Law and Religion in Theoretical and Historical Context

EDITED BY

Peter Cane, Carolyn Evans, and Zoë Robinson

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LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT

Is there a place for religious language in the public square? Which institution of government is best suited to deciding whether religion should influence law? Should states be required to treat religion and non-religion in the same way? How does the historical role of religion in a society influence the modern understanding of the role of religion in that society?

This volume of essays examines the nature and scope of engagements between law and religion, addressing fundamental questions such as these. Contributors range from eminent scholars working in the fields of law and religion to important new voices who add vital and original ideas. From conservative to liberal, doctrinal to post-modernist, and secular to religious, each contributor brings a different approach to the questions under discussion, resulting in a lively, passionate, and thoughtful debate that adds light rather than heat to this complex area.

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Introduction

CAROLYN EVANS*

It was not so long ago that confident predictions were being made about the eventual demise of religion.[1] Religious people complained that liberal states had privatised religion; excluding it from the public square until such time as developments in science, education and philosophy rendered religion entirely obsolete. With the exception of the unusually religious United States, religion in the second half of the twentieth century played relatively little role in public domestic debates in Western societies and was rarely considered in international affairs. As former US Secretary of State Madeleine Albright put it, most Western political leaders in the 1990s thought that religious disputes 'were the echoes of earlier, less enlightened times, not a sign of battles to come'.[2]

Now, however, religion is back on the public agenda both domestically and internationally. Questions about the role of religion in public life are being prompted by a range of changes in many Western states. The power of 9/11 and terrorist attacks or threats of such attacks has been a powerful motivating factor in such reconsideration. In many ways this is unfortunate as it tends to skew the public discussion towards a debate over religion as a tool of terrorism or to a debate over Islam and the West.

Yet, long before the attacks on the World Trade Centre, there were complex and important questions being asked about the role of religion in society. A number of factors, aside from terrorism, mean that it is timely to reconsider some of the fundamental questions about the relationship between religion and constitutionalism. In particular, reconsideration is

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[1] S. Bruce, *Religion and Modernization* (Oxford University Press, 1992), 170–94.

[2] M. Albright, *The Mighty and the Almighty: Reflections on Power, God, and World Affairs* (Pan Macmillan, 2006), 9. The events of 9/11 and their aftermath, she concludes, forced her to 'adjust the lens through which I view the world' to include greater consideration of religion.

being prompted in many Western states because of the breakdown of social consensus over the role of the dominant religion. In the United States, republican Protestantism lost its place as the de facto national religion in a cultural and demographic sense and elements of that grouping now seek to re-establish its dominance by political and legal means. In the United Kingdom, the role of the Church of England as the established church is being placed under strain with the dual tensions of the rise of non-discriminatory human rights norms and the increasing religious pluralism of the population. In many parts of Europe, the influx of migrants from Muslim countries has raised questions of the way in which existing constitutional arrangements affecting religion (from France's policy of *laïcité* to Norway's established church) should deal with the rise of a substantial Muslim minority population. And in many places, there is a rise in atheism, agnosticism, humanism and secularism that often challenges the idea that any religion should be influential in law and society or at least raises complex questions about equal treatment of religion and non-religion.[3]

While the particular circumstances are new, questions about the way in which law and society should and do respond to religious groups have been grappled with for centuries. The questions play out at many different levels from the local and specific (should the uniform code at a particular school allow girls to wear headscarves?) to the broad and abstract (to what extent should religion be permitted a voice in the public square in liberal societies?). Often the public debate on these complex issues is shrill, heated, uninformed and simplistic, encouraging knee-jerk reactions to particular events with little consideration as to how they affect broader principles about the role that religions play in a particular society. Perhaps the current debate is particularly heated because religious questions have been brought to public attention again in the West through the combination of immigration and terrorism – both topics that tend to inflame public opinion.

In part to play a role in countering this type of shallow debate, in May 2006 the editors of this volume and Professor Adrienne Stone convened a conference on Law, Religion and Social Change at the Australian National University. The aim of the conference was to bring together scholars on law and religion from many different parts of the world with a view to engaging in a thoughtful and informed discussion about the

[3] For a very useful overview of changing religious demographics see P. Norris and R. Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge University Press, 2004).

relationship between law, religion and society in the twenty-first century. This volume brings together some of the key papers from that conference. The authors bring to their work very different approaches to the questions under discussion: from conservative to liberal; doctrinal to post-modernist; secular to religious. In many chapters they engage in a lively debate with one another. Our aim for both the conference and this volume was to include people from various viewpoints who were passionate and thoughtful, and above all, who were capable of engaging in debate that added light rather than heat to this complex area.

