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The Reformation of Religious Law

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Abstract

A long-term and significant effect of the English Reformation of the 1530s has been the marginalisation of scholarship on religious law. Although this has begun to change in recent years, very little attention has been afforded to the defining features of religious law and whether it is useful to talk of a category of religious law. This article seeks to begin to redress this by constructing an understanding of religious law as necessarily having both a religious and legal character. It draws upon the work of Robert Alexy and Niklas Luhmann in particular to propose a necessarily interdisciplinary understanding to further stimulate scholarship on religious law.

Key Words

Religious Law

English Reformation

Positivism

Natural Law

Systems Theory

1. A Lesson from History

1.1. The English Reformation occurred later and took on a different character than the Reformation that occurred on the European continent. On the continent the Reformation was a religious movement against the Catholic Church by Protestant reformers such as Martin Luther and John Calvin from 1517 that began in Germany but spread throughout continental Europe. By contrast, England's Reformation was the result of a split from Rome in the 1530s under Henry VIII in order to allow the King to divorce his wife Catherine of Aragon. As Elton (1990: 265) has noted, 'Without the divorce there would therefore have been no Reformation, which is not at all the same thing as to say that there was nothing to the Reformation but the divorce'. Yet, the English Reformation was not motivated by a religious or intellectual development. It was not a religious upheaval that required political and constitutional

reconstruction; it was a political and constitutional act that led in time to religious upheaval.

1.2. This is not to deny that the English Reformation had an effect upon the constitution. It strengthened the power of Parliament; albeit a Parliament that was clearly doing the King's bidding. And the divorce from Rome increased the powers of the monarch. The Ecclesiastical Appeals Act 1533 declared 'that this realm of England is an empire ... governed by one supreme head' and forbade 'the intermeddling of any exterior person or persons' including 'the annoyance as well of the see of Rome', forbidding all appeals to Rome which had previously resulted 'not only to the great inquietation, vexation, trouble, costs and charges of the King's Highness and many of his subjects ... in this his realm, but also to the great delay ... of said causes, for so much of the parties appealing to the said court of Rome most commonly do so the same for the delay of justice'. The Submission of the Clergy Act 1534 stated that the existing canon law was only to apply provided it was not 'contrariant or repugnant to the King's prerogative royal, or the customs, laws and statutes of this realm'. And the teaching of canon law at the Universities of Oxford and Cambridge was prohibited.¹

1.3. The English Reformation had a profound and long-lasting effect upon the recognition and regulation of religious law in three respects (Sandberg, 2014: 16). First, the end of the teaching of canon law in the universities meant that scholarship in this field became dominated by the work of professionals. It was the members of Doctors' Commons and members of the clergy who produced the books on church law not the scholars. Second, the termination of Papal authority meant that the law of the church became incorporated within the general law. The Church of England was now established by law.² Its religious law, the rules governing the established church including its doctrine and worship, were part of the law of the land enforced in church courts which were part of the State court system. Third, the fact that the Church of England became the only lawful religion meant that other forms of religion and adherence to other religious laws was unlawful. The slow march of toleration, whereby it became lawful to adhere to religions other than the established church,

¹ Cromwell issued injunctions in 1535 for the Universities which substituted lecture in Civil Law for lectures in Canon Law and in 1545 an Act (37 Henry VIII c. 17) allowed judgeships in the ecclesiastical courts to be held by laymen who were doctors only of Civil Law.

² For a discussion of the legal effects of establishment see Sandberg, (2011: chapter 4).

softened this stance. However, an important difference remained. While the religious law of Church of England was part of the law of the land and had a public law character, religious groups other than the Church of England are understood to operate a quasi-contractual jurisdiction (Sandberg and Thompson, 2017: 152). Religious groups are usually treated as voluntary associations. They are treated as a matter of law as members of clubs or unincorporated associations. As Lord Kingsdown acknowledged in *Long v Bishop of Capetown*³, members ‘may adopt rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them.’ Religious laws are private quasi-contractual agreements which are only exceptionally enforced by the courts of the State where there is a financial interest and in relation to the disposal and administration of property.⁴

