Introduction: Religious Neutrality and the Exercise of Public Authority

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Over the last many years a host of legal and political controversies have arisen out of the meeting of religion and the exercise of public authority. Some of the most contentious disputes have concerned the performance of public duties by religiously committed individuals. Other cases have involved public authorities struggling to account for a religiously diverse society. These issues have exposed the difficulties engendered when civic officials engage with religion—both as a fact of social life and as an aspect of their own identities—while discharging their public responsibilities.

Most familiar are the controversies that have arisen in jurisdictions around the world concerning the wearing of religious symbols by public officials. The issue has often surfaced as a question about whether teachers should be permitted to wear identifiably religious clothing.[1] But it has also arisen, in Canada—with the failed proposal for a so-called 'Charter of Quebec Values'—and elsewhere in a more general form as a controversy about whether visible or 'ostentatious' religious signs or symbols should be worn by anyone exercising a public function. The question of whether a municipal government can include a public prayer in its meetings has recently come before the courts in both the United States[2] and Canada.[3] And a range of cases have posed the question of whether, in discharging public duties, officials should be permitted to exempt themselves from functions that are inconsistent with their religious convictions. This may occur in a variety of contexts, including the performance of a same-sex marriage by a civil marriage commissioner[4] or the provision of healthcare and reproductive health services by medical professionals. The point of contact between public authority and religious commitment is a site that will continue to generate a range of legal and political controversies. The authors who have contributed to this volume provide insight into many of these issues. That is one way in which this volume is both timely and important: it offers to scholars of law, politics and religion a helpful resource in exploring these discrete but important debates.

[1] See, eg, *Dahlab v Switzerland* ECHR 2001–V 449.
[2] *Town of Greece v Galloway* 572 US (2014).
[3] *Mouvement laïque québécois v Saguenay (City)* 2015 SCC 16.
[4] *Reference Re Marriage Commissioners Appointed Under The Marriage Act* 2011 SKCA 3.

Yet perhaps more importantly, the volume also provides an entry point into a deeper examination of the concepts we use to organise and manage religious diversity—concepts such as tolerance, secularism and neutrality. The volume's focus on religion and the exercise of public authority brings to the surface the many difficulties involved in separating religious belief and practice from political action, exposing the complexity of these outwardly orderly concepts. Drawing on the insights and perspectives of anthropologists, religious studies scholars, philosophers, sociologists and legal scholars, this volume's interdisciplinary examination of the issues generated by the meeting of religion and public authority challenges our familiar ways of framing questions, encourages us to notice dimensions of these issues that might otherwise fall outside our range of vision, and pushes us to think more carefully and critically about the abstract principles that guide legal and political discussion of contemporary religious diversity.

The broad concepts that we seize upon as guides for managing religious difference express valuable ideals and provide a language for legal debate, but they also tend to paper over many of the complexities and challenges of religious difference. Two such concepts—toleration and secularism—are illustrative. 'Toleration' has, of course, a long pedigree as a philosophical ideal and legal tool in matters of religious freedom, equality and diversity. It was, for many years, the dominant concept invoked by the Supreme Court of Canada in its freedom of religion jurisprudence and anchored political discussion about how to address religious difference. And yet as cases and controversies continued to accumulate, scholarship has shown that the social experience of legal toleration is often one of exclusion and marginalisation.[5] Something similar can be seen in the concept of 'secularism', an ideal that anchors much political debate and often serves as a regulative concept in the jurisprudence, including that of the Supreme Court of Canada. The concept of secularism captures something important about a just and fair state in a context of religious diversity—that there ought to be some form of separation between state power and religion; however, broad invocations of the concept elide its various forms and the different implications of each,[6] conceal the political and historical facts that give shape to the varieties of secularism,[7] and mislead about the character of law itself.[8] An arguable consequence of that

[5] One of us has written about this at some length in Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto, University of Toronto Press, 2015). Wendy Brown has argued that toleration works precisely by *depoliticisation*—by extracting law from history and politics. See Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, Princeton University Press, 2006).

[6] Michael Warner, Jonathan VanAntwerpen and Craig Calhoun (eds), *Varieties of Secularism in a Secular Age* (Cambridge, Harvard University Press, 2010); Janet R Jakobsen and Ann Pelligrini, *Secularisms* (Durham, Duke University Press, 2008).

[7] Ahmet Kuru, *Secularism and State Policies Toward Religion: The United States, France, and Turkey* (New York, Cambridge University Press, 2009); John R Bowen, *Can Islam Be French?: Pluralism and Pragmatism in a Secularist State* (Princeton, Princeton University Press, 2011).

