Law and Religion

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Preacher: Simon Charles

[0:00] Well, it's my great pleasure to introduce Simon Charles. He is in the third year of the JD program, which you all know as the Juris Doctor program.

And he has been working most recently at UBC as the research assistant for Benjamin Harris, who is one of the most interesting, from my perspective, young colleagues.

He's been appointed in the law faculty to deal with issues that have to do with human trafficking. And I guess Simon, you've been one of the right-hand men in this research program.

So he comes with a lot of experience and we speak a lot about law in our discussions here at St. John's.

We think a lot about law as students of the Bible. And Simon has come to some interesting thoughts about a Christian perspective on the relationship between law and religion.

[1:21] Anyway, my task is to simply introduce him, to know that he is a graduate of the University of Winnipeg, where he graduated with honours in political science.

He also fulfilled the requirements of a three-year BA in history, which Sheila will be pleased to know. And he had a focus on global and comparative politics and political philosophy.

He has an international travelling experience, that's probably why I was asked to introduce him. And he was brought up in Southeast Asia and in Kenya, and has worked with a number of international agencies with respect to Third World Development, concerned citizens for peace in Kenya, and a number of other very interesting experiences.

So I won't trouble you with the whole of the CV, but I'm delighted that you're prepared to give us this talk, and we look forward to the discussion.

Thank you, Professor Slamecker. I've never been introduced before, so that's a treat. It is. I was told that we should perhaps begin with prayer.

[2:52] So let's pray. Father God, may you be in this place. May your spirit be amongst us, giving us wisdom and knowledge as to how to deal with the issues that are before us today.

In Jesus' name, Amen. Amen. Let's begin. So just to perhaps give a little bit more of a fuller introduction of myself. I am a third year law student at UBC, and I moved to Vancouver in August of 2009, so I'm relatively new to Vancouver.

I was raised in a Christian home and spent, as Professor Slamecker said, I've spent all of my childhood until high school graduation overseas in countries such as Bangladesh, Pakistan, Tanzania, the UK, and Kenya.

And I became a practicing Christian through the Ministry of InterVarsity Christian Fellowship at the University of Winnipeg, while studying global politics and history. Now, as some of my friends here will easily attest to, I love to argue, and I love to debate.

Maybe one of the reasons why I'm in law school. I love especially debating the controversial issues of our time. And more specifically, since becoming an active Christian, I have become increasingly interested in how one's faith is to inform one's stance on public policy issues.

[4:10] And since beginning law school, this has naturally led to an interest in matters of religious freedom, for example. So, thus I am here today. My topic for our talk this morning concerns how Christians and other religious groups should think about their interaction with the legal sphere and with public policy generally.

My thesis, just to tip my hand, is that Christians should not take their religiously tinged disputes before secular courts.

And similarly, secular courts, when confronted with such requests, should refuse to adjudicate such claims. Rather, the courts should show deference and respect to the internal governance structures of religious groups.

And this deference is supported by a concept that I'll talk about during the talk, which is called legal pluralism. And in essence, this theory states that courts should recognize that they are not the only source of law in society.

And that the consequence of this acknowledgement is that courts should accept that religious communities, for example, have their own understandings of law. And that this understanding, these understandings should be respected in our society.

[5:23] And in a sense, courts should not be so arrogant, secular courts that is, should not be so arrogant as to believe that they are the only arbiters of law in society. Now, however, before beginning, I would like to make a few caveats.

First, the elephant in the room. I am very much aware that our church has just emerged from a long and painful legal dispute. I have been a regular, a semi-regular attendee at St. John's for two years, like I mentioned, since I moved here in 2009.

And when I first visited this church, I read the various pamphlets, which explain some of the basics of the dispute that St. John's had been engaged in. However, I must admit that I felt like I had walked into a cinema right as the movie reached its climax.

And, um, and thus I am fully aware that I do not have a complete and accurate picture of the entire story. Um, and I am also very much aware that the decision to go to court in the first place was a difficult one for this church.

And, um, which, which some opposed or at least questioned. So my intention in making this, in bringing this discussion to Learners Exchange, um, is not to bring up painful memories of the past.

[6:37] And not to, to dwell on the past either. Um, this talk, this talk is not specifically targeted at St. John's legal dispute. Um, rather it, it, it's targeted on what I think is an important area of thought for Canadian Christians as we move forward in this increasingly post-Christian, uh, country.

The second caveat, I don't know everything. I'm just a third year law student. Um, so that means that I don't know everything about the law. And I certainly will admit that I do not know everything about my faith.

I'm dead. And, and fourth or third, um, I, I would like to, to encourage discussion throughout this, this, this lecture.

Uh, in law school, my experience has been that the best professors are those that encourage, uh, interactive lectures. Um, in law school, they, they used to teach strictly by the Socratic method, which is strictly question and answer.

Um, they don't do that so much anymore. Um, but I would encourage questions to, to be, you know, asked as, as I, as I go along. And, and there will be a question period, of course, at the end though, if you're more comfortable asking when I've finished.

[7:48] But I would particularly ask you to ask questions if you are confused at any point with regards to the terminology that I use. If I, at any point, slip into legalese, um, please stop me and ask exactly what I'm talking about.

Um, I try to eliminate as much of that sort of language from my presentation as possible, but to a certain degree, it's inevitable because the legal language has become a part of my vocabulary.

So, um, the, the problem. The topic of this paper, uh, and the presentation on, uh, on which it's based was inspired by a case called Brooker versus Markovitz, which was a 2007 Supreme Court of Canada decision.

Now, I'll just tell you the, the story of this a little bit, and it's on the slide as well for you to follow. Um, two Orthodox Jews in Montreal got married, Miss Brooker and Mr. Markovitz.

Unfortunately, their marriage did not go so well. They had a few children, but after a period of time, they wanted to get a divorce. Um, now when they, when they agreed, when they agreed upon getting a divorce, they signed what's called a separation agreement.

[8:56] This is a legal document. It's very common amongst, uh, couples that are, are separating. There was a clause in the separation agreement which obligated Mr. Markovitz to go before the rabbinical council of Montreal, and grants Miss, uh, Brooker a religious Jewish divorce.

