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Politics of Religious Freedom:
Contested Genealogies

Contemporary discourse on the right to religious liberty makes a number of claims but arguably none more insistent or polemical than its claim to universality. Simultaneously invoking notions of neutrality, secularity, freedom, and right, the claim is somehow to have located an Archimedean vantage point above or independent of the contingencies and disorder of politics, culture, religion, and, indeed, of history itself. Much critical scholarship in the history of ideas, however, has begun to question this reigning narrative to suggest that religious liberty is inescapably context bound and inseparable from contingencies of politics, power, and history. This volume is a contribution toward this growing scholarship. The essays in this volume taken together track multiple genealogies of the concept in a variety of historical and contemporary contexts that cut across the Western and non-Western divide. They collectively show that religious liberty is not a single, stable principle existing outside of culture, spatial geographies, or power relations but is a fractious, polyvalent concept unfolding through divergent histories in differing political orders.

The first two essays by Ian Hunter and Nehal Bhuta take apart one of the common origin stories

told about religious liberty in European history, namely, that it helped establish the basis for political secularism by separating religion from politics and making the state indifferent to claims of religious truth. In this view, since its initial formulation in seventeenth-century political thought, religious liberty has continued progressively to expand its tolerant ambit to all religions far beyond its initial mandate to institute peace across Christian denominations. In revisiting this narrative, Hunter argues that religious liberty in its earliest formulation in European history was in reality an unsteady and unstable concept, the result of a “‘circumstantial casuistry’ of historically embedded political concepts” rather than a principled commitment to the separation of church and state. Hunter thus points to the deep incompatibility within and across three distinct historical conceptions of religious liberty: first, Martin Luther’s championing of the freedom of all Christian believers in the sixteenth century against the Holy Roman Empire’s rejection of this and its attack on the Religious Peace of Augsburg; second, the Westphalian repudiation of the *cuius regio, eius religio* principle at the heart of the earlier Augsburg settlement; and third, the conflict within seventeenth-century political theory between John Locke’s conception of religious toleration developed in the context of the Anglican settlement and that advanced by Pufendorf and Thomasius writing in the context of German imperial public law and the Brandenburg-Prussian settlement.

Given the historically contingent character of these rival understandings, the various philosophical attempts to ground religious liberty in transcendent principles—whether in Catholic and Protestant scholasticisms, Lockean and Kantian rationalisms, or Taylorean philosophical hermeneutics—have been unable to supersede the incompatibilities at the heart of these conceptions since their early history. Hunter argues that conflicts over religious freedom have been historically resolved, if at all, by legal casuistry and the coercive imposition of judgments within regional jurisdictions and national state-religion settlements. Hunter’s primary claim, then, is that the intellectual history of religious freedom is to be found not in philosophical foundations but in the horizon of “the religious, political, and juridical casuistries spawned by the national religious settlements themselves.”

Crucial to the early historical unfolding of the concept of religious liberty was the category of *adiaphora*, those religious activities that are deemed unnecessary to salvation. According to Hunter, this category was employed in the early modern period to “narrow the array of doctrine and

liturgy where salvation was at stake, and to expand the array that could be regarded as soteriologically indifferent, hence to be seen not from a sacramental-religious standpoint but from a political-judicial one.” Once these acts were made inconsequential to salvation, they could then be brought under the regulation of civil law. Hunter concludes that long before conceptions of subjective natural right or the inviolable autonomy of individual belief were ever on offer, early modern legal and political casuistries created the bifurcated nature of the concept of religious liberty by seeking to distinguish the essentially religious—“inner truths” toward which civil authority claimed indifference—from the religiously permissible—which were to be left free of sovereign interference except insofar as they threatened social peace.

For Bhuta, this early history is consequential for understanding the contemporary formulation of religious liberty as encapsulated in Article 9 of the European Convention on Human Rights (ECHR) in that it “represents a wordsmithed bricolage of rights-forms derived from heterogeneous traditions and specific political projects.” In addition to this important trajectory in European history, Bhuta lays out two more that undergird the current formulation of religious liberty: one emanating from the bourgeois *Rechtsstaat* concept of legal right, which holds that any state intrusion on individual liberty be calculable, definable, and controllable; and a second from a Protestant conception of personal faith as the religious core that ought to be protected from state intervention. Each of these genealogies “coexist within the capacious language of freedom of conscience, submerging or reemerging in new ways to refract the contentious political conflicts of the day,” suggests Bhuta.

