

**I.T. Benson**

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## **What divides, what joins and who decides? Diversity, the common good and limited law**

### **Abstract**

It is commonplace to hear politics and law extol the importance of “pluralism” and “diversity”. In addition to difference, however, and less discussed, but certainly important, is the notion of “the common good”. Law, for its part, tends to mediate between what is different and what should be shared. How law is understood in relation to diversity and difference and how we understand the limits of law is also central to how a diverse society is protected and advanced. Dominance and control, on the one hand, and the privatization and marginalization of diverse beliefs, on the other, threaten the appropriate, but limited places for public involvement of diverse communities. Is it appropriate to draw a line between belief and conduct as a means of achieving public homogeneity? This article examines the meaning of pluralism, diversity, the common good, the relationship between belief and conduct and the role and limits of the law and politics in relation to personal and associational freedom.

### **Wat verdeel, wat bind saam en wie besluit? Diversiteit, die algemene welsyn en beperkte reg**

'n Mens hoor dikwels hoe die politiek en die reg die belangrikheid van “pluralisme” en “diversiteit” prys. Bo en behalwe verskil, en minder onder bespreking, maar beslis belangrik, is egter die gedagte van “die algemene welsyn”. Op sy beurt is die reg geneig om as mediator op te tree tussen wat verskil en wat gedeel behoort te word. Hoe die reg in verhouding tot diversiteit en verskil verstaan word, en hoe ons die beperkinge van die reg verstaan, staan sentraal tot hoe 'n diverse samelewing beskerm en bevorder word. Dominansie en beheer aan die een kant, en die privatisering van marginalisering van diverse oortuigings aan die ander kant, bedreig die toepaslike, maar beperkte ruimtes vir openbare betrokkenheid van diverse gemeenskappe. Is dit gepas om 'n streep te trek tussen oortuiging en optrede as 'n wyse om openbare homogeniteit te bereik? Hierdie artikel ondersoek die betekenis van pluralisme, diversiteit, die algemene welsyn, die verhouding tussen oortuiging en optrede, en die rol en beperkinge van die reg en politiek in verhouding tot persoonlike en geassosieerde vryheid.

*Prof. Iain T. Benson, Professor Extraordinary, Department of Public Law, University of the Free State, South Africa.  
Visiting Scholar, Massey College, University of Toronto, Canada.*

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## 1. Introduction

This article examines three different, but interrelated concepts, namely pluralism (or difference); the common good (or what is shared), and the role and limits of the law (what superintends).

The terms “pluralism”, “diversity” and “multiculturalism” are used frequently as central descriptive terms of states that suggest they support freedom and difference. These terms, whether or not they are found as part of the constitutional texts, are usually part of the wider framework of contemporary constitutional democracies in terms of their public rhetoric.

Alongside these terms of *difference* are terms that suggest *commonality*; thus, the notion of the “public interest” or the “common good” should lead us to think of what is shared rather than what divides. To these may be added the vaguer terms of the day when we speak of “national values” or “constitutional values”. On some issues in litigation, both sides seek to claim the high ground of their position being in the public interest, but often in ways that lead not to a clear articulation of what we might wish to see articulated as “civic virtues”, but in the portmanteau terms of “equality” or “values” just mentioned. Key, in this instance, is to consider whether what is being sought in practice (for it will not be argued this way in theory very often) is the dominance of one view over others *with a failure of accommodation or toleration*.

The whole issue concerning the meaning and nature of the “common good”, while foundational, is in need of wider theoretical analysis in relation to contemporary approaches to law. If the concepts of “public interest” or “the common good” or civic virtues, associational liberty (as well as personal liberty) and the limits of law itself are not clarified, then many other issues such as the seeking of common rationality, associational rights, religious rights and so on cannot be properly understood and protected. This is our situation. We have an ever-demanding set of legal homogenizations that tend to blur or even deny diversity by an application of general terms over against different (but theoretically allowable) contestation.<sup>1</sup>

What exactly makes up pluralism and what role(s) do law and associations (particularly religions) play in relation to them? These questions touch in important ways on politics, law and theology itself. Several key questions emerge: for example, is there a danger that a focus on politics and law,

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1 While the Canadian federal *Civil Marriage Act* S.C. 2005 c. 33 (<http://laws-lois.justice.gc.ca/eng/acts/c-31.5/page-1.html>) speaks in its preamble (“WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage”) and provisions (sections 3 and 3.1) of Canadians having a diversity of views on the nature of marriage, and precludes religious officials from being forced to perform same-sex marriages, we observe, in the treatment of religious individuals such as marriage commissioners or groups such as Trinity Western University in relation to law school accreditation or Catholic Schools in relation to bullying legislation, a failure to protect the logical extension of these concessions to the powerful, but in some ways *invisible* claim for public domination rather than simply co-existent respect.