It's called a get. You'll see it's in the quotations there. So, and, and in, under Orthodox Jewish law, if Miss Brooker does not get the get, then she is not considered divorced.

And she is considered essentially married to Mr. Markovitz until he gives her that get. And, um, and any subsequent marriage that she enters into would be considered illegitimate.

And any children that she would have from any subsequent marriage would also be considered illegitimate. And the granting of the get is a purely discretionary act.

Under Jewish law, Mr. Markovitz, under, under one interpretation at least of Jewish law, the Orthodox Jewish law, um, Mr. Markovitz is, is purely at his discretion as to whether to grant the get to, um, Miss Brooker.

[10:05] So essentially, um, and, and in the separation agreement, however, he agreed to do so. He agreed that he would go before the rabbinical council and grant her that get. However, as the story went along, he withheld that get for 15 years.

He did not go to the rabbinical council and he did not grant Miss Brooker her get. So essentially she asks the court to make him pay for the non-performance of that obligation in the, the, the agreement, the, the separation agreement.

And, um, and the ironic thing is that by, by the time that the, the dispute actually gets to the court, he's already given the grant, the get. Under threat of the legal action, he, he caves and he gives her the get.

But then she goes to court asking for money for, for the fact that she had not gotten that get for, for 15 years. So the case really surrounded the enforceability of that clause in the separation agreement between the two, uh, between the two Orthodox Jews.

Um, now I should also note that there's no, there was no, uh, impact upon, uh, Miss Brooker's civil rights in this case. She was, according to the secular state, she was considered divorced.

[11:19] Um, there was, and she could remarry as she, as she saw fit. The only question was, was under the, under the Jewish conception, whether she was considered, uh, divorced and, and the, the, the status of that, of her, any subsequent actions that she did.

So under, to avoid paying damages, essentially, Mr. Markovitz challenges the validity of the clause in the agreement itself.

He, he argues that it was, that it's essentially, it's a religious obligation. And, uh, and as such to, or for the court to order money, uh, damages would be an indirect method of coercing him to perform what is in a sense of religious obligation.

And therefore he argues it would violate his freedom of religion. So the case goes all the way to the Quebec courts. It's brought in Quebec and it eventually reaches the Supreme Court of Canada.

And the majority of the Supreme Court of Canada decided in favor of Miss Brooker. And in this, in a decision written by the justice, Rosalia Bella, who by the way, is a Jewish judge.

[12:22] Um, the court found that Mr. Markovitz had quote, secularized his religious belief, his religious obligation by agreeing in the separation agreement to go before the rabbinical council and grant Miss Brooker a religious divorce.

The fact that the obligation in the agreement had a religious aspect to it was not relevant as the obligation itself had been transformed by the act of placing it in a legal document.

However, if, if Justice Abella had just ended there, there would probably be very little dispute, but she went further. Justice Abella went further than restricting her decision to that point.

In particular, she noted that it is a well accepted function of Canadian courts to ensure that members of the Canadian public are not quote, arbitrarily disadvantaged by their own religion.

Justice Abella also rejected Markovitz's claim that to enforce the clause would violate his freedom of religion. Instead, she found that freedom of religion in this case was outweighed by numerous public policy goals, including the public interest in equality, anti-discrimination, and the need to ensure the dignity of Jewish women and their right to remarry and divorce.

[13:38] In Abella's words, Markovitz's withholding of the get for 15 years represented a quote, Unjustified and severe impairment of Miss Brooker's ability to live her life in accordance with this country's values and her Jewish beliefs.

Now this question sparked, this decision sparked questions in my mind. What exactly does it mean that the court should have the power to save religious people from their own religion?

What implications does this have for individual agency in our society? Shouldn't those who are disadvantaged by the tenets of their own religion simply leave and join another?

Or perhaps join another less strict interpretation of their religion, a less strict denomination? But at a broader context, I also started to worry that this decision had the chance to be used as an instrument to attack religious organizations with different belief structures than the wider Canadian society.

And one can easily think of examples of issues where the church is increasingly considered to have outlying views when compared to broader Canadian society. The easy issues that come to mind are of course gay rights, women's equality, education.

[14:54] All these matters are issues where the church is seemingly becoming increasingly ostracized from broader Canadian society. And I also started to wonder how Canadian commitment, constitutional commitment to multiculturalism and freedom of religion could be reconciled with such a seemingly interventionist approach to religions that contravene our broader societal norms.

So in light of these considerations, I decided for my paper in this class, through which I read the Brooker decision, I decided to examine a number of different sites of intervention where I could envision the Canadian courts inserting themselves to adjudicate issues of a religious character.

And I chose to focus on three sites. The first being marriage and divorce. The second being employment and religious discipline. And the third being communal governance. And I'll go through each one so you don't need to remember them all at the same time.

And for the interest of time this morning, I'm just going to present a few cases from each of those sites, and then we'll just discuss them. But before I move on, are there any questions? Is everybody clear on the Brooker decision?

Okay. Before examining the three sites that I mentioned, I'm going to just give everybody a freedom of religion 101 in Canada.

[16:20] The first true examination of the depth of freedom of religion is as guaranteed in the Charter of Rights and Freedoms that we have in Canada, was in a case called RV Big M Drug Mart.

And this concerns Sunday closing legislation. In most provinces across the country, prior to the enactment of the Charter in 1982, there were Sunday closing legislation. So everybody, all shops had to close, and if you opened on a Sunday, it was a criminal offense.

So essentially, Big M Drug Mart was open on a Sunday. So the law, the police and the Crown brought charges against them. And in response, Big M Drug Mart challenged the legality of Sunday closing legislation, arguing that it's against, it violates freedom of religion.

Because, you know, it's based off of a Judeo-Christian mindset. And in the decision, the court gave this quote, and I'll just read it.

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs, and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms.

[17:35] The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses. The right to declare religious beliefs openly and without fear of hindrance or reprisal.

And the right to manifest religious belief by worship and practice or by teaching and dissemination. Now, the Supreme Court of Canada has further made clear that when issues of freedom of religion come before them, they do not want to be the arbiter of what is or is not required by a particular religious belief.

