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Accommodating Conscientious Objections: From Liberty to Equality

Review of: John Adenitire *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge University Press, 2020)

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I. Introduction

Adenitire's book is a thoughtful, thorough, and engaging examination of conscience-based exemptions from state law.

Here I will focus on the book's discussion of Canadian law, and Adenitire's claim that Canadian law should and does recognize an exemption for both religious and non-religious beliefs. It is rare for me to read something by a non-Canadian that examines Canadian cases with such care.

If we rely simply on their words, the Canadian courts appear to recognize legal exemptions for fundamental beliefs both religious and non-religious, as Adenitire argues. However, if we look instead at what the courts have done in their decisions, the story is less clear. First, there have been virtually no cases under s. 2(a) of the Canadian Charter of Rights (freedom of conscience and religious) in which the courts have upheld a conscience claim, requiring the state to accommodate beliefs and practices that are not part of a religious belief system. I will argue that it is not simply an accident of litigation, that few claims have been made, or that the claims made have been weak. Second, even though the courts have said that the state has a duty to accommodate religious beliefs/practices, they have given little substance to this duty. The courts have been willing to exempt a religious practice from ordinary law, only when the exemption does not compromise the law's objectives in any noticeable way – in other words, only when it is not really an exemption. I will argue that the unwillingness of the courts to grant anything other than minor exemptions from law is understandable and justified.

II. From Liberty and Equality

According to the Canadian courts, the freedom requires not only that the state refrain from coercion in religious matters (from either compelling or prohibiting a religious practice) but also that it remain neutral in matters of religion. Meaning it does not support the practices of one religious group over those of another, and that it make some accommodation for religious practices that are restricted by law or other state action. Religion, or at least religious contest, should be both excluded and insulated from politics.[1]

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Freedom of religion, understood as a liberty, precludes the state from restricting a religious practice because it is the wrong way to worship God. The state must have a public reason to restrict a religious practice, but any public reason will do.[2] The Canadian courts, though, have adopted a different approach to the justification of limits on religious practice and have held that any time the state restricts a religious practice in a non-trivial way, even when it is advancing a legitimate public interest, it must justify the restriction under s.1, the Charter's limitations provision, by balancing the competing civic and religious interests.

However, in practice, the Canadian courts have required very little from the state. The courts will only protect religious practices that can be treated as personal to the individual or internal to the group, even if the boundary between private and civic is contestable and moveable. In other words, the state is required to make space for a religious practice or a religious community (to exempt from ordinary law) only if this can be done without any noticeable impact on state policy.

In *Syndicat Northcrest v. Amselem* the Supreme Court of Canada adopted a subjective test for determining whether a practice falls within the scope of protection under s. 2(a).[3] According to the Court, a practice will receive protection under s. 2(a), but may still be subject to justified restrictions under s.1, if the individual seeking accommodation has a sincere belief in its spiritual significance.

The appeal of an individual/sincerity test is obvious. Within every religious tradition there is substantial disagreement about doctrine. The court's focus on individual belief allows it to avoid becoming involved in disputes about religious doctrine or the proper understanding of a particular religious belief system. However, the Court's focus on the individual's sincere belief rather than on the group's established practices, when defining the scope of religious freedom, may have contributed, in later decisions, to a weak standard of justification for limits on religious belief/practice. This is so for several related reasons.

It is not clear why an individual's religious or spiritual beliefs should be exempted from legal restriction. We may have reasons to be concerned about the exclusion of cultural groups from participation in the larger society, but it is not obvious why we should be concerned about the exclusion of individuals, whose values and practices may be incompatible with ordinary law.

If the test for determining whether a practice is protected under section 2(a) is subjective (does the individual have a sincere belief in its spiritual significance?), then it is not clear what weight should be given to the practice in the court's balancing of competing religious and public interests or even why the state should be expected to compromise its public policy for a *subjectively* valued practice – a practice that from a civic or public perspective

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[1] *Mouvement laıque quebecois v. City of Saguenay* [2015] SCC 16. For a discussion see Richard Moon, 'Freedom of Religion under the Charter of Rights: The Limits of State Neutrality' (2012) 45 UBC Law Review 497.

[2] This was John Locke's position. According to John Locke, *A Letter Concerning Toleration* (1685, repr., New York: Irvington Publishers, 1979) at 199, the government may prohibit a practice such as animal slaughter provided the prohibition has a civic purpose and is not enforced exclusively against those who engage in animal slaughter for religious reasons.

