Institutionalizing Rights and Religion: Introduction

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THE TASK

Freedom of religion is a core human right, and a very complicated one. Its status as a core human right derives to some extent from its critical role in the historical development of human rights as we know them. But it is also a core human right thanks to its crucial significance to people’s identity, which is revealed, in part, by its affinity with two other identitarian rights: the right to conscience and the right to culture. This connection raises difficult conceptual and normative questions concerning the value added (if any) of freedom of religion vis-à-vis these two rights and the putative justifications of freedom of religion. This book does not address these questions directly, but it is triggered by the complex cohabitation of these two aspects of the freedom of religion – by the way religion presents an intertwined individual and communal engagement.

Accordingly, our point of departure is freedom of religion’s peculiar characterization as both deeply personal and essentially communal, and thus (at least typically) a highly institutionalized human right. The task of Institutionalizing Rights and Religion is to highlight the institutional challenges that are uniquely complex in the context of freedom of religion. We seek to shift the usual scholarly focus from the personal free expression of religion, to considering the significance of institutional design. Indeed, we believe that in order to understand freedom of religion, we must study how religions are structured as normative institutions and how state law regulates the way religious organizations are constituted and how they are able to function in a pluralistic society.

Our goal in this book, more specifically, is to highlight the significance of the institutional design of both religions and political regimes with respect to the relationship between religious practice and activity, and human rights. In the contemporary world, religious conviction, individual freedom, and institutional authority intersect in complex and volatile ways. Religiously motivated persons and organizations are
sometimes among the most effective agents for securing human rights. But at other
times and on other occasions, religion is the animating force behind terrifying and
persistent threats to the rights of individuals. For several hundred years, modern
statesmen and political theorists have struggled to design political and other insti-
tutions that will simultaneously respect the freedom of religion, nurture religion’s
capacity to be a force for civic good and human rights, and tame religion’s illiberal
tendencies.

Institutionalizing Rights and Religion seeks to reinvigorate this institutional study
of the interaction of religion and human rights – a study that is particularly chal-
lenging, given that both religion and the state have institutionalized structures that
claim authority over vital components of individual, family, and social life. This
book examines how the internal organization (formal and informal) of religious
communities affects the rights of members of these communities and the function-
ing of religion as a source of human rights. It investigates both the scope and limits
of a just state’s authority to compel changes in the internal aspects of organized
religion, in the name of human rights. It explores how social and political institu-
tions shape religious behavior and how they affect the human rights of members of
religious communities and the society at large.

We do not of course purport to present a comprehensive discussion of these
perennial multifaceted questions. All of the contributions that follow focus on rights
rather than states’ support of religions, which also entails an important institutional
dimension; and most of these essays analyze the United States and Israel, both of
which may be rather extreme test cases, since the former has a high level of separa-
tion of religion and state, while the latter has a high level of government involve-
ment in religion. But we believe that the complexities of the issues discussed, as
well as the particular – and particularly interesting – examples considered, already
provide important insights that are of relevance beyond the particular contexts in
which these issues and problems arise. Indeed, we think that they illuminate the
institutional challenges posed by, and possible responses to, the fraught relationship
between religion and rights in the world today.

Institutionalizing Rights and Religion is divided into two parts. The first part,
“Secular Institutions and the Limits of Religious Recognition,” considers what kinds
of religions and religious institutionalization the secular state can and cannot tol-
State,” turns to some of the ways in which religions and religious institutions put
pressure on secular states to defend their own commitments to individual rights,
tolerance, and democratic pluralism. Taken together, both parts resist the obvious
and common temptation to treat the modern nation-state and religion as wholly
separable enterprises. Instead, these essays show that religions, rights, and institu-
tions not only influence, but also continually shape and form one another. This
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means that those concerned about the relation between religion and human rights need to attend to the complexity and diversity of religions, rights, and institutions in the modern world, rather than attempt to come up with a one-size-fits-all solution to these very real problems.

