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FREEDOM OF RELIGION IN CANADA AND FRANCE: IMPLICATIONS FOR CITIZENSHIP AND JUDGMENT

MADELEINE SINCLAIR[†]

ABSTRACT

Despite the increasing tendency to relegate religion to the private sphere, the role of religion in public debate remains important and contested. Given the reality that these debates usually results in binding decisions that must be accepted by all groups, this paper engages the idea that perhaps the goal in a pluralistic society should not be to simply garner unanimous agreement or even the greatest consensus possible, but to ensure that decisions be seen by all members of a society as valid, whether or not they accord with individual or collective views.

Arendt's theory of judgment holds that it is the use of the 'enlarged mentality', the consideration of others' perspectives, that allows judgment to be seen as valid by the judging subjects. Nedelsky, in turn, focuses on how this approach to judgment helps us theorize about the optimal role of religiously based argument in the public space. This paper examines what Nedelsky's theory may have to offer in the specific contexts of Canada and France. While these two jurisdictions have much in common, important distinctions emerge with respect to the challenges posed by religious diversity and what is driving the responses to these challenges.

Through a comparative analysis, this paper begins by attempting to delineate the fundamental differences between the approaches of both countries to freedom of religion and religious diversity. An analysis is then undertaken with respect to the implications for both Canada's and France's capacities to engage a theory of judgment that uses the enlarged mentality to consider religious perspectives.

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The paper is organized as follows: firstly the legal systems, general text of the constitutions and how these relate to religion in society is compared; secondly the model of church and state relationship in both countries is examined; thirdly, the discussion is situated in the greater context of France's approach generally to the management of diversity; finally a comparative analysis of the content and delineation of freedom of religion in both jurisdictions is undertaken

The study essentially concludes that France may be neither interested nor capable of including religious perspectives in its deliberations and in that respect the validity attained when the enlarged mentality is used in judgment may not be achievable. While the paper concludes that Nedelsky's judgment may be possible in Canada, the recent example of Muslim personal law (Sharia) in Ontario is used to illustrate that, despite all of the right conditions, political will is crucial if we are to follow through with the politically difficult decisions that follow from them.

INTRODUCTION

One does not have to look further than the front page of a national newspaper in either Canada or France to appreciate the important and contested role religion currently plays in public debate, be it the case of headscarves, kirpans, or prayer space in schools, the place of Sharia in family law arbitration, or even the debates surrounding same-sex marriage. Many would also likely agree that there has been a tendency in the last fifty years or so to “relegate religion to the private sphere; to suggest that it should have as little as possible to do with economic, social, and political life.”¹ It may be that it is time to question the assumptions underlying this approach and query whether it is still appropriate given today’s socio-political climate. The reality in any democratic society is that, at some point, these debates result in binding decisions that, at least for a time, must be accepted by all groups whether they accord with the views of the group or not.² The challenge therefore lies in the reality of a pluralistic society: perhaps the goal should not be simply to garner unanimous agreement or even the greatest consensus possible, but also to ensure that decisions be seen by all members of a society as valid, whether or not they accord with individual or collective views.

Hannah Arendt outlined a preliminary theory of judgment before she died in which the central concept is the “enlarged mentality,” a concept she borrowed from Kant.³ Essentially, the theory maintains that judgment is distinct from both provable truth claims and subjective preference in that it involves the act of reflecting on a matter from the perspective of others. Because judgment is itself an inherently subjective process, it cannot compel others to concur in the way that truth claims can. It is specifically the act of using the “enlarged mentality,” of considering others’ perspectives, that allows judgment to be seen as valid by the judging subjects.⁴

¹ Claude Ryan, “In Place of a Foreword” in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen’s University Press, 2004) ix [Ryan, “In Place”].

² *Ibid.*

³ Ronald Beiner, ed., *Hannah Arendt, Lectures on Kant’s Political Philosophy* (Chicago: University of Chicago Press, 1982).

⁴ J. Nedelsky, “Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives” [forthcoming 2006] at 2 [Nedelsky, “Legislative Judgment”].

In her work, Nedelsky focuses on how this approach to judgment helps us theorize about the optimal role of spiritually or religiously based argument in the public space. Although Nedelsky specifically does not hold her argument to be valid in all times and places, this paper intends to examine what her theory may have to offer in the contexts of Canada and France.

Although her inquiry is specifically focused on the significance of judgment in legislative functions, namely deliberation on the common good and the articulation and evolution of constitutional values, her theory may also have important implications for judgment in the judicial context. Her central claim is that thinking about legislative functions in terms of judgment and the enlarged mentality will help us develop the norms necessary for religiously based argument. She posits that “neither the secularist norms nor the most vocal of the religious voices provides us with a good model for reflecting on optimal contemporary norms for religiously based argument in the public sphere,” emphasizing that elucidating these norms becomes crucial as religiously based policy positions grow in importance.⁵

This paper considers both legislative and judicial judgment because pragmatically, the site of judgment depends entirely on where these deliberations and articulations are taking place.⁶ One of the central arguments of this paper is precisely that the site, or the ways in which institutional structures operate in a given jurisdiction, may make all the difference.

One can legitimately argue that Canada and France have much in common. Both are western, liberal, functioning democratic states with significant immigrant populations.⁷ It is also fair to say that with re-

⁵ *Ibid.* at 4.

⁶ A full discussion of why the theory may or may not be applicable to the judicial context is beyond the scope of this paper. However, it is crucial for this paper to consider the implications of judgment using the enlarged mentality in the judicial context. The Chief Justice of Canada recently reminded us of the importance of the judicial context and rather important role judges play in constitutional law making in Canada: “[T]he rule of law requires judges to uphold unwritten constitutional norms, even in the face of clearly enacted laws or hostile public opinion”. Beverley McLachlin C.J., “Unwritten Constitutional Principles: What is Going On?” (Lecture presented at the Lord Cooke of Thorndon Lecture, University of Wellington, New Zealand, December 2005) [unpublished].

⁷ The 2001 census in Canada revealed that immigrants accounted for 18.4% of

spect to diversity, both countries subscribe to a version of liberalism with limits in terms of what forms of cultural diversity can be accommodated and embraced within the larger society.⁸ In fact, a study of both countries reveals agreement that in order to sustain a democratic constitutional order, the state must be able to promulgate certain civic ideals. What these civic ideals are however, as well as their consequent effects on the management of diversity, differs significantly in the two jurisdictions. In both countries, diversity presents political and legal challenges alike, and has important implications for citizenship. Yet in these two countries faced with fairly similar challenges, important differences emerge, not only in the actual responses to the challenges but perhaps more interestingly from an analytical perspective, in what drives those very responses.

