

**IN TWENTY-FIRST CENTURY EUROPE, DO CONSTITUTIONAL
DEMOCRACIES REQUIRE CO-OPERATION OR STRICT SEPARATION
BETWEEN PUBLIC AUTHORITIES AND RELIGIOUS BODIES?**

A thesis submitted to The University of Manchester for the degree of
Doctor of Philosophy
in the Faculty of Humanities

2019

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Word count: 87,994

Abstract

The study is a comparative investigation into the religion-state relations in three Western European countries: the United Kingdom, France and Italy. Each country represents one of the three classical models of religion-state relations. Within the wider framework of law and religion in the United Kingdom, the Church of England's constitutional links with the State represent the most important aspect of the established church model. France seeks to separate religion from the State under its constitutional principle of laïcité. Italy represents one of a number of countries that co-operates with religious bodies by entering into agreements with them.

The analysis of each country contains a section on political and religious demography which provides empirical context. The model of religion-state relations and exceptions to it are then discussed. A historical section focuses on aspects of the encounter between religion and emerging liberal democracy. Finally, a case study examines some of the contemporary legal issues arising from the state's interaction with religion.

The study considers which aspects of the three models are more in-line with democratic credentials. In doing so, it explores the key pillars of liberal democracy: participation and the democratic processes; the rule of law; the separation of powers; and human rights.

In response to the findings of the research, the study presents the outline of a new model of religion-state relations based on a critique of the three classical models. The new model is one of critical engagement between religion and the state from a position of mutual separation. The model takes seriously the historical legacy of the encounter between religion and liberal democracy and attempts to integrate the inevitable tensions within its structure.

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'It may be that, without the pressure of social forces, political ideas are stillborn: what is certain is that these forces, unless they clothe themselves in ideas, remain blind and undirected.' Isaiah Berlin¹

'In their task government and Church are separate, but government and Church have the same field of action, man.' Dietrich Bonhoeffer²

Acknowledgments

I would like to express my sincere thanks to Dr. Javier Garcia Oliva and Professor Rodney Brazier for their support and guidance in supervising my thesis. I would particularly like to thank Javier for the time and commitment he has given to the project and especially his patience and understanding.

Dedications

To my parents, Joseph and Kay, who first taught me to be curious and think.

To my husband, James, for his love and forbearance.

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¹ Berlin, I. 'Two Concepts of Liberty' (first published 1969) in Hardy, H (ed.) *Liberty*, Oxford: Oxford University Press, 2008, p.168.

² Bonhoeffer, D. *Ethics*, (first published in 1949), London: Simon & Schuster, 1995, p.346. (Inclusive language should be inferred.)

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Introduction

When I began my research in 2012, I was conscious that issues to do with religions' relationship with constitutional democracy could be seen as somewhat anachronistic or esoteric, being of little interest other than to a small pool of scholars working in this area. I was not to know that by the end of the project, some of the key issues would have significant relevance and impact. The nature of religions' relationship with liberal democracy is an area that needs to be disseminated beyond the narrow set of law and religion scholars to become part of the core knowledge of constitutional lawyers and political scientists generally.

In a very short space of time, the presence and role of religion in society has resurfaced.³ The hitherto widely accepted conclusion of the secularisation thesis that religion would eventually die out, especially in Western Europe, is no longer held with the certainty it once was.⁴ God is not as dead as Nietzsche had thought.⁵ The collapse of the former Soviet Union has confirmed the rejection of totalitarian atheistic regimes in the West. The 9/11 terrorist attack on the World Trade Centre in New York tragically provided a catalyst for continuing Islamic fundamentalist attacks across many Western

³ Calhoun, C., Juergensmeyer, M. and Van Antwerpen, J. (eds.), *Rethinking Secularism*, Oxford: Oxford University Press, 2011; Mancini, S. and Rosenfield, M. (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press, 2014.

⁴ Bruce, S. *God is Dead: Secularization in the West*, Oxford: Blackwell, 2002. Bruce, S. *Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis*, Oxford: Clarendon Press, 1992; Casanova, J. *Public Religions in the Modern World*, Chicago: University of Chicago Press, 1994; Inglehart, R. and Norris P. *Modernization, Cultural Change and Democracy*, New York: Cambridge University Press, 2005; Inglehart, R. and Norris P. *Sacred and Secular: Religion and Politics Worldwide*, New York: Cambridge University Press, 2011.

⁵ Nietzsche, F. *The Gay Science*, New York: Vintage Books, 1974, p.188.

democracies.⁶ At the same time, those very same democracies struggle to cope with increased immigration, which from a religious perspective, has proved most challenging in relation to Muslims.⁷

Since the financial crisis of 2007/08, a number of countries have lurched towards populism and some politicians have sought to encourage and harness religious support for their policies.⁸ In response, powerful and often strident religious voices recognise an opportunity to shape society according to their values. Social media has provided new platforms for immediate and often unrestrained debate on the interconnections between religion, culture, politics and ethics.⁹ In such turbulent times, are the institutions of liberal democracy robust enough to ensure a tolerant, free and open society?

Silvio Ferrari, one of Europe's leading law and religion scholars, writing in 2010, asserted that some traditional mechanisms of regulating the relations between the state and religion have become obsolete. He said, 'Everywhere in Europe, the States that draw their inspiration from secularism and Church-State separation encounter increasing difficulties in regulating the public presence of religious groups; those characterized by religious models - from

⁶ Bossong, R. *The Evolution of EU Counter-Terrorism: European Security Policy after 9/11 (Contemporary Terrorism Studies)*, London: Routledge, 2012.

⁷ Murray, D. *The Strange Death of Europe: Immigration, Identity, Islam*, London: Bloomsbury Continuum, 2016.

⁸ For example, President Putin's support for the Russian Orthodox Church; President Erdogan's AK Parti alignment with Islamic values in Turkey (Borzou, D. 'Erdogan has Mastered Democracy' in *Foreign Policy*, 25 June 2018 at <https://foreignpolicy.com/2018/06/25/erdogan-has-mastered-democracy/> - last accessed 24 January 2019; President Trump's desire to appeal to Evangelical Christians in the USA. See also recent elections in Germany (September 2017), Austria (October 2017), Italy (March 2018) and Hungary (April 2018) where populist right-wing political parties have gained ground.

⁹ Van Dijck, J. *The Culture of Connectivity: A Critical History Of Social Media*, Oxford: Oxford University Press, 2013.

the State Church to dominant religion - have difficulty in governing the plurality of religions present in their territory'.¹⁰ The extent to which liberal democracy requires the strict separation of public authorities from religion or co-operation with it becomes no longer an obscure question. It is a pressing issue which this thesis seeks to address.

At the heart of the study is the interaction between organised religion and the liberal democratic constitutional framework. The aim of the thesis is to analyse the religion-state relations in three Western European countries, the United Kingdom (focusing on the constitutional status of the Church of England), France and Italy to determine which system is most compatible with liberal democracy. Each country represents one of the three broad classifications or models of religion-state relations: the Church of England is the established church in England but has a wider constitutional role within the UK, France is a secular separatist regime and Italy, through entering into agreements with religions, is characterised as taking a co-operative stance towards them.

Western Europe is the focus of the study because each country has evolved a mature liberal democracy from a position of Christian dominance in politics and law. Religion-state relations operate primarily on the basis of domestic national laws. However, the primary supranational dimension concerns the Council of Europe and the European Convention on Human Rights (ECHR)

¹⁰ Ferrari, S. 'Conclusion', in Ferrari, S. and Cristofori, R. (eds.), *Law and Religion in the 21st Century: Relations between States and Religious Communities*, London: Routledge, 2010, pp.369-375 at p.371.

and its jurisprudence. This aspect is considered within the context of human rights as a key aspect of liberal democracy.¹¹

It is notoriously difficult to define 'religion' in the context of law.¹² Courts at both the national and international level do not provide a legally usable definition of religion instead preferring either to say what they do not consider religion to be or, they employ non-religious criteria to determine whether an issue is justiciable.¹³ This issue is not as significant as it might be because the thesis is concerned primarily with the Abrahamic religions of Judaism, Christianity and Islam.¹⁴ Unless the context requires otherwise, the general use of 'religion' in the text should be taken to refer to one or more of those three monotheistic religions.¹⁵

There are three main reasons why the thesis focuses primarily on the Abrahamic religions:

¹¹ European Union law on the relationship between law and religion is less well developed than that of the Council of Europe and is not considered in the same detail.

¹² Edge, PW. 'Determining Religion in English Courts' in *Oxford Journal of Law and Religion*, 1:1, 2012, pp.402-423.

¹³ For the UK approach see Edge, P and Vickers, L. 'Review of equality and human rights law relating to religion or belief', an Equality and Human Rights Commission Research Report, No. 97, 2015, pp.14-20.

¹⁴ The unifying thread is the covenantal relation between Abraham and God. See Silk, M. 'The Abrahamic Religions as a Modern Concept', in Silverstein, AJ. and Stroumsa, GG. (eds.), *The Oxford Handbook of the Abrahamic Religions*, Oxford: Oxford University Press, 2015, p.71.

¹⁵ In relation to the jurisprudence of national and international courts, especially in relation to freedom of religion law, 'religion' includes all of the world's great religions, atheism and non-religious movements e.g. pacifism and usually most new religions and sects.

1. Each religion is based on divinely inspired scriptural revelation which is its primary source of truth.¹⁶ This theological foundation is authoritative on its own terms. The revelation is eschatological in that it looks to a future for the human being beyond death. At the same time, the praxis of the revelation entails working towards the establishment of a particular vision of how the world should be. The vision is comprehensive in that it attempts to provide a universal means of regulating society, which applies to all human beings.¹⁷ This means that each religion is capable of influencing and becoming involved in politics and often this can be expressed as a requirement or a vocation.¹⁸

2. Scriptural revelation constitutes the primary source of law for each religion. It sets out rules which govern the ethical aspects of life and also judicial practices. Whilst God, as the ultimate authority, is the one true judge, mediators (clerics), recognised by the religious community, are usually required to ensure the adherence and implementation of the laws. The link between law and religion is clear as each religion has its own concept of justice involving theology, law and ethics. This provides a compelling motive to be involved in law-making and judicial interpretation.

¹⁶ In Judaism and Christianity the revelation is of God himself. For Islam, God does not manifest himself but expresses his will by uttering commands. See Brague, R. *La Loi de Dieu: histoire philosophique d'une alliance*, Paris: Gallimard, 2005.

¹⁷ They are comprehensive doctrines in the Rawlsian sense though not all aspects are necessarily reasonable: Rawls, J. *Political Liberalism*, New York: Columbia University Press, 2005, pp.58-66.

¹⁸ Benne, R. 'Martin Luther on the Vocations of the Christian' in the entry for Theology and Philosophy of Religion, Christianity, The Reformation in the Oxford Research Encyclopaedia, on-line publication date August 2016.

3. The Abrahamic religions seek to transmit their faith and values to successive generations. All three religions are to a greater or lesser degree involved in education and particularly seek to influence the formation of children at a very early age. Christianity and Islam are missionary religions that seek to convert non-believers or those of other religions.

The use of the term Abrahamic is not without its detractors, however, and commentators have criticised it for using different interpretations of Abraham as a shared point of origin and also for glossing over the realities of the often mutually hostile and fundamentally divergent worldviews that exist between the religions.¹⁹ Indeed, the term does not always meet with the approval of the religions themselves.²⁰

Cécile Laborde, without providing a comprehensive definition of religion, offers the following series of features which are typically considered traits of a religion, including the Abrahamic religions: 'a complex notion involving faith and belief, conscientious duty, a sense of the sacred, valued communal practices, comprehensive scope, ultimate moral concern, the pursuit of extra-temporal goods, a divine authority, totalising social institutions, historically salient collective identities, divisive and controversial belief systems.'²¹ She says that this type of conceptual construction has provided the structural

¹⁹ Levenson, JD. *Inheriting Abraham: The Legacy of the Patriarch in Judaism, Christianity and Islam*, Princeton: Princeton University Press, 2012; Hughes, A. *Abrahamic Religions: On the Uses and Abuses of History*, Oxford: Oxford University Press, 2012.

²⁰ Some commentators criticise the term for promoting a shift towards religious universalism and a supersessionist bias.

²¹ Laborde, C. 'Equal liberty, non-establishment and religious freedom' in Requejo, F and Ungureanu, C (eds.), *Democracy, Law and Religious Pluralism in Europe*, Abingdon: Routledge, 2014, p.39.

template out of which liberal political philosophers from John Locke onwards, have conceptualised and justified the liberal state. In addition, two further features could be included in the modern context. Religion is a private choice which can also require the public expression of that choice in ways that relate to personal identity. It is in the regulation of the public expression of religious identity that the law often plays a key role.

It is a matter of historical fact that Christianity has played a formative role in the evolution of Western societies and particularly the three countries at the heart of this study. The influence of Christianity cannot be overstated. Since its adoption by the Emperor Constantine after his conversion in approximately 312 CE and subsequently as the religion of the Roman Empire, it has, from a historical perspective, been the primary source of European law and culture.

More recently, increased Muslim immigration into Europe over the past fifty years has brought new pressures and challenges both to the dominant Christian heritage and also to notions of secularism. The extent to which the *sharia* is compatible with liberal democracy has been a source of intense debate during the first two decades of the twenty-first century.²² A particular question this work raises is the extent to which Islam can envision and relate to models of separation between religion, politics and law.²³ The poor record

²² See for example, Ahdar, R. and Aroney, N. (eds.), *Shari'a in the West*, Oxford: Oxford University Press, 2010.

²³ Lewis, B. *Faith and Power: Religion and Politics in the Middle East*, Oxford: Oxford University Press, 2010, p.55.

of Islamic countries embracing democratic ideals is concerning.²⁴ The dominance of Christianity in Western Europe has raised important questions of 'insiders' and 'outsiders' and how the state deals with non-Western sources of jurisprudence.²⁵

The historical context of both religion and liberal democracy is an important feature of the thesis because the development of the law must take into account its own '*sitz im leben*' or 'setting in life'. With this in mind, it needs to be remembered that religion is deeply intertwined with culture and sometimes embedded to the extent that the two are difficult to distinguish. Consequently, it is not usually possible (or perhaps desirable) for the law in this area, especially at a constitutional level, to break radically with what has gone before. Change tends to be incremental, in some cases so as to avoid social unrest. And yet at the same time, we are able to see how a dominant Christian presence in the public sphere has begun to give way to competing religious views and a diversity of secular world views.²⁶

Each of the chapters on the UK, France and Italy contains a historical section. The purpose is *not* to show the formation of a distinctive model of religion-state relations. Rather, it is to demonstrate the interplay, often involving reaction and friction (and sometimes violence) between competing religious voices and also religious and non-religious voices as liberal

²⁴ Of the 46 states which are members of the international Islamic Conference, only Turkey is a democracy. Many Islamic countries retain strict blasphemy laws e.g. Pakistan, which clash with liberal democratic principles.

²⁵ McCrea, R. *Religion and the Public Order of the European Union*, Oxford: Oxford University Press, 2010.

²⁶ Joppe, C. *The Secular State Under Siege: Religion and Politics in Europe and America*, Cambridge: Polity Press, 2015, p.42.

democracy evolved in those countries. The sections present a thread of how the development of liberal democracy has challenged religious dominance in public affairs.

Within the study, Christianity is discussed more than Islam or Judaism because of its historical influence. Equally, the Roman Catholic Church and the Church of England are the main denominations considered because of their importance to the countries investigated. Since World War II, Europe has become more religiously diverse and increasingly diverse in non-religious ways. Indeed, ethical perspectives which exclude conventional religious belief in a deity have become an increasingly acceptable norm. Atheists, secularists, humanists and agnostics, those apathetic about labels or who reject simple categorisations about identity seek to live alongside those who value and espouse a religious identity. In short, there is a multiplicity of world views. Within each of these groups there are those who sit lightly to their religious identity whilst there are others who ascribe to themselves what may be called a 'thick' religious identity. Religious leaders, usually, although not exclusively male, undoubtedly fall within this latter group. They tend to be socially conservative and often question the benefits of freedom and individual autonomy preferring communal rights and practices.

Without agreeing to the precepts of any one religion, the thesis acknowledges and accepts that religion should be treated seriously. That means recognising that those who belong to that religion and particularly

those who lead that religion should ordinarily be credited with believing the religious doctrines and the ethical positions and practices which they take to be the prescriptive requirements of those doctrines. At the same time, it is also recognised that there is a spectrum of belief within religions. There are groupings and factions that may be more or less liberal or conservative and, at the extreme end of the spectrum, fundamentalist in their beliefs.²⁷ Adherents practice, follow and believe the tenets of their faith to differing extents.²⁸ In other words, caution is required when talking about religion generally - there is the capacity for great good and great evil.²⁹

One of the reasons for undertaking this study was to investigate why human beings who do not belong to an organised religion, nevertheless allow organised religions to influence law-making in ways that could restrict freedom generally. Competing world views are nothing new and nor are the disagreements and debates in politics and ethics. Indeed, they may be essential. What is surprising, however, is that, despite advances in science and technology, of which the developments in mass media and communication are some of the most influential and pervasive, organised religions still lay claim to the independent application of theocratic techniques for anthropological and ethical solutions. Moreover, they continue to believe and expect that these solutions can be applied outside the faith to everyone

²⁷ Woodhead, L., Partidge, C. and Kawanami, H. (eds.), *Religions in the Modern World: Traditions and Transformations*, Abingdon: Routledge, 2016.

²⁸ For example, the use by Roman Catholics of contraception. Religious practice also varies in Islam, see DeHanas, DN. 'Elastic Orthodoxy: The Tactics of Young Muslim Identity in the East End of London' in Dessing, NM., Jeldtoft, N. and Woodhead, L. (eds.), *Everyday Lived Islam in Europe*, Abingdon: Routledge, 2016, p.69.

²⁹ For a critical view of religion see Hitchens, C. *God Is Not Great: How Religion Poisons Everything*, London: Atlantic Books, 2007.

in society.³⁰ Liberal democracies do not sit easily with the desire to apply absolutist restrictions of this type on individual freedom. Why do religions that benefit from laws on religious freedom so often not also value that same freedom for those outside the religion?

The ability and ease with which to communicate and travel has enabled new encounters between cultures, identities and philosophies.³¹ Only the most repressive political regimes attempt to control and restrict this interaction. At best, they will enrich the participants, lead to creativity, result in change and hopefully contribute to human flourishing on both individual and societal levels. On the other hand, it is clearly wise to reflect on such developments in order to discern the extent to which they are, or are not, beneficial to wider society.³² It is easy to see a role for religion in this process of discernment as, together with other groups and organisations in civil society, they attempt to guide and encourage a more beneficial future for humanity and the planet on which it resides.

At its heart the study is comparative. Chapter 1 begins by examining what happens when religion and politics are fused in theocratic and erastian regimes. The purpose of the chapter is to describe the almost magnetic attraction between religion and political power in attempts to dominate and control the public sphere. When operated without the freedom of religion,

³⁰ Nehushtan, Y. *Intolerant Religion in a Tolerant Liberal Democracy*, Oxford: Hart Publishing, 2015, p.93.

³¹ White, A. *Digital Media and Society: Transforming Economics, Politics and Social Practices*, Basingstoke: Palgrave MacMillan, 2014.

³² Bolter, JD. *The Digital Plenitude: The Decline of Elite Culture and the Rise of Digital Media*, Cambridge, Massachusetts: MIT Press, 2019.

the dominance of one religion can be overwhelming. When the civil power has the upper hand, religion can become a mere puppet in the pursuit of political rather than spiritual objectives.

Chapter 2 sets out a comprehensive analysis of liberal democracy in order to make explicit its key features. Four aspects are discussed: participation and the democratic processes; the rule of law; the separation of powers; and human rights. The analysis provides the basis on which an assessment will be made of the most appropriate form of religion-state relations compatible with that system of government.

Chapters 3 to 5 provide the substantive analysis of the constitutional relationship between religion and the state in the UK, France and Italy. Each chapter has a similar structure: Section 1 examines the political and religious demography. Section 2 sets out the existing model of constitutional religion-state relations. Section 3 provides a largely descriptive historical thread illustrating the clash between religious dominance and nascent liberal democracy. It follows the description of the model in order to highlight the fact that its primary purpose is not to explain how the model evolved. Section 4 uses a recent contentious issue in law and religion as a case study through which to examine continuing areas of tension and dispute relevant to the application of the model.

Chapter 6 proposes a new model of religion-state relations. It takes seriously the historical encounter between religion and nascent liberal

democracy. Recognising that the interaction has often been one of friction, the model acknowledges this and integrates the tensions into the design of the model. The results of my research show that neither strict separation nor co-operative approaches are sufficient and so the classical models are rejected. Rather, it is possible to detect a process of re-alignment taking place. The process is not the death of religion but the re-positioning of religion in public life according to the demands of liberal democracy.

In answering the question whether in twenty-first century Europe, constitutional democracies require co-operation or strict separation between public authorities and religious bodies, the thesis proposes the development of a model based on the state's critical engagement with religion from a position of mutual separation. Building on a critique of the classical models, the new model relates the encounter between the state and religion to the four key areas of liberal democracy identified in Chapter 2.

Dominant religious influence is reducing as other world views compete and, to some, this will feel like relegation. However, whilst the impact of religious institutional power and control may wane, that does not necessarily mean that the theological voice is diminished. The new model is not static but one of encounter and praxis – its development is already underway.

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Chapter 1

Theocracy and Erastianism - the fusion of religion-state relations

1 Introduction

The classical form of European religion-state relations was proposed by Gerhard Robbers.³³ According to this view, the stance taken by a state towards religion can broadly be attributed to one of three models:

1. The formal legal establishment of a religion or denomination within a state;
2. The separation of religion from the state; and
3. Co-operation between the state and religion.

This classification has traditionally been used by scholars when discussing religion-state relations from a constitutional perspective. However, the models have sometimes been criticised as producing an overly narrow or simplistic approach to religion-state relations.³⁴ Some commentators, including Ferrari, have reassessed them to recognise that co-operation is to some extent a feature of all the relationships between religion and the state in Europe.³⁵ Indeed, the law relating to organised religion is diverse,

³³ Robbers, G. (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, 2005, p.578-580.

³⁴ Nieuwenhuis, AJ. 'State and religion, a multidimensional relationship: Some comparative law remarks', in *International Journal of Constitutional Law*, 10:1, 2012, pp.153-174.

³⁵ See for example, Ferrari, S. 'Law and Religion in Europe' in *Religion in the 21st Century*, Farnham: Ashgate, 2010, pp.149-159; Sandberg, R. and Doe, N. 'Church-State Relations in Europe' in *Religion Compass*, 2007; Sandberg, R. 'Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach' in *Journal of Religion in Europe*, 2008,

affecting much more than the constitutional relationship between religions and the state. Whilst accepting Ferrari's assertion that co-operation is a feature of almost all religion-state relationships in Europe, the classical view emphasises key differences and allows similarities to be observed.³⁶ The models are not pure and the exceptions can be as informative as compliance. In each case, religion-state relations have long histories and have developed in response to political events, some of which have been extreme.

According to the classical view, the fusion of religion and the state is at one end of the spectrum and the complete separation of religion from the state at the other.³⁷ In order to fully understand the consequences of separation, it is necessary to consider what happens when religion and the state are fused and this can take two forms, theocracy and erastianism.³⁸ In a theocracy, religion controls the state whereas in an erastian regime, the state controls religion.³⁹ The tensions inherent in these two positions over who controls whom have been long fought over. We will see that neither position is compatible with liberal democracy and the operation of its public institutions.

pp.329-352; Doe, N. *Law and Religion in Europe: A Comparative Introduction*, Oxford: Oxford University Press, 2011, p.2.

³⁶ Ferrari, S. 'Law and Religion in Christofferson, L *et al* (ed.), Europe' in *Religion in the 21st Century*, Farnham: Ashgate, 2010, pp.149-159.

³⁷ Ahdar, R. and Leigh, I. *Religious Freedom in the Liberal State*, Oxford: Oxford University Press, 2005, p.70ff; Fox, F. *A World Survey of Religion and the State*, Cambridge: Cambridge University Press, 2008, Chapter 5 which deals with Western democracies.

³⁸ Erastianism takes its name (not altogether fairly) from the Swiss physician and theologian Thomas Erastus 1524 - 1583.

³⁹ Anti-religious regimes can be seen as 'erastian' because they seek to enforce a version of state atheism rather than a religion.

Pure forms of theocracy or erastianism do not exist in Europe today and it would not be possible for a European state to transition into a theocratic or erastian regime without violating the norms of liberal democracy. By examining these forms of government, it is possible to observe some of the risks that could lie in wait for a democratic state which fails to be alert to the dominance of religion in society and the need to protect the freedom of religion.

The first section of the chapter discusses theocracy. It focuses on the Vatican City State (the 'Vatican') in Rome which functions as a conventional state on a theocratic basis – it is not a liberal democracy. This also helps to understand the nature of the Roman Catholic Church, which as the Holy See, administers Catholicism from the Vatican. The second section focuses on erastianism which has been a historic feature of most European states and continues to play a role in religion-state relations in Europe. It helps to explain why some states continue to exert civil control over religion and retain a state church system.

1.1 Theocracy

In a theocracy, religion controls the state and the purpose of the state is to further the objectives of religion. A theocracy's rulers, institutional arrangements and laws are religious and the authority for the basis of governance is rooted in the divine. Historically, a number of countries have endeavoured to establish theocracies, particularly in the ancient world.⁴⁰ There is a nexus between divine law and the highest tier of political authority in the government through which the law is interpreted, administered and enforced. So priests may form the ruling elite, as in Tibet before communist rule from China or, a king or president may rule by divine right or under the authority of a priestly caste. Central to the concept of a theocracy is the notion that the authority for the general law is religious.

Today, some of the countries of the Middle East and North Africa exhibit the most visible theocratic traits usually through the constitutional entrenchment of Islamic sharia.⁴¹ The sharia is a legal code which applies to all aspects of life, personal and social. Its application can render the concept of the separation between religion and the state practically non-existent. Modern-day Iran is a Republic whose constitution is fundamentally Islamic but which also contains democratic elements.⁴² However, despite having an elected president, who must be a Muslim, the leadership of the country is essentially

⁴⁰ Historic examples include the ancient Egyptians, Tibetans and Hebrews.

⁴¹ Fox, J. *A World Survey of Religion and the State*, New York: Cambridge University Press, 2008, p.227.

⁴² Article 1 of the 1979 Constitution (amended in 1989) establishes Iran as an Islamic Republic.

given over to a religious leader and clergy.⁴³ The Supreme Leader and the Islamic Guardian Council supervise elections, review all laws for conformity with Islam and approve all candidates for public office. Iran's 'democracy' is controlled by religion. The most significant contemporary example of a theocracy is Saudi Arabia under the absolute monarchy of King Salman. Despite some recent minor social reforms, the state religion, a very conservative interpretation of Islam, remains mandatory – there is no freedom of religion.⁴⁴

Theocracy also lies at the heart of political Islam or fundamentalist Islam where there is strictly no distinction between law and religion. Opposition to the secular state is central to the teachings of Sayyid Qutb, the founder of radical Islamic political ideology.⁴⁵ On this understanding all human law not rooted in the sharia is rejected.⁴⁶ Unlike Christianity, Islam has not historically engaged with the values of liberal democracy in the same way or to the same extent.⁴⁷ As a result, theocratic practices including censures for blasphemy and apostasy continue in many Islamic countries.⁴⁸

⁴³ See Articles 2, 5, and 57 of the 1979 Constitution (as amended).

⁴⁴ For example, Article 7 of the 1992 Constitution declares that the government 'derives power from the Holy Koran and the Tradition of the Venerable Prophet'; Article 8 declares the Sharia to be the law of the State; Article 23 requires the State to protect Islam and implement the Sharia; Article 55 requires the King to implement the Sharia and carry out the nation's policy in accordance with Islam.

⁴⁵ Moussalli, AS. 'Sayyid Qutb' in Akbarzadeh, S. (ed.), *Routledge Handbook of Political Islam*, London: Routledge, 2011, pp.9-26, at p.16.

⁴⁶ *Ibid*, p.15.

⁴⁷ Bahlul, R. 'Modernity and Islamic religious consciousness' in Akbarzadeh, S. (ed.), *Routledge Handbook of Political Islam*, London: Routledge, 2011, pp.35-50.

⁴⁸ Bazargan, M. 'Religion and Liberty' in Kurzman, C. (ed.), *Liberal Islam: A Sourcebook*, Oxford: Oxford University Press, 1998, p.85.

We now consider the only theocratic state within Western Europe which is the Vatican where the Pope has a dual role as Head of State and the spiritual leader of Roman Catholicism.

1.1.1 The Holy See and the Vatican City State

The Roman Catholic Church functions through its internationally recognised episcopal jurisdiction known as the Holy See which functions administratively from the Vatican in Rome.⁴⁹ Disentangling these two entities is not easy because whilst the Vatican is a geographical territory, the Holy See is a unique entity being something of a hybrid which as an essentially religious organisation also bears some of the characteristics of statehood.⁵⁰

The precise legal status of the Holy See is disputed.⁵¹ There is little doubt that it has existed in some recognisable form resembling an independent sovereign entity since the time of the late Roman Empire. Arguments can be put forward in favour of the legally independent non-territorial status of the Holy See primarily because its international recognition continued during the period after Italy annexed the Papal States in 1870. Finding himself without any geographical territory from 1870-1929, the Pope (Pius IX and his successors) refused to leave the Vatican or recognise the Italian

⁴⁹ The Holy See is also known as the Apostolic See or *Sancta Sedes*.

⁵⁰ Morss, JR. 'The International Legal Status of the Vatican/Holy See Complex' in *European Journal of International Law*, 26:4, 2015, pp.927-946; Rynaert, C. 'The Legal Status of the Holy See' in *Goettingen Journal of International Law*, 3:3, 2011, pp.829-859; Byrnes, TA. 'Sovereignty, Supranationalism, and Soft Power: The Holy See in International Relations' in *The Review of Faith & International Affairs*, 15:4, 2017, pp.6-20.

⁵¹ Morss, JR. 'The International Legal Status of the Vatican/Holy See Complex' in *European Journal of International Law*, 26:4, 2015, pp.929.

government. This situation, known as 'the Roman Question', was solved by the creation of the Vatican City State as a geographical and legally recognised sovereign state under the Lateran Treaty of 1929.⁵²

What is disputed is whether the sovereignty of the Holy See and the Vatican are one and, if so, whether the Roman Catholic Church can be treated in the same way as any other state in international law. Some scholars have suggested that the legal nature of the Holy See is *sui generis*, maintaining that the practical legal recognition of the Holy See by other states is *prima facie* evidence for the independent legal existence of the Holy See.⁵³ This argument appears to be the most convincing as the Holy See, during the period 1870-1929, continued to enter into concordats with states throughout the world.

The parties to the Lateran Treaties are the Italian government and the Holy See, which suggests that the Holy See was considered to have the rights and obligations analogous to those of a modern state or other bodies capable of concluding treaties in international law. Since 1929 the Holy See has continued to be recognised in international law and now maintains diplomatic relations with one hundred and seventy-eight states. In 2004, the United Nations General Assembly confirmed and raised the status of the

⁵² Vatican City was established as an independent state in 1929 by the Lateran Treaty, signed by Cardinal Secretary of State Pietro Gasparri, on behalf of Pope Pius XI and by Prime Minister and Head of Government Benito Mussolini on behalf of King Victor Emmanuel III of Italy.

⁵³ Brownlie, I. *Principles of Public International Law*, Oxford: Oxford University Press, 2008, pp.64-65.

Holy See to that of an Observer State within the United Nations and it is a full member of a large number of UN Specialised Agencies.⁵⁴

The position of the Holy See can be contrasted with that of the Vatican. The creation of the Vatican has been described as a way of guaranteeing the 'spiritual freedom of the Pope with the minimum territory'.⁵⁵ The Pope is Head of State and all the key administrative organs are controlled by priests and bishops. Although elected by the College of Cardinals, the Pope is sovereign and as such he is the last remaining absolute monarch in Western Europe. By virtue of his office, the Pope exercises ultimate executive, legislative and judicial power over the Vatican.⁵⁶ Legislative authority is delegated to the Pontifical Commission for Vatican City State, a body of cardinals appointed by the Pope for five-year periods. The Vatican's administration of foreign affairs is a function of the Holy See. Justice is administered in the name of the 'Supreme Pontiff' and administratively consists of a sole judge, a tribunal, a Court of Appeal and a Supreme Court.

An example of the Vatican exerting its theocratic independence over its own affairs can be seen in the decision of Pope Benedict XVI that the Vatican would no longer automatically adopt laws passed by the Italian Parliament. The ruling came into force on 1 January 2009 and was deemed necessary

⁵⁴ See Resolution 58/314 of 16 July 2004.

⁵⁵ From a lecture given by Archbishop Jean-Louis Tauran, the Holy See's former Secretary for Relations with States, on 22 April 2002, which can be found at http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20020422_tauran_en.html Vatican.va- last accessed 24 January 2019.

⁵⁶ As an example of theocratic power, the decision to replace the Fundamental Law of Vatican City State was recently taken *motu proprio* i.e. 'on the pope's own accord'. The changes will come into force in June 2019.

by the Vatican because canon lawyers within the Roman Curia had decided that, in recent years, too much Italian legislation had conflicted with the Church's theological and ethical teaching.⁵⁷ As a result, each Italian law, whether criminal or civil, is now examined on an individual basis to see if it is congruent with the moral teachings of the Church before it is adopted by the Vatican.

The dual adoption of Italian Law was agreed under the Lateran Treaties in the 1929. It had meant that most Italian laws were automatically implemented by the Vatican except where there was a significant conflict with basic canon law. Consequently, if an Italian government had passed legislation approving, for example, euthanasia or gay marriage, the Vatican would have already been able to not recognise it and prevent its implementation in the Vatican. The new procedures mean that all legislation and regulation, even those which are indirectly in conflict with Church teaching, are scrutinized and can be refused recognition by the Vatican. The Vatican also reviews international treaties and other legal instruments before deciding on whether or not to adopt them.

In 2008, the Vatican decided not to assent to a declaration made by the United Nations that decriminalised homosexuality. This decision came under severe criticism following which the Vatican clarified its view saying that while it agreed that homosexual acts should not lead to criminal penalties, it could not agree to the wording of the declaration because of the potential that

⁵⁷ See comments made by canon lawyer Monsignor Jose Maria Serrano Ruiz in the Vatican's newspaper, L'Osservatore Romano, 31 December 2008.

phrases like 'sexual orientation' and 'gender identity' could be used to challenge existing human rights norms.⁵⁸ In a theocracy like the Vatican, the law is an important tool by which the government can establish and maintain a society which reflects and preserves its theological and moral coherence. Such a system is neither democratic nor plural in its approach as religious doctrine controls the public space.

Having considered a state controlled by religion, we now consider the position when the state controls religion. Whilst a liberal democratic state may desire or need to regulate religion to some degree e.g. to preserve religious freedom, a state which controls one religion for its own purposes is an erastian state.

⁵⁸ See the 'Statement of the Holy See Delegation at the 63rd Session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity', 18 December 2008 at http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_statement-sexual-orientation_en.html - last accessed 24 January 2019.

1.2 Erastianism

Historically, erastianism was used to allow the state to prevent political dissent from religious sources. The state uses religion to further its own objectives. It was the most common model for religion-state relations in Europe. Secular rulers sought to govern by exerting political and legal power over religious organisations and in some cases claimed religious authority for themselves. The relationship between the Church of England and the State will be considered in Chapter 3, however, it should be noted at this point that the Church of England itself has erastian origins.

During the Reformation, the 'Henrican' reforms in England saw Henry VIII repudiate papal authority and take control of the Church. Reflecting the medieval relationship between the Church and the State, the Church of England became established through a tapestry of statutes, traditions and customs.⁵⁹ Despite the fact that there exists no single definitive constitutional document setting out the precise nature of the relationship between the Church of England and the State, the theory of establishment is already discernible from the formulation used in the preamble to The Ecclesiastical Appeals Act of 1532 which saw the realm as being constituted in two parts, a 'temporality' of secular and lay persons and a 'spirituality' of ecclesiastical and clerical persons.⁶⁰

⁵⁹ MacCulloch, D. *A History of Christianity*, London: Penguin Books, 2009, p.626.

⁶⁰ 24 Hen 8 c 12 (1532) (repealed).

Peter Hinchliff makes the important observation that despite this Act appearing to describe an equal symmetry of civil and spiritual authority, the very fact that the arrangement is put in place by an Act of Parliament automatically gives the civil power the upper hand.⁶¹ The King sought to bring these two parts of the realm into a single unity under the Crown in the person of the King. In the Act of Supremacy 1534, Parliament recognised Henry and his successors as Supreme Head of the Church of England.

Dissent by ecclesiastics and those in public office was not permitted.⁶² Sir Thomas More who was Lord High Chancellor of England from 1529-1532, opposed the Reformation and refused to acknowledge Henry as Supreme Head of the Church of England. In refusing to take the Oath of Supremacy, More was convicted of treason and executed. Shortly before his death, he was famously reputed to have said, 'I die the King's faithful servant, but God's first.'⁶³

Elizabeth I came to the throne in 1558 and took the title Supreme Governor of the Church of England, a title which continues today.⁶⁴ Once again, dissent was forbidden.⁶⁵ By the end of the sixteenth century, Richard Hooker, the supreme apologist for the Elizabethan Settlement, sought to secure and confirm the role of the monarch as Supreme Governor of the Church of England on the grounds that she was appointed by God and that

⁶¹ Hinchliff, P. 'Church-State Relations' in Sykes, S. and Booty, J. (eds.), *The Study of Anglicanism*, London: SPCK, 1988, p.353.

⁶² The Treasons Act 1534 (26 Hen 8 c 13) made it treasonable to disavow the Act of Supremacy.

⁶³ Ackroyd, P. *The Life of Thomas More*, London: Vintage, 1999.

⁶⁴ Act of Supremacy, 1 Eliz 1 c 1 (1558–9).

⁶⁵ See the oath of obedience required by the 1559 Act of Supremacy.

the Church and State were two inseparable aspects of one commonwealth.⁶⁶ Under this model, it was no surprise that the State should monitor and govern the Church as, at the same time, it sought to prohibit other religions becoming established thus ensuring that papal authority (and other religions or ideologies) could have no jurisdiction.

