Book reviews

Research handbook on law and religion

Rex Ahdar (ed.)

Cheltenham, UK: Elgar, 2018, xvii + 493 pp., ISBN 978-178812468, £190.00

Part of a series of research handbooks published by Edward Elgar, this volume provides an excellent review of recent scholarship in key areas of law and religion. The editor, Professor Rex Ahdar from Otago University in New Zealand, is a leading expert in this area, and the volume features valuable contributions from other world-class scholars, as well as from emerging stars on the topic.

An important foreword by John Witte Jr. of Emory University, the dean of law and religion scholars, provides a brilliant short review of the nature of the discipline and its development in recent years from a subset of US First Amendment studies to a wide-reaching, interdisciplinary field with engagement from scholars all over the world.

Part I offers two survey articles. First, Ahdar uses nautical metaphors to note the "familiar waterways" still being explored (church-state relations, the nature of secularism in the modern state, the meaning of "establishment," religious freedom rights and their intersection with discrimination laws) and then boldly suggests some uncharted waters where further exploration may prove fruitful (such as the place of indigenous religions, the rise of "neo-paganism," and the implications of emerging artificial intelligence technology). In chapter 2, Russell Sandberg explores connections between law, religion and sociology. He notes, for example, the possible synergy between legal and sociological perspectives on the thorny question of defining religion, as each discipline supplies perspectives that the other needs.

Part II dives into some of the deep jurisprudential waters that surround the area. Steven D. Smith provides a challenging critique of the concept of "equality" and how it has come (unhelpfully) to be assumed (but rarely analysed or argued for) as the "new orthodoxy" by many secular commentators. Jonathan Burnside, best known for his detailed analysis of biblical law, offers a stimulating analysis of philosopher Jeremy Bentham's little-discussed view of law and religion. Emerging Australian scholar Joel Harrison analyses the infamous suggestion by Ronald Dworkin that we can have "religion without God," comparing it to the classical model presented by Augustine. Finally in this part, Andrew Koppelman explores how religious liberty is dealt with as a "human right," along with the implications of seeing it, in Charles Taylor's terminology, as a "hypergood" (though not thereby always trumping other deeply important rights).

Part III turns to the long-contested realm of "religion-state relations." Perry Dane notes how dependent models of "establishment" are present within the specific constitutional arrangements in place in different nations. He notes various metaphors that have been used for the relationship: wall of separation, interlocking jigsaw, separate spheres, and *laicité* in the French context (where in some sense "the Church is *in* the State" and subject to it). Richard Albert and Yaniv Roznai discuss the phenomenon of constitutions in which religious declarations are formally unamendable. Jaclyn Neo discusses the challenges of regulation in a multi-cultural society and notes the differing focus of governance between Western cultures (where religion is regarded as a mostly private matter) and other cultures where it is a more communal concern.

In chapter 10, Benjamin Berger suggests that the usual approach to secularism in liberal constitutions may need to be rethought in light of the persisting importance of religion in the lives of many citizens. Next, Hans-Martien ten Nepal provides a helpful description of a range of faith-based organisations operating in Europe, in the context of considering whether religious freedom is a "natural" or "positive" (i.e. state-endowed) right. Farrah Ahmed surveys how the obligations of "religious law" are enforced in a society (such as India) which adopts the "personal law" model of allowing certain legal rights and duties to be determined according to the religious community to which a person belongs. (Table 12.1 within this chapter is a very helpful resource on how these laws operate in relation to five different religious communities.)

Part IV surveys issues surrounding the adjudication of religious rights in Western societies. Michael Helfand offers a stimulating revision of the established view that judges cannot adjudicate religious questions, noting that, despite this oft-stated principle, US courts often do this in specific contexts, especially where "private rights" are at stake. Francis Venter also reviews the law in this area and examines a number of examples where disputes arise between state and church, between churches, and within church communities.

Part V, on issues in international law, begins with Paul Taylor's essay on similarities and differences between the major international instruments (the UDHR, ICCPR and ECHR), which discusses when the content of religious doctrine or practice may conflict with rights conferred by these instruments. In particular, he notes the different approaches in recent years to cases involving the right to wear a head scarf. Merilin Kiviorg looks at the thorny question of when national security issues override religious freedom, with particular and fascinating analysis of some cases involving the Jehovah's Witnesses in Russia.

