

# THE CASE FOR RELIGIOUS INCLUSIVISM AND THE JUDICIAL RECOGNITION OF RELIGIOUS ASSOCIATIONAL RIGHTS: A RESPONSE TO LENTA

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The idea of culture derived from anthropology, a discipline which studied the encapsulated exotic, is no longer appropriate. There are no longer (if there ever were) single cultures in any country, polity or legal system, but many. Cultures are complex conversations within any social formation. These conversations have many voices.<sup>1</sup>

## 1 Introduction

Patrick Lenta, in his comment on *Pillay* and in earlier work,<sup>2</sup> has done South African jurisprudence a great service by forcing us to attend to the complexity of cultures and the problems associated with the

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<sup>1</sup> M Chanock 'Human rights and cultural branding: Who speaks and how' in A An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 41. See also S Benhabib *The claims of culture: Equality and diversity in the global era* (2002) 3-9.

<sup>2</sup> See: P Lenta 'Cultural and religious accommodations to school uniform regulations' ('School uniforms') (2008) 1 *Constitutional Court Review* 261 'Muslim headscarves in schools and in the workplace' (2007) 124 *South African Law Journal* 296 ('Headscarves') and 'Religious liberty and cultural accommodation' (2005) 122 *South African Law Journal* 352 363-371 ('Accommodation').

accommodation of religious belief and practice in constitutional democracies. The usefulness of his work extends beyond South Africa's borders. Questions of religious (and cultural) accommodation are on the front burner in many other constitutional democracies. This reply focuses on a narrow set of questions that fall within the framework Lenta and others have constructed for discussions about the relationship between religion and the State. First, I want to suggest that: (a) commentators and courts alike reflexively invoke a rather reductive conception of 'the secular'; (b) that this reductive conception is generally 'anti-religious'; and (c) the South African Constitution ought to be read so as to recognise that religions and religious practice occupy an important role in the formation of public discourse and the support of public institutions.<sup>3</sup> Religions are *not* merely to be tolerated: In societies such as South Africa, they ought to be embraced. Second, I hope to demonstrate that the failure to take seriously religions and cultural communities with comprehensive understandings of the good, results in a body of jurisprudence – in South Africa and Canada – that privileges individual religious autonomy over the communal dimension of rights to religious freedom and practice.

## 2 The problem of single cultures or 'convergence liberalism'

John Gray and others have of late suggested that the concept of a 'single culture' or a 'one-size fits all' conception of the public sphere hides illiberal strains of liberalism implicitly committed to an endorsement of 'convergence'. Gray has described the two main approaches to liberalism in relation to pluralism as follows:

Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism's future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.

<sup>3</sup> These readings of 'secularism' may appear to some to be variant readings. However, they are consistent with the meaning of the neologism coined by George Jacob Holyoake. While others may use the term in a way that suggests that secularism is religion-friendly and consistent with the contours of every liberal democracy, I think it important to emphasise the often aggressive strategy of religious exclusion and marginalisation that occurs in many 'secular' liberal democracies (eg, France).

The predominant liberal view of toleration sees it as a means to a universal civilisation. If we give up this view, and welcome a world that contains many ways of life and regimes, we will have to think afresh about human rights and democratic government. We will refashion these inheritances to serve a different liberal philosophy. We will come to think of human rights as convenient articles of peace, whereby individuals and communities with conflicting values and interest may consent to coexist.<sup>4</sup>

Such a characterisation of liberalism would seem to fit Lenta's notion that modern liberal states often assume or propound a false view of the public sphere as a 'neutral' space. However, Lenta does not discuss variant interpretations of the 'secular'. And when he tends to use the term at all, he employs it in a Rawlsian sense<sup>5</sup> to mean the opposite of 'religious.' This disjunction is odd (and flawed). For the Rawlsian characterisation<sup>6</sup> of the secular and the religious leads us toward religious exclusivism – a terminal point largely at odds with the religious inclusivism of Lenta's analysis.<sup>7</sup>

In religiously *exclusive* liberal discourse, 'secular' often serves as a synonym for 'non-religious'. While the two terms are commonly conflated in this manner, this terminology does not sit comfortably with Lenta's call for inclusivity of religious believers and what he describes as a constitutional 'presumption in favour of the government's being required to grant an exemption [for religious belief].'<sup>8</sup> Such an approach, according to Lenta, means 'departing from the principle of uniformity.'<sup>9</sup> On this matter, Lenta and I are in accord. Further evidence of a more nuanced position can be gleaned from Lenta's work as a whole. In 'Headscarf', Lenta describes the differences between the French approach to *laïcité* and the Canadian approach to multi-cultural inclusion – and then notes that the Canadian commitment to inclusivism – even with its limitations –

<sup>4</sup> J Gray *Two faces of liberalism* (2000) 105. See also: PD Lauwers 'Religion and the ambiguities of liberal pluralism: A Canadian perspective' (2007) 37 *The Supreme Court Law Review* 1.

