

Vocabulary for the Study of Religion

Volume 2

F–O

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BRILL

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Law

Law is studied both by legal professionals as an aspect of the enactment of law and by other scholars who seek to understand law in the larger context of human society by using other disciplinary methods. Gathered together today under the rubric of socio-legal studies or law and society, law has since the eighteenth century, with the rise of the human sciences, been studied as a social fact interdependent with other aspects of a particular society, including religion. All of the great social theorists studied law. Many were trained as lawyers. Their theories of law and religion are deeply intertwined. Because of the prestige of law, however, the study of law has often also been deeply related to the reform of law. Thus social scientists have tried to derive normative law from scientific studies of law and scientific studies of law have been driven by ideological commitments and debates.

Law is fundamentally present in all human society—in the sense that all societies have rules and processes that structure and govern them, and in the sense that all persons in all times can be understood to act with reference to law. Indeed, every aspect of human life can be understood to be subject to law, broadly understood, including diet, dress, sexuality, religion, speech, family relations, economic activity, and politics. All societies have systems for resolving disputes. To be human is to have law. Law as a social fact, then, has a long and complex history, continuous with human history, both intellectually and institutionally. The human legal imagination is protean. From a social scientific perspective, the ubiquity of law means that law, like religion, is one of the grand categories by which to organize and compare our knowledge of human societies and how they work, at whatever scale and whatever their form of government.

Law is interesting in part because it is both an unexceptional and quotidian, even bureaucratic, aspect of society, enabling its day-to-day life, but it also functions normatively; that is, one can say that, for law, there are better and worse reasons

that can be given for human action. Law is one location for thinking and enforcing duty and obligation. Philosophers take varying positions on the extent to which law and morality are factually, or even logically, related; that is, whether law results whenever there is either consensus or superior force resulting in its realization, or whether law must still, perforce, even then, adhere to ethical standards in order to qualify as law.

One expression of the normativity of law can be seen in the fact that a common measure of modern progressive society today is whether it is understood to be governed by the rule of law. Here law means the secular positive law of the modern nation-state, law that is ideally transparent, equal in application to all citizens, administered and enforced by knowledgeable officials, and uncorrupted by partiality based in partisan politics or personal favors—but which is also subject to universal norms agreed to by the international community and enshrined in the various documents of the international community such as the Universal Declaration of Human Rights. On this understanding of law, and particularly given the power, authority, and mythology of the modern state, law is understood not to be universal but to be the achievement of modern progressive societies, so that one can indeed have lawless societies, either because such societies have pre-modern institutions or because such societies are illiberal. On this reading of law, an unjust law is not law. (This issue was classically the subject of the debates between H.L.A. Hart and Lon Fuller in the 1960s.) Such a law may be formally and effectively binding, as a matter of fact, but it cannot be understood morally to justify the use of the force of the state in its implementation.

Law can also be understood to be an aspect of culture, whether at the local, national, or international level. What counts as legal—or as illegal—the institutions and personnel involved, and the methods of assessing events and punishing offenders—are all deeply inflected by particular anthropologies (understandings of the nature of the human person) and particular cosmologies

(understandings of the nature of the world). Some cultural theorists, including legal anthropologists such as John Comaroff, would suggest that law is indeed best understood as a creature of culture, incomprehensible outside of the cultural narratives that undergird its various instantiations. Thought of thus, the success of law is measured by the extent to which it corresponds culturally to those whom it would govern.

Religion can be understood to intersect with law in all of these senses. So religion shares with law a structuring function for human behavior and society; modern secular law is measured in part by the degree to which it is separate from religion, while simultaneously ensuring that religion is both “free” and subject to the rule of law; and religious cultures are not only legally structured themselves but religion deeply informs the content and administration of law everywhere. One cannot study religion without also studying law. Law is always implicated when religion is considered, just as religion is always implicated when law is considered. Re-incorporating law into the study of religion presents particular challenges today, however, in part because the separation of religion and law has been one of the founding myths of modernity and has deeply affected the modern study of religion.

