imply separate and private courts for religious disputes? A survey of recent SCC decisions will determine the particular protections religious persons are afforded publically, in a supposedly secular Canada. It will also help in discovering the extent of law's capacity to recognize the importance of religion for believers both in their private lives and as civic citizens. Although the virtues of the rule of constitutional law are essentially functional, they are also moral-political virtues intending to enhance a range of goods valued in a pluralistic society.³⁴⁰ Brief discussions of six SCC cases, ranging from 1985 to 2009, relating to the scope of freedom of religion and equal religious citizenship follow in: (a) *Big M*.³⁴¹; (b) *Edwards Books*³⁴²; (c) *Amselem*³⁴³; (d)

³³⁹ Currie, *supra* note 316 at 182.

³⁴⁰ Andrei Marmor, *Law in the age of Pluralism* (New York: Oxford University Press, 2007), at viii.

³⁴¹ *Big M*, *supra* note 272.

³⁴² *Edwards Books and Art Ltd. v. The Queen* [1986] 2 SCR 713, 35 DLR (4th) 1 [*Edwards Books*].

³⁴³ *Amselem* *supra* note 304.

*Multani*³⁴⁴ ; (e) *Hutterian Brethren*³⁴⁵; and (f) *A.C.*³⁴⁶

1. *R v Big M Drug Mart* [1985]1 SCR 295 [*Big M*].

Big M is a leading case on the *Charter* guarantee of freedom of religion. In this case, the SCC struck down the *Lord's Day Act (LDA)*, a federal statute that bound all Christian and non-Christian Canadians to sectarian ideals and values rooted in Christian morality.³⁴⁷ For many centuries in England, Sunday closing law promoted the Christian Sunday Sabbath as a day to abstain from work for religious participation. Sixteenth century English law obligated attendance in Church on Sundays and no business or labour was to be conducted.³⁴⁸ In later centuries, and in particular, in the 18th and 19th centuries, settlers in North America were required by law to attend church on Sundays and were discouraged from participating in non-religious activities such as entertainment, travelling and sports.³⁴⁹ Contraventions to prohibitions meant severe penalties. The historical translation of Christian morality into positive law still persists.

In Canada, until 1985, the *LDA* made it an offence punishable on summary conviction for anyone engaging in or carrying on business on Sunday. The purpose of the *LDA* was to secure public observance of the Christian Sabbath but it also seemed to provide a uniform day of rest from labour for people of all denominations.³⁵⁰ Otherwise lawful, moral and normal activities of non-Christians carried out on Sundays were therefore illegal under the purpose of this *Act*. This denial of right to work on Sunday on

³⁴⁴ *Multani supra* note 237.

³⁴⁵ *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC No. 37 [*Hutterian Brethren*].

³⁴⁶ *A.C. v Manitoba (Director of Child and Family Services)*, [2009] 2 SCR 181.

³⁴⁷ *Lord's Day Act*, R.S.C. 1970, c. L-13, s. 4, was enacted in 1906. It prohibited work and other commercial activities on Sunday (the period of time that begins at midnight on Saturday night and ends at midnight on the following night).

³⁴⁸ *CCL, supra* note 2 at 842.

³⁴⁹ *CCL, ibid* at 842.

³⁵⁰ *CCL, ibid* at 844.

grounds of public religious observance of the Christian Sabbath infringed upon the religious freedom of Canadians in general. And cases challenging Sunday closing laws were already in place when the *Charter* came into force in 1982.

a) Interpretation of public purpose of law in *Big M*

In this 1985 case, *Big M*, the SCC found that the *LDA* had a religious purpose in forcing Sunday closing and was therefore unconstitutional. The Supreme Court addressed, head-on, the fundamental issues raised by individual rights and freedoms enshrined in the *Charter*, as well as issues concerning legislative powers. The main challenge in issue before the SCC, for the first time, was the interpretation of the fundamental freedoms protected by the *Charter*, the guarantee of "freedom of conscience and religion" entrenched in s. 2(a). Section 2(a) in effect protects both religious belief and religious practice or observance. The SCC laid the foundation, finally, of the judicial interpretation of religious freedom as guaranteed by the *Charter*.

Although the Alberta Court of Appeal in this case dismissed the appeal of its Attorney General, the Court was divided on the interpretation of s. 2(a). The strongly expressed positions of the dissenting justices at the Court of Appeal are reflective of the tensions and the difficulties of balancing liberal modernism and religious freedom in the current sociolegal context in Canada. In dismissing the appeal from the Court of Appeal, Dickson, C.J., in narrating portions of Belzil, J. A.'s judgment, illustrates the conflict between minority and majority rights. For instance, Belzil, J. A. states that the day of the week "regarded as holy by the great majority of Canadians is not inconsistent with the basic principles of democracy. That is political reality."³⁵¹ On further assessing the reflections of the Court of Appeal, Dickson, C. J. states:

³⁵¹ *Big M supra* note 272 per Dickson, J at para 30.

Mr. Justice Belzil said it was realistic to recognize that the Canadian nation is part of "Western" or "European" civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society. The judge quoted a passage from *The Oxford Companion to Law* (1980) expatiating on the extent of the influence of Christianity on our legal and social systems and then appears the *cri du coeur* central to the judgment at pp. 663-64:³⁵²

I do not believe that the political sponsors of the *Charter* intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loath to assume that role. With the *Lord's Day Act* eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the *Gregorian Calendar*? Such interpretation would make of the *Charter* an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.

“Positive law had circumscribed freedom of religion so as to prevent the *Lord's Day Act* from breaching the guarantee in the *Canadian Bill of Rights*,”³⁵³

In this majority decision, Dickson, C.J. also stated that “the protection of one religion and the concomitant non-protection of others, imports a disparate impact destructive of the religious freedom of society.”³⁵⁴ And in defining freedom of religion, he offered the following:³⁵⁵

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

For Dickson C.J., it was important that due to the “spread of new beliefs” and the “changing religious allegiance”³⁵⁶ interpretation of the meaning and purpose of the specific guarantee of freedom of religion does not “overshoot the actual purpose of the

³⁵² *Ibid.*

³⁵³ *Ibid.* per Dickson, J at para 127.

³⁵⁴ *Ibid.* per Dickson, J at para 296.

³⁵⁵ *Big M* *ibid.*, at para 336.

³⁵⁶ *Big M* *ibid.*, at para 118.

freedom in question and to recall that the *Charter* was not enacted in a vacuum and must therefore...be placed in its proper linguistic, philosophical and historical contexts.”³⁵⁷ In the post-*Charter* era, not only did this case lay down the foundations of religious freedom but it also provides courts with an explicit approach in the interpretation of religious rights and freedoms guaranteed by the *Charter*.³⁵⁸

b) Justification of the impact of law on religious rights in *Big M*

One of the constitutional questions before the SCC was whether the *LDA* infringed the right to freedom of conscience and religion guaranteed in s. 2(a) in the *Charter* and was it also justified under s. 1 of the *Charter*. The Supreme Court held that the *LDA* which prohibited the operation of a business and other commercial transactions on Sunday compelled religious practice contrary to s. 2(a) and could not be justified under s. 1. Section 2(a) of the *Charter* would require the law to *accommodate* minority religions by according exemption for their practices only in cases where there is no compelling governmental interest to the contrary and as justified by s. 1 of the *Charter*.

Restrictions on acts that are religious practices must be demonstrably justified by the government pursuant to s.1 of the *Charter* or must be shown to be incapable of accommodation without undue hardship in the statutory human rights context. The commitment in Canadian human rights law to equal religious citizenship in a pluralistic society includes the right to engage in religious practices without interference. For instance, if there is no evidence that accommodating the wish of the religious observer to take time off for religious Sabbath will not cause undue hardship on the employer, the believer has the right to the time off. This reasoning constitutes the Canadian conception

³⁵⁷ *Big M* *ibid*, at para 117.

³⁵⁸ *CCL* *supra* note 2 at 842.

of equal religious citizenship. Without the ability to demand that neutral rules and policies be adjusted to meet their religious needs, persons of faith cannot participate equally in social and economic life. The believer too recognizes that religious equality rights are not absolute; they will have to give way in the face of competing rights and interests particularly where the employer's ability to run a business without incurring an undue expense in accommodating the religious needs of its employees is compromised.

In this case, the SCC held that the *LDA* prohibited commercial activity for some on a Sunday and compromised the guarantee of freedom of religion in s. 2(a) of the *Charter* by historical purposes which compelled adherence to the Christian Sabbath. The purpose was found to be invalid and could not be justified under s. 1. The legislation was therefore struck down.³⁵⁹ Dickson C.J. stated:

On the authorities and for the reasons outlined, the true purpose of the *Lord's Day Act* is to compel the observance of the Christian Sabbath and I find the *Act*, and especially s. 4 thereof, infringes upon the freedom of conscience and religion guaranteed in s. 2(a) of the *Charter*.³⁶⁰

His reasons included the fact that in binding all Canadians to a sectarian Christian ideal, the legislation did not have a secular purpose. Rather, that purpose was an infringement of the freedom of religion of non-Christians because, by virtue of the guarantee of freedom of religion, "government may not coerce individuals to affirm a specific religious practice for a sectarian purpose."³⁶¹ The purpose was not compatible with s. 2(a); it was religious, not secular.

The object of legislation is critical if liberal rights that are guaranteed are to be protected. The SCC emphasized that religious freedom could be violated by either the

³⁵⁹ Another Sunday closing case, *Edwards Books*, see *supra* note 342, will be discussed next wherein the purpose of the law was found to be secular and valid.

³⁶⁰ *Big M*, *supra* note 272 per Dickson, J at para 136.

³⁶¹ *Big M* *ibid*, at para 123.

purposes or the effects of laws or policies. However, the purpose and effect of legislation are indivisible.³⁶² In *Big M*, Dickson C.J. too opined that both purpose and effect are relevant in determining constitutionality where either the purpose or the effect of the law can invalidate legislation. This concept of adverse effects discrimination is evident in Dickson C.J.'s comment in *Big M* that "...the equality necessary to support religious freedom does not require identical treatment of all religions...true equality may require differentiation in treatment."³⁶³

In its expansive conception of religious freedom that included protection for religious practices from direct or indirect coercive interference by the state, the court closely allied with the *Charter's* commitments to religious equality in s. 15 and to the preservation and enhancement of Canada's multicultural heritage in s. 27.³⁶⁴

c) Implication on constitutional protection of religion in *Big M*.

Big M is a classic case of the SCC's s.2(a) jurisprudence that describes a free society as one in which fundamental freedoms are 'equally' enjoyed. The shift in jurisprudence since *Big M*, since 1980, is that religion has constitutional relevance in terms of an expression of human autonomy and choice. Liberal law recognizes religion as personal choice. In outlining the harm of Sunday closing legislation, Dickson, C.J. stated that the *LDA* creates "a climate hostile to and gives the appearance of discrimination against non-Christian Canadians."³⁶⁵ He further stated that Canadian constitutionalism is committed to the ideal of "a truly free society...one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and

³⁶² *CCL supra* note 2 at 844.

³⁶³ *Big M. Supra* note 272, at para.124.

³⁶⁴ *Charter*, supra note 6 at ss 15 & 27.

³⁶⁵ *Big M supra* note 272 per Dickson, J at para 97.

codes of conduct.”³⁶⁶ An individual may be capable of reflecting upon and revising incrementally particular aspects of her/his worldview, but it may be difficult or impossible for her/him simply to discard and replace her/his most basic values and beliefs or to walk away from her/his religious community. Religion can claim, within law, an autonomous expression of important sets of preferred tastes and chosen pursuits. A necessary outgrowth of the good of freedom and autonomy is that to protect the ideal of religion is to protect the right of an individual to make choices about her/his spiritual life.

In this case, Dickson, C. J. defined freedom of religion as “freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.”³⁶⁷ The definition of freedom of religion offered by Dickson, C. J. does not fully explain the rationale of this freedom. He made clear that s. 2(a) protects religious practices as well as religious beliefs within the constitutional right to freedom of religion of individual liberty to embrace and enjoy a chosen religious belief; the autonomous agent is supreme. Protecting autonomy is the core element of religious liberty and autonomy and in this case is secured by ensuring an absence of coercion or restraint.³⁶⁸ Religious beliefs, however, are deeply connected to other believers in faith-based communities and the very identity of the believer is shaped by the moral framework of her/his religious community.

In a liberal modernity, religious adherents are free to follow the norms of their community yet, their values may clash with those of official law. The freedom in s. 2(a) is explicitly the freedom of the individual, not, although it is connected to collective or associational freedoms of the community, the authority of the immediate or extended

³⁶⁶ *Big M ibid* per Dickson, J at para 94.

³⁶⁷ *Big M ibid* per Dickson, J at para 127.

³⁶⁸ This autonomy will be discussed below in *Amselem* and *Multani* as well.

family or of the faith community. However, the freedom to act in accordance with religious beliefs is the most important means through which religious rights provide protection that goes beyond that provided by other fundamental freedoms.

d) Freedom of religion and secularization in *Big M*.

Dickson, C.J. added the proviso that freedom of religion would not protect minority religious groups in certain religious practices. The entrenchment of freedom of religion in the Constitution promotes state secularization and the government must refrain from adopting laws or policies that favour one religion over another. Any facilitation of religious life by the state has to be without discrimination in its treatment of different groups or belief systems. In *Big M*, the SCC read the guarantee of freedom of religion as protecting freedom to follow one's religious beliefs and practices, freedom from state imposition of religious precept and action, and the equal standing of all religious faiths; the lower court did not. The SCC and the Court of Appeal were at opposite poles in the resolution of the conflict concerning freedom of religion.

Although as stated earlier, Christianity is an embedded component of Canadian law, the *LDA* could not withstand a *Charter* challenge in this case. Dickson, C.J. stated in this case that “the theological content of the legislation remains a subtle, and a constant, reminder to religious minorities within [Canada] of their differences with, and alienation from, the dominant religious culture.”³⁶⁹ However, even though the Supreme Court reaffirmed the *Charter* guarantee of freedom of religion, and equal standing of all religious faiths, it omitted the political background of the relationship of the individual and the state. Dickson, C. J. was concerned with the place of religious minorities; but while the court's ruling challenged the status and authority of Christianity as the

³⁶⁹ *Big M supra* note 272 per Dickson, J 97.

dominant faith, it could not displace its dominance in society entirely. The explanation for this would seem to be fear of “shifting variable[s]” in future jurisprudence that could create uncertainty in the law and the fact that no legislation would be safe from a revised judicial assessment of the purpose of the law; it would jeopardize the doctrine of *stare decisis*. This is a clear case of the power that resides within the judiciary, as ultimate arbiters, to be able to manipulate state law by not only incorporating difference within the law but also by further entrenching within it the dominance of Christianity. The law remains a slave to the singular purpose of liberal secular modernity even though variables within society point to plural indices.