<sup>5</sup> See Lenta 'School uniforms' (n 2 above) 266.

<sup>6</sup> See J Rawls *Political liberalism* (1993). For a useful criticism of the approach taken by John Rawls, see PF Campos 'Secular fundamentalism' (1994) 94 *Columbia Law Review* 1814 1825. Campos would have been better served had he noted that Rawls' argument is not so much 'secular' as 'secularist'. That is, a secularist is someone who advocates secularism in the construction of the political domain. See further CL Niles 'Epistemological nonsense?: The secular/religious distinction' (2003) 17 *Notre Dame Journal of Law, Ethics & Public Policy* 561 575 n 50 (criticising Rawls' *A theory of justice* on these same grounds.)

<sup>7</sup> Religiously inclusive secularism, which we might better call a 'religiously inclusive public sphere', has been adopted by the Supreme Court of Canada. The Canadian jurisprudence shall be discussed in greater detail below. See *Chamberlain v Surrey Sch Dist No 36*, [2002] 4 SCR 710 749 (Can) ('*Chamberlain*')

<sup>8</sup> Lenta 'Headscarves' (n 2 above) 307.

<sup>9</sup> As above.

more closely approximates both the South African position and his preferred reading of South Africa's basic law.<sup>10</sup>

And yet, Lenta remains committed to the proposition that the Western liberal political tradition is committed to freedom of religion largely as a response to historical religious strife. Of course, there's more than a grain of truth to that proposition. For one can mark liberalism and constitutionalism's true beginning with Locke's *Letter on Toleration*. But if one does mark 'religious freedom' as beginning with this modest, but still revolutionary, tract, then, upon a closer reading, it is hard to view – from a Lockean perspective – state neutrality as liberal exclusivism regarding religion, as anything but an *anti-religious* ideology.<sup>11</sup>

For many liberals, the term 'secular' means only 'non-religious'. But that mistakes the term's origins – the *saecularum* – as a particular way of marking periods of time. It is important, therefore, to stop and to examine what we mean when we use terms such as 'secular' or 'secularism'. The failure to do so can lead, I contend, to fundamentally anti-religious outcomes.<sup>12</sup> A decision from the Canadian courts provides an illuminating and instructive account of why getting this term right is of such great import.

Mr Justice McKenzie, in the unanimous decision of the British Columbia Court of Appeal in *Chamberlain*, stated that:

*In my opinion, 'strictly secular' in the School Act can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of a*

<sup>10</sup> The South African approach might well be said to accept a 'co-operation' of Church and State – rather than any American notion of 'strict separation'. Of course, anyone *au fait* with recent American constitutional law knows that the US Constitution is no longer read as endorsing an absolutely strict separation of Church and State. The principles of such co-operation and useful distinctions about avoidance of both atheistic and religious theocracy are neatly set out in A Sachs *Protecting human rights in a new South Africa* (1990) 43-49. See also: SC Woolman 'Community rights: Language, culture and religion' in SC Woolman *et al* (eds) *Constitutional law of South Africa* (2nd edition, 2008, OS) chap 58.

<sup>11</sup> Something of this sort is occurring now in Canada. A Commission made up of two academics – including noted philosopher Charles Taylor – have endorsed 'open secularism' and defined secularism at variance with its history. For comment, see: IT Benson & TL Nguyen 'The need to re-evaluate the language of the secular and secularism in the quest for fair treatment of minorities and belief in Quebec and Canada today' 18 December 2007, [http://www.culturalrenewal.ca/downloads/sb\\_culturalrenewal/BriefTaylorBouchardCommissionDecember2007Fin a.pdf](http://www.culturalrenewal.ca/downloads/sb_culturalrenewal/BriefTaylorBouchardCommissionDecember2007Fin a.pdf) (accessed 12 September 2008).

<sup>12</sup> For more on the history of the terms 'secularism' and 'secular', see: IT Benson 'Considering secularism' in D Farrow (ed) *Recognising religion in a secular society: Essays in pluralism, religion and public policy* (2004) 83-93 and 'Notes towards a (re)definition of the secular' (2000) 33 *University of British Columbia Law Review* 519 520-538.

