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Reason, law and religious freedom

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Judgement on the proper place of religious freedom in relation to law is affected by the perception of how religion stands in relation to rationality. Seven consequences of the supposition that religious belief is irrational are briefly set out, and their bearing noted on the question of conscience.

Introduction

In the contemporary debate on the law and religious freedom, 'religion' is often conceived in a way that prejudices the terms of the debate. This article explores the effects on our approach to the question of law and religious freedom of the assumption that religion is irrational, whether this means contrary to reason or incapable of being rationally established.[1] I shall pass over three questions: 1. how religion should be defined, whether in philosophy, theology or law; 2. how desirable a legal definition is, whether at national, European or international level; 3. what status religious liberties should have in relation to other liberties. A fourth question, indirectly related to the third, will be touched on, but not examined: the question of whether religious belief should be a protected characteristic precisely because it is religious, or because it shares relevant characteristics with non-religious moral beliefs or philosophical belief-systems that are equally entitled to protection.

'Religion' is here understood in its ordinary-language sense and so excludes atheism. As far as I can tell, the supposition about religious irrationality has consequences in at least seven relevant areas.

Seven consequences of viewing religion as irrational

1. 'Neutrality' in the public domain becomes equated with secularity or secularism. In ordinary language, neutrality in relation to religion ought to mean neutral as between the religious and secular. However, where religion is regarded as irrational, and the secular, lacking religious content, is understood as rational, it is not surprising that the neutral becomes identified with the secular. It is hard to be benignly neutral as between the rational and the irrational.

2. If the public square is neutral and the neutral is secular, religion is appropriately assigned to the private domain. Frederick Gedicks observed that '[l]iberal government…treats religious beliefs neutrally – as subjective value preferences restricted to private life, rather than as objective knowledge proper to public life'.[2] If religious beliefs were regarded as rational, presumably we should be less willing to describe them as subjective value-preferences and more willing to regard them as capable of objective knowledge and, as such, qualified to give guidance in public life.

3. Religious conscience entertains scruples and generates expressions which may be accommodated in a secular state but are not candidates for the status of providers of the substance of public policy. The word 'conscience' connotes a private and subjective phenomenon, whether belonging to the individual or to the group. Possessing this form, its substantive claims have no critical right to challenge the public policy to which it is opposed; it is solely a question of allowing conscience its private sphere. It is consigned to the domain of scruple.

4. When religious autonomy is granted (whether or not we use 'autonomy' to indicate a sphere in which religion is legitimately exercised) this lies in the gift of the state. Rational autonomy does not; the state is at its service.

Democracy accommodates the religious, regarded as irrational, but its foundations are rational and the state is the instrument of rational order. (I gloss over the important but independent question of the proper foundation and role of the state.)

5. Equality begins to gain an advantage over liberty in the event of actual or potential collision. Religious liberty is generally important but particular religious liberties are naturally assigned to the domain of exception and of possibility; they may even be granted in the spirit of concession. Equality, on the other hand, occupies the domain of the normative and the necessary. Thus Eisgruber and Sager: '…The secular goal upon which religious liberty rests [is] *the equality of persons*'; 'the point of religious liberty' is 'equal regard'.[3] Where religion is irrational and equality is a rational principle, the detailed application of this formulation puts equality in a good position to trump liberty in the case of perceived conflict.

6. Tacit belief in progress is apparently in evidence when it is assumed that to be 'on the side of history' is, by definition, a good thing. At any rate, an implicit doctrine or, at least, a limited narrative of progress is required when steps are taken to displace or marginalise religion in public life. These are steps in the progress of rationality. The Enlightenment project is basically intact, albeit developed, refined or tweaked. Any sign that religion is necessary for human flourishing is a sign of rational limits and an unacceptable denial that secular reason is intellectually sufficient for social progress.

7. The enforcement of morals in the name of reason becomes palatable. In the celebrated debate between Lord Devlin and H. L. A. Hart following the publication of the 1957 Wolfenden Report, which recommended the decriminalisation of homosexuality, Hart is widely supposed to have been on the side of history and of reason in supporting a modified version of Mill's objection to the role of law in the enforcement of morals.[4] However, if equality, for example, is a rational moral requirement and what stands in its way is irrational, then its enforcement looks simply like an implementation of justice.[5]

Responding to the claims of irrationality

What shall we say in response? Because of the diversity of religions, it is impossible to state the relation of reason to 'religion' in general. Moreover, the concept of reason requires as much scrutiny as does the concept of religion. Whatever judgement we make on postmodernism, whether on its cultural influence or its intellectual merits, the public rhetoric of equality, liberty and rights is in salient respects strikingly free of its influence. Rational norms are assumed, whether this is for better or for worse.

