



Introduction

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Since 2010, there has been a noted increase in actions that seek to defend *and* contest religious rights. These actions have occurred from both inside and outside the legal system. Examples abound: we can think here of houses or spaces of worship, whose very presence and aesthetics are challenged by way of a referendum, the use of local ordinances against the wearing of religious clothing in public spaces, or religious lobbying in parliamentary institutions. We can also consider the State's choice to define and take over the responsibility of religious heritage, leaning on the presence of religious symbols in public institutions to justify their intervention. These examples and processes invite us to question how we understand democratic imperatives and religious rights, as well as their governance in a variety of settings.

This special issue is the fruit of a workshop held at the Université du Québec à Montréal (UQAM) in January 2020, organized by professors Dia Dabby (Département des sciences juridiques, UQAM) and David Koussens (Faculté de droit, Université de Sherbrooke). Funded by the Centre de recherche interdisciplinaire sur la diversité et la démocratie (CRIDAQ), an interdisciplinary research centre on diversity and democracy, as well as Koussens' Chaire de recherche, Droit, religion et laïcité, and the Centre de recherche, Société, droit et religions de Université de Sherbrooke (SoDRUS), this workshop sought to explore, analyze and critically evaluate how processes such as referendum, legislation and local ordinances allow for the circumvention of religious rights in the name of the "public" or "common good". The special issue takes up and pushes these conversations further, engaging with public law mechanisms that can unduly restrain religious expression and, in many instances, directly affect minority religious populations. Public law mechanisms are often invoked in the name of the common good and democratic principles. While the intended recipients of these public law mechanisms can be individuals (and thus result in individual restrictions), they can also target houses of worship and other spaces which hold religious significance.¹

While this workshop and special issue were envisioned prior to the COVID-19 pandemic, many of the questions addressed here have been further illuminated by the health emergency. Imprudent or expansive reliance by governments on rule by

¹ Ran Hirschl and Ayelet Shachar speak of these individual and collective restrictions as illustrations of *spatial statism*, namely, ways through which "governments can try to control the 'landscape' of their respective countries." See "Spatial statism" *I-CON* (2019): 387, 428.

decree, rather than enduring the seemingly laborious (and generally more accountable) process of rule of law, has emerged as a favourite tool by some.² Others have instead contested the jurisdiction of the secular state in religious affairs, even in the context of the pandemic, claiming “God’s jurisdiction”³ rather than that of the State.⁴ The jurisdictional tussle over houses of worship and their adherents has, as a result, reshaped religious practices. It should be noted that the refashioning of religious practices can also lead to innovative practices in the face of a shared pandemic, solutions often crafted with religious groups working hand in hand with the state. These jurisdictional interrogations further highlight the inherent complexity of religious practices and, conversely, offered a classification or hierarchy of what is considered an “essential good” in the time of a worldwide health crisis.⁵ And religious expression often doesn’t make the cut. Others, still, have attempted to adopt broad security laws during the pandemic, citing national interests, which would result in a profound reshaping of religious rights.⁶ Whether in a time of

² See, for instance: Laura Rapeli and Inga Saikkonen, “How Will the COVID-19 Pandemic Affect Democracy?” *Democratic Theory* 7, no. 2 (2020): 25, 28; Günther Frankenberg, “The Pandemic of Authoritarianism” *Comparative Law Review* 10 (2020): 9. The (mis)use of the pandemic has also been a source of critique in Canada. In Quebec, for instance, the provincial government has renewed the national health emergency at least 53 times since the pandemic has been declared, without sufficient justification or oversight. See David Rémillard, “Un an de gouvernance par décret: ‘une faille gigantesque’ dans la loi,” *Radio-Canada* (April 3, 2021), <https://ici.radio-canada.ca/nouvelle/1782015/gouvernance-decret-quebec-covid-19-etat-urgence-sanitaire-droit>. In Ontario, under the guise of an omnibus law to help small business in the context of the pandemic, a (discredited) religious college regained its power to grant university degrees, seen as a political favour rather than as helping small businesses. See Natasha Macdonald-Dupuis, “Le nouveau copinage de Doug Ford,” *Radio-Canada* (November 4, 2020), <https://ici.radio-canada.ca/nouvelle/1743775/doug-ford-premier-ministre-covid-nepotisme-ontario-toronto>.

