

5-15-2014

## Introduction: Religious Law In the 21st Century

Michael A. Helfand

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>



Part of the [Courts Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Michael A. Helfand *Introduction: Religious Law In the 21st Century*, 41 Pepp. L. Rev. 991 (2013)  
Available at: <http://digitalcommons.pepperdine.edu/plr/vol41/iss5/6>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

# 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 conscience<sup>1</sup> to institutional claims of religious autonomy.<sup>2</sup>

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. EEOC*<sup>3</sup> and *Christian Legal Society v. Martinez*<sup>4</sup>—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 constitutional<sup>5</sup> and striking down a rule that had required for-profit, religiously-motivated employers to provide insurance that covered contraceptives.<sup>6</sup>

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.

1. For a recent symposium addressing individual claims for religious accommodation, see Symposium, *Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History*, 32 CARDOZO L. REV. 1655–2091 (2011).

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).

3. 132 S. Ct. 694 (2012).

4. 130 S. Ct. 2971 (2010).

5. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

6. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

in San Francisco,<sup>7</sup> the increased adoption of state anti-Sharia bills—bills that prevent state courts from considering religious law in their decisions<sup>8</sup>—and state laws prohibiting religiously-motivated business owners from denying services for same-sex weddings.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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,<sup>12</sup> while Turkey has

7. See Madison Park, *San Francisco Judge Removes Circumcision Ban From Ballot*, CNN (July 28, 2011, 7:34 PM), <http://www.cnn.com/2011/HEALTH/07/28/circumcision.ban.voting/>.

8. See Robert P. Jones, *The State of Anti-Sharia Bills*, ONFAITH (Feb. 29, 2012), <http://www.faithstreet.com/onfaith/2012/02/29/the-state-of-anti-sharia-bills/10618>.

9. See, e.g., *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) (holding that a photographer who refused to photograph a same-sex wedding violated the New Mexico Human Rights Act); *Craig v. Masterpiece Cakeshop, Inc.*, CR 2013-0008 (Colo. Civil Rights Comm'n., Dec. 6, 2013). Legislatures have attempted to address this question, and such legislation remains controversial. See, e.g., OFFICE OF GOVERNOR JANICE K. BREWER, SENATE BILL 1062 VETO LETTER (Feb. 26, 2014), available at [http://azgovernor.gov/dms/upload/PR\\_022614\\_SB1062VetoLtr.pdf](http://azgovernor.gov/dms/upload/PR_022614_SB1062VetoLtr.pdf) (vetoing a controversial bill in Arizona); Bryan Lowry, *Kan. Senate president: Bill that allows service refusal to same-sex couples on religious grounds unlikely to pass*, KANSAS.COM (Feb. 13, 2014), <http://www.kansas.com/2014/02/13/3287827/susan-wagle-bill-that-allows-service.html> (discussing the fate of HB 2453, 2014 H.R. (Kan. 2014), available at [http://www.kslegislature.org/li/b2013\\_14/measures/hb2453/](http://www.kslegislature.org/li/b2013_14/measures/hb2453/)).

10. *Arab Spring Adds to Global Restrictions on Religion*, PEWRESEARCH (June 20, 2013), <http://www.pewforum.org/2013/06/20/arab-spring-restrictions-on-religion-findings/>; Daniel Philpott, *Citizens or Martyrs? The Uncertain Fate of Christians in the Arab Spring*, BERKLEY CENTER (Nov. 4, 2011), <http://berkeleycenter.georgetown.edu/publications/citizens-or-martyrs-the-uncertain-fate-of-christians-in-the-arab-spring>.

11. See generally Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?*, 28 AM. U. INT'L L. REV. 733 (2013).

12. See Tom Heneghan, *France Debates Extending Headscarf Ban to Universities*, REUTERS (Aug. 6, 2013, 10:03 AM), <http://www.reuters.com/article/2013/08/06/us-france-islam-headscarf->

chosen in recent years to lift its ban in both universities<sup>13</sup> and public offices.<sup>14</sup> Moreover, similar issues were at stake when in 2012, a German court in Cologne ruled that the circumcision of children could trigger criminal penalties<sup>15</sup>—a decision decried by both Jewish and Muslim groups<sup>16</sup>—requiring subsequent legislation in Germany to protect the right of parents to circumcise their children.<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup> 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

idUSBRE9750MG20130806.

