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Workshop 6

Religion, Law And Democracy

directed by

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Workshop abstract

Liberal Democratic Theory until recently had relatively little to say about the role of religion in democracy. In essence, it recommended the strict institutional separation of religion and state, and the relegation of religious identity to the private sphere. However, most consolidated democracies in fact entertain relations of cooperation rather than strict separation between religion and state, and religious identities can hardly be isolated from the formulation of public preferences and the process of legislation.

The complex relationships between religion and state are under-theorized and under-researched in the existing social science literature. Even though religious law and religion-state relations is a well-defined field in legal studies in many countries, the reception of this literature in political science and sociology is rather limited, and the implications of state-religion relations for the quality of democracy under-examined. The limitations of the existing literature stand out against the growing number of empirical political and judicial conflicts over the appropriate regulation of religious institutions and practices in emerging as well consolidated democracies. Such conflicts characterize religious politics in particular at the moment in France, Lebanon, Italy, Turkey, Spain, Israel and other states dealing with significant demographic changes or rapidly changing worldviews. The workshop will provide the opportunity for researchers trained in Political Science, Law, Sociology, Religion and History to advance the theoretical as well as the comparative discussion with regard to the nexus between religion and law in democratic and democratizing settings.

Workshop description

While until only a decade ago many social scientists predicted the demise of religion as a relevant category in 21st century politics – the *Economist* even published an “obituary of God” in its millennium edition – religion has remained a phenomenon of large and growing significance, affecting legislation and institutional design in emerging, as well as established democracies. New democracies, particularly in Muslim-majority societies such as Turkey, Indonesia, Bosnia and Senegal, are grappling with the appropriate relationship between religious traditions and the secular institutions of the modern state. Disputes over state regulation of religion have recently stirred also long-standing democracies, where legislatures are struggling to accommodate the clashing demands of different religious and secular groups within their societies. The headscarf debate in France and Turkey, debates about the nature of religious instruction in public schools in Germany and Italy, about home schooling in the United States, and about same-sex marriage in the United States, Italy and Greece are cases in point. In some countries, for example in India and Israel, the conflict over state regulation of religious practices has escalated onto the institutional level. The Supreme Courts of Israel and India have been struggling to guard secular and liberal principles vis-à-vis legislatures whose majorities are inclined to pass religiously-inspired legislation, or to pass administrative law that expands the jurisdiction of local religious courts.

Democratic Theory until recently had relatively little to say about the role of religion in democracy. By and large, the doctrine of political liberalism was considered normatively superior in accommodating religion and religious differences in a democratic society. In essence, political liberalism calls for the separation between particular cultural or religious identities of individual members of society on the one hand, and their commonly shared civic identity as citizens on the other. Religious identity, according to John Rawls, should be limited to the private sphere of individual members of society. There is no room for religious expression in the public sphere of the polity, and hence, Rawls argued, it should be taken “off the agenda”.¹ Jürgen Habermas suggested that constitutional patriotism would over time replace other social bases of cohesion, such as religion and nationalism.² Such liberal and proceduralist expectations were sustained by a secularization thesis that postulated religion would soon disappear from the social landscape of developed democratic nations and therefore would become a non-issue for democratic politics.^{3,4} According to this doctrine, healthy democracy rests on an institutional separation as strictly as possible between religion and state.⁵

¹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 151. For his later qualifications, see John Rawls, “The Idea of Public Reason Revisited”, *The University of Chicago Law Review*, Vol. 64, No. 3 (Summer, 1997), pp. 765-807.

² Jürgen Habermas, “Citizenship and National Identity,” in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1996).

³ For sure, Habermas’ more recent writing does accommodate for comprehensive doctrines to be invoked in public reasoning. Yet his differentiation between discourses in the public sphere vis-à-vis those in legislatures where religious reasons may not enter deliberations necessarily weakens his notion of democratic representation. See Jürgen Habermas, “Religion in the Public Sphere” in *European Journal of Philosophy*, Vol. 14, 1, pp. 1-25.

⁴ For a thorough critique of the secularization thesis, see José Casanova, *Public Religion in the Modern World* (University of Chicago Press, 1994).

⁵ The 1947 US Supreme Court decision on *Board of Education vs. Everson* rendered credence to this view by interpreting the U.S. constitution’s establishment clause as a “wall of separation” – a much stricter principle than non-establishment would require. For a recent re-evaluation of the U.S. and French models of strict

The empirical realities in democratized and democratizing states in Europe and around the world seem to require a more complex and subtle understanding of the relationship between religion and law in democratic states than is currently offered by most approaches in democratic theory. Most European and Latin American democracies as well as India and Japan in fact entertain relations of *cooperation* rather than strict *separation* between religion and state. Such cooperation takes place in the areas of education (state funding for religious private schools or for religious instruction in public schools⁶), public health (hospitals, clinics and retirement homes are in many states administered by religious entities), taxes (several European states collect religion tax⁷) and personal status law (state recognition of religious marriage, for example⁸).