As with any edited collection, particularly one arising from a conference, the essays gathered here are not, and do not aim to be, comprehensive or inclusive of all issues of law and religion. Indeed, law and religion is such a wide field that no single book could address it comprehensively. Instead, this book adds to the literature in the area by using a series of high quality chapters to address some of the fundamental questions – questions about the nature and scope of engagements between law and religion. Is there a place for religious language in the public square? Which institution of government is best suited to deciding how religion should influence law? Should states be required to treat religion and non-religion in the same way? Is that even possible? How do the historical roles of religion in a society influence the modern understanding of the role of religion in that society? The authors in the volume include some of the most eminent people working in the field of law and religion, as well as some important new voices who add vital, original ideas to the on-going debates.

Overview of the book

The chapters in this book centre around the theme of religion and constitutionalism; they raise questions about the role of religion in the state and the legal system. Some of these questions are played out in the shape of debate over a formal written constitution. It is difficult to discuss these issues in the United States, for example, without consideration of the formative role of the First Amendment's religion clauses. Other chapters are set in a context where there is no single, primary constitution document (such as the United Kingdom and Israel) or where international instruments (such as the European Convention on Human Rights) are the focus. Still others work from the level of theory, seeking to develop a principled approach to the relations between state and religion regardless of the particular constitutional arrangements that

are in place currently. All engage with some of the key questions of theory, history, constitutionalism and law.

Theory

The first group of chapters in this book are theoretical explorations of the role played by religion in public life. Each of the four chapters engages with the question of how the democratic, liberal state should treat religion. The book begins with a vigorous debate between Larry Sager and Jeremy Webber. Sager articulates and defends a conception of religious freedom based on equality between religion and non-religion and argues against a privileging of religious viewpoints and practices. Webber directly tackles this viewpoint arguing that religious freedom has an irreducibly religious core and necessarily reflects a view that religion is valuable.

Meyerson shifts the theoretical debate by moving beyond the specific context of religious freedom and onto the broader question of the role of religion in the public square. In her chapter she defends a broadly Rawlsian approach to the role of religions, creating space for religious people to use the public square but arguing that if they do, they have a moral responsibility to use publicly accessible forms of reasoning. She argues in favour of three principles of political morality: 'that the government should not act on religious purposes; that it should not assist religious groups to spread their religious beliefs; and that arguments based solely on religious convictions should not be offered as reasons for laws and public policies'.

In the final chapter that focuses on theory, Davies examines the plural legal systems under which many people live. While liberal models, such as the ones outlined in the first three chapters, may assume a single, dominant, positivist legal system, the lived reality is that there are webs of obligation that derive from religious and cultural sources as well as the liberal legal system. In contrast to Meyerson's conception of the possibility of state neutrality, Davies argues that the concept of law as an 'institutionally separate, ideologically neutral and normatively superior entity which orders our society is no longer tenable'.

History

The second group of chapters in the book look at issues of church and state by reference to history. McConnell gives an overview of four stages

of the United States Supreme Court's jurisprudence on religious freedom and charts the way in which the case law dealing with religion reflected broader social changes. He argues that the cases cannot be properly understood in isolation from other elements of the court's concerns at various times (for example with desegregation) and from changes in American society more broadly.

Radan also considers the development of First Amendment case law on religious freedom, but this time in the context of cases on the teaching of evolution in schools, particularly the *Scopes* trial and the more recent controversy over intelligent design. He argues that these cases are best understood as not being religiously specific but part of a broader debate over whether controversial cultural issues are best resolved by democratically elected institutions, such as legislatures and school boards, or by non-representative expert groups, such as scientists and judges. He demonstrates the extent to which the debate between elitism and popularism has been present since the early days of interpreting the religion clauses and suggests that earlier approaches that gave priority to representative institutions are preferable to current approaches that give preference to the judiciary.

Smith presents a very different history of state-church relations in her examination of the role of the established Church of England in modern day Europe, as exemplified in the case of *Aston Cantlow* v. *Wallbank*.[4] She argues that the role and importance of the Church of England beyond its parishioners is no longer properly understood in its historical context. As human rights and non-discrimination norms become dominant modes of discourse, they fail to account properly for and understand the older model of the established church. The traditional English model of constitutionalism developing over time, she argues, may not be sufficient to meet the challenge of re-imagining a role for the Church of England.