without reference to associational diversity, will elide the important nature and scope of non-State actors to the detriment of freedoms essential to a meaningful conception of “the common good” and “civic virtues”? Since not everything that claims to be based on belief can be justified as part of the common good, where ought the lines to be drawn? One valid suggestion is that the line between belief and conduct is the appropriate place. Is such a distinction or line workable and even consistent with ideas that belief has, necessarily, a public dimension? These questions and others will be addressed in this article.

## 1.1 Pluralism and difference

An insight from the former Chief Rabbi of Great Britain, Rabbi Jonathan Sacks, neatly frames a key aspect of pluralism.

Pluralism is a form of hope, because it is founded in the understanding that precisely because we are different, each of us has something unique to contribute to the shared project of which we are a part. In the short term, our desires and needs may clash; but the very realization that difference is a source of blessing, leads us to seek mediation, conflict resolution, conciliation and peace, the peace that is predicated on diversity, not on uniformity. Covenant tells me that my faith is a form of relationship with God – and that one relationship does not exclude any other, any more than parenthood excludes a love for all one’s children.<sup>2</sup>

Sacks calls not for a global government, nor a global civil religion, but for something more subtle and more profound. He calls for a “global covenant” that would need to frame “our shared vision for the future of humanity”. Hope, which requires courage, “... is the faith that, together, we can make things better”.<sup>3</sup> However, we might ask: What is the form of such a Covenant? With and by whom is it made? How, if at all, is it enforced, and how and by whom promulgated?

In his 10 July 2013 Ramadan message “To Muslims throughout the world”, Pope Francis stated the following:<sup>4</sup>

It is clear that, when we show respect for the religion of our neighbours or when we offer them our good wishes on the occasion of a religious celebration, we simply seek to share their joy, without making reference to the content of their religious convictions. Regarding the education of Muslim and Christian youth, we have to bring up our young people to think and speak respectfully of other religions and their followers, and to avoid ridiculing or denigrating their convictions and practices. We all know that mutual respect is fundamental in any

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2 Sacks 2002:203-204.

3 Sacks 2002:206.

4 Available in full from <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2014/07/18/0523/01167.html#Testo> in lingua inglese (accessed on 12 December, 2014).

human relationship, especially among people who profess religious belief. In this way, sincere and lasting friendship can grow .... It is not possible to establish true links with God, while ignoring other people. Hence it is important to intensify dialogue among the various religions, and I am thinking particularly of dialogue with Islam.

A Turkish Muslim writer, Bediüzzaman Said Nursi (1878-1960), who lived and died in Turkey, and whose work commands an increasing following among Muslims around the world, but particularly in Turkey, commented on a Surah of the Qu'ran well known by Muslims, then reminds his readers:

O mankind! We created you from a single (pair) of male and female, and made you into nations and tribes that you may know each other. That is, I created you as peoples, nations and tribes, so that you should know one another and the relations between you in social life, and assist one another; not so that you should regard each other as strangers, refusing to acknowledge one another and nurturing hostility and enmity. That is to say, being divided into groups and tribes should lead to mutual acquaintance and mutual assistance, not to antipathy and mutual hostility.<sup>5</sup>

The Pope and a leading Muslim scholar have thus shown that a theoretical openness to the other can be found in their traditions – an openness to “the other” that is important at this time where widespread fear accompanies all too frequent bloodshed often in the name of religion. Cooperation within and between religions is very much a part of the contemporary world however much media attention seems focused on division and terror from those claiming religious warrant for their barbarism.

The creation of the *South African Charter of Religious Rights and Freedoms* over several years exemplifies a recognition by constitutional drafters and then society actors in response to a problem if constitutional development is merely accomplished by the “dialogue” of legal decisions and legislative responses. The fact that the *Charter* was signed in September 2010 by every major religion in South Africa indicates the possibility of constitutional development moving beyond a dialogue between courts and legislatures to a “trialogue” between law, politics and civil society. This first use of section 234 of the *Constitution of South Africa* points the way to a necessary opening up of the so-called “dialogue” said to be operative in, for example, the Canadian Constitutional dispensation.<sup>6</sup> By expressly including civil society as actors in relation to the formation of “additional Charters” the provision and the *Charter* show the potential for greater peripheral vision in the task of policy formation and institution building viewed broadly.

