

Law and Religion in the Commonwealth: The Evolution of Case Law

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‘[This is the] prevalent mood of modern secularism, sidelining religion into the status of little more than a hobby or leisure pursuit.’ So says Mark Hill KC in discussing the House of Lords’ approach to defining the role of the Church of England *vis-à-vis* the state. A consistent theme throughout this collection of essays is the extent to which activities that are emanations of religious belief—provision of health care, care for the poor, education, participation in civic affairs—but which have now been taken up, very late in the human story, by the state or non-religious bodies, can truly be considered examples of the free exercise of religion. Is religion limited to praying on Fridays in a mosque, or attending Choral Evensong, not reaching beyond the threshold of the place of divine worship? Or does the state—through its courts—recognise that the expression of religious belief extends to all parts of the human experience?

It might be thought—particularly in the West—that the secularist (as opposed to secular) state is on the march and religion is on the retreat. This collection blows the whistle on that idea. It shows that it is not necessarily true in the West. There are some societies in the Commonwealth of Nations that are deeply religious, and there is no realistic prospect of any change to that situation. There are others which are suffused, both in their society and their laws, with religion and religiosity, but are trying to resist a nascent secularism. In any event, the movement is not all one way.

The utility of a collection of essays organised around the twin themes of case law and the Commonwealth is not immediately apparent. I harboured scepticism at the outset. The Commonwealth is a disparate group of countries, not all of which apply the common law. Some members are subject to supranational courts, as Russell Sandberg explains with respect to the European Court of Human Rights’ decision in *Eweida v United Kingdom*. Happily, this well-selected and well-balanced collection dispels any such doubt. It brings together viewpoints from across the globe, addressing many of the facets of the interactions between law and religion. Consistent themes emerge, from societies in wildly different conditions.

It need hardly be said that religion (or its absence) is a fundamental part of the human condition. It is an organising principle—to a greater or lesser extent—for billions of human beings. Law, simultaneously, is all-pervasive, affecting the daily behaviour of the 2.5 billion inhabitants of the Commonwealth. They are bound to interact; sometimes on a collision course, and other times in a significant degree of collaboration and mutual reinforcement. These essays demonstrate how modern states continue to struggle with how to deal with religion—which existed before they did and can be expected to outlast them.

Analysis through cases is an obvious approach. Cases are where the legal rubber hits the road. Claims are pleaded, evidence adduced, submissions made, and a decision issued. The fates of the parties are changed. Many others' futures are affected. Cases have a real-world attractiveness, with real outcomes.

But to speak of 'case law' is not to speak of the common law as embodied in reasons for judgment. All but one of the cases examined in this book consider the operation of legislation, whether constitutional or ordinary statute.

The Commonwealth presents a rich diversity of societies: the wealthy and the poor, continental landmasses to tiny islands, the deeply religious and the aggressively atheist. Some have established churches, others forbid establishment. All five major religious traditions exist in the Commonwealth.

That diversity serves to show the difference in magnitude of the problems faced by societies. For example, in the United Kingdom and Australia, appellate courts have been concerned with the provision of cakes and campsites to homosexual persons. In Nigeria, its apex court considered the lawfulness of summary execution for blasphemy against the Prophet Mohammed.

It is in the midst of that rich diversity that consistent themes emerge:

Defining religion. Secular courts have long struggled with defining what a religion is, what its tenets are, and the obligations it imposes. As Renae Barker explains, the High Court of Australia has provided useful yardsticks to determine whether a belief system amounts to a religion, in holding that Scientology was a religion. In Malaysia, its Federal Court decided what name the Islamic God has, contrary to centuries of theological aversion from that issue.

Content of religion and religious obligation. More difficult is determining what falls within and without the scope of religious practice. Judges in secular courts are perhaps ill-equipped to decide whether or not a certain obligation is demanded by a religion, or has some other obligation. The Supreme Court of Canada had to decide whether Sunday rest was a Christian obligation, or whether it was just a good idea for all people. In some ways, Christianity has been the victim of its own success. For example, the Christian church was the dominant provider of health care for many centuries. The state (at least in the West) only entered the field in the twentieth century. Is health care therefore an emanation of Christian belief? True it is that health care can be provided for reasons other than belief in Christianity; but it is equally true that Christian churches provide health care because it is their mission to do so, not out of some desire to compete in the health care market.

Religious liberty and anti-discrimination law. A number of the chapters in this book analyse the balance which is sought to be struck between preserving religious liberty and avoiding discrimination. Ian Leigh explains the Northern Irish 'gay cake' case: *Lee v Ashers Baking Co*. The balance between the baker's

right to refuse to promote gay marriage, and a gay person's right to be discriminated against is explained as a false dichotomy. He makes the important point that to compel a person to promote a political message contrary to their own views (whether religious or not) is the antithesis of a liberal democracy. In contrast, the Victorian Court of Appeal fell on the other side of the line: a church-owned campsite could be compelled to support speech which cut across its own religious views of human sexual relationships. Iain Benson explains how the South African Constitutional Court, in *Fourie*, took a much richer view of religion and law, than a mere trade-off of rights. It recognised that religion forms an essential part of many citizens' lives, but that in a liberal society, those citizens must co-exist with others who do not share their beliefs. The court must work to foster such co-existence. To do otherwise would be enforce uniformity on all citizens, which runs counter to the diversity which liberalism seeks to foster. Any balancing of interests must be grounded in tolerance and mutual respect.

State support for religion. Umar Rashid explains how the Supreme Court of Pakistan has taken on the role of promoting the Islamisation of Pakistan through its laws, by allowing itself to review any government decision by acting *suo motu*, i.e. without any party petitioning for relief. The judges of that court do sometimes conceive that they have a divine mandate, given that Islamic principles saturate the Pakistani constitution. Dian AH Shah shows how Malaysia's states enact laws to reflect *syariah*, but that the federal parliament can impose nationally consistent secular laws.

The Australian Constitution forbids the federal parliament from establishing any religion. Luke Beck criticises the High Court's construction of that provision, as it gives very little content to the prohibition. He explores the concept of establishment, and whether the funding of religious schools amounts to a breach of the prohibition on establishment.

The collection, once assembled, would have benefited from a consistency edit. There were spelling errors ('Judeo-Christin'). The citation of cases was not uniform: sometimes authorised reports were used, sometimes neutral citations, and sometimes both. Judicial titles were confusingly mixed and matched ('Judge Smith', 'Justice Smith', 'Smith J', all referring to the same judge). Years for cases were wrong.

The index is not very helpful. Its headwords are largely proper nouns. Very few subjects are included. It is more of a concordance than an index. In an essay collection, indexes are very important because they can helpfully draw together the same subject expressed across multiple essays.

This collection will have great utility for practitioners. The book shows that courts do not draw on cases from other jurisdictions as much as they could, given they consider very similar issues. This book will assist practitioners to bring foreign cases to the attention of courts. It would also be of great help to

scholars of law, religion, or both, because it compares and contrasts the approaches taken to these issues across many different cultural and legal settings. Given the centrality of religion and law to any society, any person of goodwill would benefit from this book.

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