

Reviews in History

Published on *Reviews in History* (<http://www.history.ac.uk/reviews>)

The Law of Organized Religions: Between Establishment and Secularism

Review Number:

1161

Publish date:

Tuesday, 1 November, 2011

Author:

Julian Rivers

ISBN:

9780199226108

Date of Publication:

2010

Price:

£50.00

Pages:

424pp.

Publisher:

Oxford University Press

Place of Publication:

Oxford

Reviewer:

Olive Barnes

This is a book which could very easily slip under the radar of most historians. Even had they noticed the title, and had their curiosity piqued by the sub-title, after checking the academic discipline of the author (Julian Rivers is Professor of Jurisprudence at Bristol University) many might well have decided that this book was probably of no professional interest to them.

And yet, there is a great deal of material in this book of relevance to historians, and not just those whose chosen subset is constitutional, legal or ecclesiastical history. In writing these reviews, reviewers are requested to place the book under review in its historiographical context. I must profess this is difficult as, strictly speaking, this does not fall within such a context, but individual chapters do contain considerable material which does.

Rivers gives an overview of the law as it applies to religious bodies from Magna Carta through to the present day. He concentrates in chapter one on the non-Established denominations, including Judaism. Here his treatment is brief but comprehensive. The most obvious example to take is the law as it changed with regard to the Roman Catholic Church in England and Wales as this was the major non-reformed Christian faith (Rivers admits in his preface that the book is Anglo-centric, so apologies to those from Scotland). A large

body of law proscribing Catholicism had been enacted from the reign of Elizabeth I through to 1829. Dealing with the dismantling of these laws, historians of Catholicism in England have been accused as seeing the relief from these laws as a Whiggish development ? the First Relief Act of 1778, the Second in 1791 and finally Catholic Emancipation in 1829.⁽¹⁾ The enactments of these statutes certainly relieved the position of Catholics in England and removed many of the disabilities under which they had laboured, but it was not the whole story. The 1813 Act is omitted from this chronology. Prior to the 1801 Act of Union of Great Britain and Ireland, Catholic relief had proceeded at a somewhat faster rate in Ireland. The 1813 Act extended the Irish relief of 1793 to those transferring to offices in England. One of the major anomalies was the position of officers in the Army. The 1793 Act in Ireland had allowed Catholics there to take commissions up to the rank of colonel; Catholics in England were not allowed to take commissions. An attempt to regularise the position of Irish Catholic soldiers in England was made in Parliament in 1805 during the annual debate on the Army Act, but failed due to King George III's refusal to accept any further concessions to Catholics. To what extent Irish office holders, whether in the army or in other positions, suffered because of the unevenness of the law, has not, to the best of this writer's knowledge, been researched.

Relying on statute law to declaim that Catholicism was, from 1829, on a par with the other Christian denominations, omits consideration of case law. In this area, common Catholic practices such as leaving a legacy for a priest to say masses for the soul of the legatee were deemed to be ?superstitious? until 1919 when in the case of *Bourne v Keen* the previous decision of the courts was overturned. For much of the 19th century, from 1834 when such a legacy was first declared to be superstitious (*West v Shuttleworth*), advice was given in Catholic publications as to an appropriate wording of one's will to effect such a legacy legally.⁽²⁾ So that, although full civic rights were granted to Catholics in 1829, the decision in *West v Shuttleworth* prevented Catholics from exercising one of the principal tenets of their faith ? to pray for the souls of the deceased (such legacies were legal in Ireland).

Chapter one is really the only strictly historical chapter in this book. The following nine chapters look at specific aspects of engagement between religions and the state. Rivers covers all aspects of such engagement: education, welfare, rites of passage, chaplaincies, access to public discourse by religious bodies, the legal position of ministers of religion (their employment rights and so on). His coverage is wide, encompassing all the major, well-known denominations and faiths, and some minority religions ? including for example an account of the Druids' wishes to celebrate the summer solstice at Stonehenge. Each chapter includes a brief account of the history of that particular aspect of law. For example, in the chapter on welfare, Rivers takes the story right back to the time of the Reformation and carries the reader forward to the attempt by the Catholic adoption agencies to gain exemption from the recent equality laws regarding adoption by gay couples.

Because of the Human Rights Act 1998, many judgements in England now reflect international human rights laws and decisions. Chapter two shows how human rights, at first deemed to be individualistic, developed to granting rights to religious groups.

