

DOES GOD BELIEVE IN HUMAN RIGHTS?: ESSAYS ON RELIGION AND HUMAN RIGHTS. Edited by Nazila Ghanea, Alan Stephens and Raphael Walden. Martinus Nijhoff 2007. Pp. 272. \$97.00. ISBN: 9-004-15254-7.

Does God believe in human rights? “What is the answer?” compels us to ask, like Gertrude Stein on her deathbed, “What is the question?”¹ The question posed by the essays under review turns less on God’s beliefs than our own: Should religion disturb our undogmatic slumbers? Have human rights become, in Elie Wiesel’s words, a “worldwide secular religion?”² Or can complex, pluralist societies take both rights *and* religion (even non-theistic religion) seriously?

The papers in this edited collection were originally offered at a 2005 colloquium jointly sponsored by the Clemens Nathan Research Center, the University of London Institute of Commonwealth Studies and the publishers. As one might expect, even such a fine collection betrays a certain unevenness of scholarly depth and rigor. Yet the volume as a whole offers a rich and timely assessment of the role of religion in international human rights jurisprudence, with particular attention to the European Convention on Human Rights. The first half of the book addresses the compatibility of religious systems of belief with modern human rights law, while the second turns to more specific substantive and methodological issues. Let me touch briefly on the individual contributions before considering several of the motifs running throughout the collection.

Malcolm Evans’s introduction sets the stage by exploring the tensions of incorporating religious claims under the legal rubrics of human rights. In the first chapters, Richard Harries and Roger Ruston argue that the dignity of persons created in “the image of God” (*imago dei*) provides a distinctive theological foundation for modern rights discourse. Writing from a Christian perspective, both authors recognize the complex, internal logic of the development of religious tradition, e.g., in the gradual recognition of religious liberty. So too, as Michael Ipgrave illustrates in the next chapter, rights discourse itself develops in response to issues posed by a religiously pluralist polity, i.e., “the

1. James R. Mellow, *Charmed Circle: Gertrude Stein and Company* 468 (Praeger Publishers 1974).

2. Elie Wiesel, *A Tribute to Human Rights*, in *The Universal Declaration of Human Rights: Fifty Years and Beyond* 3, 3 (Yael Danieli et al. eds., Baywood Publg. Co., Inc. 1999).

safeguarding of religious freedom in public life,” “the acknowledgement of religious identity as a dimension of citizenship,” and “the valuing of religious communities as partners with statutory authority in the functioning of civil life.” (45)

In a particularly topical contribution, Javaid Rehman proposes a critical rapprochement of Islam and modern human rights, rejecting “[a]n insular, myopic and archaic view of Sharia” in favor of “a contextualised and methodological analysis of Sharia and religion itself.” (88) Norman Soloman and Avrom Sherr argue for a kindred understanding of “universal human rights” as emerging from an “internal process of growth” within Judaism (104); while John Barnabas Leith underscores the strong traditional support of the Bahá’í for modern rights regimes. (121) Melanie Phillips, by contrast, strikes a dissenting note, arguing in the spirit of Alasdair MacIntyre “that *modern* human rights are in direct conflict with religion.” (115) And yet, like MacIntyre himself, she falls prey to the very emotivist fallacy MacIntyre condemned, i.e., confusing the meaning of rights with a particular, limited use. I shall return to this criticism below.

Both general methodological and specific juridical questions are posed in the book’s second part. Paul Weller offers an illuminating typology of “secular” rights regimes, which determine, in part, the “variant configurations” of religions and rights. (147) And, with considerable insight, the final chapters address aspects of the paradox that the very legitimacy of a regime protecting religious believers must also, under certain circumstances, restrict the expression of their particular beliefs. Favoring a deliberative rather than merely vacuous tolerance, Dennis de Jong assesses the legal implications of recognizing religion in a globalized era (187) while Conor Gearty explores the postmodern affinities of rights and religion. (209) Nazila Ghanea and Peter Cumper then consider the proper scope and limits of legal protections as the claims of religious belief are incorporated within modern rights regimes. (211, 235) Frederik Harhoff concludes the volume with a critical appraisal of the differing, yet overlapping interpretative frameworks of such regimes and the religious claims they both protect and constrain. (259)

In assessing whether, or in what respects, the secular entitlements of individuals are compatible with religiously inspired obligations to community (whether of co-religionists or the broader polity), at least three distinct yet related issues emerge in the volume: (i) whether human claim-rights (entitlements) are compatible with the religious primacy accorded duties; (ii) whether such individual “liberal” claims are

compatible with “communitarian” appeals to the common good; and (iii) whether grounding reasons for claim-rights (or duties) are secular or distinctively religious. Let us consider these in turn.

