



Analytical Vocabularies in Anthropology, Law and Religion: Time for a rethink?

Roger Ballard
Centre for Applied South Asian Studies
roger@casas.org.uk
www.casas.org.uk

Distinctions and Disjunctions

- Insofar as they seek to make sense of human behaviour, Anthropology cover much the same ground
 - however my experience of preparing expert reports for use in legal proceedings has often left me feeling like a fish out of water
- Since the two disciplines turn out to occupy sharply differing conceptual universes
 - my experience also suggests that nowhere are these differences greater than in precisely the areas with which the Religare project is concerned
 - our understandings of the concepts of religion, of culture, and above all of law itself
- It is these issues which I would like to explore this afternoon

On religion

- Religion – or more precisely religious disputes – have become an ever more salient feature of the contemporary world
 - such that legislators, as well as the courts, have also found themselves addressing religious issues with increasing frequency
- But just what kind of phenomenon do they assume religion to be?
- Whilst Article 9 of ECHR may have put religion firmly on the contemporary legal agenda, it does so in a thoroughly contradictory way:
 - having opened with a resounding commitment to the right to freedom of belief
 - it promptly qualifies that freedom when it comes to its manifestation in practice
 - which, in a dangerous series of phrases, can be over-ridden by “such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.”

On *religious* belief

- But before we even get around to matters of practice, how can beliefs which are distinctively *religious*
 - be distinguished from those which are merely cultural, superstitious or what have you?
- From an anthropological perspective the drawing of such distinction with respect to cosmologically oriented conceptual frameworks make no sense
 - on the grounds that all such conceptual frameworks deserve a similar degree of analytical respect
- However my experience suggests that lawyers, and above all litigants, rarely see things that way
 - instead they draw routinely a distinction between the theological visions which can be drawn from ancient scripture
 - and popular/superstitious misreadings and misinterpretations of those texts produced by those with less scholarly knowledge than themselves
 - but when courts accept that (protestant) distinction, they soon find themselves in a serious quagmire
 - Since they have to start wrestling with the distinction between (legitimate) religion and (illegitimate) 'superstition'

On the manifestation of religion

- Can one meaningfully distinguish between religion and its manifestation, as Article 9 invites us to do?
 - viewed historically from a Protestant perspective, the answer is a firm yes
 - since this stance enabled post-Lutherans to distinguish the interiority of their *beliefs* from the externally oriented and superstitiously ground ritual practices of the Roman Catholics
 - however it also recently enabled the Court of Appeal to refer a Hindu challenge to the Cremation Act of 1902 back to the secular arena of Newcastle City Council's planning committee
 - for despite the fact that *anthyeshiti sanskara* is a key Hindu sacrament
 - it is merely a *manifestation* of religion, and can consequently readily over-ridden on 'democratic' grounds
- A legally proper outcome which seems appears deeply ethnocentric, at least from an anthropological perspective

On Culture

- Unlike religion, culture attracts no protection in ECHR
 - whether in terms of belief or practice
- Moreover culture conditions a far wider range of behaviours than does religion
 - if, indeed, a meaningful boundary can be drawn between the two phenomena
- Yet more significantly still, just whose behaviour is regarded as being culturally conditioned in the contemporary world?
- My experience in court provides a clear answer to that one:
 - it is only the behaviour of 'they', the others, members of minority groups, which is regarded as being culturally conditioned, whilst 'our' behaviour is just normal
- This has far reaching consequences
 - whilst the cultural premises around which members of the indigenous majority order their behaviour are quite literally disappeared into 'normality'
 - those in terms of which members of the minority prefer to organise their interactions are at best perceived as abnormal, deviant and disruptive
 - and at worst rendered criminal as a result of statutory intervention
- When community cohesion becomes the order of the day
 - the tendency to envision cultural alterity as a criminal offence becomes steadily more salient
 - and 'culture' to be envisaged as the antithesis of normality

On Law: an anthropological perspective ⁷

- Law is both a necessary, and an integral, part of every social order
- Law is a context-specific phenomenon, since it is a product of, and articulated within, an infinite range of variably structured social arenas.
- Law is no more static than the social arena within it is utilised, or than the interpersonal interactions articulated on the basis of its premises: as such it is subject to constant development, renegotiation and change.
- As a means of order-maintenance, law has two distinct dimensions:
 - besides to setting out 'the rules of the game'
 - it must also offer a means whereby disputes between players can be resolved.
- Complex societies include a wide range of arenas within the context of which specific groups and communities deploy distinctive 'rules of the game'
- Hence legal homogeneity is the exception not the rule: the vast majority of social orders, no less in the present than the past, display a degree of legal pluralism
- But as contemporary jurisdictions have begun to make ever more strenuous efforts to homogenise themselves, efforts to de-legitimise diversity have intensified
 - Precipitating, in turn ever more vigorous demands by minorities for their underlying patterns of *de facto* cultural, religious and familial alterity to be accorded legal recognition

