

## Constitutionalism, Democracy and Religious Freedom: To Be Fully Human

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This book is an enjoyably spry reflection on the pitfalls of aggressive secularism and the atomistic tendencies of modern liberal individualism. Napel deploys comparative legal method, interdisciplinary scholarship and social pluralist thought from Burke to neo-Calvinism (pp 12–18) but does not try to reinvent the wheel; the book's thesis and scope are refreshingly modest. Religious freedom as a right is coming under increasing pressure on two fronts (p 3), both from those who deem that this liberty acts as a bastion of conservatism against the onward march of progressive orthodoxy and from those who deem the very notion of rights to be a biased Western construction which disadvantages religions with different institutional assumptions from those of Christianity (pp 4–5). Constitutionalism and democracy hang in the balance as 'no legitimate liberal democracy is feasible' without the historically derived right to religious liberty as we know it (p 7). This right possesses and requires a collective dimension in order to protect those groups and institutions spanning the public/private divide which sustain pluralism and human flourishing (p 7). In other words, the health of liberal democracy depends upon strong protections for organisations adhering to world views which may well be at odds with each other and the prevailing liberal ethos of the public sphere (pp 160–161). It is in this respect that Napel concedes that modern liberalism has gone badly awry.

The first chapter surveys recent case law on religious freedom from across the Western world. The collapsing scenery of the traditional social order forms the backdrop: a rapidly secularising and atomising society parallel to an increasingly confident and assertive Islam (p 8). 'Expressive individualism' rather than the theme of autonomous civil society now dominates public philosophy, relegating religion to a mere component of individual–state relations (p 26). Strong intermediate institutions which subscribe to their own moral ethos have thus come to be viewed in Hobbesian terms as worms in the entrails of the commonwealth threatening the health of the egalitarian statist agenda (pp 29–30). Napel concludes that time is running out for the natural right conception of religious liberty. This traditional understanding is steadily being replaced by the state's condescending indulgence towards inconvenient but just-about-tolerable hold-outs for museum-piece beliefs at odds with the sovereign virtue of equality (p 41). In short, the liberal left establishment, as the 'sore winners' of the culture wars, appear to have grudgingly agreed to an armistice – probably

temporary – with conservative religious groups whose existing legal protections remain precarious in the long term (pp 44–47).

The following chapter warns that liberalism has evolved from a procedural framework for managing diversity into a proselytising ideology brooking no challenge to state sovereignty and the dominant ethic of the public square (p 9). Napel contends that this transformation threatens the very principle of limited government by squeezing out the collective, non-private dimensions of religious freedom and by permitting ever-greater interference in the internal affairs of organised religion (p 9). The breezy historical overview of liberalism's Christian roots concludes, much like Sir Larry Siedentop in his definitive *Inventing the Individual* (2014) (which, strangely, is never referenced), that Christianity's formative and continuing legacy is one of liberalism's greatest assets (p 59). Yet constitutionalism is contingent upon the prevailing worldview of the jurisdiction's population (p 55). It follows that large demographic changes and cultural realignments will fundamentally alter the democratic consensus as to what is politically acceptable. Liberalism has undergone a 'regime change' since the 1960s (p 65) and does not now wish to acknowledge its own peculiar heritage. More than that, it most certainly does not like reminders, often provided by litigious religious groups, that its right-on doctrines are not welcome everywhere. This bodes ill for us all, as the form, interpretation and application of core freedoms matter greatly. The further we move away from a natural right conception of religious liberty, one which values dissenting institutions as a matter of constitutional principle, the less space we all have for participation in meaningful collective endeavours which check government power and make lasting pluralism possible (pp 77–78).

The purpose of the third chapter is to show that secularising democracies are fragmenting despite their aspirations to neutrality. They cannot provide guidance on the good life without trampling upon pluralism and so public debate largely revolves around economic and security concerns (p 10). Religious groups can furnish the rich concepts of the common good and meaningful worldviews that the state cannot, making strong protections all the more important. Only firm boundaries enshrined by law can ensure that organised religion is protected against both itself and an over-mighty state (p 11). This arresting chapter draws upon insights from novelists and political theorists to illustrate the depth of ennui and dysfunction apparent across the free world (pp 86–87). Napel rejects 'unbounded multiculturalism' (p 102) and demonstrates that principled social pluralism is both possible and desirable (pp 94–96, 102–105). The fourth chapter fashions a 'generous conception of religious freedom' capable of guaranteeing the individual and collective aspects of this right along social pluralist lines (p 112).

The main fault with this book is stylistic. Undigested quotes and superfluous references to fellowships undertaken, lectures attended and academics met

abound (for example, pp 1, 6, 25, 55 and 63). Nevertheless, Napel makes several important contributions. He paints a compelling picture of the deleterious effects of the 1960s revolution on liberalism. Anyone concerned with the fact that 'liberal' is fast becoming a term of abuse will find much to admire here. He does a very good job of collating international strands of pluralism and committing them to the defence of a strong civil society. For a fellow traveller more familiar with the Anglo-German school of pluralism (Gierke, Maitland and Figgis), the exotic sources on display are fascinating novelties. Napel's gentle conservatism never strays into polemic and this makes his timely plea for a more historically literate, culturally grounded and community-oriented vision of religious liberty all the more potent.

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### **Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West**

MICHAEL J BROYDE

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In this book, Professor Broyde of Emory University School of Law, a rabbi and a judge in the United States Beth Din, explores why religious individuals and communities are increasingly turning to private faith-based arbitration. Broyde provides a thorough and rigorous analysis of both the theoretical and the practical aspects of religious arbitration. Based on his own experience and extensive research, he illuminates many of the procedural and substantive issues surrounding religious arbitration and the challenges confronting religious tribunals. This provides a welcome reference to the dynamics and potential benefits and risks of the religious arbitration process. His analysis of the benefits and risks of religious arbitration leads him to argue that religious tribunals, rather than threatening secular values, can contribute to a healthy pluralist society. Liberal, pluralistic societies, in his opinion, need to have numerous voices and traditions as part of any deliberative public discourse.

In Broyde's view, religion cannot easily be excluded from arbitration since religious arbitration, properly regulated, provides a preferable method to decide religious family disputes. Such tribunals will have a greater understanding of religious disputes and terminology. Thus, he argues that religious arbitrators, who are experts in these matters, should judge such cases rather than