We see all three of these genealogies at play in the textual structure of the right itself. Article 9(1) protects an inviolable right of “everyone” to “freedom of thought, conscience and religion,” while Article 9(2) subjects the freedom to manifest religion or belief to certain grounds of limitation where necessary, for example, to protect “public order” or “the rights of others.” Both this structure of the right and its interpretation by the European Court rely on a distinction that significantly shapes the modern politics of religious freedom. The first element in Article 9(1), known as the *forum internum*, is defined as the locus of religious belief and conscience protected absolutely by law while the second element in Article 9(2), known as the *forum externum*, is where the outward expression of this belief is subject to state regulation. (Note its consonance with the early modern distinction

laid out by Hunter.) Integral to this formulation is the concept of public order in the name of which the state accords itself the right to regulate and intervene in the latter via either recognition or limitation of manifestations of religious belief.

The conceptual architecture of the right is in this respect premised on a paradox. On the one hand, it is said to be neutral toward specific religious beliefs, and indeed neutrality is the leitmotif of modern religious liberty discourse whether in moral, legal, or political contexts. On the other hand, the right to religious freedom, as a technology of modern state and international legal governance, is deeply implicated in the regulation of religion. This tension between inviolability and regulation is *internal* to the concept of religious liberty itself and serves to generate the distinctive antinomies and contradictions that arise in struggles over its meaning, justification, and realization.

Given this conceptual structure, it is hardly surprising that the legal reasoning of the European Court of Human Rights interpreting Article 9 embeds and entangles these long-standing conceptual conundrums. For Bhuta, this is strikingly evident in the recent jurisprudence of the court on the headscarf in that it accords the state a wide margin of appreciation in the name of upholding public order, which itself is grounded in the majoritarian Christian values and sensibilities. These decisions taken together, he argues, represent a “moral-cultural political theology of democracy as transvalued Christianity” while imposing limitations on the public expression of rival religious commitments.

Importantly, this conception of religious liberty and its attendant antinomies are operative not only in the jurisprudence of the ECHR but also of courts in Egypt and India as analyzed in both our contribution and Ratna Kapur’s. In each context, the relationship between religion and state is distinct: in some cases (Egypt) the religious personality of the state is pronounced whereas in others (India and Italy) it is more muted, and in Europe (France and Britain) it is distinctly secular. This dissimilarity between levels of secularity would make any comparison impossible for most scholars of religious liberty. Yet as is evident in the analysis offered of case law from Europe, Egypt, and India, there are remarkable similarities in the structure of the legal arguments deployed. In all the cases examined, the courts have simultaneously upheld the individual’s right to belief while sanctioning the public display of these beliefs, especially of religious minorities. As our contributors show, what is shared in these judgments is the deployment of the

concept of public order in order to secure the state's right to intervene and regulate the religious practices of its citizens. Thus the French and other European states' ban on the veil are premised on this argument, as is the regulation of the right of the Bahais to proclaim their faith publicly in Egypt and the Indian court's rejection of the Muslim minority's claim to worship in the contested site of Ayodhya. In all of these cases, the prerogative of the state is predicated on the prior distinction between *forum internum* and *forum externum* that essentially allows the state simultaneously to uphold the immunity and sanctity of religious belief *even as* it regulates the manifestation of these beliefs.

As we argue in our contribution to this volume, "Immunity or Regulation? Antinomies of Religious Freedom," this inevitably involves the state in making substantive arguments and claims about what is essential or inessential to the domain of religious belief (e.g., is the veil an essential part of Islam or simply a cultural accretion?), which is a violation of the state's claim to abstain from intervention in the religious domain. Rather than read this contradiction as a corruption of the right to religious liberty, we want to suggest that this antinomy is internal to the conceptual architecture of the right itself. The strikingly parallel legal arguments invoked in a variety of contexts, with distinctly different models of religion-state ententes, makes this evident. Viewed from this perspective, we conclude that the right to religious liberty is not simply a legal instrument that protects the sanctity of religious belief but also a technology of modern governance that ensures the state's sovereign right to regulate all domains of social life, a necessary part of which is religion.

An important theme that emerges from the articles here is how the legal concept of public order privileges the beliefs, values, and practices of the majority religious tradition in any given polity. We see this in the Ayodhya case in India, the Bahai case in Egypt, the *Jehovah Witness* case in Greece, the *Şahin* case in Turkey, the *Lautsi* case in Italy, and the *Dogru* case in France. Some contributors to this volume (Samuel Moyn and Kapur) view this propensity in the jurisprudence of the right to belie its claim to secular neutrality. Other contributors (Mahmood and Danchin) see this propensity as diagnostic of the necessary intertwining between the religious and the secular that characterizes all modern polities despite different models of state-religion entente that prevail in a particular polity. "Immunity or Regulation?" for instance, argues that insomuch as the disciplinary powers of the modern state extend over all of social life, the secular state is necessarily

