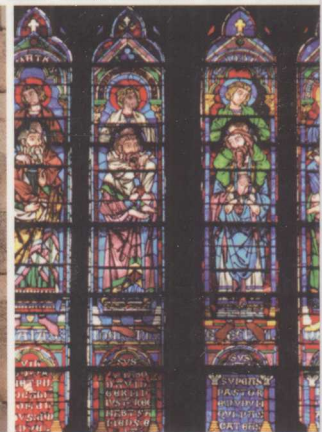
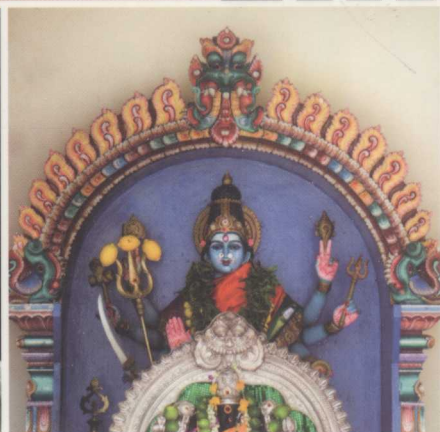


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NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES

■ W. COLE DURHAM, JR. ■ BRETT G. SCHARFFS



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with gratitude for love, patience, and support

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PREFACE

The guiding philosophy of this casebook is that less is more and more is more. We have attempted to cover the subject matter of law and religion in about half the pages of most law and religion casebooks: that's the less. We also address at least three times the subject matter, focusing a majority of the book on international and comparative law materials: that's the more, together with a voluminous Web Supplement that includes a broad array of U.S., international, and comparative law cases, commentary, and analysis.

In adopting this approach we have undertaken the rather audacious task of offering a new paradigm for studying law and religion. We hope it will be of interest to both U.S. and international students of the law.

We believe this shift in focus to include international and comparative law materials is warranted by several tectonic shifts that have taken place in the last fifty years.

First, whether the world is flat, curved, or spiky, the forces of globalization are real: we live in a world that is smaller and more interconnected than ever before; travel and communication occur at speeds and with a frequency that were unimaginable even a generation ago. For many years, religion has been thought of as an archetypal "local" issue, but in recent years it has increasingly become a "global" concern. We believe the topic of law and religion can be addressed better by trying to locate local issues within a broader historical, political, and international context, and that even quintessentially local issues can be illuminated by viewing them from cross-cultural perspectives. This relates to a more fundamental reality: viewed globally, there is no majority religion, and believers and nonbelievers can all benefit from viewing ourselves as religious minorities.

A second reason for taking an international and comparative approach to the study of law and religion is that religion and religious commitment, rather than diminishing and becoming less important, as was widely expected by scholars and political leaders a generation ago, has increased. Indeed, today we are more likely to make the mistake of seeing religion as everywhere and dangerous, rather than viewing it as nothing and irrelevant. The tendency to

view human affairs as presenting a titanic clash of civilizations has become something of the norm, albeit a disputed norm, as illustrated most powerfully by the challenges posed by (and the need to come to a deeper understanding and appreciation of) Islam, including Islam-inspired terrorism. We have endeavored to include a range of religious points of view in this book, and have in particular taken seriously the opportunity to engage in a sustained way with Islam. Nearly every chapter includes materials on Islam and Muslim perspectives on a broad array of topics including the headscarf controversies in France and Turkey, the Danish cartoon controversy involving depictions of the Prophet Mohammed, female circumcision (including the debate about whether this is or is not a Muslim issue), prohibitions on conversion, marriage and family law issues, attempts to create Shari'a tribunals (e.g., within the framework of arbitration systems), and efforts to ground constitutional law on both Shari'a and human rights norms in Afghanistan and Iraq.

A third development is the groundbreaking work of the European Court of Human Rights. Beyond the awareness of most Americans, the ECtHR is an international court that gives over 900 million citizens of 47 countries a forum of last resort to bring cases claiming that their own governments have violated their human rights, including their religious freedom rights guaranteed by Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court's jurisprudence has become a powerful source of persuasive authority that is recognized around the world. Nearly every chapter includes cases from the European Court, often matched with U.S. Supreme Court cases and comparative law materials from other countries on the same or similar issues. We also live in an era where in many circles the commitment to the rule of law and to the understanding of human rights as universal norms that apply to all countries at all times is being called into question from many quarters. Thus, we view with some urgency the need to think about issues involving law and religion from a human rights perspective, which is precisely what the European Court of Human Rights does.