Finally, part VI encompasses several well-known areas where freedom of religion issues arise and offers important further insights into classic dilemmas. Mark

Hill explores matters of employment, including when clergy are classified as employees, and issues that arise when ordinary believers face challenges in being true to their faith while working in secular workplaces. Ian Leigh revisits the familiar problem of conscientious objection but moves on from the issues raised by military objectors to those that arise in the context of provision of medical services. Renae Barker provides a comprehensive overview of cases on whether a Muslim woman can decline to remove a face covering when testifying in court. Janet Epp Buckingham reviews the litigation involving Trinity Western University in Canada and the impact of professional objections to a religious stance taken by educators at a private, faith-based institution. Keith Thompson revisits the area of "religious confession privilege" in light of recommendations made since his seminal work on the topic was published in 2011. He notes that although the privilege has generally been retained, there are increasing pressures to abolish or modify it in light of revelations of child abuse in churches.

This collection provides a worthy overview of key topics in this area and is an excellent starting point for further research on any of the issues covered. The editor is to be congratulated for bringing together such a high-quality collection from a wide range of brilliant scholars.

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Human rights in thick and thin societies: Universality without uniformity

Seth D. Kaplan

Cambridge: Cambridge University Press, 2018, 249 pp. ISBN 978-1108471213, US$110.00.

Seth Kaplan examines the challenges of developing a truly universal human rights system in a culturally diverse world. The book covers well-trodden terrain, reiterating some familiar critiques of international human rights that centre on the gap between the Western culture of individual rights and the non-Western (i.e. everyone else) cultures that feature deeper social and communal ties. Kaplan quite helpfully recasts some of the key terms of these debates, reviving the possibility of a renewed approach to human rights that is universal, flexible and inclusive of different sociocultural perspectives.

Kaplan begins by re-introducing us to the Universal Declaration of Human Rights (UDHR), which he considers an incredible achievement in knitting together a di-

verse range of philosophical perspectives and articulating common goods to be pursued in all human societies. He explores the troubles that have afflicted this original vision of human rights, in particular how it was coopted by a particular moral and theoretical perspective, creating division and polarization between societies. Kaplan then applies his analysis to two case studies: male circumcision in Europe and Rwanda's post-genocide *gacaca* courts. In the final chapter, Kaplan presents a four-step path to restoring a flexible, universal system of human rights, which he believes would emulate the same kind of approach, and generate similar global consensus, as the UDHR.

The central problem that Kaplan identifies is already well known: the global (as opposed to regional) international human rights system is dominated by a particular perspective, a set of concerns, and a group of actors often (and unaffectionately) referred to as "the West." Kaplan borrows a more innovative (and mocking) moniker from the field of cultural psychology to describe the perspective of the dominant group: it is WEIRD (Western, educated, industrialized, rich and democratic). This highly individualistic perspective is weird because it is at odds with the more socio-centric perspective of most of the world's population.

Kaplan links the WEIRD perspective to "thin" social organization. A thin society is one oriented around the autonomy of the individual. Social institutions and their influence in regulating people's lives and behaviours are downplayed and displaced in favour of a more state-centric form of behavioural regulation. A thin perspective on human rights privileges individual choice and political freedoms while downplaying collective and economic integrity. Kaplan describes a thick society, on the other hand, as sociocentric. A much smaller state is required in a thick society because individual behaviour is regulated, and various goods are distributed, through non-state social institutions. Thick societies, contrary to thin ones, take a posture toward human rights that focuses on economic integrity, protection of the family, and support for other cultural and social institutions.

Kaplan argues that the international human rights regime has been co-opted by the thin or WEIRD perspective. The heart of the problem, he says, is that the WEIRD perspective is monistic and universalizing, engendering intolerance of different moral positions within the human rights framework. Consequently, the human rights regime aggressively promotes a uniform, thin organization of social and political goods and institutions. Only one approach to human rights is considered appropriate, and all others are denigrated. The resulting effect is that the international human rights regime now operates as a cultural force, pushing the perspective into socio-cultural contexts that are naturally thick. This is experienced by thick societies as intrusive and has generated a resistance and bitterness that undermine global support for human rights in many parts of the world.