Chapter three looks at the constitution of religious bodies. Rivers traces these developments starting with 19th-century trust law. In this area such questions as the ownership of property loom large. In the case, for example, of a monastic community, who actually owns the property? How should the law intervene in the case of a dispute? The ownership of the religious community's property was particularly difficult if that community were Catholic and male, as they were illegal in English law until the Catholic Relief Act of 1926. Rivers does not delve into the history of how those communities existed and managed their property ownership, which under their rule should have been communal. It was an issue which was recognised by Catholics in the 19th century as the testimony of various witnesses to the House of Commons Select Committee in 1870 testifies. It was also an issue, in terms of the wider ownership of church property, which Archbishop Bourne of Westminster laid before his fellow bishops at their annual meeting in 1904. On that occasion Bourne outlined some of the difficulties encountered when church property was held in trust by laymen ? a device used to circumvent the difficulties which the law posed.

There were also difficulties for the non-conformists. In the case of a dispute amongst a congregation, which part of the congregation should retain the property? The danger for the courts in such cases was that they could be accused of taking sides in a doctrinal dispute which they were not competent to adjudicate. Endeavouring to remain neutral as to doctrine and apply the law strictly was a major consideration for the courts. Many of these denominations had been founded on the principle of congregational pre-eminence with no hierarchical structure; how could the court decide on property ownership in a situation of schism? Parliament has passed a number of Acts referring to individual denominations such as the Baptist and Congregational Trusts Act (1950) and the Presbyterian Church of England Act (1960) which empowered the courts without involving them in doctrinal disputes.

Throughout this book it is clear that the trajectory in the law is towards toleration of religious pluralism. This is shown in the chapter on chaplaincies. Chapter four deals with modern employment law as it refers to ministers of religion but chaplains are unusual in that they are directly employed by a particular organisation (e.g. the Armed Services or the Prison Service) and hence the separate chapter on this subject. Prior to the Crimean War, the Army Chaplaincy service employed Church of England chaplains only. The history of Catholic chaplains in the Army has been written by T. Johnstone and J. Hagerty (3) and in the British Indian Army by M. Mulvihill.(4) In the more religiously pluralist environment of Britain, members of non-Christian faiths are assured of chaplaincy services too. The one area which diverges from the equality of chaplains of all faiths is in the Prison Service where the Church of England chaplain is *primus inter pares*.

Education, its development, its history, the battle by non-conformists for non-denominational education and by Catholics for funding for its schools has been well-recounted in numerous books and papers. It is doubtful if Rivers adds greatly to that which is already published. However, as this book does not concentrate wholly on education, just one observation is of note. From the very beginning, education was to be instruction in the Christian faith. In this one area, the organised religions have maintained their influence to a considerable degree and education benefits from specific protection when considered from the perspective of international human rights. The history of educational provision in the United Kingdom has led to a complexity unmatched in other areas.

One of these areas is that of welfare. In this chapter Rivers notes what he terms as three 'secularizing moments'. The dissolution of the monasteries by Henry VIII removed the main medieval providers of charitable relief. The onus for relief of the poor was placed on parishes by an act in 1572. The creation of the Charity Commissioners in 1597 and a further Elizabethan Charity Act in 1601 led to an upsurge in charitable giving and the establishment of various institutions. In medieval times the giving of alms was understood to have a spiritual benefit to the giver and thus focussed on the afterlife; the new institutions founded in the early 17th century were for the betterment of people in this life. As these were not Church bodies, they were secular, but not atheistic as they often had chaplains attached. 'But a structural differentiation had been reached which enabled a distinction to be drawn between religion and welfare'. The Poor Law hospitals of the 19th century followed this pattern of having chaplains even though they were not religious foundations (the common model in much of Europe at the time).

The second 'secularizing moment' was the creation of the Welfare State after the Second World War. In the post-war period, organisations such as Dr Barnardo's, founded on Victorian principles of philanthropy which included proselytism and rescue became more secularist, even though individual members may have retained a faith-based motivation. With the State now being the major provider of welfare, many religious organisations began to operate in minority areas. Rivers suggests that the recent legislation to secure equality and diversity may well turn out to be the third 'secularizing moment'.

Overviews of the history of religion in Britain have been written. O. Chadwick wrote extensively on religion in the Victorian era (5); G. I. T. Machin covered religion and politics in the 19th century in two volumes (6); more recently A. Hastings has reviewed the 20th century.(7) Such volumes are supplemented by writers covering aspects of individual denominations. D. Hempton has written on Methodism (8); J. Bossy on Catholicism (9); and many authors on the Established Church. The particular advantage of Rivers' book is

that it approaches the subject from the perspective of the law, and not just statute law, but case law as well. This latter aspect is frequently overlooked by historians and yet its effects are as important as statutes. Lord Mansfield is well-known to historians of 18th-century religious matters as being tolerant of such diversity as existed at the time. It was he who with other judges made it impossible in practice to secure a conviction for being a Catholic priest (the punishment on conviction was life imprisonment). In giving judgement in the case of *Evans v Chamberlain of London*, Mansfield remarked that the effect of the Toleration Act (1689) was not merely to remove the penalties attaching to religious dissent but to bring about the legal establishment of non-conforming Protestantism.

