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The Supreme Court of Canada

Francesco Alicino

1. *Introduction*

Although many national Constitutions and international legal documents recognize and guarantee rights related to 'religion', almost none of these attempt to define the term and the relative concept.[1] As a result, while important provisions safeguard fundamental rights concerning religion, what we call religious rights, the word itself remains undefined. One may say that the nonexistence of a definition does not differentiate rights related to religion from most of the other rights. That is not exactly true. Since religious rights are much more complex than other guaranteed rights, the difficulty of understanding what is and what is not protected by States and supranational organizations has significantly become greater. This is even more evident in the light of the current processes of immigration and globalization, through which in the last decades many Western Countries have moved from a number of creeds sharing, more or less, a common Christian cultural background to today's variety of different religions or beliefs.

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[1] See, for example: Article 8 of the 1986 African Charter of Human Rights and People's Rights (O.A.U. Doc. CAB/LEG/67/3/Rev.5); Articles 1, 4 and 19 of the 1976 Convention Relating to the Status of Refugees (July 28, 1951, U.S.T. 6259, 189 U.N.T.S. 137); the 1976 Protocol Relating to the Status of Refugees (19 U.S.T. 6223, 606 U.N.T.S. 267); Article 18 of the 1966 International Covenant on Civil and Political Rights (G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316); Article 2 of the 1966 International Covenant on Economic, Social, and Cultural Rights (G.A. Res. 2200°, XXI, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316); Article 9 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 12 of the 1969 American Convention on Human Rights (1144 U.N.T.S. 123). See also: the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/684); the 1993 General Comments Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 22(48) (art. 18), U.N. GAOR Hum. Rts. Comm., 48th Sess., Supp. No. 40,cat 208, 209, U.N. Doc A/48/40).

These States have in effect to deal with an era of unprecedented religious-cultural diversity. Hence, many legal strategies and normative instruments that have until recently been used to manage and define religious phenomena are not working any more, or better, they seem to be less efficient than in the past. They not only are unable to clarify what religion is, but they also cannot accommodate the demands coming from the existing religious landscape. It is not by chance that the most troubling examples of these tendencies are laws that differentiate between traditional and non-traditional religions, as affirmed in Russia, Greece and Italy,[2] or that differentiate between religions and sects, as stated in France.[3]

These tendencies, however, reflect problems also present in multicultural legal systems, which have for many years boasted a good experience in dealing with multi-ethnic and multireligious societies. One of the most important examples of that is given of Canada where, while religion has always been a significant force in the public life, the relationship between religious and the State's authorities has changed profoundly in the last period. An explicit or implicit alliance between the State's law and the teachings of the dominant Christian religions, long taken for granted, has been steadily challenged. The Canadian State is now conceived, in popular and constitutional discourses, as officially secular yet supportive of religious and cultural pluralism.[4] But even in this multicultural perspective, never as in recent years has Canada appeared to be experiencing an increasingly profound crisis, mainly alimented by the new human settlements made up of immigrants. This is also demonstrated by an intense debate concerning multiculturalism, reasonable accommodation and the State-religions relationship, that is to say the pillars of the Canadian constitutional order, in respect of which Courts in general and the Supreme Court in particular play a very important role.

This article is divided into two parts. The first part is concerned with the legal definition of religion, which is difficult yet, at the same time, necessary. This is more evident in a multicultural and multireligious context, as it is the case of the current Canada's society.[5] With the second part I analyse the Su-

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[2] See F Alicino, 'Western Secularism in an Age of Religious Diversity' (2012) 22 Intl Rev of Sociology 305.

[3] See, for example, *Assemblée nationale*, *Rapport fait au nom de la Commission d'enquête relative à l'influence des mouvements à caractère sectaire et aux conséquences de leurs pratiques sur la santé physique et mentale des mineurs, Assemblée nationale,* 12 December, 2006, http://www.assemblee-nationale.fr/12/pdf/rap-enq/r3507-rapport.pdf.

[4] LG Beaman, 'Religion and Canadian Society: Traditions, Transitions, and Innovations' (Canadian Scholars' Press Inc 2006).

[5] See paras 2, 2.1 and 2.2.

preme Court's interpretative strategies to better define religion and religious practices, which takes into account some of the most important pillars of the Canadian Constitution, such as human rights, freedom of religion, principle of equality, reasonable accommodation, and State's duty of neutrality.[6] Indeed, the questions of defining religion may be better understood when analysed in the light of the overlapping affiliation that exists between constitutional rights, secular State, religious *nomoi* groups and individuals who are, at the same time, persons, citizens and – eventually – members of a religion.[7]

2. *The Problem of Defining Religion*

In legal studies related to religion there is a very dynamic debate as to whether the term and the concept can or should be defined. Hundreds of proposals have been made, each claiming to solve the definitional problem of religion in a new and unique way. It is pointless to say that no definition has gained a wide acceptance in the scientific community. Hence, the definitional enterprise, as well as the debate over the need for a definition, continues in full dynamism.

The fact is that, while academics have the luxury of debating whether the term is hopelessly ambiguous, judges and lawyers cannot do so. Take for example members of the European Court of Human Rights, who may be required to give meaning to the word 'religion' for purposes of interpreting the European Convention, starting with Article 9 devoted to the rights of freedom of thought, conscience and religion. Among other things, this Article states that everyone has the right to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Which is a clear demonstration of the multidimensional view of religious freedom.[8] Similarly, in order to recognise a tax- exemption to religious organizations and associations, as happened in many Western States, public authorities should primarily understand whether these groups are actually religious.[9] Not to mention the pressing problem of asylum-cases, where jud-

[6] See paras 3, 3.1, 3.2, and 3.3.

[7] See para 4.

[8] It should be remembered that the first paragraph of Article 9 of the European Convention of Human Rights reproduces the content of Article 18 of the 1948 Universal Declaration of Human Rights.

[9] Take for example Article 47 of the Italian Acts concerning the public funding to religious denominations with the 0.008 of the income tax (called *IRPEF*). According to these Acts all Italian

ges, lawyers and public authorities are called upon to decide whether people who are outside their Countries have a well-founded fear of being persecuted for reasons combined with their religious belonging.[10]

In these and in other cases one can easily notice that decisions about what constitutes religion make a real difference in the lives of many human beings. The problem is that defining religion is fraught with difficulty. This is because religion is a matter of faith, intermingled with culture. It is about religious beliefs, but also about religious relationships. It is individual, yet profoundly communitarian. While religion may involve group identity or voluntary affiliation, it also encompasses a vast range of activities, practices, rites, and manifestation of convictions.

Adherents of some religions may claim, for example, to suffer persecution if required to cut their hair or shave their beards. At the same time other believers complain that they are persecuted because they are forced to grow their hair and beards. Some creeds require ritual slaughter of animals and others forbid eating meat. Few religious confessions involve drinking alcohol in sacred rituals others prohibit its consumption at any time. Several religious groups ban military services others require male adherents to carry knives. Important creeds keep Saturday or Sunday holy others do not do so. Some beliefs permit a man to have more than one wife, what is considered a sin in different religious contexts.

Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy, other practices may be optional or a matter of personal choice: between these two extremes lies a vast array of beliefs and customs, more important to some adherents than to others. Besides, some religions, like Buddhism, do not believe in a personal God or a divine being, nor have worship, praying to, or praising of a divine being; they offer no form of redemption, forgiveness, no heavenly hope, or a final judgment to those practicing its system. These elements, on

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taxpayers can participate to a sort of 'poll' to allocate 0.008 of their income tax (*IRPEF*) to Either the State or one of the religious organizations (namely Catholic Church and religions other than Catholicism that have signed an agreement with the State) by signing under one of the other in the tax form. The entire fund (i.e. the overall amount of 0,008 of the *IRPEF*) will then be divided proportionally amongst the choices selected by the tax payer who signed to give 0.008 of their taxes to specific religions. In doing so, even the tax payers who did not choose any denomination will end up funding one according to the selection made by those who did sign to give their taxes to a religious group. See F Alicino, 'Un referendum sull'otto per mille? Riflessioni sulle fonti, (2013) 33 Stato, Chiese e pluralismo confessionale 1-35.