Kaplan argues that we can recover a broad consensus on human rights if we recover the original flexible, universalist vision of the UDHR and re-establish its underlying liberal pluralist philosophy as the theoretical foundation for international human rights. The key ingredient that Kaplan marshals to advance the pluralist view of human rights is the study of cultural psychology, which he believes "can help shift the unsatisfying dynamics that characterise human rights debates because it helps explain why differences are so embedded. It can help construct a framework, based on empirical research, for understanding these differences and how they impact the interpretation, prioritization, and even acceptance of various rights" (9).

Drawing on cultural psychology, Kaplan describes a reciprocal relationship between our inherited socio-cultural reality, our moral conceptual framework, and our psychological make-up. His basic idea is that humans have a certain number of "moral receptors," which can be engaged differently to produce different forms of moral expression. Cultural frameworks reflect – both shaping and being influenced by – these different forms of moral expression. Kaplan argues that the cultural psychological explanations of different moral perspectives – thin/WEIRD and thick/non-WEIRD forms of social organization – are connected to the different approaches taken to human rights throughout the world. This is a fascinating proposition which, despite my own misgivings about cultural psychology, offers some very important food for thought in the human rights debate. It is particularly helpful in turning our attention to the possibility that different, socio-centric approaches to human rights may be just as morally defensible as the dominant Western individualistic approach.

Framing human rights as a matter of morality, rather than as political and legal theory, also brings the value and latent potential of the UDHR into high relief. The current tension regarding human rights is at odds with what Kaplan describes as an earlier consensus that existed when the UDHR was passed. The consensus that surrounded the UDHR was made possible by a text that avoided controversies and used general or vague phraseology. The UDHR represented an agreement on basic principles of human rights that did not offer reasons for why those rights should be valued. This created space for various moral matrices to be engaged in understanding and assenting to the rights outlined. Standing between the plurality of moral matrices throughout the world and the crystallization of rights in various legal instruments, the UDHR is a moral document that does not call for moral consensus. Rather, it provides a point of reference to direct various moral perspectives toward the foundational human rights treaties, offering a way to approach the acknowledgement and fulfilment of legal obligations related to universal human rights from a local moral point of view.

According to Kaplan, the flexible-universalist approach of the UDHR is grounded in liberal pluralism, which recognizes that goods are ultimately incommensurable while also asserting moral agreement on certain core matters that are right and wrong. This provides a path to return the human rights regime to an older, thinner vision of rights, which can act as the skeleton that local actors flesh out in their own terms. Our aspiration should not be to close the gaps between different cultural approaches to human rights, but rather to develop a language that can be used productively by every culture. The goal is to create a "supra-cultural human rights framework that transcend[s] culture and reache[s] into some natural essence of humanity" (214). Dislodging the privilege enjoyed by the thin/WEIRD perspective, along with its monistic universalism, is key to developing greater global consensus regarding human rights.

Kaplan's book certainly contributes to an important and ongoing conversation around human rights and social and cultural diversity. He offers valuable insights into the descriptive and normative value of moral and liberal pluralism to the human rights debate. His description of the global tension in international human rights as the manifestation of a dominant individualist and monistic universalist perspective is compelling, as is his call to dethrone it. Kaplan also exhibits a laudable aspiration to develop greater humility with regard to how human rights are understood and applied (which may be relevant to how we think about domestic human rights laws). This includes recognizing the multiple ways of conceptualizing the good and organizing society in its pursuit. It also includes acknowledging that the human rights regime is only one cog in the wheel of moral thought and action.

On the other hand, I am much less convinced by Kaplan's advocacy of cultural psychology and I suspect that he overstates its importance. To his credit, Kaplan admits that the connection between the cultural-psychological moral matrices, political theories and forms of social organization is not always neat. Undoubtedly, cultural psychology is one way of articulating the idea of moral pluralism. But Kaplan does not make clear what cultural psychology can offer to really advance the pluralist agenda, other than gesturing towards a socio-cultural-psychological basis for acknowledging the possibility of different approaches to human rights.

