

GOD AND THE SECULAR LEGAL SYSTEM

This timely book offers a theistic approach to secular legal systems and demonstrates that these systems are neither agnostic nor atheist. Critical but succinct in its approach, this book focuses on an extensive range of liberal legal approaches to religious and moral issues and provides critical scrutiny from a secular perspective. Expertly written by a leading scholar, the book offers a rare combination of profundity of ideas and simplicity of expression. It is a ringing defense of the theistic conception of secular legal systems and an uncompromising attack on the agnostic and atheist conception.

Rafael Domingo is Professor of Law and ICS Research Professor at the University of Navarra in Spain, where he served as Dean of the Law School, and Francisco de Vitoria Senior Fellow at the Center for the Study of Law and Religion at Emory University. He has lectured throughout the world and published more than ten books on legal history, comparative law, and legal theory, including *The New Global Law* (Cambridge University Press, 2010).

LAW AND CHRISTIANITY

Series Editor

John Witte, Jr., Emory University

Editorial Board

Nigel Biggar, University of Oxford
 Marta Cartabia, Italian Constitutional Court / University of Milan
 Sarah Coakley, University of Cambridge Norman Doe, Cardiff University
 Brian Ferme, Marcianum, Venice
 Richard W. Garnett, University of Notre Dame
 Robert P. George, Princeton University
 Mary Ann Glendon, Harvard University
 Kent Greenawalt, Columbia University
 Robin Griffith-Jones, the Temple, the Inns of Court
 R.H. Helmholz, University of Chicago
 Mark Hill, the Inns of Court / Cardiff University
 Wolfgang Huber, Bishop Emeritus, United Protestant Church of Germany /
 Universities of Heidelberg, Berlin, and Stellenbosch
 Michael W. McConnell, Stanford University
 John McGuckin, Columbia University
 Mark A. Noll, University of Notre Dame
 Michael Welker, University of Heidelberg

The Law and Christianity series publishes cutting-edge work on Catholic, Protestant, and Orthodox Christian contributions to public, private, penal, and procedural law and legal theory. The series aims to promote deep Christian reflection by leading scholars on the fundamentals of law and politics, to build further ecumenical legal understanding across Christian denominations, and to link and amplify the diverse and sometimes isolated Christian legal voices and visions at work in the academy. Works collected by the series include groundbreaking monographs, historical and thematic anthologies, and translations by leading scholars around the globe.

Books in the Series

Agape, Justice, and Law
 Robert F. Cochran and Zachary R. Calo
Great Christian Jurists In English History
 R.H. Helmholz and Mark Hill QC
Calvin's Political Theology and the Public Engagement of the Church
 Matthew J. Tuininga
God and the Secular Legal System
 Rafael Domingo
How Marriage Became One of the Sacraments
 Philip Reynolds

Cambridge University Press
978-1-107-14731-7 — God and the Secular Legal System
Rafael Domingo
Frontmatter
[More Information](#)

Christianity and Freedom
edited by Timothy Samuel Shah and Allen D. Hertzke
The Distinctiveness of Religion in American Law
Kathleen A. Brady
Pope Benedict XVI's Legal Thought
Marta Cartabia and Andrea Simoncini
The Western Case for Monogamy Over Polygamy
John Witte

Cambridge University Press
978-1-107-14731-7 — God and the Secular Legal System
Rafael Domingo
Frontmatter
[More Information](#)

God and the Secular Legal System

RAFAEL DOMINGO

Emory University / University of Navarra



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-107-14731-7 — God and the Secular Legal System
Rafael Domingo
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

32 Avenue of the Americas, New York NY 10013

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107147317

© Rafael Domingo 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

A catalogue record for this publication is available from the British Library.

ISBN 978-1-107-14731-7 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-107-14731-7 — God and the Secular Legal System
Rafael Domingo
Frontmatter
[More Information](#)

To my parents

Contents

| | |
|---|----------------|
| <i>Foreword</i> , John Witte, Jr. | <i>page</i> xi |
| Introduction | 1 |
| 1 God as a Metalegal Concept | 23 |
| 1. Introduction | 23 |
| 2. God and Gods | 25 |
| 3. Metalegal Concepts | 29 |
| 4. God as a Metalegal Concept | 32 |
| 5. The Legal Recognition of God as a Metalegal Concept | 44 |
| 6. The Religious Objection | 49 |
| 7. The Dworkinian Objection | 56 |
| 8. The Moral Objection | 60 |
| 9. The Legal Objection | 63 |
| 10. Religion, not God, as a Matter of Toleration | 65 |
| 11. Recovering the Dialogue Between Theology and Jurisprudence | 68 |
| 12. Conclusion | 71 |
| 2 Religion as a Constitutional Limit of the Secular Legal System | 73 |
| 1. Introduction | 73 |
| 2. Legal Identification of Religion | 74 |
| 3. Suprarationality as the Ultimate Justification of the Legal Protection of Religion | 79 |
| 4. The Exclusion of Suprarational Acts from the Secular Legal System | 82 |
| 5. Tolerating Suprarational Law | 86 |