These complex relationships between religion and state as they are regulated by law, often constitutional law, are under-theorized and under-researched in the extant social science literature. Even though religious law and religion-state relations is a well-defined field in legal studies in many countries, the reception of this literature in social science is limited, and the implications of religion-state relations for the quality of democracy under-examined. Present analyses tend to focus on particular cases or countries,⁹ and rarely examine systematically and comparatively the relationship between religious or secular law and democracy across a variety of Muslim-majority and Christian-majority backgrounds as well as Israel. Among the few exceptions are Jonathan Fox's quantitative overview on separation of religion and state in existing democracies,¹⁰ as well as Gad Barzilai's 2007 edited volume *Law and Religion*, which represents a comparative perspective on the multifaceted approaches of religion in and towards law.¹¹

We hope that our workshop will provide an opportunity to advance the theoretical as well as the comparative discussion with regard to the nexus between religion and law in democratic and democratizing settings. In particular, we would like to examine these links in conflicting contexts, where deep-seated disagreements exist between competing perspectives on the appropriate relationship between religion and the state, such as appears to be the case particularly in France (headscarf affair), Turkey (AKP and consequences of decreasing state regulation of religion), Israel

secularism and the conceptualization of an alternative, see Veit Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (Amsterdam University Press, 2008).

⁶ In 'secular' France, for example, teachers of religious schools qualify for state support and as much as a fifth of the total educational budget goes to private Catholic schools. In Spain, private Catholic schools are 70% financed by the state. In England, non-denominational religious education is mandatory in all state schools and the Church of England enjoys veto power over the construction of local 'agreed syllabuses.' For cases of state funding and regulation of religious education in Europe, see, for instance, John Madeley and Zolt Enyedi (eds.), *Church and State in Contemporary Europe: The Chimera of Neutrality*. Frank Cass, 2003.

⁷ In Finland, Spain, Italy and Germany. In several European states, religious communities receive extra tax breaks. *Ibid*

⁸ For example in the UK, Italy and in Spain.

⁹ For example Gary Jacobsohn *The Wheel of Law* (Princeton University Press, 2003); Rajeev Bhargava (ed.) *Secularism and Its Critics* (Oxford University Press, 1998); Tim Byrnes and Peter Katzenstein (eds.), *Religion in the Expanding Europe* (Cambridge University Press, 2006), and Lucian N. Leustean and John Madeley (eds.), *Religion, Politics and Law in the European Union*, London: Routledge, forthcoming 2009; also published as a special issue of the journal *Religion, State and Society*, forthcoming 2009, 37 (1 & 2).

¹⁰ Jonathan Fox, "Do Democracies have Separation of Religion and State?" in *Canadian Journal of Political Science*, 40 (01), 1-2, 2007. See also Jonathan, *A World Survey of Religion and the State*, (Cambridge University Press, 2008).

¹¹ Gad Barzilai (ed.), *Law and Religion*, (Aldershot: Ashgate Publishing, 2007).

and India (scope of personal status law), the US (home-schooling, US AID participation in the faith based initiative), Indonesia (secular constitutional provisions versus local sharia-inspired bylaws), for example.

Type of Papers

The workshop aims at bringing together political and social scientists, and scholars of law, history and religion, with a strong research focus on comparative religion-state relations, institutional design, religious law and democratic theory. It is designed to attract both single-case and comparative work that is either theoretically informed or theory-generating. We welcome papers that examine the nexus between religion, law and democracy from various religious points of view in either fully democratized, or democratically consolidating states. In particular, we invite papers that relate to one or several of the following questions:

1. *State Regulation of Religion:* How do democracies regulate religion through law? Are there democratic limits to religious provisions in public law (e.g. building regulations for construction of churches, mosques, etc.) and private law (e.g. on divorce, polygamy, inheritance)? Can we discern unequivocal criteria that demarcate at what point the cooperation between religion and state violates liberal democracy?
2. *Legal Recognition of Religious Communities:* How do policies as to the legal and political recognition of religious communities in extant democracies differ? How does the recognition of religious particularity in law affect universal citizenship? Is it possible to discern optimal constitutional regulations on the politico-legal involvement of religious authorities or do these fundamentally differ from religion to religion? Here case studies of mixed systems (such as in India, Israel and, to some extent, Canada) where dual legal systems allow for niches of religious personal status law will be particularly instructive.
3. *The Nature of Law:* Many laws stemming from religious injunctions have been secularized over time. At what point do we stop thinking of them as embodying a religious ethos, and simply see them as universal secular laws of the state? Can the religious roots of such laws be re-activated in the face of increasing politicization of religious and secular identities?
4. *The Role of the Courts:* What is or what should be the role of the judiciary under conditions of deep societal disagreement about the appropriate relationship between religion and state institutions? To what extent does administrative law (e.g. the composition of the Court and the procedures of Justices appointment, the demarcation between personal status and public law, between national framework and local legislation) affect the balances between existing institutions?
5. *Supranational Legislation:* What is the role of supra-national organizations in effecting religious or secular legislation in democratic countries? Particularly, what is the role of the EU in the context of growing clashes over religious issues in its member states? To which degree have the international/regional human rights systems (UN, Council of Europe, etc.) been involved in the question of religion-state relations?