Erastianism has not totally lost its place in European democracies and its presence, albeit in a distinctly moderated form, continues in those countries which have a state church system.

1.2.1 State Church Systems

A religion that has a unique relationship with a state is known as either a 'state church' or an 'established church', as in England.⁶⁷ Peter Edge defines a religious organisation as being 'established where there are laws which apply to that organisation...which do not apply to the majority of other religious organisations'.⁶⁸ The reference to a legal requirement being necessary for a denomination to be considered to be established makes establishment formal or *de jure* as is the case with the Church of England, the (Presbyterian) Church of Scotland (also known as the 'Kirk') and the

⁶⁶ McGrade, AS. (ed.), *Hooker: Laws Ecclesiastical Polity: Preface, Bk. 1 & Bk. 8* (Cambridge Texts in the History of Political Thought) (first published between 1594 and 1662), Cambridge: Cambridge University Press, 1989, Book VIII, iii, 2, p.140ff.

⁶⁷ In the English context Garcia Oliva distinguishes between the Church of England as a 'state church' prior to 1919 and an 'established church' after that time he Church of England Assembly (Powers) Act 1919. The term 'national church' is sometimes also used.

⁶⁸ Edge, P. 'Re-orienting the Establishment Debate: From Illusory Norm to Equality of Respect' in *Anglo-American L Rev*, 27, 1998, p.271.

Lutheran Church in Scandinavian countries like Denmark, Finland, Iceland and until recently Sweden and Norway.⁶⁹

In these countries a particular Christian denomination is recognised by the state, usually in its constitution, as the official religion of that country. This defining characteristic, commonly referred to as 'the confessional state', has often endured a complicated and sometimes tortuous historical series of religious-political events. Ultimately, one form of Christian denomination has found itself to have such close ties with the state that the parameters of the distinctiveness between the two entities have become blurred. Often the difference between faith and denominational allegiance can become intertwined and difficult to disentangle from patriotism, a sense of national unity and other cultural affections.⁷⁰

The diversity of confessional states was one of the most distinctive outcomes of the Protestant Reformation in the sixteenth century.⁷¹ While Roman Catholicism retained its status in many southern European states, it was mostly northern European states that adopted a protestant denomination.⁷² The Christian confession or denomination which established itself was usually the same as the faith of the local ruler, following the maxim '*cuius*

⁶⁹ The Church of Sweden ceased to be the state church in 2000. A partial separation of Church and State took place in Norway on 1 January 2017, see Wood, KP. 'Norway's separation of Church and State: a work in progress' 4 January 2017 posted on the National Secular Society website at <https://www.secularism.org.uk/opinion/2017/01/norways-separation-of-church-and-state-a-work-in-progress> - last accessed 24 January 2019.

⁷⁰ Rieffer, BJ. 'Religion and Nationalism: Understanding the Consequences of a Complex Relationship' in *Ethnicities*, 3:2, 2003, pp.215-242.

⁷¹ MacCulloch, D. *Reformation: Europe's House Divided 1490 – 1700*, London: Penguin Books, 2004 pp.674-679.

⁷² Roman Catholicism remains the established religion in Liechtenstein, Malta and Monaco.

regio eius religio', originally recognised at the Peace of Augsburg in 1555.⁷³ In other words, the civil head of state decided the religion that would be supported by the state. However, if sectarian conflict was to be avoided, the law had to develop in such a way as to enable some level of tolerance between the members of the established church and those of other minority religions.⁷⁴

In most countries, the established nature of the relationship between the state and its religion is set out in the constitution.⁷⁵ Equally, whilst a country's laws may privilege one religion over the others present within its territory, a state will also have laws that guarantee and protect the freedom of conscience and religion such that any one individual will have the right to profess or not to profess a religion.⁷⁶ States will usually also have legislation prohibiting discrimination on the grounds of religion.⁷⁷

It is important to realise that most countries in the world separated themselves from the state religion during the course of the twentieth century.⁷⁸ The trend continues in Europe, particularly in the Nordic countries. Sweden only enacted a freedom of religion law in 1951 and the process of separating the church from the State and to allow the administrative independence of the state church began soon after. Sweden effectively

⁷³ The maxim is translated as 'whose realm, his religion'.

⁷⁴ See Rivers, J. *The Law of Organised Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010, pp.13-19 for an account in the English context.

⁷⁵ For example, Denmark, Iceland and Finland.

⁷⁶ Article 9, European Convention on Human Rights.

⁷⁷ In England see the Equality Act 2010.

⁷⁸ See the table of 'Established churches and former state churches' at http://www.newworldencyclopedia.org/entry/State_religion - last accessed 24 January 2019.

disestablished its state church in the year 2000.⁷⁹ Norway made significant moves towards a limited disestablishment in 2012 and again in 2017.⁸⁰ The Norway 'separation' is not strict and the constitution continues to require that the King 'shall at all times profess the Evangelical-Lutheran religion' (Article 4) and states that the Norwegian Church 'will *remain* the Norwegian national church' (Article 16). Whilst not embarking on the path of formal disestablishment at present, Finland and Iceland are both considering loosening their state church relationship.⁸¹

The country in Europe which continues to be most erastian is Denmark. Denmark is both a democratic and plural country which, like other European countries, has faced increasing levels of immigration.⁸² Religion in Denmark has come under considerable scrutiny following the aftermath of what has become known as the Danish cartoons controversy.⁸³ A central aspect of the debate has been the extent to which the religious views of ethnic Danes and immigrant Danes contribute to strengthen or serve to weaken the Danish national identity. The constitutional position of the established church in Denmark enables it to play a central role in maintaining Danish cultural identity. In some respects it acts as a buffer against social and cultural change.

⁷⁹ Pettersson, P. 'State and Religion in Sweden: Ambiguity Between Establishment and Religious Control', in *Nordic Journal of Religion and Society*, 24:2, 2011, pp.119–135.

⁸⁰ See <http://www.kirken.no/english/news.cfm?artid=378447> - last accessed 24 January 2019.

⁸¹ See Kotiranta, M. '*Religion and the Secular State in Finland*', ICLARS, Milano, 2011, pp.273-298 at p.277. In Iceland, a 2012 non-binding referendum found that 57.1% were in favour and 42.9% against the new constitution referring to the established church.

⁸² See Christofferson, L. and Vinding, N. *Danish Regulation of Religion, State of Affairs and Qualitative Reflections*, Copenhagen: University of Copenhagen, 2012, pp.15-20.

⁸³ See Iversen, HR. 'Background of the Cartoon Crisis in Danish Mentality' in Christofferson, L et al (ed.), *Religion in the 21st Century*, Farnham: Ashgate, 2010, pp.191-205.

Denmark has been a protestant Lutheran country since the Reformation in 1536. The Evangelical Lutheran Church is the state church and is known as the 'people's church' or *Folkekirke*.⁸⁴ A majority of the Danish population are members of the *Folkekirke*, with statistics placing the percentage as high as 75.9% in 2016/17.⁸⁵ Despite this, traditional weekly church attendance is low being around the 5% of the population, a fact which contributes to Denmark often being described as a *de facto* 'secular' country.⁸⁶

Article 6 of the constitution requires the monarch to be a member of the state church. The erastian nature of the *Folkekirke* stems from the extent to which it is linked to and controlled by the Danish government. Denmark's Parliament, Folketinget, is the supreme legislative authority for the *Folkekirke* and the *Folkekirke*'s law is part of public law, which gives it a status similar to that of a state agency or public authority.⁸⁷ The 'Ministry of Gender Equality and the Church' is a government department and, together with its minister, it is the highest administrative authority of the *Folkekirke*.⁸⁸ It provides administration, supervision and various advisory services to the *Folkekirke*.⁸⁹ It is also responsible for registering other religious organisations for approval by the State, if they so choose.

⁸⁴ The term, *Folkekirken* was first used in the 1849 Constitution.

⁸⁵ Data provided by the Kirkeministeriet for 2016.

⁸⁶ <http://www.gallup.com/poll/13117/religion-europe-trust-filling-pews.aspx> - last accessed 24 January 2019.

⁸⁷ This is in contrast to other religious organisations that are governed by private law being associations, charities or private bodies.

⁸⁸ The Ministry of Gender Equality and the Church was established on 3 October 2011 being a merger between the Department of Gender Equality and the Ministry of Ecclesiastical Affairs.

⁸⁹ See <http://www.km.dk/> - last accessed 24 January 2019.

The most tangible sign of State support is in the form of the taxation gathered from members of the *Folkekirke* by the Government on behalf of and exclusively for the purposes of the *Folkekirke*; no other religious body receives government money in this way.⁹⁰ The State pays the salaries of the 10 bishops. Moreover, in addition to this, it makes additional contributions to clergy stipends and pensions.⁹¹

The position of the *Folkekirke* contrasts markedly with that of other religious organisations.⁹² It is open to other faith communities to register with the Danish authorities thereby becoming 'approved' by the State. Despite the fact that these religious organisations are also involved in civil registration and run cemeteries for their members, they nevertheless do not receive financial support directly from the State. However, there is a system of tax allowances to enable members of religious organisations to deduct contributions to their religious organisation from their tax return. This form of indirect support is not available to members of the *Folkekirke*. Although the disestablishment debate surfaces in Denmark from time to time, the more vigorous discussion is to do with how the *Folkekirke* could better serve the needs of the whole nation.⁹³

In this chapter we have seen that religion and government can be fused. The effects are either theocracy, where religion takes the dominant role, or

⁹⁰ See <http://miliki.dk/ministeriet/om-kirkeministeriet/kmoekonomi/> for a detailed analysis of the *Folkekirke*'s finances – last accessed 24 January 2019.

⁹¹ Currently, 40% of the clergy stipend bill comes from government.

⁹² Nielsen, MV. and Kühle, L. 'Religion and State in Denmark: Exception among exceptions' in *Nordic Journal of Religion and Society*, 24:2, 2011, pp.173-188.

⁹³ A 2007 poll found that 52% wished to split church and state, 30% were against, and 18% undecided.

erastianism, where the civil power becomes involved in the regulation of religion. Neither form is ideally suitable for modern plural societies. A pure form of theocracy or erastianism would not allow the freedom of religion and so it would be impossible for this type of regime to be a liberal democracy. Once the freedom of religion is permitted, space is created for a diversity of religious belief and also the rejection of religious belief in favour of an alternative worldview. The freedom of religion must at least allow for the possibility of a wholly secular perspective.

For the most part, we are moving away from a period of religious dominance in politics and law and yet there remain those on the Christian Right and within radical Islam who continue to support and in some cases demand the institution of theocracies.⁹⁴ In the forthcoming chapters we will investigate some of the tensions evident in religions' reaction towards evolving liberal democracies. The appropriate degree of separation or co-operation required between religion and the state requires an examination of the extent and quality of the freedom available for both religious and non-religious worldviews, identities and lifestyles. Liberal democracy is the system of government that has evolved to allow the state to manage this degree of diversity and its key features are examined in the next chapter.

⁹⁴ Sanford, JC. *Blueprint for Theocracy: The Christian Right's Vision for America*, Rhode Island: Metacomet Books, 2014. Sivan, E. *Radical Islam: Medieval Theology and Modern Politics*, Yale: Yale University Press, 1990.

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Chapter 2

Liberal Democracy

2 Introduction

The purpose of this chapter is to set out the key elements of liberal democracy. This is in order to be able to evaluate the classical models of religion-state relations and propose a model of relations between public authorities and religious bodies that is more compliant with democratic credentials in later chapters.

The chapter is arranged in four sections. The first section, deals with participation in politics and the democratic processes. The next section analyses conceptions of the rule of law by contrasting formal and substantive approaches. A liberal democracy requires a degree of separation of powers to provide checks and balances on power and so the third section discusses the relationship between the executive, legislative and judicial branches of government. The protection of human rights is increasingly recognised as a fundamental aspect of the liberality of liberal democracy and so the final section considers those aspects of human rights law most relevant to protecting religious freedom.⁹⁵

⁹⁵ Perry, M. *The Political Morality of Liberal Democracy*, Cambridge: Cambridge University Press, 2010, p.61.

2.i Constitutionalism

According to Jonathan Israel, it is one of the triumphs of the Enlightenment that it enabled the transition from absolutism as a form of government to constitutional democracy.⁹⁶ Writers on political philosophy of the period like Thomas Hobbes (1588-1679), John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778) supported and developed the idea of constitutional government.⁹⁷ A fundamental principle was that governmental action should be bound by the terms of the constitution and accountable to it.⁹⁸ As a result, society could experience greater stability through the application of the terms of the constitution. The motivation for constitutionalism has been described as essentially the solution to conflict between the liberal bourgeoisie and absolute monarchy.⁹⁹

Liberal constitutional democracy is now the preferred political system in the West. The main attraction is that those being governed give their consent and legitimacy to the constitution and, as a result, to those who govern and make laws.¹⁰⁰ Writing at the end of the eighteenth century, Thomas Paine stated that:

⁹⁶ Israel, JI. *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750 – 1790*, Oxford, Oxford University Press, 2012.

⁹⁷ Hobbes, T. *Leviathan* (first published 1651) London: Penguin Books, 1985; Hobbes, T. *De Cive* (first published 1651) Dumfries & Galloway: Anodos Books, 2017; Locke, J. *Two Treatises of Government* (first published 1689) New Haven: Yale University Press, 2003; Rousseau JJ. *The Social Contract* (first published 1762) London: Penguin Books, 2012. See also Daly, E. *Rousseau's Constitutionalism: Austerity or Republican Freedom*, Oxford: Hart Publishing, 2017.

⁹⁸ Paine, T. *Rights of Man*, (originally published 1792) Oxford: Oxford University Press, 1995, Part II, p.238.

⁹⁹ Grimm, D. *Constitutionalism*, Oxford: Oxford University Press, 2016, p.128.

¹⁰⁰ Paine, T. *Rights of Man*, (originally published 1792) Oxford: Oxford University Press, 1995, Part II, p.238

'A constitution is not the act of government, but of a people constituting a government, and a government without a constitution is power without right...A constitution is a thing antecedent to a government; and a government is only the creature of a constitution.'¹⁰¹

Constitutional democracy is a relatively recent development which became more prevalent during the second half of the twentieth century.¹⁰² It is not a perfect form of government and important criticisms can be levelled against it. It can be a fragile and vulnerable to abuse, especially if not supported by effective institutions.¹⁰³ This usually occurs because there are insufficient checks and balances on the executive.¹⁰⁴

A constitution can be codified or uncoded. Most countries have codified constitutions and only five have either wholly or partly uncoded constitutions including the United Kingdom.¹⁰⁵ A codified constitution provides clarity and definiteness. The constitution itself is usually considered to be the ultimate source of authority and therefore sovereign. It is usually interpreted by a constitutional court and has the potential to safeguard against abuses of government via judicial review. On the other hand, an uncoded constitution is thought to provide greater flexibility in its ability to

¹⁰¹ Ibid, Part II.

¹⁰² Held, D. *Models of Democracy*, Cambridge: Polity Press, 2006, p.238 and pp.94-95.

¹⁰³ See the speech given to the European Parliament by The President of the French Republic, Emmanuel Macron on 17 April 2018 at <http://www.elysee.fr/declarations/article/discours-du-president-de-la-republique-au-parlement-europeen/> - last accessed 24 January 2019.

¹⁰⁴ Mersel, Y. 'The dissolution of political parties: The problem of internal democracy.' *International Journal of Constitutional Law*, 4:1, 2006, pp.84–113.

¹⁰⁵ The other countries with wholly or partially uncoded constitutions are: New Zealand, Canada, Israel and Saudi Arabia.

adapt to changing situations.¹⁰⁶ The law of the constitution may be more difficult to amend than ordinary law, for example, it may require a higher threshold than a simple majority or a public referendum.¹⁰⁷

In general terms, the constitution governs the nature of the state's institutions, their duties and the limits of their powers. So the constitution regulates the separation of powers between the executive, legislature and the judiciary and the institutions within each branch of government.¹⁰⁸ Importantly, the constitution will also seek to establish and define the nature of the relationship between the state and the citizen. In addition, it can also entrench certain rights and freedoms which protect the citizen from either abuses of power by the state or from abuses resulting from the so-called 'tyranny of the majority', which is one of the major weaknesses of democracy.¹⁰⁹ The protection of rights is a feature of liberal democracy which distinguishes it from forms of non-liberal democracy.

Having described constitutionalism generally, we now turn to examine the first key element of liberal democracy namely, participation and the democratic processes.

¹⁰⁶ See Walters, MD. 'The Unwritten Constitution as a Legal Concept' in Dyzenhaus, D. and Thorburn, M. (eds.), *The Philosophical Foundations of Constitutional Law*, Oxford, Oxford University Press, 2016, p.33.

¹⁰⁷ E.g. in France, under Article 89 of the Constitution of the Fifth Republic, constitutional amendment may be carried out either by referendum or a majority of three-fifths in Congress.

¹⁰⁸ Barnett, H. *Constitutional and Administrative Law*, London: Routledge, 2017, p.7.

¹⁰⁹ In the UK context, see the judicial comments in *Jackson v Attorney General* [2005] UKHL 56, for example per Baroness Hale, para 159, who acknowledged that Parliament had placed voluntary limitations on its sovereignty e.g. The European Communities Act 1972 and the Human Rights Act 1998.

2.1 Participation and the democratic processes

Democracy is too often narrowly perceived in terms of the mere ability of a person to cast their vote in an election. However, in the twenty-first century, the concept of participation has a much wider meaning than this, largely as a result of traditional and social media, globalisation and other vested interests and campaigns.¹¹⁰

Democracy (in Greek δημοκρατία) literally means the 'rule of the people'. Theoretically, everyone who is legally eligible to vote can participate in the decision making process to determine who should govern them. Democracy aims to give an individual a voice in trying to influence the type of politics and law they would like to see in their country. Typically, democracy is characterised by a form of free, fair and competitive elections between independent political parties.¹¹¹ Usually, all adult members of the country are able to vote regardless of wealth, race, religion, class or other aspects of identity. Each person's vote usually has equal weight in the hands of the elector and the election produces elected representatives who form part of a legislature, the primary role of which is to make law.¹¹²

Through the electoral system, democracy determines who will hold political office and effectively gives political power to the majority. This is true both in

¹¹⁰ See, for example, recent controversies about the interference in elections by foreign States and the suspected use of social media data to influence election outcomes.

¹¹¹ Van Reybrouch, D. 'Why elections are bad for democracy.' *The Guardian*, 29 June 2016 at <https://www.theguardian.com/politics/2016/jun/29/why-elections-are-bad-for-democracy> - last accessed 24 January 2019.

¹¹² Barnett, H. *Constitutional and Administrative Law*, London: Routledge, 2017, p.306.

direct and representative democracies. In a direct democracy each person can vote on particular issues e.g. a referendum. However, most democracies are representative democracies where politicians are elected by a constituency to represent them as legislators.¹¹³ The government is usually formed by the political party having most representatives in the legislature. In a representative democracy, legislative sovereignty can be shared with unelected representatives. For example, in the UK context parliamentary sovereignty includes not only the elected House of Commons but also the unelected House of Lords.¹¹⁴ It also includes the concept of the 'Queen-in-Parliament' to refer to the monarch's constitutional and legislative role.

There is little doubt that the most attractive feature of democracy, as opposed to other systems of government, is that those who are governed participate in choosing those who govern them. Indeed, perhaps the greatest advantage of a properly functioning democracy is that the electors can remove and replace the government should a majority choose to do so.¹¹⁵ Abraham Lincoln eloquently provided what is still regarded by many as the simplest and most succinct definition of democracy when he said, 'Government of the people, by the people, for the people, shall not perish from the Earth.'¹¹⁶

¹¹³ Mill, JS. *Considerations on Representative Government*, (first published 1861) in Acton, HB (ed.) *Utilitarianism, Liberty and Representative Government*, London: Dent, 1951, pp.195, 239-240.

¹¹⁴ The House of Lords consists of appointed Life Peers, 92 Hereditary Peers and 26 Church of England Bishops. At approaching 800 members, it is one of the largest legislative chambers in the world.

¹¹⁵ Paine, T. *Rights of Man*, (originally published 1791) Oxford: Oxford University Press, 1995, Part I.

¹¹⁶ Lincoln, A. *The Gettysburg Address*, ed. Nicolay, J, 1863.

Democracy is recognised as an imperfect system with limitations and deficiencies, for example, it is a system that requires compromise. This raises the simple yet acute question of why any individual should obey laws created by other individuals.¹¹⁷ Why should someone submit to rules formed from the opinions of groups, institutions or political parties consisting of individuals different to them?¹¹⁸

In pursuit of freedom and autonomy, liberal democracy expects a high degree of tolerance from its participants in order for them to co-exist peaceably and this requires confidence to be maintained in 'a politically stable and morally legitimate arrangement'.¹¹⁹ Pluralism and diversity require a certain level of freedom and tolerance and so these become essential features of liberal democracy. Democracy is sometimes considered to be the least bad system through which political power is granted to those who govern.¹²⁰ As a result, significant criticisms can be levelled against democracy and it is to those we now turn.

¹¹⁷ Compare democracy with anarchism.

¹¹⁸ Mill, JS. *On Liberty* (first published 1859), London: Penguin, 1985, p.59.

¹¹⁹ Walzer, M. *On Toleration*, New Haven: Yale University Press, 1997, p.xii.

¹²⁰ Winston Churchill, apparently quoting someone unknown, said in the House of Commons on 11 November 1947, 'Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time...' HC Deb 11 November 1947, vol. 444, cols. 203-321.

2.1.1 Criticisms of democracy

The main criticisms illustrate the inherent weakness and vulnerability of democracy and concern the potential effects of the 'tyranny of the majority'.¹²¹ The problem is that power is granted to those who can persuade the majority of people to vote for them. Equally, those in power will be expected to implement the policies of the majority who voted for them. If that is the case, what happens about the views and rights of the minority? Two questions arise: are the majority capable of choosing the right leader, and will that leader implement the laws necessary for a society in which all can flourish?¹²²

Despite the recent success of democracy, criticism of it dates back to the classical period. Majoritarianism and other weaknesses of democracy were first identified by Plato (427-347 BC). A leading commentator on democracy, John Dunn, writing in 1979, reflected that Plato's criticisms about the limitations of democracy 'have never been surpassed in force and urgency'.¹²³

In his book, *The Republic*, Plato identified democracy's major flaws.¹²⁴ The first problem was one that appears strange in the modern world - that

¹²¹ Mill, JS. *On Liberty* (first published 1859), London: Penguin, 1985.

¹²² Schumpeter, J. *Capitalism, Socialism and Democracy* (first published in the UK 1943) Abingdon: Routledge, 2010, p.241.

¹²³ Dunn, J. *Western Political Theory in the Face of the Future*, Cambridge: Cambridge University Press, 1979, p. 17.

¹²⁴ Plato, *The Republic* (first published 380 BC) London: Penguin, 1974.

democracy treats people equally.¹²⁵ Plato did not like the fact that by treating people equally, each person had the capacity and freedom to do as they like.¹²⁶ Plato acknowledged the two key hallmarks of democracy, namely that it is a system capable of promoting 'political equality' and 'political liberty'. Whilst, in the European mind's eye these qualities are usually seen as positive, for Plato, it led him to two major criticisms.

The first asks why it is right to give a vote to all people when they may be too ignorant to vote for the most appropriate person to wield power.¹²⁷ They may not be educated enough to choose the most appropriate person or they may be swayed by trivial, sycophantic or populist motives. Plato reached the conclusion that true leadership is impossible in a democracy because the uneducated 'mob', would only vote for who is popular to them. They would be swayed by short term causes which satiate their immediate desires. For Plato, democracy did not promote the wisdom necessary for society to flourishing in the long-term.

Plato went further in his analysis to consider what would happen when 'equality' and 'liberty' are valued above all else. He thought that when people could claim equal rights, that would enable them to do as they please regardless of their abilities or the contributions they make to society. Whilst in the short term this may lead to an attractively diverse society, he speculated that eventually, it would lead to a breakdown of social cohesion because, being free from restraint, citizens would begin to disregard the laws

¹²⁵ In Plato's time, this would have only included male citizens.

¹²⁶ Plato would have only considered free male citizens capable of holding the right to vote.

¹²⁷ Plato, *The Republic* (first published 380 BC) London: Penguin, 1974, p.282.

they find disagreeable. Ultimately, authority, order and stability would be threatened and this would result in competing factions. Resentment would grow, especially between those with and without resources, the rich and the poor.¹²⁸

Plato foresaw that the most powerful would surround themselves with people to protect them. The wealthy and popular champion is likely to win-out over his rivals and, once successful, it would be a short step to consolidating control. The identification of a clear vision for the future and a strong sense of direction coupled with the identification of 'enemies' who hold things back would result in the destruction of an effective opposition by mob. The leader would now be tyrant and the tyrant's supporters would have everything to lose from not continuing in their support.¹²⁹

Plato's second criticism of democracy was concerned with how people are able to thrive in a flourishing society.¹³⁰ He saw the mass of humanity as a mixture of people with desires and habits that were sometimes good or bad, right or wrong, admirable or shameful. The government needed to be made up of 'philosophers' who could discern the correct laws to promote goodness and reduce badness. This elitist view saw the 'philosopher', coming from a class of persons capable of governing because they were well educated and had the deliberative faculty necessary to discern what was wise. Plato believed that virtue was knowledge capable of determining the good life necessary for human flourishing at both the individual and societal levels.

¹²⁸ Held, D. *Models of Democracy*, Cambridge: Polity Press, 2006, p.25.

¹²⁹ Ibid, p.25.

¹³⁰ Plato, *The Republic* (first published 380 BC) London: Penguin, 1974, p.288.

Through his second critique, Plato identified the moral limitations of democracy.¹³¹

Today, Plato's criticisms are often regarded as patriarchal, not just elitist. Yet they speak to an important aspect of political participation in terms of the need for ethical decision making and good governance.¹³² They highlight the need for an electorate that is educated to a certain level and where character and values matter. Modern democracies are complicated and the problems identified by Plato need to be taken into account if democracy is to be robust enough to cope with the challenges of pluralism and globalisation.

2.1.2 Modern democracies

Modern democracies have developed a number of ways to reduce or ameliorate the worst consequences of democratic criticism. We have already seen that one protection against the potential ignorance, corruption and vanity of the majority has been reliance on representative democracy. A frequent criticism is that this puts too much power in the hands of elites and this in turn isolates individuals from politics.¹³³

Modern democracies have also developed different voting systems e.g. proportional representation and systems that enhance voter choice and local

¹³¹ Dunn, J. *Western Political Theory in the Face of the Future*, Cambridge: Cambridge University Press, 1979, p. 17.

¹³² De Beauvoir, S. *The Second Sex* (first published 1949) London: Vintage, 1997, p.113ff.

¹³³ See Weber's critique of direct democracy in Weber, M. *Economy and Society*, (first published 1922) Berkeley: University of California Press, 1978, pp.949, 951-2.

representation.¹³⁴ These systems tend to be more sophisticated than the simple 'first past the post' system.¹³⁵ In a proportional system, of which there are numerous versions, electors may have a number of votes ranked in order of priority. Rather than the winner-take all approach, proportional representation tries to ensure votes carry equal weight. In other words, second and third votes may count towards the final result. Sometimes a geographical area may elect a number of representatives. Often, these systems can result in coalitions.

Where the 'tyranny of the majority' dominates unchecked, this can lead to discrimination against minorities and government lacking rationality.¹³⁶ Supporters of majoritarianism see it as a positive political doctrine because it allows the dominant majority group to assert its right to political and legislative primacy. This allows the majority to shape society towards its vision of how society should be organised.¹³⁷ Such groups can be characterised by affiliations of religion, class or ethnicity and can also possess the belief that being in the majority gives them the right to make decisions for society as a whole on the basis of that affiliation.¹³⁸

¹³⁴ For a range of examples see the United Kingdom Electoral Reform Society at <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/> - last accessed 24 January 2019.

¹³⁵ Curtice, J. 'A Return to Normality? How the Electoral System Operated', *Parliamentary Affairs*, 68:1 (supp.), 2015, pp.25-40 at p.37ff.

¹³⁶ See Alexis de Tocqueville's discussion of what moderates the tyranny of the majority in Tocqueville, A. *Democracy in America*. (first published 1840), London: Penguin 2003, Volume 1, Chapter 8, p. 305.

¹³⁷ Matthews, F. 'Majoritarianism Reinterpreted: Effective Representation and the Quality of Westminster Democracy', *Parliamentary Affairs*, 71:1, 2018, pp.50–72.

¹³⁸ Dahl, RA. *Democracy and its Critics*, New Haven: Yale University Press, 1989. In the UK context, politics in Northern Ireland is a good example.

The representative politician must, out of self-preservation, undoubtedly pay close attention to the demands of those who voted for him or her and will want to continue to do so. Nevertheless, there is at least the capacity for the representative to base decisions on facts, knowledge or experience that go beyond those of narrow populism. This is especially true perhaps on matters of conscience and those which are ethically contentious. However, this raises the further complication that the politician may be open to being influenced or persuaded by the views of other stakeholders including e.g. trade unions or business or, where ethical matters are to be decided, the views of organised religions which often have established views on such matters.¹³⁹ What is becoming increasingly clear is that alongside political affiliation, other identity commitments matter.¹⁴⁰

Elected politicians are open to an increasing range and number of external influences. Sometimes, opinions are sought from individuals and bodies with experience on a particular matter to be legislated for. Consultations are increasingly common and allow interested stakeholders to make their views known to both government and the legislature.¹⁴¹ Sometimes dialogue can be formal and required by law as is the case between the European Union and certain religious and non-religious bodies.¹⁴² This potentially widens the

¹³⁹ This is often referred to as 'group politics', see Beyers, J., Eising, R. and Maloney, W. 'Researching Interest Group Politics in Europe and Elsewhere: Much We Study, Little We Know?' *West European Politics*, 31:6, 2008, pp.1103-1128.

¹⁴⁰ Bennett, W.L. 'The Personalization of Politics: Political Identity, Social Media, and Changing Patterns of Participation', *The Annals of the American Academy of Political and Social Science*, 644, 2012, pp.20-39.

¹⁴¹ Kaehne, A. and Taylor, H. 'Do public consultations work? The case of the Social Services and Well-being (Wales) Bill' *Public Policy and Administration*, 31:1, 2015, pp.80-99.

¹⁴² Article 17 of the Treaty on the Functioning of the European Union 2007 (Lisbon Treaty) contains a legal requirement for the EU to 'maintain an open, transparent and regular dialogue' with both religious and non-religious organisations in recognition of their identity

basis on which decisions are made from the merely personal, party or constituency levels. At the same time, even after a representative may have formed a personal opinion, the political party apparatus may 'whip' the representative into following a party line. Other decisions may be left to conscience.

In addition to the opinions sought through consultation, elected representatives are subject to all manner of pressure groups and lobbyists. There are also increasing numbers of independent and non-independent 'think tanks' engaged often in empirical research designed to influence public and political opinion.¹⁴³ One of the potential consequences of these increasing forms of external influence is that elected politicians may become subject to undue pressure placed on them to vote in a particular way. Another consequence is that the electorate may become increasingly factionalised in ways that go beyond party politics e.g. geography or ethnicity.¹⁴⁴

One of the most significant changes to the political landscape is the growth of the media – both the traditional and social media. In terms of the traditional media, digital communication methods have created the 24 hour global news cycle which seems to require politicians to be prepared to react

and contribution to the development of European culture. See also, Jansen, T. 'Europe and Religions: the Dialogue between the European Commission and Churches or Religious Communities' in *Social Compass*, 47:1, 2000, p.103.

¹⁴³ Kelstrup, JD. *The Politics of Think Tanks in Europe*, Abingdon, Routledge, 2016.

¹⁴⁴ Boucek, F. *Factional Politics: How Dominant Parties Implode or Stabilize*, Basingstoke: Palgrave Macmillan, 2012.

instantly to changing situations.¹⁴⁵ At the same time, developments in social media allow individuals to express themselves publically in ways that have been hitherto impossible. Social media platforms such as 'Facebook' and 'Twitter' allow members of the public to have their say on matters important to them and this can become part of the mainstream news.¹⁴⁶ Equally, politicians can also use the social media as a means of communicating directly with the public effectively by-passing the traditional media and its role in editing political comment.¹⁴⁷ Religious organisations are also better able to communicate with their members through websites and social media platforms.¹⁴⁸

This level of interaction between elected politicians, other groups in civil society and the public has never been seen before and its full effects have yet to be understood.¹⁴⁹ There are undoubtedly negative consequences to these changes e.g. coping with the pace of change and range of views, but there will also be advantages. It is already established that a major advantage 'could' be an enhancement of democratic participation through greater deliberation. The more informed the public are, the greater the chance that they will be able to work out what is right and vote accordingly. They may also become more likely to vote for the right person for the right

¹⁴⁵ Cushion, S., Lewis, R. and Roger, H. 'Adopting or resisting 24-hour news logic on evening bulletins? The mediatization of UK television news 1991-2012', *Journalism*, 16:7, 2014, pp.866-883.

¹⁴⁶ Maloney, D. "Everyone on Twitter is talking about it' is not the same as everyone talking about it", *The Guardian*, 12 June 2016 at <https://www.theguardian.com/technology/2016/jan/12/twitter-talking-journalists-social-media> - last accessed 24 January 2019.

¹⁴⁷ For example, Donald Trump's use of Twitter.

¹⁴⁸ For example, the Pope has his own Twitter account, '@Pontifex'.

¹⁴⁹ Davidson, S. and Elstub, S. 'Deliberative and Participatory Democracy in the UK', *British Journal of Politics and International Relations*, 16:3, 2014, pp.367-385.

reason. In this sense, participation through dialogue and deliberation are seen to go hand in hand with other forms of participation.

We have seen how participation and the democratic processes form one essential element in a fully functioning liberal democracy. The second essential feature is the rule of law and it is to that we now turn.

2.2 The Rule of Law

Originating in classical and medieval times but significantly developed in the modern era, the rule of law is recognised as one of the fundamental pillars of a democratic constitution. It is also considered to be an essential ideal of liberal political morality.¹⁵⁰ Originally an English expression, it is also a concept recognised in many other countries across the world as a guiding constitutional principle and that is true of the countries examined in this study. In addition to the UK, the principle of the rule of law is a meaningful concept both in the jurisprudence of Italy and also France where it is known as the *État de droit* or 'the law-governed state'.

What does the rule of law mean? A simple question, and yet the answer is complicated. Generally, the rule of law consists of a number of principles that are applied either formally or through the use of established procedures in order to create an identifiable way a community is governed.¹⁵¹ The application of the rule of law cannot be viewed in isolation to politics and, as a concept, it is inextricably linked to Western democratic liberalism both in terms of determining the extent to which the government acts under the law and the extent to which individual rights are recognised and protected by the law.¹⁵² The purpose of the rule of law is to create the norms of law that can enable society to recognise and use the law. So the formal principles

¹⁵⁰ Tamanaha, B. *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press, 2004.

¹⁵¹ Hutchinson, AP. and Monahan, P. (eds.), *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987.

¹⁵² Neumann, F. *The Rule of Law: Political Theory and the Legal System in Modern Society*, Leamington Spa: Berg, 1986.

concern for example, the generality, clarity, publicity, stability and prospectivity of the law.¹⁵³ Procedurally, the rule of law is concerned with the rules by which law is brought into force and the administration of the law through its institutions like the courts and an independent judiciary.¹⁵⁴

It is not possible to set out here a thorough exposition of each element of the rule of law, its history nor the many disputes concerning its application. Commentators specialising in jurisprudence have done this elsewhere and there are contrasting schools of thought.¹⁵⁵ In what follows, my task is more modest and yet I hope to be able to discuss some aspects of the rule of law relevant to the role of religion and its relationship with the state. First, it is important to say something about the underlying purpose of the rule of law that most commentators would agree on. Essentially, this is to do with how the law rules government and how citizens are bound by the law.

The law provides a system of justice by which government can exercise power legitimately. It prevents governments acting in unauthorised discretionary ways or by capricious and arbitrary behaviour. It also provides a means of accountability capable of remedying abuses of power. In constraining the exercise of power, it prevents individuals or governments

¹⁵³ 'Rule of Law', Stanford Encyclopaedia of Philosophy, 22 June 2016 at <https://plato.stanford.edu/entries/rule-of-law/> - last accessed 24 January 2019.

¹⁵⁴ Hart, HLA. *The Concept of Law*, Oxford: Oxford University Press, 1961.

¹⁵⁵ Bingham, T. *The Rule of Law*, London: Penguin, 2011; Dicey, AV. *Introduction to the Study of the Law of the Constitution*, (originally published in 1895) London: McMillan and Co., 1982; Fuller, L. *The Morality of Law*, New Haven: Yale University Press, 1964; Raz, J. 'The Rule of Law and its Virtue' in *The Authority of Law*, Oxford: Oxford University Press, 1979 [1977]; Tamanaha, B. *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press, 2004.

acting according to personal preference or in accordance with a particular ideology, be that religious or otherwise.¹⁵⁶

The rule of law requires the citizen to respect the law and act in accordance with it even when they object to it or regard it as unjust. That is until the point when higher moral obligations require disobedience e.g. Nazi laws in Germany in the 1930s and 1940s.¹⁵⁷ Ordinarily, citizens should be prepared to recognise and accept the decisions of courts and tribunals as binding.¹⁵⁸

It is a key feature of the rule of law that no one should be above the law and that the law should be applied equally to everyone.¹⁵⁹ Moreover, in ensuring equal treatment before the law it is necessary for citizens to be able to know what the law is so that they can have access to its protection.¹⁶⁰ Consequently, it is recognised that the law should be public and transparent so that people can fully understand its present and future requirements. The law must also offer citizens the means of settling disputes or challenging abuses of power by government and this requires the state to provide the administrative apparatus to ensure legality, for example, an independent

¹⁵⁶ Barnett, H, *Constitutional and Administrative Law*, London: Routledge, 12th Ed., 2017, pp.59-62.

¹⁵⁷ See the debate between Fuller and Hart. Fuller contends that Nazi laws were not laws at all and therefore could be disregarded. Hart maintains that they are laws but can be disobeyed on moral grounds: Hart, HLA. 'Positivism and the separation of law and morals', 71 *Harvard Law Review*, 1958, p.593 and Fuller, L. 'Positivism and fidelity to the law: a reply to Professor Hart' 11 *Harvard Law Review* 1958, p.630.