1.4. These consequences of the Reformation have meant that English legal scholarship has paid little attention to religious law. The study of law and religion generally is a relatively recent development in British Law Schools (see Sandberg, 2011: chapter 1) and that scholarship has tended to focus on what I have termed ‘religion law’: the study of external international and national laws affecting religion including constitutional laws, human rights, discrimination law, criminal law and other provisions that affect individual and collective religious freedom. Recent years have seen a growth in scholarship on legal pluralism and some work on the interaction and compatibility of religious laws with international and national laws.⁵ However, less attention has been given to the study of religious laws in their own right as systems of law. As Rivers (2012: 394) has argued: ‘The idea that religions command respect on the part of secular government institutions because they consist of, or contain, autonomous systems of law is being lost in the inexorable rise of a dominant state-individual paradigm and the embrace of state regulation’. There are some exceptions to this trend, of course. The study of the law of the Church of England has undergone something of a renaissance through the formation of the Ecclesiastical Law Society and the works of Doe (1996) and Hill (2007) while important works on Islamic law, Jewish law, and Hindu law have been published together with some work focusing

³(1863) 1 Moore NS Cases 461.

⁴*Forbes v Eden* (1867) LR 1 Sc & Div 568.

⁵ See, for instance, the essays in Sandberg (2015a) and Bottoni, Cristofori and Ferrari (2016).

upon traditions within each faith.⁶ And there are a very small number of seminal works that seek to compare religious laws.⁷ However, generally, very little attention has been afforded to the defining features of religious law and whether it is useful to talk of a category of religious law. This article seeks to begin to redress this.

Developing my previous definition of religious law as the ‘internal’ laws, rules and norms generated by religious groups themselves (see Sandberg, 2011: chapters 1 and 9), this article seeks to construct an understanding of religious law as necessarily having both a religious and legal character.

2. A Diversion from Philosophy

2.1. Following the work of Alexy (2000), law – including religious law – can be understood as a form of communication. Alexy’s work provides a means of navigating and sidestepping (if not completing overcoming) one of the biggest divides in legal philosophy: the debate between legal positivist and natural law approaches as to the nature of law and, in particular, whether it is possible to develop a meaningful notion of law without reference to a core of legal principles that the rules enacted by the lawmaker must respect. Put simply, the basic conceptual difference between these two theories lie in the way that positivist theories see the status of law as depending upon the fact that it has been laid down in a certain way recognised by the legal system, while natural law theorists, to varying extents, reject the notion that a law must be obeyed simply because it has been created through the mechanisms of the particular legal system (Sandberg, 2017).

2.2. As Alexy (2002: 3-4) has written, the difference between the two schools of thought is that positivistic theories defend the ‘separation thesis’, that ‘there is no conceptually necessary connection between law and morality, between what the law commands and what justice requires, or between the law as it is and the law as it ought to be’ while natural law theories support the ‘connection thesis’, that ‘the concept of law is to be defined such that moral elements are included’. The value of Alexy’s work is that by focusing on legal communications he maintains that an element relating to natural law

⁶ There are also a small number of works on the laws of other Eastern religions such as Buddhism, see Hussain (2015) and Redwood French and Nathan (2014).

⁷ Such as the works of Neusner and Sonn (1999 and 2000), Huxley (2000) and, in relation to Christianity, Doe (2013).

is a necessary feature of all legal systems in terms of the resolving of disputes. His work recognises a tripartite distinction of three elements that can be found in legal communications (2002: 13). The first, 'authoritative issuance', defines a statement as law if certain procedural or status-based requirements are met. This is the classic positivist approach. The second, 'social efficiency', defines a statement as law by reference to how it is observed to function in society (2002: 14-16). This includes 'external aspects' such as the Weberian understanding that law exists as law where there is a possibility of it being enforced by 'coercion through action aimed at enforcing compliance or punishing violation' (Weber, 1978: 34). It also includes 'internal aspects' which comprise subjective approaches whereby law is law if people recognise it as such. The third, 'correctness of content', defines a statement as law if it is 'rationally justifiable' within the context of the legal system (Alexy, 2002: 16). Law is a system of norms 'that are not themselves unjust in the extreme' (2002: 125). This embraces a natural law approach. For Alexy (2002: 214), 'There is no claim that the normative statement asserted, proposed, or pronounced in judgments is absolutely rational, but only a claim that it can be rationally justified within the framework of the prevailing legal order'.