[3] *Syndicat Northcrest v. Amselem* [2004] SCC 47.

has no intrinsic value or merit.[4] The court's judgment that an accommodation should be made under the Charter will be based not on a principled balancing of competing civic and spiritual values but instead on a practical determination that the impact of the accommodation of a personal/communal spiritual practice will have only a minor impact on public policy.

The subjective test means that accommodation claims can take many forms. If any act can be a religious practice (if sincerely believed to be spiritually significant), then any law can potentially breach s. 2(a). Given the innumerable ways in which spiritual practices might conflict with law, a significant duty to accommodate could severely limit the state's ability to act in the public interest. Even if the accommodation of a small number of individuals will not have a significant impact on a law's effectiveness, it is always possible (theoretically) that more individuals will later come forward and request the same exemption. If this happens then the law's purpose may be entirely undermined. Lawmakers may be able to take some account of established religious practices when formulating law – when determining whether or to what extent the law should be adjusted to make space for such practices; but they cannot be expected to anticipate every possible individual claim to exemption that might be made.[5] This makes it difficult for the courts to require the state to grant an exemption in any particular case, since future requests for exemption are possible and may have the cumulative effect of undermining the law's operation. The courts are meant to make principled decisions, reconciling or balancing competing claims. Their decisions should not be different, or should not change, simply because the number of individuals seeking accommodation changes.

III. Why Accommodate

The most common justification for the neutrality requirement, and more particularly the state's duty to accommodate religious practices, is that it serves to protect the individual's deeply held commitments or her decisional autonomy in important or fundamental matters.[6] But why should an individual's deeply held religious practices be insulated or excluded from politics? To bracket religion off from politics in this way is to treat it as a matter of (cultural) identity (similar to gender or race) rather than individual judgment.

The shift in the freedom's focus from liberty to equality or neutrality (and the treatment of a religion as a matter of cultural identity rather than as simply a personal commitment or judgment) rests on a concern about the status or vitality of religious groups.[7]

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[4] There are arguments that religious practice/belief has civic value, for example that religious believers make better, more publicly-minded citizens, but these do not rest on the value of the particular belief or practice.

[5] See *Alberta v. Hutterian Brethren of Wilson Colony* [2009] SCC 37, [99] in which Chief Justice McLachlin of the Supreme Court of Canada rejected the claim of members of a Hutterite Colony for a religious exemption to the photo requirement for driver's licences in the province of Alberta, in part, because it was always possible that more claimants might come forward in the future, undermining the law's purpose.

[6] This is central to Dr. Adenitire's argument – although he also emphasizes the protection of minority communities. In Canada see *Syndicat Northcrest v. Amselem* [2004] SCC 47.

[7] The Canadian courts have had difficulty acknowledging the group or collective character of religion, and religious freedom, perhaps, because within any religious community or tradition there is an enormous diversity of belief and practice. The followers of a religious tradition may interpret scripture or apply the practices of the tradition in different ways, and yet still understand themselves to be members of that tradition – as Christians or Jews or Buddhists. They may identify with a religious tradition or belief system

Accommodation should be made for the practices of different religious groups, because these groups are a source of identity and meaning for their members.[8] Accommodation may also be necessary to avoid or limit the marginalization and alienation of minority religious groups. If the law prevents the members of some religious groups from fully participating in society, their identification or connection with the larger political community may be negatively affected and this in turn may result in social conflict. The ties between religious group members, which may be intergenerational and comprehensive, make the group particularly vulnerable to suspicion, discrimination, and marginalisation.

IV. The Balancing of Civic and Religious Interests

Despite what the courts often say, religious freedom claims are not, and cannot be, resolved through the balancing of civic and religious interests. A court has no way to attach value or weight to a religious belief/practice. From a secular or public perspective, a religious belief/practice, such as honouring the Sabbath or wearing a turban or hijab, or not eating pork, has no necessary or recognizable value; indeed, it is said that a court should take no position concerning its value or truth, that the court should remain neutral on the question of religious truth. The belief/practice is significant, from a civic-secular perspective, because it matters deeply to the group and its members or because it is part of their cultural identity: how they understand and live in the world. But there is no way to balance this concern about group identity against the purpose or value of the restrictive law.[9] Even the person or group seeking an exemption for a particular practice must frame their claim in secular terms and argue before a secular court that their practice should be protected not because it is true but because they believe it to be true.