All people today are subject to multiple and overlapping legal systems, formal and informal, including social conventions; the rules of various associations, industrial regulation of various kinds; municipal, provincial and national ordinances and statutes; and the customary law of indigenous communities; as well as various transnational legal orders, including those based in treaties and conventions and those created by various transnational legal actors, including businesses and religious organizations. In other words, legal pluralism is now understood to be the natural order of things, notwithstanding the claims and efforts of nation states to establish and maintain legal monopolies within their borders. At the level of the individual, all persons field a multiplicity of normative orders, exercising more or less agency,

alone and with others, in negotiating individual choices within that field.

Law today is studied by historians, sociologists, anthropologists, and philosophers, among others. Law is also elaborated academically by legal specialists on law faculties who primarily endeavor to reform law in line with progressive/liberal ideas of human flourishing.

Modern Law

Notwithstanding the ubiquity of law through space and time, to speak of law at this time in human history is commonly to evoke a very specific set of ideas and institutions, including legislatures, statutes, courts, judges, and, above all, lawyers. Lawyers are arguably the indispensable experts on negotiating modern life. And they come by this very specific, highly rationalized, and specialized practice through a legal education that understands itself to equip its students to think about and manipulate all matters better than anyone else. As Bruno Latour reminds us, modern law itself has no content. It is a peculiarly totalizing human form that is mixed with everything. In Latour’s words, law is “fractal” (2010: 256). It “has its own ontology” (2010: 276). It is “its own meta-language” (2010: 260). Law performs a particular schematizing of social facts that provides no additional information about anything. To expect otherwise, Latour insists, is to misunderstand modern law. To expect otherwise is “like trying to fax a pizza” (Latour 2010: 268). Modern law is also understood to be quintessentially secular.

This modern understanding of law has a history. Closely linked in what has come to be called the modern West is a constellation of founding events: the invention of the modern nation state, the bureaucratization of law, secularism/secularization, market capitalism, imperialism/colonialism—even a new sense of self. These elements of the modern find their origins in transformations that have been traced to shifts as far back as the invention of salvation religions in the so-called axial age, but principal landmarks in the

creation of the law of modern states are usually seen to begin with the “re-discovery” of Roman law beginning in eleventh-century Bologna. The texts of Justinian’s codification of Roman law were used by the glossators to create a newly rationalized approach to law and governance both for the church and for the emerging civil rulers of Europe. Until nationalist codifications in the eighteenth and nineteenth centuries that claimed to occupy entirely the legal field for each nation, a common but varied and evolving European tradition based in Roman law coexisted with the customary laws of the various peoples of Europe.

The reception of Roman law in the various legal systems of Europe, ecclesiastical and civil, resulted in a diverse pattern of accommodation between the earlier customary law of the peoples of Europe and the new Roman law resulting in the eventual new codifications of the new states. Thus, for example, after the Revolution, Napoleon organized a massive codification of French law that was intended to entirely exhaust and replace all law for France. Yet French customary law can be seen to continue even after the Napoleonic code. Codification and unification of law was later in Germany and resulted from a more explicit negotiation with German customary law.

The nineteenth century also saw the development, particularly in continental Europe, of a scientific jurisprudence that refined and promoted a formal legal rationality that underlay an increasingly autonomous legal sphere. From Savigny’s *The System of Modern Roman Law* (8 vols. 1840–1849) until the 1930s, jurists in Europe elaborated the idea that the ensemble of valid legal norms constituted a system in the strong sense of an entity whose internal coherence and insulation from history could be presupposed.

Continent-wide changes in law were also precipitated by changes in religious doctrine. At the Lateran Council in the twelfth century, for example, ordeals were forbidden because they were thought to involve God in an inappropriate way in human matters. The Council introduced instead evidentiary processes dependent on oath-taking

by witnesses, processes that have since come to present their own problems. In following centuries, the ideas of the humanists and of the reformers further transformed the understanding and practice of law.