2.3. Although Alexy's approach definition has been criticised (see, e.g., Berteau 2003: 224-225), it helpfully undermines common binary depiction of natural law and positivist theories. This correctly reflects the fact that ideas and assumptions from both theories are found in the day to day life of all legal systems. Both natural law and positivist ideas have long informed and been expressed both explicitly and implicitly by judges in court rooms. Historical research has shown that positivist ideas have long existed alongside natural law ideas and concepts that we attribute to the law of equity actually have a long history in the common law courts (Doe, 1990; Seipp, 2016). This observation is especially important in relation to religious laws where at least in relation to Christianity there is an assumption that natural law ideas are even more prevalent within the legal systems of most religions than within the legal systems of most States or other social groups (Doe, 2017). Yet, applying the work of Alexy, this assumed distinctive characteristic of religious law can be doubted. It is not the case that natural law thinking is ubiquitous only in religious law; it is a characteristic of legal argument per se. Yet, this philosophical literature does reveal a more nuanced definitional attribute of religious law in particular. The 'correctness of content' in

religious laws is often regarded as something that is determined by something or somebody that is external to human beings and precedes them. This is the difference between religious and non-religious natural law theories. It is important not to overplay this difference and to assert that the difference is between divinely created and humanly found natural law ideas. The form in which natural law ideas are expressed will vary from religious tradition to tradition and even within one religion (as shown by the essays in Doe, 2017). Sometimes natural law is understood to be the law divinely implanted in nature that rational creatures can discern through the use of natural reason; sometimes natural law is considered to be directly revealed by the divine. Sometimes a distinction is made between natural law and divine law; sometimes the two terms are considered to be synonymous (Sandberg, 2017). The definitional attribute of religious law is that the ultimate foundation of natural law comes from a reality external to the individual: religious rules require being obeyed simply because dictated by God (for some religions) or rooted in the cosmic order (for others).

2.4. This neatly encapsulates the main argument that will be made below: religious law can be distinguished from other forms of law by reference to its religious and legal character. This argument is not intended to presuppose a distinction between law and religion. Rather, the purpose is to suggest that a definitional attribute of religious legal systems is not only the existence of both religious and legal phenomenon but also their fusion. It is impossible to neatly distinguish law and religion within religious legal systems. They are necessarily characterised by being both religious and legal and this is what makes them distinctive and what makes talk of a category of religious law useful and meaningful.

3. The Religious Character of Religious Law

3.1. The first proposition is that religious law can be distinguished from other types of law by nature of its religious character. As I have argued elsewhere (Sandberg, 2011: chapter 9) religious law has distinctive sources, purposes or functions and subject matters. This is not to deny that religious laws do not share sources, purposes or content with other forms of law. However, there are elements that are distinctive and these flow from the religious character of religious law. In terms of sources, it is true

that there are similarities between religious laws and other forms of law. Religious law is not limited to the rules that adherents receive through sacred texts or cosmic laws. It also includes ‘internal’ laws or other regulatory instruments that govern the activity of a religious group. These are the more practical rules, norms and laws – formal and informal, written and unwritten – that are constantly developed by group members to regulate their everyday life. These modern rules are often seemingly indistinguishable from the rules of other social groups or indeed State law. In the Anglican context, the *Principles of Canon Law* (2008) helpfully distinguishes between ‘fundamental authoritative sources of law’ namely ‘Scripture, tradition and reason’ and ‘formal sources’ such as ‘constitutions, canons, rules, regulations and other instruments’. It might be thought that only the ‘fundamental authoritative sources’ of religious law are distinctive since the ‘formal sources’ of religious law have much in common with other forms of law. However, this would ignore the way in which some ‘formal sources’ of religious law are seen to be divinely inspired and that all of them are oriented to a supernatural goal. The distinctive feature in terms of source is rather that the ultimate foundation of the sources comes from a supernatural cause; a reality external to the individual.

3.2. In terms of purpose or functions, there is again an obvious overlap between religious laws and other forms of law. The purpose of religious law, like other forms of law, is to facilitate and order everyday life.⁸ As Madrid (2004: vi) has noted in relation to Catholic Canon Law, the Church ‘needs canon law the way a freeway needs lane stripes’. Yet, again, for religious law there is a deeper purpose. In the words of Rowan Williams (2008:11) ‘Canon Law begins from that basic affirmation of equity which is the fact of membership in the Body of Christ – a status deeper and stronger than any civil contract or philosophical argument’.⁹ As Örsy (2000: 2) writes, ‘The *purpose* of canon law is to assist the Church in fulfilling its task which is to so reveal and communicate God’s saving power to the world’. These transcendent dimensions are not unknown in State law or international law but do not carry the same weight.