In France, one of the most important civic ideals being promulgated by the state is the doctrine of “*laïcité*” or secularism. In fact, one of the most crucial things to understand when engaging in a comparative study involving France is the central role that *laïcité* plays in the neo-republican discourse on national identity.⁹ Although one may be tempted to translate *laïcité* as the French equivalent of secularization, it is important to understand how qualitatively different it is from a mere statement about the separation of church and state. There is an important distinction to be drawn between a secular state clearly separate from the church and secularism as a doctrine and ideal of citizenship promulgated vigorously by the state.¹⁰

the population <www.statcan.ca> while in France, preliminary analysis of the 2004 census revealed that immigrants accounted for 9.6% of the population <www.insee.fr>.

⁸ I am referring here to Kymlicka’s liberal theory of minority rights that posits that liberal principles impose two fundamental limitations on minority rights. Firstly, a liberal conception of minority rights will not usually justify ‘internal restrictions’, the demand by a minority culture to restrict the basic civil or political liberties of its own members. Secondly, a liberal conception of minority rights, while being more sympathetic to demands for ‘external protections’ that reduce their vulnerability to the decisions of the larger society, still imposes limitations to the extent that external protections are only legitimate as long as they promote equality between groups. Will Kymlicka, *Multiculturalism Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 152.

⁹ Michael, Leruth “The Neorepublican Discourse on French National Identity” (1998) 16 French Politics & Society 46 [Leruth, “French National”].

¹⁰ For the purposes of this paper *laïcité* will be used to specifically denote the

The challenge with the French doctrine then may be to keep secularism from becoming just another sectarianism, but one with universal pretension.¹¹ Perhaps this is the very challenge Nedelsky has in mind when advocating for the creation of a space and norms through which religious perspectives can be both heard and respected? Through a comparative analysis of religious diversity and freedom of religion in Canada and France, this paper attempts to delineate the fundamental differences in the responses of both countries to religious diversity and to analyse the implications these differences have for their capacity to engage a theory of judgment which uses the enlarged mentality to consider religious perspectives.

The study essentially concludes that France may be neither interested nor capable of including religious perspectives in its deliberations and in that respect the validity attained when the enlarged mentality is used in judgment may not be achievable. The question remains, however, whether Nedelsky's judgment is possible in Canada. The claim I make about France is grounded in three significant differences that emerge as a result of the comparative analysis. Firstly, the differences in the two countries' church-state models, contrasting the French doctrine of *laïcité* with the state's duty of neutrality with respect to religion in Canada. Related, is a philosophical difference that emerges between the two countries with respect to the conception of how and why individual autonomy ought to be protected. Secondly, and very much related, is the role that *laïcité* plays as the normative ideal of citizenship in the neo-republican discourse on French national identity which is perceived to be threatened by a multicultural France. This discourse posits the ideal French citizen as engaged with public policy issues in purely secular terms. Finally, the design of the institutional structures, that is the role of the courts in relation to the legislature in France, is an important consideration. My claim is that these structures are inherently vulnerable (or amenable depending on one's perspective) to majorities, and that consequently minority rights will never be well guarded in such a structure.

French doctrine of secularism.

¹¹ Kwame Anthony Appiah, "The Limits of Being Liberal" Global Agenda Magazine (2004) online: Global Agenda Magazine <www.globalagendamagazine.com>.

The comparative study of the two countries is organized as follows: firstly, the legal systems, general text of the constitutions and how these relate to religion in society will be compared; secondly the model of church and state relationship in both countries will be examined; thirdly, the discussion will be situated in the greater context of France's approach generally to the management of diversity; finally a comparative analysis of the content and delineation of freedom of religion in both jurisdictions will be undertaken.

I. GENERAL CONSTITUTIONAL FRAMEWORK

Several pieces of legislation – constitutional and other – define freedom of religion in France. The starting point is Article 10 of the Declaration of the Rights of Man and the Citizen which states that:

No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.¹²

Article 10 is important in that it signifies the privatization of religion, presupposing that religious opinion ought to fall into the private sphere, while simultaneously asserting that the expression of *any* opinion is necessarily public and must not disturb the public order.¹³

This privatization of religion was reaffirmed in the Law of 1905,¹⁴ which many consider as marking the beginning of “true” French secularism.¹⁵ Until that point religious institutions had been under State control, their social utility publicly recognized.¹⁶ At least part of the underlying rationale for the separation was a view that the State ought to

¹² *Declaration of the Rights of Man and the Citizen* art X online: <<http://confinder.richmond.edu>> [Article 10].

¹³ Michel Troper, “French Secularism, or Laïcité” (1999-2000) 21 *Cardozo L. Rev.* 1274 [Troper, “French Secularism”].

¹⁴ *Loi du 9 décembre 1905, Loi concernant la séparation des Eglises et de l’Etat, J.O., 11 December 1905* [Law of 1905] [translated by author].

¹⁵ Troper, “French Secularism”, *supra* note 13.

¹⁶ Danièle Hervieu-Léger, “Redefining Laïcité in Multicultural France” in Peter L. Berger, ed., *The Limits of Social Cohesion* (Oxford: Westview Press, 1998) 38 at 44 [Hervieu-Léger, “Redefining Laïcité”].

be supreme as it “has a charge of men’s souls just as much as a church of community, but in a more universal fashion.”¹⁷ Although the law itself neither contains an explicit separation nor an explicit affirmation of *laïcité*, it does enunciate the refusal by the state to recognize any religion and at once reaffirms freedom of conscience. The result was that the Republic no longer recognized, funded nor subsidized any religious group.¹⁸

The next important document with respect to freedom of religion in France is the preamble to the Constitution of 1946,¹⁹ which is expressly affirmed and integrated as part of the Constitution of 1958.²⁰ It asserts that “each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights,” thereby affirming the right to be free of discrimination based on religion.

In Canada, both freedom of religion and conscience are affirmed in s. 2(a) of the *Charter of Rights and Freedoms*.²¹ The right to be free from discrimination based on religion in turn is affirmed in s. 15(1).²² Thus, freedom of religion in France, at least on paper, is not framed in a drastically different manner from the way it is framed in Canada. Both constitutions affirm a freedom to choose and express one’s beliefs in the freedom of conscience, and a freedom to practice one’s religion,

¹⁷ Charles Renouvier was a French Philosopher broadly regarded as one of the architects of the separation of the church and state. I say “at least” as the Law of 1905 is really part of a complex history of the development of the state in France of which a full discussion is beyond the scope of this paper; Charles Renouvier, “L’éducation et la morale” (1872) *La Critique Philosophique* 279, cited in Troper, “French Secularism”, *supra* note 13.

¹⁸ Art. 2 Law of 1905.

¹⁹ France, Constitution (1946) online: <<http://confinder.richmond.edu>>.

²⁰ France, Constitution (1958) online: <<http://confinder.richmond.edu>>.

²¹ “Everyone has the right to freedom of conscience and religion”; *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [the Charter].