involved in regulating the social life of religion and often prescribing substantive content while at the same time claiming to treat all of its citizens equally regardless of their religious commitments. This dual impetus internal to secular governmentality is evident in the two parts of the right to religious liberty discussed above: the first that enshrines religious belief as an inner sanctum protected from state intervention, and the second that authorizes the state to sanction and regulate the public expression of religious beliefs. The former promises civil and political equality across lines of religious difference, and the latter lodges majoritarian values and sensibilities in the very substance of a nation's laws. If indeed this tension is internal to the right to religious liberty, and the modern secular state more broadly, then, as the essay concludes, religious intolerance cannot be understood simply as a product of cultural, religious, or social values but requires that we attend to the operation of modern secular power in generating new forms of religious prejudice and enhancing old ones.

There is another important consequence that follows from the conceptualization of the right to religious liberty as a technology of modern governance, namely its role in settling and generating geopolitical conflicts. This dimension of religious liberty comes to the fore most forcefully in the contributions by Moyn and Melani McAlister. Importantly, Moyn shows how the concept of religious liberty, far from being a secular instrument, served as a weapon during the Cold War against "godless communism" in American and European diplomacy. In this formulation, religious freedom was not a religious concept but a Christian one deployed in "the holy crusade against [Soviet] secularism." American and European Christian activists played a key role in shaping Article 18 of the Universal Declaration of Human Rights at the end of the Second World War, suffusing it with a "Christian personalist" ethos that persists in the right's enshrinement of conscience (over other aspects of religion) to this day. Moyn echoes Hunter and Bhuta in concluding that the definition of the right to religious liberty has changed depending on the political context in which it is inserted and the national security interests it is made to serve. It is not surprising therefore that when its target was godless communism during the Cold War, it had a Christian cast, and now that the target is Islam in Euro-American states, religious liberty has come to be cast as a secular principle. The targets of religious liberty may have changed (from communists to Muslims) but its rationale as an instrument of *raison d'état* continues to be evident.

If Moyn's focus is on Cold War geopolitics as a decisive factor in the development of the concept of religious liberty in international law, then

McAlister's essay provides a different geopolitical arc that cuts across the divide between the North and the global South. It concerns the rearticulation of the Christian evangelical movement in America, which, following the end of the Cold War, came to focus its energies on Islam as the new enemy of Christendom globally. Their most notable success was the passage of the International Religious Freedom Act (IRFA) by the US Congress in 1998, which charges the US State Department to monitor and sanction infractions of religious liberty globally, especially when the victims are Christians and the perpetrators Muslims. McAlister follows the unfolding of this ambitious project in Southern Sudan where American evangelicals mobilized on behalf of Sudanese Christians, making wide use of IRFA and in the process deploying a uniquely American vision of religious liberty and racial politics. While the persecution of Southern Christians was quite ferocious by the North Sudanese government, in saving these persecuted souls, the American evangelicals (blacks and whites) projected their own imaginary of race, redemption, and slavery onto the Sudanese, indelibly transforming the self-understanding of the local players and the racial topography of race and religion. The American conception of race was anachronous to the Sudanese reality, but it became widely adopted as the civil war raged on and the American evangelical activism gave it a new grid of intelligibility. McAlister's essay powerfully shows that the right to religious liberty is not simply a neutral instrument that protects persecuted populations but is also enormously productive and transformative of religious identity, often hardening existing lines of religious difference and transforming religious conflicts into racial ones by infusing local politics with new meaning.

In conclusion, the essays in this volume provide an account of the right to religious liberty in which the power differential between religious majority and minority within a polity, between the North and South, between the state and its subjects, provides a different interpretive grid for its conceptual and practical understanding. A basic argument that runs through these articles is that far from being an instrument of neutrality that protects religion or its practitioners, the right to religious liberty also helps create new identities, reifies religious difference, furthers state regulation of religious life, and at times facilitates the hegemony of powerful geopolitical actors.

By highlighting these aspects of religious liberty, our aim is not to condemn it but to bring our attention to the performative and productive capacity of this putatively neutral legal instrument to generate new political polarizations. Once we recognize that religious liberty is not universal but necessarily context bound, and that the secular and the religious are not in fact opposites

but closely intertwined in paradigmatic ways in all nation-states, then we might be able to appreciate how the right to religious liberty is not a safeguard against state coercion and religious intolerance but at times their vehicle. The challenge we are left with is a *political* problem: how to conceive and institute the pragmatics of religious liberty in ways that do not reify the categories and operations of the Leviathan and its regulatory powers.

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