Religious freedom, as a constitutional right in a democratic political system, must be limited in what it protects in matters that can be treated as private and outside the scope of politics. The courts' task then is not to trade off or balance competing values/interests but is instead to mark out a protected space for religious communities or ways of life. To define the scope of personal or communal religious practice that should be insulated (and excluded) from legal regulation. The court may sometimes require the state to compromise its pursuit of a particular objective to make space for a religious practice that is viewed as personal to a group's members or internal to the group, without directly challenging the state's authority to govern in the public interest and to establish public norms.[10] The boundary between the sphere of personal and communal spiritual life

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in different ways, with different levels of commitment and degrees of involvement. This is a reminder of the way in which religion is both a matter of cultural identity and personal commitment – that it is a system or tradition that individual members understand, and identify with, in ways that may be particular or personal.

[8] A tension between the focus of s. 2(a) protection (individual belief and practice) and the reason for protection (the importance and vulnerability of religious groups) runs through the court's freedom of religious cases: Richard Moon, 'Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*' (2005) 29 Supreme Court Law Review 201, 216.

[9] In this way religious freedom is different from rights, such as freedom of expression, which is protected because there is value in the activity of expression (its contribution to democracy, knowledge, individual agency). In deciding whether to uphold a limit on expression, the courts must make a judgment about the reasonable trade-off between competing public/civic values or interests.

[10] See for example, *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] SCC 6 which is discussed below.

(which should be insulated from state action) and the sphere of civic or public life can be pushed and pulled in different directions, as the courts seek reconcile the capacity of democratic institutions to take collective action in the public interest with the preservation of space for spiritual life and religious community.

Religious practices (forms of worship) that are 'personal' in character are sometimes indirectly or incidentally limited by state action. The courts, in seeking to protect religious life, may sometimes exempt such practices from the application of an otherwise justified law. A police uniform requirement may have the effect of excluding individuals who wear head coverings for religious reasons, or a school schedule may not take account of the holidays of some religious groups. An exemption from a uniform requirement made for an individual who wears a turban or hijab as an expression of his/her faith or identity will have an impact on state policy, but only a minor one. Allowing a government employee to take a day off work for a religious holiday that is not included in the list of statutory holidays will not disrupt the unit's operations in any significant way. These practices may be viewed as personal and treated as private since they are not concerned directly with public policy and do not noticeably compromise the state's objectives.[11]

Sometimes an accommodation claim is made not by an individual, who is seeking exemption for a specific practice, but instead by a religious organization or collective that is claiming a degree of autonomy in the governance of its affairs — in the operation of its

internal decision-making processes. In these institutional autonomy cases, the key question for the court is whether the exemption from state law will impact the rights and interests of others – of non-members. For example, the right of the Catholic Church to exclude women from the priesthood (to discriminate against women) is not decided by balancing the religious claim or interest against the claim to gender equality. Because the Catholic church is viewed as a private religious organization or institution, it is free to govern its internal affairs according to its own norms and remains insulated from public anti-discrimination requirements. Similarly, a religious school may dismiss a teacher who enters a same-sex relationship contrary to church doctrine, not because the religious interests of the group or school outweigh the public value of sexual orientation equality but simply because the school is understood to be a private religious organization.[12] However religious organizations operate in the larger world and their actions will almost always have some impact on outsiders. The question is what kind or degree of impact is sufficient to say that the organization is no longer operating as simply a private/voluntary religious association?

V. Canadian Accommodation Cases

In their decisions, the Canadian courts have given little substance to the accommodation requirement. *Multani v Commission scolaire Marguerite-Bourgeoys*, is one of the few

[11] Moreover, we know that police or other uniform requirements or statutory holidays often reflect, or already take account of, the cultural and religious practices of historically dominant groups. The distinction between a civil servant's personal religious expression and the performance of his/her public role or duty is erased in the Province of Quebec's recently enacted Bill 21 (An Act respecting the laicity of the State), which treats the wearing of religious dress or symbols, such as a hijab or turban, by certain civil servants, as a political act – a state act, that is incompatible with the requirement that the state remain neutral in matters of religion.