If Christians concur in a conviction that there are rational norms, they will believe that their faith sustains a rational morality, along one or more of the following lines. Firstly, Christian moral tenets are demonstrably rational. Secondly, the foundational theological claims of Christianity are rational and this provides an indirect, though firm, support for those tenets. Thirdly, the vantage-point of faith allows what is rational to come into focus, faith functioning as spectacles so that the eyes of reason see properly and see well.

Correspondingly, the Christian may hold that a non-religious secular moral perspective is rationally weak, whether (a) in substance, (b) with respect to foundation or (c) in explanatory power. *Now* the question of the legal balance of competing rights, where religion is involved, begins to look very different from the way it looks from within a typically secularist framework. Indeed it also looks different if we settle just for the claim that the state, on the basis of either an explicit or a working principle, must regard secular and religious perspectives as equally rational.

In pondering and making proposals on the relation of law to religious freedom, should we, then, seek to press for the recognition that, at least in the case of Christianity, we are dealing with rational proposals? The philosophical and theological debate over reason and faith, rationality and Christianity, demands greater attention than it can be given here if we are to answer this question properly. But what we can at least say is that we, as Christians, do need to show in what sense we regard Christianity as rational, whether we have in mind its religious foundations or its moral tenets.

Religion in the public square

If, for purposes of discussion, we allow Christianity to do proxy for religion *ad hoc*, a question naturally arises as to the proper use and fruitfulness of the concept of religion in the public square. Take the case of Ashers Bakery, which has received international attention: a Belfast-based Christian firm which refused to ice a cake with a message which promoted gay marriage, because its owners objected to gay marriage on biblical grounds, was found guilty of wrongful discrimination in the provision of goods and services. (As I write, a process of appeal is under way.) I am not a lawyer and do not here comment either on the legal strength of the judgment or on legal aspects of the case. There are social circumstances attending this sequence of events which are peculiar to Northern Ireland, having to do with the religious and political legacy of 'the Troubles', the Good Friday Agreement and the changed political landscape against the background of frequently negative cultural perceptions of religion in the province today. Still, reference to the case is more widely relevant.

In both the popular arena and (in a more technical way) on the judicial scene, the competing demands were couched in terms of discrimination on grounds of sexual orientation and the rights of religious conscience. Leaving aside the legal framework within whose constraints the case was prosecuted, we note that the question of sexual orientation was actually irrelevant. No service was refused on grounds of sexual orientation and the supplementary facts that (a) some homosexually active gay people are opposed to gay marriage and (b) some people who support gay marriage also support Ashers' right to act as it did have frequently been marginalised in public discussion in Northern Ireland. However, our concern is with religion. Paul Givan, a member of the Stormont Legislative Assembly, drew up a Private Members' Freedom of Conscience Amendment Bill which was the subject of consultation. In light of the case then being brought against Ashers via the Equality Commission, its aim was to redress perceived legislative imbalance so that the rights of conscience of religious believers were not unjustly outweighed by the right of people not to be discriminated against.

In the Amendment Bill, there was deliberate reference to conscientious objection to military service, in order to show that the bill does not amount to special pleading. Further, many who have sided with Ashers have also and pointedly defended the right of an atheistic printing firm to refuse to print literature promoting the cause of religion or of a printing firm owned by gay people to refuse to print literature proclaiming that homosexuality is an evil. Where these arguments, along with the right of conscientious objection to military service, are invoked, it is clear that the rights of religious conscience are being viewed not as *sui generis*, but as species of a general right to withhold goods and services in the public square on what we may broadly or more strictly term moral grounds. However, because Ashers indicated that its objection was grounded on biblical teaching, this obscured the possibility of viewing the issue in a 'non-religious' light.[6] If the generic notion of religion did not already effect this occlusion, the fact that the Bible was cited as the source of religious and moral conviction meant that the perceived gulf between religion and reason encompassed the whole issue.

Comparing the judiciary with the legislature and the executive, John Rawls observed: '…Because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents…the court's special role makes it the exemplar of public reason'.[7] When religious belief is viewed as either opposed or standing in radical contrast to public reason, judgement – whether in the legal sense of adjudication or the informal sense of assessment – is warped.[8] A pertinent example is Baroness Hale's address on 'Religion and Sexual Orientation: The Clash of Equality Rights'.[9] This is an example of particular interest in Northern Ireland because, in this lecture, she responded critically to remarks by John Larkin, the Northern Ireland Attorney General, on the case of *Preddy v Bull*, where the owners of a private hotel were found guilty of discrimination when they refused to provide a room for a homosexual couple. Larkin had himself criticized Baroness Hale's judgment on that occasion.