¹⁵⁸ Barnett, H, *Constitutional and Administrative Law*, London: Routledge, 12th Ed., 2017, pp.59-62.

¹⁵⁹ Dicey, AV. *Introduction to the Study of the Law of the Constitution*, (originally published 1885), London: Macmillan, 1959.

¹⁶⁰ See the 8 characteristics necessary for a legal system to conform to the rule of law in Bingham, T. *The Rule of Law*, London: Penguin, 2011.

judiciary, accountable and uncorrupted officials involved in the provision of legal services and transparent forums of justice to ensure fair trial.¹⁶¹

One of the most contentious questions in relation to the rule of law is whether it should have a moral content and, if so, is that necessary for its proper functioning? Historically, this question has a long heritage and centres on the concept of natural law.¹⁶² Barnett defines natural law by saying that, 'natural law insists that the authority law derives is not from the power of any political ruler, but from a higher source, either theological or secular' i.e. God or nature itself.¹⁶³ There has been a tradition in Western philosophy from the time of Socrates (470-388 BC), Plato (427-347 BC) and Aristotle (384-322 BC) which stretches through the Middle Ages to the present day whereby philosophers have sought to imbue the law with virtue.¹⁶⁴

The impact on Western legal thought of the work of St. Thomas Aquinas (1225-1274) who strove to integrate natural law with Christian teaching cannot be overstated.¹⁶⁵ In his view, natural law was God-given; there was a direct and unifying relationship between natural law and the revelation 'eternal law' in the Christian scriptures and these laws were unchanging and binding on all people. For Aquinas, human law was invalid if it conflicted with natural law. He wrote that, 'Every human law has the character of law

¹⁶¹ 'Rule of Law', Stanford Encyclopedia of Philosophy, 22 June 2016 at <https://plato.stanford.edu/entries/rule-of-law/> - last accessed 24 January 2019.

¹⁶² See d'Entrèves, AP. *Natural Law*, 2nd edn, London: Hutchinson, 1970 and Finnis, JM. *Natural Law and Natural Rights*, Oxford: Clarendon, 1980.

¹⁶³ Barnett, H, *Constitutional and Administrative Law*, London: Routledge, 12th Ed., 2017, pp.55.

¹⁶⁴ Besser-Jones, I. and Slote, M. (eds.), *The Routledge Companion to Virtue Ethics*, London: Routledge, 2015, Part 1, pp.1-51.

¹⁶⁵ Gilson, E. *The Christian Philosophy of St Thomas Aquinas*, London: Victor Gollancz, 1957; Finnis, J. *Aquinas: Moral, Political and Legal Theory*, Oxford: Clarendon Press, 1998.

insofar as it is derived from the law of nature. If in any case it is incompatible with the natural law, it will not be law, but a corruption of law.¹⁶⁶ In this sense, law should enshrine goodness because only virtuous law can facilitate justice. It also follows that laws that embody virtue and support virtuous behaviour promote a good, stable and flourishing society for those who support those values.¹⁶⁷ Equally, we can see how a legal system which has goodness locked into it may serve to mitigate some of the worst consequences of human behaviour which formed the basis of Plato's key criticisms discussed earlier.

The incorporation of morality into the rule of law is a source of contention amongst legal scholars and has important consequences for any consideration of the rule of law and religion. The debate centres on 'formal' and 'substantive' conceptions of the rule of law, and it is to those we now turn.

2.2.1 Formal conceptions of the rule of law

Formal conceptions of the rule of law focus on the operation of the key features outlined above. These are to do with the formal requirements of legality. The formal norms can be principles as for example, Lon Fuller's eight formal principles of the rule of law: generality, publicity, prospectivity,

¹⁶⁶ Aquinas, T. *Summa Theologiae* (1266-1273) London: Eyre & Spottiswoode, 1964-80, 1a2ae. 95. 2.

¹⁶⁷ Consider the resurgence of interest in Virtue Ethics, see the Jubilee Centre for Character and Virtues at <https://www.jubileecentre.ac.uk/> - last accessed 24 January 2019.

intelligibility, consistency, practicability, stability and congruence.¹⁶⁸ Whilst these are important formal principles, they are not moral concepts outside of being good in their own terms in relation to the proper functioning of the rule of law. Equally, procedural considerations, for example, the rules governing how legislation comes into force, or the rules governing the impartiality and independence of a tribunal hearing, are good in their own terms but do not require a wider reference to morality.

Most commentators follow Joseph Raz, a leading positivist, who has argued strongly that the rule of law is a purely formal concept that does not rely on substantive considerations of morality for its efficacy.¹⁶⁹ For Raz, it is through the formal rules of law that the rule of law is known. On this measure, it is possible for an unjust regime to nevertheless follow and administer the rule of law. The formality of the law will be certain and the procedures of the law will be followed with integrity but the laws themselves may be unfair, unjust or even evil. Raz assumes a morally neutral standpoint and states that:

'A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies....It will be an immeasurably worse legal system, but it will excel

¹⁶⁸ Fuller, L. *The Morality of Law*, New Haven: Yale University Press, 1964.

¹⁶⁹ Raz, J. 'The Rule of Law and its Virtue' in *The Authority of Law*, Oxford: Oxford University Press, 1979 [1977].

in one respect: in its conformity to the rule of law....The law may...institute slavery without violating the rule of law.¹⁷⁰

According to Raz's position, it is not possible to understand what the rule of law is unless you have a prior understanding of what the concept of law is and when that understanding is independent from the operation of the rule of law. In this way, Raz seeks to maintain a separation between concerns about the law which are moral in character and those which are formal or procedural. For Raz, the only morality relevant to the proper application of the rule of law is the goodness of the instrumental or practical ability of the rule of law to function efficiently and effectively. The rule of law, in this context, is a neutral tool which is good for the organisation of society but cannot be used to pursue a particular moral good or goals outside itself.

2.2.2 Substantive conceptions of the rule of law

Raz's approach is contrasted with that of commentators like Ronald Dworkin and Tom Bingham.¹⁷¹ We have seen that Raz insists that 'the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged'.¹⁷² He saw other aspects of governance e.g. democracy, human rights and social justice as being separate from the rule of law and not part of the rule of law. For Raz, these deserved to be treated separately but Tom Bingham rejects Raz's analysis, stating:

¹⁷⁰ Ibid, p.221.

¹⁷¹ Dworkin, R. *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977 and T. Bingham, *The Rule of Law*, London: Penguin, 2011.

¹⁷² Raz, J. 'The Rule of Law and its Virtue' in *The Authority of Law*, Oxford: Oxford University Press, 1979 [1977], p.211.

'While, therefore, one can recognise the logical force of Professor Raz's contention, I would roundly reject it in favour of a 'thick' definition, embracing the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.'¹⁷³

Bingham links the protection of human rights with the rule of law. In other words an objective of the rule of law is to seek to further a moral purpose outside and beyond the mere observance of its formal and procedural aspects.

Paul Craig critiques a number of approaches to the substantive view of the rule of law including those by Allan, Laws and Dworkin.¹⁷⁴ Allan supports a substantive approach and he criticizes Raz for not recognising the moral basis of his own conception of the rule of law which supports autonomy and freedom, values which themselves are deemed to be morally good.¹⁷⁵

¹⁷³ Bingham, T. *The Rule of Law*, London: Penguin, 2011, p.67.

¹⁷⁴ Craig, P. 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, (1997), pp.467-87.

¹⁷⁵ Allan, TRS. *Law, Liberty and Justice: The Legal Foundations of UK Constitutionalism*, London: Clarendon Press, 1993.

It is, however, in the writings of Ronald Dworkin that the formal conception of the rule of law is comprehensively rejected.¹⁷⁶ Dworkin rarely mentions the rule of law in his work.¹⁷⁷ Instead, he focuses on an approach whereby citizens owe one another moral rights and duties and are attributed certain political rights which can be used against the state.¹⁷⁸ Dworkin believes that there are absolute moral values built on human dignity and self-respect.¹⁷⁹ In his view, law is a moral enterprise inextricably linked to political morality.¹⁸⁰ For Dworkin adjudication of the law was central to its purpose and for that to happen judges have to interpret the law. Interpretations should follow received traditions of interpretation which themselves have been decided on the basis of upholding those absolute values built on human dignity and self-respect. In Dworkin's terms, this allows judges to strike down legislation which may be morally repugnant because it offends against those values. Clearly, this is a very different to the formal conception outlined above. But where does religious concern intersect with this debate?

If the ideological foundations which you believe are not reflected in those that underpin the morality of the law, then you will struggle to trust the law. This is one of the major criticisms of the substantive approach. On the other hand, if the formal approach to the rule of law (ostensibly) makes no moral claims in relation to the substance of the law, the integrity of the system is

¹⁷⁶ Dworkin, R. *A Matter of Principle*, Oxford: Oxford University Press, 1985.

¹⁷⁷ Craig, P. 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, (1997), pp.467-87 at p.478.

¹⁷⁸ Dworkin, R. *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, (1997), pp.467-87 at p.477.

¹⁷⁹ Dworkin, R. *Justice for Hedgehogs*, Harvard: Harvard University Press, 2011.

¹⁸⁰ *Ibid*, 2011.

not threatened.¹⁸¹ Some people may disagree with a particular law but they cannot challenge or discredit the rule of law, the very basis of the legal system, because of it. Craig highlights the issue when writing about the work of Sir John Laws.¹⁸² Laws adopts a liberal Kantian rights based theory and seeks to substantiate the background assumptions that lie behind the theory. Craig points out that these assumptions may themselves be open to debate and makes the crucial observation:

'More fundamentally, that theory has itself been criticised. One of the principal debating points within modern political theory is between advocates of some version of Kantian liberalism and variants of republicanism and communitarianism. Indeed, Lord Irvine, in his response to Sir John Laws, highlighted this when he pointed to the "communitarian critique of the classic liberal notion of the autonomous moral agent."¹⁸³

We have seen that Bingham's support for Human Rights both integrates and elevates that substantive body of law into a central position crucial to the proper functioning of the rule of law. Dworkin would no doubt approve of

¹⁸¹ See Shapiro, ST. 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed', *University of Michigan Law School Public Law and Legal Theory Working Paper Series*, Working Paper No. 77, March 2007, pp.44-45. Here, Shapiro says that, 'The proper task of the legal interpreter, I would like to suggest, is to impute to legal practice the political objectives that the current designers of the legal system sought to achieve. The purposes that are legally relevant, in other words, are those that *explain*, rather than justify, the current practice. These objectives might be laudable ones, such as promoting democratic self-rule and protecting individual liberty, or they may be more morally suspect, such as seeking to implement the will of God or hastening the proletariat revolution. The proper methodology for a particular legal system would be the one that best harmonizes with the ideological objectives of those who designed the current system, regardless of the moral palatability of their ideology.'

¹⁸² Craig, P. 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, (1997), pp.467-87.

¹⁸³ *Ibid*, pp.467-87 at p.478 at p.480. Also, Lord Irvine, "Response to Sir John Laws 1996" [1996] *Public Law* p.636 at 637.

that. It is interesting to note that religion is never mentioned in Bingham's book except on one occasion in the very final paragraph when he reflects on what makes the difference between good and bad government. His answer, of course, is the rule of law but he goes on to say:

'...in a world divided by differences in nationality, race, colour, religion and wealth it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion.'¹⁸⁴

We have seen that the rule of law is a complicated and contentious concept. The tension over what underpins the rule of law will surface during the analysis of religion-state relations in the UK, France and Italy. Central to the debate is the type and degree of moral content in any conception of the rule of law. In order to be legitimate, the rule of law must be built on principles conducive to a legal system capable of justice. In the context of democracy, ultimately the law must also endeavour to match the aspirations of the electorate. In a liberal democracy the rule of law needs the confidence of those it is designed to protect.

¹⁸⁴ Bingham, T. *The Rule of Law*, London: Penguin, 2011, p.174.

2.3 The Separation of Powers

The contemporary concept of the separation of powers has come to mean the separation of the executive, legislative and judicial branches of government.¹⁸⁵ It has evolved over many centuries primarily in order to avoid the almost inevitable abuses of power that were inherent risks in a system of monarchical absolutism.¹⁸⁶ It now includes various checks, balances and limitations that are placed on those powers, for example, judicial review where independent courts can adjudicate whether a government department has acted *ultra vires*.¹⁸⁷ Supranational and international law can also provide a framework which places limitations on the flexibility and scope of governments to act.¹⁸⁸

As a constitutional concept, it is usually considered to have originated in John Locke's Second Treatise of Government where he argued that the different functions of government and the powers associated with them should be separated in order to minimise the abuse of power.¹⁸⁹ He did not propose a mechanism for separating the powers in the modern sense, but he did insist on keeping the making of laws separate from executive power so

¹⁸⁵ Masterman, R. *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*, Cambridge: Cambridge University Press, 2011, p.11.

¹⁸⁶ For a discussion of the early foundation of the theory, see Vile, MJC. *Constitutionalism and the Separation of Powers*, Oxford: Oxford University Press, 1967, p.23ff.

¹⁸⁷ Wade HWR. and Forsyth, CF. *Administrative Law*, Oxford: Oxford University Press, 2004, pp.4-5.

¹⁸⁸ For example, EU law and the policies of bodies like the International Monetary Fund (IMF) can have a considerable influence on the development of law within a nation state. See also, Bogdanor, V. *The New British Constitution*, Oxford: Hart Publishing, 2009, Chapter 3, where he discusses the impact of the introduction of international human rights obligations into UK law.

¹⁸⁹ Locke, J. *Second Treatise of Government and A Letter Concerning Toleration* (first published 1639) Oxford: Oxford University Press, 2016.

as to avoid despotism.¹⁹⁰ Separation means that one branch of government becomes restrained in the extent to which it could limit or abuse the political liberty of citizens because of the effects of other powers attributed to the other branches of government.

The idea was developed by Montesquieu writing in the mid-eighteenth century.¹⁹¹ In his book, 'The Spirit of Laws' (*De l'esprit des lois*), published anonymously in 1748, Montesquieu argued for constitutional government based on the rule of law, the protection of civil liberties and also the separation of powers.¹⁹² Montesquieu's primary concern was that the branches of government should be kept separate in order to ensure freedom. He wrote:

'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty...there can be no liberty if the power of judging is not separated from the legislature and executive...there would be an end to everything if the same man and the same body were to exercise those three powers.'¹⁹³

Both Locke and Montesquieu were acutely aware of the role and power of religion in society. They were writing at a time when decisions about religious identity and allegiance to the monarch could have severe

¹⁹⁰ Ratnapala, S. 'John Locke's Doctrine of the Separation of Powers: A Re-evaluation' in *The American Journal of Jurisprudence*, 3:1 1993, pp.189-220.

¹⁹¹ Hazo, RG. 'Montesquieu and the Separation of Powers', *American Bar Association Journal*, 54:7, 1968, pp.665-668.

¹⁹² Montesquieu, C. *The Spirit of Laws*, (first published 1748) Cambridge: Cambridge University Press, 1989.

¹⁹³ *Ibid*, p.157.

consequences.¹⁹⁴ That issues concerning religion were a sensitive area throughout this period is an understatement and manifestly had consequences on the extent to which such commentators could speak or write freely. Given these sensitivities, it is a moot point to reflect on the extent to which the early development of the separation of powers was partly an attempt to ameliorate the worst consequences of absolutist political power wielded in a context where the justification for that power rested on religious authority. Indeed, it is possible to see the rise of the separation of powers as a counter-balance to the diminution of monarchical and hierarchical political power rooted in religious principles and authority.¹⁹⁵

We have seen that from the Reformation onwards, erastianism became one of the key mechanisms used to control religion and this may account for why issues surrounding religion effectively became removed from being part of the traditional doctrine of the separation of powers.¹⁹⁶ Certainly, in the UK context, religion is not usually referred to in the context of the separation of powers in the classic texts on constitutional law. This may be because before the mid-twentieth century the presence and role of religion in politics had become largely settled and protected by an erastian establishment. To this extent, most people in power in all branches of government largely submitted to Christian principles and consequently, in less critical days, the

¹⁹⁴ Locke was forced to flee to the Netherlands, under suspicion of involvement in a plot to assassinate King Charles II in 1683. Montesquieu writes at length on the role of religion in the *Spirit of Laws*, Books XXIV and XXV.

¹⁹⁵ Waldron, J. *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*, Cambridge: Cambridge University Press, 2002, p.108ff.

¹⁹⁶ The Reformation split with Rome that laid the ground for erastianism and the continuing ban on the British monarch being Roman Catholic are an attempt to separate religious and political power.

religious element was seldom explicitly referred or indeed questioned by mainstream commentators.¹⁹⁷ Since the 1960s, the sentiment behind the phrase 'God is dead' or at least 'progressively dying' became prevalent and so once again, there was no need to refer to religion which was thought set to wane under the secularisation thesis. Now that 'God is back', the risks associated with religious influences on those forming policy, those responsible for enacting them and adjudicating them, once again become a relevant issue.¹⁹⁸ A new model of religion-state relations must once again consider the separation of religious and political power in the interests of liberal democratic government and we will return to this aspect in Chapter 6. The present section, however, focuses on the contemporary application and significance of the separation of powers as a pillar of liberal democracy for the three countries investigated in the study.

The separation of powers has become increasingly influential in modern political and constitutional theory.¹⁹⁹ However, there are different models or formulations of the doctrine that vary according to the political development of the particular country. A pure doctrine of the separation of powers would involve a strict separation between both the functions of government and its personnel without any overlap. A simple comparison between the strict application of the separation of powers in the constitution of the United

¹⁹⁷ Lord Denning, Master of the Rolls 1962-1982, was for many years president of the Christian Lawyers' Fellowship and liked to have the Bible to hand when writing judgments. He once wrote 'Without religion there is no morality, and without morality there is no law', quoted in his obituary in *The Daily Telegraph*, 6 March 1999. It is unlikely that this approach would garner judicial support today.

¹⁹⁸ Wooldridge, A. and Micklethwait, J. *God is Back: How the Global Rise of Faith Changed the World*, London: Penguin, 2010.

¹⁹⁹ Bondy, W. *The Separation of Governmental Powers: in History, in Theory and in the Constitution*, New Jersey: The Law Book Exchange, 2004.

States of America with the more organically evolved and ‘overlapping’ approach in the United Kingdom illustrates the point.²⁰⁰

The separation of powers is not absolute in this strict sense in any of the three countries examined in the thesis. The UK, France and Italy all employ the doctrine of separation but in different ways. It is not possible to provide a full account of the separation of powers in each country but it is important to outline some of the key principles with respect to the executive, legislature and judiciary.

2.3.1 United Kingdom

In the UK, the executive consists of the Crown, Prime Minister, Cabinet and non-Cabinet ministers, the Civil Service and other public bodies.²⁰¹ The executive makes policy, initiates legislation and through the Government exercises the royal prerogative powers on behalf of the Crown. Ministers are accountable to Parliament through the concept of ministerial responsibility. A successful vote of ‘no confidence’ in the House of Commons will lead to a government’s resignation.²⁰² The legislature consists of the Crown, the House of Commons and the House of Lords and other legislative bodies like the EU and the devolved governments.²⁰³ The legislature makes laws,

²⁰⁰ Tushnet, M. *The Constitution of the United States of America*, Oxford: Hart Publishing, 2009. Bryce, J. *Flexible and Rigid Constitutions, in History and Jurisprudence*, Vol. 1, Oxford: Oxford University Press, 1901 (the original essay is dated 1884).

²⁰¹ Barnett, H, *Constitutional and Administrative Law*, London: Routledge, 12th Ed., 2017, p.93.

²⁰² Brazier, R. *Constitutional Practice: The Foundations of British Government*, Oxford: Oxford University Press, 1999, pp.217-219.

²⁰³ Barnett, H, *Constitutional and Administrative Law*, London: Routledge, 12th Ed., 2017, p.93.

scrutinises government policy and holds the government to account. As such Parliament is deemed to be sovereign because it is the ultimate law-making authority. The judiciary consists of judges and magistrates separately appointed in England and Wales, Scotland and Northern Ireland, who interpret and apply statute and common law. Senior judges also ensure the legality of the exercise of government through judicial review.²⁰⁴

The UK has mixed government with a relatively weak application of the separation of powers.²⁰⁵ Here, for example, the executive in terms of the Prime Minister and Cabinet are all members of the legislature and so there is overlap in terms of personnel.²⁰⁶ From a positive perspective, the partial fusion of the executive and legislature offers a pragmatic approach to law-making and usually prevents conflict or stalemate from hindering governance.²⁰⁷ García Oliva and Hall make the important point that a rigid separation of powers would 'inevitably necessitate the abandonment of parliamentary sovereignty in its current form'.²⁰⁸ The strengthening of the powers of Parliamentary Committees has led to greater scrutiny of the executive and the introduction in 2010 of the Backbench Business Committee has allowed Parliament to exert more control over its own

²⁰⁴ Allan, TRS. 'Judicial deference and judicial review: legal doctrine and legal theory', *Law Quarterly Review*, 127, 2001, p.96.

²⁰⁵ Some commentators question whether the doctrine is applicable e.g. Marshall, G. *Constitutional Theory*, Oxford: Clarendon Press, 1971, p.124 and Bradley, A. and Ewing, K. *Constitutional and Administrative Law*, London: Pearson, 2014, Chapter 5.

²⁰⁶ Walter Bagehot called the relationship between the executive and legislature a 'fusion' – Bagehot, W. *The English Constitution*, (first published 1867) London: Fontana, 1993, pp.67-68.

²⁰⁷ Lansley, A. 'Legislature and Executive: An Open Lecture', 24th April 2013 at <https://www.parliament.uk/get-involved/education-programmes/universities-programme/university-teaching-resources/the-legislature-and-the-executive/> - last accessed 24 January 2019.

²⁰⁸ García Oliva, J. and Hall, H. *Religion, Law and the Constitution: Balancing Beliefs in Britain*, London: Routledge, 2018, p.289.

agenda.²⁰⁹ The increased use of 'Urgent Questions' whereby a Minister must come to the House of Commons to answer an Opposition question and the use of e-petitions have also served to bolster the ability of Parliament to hold the executive to account.²¹⁰ Nevertheless, the executive remains powerful, especially where it has a significant parliamentary majority.²¹¹ It is often given wide powers by Parliament to implement Secondary Legislation, which, in some cases, can thereafter fall outside the proper scrutiny of Parliament.²¹²

In recent years, the UK has moved towards increased separation of powers through the establishment of a new Supreme Court in 2009 and the removal of the Lord Chancellor's judicial functions by the Constitutional Reform Act 2005.²¹³ As a result, the judiciary have become fully independent of the legislature and executive. This independence is strengthened by the fact that judges are appointed for life and can only be removed by a petition to the Monarch by both Houses of Parliament.²¹⁴

Whilst judicial independence has always been upheld in practice the institutional overlapping with the House of Lords created the perception of

²⁰⁹ Ibid, p.290.

²¹⁰ Lansley, A. 'Legislature and Executive: An Open Lecture', 24th April 2013 at <https://www.parliament.uk/get-involved/education-programmes/universities-programme/university-teaching-resources/the-legislature-and-the-executive/> - last accessed 24 January 2019.

²¹¹ For a supportive view of the effectiveness of Parliament to hold the executive to account see, Russel, M., Gover, D. and Wollter, K. 'Does the Executive Dominate the Westminster Legislative Process?: Six Reasons for Doubt' in *Parliamentary Affairs*, 69:2, 2016, pp.286-308.

²¹² Barber, NW. and Young, AL. 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty', (March 8 2016) [2003] *Public Law* 113.

²¹³ Brazier, R. *Constitutional Reform: Reshaping the British Political System*, Oxford: Oxford University Press, 2008, pp.150-153.

²¹⁴ Senior Courts Act 1981, s.11(3).

intermingling and a lack of separation. It is this confusion that the Constitutional Reform Act 2005 sought to clarify and the perception of potential coercion is removed.²¹⁵ Moreover, judicial appointments are made by the independent Judicial Appointments Commission and senior judges have tenure for life under the Act of Settlement 1700. In addition, there is a longstanding statutory prohibition on judges standing for election as Members of Parliament.²¹⁶ While retired judges are eligible to be appointed to the House of Lords, by convention, they usually sit as 'crossbenchers' rather than on government or opposition benches in order to preserve a perception of political neutrality.

In terms of the relationship between the different branches of government, there is a convention that judges should not be criticised by members of the executive. This does not apply to other Members of Parliament. Also, the *sub judice* rule prevents Members of Parliament raising issues in debate where there are proceedings either before a court or awaiting trial. In the UK, decisions of the judiciary are subordinate to those of Parliament when expressed through legislation.²¹⁷ However, the courts do have limited powers under the Human Rights Act 1998 and the EU treaties to review some legislation in certain circumstances.²¹⁸

²¹⁵ García Oliva, J. and Hall, H. *Religion, Law and the Constitution: Balancing Beliefs in Britain*, London: Routledge, 2018, p.291.

²¹⁶ House of Commons (Disqualification) Act 1975.

²¹⁷ *Pickin v British Railways Board* [1974] AC 765.

²¹⁸ Feldman, D. 'The European Court of Human Rights and the UK' – Why Should Strasbourg Decide on Human Rights?' *UK Constitutional Law Association*, 2012 at <https://ukconstitutionallaw.org/2012/12/07/david-feldman-the-european-court-of-human-rights-and-the-uk-why-should-strasbourg-decide-on-our-human-rights/> last accessed 24 January 2019.

From a judicial perspective the contemporary view of the application of the doctrine of the separation of powers in the UK was made by Lord Mustill, who stated that:

'It is a feature of the peculiarly UK conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see they are obeyed.'²¹⁹

Lord Mustill was writing before the Constitutional Reform Act 2005. It is clear that he envisaged a separation in the function of each branch of the constitution. Whilst the establishment of a Supreme Court and the removal of judges from the House of Lords may have improved the perception of a separation of powers, it is arguable that it has also led to a less efficient system and perhaps some tension between the government, Parliament and the courts. For example, senior judges are no longer able to amend bills or speak in Parliament. Equally, there is no mechanism for politicians to speak informally to judges or to hold them to account.²²⁰

²¹⁹ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, 567.

²²⁰ See Dymond G. *The Appellate Jurisdiction of the House of Lords*, House of Lords Library Notes, 2009 at <https://www.parliament.uk/documents/lords-library/ln2009-010appellate.pdf> last accessed 24 January 2019; Lord Hope of Craighead in 'Voices from the past – the Law Lords' contribution to the legislative process', *Law Quarterly Review*, 123, 2007, p.547; Blom-Cooper, L., Dickson, B. and Drewry, G (eds.), *The Judicial House of Lords 1876–2009*, Oxford: Oxford University Press, 2009.

2.3.2 France

France's 1958 Constitution of the Fifth Republic provides for the separation of powers without mentioning the term explicitly.²²¹ Executive power is exercised by both the elected President of the Republic and the Government consisting of the Prime Minister and ministers.²²² For this reason the French state is sometimes referred to as being semi-presidential.²²³ Interestingly, the term executive does not appear in the French Constitution despite it being the most powerful branch of government.²²⁴

In relation to the other branches of government, Boyron describes what she calls the 'primacy of the executive' which has grown in power at the expense of Parliamentary democracy and a lack of accountability.²²⁵ The legislative branch is bicameral and consists of the National Assembly and the Senate and both houses of Parliament are elected. Both houses sit separately at different locations but when, on occasion, they sit together to revise or amend the Constitution of France they are known as the *Congrès du Parlement*. The *Congrès du Parlement* sits in order to consider amendments to the Constitution or to approve a new state joining the European Union, when a referendum is not used.²²⁶ The judiciary of France are independent

²²¹ The Constitution of France 1958, English translation at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleIII> last accessed 24 January 2019.

²²² Title 2 and 3 of the French Constitution.

²²³ Elgie, R. *Semi-Presidentialism in Europe*, Oxford: Oxford University Press, 1999.

²²⁴ Boyron, S. *The Constitution of France; A Contextual Analysis*, Oxford: Hart Publishing, 2013, p.56.

²²⁵ Ibid, p.92.

²²⁶ Article 89 of the Constitution requires a 3/5 majority in the *Congrès du Parlement* in order to amend the Constitution.

of the legislature or the executive.²²⁷ Judges have security of tenure and may not be promoted or demoted without their consent.²²⁸ The judicial system is split between civil and criminal cases and an administrative branch.

France, like the UK, has a flexible approach to the separation of powers and there is some overlap between the personnel of the legislative and executive branches. Where it differs is in the powers ascribed to the President of the Republic. The role of the President is crucial to the checks and balances between the legislative and executive branches. The President can appoint and dismiss the Prime Minister. He can also dissolve the National Assembly.²²⁹ When the political party of which the President is a member also controls Parliament, then the President is in a very powerful political position and can exert his authority over the legislative agenda.²³⁰

The Government is led by the Prime Minister and is served by the civil service and other government agencies. The Government meets each week and that meeting is chaired by the President of the Republic. The President and the Prime Minister have limited powers to sign decrees (executive orders) and Parliament may authorise the executive to issue ordinances, which Parliament must then ratify. Decrees are typically used for appointing and dismissing senior civil and military servants. Ordinances are usually

²²⁷ Article 64 of the Constitution.

²²⁸ Article 64 of the Constitution.

²²⁹ See Articles 5-19 of the 1958 Constitution.

²³⁰ Baranger, D. 'Executive Power in France' in Craig, P.P. and Tomkins A. (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective*, Oxford: Oxford University Press, 2006, pp.217 – 242.

reserved for urgent matters. The Government can introduce legislation into Parliament but before it does so it must undergo a compulsory review by the *Conseil d'Etat*, the supreme administrative court.²³¹ By virtue of this function, the *Conseil d'Etat* provides legislative judicial review role.²³² The *Conseil d'Etat* hears cases against executive branch decisions and has the power to quash or set aside executive-issued statutory instruments such as orders and regulations when they violate constitutional law, enacted legislation, or codified law.

In addition to legislating, Parliament also exerts some limited control over the action of the executive through formal questioning and through its ability to establish commissions of inquiry. The National Assembly may force the resignation of the Government by voting a motion of censure.²³³ Whilst the Government or Members of Parliament may initiate legislation in Parliament, the majority of significant legislation is initiated by the executive.²³⁴

Under the Third and Fourth Republics there was no provision for the judicial review of the constitutionality of statutes. This changed when the 1958 Constitution created the *Conseil constitutionnel* or Constitutional Council.²³⁵ The members of the Constitutional Council are appointed by the President of the Republic and the Presidents of each house of Parliament. The Council

²³¹ Bell, J. *French Legal Cultures*, Cambridge: Cambridge University Press, 2001, p.30f.

²³² Bell, J. 'What is the role of the *Conseil d'Etat* in the Preparation of Legislation?', *International and Comparative Law Quarterly*, 49, 2000, p.661.

²³³ Articles 24-33 of the 1958 Constitution.

²³⁴ Hayward, J. 'Parliament and the French Government's Domination of the Legislative Process', *Journal of Legal Studies*, 10, 2004, p.79.

²³⁵ Stone, A. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford: Oxford University Press, 1992.

was not originally conceived as a constitutional court but was intended to review statutes to approve their conformity with the constitution. However, since then its scope has widened and its independence has grown. In particular, in 1971, the Council decided to review statutes against provisions of the Preamble to the Constitution, the Declaration of the Rights of Man and the Citizen, the Preamble of the 1946 Constitution and also the principles referred to in that preamble.

In 1974, the Constitution was amended to allow the speaker of either house of Parliament or a delegation of 60 Deputies or 60 Senators to ask for the text of a bill that has passed through Parliament and has been signed by the President of the Republic to undergo constitutional review by the Constitutional Council. Again, in 2008, the Constitution was amended to create a new legal procedure whereby parties to a case before a French court could challenge the constitutionality of a law and refer it to the Constitutional Council via either the *Conseil d'État* or the Court of Cassation.²³⁶

The Constitutional Council is perceived to have used its powers of judicial review with self-restraint and deference. Given the declaration of laïcité in Article 1 of the Constitution, the Council has had to adjudicate on laws relating to the secular nature of the French state e.g. the public funding of religious schools.²³⁷

²³⁶ Proper, M. 'Sovereignty and Laïcité' in Mancini, S and Rosenfeld, M. *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press, 2014, p.155.

²³⁷ Ibid.

2.3.3 Italy

Italy's constitutional tradition has taken elements from both the British and French traditions.²³⁸ As we have seen with the constitutional frameworks of the UK and France, the separation of powers is not strict and this is the case in Italy where there is overlap in the personnel of the executive and legislature. Whilst there is no explicit reference to the separation of powers in the Italian Constitution, Article 70 entrusts the legislative role to Parliament and Article 102 accords judicial functions to ordinary judges created under the *legge sull'ordinamento* statute. There is no constitutional provision establishing the executive branch of government as this is deemed to flow from the decisions of the legislature.²³⁹

Prior to the introduction of the 1948 Constitution Italian judges were not independent but subject to the powers of the executive.²⁴⁰ Barsotti *et al*, makes the point that the concept of a separation of powers is not strict as in the US but refers rather to 'a co-operative constitutional structure focused on Parliament as the core of the legal institutional architecture.'²⁴¹ They refer to the co-operative model as the 'relation of powers' principle.²⁴²

The Head of State is the President of the Republic of Italy, a position which is elected by Parliament and some representatives from the regions for a seven

²³⁸ Barsotti, V., Carozza, PG., Cartabia, M. and Simoncini, A. *Italian Constitutional Justice in Global Context*, Oxford: Oxford University Press, 2017, p.4-5.

²³⁹ *Ibid*, p.37.

²⁴⁰ *Ibid*, p.8. The Constitutional Court was conceived as part of the 1948 Constitution but only established in 1956.

²⁴¹ *Ibid*, p.155.

²⁴² *Ibid*, p.159.

year term. The President is not permitted to hold office in any other branch of power. However, he formally appoints the executive and is president of the judiciary. The powers of the President are set out in Article 87 of the Constitution and are similar to those reserved to a monarch, for example, he/she can introduce to Parliament bills authorised and initiated by the Government, dissolve one or both Houses of Parliament following consultation with the respective president of the house, make declarations of war agreed by Parliament. Whilst the president is politically neutral, as guardian of the Constitution, he can oppose acts intended to violate it.

The executive branch is the Government consisting of the Prime Minister and Ministers. Whilst the Prime Minister is appointed by the President, the Government must command the confidence of Parliament in order to be viable. Because of this, the Government is responsible and accountable to Parliament. When Parliament withdraws its confidence in the executive, the Prime Minister must immediately offer his resignation to the President. The legislative branch is a bicameral system consisting of the Chamber of Deputies and the Senate. Both Houses of Parliament are elected although the Senate also contains a small number of Senators who hold office for life e.g. former Presidents. The judicial branch is completely separate from the executive and legislature.²⁴³ Whilst the Minister of Justice is tasked with organising legal services, the judges themselves are both independent and autonomous. Constitutional issues are determined by the Constitutional Court which is composed of 15 judges. One third of the judges are

²⁴³ Although the President of the Republic serves as *ex officio* President of the High Council of the Judiciary.

appointed by the President, a further third are elected by the Parliament and the final third are elected by the ordinary and administrative supreme courts.

A striking feature of the development of constitutionalism in Italy has been the growth of the power and independence of the Constitutional Court since its inception in 1956. The purpose of the Constitutional Court is set out in Article 134 of the Constitution, which requires the Court to decide on the constitutional legitimacy of laws issued at national or regional level. It also adjudicates on conflicts arising between state powers and those of the regions and can make decisions as to the legitimacy of charges brought against the President of the Republic.

Initially, there were doubts about the effectiveness of the new Constitutional Court. However, these were squashed by the Court's Judgement 1/1956 which has been likened to the 'Italian Marbury v Madison'.²⁴⁴ This case saw the Court facing a constitutional challenge to a piece of Fascist-era legislation which required anyone who wished to disseminate their opinions via posters or flyers to obtain prior authorisation from the police. Article 21 of the 1948 Constitution guaranteed that, 'Everyone has the right to freely express their thoughts in speech, writing, or any other form of communication'. One of the arguments used by the State was that laws prior to the Constitution were not subject to constitutional scrutiny by the Constitutional Court. This was roundly rejected by the Court's judgment which stated:

²⁴⁴ Barsotti, V., Carozza, PG., Cartabia, M. and Simoncini, A. *Italian Constitutional Justice in Global Context*, Oxford: Oxford University Press, 2017, p.30.

'With regard to the competence of this Court, challenged by the Attorney General, we must first note that it is the exclusive competence of the Constitutional Court to decide controversies regarding the constitutional legitimacy of laws, or other acts having the force of law. This cannot be put into question, and is established in Article 134 of the Constitution. In fact, a declaration of unconstitutionality cannot be made but by the Constitutional Court as required by the Constitution in Article 136.'²⁴⁵

Through this judgment the Court broke with the previous judicial and political position characteristic of the Italian legal tradition hitherto and which would have been hostile to a fully independent system of constitutional adjudication.

Unlike France, the Italian Constitution makes no explicit reference to the religious or secular nature of the State. We will see in a later chapter that the Constitutional Court was pivotal in declaring Italy a secular state on the basis of its interpretation of the Constitution.

2.3.4 Concluding remarks

There are two themes which can be discerned from this brief discussion of the relationship between the executive, legislature and judiciary in the UK, France and Italy.

²⁴⁵ Constitutional Court Judgment 1/1956.

The first is that recent decades have seen an expanding role for the executive branch as the key policy maker. Executive dominance appears to be at the expense of the power and influence of the legislature. It may be because of a diminution of interest in political parties and political activism and it is not yet clear whether this represents a crisis for the institutional success of liberal representative democracy. It points towards a potential democratic deficit in terms of the extent to which electors experience a sense of being connected to their elected representatives and have confidence that their representative are capable of exerting significant influence on public affairs. The lack of Parliamentary power and ability to hold governments to account is magnified when the government has a landslide majority, a feature encapsulated by Lord Hailsham in his famous phrase when he referred to an 'elective dictatorship' to describe a situation where the government dominates Parliament.²⁴⁶

The second area that unites the three countries discussed is the expansion of judicial power, especially in relation to the judicial and constitutional review of the courts.²⁴⁷ Judicial independence has resulted in a dramatic increase in the judiciary's influence on political systems overall. The separation of the judiciary from both the executive and legislature has protected judicial independence and also protected judges from allegations of treading on the domains most appropriate to the other powers. At the same time, there are

²⁴⁶ Lord Hailsham was the Lord Chancellor of the United Kingdom and used the phrase in a Richard Dimbleby Lecture at the BBC in 1976. The phrase was originally used a century earlier to describe Giuseppe Garibaldi's political doctrines in Italy.