[12] See *Caldwell v. Stuart* [1984] 2 SCR 603.

cases in which the Supreme Court of Canada found that a state restriction on religious practice breached the Charter.[13] In that case the Supreme Court of Canada held that the decision by a public-school authority to prohibit a Sikh student from wearing a kirpan to school breached section 2(a) and was not justified under section 1. The school did not dispute that the student had a sincere belief in the spiritual significance of the kirpan and that he considered himself bound to wear it at all times. The position of the school was that the kirpan is a weapon and therefore prohibited under the school's safety policy.

Justice Charron, writing for the majority of the Court, noted that the school's policy must simply be to ensure reasonable safety, since it was unrealistic to imagine that the school could ban all safety risks. She observed that pens, scissors, and bats were all permitted despite their potential use as weapons. Justice Charron found that the safety of the school would not be compromised in any real way if the student was permitted to wear the kirpan. She observed that for Sikhs the kirpan is a religious symbol rather than a weapon: "[W]hile the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person . . . for orthodox Sikhs [it] is above all a religious symbol."[14] The kirpan could, of course, be both a weapon and a religious symbol, in the sense that its symbolic role is tied to its history or design as a weapon. For Charron J., though, the important point was that the kirpan is not carried as a weapon. She rejected the school authority's claim that "kirpans are inherently dangerous" and noted that there were no recorded incidents in Canada of a Sikh student drawing his kirpan in a public school. She further observed that in contrast to an airplane or a courthouse, where a ban on the kirpan might be justified, the school had an ongoing relationship with its students and so could monitor their actions and assess the risk of violent behaviour. Finally, Charron J. thought that if the kirpan was sewn into the student's clothes (something to which his family and the school administration had previously agreed), there would be little risk of it falling out or being taken by anyone else and used as a weapon. After determining that the kirpan is a weapon in form only and presents no real risk to school safety, the Court held that it should be exempted from the weapons ban.

However, when there is any concern that a religious exemption will compromise the law's purpose (public policy) in a tangible way, the Court has determined that the restriction (and the state's refusal to exempt the religious practice) is justified under s.1. The case of *Alberta v Hutterian Brethren of Wilson County* involved a challenge to the regulations in Alberta dealing with driver's licences, which had been amended in 2003 to require that all licence holders be photographed.[15] The licence holder's photo would appear on her/his licence and be included in a facial recognition data bank maintained by the province. Before this change, the regulations had permitted the Registrar of Motor Vehicles to grant an exemption to an individual, who for religious reasons objected to having his/her photo taken. Members of the Hutterian Brethren of Wilson Colony, who believed that the second of the Ten Commandments prohibited the making of photographic images, had been exempted from the photo requirement under the old regulations, but were required under the new law to be photographed before a licence would be issued. The colony members argued that the photo requirement breached their section 2(a) Charter right and could

[13] *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] SCC 6.
[14] Ibid 37.
[15] *Alberta v Hutterian Brethren of Wilson Colony*, *Alberta* [2009] SCC 37.

not be justified under section 1. They claimed that no one from the colony would be able to obtain a driver's licence and that this would affect their ability to carry out activities that were necessary to their agrarian and communal way of life.

The majority judgment of McLachlin CJ accepted that the photo requirement breached the section 2(a) rights of the Wilson Colony members but found that the breach was justified under section 1. Chief Justice McLachlin determined that the purpose behind the photo requirement (reducing the risk of identity theft by ensuring the integrity of the driver's licence system) was pressing and substantial. She noted that the inclusion of driver's licence photos in a digital data bank will "ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence," which in turn will help to prevent the fraudulent acquisition of driver's licences.[16] McLachlin CJ agreed with the province that any exemption from the photo requirement would detract from the system's effectiveness in preventing identity theft. At the same time, she noted that the province was not compelling the colony members to have their photos taken. They had to have their photo taken only if they wanted to drive. She took the position that driving is a privilege rather than a right and also suggested that the colony members could hire others to do their necessary driving. McLachlin C.J. thought that the costs of the regulation "do not rise to the level of seriously affecting the claimants' right to pursue their religion" and "do not negate the choice that lies at the heart of freedom of religion" and so concluded that the benefit of the law outweighs its negative impact on religious practice.[17]