[10] See, for example, article 1.A.2 of the 1951 Convention Relating to the Status of Refugee, which does not offer a definition of religion. On this see TJ Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law' (2003), 16 Harvard Human Rights J 189-214.

the other hand, are essential in monotheistic Abrahamic religions, which includes the most numerous and influential creeds in the world.[11]

In sum, what the adherents of some religions might perceive to be trivial issues, others may see as an integral part of their lives. And we should also not forget that in some Western States atheist and agnostic groups, whose members do not hold a belief in the existence of any deity, are legally classified as religions.[12]

The religious experiences lived by individuals and communities are so diverse that a single encompassing definition is almost impossible. Yet, in order to solve some disputes, sometimes one cannot avoid defining what is (or isn't) a religion. In other words, one cannot duck out of the issue of identifying the components that distinguish religions and religious conduct from other kinds of community and human activities. And this becomes even more crucial when considering the rights and freedoms related to religion in contexts made up of people from a rich variety of cultural-religious backgrounds, as is the case of Canada's contemporary society.

2.1. *The Legal Framework and the Social Evidence of Canada's Multiculturalism*

In Canada the legislative provision of religious freedom dates back to the 1851 Statute of the Provinces (being the fourth session of the third provincial Parliament of Canada), which guaranteed freedom of religion and worship, while respecting morality, peace and security. The 1867 British North America Act – despite not being conceived as an Act recognising and granting fundamental rights – provided legal protection of some religious practices, like those referring to the Catholic and Protestant schools in Ontario and Quebec.[13]

In any case, in 1960 for the first time in the history of Canada the Section 1 of the Canadian Bill of Rights explicitly stated that '[i]t is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex,

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[11] On this question see, for example, *Torcaso v. Watkins*, 367 U.S. 488 (1961), fn. 11: '[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others'.

[12] S Culham Bullivant, 'Believing to Belong: Non-religious Belief as a Path to Inclusion', in LG Beaman and S Tomlins (eds), 'Atheist Identities – Spaces and Social Contexts' (Springer 2015) 101-116.

[13] See Sect 93 of The 1867 British North America Act.

the following human rights and fundamental freedoms, namely … (c) freedom of religion'. In addition in 1971, under Prime Minister Pierre Elliot Trudeau, the Federal Government declared that Canada would adopt multicultural policy. In doing so, the Government underlined the value and dignity of all Canadian citizens, regardless of their racial or ethnic origins, their language, or their religious affiliation.[14] The 1971 policy also confirmed the rights of Aboriginal peoples and the status of Canada's two official languages. [15]

In line with this view, the first part of the 1982 Constitution Act, better known as the Canadian Charter of Rights and Freedoms (hereinafter the 1982 Charter), affirmed (Sect. 2) that everyone has (a) the freedom of conscience and religion as well as (b) the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. These rights and freedoms are subject only to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' (Sect. 1). Besides, Section 15 of the 1982 Charter states the principle of equality, according to which '[e]very 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' (para. 1). It should be noted that this principle 'does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour and religion' (para. 2). Canada's respect for diversity emerges also from Section 27 of the 1982 Charter, which states that '[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'. Six years later, the Canadian Multiculturalism Act entered into force, preserving and enhancing multiculturalism system. It not only recognised the demographic realities of Canada and promoted multiculturalism as a State's objective. In connection with the 1982 Charter, the 1988 Act also facilitated institutional changes by providing material benefits in the form of equality-rights legislation.[16]

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[14] W Kimlicka, 'The Three Lives of Multiculturalism' in S. Guo and Lloyd Wong (eds), 'Revisiting Multiculturalism in Canada. Theories, Policies and Debates (Sense Pubblishers 2015), 18-24; W Kymlicka, 'The New Debate on Minority Rights (and Postcript)' in AS Laden and D Owen (eds), 'Multiculturalism and Political Theory' (CUP 2007) 25; T Modood, 'Multiculturalism: A Civic Idea' (Polity Press 2007) 21.

[15] H Donald Forbes, 'Trudeau as the First Theorist of Canadian Multiculturalism, in S Tierney (ed), 'Multiculturalism and the Canadian Constitution, (UBC Press 2011) 27-42.

[16] E Mackey, 'House of Difference. Cultural Politics and National Identity in Canada (Routledge

In many respects, these Acts do not really constitute a novelty. Yet, especially the application of the 1982 Charter marks a structural shift in assuring religious freedom. This is because, as part of the Constitutional Act, the Charter is placed at the top of the hierarchy of legal sources, increasing and centralizing the judicial review.[17] Besides, the 1982 Charter highlights the fundamental principle of pluralism, denoting a substantial equality among cultures and religions.[18] This led the Supreme Court to affirm that religions are integral parts of the multicultural heritage of Canadians and that respect for multiculturalism is incompatible with a more favourable treatment of some religions than that accorded to others.[19] These values are essential to Canada's system that, on the other hand, is based on the 'dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions, which enhance the participation of individuals and groups in society'.[20] In this sense, Canadian Courts must determine whether religious believers should be exempted from laws (which apply to members of the broader society) are faced with dizzying complexities. In doing so, they must also determine whether a State's rules or policies constitute an infringement of religious rights.[21] Moreover, Courts must determine whether these rules and policies are justifiable in the context of a free and democratic society. They must finally determine whether the limitation of rights are proportionate to the objective pursued by the Constitution. Called the *Oakes* test, this battery of tests is then strictly related with the values 'codified' in the Canadian constitutional order.[22]

1999) 80-83. See also L Roth, 'Snapshots and Dialogues: Canadian Ethnic Television Broadcasting and Social Cohesion', in DL d'Haenens, M Hooghe, H Gezduci and D Vanheule (eds), 'New' Citizens, New Policies? Developments in Diversity Policy in Canada and Flanders (Academia Press 2006) 175-178.

[17] T Groppi, 'La Corte suprema del Canada come "giudice dei diritti"', in G Rolla (ed), 'Lo sviluppo dei diritti fondamentali in Canada. Tra universalità e diversità culturale (Giuffrè 2000) 63-82; E Ceccherini, 'La dottrina canadese in tema di diritti' (2000) 4 Diritto pubblico comparato ed europeo, 1542-1546.

[18] S Kambourel 'The Technology of Ethnicity: Canadian Multiculturalism and the Language of Law', in D Bennett (ed), 'Multicultural States. Rethinking Difference and Identity' (Routledge, 1998) 208-222.

[19] *R. c. Big M Drug Mart Ltd*, [1985] 1 R.C.S. 295, para 99.

[20] *R. c. Oakes*, [1986], RCS 103, para 64.

[21] F Onida, 'Le garanzie costituzionali di uguaglianza e di libertà religiosa nell' ordinamento canadese degli anni Ottanta', (1990) 4 Il diritto ecclesiastico 468-495.

[22] See D Weinstock, 'Philosophical reflections on the Oakes test', in LB Tremblay and CN Grégoire Webber (eds), 'La limitation des droits de la Charte : essais critiques sur l'arrêt R. c. Oakes / The Limitation of Charter Rights: Critical Essays on R. v. Oakes, Montréal' (Edition Thémis 2009)

Every society has values that are important to it and that set it apart from others. In this respect, Canada is no different from other societies. There are values that are important to Canadians, which may not be fully shared by other Countries. Some of these values are based on the idea of multiculturalism, which tries to understand, appreciate and respect cultures, customs and traditions of all people, whether they were born in Canada or in other parts of the world.[23] So, in the light of the pressing processes of immigration and globalization, the Canadian system has in the last decades gained a new impetus, underlying its potential advantages. At the same time, however, these same processes have raised an intense debate about multiculturalism, stressing the question of the role of religious groups and religious practices within the State's legal order.

Among other things, this debate has shown that Canadian multiculturalism is primarily informed by the combined influence of the Judeo-Christian tradition and the Enlightenment, as well as grounded in English common law.[24] From time to time Christian values – such as monogamy in marriage, restrictions around divorce, official holidays, and the workweek – have been 'codified' in the State's law.[25] This is in effect a characteristic that the Canadian constitutional model shares with other Western democracies, such as the United States of America[26]. The fact is that, along with the traditional religions (such as Catholicism, Protestantism, the Orthodox Christian and the Jewish faith) related to an immigration coming mostly from Europe, in

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115-129. See also D Weinstock, 'Beyond Objective and Subjective: Assessing the Legitimacy of Religious Claims to Accommodation' (2011) 6 Les ateliers de l'éthique / The Ethics Forum 160-161.