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5 Nursi (2007, 336 ff), commenting on Holy Qur'an Surah Al-Hujurat 49:13.

6 Benson 2011a:125-134. See also Benson “Expanding constitutional dialogue: A lesson from South Africa”, <http://www.cbabc.org/BarTalk/Archive/Issues/2011/BarTalk-October-2011>(accessed 12 December, 2014). See also Malherbe, 2010. The background and content of the proposed South African Charter of Religious Rights and Freedoms, <http://www.iclrs.org/content/blurb/files/MalherbePaper,%20South%20Africa%20revised.pdf> (accessed on 14 December, 2014).

In Canada, a joint venture between the Government of Canada and His Highness the Aga Khan has been established to examine the nature of pluralism.<sup>7</sup> In the course of its work, the GCP has begun to examine the nature of pluralism. In an early document, “Defining pluralism”, the concept was described as follows:

Pluralism rejects division as a necessary outcome of diversity, seeking instead to identify the qualities and experiences that unite rather than divide us as people and to forge a shared stake in the public good. Respect for diversity transcends tolerance to embrace difference as an engine of commonwealth.<sup>8</sup> ... Pluralist societies foster the equal participation of all citizens in the political, economic, and socio-cultural life of the nation – enabling individuals as well as groups to express their cultural, linguistic and religious identities within a framework of shared citizenship. Through these means, the ethic and practices of pluralism can foster a more equitable and peaceful human development ... Policies to support pluralism must address the relationship of the state to groups as well as the dynamics among groups. Competition for economic benefit rather than cultural benefit *per se* is a wedge that leads to “us-and-them” thinking and ultimately, left unchecked, to conflict or worse. For this reason a commitment to pluralism often necessitates adjustments in the principles, institutions and procedures of the state.

It is all too easy to remain fixed in an analysis of government and its twin sister diplomacy rather than to reach out to civil society engagement with, among others, religious leaders. Such is the world’s condition that we, all too often, try to use diplomacy and governmental initiative where they cannot succeed. The dualistic dominance of law and politics, a condition that philosopher Giorgio Agamben referred to as involving “the hypertrophy of law”,<sup>9</sup> has blinded us to the need for a vibrant and protected civil society and the threat that illegitimate extension of law poses to associational life. Perhaps this has happened in part because we have failed to attend to the articulation and education in *civic virtues and their proper ground* as we all breathe the ambiguous gas of “values language” that “obscuring language for morality used when the idea of purpose has been destroyed” as George Grant said so memorably in one of David Cayley’s luminous CBC “Ideas” programmes many years ago?<sup>10</sup> So where might we start for an articulation of what unites and binds us?

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7 I declare an interest, as I sit on the Board and Executive Committee of this project, the Global Centre for Pluralism, based in Ottawa Canada.

8 Global Centre for Pluralism, Defining pluralism, Ottawa, Canada, January 2012:1, [http://www.pluralism.ca/index.php?option=com\\_content&view=article&id=222&Itemid=773&lang=en](http://www.pluralism.ca/index.php?option=com_content&view=article&id=222&Itemid=773&lang=en). (accessed on 12 December, 2014).

9 Agamben 2012:40. Having invoked the concept of hypertrophy of law, Agamben speaks of law “under the guise of legislating everything, betrays its legitimacy by legalistic excess”.

10 I reference this programme, “The moving image of eternity”, and Grant’s overall theory of “values language”, in Benson 2008a:117-136.

## 1.2 The common good (what is shared)

What do we mean by “the common good”? The Catechism captures the concepts well:

By common good is to be understood the sum total of social conditions which allow people either as groups or individuals to reach their fulfilment more fully and more easily. The common good concerns the life of all. It calls for prudence from each and even more from those who exercise the office of authority.<sup>11</sup>

The common good consists of three essential elements. First, the common good presupposes *respect for the person* as such.<sup>12</sup> Secondly, the common good requires the *social wellbeing* and *development* of the group itself. It is the proper function of authority to arbitrate, in the name of the common good, between various particular interests, but it should make accessible to each what is needed to lead a truly human life: food, clothing, health work, education and culture, suitable information, the right to establish a family, and so on.<sup>13</sup> Thirdly, the common good requires peace; that is, the stability and security of a just order. It presupposes that authority should ensure by morally acceptable means the *security* of society and its members. It is the basis of the right to legitimate personal and collective defence.<sup>14</sup> Each human community possesses a common good which permits it to be recognized as such; it is in the *political community* that its complete realization is found. It is the role of the state to defend and promote the common good of civil society, its citizens and intermediate bodies.<sup>15</sup>