Great risks accompany over-investing in a theory that biologizes cultural difference, though. One risk is that we might burn the bridges of rational understanding and discussion across differences in speech, thought and other forms of social meaning. Another risk is the possible rise of a socio-cultural "survival of the fittest," which would question why cultural difference should be respected at all. If cultural differences and related moral attitudes are merely the product of socialization – a social accident of time and place – then why prevent a global process of acculturating to the WEIRD perspective? It may be possible to answer these challenges while

still defending cultural psychology's importance. But I feel that it is better to view cultural psychology as a heuristic tool rather than a core part of the social-political-legal theory of human rights. This would relieve Kaplan of the burden of addressing these issues more fulsomely (which he does not do in the book), as well as allowing the reader easier access to the value that his argument offers (by not having to decide whether to support a wholesale acceptance of cultural psychology).

Kaplan's argument does not, in my view, hang on cultural psychology. His basic message is that different societies will have a different relationship to human rights, and that this is okay. He hopes we will come to accept that human rights can be legitimately worked out in different ways and from different points of view in these different social contexts. Ultimately, Kaplan argues, human rights will be more effective, and will enjoy greater global (and pan-cultural) support, if the language of human rights is scaled back and greater attention is paid to thick social factors. That's the whole basis of the UDHR, and I believe this idea is worth recovering today.

Overall, Kaplan provides a useful contribution to the ongoing discussion about human rights and cultural diversity. The reader will get the most out of this book by approaching it with an eye to understand what a renewed human rights system, based on global consensus, might look like. Kaplan takes a step back and finds a different line of sight into some well-developed questions. The book is sure to spark further conversation, as it does not offer definitive answers to some of the big questions it grapples with. Instead, Kaplan invites us to take a fresh look and consider what the future of human rights might look like if we do. He leaves it up to us to decide where things will go from there.

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Articles of faith: Religion, secularism and the Indian Supreme Court (expanded edition)

Ronojoy Sen

New Delhi: Oxford University Press, 2019, 304 pp., ISBN 978-0199489367, US$25.00.

This book presents a careful analysis of Indian Supreme Court judgements on religion. It sets out to understand the jurisprudence on religion in the context of Indian secularism, highlighting the influence of high modernism and rationalism on judicial discourse concerning religious matters in India. According to Sen, examining the constitutional and legal foundations of the place of religion in India is an effective way to study its relationship with the state.

Sen ventures into complex and controversial issues concerning the judicial interpretation of religion. He examines court rulings on the definition of Hinduism, the use of religion to appeal for votes in elections, essential religious practices, minority rights and anti-conversion laws.

Sen quotes the view of Rajeev Dhavan and Fali Nariman that the judges of the Indian Supreme Court wield power greater than that of a high priest, as they have virtually assumed the theological authority to determine which tenets of a faith are "essential" to any faith. Sen also notes that the court is probably the only one in the history of humankind to have asserted the power of judicial review over amendments to the Constitution. Sen establishes that popular faith in the judiciary is higher than that in other state institutions, based on various recent surveys.

Sen observes that the landmark *Bommai* judgement challenging the power of the central government and the president to dismiss a state government contains the most detailed explication of the Supreme Court's views on secularism. In this judgement six of the nine judges deciding the case had varied views on the concept of secularism, reflecting a lack of consensus within the court on what secularism entails. Sen then examines Dhavan's description of secularism, the reformist agenda, and the Constituent Assembly debates, and he then considers how India should be imagined: as a culturally homogeneous political community of equal but unmarked citizens or as a culturally diverse political community of equal but marked citizens?