Rather, the court has favored a subjective definition of religious belief. For example, the next quote. For example, Justice Iacobucci, who is a graduate of the University of British Columbia, stated the following.

The state is in no position to be, nor should it become, the arbiter of religious dogma. Secular judicial determinations of theological or religious disputes or of contentious matters of religious doctrine unjustifiably entangle the court in the affairs of religion.

So I take that to mean that the court has made it very clear that they want to avoid the interference of the state and its courts with religious belief. And it previously, the court has also previously expressed a wariness at intruding into religious affairs and giving value judgments of unconventional or non-mainstream religious groups.

[19:02] Now, a few other things should also be noted about Canada's constitutional structure. And I briefly alluded to this. Canada's constitution enshrines multiculturalism in the Charter.

However, the Charter of Rights and Freedom states that all the rights that are granted therein are to be interpreted in light of Canada's multicultural stance. And furthermore, unlike America, in Canada there is no constitutional doctrine of the separation of church and state.

Therefore, Canadian courts have no constitutional barrier per se to considering religious disputes or issues. Therefore, freedom of religion in Canada, in theory at least, grants an expansive protection to religious freedom for the individual and for communities.

However, it's my assertion that in practice Canadian courts have become increasingly interventionist. And I'll now look at these three sites that I mentioned earlier. The first one concerns marriage and divorce.

So again, returning to the Brooker case, Brooker, of course, being a case about a divorce, about a separation agreement. This is a really a prime example of how secular courts are beginning to insert themselves into what I call religiously tinged disputes.

[20:19] Disputes that have an aspect of religious religiosity to them. And consequently, the decision has been hugely controversial. For example, a judge at the Supreme Court of Canada who disagreed with Justice Abella, who I was talking about earlier.

She argued that the clause in the separation agreement between Mr. Markovitz and Miss Brooker was essentially a religious one in character. And therefore, it was unenforceable by secular courts.

And instead, she argued that the obligation could only really be enforced by a religious authority. Some scholars have also noted that it didn't appear that Justice Abella approached the issue of Jewish divorce law as a neutral arbiter.

The issue of the get and the withholding of the get by Jewish husbands is very controversial in Jewish law. And it has given rise to the phenomenon of what are called agunah.

I don't know how to pronounce that in Hebrew, I'm afraid. But it's agunah means a chained wife. And essentially, these wives, there are a number of these people apparently in Orthodox Jewish communities who are essentially chained to their former husbands because the former husbands will refuse to grant them a get.

[21:32] Now, these, they are therefore, of course, strictly, severely restricted in the Orthodox Jewish community. Now, it appears that Justice Abella has actually participated in these debates in the Jewish community amongst the legality of withholding the get under Jewish law.

And so it and she holds very strong views on this matter. So it doesn't seem that she approached the case from a strictly neutral perspective. And by seemingly disregarding neutrality in the face of claims for equality and secular Canadian values, some scholars have argued that the courts will, it seems, increasingly be willing to intervene in religious disputes whenever they see fit.

And of course, so I just mentioned a few criticisms. So the first being that Justice Abella was not neutral. And so she, in a sense, it was a value-laden judgment of Jewish law. She was essentially judging Jewish law and finding it to be in contravention of equality, anti-discrimination, women's rights.

And also there's, as I, again, briefly mentioned, the idea that Justice Abella was imposing secular Canadian values such as equality, anti-discrimination, women's rights, upon a religious group that, quite frankly, has a different conception of the world and a different conception of what those rights might entail.

And then, of course, the last one being the hugely controversial creation of a so-called right to not be arbitrarily disadvantaged by your own religion.

[23:10] This right does not take adequate account, in my opinion, of the fact that Miss Brooker's commitment to her faith and her faith community was, in fact, the reason why she was prevented from living a full and equal life.

Mr. Markovitz's denial of the consent merely constrained her because of that commitment that she had. Now, another example of courts inserting themselves into marriage and divorce law concerns religiously-based marriage contracts.

And I'll just give you an example from the Ismaili context. For those that are unaware, Ismailis are a particular Muslim sect. They're quite small, but they're quite influential because they tend to be quite successful in society.

But when they marry, in Ismaili tradition, they sign what's called a MAR contract, M-A-H-R. And in the MAR contract, the would-be husband and the wife, the husband essentially pledges two lump sum payments.

He pays an initial payment to the wife's family in a sense of form of a dowry. And then the second payment is held in the event that the marriage ends in separation.

[24:18] And if the marriage ends in separation, that money is then released to the wife. And it's a form of ensuring the financial security of the wife should the marriage end.

Now, some of the first, and the picture I have there is actually of the Aga Khan. The Aga Khan is the spiritual head of the Ismailis. So some of the first decisions to reference Brooker concerned the enforceability of these MAR contracts.

These contracts are essentially rooted in Islamic law. And prior to Brooker, the Canadian courts were actually split as to whether or not they should be considered enforceable or not.

Ontario courts, for example, viewed these contracts as essentially Islamic religious matters. And therefore, the leading case prior to Brooker held that to enforce these contracts would inevitably lead the court into the religious thicket of doctrinal disputes.

The courts of other provinces, including British Columbia, on the other hand, likened these contracts to simply prenuptial agreements. And they said, there's no difference. The fact that they have a religious aspect to them doesn't make them unenforceable before our courts.

[25:30] So they can be enforced on the same logic of the Brooker decision, which is that you've secularized your obligation by putting it in this legal document. Now, since Brooker, courts have uniformly enforced these obligations.

They have determined that these contracts create legally recognizable rights. And as such, they have inevitably entered, in my opinion, into the arena of possible religious dispute. Indeed, one of the cases indicated that under Islamic law, there is an argument to be made that an Ismaili woman could actually disentitle herself from the MAR given certain conduct or circumstances.

Now, the standard against which one would measure that conduct or circumstances would undoubtedly be adjudicated on the basis of Islamic law. So that would lead a secular court to assess what conduct and circumstances under Islamic law would require, would lead to the disentitling of a woman under the MAR contract.

And in my opinion, this would essentially lead the courts to ruling on religious issues. And that's hugely problematic, in my opinion. The second site that I talk about is the employment and discipline context.