(i) Though several authors appeal to Wesley’s Hohfeld’s distinction of claim-rights from powers, privileges, and immunities,³ others paint with an excessively broad brush. Phillips, we saw, accepts a rather uncritical opposition of rights and duties; while Sherr questions the juridical relevance of the distinction. Yet neither gambit finally suffices. For though rights may be, in Hohfeld’s words, “chameleon-hued,”⁴ human rights are typically parsed as claim-rights imposing correlative duties. Such duties, as modern rights theorists like Alan Gewirth and Henry Shue argue,⁵ are in turn specified negatively and positively, i.e., as duties of forbearance, and of provision and protection. Even “negative” rights, e.g., freedom of speech or religion, thus generate correlative “positive” obligations of protecting individuals or groups against standard threats, e.g., through legal safeguards of a domestic rights regime. The State becomes the principal respondent or recipient of such claims, while citizens bear imperfect moral duties to support a rights regime.

Now one observes here the asymmetry of rights and duties. For A may be the beneficiary of a duty borne by B, without holding a claim-right (entitlement) against B, e.g., divinely ordained protection of noncombatants does not, *eo ipso*, confer a claim-right upon the latter. One’s duty is to God, even if noncombatants are the beneficiaries. To say, then, that A has a right against B is to recognize the logical precedence of right to correlative duty. The asymmetry extends further, moreover, inasmuch as the same human claim-right, e.g., to religious liberty, must be instantiated in differing, particular rights regimes. Positive duties of provision and protection, in particular, depend for their effective implementation and enforcement upon distinctive cultural—and religious resources.

(ii) Indeed, recognition of both positive (so called, “second generation”) rights to subsistence, and, a fortiori, of positive duties to protection and provision, introduces a communitarian dimension to our rights talk. The individualism of American rights rhetoric is belied by

3. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *Fundamental Legal Conceptions as Applied in Judicial Reasoning: Essays by Wesley Newcomb Hohfeld* 35-64 (W. Cook ed., Yale U. Press 1923).

4. *Id.* at 35.

5. See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* 5-87 (Princeton U. Press 1980); Alan Gewirth, *Human Rights* 41-78 (U. Chi. Press 1982); cf. Alan Gewirth, *The Community of Rights* 31-70 (U. Chi. Press 1996).

the institutional prerequisites of preserving a human rights regime—in Gewirth’s felicitous words, a “community of rights.”⁶

Individual entitlements, e.g., to religious liberty, need not then be inimical to religiously grounded obligation to community; on the contrary, the religious primacy accorded neighbor-love, as Harries, Ruston and Harhoff observe, contributes to fostering an ethos of human rights. And if religious traditions increasingly translate their moral teaching in the idiom of human rights; so such traditions, as Harries, Solomon, Ipgrave, and de Jong maintain, tutor our imaginations, e.g., by underwriting citizens’ recognition of (imperfect) duties to promote a rights regime. We may speak, then, not merely of internal compatibility but even of inter-dependence of religion and rights-based law.

(iii) Finally, as Gearty argues, the putative opposition of secular reason and religion founders on the postmodern turn to critical pragmatism. (209) Once we concede that our “worldwide secular religion” no longer admits of a transcendental (Kantian) foundation in pure reason, we may look to pragmatic religious justification. What suffices, after all, is an overlapping consensus regarding dignity as the proximate backing for basic human rights (e.g., in the Universal Declaration); but distinctively religious attitudes and beliefs may, as Harries, Ruston, Leith, and Gearty insist, support dignity itself, e.g., belief in the *imago dei*. Religion, that is, may ground what Hannah Arendt once called our “right to have rights.”⁷

Curiously, it is here that we come full circle. For postmodern or, perhaps better, post-liberal theories of human rights recall the very origins of subjective rights in western legal practice. Though several of the authors assume with MacIntyre that our rights talk is a stepchild of the Western Enlightenment, Brian Tierney’s magisterial study proves otherwise. Tracing the origins of subjective rights to late twelfth century canonical jurisprudence, Tierney reminds us:

[T]he idea of natural rights in its earlier formulations was not one of “atomic individualism”; it was not necessarily opposed to the communitarian values of traditional societies. Nor was the idea dependent on any particular version of Western philosophy; rather it coexisted with a variety of philosophies, including the religiously oriented systems of the medieval era and the secularized doctrines of the Enlightenment. The one necessary basis for a theory of human rights is a belief in the value and

6. Alan Gewirth, *The Community of Rights* (U. Chi. Press 1996).

7. Hannah Arendt, *The Origins of Totalitarianism* 298-299 (new ed., Harcourt, Brace & World, Inc. 1966)

dignity of human life.

Antedating the “more egotistical impulses of early modern capitalism,” our rights theories, says Tierney, “grew from good seed,” and there is the prospect, let us hope, that “they will continue to bring forth fruit.”⁸

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8. Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625*, at 347-348 (Scholars Press 1997).

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