*conscience that is religiously informed or not. That meaning of strictly secular is thus pluralist or inclusive in the widest sense ...*

No society can be said to be truly free where only those whose morals are uninfluenced by religion are entitled to participate in deliberations related to moral issues of education in public schools. In my respectful view 'strictly secular' so interpreted could not survive scrutiny in light of the freedom of conscience and religion guaranteed by section 2 of the Charter [conscience and religion] and equality rights guaranteed by section 15.<sup>13</sup>

What is said here about moral positions applies equally to religious and cultural beliefs in a public school setting such as *Pillay*. Simply put, convictions emanating from religious beliefs ought to be at no disadvantage in terms of public respect by comparison to belief sets that emanate from non-religious convictions. When the case reached the Supreme Court of Canada, all nine judges agreed with the reasoning of McKenzie J. 'Secular' in Canadian constitutional jurisprudence embraces a religiously *inclusive* understanding of the term.<sup>14</sup>

Justice Gonthier provides further support for this proposition when he writes:

*In my view, Saunders J [the trial judge] below erred in her assumption that 'secular' effectively meant 'non-religious'. This is incorrect since nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the Charter itself establishes that '... Canada is founded upon principles that recognise the supremacy of God and the rule of law'. According to the reasoning espoused by Saunders J, if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has 'belief' or 'faith' in something, be it atheistic, agnostic or religious. To construe the 'secular' as the realm of the 'unbelief' is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does*

<sup>13</sup> *Chamberlain v Surrey School Board* (2000) 80 BCLR (3d) 181 (CA) ('*Chamberlain*') at paras 33 & 34, reversing *Chamberlain v Surrey School Board* (1998) 60 BCLR (3d) 311 (SC) (emphasis added). For a detailed analysis of this decision, see IT Benson & B Miller 'Court corrects erroneous understanding of the secular and respects parental rights' *Lex View* No. 40.0, available at <http://www.culturalrenewal.ca/qry/page.taf?id=64> (accessed 12 December 2008).

<sup>14</sup> *Chamberlain* (n 7 above) 749. Madam Justice McLachlin, who wrote the decision of the *Chamberlain* majority, endorsed the reasoning of Justice Gonthier on the correct interpretation of 'secular'.

not imperil community living, must be capable of being accommodated at the core of a modern pluralism [emphasis added].<sup>15</sup>

The approach of the Supreme Court of Canada and the implicit recognition in *Pillay* that a public school must accommodate a variety of beliefs (religious or cultural) are at stark variance with the approaches taken by countries such as France. In France, the public sphere has generally been stripped of all religious accommodation under the mistaken belief that the removal of all religious signifiers is 'neutral.' In *Pillay*, the Constitutional Court of South Africa arrived at a similar conclusion about the place of religion in the public sphere as the Canadian Supreme Court did in *Chamberlain*. (I would have preferred, however, a somewhat different characterisation of the relationship between the 'sacred' and the 'secular'.) In *Fourie*, Sachs J offers the kind of careful and nuanced understanding of the public realm as a sphere of 'co-existence' that is largely on all fours with the notion of religious inclusivism defended here and set out as above in *Chamberlain*:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other ... The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all ... It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.<sup>16</sup>

A more coherent and accurate way of describing what is at issue is to recognise that religious beliefs and believers are within the public sphere shared by all. Utilising the secular/sacred dichotomy confuses the principles at issue. What should be emphasised is the co-operative relationship – between politics and religion – in the same manner as

<sup>15</sup> As above para 137 (emphasis added).

<sup>16</sup> *Minister of Home Affairs & Another v Fourie & (Doctors for Life International & Others, amici curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC) paras 94-98.

the passage correctly notes the *co-operation* of the religious and the non-religious within ‘the same public realm.’ Unfortunately, the distinction between the ‘secular’ and the ‘sacred’ at the outset does little to assist what I take to be South Africa’s religiously inclusive position. For a religious citizen, the public order of the State, too, has its own *sacred* dimension. Why? Because everything within creation flows, in a some sense, from ‘grace’ or ‘the holy’ or ‘the divine’. The *Fourie* Court would have done better to describe the public realm as encompassing believers of all sorts – whether atheist, agnostic or religious – and identifying the role of the law, when certain types of conflicts emerge, as ordering all relationships according to principles of justice. When most people use the term ‘secular’ they mean ‘public’ – and it would clarify matters greatly if the Constitutional Court (and courts elsewhere) said so in the future.

