

Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015), 223 pp, ISBN: 978-1-4426-4357-4.

Members of a Hutterite community are barred from obtaining a driver's licence because Alberta requires photographs which violate Hutterite adherence to the biblical injunction against graven images; an adolescent refuses a blood transfusion because her Jehovah's Witness's belief forbids her from consuming blood; a Sikh schoolboy wants to attend school carrying his *kirpan*, a small dagger, as required by his faith, but in violation of the school's ban on weapons; an observant Jewish man wants to construct a *sukkah* on his balcony in violation of the condominium's bylaws.

Benjamin Berger offers a careful, thoughtful, and philosophically rich analysis of each of these recent Canadian cases. He studies the ways in which law and religion intersect under regimes of liberal constitutionalism in a thought-provoking way. While he treats individual instances of the law/religion nexus, like the four cases invoked above, with care and attention, Berger's interest does not lie in the practical or particular solutions to the conflicts that arise between religious faith and practice and legal norms. This does not mean that *Law's Religion* is not concerned with religious freedom and the ways of enshrining it through law. Its focus is more fundamental. Berger examines the ways in which religious experience and belief are constructed, understood, and limited by judicial decision-making in the *Charter* era.

His project, carried out in an engaging and meticulous fashion, is to examine how and why religion is treated the way it is in the process of legal adjudication. Berger's goal, which he achieves admirably, is to understand the ways in which religion is constructed and necessarily limited by law. *Law's Religion* is a precise deconstruction of the pretense of law itself when our legal institutions, particularly the courts, are confronted with claims that religious belief and practice deserve recognition and respect. Recent Canadian experience classifies these claims under various taxonomies—tolerance, multiculturalism, and reasonable accommodation. Berger's primary claim is that each of these categories of legal analysis disguises law's fundamental flaw in its confrontation with religious experience. The culprit is law itself which insists that is a neutral field, divorced in some mystical process from the culture and religious normativity of which it is a part.

Québec's Law 61 highlights the issues at the heart of Berger's book. While the work predates this legislation, his analysis provides a path to a clearer understanding of law and religion in Canada's constitutional era. The CAQ government invoked an understanding of secularism (*laïcité*) that it defines as neutral and ahistorical, but which is clearly a concept, as Berger establishes, steeped in historical and cultural context.

Indeed, Law 61 recognizes that its “neutrality” violates religious freedom through its invocation of the “notwithstanding” clause. *Laïcité* defines a public national identity while religion is relegated to the private sphere.

Politics and legislation have excluded litigation as a path for religiously observant Jews or Muslims to obtain direct redress against the prohibition on *kippahs* or *hi-jabs*. Instead those who object to the radical anti-religious secularism of the Québec statute are compelled to make arguments that its prohibitions disproportionately attack Muslim women or affect the constitutionally protected rights of English school boards to hire whom they choose. Religion has been replaced by gender and language rights as the only legal categories of opposition. This a stark example of the way in which, as Berger argues, legal (and political) debate transform and ignore the realities of religious experience and demands their translation into the particularities of the discourse of liberal constitutionalism.

The core problem critiqued by Berger is that law’s understanding of itself demands that legal actors perform as though law continues to exist separated from culture and history. This leads to an essential flaw in the adjudication of religious conflict cases; law and legal actors do not understand that law is itself a part of the culture in which it operates. Its construction of the conflicts between legal norms and religious belief must always, if law is to be true to this internal vision of itself, ignore the lived reality of religious belief and translate it into rigid categories.

The ways in which this happens are multiple and complex, and Berger’s text treats them with the depth and detail they merit. A key move, although not the only one, is the way in which law asserts a distinction between the public and the private realms. Religion is placed firmly, in the liberal tradition of European liberal thought, in the private sphere. People can believe what they want, and practice as they wish, in private. When religion enters the public arena, problems arise for a secular, liberal understanding of that space. Law then translates disputes according to this taxonomy, which is always presented as ahistorical, objective, and neutral.

Religious belief is constructed as a matter of individual choice. This is a core element of the philosophical tradition of liberalism, part of law’s unacknowledged cultural frame of reference. What it ignores is that religious experience is often grounded in both an ideal of commandment, not choice, and of a communal identity that modifies and redefines the place of the individual. Planning debates over *eruvim* embody this conflict at another level, as objections and arguments rage over the potentially pernicious transformation of public, neutral and areligious, space, into religious “Jewish” space.

For Berger, *Law's Religion* is its faith in its own cultural independence from which its understanding of “religion” flows. This does not mean that all cases will result in a loss for the party claiming protected religious belief. What is significant for Berger is the way in which they win or lose. Berger’s analysis and critique are profound and careful, and this depth and concern for unveiling the discourses and processes of religious rights claims offer unique and significant insights for our understanding of the current troubled place of religious experience in its encounters with law.

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