[8] Winnifred Fallers Sullivan, Robert Yelle and Mateo Taussig-Rubbo (eds), *After Secular Law* (Stanford, Stanford University Press, 2011).

concealment has been the emergence of political claims about secularism that are at odds with principles of religious inclusion and equality.[9]

This volume is appearing just as another concept has become prominent in legal discussions of how to manage religion: the concept of state neutrality. It emerges in the jurisprudence of international courts as the foundational demand flowing from a commitment to religious freedom;[10] and here in Canada it has arguably eclipsed toleration as the central concept in the Supreme Court's approach to the management of religious difference.[11] Yet the concept of (and demand for) state neutrality has many possible meanings, and is afflicted by a certain instability. It is applied selectively or inconsistently across and within liberal democracies, reflecting the variety of postures towards religion that flow from the particularities of local political histories, cultural inheritances, and conceptions of secularism.[12] For some, the neutrality requirement is understood broadly as precluding the state from taking any position on the question of what constitutes a good society. For others, state neutrality requires an evenhandedness between religious—and non-religious—modes of life and forms of belief, but does not preclude the state from taking positions on how to pursue a just and attractive common social world.[13]

Although the Supreme Court of Canada has conceded that 'the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage',[14] and that 'the state always has a legitimate interest in promoting and protecting' certain 'shared values' such as equality, human rights, and democracy,[15] the Court has held that the essence of the demand for state neutrality is that it 'presupposes that the state abstains from taking a position on questions of religion'.[16] 'State neutrality', the Court has claimed, 'is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows

[9] One such example is the episode involving the proposed 'Charter of Quebec Values', *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st sess, 40th Leg, Quebec, 2013.

[10] See, eg, *Leyla Sahin v Turkey* ECHR 2005–XI 819, 44 EHRR 5; *Lautsi and Others v Italy* ECHR 2011–III 2412, 54 EHRR 3.

[11] See *Saguenay* (n 3). The theme of the ascendance of the ideal of neutrality, and its associated focus on non-exclusion rather than coercion, was noted in Richard Moon, 'Liberty, Neutrality, and Inclusion: Freedom of Religion under the Canadian Charter of Rights' (2003) 41 *Brandeis Law Review* 563. For another discussion of 'state neutrality' eclipsing 'toleration' as the court's guiding ideal, see Benjamin L Berger, 'Religious Diversity, Education, and the "Crisis" in State Neutrality' (2014) 29 *Canadian Journal of Law & Society* 103.

[12] See, eg, *Leyla Sahin v Turkey* ECHR 2005–XI 819, 44 EHRR 5; *Lautsi and Others v Italy* ECHR 2011–III 2412, 54 EHRR 3; *Dahlab v Switzerland* ECHR 2001–V 449. Richard Moon, 'Christianity, Multiculturalism, and National Identity: A Canadian Comment on Lautsi and Others v. Italy' in Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden, Martinus Nijhoff Publishers, 2012).

[13] For this view, see Bruce Ryder, 'State Neutrality and Freedom of Conscience and Religion' (2005) 29 *Supreme Court Law Review* (2d) 169; Moon (n 11); Berger (n 11).

[14] *Saguenay* (n 3), para 116.

[15] *Loyola High School v Quebec (Attorney General)* 2015 SCC 12, para 47.

[16] *Saguenay* (n 3), para 132.

respect for all postures towards religion, including that of having no religious belief whatsoever'.[17] Accordingly, the state is precluded from preferring or supporting the practices or beliefs of one religion over those of another, or favouring religious belief over non-religious belief, and vice versa.

The idea of state neutrality expresses certain important aspects of what the just treatment of religion in a religiously and morally diverse society might require. The commitment to neutrality may flow in part from the idea that religious issues should be removed from politics because of the difficulty of resolving such matters, the risk of conflict on such points, or, otherwise put, the impossibility of finding 'overlapping consensus' on questions of religion. Alternatively, the demand for state neutrality may be anchored in an inclusionary impulse linked to concerns about identity and equality. If religious belonging and belief are understood as dimensions of identity, a judgment by the state that suggests that the beliefs and practices of one group are less meritorious or true than another may be experienced not simply as a position taken on a public policy debate, but as a denial of one's equal worth, or as the marginalisation of one's religious community.[18] In these ways, the concept of state neutrality expresses important ideals.