English common law is often drawn as sharply different from the “civil law” of continental Europe, as for example in the contrast between the jury trial and the inquisitorial form, yet Roman law had its reception in Britain and codification was an explicit project of nineteenth century utilitarians such as Bentham, who wished to rid English common law of its superstition, legal fictions, and cultural oddities. Common law developed in England with the unification of governance under the Crown and the expansion of royal jurisdiction beginning in the early modern period. William Blackstone’s *Commentaries on the Laws of England* (1765–1769) produced a synthesis and celebration of the English common law, tracing its origins in the mists of time, that was influential in British colonies and continues to be cited in common law jurisdictions today.

European colonial administrators carried with themselves European assumptions about law and legal administration, but they also engaged in various new projects of law reform in their overseas colonies, projects that often resulted in the radical transformation of existing legal systems and the creation of hybrid modern/customary legal systems. The codification of *adat* law in Indonesia, for example, was performed by Dutch colonial administrators. Asian states that were not colonized, such as Thailand and Japan, went shopping for modern legal systems and created their own modern law out of these borrowings. The administrators of postcolonial states have further innovated, incorporating socialist theories of law as well.

Modern legal theories of the nature of property and of the individual have been central to imperialist claims of sovereignty as well as to the development of liberal theories of government. According to Duncan Kennedy, the will theory, or normative individualism, is foundational to modern law. It has guided the scholarly re-conceptualization,

reorganization and reform of private law rules in what the participants understood as an apolitical rationalization project (Kennedy 2004). But it has also provided the discursive framework for the situations in which labor confronted capital and small business confronted big business. And, together with private property, normative individualism has provided an abstract, overarching ideological formulation of the meaning of the rule of law as an essential element in a liberal legal order. The Rights of Man arguably made it possible for the capitalist to use things and men freely, just as this-worldly asceticism bred the capitalist spirit and the rational “professional” who was needed by capitalism.

European legal thought in the twentieth century has been profoundly affected by World War II. Those effects can be seen in the dominance of the further implementation of international human rights norms and by the achievement of European Union law. Modern Euro-American law has been slow, however, to absorb the critiques of its claimed universality based in the research of anthropologists and historians documenting both the provincialism of, and the ongoing occlusion of, other legal ways of life by that law.

Law and Religion

All law can be said to depend upon religious anthropologies and cosmologies, broadly speaking. And all religion can be said to be legal in its generation of norms and institutions governing human behavior. The secular modern law of nation-states speaks in a largely opaque universal language that claims to be based entirely on the rational decision making of the modern bureaucratic state and to derive authority from the will of the people. The conscious attempt to separate law and religion in the modern period has arguably produced an antinomian understanding of religion and an acultural universalist understanding of law. But there are persistent alternative understandings of their relationship.

Theories and practices of law founded in explicit religious anthropologies/cosmologies may be found in the law that governs religious communities, such as the law of the *sangha* (monastic community) in Buddhism or the canon law of the Roman Catholic Church. More broadly, as, for example, within the Muslim and orthodox Jewish understanding, all adherents understand their religious obligations within a legal framework—so that fidelity to God is elaborated by specialists and internalized by adherents in legal terms. For traditional Jews, God’s desire for human life is expressed in the 613 commandments and the commentarial traditions on those laws. For Muslims faithful religious life is defined in terms of *shari’a*.

For most Christians, religious life is understood ultimately to transcend law. Indeed, in the Pauline tradition, Christianity is understood to supersede Judaism in that love, rather than, law, is understood to form the basis for communal life as well as one’s relationship to God. But predominantly Christian societies have developed law for governing both the church and the larger society. The western Roman church is governed by canon law. The Church of England is governed by an ecclesiastical jurisdiction understood to be a part of state law.

There are ideas about the relation of religion and law that are internal to individual religious traditions, but societies with plural religious communities have also developed external law that explicitly governs those communities as religious communities. The law of the Roman Empire, for example, distinguished legal religion from illegal religion. The categories and rules developed by the Romans to control illicit religion were later adapted by Christian rulers to control non-Christian religion. The Ottoman rulers governed minority religious communities in distinct ways through the *dhimmi* system, developed to govern certain non-Muslim minority communities.

