

## Book Review

### *Law and Religion in the Commonwealth: The Evolution of Case Law*

*Law and Religion in the Commonwealth: The Evolution of Case Law*. Edited by Renae Barker, Paul T. Babie, and Neil Foster. Hart, 2022. Pp. 352. ISBN: 9781509950140.

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In recent years, the study of law and religion has ‘exploded’ in attracting more students.<sup>1</sup> With the growing academic interest, there is a concurrent demand for more literature on the subject — not to simply fill the space but to provide competent material that expands our knowledge and appreciation for this growing field. Barker, Babie, and Foster’s *Law and Religion in the Commonwealth: The Evolution of Case Law* provides a much-needed contribution to law and religion studies. The editors assembled material from a wide spectrum of Commonwealth of Nations’ law and religion experts (nineteen in all). An eclectic array of topics is covered, along with analyses of cases and trends that are sure to meet the needs of both student and instructor.

This book reminds us that religion continues to have a significant impact on the English common law, statutory interpretation, and constitutional law. Such influence on the law is, in many ways, the result of the extent of the religiosity of the people of the Commonwealth and their political and judicial representatives. The ebb and flow of religious influence upon the law observed by the legal scholar needs a structure of analysis to better understand the phenomena. The papers included in this collection assist in the building of that analytical architecture.

The book begins with a discussion on the nature of religion because how religion is defined determines its practical influence on the law. Throughout the Commonwealth there are various state privileges granted to religious entities and individuals. The definition of ‘religion’ has a gatekeeper function: it will determine who will get the privilege and who will not. For example, whether an organisation receives tax advantages, as was the subject in the Australian High Court case *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*,<sup>2</sup> may very well depend on whether the organisation meets the legal definition of a religion. As Renae Barker notes, although the case does not have a clear ratio decidendi, it does provide a ‘theological essay’ that gives some guidance to courts in understanding religion.<sup>3</sup> The justices variously provide a ‘functional’ definition for the individual, a ‘substantive’ definition that identifies the essence of religion, and an ‘analogical’ definition with indicia to determine whether something is a religion, such as: ideas

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<sup>1</sup> John Witte, ‘The Interdisciplinary Growth of Law and Religion’ in Frank Cranmer et al (eds), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* (Cambridge University Press, 2016) 247, 247–261.

<sup>2</sup> (1983) 154 CLR 120.

<sup>3</sup> Renae Baker, ‘Church of the New Faith v Commissioner of Pay-roll Tax: Defining Religion for the World?’ in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 9.

and practices involving the supernatural, beliefs about man's nature and place in the universe, codes of conduct, identifiable organisational structures, and, finally, the subjective understanding of the adherents as being part of a religion.

Religion's complexity will vary from one jurisdiction to another as the *Titular Roman Catholic Archbishop of Kuala Lumpur v Home Minister*<sup>4</sup> case reveals. Joshua Neoh makes the compelling argument that secular courts should not adjudicate theological disputes.<sup>5</sup> Determining who may use a holy name of the deity, for example, is one subject that a court ought to leave to the theologians, but, alas, the court decided to take sides in the dispute. Similarly, other contributions in the book establish that for years religion has been the subject of litigation involving everything from claims of undue influence,<sup>6</sup> to contract law and justiciability,<sup>7</sup> to the legitimate functions of an established church,<sup>8</sup> and even to essentially political disagreements.<sup>9</sup>

Religion finds itself addressing postmodern concepts such as same-sex relationships and the increased expectation among some that religious freedom is not to be used as a 'license to discriminate'. Yet, with each new reformulation of human interaction there remains the concern that citizens who abide by traditional understandings must still be free to practice their religious beliefs without state reprisal. These 'culture war' issues<sup>10</sup> and more are addressed by competent scholars and legal practitioners in this work.

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<sup>4</sup> [2014] 4 MLJ 765.

<sup>5</sup> See Joshua Neoh, 'Titular Roman Catholic Archbishop of Kuala Lumpur v Home Minister: What is the Name of God?' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 33.

<sup>6</sup> See Craig Allen, 'Allcard v Skinner: Religious Influence and Undue Influence' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 311.

<sup>7</sup> See Kathryn Chan, 'Lakeside Colony of Hutterian Brethren v Hofer: Jurisdiction, Justiciability and Religious Law' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 211.