Canadian courts have shown a willingness to intervene in church employment and disciplinary matters. Now, this is a longstanding trend in Canadian law. And while there are a number of circumstances where they will intervene, for the purposes of our discussion, I'll just talk about a few.

[26:57] The first one is that courts will intervene to ensure that religious organizations abide by their own rules. And I'll just give you an example. In 2007, I believe, I think it's 2007, the BC Supreme Court held that the expulsion of some lay members of the faith Lutheran Church in Kelowna was not done, was unlawful, because it was not done in accordance with Matthew 18, 15 through 18.

So, this scriptural passage was in the church's bylaws, that that was the method by which they would resolve all internal church disputes. And so the court was asked to adjudicate whether the expulsion of the members had been done in accordance with Matthew 18, 15 through 18.

And they found that it wasn't. So they reinstated the members. So courts, however, it should be recognized that courts have actually shown remarkable restraint in these cases.

They have recognized, for example, that reinstating pastors with a dysfunctional relationship with their congregation or the broader denomination can actually be counterproductive or harmful.

So I shouldn't go too far. But I'm just, that's the first situation in which courts have shown that they're willing to intervene. The second situation is also listed there.

[28:19] Courts will intervene when there is a civil or political right at stake. And there's quite a funny example about, to illustrate this point. It comes from the 1870s.

Essentially, one of the congregants of a particular congregation didn't have a very good relationship with his reverend. And this plaintiff, this congregant, he was also the lay representative for his church at the local diocese.

One of the requirements of him keeping that position was that he take Holy Communion at least once annually. So the reverend didn't care for him very much. So he refused to administer communion to him.

And so therefore, the congregant brought a claim to the court saying that, Please court, issue an injunction against my reverend that he cannot restrain from giving me Holy Communion.

In a sense, tell him to give me Holy Communion. And the court, however, refused to intervene in this situation. Because they could not perceive a civil or political right at stake.

[29:30] The plaintiff's position as the lay representative was a purely ecclesiastical one in the words of the court. And the right to participate in the ordinances of the church, such as Holy Communion, was also purely ecclesiastical in nature.

There was no way that a secular court could look at that dispute and say, There's something which we can kind of sink our teeth into and say, Yeah, that's something that we can actually recognize as a legal right.

And the third situation which I have there is that courts will intervene in certain circumstances to assist in the enforcement of internal disciplinary punishments. And actually, an interesting case for this church comes from 1874, where the BC Supreme Court granted an order to the Anglican Bishop of British Columbia to restrain a particularly rebellious reverend from preaching or officiating as an Anglican clergyman.

Apparently this reverend was just flying in the face of the Anglican Bishop at the time, and the Anglican Bishop didn't like it. So he went to the court asking for an order to make sure that that guy couldn't do what he was doing.

And he won. And the court found that, in a sense, religious people could not occupy the buildings of their denomination in complete rebellion against the internal hierarchies that be.

[30:54] Now, I also want to talk about one case that I feel is actually really, really interesting from this perspective. It's the case of Christian Horizons.

This interventionist approach is also true, for example, of Christian social service organizations, of which Christian Horizons is one. Now, a little bit of background. All provinces in Canada have human rights codes.

And these human rights codes protect individuals from discrimination on the basis of a whole number of grounds, such as age, sex, family status, sexual orientation, etc.

These human rights codes tend to have exemptions for religious organizations so that religious organizations can, in a sense, discriminate on the basis of their religious law.

Now, in 2010, the Ontario Human Rights Commission found that Christian Horizons, which is an evangelical organization which manages residential homes for people with developmental disabilities, had wrongfully discriminated against one of their employees, Connie Hines, on the basis of her sexual orientation.

[31:58] I'll just tell the story. Connie Hines began working as a, I think it's a, they called her a life support worker or something like that.

And so she signed a contract with Christian Horizons, which is an explicitly evangelical organization. And they, and part of the contract was what's called a lifestyle and morality statement.

And, of course, in this lifestyle and morality agreement, it forbade, amongst other things, homosexual activities. Now, soon after she began working at Christian Horizons, however, she began a lesbian relationship.

Now, after this came to light, there was a whole series of internal mechanisms that were used to try and solve the situation. However, these internal attempts were unsuccessful.

And eventually, Ms. Hines quit, and she lodged a human rights complaint against Christian Horizons. The Human Rights Commission found that Christian Horizons had discriminated against her on the basis of her sexual orientation, and that it could not benefit from the religious exemption, which I mentioned earlier, because it did not exclusively serve the interests of other evangelical Christians, and had made no effort to examine whether heterosexuality was a legitimate requirement for the specific provision that Ms. Hines, the specific position that Ms. Hines actually occupied in Christian Horizons.

[33:22] Now, it should be noted that a superior court ultimately overturned the Human Rights Commission's decision, so the decision has been squashed.

However, they found that organizations such as Christian Horizons could actually benefit from the religious exemption if they conceived of themselves as religious, and if the activity that they undertook furthers the religious purposes of the organization and its members.

So, in a sense, they found that Christian Horizons fit within the religious exemption in the Human Rights Code. However, after making that finding and squashing the decision on that basis, the court made clear that discriminatory qualifications such as the lifestyle and morality agreement that Ms. Hines agreed upon will not be accepted in the absence of a direct and substantial relationship between the qualification, the moral qualification, and the abilities, qualities, and attributes needed to successfully or satisfactorily perform the particular job in question.

And they found that there was nothing in the nature of Ms. Hines' former employment that made heterosexuality a necessary qualification for her work. Now, in my opinion, this case is indicative of a broader trend to restrict religious organizations' ability to govern themselves according to the rules which may seem discriminatory from the perspective of broader society.

And this is particularly the case with organizations that actually interact with the broader public. It seems that the message of the Christian Horizons case is that if you do not discriminate on the basis of whom you serve, you cannot discriminate on the basis of whom you employ.

[35:09] And to my mind, that is a hugely problematic statement. The requirement that spiritual qualifications be directly and substantially linked to the position that they occupy also has the chance to greatly complicate the work of such organizations.