²² “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”; s. 15(1) of the Charter. It is worth noting that discrimination on the basis of religion is also prohibited in the federal and provincial human rights legislation in Canada. The present discussion will be limited to the constitutional context.

commonly referred to in France as “liberty of cult.”²³ Both constitutions also similarly proclaim a right to be free from discrimination on the basis of one’s religion. However, two important differences do emerge. Firstly, in France, secularism is explicitly affirmed as a constitutional principle:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.²⁴

No such doctrine or enunciation of the separation of church and state appears in the Canadian constitution. A second important difference also emerges between the two constitutional frameworks when one considers unwritten or implicit constitutional principles. In the case of Canada, the Court’s decision in the *Reference re Secession of Quebec*²⁵ has important implications for the present discussion as the Court in that case gave constitutional status to the principle of the protection of minorities. This principle was subsequently explicitly extended to religious minorities.²⁶ No such principle is found, expressly or impliedly, in the text of the French constitution. There is also a tradition with respect to minority rights present in the Canadian constitution, namely the s. 23 minority education language rights and the s. 35 recognition of existing aboriginal and treaty rights, which is notably absent from the French constitution.

²³ Julien Taieb, “Freedom of Religion: from France to the United States, a National Conflict of Law” (2004) 4 *Global Jurist Advances* 1 [Taieb, “Freedom”].

²⁴ *Supra* note 20.

²⁵ [1998] 2 S.C.R. 217 at 79 [Reference Re Secession].

²⁶ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [Syndicat Northcrest].

II. THE FRENCH APPROACH

1. Church-state model in France, the republican ideal, and its implications for citizenship

In his work “French Secularism, or *Laïcité*,”²⁷ Michel Troper highlights the difficulties in classifying French secularism within the traditional dichotomy where either church and state are separate or such a separation is absent.²⁸ He emphasizes that, although in France the secular state is *structurally* separate from religion, this does not mean that the state abstains from propagating values.²⁹ Thus, one could argue that the French model really belongs in a third intermediary category characterized by this function of propagating values.

As a result of this function, the content of the relationship between church and state in France is anything but neutral. On the contrary, the doctrine of *laïcité* propagated by the state plays an important role as one of the normative ideals of French citizenship.³⁰ Although this is not a new idea in French society, *laïcité* as a normative ideal is experiencing a resurgence of sorts in that it is being drawn on heavily in the face of new challenges. As France grows increasingly pluralistic, religious diversity has come to be perceived, at least by some, as an “obstacle to a citizenship conceived in terms of the autonomy of the individual, gender equality, and the ability of individuals to place distance between themselves and their community roots.”³¹

“A clear sign of the times,” Leruth writes, is that the ‘Right’ in France is no longer alone in suggesting that the preservation of national identity ought to be a national priority.³² Many point to the publication in 1989 in a popular French newspaper of an article written by five left-leaning

²⁷ *Supra* note 13.

²⁸ Troper, “French Secularism”, *supra* note 13.

²⁹ Troper, “French Secularism”, *supra* note 13.

³⁰ Micheline Milot, “L’Ecole et la diversité religieuse au Canada et au Québec” (Paper presented to the Perspectives Canadiennes et Françaises sur la Diversité, October 2003) online: <www.pch.gc.ca>.

³¹ *Ibid.*

³² *Supra* note 9 at 46.

philosophers³³ as one of the key events that sparked a heated debate on *laïcité* which has pervaded French society for the last fifteen years. The article called on the government to take a tougher stance on the wearing of Muslim headscarves in schools. The philosophers made three main points³⁴ in their appeal, many of which a 2004 law³⁵ banning “ostentatious” religious symbols in schools picked up on. Their first point was that the school’s mission above all is to train young people to act and think like citizens of the Republic, stressing that citizenship involves a duty to employ rational faculties of judgment to transcend personal prejudices. They argued that the students’ religious *a priori* should not interfere with the neutral classroom environment required to develop these faculties. Their second point was an attack on the philosophy of multiculturalism, arguing that the right to be different means nothing if it is not met with a right to be different from one’s difference. The school, they argued, should be a place of individual emancipation. The authors argued thirdly that France must avoid tailoring public education to meet the needs of specific communities, as this runs contrary to the value of universalism, which the school must preserve.

In order to fully understand the present construction of French identity that these philosophers are arguing should be preserved, one would need to look at least as far back as the Revolution to see that, to some degree, French identity has always “depended on the idea that citizenship should transcend community ties and define, beyond all particularisms, a national “we” with which each person can identify.”³⁶ The “Rousseau-influenced revolutionary hostility to intermediary groups and ‘factions’ – associated with privileges, divisiveness, and corruption – shaped a view of republican democracy as essentially unitary, permanently fragile and under threat.”³⁷ It is as though a national conscious-

³³ Elisabeth Badinter et al. “Profs, ne capitulons pas!” *Le Nouvel Observateur* (2 November 1989) online: *Le Nouvel Observateur* <www.nouvelobs.com> [translated by author].

³⁴ This summary refers to a summary and translation of the main arguments as cited in Leruth, “French National”, *supra* note 9.

³⁵ *Loi n° 2004-228 du 15 mars 2004, J.O., 17 March 2004, 5190* [the 2004 law] [translated by author].

³⁶ Hervieu-Léger, “Redefining Laïcité”, *supra* note 16 at 57.

³⁷ Cécile Laborde, “Secular Philosophy and Muslim Headscarves in Schools” (2005) 13 *The Journal of Political Philosophy* 316 [Laborde, “Secular Philosophy”].

ness developed over time, founded on this idea that the public sphere requires protection from the intrusion of “particular loyalties, identities or groups, lest it allow the ‘general will’ to disaggregate into myriad conflicting private wills.”³⁸

Since the Revolution, the historical confrontation between a Catholic France and a *laïque* France has resulted in the establishment of a very particular and jealously guarded identity; a *laïque* country of Catholic culture.³⁹ Laborde argues that the struggle whereby the republican state established itself in the face of a domineering Catholic Church resulted in an assumption by the state of the spiritual mission previously entrusted to the church.⁴⁰ The importance placed on the school in this debate appears to have stemmed from this struggle. After centuries of struggle and a final formal separation in 1905⁴¹, the Republic was faced with the task of creating “citizens” out of “believers.”⁴² The school thus became the logical place in which to “engage in a strong formative project, aimed at the inculcation of the public values of democratic and egalitarian citizenship, and introduce an alternative set of civil symbols into the public sphere, so as to lead citizens to endorse a robust public identity capable of transcending more particular religious, cultural, and class loyalties.”⁴³

While the focal point of the tension in France is still the school, the dynamic of the conflict no longer simply involves Catholicism and republicanism diametrically opposed, vying over control of the public space. The fact is that the operative community ties have changed and the requirement that they be transcended appears to be posing different challenges. The conflict is no longer with religion in and of itself; the ‘problem’ of significant religious and cultural diversity has been added to the mix. What is inherently problematic from an analytical perspective is that the citizenry, and therefore the interests, have changed fun-

³⁸ *Ibid.* Despite its obvious relevance to the present discussion, a real discussion of the genesis of this French consciousness or identity is unfortunately beyond the scope of this paper.

³⁹ Hervieu-Léger, “Redefining Laïcité”, *supra* note 16 at 57.

⁴⁰ Laborde, “Secular Philosophy”, *supra* note 37.

⁴¹ Referring to the Law of 1905.