⁸ For discussion of the facility and order theories see Doe (1996: 33 *et seq.*).

⁹ This does not mean that religious laws cannot be seen as contractual. There are other agreements which are not easily classifiable as contracts. For instance, in *Radmacher v Granatino* [2010] UKSC 42 at para 63 it was held that the question of whether prenuptial agreements (‘prenups’) are contracts was a ‘red herring’ and as Thompson (2015: 105) has argued, ‘prenups differ hugely from agreements between business partners’ but ‘prenups are not exactly family law agreements either’. For discussion of proposed statutory reform see also Thompson (2016).

3.3. Religious law can also be defined by reference to the subjects it covers. Beckford and Richardson (2007: 397) identify ‘the codification of beliefs, tests of orthodoxy, the training and certification of leaders, and the disciplining of deviants’ as ‘forms’ of what they refer to as ‘religious self regulation’. The subjects that religious laws cover tend to be different from ‘secular’ laws because religious groups tend to face unique issues which they have in common with one another. For Anglicans, for instance, the *Principles of Canon Law* state that ‘the principal subjects with which laws deal are ecclesiastical government, ministry, discipline, doctrine, liturgy, rites, property, and ecumenical relations’. However, it is important not to over-state this. Many of the subjects dealt with by religious law are not uniquely its preserve and are also regulated by State law. This is true, for instance, of laws concerning property rights. Looking at the Roman Catholic Church, it may be observed that although the titles of some of the seven books that constitute the *Code of Canon Law* such as ‘The Teaching Function of the Church’ and ‘The Sanctifying Function of the Church’ would not be found in a non-religious context, the title of other Books, such as ‘Temporal Goods’, ‘Penal Law’ and ‘Procedural Law’ would not look out of place in a code of State laws. Moreover, the Church does not live in social isolation: many religious laws concern subjects that are also dealt with under State law.

3.4. The point is that, although religious laws will often have much in common with other forms of law, reference to their sources, purposes and (to some extent) subject matter show that religious laws are distinctive because of their religious nature and context (Sandberg, 2011: chapter 9). The fact that religious law can be defined and distinguished from other types of law means that this expression can be used to include particular systems of religious law such as Islamic law, Jewish law, Hindu law and Christian law (or indeed, labels that describe particular denominations, traditions or schools within a religion). This is not to deny, however, that the use of the label religious law is controversial. Its use has been criticised on a number of grounds: the focus on religion excludes legal systems based on cultures and beliefs which have much in common with religious legal systems (Hussain, 2015); it is unproven what particular systems of religious law such as Islamic law, Jewish law and Christian law have in common; and talk of religious law often invokes an understanding that such phenomena are largely historical relics. This view is taken by

Huxley (2002: 1) who preferred to refer to religious law as ‘Old World Law texts’ or ‘Obsolescent Written Law’. He argued that emphasis is to be given to the ‘O’ word in both of these formulations since ‘what critically differentiates these ... systems from the normal Comparative Law fodder is oldness, obsolescence or, if you prefer, history’. This approach, however, underplays the dynamic nature of religious law: the way in which religious laws are created, interpreted and applied in the day to day life or faith communities. These criticisms, though important, do not require the rejection of religious law as a category.

4. The Legal Character of Religious Law

4.1. Yet, the religious character by itself does not capture the phenomena of religious law.

The unique thing about religious law is that it has both a religious character and a legal character. A legal system is not religious because it has a religious component; many other legal systems will have religious rules and will share sources, purposes and subject-matter with religious laws. Rather, a legal system is a religious legal system where it is identifiable with a religious group; where it is produced, adjudicated, upheld and interpreted by a religious group. This means that religious law has a legal character. This is not to say that it must resemble State law or any other particular form of law. Rather, it is to say that religious law includes legal as opposed to social or religious norms that are capable of enforcement in a way that is legal rather than social or religious (though, of course, the norms may well be social and religious too and enforced in social and religious ways too).