| | |
|--|------------|
| 6. The Suprarational Argument as an Irrelevant Legal Argument | 88 |
| 7. Structural Dualism as a Constitutional Limit of the Secular Legal System | 92 |
| 8. The Election of the Dualistic Model as a Constitutional Decision | 98 |
| 9. Autonomy and Independence of Religious Communities | 104 |
| 10. Religious Equality and Equality of Religions: the False Neutrality | 107 |
| 11. The Right to Religion | 113 |
| 12. The Religious Exception | 117 |
| 13. Conclusion | 120 |
| 3 Conscience as a Private Limit of the Secular Legal System | 122 |
| 1. Introduction | 122 |
| 2. Significance of Conscience | 125 |
| 3. Conscience and Dignity | 131 |
| 4. Public Morality Versus Private Morality | 133 |
| 5. Conscience as a Private Moral Limit of the Secular Legal System | 136 |
| 6. Freedom of Conscience: between Freedom of Thought and Freedom of Religion | 138 |
| 7. A Right to Religious and Moral Freedom? | 142 |
| 8. Ethical Independence Versus Moral Autonomy | 146 |
| 9. Moral Accommodation Versus Religious Toleration | 151 |
| 10. Privilege of Abstention and Conscientious Refusal | 155 |
| 11. Privilege of Abstention Versus Religious Exception | 161 |
| 12. Conclusion | 164 |
| Concluding Reflections | 166 |
| <i>Index</i> | 171 |

Foreword

In his monumental tome, *On the Law of War and Peace* (1625), Dutch Protestant jurist Hugo Grotius ventured the (in)famous “hypothesis” that the law of nature would exist “even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him.” For Grotius, this was not a declaration of impiety, but a call for respect and reverence for God even in the midst of the bitter religious wars that were tearing his Christian world apart. For Grotius it was impious for any one state to pretend that it had fully captured divine truth in its law, and to kill and persecute others for taking contrary religious views. God’s truth is above the law and politics of any human community, he insisted, and wars of religion are an insult to God. It was likewise impious for any antagonist, even in the midst of a just war, to defy the natural “law written on the heart” that guided them on the paths of virtue. The law of nature teaches not only war but also peace, not only retribution but also reconciliation. Regardless of what any state law and policy might require, the natural law sets limits on human behavior even in wars between the bitterest enemies.

In this short and provocative treatise, Spanish Catholic jurist Rafael Domingo articulates a comparable need to bracket God from the positive law of any state – again out of respect for God and God’s law, in all the different ways that God is understood today. For Domingo, respect for God requires a state and community to recognize an antecedent or transcendent source of law and rights that lies beyond the positive laws of the state. A state may acknowledge God in ceremonies, symbols, and political iconography that accord with local beliefs. It may acknowledge that rights and duties, and moral principles and practices of life are rooted in “the law of nature and nature’s God.” But beyond that, the state cannot and should not go. God is a “metalegal concept,” Professor Domingo insists, who is above the formulations of any state or any political legal order. The state has enormous power and responsibility in secular matters, but it has no jurisdiction, no power to “declare the law” (*jus dicere*)

for the religious sphere. Religion is left to the conscience of each individual and to the confessions of peaceable religious communities.

In our multireligious world, the law of the modern state must be secular, Professor Domingo insists. This means that states should end traditional forms of religious establishment – whether Christian, Jewish, Muslim, Hindu, Confucian, Shinto, or otherwise. The state has no business dictating, defining, or favoring any particular religious doctrine, liturgy, text, or canon. It has no business involving itself in the polity, property, or personnel of any religious body. It has no business coercing its subjects to practice or fund religion, or discriminating in favor of one religion and against another. For the state to reduce God and religion to a simple political category or a legal command is ultimately a form of political idolatry, even blasphemy. For the state to dictate to private consciences or to religious authorities how they should be or act religiously is ultimately an invasion of the sovereignty of God. Traditional *religious* approaches to law and politics, while they may have been popular in the second millennium, cannot be sustained.

Modern *secularist* approaches to religion are equally problematic, however, Professor Domingo insists. The modern state must not establish a secularist ideology – whether liberalism, socialism, communism, or fascism – that stands in the place of a traditional religion and commands comparable devotion and allegiance in violation of the conscience of the individual, the authority of religious communities, and the ultimate sovereignty of God. Stalinist Russia, Maoist China, Nazi Germany, Mussolini's Italy, Pinochet's Chile, Pol Pot's Cambodia, are only a few of the many examples of modern totalitarian states that have arrogated to themselves this kind of transcendent power.