Lenta’s use of the work of Iris Marion Young,<sup>17</sup> which is critical of ‘*the liberal tendency*’ (the singular conception of ‘liberal’ here is telling) is good as far as it goes in suggesting a tendency towards the privatisation and consequent public irrelevance of religion within one strand of liberal thought. Any monofocal view of ‘liberal’ fails, however, to look at *different conceptions of liberalism* and the conceptions of ‘the secular’ themselves that play into such an implicit or explicit privatisation and marginalisation of the religious and the sacred. Secularism (as an anti-religious movement) goes unanalysed in Lenta’s work. But the same, it must said, is true of *Pillay* and *Fourie* and the Supreme Court of Canada’s reasoning in *Chamberlain*.

In discussing *Pillay*, Lenta does not address how we will try to accommodate (if we should) non-religious or non-cultural claims regarding belief sets and practices. Unfair discrimination, by both the State and private parties, including on the grounds of both religion and culture, is specifically prohibited by sections 9(3) and (4) of the Constitution. Section 9(3) reads:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

*Pillay* focuses exclusively on ‘religion’ and ‘culture’ and concludes that cultural practices are entitled to the same degree of constitutional solicitude as religious practices. One would do well to heed without necessarily agreeing with Justice O’Regan’s concerns about the extent to which culture and religion differ in terms of the

<sup>17</sup> See Lenta ‘School uniforms’ (n 2 above).

community and the individual.<sup>18</sup> Two important questions, raised by *Pillay*, but not engaged by Lenta, are: (1) can there be ‘a culture of one?’ and (2) does the accommodation approach apply if the objection to wearing of a uniform is based simply on ‘belief’ or ‘opinion’?

### 3 Equating ‘culture’ with religion: Can there be a ‘religion or culture of one?’

If it is true, as John Donne famously observed, that ‘no man is an island’,<sup>19</sup> then it might be fair to ask if one person can be a culture or one person’s beliefs a religion. What are the requirements in order for something to constitute a ‘culture’ or ‘religion’? The judgment in *Pillay* does not help us here. Chief Justice Langa’s judgment begins and ends its analysis with the following ‘brief introduction’:

Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community’s underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.<sup>20</sup>

A tension always exists between understanding religion in its personal dimensions and broader communal dimensions. Too great a focus on the individual’s belief runs the risk of trivialising the communal foundation to which any individual belief is invariably related. It is not too strong a statement to say that *Pillay* gets things back to front: The meaning that an individual draws from a religious belief or a religious practice is contingent upon the existence of a pre-existing religious community with well-developed tenets of belief and practice. Put differently, in a very important sense, the religious community creates and nurtures the religious believer.<sup>21</sup> Unfortunately, *Pillay* fails to recognise this relationship.

<sup>18</sup> *KwaZulu-Natal MEC for Education v Pillay* 2008 (1) SA 474 (CC) (*Pillay*) paras 141-148. As I expand upon below, Justice O’Regan’s reasons view religion individualistically and fail to accord religion an appropriate associational dimension.

<sup>19</sup> J Donne ‘Meditation XVII’ in MH Abrams *et al* (eds) *The Norton anthology of English literature* Vol. 1 (3rd ed, 1974) 1215.

<sup>20</sup> *Pillay* (n 18 above) para 47.

<sup>21</sup> SC Woolman ‘Freedom of Association’ in Woolman *et al* (eds) (n 10 above) ch 44. See also M Walzer ‘On involuntary association’ in A Gutmann (ed) *Freedom of association* (1998) 64.



Consider this statement from another Constitutional Court decision on religious faith and culture, a decision referred to in the most recent Supreme Court of Canada decision touching on religious rights:

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.<sup>22</sup>

The reference both to 'community' and 'social stability' in this passage points towards a better framework for locating the right to religion (and also to culture). For it is precisely in the *relationship between the person and the community* that the importance of the freedom of religion is best viewed. Social stability, after all, is not something achieved by the individual. Its achievement is a function of the co-ordination of action between and among individuals within a community. Neither *Pillay* nor the Canadian Supreme Court in *Amselem*<sup>23</sup> seem comfortable with affirming this proposition.

But should they be? For example, we recognise many religiously or culturally sponsored charitable endeavours as public goods. Religious institutions that promote 'health care' or 'education' are only possible because various communities commit themselves to their realisation and their ongoing maintenance.

