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***LAW, RELIGION, CONSTITUTION: FREEDOM OF  
RELIGION, EQUAL TREATMENT, AND THE LAW***

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CRISTIANA CIANITTO AND DONLU THAYER  
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I

There is certainly no shortage of recent books that deal with the relationship between religion and constitutions, both from the perspective of protecting religion from the predations of the state and from that of promoting religion through constitutionalism. Recent contributions to this growing body of literature include T Jeremy Gunn and John Witte's *No Establishment of Religion: America's Original Contribution to Religious Liberty*,<sup>1</sup> Ran Hirschl's *Constitutional Theocracy*,<sup>2</sup> and Richard Moon's *Freedom of Conscience and Religion*.<sup>3</sup> Need matches supply. It comes as no surprise that against the backdrop of a global religious revival<sup>4</sup> and the increasingly plural approach to spirituality internationally and nationally,<sup>5</sup> religion increasingly finds its way into the public square. To name just three of the most significant recent examples demanding a good deal of our attention: the Arab Spring and the Islamic uprisings of 2011–12;<sup>6</sup> the ongoing

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<sup>1</sup> T Jeremy Gunn and John Witte (eds), *No Establishment of Religion: America's Original Contribution to Religious Liberty* (Oxford University Press, 2012).

<sup>2</sup> Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, 2010).

<sup>3</sup> Richard Moon, *Freedom of Conscience and Religion* (Irwin Law, 2014).

<sup>4</sup> See John Micklethwait and Adrian Wooldridge, *God Is Back: How the Global Revival of Faith Is Changing the World* (Penguin, 2009).

<sup>5</sup> See, eg, Gary D Bouma, *Australian Soul: Religion and Spirituality in the 21<sup>st</sup> Century* (Cambridge University Press, 2007).

<sup>6</sup> See Saban Center at the Brookings Institution Books (ed), *The Arab Awakening: America and the Transformation of the Middle East* (Brookings Institution Press, 2011).

debates about Obama-care and its impact on religious freedom in the United States;<sup>7</sup> and, closer to home, the work of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>8</sup> These events, and the religious issues they raise, call for careful assessment of how a society deals with religion through law generally, and through its constitution specifically. And, without putting too fine a point on it, Australia does the latter badly.<sup>9</sup>

How might Australia (especially its politicians and the legal community) begin, on the one hand, to consider what is necessary when using a constitution to deal with and to protect religion, and, on the other, to rectify the problems created through long constitutional neglect of religion? Well, it can begin to look to other countries, and their experts who have the experience with these matters, for guidance. Gunn and Witte, Hirschl, and Moon are a start, but those offerings are limited in the sense that Gunn and Witte and Moon deal with only one jurisdiction each — the United States and Canada respectively, while Hirschl deals with a particular issue — theocracy through constitutions. A new addition to the literature on this topic, however, draws together within one set of covers the plurality of possible national constitutional approaches to religion, the range of ways in which religion might be treated in one offering and the leading scholars in the world on the topic in their respective jurisdictions: W Cole Durham Jr, Silvio Ferrari, Cristiana Cianitto and Donlu Thayer (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law*.<sup>10</sup>

The contributors to Durham, Ferrari, Cianitto and Thayer seek to answer the range of possible questions that any nation, including Australia, must face when considering the interplay between its constitution and religion. If, as the book's cover notes, 'Constitutions are at the centre of almost all contemporary legal systems and provide

<sup>7</sup> See, eg, Micah Schwartzman and Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall* (26 November 2013) Slate <[http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/obamacare\\_birth\\_control\\_mandate\\_lawsuit\\_how\\_a\\_radical\\_argument\\_went\\_mainstream.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html)>; Kristina Peterson, 'Supreme Court's Hobby Lobby Ruling Ignites Debate Over Religious-Freedom Law', *The Wall Street Journal* (online), 30 June 2014 <<http://online.wsj.com/articles/supreme-courts-hobby-lobby-ruling-ignites-debate-over-religious-freedom-law-1404155510>>.

<sup>8</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, established by Letters Patent of the Governor-General of the Commonwealth of Australia, dated 11 January 2013, pursuant to the *Royal Commissions Act 1902* (Cth). For details of the Commission's work, see [www.childabuseroyalcommission.gov.au](http://www.childabuseroyalcommission.gov.au).