On 'Law' and 'Custom': a legal perspective⁸

- Most contemporary lawyers find it difficult to see how demands for the recognition of alterity can ever be accommodated within the established jurisdictional order
 - not least because their positivistic perspective leads them to insist that mere 'custom' can never be accorded the same status as properly constituted law
- So just how and why do lawyers and anthropologists differ on this issue?
 - i. Anthropologists make no assumption that the rules of the game must *ipso facto* be laid down and enforced by the state
 - ii. They routinely assume that players operate within networks of social relationships, of within the context of a self-governing community
 - if so dispute settlement is much more a matter of mending relationships
 - than of deciding which of two competing parties is in the wrong
- A perspective which differs radically from Austin's insistence that law arises
 - as the outcome of the *command* of a sovereign lawgiver,
 - thereby imposing *an obligation* on the citizen,
 - underpinned by the threat of *sanctions* in the event of disobedience.

Law, the State and Social Policy

- Given its statist outlook, this kind of post-enlightenment black-letter law has no time for communities
 - rather it seeks to regulate the activities and interactions of free-standing individuals
 - and/or of formally constituted corporations which can consequently be regarded legal persons
 - whose interactions are normatively assumed to be grounded in written relationships of contract
 - whose terms the courts are expected to enforce if a dispute should arise
- In other words this a system in which the state plays a prominent *regulatory* role
- Whilst the legislature plays a key role as the vehicle for the articulation of *social policy*
 - i. with the objective of implementing an ever greater degree of social justice
 - ii. whilst also ensuring that the integrity of the (unitary) republic is sustained
- With the result that self-organising communities ('custom') are left with no significant role to play in the wider socio-political order
 - other than to represent a threat to its integrity

Wither 'religion' in 'secular' jurisdictions?

- Besides drawing an absolute disjunction between the Church and the state
 - the philosophes of the enlightenment also sought to banish what they considered to be the 'irrational' beliefs and practices to the private sphere
 - where they expected superstition to wither away in the face of the onrush of progress
- Two centuries have now passed since serious efforts to bring that outcome about began to be made
 - but with little sign of progress
 - i. millions of migrants have arrived with a powerful commitment to community-based religion in their backpacks
 - ii. the established Churches, although wounded, have not been extinguished
 - iii. militant secularism is beginning to exhibit some suspiciously 'religious' characteristics
- Like it or not, religion – however we choose to understand it – remains as inescapable a component of human affairs as politics and economics

The Westphalian fiction *of cuius regio, eius religio* is long past its sell-by date

- Like it or not religion, or more specifically religious diversity, remains a salient, and an increasingly troublesome, feature of every European jurisdiction
- Moreover its 'troublesomeness' has two quite distinct dimensions
 - i. It is a source of ever more salient forms of social tension
 - despite (or more usually because of) efforts to regulate the problem away
 - ii. In our post-Christian/post-enlightenment world, we lack a conceptual framework within the context of which to make sense of current religious developments
 - particularly when they are manifested in non-Christian and non-Protestant formats
- It follows that is not just the enlightenment whose premises we need to unpick
 - but also the conceptual premises which were deployed in the course of negotiating the Peace of Westphalia

Some meaningful conceptual distinctions?

– or a shoal of misleading red herrings?

Contemporary discourse is powerfully conditioned by an interconnected set of antitheses

Rational Formality	Chaotic Informality
Law	Custom
Common sense	Cultural exoticism
Religious belief	Superstitious practice
Autonomous individualism	Collective reciprocity
Coherent homogeneity	Chaotic Plurality
Progressive modernity	Mindless traditionalism

giving rise distinctions which lie at the heart of our commitment to
modernity

but could it be that modernity has had its day

such that the past provides our best guide towards a post-modern future?

Thinking outside the Box: a non-Eurocentric conceptual vision of religious phenomena

<i>Sphere of Activity</i>	Significance	Definition	Domain
<i>Panthic</i>	Spiritual/ Gnostic inspiration	The ideas and practices deployed by those in search of spiritual and mystical inspiration, invariably under the guidance of a Spiritual Master (e.g. <i>Pir, Yogi, Sant, Swami or Guru</i>)	Spiritual/ Occult
<i>Kismetik</i>	Occult/ Making sense of the world	The ideas used to explain the otherwise inexplicable, and the occult practices deployed to turn such adversity in its tracks; both are usually deployed with the assistance of a Spiritual Master.	
<i>Dharmic</i>	Morality/ Social order	The moral ideology in terms of which all aspects of the established social and behavioural order is conceptualised and legitimated.	Social/ moral
<i>Sanskritic</i>	Rites of passage/ social reconstruction	The set of ritual practices – and most especially those associated with birth, initiation, marriage and death – which celebrate and legitimate each individual's progress through the social and domestic order.	
<i>Qaumic</i>	Political/ Ethnic mobilisation	The use – and more often than not the reinterpretation – of religious ideology as a vehicle for collective social and political mobilisation. The typical outcome of this process is that an increasingly clearly defined body of people begin to close ranks on a morally sanctioned basis the better to pursue shared social and economic objectives	Political

Five Dimensions of Punjabi Religion