Law that is not modern is often assumed to be so because it looks for its authority or its norms in religious texts and traditions. Such assumptions obscure both the religiousness of modern law and

the “rationality” of other legal systems. But it also groups together legal ideas and institutions that have little else in common. If these other law ways are re-incorporated into the larger story of human legal ideas and institutions, and they are studied comparatively with modern law, modern law may be seen to be historically and culturally embedded in ways previously little understood.

Because law, like religion, is increasingly not tied to geographic centers but dispersed through diasporic reproduction and transformation, all law and all religion happen everywhere today. What follows is a brief introduction to some of the groupings of what is typically called religious law. All of these interact with each other and with modern law, both historically, and today.

In Asia, then, as elsewhere in the world, persons today are subject to multiple and overlapping legal regimes, local, national, and international. This law includes that promulgated by official legislative bodies, private regulatory bodies, and voluntary associations, as well as various traditional and customary norms. The law of Asian countries relies on anthropologies and cosmologies which are both universalist and particular and which have been deeply influenced by Hindu, Buddhist, Islamic, and Confucian legal ideas and institutions, as well as those of other traditional religions and ways of life, as well as modern scientific and social-scientific ones. Nations which are former colonies see the influence of colonial legal ideas and institutions, while communist and socialist regimes see the influence of Marxist law.

For both Hindu- and Buddhist-inflected law, law finds its foundational meanings in ancient Indian philosophy and in the concept of *dharma* (Sanskrit) or *dhamma* (Pali). Dharma is a subtle and complex term, encompassing personal duty as well as structuring society-wide institutions and customs. One’s dharma is usually affected by one’s age, class, occupation, and gender, and those who live in accordance with dharma proceed more quickly toward personal liberation. In traditional Hindu society, dharma has historically included Vedic ritual, ethical conduct, caste rules, and civil

and criminal law. Its most common meaning however pertains to two principal ideals: that social life should be structured through well-defined and well-regulated classes (*varna*), and that an individual’s life within a class should be organized into defined stages. The *Laws of Manu*, dating from the first centuries of the common era, is the most important classical legal text in Hinduism. In it, Manu answers the queries of a group of seers who ask him to tell them the “law of all the social classes.” *Manu* became the standard point of reference for all future *Dharmaśāstras* that followed it. While India today is governed primarily by modern secular law, aspects of Hindu legal culture can be found in that law and personal law jurisdictions continue to exist for non-Hindu communities.

Buddhist societies historically have two legal cultures, one that governs the monastic community, derived from the rules that the Buddha established for the *sangha*, and the other governing lay persons, traditions of law established by Buddhist monarchs, beginning with the exemplary King Asoka, who lived in the third century B.C.E. Both have over time interacted with and been influenced by other legal regimes.

Until the twentieth century, the law of the Chinese state was based in Confucian philosophy. Local customary law co-existed with this imperial administration. Following the Revolution of 1911, the new republic first adopted a German-influenced legal code in the civil law tradition, and then, with the establishment of the Peoples’ Republic of China in 1949, a Soviet-influenced socialist legal code. Earlier legal traditions, Confucian and customary, continued to be significant, however. Today, Chinese law and legal institutions and an ethos of the “rule of law” are rapidly being adapted to serve China’s new international ambitions.

As with other legal systems now associated with what modern discourse terms religions, Jewish and Muslim laws today structure lives both formally through their translation and enactment into national legal codes and practices, as in Indonesia and Israel, for example, but they also continue to

govern lives through private enforcement within minority communities, and through the formation and disciplining of the personal conduct of individuals who otherwise live within the formal jurisdiction of modern state law.