Sen briefly discusses the genealogy of Hinduism and two of its strands: "inclusivist Hinduism" propounded by Swami Vivekananda and "exclusivist Hinduism" associated with Sarvakar, the founder of contemporary Hindu nationalism and the notion of Hindutva (Hinduness). He highlights the 1966 *Satsangi* case where the Supreme Court ruled that if Hinduism does not appear to satisfy the narrow traditional feature of a religion or creed, then it may broadly be described as a way of life and nothing more. Sen touches on the impact of this case and its way-of-life metaphor on the judiciary, which lasted for several years, including the notable Hindutva rulings in 1997 by Justice Verma, on the legitimacy of appealing to Hindutva during election campaigns. Verma conflated an inclusivist discourse on Hinduism with the exclusivist version propounded by Hindu nationalists to conclude that Hindutva could be understood as a synonym for "Indianisation," or the development of a uniform culture by obliterating the differences between all cultures co-existing in the country. The Hindu nationalists were jubilant with the Hindutva ruling, and the RSS, a Hindu nationalist organization, claimed that the Supreme Court had fully endorsed the concept of Hindutva, which the nationalist Bharatiya Janata Party (BJP) has been propounding since its inception. In fact, the BJP referred to this judgement in its election manifesto in 1999.

According to Sen, the court has become an inadvertent ally of the Hindu nationalists in their aggressive demand for homogenization and uniformity. This has become an illustration of the influence of values and ideology on judicial decision-making and of the displacement of the idea of law as a "body of immutable principles" by an emphasis on the role of the judge.

The court's uneasiness with legal pluralism comes across clearly in personal law cases. For example, its rulings on Muslim personal law have almost always been premised on legal universalism.

Sen refers to the *Stanislaus* judgement of 1977, saying that the Supreme Court came up with a peculiar, impoverished version of the right to propagate one's faith which interpreted precluded conversion as an infringement on freedom of conscience. The *Stanislaus* decision, which upheld acts limiting freedom of religion that had been passed in two Indian states, is described as "clearly wrong" and a travesty. Sen acknowledges the upsurge in violence against Christians, pinpointing the ghastly killing of Australian missionary Graham Staines and his two sons in Odisha in 1999 as reflecting the rise in violence aimed at preventing conversions to Christianity. Less than a decade later, the 2008 Kandhamal violence in Odisha showed the growing hatred and intolerance against Christians. According to Sen, the court rulings give Hindus considerable disincentives to exit from Hinduism, whereas it is easier for converts to re-enter the fold of Hinduism. Appeals for reservation[1] of Dalit Christian and Muslims were rejected by courts citing the Constitution (Scheduled Castes) Order of 1950, which expressly prohibits reservation benefits for anyone other than Hindus, Sikhs and Buddhists. In this regard, Sen quotes Dhavan and Nariman again: "The Supreme Court's approach to minority rights and institutions has been far from consistent."

Regarding the Uniform Civil Code, Sen relies on Rudolph's view that the code has no single meaning but can be characterised as a "multivalent signifier." For Hindu nationalists, it is a way to eliminate cultural difference. Sen concludes that it is time for the court to realize, in the words of Professor Werner Menski, that "The one-sided political motivated quest for truly uniform family law for India is, several decades after the Constitution was promulgated, perhaps no longer a realistic aim. It has been defeated by the persistence of traditional Indian preferences for diversity and flexibility, and by the mere size of the land and the diversity within its population."

Sen discusses the role of law and judges by evaluating court decisions from a rationalist perspective and also by applying the standards set by jurists such as Oliver Wendell Holmes.

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[1] Reservation is a concession in law for the benefit of socially and economically backward classes in matters of admission to educational institutions and government jobs. The castes and tribes are mentioned in two schedules to the Constitution and are often referred to as Scheduled Castes and Scheduled Tribes.

The book focuses on Articles 25 to 30 of the Indian Constitution on religious freedom and minority rights, which Sen aptly calls "articles of faith." Sen's critical analysis of court judgements appropriately takes into account historical and socio-political factors and makes complex issues understandable for the reader. The book is comprehensively researched and relevant to our times, particularly as the question of the constitutional validity of the Constitution (Scheduled Castes) Order of 1950 is pending adjudication. On 11 May 2020, the Supreme Court of India ruled that a nine-judge bench should be constituted to decide on the interplay between the freedom of religion under Articles 25 and 26 of the Constitution and the right to equality, among other questions. In this context, understanding jurisprudence on religion in the context of Indian secularism is indeed a relevant and hotly disputed issue.