<sup>9</sup> See Paul Babie and Neville Rochow, 'Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom' (2010) *Brigham Young University Law Review* 821; Laira Krieg and Paul Babie, 'The Space for Religion in Australian Society: An Assessment of the Impact of Australian Anti-Discrimination Legislation on Religious Freedom' in Hilary Regan (ed), *Child Sexual Abuse, Society and the Future of the Church* (ATF Press, 2013) 83.

<sup>10</sup> W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013).

the principles and values that inspire the action of the national law-makers',<sup>11</sup> then some important questions arise: What is the place assigned to religion in the constitutions of contemporary states? What role is religion expected to perform in the fields that are the object of constitutional regulation? Is the separation of religion and politics a necessary precondition for democracy and the rule of law?<sup>12</sup> This latest offering to the growing literature of constitutional treatment of religion addresses these questions through a careful analysis of relevant constitutional texts from a number of national jurisdictions. This book therefore ought to be read by Australians. To assist in that, this brief review outlines what one finds.

The editors divide the book into three parts. Part I examines some topics that are central to the constitutional regulation of religion. Building on that, Part II considers a number of national systems, covering countries with a variety of religious and cultural backgrounds. Part III considers the constitutional regulation of some particularly controversial issues, such as religious education, the relation between freedom of speech and freedom of religion, abortion, and freedom of conscience. I want here only to highlight one of the chapters from each section, to provide a flavour of what one can expect to find and to guide the reader as to where to find it.

## II

Part I of the book, entitled 'Religion and Constitutions: Main Themes', contains six chapters: Iván C Ibán, 'God in Constitutions and Godless Constitutions'; Gerhard Rober, 'Church and State Relations in the Constitutions'; Jorge Precht Pizarro, 'Constitutional Reception of International Law Provisions on Religious Freedom'; Gianluca P Parolin, 'Religion and the Sources of Law: Shari'ah in Constitutions'; and Johan D van der Vyver, 'Constitutional Protections and Limits to Religious Freedom'. The chapter of greatest assistance for present purposes, though, is W Cole Durham Jr's introduction to the collection, 'Religion and the World's Constitutions'.

W Cole Durham Jr, one of the world's leading experts on law and religion, frames the discussion around which the entire book and its offerings revolve. The focus is on religious autonomy in a narrow sense: 'a competence of religious communities to decide upon and administer their own affairs without governmental interference'<sup>13</sup> — in other words, this explores the self-determination of religious groups. For Durham, this autonomy has four dimensions: horizontal (from core community to affiliated entities), vertical (from leaders at the top down to those doing essentially secular work), depth (the pluralistic depth of types of horizontal and vertical structures that a society allows), and temporal (the variance in the allowed institutions over time). Each dimension has a bearing on numerous substantive areas

<sup>11</sup> Ibid, cover description.

<sup>12</sup> Ibid.

<sup>13</sup> W Cole Durham Jr, 'Religion and the World's Constitutions' in W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013) 3, 6.

of law and these practical issues are nested in progressively more abstract levels of discourse: in specialised legal disciplines; constitutional law; trans-constitutional shifts in overarching legal paradigms; and finally, a more theoretical discussion about ‘the nature of and justification for religious institutions in free societies’.<sup>14</sup>

### III

Durham’s opening chapter not only frames the other essays in Part I, but also shapes the assessment of the range of national experiences and cases in Part II. This Part contains eleven chapters which together cover a range of possible national constitutional approaches to religion: Latin America (Carmen Asiaín Pereira); Mexico (Pauline Capdevielle); Sub-Saharan Africa (Kofi Quashigah); Maghreb (Nassima Ferchiche); South Africa (Helena van Coller); Israel (Natan Lerner); Nepal (Kanak Bikram Thapa); China (Liu Peng, Brett G Scharffs, and Carl Hollan); Spain (Santiago Cañamares Arribas); and the European Union (Emma Svensson).