Again, Rabbi Sacks observes the difference between notions of the self as an unencumbered rights-affirming individual (the standard liberal sense of the individual) and the religious insight about the nature of the person:

Members and citizens alone cannot sustain themselves, let alone establish a framework of collaborative action and collective grace. Covenants exist because we are different and seek to preserve that difference, even as we come together to bring our several gifts to the common good.<sup>16</sup>

This good, while it is “common”, is not uniform. Sacks, therefore, endorses the conception of “a community of communities” that undergirds a developed religious insight about pluralism.

Professor Louis Dupré noted that “democratic freedom is perfectly compatible with a positive conception of the common good” and has warned that he perceives:

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11 *Catechism of the Catholic Church* (Ottawa, CCCB, 1994) paragraph 1906.

12 *Catechism of the Catholic Church* paragraph 1907.

13 *Catechism of the Catholic Church* paragraph 1908.

14 *Catechism of the Catholic Church* paragraph 1909.

15 *Catechism of the Catholic Church* paragraph 1910.

16 *Catechism of the Catholic Church* paragraph 203.

[n]o chance of regaining even a minimal agreement on what constitutes the common good without some return to a religious-moral view of the human place in cosmos and society. Without the restoration of some sense of transcendence, there remains little hope for a consensus on what must count as good in itself. For such a good must present itself in an objective, *given* order ... what I am defending, in plain terms, is a return to virtue on a religious basis as an indispensable condition for any possibility of a genuine conception of, and respect for, the common good.<sup>17</sup>

If there is no “common good”, how can there be meaningful justice? Against what standards can justice be measured and argued for if there is not some shared conception of “good”, however general? Some have suggested that moves towards “liberal virtue” are enhanced by discussions of faith, in general, and religious faith, in particular. Dupré’s conviction, that it is only *religious* faith that can enhance this move towards virtue, should be considered widely and discussed in greater detail. At the very least it means that political and legal actors must consider the function of religious communities and projects before taking action that affects them.

A judgement exemplifying a positive conception of the role of religion to South African society is a decade-old decision from the Constitutional Court of South Africa in the case of *Christian Education v. The Minister of Education*:

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer’s view of society and founds the distinction between right and wrong.<sup>18</sup>

Note, in this instance, that religion is *recognized as having a strong social dimension* as well as a personal or individual dimension. This is important, as some commentators (and a few Canadian legal decisions) have suggested that the right of religion is essentially individualistic and private. The passage above shows a greater awareness of the social and public importance of religion.

There is no passage anywhere in a Canadian Supreme Court decision, or any other Canadian court decision with which the author is familiar, that expounds the kind of recognition of the place and role of religion referred to in the above passage. Canadian judges, and those in other countries, are much less confident about the important cultural role of religion or, alternatively, do not speak in such encouraging terms about it. This hesitance does not assist the public respect for religions or a richer

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17 Dupré 1993:687, 707-708, emphasis in original. See also Berlin 1990:47-48.

18 *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC), paragraph 36.

conception of pluralism including religious pluralism or a common good that recognizes a central place for associations. Other decisions in recent years go further and actually menace the proper respect law should have for religious diversity with its many meanings and concepts.<sup>19</sup>

Writing from a perspective heavily influenced by Roman Catholic social thought, Jacques Maritain has written of the need for a clear distinction between what he refers to as a “human and temporal creed” and a “set of practical conclusions or practical points of conversion essential to common life”:

[T]he body politic *has the right and the duty* to promote among its citizens, mainly through education, the human and temporal – and essentially practical – creed on which depend national communion and civil peace. It *has no right*, as a merely temporal or secular body, enclosed in the sphere where the modern State enjoys its autonomous authority, to impose on the citizens or to demand from them a rule of faith or a conformism of reason, a philosophical or religious creed which would present itself as the only possible justification of the practical charter through which the people’s common secular faith expresses itself. The important thing for the body politic is that the democratic sense be in fact kept alive by the adherence of minds, however diverse, to this moral charter. The ways and justification by means of which this common adherence is brought about belong to the sphere of inner freedom of mind and conscience.<sup>20</sup>

Where legal and general education has failed is in relation to teaching about appropriate *social ordering* (including the limits of religion and the law) and *civic virtues* we need even more strongly in order to deepen our theory and practical understanding of the crucial importance of associational diversity and its justifications.

