Outline of Presentation

Religious Perspectives on the Secular State - Comparative Observations

Francois Venter

1 Introduction

Academic survival under a global regime of agnostic scholarship.

2 Manifestations of state secularism

- It is remarkable how ubiquitous the reference to religion is in constitutions, more often than not as invocations of moral authority. Liberal interpretation tend to relegate such references to the status of "ceremonial deism". Eg *In re: Certification of the Constitution of the Western Cape*, 1997 1997 (4) SA 795 (CC) para [28].
- The roots of state secularism are (ironically) to be found in Christian theological dualism: in the 5th Century Aurelius Augustine's *two cities*, Pope Boniface's *two powers*, later in the 11th to 13th Centuries the *two swords*, and in the 16th Century Luther and Calvin's *two kingdoms*.
- The "Lemon test" (*Lemon v Kurtzman* 403 U.S. 602 (1971)) for non-establishment: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."
- Section 76(1) of the (Canadian) British Columbia *School Act* of 1996: "(1) All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles."

  Abella J in *Loyola High School v Quebec (Attorney General)*, 2015, para [63]:

  > "Although the state's purpose here is secular, requiring Loyola's teachers to take a neutral posture even about Catholicism means that the state is telling them how to teach the very religion that animates Loyola's identity. It amounts to requiring a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism."

Sachs J in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para. [34]):

- "[R]eligious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way."
- The French *Conseil Constitutionnel* (2013): "Article 10 of the 1789 *Declaration of Human and Civic Rights* means that the principle of laicity and the neutrality of the state is based upon the freedom of religion, and therefore the state may not support any religious education."

3 A new search for ethics and morality in the post-secular era

Jürgen Habermas "Intolerance and discrimination" (2003) 1 *Int'l J. Const. L.* 2, 9: "In all cultures, religious beliefs and practices have had a crucial influence on the way individuals have understood themselves in ethical terms."

4 The subjectivity of neutrality

Mark Witten "Rationalist Influences in the Adjudication of Religious Freedoms in Canada" (2012) *Windsor Review of Legal and Social Issues* 32, 92-93:

> "Canadian constitutional law is not neutral, but is rather a political culture that is partisan to its own informing values. As Professor Benjamin Berger contends, Canadian constitutional law shares the political culture of liberalism, an ideology that birthed the modern democratic state and its institutions. Berger argues that law inevitably casts religion in a manner that comports with its own cultural assumptions: religion as an individual experience, religion as a private matter, and religion as an expression of autonomy. Thus, for religion to be understood, recognized, and accommodated at law, it may be forced to resonate with the judiciary's preferred construction of religion. In addition, it also follows that law's comprehension and treatment of religion is deeply influenced by liberalism's *epistemological* assumptions, which are the assumptions of *rationalism.* Rationalism presumes a way of knowing that elevates reason and considers the criterion for truth to be exclusively intellectual and deductive, as opposed to sensory, mystical, or experiential. Moreover, because the rationalist philosophy of the Enlightenment developed in reaction to religious power, its assumptions hold unique implications for law's treatment of religion."

5 A religious perspective: the golden rule

Francois Venter *Constitutionalism and Religion* (Edward Elgar, Cheltenham, 2015) 83:

> "The sources of support for reciprocity are found in the major philosophies (beginning with Confucianism) and major religions (including Judaism, Christianity and Hinduism). The golden rule manifests itself intuitively as a universal truth on a par with the universal acceptance that murder, theft and dishonesty constitute reprehensible conduct."

Wattles J *The Golden Rule* (Oxford University Press, New York, 1996) 165-166:

1. Treat others as you want others to treat you. [Major premise]
2. You want others to treat you with appropriate sympathy, respect, and so on. [Minor premise]
3. Therefore, treat others with appropriate sympathy, respect, and so on. [Conclusion]

BACKGROUND READING

Moving from neutrality to objectivity[1]

It has become clear that the complexity of the interface between law and religion has escalated and continues to do so as religious pluralism spreads across the globe amidst a pronounced trend towards heightened levels of public religiosity. It is also clear that the standard liberal and secular approach for dealing with these complexities is no longer effective and can no longer reasonably be maintained – if it ever could. Developing alternatives is therefore essential, and calls for much thought and effort. A simple, once-off solution is not possible, but as a point of departure for the purpose, it is suggested that the notion of state/legal neutrality towards religion within the context of liberal constitutionalism should be replaced with *objectivity*, applied in the context of *constitutionalism*, understood as a standard for the just exercise of the authority of the state as it has crystallised over centuries of human experience with the allocation and limitation of public authority.

It is submitted that the trap in which various states have landed themselves under the influence of Western liberalism by subscribing to secular neutrality when dealing with such a profoundly human attribute as religion (including anti- or non-religious stances) is caused by the deliberate blandness of the notions of secularity and neutrality. The law and its authors and practitioners are generally required to act fairly and in an even-handed manner.

Legal artefacts such as constitutions and fundamental rights are not bland, however. They are based on concepts and values inspired by profound philosophical and religious presuppositions. For judges, governments and legislatures, fairness does not require neutrality. On the contrary, neutrality implies detachment, disinterest, non-engagement, an attitude that one might associate with cybernetics, not with jurisprudence, politics, good governance or constitutional scholarship.