2. *Edwards Books and Art Ltd. v The Queen* [1986] 2 SCR 713, 35 DLR (4th) 1 (*Edwards Books*)

This was another landmark Sunday-closing law case before the SCC, *R. v. Edwards Books*, wherein the Province of Ontario *Retail Business Holidays Act* was challenged by four Ontario retailers as they wished to open their businesses on Sundays and other holidays.³⁷⁰ The Ontario *Act* prohibited retail businesses to sell or offer to sell retail goods on a Sunday or on a holiday.³⁷¹ In 1983, three of the four businesses were charged and convicted under s. 2 of the Ontario *Retail Business Holidays Act*. At their appeal, the businesses invoked section 2(a) of the *Charter*. Given the success in *Big M.*, they challenged the constitutional validity of the Ontario Sunday closing legislation. The SCC, in reviewing this case, agreed with the Ontario Court of Appeal that the legislation had a secular purpose and was therefore valid. The secular purpose was to provide

³⁷⁰ *Edwards Books & Art Ltd., Longo Brothers Fruit Markets Ltd. et al., Paul Magder, and Nortown Foods Ltd.*

³⁷¹ *Retail Business Holidays Act, RSO 1980, c. 453*. The definition of “holiday” in s 1 of this *Act* includes some days that are secular in nature and other days that are definitely significant to the Christian denominations.

uniform holidays or pause days for retail workers and that there was no impact on religious practice.

a) Interpretation of public purpose of law in *Edwards Books*

In this case, there were at least three issues that were considered by the SCC: was the *Retail Business Holidays Act* within provincial jurisdiction pursuant to the *Constitutional Act, 1867*? Did the *Retail Business Holidays Act* violate ss. 2(a), 7 and 15 of the *Charter*? And if it did, was the violation justifiable under s. 1 of the *Charter*? Although the purpose of the law was secular, the court’s assessment of the effect of the law was found to limit freedom of religion, particularly as Sunday has historically been accepted as the common pause day for *religious* reasons. The effect of the law actually would impose a burden on retailers whose religious beliefs required them to abstain from work on a day other than Sunday. Even though the Ontario *Act* limited the *Charter* guarantee of freedom of religion, it was held to be justified under s. 1 and was therefore exempt. The court found that the religious purpose did not render the exemption unconstitutional as it was open to the provincial legislature “to attempt to neutralize or minimize the adverse effects of otherwise valid provincial legislation on human rights such as freedom of religion.”³⁷² The rule is that the purpose of a statute is paramount in assessing whether it does indeed violate a *Charter* guarantee. The SCC concluded that “the constitution does not contemplate religion as a discrete ‘constitutional matter’ falling exclusively within either a federal or provincial class of subjects.”³⁷³ “The *Act* was within the provincial legislative competence.”³⁷⁴ The impact of the law on religion is not critical. In that the intent of the *Act* is to provide a uniform day of rest, the *Act* was found

³⁷² *Edwards Books* supra note 342.

³⁷³ *Edwards Books* *ibid* at para 38.

³⁷⁴ *Edwards Books* *ibid*, per Dickson, CJ at para 38.

to have “secular inspiration” and did not abridge freedom of religion. Any economic harm was supposedly due to religion.

b) Justification of the impact of law on religious rights in *Edwards Books*

In this case, it was found that “none of the retail stores...has established that it was open on Sunday for any purpose than to make money.”³⁷⁵ Dickson, C.J.C stated that:

“The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. ...legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial. ...³⁷⁶

The SCC also stated that part of the object of the legislation benefits retail employees so that a common weekly holiday is available and enjoyed by most of the community. The practicality of Sunday as a pause day was significant but the impact on religious practice was inconsequential; the law was upheld as a reasonable limit that is demonstrably justified in a free and democratic society.

c) Implication on constitutional protection of religion in *Edwards Books*

In the question of constitutional protection of non-Christian believers to conform to majoritarian religious dogma that requires Sunday closure for business, the court in *Edwards Books* considered that although “all coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a)”³⁷⁷, “not every burden on religious practices is offensive to this constitutional guarantee of freedom of religion.”³⁷⁸

The SCC stated that the state is “under no duty...to take affirmative action to eliminate

³⁷⁵ *Edwards Books* ibid at para 101.

³⁷⁶ *Edwards Books* ibid at para 97.

³⁷⁷ *Edwards Books* ibid at para 96.

³⁷⁸ *Edwards Books* ibid at para 97.

the natural costs of religious practice.”³⁷⁹ Retailers and consumers who observe days other than Sunday as a day to practice their religious tenets would face loss of business on days that they actually take as a pause day. The constitutional guarantee of these retailers and consumers is indirectly coerced.

d) Secularization and freedom of religion in *Edwards Books*

According to Hogg, the observance of days of religious significance is a matter upon which attitudes will vary from one locality to another.³⁸⁰ Although the legislation in both, *Edwards Books* and *Big M*, concerned Sunday closing jurisprudence, the outcomes in each of the cases is different. In *Big M*, the purpose of the federal legislation was found to be religious and therefore infringed upon the *Charter* guarantee of freedom of religion; it was struck down. In *Edwards*, the purpose of the provincial prohibition was secular. If there is a conflict between the federal *Act* and the provincial *Act*, an unconstitutional statute cannot render provincial legislation inoperative under an overriding doctrine.³⁸¹ The impact of the law (*intra vires* the province or not) on religion is generally not critical.³⁸² What is critical is the clearly outlined purpose of the legislation. The purpose of the provincial *Act* is to ensure state interest.

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

Amselem was based on a claim alleging infringement of freedom of religion under the *Quebec Charter of Human Rights and Freedoms*.³⁸³ In this case, Orthodox Jewish residents installed individual *succahs*—outdoor structures built by Orthodox Jews during the harvest festival of *Succot*—on the balconies of their apartments in an upscale part of

³⁷⁹ *Edwards Books* *ibid* at para 114.

³⁸⁰ *CCL* *supra* note 2 at 929.

³⁸¹ *Edwards Books* *supra* note 342 at para 39.

³⁸² *CCL* *supra* note 2 at 926.

³⁸³ For further elaboration, see *Quebec’s Charter of Human Rights and Freedoms*, CQLR c C-12.

Montreal, Quebec.³⁸⁴ For those connected to the Jewish faith, this nine day festival is biblically mandated. The condominium association demanded the removal of the *succahs* based on the bylaws that prohibited decorations on balconies but offered to set up a communal or collective *succah* in the gardens on the ground floor for religious observance. The explanation given by *Amselem* was that a communal *succah* would cause extreme hardship with their religious observance, but a *succah* on their own balcony was integral to their personal religious beliefs. Regulations agreed to by all owners explicitly set out the character of the neighbourhood as a condominium building. Mr. Amselem, however, defied the condominium, Syndicat Northcrest's, regulations, and insisted on building this *Succot* on his balcony. His neighbours raised various economic, security, and aesthetic concerns, including concerns about the way they wished to be perceived within the common areas by outsiders. For Amselem, this activity was perfectly legitimate and appropriately circumscribed. The association applied for a permanent injunction against *succah* construction on individual balconies. The corporation's application was granted by the Québec Superior Court, and this decision was affirmed by the province's Court of Appeal.

a) Interpretation of public purpose of law in *Amselem*

At the SCC, the majority in this case found Amselem's beliefs to be sincerely held indicating that this SCC judgment is firmly grounded in public law notions of individual rights which include religious freedoms. Individual self-fulfillment of a religious person with "deeply held personal convictions or beliefs"³⁸⁵ took precedence over the complaint of nuisance regarding the *succah* and this complaint was found to be

³⁸⁴ This nine day festival is biblically mandated and is connected to the Jewish faith.

³⁸⁵ *Amselem* supra note 304, per Iacoboucci, J at para 39.

unreasonable. In this SCC judgment concerning freedom of religion, the liberal individual is central. At the same time, the majority decision did not characterize the narrative as one of association of religious or cultural groups. In this case, Iacobucci, J. gave the example of a previous freedom-of-religion case, *R. v. Jones*, wherein La Forest J. stated that the court may not question the validity of a religious belief regardless of the quantity of claimants that may share that belief.³⁸⁶ He also cited the U.S. Supreme Court, Burger, CJ, in *Thomas v. Review Board of the Indiana Employment Security Division* that “courts are not arbiters of scriptural interpretation.”³⁸⁷ In this case, freedom of religion, the majority asserted “revolves around the notion of personal choice and individual autonomy and freedom.”³⁸⁸ In liberal democratic and secular terms, the individual condominium owner is characteristically understood as the individual condo owner; the law only understands religion as a product of choice, a choice connected to the liberty and autonomy of the individual.

In the dissenting judgment of Justice Bastarache in this case, the rights of individual neighbours were also balanced as individual rights against each other. He also argued that the law must take cognizance not only of the claimants’ religious interests but also of the other owners’ property rights: “...not only is there a conflict between the right to freedom of religion and property rights, but the right to freedom of religion is also in conflict with the right to life and personal security, and with contractual rights.”³⁸⁹

b) Justification of the impact of law on religious rights in *Amselem*

In this case the SCC stated that, “claimants seeking to invoke freedom of religion

³⁸⁶ *Amselem*, supra note 304, per Iacobucci at para 44.

³⁸⁷ *Amselem*, ibid for reference to Burger, SCJ, 450 U.S.707 (1981) and as quoted by Iacobucci J for the majority at para 43.

³⁸⁸ *Amselem*, ibid, per Iacobucci, J at para 40.

³⁸⁹ *Amselem*, ibid, per Bastarache, J at para 176.

should not need to prove the objective validity of their beliefs”³⁹⁰; sincerity of belief is not the same as validity of belief. The majority in this case stated, per Iacoboucci, J.³⁹¹

In my view, when courts undertake the task of analysing religious doctrine in order to determine the truth or falsity of a contentious matter of religious law, or when courts attempt to define the very concept of religious "obligation", as has been suggested in the courts below, they enter forbidden domain. It is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine.

Jurisprudence is limited in its treatment of religion.

The Supreme Court in this majority decision drew up a definition of freedom of religion under the *Quebec Charter of Human Rights and Freedoms* mindful of the overlap with section 2(a) of the *Canadian Charter*.³⁹² In so doing, the Court attempted to define religion itself.

In order to define religious freedom, we must first ask ourselves what we mean by "religion". While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. 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.³⁹³

Although this may seem to be an expansive definition of religion, it is important to note that the definition of religious practices as protected under s. 2(a) is still defined in individualist terms.

c) Implications on constitutional protection of religion in *Amselem*

³⁹⁰ *Amselem*, ibid at para 43.

³⁹¹ *Amselem*, ibid per Iacoboucci, J at para 67.

³⁹² See Quebec's *Charter of Human Rights and Freedoms*, CQLR c C-12.

³⁹³ *Amselem supra* note 304 at para 39.

In *Amselem*, the Supreme Court somewhat weakened the symbolic boundary between the public and the private. The test that law required the truth of the sincerity of belief of the liberal individual in religion was satisfactory in meeting the individualist definition of religion as explained by the principled basis for the protection of religion. However, both, validity and sincerity of belief are central facets of the code of conduct for a vast majority of believers. Additionally, the SCC recognizes that it has no capacity to adjudicate questions of religious doctrine. But for now, Canadian law understands religion as central to individual autonomy and religious commitment only as a conscious preference. However, law can understand religion. For Berger, law is in effect asserting something about the true nature of that which it is protecting only.³⁹⁴ And for Beaman, religion is like law because the way in which it is written and the way it is lived are two different phenomena making it very difficult to define religion for the purpose of determining religious freedom.³⁹⁵

d) Secularization and of freedom of religion in Amselem

In *Amselem*, the finding that religion encompasses a right to religious practices if the individual has a sincere belief does not take into consideration whether the practice was needed according to religious practice. The court simply has to believe the individual that his/her practice is connected to religion. In this case, the court felt that religious beliefs are indecisive and individual “beliefs and observances evolve and change over time.”³⁹⁶

³⁹⁴ Berger, Benjamin. “Law’s Religion: Rendering Culture” Robert Moon ed, “*Law and Religious Pluralism in Canada*” (Vancouver: UBC Press, 2008) at 286.

³⁹⁵ Lori G Beaman, “Defining Religion: The Promise and the Peril of Legal Interpretation” in Richard Moon ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 194 [hereafter Beaman, “Defining Religion”].

³⁹⁶ *Amselem*, *supra* note 304, per Iacoboucci, J at para 71.

The Supreme Court's focus on the individual pays full respect to the person driven by internal faith and religious obligation and with respect to his private property. However, the consequences of the judgment of the majority in the case go beyond *Amselem* and reshape membership both in a religious community and in the community of the co-owners and residents of the condominium. The residents must readjust their understanding of what give-and-take means and the ongoing conversation among co-owners of the building is thus reframed. *Succah* structures, for ten days of the year, are relabelled normal or reasonable interference with condominium owners' enjoyment of their spaces. The Jewish holiday of *Succot* and its implications for celebrants and the people who live next to them are now in a shared experience of these structures in their neighbourhoods for ten days a year; it is possible to rezone religious space and time by positive law in the minds of the Canadian citizenry.

Berger too confirms that the separation between religion and law is "artificial," where law is informed by the political culture of liberalism and lacking a fluid or complex understanding of religion.³⁹⁷ Religion cannot be separated from other practices of everyday life, culturally, legally, politically, medically and so on.

4. *Multani v Commission Scolaire Marguerite-Bourgeoys [Multani]*

The difficulty of securing rights to equal religious citizenship is illustrated in the SCC case of *Multani*, which concerned the ability of a twelve-year-old Orthodox Sikh student to carry his *kirpan* (dagger with a metal blade) on school property—his religion requires that a *kirpan* has to be worn at all times. In *Multani*, the Court found freedom of religion should protect a non-violent Sikh student's right to wear a *kirpan* in school. This case began in 2001 when the *kirpan* of Gurbaj Singh Multani, the Sikh student, dropped

³⁹⁷ Berger, "Law's Religion" *supra* note 394 at 267.

to the ground in the schoolyard of the public school he was attending. Recent events had heightened school security in Montreal public schools and this *kirpan* event was exacerbated by religious fears post 9/11. The event triggered a strong reaction from parents, teachers, and administrators. The school board council of commissioners decided that carrying of *kirpans* violated the school's no-weapons policy. This policy infringed upon the religious tenets of Multani's faith.

