After Secular Law

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Introduction

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Losing Faith in the Secular

An easy assumption in much academic writing for a century or more has been that a key feature of the modern era and social order, whether this is understood to have begun in the twelfth, sixteenth, or eighteenth century, is the progressive immanence of our concerns and our references. The separation of the state and of its various institutions, including law, from religion, and with this the religious neutrality of the state (and the political neutering of religion), has been conceived as not only central to the emergence of this new order, but also necessary for its preservation and for the achievement of the justice that it is supposed to guarantee. Given the prevalence of this assumption, it is perhaps surprising how quickly "secular," "secularism," and "secularization" have recently come to be seen as highly unstable terms in academic discourse. Whether it is their etymological and discursive origins, their present definition, or their inseparability from dubious projects of modernity and "the West," these categories have been called into question by an ever-expanding number of books, articles, and conferences.

There is a significant urgency, even a sense of panic, to much of the new discussion about the secular, as if getting control of the words might alone hold back history and provide a foundation for the reconstitution of political order. This urgency has been exacerbated by several developments, including especially the rise of religious movements, both in the United States and abroad, that have challenged long-settled assumptions and contributed to what now appears to be an existential crisis for secular liberalism.

Criticism of the assumptions underlying secularization was not entirely absent in the past; consider Karl Marx on the Jewish question[1], or Carl Schmitt's arguments in Weimar Germany that modern law has its own "political theology."[2] For the most part, however, secularism was treated as an unproblematic background condition. In the last twenty years or so, this background has become foreground. Historians, sociologists, anthropologists, and political theorists are insisting in various ways on the persistent relevance of religion or of the "sacred." Among others, sociologist José Casanova's 1994 *Public Religions in the Modern World*, anthropologist Talal Asad's 2003 *Formations of the Secular*, philosopher Charles Taylor's 2007 *A Secular Age*, and the new salience of "political theology" in both Continental and Anglo-American political thought, have reoriented the conversation, placing questions about secularism at the top of the agenda for many social and political theorists.[3]

These works and others have decentered the secular, urged a new relevance for religion, and insisted on the existence of multiple modernities and diverse ways of relating religion to the public order. Such scholarly trends highlight the changes to religion and to governance that have occurred since the accommodations of the early modern era. It is now better understood that religion, like secularism, takes plural forms, some of which fit uncomfortably with the liberal modes of thought dominant in Euro-American societies. Some of these deviations from the paradigm of liberal secularism extend the promise of multiculturalism, but some also appear to challenge key assumptions of traditional theoretical models justifying public order, and to expose vulnerabilities in the sovereignty of the secular state. It is the purpose of this volume to focus attention on one domain in which questions of the secular have received relatively little detailed attention—namely, that of law: how did law become secular, what are the phenomenology and social and individual experience of legal secularism, and what are the challenges that taking into account religious formations poses for modern law's self-understanding?

The value of the rule of law as a necessary element in global development is largely taken for granted. Great hope is placed in law, properly understood and administered, as a vehicle for the transformation of society. Most movements for modern reform also accept without question law's account of itself as autonomous, universal, and above all, secular—meaning, in the first instance, religiously neutral, but also, more strongly, paradigmatically rational. A common account of modern law is that it ensures a regime of religious toleration and pluralism, one that allows a zone of "religious freedom" in which individuals and communities are free to follow the dictates of conscience in matters of religious belief and practice.[4] In these accounts, private individual or communally

bounded modes of religion are juxtaposed to and contained within a universal "secular" law. One intention of this volume is to document, historically and ethnographically, the always mutually involved ways of law and religion.

Interestingly, law's claim to the universal resembles—indeed arguably derives its power from—the universalism that is claimed by a number of religious traditions, including, notably, Christianity. "In Christ there is," in the words of the Apostle Paul, "neither Jew nor Greek" (*Galatians* 3:28). Similar to the way in which Christianity arrogated to itself the power to succeed and contain Judaism (as Islam did in turn to both of those earlier traditions), secularism asserts its authority to displace and locate religion.[5] As with the universalisms of the monotheistic religious traditions, the contemporary promotion of secularism as a "one size fits all" approach appears similarly as an effort at proselytizing and conversion. So, while, for the most part, the very expression "law and religion" reflects an assumption that law is different and separate from religion—that they are discrete kinds of things, separate species if not members of different kingdoms altogether—in fact, regarded more closely, their overlapping functions define a range of possible relationships that law has to religion, as complement and mutual support, as competitor, or as successor.