Fourth, much of the most remarkable and nuanced work on religious freedom issues is being done by Constitutional and other courts in countries other than the United States. Viewing the landscape from a U.S. perspective, it is important to recognize that these courts utilize, build upon, distinguish, and often take different paths from those followed by U.S. courts. In an increasingly interconnected world it is ever more untenable to proceed with blinders on, as if U.S. courts are the only institutions that have grappled with the broad array of issues involving religious freedom. From an international vantage point, we hope this book will provide a useful resource for those working in other legal systems, and that it will signal the growing interest and respect a growing number of experts in the United States have for developments elsewhere. Due to the variety, not to mention sheer volume, of comparative law materials, we have had to be extremely selective in what is included in the book. Nevertheless, most chapters include representative samples of comparative law approaches, altogether representing approximately twenty different countries. We have not provided a comprehensive comparative study of any single country or region, opting instead to include cases from many different

nations and areas of the world. The casebook's Web Supplement includes numerous additional cases from many countries, which should accommodate classes that want a more focused comparative study of particular jurisdictions.

A fifth reason for this new approach is that many of the distinctive features of the U.S. system can be seen more clearly by engaging in comparative study. For example, the United States is almost unique in the world for not having a national government department devoted to religious affairs, which on balance is probably a good thing, but which works at least in part because our non-establishment clause minimizes the amount of cooperation and aid flowing to religious communities. In addition, registration and recognition of churches is a virtual non-issue in the United States, but it is one of the primary obstacles to religious freedom around the world. Another distinctive, although not unique, characteristic of the U.S. system is that the First Amendment includes an Establishment Clause, prohibiting an establishment of religion, as well as a Free Exercise Clause, which aligns more closely with religious freedom provisions in international human rights instruments and most other constitutions. Nevertheless, other countries grapple with many of the issues that in the United States are categorized as Establishment Clause cases, so the U.S. situation is not as unique as we (and others) sometimes imagine it to be. Comparative study also helps identify the strengths, weaknesses, and underlying assumptions of approaches taken by U.S. courts. For example, focusing on how other legal systems have grappled with defining the permissible limitations on religious freedom sheds light on some of our own deepest challenges in determining when state interests are sufficiently great to justify overriding religious freedom claims.

By engaging in international and comparative law analysis, we can get a better view of the general legal topography, as well as a deeper understanding of the ways and places where legal systems get stuck or go off track in grappling with recurrent issues. We can see how similar situations are often viewed as raising very different types of legal questions, and how problems get addressed through different historical, cultural, and constitutional prisms.

* * *

A few words about case selection and editing may be helpful. We have had to be selective in cases we include and rather severe in the pruning we have conducted on them. Here we have been guided by several key principles.

First, we have focused on what we believe to be landmark cases, representing significant developments in legal doctrine. This means, for example, that we have omitted or relegated to notes and comments dozens of United States Establishment Clause cases involving the Supreme Court's tortured interpretation, application, and reinterpretation of the *Lemon* test in cases involving governmental aid to parochial schools and religious symbols on public property. We have done this partly out of mercy to students, but also because many of these cases have been overturned, distinguished, or disregarded by later cases.

Second, when there is a long line of cases on a subject, we have tried to include excerpts from early cases where doctrine is set, cases that illustrate different theoretical or doctrinal approaches, and the most recent cases, and

have left out or summarized in notes and comments most of the intervening cases.

Third, we have looked for cases with interesting international and comparative law counterparts. To be sure, we have included cases that are distinctly American, including controversies over the Pledge of Allegiance, the study of creationism, and school prayer, but even in these areas there are often interesting comparative materials.

Fourth, in editing cases we have wielded an unforgiving scalpel. Cases that have generated dozens or even hundreds of pages of court opinion have been reduced to a few pages. We have undoubtedly cut out a fair amount of muscle as well as flab. In editing we have observed several guidelines. We have tried to give a fulsome account of the facts, have given the Court one and only one chance to explain the law, and have generally omitted the text of laws and quotations from other cases that are included elsewhere in the book. We have also omitted almost all footnotes, string citations and even discussion of other cases. In order to enhance readability and save space we have sometimes omitted ellipses or other indicia of editorial judgment. The casebook's Web Supplement includes the full text of the cases excerpted and most of the other materials that are either excerpted or described in notes and comments (to the extent copyright constraints on other sources have allowed). When a court or commentator's analysis seems perfunctory or incomplete, there is a good chance—although not an absolute certainty—that the fault lies with our editing, but that the fault can be remedied by checking the Web Supplement.

Fifth, if a case is not interesting (at least to us), we omit it. There is plenty that is gripping, heartbreaking, and outrageous in the law of religious freedom. We haven't had to include anything that is not stimulating and important—unless you adhere to the rule of thumb invoked by one of our spouses to keep us humble: that anything we find interesting is by definition boring. Yet even she has conceded of late that the issues being addressed here have surpassed her most discerning interest threshold.

W. Cole Durham, Jr.
Brett G. Scharffs

December 2009

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Our only regret is that we have not been able to include more of what all of the foregoing have suggested. We are grateful for the opportunity the Web Supplement will provide for sharing more of the manifold contributions others have made.

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