Multani's rights were vindicated at trial at the Quebec Superior Court, but the Quebec Court of Appeal found that the school board, "a creature of statute [that] derives all its powers from statute,"³⁹⁸ did not have to accommodate Multani's religious practices because the toleration of any security risks in schools would constitute "undue hardship." There had not been any reported incidents of school violence involving *kirpans*, and the boy in question had no record of disciplinary problems. Sikh students were, after this Quebec Court of Appeal judgment, forced to choose between the tenets of their faith and attendance at public schools; in effect, Sikh students were to abandon their faith and in order to become full members of Canadian society they had to alienate themselves from their own. This would now be a precedent in other Canadian environments. The matter was then appealed to the SCC.

a) Interpretation of public purpose in *Multani*

An issue that the SCC was required to consider was whether the school board's decision, which infringed the plaintiff's s. 2(a) rights, was justified under s. 1 of the *Charter*. The uneasy relationship of religious *accommodation* and religious freedom is illustrated in this appeal to the SCC. The school regulation prevented the student, Multani, from acting on a sincere religious belief and the regulation contravened s. 2(a)

³⁹⁸ *Multani supra* note 237 per Charron, J at para 22.

of the *Charter*. Justice Charron, for the majority, found that absolute prohibition (no weapons policy in schools) was not justified and the minimal risk to school safety posed by wearing the *kirpan* could be managed by the school. An absolute prohibition was out of proportion to the small risk posed by the wearing of the *kirpan* and “would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others.”³⁹⁹ She held that this prohibition on weapons was too broad to satisfy the minimum impairment branch of the *Oakes* test.⁴⁰⁰ But in her attempt for reasonable accommodation, Charron, J. limited the student’s freedom of religion by ordering that the *kirpan* be kept in a wooden sheath and be sewn into the student’s clothing so that it could not be easily removed. Justice Charron also accepted and seemed to agree with the lower court decisions upholding an absolute prohibition of the *kirpan* in aircrafts and even in courtrooms as these two environments would justify “a different level of safety.”⁴⁰¹ Although the Supreme Court in this case was divided on the question of whether a state obligation to accommodate religious believers is sufficiently strict an obligation to be encompassed by the justificatory analysis of freedom of religion under s. 1⁴⁰² of the *Charter*, it held unanimously that the regulation infringed the student’s freedom of religion.

b) Justification of the impact of law on *Multani*

According to Charron, J., an individual must show that he or she sincerely

³⁹⁹ *Multani*, *ibid* per Charron, J at para 78.

⁴⁰⁰ *CCL*, *supra* note 2 at 936.

⁴⁰¹ *Multani*, *supra* note 237 per Charron, J at para 66.

⁴⁰² *Charter supra* note 6 at s 1 states: “Guarantee of Rights and Freedoms” – “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

believes that a certain belief or practice is required by his or her religion.⁴⁰³ In *Multani*, Singh was required to show that he sincerely believes that his faith requires him at all times to wear a *kirpan* made of metal. She notes, from the evidence that:

... the Sikh religion teaches pacifism and encourages respect for other religions, that the *kirpan* must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic *kirpan* made of a material other than metal is based on a reasonable religiously motivated interpretation.⁴⁰⁴

Regardless of its moral validity, as a legal principle, freedom of religion serves as an authoritative source of political power granting powers to institutions and individuals. It can also coerce the same institutions and individuals to refrain from violating the principle of freedom of religion. In that the operation of freedom of religion requires justification within the domain of political morality, the liberal theory excludes the plausibility of political justification of religious doctrine; political justification must be based on reasons accessible to all reasonable persons within the polity.⁴⁰⁵ “What we need”, going back to Parekh, “is a liberal theory of multiculturalism” for a co-existence of indifference through policies that engage, dialogue and learn, and care for each other.⁴⁰⁶

The importance of freedom of religion by the SCC is further stated by Charron, J. She reproduced Dickson, C. J.’s statements in *Big M*. in terms of the right to choice of religious beliefs and to the ability to fully practice these ideals openly.⁴⁰⁷ She quotes from *Big M*:

Freedom means that, subject to such limitations as are necessary to protect public

⁴⁰³ *Multani*, *supra* note 237, see blood transfusion case (A.C.) *supra* note 346.

⁴⁰⁴ *Multani*, *ibid* at para 36.

⁴⁰⁵ Avihay Dorfman, “Freedom of Religion” (2008) 21 Can JL & Jur 279.

⁴⁰⁶ Parekh, “Rethinking” *Supra* note 17 at 104.

⁴⁰⁷ *Multani supra* note 237, per Charron, J at para 32.

safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.⁴⁰⁸

And in reproducing from *Amselem*, Charron J. states that “it was explained in *Amselem* that freedom of religion consists:

... of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.⁴⁰⁹

Charron, J, quotes further from *Big M*:

... With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise.⁴¹⁰

However, in this case—as opposed to the case of *Big M*, legislation was found to be unconstitutional on its face because it violated the *Charter* right to freedom of religion and it could not be saved under s. 1 of the *Charter*. Although freedom of religion was accommodated there was no full liberty. Freedom of religion in Canada is a principle that asserts its own validity, as a moral principle and as a legal principle.

c) Implication on the constitutional protection of religion in *Multani*

Singh’s constitutional rights were broadly well-established some years earlier pursuant to previous jurisprudence, namely, *Big M* and *Amselem*. Despite the strong support of the SCC for equal religious citizenship, constitutional/state restriction on fundamental freedoms under s. 1 remains dominant. The appellant had to bear a time consuming, costly court battle to secure the rights to which he was clearly entitled.⁴¹¹

⁴⁰⁸ *Multani* ibid per Charron para 32.

⁴⁰⁹ *Multani*, ibid per Charron, J at para 33.

⁴¹⁰ *Multani*, ibid at para 32.

⁴¹¹ Ryder, “The Canadian Conception” *supra* note 27 at 104.

Multani, at an impressionable young age, also suffered prolonged agonizing negative attention from numerous Canadian citizens who were ignorant of his rights. Neutral rules need to be adjusted to accommodate religious practices. The duty to accommodate—represented as the state’s obligation to facilitate the maintenance of religious pluralism—is an idea familiar to human rights law in the context of employment.⁴¹² This was noted in the minority judgment in *Multani*. Employers are required to take into account religious difference and to accommodate religious preferences. But accommodation in the presence of pluralism is assimilationist.

5. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*]

The Colony of Hutterian Brethren in the Province of Alberta sincerely believed that their faith-based Second Commandment prohibited them from having their photograph willingly taken as this seriously violated religious belief and would be akin to “sinful” behaviour. However, specific regulations in each province in Canada require that all persons who drive motor vehicles on Canadian motorways hold a driver’s licence with a photo-identification; Alberta is no exception. In Alberta, before 1974, a Condition Code G license, a non-photo driver’s licence, was granted at the registrar’s discretion, under the *Traffic Safety Act*, to those who objected to their photographs being taken on religious grounds.⁴¹³ This Colony carries on business as a rural self-sufficient religious commune and claimed that if their members could not obtain drivers’ licenses their communal lifestyle and survival would be threatened.

In 2003, the Province of Alberta amended its *Traffic Safety Act* and adopted a new

⁴¹² David Schneiderman, “Associational Rights, Religion, and the Charter” in Robert Moon ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 67.

⁴¹³ *RSA 2000*, c.T-6: Operating Licensing and Vehicle Control Regulation 320/2002, s 14(1)(b) (am. Alta. Reg. 137/2003, s. 3).

regulation under this *Act* making photo requirement universal. The objective and therefore the interest of the province lay in a new universal facial recognition data bank that would reduce the risk of identity theft associated with photo-identification. The photos were to be deposited in the province's facial recognition data bank for quick computer access for this governmental fraud control purpose. The Colony therefore proposed what they believed to be an alternative to the functionality of the control system by requesting that they be allowed drivers' licences marked "Not to be used for identification purposes."

The Colony's proposal was denied; they challenged the constitutionality of Alberta's newly enacted regulation alleging an unjustifiable breach of their religious freedom in a free and democratic society. At this point, there were 450 Condition Code G licences in Alberta, 56 percent of which were held by members of the Hutterian Brethren Colony. *Intra*-Province of Alberta, both levels of courts held that there was infringement of s. 2(a) and that this infringement upon freedom of religion was not justified under s.1. On appeal by the Government of Alberta, the SCC upheld the regulation.

a) Interpretation of public purpose in *Hutterian Brethren*

After a six-year court battle, the Colony was not successful in persuading the SCC that the impugned regulation was not justified in a free and democratic society. McLachlin C.J. C. (Binnie, Deschamps and Rothstein JJ concurring) held that the regulation was justified under s.1 of the *Charter*. LeBel, Fish and Abella JJ dissented. The limiting regulation was found to be constitutional on this narrow, four to three, decision and the appeal was allowed. The majority decision per McLaughlin held that the

universal photo requirement was rationally connected to the objective of the province, it minimally impaired s. 2(a) right and that it was justified. The SCC proceeded only on the justification test under s. 1. Therefore the validity of the regulation becomes questionable. The question before the courts was whether the vehicle control regulation infringed upon freedom of religion of the Colony; did the universal photo requirement infringe on s. 2 (a) of the *Charter*? If so, was the infringement justified under s. 1 of the *Charter*? Within the justification is the limit prescribed by law? Is the purpose for which the limit is imposed pressing and substantial? Is the means by which the goal is furthered proportionate?

b) Justification of impact of law on religious rights in *Hutterian Brethren*

In this case, McLaughlin C.J.C. was hesitant to use s. 2(a) to transform its supposed neutrality based on guaranteed secular principles and the principles of universality. She explained that freedom of religion poses specific challenges because of the “broad scope of the *Charter* guarantee” and that:

Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver’s licences at issue here, to the overall detriment of the community.⁴¹⁴

And as the legislation was challenged as unconstitutional the court had to determine whether it falls within “a range of reasonable alternatives.”⁴¹⁵ Per McLaughlin:

Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s.1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused. ... The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened.⁴¹⁶

⁴¹⁴ *Hutterian Brethren supra* note 345 at para 36

⁴¹⁵ *Ibid.* at para 37

⁴¹⁶ *Ibid* at para. 37

McLaughlin C.J.C. distinguished the reasonable accommodation analysis in *Multani* on which the lower courts in this case had relied on in their assessment of minimal impairment, and in their analysis under a s.1 justification. Is it legislation that is at issue or is it statutory discretion that is at issue? It is understood that for validity of a law of general application, government has to show that the measure: (a) is rationally connected to a pressing and substantial goal; (b) minimally impairs the right in s. 2(a); and (c) is proportional in its effects.⁴¹⁷ According to McLaughlin, C.J.C., a s.1 analysis is crucial where the validity of a law is at stake, but a reasonable accommodation analysis simply addresses an alleged violation by the government or its administration, of a *Charter* claim.⁴¹⁸ For McLaughlin, "reasonable accommodation is not an appropriate substitute for a proper s.1 analysis" based on her methodology of *Oakes*. The SCC in this case redefined the *Oakes* test. She explains that when a law which has passed through all the rigours of the *Oakes* proportionality test—pressing goal, rational connection and minimum impairment—it could fail at the final inquiry of proportionality of effects.

The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups."⁴¹⁹

Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right. . . .It requires placing colliding values and interests side by side and balancing them according to their weight.

In assessing the Hutterians' proposed alternative in the context of the minimum

⁴¹⁷ *CCL* supra note 2.

⁴¹⁸ *Hutterian Brethren* supra note 345 at para 66 and 67.

⁴¹⁹ *Ibid.* at para 76.

impairment test, McLaughlin C.J.C. found that it would "compromise the Province's goal of minimizing the risk of misuse of driver's licences for identity theft."⁴²⁰

However, in dissenting, Abella, Fish and LeBel, JJs agreed that the impugned regulation was not proportionate and should be struck down. Abella, J. reasoned that the burden on the government, of demonstrating infringement of religion, was not justified under s.1; in terms of deleterious effects, the regulation seriously harms the small Colony's religious rights and threatens their autonomous ability to maintain their communal way of life. She felt that it constituted an indirect form of coercion leaving the Colony members having to make difficult choices concerning religious tenets. Abella, J's reasoning is that the law does not have to fail at the minimal impairment stage because the proportionality test does not end here; her reasoning is more consonant with claimants' rights in *Multani* and *Amsellem* wherein government inquiry into the sincerity of religious beliefs was restricted.

When Abella J states that in her opinion "the government has not discharged its evidentiary burden or demonstrated that the salutary effects in these circumstances are...a web of speculation,"⁴²¹ and adds that there is no evidence "from the government to suggest that...for 29 years...an exemption to the photo requirement [has] caused any harm at all to the integrity of the licensing system", the dominance of political objectives become apparent. To Abella, J., the basis for determining the exemption is no longer feasible. She finds the impugned regulation is a form of indirect coercion that places the Colony "in an untenable position of having to choose between compliance with their religious beliefs or giving up their self-sufficiency of their community...[and their]

⁴²⁰ *Hutterian Brethren* ibid at para. 59.

⁴²¹ *Hutterian Brethren* ibid at para 154.

historically preserved...autonomy...”⁴²²

LeBel, J in dissenting also, states that “courts must weigh the purpose against the extent of the infringement.”⁴²³ He also states that McLaughlin C.J.C.’s approach to minimal impairment “would severely restrict the ambit of court review of government action and would reduce it to an analysis of the alignment of means with purposes.”⁴²⁴ How much flexibility does the court have over the effect of government objective when assessing the alternative proposed by the Colony? And are citizens with different criteria in the conduct of life to be discouraged from formulating novel alternatives? It seems that with the exception of *Big M* in freedom of religion jurisprudence, legislative objective remains firmly installed.

c) Implications on constitutional protection of religion in *Hutterian Brethren*

In the s.1 analysis of proportionality in this case—balancing between the deleterious and salutary effects of the purpose of the impugned regulation on religious rights—the objective of the regulations prescribed by law was given more significance. The alternative suggested by the Colony was discarded as illegitimate. But exactly how compromised is this particular government goal in general? In the balance, the effects on the overall system concerned a very small isolated group without a photograph in their driving licences; the Colony could have just been given an exemption without much impact on the system or legislative schemes. The impact on the Colony was significant. Are there less harmful ways of achieving government or legislative goal?

Interaction that is based on principles of secularization and democratization when

⁴²² *Hutterian Brethren* ibid at para 170.

⁴²³ *Hutterian Brethren* ibid at para 195.

⁴²⁴ *Hutterian Brethren* ibid at para 197.

legitimated by authority that is anchored in the politics of legalism, tend to delegitimize evidence of community practice, historical precepts and observance, and practice of religion, all of which are significant to the lifeworld of a plurality of citizens. Is the objective important enough to limit the *Charter* guarantee? In the balance, the mal effects of the infringement of the regulation by a very small, vulnerable group of people on society are significantly less than the mal effects on the colony itself in the infringement of their *Charter* right to freedom of religion under s. 2(a).

6. *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 [A.C.]⁴²⁵

The focus of this case is on a devout minor-mature Jehovah's Witness'—A.C.'s—right to refuse blood transfusion to which she herself objects. A.C., a girl aged fourteen years and ten months, was hospitalized for lower gastrointestinal inflammation and bleeding caused by Crohn's disease.⁴²⁶ It was medically determined that her hemoglobin count was dangerously low and that she urgently needed blood transfusion. Jehovah's Witnesses interpret the bible to prohibit any form of ingestion of blood. A.C. had signed written instructions forbidding transfusion of blood to her under any circumstances. She particularly refused receipt of blood after the advice of her doctor that internal bleeding had created an imminent, serious risk to her health and perhaps her life.

Despite the fact that a psychiatric assessment at the hospital deemed A.C. to have the capacity to make medical decisions relating to herself, the Director of Child and Family Services of Manitoba apprehended her as a child in need of protection, and sought a treatment order from the court under s. 25(8) of the *Manitoba Child and Family*

⁴²⁵ *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (A.C.)

⁴²⁶ A painful condition that can cause internal bleeding; it has no cure but can be eased through surgery and drugs.