### 1.2.1 What might insights coming from religions add?

Charles Taylor teased out some very important problems with political theory and the role of law in our time – problems to which religious perspectives provide important contributions. Detailing these is not necessary, in this instance, but I would like to highlight a number of his insights. First, Taylor refers to “the hold of moral subjectivism in our culture”, according to

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19 Two decisions of the Supreme Court of Canada show a marked failure to understand the importance of religion in the way Justice Albie Sachs articulated it. See *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 Can.) (the “Hutterian Brethren” decision) and *S.L. and J.D. v Commission scolaire des Chênes* [2012] 1 SCR 235 (the “Drummondville parent’s” case). In neither case were subsidiarity or solidarity and the wider implications comprehended or respected. This is, in recent years sadly and generally, typical of Canadian decisions that touch upon the scope and nature of the freedom of religion. Canada awaits its Albie Sachs.

20 Evans & Ward 1955:138, emphasis added.



which view, “reason cannot adjudicate moral disputes”.<sup>21</sup> He notes that social science, in the “normal fashion” of its contemporary explanations “has generally shied away from invoking moral ideals and has tended to have recourse to supposedly harder and more down to earth factors in its explanation”.<sup>22</sup> The result of this, according to Taylor, is that our debates, particularly about what constitutes a “good life”, have become extraordinarily “inarticulate” under the “liberalism of neutrality”<sup>23</sup> and the result has been to “thicken the darkness” around our moral ideals.<sup>24</sup>

Taylor describes two facets of contemporary political life that are having an increasing impact on this moral darkness. First, “more and more turns on judicial battles and the efforts of politics being directed towards judicial review”;<sup>25</sup> Taylor gives abortion as a case in point and how battles to “stack the court” in the United States have resulted in “politics-as-judicial-review” in which the law schools are “the dynamic centres of ‘social and political thought’”<sup>26</sup> Taylor is too kind by half; a case can be made that, on the evidence of recent developments, law schools have become, all too often, secularist bastions of one-sided politics, secularism and political correctness frequently curtailing the very open conversation that one would think a richer examination of justice requires<sup>27</sup>.

The second dimension of contemporary political life is that “interest or advocacy politics” based on “single-issue campaigns” become the focus of favourite cause advancement. Taylor points out that these two aspects, taken together, have led to the atrophy of a third important aspect which is “the formation of democratic majorities around meaningful programs that can be carried to completion”.<sup>28</sup> Taylor’s thesis is compatible with the “impoverishment of political discourse” observed by Mary Ann Glendon in her important book *Rights talk* (1991),<sup>29</sup> and Graham Good’s description of the contemporary university and attacks by the “new sectarians” in his elegant volume *Humanism betrayed* (2001) on its openness of inquiry in which a religious type of fervour (but lacking the gentler qualifiers of religious adherence) has come to dominate contemporary university settings.<sup>30</sup> The shifting of focus to identity politics expressed in the courts has had a particularly negative effect on the proper role of politics and more holistic political programmes. Taylor’s next observation is particularly important:

[T]his style of politics makes issues harder to resolve. Judicial decisions are usually winner-take-all; either you win or you lose.

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21 Taylor 1991:18.

22 Taylor 1991:19.

23 Taylor 1991:19.

24 Taylor 1991:21.

25 Taylor 1991:114.

26 Taylor 1991:114-115.

27 See, for example, the heated debates in Canada in 2013-2014 involving whether a Law School based upon Christian principles should be accredited by Provincial Bar Associations. I have detailed some of this in Benson 2013:671-675.

28 Taylor 1991:115.

29 Glendon 1991:subtitle to book

30 Good 2001.

In particular, judicial decisions about rights tend to be conceived as all-or-nothing matters. The very concept of a right seems to call for integral satisfaction, if it's a right at all; and if not then nothing. Abortion once more can serve as an example. Once you see it as the right of the fetus versus the right of the mother, there are few stopping places between unlimited immunity of the one and the untrammelled freedom of the other. *The penchant to settle things judicially, further polarized by rival-interest campaigns, effectively cuts down the possibilities of compromise.*<sup>31</sup>

Taylor notes that the tendency of “an unbalanced system such as this” is to entrench fragmentation and further increase what he calls “the atomist outlook”. He points out that the effective antidote to individualism and individualistic politics and jurisprudence is a focus on the broader aspects of culture – namely the nature of association (particularly concerning religions) and “the common good”.