²⁴⁷ Craig, P. 'Political constitutionalism and the judicial role: A response', in the *International Journal of Constitutional Law*, 9:1, 2011, pp.112-131.

those who regard the intervention of unelected judges as an unwelcome interference with democratic government.²⁴⁸ This may reflect the view that, on the whole, members of the executive and legislature are elected politicians whereas judicial appointments are protected. Ultimately, the final check on the power of the government is not from the judiciary but from the electorate.

²⁴⁸ In the US context see Waldron, J. 'The Core of the Case Against Judicial Review' in *Yale Law Journal*, 115:6, 2006, p.1346.

2.4 Human Rights

The fourth pillar of a liberal democracy is the guarantee and protection of human rights and civil liberties.²⁴⁹ It recognises that the protection of the rights and freedoms of citizens is a fundamental duty of the state.²⁵⁰ Because it provides protection for everyone, human rights law is a check against the 'tyranny of the majority'.²⁵¹ Human rights legislation can also be a powerful deterrent against the state's intentional or unintentional abuse of its powers.²⁵² Human rights are protected at both the national and international level in the UK, France and Italy.

Whilst it is natural to focus the discussion on the protection of human rights as codified in the various conventions, it is also important to remember that countries have long protected various rights which have been regarded as fundamental in general law e.g. the right to a fair trial, the right not to be imprisoned without due process taking place under the rule of law. In the English context, *Magna Carta*, 1215, protected certain rights including the freedom of the English Church.²⁵³ In the French context, the freedom of

²⁴⁹ Perry, M. *The Political Morality of Liberal Democracy*, Cambridge: Cambridge University Press, 2010, p.61.

²⁵⁰ Levinson, M. 'Liberalism, Pluralism and Political Education: paradox or paradigm?' *Oxford Review of Education*, 25, 1999 p.41.

²⁵¹ Donnelly, J. *Universal Human Rights in Theory and Practice*, London: Cornell University Press, 2015, p.2.

²⁵² Saunders, R. 'Human rights abuses at the limits of the law: Legal instabilities and vulnerabilities in the 'Global War on Terror' in the *Review of International Studies*, 44:1, 2018, pp.2-23.

²⁵³ Griffith-Jones, R. and Hill, M (eds.), *Magna Carta, Religion and the Rule of Law*, Cambridge: Cambridge University Press, 2015.

religion has been protected since the Revolution in the Declaration of the Rights of Man 1789.²⁵⁴

Many of the human rights protected by international instruments today have earlier origins, some growing from religious thought whilst others developing in opposition to religious dominance.²⁵⁵ Sources include religious and non-religious philosophies from *inter alia* Classical Greece, Medieval Christianity, Reformation Humanism and the Enlightenment.²⁵⁶ Despite the desire for human rights to be regarded as 'universal' there is in fact no consensus on the rights and freedoms which are fundamentally protected.²⁵⁷

Some commentators recognise the threats posed to human rights by those who reject them and question whether they are fundamental at all.²⁵⁸ Others dispute the development of jurisprudence in relation to some fundamental human rights, fearing that those developments may serve to weaken, dilute or trivialise their fundamental nature.²⁵⁹ In *R (Daly) v Secretary of State for the Home Department* (2001) Lord Bingham quoted Lord Cooke who said that, 'The truth is, I think, that some rights are inherent and fundamental to

²⁵⁴ Boyron, S. *The Constitution of France: A Contextual Analysis*, Oxford: Hart Publishing, 2013, p.38.

²⁵⁵ For example, laws protecting freedom of expression and anti-discrimination as opposed to blasphemy laws which protect theocratic and scriptural morality.

²⁵⁶ García Oliva, J. and Hall, H. *Religion, Law and the Constitution: Balancing Beliefs in Britain*, London: Routledge, 2018, p.362.

²⁵⁷ Bingham, T. *The Rule of Law*, London: Penguin, 2010, p.68.

²⁵⁸ Alston, P. 'The Populist Challenge to Human Rights' *Journal of Human Rights Practice*, 9:1 2017 pp.1-15.

²⁵⁹ Clément, D. 'Human rights or social justice? The problem of rights inflation.' *International Journal of Human Rights*, 22:2, 2017, pp.155-169.

democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them'.²⁶⁰

A particular issue of concern is the difficult and seemingly unanswerable question over the ultimate origin of human rights. Michael Perry in 'The Political Morality of Liberal Democracy', places the concept of human dignity at the heart of his argument to substantiate the need for human rights protection.²⁶¹ He bases his argument on the texts of the three principal and foundational Human Rights documents: The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.²⁶²

The key text he cites is found in the preamble to the Universal Declaration which refers to, 'the inherent dignity...of all members of the human family' and states, in Article 1, that 'all members of the human family are born free equal in dignity and rights'. The preambles of the two Covenants share the following wording, 'Considering that...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.'²⁶³ Here the key concepts are 'inherent dignity' and 'inalienable rights'. In other words, dignity cannot be detached from the human person and the rights required to

²⁶⁰ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, para.58.

²⁶¹ Perry, MJ. "The Political Morality of Liberal Democracy", Cambridge: Cambridge University Press, 2010, pp.16-17.

²⁶² The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948. The International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, each adopted by the General Assembly of the United Nations on 16 December 1966.

²⁶³ See the 'Preamble' to the International Covenant on Civil and Political Rights at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> last accessed 24 January 2019.

maintain that dignity must not be violated. This allows Perry to make two claims, (1) that each human being has equal inherent dignity and (2) that dignity should be respected and not violated.²⁶⁴

Later, Perry raises the question if these claims are true, *why* are they true? He makes the point that the human rights documents do not attempt to answer this question stating that they are famously silent on the question. Jacques Maritain, a Roman Catholic involved in the first drafting exercises for the nascent Declaration of Human Rights, recalled a Unesco National Commission where Human Rights were being discussed when someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. Maritain said, 'Yes, we agree about the rights but *on condition that no one asks us why.*'²⁶⁵

The Council of Europe is the main international body governing human rights law in Europe. It was founded on 5 May 1949 and currently has 47 Member States. All European states have acceded to the Council of Europe, with the exception of Belarus and Kazakhstan where there are human rights concerns and the Vatican City State which, as a theocracy, has observer status at the Council.²⁶⁶ The Council of Europe promotes human rights through international conventions, principally the European Convention on Human Rights ('ECHR') and monitors Member States' progress in

²⁶⁴ Perry, M.J. "The Political Morality of Liberal Democracy", Cambridge: Cambridge University Press, 2010, p.28,

²⁶⁵ Maritain, J. 'Introduction' in *UNESCO, Human Rights: Comments and Interpretation*, 1949, pp.9-17. [emphasis added]

²⁶⁶ Some states with limited recognition e.g. Kosovo, are not members of the Council of Europe.

implementing and administering these rights recommendations made by independent expert monitoring bodies.²⁶⁷ Member States of the Council of Europe are signatories to the ECHR. Applications alleging that a contracting state has breached one or more of the human rights provisions concerning the civil and political rights set out in the Convention and its protocols are made to the European Court of Human Rights ('ECtHR') based in Strasbourg.

There are debates about competing views of human rights law particularly at the supranational level.²⁶⁸ These include how the Council of Europe views the historic ties between some churches and the state and also the claims from some religious organisations of a growing secular universalism that flows from a monopolistic rights-based culture. The focus of the discussion is, therefore, limited primarily to issues relating to the freedom of religion and how human rights law views religion-state relations. The jurisprudence of the ECtHR forms an important part of the analysis of religion-state relations that follow in later chapters and so it is to this we now turn.

²⁶⁷ See <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en> – last accessed 24 January 2019.

²⁶⁸ Benvenisti, E. 'Embracing the tension between national and international human rights law: the case for discordant parity', *International Journal of Comparative Law*, 15:1, 2017, p.57.

2.4.1 *The European Convention on Human Rights*

In Western Europe, the supranational basis for the protection of human rights is located primarily in the ECHR and the case law that flows from the ECtHR.²⁶⁹

The ECtHR is the ultimate interpreter of the meaning of the ECHR and so individuals, a group of individuals or a contracting state can bring an application concerning a potential breach of human rights before the ECtHR.²⁷⁰ Most of the Member States, including France and Italy guaranteed the protection of basic rights either through a written constitution or by incorporating ECHR rights into their law. ECHR law was not directly enforceable in UK domestic law until the introduction of the Human Rights Act 1998.

The majority of cases referred to the ECtHR are declared inadmissible. Once referred, the case is assigned to a judge rapporteur, who will determine its admissibility. There are a range of grounds upon which a case may be found inadmissible including its subject matter, time-frame, the nature of the person, a conflict with a pre-existing legal procedure or the non-exhaustion of domestic remedies. Once referred, it is also open to the court to decide the case is inadmissible. Cases are usually heard before a Chamber but under Article 43(3) ECHR following that judgment, any party may request the case

²⁶⁹ See https://www.echr.coe.int/Documents/Convention_ENG.pdf - last accessed 24 January 2019.

²⁷⁰ Domestic remedies must be exhausted first before an application may be brought to the ECtHR, ECHR, Article 35.

be referred to the Grand Chamber. The referral applications are then decided upon by a panel of five judges, which decides whether they raise sufficiently 'serious' questions for the Grand Chamber to be convened. Under Article 44 ECHR, states undertake to abide by the final decision of either the Chamber or Grand Chamber and compensation may be awarded as a suitable remedy.

In applying ECHR law, the ECtHR is able to use the 'margin of appreciation' as a tool of discretion to allow for the diverse nature of different Member States. This not only means that the application of ECHR law may vary between Member States but that states may be able to vary the extent of the protection. The margin of appreciation theoretically applies to all Articles of the ECHR but traditionally its application has been minimal or omitted e.g. in relation to Articles 2, 3 and 4 which are absolute rights.²⁷¹ It is frequently used in determining judgments involving Article 9 ECHR which protects the freedom of religion and conscience.

In circumstances where a state finds it impossible or undesirable to comply with a specific Article of the ECHR, it may seek a derogation or reservation on the matter. Some Articles, e.g. Article 2 (the right to life) cannot be derogated from. Under Article 17 states are obliged to prevent any group or

²⁷¹ Morrison, C. 'The Margin of Appreciation Doctrine Standards in the Jurisprudence of the European Court of Human Rights' in *Human Rights Quarterly*, 4, 1982, p. 47. For a comprehensive account of the application of the margin of appreciation to the Articles of the ECtHR see 'The Margin of Appreciation' at https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp - last accessed 28 May 2019.

person from engaging in an activity which is aimed at the destruction or limiting of rights protected by the ECHR.

The rights protected by the ECHR are absolute, limited or qualified. The freedom from torture under Article 3 is an absolute right whereas the right to life under Article 2 is limited and, for example, does not apply where death results from defensive action against unlawful violence. Qualified rights include Article 8 (privacy), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of association).

In each case, the first part of the Article sets out the substantive right whilst the second section describes the lawful restrictions that may be placed on the right. If a right is restricted it must usually be prescribed by law and necessary in a democratic society in order to achieve a legitimate aim e.g. protecting national security. The effect of these variations to the application of the ECHR is that specific circumstances must be met if a state is going to be able to lawfully interfere with the enjoyment of a right protected by the ECHR. Moreover, even where the circumstances permit the interference with a Convention right, the state's approach must be proportionate in achieving that aim.

In addition to the substantive Articles of the ECHR, since January 2010, fifteen protocols to the Convention have been opened for signature by Member States. There are two main groups of protocols, (1) those amending

the framework of the convention system, and (2) those expanding the rights that can be protected. The former require unanimous ratification before coming into force, whilst the latter require a certain number of states to sign them before they come into force. As a result, not all protocols are adopted by all Member States.

2.4.2 Article 9 ECHR

The right which affects (and benefits) most religious people is the right protecting the 'freedom of thought, conscience and religion' Article 9 ECHR.²⁷² Historically, the right has been hard won. Its protection developed sporadically and to different extents in nation states since the growing recognition, from such costly events as the Wars of Religion (1562-1598), that a plurality of opinions and beliefs required both tolerance and respect. In other words, freely held yet conflicting beliefs needed protection.

Article 9 is closely related to and often used in conjunction with Article 10 of the ECHR which protects the freedom of expression. Article 2 of Protocol No. 1 to the ECHR concerns one specific aspect of freedom of religion, namely the right of parents to ensure the education of their children in accordance with their religious convictions. In addition, Article 9 is often

²⁷² The wording of Article 9 is as follows:

'1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to 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 for the protection of the rights and freedoms of others.'

relied upon in conjunction with Article 14 of the ECHR, which prohibits discrimination based on a number of grounds including religion and political opinions.

Article 9 is divided into two paragraphs, which need to be clearly distinguished. The first part of paragraph one protects thought, conscience and religious belief absolutely and unconditionally. This is known as the *forum internum*. The second part of paragraph one protects the manifestation of those beliefs but that right is qualified by paragraph two which allows the state to restrict religious practice in circumstances which are set in law only to the extent necessary in a democratic society for one or more legitimate aims, namely: public safety, to protect public order, health or morals or to protect the rights and freedoms of others. Clearly, it is in relation to the interpretation of the application of the second paragraph, the practice of the *forum externum*, that most concerns jurisprudence on Article 9.

Within the meaning of the ECHR, the freedom of thought, conscience and religion as enshrined in Article 9 represents one of the foundations of a 'democratic society'.²⁷³ It is regarded as fundamental not just to the identity and conception of life of religious people but also a 'precious asset for atheists, agnostics, sceptics and the unconcerned'.²⁷⁴ As such, it protects the pluralism that is so fundamental to democratic society. Religion is not defined and the protection also extends to sincerely-held philosophical convictions e.g. pacifism and also the freedom *from* religion. In order to

²⁷³ Kokkinakis v. Greece, App No 14307/88 (1993).

²⁷⁴ Ibid.

receive either personal or collective protection under the ECHR the conviction or belief must attain 'a certain level of cogency, seriousness, cohesion and importance'.²⁷⁵

One of the main tasks of the ECtHR in cases involving Article 9 is to determine whether the measures taken to limit the right at the national level are justified in principle and proportionate. In deciding on proportionality, the ECtHR frequently refers to the state's 'margin of appreciation'.²⁷⁶ This allows the state a certain scope and flexibility in relation to whether it does interfere with the right and the extent of that interference.²⁷⁷ This mechanism allows the Court to accept that in some circumstances, national authorities are better placed to evaluate local needs and conditions than the international Court. Usually, the state is accorded a wide margin of appreciation in Article 9 cases on condition that genuine pluralism is preserved. Importantly, the ECtHR will take into consideration the historical background of the state in relation to religion and so different laws may apply in different states in relation to e.g. religious symbols etc. There is general approval of the use of the margin of appreciation principle although there are criticisms of a lack of consistency in its application.²⁷⁸

²⁷⁵ Campbell and Cosans v. United Kingdom, (1982) 4 EHRR 293.

²⁷⁶ Spielmann, D. 'Whither the Margin of Appreciation?' in *Current Legal Problems*, 67:1, 2014, pp.49-65.

²⁷⁷ Saul, M. 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' in *Human Rights Law Review*, 15, 2015, pp.745-774.

²⁷⁸ McGoldrick, D. 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' in *International and Comparative Law Quarterly*, 65:1, 2016, pp.21-60 at p.39.

The case-law of the ECtHR also places on states a 'duty of neutrality and impartiality.'²⁷⁹ Essentially, this requires the state to avoid making an assessment of whether a particular religious viewpoint is legitimate or valid. It also prevents the state from involving itself directly in disputes between religions. Whilst the formulation to maintain neutrality stance between different religions appears to be reasonable and equitable it is difficult in practice.²⁸⁰ The issue of neutrality is contentious. It is easy to understand the sentiment behind the requirement, especially in the context of the state's commitment to preserving and encouraging a tolerant and plural society. It is more difficult to substantiate the practical application of neutrality given that some states maintain historic ties with a particular religion and the reality is that religions and the ways in which they manifest their beliefs in public vary.

Article 9 places an immense variety of positive and negative obligations of the state in relation to how it must deal with religions.²⁸¹ These cover issues as diverse as religious symbols, proselytism, education and taxation. Some of these will be discussed in the forthcoming chapters when assessing the extent to which the relations between public authorities and religious bodies are more in compliance with democratic credentials.

²⁷⁹ Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria, nos. 412/03 and 35677/04 (2009) para. 119.

²⁸⁰ See Madeley, JTS. and Enyedi, Z. *Church and State in Contemporary Europe: The Chimera of Neutrality*, London, Routledge, 2003.

²⁸¹ For comprehensive accounts of the general case-law on the freedom of religion see Evans, C. *Freedom of Religion under the European Convention on Human Rights*, Oxford: Oxford University Press, 2001; Taylor, PM. *Freedom of Religion: UN and European Human Rights Law and Practice*, Cambridge: Cambridge University Press, 2005; Evans, MD. 'Freedom of Religion and the European Convention on Human Rights: approaches, trends and tensions' in Cane, P. et al. (eds.), *Law and Religion in Theoretical and Historical Context*, Cambridge: Cambridge University Press, 2008.

2.4.3 Religion-state relations and the Council of Europe

The Council of Europe is principally concerned with developing human rights, shaping attitudes towards democracy and ensuring the preservation of the rule of law. It has become increasingly concerned about the place of religion in society for a number of decades. This concern has become more intense in recent years following the growth in terrorist atrocities carried out by radical Islamist groups and the consequent threats this has presented to social cohesion.²⁸²

The Council of Europe questions whether a state should, as a matter of policy, continue to endorse one particular religion over others. For many states this issue is contentious and a politically and culturally difficult question. It regards the separation of religion from the state as a principle conducive to healthy democratic governance and, therefore, to be welcomed. At paragraph 4 of Recommendation 1804 entitled 'State, religion, secularity and human rights', the Parliamentary Assembly of the Council of Europe in 2007 stated that:

'one of Europe's shared values, transcending national differences, is the separation of church and state. This is a generally accepted principle that prevails in politics and institutions in democratic countries.'²⁸³

²⁸² See Cranmer, F. 'Religion, human rights and the Council of Europe: a note' in *Law and Justice*, 162:36, 2009 at p. 41 for Assembly Recommendations, Resolutions and other texts relating to religion up to 2009.

²⁸³ Recommendation 1804 (2007) of the Council of Europe Parliamentary Assembly. Assembly debate on 29 June 2007.

That the separation of church and state is a 'generally accepted principle' has been criticised as not representing the facts about church-state relations in Europe.²⁸⁴ Cranmer holds that the Council of Europe's emphasis on the effective separation of the state from religion stems from the influence of France and Turkey which both adhere to a form of the principle of *laïcité* involving a 'strict' separation between religion and the state.²⁸⁵

Looking at the wider context of the Recommendation, the Assembly draws attention to the fact that whilst church attendance has fallen over the twenty years preceding 2007, religion itself and its role in society, has become a central issue of debate.²⁸⁶ It also accepts that practice varies between states recognising that even formal arrangements between a state and religion are not illegal as long as they are compatible with human rights norms and do not undermine them.

Recommendation 1804 suggests that states do not allow the dissemination of religious principles which, if put into practice, would violate human rights. To enforce compliance it suggests that states should require religious leaders to take an unambiguous stand in favour of the precedence of human rights, as set forth in the ECHR, over any religious principle.²⁸⁷ The concern is to prevent a situation arising in Europe where politics and law are insufficiently independent from religion.

²⁸⁴ Cranmer, F, 'Notes on Church and State in the European Economic Area 2011', p.45 at http://www.law.cf.ac.uk/clr/networks/Frank%20Cranmer_%20Church%20&%20State%20in%20W%20Europe.pdf - last accessed 24 January 2019.

²⁸⁵ Ibid, p. 44.

²⁸⁶ Recommendation 1804 (2007) paras. 6 and 7.

²⁸⁷ Ibid, para. 17.

In relation to religion-state relations in Europe, the ECtHR has recognised that there is no single model and wide variety of models exist which largely follow the history development of the state in question. The ECtHR accepts the broad formulations of: 1. countries with a state church or an established church; 2. secular polities that are either strictly, or largely separatist and 3. co-operative or concordat style systems, as models of religion-state relations and has acknowledged that, in principle, all three are compatible with Article 9.²⁸⁸ As a result, the ECtHR permits a state to maintain close historical ties with one particular religion, giving that religion certain privileges and, in some cases, imposing duties and responsibilities on it that are not available to other religions operating within its jurisdiction.²⁸⁹

At the same time, it would seem that formal church-state systems (as we have seen in relation to Denmark), are regarded as anachronistic, reflecting a time when religion played a more centrally pervasive role in society. Whilst they are not necessarily regarded as being incompatible with democracy *per se*, there is an implicit acknowledgement that they are at variance with the general principle.

There are a number of reasons why the Council of Europe accepts a variety of religion-state relations. Formal church-state systems appear to have had to be regarded as a *fait accompli* by those who have internationally interpreted the freedom of religion rights since the mid-twentieth century and

²⁸⁸ See, for example, *Darby v. Sweden*, (1991) 13 EHRR 774 and *Asatruarfelagid v. Iceland* (dec.), Application No. 22897/08, 18 September 2012.

²⁸⁹ See, for example, *Lautsi v Italy*, App no 30814/06 (3 November 2009).

this effectively ruled out a direct interventionist approach but nevertheless allowed the Council of Europe to steer future developments in church-state relations in a particular direction. Church-state systems were deemed permissible as long as the religious and philosophical freedom of other citizens was respected and upheld. While it is now clear that secularisation is not resulting in the demise of religion, most European states are becoming more secular, including those with formal church-state systems.²⁹⁰

At the same time, there is evidence of religion being used to seek to influence law and politics in ways that conflict with the thrust and development of human rights law.²⁹¹ Whilst this influence goes beyond the narrow confines of formal religion-state systems, it potentially impinges on the degree of separation there needs to be between religion and the states that have increasingly plural and diverse populations.²⁹² The politically assertive presence of Catholicism in Poland is a good example of this development.²⁹³

The discussion of religion-state relations in Europe has so far concentrated on Christianity as being both the religion that has had most influence on the development of European civilisation and the religion that is still the most

²⁹⁰ See Eurostat's Eurobarometer opinion polls at http://ec.europa.eu/public_opinion/archives/ebs/ebs_341_en.pdf pp 206-207. It should be noted that there are significant divergences between countries.

²⁹¹ See Stan, L. and Turcescu, L. *Church, State, and Democracy in an Expanding Europe*, Oxford: Oxford University Press, 2001, p.209.

²⁹² Countries like Germany and Italy provide finance to certain religious groups. Norway, Denmark, Spain, Sweden and Greece provide government subsidies only to the majority church.

²⁹³ Zuba, K. 'The Political Strategies of the Catholic Church in Poland' in *Religion, State and Society*, 38:2, 2010, pp.115-134; Szumigalsha, A. 'The Polish Catholic Church's perception of the processes of EU integration and Europeanisation in the context of traditional norms and values' in *Religion, State and Society*, 43:4, 2015, pp.342-356.

influential today. Islam is the second largest religion by population in the EU. Whilst most Muslims choose to live peaceably within a Member State adopting and integrating into the established Western culture to different extents, each Member State and the European institutions have had to counteract and deal with the consequences of radical Islam.²⁹⁴

In its attempts to do this, the Council of Europe has had to carry out a difficult balancing exercise between appearing to disregard historic links between a state and a religion, usually a form of Christianity, which has become culturally entrenched and, therefore, commonly acceptable and the potential threats to democracy that are implicit in certain forms of radical Islam. In his report, 'Islam, Islamism and Islamophobia in Europe', made to the Parliamentary Assembly on 25 May 2010, Rapporteur Mogens Jensen sought to describe the place of Islam in contemporary Europe and some of the challenges that creates.²⁹⁵ Noting the significant increase in the Muslim population of Europe since the 1950s he carefully described the key tenets of Islam, briefly discusses the diversity within Islam before considering some of the threats that extremist forms of Islamism present.²⁹⁶ He is unequivocal about the risks that Islamism creates for a democratically ordered society, stating that:

²⁹⁴ Ramadan, T. *Western Muslims and the Future of Islam*, Oxford: Oxford University Press, 2004; Jenkins, P. *God's Continent: Christianity, Islam and Europe's Religious Crisis*, Oxford: Oxford University Press, 2007; Roy, O. *Secularism Confronts Islam*, (translated by George Holoch) New York: Columbia University Press, 2007.

²⁹⁵ Document 12266, 25 May 2010, 'Islam, Islamism and Islamophobia in Europe', Report to the Committee on Culture, Science and Education by Rapporteur Mogens Jensen, Denmark, Socialist Group, para. 34.

²⁹⁶ The Muslim population of Europe increased from around 800,000 in 1950 to approx. 23 million in 2007.

'Islamists pursue a model of society incompatible with the values and political structures of a democratic, tolerant and pluralistic Europe. Their claims challenge democracy, secularity and human rights. Islamists are not willing to submit to a national legal framework as this is perceived to go against their religious belief. They do not accept the separation between religion and state.'²⁹⁷

In trying to articulate a way forward for Muslim integration into European democracies and their cultural and religious pluralism, the Jensen report stresses that 'Europe's religious and cultural pluralism is based on principles and values which are beyond any religious or cultural particularities because they aim to protect the rights and freedoms of others.'²⁹⁸ The report reiterates the requirement for a proper separation of the state from religion in the clearest terms. It is open about the fact that many Muslims regard their faith as incompatible with secularism because Islam fuses the religious, political and social components of life. But it also makes the crucial point that secularism does not mean that individuals cannot live and publicly practise their own values or that politicians cannot have religious values. It simply means that state institutions must remain neutral towards all religions and should therefore not prefer a particular religion.'²⁹⁹

This plea to Member States to actively support religious organisations in engaging in intercultural dialogue mirrors the approach of the European

²⁹⁷ Document 12266, 25 May 2010, para. 34.

²⁹⁸ Ibid, para. 52.

²⁹⁹ Ibid, para. 56. See also Resolution 1743 (2010) 'Islam, Islamism and Islamophobia in Europe' para.6, Assembly debate on 23 June 2010.

Union. It is the suggested *modus operandi* for both supranational organisations to achieve their aims of securing a peaceful and tolerant society.³⁰⁰ However, if the role of secularism is essentially to ‘hold the ring’ for competing religious interests, it is neither assured nor uncontested.³⁰¹

Julian Rivers recognises the potential risks in this approach which seek to reduce the significance of religious difference by effectively using human rights law to inoculate conflicting views between different religions and between religions and secularists.³⁰² These differences should not be underplayed, as they can be seen as the source of intense conflict in many parts of the world. While the notion of a ‘clash of civilisations’ should not be overplayed the clash of belief, values and ethical systems should also not be unduly disregarded.³⁰³ Rivers criticises what he calls the ‘equalities approach’ in international human rights discourse as seeking to apply standards which were originally intended only to apply to contracting states to religions and religious organisations. He is concerned that the ‘mutual respect approach’ implicit in attempts to promote intercultural dialogue fails to acknowledge that enforcing blanket human rights standards on religious people, can itself be a form of discrimination and reduction of religious freedom.³⁰⁴ Preferring human rights to be used to protect the religious individual and religious groups from governmental interference, he rails

³⁰⁰ Klausen, J. *The Islamic Challenge: Politics and Religion in Western Europe*, Oxford: Oxford University Press, 2005.

³⁰¹ See Davie, G. *Europe: The Exceptional Case: Parameters of Faith in the Modern World*, London: Longman Todd, 2002.

³⁰² Rivers, J. *The Law of Organised Religion: Between Secularism and Establishment*, Oxford: Oxford University Press, 2010, p. 36.

³⁰³ Huntington, SP. *The Clash of Civilisations and the Remaking of the World Order*, New York: Simon and Schuster, 1996.

³⁰⁴ Rivers, J. *The Law of Organised Religion: Between Secularism and Establishment*, Oxford: Oxford University Press, 2010, p. 36.

against public bodies being used to regulate religious difference stating that the 'reinvention of government as the benign promoter of a new syncretistic public orthodoxy is only one step from oppression.'³⁰⁵

A new model of religion-state relations needs to address the concern over the extent to which human rights law can be used to ensure the liberality of the state in the face of illiberal or anti-liberal individuals or groups.³⁰⁶ Human rights law has become crucial to the liberality of liberal democracy. As Rubinstein passionately states, 'Liberalism is the result of a long, painful and bloody struggle to organise human society on the rational principle of human autonomy and dignity.'³⁰⁷ The fundamental freedoms it protects have seen human rights law take a central position in the constitutions of liberal democracies at both a national level and also at the supranational level.

³⁰⁵ Rivers, J. *The Law of Organised Religion: Between Secularism and Establishment*, Oxford: Oxford University Press, 2010, p. 36.

³⁰⁶ Other protected rights include the freedom of expression and laws against discrimination.

³⁰⁷ Rubinstein, A. 'Unashamed liberalism: illiberal and anti-liberal minorities' *Public Law*, 2017, p.286.

2.5 Concluding remarks

This chapter has set out the four core features of liberal democracy. They ensure that the citizen can participate in the democratic process whilst also being protected from the violation of their rights by the state, other institutional actors or individuals. Participation is crucial for the legitimacy of the democratic process as it allows each person to feel that they have a personal role and investment in their own governance. At the same time, aspects of democratic participation may be rendered ineffective or problematic where the citizen is not sufficiently educated or socialised. Many people simply do not vote.

The rule of law is the underlying principle which protects a citizen's rights but we have seen that questions remain over how that rule is construed. We have contrasted 'formal' and 'substantive' approaches in order to consider its moral foundations. In Chapter 6 we will seek to consider how a commitment to the rule of law, built on a consensus across religious and non-religious divides, may bolster support for liberal democracy generally.

We have seen that the development of the separation of powers has become a critical feature of each of the liberal democracies considered. There is a variation in its application both in terms of its strictness and weighting. Each country has an independent judiciary which has the powers of some form of judicial review at its disposal. On the other hand, there is some degree of overlap between the legislative and executive functions. The separation of

powers is frequently criticised as being ineffective and failing to hold the executive to account. This can lead to a lack of confidence in the democratic process by members of the public. Despite this, most countries share a sense that the branches of government are capable of ensuring effective liberal democratic government without the participation of other organisations like religion. The extent to which the state and its law-making institutions should be separate from religious involvement is a key question considered in the chapters that follow.

Finally, human rights law ensures the protection of minorities against the implementation of policies which may have majority support but which violate fundamental rights. We have seen that there is little or no consensus over the grounding of fundamental rights and this remains a contentious issue with regards to religion. The interpretation and application of human rights law is largely a matter of supranational governance and it features significantly in the discussion of the classical models of religion-state relations to which we now turn.

Chapter 3

United Kingdom

3 Introduction

The Church of England's constitutional role within the United Kingdom ('UK') is unique as it embodies the key features of the establishment model of religion-state relationship. It has been chosen for the study because whilst the Church of England is a religious organisation whose pastoral and doctrinal role is limited to England, it has a role and exerts influence over the British constitution as a whole.

The Church of England has been the established church in England since the Reformation when the Act of Supremacy 1534 repudiated papal authority.³⁰⁸ Despite political devolution within the UK, there is an on-going constitutional relationship between the Church of England and the Westminster Parliament. The Church of England plays a central role in the Coronation Service and the Head of State is required by law to be in communion with the Church of England. Church of England bishops sit in the House of Lords and a legal mechanism continues to exist by which Parliament could potentially influence Church affairs.

³⁰⁸ The Church of England sees itself as both a reformed and catholic church with a pre-Reformation heritage as the *Ecclesia Anglicana*, which had always sought to maintain a degree of independence from Rome. See Haines, RM. *Ecclesia Anglicana: Studies in the English Church of the Later Middle Ages*, Toronto: Toronto University Press, 1989.

I agree with the conclusion of Garcia Oliva and Hall that establishment cannot be analysed in isolation of the wider legal framework affecting law and religion.³⁰⁹ In acknowledging this, the chapter discusses establishment with reference to that framework and also in relation to the historical development of the freedom of religion. Section 1 briefly analyses the political and religious demography of the UK. Section 2 discusses the key aspects of the establishment model focusing on the Church of England's unique links with government. This provides the basis for a historical discussion in Section 3 on how, in response to increased religious freedom, the State has gradually sought to release its control of the Church of England through a period of unilateral de-erastianisation. Section 4 focuses on the Church's parliamentary opposition to the introduction of same-sex marriage as a case study. It shows how the Church attempted to use its position in the House of Lords to ensure that the general law on marriage continued to reflect its traditional teaching. In concluding remarks, consideration is given to what extent liberal democracy is best served by the establishment model, which so closely aligns the state with one particular form of religion.

³⁰⁹ García Oliva, J. and Hall, H. *Religion, Law and the Constitution: Balancing Beliefs in Britain*, London: Routledge, 2018, p.438.

3.1 Political and religious demography

3.1.1 Political demography

The United Kingdom of Great Britain and Northern Ireland consists of England, Scotland, Wales and Northern Ireland.³¹⁰ The population of the UK is estimated to be approximately 66.5 million people.³¹¹ The UK is a unitary State under a constitutional monarchy. Queen Elizabeth II is the current Monarch and Head of State. The Constitution of the UK is uncodified and includes statute, common law, international treaties and constitutional conventions. There is no separate branch of constitutional law and constitutional reform can take place by ordinary statute, although Parliament cannot bind its successors.

The UK has a parliamentary government consisting of an elected House of Commons and an appointed House of Lords. All legislation must be given Royal Assent before becoming law. Scotland, Wales and Northern Ireland have forms of devolved government but England does not.³¹² All countries in the UK elect Members of Parliament who sit in the House of Commons at Westminster. The United Kingdom does not have a single legal system. There is a system for England and Wales which is largely separate from

³¹⁰ The Acts of Union 1707 brought together the Kingdom of England and the Kingdom of Scotland to form the United Kingdom of Great Britain. The Acts of Union of 1800 combined Great Britain and Ireland to form the United Kingdom of Great Britain and Ireland.

³¹¹ See <http://www.worldometers.info/world-population/uk-population/> - last accessed 24 January 2019. England is geographically and by population the largest country in the United Kingdom. According to the 2011 Census the total population of the UK was 63,181,775 of which 53 million lived in England.

³¹² For a review of the complexity of UK devolution especially as it affects the legal system see: Leyland, P. 'The multifaceted constitutional dynamics of U.K. devolution' in *International Journal of Constitutional Law*, 9:1, 2011, pp.251-273.

those which apply to in Scotland and Northern Ireland.³¹³ However, there is a Supreme Court of the United Kingdom, which was established in 2009, which is the highest domestic court for all civil and criminal cases in England, Wales and Northern Ireland and all civil cases in Scotland.³¹⁴ The UK is a founder member of the Council of Europe.³¹⁵ It has been a member of the European Union since 1 January 1973 but voted to leave the economic block in a referendum which took place on 23 June 2016.³¹⁶

The main political parties in the UK that have representation at Westminster are the right of centre Conservative Party, the left of centre Labour Party and the centrist Liberal Democrats. Scotland elects members of Parliament from each of these parties and also from the Scottish National Party which campaigns for Scottish independence from the UK. Northern Ireland has a number of political parties amongst which the Democratic Unionist Party is the main party represented at Westminster. Sinn Féin is an Irish nationalist party and campaigns for a united Ireland. It is the only other political party from Northern Ireland to have representation at Westminster but historically declines to take up its seats. The remaining seats in Parliament are taken up by Plaid Cymru, a Welsh nationalist party, the Green Party and a small number of independents.

³¹³ Article 19 of the Treaty of Union brought into force by the 1707 Acts of Union created the Kingdom of Great Britain and guaranteed Scotland's separate legal system.

³¹⁴ The Supreme Court replaced the Appellate Committee of the House of Lords.

³¹⁵ The Council of Europe was founded on 5 May 1949.

³¹⁶ It was expected that the UK would leave the EU on 29 March 2019 but at the time of writing this has been delayed.

3.1.2 Religious demography

The UK is a multi-religious and multi-ethnic country with a Christian heritage stretching back over 1400 years. Like many countries in Western Europe regular church attendance has fallen rapidly since the mid-twentieth century. According to the 2001 Census, 72% of the population identified as Christian but that had reduced to 59.4% in the 2011 Census.³¹⁷ At the same time, immigration has contributed to the increase in members of other faiths living in the UK during this same period. The Muslim population increased from 1.6 million in 2001 to 2.7 million in 2011 making it the second largest religious group in the UK.³¹⁸

Based on data from the 2011 Census, 59.4% of people in England identified as Christian, 5% Islamic, 1.5% Hindus, 0.8% Sikhs, 0.5% Jewish, 0.5% Buddhist. Importantly, 31.9% of respondents claimed to be of no religion or did not state a religion and this figure represented a doubling of the 2001 Census information. The Census information includes both adults and children but polling evidence on religion varies where surveys just contact adults. For example, a British Social Attitudes survey in 2016 asked adults across the UK if they regarded themselves as belonging to any particular religion and 53% of respondents selected 'no religion'. 41% indicated they were Christians while 6% identified with non-Christian religions.

³¹⁷ See Office for National Statistics at <https://www.ons.gov.uk/> - last accessed 24 January 2019.

³¹⁸ Ibid.