⁴² Laborde, “Secular Philosophy”, *supra* note 37.

⁴³ Laborde, “Secular Philosophy”, *supra* note 37.

damentally yet this ideal of citizenship predicated on secularism at all costs is still being called on to do all the work of reconciling.

2. Diversity in France

In light of the above discussion and the significance of the threat (perceived or actual) presented by diversity to the state's promulgated ideal of citizenship, it is worth situating the conflict in France's broader approach to diversity.

France, like many other Western European countries, has really only dealt with large-scale immigration in relatively recent history. It was not until after WWII that immigrants were welcomed, recruited even, to provide labour during a time of rapid growth.⁴⁴ The recession in the 1970s marked the end of this trend, and the beginning of serious efforts to slow, limit, and even cease immigration completely.⁴⁵ The last two decades have witnessed a very real hardening in the position on immigration of all political parties, perhaps as a result of the growing popularity of Jean-Marie Le Pen's Front National. In 2002, Le Pen managed to finish second in the primary presidential election running on an essentially anti-immigrant platform.⁴⁶ Immigration has been blamed for nearly every social ill in France, including unemployment and a rising crime rate, not to mention the perceived threat to the country's national identity outlined above.⁴⁷

Despite these sentiments, France has nonetheless become one of the most multi-ethnic countries in Europe with the proportion of foreign-born residents at around 10% or 5.9 million people.⁴⁸ In general,

⁴⁴ Monica Nigh Smith, "France for the French?" *The Europeans? The Caucasians?: The Latest French Immigration Reform and the Attempts at Justifying its Disproportionate Impact on Non-white Immigrants* (2005) 14 *Transnat'l L. Contemp. Probs.* 2 [Smith, "Immigration Reform"].

⁴⁵ Joel S. Fetzer & J. Christopher Soper, *Muslims and the State in Britain, France, and Germany* (Cambridge: Cambridge University Press, 2005) at 64.

⁴⁶ Online: Front National <www.frontnational.com>

⁴⁷ Smith, "Immigration Reform", *supra* note 44 at 1.

⁴⁸ The 2001 census in Canada revealed that immigrants accounted for 18.4% of the population, online: Statistics Canada <www.statcan.ca>, while in France, preliminary analysis of the 2004 census revealed that immigrants accounted for 9.6% of the population, online: Institut National <www.insee.fr> [translated by author].

France's response to an ever increasingly diverse population has always been a strong goal of integration and assimilation. The extent of this effort to assimilate is evident in the country's law banning the collection of all statistics reflecting the religion or ethnicity of the population.⁴⁹ One need look no further than the charred remains of 8,973 vehicles torched during the 20 nights of rioting in October and November of this year to understand that these efforts to integrate and assimilate have not been entirely successful.⁵⁰ While what exactly caused and perpetuated the riots is disputable, it is widely held that French society's negative perceptions of Islam and of immigrants and the resulting alienation felt by many French Muslims was a significant factor.⁵¹

As French sociologist Alain Touraine points out, part of the problem is that the universalism that is so central to the French republican model has led to a rejection and inferiorisation of those who are 'different.'⁵² He argues that, while rejecting communitarianism has been a positive outcome of this transcending of differences, the French model is problematic in that it does not allow for the recognition of differences, thus violating the right of each individual to have his or her freedom of religion and cultural affiliations respected. In this sense he argues that France's national 'we' that is guarded so jealously, is becoming a threat to itself. Faced with a republicanism loaded with prejudice and aggressive communitarianism, he argues that France must find a way to combine integration and universalism with the recognition of differences and respect for the cultural rights of all.

3. Freedom of religion in France

As mentioned earlier in the discussion of the general constitutional framework, freedom of religion in France is protected in several legal texts, namely Article 10 of The Declaration of the Rights of Man of

⁴⁹ *Loi n°78-17 du 6 janvier 1978*, Loi relative à l'informatique, aux fichiers et aux libertés, J.O. 7 June 1978 [translated by author].

⁵⁰ "Nicolas Sarkozy sort renforcé de la crise des banlieues" *Le Monde* (17 November 2005) online: [Le Monde <www.lemonde.fr>](http://www.lemonde.fr) [translated by author].

⁵¹ "Ghettos shackle French Muslims" BBC News (31 October 2005) online: [BBC News <www.bbc.co.uk>](http://www.bbc.co.uk).

⁵² Alain Touraine "Les Français piégés par leur moi national" *Le Monde* (8 November 2005) online: [Le Monde <www.lemonde.fr>](http://www.lemonde.fr) [translated by author].

1789,⁵³ the preamble to the Constitution of 1946⁵⁴ and article 2 of the Constitution of 1958.⁵⁵

Freedom of religion in French law is essentially composed of two distinct elements: the first is freedom of conscience, which encompasses the right to choose and express one's faith and consequently to not be discriminated against on the basis of one's religion and the second, referred to as 'liberty of cult,' guarantees the right to "put into practice one's religious commandments."⁵⁶ Liberty of cult basically precludes the state from interfering with the doctrines taught, ceremonies, holy days and the general internal functioning of a given religious community.⁵⁷

As stated above, one of the milestones in the intellectuals' rediscovery of the republican ideal was an open letter to the government published in a popular newspaper by a group of French philosophers urging the government to take a tougher stance on headscarves in schools.⁵⁸ This was in response to the much-publicised expulsion of two Muslim schoolgirls who refused to remove their headscarves.⁵⁹ Because of the significance of these events and the role they have played in the neo-republican discourse on national identity, as well as the significance of the school in any discussion of secularism in France, it makes sense to narrow the discussion of freedom of religion in France to how the debates have played out in that context.

On the 15th of March 2004, Statute n. 2004-228,⁶⁰ better known around the world as the ban on Muslim headscarves in schools, was enacted. Until that point, it had been the duty of judges at the *Conseil d'Etat*⁶¹ (the administrative court) to balance *laïcité* and the right to free-

⁵³ *Declaration of the Rights of Man and the Citizen* art X online: <<http://confinder.richmond.edu>> [Article 10].

⁵⁴ *Supra* note 19.

⁵⁵ *Supra* note 20.

⁵⁶ Taieb, "Freedom", *supra* note 23.

⁵⁷ Taieb, "Freedom", *supra* note 23.

⁵⁸ Leruth, "French National", *supra* note 9.

⁵⁹ Taieb, "Freedom", *supra* note 23 at 8.

⁶⁰ *Loi n° 2004-228 du 15 mars 2004, J.O.*, 17 March 2004, 5190 [the 2004 law] [translated by author].

⁶¹ The *Conseil d'Etat* is the highest administrative court in France. The administrative courts are generally concerned with litigation involving the

dom of religion on a case-by-case basis, operating under an assumption that the two could be reconciled. The statute is intended to end a decade and a half long debate otherwise known as the “headscarf affair” which began in 1989 with the aforementioned events.