Services Act (CFSA),⁴²⁷ by which the court may authorize treatment that it considers to be in the child’s “best interests” if the child is under the age of 16 and when a life is at risk. And s. 25(9) of the same *Act* presumes that the “best interests” of a child 16 or over will be most effectively promoted by allowing the child’s views to be determinative, unless it can be shown that the child does not understand the decision or appreciate its consequences; no such presumption existed here. However, the applications judge ordered that A.C. receive blood transfusions, after concluding that when a child is under 16, there are no legislated restrictions of authority on the court’s ability to order medical treatment in the child’s “best interests.” A treatment involving blood transfusion was administered to A.C. A.C. and her parents appealed the order arguing that the legislation (*Manitoba CFSA*) was unconstitutional because it unjustifiably infringed a variety of A.C.’s rights under ss. 2(a), 7, and 15 of the *Charter*.

a) Interpretation of public purpose of law in A.C.

The question before the courts was: What is the legitimacy of *Charter* guarantees under freedom of religion, security of person and equality? Section 7 concerned the *Charter* rights of liberty and security of person and fundamental justice wherein provincial family services apprehended and authorized medical treatment under the legislative power of s. 25(8) and contrary to the child’s wishes and consent and personal moral conviction, and voluntary compliance. Section 2(a) concerned *Charter* rights of freedom to practice religion in Canada and in this case the faith-based practice of a minor Jehovah’s Witness under the age of 16 having a right to reject blood transfusion despite dire consequences and the fact that coercion had already occurred in the forced

⁴²⁷ *Child and Family Services Act, C.C.S.M. c. C80, s. 25(8), and (9)*. The Act has been amended since this hearing before the SCC.

administration of blood and her ability to understand relevant information or consequences of treatment decision under the impugned law. Section 15 of the *Charter* concerned equality rights, in this case, of discrimination on the basis of being under the age of 16 years and whose maturity status on the capacity—in effect her level of understanding—to refuse blood transfusions was questioned. The Manitoba Court of Appeal unanimously upheld the constitutional validity of the impugned provisions and the treatment order of the applications judge. A further appeal of the imposed transfusion to the SCC was dismissed.

At the SCC, the appeal was dismissed and ss. 25(8) and 25(9) of the Manitoba *CFSA* were upheld as constitutional in a six to one decision; Binnie J dissented. Four SCC judges—Abella, LeBel, Deschamps and Charron JJ—found that there was no violation of her freedom of religion under s. 2(a) of the *Charter*, two judges—McLachlin C.J and Rothstein J—found that a violation of s. 2(a) did occur but was justified under s.1 of the *Charter*, and in dissenting, Binnie J found that the violation of A.C.’s s. 2(a) rights was unjustified and that s.25 of the *CFSA* was unconstitutional.

In assessing whether A.C. was acting without restraint and with a mature understanding of the consequences of refusing blood transfusion, the majority judgment delivered by Abella J did consider the child’s religious heritage and the ‘truth’ and depth of her core values and beliefs. However, the paramount aim of the SCC was to determine the statutory “best interests” of the child under s. 25(8) of the Manitoba *CFSA*. After a comprehensive evaluation by the SCC of “the maturity of the adolescent...to determine whether ... her decision is a genuinely independent one” that reflects understanding and the serious consequences of her decision, the SCC felt that a young person’s religious

wishes could be respected only “as his or her maturity increases in a proportionate response both to the young person’s religious rights and the protective goals of s. 25(8).”

⁴²⁸ The three sets of reasoning at the SCC are summarized here:

b) Justification of the impact of law on religion

I. Four out of Seven SCC Judges found no Violation of s. 2(a).

In this case, the majority at the SCC found that the constitutional balance was “appropriate” between achieving the protective legislative goal while at the same time respecting the right of mature adolescents to participate meaningfully in decisions relating to their medical treatment.⁴²⁹ *A.C.* in effect became a child claimant without legislative capacity to exert her autonomous rights, in this case freedom of religion. In its “careful” application of the “best interests” standard, the majority found that although the legislative scheme created by ss. 25(8) and 25(9) of the *CFSA* did impose differential treatment on the basis of age, it did not infringe ss. 7, 15 or 2(a) of the *Charter* because it is neither arbitrary, discriminatory, nor violative of religious freedom. Per Abella J.⁴³⁰

The question is whether the statutory scheme strikes a constitutional balance between what the law has consistently seen as an individual’s fundamental right to autonomous decision-making in connection with his or her body and the law’s equally persistent attempts to protect vulnerable children from harm. This requires examining the legislative scheme, the common law of medical decision-making both for adults and minors, a comparative review of international jurisprudence, and relevant and social scientific and legal literature. The observations that emerge from this review will inform the considered analysis.

Global modern liberal secular rationale prevailed. In Canada, State goals tend to be paramount.

II. Two SCC judges concurred with the majority decision but found there was violation of s. 2(a) that was justified under s. 1 of the Charter.

⁴²⁸ *A.C. supra* note 346 at paras 95 & 113.

⁴²⁹ *A.C. ibid* at para 28.

⁴³⁰ *Ibid. A.C.* at para 30.

In concurring with the majority decision, McLachlin C.J, and Rothstein, J concluded that the legislative authorization to override A.C.'s sincere religious belief and objection to transfusion constituted an infringement of her right to religious freedom guaranteed by s. 2(a) of the *Charter* but they also found that the authorization of treatment by the applications judge was justified under s.1 of the *Charter*. They did not dispute "that A.C. possessed a sincere religious belief as a Jehovah's Witness against receiving blood products and transfusions."⁴³¹ McLachlin, C.J. referenced *Amselem* wherein Bastarache J. stated that:

...religion is a system of beliefs and practices based on certain religious precepts. A nexus between personal beliefs and the religion's precepts must therefore be established.... Connecting freedom of religion to precepts provides a basis for establishing objectively whether the fundamental right...has been violated....a practice must be connected with the religion...the connection must be objectively identifiable.⁴³²

McLaughlin further states that this is clearly more than a trivial interference with her "right to manifest beliefs and practices."⁴³³ She also referenced Dickson C.J. in *R. v. Big M*:

M:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.⁴³⁴

⁴³¹ A.C. *ibid* at para 153.

⁴³² *Amselem supra* note 304 at para 135.

⁴³³ A.C. *supra* note 346 at para 154.

⁴³⁴ *Big M supra* note 272 at para 95

The majority in this case found infringement to be justified under s.1 of the *Charter* and religious belief could not alter the essential nature of the claim for absolute personal autonomy and of the medical intervention for the preservation of life.

Again, according to McLachlin, C.J., when s. 25(8) is considered in light of s. 2(a) of the *Charter*, the limit on religious practice imposed by this legislation is justified under s.1 as a proportionate limit on the right; the life of the minor has to be ensured and courts have the discretion to order treatment after consideration of all relevant circumstances.⁴³⁵ In this case the impugned provisions of the Manitoba *CFSA* deprived A.C. of full decision-making authority as to her firm religious beliefs. McLachlin stated that “in this case, the s. 7 and s. 2(a) claims merge...”⁴³⁶ She also rejected the assumption that s. 7 is absolute and trumps all other values; she argued that the treatment order also violated s.7.⁴³⁷ McLachlin C. J. and Rothstein, J. affirmed the constitutionality of ss. 25(8) and 25(9) of the *CFSA* but awarded costs to A.C. throughout. State action, coercion, was at the direction of the judiciary.

But although the court acknowledged that there was infringement of A.C.’s s. 2(a) rights at the justification stage, the principles of fundamental justice were found to be a reasonable limit on A.C.’s rights and were allowed to override the sanctity of religious values and free participation in deeply held beliefs.

III. Binnie J.’s dissenting judgment that s. 2(a) was violated by the legislative scheme

In dissenting, Binnie J. stated that:

...the *Charter* enshrines in our highest law the liberty and independence of a mature individual to make life’s most important choices free of government

⁴³⁵ A.C. *supra* note 346 at para 156.

⁴³⁶ A.C. *ibid* at para 152.

⁴³⁷ A.C. *ibid* at para 160.

intervention, provided there is no countervailing social interest of overriding importance.⁴³⁸

Binnie J. reiterates that although judges would instinctively give priority to the sanctity of life, for Jehovah's Witnesses, refusing blood transfusions despite life threatening situations is fundamental to their religious convictions.⁴³⁹ However, the state, for Binnie J., is not justified in taking away the autonomy of individuals, even those under 16 years old; given the equality rights under ss. 2(a) and 7 of the *Charter* if a mature minor does in fact understand the nature and seriousness of her medical condition and is mature enough to appreciate the consequences of refusing consent to treatment, the young person has the capacity to make the treatment decision, "not just to have "input" into a judge's consideration of what the judge believes to be the young person's best interests."⁴⁴⁰

Binnie J. also references Dickson, J. in the *Big M* case to emphasize that s. 2(a) covers religious practices as well as religious beliefs.⁴⁴¹ He finds that A.C.'s belief was "sincere as must be established by an s. 2(a) claimant.

In stressing the sincerity and the importance of freedom of religion, he refers to *Amselem* and *Multani*, the latter quoted here per Charron, J:

What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice (*Amselem*, at para. 52). In assessing the sincerity of the belief, a court must take into account, *inter alia*, the credibility of the testimony of the person asserting the particular belief and the consistency of the belief with his or her other current religious practices (*Amselem*, at para. 53).⁴⁴²

To deny the truth of capacity to consent to or refuse medical treatment violates A.C.'s

⁴³⁸ A.C. *ibid* at para 162.

⁴³⁹ A.C. *ibid* at para 191.

⁴⁴⁰ A.C. *ibid* at paras 202 & 207

⁴⁴¹ A.C. *ibid*.

⁴⁴² *Ibid*.

“freedom of religion and her right not to be deprived of her liberty or security of person except in accordance with the principles of fundamental justice.”⁴⁴³ Binnie J. further states that the “interference with A.C.’s religious conscience far exceeded the “non-trivial” threshold established in *Amselem*, and it was rightly conceded that s. 25...violated s. 2(a), subject to s. 1 defence advanced by the government.⁴⁴⁴ According to Binnie, J., the legislative objective could not justify the limiting of freedom of religion under s. 1 indicating that the purpose of the law contradicts the *Charter* right.

a) Implication on the constitutional protection of religion in A.C.

In the question of refusing blood transfusion in the face of a threat to life of a minor as part of sincere religious observation (or be plagued with feelings of being damned for eternity), how strong is the claim for accommodation of s. 2(a) rights? The justification of the limiting law lies in the purpose of the freedom itself; the law has to fulfil its legislated function in guiding human conduct. Also an integral purpose of fundamental freedoms is the preservation of life and courts are empowered to protect life. Section 1 requires that the policy of the legislation be balanced against the policy of the *Charter*.⁴⁴⁵ However, courts can uphold legislation only under s.1 of the *Charter* and they will therefore strive to find that s.1 is satisfied.⁴⁴⁶ Limits are justifiable where the freedom is being engaged to restrict the circumstances in which one may be convinced to change one’s belief and to protect certain public spaces as neutral zones in moral contests particularly those involving the preservation of life. In this moral debate, the will of the majority prevailed. But proportionality is at the discretion of the reviewing judge/body.

⁴⁴³ A.C. *ibid* at para 211.

⁴⁴⁴ A.C. *ibid* at para 215.

⁴⁴⁵ CCL *supra* note 2 at 731.

⁴⁴⁶ CCL *ibid* at 730.

In weighing proportionality in this case between the deleterious and the salutary effects, the deleterious effects are dominant. Hogg states that:

...the scope of the judicial review depends upon: a stringent standard of justification coupled with a purposive interpretation of rights against a relaxed standard of justification coupled with a broad interpretation of rights.”⁴⁴⁷

And he further states that to be able to maintain a meaningful balancing process, “judicial review will become even more unpredictable than it is now [and]...the purposive approach will usually have the effect of narrowing the right...[and]...generous approach is subordinate to purpose.”⁴⁴⁸ The impact of legislated limitations on the democratic process is already vague. How do growing normative bases that are plural continue to survive or at least co-exist?

Again, in this case, there is a difference in the characterization of the purpose of the law in the three groups of decisions. In each instance, although the objectives of the law are in concert with the values of a free and democratic society, these objectives are related to the infringement of a plurality of *Charter* rights that go well beyond a determination of the maturity of a mature minor which in turn is directly related to freedom of religion and illiberal ideals.

b) Secularization and freedom of religion in *A.C.*

In the majority decision, although the conscience or religious expression was not significantly interfered with, the democratic process was not allowed to expand to include an ‘other’ set of beliefs with openness. The legislative integrity is directly at odds with the value of pluralism and the commitment of a liberal state to respect reasonable pluralism. Again, the outcomes of jurisprudence concerning freedom of conscience and

⁴⁴⁷ *CCL ibid* at 791.

⁴⁴⁸ *CCL ibid* at 731-32.

religion almost never change sincerely held religious beliefs and values. In that it is by an independent jurisdictional sphere arising from the concept of the separation of church and state—the process of secularization—that freedom of religion is tied up with state law accommodation, state law does not recognize religion. Religious believers however, see themselves not in terms of individual rights claimants, but in terms of community rights. Faith is a collective activity and the key right is self-government. The believer “categorically disregards elementary self-interest and accepts martyrdom” rather than transgress religious tenets.⁴⁴⁹ Limit to religious accommodation has to account also for respect for different perspectives as part of legislated freedom of religion. Different social situations may warrant changes in the purpose of the law. In a pluralistic society the law has to be able to meet diverse moralities. Hogg points out that significant variations in individual beliefs do exist within a particular religion be it Christianity, Islam, Judaism, Hinduism and many others. And change is costly morally, politically and economically. The democratic process, the judiciary and subsequent *Charter* rights need to be emancipated from the *politics* of secularization.

F. Conclusion: interpretative challenges within jurisprudence of modernity

As can be seen in the above cases, a pattern has emerged: where there is disagreement on some acute moral, political and legal conflicts, and there is no clear distinction between the normatively right and the institutionally feasible positions on individual rights with religious freedoms, priority is given to the state interests in autonomy and modern secular politics over religious freedoms in most cases.⁴⁵⁰

⁴⁴⁹ Beaman, “Defining Religion” *supra* note 395.

⁴⁵⁰ Heyking, *supra* note 117.

Although many disputes may be resolved within religious communities, or in various levels of courts, the means to administer a diversity of moral perspectives in courts is missing. Legislative integrity is only a political ideal and legislators should try to make the total set of laws they enact as morally coherent as possible.⁴⁵¹ Limits on the claims of faith believers should leave them, at a minimum, meaningful choice rather than a complete deprivation. There is no one stable core that can be attributed to ethnic experience and difference in Canada is viewed as unchanging essence to the exclusion of all others. The SCC has not been able to find middle ground between compelling state interest and religious liberties and tensions have aggravated between the two sides.⁴⁵² When it comes to determining religiosity for legal purposes and with substantive constitutional concepts, there is an indication that courts do not seem to have flexibility. In weighing state objectives against individual and collective rights under the s. 2(a) guarantee, it would seem that courts are more deferential towards state objectives. For “equal religious citizenship”, according to Ryder, there is a requirement that accepted neutral rules be adjusted to accommodate religious practices if there is to be equal participation for persons of faith in social and economic life.⁴⁵³

According to Schneiderman, religion and law continually interact, yet always insist on boundaries of their own space and the modalities of their use of that space.⁴⁵⁴ There are many instances wherein a court will be asked to define the outer boundaries of a religious faith, and this may require inquiry into the external boundaries, for example when an individual seeks accommodation from mainstream practices. Although, all

⁴⁵¹ Marmor, *supra* note 340 at ix.