All surveys on church attendance, particularly in the Church of England, show a serious pattern of decline amongst traditional denominations.³¹⁹ In 1980, 11% of the population of the UK regularly attended a church service with the average age of those attending being 37. By 2012 attendance had fallen to 6% of the population with an average age of 51 and it is predicted that attendance could fall to 4% by 2020 with an average age of 56.³²⁰ The most recent figures for Church of England weekly attendance in 2017 show a continued decline to 722,000 which is 18,000 fewer than in 2016.³²¹ Figures published by the British Social Attitude Survey in September 2018 showed that affiliation to the Church of England was at a record low with only 14% of all ages identifying with it (this was 31% in 2002) and only 2% of young adults identifying with it.³²² A study in 2004 showed that approximately 930,000 Muslims attended a mosque at least once a week and it is likely to be the case that this underestimates the number of practising Muslims as most Muslims also pray at home.³²³

The results of these demographics reveal a number of potential consequences. If the broad patterns continue, then the UK will become increasingly secular. The most rapidly increasing form of religious practice will be Islam given that Christians are mostly over 50 years of age compared

³¹⁹ See 'Church Attendance in Britain, 1980-2015' on the 'British Religion in Numbers' (BRIN) website at <http://www.brin.ac.uk/> last accessed 24 January 2019. BRIN is run by the University of Manchester and contains comprehensive empirical data of religion in the UK. See also, 'Faith Survey' at <https://faithsurvey.co.uk/index.html> - last accessed 24 January 2019.

³²⁰ 'WhyChurch Attendance Trends', *WhyChurch*. 2012. Retrieved 6 May 2012.

³²¹ See the Church of England Statistics for Mission 2017 at <https://www.churchofengland.org/more/policy-and-thinking/research-and-statistics/key-areas-research#church-attendance-statistics> – last accessed 24 January 2019.

³²² See <http://www.bsa.natcen.ac.uk/> - last accessed 17 November 2018.

³²³ See 'The Future of the Church' by Christian Research, 2004 at <http://www.christian-research.org/religious-trends/> - last accessed 24 January 2019.

to the number of Muslims under the age of 30.³²⁴ Perhaps the greatest contact between faith-based organisations and the non-religious public in the UK is in relation to the provision of education. Despite increasing secularism, the number of faith based schools is increasing and whilst most continue to be of Christian ethos other faiths are opening schools.³²⁵

The UK is a multi-faith state with a religious demography moving in an increasingly secular direction. However, it would be wrong to characterise the UK as a *de facto* secular state, it is both secular and religious. Constitutionally, the Church of England is an example of a *de jure* or legal form of establishment. It is to the interaction between the Church of England and the State that we now turn.

³²⁴ Demographic report 'Europe's Growing Muslim Population' by the Pew Research Centre, 29 November 2017.

³²⁵ For recent information and statistics of the provision in England see Long, R. and Bolton P. 'Faith Schools in England: FAQs', *House of Commons Briefing Paper, No. 06972*, 6 June 2018 at <http://researchbriefings.files.parliament.uk/documents/SN06972/SN06972.pdf> - last accessed 24 January 2019.

3.2 The model – Establishment

Whilst the focus of the chapter is on the unique aspects of the constitutional role of the Church of England as the established church, it is important to recognise the wider legal framework for religion in the UK. Space does not permit a comprehensive analysis but this has been carried out by a number of commentators in recent years.³²⁶ The general framework provides the context within which establishment sits.

3.2.1 The general framework of law and religion

I agree with Garcia Oliva and Hall that the UK's current legal framework is welcoming towards religion and positive in facilitating its practise, although I am less convinced with their view that the entire legal framework is religious.³²⁷ It is neither codified nor the product of some overarching design. Being the result of historical contingency it is not systematic and contains anomalies. Its development up to the mid-eighteenth century was largely the result of the privileged role of the Church of England and the tensions that provoked with Catholicism and dissenting protestant traditions. Since then, the framework has developed alongside increasing secularism and the adoption by the State of functions previously undertaken by religion.³²⁸

³²⁶ García Oliva, J. and Hall, H. *Religion, Law and the Constitution: Balancing Beliefs in Britain*, London: Routledge, 2018. Rivers, J. *The Law of Organized Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010. Sandberg, R. *Law and Religion*, Cambridge: Cambridge University Press, 2011. Ahdar, R. and Leigh, I. *Religious Freedom in the Liberal State*. Oxford: Oxford University Press, 2005.

³²⁷ García Oliva, J. and Hall, H. *Religion, Law and the Constitution: Balancing Beliefs in Britain*, London: Routledge, 2018, p.438.

³²⁸ Rivers, J. *The Law of Organized Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010, p.25-32.

Rivers attempts to search for a constitutional principle which can be applied to the law of organised religions.³²⁹ He accepts the difficulties inherent in such a task and concludes that if a new constitutional settlement for law and religion is sought, it should exhibit a balanced approach between establishment and secularism. In so doing, Rivers hopes this will avoid what he considers the pitfalls of indifference towards religion and state-sponsored atheism.³³⁰

It is widely accepted that establishment does not hinder the freedom of religion generally but, as we shall see, there are questions about the equality of religions.³³¹ The UK protects the freedom of conscience and religion primarily through the Human Rights Act 1998 which gives effect to the European Convention on Human Rights in domestic law.³³² Religion is also a protected characteristic under the Equality Act 2010. In certain circumstances religion is granted exceptions from the general law but these exemptions are not guaranteed and must be argued in Parliament on a case-by-case basis.³³³

It would be easy to consider the Church of England as the only form of public religion but this is not how religion is treated under the law of England and Wales especially in relation to the registration of places of worship and

³²⁹ Ibid, p.316.

³³⁰ Ibid, p.344-347.

³³¹ Ahdar, R. and Leigh, I. Religious Freedom in the Liberal State. Oxford: Oxford University Press, 2005.

³³² A common law right to the freedom of conscience existed in England and Wales prior to the ECHR, see Halsbury's Law of England, 2011, Volume 34, para 44.

³³³ E.g. see Motorcycle Crash-Helmets (Religious Exemption) Act, 1976 which exempts Sikhs from wearing a helmet whilst riding a motorbike. See also Schedule 9 to the Equality Act 2010.

charitable status.³³⁴ Of these two, the charitable aspect is the more important because of its financial advantages under tax law. Once favouring the historical status quo, the charities regime has recently been revised under The Charities Act 2006. This Act continues to recognise the advancement of religion as a charitable purpose but has widened its scope to include the belief in many gods or none.³³⁵ Whilst it has retained the requirement that the advancement of religion should confer a public benefit, it has removed the presumption for religious charities and so the public benefit must now be demonstrable. This has gone some way to level the playing field in relation to newer forms of religious advancement. An example of the effects of an increased awareness and recognition of secular and diversity perspectives in the law can be seen in the application of anti-discrimination legislation to Roman Catholic adoption agencies in 2007. The legislation had the effect of causing the Catholic adoption agencies either to cease operation or to sever their links with the Catholic Church.³³⁶

The provision of faith schools is a major feature of the religious landscape in the UK.³³⁷ Space does not permit a comprehensive treatment but the law ranges over many areas e.g. school type and ethos, human rights, staffing, admissions and the provision of education and worship.³³⁸ The area is contentious. The Church of England and the Catholic Church fight hard to

³³⁴ Rivers, J. *The Law of Organized Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010, p.147ff.

³³⁵ Charities Act 2006, s.3(2).

³³⁶ See *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] EWHC 520 (Ch) and Butt, R. 'Catholic adoption agency loses gay adoption fight' in *The Guardian*, 26 April 2011 at <https://www.theguardian.com/society/2011/apr/26/catholic-adoption-agency-gay-lesbian> - last accessed 24 January 2019.

³³⁷ For a brief introduction see Petchey, P. 'Legal Issues for Faith Schools in England and Wales' in *Ecclesiastical Law Journal*, 10, 2007, p.174.

³³⁸ See Harris, N. *Education, Law and Diversity*, Oxford: Hart Publishing, 2007.

maintain their presence and the significance of religion against pressure from some secular organisations opposed to faith schools.³³⁹

The UK has two established churches, the Church of England and the Church of Scotland. The Church of Scotland is Presbyterian and known as the 'Kirk'.³⁴⁰ The role of the Church of Scotland is very different to that of the Church of England as it guards its independence from the State and the Scottish courts do not interfere in the church's affairs.³⁴¹ The Church of Scotland does not have a constitutional role to the same extent as the Church of England and will not be considered further. In relation to the other provinces, the Anglican Church in Wales was disestablished in 1920 and the Anglican Church of Ireland was disestablished in 1870. Apart from the established churches, all other faiths and denominations operate as voluntary associations under charity laws.

3.2.2 *The Church of England*

The Church of England consists of the two provinces of Canterbury and York each led by an archbishop and forty-two dioceses each led by a diocesan bishop. The Archbishop of Canterbury also functions as the *primus inter*

³³⁹ See the dedicated website 'No more faith schools' set up by the National Secular Society at <https://www.nomorefaithschools.org/> - last accessed 24 January 2019.

³⁴⁰ See for example, MacLean, M. 'The Church of Scotland as a National Church' in *Law & Justice*, 149, 2002, pp.125–133 and Murray, R. [Lord Murray] 'The Constitutional Position of the Church of Scotland' in *Public Law*, 1958 pp.155-162.

³⁴¹ See the Church of Scotland Act 1921 and subsequent case law.

parae amongst the bishops of the Anglican Communion.³⁴² The Church has 12,600 parishes and 19,550 clergy including 7,790 who are stipendiary.³⁴³

The relationship between the Church and State is sometimes described from the perspective of a 'high' view of establishment or a 'low' view of establishment.³⁴⁴ The 'low' view typically refers to the presence of the Church of England in England through its activities in civil society whereas the 'high view' stresses its constitutional links at the UK level.³⁴⁵ It is arguable whether this distinction is as helpful as it first appears and it may be more beneficial to regard the Church more homogeneously as a 'national' church.³⁴⁶

The Church's commitment to a nation-wide parochial system can be seen as a central feature of 'low' establishment.³⁴⁷ Through this system the Church seeks to offer Christian ministry to all parishioners. Clergy minister to their own congregations but because of establishment the Church also offers pastoral care to the wider community. Many clergy and members of congregations are actively involved in community organisations. The Church has 4,644 schools at primary and secondary level and this is its most

³⁴² The Anglican Communion is a group of 39 autonomous national and regional Churches plus six Extra Provincial Churches and dioceses that broadly share the same doctrines and liturgies, see <http://www.anglicancommunion.org/identity/about.aspx> - last accessed 24 January 2019.

³⁴³ Church of England Research and Statistics at <https://www.churchofengland.org/sites/default/files/2017-10/2016ministrystatistics.pdf> - last accessed 24 January 2019.

³⁴⁴ Carr, W. 'A Developing Establishment' in *Theology*, 1999, pp.2-10. For a focus on the 'low' church aspects of establishment see Turnbull, M. and McFadyen D. *The state of the Church and the Church of the State*, London: Darton, Longman and Todd, 2012.

³⁴⁵ See Carr, W. 'A Developing Establishment' in *Theology*, 1999, pp.2-10.

³⁴⁶ Turnbull, M. and McFadyen, D. *The state of the Church and the Church of the State*, London: Dartmon, Longman and Todd, 2012.

³⁴⁷ Davie, G. *Religion in Britain Since 1945: Believing Without Belonging*, Oxford: Blackwell Publishers, 1994.

significant public presence outside the delivery of its core religious services.³⁴⁸ Some clergy and licensed lay-workers have chaplaincy roles in universities, hospitals and the armed forces.

The Church does not receive state funding for its missionary and pastoral work. It does, however, receive some grants from the State principally to fund repairs and maintenance of historic churches and cathedrals. The Church is mainly funded through regular giving and donations from members of the Church and through investments held by the Church Commissioners. In 2017, the investment fund held by the Church Commissioners was £8.3 billion which generated an income to the Church of £226.2 million, approximately 15% of the Church's annual income.³⁴⁹ Most of these funds are used to pay clergy stipends and pensions.

A particular area where the established nature of the Church of England is relevant 'on the ground' is in its commitment to offer rites of passage to all parishioners.³⁵⁰ At common law, all parishioners have the right to present their children for baptism, to be married if they are heterosexual and to be buried by the Church of England.³⁵¹ This type of engagement with civil society is common for many faiths, but undoubtedly greater for the Church of

³⁴⁸ See the Church of England website, 'Church Schools and Academies' at <https://www.churchofengland.org/more/education-and-schools/church-schools-and-academies> - last accessed 24 January 2019.

³⁴⁹ Church Commissioners Annual Report 2017 at https://www.churchofengland.org/sites/default/files/2018-05/Church%20Commissioners%20Annual%20Report%202017_1.pdf – last accessed 24 January 2019.

³⁵⁰ The latest available statistics for the provision of Occasional Offices can be found at <https://www.churchofengland.org/sites/default/files/2017-10/2016statisticsformission.pdf> - last accessed 24 January 2019.

³⁵¹ Doe, N. *The Legal Framework of the Church of England*, Oxford University Press, 1996, pp.358-362.

England whose self-understanding is to have a national role and not to be restricted to the internal ministry of its members.

The 'high' view of establishment focuses on the constitutional relationship between the Church of England and the State.³⁵² This is a wider role within the constitution of the UK and the Westminster Parliament. It has a political and legal dimension and is central to debates about the separation of the Church and State. At the heart of the relationship is the relationship between the Church and the Crown as seen most particularly in the person of the Monarch who is both Head of State and Supreme Governor of the Church of England.³⁵³ There are links between the Church and Parliament and Church legislation has a special status. These features distinguish the Church of England from all other religious organisations in the UK and form the basis of the discussion that follows.³⁵⁴

3.2.2.1 What does 'establishment' mean in legal terms?

There is no clear legal definition of 'establishment'.³⁵⁵ Establishment has been described as a 'portmanteau, elastic term rather than a fixed, immutable concept'.³⁵⁶ The Church is frequently referred to in legislation as 'the Church by Law Established', and a number of different definitions of

³⁵² McLean, D. 'The changing legal framework of establishment' in *Ecclesiastical Law Journal*, 7:34, 2004, p.292.

³⁵³ The Act of Royal Supremacy in 1535 and the Act of Supremacy 1559.

³⁵⁴ Historically, these features date back to the Reformation, the 1688 Glorious Revolution, the Act of Settlement 1700 and the union with Scotland in 1707.

³⁵⁵ Edge, P. 'Re-orienting the Establishment Debate: From Illusory Norm to Equality of Respect' in *Anglo-American L Rev*, 27, 1998.

³⁵⁶ Cranmer, F., Lucas, J. and Morris, R. *Church and State: A Mapping Exercise*, London: The Constitution Unit of UCL, 2006, p. 6.

establishment have been proposed.³⁵⁷ The 1935 Archbishops' Commissions on Church and State, known as the Cecil Report, described establishment as:

'The expression 'Established Church' is not, however, a term of art in the sense of connoting a legal status with a well-defined and universally recognised content. The essence of establishment appears to be a recognition of some kind by the State, but the legal consequences and implications of that recognition may vary indefinitely....it means that the State has for some purpose of its own distinguished a particular Church from other Churches, and has conceded to it in a greater or less degree a privileged position.'³⁵⁸

The established nature of the Church was discussed most recently from a legal perspective in the case of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546. The substance of the case was to do with the obscure issue of liability for the chancel repairs to a parish church but it required the judges in the House of Lords to decide upon whether a Parochial Church Council was a public body for the purposes of the Human Rights Act 1998. This gave the judges an opportunity to discuss the constitutional status of the Church of England. It is worth noting at the outset, the words of Lord Hope of Craighead who said, 'The Church of

³⁵⁷ Garcia Oliva, J. 'Church, state and establishment in the United Kingdom in the 21st century: anachronism or idiosyncrasy?' in *Public Law*, 2010, pp.482-504 at p.484ff.

³⁵⁸ Cecil of Chelwood, *Church and State – Report of the Archbishops' Commission on the Relations between Church and State* London: Church Assembly, Vol.2, 1935, p.171.

England as a whole has no legal status or personality. There is no Act of Parliament that purports to establish it as the Church of England.³⁵⁹

In the Court of Appeal, counsel for the defendants had argued for a 'high' view establishment, saying that the Church of England was a public authority by virtue of its status which distinguished it from all other religious bodies. It had links with central government and, in England the public had common law rights such as baptism, marriage and burial in relation to the Church.³⁶⁰ This view was rejected by the House of Lords. Lord Hope of Craighead explained that in his view establishment in law meant that the State had incorporated Church law as a branch of its general law. This did not make it part of government because the State had not surrendered or delegated any of its functions or powers to the Church. The relationship was one of recognition.³⁶¹

Lord Roger of Earlsferry focused on the theological mission of the Church which he regarded as distinct from the secular mission of government. At the same time, he accepted that the Church had important links with the State but found it was not a public body because the links were primarily to assist the Church in accomplishing its own mission, not the aims and objectives of the Government of the United Kingdom.³⁶² Lord Roger's view is essentially separationist in that it attempts to distinguish between the spiritual

³⁵⁹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 at para. 61.

³⁶⁰ 3 All England Reports, p. 393.

³⁶¹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546; [2003] 3 All ER 1213, HL, per Lord Hope of Craighead para.61 (emphasis added)

³⁶² *Ibid*, para 156 per Lord Roger of Earlsferry.

mission of the Church and the secular mission of the State. But why should the State assist one particular Christian denomination in fulfilling its mission? The Church and State may have different objectives, but in giving special recognition to the Church of England in way unavailable to other groups, the State is *prima facie* non-neutral and unless viable reasons can justify this level of impartiality, then such a discriminatory arrangement would ordinarily contravene democratic principles.

Lord Nicholls of Birkenhead acknowledged the Church's historically important and influential role in the life of the nation. However, despite its special links with central government, he maintained that the Church remained a religious organisation and did not have the character of a governmental organisation. He accepted though that this was despite the fact that 'some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances.'³⁶³ Lord Nicholls acknowledges that these are two areas where the Church and State have decided to co-operate.

Whilst the judgement gives an insight into what establishment is, it fails to consider why establishment is necessary. This is a deficiency in the legal consideration of establishment, which, in the UK public law context, almost wholly concerns the practical and structural nature of establishment. In turning to the three aspects of establishment that distinguish the Church of England from all other religious organisations in the UK, it is the Church's

³⁶³ Ibid, para 13 per Lord Nicholls of Birkenhead. (My emphasis.)

relationship with the Monarch that is the most important and it is here that we find the true reason for establishment.

3.2.2.2 The Monarch – Head of State and Supreme Governor of the Church of England

The Monarch is the ultimate political authority in the British constitution. However, through its development into a liberal constitutional democracy, the Queen is not involved in formulating policies or law, and nor does she make decisions on whether they are implemented.³⁶⁴

The relationship between the Monarch and the Church of England has been fundamental to the concept of establishment ever since Henry VIII (1509–1547) broke all links with Rome at the Reformation. Since then, the Monarch has been Head of State and Head of the Church. The subsequent title of ‘Supreme Governor’ was first used in the Oath of Supremacy in the Act of Supremacy 1559 during the reign of Elizabeth I (1558–1603) and continues to be used today.

Following the Glorious Revolution of 1688, the Bill of Rights 1689 prohibited absolute monarchy. England developed as a constitutional monarchy throughout the eighteenth and nineteenth centuries when the institutions of government including executive authority and parliamentary sovereignty evolved. In the nineteenth century, the convention that the Crown, in the

³⁶⁴ Bogdanor, V. *The Monarchy and the Constitution*, Oxford, Clarendon Press, 1995, pp.1-41.

exercise of its prerogative powers, must act on the advice of ministers became recognised and accepted.³⁶⁵ The Parliament Acts of 1911 and 1949 confirmed the primacy of the House of Commons over the House of Lords. The ban on the Monarch or heir to the throne being a Roman Catholic set out in Section 2 of the Act of Settlement 1700 remains in place. The Monarch must be in communion with the Church of England but does not exercise an executive role.³⁶⁶

In 2002, following a period of constitutional reform carried out by the then Labour government, the Fabian Society set up an independent commission to report on the future of the monarchy.³⁶⁷ Its report highlighted the 'deep and complex' relationship of the United Kingdom and the monarchy but emphasised that despite its representative and ceremonial role, the 'monarchy is more than a symbol; it is the centrepiece of Britain's constitution'.³⁶⁸ The Commission noted that whilst it is unlikely that a newly constituted democratic state would choose to introduce a hereditary monarchy, the model had offered a rich source of continuity and stability and was commonly regarded as being above sectarian or political interests. The Commission was concerned that, given the UK's increasingly diverse ethnic, religious and geo-political make-up, the monarchy's role could only continue in that vein without being undermined if it were to 'become more

³⁶⁵ Poole, T. 'United Kingdom: The royal prerogative' in *International Journal of Comparative Law*, 8:1, 2018, pp.146-155.

³⁶⁶ Act of Settlement 1701 ss.1 and 3. The most recent legislative change affecting the monarchy is the Succession to the Crown Act 2013. Under the Act, both the monarch and those in the line of Succession are now able to marry Roman Catholics. Morris, R. 'The Succession to the Crown Act' in *Ecclesiastical Law Journal*, 15:2, 2013, p.186.

³⁶⁷ The Fabian Society, *The Future of the Monarchy*, The Report of the Fabian Commission: The Fabian Society, 2003. ('Fabian Report'.)

³⁶⁸ *Ibid*, pp.131-132.

representative at a symbolic level, and its functions more appropriate at a constitutional one.³⁶⁹ In other words, if the monarchy adapted to meet the aspirations of a changing demography, this would enable a greater proportion of the population to feel a sense of belonging and the ability to participate more fully as stakeholders in democratic life of the nation.

Religion concerned the Commission in relation to a number of succession issues and also substantively, in relation to the role of the Monarch as Supreme Governor of the Church of England. Many of the non-religious proposals for reform that the Commission proposed have been adopted but of the reforms involving religion, few have been implemented. In particular, the Report recommended the complete removal of the ban on Roman Catholics acceding to the throne.³⁷⁰

The depth and intensity of the Monarch's relationship with the Church of England can be seen most clearly in liturgy of the Coronation Service which is an important constitutional document.³⁷¹ It is an initiation rite, theological in nature and, I believe, crucial to a proper understanding of establishment. In essence, it attempts to ground the constitution and its institutions within a theological vision of God's justice. According to this understanding, the constitution is underpinned by religious principles founded on an Anglican conception of justice and not merely the will of the people.

³⁶⁹ Ibid, p.132.

³⁷⁰ Ibid, p.135. On the Roman Catholic question see, Pepinster, C. *The Keys and the Kingdom: The British and the Papacy from John Paul II to Francis*, London: Bloomsbury T&T Clark, 2017, p.125f.

³⁷¹ Bradley, I. *God Save the Queen: The Spiritual Heart of the Monarchy*, London: Continuum, 2012, p.91.

3.2.2.3 Theologizing the Monarchy

It is possible to highlight some of the central features of the Coronation Service in order to glimpse the theological setting of the Monarch within the constitution.

The liturgy has ancient origins and at its core, the Monarch is anointed by God. Sir Roy Strong writing about the Coronation said, 'I have been struck by the widespread ignorance as to the nature of this ancient rite, *au fond* a foundation stone of the British state and a bulwark against its total secularisation.'³⁷² The long reign of Queen Elizabeth II (1952 – present) has meant that several generations have not witnessed a Coronation and so knowledge and familiarity with the liturgy and its theology are rare.

The service establishes the sovereign's authority as being derived from God and the Coronation Oath requires the Monarch to protect the Church.³⁷³ After taking the oath, the Queen receives the Bible, given with the words: 'Our gracious Queen: to keep your Majesty ever mindful of the law and the Gospel of God as the Rule *for the whole life and government* of Christian Princes....Here is Wisdom; This is the royal Law; These are the lively Oracles of God.'³⁷⁴

³⁷² Strong, R. *Coronation: A History of Kingship and the British Monarchy*, London: HarperCollinsPublishers, 2005, p.xi.

³⁷³ Coronation Oath Act 1688 s.3.

³⁷⁴ Ratcliff, EC. *The Coronation Service of Her Majesty Elizabeth II*, London: SPCK and Cambridge: Cambridge University Press, 1953, p.39. (My emphasis.)

The anointing is regarded as the most sacred and holy moment in the Coronation rite. Here, the Queen becomes of religious significance in her own person; consecrated and set apart and sacralised. A panoply of rich theological language and symbolism follows which combine metaphors of theology and justice. Throughout the liturgy, Christian ethics and its conceptions of justice and sin are placed at the heart of the constitution.

The most striking statement of Christian hegemony is expressed in the presentation of the Orb representing the world. Surmounted by a cross representing Christ's dominion, it is placed in the Monarch's right hand with the words: 'Receive this Orb set under the Cross, and remember that the whole world is subject to the Power and Empire of Christ our Redeemer.'³⁷⁵ The theological language continues as more regalia are invested.³⁷⁶ At 'The Putting on of the Crown', which is topped with an orb and cross, everyone present acclaim 'God save the Queen'.

The Coronation binds together the constitutional life of the Monarch with the life of the Church. It is through this relationship that the Church retains its influential presence in British constitutional life. It is a relationship that is divine, ecclesiastical and hereditary. It is also reciprocal and all Church of England clergy must swear an oath of allegiance to the Monarch.³⁷⁷

³⁷⁵ Ratcliff, EC. *The Coronation Service of Her Majesty Elizabeth II*, London: SPCK and Cambridge: Cambridge University Press, 1953, p.48.

³⁷⁶ The historic title of 'Defender of the Faith' has been used by the Monarch since 1521 when it was bestowed on King Henry VIII by Pope Leo X.

³⁷⁷ Bursell, R. 'The clerical oath of allegiance' in *Ecclesiastical Law Journal*, 17:3, 2015, p.295.

The place of the Church of England and its link with the State is rededicated at each Coronation. The fact that this relationship has a theological basis and not a democratic one was observed in 1911 when Archbishop Davidson wrote to the Archbishop in the York about the Coronation service saying, 'The usings of Feudal times don't fit well into a Democratic age!'³⁷⁸ Ratcliff, the liturgist responsible for the 1953 Coronation, said that the service 'reflects the persistent intertwining of sacred and secular, of civil and ecclesiastical. It reflects particularly the historical English conception of the mutual relations of Sovereign, Church and People, and of all three to God....In a word, the English Coronation Service symbolises national continuity considered sub specie Christianitatis'.³⁷⁹

The most cogently argued case supporting establishment is, I believe, by Nigel Biggar writing in 2011.³⁸⁰ He argues that establishment gives a moral legitimacy to government by providing a theological foundation. If this view is accepted, he rightly sees the Church of England's role in the Coronation Service as providing the means by which God's justice is set as the foundation of government rather than 'merely' the will of the people.³⁸¹ On this account, democratic participation and its consequences are weighed against religious scruple. For Biggar, this is the primary purpose of establishment and he defends his position against a number of criticisms.

³⁷⁸ Lang, LP. Papers, 189, fol. 264, Letter of 10 December 1910.

³⁷⁹ Ratcliff, EC. *The Coronation Service of Her Majesty Elizabeth II*, London: SPCK and Cambridge: Cambridge University Press, 1953, p.23.

³⁸⁰ Biggar, N. 'Why the 'establishment' of the Church of England is Good for Liberal Society', in Chapman, M, Maltby, J and Whyte, W (eds.) *The Established Church: Past, Present and Future*, London: Y&T Clark International, 2011, pp.1-25.

³⁸¹ Ibid, p.1.

Biggar argues that the Church of England can fulfil its role because it is a 'Christian humanist' organisation which is liberal friendly and values human dignity. He dismisses the Church of England's past opposition to religious freedom as merely an attempt to assert orthodoxy over heterodoxy. Moreover, he states that the Church of England can fulfil this role *exclusively* because whilst he accepts that there are many humanist worldviews that support a liberal perspective, public institutions and rituals cannot be brought together without becoming 'dissonant and incoherent'.³⁸² In an increasingly diverse society, Biggar's claim for exclusivity is the main weakness in his argument. It is increasingly unsustainable as Church attendance falls and Christian literacy reduces. If the exclusivity of establishment does not require disestablishment (and I think it probably does), then what is certain is that the four pillars of liberal democracy need broad public support and commitment. The constitutional basis of liberal democratic government will suffer if a vacuum is created because the key aspects of liberal democracy like the rule of law are unable to be nourished by the widest public support.

3.2.2.4 Bishops in the House of Lords

The most significant aspect of the Church's presence at Westminster is that bishops sit as of right in the House of Lords and play an active part in the legislature.³⁸³ No other European country has such a religious presence in government. The right stretches back to medieval times when the role of

³⁸² Ibid, p.6.

³⁸³ See The Church of England in Parliament at <https://churchinparliament.org/about-the-second-church-estates-commissioner/> - last accessed 24 January 2019.

bishop had a temporal, political and spiritual dimension.³⁸⁴ It is arguably the most visible exemplification of establishment and, correspondingly, the most conspicuous proof of a lack of separation between religious and political power.

Twenty six Church of England bishops are entitled to sit in the House of Lords, where, subject to certain conventions, they take part in the legislative process.³⁸⁵ They are known as the Lords Spiritual. They do not behave like a political party but have an independent yet collective voice. There is always at least one member of the Lords Spiritual present in the House of Lords when Parliament is sitting. According to the Church, the role and purpose of the bishops in the House of Lords is as 'an extension of their general vocation as bishops to preach God's word and to lead people in prayer....while they make no claims to direct representation, they seek to be a voice for all people of faith, not just Christians.'³⁸⁶ In practice, bishops take responsibility for different aspects of legislation that the Church is particularly interested in e.g. social, ethical and educational issues etc.

The Archbishops of Canterbury and York, and the Bishops of London, Durham and Winchester have permanent seats in the House of Lords because of the historic seniority of these posts. Of the remaining diocesan

³⁸⁴ Religious leaders were consulted by Saxon Kings, before the Norman Conquest. The formal right for bishops to sit in Parliament dates back to the 14th century. Drewry, G and Brock, J. 'Prelates in Parliament' in *Parliamentary Affairs*, 24:3, 1971, p 248.

³⁸⁵ Originally, all archbishops and bishops were *ex officio* members of the House of Lords but the Bishopric of Manchester Act 1847 reduced the number to 26.

³⁸⁶ <http://www.churchofengland.org/our-views/the-church-in-parliament/bishops-in-the-house-of-lords.aspx#Which> Bishops become Lords Spiritual - last accessed 24 January 2019.

bishops a further twenty-one take seats in the Lords based on their date of appointment. When a bishop retires, that See is placed at the bottom of the list and the seat is taken by the next most senior bishop who is not already a member.³⁸⁷ Bishops retire at the age of 70 and must cease to sit in the House of Lords.³⁸⁸ Archbishops are usually made life peers and other retired bishops can be appointed life peers in the usual way. The Lords Spiritual have the same rights as life and hereditary Peers. A bishop reads prayers at the start of each sitting day. A Convenor of the Lords Spiritual is appointed by the Archbishop of Canterbury in order to coordinate the work of the bishops in the Lords.

State involvement in the appointment of bishops has reduced significantly in recent years. Historically, the Sovereign had the power to appoint all bishops including the Archbishops of Canterbury and York.³⁸⁹ By convention, the Monarch makes appointments on the advice of ministers and until 1976, the decision over whose name to send to the Monarch was made exclusively by the Prime Minister. Since 1976 a committee, now known as the Crown Nominations Commission, has passed two names to the Prime Minister, usually in order of preference. The Prime Minister could recommend either of them to the Sovereign, or reject both and ask for further nominations.³⁹⁰

³⁸⁷ The Bishop of Sodor and Man and the Bishop of Gibraltar in Europe are not eligible to sit in the House of Lords, but the former has a seat in the Upper House of the Tynwald, Isle of Man. See also the temporary provisions in Lord's Spiritual (Women) Act 2015.

³⁸⁸ Ecclesiastical Offices (Age Limit) Measure 1975 (1975 No 2).

³⁸⁹ By virtue of the Appointment of Bishops Act 1534 and the Suffragan Bishops Act 1534.

³⁹⁰ See the 'Briefing for Members of the Vacancy-in-See Committee as amended July 2013.

Proposals to simplify the procedure were made in 2007. Gordon Brown, the then Prime Minister, was in favour of establishment but against Prime Ministerial involvement in making senior church appointments.³⁹¹ Today, all senior ecclesiastical appointments are made in conjunction with the Church by the Crown via a small secretariat forming part of the Cabinet Office.³⁹² The procedure removes any discretionary involvement by the Prime Minister and places the responsibility for the appointment of bishops almost totally in the hands of the Church itself.³⁹³ Whilst the lack of overt political involvement may be more appropriate for the Church, the retention of an unelected religious presence within the legislature is less clearly beneficial from a democratic perspective, especially since the appointment of bishops also falls outside the appointment procedures which apply to other members of the House of Lords. The ramifications of this have potential consequences for the operation of the separation of powers, a concern identified in 1976 by the then Prime Minister, James Callaghan who said that:

‘There are... cogent reasons why the State cannot divest itself from a concern with these appointments of the Established Church. The Sovereign must be able to look for advice on a matter of this kind and that must mean, for a constitutional Sovereign, advice from Ministers. The Archbishops and

³⁹¹ *Hansard*, HC Vol.462, col.817 (July 3, 2007).

³⁹² For a detailed exposition of the appointments process see the ‘Briefing for Members of the Vacancy in See Committee’ at <https://www.churchofengland.org/sites/default/files/2017-11/Briefing%20for%20the%20Vacancy%20in%20See%20Committee.pdf> – last accessed 24 January 2019.

³⁹³ The 1974 Synod had affirmed the principle that the decisive voice in the appointment of diocesan bishops should be that of the Church.

some of the bishops sit by right in the House of Lords, and their nomination must therefore remain a matter for the Prime Minister's concern.³⁹⁴

3.2.2.4.1 *Should bishops remain in the House of Lords?*

Proposals for constitutional reform in 2011 would have reduced the number of bishops eligible to sit in the House of Lords from 26 to a maximum of twelve. They would sit *ex officio* and, over time, their number was expected to have reduced to seven.³⁹⁵ Progress on House of Lords reform stalled and the proposals have not been implemented.³⁹⁶ Arguments for reducing the number of bishops in the House of Lords highlighted the State's lack of neutrality and impartiality in having a special relationship with one religion. There is a strong argument that retaining a permanent denominational religious presence in the legislature represents something of an aberration within the separation of powers by permitting a confessional bias unavailable to any other religious or secular organisation. Now that bishops are wholly appointed by the Church the situation is compounded by the creation of an inevitable English bias. It is a democratic anomaly which is difficult to reconcile with devolution and the Westminster Parliament's national role.³⁹⁷

The presence of religious peers remains contentious and has been subject to serious criticism because unlike other peers, they do not have to justify their

³⁹⁴ HC Deb 2 June 1976 c613.

³⁹⁵ HM Government, *House of Lords Reform Draft Bill*, London, 2011.

³⁹⁶ See the report in *The Guardian* on 10 July 2012 at <https://www.theguardian.com/politics/2012/jul/10/house-of-lords-reform-halted> - last accessed 24 January 2019.

³⁹⁷ Morris, R. 'The future of "high" establishment', in *Ecclesiastical Law Journal*, 13:3, 2011, p.260.

moral and ethical opinions to the public using sound rational arguments but can rely on religious arguments, which may or may not be worthy or respect.³⁹⁸ Arguments in favour of retaining a religious presence in the Lords includes reference to the bishop's historic role, the knowledge they bring from their dioceses and their involvement in passing Church legislation.³⁹⁹

If future reforms move in the direction towards a wholly elected chamber, then the presence of bishops may come to an end and this would have implications for the established nature of the Church.⁴⁰⁰ However, other options have been proposed.⁴⁰¹ For example in 2010 Lord Bingham proposed making the second chamber a primarily revising chamber of experts who could scrutinise legislation.⁴⁰² If this were the case, then it may be easier to justify some form of religious presence, not just from the Church of England but from other faith and also non-faith groups who have an interest and expertise in ethical issues.⁴⁰³ The Church of England has indicated for some time that it would welcome greater religious representation in the upper house and has also commented that until then, it

³⁹⁸ Warnock, M. *Dishonest to God: On keeping religion out of politics*, London: Continuum International Publishing Group, 2010, p.106-107.

³⁹⁹ Lord Mackay of Clashfern. 'Does Establishment Have a Future?' in *Law and Justice*, 170, 2013, pp.7-18 at p.13.

⁴⁰⁰ Reid, R. 'Do ideas matter? peers and reform of the House of Lords' in *Commonwealth and Comparative Politics*, 53:4, 2015, pp.497-515.

⁴⁰¹ See The Constitution Unit, University College London, *Comparative Study of Second Chambers* (London: University College, 2002), p.35, quoted in Cranmer, Lucas and Morris, *Church and State* (2006), p.21.

⁴⁰² Lord Bingham of Cornhill. 'The House of Lords: its future?', in *Public Law*, 2010, pp.261-274.

⁴⁰³ Members of other denominations and religions are appointed life peers.

is 'ready and willing to speak in Parliament for its Christian partners and for the people of other faiths and none'.⁴⁰⁴

Perhaps the central issue to consider when trying to answer the question whether the Church of England should continue to be represented at Westminster, is what practical impact the effect of having bishops in the House of Lords has.⁴⁰⁵ Some see their continuing presence as positive for the common good while others point to instances where the bishops have voted to protect the Church's position against the will of the elected government.⁴⁰⁶

3.2.2.5 Church of England Legislation – the Enabling Act 1919

According to Morris, in 1800 the Church of England 'had no national institutions uniquely its own. All significant changes in the functioning of the Church had to be processed through the legislature'.⁴⁰⁷ All matters of Church regulation, including internal issues to do with worship and doctrine, were subject to parliamentary procedure for which little parliamentary time was assigned.⁴⁰⁸

⁴⁰⁴ *The Role of Bishops in the Second Chamber. GS Misc 558*, London: Church of England, 1999, p.9.

⁴⁰⁵ Harlow, A., Cranmer, F. and Doe, N. 'Bishops in the House of Lords: a Critical Analysis', in *Public Law*, 2008, p.502.

⁴⁰⁶ McLean, I. and Peterson, S. 'A Uniform British Establishment', in Chapman, M. et al (eds.), *The Established Church: Past, Present and Future*, London: T&T Clark International, 2011, p.141.

⁴⁰⁷ Morris, R. *Church and State in 21st Century Britain: the Future of Church Establishment*, Basingstoke, Palgrave Macmillan, 2009, p.28.

⁴⁰⁸ For statistics on Church legislation see Morris, R. *Church and State in 21st Century Britain: the Future of Church Establishment*, Basingstoke, Palgrave Macmillan, 2009, p.23.

