Introduction: Religious Law In the 21st Century

Michael A. Helfand
Introduction:
Religious Law in the 21st Century

Michael A. Helfand*

As the world has moved into the 21st century, new tensions between law and religion have become an almost daily affair. In only the last few years, such tensions have emerged regularly in the United States as courts legislators, and citizens all debate how government should navigate the increasing conflicts between the demands of law and the demands of religion. Such emerging tensions run the gamut of the human condition—from family life to employment relationships, and from individual claims of religious conscience1 to institutional claims of religious autonomy.2

Indeed, the Supreme Court has been called upon to weigh in on these recent skirmishes—and with increasing frequency. For example, in two recent decisions—Hosanna Tabor Evangelical Lutheran Church and School v. EEOC3 and Christian Legal Society v. Martinez4—the Supreme Court considered conflicts between anti-discrimination norms and religious liberty. And in 2014, the Supreme Court resolved two more big-ticket conflicts between law and religion, holding a town’s legislative prayers to be constitutional5 and striking down a rule that had required for-profit, religiously-motivated employers to provide insurance that covered contraceptives.6

Moreover, these cases before the Supreme Court are just the beginning; other recent high profile tensions include a 2011 attempt to ban circumcision

---

* Associate Professor, Pepperdine University School of Law and Associate Professor, Diane and Guilford Glazer Institute for Jewish Studies.
2. For a recent symposium addressing the institutional dimension of this law and religion debate, see Symposium, The Freedom of the Church in the Modern Era, 21 J. CONTEMP. LEGAL ISSUES 1–486 (2013).
4. 130 S. Ct. 2971 (2010).
in San Francisco, the increased adoption of state anti-Sharia bills—bills that prevent state courts from considering religious law in their decisions—and state laws prohibiting religiously-motivated business owners from denying services for same-sex weddings.

In this regard, the United States is far from unique. Throughout the world, governments continue to navigate the complex relationship between law and religion. For example, the recent wave of uprisings in Arab countries has introduced significant uncertainties about the scope of religious freedom in those countries, raising worries about how new regimes will account for religious diversity within their borders. The entire relationship between law and religion continues to evolve in many Arab nations as these countries consider and interpret constitutional provisions identifying Islamic law as a source of national law.

And in Europe, debates over the role of religion in the public square continue to rage. Controversy over religious symbols in public spaces—most notably Muslim headscarves—persist, with France recently exploring the possibility of expanding its ban to public universities, while Turkey has

chosen in recent years to lift its ban in both universities and public offices. Moreover, similar issues were at stake when in 2012, a German court in Cologne ruled that the circumcision of children could trigger criminal penalties—a decision decried by both Jewish and Muslim groups—requiring subsequent legislation in Germany to protect the right of parents to circumcise their children.

While these persistent debates implicate a wide range of considerations, a recurring theme is the unique challenge of reconciling conflicts not just between law and religion, but between the law of the nation-state and “religious legal communities”—that is, communities that primarily experience their religious norms through the prism of legal rules. Indeed, if clashes between law and religion raise questions of faith and identity, then clashes between religious law and state law further intensify these conflicts by ensconcing those demands in legal structures. In turn, by couching mutually exclusive obligations in the language of law, religious and state legal systems raise the stakes of the conflict, layering the preemptive

---

aspirations of law\textsuperscript{20} on top of the already complex terrain created by clashes between law and religion.

Muslim and Jewish communities serve as prime examples of such religious legal communities and thus the challenges faced by these communities often parallel each other in important ways.\textsuperscript{21} Thus, an important subset of contemporary religious controversies—from circumcision bans to anti-Sharia laws—emerge as not only conflicts between law and religion, but as conflicts between law and law.\textsuperscript{22} And it is to this unique set of questions that the jointly-sponsored program of the Islamic Law and Jewish Law Sections of the American Association of Law Schools was addressed.\textsuperscript{23} The program was split into two thematic panels, and the articles in this symposium reflect those themes.

The first—titled “Religious Law in U.S. Courts”—considered the various contexts in which U.S. courts have been asked to address religious questions that touch upon religious law. Whether in the context of contract interpretation, tortious conduct, or family law,\textsuperscript{24} attempts to adjudicate such issues have raised a host of constitutional and religious complications,\textsuperscript{25} which have been further exacerbated by the rise of anti-Sharia laws in the United States.\textsuperscript{26} The second—titled “Religious Law in the Secular State”—considered contemporary issues related to the practice and implementation of religious law in secular democracies. More specifically, the panelists and papers focused on how Jewish and Islamic law—as well as Jewish and Islamic identities—have engaged with secular, political, and legal structures in a range of countries, including Israel,\textsuperscript{27} Turkey,\textsuperscript{28} and the United States.


\textsuperscript{22} John Locke, \textit{A Letter Concerning Toleration}, in \textit{JOHN LOCKE: A LETTER CONCERNING TOLERATION AND OTHER WRITINGS} 1, 52 (Mark Goldie ed., 2010).


\textsuperscript{27} See Zvi Triger, “A Jewish and Democratic State”: Reflections on the Fragility of Israeli
Together, these papers bring new insight to these questions and serve as a springboard for discussion and debate about how religious law will fit into the ever-evolving landscape of the 21st century.

