

The Right to Religious Freedom in International Law

Between group rights and
individual rights

Anat Scolnicov



Routledge Research in Human Rights Law

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The Right to Religious Freedom in International Law

This book analyses the right to religious freedom in international law, drawing on an array of national and international cases. Taking a rigorous approach to the right to religious freedom, Anat Scolnicov argues that the interpretation and application of religious freedom must be understood as a conflict between individual and group claims of rights, and that although some states, based on their respective histories, religions, and cultures, protect the group over the individual, only an individualistic approach of international law is a coherent way of protecting religious freedom. Analysing legal structures in a variety of both Western and non-Western jurisdictions, the book sets out a topography of different constitutional structures of religions within states and evaluates their compliance with international human rights law. The book also considers the position of women's religious freedom *vis-à-vis* community claims of religious freedom, of children's right to religious freedom and of the rights of dissenters within religious groups.

Anat Scolnicov is lecturer and fellow in law of Lucy Cavendish College and deputy director of the Centre for Public Law, University of Cambridge.

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**Dedicated to the memory of my grandparents,
Sonia Bergmann, Felix Bergmann, and Israel Shekel**

Preface

This book is a revised version of my doctoral dissertation, undertaken at the London School of Economics. Its roots, however, are deeper than that. It is from my work as a barrister with the Association for Civil Rights in Israel and legal cases I represented on its behalf that I developed my quest to understand and shape the relationship between religion and state. I thank my colleagues there for inspiring this work.

Although through my experience I knew this to be a vital topic of practical legal implications, my main interest in writing this project was theoretical. It was to understand the roots of the conflict between two normative systems – religion and state – and offer a principled legal solution to this conflict, which must be applicable across a wide array of differing constitutional systems and religions.

However, through the years of writing my thesis this issue had gained urgent topicality, making the solution of this conflict vital for the peaceful existence of many states. I will only mention 9/11 and the questions this raised about the role of religion in world politics, which confounded academics and world leaders alike. Many issues of minorities in Europe came to the courts in the last years and the implications of these are also discussed here. New cases and legal issues in this topic arise constantly and, of course, those arising after submission of this book for publication are not included.

Portions of chapters 4 and 5 have previously appeared in the following articles: ‘Religious law, religious Courts and human rights within Israeli constitutional structure’, *International Journal of Constitutional Law* 4(4), 2006, 732–740; ‘Multi-religious societies and state legal systems: religious marriages, the state and implications for human rights’ in T. Wilhelmsson (ed.), *Private Law and the Many Cultures of Europe*, Kluwer Law International, 2007; ‘Women and religious freedom: a legal solution to a human rights conflict?’, *Netherlands Human Rights Quarterly* 4, 2007, 569–599; ‘The child’s right to religious freedom and formation of identity’, *International Journal of Children’s Rights* 15(2), 2007, 215–226. I am grateful to the various publishers for permission to use these materials in the current text.

It is the most pleasurable aspect of publishing this work as a book that I am finally able to thank properly all those who helped me in writing it. First and foremost, my thanks go to my inspiring doctoral supervisor, Christine Chinkin,

and to Nicola Lacey, with whom I was privileged to work and who steered me through large parts of my work.

Friends and colleagues discussed, read, commented and encouraged – John Tasioulas, Shay Menuchin, Michal Levertov, Nomi Bar-Yaacov, and Rebecca Cox who offered words and whiskey. My mother, Hanna Scolnicov, cast her English literature scholar's eye over the draft manuscript. I thank them all.

I have many people to thank in Cambridge, my current academic home. James Crawford, formerly Chair of the Cambridge Law Faculty, encouraged me to publish this book. His successor, David Feldman, challenged my thinking on the topic of this book in many conversations. Without the help and patience of Leslie Dingle, librarian of the Squire Law Library, this book would never have been finalized. LLM students at the Cambridge law faculty heard and discussed my ideas. Lucy Cavendish College and its fellows provided me with an academic place for my work. Special thanks go to Michelle De Saram and Andrew Sanger for research assistance in the completion of the manuscript. My gratitude goes to all.

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Finally, no words could convey the gratitude I owe to my dear father, Samuel Scolnicov, who helped me through the period of writing the PhD and subsequently this book.

Cambridge, 2010

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Table of abbreviations

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CEDAW	Convention on the Elimination of All forms of Discrimination against Women..... 124, 128–131, 133, 135, 139–141, 144, 145, 148, 150–154, 156–159, 224
CERD	Convention on the Elimination of All Forms of Racial Discrimination 32, 158, 206
CRC	Convention of the Rights of the Child..... 158, 160–162, 167, 192
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms.....66, 94, 97, 107, 120–122, 124, 125, 183, 187, 207, 212, 229
GC	General Comment 128–130, 140, 142, 144, 148, 150, 156, 159, 224
HRC	UN Human Rights Committee 19, 27, 56, 68, 117, 129, 130, 139, 148, 154, 207, 212, 216
ICCPR	International Covenant on Civil and Political Rights 12, 13, 19, 27, 56, 60, 61, 68, 104, 128, 129, 135, 139, 140, 150, 154, 157, 158, 161, 166, 168, 172, 174, 189, 190, 206, 212–214, 216, 224, 230
ICESCR	International Covenant on Economic, Social and Cultural Rights..... 12, 61
ICJ	International Court of Justice 150, 151
UDHR	Universal Declaration of Human Rights 11, 14, 21, 23, 58–60, 68, 125, 150, 214
1981 Declaration	The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981) 14, 20, 68, 103, 128, 167, 201, 214