In another setting, that of whether a privilege should extend to religious communications in the criminal law area, two justices of the Supreme Court of Canada recognised the wider context and referred to the following passage with approval:

In a very real sense, then, the value of religious confidentiality *is the value to society of religion and religious organisations generally. Even from a purely utilitarian perspective, that value cannot be overstated. Religious organisations based on claims to unchanging truths are a stabilising influence in an increasingly fast-paced and atomised society where bonds of community are scarce and worth preserving.* Moreover, many provide

<sup>22</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 36. See, generally, I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 336-357; P Farlam 'Freedom of religion' in Woolman *et al* (eds) (n 10 above) ch 41. See further *Bruker v Marcovitz* 2007 SCC 54; K Boonstra & IT Benson 'When should the courts enforce religious obligations?' *Lex View* No 63 (2008), available at <http://www.culturalrenewal.ca/qry/page.taf?id=150> (accessed December 12, 2008).

<sup>23</sup> *Syndicat Northcrest v Amselem* 2004 SCC 47. See discussion in n 28 below.

needed social services that government is unwilling or unable to provide in a cost-efficient and humane manner.<sup>24</sup>

Religious organisations and their special character (including their internal rules, employment contracts etc.) would be ignored or threatened were religious or cultural accommodation limited to the protection of only individual practices or belief sets or if courts adopt too ready a willingness to scrutinise internal arrangements. Moreover, the undeniable public benefits of these privately funded institutions are what make these projects of interest to the ‘public’.<sup>25</sup> Yet what is clearly understood in charities law gets overlooked all too frequently in constitutional dicta. Consider the errant approach of the Supreme Court of Canada in the following passage:

While some provisions in the Constitution involve groups, such as section 93 of the Constitution Act 1867 protecting denominational schools and section 25 of the Charter referring to existing aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members. The group or organisation is simply a device adopted by individuals to achieve a fuller realisation of individual rights and aspirations. People by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess.<sup>26</sup>

This position – a standard liberal individualistic approach to communities – is both epistemologically incorrect and politically unsound: it gets the ontological priority of meaning back to front. Individuals only come to participate in these institutions because a community has – in most instances – already produced them and the meaning that flows from their ongoing reproduction. It is because communities exist that individuals have anything to choose at all. Indeed, sections 15, 30 and 31 of the South African Constitution expressly recognise the communal nature of these religious and cultural institutions. When the Constitutional Court is ultimately faced, again, with questions of religious and cultural accommodation it would do well to recall that these charitable institutions are not run by an individual but built and supported over time by identifiable communities. The express legal recognition of the ‘public benefits’ of many religious and cultural charities points us in the right direction.

A real danger – and not a mere oversight – exists when the ‘individualising tendency’ of one strand of liberalism is ascendant.

<sup>24</sup> *R v Gruenke* [1991] 3 SCR 263 299-300 per L’Heureux-Dubé J for herself and Gonthier J concurring with the majority (emphasis added).

<sup>25</sup> On the ‘public benefit’ of religious charities, see H Picard (ed) *The law and practice relating to charities* (3rd ed 1999) 84-116; J Warburton (ed) *Tudor on charities* (9th ed 2003) 78-81 and DWM Waters (ed) *Waters’ law of trusts in Canada* (3d ed 2005) 716-745.

<sup>26</sup> Public Service Employee Relations Act (Alberta) Ref [1987] 1 SCR 313.

The individualising tendency, I would argue, poses a genuine threat to the proper recognition of religious liberties. Holding the individual and communitarian dimensions together in theory and in practice is essential for the very social stability that the Constitutional Court in *Christian Education* refers to above. As William Galston notes:

In some measure, religion and liberal policies need each other. Religion can undergird key liberal values and practices; liberal politics can protect – and substantially accommodate – the free exercise of religion. But this relationship of mutual support dissolves if the respective proponents lose touch with what unites them. Pushed to the limit, the juridical principles and practices of a liberal society tend inevitably to corrode moralities that rest either on traditional forms of social organisation or on the stern requirements of revealed religion ... [L]iberal theorists (and activists) who deny the very existence of legitimate public involvement in matters such as family stability, moral education, and religion are unwittingly undermining the values and institutions they seek to support.<sup>27</sup>

Yet once one recognises the importance religious and cultural rights have for a society, we still need to define what count as religions and cultures and ask what are the rules or requirements of entrance, exit and membership (to name but three) for a ‘culture?’<sup>28</sup> Is something worthy of constitutional protection simply because I say or believe it is? If, like religion, protection and recognition extend to those things that are voluntarily chosen as well as obligatory (and what would be the obligatory aspect of ‘a culture of one’ except mere assertion of the will?), should we be concerned that the important category of culture could be thinned out to nothingness, deflated to the point of implosion, by lack of meaningful definition? If this concern is accurate, as I think it is, then too broad a conception of culture can have the paradoxical result that in trying to give content to the

<sup>27</sup> W Galston *Liberal purposes: Goods, virtues, and diversity in the liberal state* (1991) 279.