In most cases where law meets religion, objective legal standards are rightly sought in the text of a supreme constitution. However, this unavoidably calls for interpretation of the text, and interpretation is notoriously subjective. To cite the Constitution as a neutral "common point of reference" is therefore problematic: it amounts to the elevation of a particular, value-free interpretation of the constitutional text to the level of moral authority. Constitutional interpretation should therefore not be an attempt at neutrality, but an exercise in objectivity.

It is impossible to ignore the growing difficulties that constitutional states are facing due to the global increase of the multi-culturalism that characterises contemporary society. To remain true to the need to be impartial when dealing with the unavoidable tensions arising from religious pluralism, the state must find a better means of conceiving and applying the law fairly to all.

Attempts at neutrality confronting these difficulties are not convincing. They cause confusion and unnecessary inconsistencies. Secularism simply is not neutral. Religion cannot arbitrarily be set aside at will. Neutrality is a cop-out. Neutrality means not taking sides, which implies that a neutral arbiter cannot resolve a dispute. It is easily confused with objectivity, which means not being prejudiced. Put differently, neutrality is bland, colourless, not engaged. Neutrality entails the supposition that subjectivity can be avoided, or worse, it supposes indifference.

A more fruitful channel that warrants further investigation is one that acknowledges the human inability to be neutral and then to seek solutions *objectively*. Some will object to this approach by assuming that neutrality is synonymous with objectivity and impartiality.

---

[1] Francois Venter *Constitutionalism and Religion* (Edward Elgar, Cheltenham, 2015) 237-240.

It is suggested, however, that whereas neutrality requires a personal ability to be completely detached from a legal question, objectivity involves the express acknowledgement of anyone's inability so to be robotically detached, followed by recognition of the responsibility to find objectively fair solutions. Where neutrality assumes the disengagement of feeling, objectivity switches on the desire to be even-handed, despite one's own predilections. This is, for example, what good judges routinely do in cases not involving religion. Neutrality is bleak, bloodless, evasive – objectivity is warm, alive and calls for conscious effort to do unto others as you desire to be done to.

Although the judicial constructs of *praktische Konkordanz* and the balance of convenience have not been motivated in terms of objectivity, and employing them may not always guarantee an outcome considered by all to be fair, they may be examples of a means of achieving justice objectively as opposed to neutrally, since they involve judicial engagement with the subjective realities of the conflicting claims of the parties to a dispute.

Aulis Aarnio strikingly depicts the distinction between neutrality and objectivity in the following manner:[2]

> As is well-known, the goddess of justice is usually described with her eyes covered with a bandage. Her impartiality is a kind of neutrality that does not glance around. The symbol is, however, simultaneously a sign of danger. The goddess of justice can never see the course of her sword. Her dispensing justice is blind. And to blind action is always connected, whether we want it or not, the danger of sporadicality, ultimately of despotism. Only the kind of dispensation of justice that with an open look – fearing no justification – takes into consideration all circumstances, produces simultaneously both justice and reasonableness. For this reason one should, considering the challenges of modern society, presumably take off the bandage covering the eyes of the goddess of justice. It is then that the administration of justice has the courage to accept the entire enormous challenge that the future seems to unroll before man.

Being objective requires acknowledgment of one's natural subjectivity, followed by a consciously impartial engagement and the weighing of a matter in terms of clearly determined, external non-subjective standards. Constitutionalism properly construed can provide us with standards of this nature. It also requires justification according to disclosed, objective criteria.

No state or its organs can hope to succeed in their institutional tasks in the 21st Century by presuming that engagement with religion can be eliminated from their constitutional function of maintaining good and just social peace and order. It is not the function of the constitutional state to defend or maintain any specific religion, but it must promote religious patience amidst pluralism and search for a fair balancing of the religious interests of all, even where such balancing requires adherents of contending religions to forfeit some privileges.

In summary:

- Where church-state relations were an historical constitutional dichotomy as the nation-state developed and became established, the contemporary challenge facing the constitutional state which is subjected to the effects of globalization is balancing the interests of the adherents of a plurality of diverse and often competing religions within their populations.

---

2 Aulis Aarnio *A Reason and Authority – A Treatise on the Dynamic Paradigm of Legal Dogmatics* (Ashgate, Dartmouth, 1997) 16-17.

- The notion that a "secular state" can provide neutral solutions to this challenge is misleading, since secularism is in itself a value-laden and subjective stance with strong assumptive or even religion-like undertones.
- Although constitutional diversity around the globe can be expected to prevail indefinitely, it does not mean that persuasive guidelines for dealing with religious pluralism may not be gleaned from the expanding impact of the notion of constitutionalism as a general standard.
- Replacing neutrality, being an unachievable and justice-defeating goal, with objectivity in religious matters, does not mean either that authorities should be permitted in law to conduct themselves in a religiously prejudiced manner, nor does it mean that they are incapable of dealing justly with religious issues should they, as organs of a constitutional state, wish to perform their essential function of establishing and maintaining social peace and order.
- The universally accepted golden rule of reciprocity, foundational to the rule of law and constitutionalism, contains the promise of the achievability of objective justice in religious matters.