In answer to the question “How do you fight fragmentation?”, Taylor responds that this is not easy and “there are no universal prescriptions”. He points out, in particular, that:

fragmentation grows to the extent that people no longer identify with their political community, that their sense of corporate belonging is transferred elsewhere or atrophies altogether. And it is fed, too, by the experience of political powerlessness. And these two developments mutually reinforce each other. Fading political identity makes it harder to mobilize effectively, and a sense of helplessness breeds alienation.<sup>32</sup>

In this new world of dominant judicial review, according to Taylor, citizens begin to feel powerless or threatened by the developments around them. However, Taylor, along with Oxford's Joseph Raz, notes that this sense of powerlessness can be mitigated by a “decentralization of power” as Tocqueville sought.<sup>33</sup> Principles dear to religions such as “subsidiarity” and the recognition of “mediating institutions”, or as I have reviewed it in this instance, “the common good”, as well as strong convictions that the state and the law have important, but limited jurisdictions, offer principles for this theoretical “decentralization of power”, on the one hand, and associational recognition, on the other.

Divisions of power exemplified in the federal system, “particularly one based on the principle of subsidiarity”, can be good “for democratic empowerment”, according to Taylor, and “this is the more so if the units to which power is devolved already figure as communities in the lives of their members”. Although Taylor does not refer to religious associations in particular, it is obvious, based on his other writing and the logic of his argument, that this kind of association is a prime example. Taylor concludes his important lectures on this point:

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31 Taylor 1991:116, emphasis added.

32 Taylor 1991:118.

33 Taylor 1991:119-120.

The effective re-enframing of technology requires common political action to reverse the drift that market and the bureaucratic state engender towards greater atomism and instrumentalism. And this common action requires that we overcome fragmentation and powerlessness – ... at the same time, atomists and instrumentalist stances are prime generating factors of the more de-based and shallow modes of authenticity; and so a vigorous democratic life, engaged in a project of re-enframing would also have a positive impact here ... What our situation seems to call for is a complex, many-levelled struggle, intellectual, spiritual, and political.<sup>34</sup>

While other groups and associations may be involved, those with the traditions, the support bases and the commitment (of volunteers as well as others) are overwhelmingly the religious.

It is worthwhile pointing out that resistance to government and the creation or recognition of an “independent power basis” is another aspect of the importance of religious associations to democratic culture. This is important particularly in comparing democratic with totalitarian regimes.<sup>35</sup> Totalitarianisms or “civic totalists” tend to deny associational life,<sup>36</sup> unless those associations inculcate *the* philosophy of the state, and it is important to note the thinkers who have analysed associational diversity and totalitarianism and shown the negative correlation that exists between them.

### 1.3 The role and limits of the law

Both conscience and religion have public aspects. As Justice Sachs noted, the right to religious liberty is a right that has very public dimensions. In saying that conscience and religion are recognized to have public aspects, however, one must be careful not to assume that the distinction between private and public has been or should be collapsed.

An interesting aspect of the current debates on the public place of “sexual orientation” debates is the shift from private sexual moralities to public demands for public recognition. The late Jean Bethke Elshtain has commented on this shift and the danger it poses to genuine civil rights. In her Canadian Massey Lectures, she wrote that:

[T]he complete collapse of a distinction between public and private is anathema to democratic thinking, which holds that differences between public and private identities, commitment, and activities are of vital importance. Historically it has been the antidemocrats

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34 Taylor 1991:119-120.

35 Taylor 1991:120.

36 See, for example, Carter (1993:132-133) who points out that one of the important reasons for accommodation of associational diversity is the preservation of religions as independent power bases so as to “resist the State”. See also Benson 2013a:671-675, in which I refer to William Galston’s work and description of “civic totalism”.

who have insisted that political life must be cut from one piece of cloth; they have demanded overweening and unified loyalty to the monarch or the state, unclouded by other passions, commitments, and interests ... a politics of displacement is a dynamic that connects and interweaves public and private imperatives in a way that is dangerous to the integrity of both.<sup>37</sup>

Elshtain gives two examples of this displacement politics: the ideology of women's victimization and identity politics, particularly in relation to "gay liberation". She concludes her insightful analysis by noting that: "the demand for public validation of sexual preferences, by ignoring the distinction between the personal and the political, threatens to erode authentic civil rights, including the right to privacy".<sup>38</sup>

While religion and conscience have public dimensions, these public aspects must not be taken as meaning that there is no longer a private dimension to the lives of citizens and their groups. In fact, the maintenance of an appropriate sphere for private action is an indispensable part of a society that can craft public policy that is favourable to the liberty of associational life and to the lives of citizens, but that still respects that there are limits to such public entanglement.