Yet, despite its conceptual force and appeal, state neutrality is also afflicted by a number of limits, frailties, and conundrums as a governing legal ideal. For example, the courts have recognised that religious practices have shaped the traditions or customs of the community, and cannot simply be erased from the public sphere or ignored in the formulation of public policy.[19] Canadian courts have not demanded that governments eliminate religious symbols and practices from physical and social structures, some of which were constructed long ago. However, it may often be difficult to determine when the use of religious symbols or practices by that state is simply an acknowledgment of the country's religious history or of the importance of religion in the private lives of citizens, and when it amounts to a present affirmation of the truth of a particular religious belief system. Moreover, if a large part of the population is Christian, it is difficult to see how the state could not take the practices of this group into account, when, for example, it selects statutory holidays or establishes a 'pause day' from work. As long as religion remains part of private life, it is bound to affect the shape of public action. In *Chamberlain v Surrey School District*, the Supreme Court of Canada held that elected officials may draw on their religious values (or the religious values of their constituents) when making political decisions. As Chief Justice McLachlin recognised in *Chamberlain*, '[r]eligion is an integral aspect of people's lives, and cannot be left at the boardroom door'.[20]

The focus of this volume on the way that public officials must negotiate and interact with religion reminds us of the historical, demographic, and situational

[17] *SL v Commission scolaire des Chênes* 2012 SCC 7, para 32, [2012] 1 SCR 235.

[18] See ibid; Richard Moon, 'Freedom of Religion under the Charter of Rights: The Limits of State Neutrality' (2012) 45 *University of British Columbia Law Review* 497.

[19] Richard Moon, *Freedom of Conscience and Religion* (Toronto, Irwin Law, 2014).

[20] *Chamberlain v Surrey School District No 36* 2002 SCC 86, para 18, [2002] 4 SCR 710.

complexity on which the call for state neutrality floats. It reminds us that the 'state' involved in the call for state neutrality is not an abstract entity, but embodied in individuals—actors who are invested with commitments and identities, at work in particular times and settings, and called upon to discharge specific duties and respond to specific problems. Examining the exercise of public authority by individuals who are religiously committed—or who, in the discharge of their public responsibilities must account for and engage with those who are—exposes some of the assumptions about legal and political life that underlie the concept of state neutrality and reveal some of its limits as a governing ideal.

So what, in particular, does the hard look at religion and the exercise of public authority found in the contributions to this volume recover for us about the social and political realities that sit beneath the call for state neutrality?

First, through a historical and sociological examination of public officials and the exercise of public authority, a number of the chapters in this volume remind us of certain inconvenient facts about the nature, formation, and contemporary structure of the state that is expected to conform to this ideal of neutrality. Just as scholarship has shown that the language of toleration or of legal multiculturalism extracts matters from their historical and political constitution,[21] a focus on state neutrality may similarly impede a recognition of the ways in which the state has shaped itself around claims of a religious character, using metaphysical appeals and ritual performances to consolidate its boundaries, authority, and power. Pamela Klassen's chapter, 'God Keep our Land: The Legal Ritual of the McKenna-McBride Commission 1913–1916' draws this truth to our attention in a subtle way, showing how public officials charged with expanding and consolidating the nation made cosmological claims, claims that had Christian contours but drew from the particularity of this land, and that became the frame in which discussion and argument took place. These claims were, in portentous ways, in direct competition with Indigenous cosmologies, as state officials sought to clear the terrain for assertions of state sovereignty. With Idle No More and the Truth and Reconciliation Commission, we have been made keenly aware of the contemporary consequences of this project in which religion and the exercise of state authority was central. Those are some of the continuing deposits of that history of the state's involvement with religion. Yet as the chapter by Amélie Barras, Jennifer Selby and Lori Beaman shows us, these deposits are also found and felt in the experience of those living and working today in the corridors of public authority. Their chapter explores the way in which 'the workplaces of Canadian public servants are not neutral', as shown through interviews with Muslim public servants. Instead, based on this novel research, Barras, Selby and Beaman argue that many of those working in and for the state remain keenly aware of the historical Christian backdrop that shapes their workplaces. As they explain, 'Christianity is almost invariably worked-out and lived as a dimension that is constitutive of the Canadian public realm and, for these public servants, constitutive of their everyday work lives'. And so both

[21] See Berger (n 5); Brown (n 5).

historical and sociological considerations of this issue remind us of the limits of state neutrality and complicate the starting assumption of an abstract state fitted from the outset for a posture of neutrality. The state that is expected to act 'neutrally' has a particular religious history that continues to shape its day-to-day life.