Contexts

The final group of papers in the book explore particular examples of the questions raised by the legal regulation of religion and how they illuminate broader questions about religion in the constitutional order. Many of them also make arguments about the way in which the constitutional and legal order needs to adapt to meet the challenges of religiously plural societies.

[4] [2001] EWCA Civ 713 and [2003] UKHL 37.

Gavison and Perez look at the issue of days of rest in a variety of Christian, Muslim and Jewish states with particular emphasis on Israel. Their exploration makes clear that the problem of official days of rest cannot be resolved by reference to standards such as neutrality or simple principles of non-discrimination. They carefully chart the legitimate claims made by majority interests in such a case; rejecting the notion that it would be better to choose a 'neutral' day of rest or abolish such days altogether because such an approach would create serious hardship for the religious majority. Yet this does not mean that minority interests simply have to be subsumed into the mainstream, as the authors argue for recognition of minority rights within the majoritarian system. Gavison and Perez acknowledge the complexities that this type of decision entails; even their desired solution may exacerbate ghetto-isation and cause inter-communal divisions, and they thus argue for some flexibility around the basic principles to facilitate solutions that best meet the needs of particular societies.

In another consideration of the way in which minority religious groups can have difficulties with the majoritarian legal system, Willheim's chapter criticises some of the traditional responses of the law to indigenous sacred sites in Australia. His paper highlights problems that may, in particular contexts, confront approaches, such as that suggested by Meyerson, which require public speech to satisfy some criterion of reasonableness. Recognition of indigenous interests in land considered sacred often conflicts with requirements of the liberal legal system for transparency and rationality. Requiring indigenous people to prove or justify their claims about the sacred nature of the land has led to some claims being dismissed on the basis of their 'irrationality' – a dismissal of their relevance that may be the logical outcome of requiring religions always to use concepts that can be equally understood by the non-religious. Willheim attempts to create a solution that recognises that the legal and political system has a certain place in resolving these disputes, particularly in weighing indigenous claims against other interests. He rejects the notion, however, that this system is the appropriate one for determining whether or how a site is sacred, saying that indigenous people should have their own system for making such determinations.

Nehushtan also considers what response legal systems should have to certain types of minorities, but in a rather different context. He explores the justifications that there might be for allowing conscientious objectors (including religious objectors) to be exempt from certain laws that apply to all others. He rejects equality as a basis for such exemptions and argues instead that tolerance is a better basis for understanding conscientious objection.

Naffine explores from yet another perspective the way in which various religious conceptions inform the law. Her chapter explores the multiple concepts of the 'person' present in the legal system and the way in which judges' attempts to keep the legal purely legal fail. Her chapter outlines various conceptions of the person that are used in 'Anglian' legal systems – from the formal legal person to the more religious conception of the person as sacred or as having a special dignity that separates it from other beings such as animals. Her chapter demonstrates, particularly through examination of the case law on foetal status, the way in which religious ideas continue to inform and underpin legal systems even when explicitly religious language or justifications are no longer used.

Finally, Evans takes us beyond single-state approaches to religious issues and considers the way in which the European Court of Human Rights has approached religious freedom cases. He argues that the court has abandoned an approach that respects religious difference and created space for religious expressions to one that is very repressive towards religion while using the language of pluralism and tolerance. He questions whether religious people need to move beyond a reliance on human rights law and to think more broadly about ways of developing religious freedom.

Underlying themes

There are numerous points of intersection, overlap and debate between the authors in this collection. There are several themes that underpin many of the chapters in this work and, in some cases, illuminate reasons why the various authors have taken different approaches to particular questions. In many cases, however, these themes and assumptions are implicit rather than explicitly discussed. In this section, I identify and explore three such themes: the definition of religion; the question of how law should respond to the blurring of boundaries between religion and other phenomena; and whether religion should be conceived of as a social good or not.

The difficulties of defining the boundaries of religion

The definition of 'religion' is notoriously contested. Domestic and international courts have grappled with it, often in the context of legal protections for religious freedom contained in constitutions or treaties.[5]

[5] See, for example, *US* v. *Seegar*, 380 U.S. 163 (1965) (United States); *Church of the New Faith* v. *Commissioner for Pay-Roll Tax (Vic.)* (1983) 154 C.L.R. 120 (Australia).