These events prompted the Minister of Education to ask the *Conseil* to advise on whether the wearing of symbols of belonging to a religious community is compatible with the principle of *laïcité*, given the principles in the Constitution, the laws of the Republic and the rules pertaining to the organization and functioning of public schools.⁶² In its opinion, the *Conseil* handed down a set of guidelines stating clearly that the headscarves were not in and of themselves in breach of the principle of *laïcité* and that *laïcité* did not justify prohibiting religious expression. Religious freedom could only be limited when it presented an obstacle to the accomplishment of the statutory mission of public education. Thus, religious symbols could be prohibited when their display constituted an act of pressure, proselytism, propaganda or provocation, when they threatened the “good order” of the school or posed a threat to health and safety. The *Conseil* delegated the task of deciding on a case-by-case basis whether these conditions were met to the school principals.

This approach proved difficult to implement as evidenced by the *Kherouaa*⁶³ case, which the *Conseil* heard three years later. Essentially the guidelines provided in the 1989 decision were entirely disregarded when three Muslim girls were once again expelled from their public school for violating a school rule prohibiting all distinctive symbols indicative of belonging to a religious, political or philosophical order. The bulk of the decision is actually identical to the 1989 decision.⁶⁴ In finding that none of the conditions required for prohibition were either al-

administration; Catherine Elliott and Catherine Vernon, *French Legal System* (Harlow: Pearson Education Limited, 2000) at 78 [The French Legal System].

⁶² Cons. d’Etat, 27 November 1989, *Port de signe d’appartenance à une communauté religieuse (foulard islamique)*, n° 346.893, <www.conseil-etat.fr> [the 1989 decision] [translated by author]. Although the Conseil d’Etat is generally concerned with litigation involving the administration, the government has wide discretion to seek the Conseil d’Etat’s advice when confronted with an administrative problem; The French Legal System, *supra* note 61 at 81.

⁶³ Cons. d’Etat, 2 November 1992, n° 130394 [Kherouaa].

⁶⁴ I do not mean to imply that the 1989 decision is cited but that the decision is literally copied word for word without citation. Pasted into the Kherouaa decision without acknowledgment.

leged or established, the *Conseil* overturned the decision and reinstated the girls as students at the school.

Further hostility to the 1989 decision and the Court's attempt to balance the principle of *laïcité* was demonstrated when the Minister of Education published a regulation essentially calling on school principals to ban "ostentatious" religious signs. The principles invoked are essentially those that later inspired the 2004 law.

In France, the national project and the republican project have merged around a certain idea of citizenship. This French idea of the nation and the Republic is, by nature, respectful of all convictions, in particular of religious convictions, political convictions and of cultural traditions. But it excludes the fragmenting of the nation into separate communities, indifferent to one another, only considering their own rules and laws, engaged in simple coexistence. The nation is not just a collection of citizens holding individual rights. This ideal is built initially at the school. The school is the premier place of education and integration where all children and all young people come together and learn how to live together and to respect each other. The presence, in school, of signs and behaviours that show that students cannot conform to the same obligations, nor take the same courses and follow the same programs, would be a negation of this mission. All discrimination, be it on the basis of gender, culture or religion must be left at the door. This secular and national ideal is the very substance of the school of the Republic and the basis of the civic duty of education. This is why it is not possible to accept the presence and the multiplication of symbols so ostentatious that their effect is precisely to separate certain pupils from the common rules of the life of the school. These symbols are, in themselves, the elements of proselytism.⁶⁵

The regulation provides substantial support to the argument above that secularism in France does much more than negotiate the terms of the relationship between church and state. This statement affirms the crucial role secularism plays in the republican ideal. The perceived threat to this ideal and the emphasis on the school as the breeding ground for the new French citizen are also immediately apparent.

It has been said that it was the situation of legal uncertainty, where decisions were left to principals to make on a case-by-case basis, which

⁶⁵ *Bulletin officiel du ministère de l'Éducation nationale*, N° 35, 29 September 1994, 2528 [translated by author].

prompted the legislature to step in and convene the Stasi Commission which ultimately drafted the 2004 law.⁶⁶ Although it is likely that the lack of legal certainty was a factor, it seems impossible to conclude from the above dialogue between the *Conseil*, the schools and the legislature that there was not also a significant degree of hostility towards the *Conseil's* interpretation of secularism as a flexible principle to be reconciled with religious freedom.

The Stasi Commission, mostly composed of academics and politicians, was formed in July 2003 and was charged with the task of proposing a theoretical and practical framework for the revival of secularism in the Republic.⁶⁷ Most politicians defended the idea of adopting a statute with some notable exceptions.⁶⁸ Nevertheless, the report⁶⁹ was adopted unanimously five months later. The report made several recommendations for a new law on *laïcité* whose aim would be to, on the one hand provide precise rules regarding the functioning of public services, and on the other hand foster the spiritual diversity of the country.

The report made several recommendations with respect to a new law on *laïcité* including a proposed ban on all “ostentatious”⁷⁰ symbols demonstrating a religious or political affiliation. The law also included a proposal to make Yom Kippur⁷¹ and Eid al-Fitr⁷² pedagogical holidays, a proposal to allow employees to choose one religious holiday a year as an additional statutory holiday and a proposal to create a national school

⁶⁶ *Supra* note 23.

⁶⁷ The commission consisted of 20 members. Its mandate was included in the “Lettre de mission” sent July 3, 2003 from the President to Bernard Stasi online: <ladocumentationfrancaise.fr>.

⁶⁸ Nicolas Sarkozy, the Minister of the Interior at the time, was one of these notable exceptions. Mr Sarkozy warned that the statute could stigmatize the Islamic community in France and that if the real goal was integration that this could not be achieved solely through banning headscarves in schools. Taieb, “Freedom”, *supra* note 23.

⁶⁹ Rapport Commission Stasi, online: <www.fil-info-France.com>.

⁷⁰ This includes large crosses, the Kippa and the Muslim headscarf. This does not include small crosses, small stars of David, hands of Fatima and pocket sized Korans.

⁷¹ Jewish day of atonement.

⁷² The celebration when the fast is broken at the end of Ramadan.

of Islamic studies⁷³. The President of the Republic however, chose only to adopt the ban on religious symbols.

Overall, one could argue that the report is wholly inadequate considering its mandate which included such unrealistic goals as to change mentalities and habits, fight racial discrimination in the public and private spheres, impose a strict respect for *laïcité* in the public services, and to enhance spiritual diversity, as all it did practically was enable the adoption of the 2004 law.⁷⁴

It is interesting to note what commissioners have said about the Commission since the law's adoption. At least one commissioner has said that truthfully there was never any real debate over whether or not there should be a law, rather only about what the law should contain. He emphasized that there was a sentiment amongst commissioners that an administrative guideline would not have been enough to assuage the pressure of public opinion surrounding the issue; a unanimous vote in favour of a statute was necessary. He also admitted that he felt the work of the Commission was necessarily unbalanced as the most important goal had always been to say 'no' to Islamic fundamentalism.⁷⁵

As mentioned above, in some ways the law represents a certain hostility toward the courts engaging in a balancing act, trying to reconcile *laïcité* with the guarantee of freedom of religion. The *Conseil* was prepared to assume the two principles could be reconciled and limit freedom of religion only where it was necessary to, i.e. when there was an act of pressure, proselytism, propaganda or provocation, where the 'good order' of the school was threatened or where a threat was posed to health and safety. The effect of the 2004 law, in contrast, is to end the competence of the *Conseil* to engage in this balancing exercise, thereby making an implicit statement that *laïcité* is not after all a 'flexible principle' and imposing serious internal limitations on the right to freedom of religion.