**PART I: SECULAR INSTITUTIONS AND THE LIMITS OF RELIGIOUS RECOGNITION**

Part I focuses on three interrelated issues: reasons for accommodating religious institutions, the limits of such accommodation, and the possibility of deflecting difficulties by delegating accommodation to geographical subunits. Chapter 1, “Religion in the Law: The Disaggregation Approach,” by Cécile Laborde, raises the broad question of whether religion ought to be accommodated at all. Laborde engages two influential interpretive theories of freedom of religion in political theory: first, what she calls the *substitution approach*, which argues that freedom of religion can be adequately expressed by a substitute category, such as freedom of conscience; and second, what she calls the *proxy approach*, which argues that the notion of religion should be upheld in the law, albeit as a proxy for a range of different goods. After rejecting both of these strategies, Laborde defends a third alternative, which she calls the *disaggregation strategy*. This strategy suggests that different parts of the law should capture different dimensions of religion for the protection of different normative values. In Chapter 2, “The Puzzle of the Catholic Church,” Lawrence Sager asks more specifically why the Catholic Church in the United States is entitled to insist that its priests be male without interference from the state. Sager considers four possible arguments for this accommodation, but argues that ultimately only the fourth one he describes warrants this accommodation. This is the claim that members of political communities have a right to be free from governmental intrusion into close and personal relationships, except in cases of harm or abuse.

Chapters 3 and 4 argue for a greater openness to religious accommodation in the United States and Israel, respectively. In “Religious Accommodations and – and Among – Civil Rights: Separation, Toleration, and Accommodation,” Richard Garnett maintains that religion is special and therefore should be singled out for special treatment and respect in American laws, traditions, and practices. This means that while the tension between religious liberty and (other) civil rights is sometimes real, it is crucial to remember that the tension is among civil rights claims. Garnett argues that Americans have good reasons, anchored in a commitment to pluralism, for insisting that governments should not prevent, correct, or even discourage all instances of wrongful discrimination. Focusing on the Israeli context, in “Israeli Law and Jewish Law in Israel: A Zero-Sum Game?” Yedidia Stern argues that Jewish religious law (*halakha*) and Israeli civil law ought to contribute to each other and, in

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so doing, give the citizens of the Jewish and democratic state a legal system that suits the unique character of the Jewish nation-state. Stern maintains that an engagement between the halakhic authorities and secular legislators and judges is necessary, because the struggle between them ultimately affects the stability of Israeli democracy.

Chapters 5 and 6 argue for the limitations of religious accommodation in the United States and Israel, respectively. In “Why ‘Live-and-Let-Live’ Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights,” Mary Anne Case considers proposals over the past decade for accommodation of religious objectors in the context of state laws recognizing same-sex marriage in the United States. Case argues that the expansion of claims for accommodation does not solve, but rather compounds the problem of selective attention to only a subset of the laws and regulations to which religiously motivated actors might have a conscientious objection. Turning to the Israeli context, in “Control by Accommodation: Religious Jurisdiction Among the Palestinian-Arab Minority in Israel,” Michael Karayanni argues that, while accommodation of religious minorities in non-Western states is generally considered in line with liberalism rather than in conflict with it, this is not the case in Israel. Karayanni argues that maintaining the millet system of religious courts has historically impeded relations between Jews and Arabs in Israel, and as long as the state of conflict between Israeli Jewish collective aspirations and Palestinian collective aspiration continues, there will be no genuine move toward the abolishment of the Israeli millet system.

Chapters 7 and 8 consider possibilities for deflecting some of the difficulties of religious accommodation by delegating accommodation to geographical subunits in the United States and Israel, respectively. In “Decentralizing Religious and Secular Accommodations,” Roderick Hills argues that the decentralization of religious accommodations to subnational governments may be a way to extend equal concern and respect to rival and reasonable conceptions of religious liberty. Hills analyzes the American version of federalism, epitomized by the US Supreme Court’s decisions in Hobby Lobby and City of Boerne v. Flores, as such a form of equal concern and respect. In “In Search of the Secular,” Yishai Blank argues that secularism in Israel should be understood as an effort by a minority to confront and oppose the dominant and empowered state religion, and as such, it should be given protection. Blank contends that, in Israel, localities have been the only place where individuals and communities have been able to materialize a fuller idea of secularism, secularizing public spaces, disentangling their locality from religion and making belief in God one choice among others. Blank concludes by advocating for islands of pluralism, where individuals from different communities are exposed to each other, in spite of radical differences.
PART II: THE CHALLENGES OF RELIGIOUS INSTITUTIONS
FOR THE SECULAR STATE