The distinction between public and private has a personal as well as a community dimension. Personally, there are matters that we value because they are our own. We recognize that we have a right to our viewpoints on certain matters. No one has any right to interfere with us. The only limit to a belief is when it manifests in actions, and these may be limited only when the effect that they have on another person is one that the law recognizes as requiring a limitation. With this piece of circular logic: "a right may be limited only when the law deems it essential to limit that right" the matter of personal belief and beliefs held in common and acted on in concert, rest.

I have written elsewhere of how the focus of associational rights such as religious belief cannot properly be viewed individually as that neglects the framework within which such rights have any reality.<sup>39</sup> One cannot practise the freedom of religion unless there are religious groups to join – and the public dimension of religious activity is what makes it possible to manifest, disseminate or practise the right to the freedom of religion. Central though prayer is to many religious traditions, it means little if the community dimension of prayer is neglected, because we have an individualistic squint to how we view religion. The same may be said of the right to association: it requires linkage for its manifestation and that linkage is the associational dimension of the person understood as a relational being and not simply an individual.<sup>40</sup>

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37 Elshtain 1995:38, 40.

38 Elshtain 1995:57.

39 Benson 2008b:295.

40 There is a vast literature on the distinction between a "person" and an "individual" – this is not the place to develop that idea, but a good starting point in this area is Mounier 1952; MacMurray 1957; Taylor 2002; Langan 2010.

Thus, we may personally hold a belief that many would find obnoxious or even hateful. But, in a free and democratic society, we know that the law should not, ideally, interfere with mere beliefs unless it supports required actions of certain types.

## 2. Why we should reject attempts to draw a simple line between “belief and conduct”

While there is a relationship between belief and conduct, we might be tempted to seize upon this as a way of insulating a putative “public sphere” from a “private” religious belief such that “acts” and beliefs are separated. On such a reading, while we may be free to believe a certain thing “in private”, we may not, so the reasoning goes, be entitled to act on it “in public”.

We should be very cautious of such a formulation and temptation for this reason. If a line is drawn too mechanistically between, say, “belief and conduct”, then the public aspects of belief and associational life are at risk of evisceration. After all, such aspects of conduct (manifestation, dissemination and teaching) have been recognized rightly as essential to the very *nature* of the freedoms of conscience, religion and association, to name but three. Consider the following well-known passage from the Canadian *locus classicus* on “the essence of the freedom of religion”, *Big M Drug Mart* where Chief Justice Dickson noted that the essence includes the right to: “*declare* religious beliefs openly and without fear of hindrance or reprisal and the right to *manifest* religious beliefs by worship and *practice* or by *teaching* and *dissemination*”.<sup>41</sup> Thus, recourse to any limp formulation that brackets belief to the purely personal and private fails to deal properly with the essential public aspect (or dimension) of the rights at issue and should be rejected.

Within limits, we are free to live (believe *and* act) as we wish and there are no laws, generally, to stop us eating unhealthily, failing to exercise, or watching inordinate amounts of television – although lack of a proper diet and bad exercise habits ultimately make us a greater drain on a health-care system for which we all pay and the cost of which is borne by all and in the cost decisions of which lives hang in the balance and some will certainly be lost. The law necessarily steps back from being involved “all the way down” into civil life.

We would think it a step too far for the state to get involved in the inner workings of our kitchens or homes. So we are free to smoke in our homes, even though every package tells us that smoking kills and we all know that the effects of smoking or excessive alcohol consumption cost us all a great deal.

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<sup>41</sup> *Big M Drug Mart* [1985] 1 S.C.R. 295 at 336, emphasis added, to show the practical and public aspects referred to above.

It has been said that the essential condition of the common law is liberty. Law is a restriction on liberty, so we are aware that, on some level, we need to be careful of the incursions of law, too much law, into the private realms of our conduct. As I have argued, we must be attentive to a related danger, namely that of restricting the validly public dimensions of belief. This is true on both the personal and the associational level.