⁴⁵² Heyking, *supra* note 117.

⁴⁵³ *Supra* note 27, Ryder, “The Canadian Conception”.

⁴⁵⁴ Schneiderman, *supra* note 412 at 67.

human communities have enforceable rules of conduct, they may or may not be written down. Whether they are articulated or not, they exist and are enforced. Such laws embody the experience a community has gained in its struggle to survive. In time, the actors discover methods of cooperation with rules that promote internal order and external strength.⁴⁵⁵ However, challenges to the liberal political and normative philosophy are bracketed as comprehensive worldviews that are disagreeable, unmanageable or costly. The constitution does not deal effectively with the religious challenge.

Freedom of religion jurisprudence in Canada illustrates that the interests of the person of religion or a religious group are pitted against the political and economic interests of the modern state as an entity bound by and acting through liberal or constitutional law and judiciary. Individuated religion is favoured ahead of the collective rituals of whole societies; the abstract individual has primacy but his/her religious development is reflected in numerous different ways of living alongside numerous religions in Canada. It is argued that the freedom of religion jurisprudence outlined above illustrates that in a democracy such as Canada, guaranteed freedom of religion is formally infringed upon when its theoretical vision of justice may no longer be able to meet the empirical reality of the adjudicatory needs of a now different, changing and pluralizing society.

The practice of faith is based on sincere beliefs that have historical significance and cannot be confined to a general authoritative law. A plurality of faith-based religious values is being trumped by the constitutional freedom based on freedom of individual conscience. The relationship between public reason and religion is a fundamental

⁴⁵⁵ Cover, "The Supreme Court 1982" *supra* note 20 at 56.

problem for present political philosophy and constitutional theory based on secularity. While Canadian law examines and responds to random slices of specific religions, it does not go far enough in answering these questions to address the normative issues that are raised by an increasingly pluralist society. Conflict is therefore inevitable. To resolve conflict, inclusionary alternatives to the existing legal-political model rest on examining plural communities and their plural moral orders that are embedded in different social and economic practices. The next chapter examines the possibilities of peaceful coexistence of state law or liberal legalism, religious law, and the customs of the multiplicity in Canada.

CHAPTER IV - Is Peaceful Coexistence of Liberal Law and Religious Pluralism possible?: Canada's Multiple Modernities and Multifaceted Legal Orders in the 21st Century and beyond.

In an age of rapid globalization, mass migration, swift transportation systems including instant electronic data exchange, intense social communications, significant economic interconnections between far-flung countries and other agencies, one of the main features of the modern world is that different laws increasingly come to share fields. Although mass migration is having the effect of blurring boundaries between the legal and the non-legal, and between Western and non-Western conceptions of law, in Canada, in the 21st Century, it would seem that peoples of diverse backgrounds and interests are inevitably coming together in organisations of varying types and goals, for different kinds and forms of creative expression, which are mostly valuable and deserving of support by government and society as a whole. However, I have argued in this thesis that, although Canada is a nominally pluralist society, the legitimacy of religious pluralism has not been fully established in its public domain. Liberal law can be said to be slow in changing as it interacts with other norms. As was evident in Chapter III, in the liberal conception of jurisprudence concerning equal religious citizenship, alternative forms of law such as religious tenets—that are historically complex and already contextually varied—cannot avoid falling prey to the limitations of liberal law.

Sociocultural life is extraordinarily diverse as is the plurality of norms within society. Where do the other normative sets of meaning and regulation, particularly of religious tenets, belong in the conceptual status of the law? In this chapter, I will discuss the works of several different legal pluralists exploring shared normative expectations and aspirations. On the basis of the perspectives of some legal pluralists and on the basis

of my review of the jurisprudence as outlined in Chapter III, I would argue that the SCC's approach to normative pluralism is inadequate to the task of recognizing religious difference. This is particularly so when balancing the purpose of the law as against freedom of religion where norms are steeped in tradition. I will also look at how the perspectives concerning law and order, generally, are developed to create basic shared expectations in consideration of vantage points that exist for particular tasks.

Canada's central rule-based power is contained by state institutions. As was evident within the sampling of jurisprudence in Chapter III, this liberal state successfully, yet selectively, legitimates particular viewpoints; there is a methodological understanding and application of the foundations of religion in a particular context that attempts to balance tradition and modernity. At the same time, the country's jurisprudence and legislation on freedom of religion indicates a continuous deconstruction of state law and a crossfertilization of rules and standards seeming to evolve between state law and various religious norms giving rise to a further multiplicity of normative expectations. For legal pluralists mentioned here, the struggle for comprehension, recognition and positive accommodation of the rights to religious practices in the liberal West must be addressed in discussions of social inclusion, immigrant integration, multiculturalism, interculturalism, democratic participation and justice.

This chapter will therefore address legal pluralist viewpoints. It will address questions such as whether the Canadian state is sufficiently prohibited from favouring any one religious community such that it can allow maximum religious freedom for all. To this extent, legal pluralist perspectives shed light on the non-neutrality of liberal legalism. How can a secular state encourage religious diversity, pluralism and the

common good? The aim eventually, is to understand the relationship between different normative systems and the impact of state law on religious diversity in Canada. Is law responsible for society or vice-versa?

According to Berman, a legal pluralist, although the concept of law is signified by empirical reality, that is, political weight or substantive content of legal forms, these legal forms and meanings can be built upon by subsequent iterations.⁴⁵⁶ However, the factual power of the state that lends empiricity for the existence of its law is in its rule of recognition: as discussed previously, the political and legal philosophy of the nation state provides its descriptive conceptions.⁴⁵⁷ However, religious norms are central to people's political identity. Because religion, most times, is at the core of people's identity rather than a consequence of chosen or formalized projects, the search is for a balance between state law with the weight of historically recognized interpretive traditions and the emergence of an urgent appeal to confront challenges of distinctiveness in the here and now or within the empirical reality. In Canada, a crucial question therefore is whether and under what conditions the law could be usefully fashioned into a cross-cultural comparative concept, state or not.

A. The normative, philosophical and theological in the quest to manage religious diversity in Canada

In Canada, multiplicities of social norms have continued to surface and grow in importance in their own right. Each social field is full of normative material originating from within itself or from external social fields.⁴⁵⁸ And in general, every legal system claims to have authority over a particular field of its area of jurisdiction. This authority

⁴⁵⁶ Berman, "A Pluralist Approach" *supra* note 1 at 307.

⁴⁵⁷ Griffiths, "What is Legal Pluralism?" *supra* note 4.

⁴⁵⁸ Moore, *supra* note 22 at 58; Griffiths, "What is Legal Pluralism?" *supra* note 4 at 34.

also claims to have priority over any other law within the field. Although there are many forms of law, religious laws in particular have historically provided guidance for social behaviour in the form of interconnected norms explicitly stated in religious doctrines. Religious law and its claim as the final authority in the code of human conduct is a major component of legal pluralism (whether for salvation or for liberty); the socio-religious diversity itself produces a multiplicity of legal systems.

That law means different things to different people with different consequences for individuals is not necessarily a problem. Legal pluralists understand law as a “chaotic tangle of ongoing social arrangements in which there are complex and binding obligations” that exist and that are based on cultural and religious overlaps and collective experiences.⁴⁵⁹ However, for pluralists, collective social life also entails institutions, networks, and so on, that result from coexistence. Cotterrel, for example, states that life is a realm:

...of solidarity, identity and cooperation, but also of power, conflict, alienation, and isolation; of stable expectations, systems, custom, trust and confidence, but also of unpredictable action, unforeseen change, violence, disruption and discontinuity.⁴⁶⁰

Pluralism is a key value within society. Ryder points out the importance of the collective aspect of religion and the close relationship of religious and conscientious belief systems and community formation and people’s sense of membership in their communities and states: “these communities are sources of strength, support, and normative authority that provide a counterpoint to the role of the state in people’s

⁴⁵⁹ Griffiths, “What is Legal Pluralism?” *supra* note 4, quoting Moore at 58.

⁴⁶⁰ Cotterrell, Roger. *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*. (London: Ashgate Publishing Ltd. 2006) at 16.

lives.”⁴⁶¹ However, a condition of openness to the viewpoints of others does not come about through “a calculated inhabitation of an ethical intersubjectivity”⁴⁶²

Legal pluralists are acutely aware of the existence of tension and of the impossibility of its resolution within orthodox legal theory and practice. For Tie, there are no indications that religious perceptions are fundamentally altering the shape of formal legality; instead, there is a recolonization of citizens that practice religion through the assimilation of their views via the language of legal pluralism.⁴⁶³ The quest has to be purely a moral pursuit that reflects on the damage being by formal presumptuous legacy. Is it possible to identify the victimization of others for the sake of reparations?

We have seen that morality which is associated with openness to otherness occurs most acutely through resistance and conflict.⁴⁶⁴ Openness to otherness is born in negativity. The concept of legal pluralism therefore begins with this embarrassing, unpredictable and precarious phenomenon.⁴⁶⁵ However, this obvious tension between identity and morality seems to compromise the personal integrity and human dignity of some individual citizens and groups against excessive or harsh punishment. More importantly, there is a danger of cultural imperialism, political subjugation, or simply a product of extreme ethnoreligious centrality before the law. As was evident in Chapter III, the judge in Canadian courts dealing with freedom of religion, is torn between: creating certainty, “closure”, about law, in ordering the current complex society and at the same time “critiquing” the position taken by the assumptions of liberal law or “to be self-reflexive about the assumption through which they have come to know and judge

⁴⁶¹ Ryder, “The Canadian Conception” *Supra* note 27 at 87 & 94.

⁴⁶² Tie, *supra* note 13 at vi.

⁴⁶³ Tie, *ibid* at 8.

⁴⁶⁴ Tie, *ibid* at. vii.

⁴⁶⁵ Tie, *ibid* at vii.

law.”⁴⁶⁶ For Tie, the space between “closure” and “critique” are impossible to inhabit; it is this space which has occupied discourse on the recognition of socio-cultural difference to create bases for shared social life.⁴⁶⁷

Peaceful coexistence—of normative orders sharing the same field—that is opened in the midst of rigid dominance is therefore difficult unless the constitution which oversees the social plurality is compatible with its social organization and other faith norms are able to acquiesce to its power. In altogether ignoring or missing an ethical position towards the ‘other’ and their conceptions of law, the liberal theory of law can be construed as politically charged. Legal pluralists have given us a conceptual framework within which one can convincingly argue that liberal legalism in Canada is, emphatically, not neutral. For instance Tully, for whom diversity produces a ‘multiplicity of demands’ for self-rule that “conflict violently” in practice, reiterates that the goal has to be to construct an approach that does not subjugate other perspectives to itself and in the process, disassemble its own cultural imperatives under an aura of neutrality.⁴⁶⁸ For civil and peaceful interaction of diverse cultural and faith norms of a multiplicity of modernities in Canada, rethinking liberal legalism is urgent. Of great importance, is the fact that the tension through which historical ethics are reshaped are escalating. Within the growing degree of legal pluralism, legal fragmentation, violence, and societal weakness, there is urgency to making democracy work in Canada.

Although all liberal constitutions adhere to the *Universal Declaration of Human Rights*, the implementation of these rights is almost impossible precisely due to irreconcilable conflicts between the established concept of human rights and the

⁴⁶⁶ Tie, *ibid* at vi.

⁴⁶⁷ Tie, *ibid*.

⁴⁶⁸ Tully, “*Strange Multiplicity*” *supra* note 60 at 6.

conceptions based mainly on non-Western culture.⁴⁶⁹ And although the standards for permissible action and validity of transactions and procedures are provided in liberal constitutions to deal with problematic situations such as the management of conflict so that disputes are given meaning and are further regulated, discussions that began with sensitivity to frequent parallel or duplicatory legal regulations within one political organization have now become increasingly dominated by the exchange of many conceptual *à priori* and of stereotypes.

According to Chiba, a non-Western pluralist, Western people tend to take differences for granted and non-Western people are threatened that their human identity, based on their specific traditional/ethnic law, are infringed upon, particularly when licenced interpretation may distort meaning.⁴⁷⁰ Again, where maintenance of identity by different peoples becomes an issue and a social conflict arises, there is a need for mutual recognition, accommodation and co-habitation by the parties. And, if the power of state legislation fails in this task, conflicts will escalate. Differences in legal conceptions and differing meanings may incite mortal harm to human life.⁴⁷¹

B. Co-existence of different legal systems: The politics of identity versus the location of meaningful and heterogeneous faith-based values

For many pluralists, the tendency to categorize and misidentify a vast number of independent heterogeneous claims despite the latter's meaningful cultural values, raises dilemmas such as how are we connected and how do we want to co-exist in all aspects of our social realities and existence, economically, politically and even morally in the 21st

⁴⁶⁹ Chiba, Masaji. "The Intermediate Variable of Legal Concepts" (1998) 41 J Legal Plur 131 at 135.

⁴⁷⁰ Chiba, *ibid* at 134.

⁴⁷¹ Chiba, *ibid* at 132.

century and beyond?

Sack argues that legal pluralism is about the co-existence of different politically distinct legal systems of law and he feels that it is not possible to relativize the different forms of law.⁴⁷² Cover corroborates, that in ancient societies, political myths and religious myths coincided in content and function.⁴⁷³ Myths are mapping devices through which we look at the multifaceted character of the world. The space between a simple, empirical meaning and the ultimate meaning of life or of death is the complex, socio-cultural space within which myths operate. For Cover, because prescription is located in discourses of “history and destiny”, “beginning and end”; “explanation and purpose” not only are history and literature obviously located within a normative universe, but prescription that is embedded in legal text also has its origin and end in experience.⁴⁷⁴ Incidentally, Tamanaha also places legal pluralism within a historical context “for the only way to grasp where we are and where we are headed is to have a sense of how we arrived at the present.”⁴⁷⁵

Again, for legal pluralists, homogeneity of any type is not a natural condition or a starting point; we need to understand, empirically, law and its place in a universe of a multiplicity of historical and current social enclaves and lives. For most pluralists, more empirical research is needed in order to further our understandings of the many variations within empirical constellations of legal pluralism and the various ways in which social, political and economic conditions of life are influenced in the context of a

⁴⁷² See generally Sack, *supra* note 31.

⁴⁷³ Cover, “The Supreme Court 1982” *supra* note 20 at 11.

⁴⁷⁴ *Ibid.* Competing prescriptions go with competing narratives and prescriptions within constitutions are amended and do evolve and do compete, at 5.

⁴⁷⁵ Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global.” August 2007, Legal Studies Research Paper, #07-0080 (St. John’s University), [Tamanaha, “Understanding Legal Pluralism”] at 2.

multiplicity of modernities. In particular, the concepts of difference and sameness are not empiricized because they reflect a particular juridical value such as “differences in humans ought not to be taken account of” and the sameness lies in the categorization of particular normative order of social facts.⁴⁷⁶ The facts themselves remain irrelevant. Different rules for identical situations cannot be applied to a common circumstance as the functional possibilities vary. Because justice for a majority is an empirical question, it is only empiricity that must distinguish between normative attributes and the variable empirical functionality concerning moral considerations and standards of ethics or justice. However, monism seems to be leading to an ideology aimed at legal unification on a global scale and freedom of religion processes continue to be redefined in liberal terms in adjudication and legislation.⁴⁷⁷

The extent to which conventional centralized conceptions of law can be relied upon to recognize socio-cultural identities in a just manner and adjudicate fairly within conflicts between differently-positioned communities such as faith groups and associations is questionable. In the 21st century, the conflicts at the interface of diverse sources of legal normativity in Western liberal polities are particularly important and urgent to address.