[23] R Hirschl, 'The Secularist Appeal of Constitutional Law and Courts: A Comparative Account' (2011) ReligioWest Kick-off meeting conference paper 16 http: // www. eui. eu/ Projects /ReligioWest/ Documents/ events /conferencePapers/ Hirschl. pdf (last accessed 12 November 2016).

[24] B Ryder, 'State Neutrality and Freedom of Conscience and Religion' (2005) 29 Supreme Court L Rev, 169-199, see169-170.

[25] M Boyd, 'Dispute Resolution in Family Law: Protecting Choice', Promoting Inclusion' 47, https: // www. attorneygeneral. jus.gov.on.ca /english/about /pubs/boyd/executivesummary. pdf (last accessed 12 Novembre 2016).

[26] For example, historians as well as legal scholars have shown the manifold ways in which the US secular notion of marriage as a monogamous union based on mutual consent has been heavily influenced by specific denominations, mainly those referring to the dominant Christian Churches. The 1878 case *Reynolds v. United States* (98 U.S. 145) vividly shows this link. A link that is more evident in some ' Mormon cases', such as *Mormon Church v. United States* (1889), where the US Supreme Court expressly stated: '[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries'. See C Weisbrod, 'The Law and Reconstituted Christianity: The Case of the Mormons', in J Mclaren, HG Coward (eds), 'Religious Conscience, the State, and The Law. Historical Contexts and Contemporary Significance' (State University of New York Press 1999) 140. See also C Weisbrod, 'Family, Church and State: An Essay on Constitutionalism and Religious Authority' (1988) 26 *J of Family L* 741.

the last past decades other faiths have gained an increasing importance in Canada (see *Tables* 1 and 2).

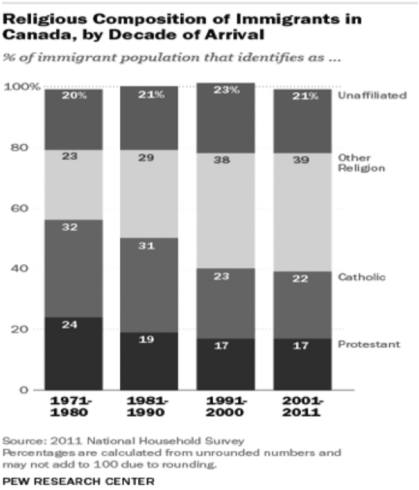

Table 1

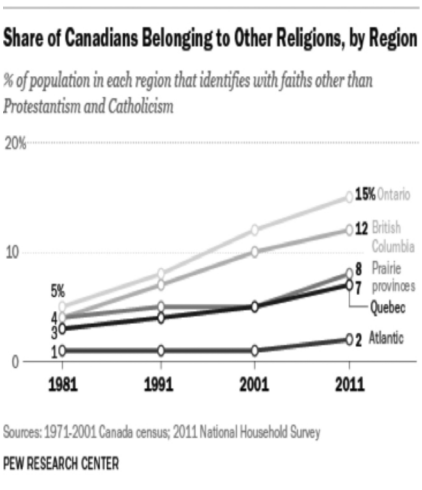

Table 2

Linked to more recent immigration (coming from States in Asia, the Pacific region and Africa), Muslims, Buddhists, Taoists, Hindus, Sikhs and other believers belonging to minority groups have contributed to accentuate the variety of confessions within the Canadian population.[27] Thus, while new religious organizations seek a greater role in the public space and the political arena, members of traditional groups find it difficult to admit that, rather than appearing to be neutral, Canada's law looks patently Christian in nature.[28] In addition, one should not forget that the transition towards a society less and less homogeneous has taken shape in a context characterized by another intensive process, based on both the progressive secularization of society[29] and the growing numbers of 'religious nones',[30] persons who neither believe in the existence of Gods nor pro-

[27] Pew Research Center, *Canada's Changing Religious Landscape*, June 27, 2013, http://www.pew-forum.org/2013/06/27/canadas-changing-religious-landscape/ (last accessed 12 November 2016).

[28] Boyd (n 25) 48.

[29] On the multidimensional notions of 'secularization' C Taylor, 'A Secular Age' (The Belknap Press of Harvard University Press 2007) 423-439. See also M Warner, J VanAntwerpen and CJ Calhoun (eds), 'Varieties of Secularism in a Secular Age (Harvard University Press 2010).

[30] See RD Putnam and DE Campbell, 'American Grace. How Religion Divides and Unites Us' (Simon & Shuster 2010) 16-24, 104-126 and 473-473; P Zuckerman, 'Atheism: Contemporary Numbers and

fess any religion or belief.[31]

As a result of all this, the reconciliation between the State's legal order and religions through multiculturalism system has become increasingly difficult and, at times, harshly contested.[32] The debate concerning both the 2006 Supreme Court's *Multani* decision[33] and the legitimacy of *Shari'a* Courts can better illustrate how such a state of affaire has come about. [34]

2.2. *Canada's Law Tested by a New Religion Landscape*

The *Multani* case dealt with the freedom of religion as guaranteed by the 1982 Canadian Charter of Rights and Freedoms and the reasonable accommodation, that is to say some of the most important legal instruments that promote multiculturalism in Canada. With the relative decision, in 2006 the Supreme Court stated that 'accommodating a student and allowing him to wear his *kirpan* in school under certain conditions demonstrates the importance that our [Canadian] society attaches to protecting freedom of religion and to showing respect for its minorities'[35].

However, the ruling was very negatively received, especially in Quebec, amplifying the public discontent in this Province and, perhaps, in the whole Country: reaction was swift and much of it focused on the idea that there was too much accommodation happening. According to some polls, up to 91% of Quebecers of all origins disagreed with the Supreme Court's sentence. Furthermore, it tinged the entire debate on multiculturalism, which was generally seen as the source of the social crisis. As a consequence, on 8 February 2007, the Quebec Government established a Co-Chairs Consultation Commission[36] made up of G. Bouchard and C. Taylor who, among other

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Patterns' in M Martin (ed), 'The Cambridge Companion to Atheism' (CUP 2007) 47; R Dworkin, 'Religion Without God' (Harvard University Press 2013) 29; F Alicino, 'La legislazione sulla base di intese. I test delle religioni "altre" e degli ateismi' (Cacucci 2013) 185-238.

[31] LG Beaman, 'Introduction', in S Tomlins (n 12) 1-17. In general see M Michael (ed), 'The Cambridge Companion to Atheism' (CUP 2007).

[32] BC Parekh, '*Re*thinking Multiculturalism: Cultural Diversity and Political Theory' (Harvard University Press 2000) 179-195.

[33] *Multani v. Marguerite-Bourgeoys*, [2006] 1 R.C.S. 256.

[34] F Alicino, 'A Pragmatic Approach of The Legal Treatment of Religious Claims: The Attitude Of Secularization And The Faith-Based Tribunals (2014) 14 Revista General de Derecho Público Comparado 1-29.

[35] *Multani v. Marguerite-Bourgeoys* (n 33) para 79.

[36] See C Taylor and G Bouchard, 'Building the Future. A Time for Reconciliation' (Bibliothèque et Archives nationales du Québec 2008) 1-28.

things, set up an original normative conception, the so-called 'interculturalism' conceived as an alternative to multiculturalism.[37]

During the same period and especially in Ontario an intensive controversy was structured around the legitimacy of religious arbitral tribunals and the civil effects of their judgements. In effect, until 2001 in this Province there had been a system of family law that had encouraged a wide range of dispute resolution methods, providing alternatives to the adversarial win-lose forum of the Courts. Large numbers of family law disputes were resolved through separation agreements, voluntarily agreed by both parties, without coercion.[38] The enabling legislation, the Arbitration Act, gave Ontario's citizens the means to resolve disputes by community law, including religious rules that the arbitrator could use in making a decision.[39] In the early 2000s, after the group called the Islamic Institute of Civil Justice announced that some *Shari'a* Courts would begin to pass judgements, many expressed fear that the use of Islamic family law could open the door to the gradual implementation of full *Shari'a* law for all Canadian Muslims.[40]

As a consequence, on 25 June 2004, the Attorney General, Michael Bryant, and the Minister Responsible for Women's Issues, Sandra Pupatello, asked a former Attorney General and former Minister Responsible for Women's Issues, Marion Boyd, to conduct a review of the use of arbitration in family. In the end, a report was published,[41] and it was favourable for the use of the arbitral tribunals, including those referring to Muslim communities.[42]

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[37] Ibid, para A8. See LB Tremblay, 'The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name?' (2009) EUI Working Paper LAW 6.