A lack of appreciation of the case law could lead to erroneous judgements or incomplete analysis. It was mentioned above that the *West v Shuttleworth* judgement had repercussions for Catholics until it was reversed in 1919 in *Bourne v Keen*. This was recognised by them at the time. Despite the 1860 Roman Catholic Charities Act, bequests for masses for the soul of the testator were still illegal. In giving evidence in 1870 to a Select Committee of the House of Commons, the then Charity Commissioner expressed the opinion that there was no reason in law why all Catholic trusts should not be enrolled. When reminded of the *West v Shuttleworth* judgement, he conceded that there may well have been trusts which would have failed the test of legality because of this.⁽¹⁰⁾ Rivers points out that the 1860 Act at least allowed the Charity Commissioners to apply such failing bequests to other Catholic charities.

Besides a full index, Rivers includes 12 pages listing all the cases which he cites in his work, giving the pages where they are mentioned and the source of the judgement. Those inexperienced in finding cases on the various websites such as Westlaw which make court judgements available to practising lawyers and academics may need some help here from a legally trained friend or librarian. Rivers also lists all the statutes cited, again with page references.

Rivers' analysis and argument is legal and jurisprudential not historical and for non-lawyers (and Rivers acknowledges that there may be such readers of this book) much of the text will require close reading. His book may open up avenues for research for historians, some of which have been suggested above. But even if no one were to undertake such research, Rivers has provided all historians of religion and religious bodies in England with a comprehensive work of reference. And while law students may complain of the cost of text books which become outdated a year after they have been purchased, this will not be one of those. Although the book was published in 2010, and some issues have already been decided since publication (the case concerning the Catholic Adoption agencies has finally been lost), when historians come to write the history of the New Labour government of 1997-2010 and the effects of the equality and diversity acts, Rivers' discussion of these will form an invaluable primary source, giving not only the law's history, but also the trajectory which it has taken in moving between Establishment and Secularism.

Notes

1. C. Haydon, 'Parliament and popery in England, 1700-1780', *Parliamentary History* 19, 1 (2000), 49. [Back to \(1\)](#)
2. See, for example, Catholic Directory 1848; unnumbered page, following August in the calendar. [Back to \(2\)](#)
3. T. Johnstone and J. Hagerty, *The Cross on the Sword : Catholic Chaplains in the Forces* (London, 1996). [Back to \(3\)](#)
4. M. Mulvihill, 'Peculiar circumstances: Catholic chaplains of the Victorian British Army in India?', *The Electronic British Library Journal* (2008) <<http://www.bl.uk/eblj/2008articles/article3.html> [2]> [accessed 8 November 2011]. [Back to \(4\)](#)
5. O. Chadwick, *The Victorian Church (Ecclesiastical history of England, volume 5)* (London, 1966); *The Secularization of the European Mind in the Nineteenth Century : the Gifford Lectures in the University of Edinburgh for 1973-4* (Cambridge, 1975). [Back to \(5\)](#)
6. G. I. T. Machin, *Politics and the churches in Great Britain, 1832 to 1868* (Oxford, 1977); *Politics and the churches in Great Britain 1869 to 1921*. (Oxford, 1987). [Back to \(6\)](#)

7. A. Hastings, *A History of English Christianity 1920?2000*. (4th ed., London, 2001).[Back to \(7\)](#)
8. D. Hempton, *Methodism and politics in British society 1750?1850* (New ed., London, 1984).[Back to \(8\)](#)
9. J. Bossy, *The English Catholic community, 1570?1850* (London, 1975).[Back to \(9\)](#)
10. C. P. Villiers, *Report from the Select Committee on Conventual and Monastic Institutions, &c.; together with the proceedings of the committee, minutes of evidence, and appendix* (1870).[Back to \(10\)](#)

The author is grateful that his work has caught the attention of historians and hopeful that it may contribute to the mutual enrichment of their respective disciplines. He has no wish to comment further on this review.

Source URL: <http://www.history.ac.uk/reviews/review/1161>

Links:

[1] <http://www.history.ac.uk/reviews/item/7804>

[2] <http://www.bl.uk/eblj/2008articles/article3.html>