In Canada, how should a religiously diverse society distribute rights and responsibilities? Do different aspects of law have to be integrated in a systematic fashion? It is understood that liberal law, by its nature, has to fulfil different functions and be cognizant of different values. Despite a variety of forms of self rule available in the dominant language of Canadian constitutionalism, and despite the attempts of the

⁴⁷⁶ Griffiths, “What is Legal Pluralism?” *supra* note 4 at 13.

⁴⁷⁷ Sack, *supra* note 31.

proportionality method under s. 1 of the *Charter* to refine responses to freedom of religion, alternative norms are still denied by liberal constitutional law. As we noticed in Chapter III, religious identity is recognized through highly formal norms of equality and non-discrimination with decidedly negotiated sets of norms about tolerance or accommodation. For Tully, the ranges of demands for identity are extremely broad: various nationalistic, linguistic, ethnic, inter-cultural, feminist, religious and indigenous voices call for the right to self-determination, not misrecognition.⁴⁷⁸ For Tully, any constitutional suppression of difference signals authoritative justification of uniformity.⁴⁷⁹ Cover confirms, that the exclusion of diversity of some and the inclusion of others is doctrinally narrow.⁴⁸⁰ Charles Taylor agrees that the monistic Eurocentric systems of legality are propelled by a newfound emphasis on identity based on universal forms of constitution and which have dominated sociolegal theories of liberalism, socialism and feminism.⁴⁸¹ Arthurs and Arnold suggest that globalization as an ideology should involve a change in Canadian and other Western social values and in liberal fundamental understandings about what role law does play and should play in society.⁴⁸²

Because law transcends any type of relativity, there can be no superior law except individual preferences based on measured individual values that hold strong personal convictions concerning characteristics of law.⁴⁸³ This individualized and personally relativized law eliminates the question of objective superiority and promotes unity in society. Legal pluralism is concerned with basic legal alternatives related to rules and

⁴⁷⁸ Tully, *Strange Multiplicity*, *supra* note 60 at 6.

⁴⁷⁹ Tully *ibid.*

⁴⁸⁰ Cover, "The Supreme Court 1982" *supra* note 20 at 13.

⁴⁸¹ Taylor, "*Modern Social Imaginaries*" *supra* note 5.

⁴⁸² Harry Arthurs & Brent Arnold, "Does the Charter Matter?" (2005) 11:1 Rev Const Stud 37.

⁴⁸³ Sack, *supra* note 31.

adjudication. Legal pluralism is not interested in the makeup of rules relating to the same subject matter or in the differences in the ways in which adjudicative bodies are arranged.⁴⁸⁴ Again, legal pluralists will take account of normative orders in so far as they are aspects of social behavior; there is no investigation of the truth of ideologies. Further, the pluralist does not engage in debate over the correctness of propositions about doctrines of law generally. Legitimacy, on the other hand, depends on meeting normative expectations—based on heartfelt bonds—of the multiplicity of modernities.

The works of several legal pluralist scholars are discussed below as they are vital to the argument in this thesis that there are other functional sources of normative authority in a liberal constitutional democracy than uniform state law.

C. The works of some legal pluralists

Cover, a foremost supporter of legal pluralism states that although the rules and principles of justice as instituted in formal law and conventions of social order are important, they are only a small part of the normative universe that ought to claim our attention.⁴⁸⁵ “We inhabit a *nomos*—a normative universe.”⁴⁸⁶ Law does not reside exclusively in the coercive commands of a sovereign power conferred by the Westphalian writ of sovereignty.⁴⁸⁷ Great legal civilizations and texts are much more than just their technical or practical sophistication, rhetorical power or inventive genius. The *nomos* is “constituted by a system of tension between reality and vision” and which cannot be utopia.⁴⁸⁸ Cover’s *nomos* constitutes and establishes paradigms for “dedication,

⁴⁸⁴ Sack, *ibid.*

⁴⁸⁵ Cover, “The Supreme Court 1982” *supra* note 20 at 10.

⁴⁸⁶ Cover, “The Supreme Court 1982” *ibid* at 4.

⁴⁸⁷ Cover, “The Supreme Court 1982” *ibid* at 48.

⁴⁸⁸ Cover, “The Supreme Court 1982” *ibid* at 9.

acquiescence, contradiction and resistance” and does not require a state.⁴⁸⁹ The creation of the legal process of a state has a collective social meaning and the state does not necessarily create legal meaning; law comes from society, which itself is now comprised of, as I have argued earlier, a multiplicity of modernities. For Cover, because universal values of modern secular liberal law are broad principles of law, they weaken the stronger jurisgenesis or creation of normative meaning based on, for instance, religious worship.⁴⁹⁰

Legal pluralists maintain that within modern liberal democratic and secularized constitutions, there is scope for the right to difference to be affirmed. The relationship between a given narrative and the way it comes to address the political conditions of a particular group needs to be understood. Narratives are created by imposing a normative force upon a state of affairs, real or imagined.⁴⁹¹ Narratives become interrelated sets of beliefs and attitudes held by a society or cultural group. Although sovereign assertions of law—prescriptive or adjudicatory—count as law, normative commitments also arise through the constant construction of law through various norm-generating communities.⁴⁹² Again, because the narrative in material reality was sourced by our imaginations, law is not merely a system of rules to be observed but a world in which we live. Because the creation of legal meaning, jurisgenesis, Cover explains, occurs through a cultural medium where real law grows, normative behavior is most intelligible and bonds are stronger within communal narratives as they provide the context of that

⁴⁸⁹ Cover, “The Supreme Court 1982” *ibid* at 6.

⁴⁹⁰ Cover, “The Supreme Court 1982” *ibid* at 11.

⁴⁹¹ Cover, “The Supreme Court 1982” *ibid* at 10

⁴⁹² Cover, “The Supreme Court 1982” *ibid* at 58.

behavior.⁴⁹³ These communal rules of conduct stemming from experience that a community has gained in its struggle to survive are the strong bonds of common meaning found in shared ritual or prayer and of a common corpus that are recognized as the moving normative force of the community. Cover maintains that societies function better on these strong interpersonal bonds, subjective discourse and trust. “We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.”⁴⁹⁴ However, strong interpersonal bonds are absent within state law. A sociocultural space without meaningful values and norms can potentially create divisions in terms of rights and obligations giving rise to a society of hierarchies leaving the “civil community...spiritually blind and ignorant [with] no faith, no creed and no gospel and its members are not brothers and sisters (prayer is not part of life).”⁴⁹⁵ “To inhabit a *nomos* is to know how to *live* in it.”⁴⁹⁶

To restate Cover, all legal traditions and institutions are part and parcel of a complex normative world, the “*corpus juris*” or prescriptions, including morality because, as he stated, “narratives...locate [and give] meaning.”⁴⁹⁷ The methods to develop cooperation between narrative and rules and the promotion of internal order and external strength, may or may not be written down.⁴⁹⁸ As rules establish normative behavior and legal doctrine between the normative and the material universe, between the demands of an ethic and constraints of reality, whether they are articulated or not, they exist and are enforced. The normative meaning therefore inheres in legal doctrines such

⁴⁹³ Cover, “The Supreme Court 1982” *ibid* at 10-11.

⁴⁹⁴ Cover, “The Supreme Court 1982” *ibid* at 4.

⁴⁹⁵ Cover, “The Supreme Court 1982” *ibid* at 14.

⁴⁹⁶ Cover, “The Supreme Court 1982” *ibid* at 6.

⁴⁹⁷ Cover, “The Supreme Court 1982” *ibid* at 5.

⁴⁹⁸ Cover, “The Supreme Court 1982” *ibid* at 31

as in messianic messages of liberation promising peace, truth and happiness and also in “apologies of power and privilege and in the critiques that may be leveled as the justificatory enterprises of law.”⁴⁹⁹

Moore, another pluralist, agrees that complex physical situations involving the co-existence of religious and non-religious conceptions antedate the establishment of a modern state in many contemporary socio-geographical spaces of the world.⁵⁰⁰ She emphasizes that the legal organization of society is congruent with its social organization and that normative heterogeneity as linked with social action takes place in a “context of multiple, overlapping semi-autonomous social fields which...is in practice a dynamic condition.”⁵⁰¹ Moore’s current socio-geographical spaces are social fields within nation states; national states; or even transnational spaces. According to Moore, each field within a particular heterogeneity is self-regulated but it is also vulnerable to the larger complex world by which it is surrounded. For Moore, because the nation state is now the fundamental unit of political organization, particularly in democracies and the rule of liberal law is its central instrument, and because law is present in every “semi-autonomous social field” as whole societies are structured and seen as a pattern and network of “areas of autonomy and modes of self-regulation”, she points out the dynamic aspect of partial autonomy: the tendency of self-regulating social fields is “to fight any encroachment on autonomy previously enjoyed.”⁵⁰² For Moore, legal pluralism is a complex social situation in which law finds its working, free from hierarchical, centralist, whole society preconceptions, with an emphasis on a continuously variable autonomy of

⁴⁹⁹ Cover, “The Supreme Court 1982” *ibid* at 9.

⁵⁰⁰ Moore *supra* note 22.

⁵⁰¹ Griffiths, “What is Legal Pluralism?” *supra* note 4 at 35.

⁵⁰² Moore *supra* note 22 at 78.

social fields.

Griffiths agrees with Moore's *descriptive* theory of legal pluralism, that the sociolegal structure is manifest in the actual pattern of interaction of the various semi-autonomous fields which can be observed.⁵⁰³ But he adds that if the recognition, incorporation or validation of normative heterogeneity stem from the perspective of a nation-state's concept of legal pluralism, the latter not only contributes to the theory of legal centralism but it obscures this descriptive theory of law. For Griffiths, the normative heterogeneity requires that the "social space is normatively full rather than empty."⁵⁰⁴

For Tamanaha, what makes legal pluralism noteworthy is not merely the fact that there are multiple uncoordinated, coexisting or overlapping bodies of law, but that there is diversity amongst them making competing claims of authority; imposing conflicting demands or norms; and having different styles and orientations. He refers to a multiplicity of legal orders ranging from village laws to sophisticated legal systems that exist nationally, supranationally, transnationally and internationally. Globally or locally, these laws can be customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society. There is also an evident increase in quasi-legal activities, from private policing and judging, to privately run prisons, to the ongoing creation of the new *lex mercatoria*, a body of transnational commercial law that is almost entirely the product of private lawmaking activities.⁵⁰⁵

For Berman, the complexity is in law in a world of hybrid legal spaces where a

⁵⁰³ Griffiths, "What is Legal Pluralism?" *supra* note 4 at 36-37.

⁵⁰⁴ *Ibid.* Griffiths at 34.

⁵⁰⁵ Tamanaha, "Understanding Legal Pluralism", *Supra* note 469 at 1.

single act or actor continues to be regulated by multiple legal or quasi-legal regimes.⁵⁰⁶

Hybrid norms are heterogeneous in origin, composition, and style, and have different types of independencies. Although they are descriptive in nature, they may perform the same function as the rule of law, rule, regulation, precept, statute, ordinance, and cannon, all of which are primary sources of ethical standards of decision-making prescribed by a single sovereign authority requiring obedience on those subjected to this authority.⁵⁰⁷

For De Sousa Santos, there is an incompleteness of each culture and a cross-culture conception of human rights is called for in a process of “diatopical hermeneutics” or on the idea that the *topoi* of an individual culture, no matter how strong they may be, are as incomplete as the culture itself.⁵⁰⁸ It has to be assessed from another culture’s *topoi*. He raises the consciousness of reciprocal incompleteness to its maximum possible by engaging in the dialogue with one foot in one culture and the other in another. This cannot occur in a social void as it shares a political bias in favour of emancipation with a different process of knowledge creation. It requires a production of knowledge that must be collective, interactive, intersubjective, networked and perhaps prescriptive.

However, for Griffiths, the *descriptive* conception of legal pluralism should break the stranglehold of “a single, unified and exclusive hierarchical normative ordering.”⁵⁰⁹ For him, the analysis of an empirical state of affairs points to legal orders which do not belong to a single system. For Griffiths also, the term ‘legal pluralism’ is not an attribute of a legal system such as a: doctrine, theory, or an ideology. The concept of legal pluralism can never be complete, orderly, and institutionalizable. And Sack laments, that

⁵⁰⁶ Berman, “A Pluralist Approach” *supra* note 1 at 321.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 340.

⁵⁰⁹ Griffiths, “What is Legal Pluralism?” *supra* note 4 at 4.

in the interrelation of legal rules with state law, that unless other forms of law are translated into rights and rules, and informal mechanisms are institutionalized, the challenges of legal pluralism are unwelcome and therefore a threat to liberal legalism.⁵¹⁰

For Berman, Cover's definition of law as that being constantly constructed through the contest of various norm-generating communities is not only unavoidable but desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations including the official prescriptive or adjudicatory jurisdiction.⁵¹¹ And Sack feels that law cannot escape its responsibility within changing societies, politics and culturally-specific formations; what is crucial is not analytical clarity and consistency achieved through logic and advanced theories of forms of law but the performance of practical social tasks.⁵¹² For pluralists, to be effective, law has to remain flexible.

Globally, the legal system is now an interlocking web of jurisdictional assertions by state, international, and non-state normative communities. Each type of overlapping jurisdictional assertion (state versus state; state versus international body; state versus non-state entity) creates a potentially mixed legal space that is not easily eliminated. It can be argued that with state versus state conflicts, growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions "will feel effects of activities around the globe, leading inevitably to multiple assertions of legal authority over the same act, without regard to territorial

⁵¹⁰ Sack, *supra* note 31.

⁵¹¹ Berman, "Global" *supra* note 5 at 1157

⁵¹² Sack, *supra* note 31.

location.”⁵¹³ And again, in the ever-increasing global flows and frictions, people feel ties to—and act based on affiliations with—multiple communities in addition to their territorial ones. These ties may be ethnic, religious, or epistemic, transnational, subnational, or international, and the norms asserted by such communities frequently challenge territorially-based authority. Canon law and other religious community norms have continued to operate in significant overlap with liberal state laws.

In Canada, Muslim and Jewish citizens, among others, experience conflict between their personal law tied to religion and Canadian law tied to their nation-state and this continues to pose constitutional and other challenges. As stated, because ethnicities bond and can also create significant normative communities, some normative systems therefore will deny even a limited mutual dialogue creating further challenges. A pluralist approach cannot provide a decision-making authority about which norms prevail within a messy hybrid world. “Pluralism fundamentally challenges both positivist and natural rights-based assumptions that there can ever be a single answer.”⁵¹⁴

Paradoxically, universal harmonization is not only unlikely to satisfy everyone but neither will it be fully achievable. Hybridity is therefore a messy reality and it not only preserves spaces for contestation, creative adaptation, and innovation, but also inculcates ideals of tolerance, dialogue, and mutual accommodation in our adjudicatory and regulatory institutions.⁵¹⁵ The ideal of the legal reality of the modern state is not, and as Griffiths affirms, “tidy, consistent, organized ... nicely captured in the common identification of ‘law’ and ‘legal system.’”⁵¹⁶ In effect, the ideological heritage of the

⁵¹³ Berman, “Global” *supra* note 5 at 1159.