Baroness Hale's lecture is a revelation of what legal deliberation looks like when it is directly shaped by secular assumptions about the relation of reason to religion. 'Religious faith is necessarily subjective'; religion is 'a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science'. Hale is quoting Lord Justice Laws and Lord Toulson, and proof is hardly required for the proposition that these three are no exceptions in the way in which they view religion.[10] 'Necessarily subjective' is apparently understood as 'necessarily not objective'; going beyond the senses or science is apparently understood as going beyond evidence so that belief is depleted of rational content.

Conclusion

In *Beyond Good and Evil*, Friedrich Nietzsche wrote of 'every great philosophy' so far that its 'moral (or immoral) intentions…constitute the actual living seed from which the entire plant has grown…one always does well (and wisely) to first ask oneself, in explaining how the most far-fetched metaphysical claims of a philosopher came about: at what morality is it (or is *he* -) aimed?'[11] He had earlier written: 'What decides against Christianity now is our taste, not our reasons.'[12] That was in 1882. If we aspire to plot aright the relation of religion to reason in the hope that this will be of public aid, we must keep both sayings in mind, at least where the Western scene is concerned. However fruitless it seems, we must surely keep up a persistent quarrel with the assumption that religion and reason are enemies, at least where Christianity is in question. 'Adding one thing to another to discover the scheme of things', said the Teacher in Ecclesiastes, 'while I was still searching but not finding, I found one upright man among a thousand' (7:27-28, NIV, slightly modified). It is worth undertaking this for the sake of one man or one woman in a thousand, undertaking it in the hope that we ourselves should be numbered amongst those who are receptive to the right, the good and the true.

For further reading

- Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd edition (Oxford University Press, 2013).
- Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard University Press, 2007).
- Basil Mitchell, *Law, Morality, and Religion in a Secular Society* (Oxford University Press, 1970).
- Roger Trigg, *Equality, Freedom and Religion* (Oxford University Press, 2012).

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1 For present purposes, I am collapsing notions of 'reason' and 'rationality', 'reasonableness' and the 'rational' which, in other contexts, require studious distinction.

2 Quoted in Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed. (Oxford University Press, 2013), 68.

3 Quoted in Adhar and Leigh, *Religious Freedom*, 78, from their article, 'Unthinking Religious Freedom' (reference supplied in Adhar and Leigh, ad loc.)

4 Lord Devlin's 1959 Maccabean Lecture, which sparked off the debate, later appeared in Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965). Hart replied to the original lecture in *Law, Liberty and Morality* (Oxford University Press, 1963).

5 Discussing the Devlin-Hart debate almost fifty years ago, Basil Mitchell, having remarked 'that there appears to be no necessary connexion between the claim that the law may be used to enforce morality and moral conservatism', adds that it 'is conceivable...that circumstances might arise in which radicals were in favour of enforcing an "enlightened" morality', *Law, Morality, and Religion in a Secular Society* (Oxford University Press, 1970), 46.

6 No judgement is involved here one way or the other on the approach adopted by Ashers. Further, what I say is said without prejudice to the persuasiveness or otherwise of Roger Trigg's argument that claims to the universality of religions are 'fatally undermined' if religious freedom is 'regarded, not as any special kind of freedom, let alone the root of all freedoms, but as an instance of a particular kind of democratic right' (*Equality, Freedom and Religion* [Oxford University Press, 2012], 55). Trigg holds that, if religious freedom is just a 'species of freedom of conscience... [t]his underestimates the importance of religion in helping to form answers of [sic] the most fundamental questions about the place of humans in the world' (152).

7 John Rawls, *Political Liberalism* (Columbia University Press, 1996), 216. Here, I both generalise on the basis of what Rawls said about the US Supreme Court and treat public reason in a broader, less strict sense than does Rawls himself.

8 In the good old days, 'judgment' meant legal adjudication, 'judgement' meant general assessment.

9 Lady Hale, "Religion and Sexual Orientation: The Clash of Equality Rights" Lecture, Comparative and Administrative Law Conference, Yale Law School, March 2014, https://www.supremecourt.uk/docs/speech-140307.pdf.

10 Roger Trigg has discussed Lord Justice Laws' views in *Equality, Freedom and Religion*, 142-45. For a glaring example of ignorance about philosophical thinking in religion, see the treatment of Intelligent Design by Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard University Press, 2007), 185-96; cf., 281. It is strikingly at odds with the general tenor of discussion in this volume. My remark neither entails agreement with Intelligent Design nor demurral from the authors' proposal for Equal Liberty.

11 Friedrich Nietzsche, *Beyond Good and Evil/On the Genealogy of Morality*, tr., Adrian Del Carro (Stanford University Press, 2014), 9.

12 Friedrich Nietzsche, *The Gay Science*, tr., Josefine Nauckhoff (Cambridge University Press, 2001), 123.