⁷³ It should be noted that no information is given about whether this school would be run by or funded by the state.

⁷⁴ Taieb, "Freedom", *supra* note 23 at 44.

⁷⁵ Philippe Bernard "Membre de la commission Stasi, Alain Touraine raconte sa conversion au principe d'une loi" *Le Monde* (18 December 2003) online: *Le Monde* <www.lemonde.fr> [translated by author].

III. THE CANADIAN APPROACH

1. Church-state model in Canada

The Canadian model of the relationship between church and state stands in stark contrast to its French counterpart. Whereas the French relationship is characterized by its positive content, the Canadian one is very much characterized by its neutrality. Rather than secularism being a value or doctrine to be propagated in and of itself, secularism in Canada exists to provide a framework within which tolerance and respect for diversity are meant to be fostered. As such, it imposes a duty of neutrality on the state.

This duty of neutrality was perhaps most recently clearly enunciated in the Supreme Court of Canada's (the "Court") decision in *Lafontaine*,⁷⁶ in which the Court looked at whether the municipality of Lafontaine had lawfully denied an application for rezoning to permit a congregation of Jehovah's Witnesses to build a place of worship. Lebel, J. wrote that the result of the clear distinction that exists between churches and public authorities is that the state is now under a duty of neutrality. He goes on to say that this concept of neutrality

allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society.⁷⁷

This notion was equally affirmed in the Court's decision in *Chamberlain*⁷⁸ where it considered the meaning of strict secularism in the *School Act*⁷⁹ with respect to a decision by a school board to ban books depicting same-sex parented families. In holding that the school board ought not to have banned the books, McLachlin C.J., writing for the majority,

⁷⁶ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village) Lafontaine*, [2004] 2 S.C.R. 650 [Lafontaine].

⁷⁷ *Ibid.* at 67.

⁷⁸ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 [Chamberlain].

⁷⁹ *School Act*, R.S.B.C. 1996, c. 412 [School Act].

held that the requirement of secularism in the *Act* implied that, while the board was free to address the religious concerns of parents, this must be done in such a way as to give equal recognition and respect to other members of the community. In holding that religious views ought not to be “left at the boardroom door,” the Court stated that those views could nonetheless not be used to exclude the concerns of a minority group as each group ought to be “given as much recognition as it can consistently demand while giving the same recognition to others.”⁸⁰

In a sense then, the state is not so much a player in these conflicts as it is a referee, there to ensure that all parties with a stake are playing by the rules. The state’s role is limited to ensuring⁸¹ that a proper legal and social framework exists in which individuals and groups are able to meaningfully exercise their freedom of religion while ensuring mutual tolerance and respect for the diversity of opinions and convictions that exist in a pluralistic society such as Canada. The state in France, on the other hand, has itself an interest to be protected. The state is seen as a crucial player, guarding against the threat that religion poses to an ideal of citizenship founded on the autonomy of the individual and his ability to place distance between himself and his community roots.⁸²

2. Freedom of religion in Canada

In Canada, the content of the guarantee in s. 2(a) of the *Charter*⁸³ of freedom of religion has been gradually shaped by the Court in its twenty or so years of jurisprudence since the *Charter* came into effect. The Court’s definition is an expansive one and one which revolves around the notion of personal choice and individual autonomy and freedom.⁸⁴ It is interesting, preliminarily, to contrast this notion of individual autonomy as a right to be protected within the right to freedom of religion with the French defence of the principle of *laïcité* which presumes that

⁸⁰ *Chamberlain*, *supra* note 78 at 19.

⁸¹ *Lafontaine*, *supra* note 76 at 68.

⁸² Micheline Milot, “L’Ecole et la diversité religieuse au Canada et au Québec” (Paper presented to the Perspectives Canadiennes et Françaises sur la Diversité, October 2003) online: < www.pch.gc.ca > [translated by author].

⁸³ *Ibid.*

⁸⁴ *Syndicat Northcrest*, *supra* note 26.

individual autonomy can only truly be achieved when an individual is able to divorce himself from his religious affiliations. This highlights the very different philosophies that imbue the two approaches when one considers that this presumption, which is distinctly absent from the Canadian approach, does so much of the justificatory work in the French approach.

Dickson J. (as he then was) first defined what was meant by freedom of religion in *R v. Big M Drug Mart*:⁸⁵

[T]he 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.⁸⁶

Dickson J. also articulated the purpose of freedom of religion in *Big M*:

[T]he values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.⁸⁷

The content and definition of the right in s. 2(a) has been further delineated by a number of cases. The Court in *R v. Jones*⁸⁸ emphasized that a trivial effect on religion will not breach the guarantee in s. 2(a). Thus, s. 2(a) does not require the legislature to refrain from imposing any burden at all on the practice of religion. In *Jones*, the appellant alleged that requiring him to apply to the school board for an exemption for his children from mandatory school attendance so that they could be home-schooled violated his freedom of conscience and religion as it forced him to acknowledge the school board and not God as the source of the right and obligation to educate his children. The Court did not

⁸⁵ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336 [Big M].

⁸⁶ *Ibid.* [emphasis in original].

⁸⁷ *Ibid.* at 346.

⁸⁸ *R v. Jones* [1986] 2 S.C.R. 284 [Jones].

accept that this represented more than a trivial effect on his freedom of religion.

From time to time situations arise where rights within the *Charter* itself come into conflict. In deciding whether the proposed legislation extending civil marriage to same-sex couples⁸⁹ was consistent with the guarantee in s. 2(a), the Court discussed how a ‘collision of rights’ should be resolved.⁹⁰ The Court reminds us that a limit on religious freedom will only be required where a true conflict of interests is made out⁹¹ before explaining that when such a conflict does arise, it must be resolved using the justificatory principles in s.1 of the *Charter* to balance the interests at stake.⁹² The Court also clearly states that conflicts of rights do not represent a conflict with the *Charter* itself, but rather that these conflicts are to be resolved within the *Charter*.⁹³

This approach was used by the Court in *Trinity Western*,⁹⁴ a case in which Trinity Western University (TWU), a private institution associated with the Evangelical Free Church of Canada, alleged that a refusal by the B.C. College of Teachers (BCCT) to accredit a teacher-training program on the basis that TWU appeared to follow discriminatory practices infringed the right to freedom of religion in s. 2(a). The concern was that the ‘Community Standards’ of TWU embodied discrimination on the basis of sexual orientation. TWU students, faculty and staff were asked to sign a document agreeing to refrain from “practices that are

⁸⁹ Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes, Order in Council P.C. 2003-1055, preamble, ss. 1, 2.