In deciding that the state should not be required to accommodate the Colony's religious belief/practice, the Chief Justice made what is sometimes referred to as a "floodgates" argument. She argued that if the courts recognize a particular claim, they may open the floodgates to an overwhelming number of additional later claims and may, as a consequence, undermine the effectiveness or predictability of the law. She expressed concern that accommodating every religious claim "could seriously undermine the universality of many regulatory programs …".[18] There were very few claimants in this case, as Abella J noted in her dissenting judgment. Had they been granted an exemption, the impact on government policy would have been minor. Chief Justice McLachlin, though, was concerned about the possibility of more claimants coming forward later. It is unreasonable, said the Chief Justice, to expect the state, when it is seeking to advance the public interest through law, to respond to or to anticipate, every possible claim for exemption on religious grounds. But on this reasoning an exemption could not be given in any case, because the law's purpose might be significantly undermined, if additional claimants were to come forward at some future time. Or perhaps, as in *Multani*, an exception could be made only if it was not truly an exception in the sense that its recognition (regardless of how many people sought "exemption") would not undermine the law's purpose.

VI. Conscience

The term 'conscience' is used in two different ways in discussions about religious freedom. Sometimes it refers to a particular kind of accommodation claim. In *conscientious*

[16] Ibid 42.
[17] Ibid 99.
[18] Ibid 36.

objection cases (conscience claims), an individual asks to be exempted not from a law that *restricts* her religious (or other) practice, but instead from a law that *requires* her to perform an act that she regards as immoral (on religious or other grounds). In many of these cases the claimant asks to be excused from performing an act that is not itself immoral but that supports or facilitates (what she sees as) the immoral action of others, and so makes her complicit in this immorality.[19]

More often, though, the term 'conscience' is contrasted with religion. Freedom of conscience, in contrast to freedom of religion, is concerned with the protection of fundamental beliefs or commitments that are not part of a religious or spiritual system. Adenitire argues that non-religious practices should be given the same protection as religious practices and takes issue with my view that while there may be a mix of practical and principled reasons for sometimes protecting religious practices from state restriction, these reasons do not apply clearly or directly to non-religious practices. Indeed, the protection of these practices may rest on nothing more than their formal resemblance to familiar religious practices and the understandable, but perhaps mistaken, assumption that if a particular religious practice is accommodated then so too should the non-religious version of that practice.

If religious freedom is understood as a liberty that prohibits the state from coercing individuals in religious matters, then it is easily extended to non-religious practices. The state ought not to interfere with an individual's practices, religious or otherwise, unless this is necessary to protect the rights and interests of others or the general welfare. However, freedom of religion as a liberty has a broad scope but little substance. It precludes the state from compelling a religious practice and from restricting such a practice on the grounds that the practice is erroneous — the wrong way to worship God. It does not require the state to compromise its policies in order to accommodate the individual's religious practices. The state must have a public reason to restrict a religious practice, but any public reason may be sufficient. This was the position taken by the US Supreme Court in the case of *Oregon v Smith*.[20]

However, if religious freedom requires not just that the state refrain from compelling or restricting religious practices without public justification (individual liberty in religious matters), but also that the state remain neutral in religious matters (and accommodate religious practices), then it is less obvious that equivalent protection should be extended to the individual's non-religious practices. Indeed, the shift in the Canadian courts'

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[19] Richard Moon, 'The Conscientious Objection of Medical Practitioners to the CPSO's Effective Referral Requirement' (2020) 29(1) Constitutional Forum. I have elsewhere argued that the significant issue in these conscientious objection cases is whether the religiously-based objection should be viewed as a personal or communal spiritual practice that should be accommodated if this can be done without any noticeable harm to others. Or instead whether it should be viewed as political as a position on the rights and interests of others in the community, or on the rightness of the law, that should be subject to the give-and-take of ordinary political decision-making. In many recent cases (such as those involving the refusal to provide goods and services for same-sex wedding receptions) the individuals seeking exemption from anti-discrimination laws have sought to convert a religious value or belief that was treated as a political position (opposition to the legal recognition of same-sex marriages), something that might influence public policy (but was rejected by policy makers), into a private or personal religious practice/belief (a matter of personal religious conscience) that should be protected from politics.

[20] *Oregon v Smith* [1990] 494 US 872.

understanding of the freedom's justification, from liberty to equality, has been accompanied by a narrowing of the freedom's scope. If the requirement that the state accommodate religious practices - that it treat religious practices as a cultural identity that lies outside the scope of politics - is tied to the role of these practices in the life of a religious *group*, then accommodation may not (often) extend to an individual's non-religious practices.