The law of most Muslim societies today combines elements of Islamic legal traditions with other legal traditions. Islamic law is understood by Muslims ultimately to derive from two primary sources, divine revelations set forth in the *Quʿran*, and the sayings and example set by the prophet Mohammad, known as the *hadith*. While *shariʿa* is often used in the vernacular as synonymous with Islamic law, it is inappropriate as a translation for law in the modern statist sense. *Shariʿa*, like *dharma*, encompasses a much broader and more diffuse structuring of human life, understood to express comprehensively the intentions of Allah for human life. *Fiqh*, or “jurisprudence,” more properly denotes the work of humans in interpreting the application of Muslim law. Muslim minorities in some countries are formally ruled by Islamic law with respect to some matters, such as family law. That is true in India and Israel, for example. In other places, there is a less formal administration of Islamic law through private arbitration or the seeking of rulings by Islamic law specialists. The practice of providing legal judgments for individuals who seek to order their lives to the demands of *shariʿa* has also flourished on the Internet.

The law of indigenous communities has gained in purchase in recent decades, both through its re-institutionalization in autonomous or semi-autonomous territorial areas within larger states, and through its implementation through state laws giving status to the claims of indigenous communities and individuals.

The argument can be made that all modern secular law is, in many ways, Christian, in its anthropology and cosmology, largely formed, as it was initially, within Christian societies and cultures. But many Christian churches also have their own internal forms of private law governing their members. That law takes shape and form both from interpretations of the Christian bible as well as

from the varied church traditions that have developed in the last two millennia, church traditions that have borrowed from the law of the societies in which they have taken shape.

International Law

While the development of law in the modern period has been very closely tied to the sovereignty of the nation state and its capacity of internal enforcement through its claim to a monopoly of violence, there has also always been law that governed the interactions among different nations. Modern international law finds its origins in the traditions of Roman law and the law of merchants, first elaborated in the early modern period. Today that law includes treaties, the law of international organizations such as the United Nations, the regulations of particular industries, and international human rights law. Often called the father of international law, Hugo Grotius (1583–1645), author of many important treatises on law including *The Free Sea* (1609) and *On the Law of War and Peace* (1625), emphasized the importance of actual practices, customs, and treaties—what “is” done—as opposed to normative rules of what “ought to be” done in determining in what natural law consists.

The formation of international law in the early modern period was significantly influenced by the debate in early modern Europe about the legal rationalization for the conquest of the Americas. Legal justification both for the seizure of lands and for the enslavement of native peoples was sought within the legal traditions of the colonizers. A formal debate was held in Valladolid in Spain in 1550–1551 between the Dominican friar and Bishop of Chiapis, Bartolomé de las Casas, who argued that the Amerindians were free men in the natural order and deserved the same treatment as others, and Juan Gines de Sépulveda, a Spanish scholar and jurist who insisted the Indians were natural slaves, and therefore reducing them to slavery or serfdom was in accordance with Catholic theology and natural law. The debate is memorialized in published texts recounting these arguments.

The Study of Law

Although observations about law are common throughout philosophical and historical literature, modern social scientific understandings of law might be said to begin with Montesquieu. In Book One (ch. 3) of *The Spirit of the Laws* (1748), Montesquieu argued that law both should and did differ according to the nature of a particular government, distinguishing between republics, monarchies, and despotisms, and that it should and did differ according to the nature of the societies it governed. “Law in general,” Montesquieu said, “is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another.”

Henry Maine, one of the Victorian Englishmen who pioneered the comparative study of cultures, famously argued against the utilitarians, including Jeremy Bentham, who sought to rationalize law, by contending that law was deeply and unavoidably inflected by history. Maine saw the transformation of law over time as proceeding through an adaptation of law to social change. He also, however, believed in progress. He is most known for the broad claim, articulated in his *Ancient Law* (1861), that the story of law is a story of movement from status to contract, that is, that “ancient law”—and, by implication, contemporary “primitive law”—is based in an understanding of the human person as embedded in the patriarchal family, such that each person’s legal position depends on that person’s status in that family. What Maine called progressive law understands each person’s legal status to be determined by contracts entered into by that person in equal relationships with all other persons. The understanding of persons as beings who own both themselves and private property is the foundation of the modern legal order.