For example, can we think of Union Gospel Mission in the downtown side having to justify a Christian faith requirement for everybody on their staff? It seems like that would be a... it would put an enormous burden upon those organizations.

And it would also not accept that many of those organizations conceive of themselves as spiritual communities which are formed to complete both the secular and religious tasks which they see themselves as having.

Now, the last slide of intervention is communal governance. And there's a picture of Hutterites there. The Hutterite community... I'm not how many sure...

Hands up, who knows what the Hutterites are? Oh, good. Lots of people. So, they're a small Christian sect. They believe strongly in adult baptism, total pacifism, and communal ownership of all goods and property.

[36:19] They live often in separate farming communities. They're primarily in Canada, at least they're found in the prairies, so Alberta, Saskatchewan, Manitoba. And a crucial thing for me to point out at this point is that if one leaves a Hutterite community, either by expulsion or voluntarily leaving, you are not given any share of the assets of the colony because they believe strictly in communal ownership of all goods.

And due to their pacifist stance, they often have ironically been forced to go to secular courts to enforce their internal decisions.

And particularly with regards to the expulsion of members who are dissidents in their community. And alternatively, these are the two simple situations.

So, the first situation is where, as I mentioned, they've ironically been forced to go to secular courts to enforce their orders. And the second situation in which these cases have come before secular courts is where expelled Hutterites have come before the court pleading for the court to reverse their expulsion because it was not done in accordance with the internal laws of the Hutterite community or to give them a share of the colony's assets as it being completely unfair that they are left with nothing after however many years of living on the colony.

Now, the judgments of the Canadian courts on these issues are fascinating. Because they are a perfect example of the problems which one encounters when you ask secular courts to deal with such a different religious minority.

[38:01] In one decision, for example, the Supreme Court of Canada was asked by the Hutterite colony to order some of the Hutterites who had converted to another form of Christianity. It was actually through a televangelism.

They had just watched TV and they had been converted to another kind of Christianity. And the broader Hutterite community found out and they didn't like that so much. And so they wanted to get rid of them and they wouldn't leave.

So the Hutterite community came to the court and they asked them to make an order that they must vacate the property. And the court, in describing the treatment of the community with respect to these individuals, they called it strange, repellent and excessive.

Yet, however, they granted the colony's request. And they said that the expelled members had voluntarily submitted themselves to the will of the colony when they first signed on to being a Hutterite.

And as such, they were bound by all the colony's decisions. Now, in another decision, it should be noted that in another decision in which there were a rebellious family, I think, in the Hutterite colony.

[39:07] And they essentially, they kept on mocking the Hutterite elders in church council meetings and things like that. And eventually the church elders, the colony elders wanted to get them off the colony.

But they didn't give them all the proper due requirements of notice, for example. They didn't tell them that we are asking you to leave the colony. Please show up at this church council meeting to defend yourself.

And then, you know, if you don't, then you're expelled. So in a sense, the court, when it was faced with that request, and that request was brought by the people who were being expelled, the court said that the colony must abide by what are called the principles of national justice.

And the principles of national justice in this case simply are that you are to be told when you have something against someone, when the church has something against you, and that you're supposed to have an opportunity to make your case, and that you will have an opportunity to do so before an unbiased tribunal.

Those are just the simple, bare requirements. Anything above that, the court said no. We will not impose anything more upon the colony. Okay.

[40:18] So on the basis of those three sites, marriage and divorce, employment and discipline, and now communal governance, I kind of came up with what I see as three sort of crucial hinging factors that will indicate whether a court will intervene or won't intervene in a particular situation.

The first one is the voluntariness of the religious commitment. And it's quite simple. The more voluntary it is that the religious commitment in question, it seems that intervention will be less likely.

And one can see that through, for example, the Hutterite decisions. The decision to join the colony was a purely voluntary one. They could have left at any moment. And so, in a sense, the court will, in usual part, respect the wishes of the individual in question.

Now, the less voluntary, if you're dealing with, for example, a young believer, a particularly young person, a person who was born into a particularly ingrained cultural religious set-up, in my opinion, intervention might be more likely.

Because the court might say, well, actually the person in question really didn't have a choice at all. They were just born into that, right? And also, part of this will be the starkness of the choice to the person in question.

[41:37] So, for example, think about Brooker. The decision that Miss Brooker was faced with was, what I would say was remain a chained wife for the rest of my life and be considered illegitimate if I ever enter into another romantic relationship or marital relationship.

And have any children from those subsequent relationships be considered illegitimate. Or, you know, have the court intervene in my favor. So, the severity of the choice, the starkness of the choice for the person in question.

Similarly, the vulnerability of the parties in question will be a crucial factor. And a quite interesting story here concerns a, it's unfortunate, a Jehovah's Witness community.

And this one young girl was sexually abused by her father in that community. And when she reached the age of 19, she actually told the church elders in the Jehovah's Witness church.

And the Jehovah's Witness elders told her in accordance with Matthew 18, 15 through 18, that she should confront her father and ask him for, challenge him with his sin and ask and offer him the chance of repentance and forgiveness.

[42:55] She did so. And she suffered emotional trauma as a result. So, she sued the church and the elders, claiming that they were negligent in telling her to do that, when the risk was so great that she would have emotional trauma as a result.

And she won. So, the vulnerability of the parties. In that case, you had a young girl, 19 years old. She had been sexually abused as a child. So, again, the vulnerability of the parties, I think, will be a factor.

And lastly, the degree, the nature, and the severity of the harm in question. Now, the various sites of intervention, which have been explored today, show that Canadian courts have a long history in intervening in religiously tinged disputes.

These are not unknown issues to them. However, I think that with the Brooker decision discussed at the outset and throughout this talk, there's something new in the air.

In that case, the Orthodox Jewish marriage and divorce system was countered by Canadian public policy goals, such as equality, anti-discrimination, women's rights, and also the right of Jewish women not to be arbitrarily disadvantaged by their own religion.

[44:13] So, in a sense, there's this imbalancing that's happening. On the one hand, it's solely the right of the Orthodox Jewish community to live as they see fit. And on the other hand, are these litany of public policy goals, equality, anti-discrimination, etc.