Law may constitute, at once, a cosmology, an anthropology, a technique of textual interpretation, a regime of images or of representation, and even a soteriology—that is, a method of justification or salvation. As such, law serves a social and cultural role analogous to that served by religion. For its part, religion provides an ever-replenishing supply of lawlike norms and narratives that govern human life. As David Kennedy has pointed out, the very gesture of separation between religion and law echoes, ironically, a fundamental concern of religion to distinguish between the "sacred and the profane," suggesting the closeness between sacred and secular modes of thought precisely at the point at which they are believed to be most distinct.[6]

If we might, following anthropologist John Comaroff, call this overlap "legal theology,"[7] how does it compare to "political theology," another concern of this volume?[8] The first points to the singularity of law and implies an attitude of reverence. The latter emphasizes different points: that law, and the state and legal order more generally, are dependent upon the more fundamental category of the political, which also includes the religious; there is a necessary structural coordination between the political and the religious domains that challenges the state's pretensions to religious neutrality; and, there is a theological, in many cases a specifically Christian, residue repressed at the foundations of the modern state. These two uses of the term "theology" thus reinforce the need to reexamine what we mean by "religion" and "the secular" in law.

Apart from the implications for the legitimacy of the secular state, and the rule of law more generally, the answers to these questions have profound implications for a wide range of practical legal issues, including evolving trial processes, the law of evidence, the defining and redefining of citizenship, state security systems, family law, the law of property, new practices of sacrifice on the part of the military and the citizenry, new formations of sacral sovereignty, the transformation of geographically located religious traditions into more portable modernist ideas and practices, the consequences of transnational migration, and changes to electoral politics, among others. The authors of the essays in this volume approach these issues as anthropologists, historians, philosophers, and legal scholars. Each takes a particular area of contention concerning religion and secular law—what Hussein Agrama, in this volume, borrowing anthropologist David Scott's phrase, calls a "Problem-Space"—and begins to redescribe the dynamic interconnections between law and religion that this space makes evident, with a view to deepening our understanding of the range of possible relationships between these two domains and the many meanings of legal secularism in a globalizing modernity.

Contexts

The study of the relationship between religion and law was, until recently in the English-speaking academic world, conventionally located in two places: in the history of church-state interactions in Europe and in the history and legal management of religious diversity. This circumscription of attention, which reflected prior political decisions in favor of secularism, and was itself a symptom rather than a diagnosis of secularism, has largely displaced religion from both broader theoretical accounts of law and its place in social history. It is worth briefly recounting the most recent historical narratives that supported this displacement.

For most of the nineteenth and twentieth centuries, evolutionary accounts of the historical development of law saw a natural progression from sacred to secular law. For example, British legal historian Henry Maine (1822–88), in a discussion of the Hindu *Laws of Manu*, asserted that the earliest legal systems were religious: "There is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance."[9] His *Ancient Law* asserted and documented what he regarded as an essential transition, that "from status to contract," as a foundation for modern, positive law.[10]

The secularization of law is bound up with other themes in the development

of modern law. Some legal historians have emphasized the importance of the increasing ascendancy of written or printed codes. Such sources of "rational" legal authority are said to have replaced, variously, the capriciousness of oracles and ordeals; the rigidity of magical formalism; or the dissemination of law by oral tradition, maxim, and proverb, or more generally custom. Yet legal codification was not synonymous with secularization, if that is understood to mean the decline of religion. Aside from the fact that many of the earliest law codes were explicitly religious, the development of legal codes in the modern, English-speaking world was itself partly due to the influence of Protestant ideas of scriptural authority, and an accompanying rejection of customary traditions as "idolatry."[11] Jeremy Bentham (1748–1832), for example, in his proposal to codify the English common law vowed to end the manipulations and "priestcraft" of the judiciary.[12] Bentham asserted the independence of law from religion, morality, and ethics, and was one of the central figures in the elaboration of a theory of positive law. Although Bentham's jurisprudence was clearly rational and secularizing, it was also deeply imbued with certain strains of Protestant thought and cannot therefore accurately be termed "nonreligious."