The great founders of modern social science, including Max Weber, Émile Durkheim, and Karl Marx, and their successors, were interested in law

and its role in the formation and transformation of society. Max Weber outlined a description of rationalization (of which bureaucratization is a part) as a shift from a value-oriented organization and action (traditional authority and charismatic authority) to a goal-oriented organization and action (legal-rational authority). Durkheim was particularly interested in criminal law and argued that as society becomes more complex, criminal law undergoes a transformation from repressive to restitutive. For Durkheim, law is an indicator of the mode of integration of a society, which can be mechanical, among identical parts, or organic, among differentiated parts, such as in industrialized societies. Marx criticized the foundation of modern law in the institution of private property and advocated rather law founded in state ownership.

The anthropological founders were likewise interested in law. Bronislaw Malinowski in *Crime and Custom in Savage Society* (1926), saw law in traditional societies as integrated with economic activity and other social systems into a coherent cultural whole. E.E. Evans-Pritchard in *Witchcraft, Oracles and Magic Among the Azande* (1937) described the use of various fact-finding methods based on his field work in East Africa. The first anthropologist of law to make ethnographic observations in a courtroom was Max Gluckman, in *The Judicial Process among the Barotse of Northern Rhodesia* (1955). Subsequent legal anthropology has included fieldwork throughout the legal systems of the world, modern and traditional. The development of legal anthropology was in its origins closely tied to European colonial projects although in recent decades the methods of legal anthropology have been used in understanding the law of the metropole. A pivotal figure in that movement has been John Comaroff, whose pioneering work on law in South Africa (1986, with Simon Roberts) skillfully elucidates the complex interdependence of law and other social processes, and whose most recent work assesses what he calls “the law of the postcolony” (see, for example, Comaroff and Comaroff 2006).

Anglo-American legal studies in the twentieth century were deeply influenced by legal realism,

critical legal studies, and the law and economics movement. A key and for many visionary figure in the contemporary study of law and religion is Robert Cover, whose article, “*Nomos and Narrative*,” described the close dependence of norms on the narratives of religious communities. He described the world as a place in which law was constantly being created, a process he called *jurisgenerative*, and also constantly being destroyed, a process he called *jurispathic*. Both the hope and the violence of law in Cover’s vision seem apropos at this time in human history.

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Legitimacy / Legitimization

The English language has a series of terms for the notion that an opinion or practice is justified or perceived as such. A concept can be validated, defended, argued for, plausible, reasonable, or legitimate. There are various nuances inherent in these formulations, and there are differences in usage, but together the various verbs and phrases denote a range of processes that are central to religious traditions. For the present purposes, this range can be roughly divided into two distinct parts, as reflected by the double heading of this article. *Legitimacy* is here seen as a passive property: A particular element of a religious tradition can be perceived as legitimate e.g. because it has certain characteristics that will satisfy the expectations of the members of that tradition. As we will see below, these characteristics and expectations need not even be consciously available to the individuals for whom the religious element is legitimate. *Legitimization*, by contrast, is derived from a transitive verb and thus signifies an activity, the deployment of strategic means to make a particular religious element—often a religious innovation—acceptable in the eyes of the beholder. Legitimization as understood here is thus an intellectual act of justification, or, to quote Bruce Lincoln, the activity of “invest[ing] specific human preferences with transcendent status” (Lincoln 2000: 416).

Delimiting the range of factors that make a religious practice appear legitimate (in the passive sense discussed above) is by no means an easy matter, and potentially legitimacy is produced by a staggering range of causes. The reasons for finding participation in a particular ritual legitimate can certainly include such ‘religious’ reasons as the assent to a proposition affirming the existence of a transcendent agent that one should propitiate or worship. There are, however, also numerous putatively non-religious grounds for finding it legitimate to participate in a rite: the wish to be seen by other participants, the social networking facilitated by participating, the desire not to offend devout family members, and the sheer entertainment value