Being controlled by Parliament, the Church prior to 1919 was erastian by nature but this changed in 1919 when the Church of England Assembly (Powers) Act (the 'Enabling Act') came into force. The Enabling Act recognised the Church Assembly (later to become the General Synod) as the Church's representative legislative body.⁴⁰⁹ Under this Act, the General Synod has powers to initiate and propose Measures having statutory effect.⁴¹⁰ It also provided a protective legislative procedure designed to reduce (but not abolish) Parliament's ability to veto or reject Church Measures.⁴¹¹

There are two views of the consequences of the Enabling Act. The first sees it as part of a move towards greater independence and separation of the Church from the State. In this sense, the Enabling Act marks a reduction in Parliament's involvement in church affairs. Garcia Oliva argues that the introduction of the Enabling Act effectively brought to an end the Church of England as the state church.⁴¹² On the other hand, it is clear that some Parliamentary involvement is retained as church law continues to be part of the law of the land and so the Church's privileged position continues.

Perhaps the best way to understand the Enabling Act is that it delegates a considerable degree of autonomy to the Church to control its own affairs but

⁴⁰⁹ Detailed guidance on the structure and procedure of the General Synod can be found at 'General Guidance', October 2015 at <https://www.churchofengland.org/sites/default/files/2017-11/Guide%20to%20the%20General%20Synod.pdf> – last accessed 24 January 2019.

⁴¹⁰ Church of England Measures are the Church's legislative instruments.

⁴¹¹ See Factsheet L10, 'Church of England Measures' at <http://www.parliament.uk/documents/commons-information-office/l10.pdf> - last accessed 24 January 2019.

⁴¹² See Garcia Oliva, J. 'Church, state and establishment in the United Kingdom in the 21st century: anachronism or idiosyncrasy?', in *Public Law*, 2010, pp.482-504 at p.490.

retains a degree of oversight which refuses to allow the Church to claim full independence from the State. Whilst Parliament retains its right to legislate on matters concerning the Church of England, there is a convention that Parliament does not legislate for the Church on church matters without the Church's consent.⁴¹³

There has been a shift from the position where the Church of England's legal practice was wholly synonymous with that of the State, to the current position whereby Parliament allows the law of the Church to become part of the general law of the land. That law, however, originates from the Church itself and the State recognises and respects the Church's governance of its own affairs and 'conventionally' exercises its ultimate control with due restraint.⁴¹⁴

In this sense, the Church of England has a legal mechanism of privileged partial self-governance that is not open to other faiths. The system raises questions over why a democratic State should involve itself so closely in the affairs of one Christian denomination. The Enabling Act is, of course, a two-edged sword because as well as allowing the State the possibility to interfere in Church affairs, it also has the potential to prevent the Church participating in the democratic processes to the same extent and with the same freedom accorded to other religious organisations.

⁴¹³ Lord Salisbury in a debate on the Civil Partnership Act 2004 (Overseas Relationships and Consequential etc Amendments) Order, 19 July 2005.

⁴¹⁴ Certain measures have been controversial, and have been the subject of Divisions, for instance, the *Prayer Book Measure* of 1927. The motion to recommend this Measure for the Royal Assent was lost by 247 votes to 205 on 15 December 1927. Similarly, the *Clergy (Ordination) Measure* was rejected by the Commons by 51 votes to 45 on 17 July 1989, but subsequently agreed to by 228 votes to 106 on 20 February 1990.

3.3 Towards disestablishment – religious pluralism and the de-erastianisation of the Church of England

Morris begins his recent investigation into the future of religious establishment in England by stating that ‘from the perspective of today, it is difficult to imagine the extent to which the Church of England possessed in 1800 a significance of a kind entirely distinct from now’.⁴¹⁵ The influence of the Church of England in public life has diminished dramatically over time as the UK has become a more plural and diverse society.⁴¹⁶ Whilst the State has effectively taken steps to disestablish itself from the Church, the Church has shown no desire to separate itself from the State.

Historically, both Church and State sought to maintain the influence of the established church by suppressing religious freedom. Securing the guarantee of religious freedom has been one of the triumphs of liberal democracy and so it is ironic that the protection of religious liberty is now being used as an argument to preserve the Church of England’s established status.

⁴¹⁵ Morris, R. *Church and State in 21st Century Britain: the Future of Church Establishment*, Basingstoke, Palgrave Macmillan, 2009, p.3.

⁴¹⁶ Compare the Church’s influence today with its role in the abdication crisis of Edward VIII and the question of the late Princess Margaret’s marriage to a divorcee, Peter Townsend.

3.3.1 Church-State restrictions on the freedom of religion

A full right to the freedom of religion has emerged only gradually in England.⁴¹⁷ The birth of Anglicanism and the break with Rome at the Reformation started centuries of discrimination and distrust towards Roman Catholics.⁴¹⁸ Whilst Henry VIII's initial disagreement with Rome may have been one of authority, the move soon allowed political and theological ideas to influence and shape the legal and doctrinal nature of the reformed Anglican Church.⁴¹⁹ Being fully controlled by the State, the Church of England became a church of the nation, retaining the medieval notion that religion embraced the whole community, all of which should ideally be part of Christendom.⁴²⁰ Under the ultimate control of the Monarch, the Church was erastian and the freedom of religion was restricted. Without separation, religious allegiances and political allegiances became fused. Religious dissent was dissent against the State, treated with suspicion and persecuted. In public affairs, all other religions were subordinate to Anglican dominance.

⁴¹⁷ Rivers, J. *The Law of Organized Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010, pp.13-25.

⁴¹⁸ All monasteries and other religious communities in England and Wales were closed between 1532 and 1540 and this was followed by the dissolution of chantry foundations. See Knowles, D. *Bare Ruined Choirs: The Dissolution of the English Monasteries*, Cambridge: Cambridge University Press, 1976 and Kreider, A. *English Chantries: The Road to Dissolution* Oregon: Wipf & Stock, 1979.

⁴¹⁹ For example, in 1537 Thomas Cromwell implemented a royal order that all parishes in England should purchase a copy of the Bible (usually Tyndale's version) in English, thus securing a protestant and evangelical basis for the 'new' Church.

⁴²⁰ MacCulloch, D. *A History of Christianity*, London, Penguin Books, 2009, p.622.

A brief review of some of the religious restrictions on non-Anglicans and the reluctant lifting of those disabilities serves to illustrate how the Church of England sought to protect its powerful and privileged position.⁴²¹

3.3.2. *From religious oppression to toleration and religious freedom*

Before the nineteenth century, the lack of religious freedom and the resistance towards the toleration of non-Anglicans had been a constant feature of the legal framework in England.⁴²² The Restoration of Charles II (1660-1685) saw a series of laws which, whilst designed to suppress dissent towards the Anglican Settlement, had the opposite effect of motivating and galvanising dissenters.⁴²³ The Corporations Act 1661 required local officials like magistrates and councillors to take an oath of allegiance and supremacy stating amongst other things that they had taken communion in the Church of England within the previous twelve months.⁴²⁴ The 1662 Act of Uniformity was an attempt to impose a common form of worship across the country and required officials in universities, colleges and teachers to accept the liturgical practice of the Church of England.⁴²⁵ This was followed in 1673 with the first

⁴²¹ Comprehensive surveys include, Selbie, W. *Nonconformist Religion in England: The Struggle for Freedom of Religion*, published by Everard Publications as a Kindle eBook 2 April 2016, first published in 1912 with the title 'Nonconformity, Its Origins and Progress'. Larsen, T. *Friends of Religious Equality: Nonconformist Politics in Mid-Victorian England*. Woodbridge: The Boydell Press, 1999.

⁴²² During the 16th, 17th and 18th centuries many groups broke away from the Church of England and became collectively known as dissenters e.g. Puritans *circa* 1558, Levellers *circa* 1647, Quakers *circa* 1650. See Watts, MR. *The Dissenters*, Oxford: Oxford University Press, published in three volumes between 1985 and 2015.

⁴²³ Rivers, J. *The Law of Organized Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010, p.14. At the time, the only significant non-Christian religion was Judaism.

⁴²⁴ 13 Cha II St 2 c 1.

⁴²⁵ In education, dissenters were excluded from Oxbridge by religious tests which were finally lifted in 1931. The University of London founded in 1826, was free such tests and became the first English university to admit students regardless of their religion. See David

Test Act that required all civil servants to take an oath of allegiance and supremacy, make a declaration against transubstantiation and take communion in the Church of England at least once a year.⁴²⁶ The second Test Act in 1678 effectively banned Roman Catholics from Parliament by requiring them to deny transubstantiation and other religious doctrines and practices.⁴²⁷ There was often discrepancy between legislative requirements and its enforcement. Some accommodation was given to Trinitarian non-conformists like Baptists and Quakers through the Toleration Act 1689 which gave limited rights e.g. exemptions from taking oaths.⁴²⁸ From 1726 a series of Indemnity Acts gradually removed dissenters from the effects of the Corporation Act for which enforcement was already more honoured in the breach.⁴²⁹

By the beginning of the nineteenth century there was a degree religious diversity and limited religious freedom.⁴³⁰ If you were a member of the Church of England, you had greater rights in civil and political society than either Roman Catholic or non-conformist dissenters to whom statutory civic disabilities applied. Victorian society was both patriarchal and hierarchical

Wykes text on the law against dissent at The Queen Mary Centre for Religion and Literature in English at <http://www.qmulreligionandliterature.co.uk/research/the-dissenting-academies-project/legislation/> last accessed 24 January 2019.

⁴²⁶ 25 Cha II c 1

⁴²⁷ 30 Cha II St 2 c1

⁴²⁸ 1 W&M c 18

⁴²⁹ See Short, K. 'The English Indemnity Acts, 1726-1867' in *Church History*, 43, 1973, p.366.

⁴³⁰ For a recent account of the law relating to religious oppression and toleration see Rivers, J. *The Law of Organized Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010, pp.13-20.

and the Church came fourth in order of precedence after the royal family, the peers and Parliament.⁴³¹

As the nineteenth century progressed, non-conformist campaigners strove to achieve equality under the law. By 1828 when the Test and Corporation Acts were amended, state sponsored discrimination against different religions began to abate.⁴³² Restrictions were lifted from Roman Catholics in 1829 by the Roman Catholic Relief Act which permitted the civic participation of Catholics and similar provision was made for Jews in 1846 and 1858. It was only in 1888 that self-confessed atheists were granted similar equality by being admitted to Parliament.⁴³³ This was a significant moment in broadening democratic participation to advance the causes of free speech. It was also an important signal of the end of religious monopoly wielded by the State.⁴³⁴

The fight for religious freedom is a central feature of the evolution of liberal democracy and effectively set the scene for a prolonged period of adjustment in the nature of Church-State relations. As society diversified, the relationship between Church and State came under greater scrutiny and, for example, the Liberation Society founded in 1844, as part of their campaign

⁴³¹ Murray, J. and Redgrave, S. *Murray's Official Handbook Of Church And State* (first published 1852), London: Kessinger Publishing Co., 2008.

⁴³² Rodes, RE. *Law and Modernization in the Church of England*, Notre Dame: University of Notre Dame, 1991.

⁴³³ Rich, J. 'The Bradlaugh Case: Religion, Respectability and Politics' in *Australian Journal of Political History*, 21:2, 1975, pp.35-51.

⁴³⁴ Nash, D. 'The (Long) Nineteenth Century' in Bullivant, S and Ruse, M (eds.), *The Oxford Handbook of Atheism*, Oxford: Oxford University Press, 2013, pp.212-228.

for full equality under the law, called for the complete separation of Church and State.⁴³⁵

3.3.3 Calls for the separation of Church and State

The Church's opposition in the House of Lords to The Reform Act 1832 was a watershed moment which prompted the State to take a more active role in organising Church affairs.⁴³⁶ Radical writers like Richard Carlisle, William Sherwin and the ex-Anglican London clergyman Robert Taylor characterised the established church as 'the corrupt and bloated lackey of the unreformed system'.⁴³⁷ Church opposition to reform led to riots and attacks on the bishops' palaces and calls for a reform of the Church. As a result, the State began to withdraw its responsibility for Church finance. In 1868 it abolished the system of compulsory church rates and over time this led to the end of the payment of tithes in 1936. In parallel, the State also took measures to disestablish the Church in Ireland from 1871 and the Church in Wales from 1920. Despite the campaigns of dissenters and other liberals across the political spectrum disestablishment of the Church of England was resisted.⁴³⁸

The collection of documents from politics and society in David Nicholls' book, *Church and State in Britain Since 1800* shows how the debates for and

⁴³⁵ Larsen, T. *Friends of Religious Equality: Non-conformist Politics in Mid-Victorian England* Woodbridge: The Boydell Press, 1999.

⁴³⁶ Saunders, R. 'God and the Great Reform Act: Preaching against Reform, 1831–32', in *Journal of British Studies*, 53, 2014, pp.378-399.

⁴³⁷ Evans, E. *The Forging of the Modern State in Early Industrial Britain, 1783 – 1870*. Abingdon: Routledge, 2001, p.296.

⁴³⁸ Pugh, M. *The Making of Modern British Politics 1867 – 1945*. Oxford: Blackwell Publishing, 2002, p.23ff.

against disestablishment of the Church of England pervaded the entire century.⁴³⁹ Writers like Samuel Taylor Coleridge (1772-1834) and Matthew Arnold (1795-1842) advocated for a Christian nation under a national church. Calls for separation came from a wide range of political, dissenting and secularist voices.

Joseph Chamberlain (1836-1914), a radical politician from Birmingham, objected to Forster's Education Bill of 1870 stating that to be successful it needed to benefit all denominations and that public funds could not be used on a project which would primarily serve the purposes of the established church.⁴⁴⁰ Edward Miall (1809-1881), a Congregational minister and later Member of Parliament for Bradford and founder of the Liberation Society, a body devoted to the separation between Church and State, argued passionately that the Church of England could not truly be itself without being free from State interference.⁴⁴¹ Miall argued that because religious organisations have specific doctrines and make comprehensive truth claims, the State's affirmation of one religious organisation over others was discriminatory and blocked other beliefs or ideologies from playing a similarly significant public role.

Frederick Harrison (1831-1923) had been a high Anglican until his faith was undermined by science and biblical criticism. He became outspokenly anticlerical saying in a lecture to the Liberation Society that, 'If a man tells me

⁴³⁹ Nicholls, D. *Church and State in Britain Since 1820*, London: Routledge, 1967.

⁴⁴⁰ Boyd, C. (ed.), *Mr Chamberlain's Speeches*, Volume 1, London: Constable, 1914, pp.13ff.

⁴⁴¹ Originally from a speech in the House of Commons, 9 May 1871, and later republished as a pamphlet entitled *Disestablishment*, pp. 16ff.

that the Church is full of life and doing great work, and tells me that to seek disestablishment is to destroy an instrument of good, I ask such a man: Is your Church the one community of Christians which can flourish only by Act of Parliament and enormous stipends?....Are your bishops the only bishops who can be kept at their high level of spiritual earnestness by sitting in state in the House of Peers, and by consuming revenues which suffice for whole Churches of their fellow Christians?'⁴⁴²

Throughout this period Parliament was becoming increasingly plural and diverse.⁴⁴³ Members of Parliament who did not belong to the Church of England questioned their competence to deal with its legislation. Others considered the nation to have more important priorities and Parliament was often unable or unwilling to spend time legislating on Church affairs. One of the main arguments advanced for disestablishment was not that it infringed religious freedom, as it had in the past, but that it infringed religious equality.⁴⁴⁴

3.3.4 'A new dawn?'

Queen Elizabeth II is not known for her public statements but in February 2012, during her Diamond Jubilee Year, she chose to speak to the leaders of

⁴⁴² From a lecture, *Official Religion*, given to the Liberation Society and published in the *Fortnightly Review New Series*, Vol. 21, 1877 with the title '*Church and State*'.

⁴⁴³ The Reform Act of 1832, the Caroline Test and Corporations Act in 1828 and the Roman Catholic Relief Act in 1829 resulted in the House of Commons becoming less Anglican.

⁴⁴⁴ See Morris, R. *Church and State in 21st Century Britain: the Future of Church Establishment*, Basingstoke, Palgrave Macmillan, 2009, p.5. See also 'Separate Church and State' on the website of the National Secular Society at <https://www.secularism.org.uk/disestablishment/> - last accessed 24 January 2019.

the nine major religious faiths in the United Kingdom. It was perhaps her strongest public endorsement of support for the role of the Church of England in public life. Remarkably, given the Church of England's history, she used the opportunity to suggest that the public role of the Church of England as the national church obliged it to be the guarantor of religious liberty for all faiths. She said:

'Here at Lambeth Palace we should remind ourselves of the significant position of the Church of England in our nation's life. The concept of our established church is occasionally misunderstood and, I believe, commonly under-appreciated. Its role is not to defend Anglicanism to the exclusion of other religions. Instead, the Church has a duty to protect the free practice of all faiths in this country.'⁴⁴⁵

No one can doubt the sincerity of the statement and few would argue that the Church of England should not protect religious freedom generally. However, we have seen that the Church of England does not have a blemish free record in this regard. Historically, there is little tangible evidence of the Church protecting religious tolerance on its own initiative.⁴⁴⁶ Is this not really an attempt to argue for the retention of establishment in the context of

⁴⁴⁵ A speech by Her Majesty Elizabeth II at Lambeth Palace, 15 February 2012, <http://www.royal.gov.uk/LatestNewsandDiary/Speechesandarticles/2012/TheQueensspeechatLambethpalace15February2012.aspx> - last accessed 24 January 2019.

⁴⁴⁶ As an example, consider Anglican opposition by the House of Lords and King George IV to the introduction of the Roman Catholic Relief Act 1829, an Act which was the culmination of the process of Catholic emancipation throughout Britain – see Coleridge, ST. 'On the Constitution of the Church and the State' (first published 1830) in *The Collected Works of Samuel Taylor Coleridge*, Volume 10, Princeton: Princeton University Press, 1976.

religious pluralism?⁴⁴⁷ Why is this necessary given the protections for religious freedom available under human rights law and who should protect the freedom of conscience and the freedom *from* religion for atheists, humanists and other secularists?

Adopting such a role for the Church may seek to assuage concerns about religious freedom. However, like the suggestion to broaden the role of the Monarch from being 'Defender of the Faith' to being 'Defender of Faith', it does nothing to ensure religious equality.⁴⁴⁸ It is a truth, uncomfortable to some, that the theological mission of the Church of England is based on its profession of the Gospel in accordance with the Thirty Nine Articles of Religion of 1562.⁴⁴⁹ The preface to the Articles states that their purpose is 'for the avoiding of diversities of opinions and for the establishing of consent touching true religion'. It is difficult to reconcile the mission of the Church that is true to the Thirty Nine Articles with a role as the guarantor of free, diverse religious practice of all faiths in the country.

Lee, writing about the future of the monarchy over the next few decades, expects the Church of England to decide to disestablish itself for its own good.⁴⁵⁰ He argues that a disestablished church in which fewer than 10% of

⁴⁴⁷ There is evidence that non-Anglican denominations and non-Christian religions value the established status of the Church of England in affirming a positive role for religion in society. See Modood, T. 'Establishment, Multiculturalism, and British Citizenship', *Political Quarterly*, 65, 1994, p.53.

⁴⁴⁸ The monarch's title includes being 'Defender of the Faith'. Prince Charles once proposed that he should be known as 'Defender of Faith' when he becomes King.

⁴⁴⁹ The Thirty Nine Articles of Religion are found at <https://www.churchofengland.org/prayer-and-worship/worship-texts-and-resources/book-common-prayer/articles-religion#1> - last accessed 24 January 2019.

⁴⁵⁰ Lee, C. *Monarchy: Past, present...and future?* London: Bene Factum Publishing, 2013, p.177.

the population worships would have no need for a supreme governor and that this would remove the 'single task' from the Coronation oath, namely to protect the Church and defend its authority, so that the Monarch's authority would lie only in his or her personal devotion to the institution.⁴⁵¹ Clearly, those who would prefer a democratically elected head of state rather than an hereditary monarch would welcome the disestablishment of the Church of England.⁴⁵² The two institutions exist in a symbiotic relationship.

The Archbishop of Canterbury, the Most Reverend Justin Welby, speaking in 2016, referred to the possibility of disestablishment when he said that separating Church and State 'would not be a disaster or a great advantage' to the Church. In referring to the Church's past failings over religious freedom, he said, 'if we're going to abuse establishment as we have done in the past, then absolutely [the Church should be disestablished]'.⁴⁵³ More recently, he has distanced the Church from taking steps towards disestablishing itself saying that it was ultimately a matter for Parliament and the people.⁴⁵⁴ Whilst it is perhaps too cynical to regard the Archbishop's position as a slightly feigned gesture towards democratic participation in the Church's future, the demos have never before been permitted a voice on whether or not to retain establishment.

⁴⁵¹ Ibid, 179.

⁴⁵² See the website of 'Republic' which campaigns for the abolition of monarchy at <https://www.republic.org.uk/what-we-want/our-head-state> - last accessed 24 January 2019.

⁴⁵³ Reported by the National Secular Society on 23 February 2016 at <http://www.secularism.org.uk/news/2016/02/welby-says-separation-of-church-and-state-would-not-be-a-disaster-admits-establishment-has-been-abused> - last accessed 24 January 2019.

⁴⁵⁴ An interview between Archbishop Justin Welby and Harriet Sherwood in the *Guardian* on 8 May 2018 at <https://www.theguardian.com/world/2018/may/18/justin-welby-separation-of-church-and-state-not-a-disaster> - last accessed 24 January 2019.

Calls for the disestablishment of the Church have waxed and waned.⁴⁵⁵ In practical terms, disestablishment has been underway for some time – it is a project yet to be completed. So far, separation has been unilateral not multilateral, although not without consultation between the parties. The Church has welcomed increased autonomy but the Bishops have made no moves towards severing its relationship with the State.⁴⁵⁶ Debates remain about the extent to which the UK remains a Christian country and the extent to which UK law is secular.⁴⁵⁷ Historically, the Church has not supported religious freedom and many of the calls for disestablishment have originated from that context. Against these calls, the Church has striven to retain its position and influence. We now consider the most recent confrontation between Church and State in legislating for same-sex marriage. The study explores the tensions that exist within the legislature when Parliament enacts legislation in conflict with Church doctrine.

⁴⁵⁵ Clements, B. and Spencer, N. 'Public Opinion in Britain towards the Disestablishment of the Church of England', in *Journal of Anglican Studies*, 13, 2015, pp.30-49.

⁴⁵⁶ Commentators from within the Church frequently speak in favour of disestablishment e.g. The Revd. Giles Fraser writing in the Guardian in January 2015 said, 'I think establishment weakens the church and turns clerics into fawning Jeeves-like courtiers who prefer dressing up to speaking out.' See <http://www.theguardian.com/commentisfree/belief/2015/jan/30/stephen-fry-downton-abbey-nostalgia-church-england> - last accessed 24 January 2019. Colin Buchanan is one of a few bishops to argue cogently for disestablishment, see Buchanan, C. *Cut the Connection: Disestablishment and the Church of England*. London: Darton, Longman and Todd Ltd, 1994.

⁴⁵⁷ See *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 especially in relation the intervention by Lord Carey. Leigh, I. and Hambler, A. 'Religious Symbols, Conscience, and the Rights of Others' in *Oxford Journal of Law and Religion*, 3:1, 2014, pp.2-24. Woodhead, L. 'The rise of 'no religion' in Britain: The emergence of a new cultural majority', *Journal of the British Academy*, 4, 2016, pp.245-261.

3.4 Law and doctrine in conflict - the Church's opposition to same-sex marriage

3.4.1 Background

The final parliamentary debates to allow same-sex marriage took place in July 2013 and the Marriage (Same Sex Couples) Act 2013 came into force on 13 March 2014. The first gay marriages began to take place on 29 March 2014. Same-sex civil unions had been legally recognised in England since the Civil Partnership Act 2004 came into force in December 2005.⁴⁵⁸ At the time, politicians, religious leaders and other commentators argued that civil partnerships gave same-sex couples the same rights and responsibilities as marriage.⁴⁵⁹ However, many supporters of gay rights, including heterosexuals, homosexuals and campaign groups argued that civil partnerships were inferior to marriage both substantively and symbolically.⁴⁶⁰ Arguments in favour of gay marriage centred on issues of equality and fairness whereas political reluctance to move towards same-sex marriage centred on the freedom of religion.

Following the introduction of civil partnerships, questions soon arose over whether, if same-sex marriage were introduced, ministers in the Church of

⁴⁵⁸ Richard Harries, the Bishop of Oxford, indicated the Church of England's support for the Bill but in the final vote, six bishops voted against whilst one was in favour.

⁴⁵⁹ See for example, Humphreys, J. 'The Civil Partnership Act 2004, same-sex marriage and the Church of England', in *Ecclesiastical Law Journal*, 8:3, 2005, p.289 and Lord Falconer of Thoroton, 'Church, state and civil partners', *Ecclesiastical Law Journal*, 2007, 9(1), p.5.

⁴⁶⁰ See the case of *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) and the literature of the time from Stonewall and Liberty.

England could be required to officiate at them.⁴⁶¹ In 2010, the then Prime Minister Gordon Brown, explained that he did not support same-sex marriage because it was bound up with questions of religious freedom and the right of religious organisations to a degree of self organisation on questions theologically important to them.⁴⁶² His stance belies the intense lobbying that the Government were subject to from religious organisations, most notably the Church of England and the Catholic Church.⁴⁶³ For both Churches the issue was one of doctrine, taking into account their scriptural and liturgical definition of marriage and an institutional homophobia based on traditional interpretations of certain Biblical texts.⁴⁶⁴ In addition, for the Church of England, there was a legal element to the introduction of same-sex marriage inextricably linked to its established status.

Under the Marriage Act 1949, the Church of England by virtue of its established status, has a specific role in carrying out marriages.⁴⁶⁵ The right to Anglican marriage is regardless of whether the couple are practising Anglicans or indeed committed Christians. Furthermore, its ordained clergy are automatically authorised to officiate at weddings, a position which differs for other religious organisations. Other religious organisations can set their

⁴⁶¹ Hammond-Sharlot, R. and Booth, P. 'Same-sex marriage and the Church of England' in *Family Law*, 38:2, 2008, p.260.

⁴⁶² From an interview with Jessica Green published on the 5 May 2010 in *Pink News* at <http://www.pinknews.co.uk/2010/05/05/gordon-brown-voting-lib-dem-makes-a-tory-government-more-likely/> - last accessed 24 January 2019.

⁴⁶³ See for example, 'A Letter on Marriage from the President and Vice-President of the Bishops' Conference of England and Wales', 10/11 March 2012 at <http://www.catholic-ew.org.uk/Home/News/2012/January-March/Archbishops-Letter-on-Marriage> - last accessed 24 January 2019.

⁴⁶⁴ For example, the story of Sodom and Gomorrah in Genesis 18:16-19:29, the Levitical description of homosexuality as an abomination and the sanction of death to homosexuals in Leviticus 18:22 and 20:13 and Paul's condemnation of homosexuality in Romans 1:26-27.

⁴⁶⁵ Marriage Act 1949, Part II. See, Doe, N. *The Legal Framework of the Church of England*. Oxford: Oxford University Press, 1996, pp.358-62.

own rules (as associations), but the rules of the Church of England are part of the general law. Ministers of other religions and denominations (apart from Quakers or Jews) must be recognised as an 'authorised person' in order to be able to officiate at weddings.⁴⁶⁶ The consequence of this would be that once the State implemented same-sex marriage and, in the view of the Church, departed from the Church's doctrine on marriage, then a legal exemption had to be created in the general law to allow the Church to benefit from the freedom of religion enjoyed by other religions.⁴⁶⁷

The introduction of same-sex marriage and the process of negotiating the Church's legal exemption was an issue of intense debate and lobbying. The Church did not want the issue to arise as it feared it would represent a further sign of the Church's *de facto* separation from the life of the nation and that it would provoke calls for disestablishment.⁴⁶⁸ Indeed, in the run up to the legislative process beginning in Parliament, the Church itself warned that same-sex marriage raised the prospect of disestablishment.⁴⁶⁹

⁴⁶⁶ Marriage Act 1949, s.53.

⁴⁶⁷ However, for a contra view see Garcia Oliva, J. and Hall, H. 'Same-sex marriage: an inevitable challenge to religious liberty and establishment' in *Oxford Journal of Law and Religion*, 3:1, 2014, p.25.

⁴⁶⁸ Ibid. Whilst I agree with Garcia Oliva and Hall that the introduction of same-sex marriage did not constitute a threat to the religious freedom of the Church, I respectfully do not agree with their contention that it did not threaten the Church's established status.

⁴⁶⁹ The Rt. Rev. Tim Stevens, Bishop of Leicester and Convenor of the Lords Spiritual, said, 'Is it possible to have the law of the Church of England saying something different to the law of England? The question is how long we can sustain that' from an article by John Bingham on 12 June 2012 in the Telegraph at <http://www.telegraph.co.uk/news/religion/9325171/Gay-marriage-raises-prospect-of-disestablishment-says-Church-of-England.html> last accessed 24 January 2019. See also, 'Gay marriage is one of the worst threats in over 500 years, says Church in England' reported in the Independent on 11 June 2012 at <http://www.independent.co.uk/news/uk/home-news/gay-marriage-is-one-of-worst-threats-in-500-years-says-church-of-england-7836852.html> - last accessed 24 January 2019.

3.4.2 *The legislative process*

The Government undertook a consultation on its proposal to introduce same-sex marriage in 2012. The Church of England issued what may be described as a tetchy response which was followed by a further note when the Government confirmed its decision to legislate.⁴⁷⁰ The concern of the Church was that because Canon Law was also part of public law and so could not be in conflict with statute, any legislation for same-sex marriage would need to be exempt from applying to marriage according to the rites of the Church of England.

As the Bill made its way through Parliament, the Church issued a number of briefing papers.⁴⁷¹ Of the bishops holding office at the time, the Archbishop of Canterbury and the Bishops of Leicester, Chester and Exeter spoke in that debate – all opposed the Bill.⁴⁷² The Archbishop spoke passionately saying that, if passed, 'Marriage is abolished, redefined and recreated....The idea of marriage as a covenant is diminished. The family in its normal sense, predating the state and as our base community of society, as we have already heard, is weakened.'⁴⁷³

⁴⁷⁰ All the documents published by the Church of England in relation to the introduction of same-sex marriage can be found at <https://www.churchofengland.org/media/>, see 'Same-sex Marriage and the Church of England an Explanatory Note'.

⁴⁷¹ 'Marriage (Same Sex Couples) Bill – Commons Second Reading' briefing from the Church of England; 'Marriage (Same-sex Couples) Bill – Commons Report and Third Reading Briefing'; and 'Marriage (Same Sex Couples) Bill House of Lords Second Reading briefing'.

⁴⁷² HL Deb 3 June 2013, vol 745.39.

⁴⁷³ *Ibid*, cols 953–954.

The heart of the Church's opposition was the redefinition of the legal institution of marriage. Interestingly, the Church did not look to statute for this definition of marriage but to its own liturgies and in particular the seventeenth century Book of Common Prayer and Canon B30 which forms part of the law of England.⁴⁷⁴ It argued that the redefinition of marriage would create a conflict between marriage as defined in the Marriage (Same Sex Couples) Bill and Canon B30, which was not sustainable.⁴⁷⁵ Whilst Canon B30 had undoubtedly been the traditional and historic definition of marriage, the Church's position was that by making marriage gender neutral, the Government was undermining it as a positive and beneficial social institution. The Church accepted that there was no distinction between civil and religious forms of marriage and that even though there was no proposal in the legislation for religious organisations to solemnize same-sex weddings, same-sex couples would be entering into the same institution. In other words, once same-sex marriage became legal, the ministers of the Church of England solemnizing opposite-sex marriages would nevertheless be officiating at the same legal institution as a same-sex marriage, despite not being permitted to officiate at same-sex weddings.⁴⁷⁶

The Church was also concerned that even if an exemption from officiating at same-sex weddings were granted by Parliament, it would be potentially

⁴⁷⁴ Canon B 30 states that 'The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union, permanent and lifelong, for better for worse, till death do them part, of one man with one woman, to the exclusion of all others on either side....' Revised Canons Ecclesiastical, Canon B 30, paragraph 1.

⁴⁷⁵ Canons are subject to special statutory provisions according to which they are ineffective if they conflict with 'customs, laws or statutes of the realm. See Submission of the Clergy Act ss.2 and 3. Synodical Government Measure 1969, s.1(3).

⁴⁷⁶ See 'A Response to the Government Equalities Office Consultation – "Equal Civil Marriage", para.21, p.9 at <https://www.churchofengland.org/media/1475149/s-%20marriage.pdf> - last accessed 24 January 2019.

vulnerable to a successful challenge for discrimination under human rights law.⁴⁷⁷ The ECtHR had previously held that the rights in Article 12 ECHR (to family life) only applied to marriages between a man and woman and did not apply to same-sex marriages. However, in 2010 in the case of *Schalk v Austria*, the ECtHR stated that it would no longer interpret Article 12 solely in relation to opposite-sex marriages although whether or not to allow same-sex marriage was a matter for domestic law.⁴⁷⁸ The Church of England felt itself to be uniquely vulnerable to challenge under the ECHR because of its role in solemnizing marriages on behalf of the State rather than in a purely religious capacity. It feared that its obligation at common law to carry out marriages to qualified parishioners would be extended to same-sex couples because it was effectively carrying out functions of a governmental nature and it would be illegal to discriminate.

3.4.3 *The quadruple lock – ‘challenging Houdini!’*

The Government responded to the Church’s concerns by making amendments to the proposed legislation which became known as the ‘quadruple lock’. This made it illegal for the Church of England to perform same-sex marriages without changes to primary legislation. The lock was designed to ensure that no religious organisation could be forced to conduct same-sex marriages without it first agreeing to do so. The components of the quadruple lock are as follows:

⁴⁷⁷ For a survey and discussion of the European approach to same-sex marriage up to 2015 see Fenwick, H. ‘Same-sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the court’s authority via consensus analysis?’ in *European Human Rights Law Review*, 3, 2016, p. 248.

⁴⁷⁸ Application No. 30141/04.

1. A religious marriage ceremony is only possible for same-sex couples where the religious organisation has given its express consent, the individual minister is willing to preside and the place of worship has been registered for same-sex couples.
2. No religious organisation can be compelled 'by any means' to marry same-sex couples or to permit this to happen on their premises.
3. The Equality Act 2010 was amended so that it became not unlawful discrimination for a religious organisation or one of its representatives to refuse to marry a same-sex couple.
4. The definition of marriage in the Church of England's Canon Law is preserved and it was made explicit that the common law duty requiring Church of England clergy to marry opposite sex couples did not also apply to same-sex couples.

The context for these changes illustrates the extent and complexity of the Church's relationship with the State especially in matters of law and doctrine. It highlights the Church's independence and rejection of State involvement in determining matters of doctrine as it has done in the past.⁴⁷⁹ Because the ecclesiastical law of the Church cannot conflict with the general law, if the

⁴⁷⁹ See Sagovsky, N. 'Hooker, Warburton, Coleridge and the "quadruple lock": state and church in the twenty-first century' in *Ecclesiastical Law Journal*, 16:2, 2014, p.140. Sagovsky points to a realignment of the traditional bonds between Church and State that leads him to the conclusion that the quadruple lock marks a significant step on the road to the disestablishment of the Church of England.' p.146.

Church were to reach a decision to recognise same-sex marriages, it would not only have to alter Canon B30 but also pass a Measure in General Synod that altered Part II of the Marriage Act 1949 and also the wording of its liturgies.

Throughout its briefing papers the Church argued that the quadruple lock did not mean that it was treated more favourably than other religious organisations, but that it merely put it on the same footing and ensured that its was treated equally. It could be argued that by disestablishing, the Church could place itself totally on a par with other religious organisations and save a significant amount of legislative time and effort in the process.

The Bill passed its second reading in the House of Lords on 3 and 4 June 2013 after a wrecking amendment proposed by Lord Dear was rejected by 390 votes to 148. Nine of the fourteen Anglican bishops who attended the debate voted in favour of the amendment whilst five abstained. The vote in favour of such a contentious issue was decisive and overwhelming. In both the House of Commons and the House of Lords, the quality of the debate and the persuasiveness of the arguments put forward by the proponents of same-sex marriage were recognised in the media as being exemplary.⁴⁸⁰

⁴⁸⁰ 'Gay marriage bill: Peers back government plans', BBC News, 5 June 2013 at <http://www.bbc.co.uk/news/uk-politics-22764954> - last accessed 24 January 2019.

3.4.4 A self-inflicted defeat

In a briefing paper to the House of Commons the bishops wrote, 'Our opposition to this Bill is rooted not in homophobia, but in a deep seated concern for the common good and value of the traditional understanding of marriage, [and] respect for the doctrine of the Church...'⁴⁸¹ The key issue is not that the Church of England should be forced to carry out same-sex marriages but that it used its established position in an attempt to restrict developments in the general law. In seeking to protect its own doctrinal position, the Church did nothing to protect the religious freedom of organisations like the Quakers who wanted to be able to allow same-sex marriages or for the religious freedom of lesbian and gay people who wanted to marry.

In a short statement to the House of Lords on 5 June 2013, the Bishop of Leicester, Tim Stevens, indicated on behalf of the Church that it would not continue to oppose the introduction of same-sex marriage.⁴⁸² Shortly afterwards, the Archbishop of Canterbury, Justin Welby, reflected on the debate and recognised some of the changes in society that increasingly make establishment untenable:

⁴⁸¹ 'Marriage (Same Sex Couples) Bill – Commons Second Reading' briefing from the Church of England p.7 at <https://www.churchofengland.org/media/1657614/ssmarriagebillbriefing.pdf> - last accessed 24 January 2019.

⁴⁸² Rt. Revd. Tim Stevens, Bishop of Leicester on 5 June 2013 at <http://www.thinkinganglicans.org.uk/archives/006090.html> - last accessed 24 January 2019.

‘The cultural and political ground is changing. There is a revolution. Anyone who listened, as I did, to much of the Same Sex Marriage Second Reading Debate in the House of Lords could not fail to be struck by the overwhelming change of cultural hinterland. Predictable attitudes were no longer there. The opposition to the Bill, which included me and many other bishops, was utterly overwhelmed, with amongst the largest attendance in the House and participation in the debate, and majority, since 1945. There was noticeable hostility to the view of the churches.’⁴⁸³

The Archbishop acknowledges that is the growing disconnection between the traditional teaching of the Church and the emerging ethical consensus on certain issues in mainstream British society. The passage of the Marriage (Same Sex Couples) Bill through Parliament showed the extent to which the relationship between the State and its established Church was put under strain because of legislation that did not conform to traditional doctrine. Has the ‘hands off’ approach adopted by Parliament since the nineteenth century in matters of doctrine allowed the Church a degree of ‘Nelsonian blindness’ towards changes in wider society whilst it has remained preoccupied with its own internal affairs?