Second, a focus on the challenges that surface at the confluence of religion and public authority shows that it is exceedingly difficult to maintain the dividing line between religious and non-religious matters, a distinction on which many claims for state neutrality depend. Recall that the Supreme Court of Canada has described the very essence of state neutrality as 'the state abstain[ing] from taking a position on questions of religion'.[22] And yet abstention from engagement with religious matters is not a realistic—or perhaps even desirable—ambition. The collection's focus on the actual problems and tasks with which public officials are seized makes it clear that a desire for this kind of forbearance will be consistently frustrated—that state engagement with religious claims, practices, and positions is inescapable. It turns out to be very hard to neatly distinguish 'questions of religion' from questions of political and civic moment. This difficulty—a manifestation of the instability of the private-public divide—flows from two sources: the fact of religious investment in general questions of public life, and the demographic reality of the religiously diverse world that public policy must govern.

The character of religion is that it is keenly interested in and takes positions on matters of public moment. The positions taken by the state on public matters will invariably touch on religious commitments and practices. Richard Moon's chapter examining same-sex civil marriages and the conscientious objection of marriage commissioners shows this well. As Moon explains, state neutrality in matters of religion 'depends on a distinction between civic views and actions, which must be subject to the give and take of the political process, and spiritual beliefs and practices that should be treated as personal to the individual or internal to a religious community, and should be both excluded and insulated from politics'. And yet his analysis shows that, despite the practical necessity of drawing such a distinction, religious believers will often experience state action in the civic sphere and state agnosticism or neutrality in relation to spiritual concerns as position taking in matters of religious belief. As others have argued, it is a misleading conceit to imagine that discharging the public task of administering marriage can be done without involving the state in religious questions.[23] In his chapter, Paul Bramadat invites us to look at some of the different ways in which state actors might engage with questions of religion, and in so doing, he underscores the importance of reflecting on how religious communities will receive and interpret state action. Discussing the treatment of Trinity Western University's bid for a law school, Bramadat asks us to remember that the public policy question regarding the accreditation of a law school with a discriminatory covenant is

[22] *Saguenay* (n 3), para 132.
[23] See Robert Leckey, 'Profane Matrimony' (2006) 21 *Canadian Journal of Law & Society* 1.

also—and crucially—part of a story about minority religious communities that are invested in a particular view of public life and see the state as acting on the basis of a competing liberal moral perspective.

The portion of Bramadat's chapter discussing how government officials have engaged with religious communities on questions of security and radicalisation points to the other reason that the state cannot but engage with religious views and practices: demographic facts colour the tasks that public officials must perform—with the result that the exercise of public authority will often involve a close engagement with religion. Public policy must understand and respond to a social world rich with religious diversity. This is a social and political reality that attention to religion and the exercise of public authority helps us to see better. The point comes out interestingly in Solange Lefebvre's chapter, which offers an 'insider' account of the litigation leading to the Supreme Court of Canada's decision in *Saguenay* on public prayer and state neutrality. Lefebvre shows that a court can only understand what a prayer at a municipal council meeting means in a community of diverse views on religion if it understands the character of religious ritual, and this is something, Lefebvre concludes, courts are ill-equipped to do.

There is perhaps no field of state action that demonstrates how the raw reality of religious diversity affects the tasks of public actors better than the field of education. The provision of public education in a religiously diverse society requires public officials—and foremost among them, teachers—to engage closely with religious beliefs and practices, both their own and those of their students. As Shauna Van Praagh takes us through an imaginative high school 'open house', she shows at each turn that public education involves all manner of productive encounters with and judgments about religion, religious identity, and religious practice. Public education, for Van Praagh, is an intrinsically interfaith enterprise and '[t]he relationship of religion to public law and authority in any jurisdiction at any time can be conveyed through the context of education'. Daniel Weinstock's chapter, 'A Freedom of Religion-Based Argument for the Regulation of Religious Schools', shows that because intergenerational transmission is vital to religion and religious communities, the state's role in educating children necessarily involves it in religious life. Indeed, Weinstock's provocative argument is that the state's active regulation or limitation of religious education might be an essential condition for the realisation of the religious freedom of parents because it gives them the space to parent according to their religious convictions without offending the child's right to an open future.

Finally, when we shift our attention from the state—its general character and context—to the individuals who embody the state—the public actors and officials themselves—it quickly becomes apparent that the difficulty in separating religious from non-religious matters is echoed in the challenge of distinguishing between the religious and non-religious dimensions of the individual. A number of the chapters in this volume explore the difficulties in drawing this line.

