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A STATEMENT ON INCLUSIVE LAW AND RELIGION

I Introduction

'Law and religion', as a field of inquiry within the legal academy, is often associated with a partisan religious agenda. The agenda is advanced under the guise of protecting religious freedom from interference by the state or other non-state actors. All too often though, the seemingly legitimate objective of advancing religious freedom is a cover for saying that one ought to have the right to criticise others in speech or to discriminate against others in actions on the basis of a purported immutable order that is established by a deity — an order that cannot be challenged or questioned by humans.

We regard the association of law and religion with such a partisan religious agenda as both unfair and unfortunate. Moreover, we reject the frequent equation of law and religion scholarship with the advancement of a partisan religious agenda. Although the advancement of such an agenda is part of the body of scholarship in this field, it does not by any means define it, and it most certainly does not cover that field. While some might use the study of law and religion instrumentally as a vehicle to advance a partisan religious agenda, we see it as capable of encompassing those who consider the interaction of law and religion as an intrinsically worthy object of study in its own right, absent the advancement of any partisan agenda. In other words, we see law and religion as inclusive, and this statement explains the approach we take to its study.

II A Statement on Inclusive Law and Religion

There are at least two ways of approaching the study of law and religion. One is to treat the two disciplines as institutionalised normative orders; as such, a scholar could study their systemic interaction. The other way is to treat the two as theoretical constructs, which consist of clusters of concepts; doing so allows a scholar to study their theoretical interaction. To be precise, one could call the latter approach 'legal theory and theology'.[1] The former approach is social scientific, while the latter approach is humanistic. Hence, the study of law and religion spans both the humanities and the social sciences.

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1 See Paul Babie, 'Breaking the Silence: Law, Theology and Religion in Australia' (2007) 31 *Melbourne University Law Review* 296.

A *Law and Religion as Institutionalised Normative Orders*

1.1 Those who claim religious liberty and those who oppose such claims are usually claiming to have the right to control the behaviour of others:

> Neither side is actually asking to 'just be left alone': each is demanding a legal rule that affects and regulates the behavior of others and the state must make a choice between these conflicting entitlements.[2]

Deciding between these two opposing claims requires legal analysis and political thought. It is a matter of both legal doctrine and political philosophy.

1.2 We believe in the 'right to freedom of thought, conscience and religion' and the 'right to freedom of opinion and expression', as stated in the *Universal Declaration of Human Rights*,[3] and later concretised in the *International Covenant on Civil and Political Rights*.[4] These rights, with some variation, are also given effect in the domestic constitutional regimes of many liberal democratic states.[5] However, while we believe in the inviolability of the freedom of conscience in the *forum internum*, we do not believe that the exercise any of these rights in the *forum externum* is absolute. In short, we agree with Justice Owen J Roberts of the United States Supreme Court, who wrote in *Cantwell v Connecticut* that a state must distinguish between the 'freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'[6] The right to express one's beliefs through conduct will have to be balanced with other competing rights, and different constitutional regimes will have different ways and means of striking the balance in the domestic context. The *Canadian Charter of Rights and Freedoms*, for instance, does so this way:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[7]

While this balancing is often left to those courts charged with adjudicating alleged violations of fundamental rights and freedoms, it will sometimes also form part of an

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2 Joseph William Singer, 'Religious Liberty & Public Accommodation', in Shyam Balganesh, Ted Sichelman and Henry Smith (eds), *Wesley Hohfeld A Century Later* (Cambridge University Press, 2018, forthcoming).

3 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 18.

4 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).

5 See, eg, the *United States Constitution* amend I; the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') s 2; and *Australian Constitution*, s 116.

6 *Cantwell v Connecticut*, 310 US 296, 303–4 (1940).