⁵¹⁴ *Ibid.* at 1165.

⁵¹⁵ *Ibid.*

⁵¹⁶ Griffiths, “What is Legal Pluralism?” *supra* note 4 at 4.

bourgeois revolutions and liberal hegemony of the last few centuries is also a complex of ideas concerning the nature of law and its place in social life.⁵¹⁷

D. Hegemonic state law and justification by courts: are complex and divergent interpretations accounting for mythical origins of norms?

As a pluralist, for Griffiths, despite the fact that law and narrative are inseparable, the hegemony of legal centralism stemming from Western theoretical approaches of law, continues to dictate that “law is and should be the law of the state, uniform for all persons, exclusive of all other law and administered by a single set of state institutions.”⁵¹⁸ The intricate union of central law commands a systematic normative ordering: how things ought to be with terms of rules, principles, categories, standards, notions, and schemes of meaning. Within this teleological vision, in other words, a commitment of official judges to the constitution, the origin of law in myth and history does not exist in the justification by a court. The liberal secular world disclaims control over the interpretation of narrative and it particularly disclaims the thick contextuality to all moral situations so that all other normative orderings such as of church, family, associations and organizations, both voluntary and economic, are subordinate to liberal institutional state law. State law can therefore permanently separate reality from vision.

Again, the propositions of state law and general layers of norms lend validity from the bottom up until some ultimate norm is reached.⁵¹⁹ In Canada, as outlined in Chapter III, the court may consider a break from its own homogeneity in the interest of being tolerable, for instance, in determining and formulating rules regarding conflict of identity such as sect, religious group, marriage laws, rites and rituals, etc. This may

⁵¹⁷ Griffiths, “What is Legal Pluralism?” *supra* note 4 at 3.

⁵¹⁸ *Ibid.* Griffiths at 3.

⁵¹⁹ *Ibid.* Griffiths

strain the court's own legal ethics in recognizing a particular religious content and norms as valid. When parts of the vision are given depth and are highlighted and other parts are cast aside—and associations even reinterpret the terms of their own being—the law takes on the role of adjudicating between many different substantive normative orders.

Both, state constitutions and widespread narrative traditions, that are not universally accepted as a basis for interpretation, are competing with 'natural law' for primacy. Cover points out that insulated communities have established their own meanings for constitutional principles in their struggle to maintain independence and authority of their own *nomos*. The norm-generating aspects of the free exercise of religion, corporation law, and contract are all instances of associational liberty protected by insular constitutions. Again, insularity, particularly of ancient scriptural religious tenets, is maintained by communities and groups at whatever cost. However, the insular movements that generate their own constitutional law have to this point been considered almost as if they operated in a world in which there is no meaning and have been subjected to force and violence.

According to Cover, no religious churches, however small and dedicated, or utopian communities, however isolated, or cadres of judges, however independent, can ever manage a total break from other groups with other understandings of law.⁵²⁰ For Cover, just as constitutionalism is part of what may legitimize the state, so constitutionalism may legitimize within a different framework, communities and movements. State law may be mistakenly overreaching itself with only a partial insight into the operation of law where multiplicities of modernities exist. Because Canadian law and its foundational beliefs are based on political ideology of liberalism, it will

⁵²⁰ Cover, "The Supreme Court 1982" *supra* note 20 at 33.

require a substantial adaptation and reformulation of both existing legislation and judicial precedent to make provision for substantive recognition of the normative claims of religious freedom. Even though official values are ultimately grounded in rational ethical arguments, we need ethical *raw data* as inputs for critical reflection and agreement. These *initial ethical inputs* come from cultures.

And Griffiths insists that the plurality of laws in a liberal modernity are “private as well as public, and the national legal system is ... a secondary rather than a primary locus of regulation.”⁵²¹ In the current normative world, there is no obvious central text that exhaustively supplies both narrative and precept. The complicated reality and tension between the ideology of legal centralism and the actual empiricism of a liberal state is further problematized by the idealized depiction of law in liberal modernity and its use to unjustly compare it to and to belittle other normative orders.⁵²² Yet, state-declared constitutions and some theological tenets continue to act as supreme law in the place of foundational beginnings emanating jurisgeneration.

This is evident within the jurisprudence wherein strong traditions of common visions and obligations continue to be at the heart of religious institutions. In that interdependence of legal meanings makes it possible to say that all communities, including the judge, are engaged in the task of constitutional understanding, the distinct starting points, stories, commitments to legal meaning and identifications make us realize that we cannot pretend to a unitary law.

This high regard for religious liberty and type of meaning of law can therefore destabilize power; there are sometimes tremendous stresses that law abiding citizens,

⁵²¹ Griffiths, *supra* note 4, quoting Galanter at 20.

⁵²² Griffiths, *supra* note 4.

believers for instance, face, when there is conflict between secular principles and deeply held religious aspects.⁵²³ In the majority of the cases of this nature, when there is a collision, allegiance is towards “God.” These forms of consciousness have stemmed from tortuous histories of hardship and ‘martyrs’ have arisen to ‘suffer’ for tenets that are upheld.

In the law-state link, von Benda-Beckmann argues that dubbing normative orders—other than state law that are not recognized—as ethnocentric, obscures the fundamental differences in form, structure and effective sanctioning between state law and other normative orders.⁵²⁴ As far as von Benda-Beckmann is concerned, whether law functions as social control or that it resolves conflicts or creates conflicts (it does both) in different empirical situations, is not as important as to how effective is it in terms of people conforming to the normative boundaries set by their law. The existence of a rule of conduct within an association, such as a religious organization, is a matter of actual behavior and recognition by the association of a standard within. Again, the concept of a social group and the concept of rules of conduct are inseparable. Does the law conform to the behaviour of the member in terms of the individual’s place within the specific association?

Pluralists maintain that because interpersonal faith and reason are *both* constitutive of the normative worlds, people cannot be satisfied with rules that disallow them to live the law. Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. Legal pluralism is omnipresent in any human society and law remains open and dynamic, not requiring entire legal systems so that the

⁵²³ See generally Chapter III herein.

⁵²⁴ von Benda-Beckmann, F., “Who’s Afraid of Legal Pluralism?” (2002) 47 J Legal Plur Unoff Law at 37.

social state of affairs may have multiple legal mechanisms comprising of rules or clusters of rules or institutions.

As we saw in Chapter III, in broad arguments, even at the Supreme Court of Canada, there is a range of opinion, but it does choose, as per Cover, a single justification of a specific court or “in the last resort a uniform rule of civil justice.”⁵²⁵ Cover suggests that although normative behaviour can be located within a “common script” it is when law is used as *social control to justify and ensure the co-existence* of many normative worlds, that the social basis for jurisgenesis destroys legal meaning—jurispathy.⁵²⁶ Even the most perfectly designed statutes need to be interpreted by the courts and ambiguities in language are inevitable. Consistently fresh events are adapted to new situations (continual legislative amendment is not always practical). Meaning is *deliberately constructed* in the normative world by jurisprudence. Jurisprudence reveals that the capacity to turn the customs of a specific religious group into law can only be done in specified circumstances when it is allowed to replace its uniform general law. As new law continues to be created through the sectarian separation of communities the “too fertile forces of jurisgenesis” create a multiplicity of meanings.⁵²⁷ Jurisgeneration by which legal meaning proliferates in cultures including interpretation of history, are strong forces but the resultant diversity is subject to violence constrained by monistic norms; the jurisgenerative world of multiple incoherent and violent interactions now requires to be maintained.

On the capacity to express a privileged hermeneutic on unresolvable differences of opinion by higher courts, Cover quotes US Justice Jackson’s famous aphorism “We

⁵²⁵ Cover, “The Supreme Court 1982” *supra* note 20 at 41.

⁵²⁶ *Ibid.* Cover at 12.

⁵²⁷ *Ibid.* Cover at 13.

are not final because we are infallible, but we are infallible only because we are final.”⁵²⁸

If it is the state that creates law only to “confuse the status of interpretation with the status of political domination” and if it is the state that elevates the court’s interpretative privilege within its political hierarchy, legal codes provided by conscious legislation deny the jurisgenerative community its legal meaning and integrity of a law of its own.⁵²⁹ This exercise of superior brute force by agencies of state law stamps out the creative hermeneutic of principle found across a multiplicity of legal meaning. For Cover, state courts can be coercive as they have supreme jurispathic capacity.

Cover suggests that there is an “undisciplined” yet “visionary jurisgenerative impulse” that is indifferent to the state.⁵³⁰ Powerful movements can create their own nomian worlds. That legal pluralists are widely divergent in the conceptualization of law and legal pluralism and that the relation of law’s content to its meaning is complicated was already well enunciated by Geertz, that “man is an animal suspended in webs of significance he himself has spun”⁵³¹

Complexities also arise when precedents multiply over decades leading to more uncertainty in law. Although common law is valuable, it does not always produce desirable results and judges taking numerous such undesirable decisions, including conflicting precedents on unsettled points, may have to come to a predicament with no obvious escape. This impasse—a radical dichotomy between the social organization of law as power and the organization of law as meaning—would take very long to resolve.

For Cover, a significant resource that enables us to “submit, rejoice, struggle,

⁵²⁸ Cover, *ibid* at 42.

⁵²⁹ Cover *ibid* at 40.

⁵³⁰ Cover *ibid* at 67.

⁵³¹ Cover *ibid* at 5, wherein Cover quotes Geertz at n 7.

pervert, mock, disgrace, humiliate, or dignify,” is manifest in patterns of intricate competition, interaction, negotiation, isolationism and the like.⁵³² The very existence of the normative universe is due to the *force of commitment to interpretation and the determination of the meaning of law*.⁵³³ Depending on which side a narrative is placed, the degree of norm-generating autonomy on the part of any association is not liberty to *be* but liberty and capacity to create and interpret law.⁵³⁴ Law therefore is meaningful when an interpretation is acceptable with a personal commitment to *act*, an affirmation, on the transformed position taken. An affirmation projects a commitment to understand the norm at work in reality – an ultimate vision in relation to its utility of all possible worlds. Again, any transformed views requiring affirmations must be with the understanding that the group, religious or otherwise, is being projected into the realm of the unknown. “The distance between the universality of the law and the *concrete legal situation* in a particular case is ... indissoluble.”⁵³⁵ For Sack, the presiding “positive law [should have]...no difficulties in incorporating even the most exotic forms of substantive foreign law.”⁵³⁶ For Cover, we ought to stop “circumscribing the *nomos*; we ought to invite new worlds [in].”⁵³⁷

Matter of fact statements about law as social control, as culture, as power and as process are useful only to the extent of the qualities and function of law in actual life and should not to be confused with identifying law with any of these specific manifestations. Neither is the scope of moral life designed from an overarching religious domain. For

⁵³² Cover *ibid* at 8.

⁵³³ Cover *ibid*.

⁵³⁴ Cover *ibid* at 31.

⁵³⁵ Merry, *supra* note 99.

⁵³⁶ Sack, *supra* note 31 at 6

⁵³⁷ Cover, *supra* note 20 at 68.

Griffiths, uniformed and administered by a single set of institutions, state law is blatantly illegitimate as, although it is vast and sophisticated, it is a myopic and stifling umbrella of liberal jurisprudence.⁵³⁸ In other words, legal centralism has been the major obstacle to the development of a descriptive theory of law.

E. Conclusion: powerful plural epistemological normativities of multiple modernities as 'agents' of social transformation

According to Shah, generally, the export via colonialism or by voluntary adoption of the monistic conception of law that has penetrated legal theory as the only form of law which is made and recognized by the state is now fiction.⁵³⁹ In referencing Menski, Shah insists that to the contrary, the core thesis is that the search for a uniform set of rules for a global order is bound to be futile because laws embody and reflect the socio-cultural particulars and experiences of functioning societies, and which, although transmitted longitudinally within the society, are nonetheless complex, fluid and dynamic. If conflict is predictable due to non-inclusive governance, and it is understood that rejection of pluralism may be the spark for this condition, the value of pluralism is essential in preempting the risk of conflict in today's ever-globalizing world.

However, a pluralist disposition is also a learned value and a continuous investment by government in harnessing the power of diversity. Allowing communities to aspire to self-rule in accord with their own customs and traditions will eradicate the injustice of an alien form of rule.⁵⁴⁰ Any adequate theory of law and of a legal order therefore must, among other considerations, take account of the particularized socio-political institutions of the society, that society's belief systems, its politics and its

⁵³⁸ Griffiths, "What is Legal Pluralism?" *supra* note 4.

⁵³⁹ Shah, "Religion in a Legal Environment" *supra* note 69 at 1.

⁵⁴⁰ Tully, *Strange Multiplicity* *Supra* note 60 at 6.

history. The one universal characteristic of all legal systems, Shah claims, is thus the inherent tendency towards “plurality-consciousness.”⁵⁴¹ Plurality is human rights, successful democracy, and institutional strength in quality service of humanity all rolled into one.⁵⁴²

Shah also brings to our attention that although the West may have been home to legal modernism, both, Menski and Chiba, who he also references, would combine modern natural law theories with legal liberalism and socio-legal traditions to form an interactive, triangular, concept of legal pluralism; in other words, their approaches to legal pluralism would include analyses of historical and conceptual development of non-Western as well as Western jurisprudence.⁵⁴³ However, the thinking that reproduction of state law by ordinary citizens is not considered legal is deeply ingrained in the methodology of social scholars, including some lawyers and judges.⁵⁴⁴ The construction of alternative approaches which emphasize morality and maneuvering through conflicting political interests, has to resonate with the rule of law.

However, in the alignment of the rule of constitutional law and liberalism for the management of religious diversity, the focus is on practical accommodation, rather than a sophisticated normative and philosophical debate.⁵⁴⁵ The liberal attitude of subordination of difference, particularly of religion, to an abstract individualism of liberal modernity—despite the fact that the human identity needs particular anchors—succeeds in invoking the constitutional rule of law to resist legislation and democracy. Democracy and human rights suffer even with the lofty achievements of the rule of law.

⁵⁴¹ *Ibid.*

⁵⁴² Shah, “Religion in a Legal Environment” *supra* note 69.

⁵⁴³ Shah, *ibid* at 1.

⁵⁴⁴ Beckmann, *Supra* note 524, at 103-107.

⁵⁴⁵ Parekh, “*Rethinking Multiculturalism*” *supra* note 17.

Although Canadians show a high degree of allegiance to or identification with the *Charter*, Blattberg asserts that many Canadian citizens feel somewhat alienated from the constitution itself and many can't seem to reconcile themselves to it at all.⁵⁴⁶ According to Blattberg, many Canadians are confused about what exactly it would mean to have achieved any kind of constitutional home.⁵⁴⁷ There is a growing recognition of cultural diversity within Canada but the same cannot be said about the recognition of its epistemological diversity, that is, the diversity of knowledge systems underlying the practices of a plurality of different social groups. The philosophical argument relies on the uncertainties of a rationalized and objective epistemology. If there are uncertainties and limits to popular participation in the political and therefore constitutional openness to change, the goal of democracy and liberal justice cannot be realized.