As societies become more pluralistic and more individualistic, the task of defining what religion is becomes ever more complex. People who claim that they have a religion or that they deserve the same protection as those who have a religion are no longer necessarily members of a relatively limited number of discrete communities of co-believers with settled practices and beliefs. Instead, they may belong to small, idiosyncratic groups. They may be free-thinkers or have composed a series of spiritual beliefs taken from a variety of sources. They may reject institutionalised religion but still consider themselves to be religious or spiritual in a personal sense.[6]

The authors in this book do not discuss in detail the question of what a religion is, but implicit characterisations of religion appear throughout. For most of the authors, religion is primarily a set of beliefs – beliefs that are capable of being adopted, rejected, modified or refined at the will of the believer. This is a particularly post-Reformation Western view of religion that gives primacy to the internal, intellectual aspects of religion over other viewpoints. It analogises religion with other important intellectual commitments. Nehushtan, for example, merges aspects of religion into the broader concept of conscience and claims that all 'deeply held belief[s] that [are] based on deeply held moral values of a group or an individual' should be treated equally. Meyerson uses the Rawlsian notion of 'comprehensive doctrines' that includes religions and some other philosophical or political commitments. Sager speaks a little more broadly of 'deep commitments and concerns' or 'deep passions and commitments' which certainly encompass an intellectual and internal dimension, but may also extend beyond it.

Yet other possible ways of conceiving of religion are also present in other chapters. In their discussion of days of rest, particularly in the context of Israel, Gavison and Perez discuss religion in part in the context of community, culture and ethnicity. Religion is not simply a set of internal beliefs but a way of structuring and living a communal existence in fidelity to religious teachings and cultural practice. It causes no particular difficulty for the state to allow each individual to have *beliefs* about what day of rest, if any, is religiously mandated. When it comes to the state determining whether and when to have an *official* day of rest, however, the issue cannot be resolved by simply allowing for a diversity of beliefs; liberal concepts of neutrality are

[6] Norris and Inglehart, *Religion and Politics Worldwide* above n.3, 55–56 discuss the ways in which traditional measures of religiosity tended to overlook less institutional and more spiritual or individualistic approaches to religion.

not particularly helpful in resolving this type of problem. The social problem of days of rest may not be best resolved by simply aggregating intellectual preferences and letting the majority have its way, as might be reasonable in a whole range of other policy areas. Instead, the communal nature of the religious beliefs means that different religious and ethnic communities will be advantaged or disadvantaged by any decision made by the state. As a consequence, decisions will have the potential to create or exacerbate inter-communal tensions unless minority religious group identity is also taken seriously and given space within the dominant legal/political system.

This communal and identity-driven conception of religion may not emphasise beliefs as central. In this conception it makes sense to say that a person is a 'cultural' Catholic or a 'secular' Jew even though, from a doctrinal point of view, the person has rejected all or most of the tenets of their faith. Further, people whose religion is associated with a publicly visible difference (such as the wearing of particular clothes or symbols, or adoption of a particular physical appearance) may find a religious identity ascribed to them by others even though they may not share all or any of the beliefs of that religion. Such people may be subjected to religious hatred or singled out by discriminatory government policies because they are deemed by others to be religious as a result of their cultural or ethnic connections with a particular community, even if they reject the religious beliefs of that community.[7] Both Radan and Davies, in different contexts, discuss the extent to which religion and culture are intertwined and cannot be easily dissociated from one another.

Willheim, in his discussion of Aboriginal sacred sites in Australia, implicitly raises another complexity in the defining of religion. Laws that single out religion assume that 'religion' can be neatly separated from other concepts such as law, government, morality, tradition, magic or culture. Yet indigenous cultures are but one place where such divisions do not map easily onto the beliefs and practices of the people themselves. The importance of sacred sites and the rules associated with protection of and care for those sites, for example, involve a mixture of religion, law, government and tradition.

Davies' exploration of the plurality of legal systems (some closely linked to religion and others less so) that exist in modern societies also

[7] The United Nations Special Rapporteur on Freedom of Religion or Belief has noted the intersection between racism and religious hatred and the way in which they are often combined to created an aggravated form of persecution. See A. Amor, *The Elimination of All Forms of Discrimination Based on Religion or Belief* A/55/280 (8 September 2000).