And the interaction of religion and law in that framework, it pits them as two entities, which are complete normative systems, and they are in fundamental tension with one another.

In a sense, both want to claim the whole of a person's loyalty, and one cannot abide by both at the same time. And this view, actually, has been...

This view of the relationship between religion and law has actually been espoused by our Chief Justice of Canada, Beverly McLaughlin. She says that these two things, these two concepts, are in dialectic tension with one another.

And she says that the dialectic must reach a synthesis. Quite ominous, in my opinion. This interaction... Sorry. My opinion is that law must first accept that it is not merely a neutral argument of society's disputes.

[45:26] Rather, law is, in fact, a cultural construct. And in many ways, when religious... When minority religious groups come before secular courts, they must first accept that certain commitments and assumptions are, in fact, not up for debate.

And, therefore, multiculturalism, tolerance, and accommodation can, in fact, be a language of power and coercion and enforced transformation for religious groups that simply want to live according to their own conception of the good.

And I would argue that secular courts need to recognize the legitimacy of these groups' internal laws and simply defer to those laws when possible.

In other words, such a vision of the relationship of law and religion would entail that courts would not demand that the inner structure of every single sphere of society must mirror the structure and principles of the broader society.

Now, what does this mean for us? I feel like I've been giving a legal lecture. I've been very legal. Canada is becoming increasingly post-Christian.

[46:42] Therefore, Christians and the Church will find themselves increasingly being challenged more and more to defend their faiths, and sometimes, in fact, in court.

Now, for a long time, Christians in Canada have simply implicitly considered themselves to be the majority. They just assumed that laws and courts would be guided and undergirded by a Christian belief.

Therefore, it seemed unthinkable that Christian institutions and organizations would have their fundamental beliefs and assumptions challenged by a secular court. However, as shown by the cases that I've discussed here today, this is increasingly not the case.

Canada is becoming more and more post-Christian. Therefore, it is increasingly important that Christians and the Church are aware of these issues.

And courts are challenging some of the basic assumptions and tenets of the Christian faith, and the Church will need to have an answer in the future, quite simply. So that's my discussion. I have some questions for discussion.

[47:56] And I don't know what the time is. Yes. Good time. So, we can go by these questions or...

Why don't we have some clarification maybe first? Sure. Any... Phil? Just on the first question, can you go back to the statement on a truly free society?

Sure. Here? It includes, um, accommodating a wide variety of codes of conduct.

Now, with the court being real in the same act, does that mean that they would idealize any code of conduct? The question I want to look at, on the negative and positive.

First of all, I don't think they would. Obviously, there's certain conduct that the court would override in any case. But the other point, though, is that as you're pointing out, as we're increasingly secular society, what the law will allow, or what the law will disallow, would be any discrimination on the basis of, say, sexual orientation of any kind.

[49:20] In other words, could lead to the abolishment of all Christian aid organizations. Or at least the severe restricting of their activities. Right.

Now, how as a Christian, Lloyd, are you going to recommend that the law take those kind of ethics into account? Well, on the basis of the legal pluralist model, which I argue for, my argument would be that the court should recognize that different communities in society have different conceptions of the good, and different conceptions of morality and sexuality, and that they should recognize that the law does not need to totalize society, make it all the same.

Rather, you should allow for religious communities to govern themselves as they see fit, obviously with some restrictions. But, you know, that would be my argument. So, yours is an argument to Parliament, not to the court?

I suppose, yeah. Part of it would be an argument to Parliament, yeah. Should that not introduce a real elephant in the room? And how about the case we just heard of the Shafi'i killing?

That's a religious cultural value. What about Sharia law? I think those are huge implications if we get too broad based on what we should accommodate in terms of religious and secular.

[50:51] Absolutely. And just to speak to that, one of the restrictions that has always been an idea in my mind on the idea of legal pluralism is that no religious group would ever be exempt from the criminal law.

So, in the Shafi'i case, they broke the law. They murdered the first wife, sorry, and three of their daughters. They broke the criminal law, and you cannot exempt yourself from that.

And the Canadian courts have been very clear that religion that advocates direct violence against anybody will not be given the protection of freedom of religion. Now, just to also talk about Sharia law, I don't know if you remember, but in Ontario, there was a controversy a few years back because they actually were thinking about doing so.

They were thinking about creating Islamic family courts that would adjudicate certain matters according to Islamic law. According to the legal pluralist mindset, that's okay, as long as it's strictly tailored so that, again, no exemption from the criminal law, and perhaps there would be safeguards so that it would require the consent of both the parties.

So, if one of the parties didn't want to put the matter to the Sharia court, they could have recourse to the secular court. That would be one safeguard that I would advocate should be in place.

[52:18] But I think we... One of the things I've been trying to convey in this talk is that, for a long time in Canada, when we think about religious minorities, we think about Muslims, or we think about Jehovah's Witnesses, or we think about the Mormons, or we think about the Hutterites.

We think about those kind of people. I'm trying to say, it's us. We know. We know. It's us, you know? And it's... We're increasingly going to become akin to those people in the eyes of broader society.

So, in a sense, maybe we should rethink our position on Sharia law, and say, you know what? Muslims have their own thing. And fine, from a Christian perspective, we don't agree. But maybe we should actually be quite sympathetic to their plight.

Because we can see that there are certain things within our own community that we wouldn't want a secular court adjudicating upon. Thank you. This is probably going to sound fairly judgmental about these religious groups.

But we have constantly been in trouble with not telling people, when they come to this country, that there are certain religious practices that they may enjoy and espouse, that are going to be called something else in Canada, and are not going to be tolerated.

[53:40] Case in point, we had a really tragic situation in this province in the 50s, relating to the Dukkabur community. Now, the Dukkabur, like Mennonites, like Jews, were persecuted by Russians at that time in history, and came looking for religious freedom.

Nobody asked them what they believed. They did not believe in governmental authority of any kind, and would not send their kids to school. And it was a mess. I mean, you're too young to remember this.

But, you know, they removed children from their parents in order to ensure that they had an education. And people actually died trying to defend the principle of their own right to practice their religion.

We don't ask people, do they believe in female circumcision when they come to this country? But we want to call that mutilation and a crime. Not a capital crime, but we do call it abuse.