⁹⁰ *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698 at 50 [*Same-Sex Marriage*].

⁹¹ The Court here is referring to its decision in *Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R. 772 [*Trinity Western*].

⁹² This is also the approach followed in *R v. Keegstra* [1990] 3 S.C.R. 697, where a person accused of promoting hatred against Jews claimed that his right to freedom of expression was being infringed. It is important to note that although resolving the conflict using the justificatory analysis in s. 1 or “ad hoc balancing” is the more common approach adopted by the Court, the Court has also engaged in some “definitional balancing” when resolving conflicts between rights, for example in *R v. O’Connor* [1995] 4 S.C.R. 411 (Peter Hogg, *Constitutional Law of Canada*, 2004 student ed. (Toronto: Carswell, 2004) at 739). A full discussion of this point however, is beyond the scope of this paper.

⁹³ *Same-Sex Marriage*, *supra* note 90 at 52.

⁹⁴ *Supra* note 91.

biblically condemned” including homosexual behaviour. The issue then was the proper definition of the scope of the right to freedom of religion and of the right to be free from discrimination on the basis of sexual orientation. The Court explicitly stated that neither one is absolute and that the “proper place to draw the line is generally between belief and conduct.”⁹⁵ Thus, the freedom to hold a belief is broader than the freedom to act on one.⁹⁶ As the Court found no evidence that training teachers at TWU would foster discrimination in the schools where these teachers would go on to teach, the Court held that their freedom to adhere to certain beliefs should be respected. The BCCT was wrong to *presume* a potential danger for the rights of others or the social order from religious doctrine. The Court was thus able to circumscribe the rights that had come into conflict and reconcile them within the Charter.

In *Ross v. New Brunswick School District No. 15*⁹⁷ the Court held that the New Brunswick Human Rights Commission was correct in finding that a school board had discriminated against the appellant and his children in the provision of accommodation, services or facilities⁹⁸ on the basis of religion and ancestry when the board continued to employ a teacher who publicly made racist and discriminatory comments against Jews in his off-duty time. This case is significant because although the beliefs and opinions held by the teacher were held to be discriminatory, LaForest, J., writing for the whole court, held that the teacher’s freedom of religion was nevertheless infringed. He stated that assuming the sincerity of the beliefs and opinions, it is not open to the courts to question their validity, thus leaving the task of reconciling competing rights to the s. 1⁹⁹ analysis. This external limiting of the right is exactly the approach that France has departed from in refusing to balance freedom of religion with the secularist goals of society.

The holding in *Syndicat Northcrest*¹⁰⁰ is related in that the Court emphasized that there is no requirement, when invoking a right to religious freedom, to prove that beliefs are objectively valid with re-

⁹⁵ *Trinity Western*, *supra* note 91 at 36.

⁹⁶ *Trinity Western*, *supra* note 91 at 36.

⁹⁷ [1996] 1 S.C.R. 825.

⁹⁸ *Human Rights Act*, R.S.N.B. 1973, c. H-11, ss. 5(1).

⁹⁹ Of the *Charter*.

¹⁰⁰ *Supra* note 26.

spect to other members of the same religion. Rather, once again, if anything must be shown, it is only that a belief is sincere. A requirement to show an objective religious obligation would run counter to the underlying purposes and principles of the right guaranteed in s. 2(a). In *Syndicat Northcrest*,¹⁰¹ Iacobucci, J., writing for the majority, held that the by-laws of a condominium building that prevented the appellants from building succahs¹⁰² on their balconies infringed their religious freedom. The majority balanced the right to religious freedom engaged against the co-owners' rights to the peaceful enjoyment of their property and personal security protected in ss. 1 and 6 of the Quebec *Charter*¹⁰³ and held that the co-owners' interests could not reasonably be considered as imposing valid limits on the exercise of the appellants' religious freedom.

CONCLUSION: IMPLICATIONS FOR JUDGMENT

Recalling the discussion at the start of this paper regarding the need for the development of norms through which religious argument could be included in public debate, it becomes apparent through a comparative analysis that the legitimacy of religious argument may be totally precluded in a given jurisdiction by the content of the state-church relationship, the ideals of citizenship promulgated by the state, and the overall design of the institutional structures.

Firstly, as evidenced by the comparison of the two countries, the content of the church-state relationship, or specifically whether this relationship has any content at all, matters greatly. In France, the state's

¹⁰¹ *Supra* note 26.

¹⁰² The word succah means booth or hut in Hebrew. During Succot, Jews eat their meals, entertain guests, relax, and even sleep in a succah, a temporary structure. The succah is reminiscent of the type of huts in which the ancient Israelites dwelt during their 40 years of wandering in the desert after the Exodus from Egypt, and reflects God's benevolence in providing for all their needs in the desert. Online: <wikipedia.org>.

¹⁰³ *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 [*Quebec Charter*]; s. 1: "Every human being has a right to life, and to personal security, inviolability and freedom"; s. 6: "Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law".

role as the propagator and guardian of the doctrine of *laïcité* has resulted in a conception of citizenship that is predicated on a notion of individual autonomy in which an individual is not truly autonomous if he has not been emancipated from his religious affiliations. It is only once this emancipation has taken place that he is truly able to participate fully in the community's deliberations on the public good. In Canada, as noted above, a very different view of individual autonomy with regards to freedom of religion is espoused. It is apparent from the delineation and content the Court has given to s. 2(a), that a notion of individual autonomy is seen as an essential part of what is being protected within the guarantee of freedom of religion. Freedom of religion guarantees not only a right to "entertain such religious beliefs as a person chooses," but perhaps more importantly for this discussion, the right to hold and manifest such beliefs is *only* limited by their actual injury to others' parallel rights.¹⁰⁴ This difference, coupled with the state's role in Canada as one of a neutral intermediary, results in there being much more potential in the Canadian context for a view of religiously based policy positions as legitimate.

The second apparent difference in the two approaches is highlighted by the reaction in France to a perceived threat that multiculturalism poses to French national identity. As articulated above, French identity continues to depend on an idea of citizenship that requires one to transcend community ties and abandon all particularisms so that all may come together to define a national French 'we' with which each person can identify. It is probably not such a stretch to suggest that many Canadians on the surface deplore the idea that one ought to rise above all else, to be French first and foremost, in order to ensure a seat at the table. But is there no such national 'we' in Canada? Or is it just that our 'we' is more immune to criticism as it also conveniently claims cultural neutrality?

Taylor reminds us to be cognizant of the fact that "[L]iberalism is also a fighting creed."¹⁰⁵ What distinguishes Canada from France then is not the lack of a national 'we.' "Difference-blind" liberalism, which claims to offer a neutral ground on which people of all cultures can meet, discuss, coexist, etc, in reality *requires* the separating out of the

¹⁰⁴ *Big M*, *supra* note 85 at 336.