<sup>28</sup> On entrance, membership and exit see Woolman ‘Freedom of association’ (note 21 above). See also A Hirschmann *Exit, voice and loyalty* (1970); E Brody ‘Entrance, voice and exit: The constitutional bounds of freedom of association’ (2002) 35 *UC Davis Law Review* 821. Though not dealing with associational rights and focused more on some of the other tensions common to *Pillay* and *Amselem*, see a helpful exchange between two Canadian scholars: R Moon ‘Religious identity and commitment: *Syndicat Northcrest v Amselem*’ (2005) 29 *Supreme Court Law Review* (2d) 201 and DM Brown ‘Neutrality or privilege?: A comment on religious freedom’ (2005) 29 *Supreme Court Law Review* (2d) 221.

concept we actually denude it.<sup>29</sup>

I have already contended that turning ‘religion’ into a merely individually assessed matter can have the damaging effect of reducing and weakening the category. Benjamin Berger has observed that one of the most profound implications of the relationship between religious commitment and assessing a contemporary liberal order is that:

... there is a fundamental, though eminently explicable, shortfall at the core of liberal legal discourse about religious liberties. Religion is not only what law imagines it to be. Law is blind to critical aspects of religion as culture. That being so, even if successful at accommodating or tolerating what it understands to be religion, aspects of religion as culture remain entirely unattended to and, therefore, unresolved in their tension with the constitutional rule of law. And with this insight we come to one important part of the explanation for why the story we tell about law and religion has proven so unsatisfactory: law – in whose

<sup>29</sup> Thus *Pillay* could be said to give either insufficient attention to the relationship between religion and culture and communities (Chief Justice Langa’s judgment) or too much attention to religion and culture as individual practices (as in Justice O’Regan’s reasons). A richer examination of the communal prerequisites for religious practice can be found in *Taylor v Kurtstag No and Others* 2005 (1) SA 362 (W). Here, in Judge Malan’s reasons for his judgment, the rules of entrance, membership, exit and excommunication in the context of Orthodox Judaism are taken seriously by the Court. The Canadian Supreme Court has, to date, focused more on the individual side of the religious rights ledger. See *Amselem* (n 23 above). In this case the Supreme Court of Canada’s majority stated that religion is about ‘self-definition and spiritual fulfillment’ (para 39). *Amselem* collapses the individual and communitarian dimensions of religious practice. *Amselem* focused on what might be termed a ‘fringe religious belief’ and held expressly that it was not necessary to show the practice in question was required by the religion. A more nuanced reading of the judgement, however, shows that since the concern about delving too far into religious beliefs would involve the courts in an assessment of ‘dogma’ and that would constitute ‘unwarranted intrusions into the religious affairs of the synagogues, churches, mosques, temples and religious facilities of the nation with value-judgment indictments of those beliefs that may be unconventional or not mainstream’ (para 55) the court, as in *Pillay*, gave respect to the communitarian dimension but in a round-about and implicit manner which should have been addressed expressly. So while the *communitarian* aspects of Charter protection were insufficiently elucidated, they clearly informed the decision. See also K Boonstra & I Benson ‘Religion is in the eye of the beholder’ *Lex View* No 64 [comment on *Amselem*] available at <http://www.culturalrenewal.ca/qry/page.taf?id=166> (accessed February 23, 2009).

capacity to tolerate, accommodate, and ‘make space’ for cultural claims we place so much faith – fails to appreciate religion as culture.<sup>30</sup>

*Pillay* and *Amselem* underscore the need for courts to make express the proposition that religion acquires meaning through communities and that religion matters to individuals precisely because they are (usually) born into communities that give their (religious) lives meaning. Belief, in the context of religion, cannot be rightly understood as an individual dispositional state. The communal character of religious believers poses strong, but not ultimately incompatible, challenges to liberal theories grounded in predominantly individualistic notions of autonomy. Liberal judges ought, in fact, to recognise that communal religious freedom is what enables many individuals in our society – religious and not – to flourish.