A more robust notion of religious freedom would explore equality of opportunities to be granted to the different kinds of knowledge engaged in ever broadening epistemological disputes aimed both at maximizing their respective contributions to build a more democratic and just society and the decolonizing of knowledge and power. There is no social justice without cognitive justice. Berger too states that the encounter between law and religion runs into conflict with an ambitious culture of the rule of law that is not as ready to delve into deep religious diversity.⁵⁴⁸ However, the task of jurisprudence is to offer us a means by which we can understand and relate to the complex phenomenon of law and society.⁵⁴⁹

⁵⁴⁶ Charles Blattberg, *Shall we Dance?: A Patriotic Politics for Canada* (Montréal: McGill-Queen's University Press, 2003).

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Berger, "Law's Religion" *supra* note 394 at 247-48.

⁵⁴⁹ Peer Zumbansen, Seminar on "Comparative Law and Political Economy Research Seminar" held at Osgoode Hall Law School, Toronto, Canada, 2010) at 26.

CONCLUSION

The Failure of Canadian Secular Liberal Law to Transcend Difference in Globalization: Religious Rights Remain Accomodational Political Claims of a Multiplicity of Modernities

Canada is ruled by a modern, liberal secular rights-protecting polity with an entrenched *Charter of Rights and Freedoms* making its liberal constitution the supreme law of the country.⁵⁵⁰ Its legislatures have a constitutional role in accommodating difference and the judicial review function for this role is vested in its courts. It is in courts that rights are actively pursued and the judge is the final arbiter that shapes the claims of the constitutional rule of liberal law. Indeed, it is the commitment to the rule of liberal constitutional law that judicial review is legitimated and which forces all institutions in society to abide by *Charter* guarantees.⁵⁵¹ The 1982 *Charter* is, in effect, a response to diversity in Canada and the post-*Charter* era is the latest incarnation of modernity in Canada, otherwise defined as a multiplicity of modernities. In the ever increasing global flows, different people feel ties to and act based on affiliations to their own group in addition to the affiliation to the state. Yet, the profoundly entrenched 17th century European ideology of the isolated and abstracted individual endures within the *Charter*.

In terms of the differences between individual rights and group rights and the norms asserted by these communities, the European ideology continues to shape the post-*Charter* Canadian approach to diversity. In the 30 plus years since the institution of the *Charter*, each instance of the difference in current normative systems continues to undergo a process of accommodation from *within* liberal legalism and often adjudicated

⁵⁵⁰ *Charter supra* note 6.

⁵⁵¹ *CCL supra* note 2.

upon as an expression of something temporary. In the post-*Charter* era, religion and the associated norms seem to have become inconsequential.

A. Revisiting the historical and theoretical perspectives within liberal law

As stated, historically, liberal law and jurisprudence have moved from supporting a state religion and considering as heathens those who did not conform to that particular religion, to a position where some religions are more clearly recognized, yet, many are not. In Canada, because the majority religion stems from Christendom, there is still a persistence of Christian privilege in Western institutional practices and structures. Although, the relationship between the religious believer and liberal law is specifically guaranteed by s. 2 (a) of the Canadian *Charter*, and basic equality guarantees to specific isolated groups, including religious organizations, are also provided in Section 15(1) of the *Charter*, the liberal legal system accommodates the needs, traditions and cultures of the majority packaged in the language of neutral rules that conceal their religious, sociological and cultural underpinnings. And although a neutral form of secularism in society seems to be entrenched in the Canadian constitution, and religion is a choice that is constructed under the dogmatic and individualistic doctrine of the autonomy of the individual, or the guarantee of freedom of individual conscience and religion,⁵⁵² the post-*Charter* era continues to be based on historical theoretical presuppositions and ideals of Eurocentric liberal modernism and in keeping with the Eurocentric concept of secularism wherein religious claims are perceived as political claims. Liberal legalism conflicts with multiple modern identities and their plural sociolegal perspectives.

Again, in Canadian liberal politics and law, because the supreme natural right to

⁵⁵² Heyking, *supra* note 117.

pursue happiness has come to mean that each person is the chief bearer of rights as against the state, and has equal rights before the law, and because these guaranteed rights to life, liberty and security are negative in nature, the *Charter* does not protect positive rights such as economic or social entitlements in the form of employment, shelter, social services, et cetera.⁵⁵³ Ideas about freedom, equality and justice will always remain central to liberalism but they have to be endorsed by all citizens that are loyal to competing definitions about these values. Individual choices that are self-centered are liberating, but at the same time, individual choices associated with religious institutions and beliefs need more support at the intersection of liberal legal authority and what it considers to be illiberal ways of life. For instance, the constitution emphasizes that people might be equal or unequal and may or may not be treated equally, or unequally, however the ideal of equality exerts a great moral force.

Yet, perpetuating historical presuppositions of liberal modernity as central to contemporary social theory in Western democracies, and perpetuating the autonomous and self-sustaining positive law by power politics and essentialism, context is replicated in modern constitutional law as a bearer of traditions. The consistent imposition of this particular approach in a plural society is unjust and may result in violent conflicts.

B. Recapping on current socio-normative and socio-political contexts in Canada

As outlined herein, generally, the sociology of law indicates that law: springs forth from sociopolitical contexts—contexts that exist in different historical eras; is biased in serving some interests rather than others; is differently orientated in different societies giving rise to different legal systems; and continues to dominate through a

⁵⁵³ *Supra* note 2, *CCL* at 1133-34.

combination of coercive and ideological legal systems, structures and processes. It was also seen that modern Western liberal constitutional law limits state interference in individual freedoms of conscience and religion, and the state is in effect the primary agent of social control and change. Law remains its purposive instrument to *transform* society. In modernity, liberal constitutional law changes and redirects social relations in the pursuit of positive social ends and goals by extensively regulating a range of activities from employment practices to financial services to human rights with a bias towards informal legal systems, customary law, and religious tenets. It is precisely when law is viewed as an expression of social relations that the complex connections and tensions between positive laws of modern societies and the spontaneous relations that have been interfered with that the latter become apparent.

A crucial lesson that is emerging from the social reality in Canada is that state ethics cannot be built by only public and elite-driven institutions based on outgrown philosophy or by constitutional engineering. The citizenry has to be fully engaged with all aspects of life, including the practice of religion, which is what maintains and produces good civic morals in the majority of society. The religious identity covers a large and important area of human life and shapes the way a believer is defined and regulated. Religion is, for believers, the source of their worldview and values, it is the very ground of their being and thus their frame of reference in the governance of all areas of their lives. For believers, this is what gives religion its political significance; its importance extends well beyond the narrow confines of the liberal constitutional order. Philosophically, religion claims to shape public reason rather than be shaped by it.

Religion in effect assumes that liberal rationalism is not sufficient for principles

of conduct and social meaning. “Scriptural literalists” go even further with their finality on the scripture as they argue that rationalism rests on faith; they may be logically incoherent.⁵⁵⁴ The secular world, on the other hand, rejects the *essence* of religion and, because state law is based on reasons that are within reach of society at large, the public sphere is a realm of reason and rationality as opposed to religious beliefs stemming from faith or from cultural community.

In Canada, the most important mechanism of constitutional change in contemporary society is now the rule of constitutional law and judicial interpretation in the governance of a multiplicity of modernities and their sincere beliefs. Since 1982, the *Charter* has enhanced the political power of the courts that are the “natural” interpreters of the constitution. In engaging in constitutional review, Canadian courts can infuse and breathe life into the constitution but they may not stray far from the corpus of liberal constitutional law if both are to thrive in the present system. Even the most analysed interpretations are subject to constitutional limitations which lends a certain amount of vagueness to constitutional outcomes.

Liberal law’s inconsistent and inelastic approach to liberalism itself denies the relevance of the value of diversity at the expense of liberalism itself.⁵⁵⁵ There is no feasible position between difference and sameness within modern liberal law. The process of secularization in the liberation of the individual is misunderstood.⁵⁵⁶ The tension between the ancient norms of minority religion and the extremely slow reshaping of liberal law is apparent in Canadian courts. Unequal treatment of religious freedom by legislation and by courts or misinterpretation of religious norms due to a lack of

⁵⁵⁴ Parekh, *Rethinking Multiculturalism* supra note 17.

⁵⁵⁵ *Ibid.* Parekh, in Foreword.

⁵⁵⁶ Taylor, “The Polysemy” supra note 41.

understanding the social significance of such norms is a form of discrimination. But more importantly, the assertion of difference can be legitimated and sometimes violated.

C. Constitutional commitment to freedom of religion in Canada

The constitutional commitment to freedom of religion in section 2(a) of the *Charter* must be taken very seriously, particularly by the enactors and enforcers of law via legislation, administration and adjudication. As noted in Chapter III, in Canada, when there are disagreements on some acute moral, political and legal conflicts at the center of liberal secular values, the importance of religious liberty may be by-passed if it is untenable to the political majority. Because within secular legalism the assumption of equality is a uniform treatment, in the event of a challenge of unconstitutionality, courts have to determine whether the limit under s. 1 of the *Charter* is “reasonable” and “demonstrably justified.” Justification of the limit on *Charter* freedoms such as freedom of religion in s. 2 (a) varies in each case. Some such cases are difficult to solve reflecting limitation in the capacities afforded to the judge. However, as was evident in the case of *A.C.*, constitutional constraints on democratic legislation enforced by judicial review or judicial restraint are morally problematic and can even be illegitimate.⁵⁵⁷ And those that insist on a homogeneous form of liberal legalism may be limiting the capacity to adjudicate fairly within conflicts between differently positioned real communities. Does this constitute a violation of human rights? The overtly narrow treatment of equality issues by the courts pulls the judiciary and the law directly into a political debate. In the tendency to politically simplify different religious norms, there is misinterpretation of complex social issues; liberal law and its principles overshadow the social goods and pre-

⁵⁵⁷ *A.C.* *supra* note 346; Also see Marmor, *supra* note 340 at ix.

existing capital of collectivities. Communities of believers are finding it difficult to mobilize the *Charter* for their constitutional status against social disparities. It would seem that the interest of the believer is legally protected in court and in the event of a moral conflict, the cornerstone of religious freedom in the *Charter* is respect for the perspectives of the other. However, where freedom of religion presents a dilemma, judges do not go far enough in the exercise of this purpose of the protection of specific claims and equal participation in society. Various national minorities, religious groups and intercultural multiplicities in Canada desire, in their own different ways, society to recognize, the legitimacy of their differences which constitute their normative identity and well-being.⁵⁵⁸

D. Possibilities in liberty: a mix of identities, equal religious citizenship and legal pluralism?

As long as secularity means non-religiosity or a contra-indication to religion, the fear of intervention of religion into political life will remain strong and just as equally, will the fear of foreshadowing of religion by secular interventions.⁵⁵⁹ Although a conscience that dictates that everything legal that is religious is not acceptable, faith-based conscience also plays an important role in the well-being of the citizen.⁵⁶⁰ Again, religious centralism, like *legal* centralism, is also an unrealistic analytical tool but in terms of ethical behaviour, both individual human rationality and collective morality are integral to humanity and a way of life. The dominance of secularism undermines religious ritualistic claims.

In Canada, the legitimacy of the institution of the judiciary is enduring. Pluralists

⁵⁵⁸ Parekh, “*Rethinking Multiculturalism*” *supra* note 17.

⁵⁵⁹ Heyking, *supra* note 117 at 3.

⁵⁶⁰ Menski *supra* note 7 at 194.

and anthropological analysts, however, have suggested that in historical terms, because plurality is a product of struggle, negotiation and other interactions amongst a multiplicity of social fields, it is a core feature of human experience.⁵⁶¹ However, it is the very commitment to Western modernity that has steadily atrophied the awareness of the knowledge of a variety of conventions that humans use to order their lives and experiences.⁵⁶²

Although, as per Cover, narrative in material reality was sourced by our imaginations and the human is indeed a spin-doctor and gets caught in his/her own trappings,⁵⁶³ reflection on Canada, and the culture, ethics and political reality in which individuals and communities are making myriad different choices, reveals a widening, transforming, hyperplural and overlapping identity that has to grapple with the complexities of law in a world of multiple normative communities. Equality before the law, and equal protection of the law, needs to be defined in culturally sensitive contexts, of differential treatment of different groups, and not as one serving as a cloak for discrimination or privilege. The problem of cultural diversity and justice, and the fate of law in plural societies, particularly in Canada, are crucial concerns. It is evident that the many shades of modernity in Canada have far-reaching implications for democracy in the context of law and society. A definition of the many shades of modernity—multiple modernities—requires a much needed understanding of not only the relationship between the democratic institutions and the critique of liberal modernity but also of the practical implications of liberal secular constitutional law. Only through a pluralistic, multi-juridical framework can we fully respect the place of plural legal thinking.

⁵⁶¹ Griffiths, “What is Legal Pluralism?” *supra* note 4 at 36.

⁵⁶² Tie, *supra* note 13.

⁵⁶³ Cover, *Supra* note 20, referencing Geertz.

F. The need for continued research of the law by pluralists

In that the law is seen as: primarily symbolic; focused on the implicit forms of normativity; arising in myriad everyday relationships; and aimed at facilitating human interaction, the goal is not just to consider technical questions of primary interest to the legal profession, but substantive matters that bear on the lives of people who fall outside of the legal mainstream: the socially disadvantaged and the politically marginalized. As such, failing to recognize the significance of religious law (for instance) will result in the impoverishment of our understanding of Canadian laws and legal processes. Consistent interrogation by pluralists will put on notice the degree of inclusivity that represents normative reality and why law and the state are at the center of our inquiries.

In the interim, as globalization and the cultural pluralizations of the multiple modernities are proceeding simultaneously, so too are arguments being advanced for legal pluralism to allow a co-existence of jurisdictional systems for different cultural and religious traditions and acceptance of a variety of institutional design for societies with strong ethnic, cultural and linguistic cleavages.⁵⁶⁴ But the very pluralization of life-spaces endows them with highly ideological absolutizing orientations and, at the same time, brings them into the political arena. Western liberal law could be said to be therefore developing without religion. It is understood that to get to the authenticity of a religious tenet of any particular religion is an extremely difficult task.

If the precepts of religion and the constitutional rule of law are two competing normative systems both claiming sovereignty over the religious citizen, the relationship between religion, politics and law in Canada is not only difficult, it is illogical.⁵⁶⁵ To continue to refuse to acknowledge or respect the *public* elements of other religious

⁵⁶⁴ Benhabib *supra* note 194 at 19.

⁵⁶⁵ Taylor, "The Polysemy" *supra* note 41.

traditions is a risk of alienation of large sectors of the dynamic multiplicity of populations in Canada.⁵⁶⁶ Pluralized constitutional law will ensure that multiplicities of laws continue to be constitutionalized. A robust pursuit of truth has to accept that unitary approaches will fail as no single known position is known to have reached the truth.

⁵⁶⁶ Heyking, *supra* note 117.

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