[38] In general see A Shachar, 'Multicultural Jurisdictions: Cultural Differences And Women's Rights' (CUP 2001) 117-145.

[39] J-F Gaudreault-DesBiens, 'The Limits of Private Justice? The Problems of the State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario' (2005) 16 Juris Publishing 19; N Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women'(2004) 1 Muslim World J of Human Rights 6; G Atlan, 'Les Juifs et le divorce: Droit, histoire et sociologie du divorce religieux' (Peter Lang 2002); B Benjamin, 'Judaism and the Laws of Divorce' (2001) UCL Jurisprudence Rev 177; P Barbier, 'Le problème du 'Gueth" (1987) Gaz. Pal. 484; A Barnett, 'Getting a 'Get' – The Limits of Law's Authority?: N. v. N. (Jurisdiction: Pre-Nuptial Agreement) [1999] 2 F.L.R. 745' (2000) 8 Feminist L Studies 241; JD Bleich, 'Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement' (1984) 16 Connecticut L Rev 201.

[40] J-F Gaudreault-DesBiens, 'Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society' (2005) 19 National J of Constitutional L 155; A Korteweg, 'The Sharia Debate in Ontario: Gender, Agency, and Representations of Muslim Women's Agency, (2008) 22 Gender & Society 334.; N Aroney and R Ahdar, 'The Accommodation of the Shari'a within Western Legal System' (2012) 13 Rutgers Journal of Law & Religion 387.

[41] Boyd (n 25).

[42] M Boyd, 'Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism' in

Nevertheless, the campaign against *Shari'a* Courts[43] led the Prime Minister, Dalton McGuinty, to 'assure public opinion'. In September 2005 he firmly stated that 'there will be no *Shari'a* law in Ontario', which meant 'there will be no religious arbitration in this Province': the family matters will be resolved in accordance with Ontario and Canadian (secular) law only, he added.[44] It was, however, the Federal Government that in November 2005 first approved the Family Statute Law Amendment Act, designed to ensure that all family law arbitrations are conducted only under the Canadian law, which includes all provincial Statutes. In addition, the same Federal Government approved an amendment to the Children's Law Reform Act in order to determine the best interests of children with respect to custody and access. On the basis of these amendments to the federal law, in the same period the Family Statute Law Amendment Act was passed by the Ontario legislator and proclaimed on 14 May 2009. All these Acts actually provide that family law resolutions based on any other laws, including any religious law and not only the *Shari'a*, would have no legal status in Canada. People would still have the right to seek advice from any religious sources in matters of family law. But such sources will not be enforced by the Canadian constitutional (secular) democracy.[45]

Now, as we will try to demonstrate, these events are important also because they clarify how and why the debate on Canada's multiculturalism has rapidly shifted to legal definition of religion, affecting at the same time the questions related to the protection of religious freedom, in its multidimensional aspects.

In this respect, we may first say that from the Canadian constitutional provisions stems an evident concern for protecting rights and freedoms related to religion. They do not however specify the objects and the limits of the protection. This is also due to the fact that it is very difficult to define religion and religious experiences, especially in a more and more varied reli-

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K Banting, TJ Courchene and F Leslie Seidle (eds), 'Belonging? Diversity, Recognition and Shared Citizenship in Canada' (Institute for Research on Public Policy 2007) 465.

[43] Feminist organizations, for example, claimed that Islamic religious principles were inherently conservative and prejudicial to women: the arbitrators would base their judgements on Muslim family law, which is in contrast with the internal and international constitutional rights, they said. See *International Campaign Against Shari'a Court* (www. nosharia. com); J Yhornback, 'The Portrayal of Sharia in Ontario' (2005) 1 Rev of Current L and Reform 5.

[44] K Leslie, 'McGuinty Rejects Ontario's Use of Shariah Law and All Religious Arbitrations' (2005) Canadian Press 11.

[45] R Hirschl and A Shachar, 'The New Wall of Separation: Permitting Diversity, Restricting Competition' (2009) 30 Cardozo L Rev 2556.

gious landscape. Nonetheless, legal definitions of 'religion' generally appear in the contexts of either protecting the freedom of religion or prohibiting discrimination on the basis of religion.

In other words, legal definitions do not simply describe the phenomenon of religion. They establish rules for regulating social and legal relations among people, who themselves may have sharply different attitudes about what religion is and which manifestations of it are entitled to be legally recognised and guaranteed. This explains why legal definitions may contain serious shortcomings when statutory and judicial characterizations of religion incorporate (perhaps unintentionally) particular social and cultural attitudes towards some religious traditions, failing to account for social and cultural attitudes of others.[46] But this also explains that, in the absence of a definition made by the law, in Canada many questions related to religious phenomena falls exclusively within the Judges' competences and powers, starting with those referring to the Supreme Court.

From this point of view we must first say that the Supreme Court has adopted a definition of religion that has received criticism in opposing directions. On one hand, some affirm that the Supreme Court's definition is too wide to such an extent that the State will not be able to reliably weed out persons with fictitious or capricious claims. On the other, we have those who say that the definition is too individualistic and narrow in such a way that it can substantially neglect its collective, communal and, in the end, cultural aspects.[47] And it is not by chance that such diversity of opinion is even more evident when examined in the light of the relationship between freedom of religion and reasonable accommodation, which imply a reasonable application of principle of equality.

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[46] Concerning the notion of 'tradition see S Scheffler, 'The Normativity of Tradition. Questions of Value in Moral and Political Theory' (OUP 2010) 290-301; P Glenn, 'Legal Traditions of the World. Sustainable Diversity in Law (OUP 2010).

[47] RE Charney, 'How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief' (2010) 51 Supreme Court L Rev 47-72; BL Berger, 'Law's Religion: Rendering Culture' (2007) 45 Osgoode Hall L J 277-314.

3. *Defying Religions and Religious Practices. The Honesty and Sincerity Test*

In its substantive aspect, the principle of equality may justify some State's interventions that, eliminating discriminations, allow for the full enjoyment of the individuals' rights and freedoms, including those referring to religions or beliefs. This is because what may appear good and true to a majority religious group, may not, for religious reasons, be imposed upon all people, starting from those who take a contrary view. The State's law should then safeguard religious minorities from the threat of the tyranny of the majority.[48] The principle of equality, necessary to support religious freedom, does not require identical treatment of all religions. As a matter of fact, the interests of true and substantive equality may well require differentiation in treatment, what cannot always be guaranteed by the strict application of the State's general law.[49]

The importance of reasonable accommodation follows from this, which substantially means a necessary and appropriate modification and adjustment to this (general) law. Reasonable accommodation is thus applied in specific cases in order to ensure equal treatment and equal protection without discrimination. With a view to the reasonable application of the principle of substantive equality, accommodation approach aims at assuring to persons belonging to minorities the real enjoyment or exercise of fundamental rights and freedoms. For this reason, it is also intended to capture the guiding principles by which religious diversity may reasonably be managed or governed.[50]

In Canada, reasonable accommodation was first used in employment. It was considered as a mechanism of response by employers to employees' requests for flexibility in relation to their religious practices: for example, if an employee's holy day or day of rest required time off from work, the employer was enjoined, through a series of the Supreme Court's decisions, to reasonably accommodate the employee as long as it did not cause the employer undue hardship. [51]

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[48] *R. c. Big M Drug Mart Ltd* (n 19) para 90.

[49] idid para 124. See *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, para 40. In addition see *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *R. v. Marshall*, [1999] 3 SCR 456; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989; *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315; *Lavigne v. Ontario Public service Employees Union*, [1991] 2 SCR 211.

[50] LG Beaman, 'Exploring Reasonable Accommodation' in LG Beaman (ed), 'Reasonable Accommodation Managing Religious Diversity, UCB Press 2012) 3.