³ Kelly Geraldine Malone, “‘God’s jurisdiction’: Manitoba churches in court to fight against COVID-19 restrictions,” *National Post* (May 3, 2021), <https://nationalpost.com/news/manitoba-churches-in-court-to-fight-against-covid-19-restrictions>. Many cases have already been decided on emergency measures and religious jurisdiction. In Canada, see, for instance: *R v The Church of God (Restoration) Aylmer*, 2021 ONSC 34; *Conseil des juifs hassidiques du Québec c Procureur général du Québec*, 2021 QCCS 281; *Springs of Living Water Centre Inc. v The Government of Manitoba*, 2020 MBQB 185; *Beaudoin v British Columbia*, 2021 BCSC 512. In the United States, see *South Bay United Pentecostal Church et al. v Gavin Newsom, Governor of California, et al.*, 592 U.S. ___ (2021). Similar decisions have also emerged in the European context. For instance, in France: *Conseil d’État*, decision no. 446930 (November 29, 2020); in Scotland: *Reverend Dr William J U Philip and others for judicial review of the closure of places of worship in Scotland* [2021] ScotCS CSOH_32 (March 24, 2021).

⁴ On this point, an independent religious school in Toronto has initiated a charter challenge following the citywide order to keep schools closed, claiming that the shutdown violates a student’s right to freedom of conscience and religion. See Maria Sarrouh, “Toronto school launches Charter challenge arguing public health order to close schools breaches freedom of religion,” *Toronto Star* (May 20, 2021), online: <https://www.thestar.com/news/gta/2021/05/20/toronto-school-launches-charter-challenge-arguing-public-health-order-to-close-schools-breaches-free-dom-of-religion.html>.

⁵ Piotr Mazurkiewicz, “Religious Freedom in the Time of the Pandemic” *Religions* 12 (2021): 103; Loïc Bawidamann, Laura Peter, and Rafael Walthert, “Restricted Religion. Compliance, Vicariousness, and Authority During the Corona Pandemic in Switzerland,” *European Societies* 23, no. 1 (2021): S637–S657.

⁶ France, *Projet de loi confortant le respect des principes de la République* (INTX2030083L). Deputies and senators sitting on the joint mixed commission [*commission mixte paritaire*] were unable to agree upon a common text on May 12, 2021. At the time of writing, the proposed bill was stalled and had been sent back to a special commission tasked with examining the proposed bill in June 2021. See Assemblée nationale, « Respect des principes de la République », https://www.assemblee-nationale.fr/dyn/15/dossiers/respects_principes_republique

emergency or not, an important narrative emerges on democracy and the common good and how religious rights “fit” into that account.

The illustrations offered at the outset of our introduction point to many transversal and common issues, which are examined in the articles in this special issue. First, we note that recourse to democratic imperatives is often mobilized to justify bypassing religious rights. Yet this exercise reveals itself to be, at best, a partial and minimal democratic exercise which limits fundamental rights. Second, these tendencies, often resonant at the local level, can also hold important sway when considering the large-scale regulation of religious diversity. Such mechanisms are not without consequences on religious and spiritual groups, which can ultimately contribute to their renewal, or even to the (pre-emptive) redefinition of religious expression and fulfilment. Indeed, the debates that have occupied Quebec since the 2019 law on state *laïcité*⁷ are fully in line with the questions highlighted in this special issue, namely, how, under the ambit of democracy, the very process of democracy can itself be diverted. On the one hand, parliamentary discussions were curtailed by government, which chose to limit representations by the public and interested parties at the time of hearings before the Commission of institutions (*Commission des institutions*); the parliamentary process was further truncated by the government’s decision to invoke closure of the bill, which ultimately resulted in incomplete discussion on the various articles (and amendments) contained in the legislative proposal.⁸ On the other hand, the provincial government’s decision to employ the notwithstanding clauses,⁹ to immunize the law (and government) against legal challenges to religious and equality rights contained in both the Canadian *Charter of Rights and Freedoms*¹⁰ and the Quebec *Charter of Human Rights and Freedoms*,¹¹ indicates a troubling choice to employ public law instruments to curb constitutionally protected identity-based rights. Thus, “democracy” varies greatly in this context, protecting some rights to the detriment of others, as well as creating a new normative framework which is not only imbued with meaning, but also brings with it binding obligations.