⁴⁸³ ‘There is a revolution: Archbishop Justin’s address to Synod, 5 July 2013 at <http://www.archbishopofcanterbury.org/articles.php/5098/there-is-a-revolution-archbishop-justins-address-to-synod> - last accessed 24 January 2019.

3.5 Concluding remarks

This chapter has investigated the established status of the Church of England. It has shown how, despite a reduction of State control over Church affairs that the Church continues to retain a presence in the constitutional framework through its link with Monarchy and its role in the Coronation Service and the presence of bishops in the House of Lords. A complicated picture emerges where the vestiges of a once powerful State Church, now largely freed from erastian control, is permitted to continue to attempt to influence law-making according to its doctrines despite an increasingly plural and secular society.

My purpose has not been to construct an argument in favour of disestablishment, although that may be its logical conclusion. Neither is it an argument in favour of removing religion from the public sphere.⁴⁸⁴ Its purpose is to set out the evidence to allow a view to be taken on whether in the twenty-first century, liberal democracy in the UK is best served by maintaining such close links with one particular Christian denomination thereby sustaining an unequal treatment of religious and secular voices. The fusion of religious and political power gives the Church of England a privileged position unavailable to other religious or non-religious organisations. It allows the Church, with its inherently English bias, a means

⁴⁸⁴ Rivers, J. 'The secularisation of the British constitution' in *Ecclesiastical Law Journal*, 14:3, 2012, p.371. The Rt. Hon. Baroness Elizabeth Butler-Sloss, Report of the Commission of Religion and Belief in Public Life, 'Living With Difference: Community, Diversity and the Common Good', Cambridge: The Woolf Institute 2015.

by which to circumvent the general democratic processes allowing a level of political participation and influence unavailable to others.

A key issue is one of foundationalism which we have seen is central to the Church's role in the Coronation Service. The problem is that it is exclusivist and fails to recognise and include other faiths and ideologies. Anglican theology is used exclusively to provide a foundation to the constitutional legitimacy of the State. The exclusivist approach is incompatible with the demands of liberal democracy because liberal democracy is inherently pluralistic and must attempt to attract and reflect support, trust and confidence from as broad a swathe of society as possible. Establishment acts as a bulwark preventing the participation of other ethical voices in providing and shaping a viable foundation for the nation's polity.

We have seen how the State has made moves to remove itself from the Church's governance and this has radically reduced its erastian nature. As a result, the Church has greater independence and to this extent partial, unilateral disestablishment is already underway. A Church which has the independence to appoint its own bishops should not also have a privileged right of access to law-making which is not granted to other religious or non-religious organisations. Whilst moves towards disestablishment on the part of the Church may enhance its presence and honourable work 'on the ground', it would certainly improve the perception of equality between religious and secular voices. In the case study on the introduction of same-sex marriage, it was clear that the Bishops could mount a significant

campaign in attempts to ensure continuity of a law that conformed with traditional Church teaching. A growth in the number of instances where the Church seeks legal exemptions to the general law in order to prevent clashes with its application to the Church will further weaken its established position.

It is one thing to claim that establishment is compatible with religious freedom, it is quite another to claim that the established status of the Church of England gives it a unique platform from which to protect religious freedom generally.⁴⁸⁵ Religious freedom has originated from the demands of emerging liberal democracy and pressure from dissenting religious voices that coerced the Church of England to accommodate it. Arguments in favour of making the Church of England the protector of religious liberty should not be used to support a system which has shown itself increasingly distant from a diverse public. For these reasons, establishment in its current form is at best anomalous and at worst incompatible with the principles of inclusion, fairness and justice inherent in the four pillars of liberal democracy.

⁴⁸⁵ Ahdar, R. and Leigh, I. *Religious Freedom in the Liberal State*, Oxford: Oxford University Press, 2005, p.127.

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Chapter 4

France

4 Introduction

France is the primary example of a European country with a policy of active secularism. The distinctive French version of secularism is known as laïcité and this model of religion-state relations implies the strict separation between religion and public authorities.

Following a brief discussion of France's political and religious demography, the chapter examines the key features of laïcité and highlights the main exceptions to its strict application. Laïcité is an idea that has evolved gradually from the period of the 1789 Revolution. The chapter considers how it emerged to become the State's response towards religious reaction against developing liberal democracy. Finally, a case study discusses the most contentious recent application of laïcité, the 2010 law banning face coverings in public.

4.1 Political and religious demography

4.1.1 Political demography

The French Republic is a unitary semi-presidential republic. It is a sovereign State which, in addition to metropolitan France, includes a number of overseas territories.⁴⁸⁶ France's population as of June 2018 is estimated to be 65.22 million people.⁴⁸⁷ France is a plural society with approximately four million foreigners predominantly from EU and former French colonies. The Constitution of the Fifth Republic came into force on 4 October 1958.⁴⁸⁸ France is a founder member of both the European Union and the Council of Europe.

Before the 1789 Revolution, France's system of government was an absolute monarchy built on the feudal idea of estates, or hierarchical social classes. The most powerful estate was the French Roman Catholic Church (the 'Church'). Unlike England, which had an erastian church independent of Rome, the French monarch had to manage the Church's ecclesiastical allegiance to Rome and this gave rise to the distinctive form of church-state relationship called Gallicanism. Essentially, Gallicanism divided the spiritual which was subject to Rome's authority from the temporal which fell under the

⁴⁸⁶ Since 2011 French territory includes five overseas departments and a number of islands.

⁴⁸⁷ See 'Worldometers' at <http://www.worldometers.info/world-population/france-population/> - last accessed 24 January 2019.

⁴⁸⁸ Constitution of 4 October 1959 at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html> - last accessed 24 January 2019.

Monarch's jurisdiction. The relationship was not straight forward or frictionless, especially with regards to ecclesiastical appointments.⁴⁸⁹

Since the Revolution, France has seen the development of liberal democracy and distinctive political parties. These initially ranged from conservative, right-wing ultra-royalists who wanted a return of the *Ancien Régime*; various shades of nascent bourgeoisie liberals who often supported a constitutional monarchy; and republicans, who especially in the earlier part of the period, were predominantly from the radical left. By the time of the Third Republic, the split was predominantly between conservative republicans and liberal modernists who advocated major social reform e.g. divorce laws etc.

As the start of the twentieth century approached, the political divide, which is often described as the 'clash of two Frances', was between the defenders of Catholicism and those who argued in favour of the separation between Church and State. More recently, debate has centred on economic policies and ethical debates over such issues as abortion, homosexuality, marriage equality and euthanasia. To a greater or lesser extent these forces continue to shape French politics today. However, the election of Emmanuel Macron as President in 2017 saw something of a breakdown of the traditional left – right split in French politics.⁴⁹⁰

⁴⁸⁹ The key agreements governing the nature of Gallicanism were the Concordat of Bologna 1516 and the Declaration of the French Clergy 1682. See Bergin, J. *The Politics of Religion in Early Modern France*, Yale: Yale University Press, 2014.

⁴⁹⁰ Bréchon, P., professeur émérite de science politique, Science Po Grenoble, 'The Evolution of France's left and right politics, from the 1789 French Revolution to this year's election' writing in *The Conversation*, 17 April 2017 at <http://theconversation.com/the-evolution-of-frances-left-and-right-politics-from-the-1789-french-revolution-to-this-years-election-76226> - last accessed 24 January 2019.

4.1.2 Religious demography

It is difficult to assess religious demography in France with certainty because the State does not officially collect data on religious affiliation and has not done so since the Census of 1872. Indeed, the 1872 law prohibiting public authorities from collecting this information was widened in 1978 to include data relating to race, ethnicity, and political, philosophical, or religious opinions.⁴⁹¹ The reason for this policy is based on the primary importance of the equality of French citizens. However, this has been criticised for reducing the effectiveness of the French state in its ability to deal fairly with minorities because it renders them invisible.⁴⁹² Despite the lack of official statistics, surveys are sometimes undertaken by non-governmental organisations which give an impression of the religious constituency of France.

A 2016 survey carried out by the Institut Montaigne, as part of a wider research project on Islam in France, found that the religious constituency of France was Christianity 51%, no-religion 39.6%, Islam 5.6%, Judaism 0.8%, other religions 2.5%, undecided 0.4%.⁴⁹³ The project reached two conclusions: (1) a continuing decline of personal identification with Christianity, and (2) a growing number of people who declare themselves to

⁴⁹¹ Article 8 of the Law on Computer Technology and Freedom dated 6 January 1978, (*loi* 78-16).

⁴⁹² Gilbert, J. and Keane D. 'How French law makes minorities invisible' in *The Independent*, 14 November 2016 at <https://www.independent.co.uk/news/world/politics/how-french-law-makes-minorities-invisible-a7416656.html> - last accessed 24 January 2019.

⁴⁹³ Report by the Institut Montaigne, 'A French Islam is Possible', September 2016, p.13 at <http://www.institutmontaigne.org/ressources/pdfs/publications/a-french-islam-is-possible-report.pdf> - last accessed 24 January 2019.

be of 'no religion'.⁴⁹⁴ This represents a stark contrast with data from 1986 which found that 82% of the population identified as Christian whilst 15.5% claimed to be non-religious.⁴⁹⁵ The results of a 2010 Eurobarometer survey found that 27% of French citizens believed in God whilst a further 27% responded that they believed in some form of 'spirit or life force'. 40% of respondents said they did not believe in any form of God, spirit or life force.⁴⁹⁶

The overwhelming majority of Christians in France are Roman Catholics.⁴⁹⁷ A 2016 survey claimed that Roman Catholics represented 53.8% of the population of France, a small yet significant majority of the population.⁴⁹⁸ Of those, 23.5% identified as engaged Catholics whilst 17% were practising. It seems unlikely that this majority position will be maintained in the future if the trend in the decline of Christian belief continues. This view is supported by a 2018 study using data from 2014-2016 which found that amongst French men aged 16 to 29 years old, 25% were Christians (23% Catholic and 2%

⁴⁹⁴ Ibid, p.13.

⁴⁹⁵ l'Institut CSA for 'La Croix' published in 'Catholicisme et protestantisme en France' at <https://actualitechretienne.files.wordpress.com/2010/08/sondagecsalacroixcatholicismeetprotestantismefrance.pdf> - last accessed 24 January 2019.

⁴⁹⁶ Eurobarometer 73.1, 'Biotechnology', conducted by TNS Opinion & Social at the request of European Commission and published in October 2010 at http://ec.europa.eu/comfrontoffice/publicopinion/archives/ebs/ebs_341_en.pdf - last accessed 24 January 2019.

⁴⁹⁷ A 2012 survey by ifop for the Association des Familles Protestants found 2.1% of the population were protestants, see 'Enquête auprès des protestants' at http://www.ifop.fr/media/poll/2074-1-study_file.pdf - last accessed 24 January 2019.

⁴⁹⁸ Chambraud, C. 'Une enquête inédite dresse le portrait des catholiques de France, loin des clichés' in *Le Monde*, 12 January 2017 at https://www.lemonde.fr/religions/article/2017/01/12/une-enquete-inedite-dresse-le-portrait-des-catholiques-de-france-loin-des-cliches_5061270_1653130.html - last accessed 24 January 2019.

Protestant), 10% were Muslims, 1% were of other religions, and 64% were not religious.⁴⁹⁹

As in other European countries, France has seen a significant increase in its Muslim population.⁵⁰⁰ The 2016 survey (referred to above) found that 6.6% of the population had an Islamic background, 5.6% stating that they were practising Muslims.⁵⁰¹ The growth of the Muslim population in the context of increased immigration, especially from the Middle East, combined with an increased number terrorist attacks on mainland France has made the presence of Islam one of the most contentious and political sensitive areas of debate.⁵⁰² There is an on-going discussion in French society over the perceived desire by many Muslims to prioritise religious identity over traditional models of French citizenship.

Although France's religious and cultural heritage is Christian, contemporary France is a plural, diverse nation where people can be religious or non-religious. France is often considered the prime example of a 'secular' country but what is the nature of that secularism and just how strict is the

⁴⁹⁹ Bullivant, S. 'Europe's Young Adults and Religion: Findings from the European Social Survey (2014-16) to inform the 2018 Synod of Bishops' a report by St Mary's University's Benedict XVI Centre for Religion and Society and Institut Catholique de Paris, 2018 at <https://www.stmarys.ac.uk/research/centres/benedict-xvi/docs/2018-mar-europe-young-people-report-eng.pdf> - last accessed 24 January 2019.

⁵⁰⁰ Kettani, H. 'Muslim Population in Europe 1950 – 2020' in *International Journal of Environmental Science and Development*, 1:2, 2010 pp.154-164 at 157.

⁵⁰¹ Report by the Institut Montaigne, 'A French Islam is Possible', September 2016, p.13 at <http://www.institutmontaigne.org/ressources/pdfs/publications/a-french-islam-is-possible-report.pdf> - last accessed 24 January 2019.

⁵⁰² For example, the Charlie Hebdo massacre on 7 January 2017 where 12 people were killed and 11 injured and the Bataclan concert hall massacre on 13 November 2017 when 90 people were killed and many injured.

separation between religion and public authorities? It is to France's model of laïcité that we now turn.

4.2 The model – Laïcité

Laïcité is enshrined in Article 1 of the Constitution:

'La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances.'⁵⁰³

This affirms France as a democracy under the rule of law, a country that respects individual beliefs but one where the nature of the State itself is secular or 'laïque'. However, laïcité itself is not defined.⁵⁰⁴ It was first confirmed as a constitutional principle by the Conseil constitutionnel on 19 November 2004 when it decided, in relation to the proposed Treaty Establishing a Constitution for Europe, that Article 1 of the 1958 Constitution would 'forbid anyone to rely on religious beliefs to overcome common rules governing the relations between public authorities and individuals.' The principle of laïcité was re-affirmed in a decision of the Conseil constitutionnel on 22 October 2009.⁵⁰⁵

⁵⁰³ 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.' Article 1 of the 1958 Constitution of France at <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Constitution-du-4-octobre-1958> - last accessed 24 January 2019.

⁵⁰⁴ France first formally designated itself as a secular republic in the Constitution of the fourth Republic, which came into force on 27 October 1946.

⁵⁰⁵ Conseil constitutionnel, 22 October 2009, decision no. 2009-591 DC relating to legislation to ensure parity of funding between public and private elementary schools under a partnership agreement when they receive students enrolled outside of their municipality of residence.

The Ministry of the Interior, which is responsible for regulating religion, defines laïcité as being based on three principles: (1) the freedom of conscience and the freedom to manifest one's convictions within the limits of respect for public order (2) the separation of public institutions and religious organizations and (3) the equality of all before the law regardless of beliefs.⁵⁰⁶ When taken together with other constitutionally recognised fundamental freedoms, laïcité can be seen to exist within a framework intended to protect the freedom of religion and the freedom *from* religion at both the collective and individual level.⁵⁰⁷

Whilst the nearest word in English to 'laïcité' is 'secularism', secularism does not fully capture the meaning of laïcité which is a broader concept in the French context, envisaging an enlarged public sphere controlled by the State in relation to the private sphere of the individual citizen.⁵⁰⁸ Greater emphasis is placed on ideas of equality and autonomy through separation than, for example, is seen in the UK's response towards religion.

France is, therefore, a non-confessional state which does not profess the competence to define religion or involve itself in the content of religious belief or the internal organisation of religious bodies. It does, however, possess the authority to regulate religion in accordance with domestic and

⁵⁰⁶ See <https://www.interieur.gouv.fr/Publications/Cultes-et-laicite/La-laicite> last accessed 24 January 2019. (My translation.)

⁵⁰⁷ Freedom of Religion was protected by Article X of the Declaration of the Rights of Man and the Citizen, 1789; Freedom of speech was protected by Article XI of the Declaration; Freedom of Assembly was protected by the Conseil État, 19 May 1933; and Freedom of association was constitutionalized, through the law of 1 July 1901.

⁵⁰⁸ Laborde, C. *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford: Oxford University Press, 2008, p.41.

international human rights law for the protection of democratic society.⁵⁰⁹ The State endeavours to provide public services equally to all citizens regardless of their religion.⁵¹⁰ In addition to the Constitution, the main law determining the content and application of laïcité is the Law of 1905 on the separation of Church and State.

4.2.1 The Law of 1905

The term laïcité was a relatively new expression at the end of the nineteenth century. Ferdinand Buisson (1841-1932) an academic and radical-socialist politician supervised the committee drafting the Law of 1905 that would separate Church and State (*'loi de separation des Églises et de l'État'*) and make the concept of laïcité a dynamic reality in French national life.⁵¹¹ Essentially, Buisson wanted the State to guarantee freedom of conscience, end the State's recognition of the Catholic Church and its subsidy of religion. The Law of 1905 contains a significant amount of technical detail, especially in relation to Church property. However, a brief survey of the key sections serves to illustrate what laïcité was intended to achieve.

Article 1 recognizes the principles of religious freedom including the freedom of conscience and guarantees the free practice of religion subject to the interests of public order. Non-establishment and non-confessionalism is confirmed by Article 2, which states that the Republic does not recognize,

⁵⁰⁹ See Article 55 of the 1958 Constitution.

⁵¹⁰ Conseil constitutionnel, 86-217 DC, 18 September 1986, *Loi relative à la liberté de communication*.

⁵¹¹ Buisson, F. *Law foi laïque*, Paris, Hachette, 1912.

pay or subsidize any religion. This had the immediate effect of removing all expenditure related to the exercise of religion from state budgets. As a consequence, public authorities could then be neutral towards religious belief and also fulfil the principle of equality between different religions. The Law of 1905 established practical arrangements for the implementation of laïcité including the transfer of ownership of public institutions of worship to religious associations.⁵¹²

The Law of 1905 also provided for 'religious police' which should be interpreted as religious regulation by the State.⁵¹³ This was essentially designed as a means of regulating the presence of religion in public places. For example, Article 27 states that 'ceremonies, processions and other exterior manifestations of worship' (including e.g. bell ringing) would be regulated by municipal law. Equally, Article 28 prohibited religious symbols being placed anywhere other than exempt places like religious buildings, cemeteries or museums. The policy was designed to keep religious practice within identifiably religious boundaries, rather than allowing it to dominate public life.

The administration of laïcité does not involve a religious police force as such. Enforcement actions can be taken at different levels by the Prime Minister, the Prefect or the mayor, and the general police authorities. The purpose of the regulation is not to implement laïcité *per se* but to maintain public order in

⁵¹² Articles 14-17. However, this obligation was subsequently transferred back to the State in 1908.

⁵¹³ Articles 25-36.

a manner that is proportionate and necessary.⁵¹⁴ Of course, every decision will not suit everyone and restrictions on religious practice are often regarded as evidence that the State is anti-religious.

That Buisson's original definition of laïcité, enshrined in the Law of 1905, continues to be applicable today is clear from its use in the report of the Stasi Commission. This Commission was established in 2003 by the French government to advise on whether Muslim school girls should be allowed to wear headscarves whilst attending state schools.⁵¹⁵ In its report, laïcité is defined as embodying three interrelated principles which cannot be disassociated from each other (1) the freedom of conscience and religion, (2) equal treatment under the law for religious and spiritual choices and (3) the neutrality of political power so as to prevent any religion from dominating either the State or society.⁵¹⁶

It is interesting to set this definition of laïcité alongside the more politically potent definition of Cécile Laborde. She argues that the term encompasses a comprehensive theory of French republican citizenship. She defines laïcité as 'equality (religious neutrality of the public sphere or secularism *strict sensu*), liberty (individual autonomy and emancipation from religious

⁵¹⁴ Tawil, E. 'La police administrative des cultes en droit français' in *Revue de la recherche juridique-Droit prospectif*, 2004, pp.19-24.

⁵¹⁵ Stasi, B. *Laïcité et République*. 2003 at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/034000725/0000.pdf> - last accessed 24 January 2019.

⁵¹⁶ "La laïcité...repose sur trois valeurs indissociables: liberté de conscience, égalité en droit des options spirituelles et religieuses, neutralité du pouvoir politique." Stasi, B. *Laïcité et République*. 2003. p.9.

oppression), and fraternity (civic loyalty to the community of citizens).⁵¹⁷ Whilst laïcité is often narrowly construed as merely concerning the separation of church and state, it becomes clear, especially from Laborde's interpretation, that this is but one aspect of its application and its reach is wider. In applying laïcité to France's revolutionary motto 'liberty, equality, fraternity', Laborde attempts to show how the impact of laïcité permeates many aspects of French society, culture and national life.⁵¹⁸

Other commentators, for example Michel Troper, whilst recognising the existence of laïcité, do not believe it can easily be reduced to a single definition.⁵¹⁹ Troper observes a more organic approach so that laïcité evolves from the decisions of the French government and courts. Here, laïcité is not a defining principle but the manifestation of other principles such as equality, freedom and non-discrimination. His approach allows laïcité a degree of flexibility so that, within certain boundaries, it can adapt to political and cultural needs. The approach also allows for certain inconsistencies in its application.

4.2.2 The application of laïcité in French society today

The practical application of laïcité requires the State to treat religions equally and so it is not possible for one religion to be recognised or established to

⁵¹⁷ Laborde, C. *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford: Oxford University Press, 2008, pp.7-8.

⁵¹⁸ Article 2 of the 1958 Constitution.

⁵¹⁹ Troper, M. 'Republicanism and the Freedom of Religion in France' in Cohen, J.L. and Laborde, C. (eds.), *Religion, Secularism and Constitutional Democracy*, New York: Columbia University Press, 2016, p.316 at p.317.

the extent others are not.⁵²⁰ In proclaiming the equality of all citizens irrespective of their religion, Article 1 of the Constitution means that no religion can have a public status and to that extent, religion becomes a private matter subject to private law.⁵²¹ However, it is presumed that there will be a variety of religion and so pluralism is envisaged and guaranteed by the Constitution. One important consequence of laïcité is that no religion can have a role within the government, it must be separate. However, despite this, the Roman Catholic Church, at a national level, continues to be regarded informally as something of a 'quasi-public religion' in that it plays a cultural-religious role e.g. involvement in the funerals of certain state officials including important politicians and commemorating certain national events.⁵²²

In relation to the collective dimension of religion, France protects the freedom of worship and the freedom of association. France continues to retain the concept of *association cultuelles* whereby organisations exclusively for the purposes of religion can benefit from tax advantages. The *association cultuelles* originated under Article 4 of the Law of 1905 as organisations capable of receiving property of former public Church establishments.⁵²³ They are subject to the Law of 1901 which recognises groups whose purpose is other than making a profit. Consequently, application for the status of *association cultuelles* is made directly to the State. Whilst

⁵²⁰ In this context, equal treatment does not mean identical treatment as its application is contextual.

⁵²¹ Prélôt, H. 'Les religions et l'égalité en droit français', *Revue: Les Cahiers de droit* 40: 4, 1999, p.738.

⁵²² For example the memorial service held in Notre Dame, Paris following the Bataclan massacre on 13 November 2015 when the government was present.

⁵²³ Morange, J. 'Le régime constitutionnel des cultes en France,' in *Le statut constitutionnel des cultes dans les pays de l'Union européenne*, Paris: Litec, 1995, pp.119-138.

Protestants and Jews use the system, the Catholic Church objected to it from the outset, fearing that it could lead to the establishment of Catholic associations outside the control of Rome.⁵²⁴

In order to alleviate the concerns of the Catholic Church and its rejection of *association cultuelles* the concept of *associations diocésaines* was developed. These were approved by the *Conseil d'État* on 13 December 1923 as complying with the Laws of 1901 and 1905 and subsequently Pope Pius XI authorised their use in the encyclical *Magnam Gravissimamque*. The *associations diocésaines* act under the authority of a bishop in communion with the Holy See and must follow Canon Law and conform to the constitution of the Catholic Church.⁵²⁵

A surprising exception to the application of laïcité lies in the differences between how the *association cultuelles* and the *associations diocésaines* own property. Under the 1905 Law, the buildings of the Protestant Churches and the Jews were vested in the *association cultuelles*, whilst under the Laws of 1907 and 1908 the property of the Catholic Church was transferred to public authorities. The State became responsible for the maintenance of buildings used for religion before 1901.⁵²⁶ Today, central government remains responsible for cathedrals and bishop's houses whilst the communes have responsibility for churches and presbyteries in their area.

⁵²⁴ Basdevant-Gaudemet, B. 'State and Church in France' in Robbers, G. (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, p.157 at p.162ff.

⁵²⁵ Foyer, J. 'De la séparation aux associations diocésaines' in Imbert, J (ed.), *Etats et religions, Revue des sciences morales et politiques*, 2, 1994, 147-166.

⁵²⁶ Conseil d'État, 28 October 1945, *Chanoine Vaucanu*, S.

The *associations diocésaines* are responsible for all new Catholic buildings built after 1924.⁵²⁷

The freedom of association provided for under the Law of 1901 has allowed organisations to be formed for charitable and educational purposes in order to benefit from tax advantages.⁵²⁸ As primarily cultural associations, they must not be exclusively for religious purposes but can operate in conjunction with a religion. Some Islamic schools operate under this arrangement.

Despite the concept of separation, France has developed a means whereby religions can engage and communicate with the public authorities. The Bureau Central des Cultes ('BCC') is a department of the Ministry of the Interior.⁵²⁹ The BCC regulates many aspects of the application of *laïcité* e.g. finance relating to religion and the conduct of processions etc. It also communicates with religious groups like the Conference of (Catholic) Bishops of France and the *Conseil français du culte musulman* (CFCM).⁵³⁰ The CFCM (an association under the Law of 1901) was established in 2003 to represent the interests of Muslims in France to the State. It is involved in a range of issues including the construction of mosques, halal food and the training of imams. These and other religious groups liaise with the BCC on

⁵²⁷ The State may provide indirect aid e.g. by guaranteeing loans for the construction of new places of worship.

⁵²⁸ An association created under the Law of 1901 may receive grants from public authorities but individual donations do not usually receive a beneficial tax treatment. An *association cultuelle* is not permitted to receive publically funded grants but donations receive a beneficial tax treatment.

⁵²⁹ Created in 1911. See <https://www.interieur.gouv.fr/fr/Archives/Archives-des-actualites/2016-Actualites/Le-ministere-de-l-Interieur-ministere-des-cultes> last accessed 24 January 2019.

⁵³⁰ Other religious bodies include the Protestant Federation of France, the Inter-Orthodox Episcopal Committee in France, the Representative Council of Jewish Institutions in France and the Buddhist Union of France.

religious issues and are regularly consulted by the National Ethics Committee on ethical issues.

Despite the State attempting to be neutral towards religion, it is also accepted that religions are different and so a fair approach will not necessarily mean equal treatment. The Conseil Constitutionnel has ruled 'that to similar situations, similar solutions should be applied, [but] it does not follow that different situations cannot call for different solutions'.⁵³¹ The practical effect of this approach can be seen most clearly in fact that the concordat regime continues to exist in the region of Alsace-Moselle.⁵³² Circumstances can also differ in some of France's overseas territories e.g. the public authorities in Guyana subsidise and organise Catholic worship.⁵³³

The effect of the principle of neutrality is seen most clearly in the way it affects the provision of public services. Public officials are required to strike a balance between the freedom of opinion and the need not to offend religion or to discriminate according to a person's religion.⁵³⁴ As a result, a public official whether or not in contact with the public, is not permitted to manifest

⁵³¹ Conseil Constitutionnel, 12 July 1979, decision no. 79-107 DC.

⁵³² The Concordat regime includes: the Law of 18 Germinal, Year X (Concordat and Organic Articles of the Catholic Religion and Protestant Religions), the order of 25 May 1844 (the Jewish religion), and the texts applying to congregations were held under Article 7 law of 1 June 1924. The four recognized religions being the Catholic dioceses of Strasbourg and Metz, Church of Augsburg Confession of Alsace and Lorraine, Reformed Church of Alsace and Lorraine, Jewish consistories of Strasbourg, Colmar, and Metz, are private autonomous institutions. They are organized under public law and funded by the State and the municipalities. In addition the government is required to organize religious instruction that is part of the everyday curricula of schools.

⁵³³ Conseil Constitutionnel, 12 July 1979, *Loi relative à certains ouvrages reliant les voies nationales ou départementales*.

⁵³⁴ Article 6 of Law No. 83-634 of 13 July 1983.

religious belief, for example by wearing of religious symbols.⁵³⁵ On 24 January 2018, the National Assembly voted to extend the laws banning the wearing of religious clothing or symbols to lawmakers in Parliament.⁵³⁶ Equally, the principle of neutrality applies to public buildings which are not permitted to display signs or symbols relating to political, religious or philosophical opinions.⁵³⁷

The application of laïcité has been heavily associated with France's education system ever since the Jules Ferry laws of the Third Republic sought to remove public education from the control of the Catholic Church.⁵³⁸ Under Article 2 of the Law of 28 March 1882, primary schools were required to allow parents to make provision for their child's religious instruction on a weekly basis. The law of 30 October 1886 affirmed the laïque nature of education by requiring an exclusively secular staff.⁵³⁹ All children have access to the state education system which does not discriminate on religious grounds.

The Law of 31 December 1959 on Higher Education known as the Law Debré allowed private schools (having a predominantly Catholic in ethos) to contract with the State in order to receive funding under certain conditions: the teachers must be suitably qualified, the school must follow the public

⁵³⁵ Conseil d'État, 3 May 2000, *Mademoiselle Marteaux*, no. 217017; TA Paris, 17 October 2002, *Ebrahimian*, no. 01-740/5; CAA Lyon, 27 November 2003, *Nadjet Ben Abdallah*, no. 03LY01392.

⁵³⁶ Heneghan, T. 'French parliament bans 'conspicuous religious signs' reported in *The Tablet*, 30 January 2018.

⁵³⁷ Conseil d'État, 27 July 2005, *Commune de Sainte-Anne*, n°259806.

⁵³⁸ Sowerwine, C. *France Since 1870: Culture, Society and the Making of the Republic*, Basingstoke: Palgrave Macmillan, 2001, pp.34-36.

⁵³⁹ State approved private religious schools are exempt from this requirement.

school syllabus, be subject to state inspection and not discriminate when accepting children. Religion is not part of the curriculum but religion classes can take place either before or after the normal school day. Additionally, the Act of 26 January 1984 requires higher education to be free from any type of ideological bias, respect objective knowledge, guarantee diversity of opinion and provide teaching and research based on science and creative and critical thinking.

The *Conseil d'État* has recognised a right for students to manifest their religious belief within an educational establishment as long as it is proportionate to other concerns of the institution.⁵⁴⁰ However, this right is limited in relation to acts of undue pressure, provocation, proselytism or the distribution of propaganda. The law attempts to preserve personal dignity and maintain a plural approach. This principle has also been applied outside the educational system to all users and consumers of public services who should avoid proselytism.⁵⁴¹ The Jean Zay circulars from 1936-1937 prohibit all forms of propaganda, political or religious at school, and all proselytizing. Furthermore, the so-called Bayrou circular of 20 September 1994 sought to ban from schools all 'ostentatious signs, which are in themselves elements of proselytism or discrimination.'

Proselytism is an issue upon which the application of laïcité shows a markedly different approach from that taken in many other European countries. Chelini-Pont and Ferchiche make the important point that in

⁵⁴⁰ Conseil d'État opinion of 27 November 1989 on laïcité and education.

⁵⁴¹ The Charter of Laïcité in the public services, ordered by Dominique de Villepin, then Minister of the Interior and signed on 13 April 2007.

France, proselytism is almost wholly regarded as something negative and this approach contrasts to that taken by the ECHR which distinguishes between proselytism and abusive proselytism.⁵⁴² They explain how this accounts for attempts by the State to associate visible signs of religious identity with proselytism and how this approach has often been upheld by the courts.

There is something anomalous about the ban on religious symbols within and on public buildings. At first it would seem to relegate religious imagery to the private sphere. However, France retains a vast array of historic public religious iconography which is almost exclusively Catholic. Monumental crosses and crucifixes are often placed at the entry and exit points to villages and many towns and villages are named after Catholic saints and martyrs. Whilst religious holidays are not officially recognised as a public holidays, festivals like 'Toussaints' celebrated on 1 November each year assume the guise of a national as well as religious commemoration of the dead. The cumulative effect of these images and associations presents a constant reminder of France's Catholic past.⁵⁴³ This could be contrasted with the ban in recent years on praying in public which was first introduced in Paris in 2011 and which has subsequently been proposed to extend to the rest of the

⁵⁴² Chelini-Pont, B. and Ferchiche, N. 'Religion and the Secular State: French Report', Publicaciones facultad derecho Universidad Complutense, 2015, p.327. See also Rolland P. 'La régulation de la liberté religieuse: le cas du prosélytisme', in *Chemins d'Europe: Mélanges en l'honneur de Jean Paul Jacqué*, Paris: Dalloz, 2010, pp. 577-589.

⁵⁴³ For a contemporary dispute over the installation of a new statute of the Madonna see Cranmer, F. 'France, *laïcité*, religious statues and public places' in *Law & Religion UK*, 6 December 2016, <http://www.lawandreligionuk.com/2016/12/06/france-laicite-religious-statues-and-public-places/> - last accessed 24 January 2019.

country.⁵⁴⁴ The ban is designed to remove Muslim religious practice from public view.

Despite the historic presence of Christian symbolism, Chelini-Pont and Ferchiche distinguish between two approaches to the implementation of laïcité.⁵⁴⁵ The first alludes to the intolerance that religion can exhibit and so identifies neutrality in a lack of religious visibility. The second approach allows religious visibility in so far as it respects human dignity and plurality. The most contentious application of laïcité in recent years has been the law of 2010 prohibiting face coverings public which has been perceived as an anti-Islamic law because it predominately affects Muslim women. This is discussed as a case study in the final section of the chapter.

We now turn to the historical development of laïcité and consider how it emerged as a response to perceived religious dominance and oppression.

⁵⁴⁴ Agerholm, H. 'France to stop Muslims praying in the street, interior minister says' in *The Independent*, 20 November 2017.

⁵⁴⁵ Chelini-Pont, B. and Ferchiche, N. 'Religion and the Secular State: French Report', Publicaciones facultad derecho Universidad Complutense, 2015, p.328.

4.3 The evolution of laïcité – arising from the tumult of the 1789 Revolution and the anticlerical conflicts leading up to the 1905 laws of separation

Laïcité has been subject to intense critical debate in France.⁵⁴⁶ However, there is one thing on which most scholars agree: that the secular state originated from (1) the anti-clerical conflicts following the 1789 Revolution and (2) those leading up to the introduction of the Law of 1905 on the separation of Church and State.⁵⁴⁷

Jean Baubérot, perhaps the most influential French contemporary writer on laïcité, sees its modern guise developing from these two events which he calls 'thresholds of secularism'.⁵⁴⁸ From the outset, laïcité was a constitutional principle wrought in the crucible of anti-clericalism and the reverberations of this continue to echo today.⁵⁴⁹ This section asks what it was about the Church and clericalism during these periods that provoked such a powerful reaction and led not only to the separation of Church and State but to the elevation of laïcité into a constitutional principle.

⁵⁴⁶ See for example, Liogier, R. 'Laïcité on the Edge in France: Between the Theory of Church-State Separation and the Praxis of State-Church Confusion' in *Macquarie Law Journal*, 9:1, 2007, pp.25-45.

⁵⁴⁷ Chelini-Pont, B. and Ferchiche, N. 'Religion and the Secular State: French Report', *Publicaciones facultad derecho Universidad Complutense*, 2015, p.311. See also Airiau, P. *Cent ans de laïcité française. 1905-2005*, Paris: Presses de la Renaissance, 2005, p.288. Tripier, Y. *La laïcité, ses prémices et son évolution depuis 1905*, Paris: L'Harmattan, 2003, p.183.

⁵⁴⁸ Baubérot, J. *Laïcité 1905-2005 Entre Passion et Raison*, Paris, Seuil, 2004.

⁵⁴⁹ Chadwick, O. *The Secularisation of the European Mind in the 19th Century*, Cambridge: Cambridge University Press, 1975, p.107ff. Gaudin, P. 'République and laïcité': What is at stake in contemporary France? in *Philosophy and Social Criticism*, 42:4-5, 2016, pp.440-447.

Despite a period of recent stability under the Fifth Republic, France's political history since the 1789 Revolution has been turbulent. The role and status of religion has played an important factor in the rapidly changing political regimes of the nineteenth century. The period up to the establishment of the Third Republic in 1870 can broadly be seen as a battle between monarchists and republicans fighting to establish their preferred system of government.⁵⁵⁰ The French Catholic Church supported by Rome was wholly supportive of the monarchists while the members of groups such as Freemasonry formed the heart of the anti-monarchist Republican Party. Catholics believed that the source of the monarch's authority came from God and this set them on a course to clash with a rapidly developing liberal democracy. The 1905 separation of Church and State ended Catholic hopes for a return to monarchy.

A brief time-line of France's political regimes since the 1789 Revolution is helpful to contextualize the discussion that follows:

⁵⁵⁰ Berenson, E. 'The Second Republic' in Berenson, E., Duclert, V. and Prochasson, C. (eds.), *The French Republic: History, Values, Debates*, London: Cornell University Press, 2011, pp. 27-44.