## 5 Are belief and opinion to be analysed in the same way as religion and culture?

What becomes of the analysis of accommodation if a student’s objection to wearing a uniform or part of a uniform is based on conscience, belief or opinion *simpliciter*? Since a term such as ‘belief’ is also a protected category, what analytical tools are we to bring to bear on assessing the importance and *bona fides* of a belief claim that some aspect of uniform wearing is offensive to a student? Are religious or cultural beliefs elevated forms of belief in terms of the constitutional protection? Should religion and culture be considered more weighty rights than idiosyncratic or individualistic personal beliefs? Given what I and others have argued about the ‘public benefits’ of religious charities and projects generally, the answer should be ‘yes.’

Lenta mentions the Scottishness of kilt wearing as a cultural practice that might have to be accommodated in light of the reasoning in *Pillay*. One wonders how and whether a belief sheltered by, say, iconoclastic or eccentric expressions of individual will, but

<sup>30</sup> B Berger ‘Law’s religion: Rendering culture’ in R Moon (ed) *Law and religious pluralism in Canada* (2008) 264 288 available in an earlier version of the article at [http://ohlj.ca/english/documents/45-2\\_02\\_Berger\\_postFR2\\_July10.pdf](http://ohlj.ca/english/documents/45-2_02_Berger_postFR2_July10.pdf) (accessed 20 September 2008). David Brown’s critique of a certain overly expansive view of law, see n 28, above, at 230 - 233 would apply to Berger’s concept that law somehow constitutes a ‘culture’ rather than, as another view would have it, a set of rules that must order relationships between cultures. Law understood as a ‘culture’ or ‘community’ in its own right would seem to call into question the ability of the law to adjudicate in a neutral fashion between competing claims amongst sub-cultures and communities. The laws are the equal property of all and owned especially by none; if this is so then it is probably wiser to avoid understanding constitutional law as constituting a ‘culture’ or a ‘community’ given how important constitutional principles are to citizenship shared by all.

nonetheless a ‘belief’, would be analysed? What weight is placed on the balancing scales where uniforms are weighed not against religious or cultural beliefs and membership (which the cases show can marshal significant social arguments for their respect) but against what may seem merely idiosyncratic whims or expressions of pique, adolescent rebellion or ego? Say, a clerk at the Constitutional Court who sports a Mohawk and goes barefoot with or without wearing a kilt. If the test here is largely subjective (as it would appear to be with both religion and now culture after *Pillay*), why should we treat the non-religious, non-cultural individual claim for respect differently than claims that are at bottom communal, but which the Court treats as individual forms of expressive conduct? Examining the associational dimension and the goods consequent upon such associations might provide some way around this difficulty.

Courts – and commentators – have tried to avoid rank-ordering rights.<sup>31</sup> Is this agnosticism about which rights are more weighty than others sustainable? In the most recent decision from the Canadian Supreme Court touching upon the freedom of religion in relation to civil laws, the majority judgment began by affirming that multiculturalism and pluralism must be protected, but then goes on to employ a fact-specific application of Canadian Charter rights that defies ‘bright-line application but does employ rank-ordered choosing without naming it as such’:

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada’s mainstream based on and notwithstanding these differences has become a defining part of our national character. The right to have differences protected, however, does not mean that those differences are always

<sup>31</sup> *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 para 72. Chief Justice Lamer stated that ‘[w]hen the protected rights of two individuals come into conflict ... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.’ See also *Trinity Western University v British Columbia College of Teachers* [2001] 1 SCR 772 para 29. Justice Iacobucci wrote that ‘[n]either freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.’ For a useful critique of balancing in hard cases and where matters of principle are at stake see SC Woolman & H Botha ‘Limitations’ in Woolman *et al* (eds) (n 10above) ch 34 citing *New Jersey v TLO* (1985) 469 US 325 369 (Brennan J describes balancing as ‘doctrinally destructive nihilism’). See also the Supreme Court of Canada’s decision allowing a student to wear a kirpan (Sikh ceremonial dagger worn for religious reasons) in a public school as long as it was sealed within his clothing; *Multani v Commission Scolaire Marguerite Bourgeois* [2006] 1 S.C.R. 256 and case comment P Lauwers and IT Benson ‘Allowing Kirpans in Public Schools’ *Lex View No. 57* <http://www.culturalrenewal.ca/qry/page.taf?id=119> (last accessed February 20, 2009).

hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multi-culturalism and public confidence in its importance.<sup>32</sup>

The French administrative court's decision that the wearing of a *niqab* (concealing the face of an individual except for the eyes) is a ground for denial of citizenship is, itself, grounded in the underlying notion that such concealment is 'inconsistent with Republican values'. Perhaps that is true for France.<sup>33</sup> But what should religiously inclusive jurisdictions such as South Africa and Canada do in the face of such a dispute and what are the grounds for deciding matters differently? The relatively empty appeal to 'balancing' articulated above is of little assistance here.