And they are told this. And we continue to say, you have the right to come to Canada and practice your own religion, without finding out what they believe that would be in contravention with our laws.

[54:45] And I cannot conceive of a situation where I would support that the Canadian law does not supersede anything that a religious group wants to practice.

We don't want the balkanization of our religious courts to wreck the principles that we have founded this country on in courts of law.

What about when the tables are turned and it's us that are in the spotlight? When it's not the Duke of Wars, when it's not the communities that practice female gender mutilation? If you're referring to our court case?

No, not just our court case, but just simply when Christian communities, like Christian Horizons, that case Christian Horizons. When it's our communities, our religious organizations, Christian religious organizations that are somehow then in the target.

Well, we're not going to be exempted from it. We have to be very careful about the contracts we write and the words that we use. And we maybe should seek more legal advice at the point of setting those up. But, you know, most religious communities, I mean, faith communities do not have their own legal system.

[55:49] Anglicans have canon law Jews. Some Jews, Orthodox Jews, have their kind of court. But the majority of Jews that want to get divorced go to secular court.

And in fact, I don't believe that that would not supersede what Orthodox Jewish courts would do. I actually have an Orthodox Jewish friend who went through this, and he needed two divorces.

And I said, why do you need a Jewish divorce? And he said, Sheila, it's a divorce under a different legal system. Yeah, absolutely. But it isn't recognized by Canadian legal systems, so he had to get the other kind as well.

Yeah, yeah. You know, it should be the government of the country that decides what is legal and not legal. And my point is simply to say that if we create those standards that can apply to other religious groups, we are also going to have that apply to us.

I would like to get back to your questions, but there are two... Oh no, these questions are simply, they were there just to spark discussion. Yeah, but if people are wondering... Howdy and then Cullo. The well-known case, Roman Catholic bishop in Alberta, had a statement in Roman Catholic parish that's read about homosexuality, and he was taken before a Human Rights Commission for that act.

[57:11] As I understand... I'm actually not aware of that case, but okay. Well, that did happen. Yeah. Oh, so I was going to ask, in legal circles across Canada, how was that received? Because it was, at least the media received as outrageous, that a Roman Catholic bishop having Roman Catholic doctrine taught from Roman Catholic pulpits to get him in trouble with a secular Human Rights Commission.

Now, there's a classic example, they were in trouble, and that becomes habitual. I should say that there's a... I'm not aware of that case, but there's another case from the Roman Catholic Church that, in the course of doing the research for this paper, I came across.

And it concerned a gay student at a Roman Catholic school in Ontario. He was about to graduate, he wanted to go to prom, and he wanted to bring his boyfriend with him.

And so the school authorities said, no, you can't do that. This is a Catholic prom, sorry. Right? So he brought a claim to the Ontario court, and in a decision that is...

It's unfortunate that it wasn't overturned, because before it could be appealed and overturned, it was settled. But in a decision, the judge, after hearing expert witness from Catholic theologians, the bishop himself, everything, talking about Catholic doctrine on homosexuality, the bishop said there's ambiguity in Catholic doctrine, because the plaintiff had found...

[58:44] The judge said this. The judge said this. Yeah, yeah. The judge said this. The judge said that there's ambiguity in Catholic doctrine about their stance on homosexuality. The plaintiff, the kid, had brought experts forward saying, in Catholic doctrine, you know, some people say it's okay to be gay, and some people, you know, different, there are different views on the matter, right?

And so the judge found that there's ambiguity. That the bishop is not, you know, the only source of Catholic doctrine. And so he found for the kid.

And he issued an injunction saying that they couldn't... But that's an example. It's the judge second-guessing the bishop, second-guessing a religious authority. I remember the judge, I remember the exact language. The right to hold the belief is very broad, he said.

The right to act upon a place is much less broad. Yeah. So they can hold the belief that it was wrong how he was living, but they couldn't act upon it. Yeah. Thereby keeping on with the dance.

Cool. Yeah, I just wanted to take a little bit of a different attack. And one of the things I'm wondering is, you presented this as sort of the... Where possibly aggressively coming in and doing things in the Christian church.

[59:58] But I'm wondering to what degree do you think this might be the result of a vacancy we have left in the church? So you talk about ecclesial court back in the Middle Ages. When you said that, it used to mean something.

There was ecclesial court and there was secular court. You talk to most Christians today, well ecclesial court, and they'll really look at you funny and be like, what in the world is that? And so I'm wondering, do you think part of the reason that courts are stepping in is because Christians really don't have a law into themselves?

You know, actually I completely agree with you, Carl. One of the questions that I had on the last slide was actually whether churches should be better, should start forming their internal laws, internal church courts.

Should we have a revival of church courts in the modern church where if you have a dispute, you go to the church court first. And you have your dispute adjudicated by canon law first before you go before a secular court at all.

You know, I really would like to look at that list of questions. You'll have more time to... No, it's a cheap option. Well, there are all sorts of questions, but it seems to me we need to have those. Someone's had the opportunity to think about this more carefully than we have in terms of the last 30 minutes.

[61:10] But I think she's been waiting for it. Okay, okay. I have one more thing. Yeah. I think like in the New Testament it speaks of definitely, you know, that the church isn't supposed to go to court anyway.

Christians should not be a Christian. I think the idea is I feel that the Holy Spirit has got the power over the worldly views. Therefore, you take control within your group.

You have that maturity of spirit to do that. And then that avoids all this confrontation with worldly views that are going downhill in different stages of history and corrupt.

And that's why the church doesn't have maybe in some cases its power because it's allowed the worldly views to overtake. the spiritual rules and the spirit of power.

Yeah. Mm-hmm. And I think one of the things that I, a valid decision kind of rang okay with me, is in the case of marriage commissioners who, Christian marriage commissioners, who are not given the right to say, I cannot marry you.

[62:18] I'm not saying you can't get married. But to refuse to marry same-sex couples is not allowed. Yeah. And I think that's a disadvantage that shouldn't happen. Doctors are able to say, I don't perform abortions but I can't stop you.