The repudiation of ritual is an important characteristic of the modern period, as scholars from Peter Burke to Talal Asad and Catherine Bell have noted.[13] Despite the persistence of ritual throughout contemporary legal institutions, modern law can also be seen as, in part, the product of an effort of deritualization. Discussions of ancient or "primitive" law often exhibit a critique of the rigid attachment to certain prescribed modes of legal procedure.[14] Many of these critiques share a characteristic modern emphasis on the value of substantive law and of legal realism over formalism, and accordingly disparage the ritual dimensions of ancient law as a mode of irrational or "magical thinking." Part of this disdain of ritual can be traced to Protestant attacks on embodied forms of worship, which contributed to the redefinition of religion as an internal state of belief more compatible with the modern concept of freedom of conscience. Part can be traced as well to earlier Christian attacks on Jewish "ceremonial laws," which, by distinguishing these from "natural" and "civil laws," anticipated the contemporary distinction between law and religion.[15]

The German sociologist Max Weber (1864–1920), whose work is still an important point of departure for contemporary discussions of secularization and the history of law, traced secularization to developments internal to Latin Christianity during and after the Protestant Reformation.[16] Society became "disenchanted"—liberated from magic and personal charisma, as well as ritual formalism—making possible the rationalization of both law and the economy. Despite numerous challenges, Weber's account has been reinforced by several

recent works on the Christian roots of secularization.[17] Yet, the very notion of disenchantment echoes earlier theological accounts according to which the Crucifixion abolished Jewish sacrifice and silenced the pagan oracles.[18] The dependence of Weber's sociology on such theological tropes illustrates the difficulty of disentangling the secular from the religious.

Weber's younger contemporary and critic Carl Schmitt (1888–1985) recognized this difficulty. He argued, "All significant concepts of the modern theory of the state are secularized theological concepts."[19] Schmitt contended that secularism followed Protestant theology in attempting to displace transcendence, by outlawing or banishing magic, miracles, and mystery from the text of law.[20] He saw contemporary jurisprudence as lacking an awareness both of its own theological antecedents, and of the inevitable persistence of "political theology." His theory of the "state of exception," in which the sovereign suspends the law in a manner analogous to revelation or divine fiat, represented a deliberate attempt to re-enchant the law. In recent decades, a reconsideration of both Schmitt's own concept of political theology and of the influence of Jewish and Christian theological traditions, most notably the writings of Paul, on modernity has engaged scholars at the intersection of political and legal theory, philosophy, and theology.[21] Several essays in this volume take up a consideration of Schmitt's challenge to secular liberalism.[22]

Critical cultural studies of law also have contributed to a significant re-examination of modern law's claims to secularity, autonomy, or even completeness and adequacy, in the absence of a religious reference.[23] Robert Cover's iconic 1983 essay "*Nomos* and Narrative" pointed to the sacral dimensions of law.[24] Peter Fitzpatrick's 1992 *The Mythology of Modern Law* and Peter Goodrich's 1995 *Oedipus Lex* both argued for law's dependence on a mythological narrative of separation from religion, a narrative that parallels religious modes of thought. Secular law, they argue, appears to have borrowed some of its strategies from religion itself. Indeed, the bare question of "what constitutes religion" in the secular state necessarily involves the law in a process of theologizing, demonstrating the "impossibility of religious freedom" and of a complete separation between law and religion.[25]

If the boundaries between law and theology now appear less distinct, the blurriness of those edges has arguably enabled a range of new stories to be told about legal modernity, stories that reject the simplistic narrative of a separation between law and religion without necessarily collapsing these two categories or returning law to a religious foundation. Historians increasingly see a profound intertwining of religious and secular ideas, institutions, and popular practices in the early modern period.[26] Upon closer inspection, key philosophical and

social-scientific thinkers who have described the evolution of modern law and politics turn out to have been as interested in religion as in the state, and significant moments in the history of law are being reinterpreted as significant moments in the history of religion.[27]