<sup>8</sup> See Mark Hill, 'Aston Cantlow v Wallbank: Defining the Public and Private Functions of the Established Church of England' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 137.

<sup>9</sup> See Dian AH Shah, 'Iki Putra Mubarrak v Kerajaan Negeri Selangor and Others: Re-defining Religious Federalism in Malaysia?' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 125; Sawinder Singh, 'M Siddiq (D) Thr Lrs v Mahant Suresh Das and Others: Inconsistencies in the Law and Politics of Indian History in the Ayodhya Case' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 167; Umar Rashid, 'Benazir Bhutto v Federation of Pakistan: Using Islamic Principles to Expand Judicial Powers' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 189.

<sup>10</sup> See Ian Leigh, 'Lee v Ashers Baking Company: Crumbs of Comfort in the Culture Wars' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 65; Michelle Flynn, 'Her Majesty's Attorney-General v Akhter and Others: The Need for Legislative Reform of the Marriage Act 1949' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 247; Neil Foster, 'Christian Youth Camps Ltd v Cobaw Community Health Services Ltd: Balancing Discrimination Rights with the Religious Freedom of Organisations' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 265; Preeti Nalavadi, 'Indian Young Lawyers Association v State of Kerala and Shayara Bano v Union of India: Understanding Religious Freedom and Women's Rights in the Twenty-First Century Using the Lenses of Sabarimala and Shayara Bano' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 293; Iain T. Benson, 'Minister of Home Affairs and

What one discovers from digesting this work is that the intersection of law and religion is not static. It is part and parcel of the community from which it originates. Therefore, the complexities caused by the interwoven interests of political, social, and religious environments can create strange results. For example, Sawinder Singh observes that in the Indian case *M Siddiq (D) Thir Lrs v. Mahant Suresh Das and Others*, justice may not have been done but political peace was maintained when the Court acquiesced to Hindu nationalists against Muslim claims to a historic mosque.<sup>11</sup> Religious freedom, it seems, is unavoidably pragmatic.<sup>12</sup>

This is a volume that can be accessed by reading it systematically from cover to cover to appreciate the depth of scholarship presented. Or, it may be approached by a ‘surgical strike’ to harvest a chapter that addresses one’s particular focus of the moment. Either way, the volume provides the student, scholar, and legal practitioner an invaluable analysis of law and religion’s contentious concerns in the modern context.

Normally, reviews offer some critical assessment of shortfalls to consider. However, it is my assessment that when a work accomplishes the task that its creators set out to do, then it is a success. The editors’ stated goal was to highlight ‘many of the unique challenges faced by communities in working through disputes centred on religion as well as common challenges faced by many, if not all of those nations which comprise [the Commonwealth].’<sup>13</sup> That has been accomplished in *Law and Religion in the Commonwealth*. The cases raised in this work are, of course, but a drop in the vast ocean of knowledge and experience that awaits the law and religion scholar. Nevertheless, such a concise, erudite, and well-argued collection of scholarly commentary on key cases in the Commonwealth is worth the purchase.

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*Another v Fourier and Another: A Jurisprudence of Engagement* in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 227.

<sup>11</sup> Singh (n 9).

<sup>12</sup> See Richard Moon, ‘*R v Big M Drug Mart: The Unavoidable Pragmatism of Religious Freedom*’ in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 81; Luke Beck, ‘*Attorney-General (Victoria) ex rel Black v Commonwealth: The High Court’s Attempt to Make the Establishment Clause of the Australian Constitution Mean Very Little*’ in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 149; Russell Sandberg, ‘*Eweida v UK: Cross Words and the Reformulation of Religious Freedom*’ in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 49; Azit O Amoloye-Adebayo and Muhammad Kamaldeen Imam-Tamim, ‘*Shalla v State: Is Blasphemy a Religious or Criminal Offence in Nigeria under Islamic Law?*’ in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 95; Paul T Babie, ‘*Adelaide Company of Jehovah’s Witnesses v Commonwealth: Balancing Free Exercise and Public Order*’ in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 105.

<sup>13</sup> Renae Barker, Paul Babie and Neil Foster, ‘Introduction’ in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 1, 1.