[51] *Bhinder v. CN*, [1985] 2 S.C.R. 561; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

The application of reasonable accommodation cannot, however, impose excessive and disproportionate burdens on both the rights of other people and the society as a whole. It is true that under religious freedom no one must be forced to act in a way contrary to his beliefs or his conscience. But it is also true that this freedom is subject to limitations necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[52] In a Constitutional democracy, while no right and freedom can be regarded as absolute, the legal recognition of a specific right or freedom must be balanced by the general duty to respect and to act within reason to protect it. In a free and open society rights and the freedom of one person will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a legal order in which each right and freedom may receive protection without undue interference with others.[53]

In the matter of religion this means that Canada's law recognizes the individual's rights to believe in what he/she wants. At the same time, though, this law limits the exercising of freedom to believe in order to guarantee respect for rulers and principles necessary for a pacific coexistence and well-being, which includes respect for the rights and freedom of other individuals. For these reasons, in Canada members of the judicial Courts have to find a good-reasonable balance between the universal need for a peaceful coexistence and the protection of religious-cultural rights; not only the rights of a group to be different, but also the rights of the individuals within these groups.

In this sense, the reasonable accommodation of religious practices is linked to the very definition of religion, which involves social institutions, organizations, and individual perspectives. This is because, on the one hand, designating or recognizing something as a religion involves certain status or privilege. On the other, accommodation of religious practices and expressions necessitates a preliminary evaluation of their normative compatibility with the constitutional principles, including those that outline limitations on freedom of belief. Thus, in accordance with these principles, in the 2004 *Syndicat Northcrest* decision the Supreme Court stated that under the 1982 Charter freedom of religion

> 'consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely

[52] *R. c. Big M Drug Mart Ltd* (n 19) para 95.

[53] *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, para 22.

> believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials'.[54]

In specifying the notion of 'sincerity', the Court introduced the subjective definition or conception of religion within the domain of the State's law. The sincerity of a believer is consistent with a personal or subjective understanding of religious freedom as well as of what religion is. As such, before the State's law a believer needs not show some sort of objective religious obligation to invoke freedom of religion. The State is in fact in no position to be the arbiter of religious dogma.

Although the State is not qualified to judicially determine the content of a subjective understanding of a religious requirement, it is nevertheless qualified to inquire into the sincerity of a believer, where sincerity is at issue. It brings the Supreme Court to another question related to the criteria needed to discern which practices are protected by religious freedom, as guaranteed by the State's law. In this case, the Court affirms that sincerity implies an honesty of belief, what we call the 'sincerity and honest test'.[55] Here the reason why members of the Canadian Courts should ensure that a believer acts in good faith, which means that his/her way of considering a belief is neither fictitious nor capricious, and that it is not an artifice. These criteria, then, can be based on the credibility of a believer, and they may be verified through the judicial procedures; for example, through a claimant's testimony.

The focus of the judicial inquiry is not on what people's religious obligations as being, but what the individual views these personal religious 'obligations' to be. For this reason, it is inappropriate to require expert opinions. Furthermore, it is also inappropriate to study and focus on the past practices of a person in order to determine whether his current belief is sincerely held: '[b]ecause of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom'.[56]

According to this attitude, within a religion the subjective criterion of personal belief prevails over the verification of the individual behaviour with

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[54] *Syndicat Northcrest v. Amselem* (n 49) para 46.

[55] Ibid.

[56] Ibid para 47.

respect to the rules established by the hierarchical religious institution.[57] Here the reason why, considering the Supreme Court's jurisprudence, that attitude brings us to reflect on the reasonably legal space inside which the sincerity and honesty test should be situated.[58]

3.1. *The Emersion of Collective Aspects*

The fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his/her freedom of religion has been infringed. The problem is that, by giving such weight to both the religious subjectivity and the process of rights claims,[59] the Supreme Court's interpretation risks reducing the entire religious phenomenon to a 'do it yourself'. In other words, it could foster the possibility of an explosion of religious requests, in an era marked more and more by the tendency towards religion *à la carte*.[60]

If it is essential to take into serious account the respect the individuals' freedom of religion, it is also important to consider the general norms of religious groups. This, on the other hand, does not exclude that, where necessary, those norms can be declared incompatible with the State's law, which implies the recognition and the protection of human rights and fundamental freedoms: what is clearly missing from an important part of the Supreme Court's jurisprudence, such as the 2004 *Amselem* ruling that, not for nothing, in that respect contains some contradictions.

In *Amselem* the Supreme Court considers religious orthodoxy to demonstrate the fact that a practice, to build a *sukkah* on a balcony,[61] is in accordan-

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[57] See also Ontario Superior Court of Justice, *R. v. Kharaghani and Styrsky*, 2011 ONSC 836, paras 165-166: '[t]hus, while many may view the beliefs of the applicants and other members of the Church of the Universe as absurd, that is not and cannot be the test of whether the beliefs of members of that Church qualify as a religion for the purposes of the Charter. Furthermore, a determination of the applicants' sincerity does not depend on a determination of the sincerity of the leaders of the Church of the Universe'.

[58] LG Beaman, 'Defining Religion: The Promise and the Peril of Legal Intepretation', in RJ Moon (ed), 'Law and Religious Pluralism in Canada' (UBS Press 2008)192-216.

[59] J-F Gaudreault-DesBiens, 'Quelques angles morts débat sur l'accommodement raisonnables à la lumière de la question du port dei signes religieux à l'école publique: Réflexions en forme de points d'Interrogation' in M Jézéquel (ed), 'Les accommodements raisonnables : quoi, comment, jusqu'où ? Des outils pour tous' (Edition Yvon Blais 2007) 241-286.

[60] S Lefebvre, 'Religion in Court, Between an Objective and a Subjective Definition' in Beaman (n 58) 45.

[61] *Sukkah* is in effect a temporary hut constructed for use during the week-long Jewish festival of Suk-

ce with a biblical precept.[62] At the same time, though, the Court relativized the significance of this precept. In brief, *sukkah* was contemplated as a question of a regulated religious practice, but it was non treated as such. As a result, on the one hand the Canadian Judges adopted a subjective definition of religion to justify the decision,[63] on the other they took into consideration the objective doctrine to underpin the evaluation of sincerity and honesty of believers concerned.[64]

It should be noted that, after the 1982 Charter entered into force the reasonable accommodation approach was for many years confined within the employment law. This approach broke free through the 2006 *Multani* decision,[65] where the narrative of reasonable accommodation took on a life of its own. Moreover, it became the framework within which an important portion of public discussion and jurisprudence (regarding principle of equality, freedom of religion and religious diversity) took place in Canada.

With the *Multani* decision the Supreme Court renewed and reaffirmed the subjective conception of religion and, consequently, the practices and behaviours protected by religious freedom. In this manner, though, as in the 2004 *Amselem* ruling, certain parts of the 2006 judgment appeared contradictory. The attention is focused on those paragraphs in which Judges deferred to expert to confirm the existence of a religious obligation, in the case in question the practice of wearing a *kirpan*, a particular knife carried by persons belonging to Sikh religion:

> '[i]n the case at bar, Gurbaj Singh must therefore show that he sincerely believes that his faith requires him at all times to wear a *kirpan* made of metal. Evidence to this effect was introduced and was not contradicted. No one contests the fact that the orthodox Sikh religion requires its adherents to wear a *kirpan* at all times. The affidavits of chaplain Manjit Singh and of Gurbaj Singh explain that orthodox Sikhs must comply with a strict dress code requiring them to wear religious symbols commonly known as the Five Ks …. Furthermore, Manjit Singh explains in his affidavit that the Sikh religion

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kot, it is topped with branches and often well decorated with autumnal, harvest or Judaic themes

[62] *Syndicat Northcrest v. Amselem* (n 49) para 9.

[63] ibid paras 51-54 and 71-72.

[64] Ibid para. 73. Cf Human Rights Tribunal of Ontario, *Heintz v. Christian Horizons*, 2008 HRTO 22. Here the Tribunal, by focusing the attention on the organization's practices, was able to affirm that Christian Horizons was a religious organization. The same Tribunal took a similar approach in *Huang v. 1233065 Ontario,* 2011 HRTO 825: in this case, by an analogy to other religions, they stated that 'Falun Gong consists of a system of beliefs, observances, and worship' (para 36).