¹⁰⁵ Charles Taylor, "The Politics of Recognition" in Amy Gutman, ed. *Multiculturalism* (Princeton, N.J.: Princeton University Press, 1994) at 62 [Taylor, "Politics"].

public from the private, or religion from politics.¹⁰⁶ He argues that liberalism “is not a possible meeting ground for all cultures, but is the political expression of one range of cultures, and quite incompatible with other ranges”.¹⁰⁷ Not only does liberalism necessarily exclude cultures for which this separation is not possible, it has serious implications for judgment using the enlarged mentality. The solution that Taylor proposes however, is compatible with the goals of Nedelsky’s theory: the challenge in dealing with an awkwardness stemming from substantial numbers of people who are citizens yet whose culture calls into question the philosophical boundaries of a given society is to “deal with their sense of marginalization without compromising our basic political principles.”¹⁰⁸ Taylor emphasizes the need for recognition of the equal value of different cultures, of the acknowledgement of their worth. All cultures in a multicultural society should benefit from the presumption that their culture has value even if the concluding judgment is not that the value is great.¹⁰⁹ There is a parallel here to be drawn with Nedelsky’s theory, which explains that by actually listening to the content of religiously based argument, those making judgments will be in a better position to understand and take into account the sense of loss a religious community may feel when reforms are undertaken which involve deep social transformation that runs counter to the positions of those communities.¹¹⁰ In that sense, although Canada must not forget that its liberalism is never neutral, within it there appears to be potential to accommodate what Nedelsky is calling for. France however, is in a different position and as such is not able to accommodate what Nedelsky calls for. The difficulty lies in that participation in the very dialogue on the national ‘we’ is contingent on an individual or a community’s ability to dispense with its cultural identity thereby precluding the very possibility of recognition.

Finally, whereas the Court in Canada has gone as far as elevating the principle of the protection of minorities to constitutional status, it appears that neither the constitutional documents, discourse nor insti-

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Supra* note 4 at 27.

¹⁰⁹ *Supra* note 105 at 64.

¹¹⁰ *Supra* note 4 at 27.

tutional structures in France are such that the same protection can be afforded to minorities there. As mentioned in the discussion on the constitutional framework, there is no protection in France for minorities in the actual constitution, nor has any substantive protection been found implicitly.

Furthermore, the dynamic between the courts and the legislature has shown that the result of disagreement and hostility between the two will be an assumption by the legislature of the task of redirecting state policy to conform with the ‘general will’. France’s parliamentary supremacy stands in sharp contrast to Canada’s system of government, which has been termed a constitutional supremacy.¹¹¹ The implications for minorities are significant. The Court clearly stated in *Vriend*¹¹² that, while democracy in Canada requires that “legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make,” that judicial intervention will be required to correct a democratic process where the interests of minorities have been denied consideration. It is arguable that these aspects of French governance, contrasted with their Canadian counterparts, confirm that overall the institutional structures in France are too vulnerable to the will of majorities to facilitate the kind of judgment that Nedelsky is calling for.

AFTERWORD

Although the purpose of this study is not to decide exactly if, how, where and when judgment using the enlarged mentality to include religious perspectives would be possible, it is worth taking a moment to consider what the implications are for Canada. It seems fair to conclude from the above analysis and discussion that, at the very least, the conditions in Canada do not totally preclude the possibility of taking religious perspectives. However, it is always important to bear in mind that the right conditions may not be everything.

In June of 2004, former attorney general of Ontario Marion Boyd was asked by the government of Ontario to conduct a review of the use of religious arbitration in family law and its impact on vulnerable people, particularly women. The review was a response to public concern

¹¹¹ *Reference Re Secession*, *supra* note 25 at 72.

¹¹² *Vriend v. Alberta* [1998] 1 S.C.R. 493.

about the potential use of Muslim personal law (Sharia) in the wake of a controversial proposal put forth by the Islamic Institute of Justice to establish a “Sharia Court” in Ontario. Despite the fact that family matters have been arbitrated on the basis of religious teachings for many years, there was intense fear that allowing Sharia arbitration could lead to abuses and a consequent erosion of the equality rights of women. The public discourse was, unsurprisingly, plagued by numerous misconceptions.¹¹³

It is well beyond the scope and purpose of this paper to delve into the issues and arguments that arose as a result of this process, but suffice to say that what resulted is interesting and pertinent given the present discussion. It is arguable that the process Marion Boyd engaged in throughout her study represents a form of the judgment using the enlarged mentality that Nedelsky advocates for. The study involved very extensive consultations of all interested groups¹¹⁴ and a series of recommendations was made based on those consultations. The recommendations included legislative and regulatory changes, changes to ensure accessibility to independent legal advice, public legal education programs, programs for the education, training and regulation of mediators and arbitrators and proposals for community development.

She concluded that the guarantee to freedom of religion in s. 2(a) mandated that peoples’ choices be respected as long as the choices or results are not illegal.¹¹⁵ She wrote that

[B]arring Muslims, or any other identifiable group in Ontario, from arbitrating family law and inheritance matters, while others continue to arbitrate according to the principles of their choice... would raise the issue of whether the government was in violation of the Charter. Given that the *Arbitration Act* provides a framework for arbitration

¹¹³ Marion Boyd “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion” (2003) at 4 online: www.attorneygeneral.jus.gov.on.ca [Boyd Report].

¹¹⁴ *Ibid.* at appendix 2. Consultation involved speaking to over 50 groups and 200 individuals including representatives from a variety of women’s organizations including immigrant organizations and groups dealing with domestic violence, representatives and organizations from the Muslim, Jewish and evangelical Christian communities, legal organizations and family lawyers, public legal education organizations, scholars, religious leaders, and private individuals.

¹¹⁵ Boyd Report, *supra* note 112 at 74.

for all Ontarians, the government should not exclude a particular group of people on the basis of a prohibited ground.¹¹⁶

The report, entitled “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion,” was submitted to the government of Ontario in December of 2004. Despite the commitment shown until that point to listen to the various interested individuals and parties and to meaningfully consider their perspectives, reality proved that what Nedelsky is calling for demands much of a given society and that a variety of challenges will inevitably arise. In September 2005, Ontario Premier Dalton McGuinty told the Canadian Press that he had “come to the conclusion that the debate has gone on long enough [...] There will be no Sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.” Stating further that religious arbitrations “threaten our common ground,” he promised his government would introduce legislation “as soon as possible” to outlaw them in Ontario.¹¹⁷

It is likely that time will reveal the underlying reasons for this rather sudden and thus far unexplained policy decision. In the meantime though, there may be important lessons to be learned. The experience reminds us of both the very real limits of our allegedly “difference-blind” liberalism and that, occasionally, the ripeness of the conditions will mean very little if there is no will to actually follow through with the perhaps more politically difficult choices that follow from them.

¹¹⁶ Boyd Report, *supra* note 112 at 74.

¹¹⁷ Colin Freeze and Karen Howlett “McGuinty government rules out use of sharia law” *The Globe and Mail* (12 September 2005) online: *The Globe and Mail* <www.theglobeandmail.com>.