Despite the apparent breadth of s 2(a) and the Court's formal acknowledgment that freedom of conscience and religion protects both religious and non-religious (fundamental) values and beliefs, the former have been at the centre of the Canadian freedom of religion and conscience cases. The protection of non-religious beliefs and practices (the conscience component of s. 2(a)) appears to be limited to practices that resemble in content and structure familiar religious practices.[21]

Freedom of religion, understood as a form of equality right, that requires the state to make some accommodation for religious beliefs/practices, rests on a recognition of the deep connection between the individual and her religious or cultural group and on a concern about the standing of such groups and their members in the larger society. The practices of a religious group are treated as part of the cultural identity of the group's members (described as deeply held or rooted) and as such are excluded and insulated from politics, because experience has taught us that the restriction of these practices may contribute to the marginalization of the group and the exclusion or alienation of its members from the larger society. It is not obvious, though, that the regulation of non-religious views raises similar equality concerns, particularly about the status of identity groups within the larger community. If religious accommodation is based not simply on the deep significance of (religious) practice to the individual, but also on the particular vulnerability of minority religious practices, which may be overlooked in the legislative process, and the risk that religious groups will be marginalised and their members alienated, then non-religious objections by an individual may not have the same claim to accommodation.

Moreover, freedom of conscience and religion may only protect practices that lie outside (or can be bracketed-off from) political contest and treated as part of a personal or communal set of practices. This seems to be what is meant when non-religious practices are described as 'deeply held': that they are part of a distinctive world view that runs contrary to conventional morality or mainstream practice. However, as a practical matter, it may be that such practices are seldom sustained outside cultural or religious communities.

The only reported cases in Canada in which freedom of conscience under section 2(a) was found to have been breached involved a refusal by the federal prison authorities to provide an inmate with vegetarian meals.[22] In *Maurice v Canada (AG)*, an inmate had previously

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[21] Richard Moon, 'Conscience in the Image of Religion' in John Adenitire (eds) *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart/Bloomsbury 2019), Chapter 5.

[22] *Maurice v Canada (AG)* [2002] FCT 69. Dr. Adenitire cites the concurring judgment of Wilson J. in *R v Morgantaler* [1988] 1 SCR 30 (which struck down the criminal ban on abortion) as an example of a conscience case. But Justice Wilson does not use the term in the same way Adenitire uses it. In Justice Wilson's decision, conscience refers to a sphere of autonomous judgment – that the individual has the right to make decisions about deeply personal matters such as reproduction without state interference. She is not arguing that those individuals (and only those individuals) who have a deep moral commitment that it is

received vegetarian meals on religious grounds, as a member of the Hare Krishna community. After he had disassociated himself from that community, he asked that he continue to receive vegetarian meals in the prison for moral rather than religious reasons. The prison authorities took the position that they were only obligated to provide vegetarian meals for religious reasons. A judge of the Federal Court of Canada, however, rejected this argument noting that section 2(a) protects both religious and non-religious beliefs and practices. In the judge's view, the prison could accommodate the inmate's vegetarianism without difficulty, particularly since it was already providing vegetarian meals to inmates on religious grounds.

Two factors may have been critical to the success of this claim, setting it apart from other (possible) claims to accommodation for non-religious practices. The first has to do with the character of the practice. The judgment provided little information about the inmate's commitment to vegetarianism; however, it appeared that the practice was basic for him and not derived from more general principles, the elaboration of which might have been the subject of debate and disagreement. The practice was both specific in content and peremptory in force and as such looked much like a religious duty. The inmate's claim was helped by the similarity of his particular practice, vegetarianism, to a recognised religious practice and indeed by the fact that he had previously been provided with vegetarian meals on religious grounds. Second, the court may have been willing to protect a practice that in ordinary circumstances is simply a private or personal matter. Outside the prison context, vegetarianism is a practice in which the individual is free to engage and that has no obvious impact on the rights or interests of others. The state ordinarily has no direct involvement in the individual's dietary choices. Within the prison, however, all aspects of an inmate's life are controlled by the prison authorities. The inmate can do nothing without the support or co-operation of the state.