[65] *Multani v. Marguerite-Bourgeoys* (n 33).

> teaches pacifism and encourages respect for other religions, that the *kirpan* must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic *kirpan* made of a material other than metal is based on a reasonable religiously motivated interpretation'.[66]

The Supreme Court also affirmed that, when facing problems like these, ordinary Judges should be aware of the great diversity existing within the Canadian population and that jurisprudence should be consistent with effective equality between persons belonging to minority groups and those belonging to the majority.[67] They should in other words accept all religions rather than be indifferent towards some of them. It also implies the possibility to treat differently individual religious organizations, in order to meet their specific needs.

Besides, aware of the difficulty of establishing appropriate criteria for defining religions, the Supreme Court decided neither to affirm an objective definition of religion nor to establish the nature of the beliefs or convictions. Similarly, in relation to the various beliefs or their mode of expression, the Court carefully avoided defining a hierarchy among religious values. Furthermore, from this point of view the Court returned to the subjective aspects of religion phenomenon rather than the objective ones. The judges also highlighted the need to balance individual religious freedom with other fundamental rights and freedoms.

In this respect the 2007 *Marcovitz* decision is relevant, where the Supreme Court placed the dignity of a woman above the freedom of religion, all the while without explicitly abandoning the subjective standard of sincere belief.[68] But, even in this case, in order to resolve the mentioned contradictions, the Court was forced to affirm that, regarding a Jewish married couple, the refusal of one spouse to grant a divorce (*get*) to the other was not, at its core, religious. And in doing so, members of the Court took into account the 'objective-collective' rules of that religious organization:

> 'the refusal to provide the *get* was based less on religious conviction than on the fact that he [Marcovitz] was angry at Ms. Bruker. His religion does not require him to refuse to give Ms. Bruker a *get*. The contrary is true. There is

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[66] ibid para 36.

[67] C Landheer-Cieslak 'L'égalité des identités religieuses: principe ou finalité pour les juges français et québécois de droit civil?' (2006) 47 Les Cahiers de Droit 254.

[68] *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007, para 131.

> no doubt that at Jewish law he *could* refuse to give one, but that is very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits'.[69]

The Court also stated that recognizing 'the enforceability by civil courts of agreements to discourage religious barriers to remarriage, addresses the gender discrimination those barriers, may represent and alleviate the effects they may have on extracting unfair concessions in a civil divorce'[70]. Hence, the Supreme Court highlighted the intersection between multiple sources of authority and identity, demonstrating the possibility of employing a standard legal recourse in response to specific gendered harms. This also implied that subjective interpretation of religious precepts could not breach the basic protections to which each person is entitled by virtue of his fundamental rights and freedoms, as stated by the Canadian Constitution.

As one can notice, in 2007 the Supreme Court did not affirm that some religious precepts and the relative practices were in contrast with these rights. They said that a specific practice in question (the refusal to grant a divorce) was not religious. In order to come to such a conclusion, they were forced to analyse the collective characteristics of a specific religious group. Thus, while reaffirming the sincerity and honesty test as well as the subjective definition of religion, in 2007 the Supreme Court implicitly recognised that sometimes doctrinal-collective definitions of religious practices is required for a better application of the constitutional principles; including those referring to the reasonable accommodation and the principle of equality, in the substantive sense of the term. It remains that the Supreme Court's subjective definition of religion makes it more difficult to see the religious import of collective activities.

3.2. *Definition of Religion in the Light of Religious Freedom*

The constitutional guarantee of freedom of religion has triggered a substantial amount of litigation since the 1982 Charter came into force. The mentioned case-laws illustrate enduring difficulties with respect to its interpretation and application, especially with questions related to the defini-

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[69] ibid para 69.

[70] ibid paras 41 and 63.

tion of religion and religious practices. It seems that the Supreme Court is experiencing hard difficulties in explaining in a complete and satisfactory manner the meaning of religion for the purposes of the Charter. The 2009 *Alberta v. Hutterian Brethren of Wilson Colony*[71] is another example of that.

The Province of Alberta requires all people who drive motor vehicles on highways to hold a driver's licence. Since 1974 each licence has borne a photograph of the licence holder, subject to exemptions for people who, on religious grounds, object to having their photos taken. In 2003, with the purpose of reducing the risk of driver's licences being used for identity theft, the Province's regulatory measure made the photo requirement universal. All licence holders were (and are) required to have their photos taken for a data bank. On the other hand, the Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. For reasons related to their religious creeds, members of this Colony have objected to having their photographs taken. After 2003, they began judicial proceedings against Alberta's Government, alleging a breach of their religious freedom. The Government offered to lessen the impact of the universal photo requirement by issuing special licences without photos, relieving Colony members of the need to carry their pictures. The public authority insisted however that the photos be taken for the central data bank. The Wilson Colony rejected the Province's proposal.

Religion is about religious beliefs, but also about religious relationships. The *Alberta v. Hutterian Brethren of Wilson Colony* case underlines this aspect. It raises issues not only about individual's freedom of religion, but also about the maintenance of communities of faith: a community that shares a common faith and a way of life, which is considered by its members as a way of living their religion and that of the future generations. In the *Hutterian Brethren* decision the majority of Supreme Court understates the nature and importance of this characteristic. They assess the Wilson Colony members' freedom of religion as being a choice between having their picture taken or not having a driver's licence. The Court, however, does not take into serious consideration the effects of these decisions on the Hutterites' way of life and identity.[72]

More specifically, in attempting to secure a social good for the whole of society, the 2003 Province's regulation imposes a cost on those who choose not to have their photos taken: the cost of not being able to drive on the

[71] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.

[72] ibid para 163.

highway. According to the Supreme Court, that cost does not rise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice, or adversely impacting on other rights and freedom of the 1982 Charter. In other words, the Court refuses to consider the communal religious practices of the Hutterites under the constitutional guarantee of freedom of religion. The Court analyses the impact on the Hutterite community only under the assessment of the proportionality of the impugned legislation. In sum, they minimize religious relationships within the Colony.[73]

Nevertheless, this does not exclude the difficulty to conceive the Hutterites' commitment to communal living as anything but religious. At the same time, the objection of this community to having the photos of their member taken arises out of a particular (Hutterian) interpretation of biblical texts. As such, the objection concerns not only a group of farmers, but above all a religious *nomoi* group:[74] a group that shares a common faith that is viewed by its members as a way of life which, in turn, is closely combined with their way of living a religious creed. In this sense, the Province's regulatory measure has an impact not only on the respondents' belief system, but also on the life of the Hutterian Brethren of Wilson community and the identity of its members.[75] In effect, this leads us to distinguish between 'religion as belief', 'religion as identity' and 'religion as a way of life'.

Religion as belief pertains to the convictions that people hold regarding matters such as God, truth, or doctrines of faith. Although sometimes linked to 'private religion', religion as belief may in fact highlight the relevance of a religious community of likeminded believers, or even the need to manifest religion in the public square. In any case, while religion as belief emphasizes doctrines, religion as identity stresses affiliation with a community. Concerning religious as identity, it is experienced as something akin to ethnicity, race, nationality, and family. Thus, religion as identity is something into

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[73] ibid paras. 50, 52-59, 60, 62- 63, 71. On the principle of proportionality see *ex plurimis* A Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 University of Toronto L J 369; M-André Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in RStJ Macdonald, F Matscher and H Petzold (eds), 'The European System for the Protection of Human Rights' (Martinus Nijhoff 1993) 125; N Emiliou, 'The Principle of Proportionality in European Law: A Comparative Study' (Kluwer Law International 1996); D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 University of Toronto L J 383.

[74] On the notion of '*nomoi* groups' see A Shachar, 'The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority' (2000) 35 Harvard Civil Rights – Civil Liberties L R 394; S Benhabib, 'The Claims of Culture: Equality and Diversity in the Global Era' (Princeton University Press 2002)120.