But less obvious versions of this kind of state excess are also at hand in current aggressive policies of *laïcité* in modern-day France and elsewhere in Europe or policies of secularization in modern-day America and Canada. These state policies, too, ultimately fail to respect God, religion, and conscience. They sometimes catechize versions of “liberty, equality, and fraternity” that can run roughshod over religious ideas of responsibility, difference, and community. They sometimes teach nationalism, patriotism, and cultural allegiance that make idols of a state, people, and ways of life. They sometimes protect, promote, and prescribe fundamental ideas about sex, marriage, and family life that upend millennia-long patterns of sexual morality taught by religious communities. But more troubling, still, is that these secularists often adopt policies that treat religion as just too dangerous, divisive, and diverse in its demands to be accorded any kind of special protection or accommodation. Freedom of conscience claims, the argument goes, unfairly demand the right to be a law unto oneself, to the detriment of general laws and to the endangerment of other people's fundamental rights and legitimate interests. Institutional religious autonomy is too often just a special cover for abuses of power and forms of prejudice that should not be countenanced in any organization – religious or not. Religion should be viewed as just another category of liberty or association, with no more

preference or privilege than its secular counterparts. Religion should be treated as just another form of expression that must play by the rules of rational democratic deliberation just like everyone else.

Professor Domingo works hard in this book to counter these new “secularist approaches,” to law and politics as much as the old “religious approaches.” He promotes what he calls “a secular theistic approach” that separates religion and state, that accommodates all sincere claims of conscience, and that defers to the inner workings of peaceable religious organizations that remain true to their callings. His approach calls each community to respect God, but not to make God an object or end of state power. It calls each community to respect the autonomy of peaceable religious communities, but does not give any religious community the secular power to coerce its subjects or to control the state. It calls political and religious communities alike to accommodate the conscience of each individual, but to avoid collapsing claims of conscience into simple claims of personal preference. And this approach calls all communities to recognize that fundamental questions of morality – of war and peace, life and death, marriage and family, nature and bioethics, and the like – must draw on states, religions, and private consciences together for reflection and resolution, and stop pretending that these questions can be treated only dogmatically, only pragmatically, or only with value-neutrality.

This argument depends on a complex differentiation of different spheres of life and power. It presupposes the ability of secular reason and secular law to operate with religion as a friendly ally, but neither as object or enemy. It presupposes the ability of religion to cooperate with the state, but to remain confined to its own principal sphere and respect the conscientious claims even of its own members. And it presupposes distinctions between religion and law, religion and morality, conscience and belief, secularity and secularism, the spiritual and temporal orders, and more – the boundaries of which have been and are fiercely contested.

These are all delicate balances to strike, but Professor Domingo brings great learning to the task, drawing on politics, history, jurisprudence, political theory, comparative law, European human rights law, and American constitutional law to drive home his points. He puts sundry great scholars in the dock for close examination – Ronald Dworkin, John Rawls, Jürgen Habermas, Charles Taylor, Michael McConnell, Joseph Raz, Kent Greenawalt, Michael Perry, and scores of others, including Popes John Paul II and Benedict XVI – in an attempt to work out and defend his position. What emerges in these pages is a lithe, learned, and lively engagement with some of the most fundamental questions of law, religion, and the state that are challenging persons and peoples throughout the world.

Professor Domingo would be the first to insist that he is no modern-day Grotius, and that this slender volume is no substitute for the massive three-volume

masterwork, *On the Law of War and Peace*. But the efforts of Grotius and Domingo still bear comparison. Both are serious Christians, ultimately interested in preserving and protecting what Grotius called *The Truth of the Christian Religion*, against contrary claims by the state and academy. Both are experts on classical Roman law and see its pre-Christianized form as an ideal type of comprehensive system of public, private, penal, and procedural law that avoided both religious and secularist approaches to law and religion, conscience and morality. Both aspire to use the idea of a “secular legal system” to build both world peace and what Domingo in his last Cambridge University Press title called *The New Global Law*.

It has been a pleasure for me to watch this book grow from a small idea first discussed over a cup of coffee a few years ago into this short work, which will doubtless inspire many more books in the years ahead as these provocative ideas are worked out more fully. Professor Domingo has been a colleague in our Law and Religion Center, and was kind enough to share these book ideas in the making with our colleagues and students. Given his Spanish background, Romanist training, and Catholic casuistry, he has made novel contributions to our law and religion work, and offered unique perspectives to our classes, colloquies, and conversations. It is a joy to see these literary fruits of his labors, and it is a privilege to include his work in our new Cambridge Law and Christianity series.

John Witte, Jr.