The attempt to draw such a distinction within the person, often implicit in invocations of state neutrality, can translate into a weighty demand on the individual. For public servants who find themselves acting against the background of laws and public practices that are at odds with their religious commitments, the call to separate personal religion and public responsibility can amount to a demand for an excruciating internal split, as Bruce Ryder's chapter on physicians' conscientious objections shows so clearly. Ryder explores how the physician's public service can be enmeshed with her religious identity such that the desire to distinguish between these elements, whether one views that demand as justified or not, exacts a considerable moral toll on her identity and self-understanding. Sensitivity to that fact, as Ryder shows, is important to determining how we should respond to this public policy question. Moon builds a case for the justifiability of refusing religious exemptions for marriage commissioners, concluding that a civil servant has no claim to be excused from performing the tasks associated with her position, simply because she is morally opposed to government policy, or to basic public values concerning the treatment of others in the community. Nevertheless, Moon is sensitive to the challenge of separating personal faith and civic duty and the demands this places on public servants—on their identity as both a religious person and a public actor.

Jocelyn Maclure takes up this theme in his chapter, which examines claims—made in a limited fashion in the Bouchard-Taylor commission and more sweepingly in the proposed but never enacted 'Charter of Quebec Values'—that public officials should be prohibited from wearing conspicuous religious symbols. Although he defends the need for certain forms of neutrality and circumspection on the part of religiously committed public officials, Maclure argues that a public official's neutrality must be gauged by the quality of his or her actions, not on the basis of appearance. He concludes that bans on the wearing of religious signs 'cannot withstand scrutiny at the level of political morality'. He emphasises the unacceptable costs that such a ban would place on religious believers, given the difficulty of disentangling religious belief and practice as components of identity.

Also interested in the debate surrounding public officials wearing religious symbols, Benjamin Berger asks us to consider the question from another angle: the potential losses to public life of insisting on too sharp a distinction between religion and public office. In 'Against Circumspection: Judges, Religious Symbols, and Signs of Moral Independence', Berger argues not only that such bans are indefensible in light of commitments to diversity and inclusion, but that the legitimacy and morality of some public functions could be enhanced by accepting and even encouraging a show of religious diversity among public officials. Berger's argument invites us to ask 'how much are we willing to ask of one another—of politicians, of fellow citizens, of judges—by way of interpretive creativity, flexibility, and nimbleness when met with the appearance of religion in public life?' And turning our attention to lawyers as public actors, in his contribution to this volume, Faisal Bhabha similarly asks what might be lost by an overzealous

insistence on the bracketing of the religious self from one's public role in the name of neutrality. Arguing for the fruits of 'religious lawyering' and the public benefits of lawyers drawing on diverse moral and ethical resources, Bhabha challenges the assumption that we can and should distinguish, factually and normatively, between religious and non-religious actors. We see in these chapters the porousness of the boundary between individual religious life and the public life of the state and, with this, another dimension of the unstable and fraught nature of the aspiration for state neutrality.

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The chapters in this volume bring to the surface the social, political and conceptual complexity of religious diversity that is otherwise concealed by organising legal and political concepts like state neutrality. They remind us of the role of religion in the historical formation and contemporary experience of the state. They suggest the inevitability of state engagement with religion, given the task of governing a religiously diverse population and the conceptual unsteadiness of the division between putatively non-religious issues and matters of religious moment. And by requiring us to recognise that the state we ask to be neutral is composed of and acts only through agents, they draw our attention to the burdens and conundrums involved in imagining a divide between the religious and non-religious *within the subject*.

The focus on religion and the exercise of public authority is thus a means of pushing us past the general concepts we employ to manage religious diversity, drawing us closer to the social facts of religious difference. It brings us close to the state and its historical and contemporary nature, as well as to the people involved and the activities that occur in the governance of a culturally plural society. In so doing, this focus helps us to recover the difficulty, paradox, and social, legal and political unruliness that characterizes modern religious diversity. For those interested in the relationship between law, politics and religion—in the struggles of religious diversity in a liberal state—this act of 'recovery' and complication is, we think, the principal value of this volume.

Paul Kahn has argued that '[e]very age has its own point of access to ethical and political deliberation. For us, that point is the problem of cultural pluralism'.[24] If this is so—and we think it is—the lessons learned and insights generated through these studies focussed on religion and the exercise of public authority have import beyond the reach of this volume, teaching us something more general about the complexity of identity, the nature of the liberal state, and the challenges of public life in a condition of deep religious pluralism.

[24] Paul W Kahn, *Putting Liberalism in Its Place* (Princeton, Princeton University Press, 2005) 1.