### 3. Conclusion: Diversity and limited law are key to the common good

Jürgen Habermas noted the importance of a variety of (religious and non-religious) voices in the political public sphere and adds an important caution to their truncation:

For functional reasons, we should not over-hastily reduce the polyphonic complexity of public voices, either. For the liberal state has an interest in unleashing religious voices in the political public sphere, and in the political participation of religious organizations as well. It must not discourage religious persons and communities from also expressing themselves politically as such, for it cannot know whether secular society would not otherwise cut itself off from key resources for the creation of meaning and identity ... Religious traditions have a special power to articulate moral intuitions, especially with regard to vulnerable forms of communal life. In the event of the corresponding political debates, this potential makes religious speech a serious candidate to transporting possible truth contents, which can then be translated from the vocabulary of a particular religious community into a generally accessible language.<sup>42</sup>

Contestation is both inevitable and to be welcomed in a free and democratic society where there are overlapping public spheres. The other viewpoint tends towards there being only one public sphere, one public norm and one public conception where that is not the case.

Like it or not *there is no one conception of equality* (and please note: *religion is an equality right itself*), and much of our jurisprudence has suffered from the search for the philosopher's stone in which one test will somehow magically yield the right result in all contexts. Often the claim has been misconstrued as the search for the test for equality. What is needed is a recognition that in both the public and the private sphere, convergence must be resisted in the name of equality, *since the very equality at issue is the equality of difference not same-ness*. It is the equality of the public sphere access, not the equality of its dominance.

Applied to associations, this means that various tests used by courts may well fail the test of respecting diversity, pluralism and the shared and different natures of the common good. Tests that fail to satisfactorily allow for difference within and between associations by applying a same-ness

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42 Habermas 2007:1-25.

test, where it is not warranted, should be rejected. Tests that seek a bright line between belief and conduct should also be rejected.

Religious associations provide the means for certain civic projects to be done from and to further a particular ethos. Those of us outside such a group, which manifests a set of personal beliefs in the action of an association, may not agree with or like that ethos; in fact, we may oppose it tooth and nail, but unless such group offends *public morals* (however difficult it may be to give clarity to such a concept at the moment), the law and the public systems should encourage diversity on a fair and equitable basis and be wary of all arguments that expressly or by implication build or rely upon convergence or neat privatizing or marginalizing strategies for their justification.<sup>43</sup>

Having said this, one must point out that dominant groups (and dominance is not always a function of numbers, but sometimes elite access and membership provides in influence what might be lacking in numbers) can be quick to claim that those who oppose them are social heretics who must not have public voices or access.

In debates on “same-sex marriage”, for example, how often does one observe attempts to truncate the diversity of *moral views* or attempts to avoid nuanced moral critiques entirely by the application of pejorative portmanteau terms such as “homophobia” that seem to preclude diversity of moral position by arguing that all opponents are simply bigots.

Such a strategy claims a universal standard under which all others must march – using law if politics does not give its devotees the dominant result they seek. However, both law and politics must be wary of such exclusive claims, as they are attacks not only on rights and freedoms (personal and associational), but also on a reasonable democratic community itself. New sectarianism has no more right to public dominance than the old sectarianism.<sup>44</sup>

Failure to respect diversity goes to the heart of the freedom that is core to a proper legal order, however much it invokes the rhetoric of “equality”, “diversity” and even “pluralism” itself. Central to the tasks ahead of us is a richer understanding and practical application of “civic virtues” to counter any creeping relativism, but the paradox is that the nature of these virtues is not given by law itself, but found in the traditions that make up cultures, and law is but one and, in some ways, the more limited of these subcultures, however necessary it is. It is to the various associations, including religious associations, that contemporary cultures must turn both to challenge the over-extension of law and politics and to guide law and politics in the direction in which they should go.

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43 Convergence is the idea, sometimes explicit, but more often implicit, that we shall all come to eventual agreement on a particular contested subject matter. Given the starting points on issues such as atheism, theism or agnosticism, there may be points of agreement, but when law and politics are involved so as to force a supposed “agreement”, the scope for consensus and compromise is greatly reduced and the freedom to think alternatively damaged or destroyed.

44 The term is Good’s 2001.

As I have argued earlier, the dialogue is most richly perceived as a kind of *trialogue* and for far too long civil society, in general, and religions, in particular, have been excluded from the key conversations that need to inform law and public policy. In their dualistic conceptions of religion as outside a supposedly “secular” society, religions have, in some respects, contributed to their own exclusion by secularists and others who share a commitment (sometimes implicit) to the privatization, individualization and marginalization of religious persons and their communities. We do indeed need to overcome “the secular illusion”, but this can best be done in light of the importance of diversity, pluralism, the common good and the limits of law itself.<sup>45</sup>

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45 Benson 2013b:at 20 ff.



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