Law is thus increasingly being recognized as varied, plural, and overlapping, dependent on religious anthropologies and cosmologies, as well as sharing symbols, ideas, and institutions with religion. The entire history of law is now being retold. Harold Berman's two volumes, *Law and Revolution I* and *II*, focus on the transformation that occurred in European law after the rediscovery of Justinian's law codes in twelfth-century Bologna, the subsequent invention of a law for the Roman Catholic Church which influenced the emerging secular states, and the Protestant reformulation of law that followed.[28] A reconsideration of the significance of customary law in Europe, including that of the common law, and the profoundly religious learning and motivation of those who invented modern positivist law is underway.[29]

These new studies, which challenge both Weber's linear account of secularization and oversimplified histories of the post-Westphalian state, while extending Weber's insight concerning the irrational or religious basis of what we call "the secular," still emphasize the unique role of Western civilization by focusing primarily on the development of law in modern Euro-American cultures and their diaspora. An urgent task for the study of legal secularism today is the displacement and "provincializing" of such a Eurocentric (and Christocentric) narrative:[30] by examining parallel and divergent examples of secularism in other cultures; by scrutinizing alternative histories of legal development; and by tracing the colonial encounter between European and non-European cultures, in which we may observe not only the emergence of "the secular" in its process of formation but also the peculiar distortions and, in some cases, Christian theological presuppositions that directed this process.[31]

Like the new histories of law, anthropologies of law have left behind colonialist constructions of culture in favor of what Comaroff calls a horizontal and polycultural legal landscape.[32] One of the most interesting aspects of globalization is the way that it restructures relations of difference—in particular, how "religion" and "culture" and "ethnicity" mark group and individual identity. On the one hand, globalization entails a universal regime of value through market exchange, the flow of capital and the sale of labor;[33] while, on the other hand, new "noneconomic" domains emerge as places where differences may be expressed.

Other anthropologists of law, such as Bruno Latour in his *The Making of Law*, an ethnography of the French Conseil d'État, attempt to specify at ground

level the peculiar life ways of modern law. Law itself, Latour observes, has no content. It is a peculiarly totalizing human form that is mixed with everything. In his words, law is "fractal"; it "has its own ontology"; "it engenders humans without being made by them"; it is "its own meta-language." Law is a particular schematizing of social facts that provides no additional information about anything. To expect otherwise, Latour insists, is to misunderstand modern law and its relation to religion, and, significantly, of both to modern science and the invention of the fact.[34]

The activities of multinational corporations and transnational religious actors are making state borders salient in new ways; and transnational political and legal institutions, both governmental and nongovernmental, have begun to enforce regional and international legal regimes that impact religion. Various sites for an investigation of these new religio-legal realities, and of their histories, include human rights, economic activity, rapid migration, environmental degradation, entrepreneurial violence, and the proliferation of electronic media. While Faisal Devji describes the contemporary terrorist as inventing the global post-human through suicide bombing,[35] President Nicolas Sarkozy talks of a *laïcité positif* that reimagines French republican religiosity.

This Volume

This volume seeks to hold together several strands of the conversation about law and religion that are often, institutionally and discursively, taken as distinct: the historical, anthropological, normative, juridical, theologico-political, and philosophical. These strands are intimately connected both genealogically and structurally today. Theorists have much to learn from the redescription being provided by historians and anthropologists about life on the ground, while historians and anthropologists have much to learn from theorists about the framing terms of the conversation and the persistence of normative claims. The study of law and religion continues to operate in a world where academic work may have immediate political currency. That currency demands careful and precise attention to history and phenomenology.

The essays are grouped into two sections, "Histories of the Legal Secular" and "Ethnographies of the Legal Secular." The essays of the first section are largely historical reassessments of the founding moments of the legal secular; the essays of the second section further specify the ambiguous phenomenology of the legal secular today. Together they address the following questions:

—What, precisely, do we mean by "legal secularism"? Is the concept of "separation of church and state" still valid as a rubric for the analysis of the many (or indeed