Right. Right. Right. Yeah. That decision was just recently given by this, the Saskatchewan Court of Appeal. Yeah. Saying that a secular marriage commissioner could not refuse a same-sex couple a marriage certificate, a secular marriage certificate, on the basis, on the basis of their religious belief.

Yeah. Bill? We, in the institutional church, we seem to like bigness, large.

It seems that to be very small, it's very attractive. In the face of all this, a house church is small.

So, you're not a big target. You're not a big target. That's a guy. How do you respond to that? I mean, my first thought is that house churches have less resources, so they're less likely to write up their internal laws, which means that if they have internal disputes, they're more likely to go to secular courts, because there's no internal mechanism to deal with it, unless you just simply think that, because it's so small, people will just talk to each other.

[63:48] But we all know that these disputes often don't get solved that way. If there's trouble in a house church, you miss a meal. Ed? Just a very brief comment in response to that ideal notion of the church, a mature church, governing its own of the church.

governing its own affairs, wandering in the detritus we've had for ten years, we've watched how terrifying injustice can be within a church. And I would be very reluctant to submit, without secular protection, to the, in quotes, wisdom, or the Lord has dictated to us that type of judgment that can fall on people.

We've watched it bring about unjust firings on other staff and so on. And I don't know why this should be, because the conviction under our Lord should be so strong.

Nevertheless, it seems that there is an inherent tendency for a huge injustice within churches, which may, in any other way, be striving to be faithful. And I would be very sad to see a gulf or a firewall set between church and state, in the sense that you couldn't go and say, wait a minute, I've been very unjustly treated.

My question was, I wonder how you feel about our human rights commissions? Again, I think of the Mark Stein case, the claims Mark Stein.

[65:20] Oh, right, yeah. Which caused outrage pretty well, at least in the West. A big article in First Things by an Australian academic saying, here's a country, surely the only one in the West, where you have no burden of proof, that you can go on to the courts if you can afford it, they have a right to impose crippling crimes on small businesses, and a perceived very heavy bias in a certain direction on most issues.

I wonder how you feel about that? Well, I mean, in general, for everybody in the room, the way the Human Rights Commission's function is that they are not a court, they're a tribunal, so they're separate.

But then the decisions of the Human Rights Commission can actually be appealed to the regular courts to be overturned. And you're right, the Human Rights Commission's, they are the ones who, it seems, push the envelope more and more and more.

And push the boundaries of, like for example, the Christian Horizons case was initially a Human Rights Commission decision, that was then overturned by a court. But the Human Rights Commission was the one that came out with all these findings that were, from my perspective, just terrible for a Christian, for Christians in Canada.

Yeah. So the relationship between Human Rights Commission's and the broader society is difficult. Yeah. Yeah. Do you think it'll change? Do you think it'll change? There's a lot of anger.

[66:51] I don't know. I don't know. I don't know. I suppose I feel that we're not living in a Christian country anymore. Really, our country is becoming more and more secular, and a lot more religious groups.

So when you look at all the, and even the Christians, the Catholic Church, and the abuse of children that's going on, the abuse in Bountiful, and the Sharia law, I just think there has to be a limit to religious freedom.

And as far as us as a Christian group, we do have already the law. We have the law of the Bible. We have the New Testament and the Old Testament telling us how our lives should be lived.

So, you know, I think to impose too much legalism from the actual function of the church is just, you know, we're supposed to, as Christians, we're supposed to know that Bible and to follow the laws of the Bible.

Actually, there are laws imposed in the church. There are, I suppose, people are not allowed to just do what they want to do within any, within this church anyway.

[68:20] I mean, there have been consequences for people in this church because of not following what the rules in the Bible were or Jesus' biblical words from.

Yeah. So, do we need more than that? I mean, you really would have a huge difficulty in this country. Yeah. Would the extremes that people go to in religious groups if they were not subject to the legal system in the country?

Yeah. Yeah. Yeah. Yeah. Yeah. I mean, in many ways, I guess what I, I can't think of another analogy, but I would want Canada to be a big tent, though, that allows for people to have a certain amount of freedom to conceive of, you know, the good life in their own way and to live it in their own way.

You can't, you can't, you can't treat minors that way. You can't, you know, or children that way. You can't, you can't do certain things. That's, that's a crime. You know?

Yeah. Well, I think we should take this last question. I was really quite specific about the Sharia law and applying it with some qualifications, as you put, I think. And one of them was that, say, in these family law cases, that both sides would voluntarily agree to the jurisdiction of that court. Do you see some practical problems with actually applying that? You know, in things not involving revision, maybe you can envisage a true voluntary submission on two parties.

[70:31] But in these cases, is it maybe asking a little much to think that, that it really will be voluntary, in a sense, on both sides, to accept that court's jurisdiction. In the sense that there'll be enormous pressure from the family?

Internally, also to the person themselves, thinking that, you know, if I don't, then am I making a decision, in a sense, against my religion, when actually I'm not wanting to do that. I'm just wanting justice, as I see it.

There may be confusion in the person's head, but they want to preserve that confusion. See, my response to that is simply to say that, in Canada, we affirm individual agency. We say that you have the ability and the freedom to make the decisions that you want for your own life.

Now, in some situations, that might be an impractical suggestion, right? Like you say, like, when you're dealing with a deeply ingrained cultural religious belief, such as a Muslim society or a Muslim culture, where Sharia law is just accepted, it might be a very difficult proposition.

But to go the other extreme, and to say that, in that case, we should allow courts to intervene and save people from their own religion, because we deem it to be so, we deem the circumstances to be just, I find that the scarier proposition in some ways.

[71:49] Sisters and brothers, we have been treated to a seminar on the tricky nature of the relationship between law and religion. The scale of the discussion was broader than perhaps most of us would have expected, but the fact that it concerns all religious groups, the fact that the law is itself, as it's practiced in Canada, a value-led and the fact that the blatant exercise is itself a terribly strange and new phenomenon. I think we all remember growing up with respect for the law and the understanding that the law was fair and just. As it is practiced in the context of a multicultural society, that question becomes a much more tricky one.

And I really do thank you, Simon, for opening up this question to us, and for giving us a professional approach to the question. We haven't solved it, but thank you for the introduction.