[75] EJ Alvin, 'The Courts and the Colonies: The Litigation of Hutterite Church Disputes' (UBC Press Vancouver 2004) 3-13.

which people believe they are born in rather than something to which they convert to after a process of reflection, study or prayer. In this basic form, religion as identity acknowledges co-religionists to be a part of the same community: it may be less likely to emphasize shared theological beliefs and more likely to emphasize shared histories, cultures, ethnicity, and traditions. As for religion as a way of life, it is normally associated with actions, rituals, customs that may distinguish some believers from adherents of other religions. Religion as a way of life may for example motivate people to live in monasteries or in religious communities. In this case religion may become the salient aspect of many peoples' lives: it may demand prayers five times a day, constant efforts to propagate the religion, the wearing of certain types of clothes, and so on. [76] That being said, all these three facets underscore (in one way or another, with more or less intensity) the collective aspects of religious phenomena and practices.

It should be noted that in the 2015 *Loyola High School* decision the Supreme Court emphasizes these aspects, focusing its attention on 'the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions'.[77] In this same decision, the minority opinion, authored by McLachlin C.J.C. and Moldaver J., specifies the communal character of religion, meaning that the protection of peoples' religious freedom requires safeguarding the religious freedom of the relative religious organizations.[78] However obvious it may seem, it is important to remember that this connection implies an inverse relationship: the protection of the collective dimensions of religious freedom derives from the need to guarantee individuals' religious freedom; in the sense that, within a religion, an individual is able to develop his/her religious personality.[79]

In matters related to religious liberty, individuals need to be protected on a collective level in order to fully live out their personal religious commitments. The values underpinning the protection of this freedom require some considerations of religion's collective dimension; which proves the fact that the individual and collective aspects of freedom of religion are in many oc-

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[76] TJ Gunn (n 10) 200-206; A Sharma, 'Problematizing Religious Freedom' (Springer 2011) 37-40.

[77] *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. 12, para 60.

[78] Ibid para 61.

[79] In this sense see, for example, the 1948 Italian Constitution, where it stated that '[t]he Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed' (Article 2) and that '[e]veryone has the right to profess freely their religious faith in any form, individually or in association, to disseminate it and to worship in private or public' (Article 19).

casions indissolubly intertwined.[80] Here is the reason why, in occasions like these, the freedom of religion of individuals cannot flourish without freedom of religion for the relative organizations, through which those individuals express their spiritual practices and through which they transmit their faith. In this sense, the *Loyola High School* decision indicates a departure from the majority holding in *Hutterian Brethren* ruling that, as seen before, gave short shrift to the collective aspects of religious freedom.

This said, both judgments affirm the position that, while the State has obligations to be neutral as between religions,[81] it need not be neutral on all value-based matters. The State always has a legitimate interest in promoting and protecting core national values, which include equality, human rights and democracy.[82] In this sense, the Court has held that the State's law cannot advance a particular form of morality. Yet, even if the State seeks to avoid passing judgment on the truth or falsity of a spiritual belief, it must sometimes pursue goals that are inconsistent with particular religious practices and religious values. Rather than demonstrating a sincere belief, an organizational claimant must show that the claimed belief or practice is consistent with both the purpose and operation of the organization. It is interesting to note that, while evaluating this consistency between the claimed belief or practice and the organization's purpose and operation, in 2015 the Supreme Court moves away from the *Hutterian Brethren* decision.

In other words, during the judicial procedure the credibility of officials and representatives who give testimony on the organization's behalf will form part of the assessment.[83] And in this case objective-collective indicators will perhaps play a more important role. Here is the reason why in the *Loyola High School* decision the minority opinion analyses the claimed belief or practice 'in light of objective facts such as the organization's other practices'.[84] The beliefs and practices of an organization may reasonably be expected to be more static and less fluid than those of an individual.[85] Inqui-

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[80] See MA Waldron, 'Introduction: How Freedom of Conscience and Religion Are Protected and Why It Matters' in MA Waldron (ed), 'Free to Believe: Rethinking Freedom of Conscience and Religion in Canada', (University of Toronto Press 2013) 3-21; J Rivers, 'Religious Liberty as a Collective Right' (2001) 4 Law and Religion 228-241.

[81] Ibid paras 43-44. See R Moon, 'Freedom of Religion under the Charter of Rights: The Limits of State Neutrality' (2012) 45 UBC L Rev 497-549.

[82] *Loyola High School v. Quebec (Attorney General)* (n 77) para 42.

[83] ibid para 139.

[84] ibid.

[85] W Kymlicka, 'Multicultural Citizenship: A Liberal Theory of Minority Rights' (OUP 1995) 105; D Grimm, 'Conflicts Between General Laws and Religious Norms' (2009) 30 Cardozo L Rev

ry into past practices and consistency of position would be therefore more relevant than in the context of a claimant, who is a single natural person. [86]

3.3. *Is Atheism a Religion? The State's Duty of Neutrality*

At the present position of jurisprudence, we may in general affirm that the Supreme Court, determining whether freedom of conscience and religion has been infringed, has developed some tests to identify religious phenomena. To conclude that an infringement has occurred, the requirement is that the complainant's belief is sincere and honest and that his/her ability to act in accordance with one's beliefs has been interfered with in a manner that is more than trivial or insubstantial.[87] When it arises from a distinction based on religious grounds, such an infringement is contrary not only to the freedom of religion, but also to the State's duty of religious neutrality, which also flows from the 1982 Charter's provisions. It means that the State must neither encourage nor discourage any form of religious conviction whatsoever, which is the central issue addressed during the 2015 *Mouvement laïque québécois v. Saguenay (City)* ruling.[88] What is more, here the Supreme Court affirms that the concept of religion encompasses non-belief, atheism and agnosticism.[89]

In this case the applicant, Mr. Simoneau, regularly attended City Council meetings, which began with a recitation of a Christian prayer. After Mr. Simoneau voiced his objections to the prayer, City Council created a bylaw that regulated its recitation: it provided for a two-minute delay between the end of the prayer and the official opening of Council meetings in order to allow individuals to recuse themselves from the prayer. Mr. Simoneau suc-

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2373; D Newman, 'Community and Collective Rights: A Theoretical Framework for Rights held by Groups' (Hart Publishing 2011) 78.

[86] H Kislowicz, 'Loyola High School v. Attorney General of Quebec: On Non-triviality and the Charter Value of Religious Freedom' (2015) 71 Supreme Court Law Review 351: 'although the distinction between Charter values and rights remains elusive, the Court took some care in *Loyola* to work out the balance between what autonomous space religious individuals and communities can legitimately demand from the state and what the state can legitimately demand of them'.

[87] On 'non-triviality test' see Kislowicz (n 86) 331-351.

[88] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3.

[89] ibid para 70. See also *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235 para 32: '[t]herefore, following a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected'.

cessfully had the bylaw declared to be inoperative and of no force or effect by Quebec's Human Rights Tribunal on the basis it infringed his rights under the 1982 Charter's Section 2(a).[90] The Quebec Court of Appeal reversed the decision.[91] The Supreme Court restored this last judgement, holding that the bylaw interfered in a discriminatory manner with Mr. Simoneau's freedom of conscience and religion. In this occasion the Court added that the Council's recitation of the prayer amounted to 'sponsorship of one religious tradition by the State', thereby contravening its 'duty of neutrality'.[92]

The duty of neutrality comes from an evolving interpretation of freedom of conscience and religion.[93] It requires the State to be neutral about religion and religious beliefs. On the one hand, the State cannot show favour or disfavour for any particular belief or non-belief.[94] On the other, the State cannot encourage or discourage any form of religious conviction or observance. These are two prerequisites for both having a public space that is free of discrimination and promoting Canada's multicultural heritage as well as the ideal of a free and democratic society.[95]

In order to understand whether the State has breached its duty of neutrality (1) it must take action that professes, adopts, or favours one belief to the exclusion of others and (2) the exclusionary action must have the effect of interfering with a person's freedom of conscience and religion.[96] In other words, the State's practice must prevent an individual from acting according to his/her beliefs. The interference must be more than trivial or insignificant. So, not every breach of neutrality results in discriminatory interference.

On the basis of these premises, the Supreme Court found that the mentioned bylaw and prayer interfered with Mr. Simoneau's freedom of conscience and religion in a discriminatory manner. He was forced to choose between conforming to the City's religious practice, or excluding himself

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[90] Province of Québec, District Of Chicoutimi, Human Rights Tribunal, *Alain Simoneau, Mouvement Laïque Québécois v. Jean Tremblay*, Ville De Saguenay, No.150-53-000016-081, February 9, 2011.