4.2. As I have discussed elsewhere (Sandberg, 2016a), the question is whether, and if so how, a line can be drawn between law and other forms of social control. Muñiz-Fraticelli (2014: 139) has agreed that the legal pluralist tradition has ‘failed to provide criteria either for distinguishing legal from non-legal phenomena or for recommending for or against the recognition of a normative system as law’. This does not mean, however, that we should abandon any attempt to distinguish law from other forms of social control (Sandberg, 2016). If we conflate law with social control then the width of the definition makes it difficult to say anything meaningful about law in particular. In the same way that not all forms of social control operated by the State constitutes State law, not all forms of social control operated by religious groups

constitutes religious law. This raises the question of where (and how) the line is to be drawn. Malik's (2012: 23) distinction between legal norms 'where an individual or group can point to distinct norms that regulate normative social order' and legal orders 'that indicate that there are mechanisms for institutionalised norm enforcement' may prove useful. Religious legal systems exist wherever there is a legal order; where there is not only a norm but also any mechanism, however informal, for resolving disputes about validity, interpretation and enforcement.

4.3. The notion of law as communication should be used to distinguish legal norms from other forms of social control (Sandberg, 2016a). This approach suggests that the definition of law, or at least its distinguishing features, can come from law itself. By emphasizing the role of legal reasoning as a linguistic activity, such an approach provides an analysis of how law itself can distinguish legal from social norms. This can be illustrated by reference to Niklas Luhmann's social systems theory (2004; 2014). Put simply,¹⁰ Luhmann's social systems theory states that modern society is functionally differentiated into autonomous social systems such as law, religion, politics, science and the media. Luhmann sees these social systems as reproducing themselves by communication. They are 'autopoietic' systems in that they produce and reproduce their own unity (Luhmann, 2014: 281). Social systems, therefore, define themselves based on self-description. For Luhmann, law is one social system and, like other social systems, law reproduces itself by communication.

4.4. This shifts the focus from debates on the 'true nature of law' towards asking how law defines its own boundaries and where they are drawn (King and Thornhill, 2003: 42) Law, like every other social system (law, religion, politics, science and so on) becomes distinct and autonomous by developing its own function and its own binary code (Luhmann, 2013: 45). Law's function is the 'stabilization of normative expectations' in the face of disappointment and its binary code is legal / illegal (Luhmann, 2004: 98-99, 147-148).¹¹ As Teubner (1991: 1451) noted, this means that 'law' includes any phenomenon which is communicated using the distinction

¹⁰ For an accessible guide see King and Thornhill (2003) and for further discussion of Luhmann's theory in relation to law and religion see Sandberg, (2015b; 2016b).

¹¹ Religion has the 'function of transforming the indeterminable into the determinable' and the binary code of immanence/transcendence. This enables the system to 'perceive what can (and cannot) be adapted as religious communication' (Luhmann, 2013: 249-250; 73).

legal/illegal that has the function of the stabilization of normative expectations. The binary code is ‘the basic distinction that a social system applies in order to communicate’ (Moeller, 2006: 216). The code allows the system ‘to determine which communications “belong to” the system’ (King and Thornhill, 2003: 24). The social system’s function and binary code provides the means by which each system will self-define and therefore perpetuate themselves. Any communication that functions to achieve ‘stabilization of normative expectations’ and uses the legal / illegal code becomes part of the social system of law. Applying social systems theory, religious legal systems produce both legal and other communications but whenever they produce communications that use the legal / illegal code and functions to achieve ‘stabilization of normative expectations’ then that is law. A systems theory approach, therefore, allows social norms to be distinguished from legal norms. It also allows the legal character of religious law to be understood.

5. Conclusion

5.1. It has been argued that the common feature found in religious laws is their dual religious and legal character. First, religious law has a religious character in that has distinct sources, purposes and subject-matters than other forms of law owing to the way in which its ultimate foundation of comes from a supernatural cause; a reality external to the individual. Second and concurrently, religious law has a legal character, being the product of a legal order and displaying the characteristics of law identified by Luhmann: communications using the legal / illegal code and functioning to achieve ‘stabilization of normative expectations’. These religious and legal dimensions of religious law overlap; indeed the defining feature of religious law may be that it has the characteristics of both legal and religious communications identified by Luhmann. The dual religious and legal character of religious law is its key definitional attribute. This underscores that the reformation of religious law studies is required given that the analysis of religious law is necessarily an interdisciplinary activity, requiring the insight of different scholars, both those trained in the study of the particular religious tradition and those trained in the study of law.

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