13. See Zehra Ayman & Ellen Knickmeyer, *Ban on Head Scarves Voted Out in Turkey: Parliament Lifts 80-Year-Old Restriction on University Attire*, WASH. POST A17 (Feb. 10, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/09/AR2008020900832.html>.

14. See Sebnem Arsu & Dan Bilefsky, *Turkey Shifts Longtime Ban on Head Scarves in State Offices*, N.Y. TIMES (Oct. 8, 2013), [http://www.nytimes.com/2013/10/09/world/europe/turkey-lifts-ban-on-head-scarves-in-state-offices.html?\\_r=1&](http://www.nytimes.com/2013/10/09/world/europe/turkey-lifts-ban-on-head-scarves-in-state-offices.html?_r=1&).

15. See Nicholas Kulish, *German Ruling Against Circumcising Boys Draws Criticism*, N.Y. TIMES (June 26, 2012), <http://www.nytimes.com/2012/06/27/world/europe/german-court-rules-against-circumcising-boys.html>.

16. See Kate Connolly, *Circumcision Ruling Condemned by Germany's Muslim and Jewish Leaders*, GUARDIAN (June 27, 2012, 1:36 PM), <http://www.theguardian.com/world/2012/jun/27/circumcision-ruling-germany-muslim-jewish>.

17. See Melissa Eddy, *German Lawmakers Vote to Protect Right to Circumcision*, N.Y. TIMES (Dec. 12, 2012), <http://www.nytimes.com/2012/12/13/world/europe/german-lawmakers-vote-to-protect-right-to-circumcision.html>.

18. See generally Michael A. Helfand, *When Religious Practices Become Legal Obligations: Extending the Foreign Compulsion Defense*, 23 J.L. & RELIGION 535, 567–69 (2010).

19. This added complexity is one of the primary insights—and areas of exploration—within the literature on legal pluralism. See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1981); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 1 (2009); Brian Z. Tamanaha, *A Non-Essential Version of Legal Pluralism*, 27 J. L. & SOC'Y 296 (2000).

aspirations of law<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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,<sup>24</sup> attempts to adjudicate such issues have raised a host of constitutional and religious complications,<sup>25</sup> which have been further exacerbated by the rise of anti-Sharia laws in the United States.<sup>26</sup> 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,<sup>27</sup> Turkey,<sup>28</sup> and the United States.

---

20. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 214 (1994) (describing the preemption thesis).

21. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1243–52 (2011).

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

23. See *Program: 2014 Annual Meeting*, AALS, <http://aals.org/am2014/Glance.pdf> (last visited Mar. 2, 2014).

24. See Ann Laquer Estin, *Foreign and Religious Family Law: Comity, Contract, and the Constitution*, 41 PEPP. L. REV. 1029 (2014); Michelle Greenberg-Kobrin, *Religious Tribunals and Secular Courts: Navigating Power and Powerlessness*, 41 PEPP. L. REV. 997 (2014).

25. See Christopher C. Lund, *Rethinking the “Religious Question” Doctrine*, 41 PEPP. L. REV. 1013 (2014).

26. See Faisal Kutty, *“Islamic Law in U.S. Courts”: Judicial Jihad or Constitutional Imperative?*, 41 PEPP. L. REV. 1059 (2014).

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.

---

*Secularism*, 41 PEPP. L. REV. 1091 (2014).

28. See Seval Yildirim, *Conceptions of Religion in the Secular State: Evolving Turkish Secularism*, 41 PEPP. L. REV. 1049 (2014); Russell Powell, *Does Shari'a Play a Role in Turkey?*, PEPP. L. REV. 1101 (2014).

[Vol. 41: 991, 2014]

*Religious Law in the 21st Century*  
PEPPERDINE LAW REVIEW

\*\*\*