VII. Passing Judgment

Adenitire believes that the "liberal state should refrain from passing moral judgment on the content of beliefs which give rise to the claim for conscientious objection". This might seem to follow from the obligation of the state to remain neutral in religious matters. But it does not – and is unworkable.

The state should not prefer the religious practices of one group over those of another or religious beliefs over non-religious beliefs and vice versa.[23] However, the state is not required to remain neutral towards religious beliefs that address civic matters or the rights and interests of others.[24] Indeed, it is hard to see how the state could remain neutral in these matters. In recognizing same-sex marriage or banning sexual orientation discrimination, the state has rejected the view that homosexuality is immoral, even if it has not done so in religious terms, employing the language of sin or making an argument about the best understanding of Christian scripture or doctrine. While the state has not limited the individual's freedom to hold or express such beliefs, it has decided that those

inconsistent with the law should be exempted from its application. Instead, she is arguing that the state should not regulate matters that are properly viewed as private and personal.

[23] *S.L. v. Commission scolaire des Chênes* [2012] SCC 7 [17].

[24] For an elaboration of this point see Richard Moon, 'Freedom of Religion under the Charter of Rights: The Limits of State Neutrality', (2012) 45 UBC Law Review 497.

who believe that homosexuality and same-sex relationships are immoral or unnatural are wrong.

This misunderstanding or misapplication of the neutrality requirement played a significant role in the US Supreme Court decision in *Masterpiece Cakeshop*.[25] In that case, the owner of a bakery refused to make a cake for a same-sex wedding reception because he believed that such relationships are sinful and contrary to God's will. A complaint was brought against the bakery under the Colorado Anti-Discrimination Act, which prohibits discrimination in the provision of market services on various grounds, including sexual orientation. The Commission found that there was a credible case of discrimination and referred the case to an administrative judge for adjudication.

When considering the discrimination complaint against the owner of the bakery, one of the commissioners made the following observation:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[26]

In a majority judgment written by Kennedy J., the US Supreme Court set aside the Commission's decision. Kennedy J. thought that the commission's assessment of the competing claims (the baker's freedom to adhere to his religious beliefs and the couples right not to be discriminated against in the provision of market services) had been tainted by hostility to religion that "was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion".[27] In Justice Kennedy's view, the government does not have a "role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate".[28] The Commission, was required to weigh the competing civic and religious interests but it had to do so in a way that respected its obligation to remain neutral in religious matters.[29]

Yet Justice Kennedy's reading of this comment by a single commissioner seemed entirely unjustified.[30] The commissioner appeared only to be making the obvious point that just because someone offers a religious reason to explain their discriminatory action does not make that action right or just or something that should be accommodated. Kennedy J. saw the commissioner's remark as a dismissal of religion, when it was more reasonably

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[25] *Masterpiece Cakeshop v. Colorado Civil Rights Commission* [2018] 584 US.
[26] Ibid 13 (Kennedy J.).
[27] Ibid 17 (Kennedy J.).
[28] Ibid 17 (Kennedy J.).
[29] Ibid 18 (Kennedy J.): "While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires".
[30] Indeed, Kennedy J. dismissed the claim instead of sending it back to the Commission for reconsideration.

understood as a rejection of a particular religious view – in this case a view about the immorality of homosexuality.

More significantly, Kennedy J. seemed to misunderstand the state's obligation to be neutral towards religion. According to Kennedy J., the state is forbidden to "impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices".[31] Justice Kennedy was critical not only of the commissioner who described the use of religion to justify immoral actions but also of another commissioner who suggested that the owner of the bakery "can believe 'what he wants to believe', but cannot act on his religious beliefs 'if he decides to do business in the state'".[32] To Kennedy J., the implication of this statement was that "religious beliefs and persons are less than fully welcome in Colorado's business community".[33] But the commissioner is correct, surely. Individuals are free to believe what they believe, and they are also free to live their private lives according to their religious beliefs or values; but they are not free to impose those beliefs on others or to act according to those beliefs in the public sphere if doing so might detrimentally impact the rights of others.

Adenitire has written a rich and thoughtful book and so there is much more I could say. But I am grateful for the chance to engage with a few of the issues he has raised.

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[31] *Masterpiece Cakeshop* (n 25) 17 (Kennedy J.). It was noted that "The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures'".

[32] Ibid 12 (Kennedy J.).

[33] Ibid 12 (Kennedy J.).