7 *Canadian Charter of Rights and Freedoms*, s 1.

ongoing 'dialogue' between different branches of government — typically between the judiciary, on the one hand, and the executive and legislature, on the other — about where the line ought to be drawn between the individual and the community.[8]

1.3 We believe in anti-discrimination and equality as norms that might sometimes require limitations to be placed upon the right to religious freedom and expression.[9] All rights must be considered within the context of pluralism that is a feature of modern liberal democratic states. Again, as with balancing, something like the *Canadian Charter of Rights and Freedoms* provides guidance:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[10]

In our view, the full matrix of rights enjoyed by members of liberal democracies are best protected in a secular legal regime. And in a secular state which respects and guarantees all rights within a secular legal framework, sometimes accommodation for religion will result, as in *Multani v Commission scolaire MargueriteBourgeoys*[11] or *Burwell v Hobby Lobby*,[12] and sometimes equality or other fundamental rights will be found to prevail, as in *Reference Re Same-Sex Marriage*[13] or *Obergefell v Hodges*.[14] These cases, among many that could be found in different jurisdictions, represent the appropriate outcome of a secular system, in which no single right is treated as absolute and all rights are treated as equal and therefore deserving of some degree of protection.

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8 See Peter W Hogg and Allison A Bushell, 'The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75. Dialogue can be achieved by the use of something like the *Canadian Charter of Rights and Freedoms*, s 33, which provides, in part, that:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

9 On such an approach, see Liam Elphick, 'Sexual Orientation and "Gay Wedding Cake" Cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38 *Adelaide Law Review* 149.

10 *Canadian Charter of Rights and Freedoms*, s 27.

11 *Multani v Commission scolaire MargueriteBourgeoys* [2006] 1 SCR 256.

12 *Burwell v Hobby Lobby*, 573 US ___ (2014).

13 *Reference Re Same-Sex Marriage* [2004] 3 SCR 698.

14 *Obergefell v Hodges*, 579 US ___ (2015).

B *Law and Religion as Theoretical Constructs*

2.1 We believe in the interplay of religious ideas and legal ideas in the development of the Western legal tradition.[15] Hence, the most 'significant concepts of the modern theory of the state are secularized theological concepts.'[16]

2.2 We believe that religious ideas can be a powerful tool for change, when combined with legal ideas, in dealing with poverty, hunger, the environment, and a wide range of other social issues.[17] Liberation theology is an example, which shows that religion does contain values that can inform and work with legal ideas.[18] Sometimes religious values will affirm legal ideas; at other times, they will challenge them. In either case, the interaction will be illuminating.[19]

2.3 We believe that we can find connection and direction in seeing legal texts as religious, religious texts as legal, and both as literature. Reading the texts in this way casts new light on certain perennial issues in legal theory and theology, such as the normative force of text, the practice of interpretation, and the relationship between past and present.[20]

III Conclusion

The interaction of law and religion is worthy of study for both sociological and historical reasons. The study of humans in society constitutes the raison d'être of the humanities and social sciences, and the legal academy is entrusted with the study and critique of the way in which law operates in, and to an extent constitutes, society. 'Law and religion', as a specific field of inquiry within the legal academy, studies the multifarious ways in which law interacts with religion in society. Bringing a partisan religious agenda to the study of 'law and religion' is partial and exclusive, and it does not do justice to the multifarious ways in which law interacts with religion. The scholarly enterprise calls for an inclusive approach to the study of 'law and religion'.

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15 See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983); Harold Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2006).

16 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, MIT Press, 1985) 36.

17 See Paul Babie, 'Private Property, the Environment and Christianity' (2002) 15 *Pacifica* 307.

18 See Gustavo Gutierrez, *A Theology of Liberation: History, Politics, and Salvation* (Orbis Books, revised ed, 1988).

19 See Paul Babie and Vanja Savić (eds), *Law, Religion and Love* (Routledge, 2017).

20 See, eg, Joshua Neoh, 'Text, Doctrine and Tradition in Law and Religion' (2013) 2 *Oxford Journal of Law and Religion* 175; Joshua Neoh, 'The Rhetoric of Precedent and Fulfillment in the Sermon on the Mount and the Common Law' (2016) 12 *Law, Culture and the Humanities* 419.