This special issue seeks to expand on the ongoing, complicated conversations on law and religion. It also aims to engage with the democratic imperatives, invoked in the name of the common or public good, which underpin many of the political actions taken and legal instruments developed. Contributors to this special issue offer exercises in situated democracy and lessons in governance of religious diversity from a variety of perspectives. With these situated exercises in democracy come a variety of opinions and arguments; each, however, questions public law

⁷ Act respecting the laicity of the State, SQ 2019, c 12 [Bill 21].

⁸ See Dia Dabby, “Le western de la laïcité,” in *Modération ou extrémisme? Regards critiques sur la loi 21*, ed. Leila Celis, Dia Dabby, Dominique Leydet, and Vincent Romani (Quebec: Presses de l’Université Laval, 2020), 239 at 241–242.

⁹ Bill 21, ss 33–34. This strategy has been employed anew in the recently proposed Bill 96, *An Act respecting French, the official and common language of Québec*, 1st Sess, 42nd Leg, Quebec, 2021, s. 118 [Bill 96].

¹⁰ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹¹ *Charter of Human Rights and Freedoms*, CQLR c C-12.

instruments in the context of what has been called the “new diversity.”¹² These arguments also come out of diverse scholarly disciplines, including law, political science, religious studies, and anthropology. As with any democratic exercise, there are bound to be a multiplicity of views on whether and how state law should define the limits to religious diversity. This special issue also seeks to bridge the linguistic divide between Canadian and European conversations on religious diversity issues by bringing in conversation authors who might not otherwise converse together in the same journal issue. Finally, readers may also notice an interesting gender divide—whereas the English language articles are written by three female academics, the French language articles are written by five male academics. We may well ask whether these linguistic and gender lines change, shift, or challenge our understanding of democratic imperatives within the context of religious governance.

The texts in this special issue are mapped out in three separate sections. The first section examines how religion is operationalized in the context of the governance of the state or supranational setting. The special issue opens with Lori G. Beaman’s analysis of how the common good, as reflected in the culture and heritage of a people, is used to justify displaying a cross in a public hospital and practising Christian prayer at a municipal government meeting.¹³ Beaman invites us to ask *whose* religion, *whose* heritage, and *whose* values are being protected, and how does the vocabulary of culture emerge as the new way to speak of majority beliefs. Xavier Delgrange takes up the European Court of Human Rights’ understanding of the common good. He explores how, as a judicial tool, the doctrine of the margin of appreciation reveals itself to be a double-edged sword when confronted with identity questions.¹⁴ His analysis points to the Court’s internal exercise in justifying its own democratic legitimacy when balancing rights between majority and minority groups. Claude Gélinas examines how the reconciliation process in Canada has both guided and reshaped the interpretation of Indigenous religious and spiritual rights.¹⁵ In the process, Gélinas illustrates how these spiritual beliefs rarely fit with the freedom of religion framework developed by the courts, perpetuating power imbalances within the Canadian state.

Whereas the first section was interested in the performative aspect of religion, the second section focuses instead on the local governance of religious diversity and deliberative democracy tools at play. Dia Dabby, in her article, offers a legal consciousness reading of a Muslim cemetery project in St-Apollinaire.¹⁶ Through a small-scale empirical study, Dabby emphasizes how local actors understand

¹² Peter Beyer and Lori G. Beaman, “Dimensions of Diversity: Toward a More Complex Conceptualization,” *Religions* 10, no. 10 (2019): 559.

¹³ Lori G. Beaman, “Our Culture, Our Heritage, Our Values: Whose Culture, Whose Heritage, Whose Values?,” *Canadian Journal of Law and Society/La Revue canadienne de droit et société* 36, no. 2 (2021): 203.

¹⁴ Xavier Delgrange, “Marge ou crève,” *Canadian Journal of Law and Society/La Revue canadienne de droit et société* 36, no. 2 (2021): 225.

¹⁵ Claude Gélinas, “L’État canadien et la reconnaissance des droits religieux autochtones,” *Canadian Journal of Law and Society/La Revue canadienne de droit et société* 36, no. 2 (2021): 245.