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Corporate spirit: Religion and the rise of the modern corporation

Amanda Porterfield

New York, NY: Oxford University Press, 2018, 204 pp., ISBN 978-0199372652, US$36.95.

It takes both courage and confidence to tackle a thesis as broad as the one which Professor Porterfield frames in *Corporate Spirit*, and the author lacks neither. She sets out to write the history of the parallel developments of Christianity and corporate law over twenty centuries, finding what she calls a corporate spirit in Christianity as early as the apostle Paul.

In the hands of a less able scholar, this topic would require a multi-volume account filling a thousand pages or more. Porterfield manages a brisk but unhurried work of barely 200 pages. Even at that, it reads more like an extended essay than a monograph.

The book is divided into two parts. Part one (about one-third of the total text) discusses the twinned evolution of churches and corporate entities from Paul's time through the British Civil War. Part two sketches the development of corporate organization alongside religious evolution in colonial and post-colonial America.

Part one, which emphasizes Christianity and the evolution of the corporate form in Roman antiquity and medieval Europe, identifies the clearest linkages between church and corporations. First Corinthians explicitly depicts the church in corporate terms: many members, each with their own purpose and operating in coopera-

tion with the others to form the body of Christ. The image of society as a body did not originate with Paul, but his influence was singular: "In its aspiration to holistic perfection, the Pauline body offered a model for social cooperation as well as individual discipline" (10). The effect of corporate cooperation and discipline served as an important impetus for the expansion of the early church organized under episcopal authority, Porterfield argues.

Later, Paul's theology of the mystical body gained additional vitality in association with the Eucharist, stimulating new legal thinking about the nature of corporate membership. In the Middle Ages, charters were granted to cities, churches and monastic communities and the rights of members began to be defined. Membership in guilds, too, gave rise to particular rights and civil liberties. When corruption and abuse became problematic, doctrines of corporate accountability were introduced in response. These developments underscored both commerce and church. Indeed, the secular and religious aspects of community life were much more unified during the centuries in which their developments paralleled one another. Canon law informed civil law and vice versa.

Part two transports the reader across the Atlantic and the development of churches and companies becomes a little less parallel. Porterfield shifts her focus away from the evolution of corporate and church law and considers Christianity and commerce, more broadly defined, in America. In this section, the cross-pollination between faith entities and commercial ones declines, but can still be observed from time to time.

Porterfield follows an outline of the early role of chartered corporations, such as the Massachusetts Bay Company, with a narration of the expansion of slavery in the nineteenth century. As is well known, slavery proponents deployed Pauline corporatism to claim biblical support for the ownership of human beings: "Pro-slavery Christians invoked Pauline teachings about the trust that bound unequal persons together in the body of Christ" (110). Slavery opponents, meanwhile, made their own biblical allusions. The concept of personhood ultimately prevailed with the abolition of slavery and the Thirteenth Amendment to the U.S. Constitution.

The sanctification and elevation of personhood also drove responses to unrestrained mechanization and unsafe workplace conditions. Gradually, the safety of workers began to receive attention. Yet personhood simultaneously fuelled corporate expansion. Corporations themselves began to gain civil rights of their own as legal persons. Personhood as a moral centrepiece therefore underscored civil and worker rights as well as corporate augmentation.

The final chapter of *Corporate Spirit* unpacks television evangelists and the Rev. Billy Graham in opposition to two corporations (Enron and AIG) marked by infamous scandals Here, Porterfield identifies a new "free-market fundamentalism"

(179) which cultivates faith (of a sort) in the business drive to dominate the marketplace and maximize shareholder value. Government responses to widespread corporate dysfunction aim to restore faith in markets. Enron failed, the narrative contends, "only when investors, analysts, and employees finally lost faith" (176). Meanwhile, contemporary theology often recharacterizes God not so much as governor and judge, but as life coach. Today, Porterfield concludes, megachurches and televangelists engender "a gestalt of aggressive confidence-building that complemented the ascendance of consumer choice, shareholder value, and bold financial schemes" (172).

Porterfield's book is readable in the best sense of the word. Given its impressive scope, it necessarily skims over a number of historical themes. However, her prose is judicious and her conclusions are reasoned and measured. This is an exceptional book.

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