[91] *Saguenay (Ville de) c. Mouvement laïque québécois*, 2013 QCCA 936, No.: 200-09-007328-112.

[92] *Mouvement laïque québécois v. Saguenay (City)* (n 88) paras 63-64. Accordingly, the Supreme Court held that the council breached its duty of neutrality, which 'requires that the state neither favour nor hinder any religion, and that it abstain from taking any position on this subject' (para 173). The Court specified the notion of 'neutrality' by differentiating 'absolute neutrality' from 'true neutrality', stating that the latter 'presupposes abstention, but it does not amount to a stand favouring one view over another. No such inference can be drawn from the state's silence' (para 134). It follows that the state's duty of neutrality does not go so far as to require complete secularity (para 79).

[93] ibid para 71.

[94] ibid para 84.

[95] ibid para 74-75.

[96] ibid para 85.

at the risk of revealing his religious views.[97] When Mr. Simoneau went to the Council's meetings he had to choose between remaining in the chamber (and conforming to the City's religious practice) and excluding himself from the chamber for the duration of the prayer. If he chose to conform to the Council's practice, he would be acting in direct contradiction with his atheistic beliefs. If he chose to exclude himself from the prayer either by refusing to participate in it or by leaving the chamber, he would be forced to reveal that he was an atheist. In sum, by reciting the prayer, the Council created a preferential space for people with theistic beliefs.[98] Participation in the prayer for non-believers came at the expense of being isolated, excluded, and stigmatized for their non-belief.[99]

In this manner, although the Court did not precisely define what religion is, they revealed that secularism or agnosticism constituted a position, worldview, or cultural identity equivalent to religious belonging. This means that if a person objects to a religious practice on the basis of his/her atheism, the case could be viewed as cases of competing religions. The Supreme Court has in brief classified atheism as a religion, adding that even a non-denominational prayer could be defined as religious in nature.

This is even more evident when the Court analyses the Preamble to the 1982 Charter, where it is stated that '[w]hereas Canada is founded upon principles that recognize the supremacy of God and the rule of law'. Here the Court explains that the reference to the supremacy of God cannot be relied on to reduce the scope of a guarantee that is expressly provided for in the Charter. That reference should not be construed so as to suggest one religion is favoured over another in Canada, nor that the God-fearing are entitled to greater rights and privileges than atheists or agnostics. Any of these interpretations would be in contrast with the 1982 Charter's provisions, including those referring to freedom of religion and conscience.[100] What the Preamble articulates is a political theory, upon which the Charter's protections operate with a generous and expansive application.[101] This leads the Court to conclude that the reference to the supremacy of God does not limit

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[97] ibid para 121.

[98] ibid para 122.

[99] ibid para 120.

[100] See also L Sossin, 'The 'Supremacy of God', Human Dignity and the Charter of Rights and Freedoms' (2003) 52 University of New Brunswick Law Journal 229: 'the supremacy of God should be seen as a twin pillar to the "rule of law" – as a moral complement to the descriptive protections and rights contained in the Charter. The concept of human dignity may serve to bridge these pillars and unite faith with reason in constitutional discourse'.

[101] *Mouvement laïque québécois v. Saguenay (City)* (n 88) para 147.

the scope of freedom of conscience and religion and does not have the effect of granting a privileged status to theistic religions and the relative religious practices. This reference must on the contrary encompass all religious beliefs, including atheist groups.

4. *Conclusion*

Canada has a diverse cultural landscape that includes unique heritage and traditional practices that are religious in nature. On the other hand, the interaction between religion and law is central to understanding religious diversity in the Country. In this sense, emphasising the importance of both religious liberty and reasonable accommodation, it follows that, so long as the State does not consciously favour a faith to the detriment of others, it does not have to abstain from preserving its multicultural-multireligious society.

The fact is that neither the limit of religious diversity nor freedom of religion is as easily defined as we might think. What is more, the recent processes of immigration and globalization have complicated the situation, thus raising questions on the mainstream ideas about what religion looks like. In particular, the difficulty arises when those questions are asked about how far people are entitled to go in the exercise of their religious freedom: at what point in the profession of their faith do they go beyond the mere exercise of their rights? To what extent, if any, in the exercise of their religion are people entitled to impose upon another to do some acts?

As seen above, in Canada the Supreme Court has been a primary actor in the attempt to delineate the criteria that define that set of problems. This is for the obvious reason that conflicts over accommodation are brought before the Court if the agents themselves cannot find settlements. But there is also a more fundamental reason: the 1982 Charter requires judicial Courts to provide for a reasonable balance between the legitimate interests of the State and the rights of people, as an individual and in the social groups within which religious freedom may be exercised and developed. Therefore, it has been left to the highest judicial power to determine how to strike that balance, which sometimes implies the definition of what religions and religion practices 'really' are.

In this context, after the 1982 Charter entered into force, the Supreme Court affirmed the subjective account, making the claimant's sincere avowal of what his faith requires determinative of whether a reasonable accommodation should be considered. But, in subsequent cases, the same Court seemed to lean toward an objective account, allowing itself to make claims

about what religions and religious obligations 'really' were. This has led to a situation of confusion, also fostered by the fact that in the recent years some of the justices who have written most eloquently in favour of the subjective approach (as affirmed in the *Amselem* decision) are now making arguments of an objective kind.

It is possible, in any case, to conclude that legal definitions of religion generally appear in the complicated contexts of either protecting freedom of religion or prohibiting unreasonable discrimination. At the present stage of the Canadian jurisprudence, it can be inferred, in particular, that definitions do not only describe the phenomenon of religion. They also establish rules for regulating social and legal relations among people who themselves may have sharply different attitudes about what religion is and which manifestations of it are entitled to be protected. As a result, with the objective approach legal definitions may contain serious deficiencies when they incorporate particular social and cultural attitudes towards some religions, failing to account for social and cultural attitudes against others: the most troubling examples of this deficiency are laws that differentiate between traditional and non-traditional religions or between the majority and minorities. In cases like these the definitions are applied – perhaps unintentionally – in such a manner as to separate some (majoritarian-traditional) groups from other (non-traditional, minority) groups.

On the other hand, the subjective approach seeks to define and identify religion and religious phenomena on the basis of the sincerity of claimants: these people must truly believe, demonstrating that they are religiously obligated to behave in a certain way. Being defined in explicit opposition to the objective one, the subjective approach has thus a very large and permissive conception of what counts as a plausible religious claim. Here is the reason why in cases like these definition leads to a dispute between what is often considered to be 'real' religion as opposed to 'pseudo' religion.

All of this shows that the definition of religion may be seen not simply as a neutral description of such things as theological beliefs or ritual practices. It contains a judgment on whether the particular beliefs or actions are acceptable to the legal system. And we should not forget that the solutions traditionally elaborated to solve the dilemma of definitions – defining a religion is very complex, but sometimes it is legally necessary – do not fit easily in a completely changed Canadian society that, from a religious point of view, is now even less homogeneous than in the past. While these solutions ensure a greater diversity in the public sphere, they do not essentially promote the religious freedom of all group members, including those who are part of neo-religious denominations, usually made up of immigrants. As a

result, legal strategies and policies, which seem attractive for some creeds, can systematically be seen as a disadvantage, if not discriminatory, by other communities.[102]

Similarly, we cannot understand that dilemma if we do not comprehend the overlapping affiliation that exists between constitutional rights, secular State, religious-cultural groups and individuals who are, at the same time, people, citizens and (potentially) members of a religion. It is necessary, then, to refuse the tendency to compartmentalize individuals' identity into single-axis categorizations, using legal definitions as shields to cover a wide range of policies. On the other hand, we need to establish clear lines between non-negotiable constitutional rights and practices that may be governed by different religions. Hence, if one really wants to speak of definitions, one needs first of all to define the constitutional principles that provide the framework within which the different communities can live and work together. Indeed, the merits of these principles appear clearly when they are regarded in the light of religious and ideological conflicts. At least in the West they have been able to 'invent' a legal context wherever the religious struggles and claims rights may be peacefully governed.

[102] In this point see J-F Gaudreault-DesBiens, 'The Legal Treatment of Religious Claims in Western Multicultural Societies: Limits and Challenges' in C Decaro Bonella (ed), 'Religious Claims in Multicultural Societies: The Legal Treatment' (Luiss University Press 2014), 19-20.