¹⁶ Dia Dabby, “Voting on Belonging,” *Canadian Journal of Law and Society/La Revue canadienne de droit et société* 36, no. 2 (2021): 263.

decision-making processes and how their interpretations (re)shape their engagements with law and governance of religious diversity. Amélie Barras proposes a comparative reading of laws regulating religious diversity in the province of Quebec and in the canton of Geneva to examine what she terms “diversity’s global crisis.”¹⁷ According to Barras, both laws feature a “preventive” form of secularism through their public law instruments, inviting us to consider the transnational dimension—and consequences—of both these laws. Finally, Vincent Valentin examines the 1905 French law on *laïcité*, examining how this law concurrently controls and supports religion.¹⁸ According to Valentin, the justifications for this contradictory approach mutually reinforce and confront each other. Both Barras and Valentin assess the effectiveness of neutrality through these legislative manoeuvres in the French, Quebec and Genevan contexts. The contributors to the first two sections underscore, each in their own way, the tensions that exist within democratic tools between enabling and protecting an inclusive understanding of religious freedom and regulating the boundaries of “appropriate” religion.

A final section examines ongoing normative debates over the optimal model for addressing religious diversity in Quebec. These two articles examine interculturalism and cultural convergence, both of which have been framed as alternatives to the Canadian model of multiculturalism, and provide different pathways to engage with the (fragile) balance between individual and collective rights. Louis-Philippe Lampron and Guillaume Rousseau’s articles also propose widely diverging opinions on how to address the resulting fragmentation of democracy. First, Lampron revisits an earlier argument on interculturalism’s place in the quasi-constitutional order in Quebec.¹⁹ In light of Quebec’s newly adopted Bill 21, however, he posits that the public law instruments contained in this new law make interculturalism’s legal foundations and entrenchment in the Quebec *Charter of Human Rights and Freedoms* impossible. Meanwhile, Rousseau argues that not only should the shift to “cultural convergence” be welcomed, the policy itself should be given a statutory footing.²⁰ He proposes legislation to reinforce the dominance of French language and culture, thereby endorsing what he claims is the “integration” as opposed to “assimilation” of “cultural communities.” Rousseau’s proposal tracks a particular current in Quebec’s political discourse on religious diversity, one that has gathered force since the Coalition Avenir Québec came to power in 2018. Any adverse effects on freedom of religion or “flattening” of religious expression²¹ are framed as either

¹⁷ Amélie Barras, “Formalizing Secularism as a Regime of Restrictions and Protections: The Case of Quebec (Canada) and Geneva (Switzerland),” *Canadian Journal of Law and Society/La Revue canadienne de droit et société* 36, no. 2 (2021): 283.

¹⁸ Vincent Valentin, “L’effacement de la laïcité libérale en France. De la séparation du politique et du religieux vers la promotion du ‘vivre-ensemble’,” *Canadian Journal of Law and Society/La Revue canadienne de droit et société* 36, no. 2 (2021): 303.

¹⁹ Louis-Philippe Lampron, “La Loi sur la laïcité de l’État et les conditions de la fondation juridique d’un modèle interculturel au Québec,” *Canadian Journal of Law and Society/La Revue canadienne de droit et société* 36, no. 2 (2021): 323.

²⁰ Guillaume Rousseau, “Convergence culturelle et législative : pour un modèle québécois d’intégration distinct consacré par une loi-cadre,” *Canadian Journal of Law and Society/La Revue canadienne de droit et société* 36, no. 2 (2021): 339.

²¹ The CAQ is by no means alone in this endeavour. Bill 21 is the fourth legislative iteration to regulate religious diversity in public life in Quebec. See, in chronological order: Bill 94, *An Act to establish*

incidental to, or necessary for, assuring the primacy of the French language, protection of collective rights and advancement of a particular narrative of Quebec nationhood.²²

As a whole, this collection speaks to how shifts in official policy, statutory frameworks and judicial reasoning not only reflect different visions of society, they stand to have an impact on how people lead their lives on a daily basis. Amy Gutmann notes that “[i]dentity groups occupy an uneasy place in democracy.”²³ This special issue examines how democratic processes can either facilitate or hinder religious rights, all in the name of the public or common good. Identity questions illuminate how transparency, processes, and justifications are employed when attempting to attain democratic imperatives. In this regard, this collection confirms Gutmann’s argument and invites further scrutiny of how public law instruments are used and their effects on particular minority communities. As a whole, we hope that the collection points to how sensitivity to the actual impact of legal instruments on the quality of participation people experience and exercise in democratic life can help to nourish the ethical imagination and political will to find ways for people to lead meaningful lives together.

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guidelines governing accommodation requests within the Administration and certain institutions, 1st Sess, 39th Leg, Quebec, 2010; Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Quebec, 2013; *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies*, SQ 2017, c 19; Bill 21.

²² Bill 96.

²³ Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2009), 1.