In his earlier writings, Lenta hints, without giving a definitive viewpoint on the matter, that a *niqab* might be distinguished from a headscarf on the basis that in certain contexts facial covering could lead to 'making identification and communication difficult'. He thereby avoids the religiously inclusive requirement to accommodate such a face-covering in public settings where such identification is essential or important.<sup>34</sup> I think Lenta is correct – if I have understood him properly – and look forward to his further analysis on this point. The debate in Canada regarding whether Muslim women should be allowed to vote while wearing face-coverings suggests that the issue may find practical means of resolution which allow for accommodation.<sup>35</sup>

To what extent headscarves or face-coverings should or should not be accommodated in public settings such as public school classrooms

<sup>32</sup> *Bruker v Marcovitz* 2007 SCC 54 paras 1-2 per Abella J.

<sup>33</sup> K Bennhold 'A veil closes France's door to citizenship' *The New York Times* 19 July 2008 available at [http://www.nytimes.com/2008/07/19/world/europe/19france.html?\\_r=1&pagewanted=1&ei=5070&en=2b01d3cac5c8b204&ex=1217304000&emc=eta1&oref=slogin](http://www.nytimes.com/2008/07/19/world/europe/19france.html?_r=1&pagewanted=1&ei=5070&en=2b01d3cac5c8b204&ex=1217304000&emc=eta1&oref=slogin) (accessed 22 July 2008).

<sup>34</sup> See Lenta 'Headscarves' (n 2 above) 319.

<sup>35</sup> A Canadian report has noted that there are very few women who wear full head coverings that obscure the face. One estimate puts the number in Quebec at 50 Muslim women out of a total number of around 200 000. According to this report, Muslim women in Canada are used to showing their faces for identification purposes at banks, airports and at the United States border. There has been some debate around the question of whether full facial coverings should be allowed at election booths and how identity can be assured. One commonly suggested solution has been for election officials to make provision for Muslim women to uncover to women election officers for the purpose of establishing identity. Another solution is to bring with them an adult who can swear to their identity. See <http://www.cbc.ca/canada/story/2007/09/09/harper-veil.html> (accessed 19 November 2008).

or government offices must be based upon nuanced and careful line-drawing. I do not believe that in a Canadian or South African context a blanket gendered approach or ‘Republican values’ conclusion of the sort that the French have embraced is likely to be the path ahead. A proper understanding of the principles of accommodation and the religiously inclusive public sphere of the kind adopted by the Canadian Supreme Court in *Chamberlain* and implicitly endorsed in *Pillay* and *Fourie*, suggests that civil function issues (such as voting identification) may be creatively accommodated.

What is certain, however, is that the courts have yet to address sufficiently the communal nature of religious belief and the importance that this communal nature (legally comprehended as associational rights) plays in serving the goods that religious beliefs can offer to free and democratic societies. An individualistic rights approach will tend to dissolve this good for the public and, ironically, for individuals as well.<sup>36</sup>

<sup>36</sup> Thus D Schneiderman ‘Associational rights, religion and the Charter’ in R Moon (ed) (n 30 above) 65 notes that: ‘... pluralists will call upon state actors to take care that they do not impair associational rights more than is necessary. Courts have often not been so careful. They have assumed a unity of purpose between state and society that should not so readily be presumed’ (80). Compare in the same volume (239) L Weinrib ‘Ontario’s Sharia law debate: Law and politics under the Charter’, who focuses on the individual aspect of rights and asserts: ‘These [Charter] provisions make clear that the relationship between the individual and the state is primary and direct: that is, undiminished by personal characteristics and unmediated by given or chosen social affiliations’ (247) (emphasis added). To argue, as does Weinrib, that relationships between the individual and his or her association (church, organisation etc) are not or cannot be, in constitutionally significant ways, ‘mediated’ by what a person has *chosen* (ie contractually agreeing to Membership Rules or a Code of Conduct etc) overstates the importance that individual rights may have in a constitutional order and contributes to the sort of threats to associational rights I have criticised throughout this article. The volume in which these papers appears shows this tension between approaches and the emerging awareness of associational rights as against what might be termed the earlier but incomplete focus upon more individualistic approaches. It seems clear the law can and should move towards greater associational rights recognition.