RELIGION, LAW AND THE CONSTRUCTION OF IDENTITIES

PREFACE

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Both in Europe and America every schoolchild learns that the state and the church are separate. In fact they are explicitly taught the language of "the separation of church and state." Since all scholars once went to school it is easy enough to notice that they have all learned their lesson well. As a consequence we lack studies which give the "wrong" answer: that state and church, or more precisely, law and religion are interrelated. Such is the case even in societies such as the United States of America which contain a constitutional separation of the two. In the United States of America Thomas Jefferson was the driving force behind the First Amendment to the constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to partition the Government for a redress of grievances." The words of the First Amendment sound simple. In fact they have their work cut out for them since they appear to be self contradictory; they acknowledge the religiousness of Americans without establishing religion.

The argument has been made more than once that the field of religious studies is dominated by a strong Protestant current which implicitly views religion as a private matter. The public institutions of the secularized state may not aid in the establishment of religion. Any public institution displaying a Christmas crèche on public property or founding a Jewish school for handicapped children will be legally reprimanded for acting against the law. But today religions ask for recognition by state institutions even in the most secularized of societies. That fact causes friction and raises fundamental arguments about the proper nature and role of religion in a society. Is a

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créche displayed in a Christmas setting a genuine religious symbol? Does it transform a commercial setting, situated in a secular context, into a religious one? Cases of this kind defy easy classification. As long as religions are regarded as primarily private matters, the decision is obvious. It is the task of the state to remove all kinds of religious representations from the public sphere. But what would happen if it were the case that religions were not a matter of private faith, what would happen if it were the case that religion were not a natural category with universal application? What if it were the case that the borders between the private and the public domain were far more vague than they were perceived to be? Answers to such questions would have important consequences for the worlds of law and litigation. Anyway, is it not the case that religions always function contextually, that religious symbols in commercial contexts have lost their inherent sacredness? However, what about the reverse argument, that the display of a créche in a public context indeed establishes religion and is against the law? Who is right, who wrong? And notice the paradox: a faithful adherent of a religion may be seriously offended by the arguments in support of a public display of his or her holy symbols.

A study of the interrelation of law and religion according to our established models lead to a dead end. The contributors to this special issue attempt a fresh approach. They deal with theoretical issues by examining judicial processes. Starting with judicial facts they end with issues in the study of religion. A "deep interpretation" discovers in the facts a structural tension between religion as an external phenomenon that obeys the law and as an ethos or worldview shaping tacitly an entire culture capable of eluding the law. Take for example Japanese religion. In Japan state and religion officially are separated. Nevertheless some years ago the supreme court declared the deification of a member of the Japanese Special Defence Forces constitutional. The apotheosis was about celebrating civic pride, not about religion.

From these studies we learn that law and jurisdiction are sensitive to meanings attributed to religion in public communication. To study