Closest to home, from a historical and doctrinal perspective, is England, which is covered in chapter 16, ‘The Right to Religious Liberty in English Law’, by Julian Rivers. Moreover, England only recently established national human rights protection, constitutional or otherwise, and in this sense, is closest to Australia. And, like Australia, where Manning Clark famously referred to religion as a ‘shy hope in the heart’,<sup>15</sup> Rivers concludes that for Britain the protection of religious freedom takes the form of an underlying value, the definition of which is ‘inherently interpretative’.<sup>16</sup>

Rivers describes the right to religious liberty ‘by reference to eight basic elements which underlie much of the relevant law’:<sup>17</sup> religious belief is voluntary; no religion or belief is contrary to the policy of the law; public bodies are non-religious; religious groups are autonomous within their own sphere; powers and privileges of religious groups are available on terms of equality; public and religious bodies coordinate action and collaborate in the areas of education and social welfare; personal religious commitments are accommodated in public; religious people and places receive special protection from hostile acts.<sup>18</sup> These eight facets of the underlying value of religious freedom in England might be seen as demonstrating the lack of necessity for any comprehensive constitutional or legislative protection for religion within a nation’s legal structures. Rivers reminds us, however, that there has been a movement in the United Kingdom towards such protection, in the form of

<sup>14</sup> Ibid 11–19.

<sup>15</sup> John Thornhill, *Making Australia: Exploring Our National Conversation* (Millennium, 1992) 172, cited in Bouma, above n 5, 32.

<sup>16</sup> Julian Rivers, ‘The Right to Religious Liberty in English Law’ in W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013) 285, 287.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid 287–99.

the European Convention on Human Rights, the *Human Rights Act 1998* (UK), and the *Equality Act 2010* (UK).<sup>19</sup>

Yet, in this seemingly positive movement towards the formal recognition of and protection for religious freedom, Rivers draws attention to three troubling developments: an increase in litigation involving religious questions; the tendency of religious individuals, organisations, and representatives to lose when challenging secular bodies (and the tendency of religious bodies to lose against individuals); and a lack of historical awareness in the judicial consideration of such questions.<sup>20</sup> For these reasons, Rivers concludes that while religious liberty in the private sphere is secure, the law seems to reflect ‘an increasing intolerance of the public presence and status of religion’.<sup>21</sup>

#### IV

In any attempt to provide some place for religion in a constitutional framework, difficult issues will arise, and certainly Part II adverts to some of them. But it is Part III, in five chapters, that drills down into the detail of some of the issues of greatest concern to states today: freedom of speech (Alain Garay); freedom of conscience and education (Pamela Slotte and Rafael Palomino Lozano); abortion (Ofrit Liviatan); and religious pluralism (Zachary R Callo). The last of these may be of greatest interest to Australians, given the increasing religious and cultural pluralism here.<sup>22</sup>

In ‘Secular Human Rights and Religious Pluralism: The British Debate’, Zachary R Calo explores pluralism, describing it as ‘the core ... principle’<sup>23</sup> adopted by the European Court of Human Rights when considering questions of religious freedom. Yet, despite that, Calo addresses what he sees as a ‘facial discontinuity’ between the Court’s endorsement of religious pluralism and its treatment specifically of Islam, which reveals a tension in the relationship between religion, pluralism, and human rights.<sup>24</sup> Calo declines to pass judgment on whether an approach favouring ‘accessible space’ to religion, or one which takes a non-liberal approach compatible with religious group rights is the preferable approach. Rather, and usefully for Australia, he seeks only to bring the pluralism debate within a theological framework, which

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<sup>19</sup> Ibid 299.

<sup>20</sup> Ibid 299–300.

<sup>21</sup> Ibid 300.

<sup>22</sup> See Bouma, above n 5.

<sup>23</sup> Françoise Tulkens, ‘The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism’ (2009) 30 *Cardozo Law Review* 2575, 2579, quoted in Zachary R Calo, ‘Secular Human Rights and Religious Pluralism: The British Debate’ in W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013) 403, 403.

<sup>24</sup> Zachary R Calo, ‘Secular Human Rights and Religious Pluralism: The British Debate’ in W Cole Durham Jr et al (eds), *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* (Ashgate, 2013) 403, 404.

can be taken as a starting point for constitutional debate on pluralism in a multi-cultural society.<sup>25</sup>

## V

There is little question that Australia's approach to the protection of religious freedom has been piecemeal and ad hoc at best, and absent at worst. This failing is not merely a constitutional one, but the lacuna found there is a good place to start, and Durham, Ferrari, Cianitto and Thayer's, *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law* offers an excellent roadmap to the considerations that Australians ought to have foremost in their mind in starting off on this journey of discovery. This book offers a theoretical framework for assessing the constitutional protection of religious freedom, national examples of how a constitution can be drafted so as to achieve that protection and to treat the delicate issues that may require addressing along the way. While Australians who care about the *Constitution* and its protection of fundamental rights and freedoms should read this book, even if they do not, they will not be able to avoid the issues it raises.

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<sup>25</sup> Ibid 412.