The second part of this book turns to distinct challenges posed by religious institutions regulating education, marriage, and religious conversion in Israel, the United Kingdom, and India. In Chapter 9, “The ‘How Many?’ Question? An Institutionalist’s Guide to Pluralism,” Ori Aronson considers adjudication and marriage registration in Israel’s multiple religious communities, in order to theorize the institutional implications of normative pluralism and to identify workable, useful benchmarks, considerations, or heuristics for pluralist institutional design. Aronson identifies two fundamental paradigms of pluralist institutionalism: mimetic pluralism, in which the pluralist field is meant to accommodate an existing diversity of practices within the state apparatus; and poietic pluralism, in which the state engages in the design or fosters the development of new institutional alternatives.

Debates about state support of religious schools in England and Israel are the focus of Chapters 10 and 11. In Chapter 10, “Equality in Religious Schools: The JFS Case Reconsidered,” Haim Shapira considers the Jews’ Free School case in England and the Emmanuel case in Israel. Shapira argues that both cases represent the willingness of Supreme Courts to intervene in religious schools’ policies in order to assure equality and prevent what they see as discrimination. Beyond the local difficulties involved in each ruling, both cases demonstrate the problematic nature of greater state involvement in religious schools and organizations. In Chapter 11, “Religious Freedom as a Technology of Modern Secular Governance,” Peter Danchin also analyzes the recent decision of the UK Supreme Court in the Jews’ Free School case. Danchin argues that once the antinomies generated by the paradoxes of religious freedom are made visible, it becomes clear that the right to religious liberty is not a single, stable principle existing outside culture, spatial geographies, or power, but instead is a contested, polyvalent concept existing and unfolding within historical political orders.

Chapters 12 and 13 focus on the challenges presented by state regulation of Jewish marriage and other religious matters in Israel. In Chapter 12, “Civil Regulation of Religious Marriage from the Perspectives of Pluralism, Human Rights, and Political Compromise,” Shahar Lifshitz considers debates about the regulation of Jewish marriages in Israel from three points of view: a liberal-pluralistic perspective, a religious perspective that seeks to protect the right to religious marriage and divorce, and a national religious perspective that tries to accommodate both of these positions. Lifshitz argues that liberals must recognize non-liberal arguments for maintaining state regulation of religious marriage and divorce, while also demanding that the state offer its citizens a civil marriage or a parallel track called marriage and a means of divorce, irrespective
of their religious faith. In Chapter 13, “The Impact of Supreme Court Rulings on the Halakhic Status of the Official Rabbinical Courts in Israel,” Amihai Radzyner considers the complex relations between two rabbinical court systems in Israel: the official courts authorized by Israeli law to deal with matrimonial matters of Jews in Israel, and the dozens of private courts that primarily deal with civil arbitrations and have no legal powers. Radzyner focuses on the ruling of the Israeli Supreme Court, sitting as the High Court of Justice in the Amir case, that the rabbinical court must not litigate in areas that do not concern marriage and divorce, even if the parties have appointed it as an agreed-upon arbitrator to litigate their civil suit in order; he uses this case to show that basing the halakhic argument about the foundation of the court on Israeli law carries risks; when this status changes, so does the halakhic status of the court.

Finally, in Chapter 14, “Is Conversion a Human Right? A Comparative Look at Religious Zionism and Hindu Nationalism,” Leora Batnitzky considers how ambivalence about religious conversion informs not just religious Zionism and Hindu nationalism, but also their secular predecessors and counterparts. Batnitzky argues that religious Zionists and Hindu nationalists utilize modern liberal commitments to the rule of law and to the priority of individual conscience as a means to support state regulation of religious conversion. She considers the implications of this analysis for thinking about whether religious conversion is a human right, as well as for what religious Zionist and Hindu nationalist anxieties about religious conversion might say about contemporary debates about religious freedom.