Date	Regime	Leader
1789	Revolution	
1789 - 1792	Constitutional Monarchy	Louis XVI
1792 - 1804	First Republic	
1804 - 1814	First Empire	Napoleon Bonaparte
1814 - 1830	Bourbon Restoration	Louis XVIII (1814 – 1824) Charles X (1824 – 1830)
1830 - 1848	July or 'Liberal' Monarchy	Louis-Phillippe, Duke of Orleans
1848 - 1852	Second Republic	Louis-Napoleon Bonaparte
1852 - 1870	Second Empire	Napoleon III
1870 - 1940	Third Republic	
1940 - 1944	Occupation by Nazi Germany and the <i>Vichy</i> regime in the Free French State	Marshal Philippe Pétin
1944 - 1958	Fourth Republic	
1958 -	Fifth Republic	

4.3.1 1789 Revolution – anticlericalism, the separation of the Church and State and the freedom of religion

The 1789 Revolution ended absolute monarchy. At the time, France's population was approximately 28 million, almost all of whom were Catholic.⁵⁵¹ The Revolution challenged the status and privileges of the Gallican Church.⁵⁵² The Church's annual income in 1789 was estimated to be in the region of 150 million *livres* which was exempt from taxation. The Church owned roughly six per cent of mainland France and was permitted a tithe of roughly one-tenth of agricultural production. Religious buildings were a pervasive reminder of the Church's presence and the affluent and often

⁵⁵¹ Sée, H. *Economic and Social Conditions in France During the Eighteenth Century* (first published in 1927 as *La France Économique et Sociale Au XVIIIe Siècle*), Kitchener, Ontario: Batoche Books, 2004.

⁵⁵² For the prehistory of the Catholic Church in France before the 1789 Revolution see: Bergin, J. *The Politics of Religion in Early Modern France*, Yale: Yale University Press, 2014.

indulgent lifestyles of senior clergy were resented.⁵⁵³ Until the Revolution, Catholicism provided the source of the monarchy's political and moral legitimacy.⁵⁵⁴ The Revolution, fuelled by resentment against the power of the Church in a deeply unequal society, radically reconfigured its status.⁵⁵⁵

The Church, with the protection of the King, had jealously guarded its independence from excessive interference of the Pope and the Church authorities in Rome.⁵⁵⁶ Gallicanism recognised that the civil authority, the monarch, also influenced the shape and nature of the French Church. Louis XIV identified national unity with religious unity.⁵⁵⁷ The King permitted religious practice and ecclesiastical structures in communion with Rome but he also appointed bishops and senior ecclesiastics and did not allow papal directives to be published in France without prior authorisation.⁵⁵⁸ To that extent the State displayed erastian traits and despite its privileges and powers, the Church was subordinate to it.⁵⁵⁹ As Perreau-Saussine writes, 'the Gallican Church could tolerate the protection and control of the State precisely because the State recognized Catholicism as its official religion'.⁵⁶⁰

⁵⁵³ Schama, S. *Citizens: A Chronicle of the French Revolution*, London: Viking, 1989, pp.349-352.

⁵⁵⁴ Catholicism triumphed over Protestantism in France during the Wars of Religion 1562 – 1598 and the subsequent emigration of many Huguenots following the Edict of Fontainebleau (1685) which revoked the Edict of Nantes (1598) and made the practice of Protestantism illegal in France.

⁵⁵⁵ Hibbert, C. *The French Revolution*, London: Penguin Books, 1982, p.30.

⁵⁵⁶ Bergin, J. *The Politics of Religion in Early Modern France*, Yale: Yale University Press, 2014, pp.6-10.

⁵⁵⁷ Tingle, E. 'Religion and Politics in France before 1800' in *European History Quarterly*, 46:1, 2016, pp.113-123.

⁵⁵⁸ Réville, J. 'Anticlericalism in France' in *The American Journal of Theology*, 9:4, 1905, p.605.

⁵⁵⁹ The 1682 Declaration of the Clergy of France gave certain privileges to the monarch e.g. the right call a Council of the Catholic Church in France and to legislate on various ecclesiastical matters.

⁵⁶⁰ Perreau-Saussine, E. *Catholicism and Democracy: An Essay in the History of Political Thought*, Princeton: Princeton University Press, 2012, p.18.

The State supported the independence of the Gallican Church from Rome and was wary of the extremes of *ultramontanisme*.⁵⁶¹ When a bankrupt King Louis XVI re-called the long-neglected Estate-General for the first time since 1614, few could have predicted the tremendous upheaval that would follow.⁵⁶²

The Estates-General represented the three social classes of the French realm under the *Ancien Regime*: the clergy, aristocracy and commoners.⁵⁶³ When the Estates General met, the clergy had 303 members (including 51 bishops), the nobility had 282 members and the commoners, representing 95% of the population, was increased to 578 men, half of whom were lawyers or local officials.⁵⁶⁴ Votes were counted according to each of the Estates which allowed the clergy and aristocracy to block calls from the Third Estate for the introduction of a constitutional democracy. This provoked the Third Estate on 17 June 1789 to declare itself the 'National Assembly'.

The Revolution that followed abolished the Estates and as a result required a strong, centralised state to replace them. At first the King refused to recognise the Assembly, but on 20 June the deputies of the Third Estate took what has become known as the Tennis Court Oath and swore to establish a new constitution. On 27 June the King acquiesced and the drafting process

⁵⁶¹ Ultramontanism is a term used to describe a political conception of the Catholic Church, often popular with clerics, that places particular emphasis the authority and status of the Pope.

⁵⁶² Bergin, J. *The Politics of Religion in Early Modern France*, Yale: Yale University Press, 2014.

⁵⁶³ Doyle, W. *Oxford History of the French Revolution*, Oxford: Oxford University Press, 2002, p.86f.

⁵⁶⁴ Schama, S. *Citizens: A Chronicle of the French Revolution*, London: Viking, 1989.

for a new constitution began.⁵⁶⁵ From 1789-1792 France was briefly a constitutional monarchy under King Louis XVI. The period marks the beginning of a period in France during which liberal democracy would emerge as the new constitutional order.

The development of laïcité and liberal democracy in France is intimately bound up with the Declaration of the Rights of Man and the Citizen of 1789 (the 'Declaration'). It remains in force today as a justiciable part of the preamble to the 1958 Constitution.⁵⁶⁶ The Declaration was originally part of the preamble to the first revolutionary constitution.⁵⁶⁷ Those who drafted it drew on a range of sources including Christian doctrine, natural law, secular influences from Enlightenment thinking as well as themes from the American Declaration of Independence.⁵⁶⁸ The purpose of the Declaration was to affirm 'the natural and imprescriptible rights of man' to 'liberty, property, security and resistance to oppression'. The series of individual rights and freedoms includes at Article 10, a right to the freedom of religion:

'No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.'⁵⁶⁹

⁵⁶⁵ Ibid.

⁵⁶⁶ Whilst the 1958 Constitution referred to the Declaration in its preamble, the rights it contained were only incorporated into the Constitution by a critically important decision of the *Conseil constitutionnel*, Decision No. 71-44 DC of 16 July 1971. The decision broadened the scope of the Constitution to include legal rights and also extended the role of the *Conseil constitutionnel*.

⁵⁶⁷ Boyron, S. *The Constitution of France: a Contextual Analysis*, Oxford: Hart Publishing Ltd, 2013, p.40.

⁵⁶⁸ Ibid, p.40.

⁵⁶⁹ Article 10 of the Declaration of the Rights of Man 1789.

The rights were available to all citizens from any social background and were envisaged as 'natural, unalienable and sacred', that is to say, fundamental.⁵⁷⁰ They were intended as protection against those with legislative and executive political power such that a government acting in accordance with the Declaration would be less likely to be corrupt.⁵⁷¹

Article 10 guaranteed the freedom of conscience and permitted a variety of public religious belief and practice (including atheism) on condition that public order was maintained.⁵⁷² Whilst it was never the intention of the revolutionaries to abolish religious belief, they did intend to combat religious intolerance and remove the historic privileges and dominant position of the Church. In itself, the Declaration did not affect the status of the Church. Whilst Article 10 paved the way for the de-confessionalisation of the French state, the early years of the Revolution saw those controlling the State attempt to impose their control on the Catholic Church through an extreme form of erastianism.⁵⁷³

In a decree of 2 November 1789, the Constituent Assembly nationalised the Catholic Church in France by placing all ecclesiastical property 'at the disposal of the Nation'. This was in return for an agreement that the State would fund the running expenses of the Church including clerical salaries.⁵⁷⁴

⁵⁷⁰ The Declaration is a clear precursor of modern day human rights law.

⁵⁷¹ Boyron, S. *The Constitution of France: a Contextual Analysis*, Oxford: Hart Publishing Ltd, 2013.

⁵⁷² Article 9 ECHR retains the same structure.

⁵⁷³ Perreau-Saussine, E. *Catholicism and Democracy: An Essay in the History of Political Thought*, Princeton: Princeton University Press, 2012, p.7.

⁵⁷⁴ Tithes had already been abolished in August 1789 and Church property was considered to cover between 20-25% of France.

The move was compounded when, in December 1790, all priests were required to take an oath of loyalty to the national institutions. On 12 July 1790 the Civil Constitution of the Clergy came into force. This was a unilateral act that effectively made the French Catholic Church into a department of state.⁵⁷⁵ French clergy were forced to choose between allegiance to the State (known as 'constitutional clergy' or 'jurors') and those who refused to sign on the grounds of conscience (known as 'refractory clergy' or 'non-jurors').

The Church was split between those who sought to conform to the ideals of the Revolution and those who rejected it and sought to maintain allegiance with Rome. The Civil Constitution of the Clergy regulated the status of priests making them into all but civil servants and sought to determine the religious practice of the Catholic Church in France.⁵⁷⁶ By 1791, almost half of all parish priests and all but seven bishops had refused to swear the oath of allegiance to the Constitution. According to Simon Schama, 'The Civil Constitution was not simply another piece of institutional legislation. It was the beginning of Holy War'.⁵⁷⁷

This period was one of intense anticlericalism during which many priests were killed. Initially, the objective was to strip the Church of its wealth and power. Church lands were nationalised in 1789, in 1790 it was banned from

⁵⁷⁵ The number of dioceses was reduced from 135 to 85 and their boundaries were aligned to the newly formed civil administrative 'departments'. This allowed both priests and bishops to be elected by the department or commune respectively.

⁵⁷⁶ For example, it effectively completed the destruction of all male and female monastic orders in France.

⁵⁷⁷ Schama, S. *Citizens: A Chronicle of the French Revolution*. Penguin: London, 1989, p.491.

levying taxes and tithes and religious orders were abolished.⁵⁷⁸ Teaching and hospital orders were abolished in 1792, marriage was secularised and all public records (birth, marriage and death) were laicised.

Political regime change was accompanied by attempts to eradicate the physical and symbolic presence of the Church.⁵⁷⁹ The de-christianisation of society became synonymous with its secularisation. For a period, France had a non-Christian republican calendar, churches were converted in to 'Temples of Reason', and civil religion emerged giving homage to the Enlightenment goddesses of Liberty and Reason.⁵⁸⁰ Anticlericalism was a brutal attempt to remove the presence and the influence of the Catholic Church.⁵⁸¹

Reflecting on the events of the Revolution in 1982, Claude Nicolet wrote in *L'idée républicaine en France* that, 'Legal and territorial unity...also requires unity of another kind: moral or spiritual: this is the function of laïcité'.⁵⁸² For republicans, removing the involvement and influence of the Catholic Church over the affairs of the State was imperative because Catholics were so intent on restoring the monarchy.

⁵⁷⁸ Tallett, F. 'Dechristianizing France: The Year II and the Revolutionary Experience', in Tallett, F. and Atkin, N. (eds.), *Religion, Society and Politics in France Since 1789*, London: The Hambledon Press, 1991, p.6.

⁵⁷⁹ Atkin, N. and Tallett, F. *Priests, Prelates & People: A History of European Catholicism Since 1750*. London: IB Tauris, 2003, pp. 56-62.

⁵⁸⁰ Baubérot, J. 'Laïcité' in Berenson, E., Duclert, V. and Prochasson, C. (eds.), *The French Republic: History, Values and Debates*, London: Cornell University Press, 2001, p.128.

⁵⁸¹ Dunn, J. 'Secularizing the Sacred: The Effort to Dechristianize France During the Revolution' in *Primary Source*, 4:2, 2012, pp.26-32.

⁵⁸² Nicolet, C. *L'idée républicaine en France (1789-1924): Essai d'histoire critique*, Paris: Gallimard, 1982, p.447.

From the perspective of the Revolutionaries, equality between those who govern and are governed only became theoretically possible once monarchy and aristocracy were ended.⁵⁸³ Democracy now linked the State (indirectly via representation) to the individual. What was the place of intermediate organisations like the Church in this new regime? Perreau-Saussine suggests that the Civil Constitution of the Clergy was designed to democratise the Church by 'identifying the people *qua* citizens with the people *qua* Christians, so that citizens participated as of right in the Catholic Church.'⁵⁸⁴ Since these citizens were now free to vote for a priest or a bishop, it is hardly surprising that Pope Pius VI condemned the Civil Constitution and described religious freedom as 'a monstrous right'.⁵⁸⁵

Following the arrest of King Louis XVI in August 1792, absolute monarchy was abolished and the First French Republic proclaimed on 21 September.⁵⁸⁶ Following *la Terreur*, the culmination of the Republic's dealing with religion was to effectively separate the Church from the State in 1795 creating a regime of separation which lasted for just six years.⁵⁸⁷ During this period, the State permitted individual choice in religious observance but did

⁵⁸³ Perreau-Saussine, E. *Catholicism and Democracy: An Essay in the History of Political Thought*, Princeton: Princeton University Press, 2012, p.8

⁵⁸⁴ Ibid, p.8.

⁵⁸⁵ "The necessary effect of the constitution decreed by the Assembly is to annihilate the Catholic Religion and, with her, the obedience owed to Kings. With this purpose it establishes as a right of man in society this absolute liberty that not only insures the right to be indifferent to religious opinions, but also grants full license to freely think, speak, write and even print whatever one wishes on religious matters – even the most disordered imaginings. It is a monstrous right, which the Assembly claims, however, results from equality and the natural liberties of all men." Taken from *Quod Aliquantum*, of March 10, 1791, by Pius VI in *Recueil des Allocutions*, Paris: Adrien Leclere, 1865, p. 53.

⁵⁸⁶ Louis XVI was executed on 21 January 1793.

⁵⁸⁷ The period is usually considered to be 5 September 1793 – 27 July 1794.

not officially recognise the status of priests, provide their salaries or premises for worship or accommodation. Catholics were persecuted.⁵⁸⁸

The Consulate of the Napoleonic Empire offered France much needed political stability.⁵⁸⁹ The separation of Church and State was abolished and Napoléon Bonaparte (1769-1812) negotiated a Concordat with Pius VII (1740-1823), which was signed on 15 July 1801.⁵⁹⁰ The preamble to the Concordat acknowledged Roman Catholicism as 'the religion of the great majority of the French people' but failed to meet the requirements of the Vatican which wanted Catholicism to be termed the 'dominant' religion. When the Concordat was published it was accompanied by a further 77 Articles, known as the Organic Articles which were unilaterally promulgated by the French government and never accepted by the Church.⁵⁹¹ The Organic Articles re-introduced state control over the administration of the Church but did not concern itself with dogmatic or theological debate. It also established the notion of 'recognised' religions, Protestantism being recognised by the State in 1802 and Judaism in 1808. This regime was to regulate the relationship between the State and the Church for the next one hundred years.⁵⁹² As the period of the Third Republic approached, the idea

⁵⁸⁸ MacLehose, SH. 'Separation of Church and State in France in 1795' in *The Scottish Historical Review*, 4:15, 1907, pp. 298-308.

⁵⁸⁹ Emsley, C. *Napoléon: Conquest, Reform and Reorganisation*, Harlow: Pearson Longman, 2003. Réville, J. 'Anticlericalism in France' in *The American Journal of Theology*, 9:4, 1905, p.608.

⁵⁹⁰ The Concordat of 1801, signed the 26th of Messidor in Year 9 of the French Republic (15 July 1801) and ratified the 23rd of Fructidor (10 September 1801).

⁵⁹¹ In addition the government published 44 articles regulating its relationship with the Protestant Churches.

⁵⁹² Other laws governed the worship of Protestants and later provisions in 1808 and 1831 regulated Judaism.

that it was possible to regulate the relationship between the Catholic Church and the State had seeped deeply into common consciousness.⁵⁹³

4.3.2 Towards the Third Republic and the 1905 laws of separation

According to commentators like Baubérot, the reconfiguration of religion-state relations which began at the 1789 Revolution set the scene for the long history of conflict fought throughout the nineteenth century between two visions of France. Those who wanted France once again to become 'the eldest daughter of the Catholic Church' provided one vision whereas the other was championed by those who thought modern France must be the daughter of the 1789 Revolution.⁵⁹⁴ Politically, governments in favour or hostile to the Catholic Church or to all religion quickly succeeded one another.⁵⁹⁵ Monarchists wanted a return to the *Ancien Régime* and the revitalisation of clerical power whilst republicans remained implacable opponents.

The 'Paris Commune' in 1871 was a radical attempt to impose a federation of republican progressive communes throughout France.⁵⁹⁶ After its failure, there was a determination by the authorities not to let similar events take place and this was supported by a general desire for peace. The reaction

⁵⁹³ Baubérot, J. 'Laïcité' in Berensen, E., Duclert, V. and Prochasson, C. (eds.), *The French Republic: History, Values, Debates*, London: Cornell University Press, 2011, pp.127-135.

⁵⁹⁴ Baubérot, J. *Laïcité 1905-2005 Entre Passion et Raison*, Paris, Seuil, 2004, p.124 ff.

⁵⁹⁵ For example, in 1829 and 1830 when the government proposed to implement legislation supportive of the Church a revolution resulted in Louis Philippe of Orleans being substituted for the Bourbon regime.

⁵⁹⁶ Price, R. 'Ideology and Motivation in the Paris Commune of 1871' in *The Historical Journal*, 15(1), 1972, pp.75-86.

against the radicals was accompanied by a revival of religious fervour which served to strengthen support for right-wing politics and conservative Catholicism which dominated political life up to 1876.⁵⁹⁷ However, any hopes of a return to monarchical government were thwarted when the potential heir to the throne, the *comte de Chambord*, refused any compromise with the government short of restoring the Bourbon dynasty and absolute rule.

The Government of Marshal de MacMahon (President 1873-1879) wedded itself to Catholic morality as the way forward for the nation and religious symbolism in the public space became once again contested. Many clerics wanted a renewed role for the Church in public life so that it could set the moral standards throughout France.⁵⁹⁸ The kindling for a further re-ignition of anticlericalism was set and compounded when French Catholics sought to encourage the Government to take an active part in supporting the continuity of the Pope's temporal authority in the face of opposition from the newly formed Italian state. Only a few years before, Pope Pius IX had published the Syllabus of Errors in 1864 decrying liberalism and held the First Vatican Council (1869-1871) to deal with the perceived 'problems' of rationalism, liberalism and materialism.

⁵⁹⁷ The Paris Commune closed opposition newspapers and declared the separation of Church and State. It was perceived as an elitist metropolitan movement by conservative rural France. See Brown, F. *For the Soul of France: Culture Wars in the Age of Dreyfus*, New York: Alfred A. Knopf, 2010, p.32ff.

⁵⁹⁸ Hazareesingh, S. *Political Traditions in Modern France*, Oxford: Oxford University Press, 1994, p.99ff.

Many French Catholics wanted France to go to war against the new Italian Republic and fight against Italian anticlerical laws but this famously resulted in the left-wing republican politician Léon Gambetta's declaration that, '*Le cléricalisme, voilà l'ennemi.*'⁵⁹⁹ By 1879 Republicans had gained majorities in both Houses of Parliament and were set to be in power for the next twenty years during which time France established itself as a Republic. At the heart of Republican idealism was the belief in popular sovereignty as long as it was informed by critical reason.⁶⁰⁰ Meanwhile, the Church wanted funds to fight the threat of democracy to its power and influence over society and the battle ground was to be education.

During 1881-1882, Jules Ferry's government passed the Jules Ferry laws, establishing free education (1881) and mandatory and lay education (1882), providing the basis of French public education. Ferry and his chief supporters, the protestant pastors Henri Buisson and Félix Pécaut, saw education as a means of unifying the country. They envisaged that it would give women equality with men and allow the poor to progress. The involvement of religious orders (Gambetta had called 'a multi-coloured militia without a fatherland') in educational provision was rejected.⁶⁰¹ Suspicious of their loyalty, they were perceived by Republicans as repressing individual personality and implicated in creating a parallel society.

⁵⁹⁹ 'Clericalism, that is our enemy' - words spoken by Gambetta to his friend Peyrat. See Kaiser, W. 'Clericalism – that is our enemy!: European anticlericalism and the culture wars' in Clark, C. and Kaiser, W. (eds.), *Culture Wars: Secular-Catholic Conflict in Nineteenth-Century Europe*, Cambridge: Cambridge University Press, 2003, pp.47-76.

⁶⁰⁰ Burleigh, M. *Earthly Powers: Religion & Politics in Europe from the French Revolution to the Great War*, London: Harper Collins, 2005, p.339.

⁶⁰¹ Quoted in Roberts, W. 'Napoleon, the Concordat of 1801 and Its Consequences' in Coppa, F.J. (ed.), *Controversial Concordats: The Vatican's Relations with Napoleon, Mussolini and Hitler*, Washington: The Catholic University of America Press, 1999, p.66.

In the years that followed, Catholicism was systematically removed from providing educational services. Compulsory state education introduced moral and civic instruction to replace Catholic teaching. Whilst the term *laïcité* had been used during the 1870s by 1883 it had been adopted by Buisson to describe circumstances where 'the State remains neutral with respect to all religions, free from all clergymen', so that it is able to 'promote equality before the law [and] freedom to all nations.'⁶⁰² This definition laid the foundations for the law of 1905 and its subsequent usage.

The pontificate of Pope Leo XIII (reigned 1878-1903) signalled a change of approach by the Vatican. The Pope indicated that the Church would refrain from interfering in political affairs on condition that the Church's fundamental freedoms were not impeded.⁶⁰³ The period marks a time when the Vatican began to recognise that liberal democracy's challenge to the traditional teaching of the Church was not superficial and that it would have profound implications for the Church's role and mission in society.⁶⁰⁴ What could have been a period of healing in church-state relations eventually ended in yet another wave of anticlerical legislation following the intense emotions and

⁶⁰² Quoted in Baubérot, J. 'Laïcité' in Berensen, E., Duclert, V. and Prochasson, C. (eds.), *The French Republic: History, Values, Debates*, London: Cornell University Press, 2011, p127.

⁶⁰³ See for example the encyclical *Nobilissima Gallorum Gens* (On the Religious Question in France) promulgated in 1884 which whilst condemning attacks on the Church sought to persuade French bishops that opposition to the French government was counterproductive. See also *Libertas praestantissimum donum*, 1888, (On the Nature of Human Liberty).

⁶⁰⁴ Chevallier, P. *La séparation de l'Église et de l'école: Jules Ferry et Léon XIII*, Paris, Fayard, 1981.

political manoeuvring stirred up by the *Dreyfus Affair*.⁶⁰⁵ The anti-Semitic plot against Dreyfus and subsequent cover-up supported by the army's Catholic elite split French society sharply between conservatives and republicans. The battle was epitomised in the famous open letter '*J'Accuse!*' by Emile Zola published in the newspaper *L'Aurore* on 13 January 1898. Zola accused the French President and the Government of being complicit in the anti-Semitic and unlawful jailing of Dreyfus.⁶⁰⁶ An army cover-up quickly became a clerical/militarist plot against the Republic and the resulting anticlerical campaign stretched to the laws of separation in 1905.⁶⁰⁷

In an attempt to control the Church, under the Law of 1901 religious organisations had to apply for parliamentary authorisation in order to operate. This was followed by elections in 1902 where the left took sweeping gains and Emile Combes became prime minister.⁶⁰⁸ Combes hated the Catholic Church for its 'arrogant claim to the sole truth and exclusive virtue'.⁶⁰⁹ His anticlerical measures included closing 3,000 pre-1901 unauthorised schools, religious hospitals and other educational establishments. Religious houses were closed and the Jesuits and Assumptionists left France. Bishops' salaries were suspended and Combes sought to abandon the practice of consulting with the Vatican over the

⁶⁰⁵ Briefly, the *Dreyfus Affair* was an anti-semitic plot against Alfred Dreyfus a French Army captain who was falsely convicted of revealing army secrets and was eventually banished to a penal colony on Devil's Island before the truth eventually came out.

⁶⁰⁶ There is an immense literature on the *Dreyfus Affair*, see for example: Schultheiss, K. 'The Dreyfus Affair and History' in *Journal of the Historical Society*, 12:2, 2012, pp.189-203; Cahm, E. *The Dreyfus Affair in French Society and Politic*, London: Routledge, 1996.

⁶⁰⁷ Harris, R. 'The Assumptionists and the Dreyfus Affair' in *Past & Present*, 194:1, 2007, pp.175-211.

⁶⁰⁸ A freemason who had earlier in his life studied theology including a doctoral thesis on St. Thomas Aquinas.

⁶⁰⁹ Burleigh, M. *Earthly Powers: Religion & Politics in Europe from the French Revolution to the Great War*, London: Harper Collins, 2005, p.357.

appointment of episcopal appointments.⁶¹⁰ Events culminated in France breaking off diplomatic relations with the Holy See and questions about the separation of Church and State emerged as a focal point.⁶¹¹ In October 1902, a parliamentary commission was established to investigate the possibility of church-state separation and political momentum grew in favour of such a move. In 1905 the Combes' government was replaced by an administration led by Maurice Rouvier whose key political policy was the separation of Church and State.

The Law of 1905 took three months to debate in Parliament and was eventually voted through the Chamber with a majority of 314 votes in favour and 233 against.⁶¹² It was intended to break once and for all the influence of the Church in the affairs of the State. It unilaterally breached the Concordat regime of 1801 which, despite exercising tight control over the Catholic Church, had effectively entrenched its political and social status and power.⁶¹³ The Law of 1905 ended the system of 'recognised religions' and set France on a course which it continues to navigate today - what Baubérot calls 'le pacte laïque' or 'secular pact', which consists of both a 'legal settlement and a way of living together'.⁶¹⁴

⁶¹⁰ Réville, J. 'Anticlericalism in France' in *The American Journal of Theology*, 9:4, 1905, p.614.

⁶¹¹ Larkin, M. *Church and State after the Dreyfus Affair*, London: Macmillan, 1974, p.102ff.

⁶¹² Guerlac, O. 'The Separation of Church and State in France' in *Political Science Quarterly*, 23:2, 1908, pp. 259-296.

⁶¹³ Laborde, C. *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford: Oxford University Press, 2008, p.33.

⁶¹⁴ Ibid.

We have traced the anticlerical reaction against Catholicism in France at two critical junctures, first in the events following the Revolution of 1789 and then in the events leading up to the introduction of the Law of 1905 and this leads to a number of conclusions. It highlights the dominance and immense influence which the Church had over society. It also shows how difficult it was to reduce that dominance without severe, traumatic and sometime violent political events. It demonstrates the intensity of religious sentiment when challenged and the ways in which it can become fused with other political objectives. The long and confrontational nature of the conflict illustrates the potency and strength of feeling on both sides when the spiritual and metaphysical values underpinning the physical, material and symbolic aspects of society are threatened.

Intertwined with these historical events is the slow and painful rise of liberal democracy and its consequences for both government and society. The process of religious adjustment to liberal democracy is one that continues in France today and laïcité is arguably the tool used to achieve this goal.⁶¹⁵ Could it be that at the end of such a long period of conflict, laïcité and the Law of 1905, in which it is enshrined, stand for the tolerance of diverse religious and political opinions in the public sphere?⁶¹⁶

Whilst Buisson is the person credited with imbuing the term laïcité with its essential elements, the term has historically attracted considerable

⁶¹⁵ See the introduction to Kelly, M. 'Religion in France: Belief, identity and *laïcité*' in *French Cultural Studies*, 28:1, 2017, pp.3-4.

⁶¹⁶ Salton, HT. 'France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law' in *Journal of Politics and Law*, 5:4, 2012, pp.30-41.

controversy and academic arguments over its meaning, practical application and utility continue.⁶¹⁷ These arguments have been at their most ferocious in recent years over the introduction of laws banning wearing religious symbols in schools and face coverings in public and it is to this we now turn.

⁶¹⁷ See Poulat, E. 'Laïcité en France au vingtième siècle.' In *Catholicism, Politics and Society in Twentieth-Century France*, edited by Chadwick, K, Liverpool: Liverpool University Press, 2000, p. 18. Laborde, C. 'On Republican Toleration', in *Constellations. An International Journal of Critical and Democratic Theory*, 9, 2002, pp.167-183. Baubérot, J. *Laïcité 1905 -2005, Entre Passion et Raison*, Paris: Seuil, 2004.

4.4 Contemporary France – the laws prohibiting wearing (1) conspicuous religious symbols in schools and (2) face coverings in public

A major question for the principle of laïcité is the extent to which it can be used by the legislature to regulate religious practice and symbolism and in so doing maintain a separation between religion and public authorities. By analysing the judicial responses to France's two legislative bans on Muslim female clothing, this section of the chapter will test whether the legislation complies with the constitutional principle of laïcité.

Patrick Weil makes the often misunderstood point that laïcité was never intended to be used to impose restrictions on individuals in the public sphere but rather 'on the State and its servants, in the political arena.'⁶¹⁸ Commentators identify three distinct spaces where the visible manifestation of religious belief may or may not be regulated by the State: the private arena; public space where the communal nature of religious belief may wish to be expressed; and the sphere of the State which is the preserve of public authorities and public servants.⁶¹⁹

The ban on wearing conspicuous religious symbols in schools came into force in 2004 (the '2004 ban') and primarily affected Muslim girls because it

⁶¹⁸ Weil, J. 'Headscarf versus Burqa', in Mancini, S and Rosenfeld, M (eds.), *Constitutional Secularism in an Age of Religious Revival*, 2014, p.195, quoting Whitman, J. 'Separating Church and State: The Atlantic Divide' in *Historical Reflections* 34, 2008, p.86.

⁶¹⁹ Requejo, F. 'Religions and Liberal Democracies' in Requejo, F. and Ungureanu, C. (eds.), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-secularism*, London: Routledge, 2014, pp.200-213.

banned the headscarf or *hijab*. The ban on wearing face coverings in public that primarily affected Muslim women by banning the *niqāb* and the *burqa* was passed in 2010 but came into force in 2011 (the '2010 ban').⁶²⁰

Whilst the laws are drafted to avoid allegations of discrimination, their effect and the reasons for their implementation have primarily been directed towards Islam and Muslim women in particular.⁶²¹ Addressing each ban separately not only reflects the chronology of the legislation but also allows each piece of legislation to be analysed independently. Despite each of the bans primarily affecting Muslim female dress, differences in the aims and objectives of the legislation have given commentators significant grounds for criticism. Many accept the legitimacy of the headscarf ban in schools but reject the wider ban on concealing the face in public.⁶²²

Myriam Hunter Henin, writing in 2012, rejected the arguments that had been put forward by the State in order to defend the 2010 ban.⁶²³ She argued that the ban was the result of a misplaced notion of the application of *laïcité* and that far from protecting the dignity and equality of women, it contributed to undermine it. She claimed the ban represented an inflated view of the role of the law in the implementation of public policy and predicted that the ban would be struck down by the ECtHR.

⁶²⁰ The *niqāb* is a veil that covers the face leaving only a slit for the eyes. The *burqa* veils the face in the same way but is also a garment that covers the whole body.

⁶²¹ Gunn TJ. 'French Secularism as a Utopia and Myth' in *Houston Law Review*, 42:1, 2005a, pp.81-102.

⁶²² Weil, J. 'Headscarf versus Burqa', in Mancini, S and Rosenfeld, M (eds.), *Constitutional Secularism in an Age of Religious Revival*, 2014, p.213.

⁶²³ Hunter-Henin, M. 'Why the French don't like the Burqa: *Laïcité*, National Identity and Religious Freedom' in *International and Comparative Law Quarterly*, 61:3, 2012, pp.613-639.

Both the 2004 ban and the 2010 ban were challenged in the ECtHR. The 2004 ban was upheld in the case of *Dogru v. France*⁶²⁴ and the 2010 ban was upheld in the controversial judgment given in *SAS v. France* published on 1 July 2014.⁶²⁵ However, on 23 October 2018, the UN Human Rights Committee, in a landmark decision, ruled that the 2010 ban violated the human rights of two women who were fined in 2012 for wearing a *niqab*.⁶²⁶ This decision now conflicts with the ECtHR decision. At the time of writing, France had a short period from the decision within which to report to the Committee on the action it had taken to implement the Committee's decision, compensate the petitioners and prevent similar violations in the future, including reviewing the law.⁶²⁷

Focussing on the rulings of the ECtHR, it is possible to revisit the circumstances and arguments made in favour of the bans at both the European and domestic level to consider how conceptions of laïcité provided for and contributed towards their justification. Whilst the effects of the legislation are central to determining whether a state can lawfully prohibit the manifestation of religious freedom under Article 9 ECHR, in making its assessment, the ECtHR takes into consideration arguments made in favour of or against the bans during the domestic legislative process. This is

⁶²⁴ *Dogru v. France* [2008] ECHR 1579

⁶²⁵ *SAS v. France* [2014] ECHR 695

⁶²⁶ See the UN Human Rights Office for the High Commissioner, 24 October 2018 at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23750&LangID=E> – last accessed 24 January 2019.

⁶²⁷ Cranmer, F. 'The UN Human Rights Committee and the French *niqab* ban' in *Law & Religion UK*, 25 October 2018, at <http://www.lawandreligionuk.com/2018/10/25/the-un-human-rights-committee-and-the-french-niqab-ban/> last accessed 24 January 2019.

particularly important in determining the margin of appreciation available to the state when it restricts the manifestation of religious belief.

4.4.1 *The legislative process and reasoning for banning the wearing of conspicuous religious symbols in schools.*

The 2004 ban was the result of a protracted period of debate in France which had begun in October 1989 when the headmaster of a school in Creil, (a small town to the north of Paris) expelled three female Muslim students for wearing headscarves in school.⁶²⁸ The debate continued throughout the 1990s during which the *Conseil d'État* accepted that students in public schools did have the freedom to manifest their religious beliefs but that right was limited and subject to the need to maintain public order and respect the fundamental rights of other students. This allowed individual schools to restrict religious symbols where their manifestation was deemed to be externally imposed, ideological or interfered with the ordinary course of the school day. Although the Court stressed the need to apply restrictions with proportionality, there was a plethora of varied approaches from schools. In particular schools struggled to decide whether wearing a religious symbol was a means of proselytism and this inevitably led to allegations of inconsistency and confusion.⁶²⁹ The issue remained one of wider public

⁶²⁸ The full title is "*loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*". Liederman, LM. 'Religious Diversity in Schools: the Muslim Headscarf Controversy and Beyond' in *Social Compass*, 47:3, 2000, pp.367-381.

⁶²⁹ See for example, Monnot, C and Ternisen, X. 'L'exclusion de deux lycéennes voilées divise l'extrême gauche' in *Le Monde*, Archives, 9 October 2003.

concern and eventually it was decided that a national approach was required.

The 2004 ban followed the publication of two reports. The first was from the Stasi Commission which had been established to evaluate whether the headscarf should be banned in schools *and* to assess the application of *laïcité* within society as a whole.⁶³⁰ The Commission's membership of twenty intellectuals including academics, educationalists and politicians has been criticised for hardly representing Muslim views and primarily consisting of those whose views represented *laïcité de combat* (combative secularism), while only Jean Baubérot maintained a consistent *laïcité plurielle* (pluralistic secularism) approach.⁶³¹ These circumstances were hardly conducive to the kinds of equitable process and participation that liberal democracy requires.

The Commission examined religious symbols range public institutions e.g. schools, hospitals, prisons etc. Its conclusion supported a ban on religious symbols in schools on the grounds of promoting integration. *Laïcité* was perceived as a value of French Republicanism and as such it was seen to be the responsibility of public schools, in providing state education, to teach this as a value to all French children. Those opposed to the ban accepted that it could apply to teachers because they provide a public service and are

⁶³⁰ Commission de réflexion sur l'application du principe de laïcité dans la République, Rapport au Président de la République, available at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/034000725.pdf> last accessed 24 January 2019.

⁶³¹ Kuru, AT. *Secularism and State Policies Toward Religion: The United States, France and Turkey*, Cambridge: Cambridge University Press, 2009, p.130.

agents of the State but argued that it should not extend to pupils who use the service and whose freedoms should be protected.

The second report, published by the Debré Commission in December 2003, was similarly criticised for neglecting the views of Muslims.⁶³² The report, expressed concern that the headscarf was symbolic of fundamentalist views, used to proselytise and as such was incompatible with the degree of individual freedom required in a school environment.⁶³³ Like the Stasi report, it also recommended the introduction of a law banning students from wearing symbols that ‘ostensibly’ manifest a particular religious belief in public schools.⁶³⁴ Whilst theoretically applying to members of other religions the practical application of the law (in terms of numbers of students affected) fell primarily on female Muslim students who were forbidden to wear the Islamic headscarf or veil.

The Stasi and Debré reports sought to portray the headscarf as a symbol of patriarchal repression and fundamentalist ideology. This view is supported by some Muslim feminists like Mona Eltahawy who see the religiously based modesty requirements of female Muslim dress as emanating from a misogynistic and patriarchal culture.⁶³⁵ However, other commentators propose various positive reasons why female Muslim students would want to

⁶³² Ibid, p.131.

⁶³³ Debré, JL. *La laïcité à l'école: Un principe républicain à réaffirmer* un rapport de la mission d'information de l'Assemblée nationale, Paris: Odile, 2004, pp.74, 157.

⁶³⁴ Article 1 of Law 2004-228 amended the Code on Education to read “Dans les écoles, les collèges et lycées publics, le port de signes ou tenues par lesquels les élèves manifestant ostensiblement un appartenance religieuse est interdit. . . .” Additional guidance on the application of the law was published by the Ministry of Education on 18 May 2004.

⁶³⁵ Eltahawy M. *Headscarves and Hymens: Why the Middle East Needs a Sexual Revolution*, London: Weidenfeld & Nicolson, 2015, p.33ff.

wear religious clothing.⁶³⁶ Often these accept an element of women's subjugation to male power and recognise conflicting approaches to gender but they also emphasise the importance of female choice, highlighting integration but not assimilation to the wider community.⁶³⁷ The ban has sparked major debates on religious and gender identity and diversity raising questions about what it means to be a French citizen and a practising Muslim.

The 2004 ban was challenged in the ECtHR in the case of *Dogru v. France*.⁶³⁸ The facts of the case are well known and concern Belgin Dogru, a Muslim aged eleven, who wore a headscarf to school. Her teacher repeatedly asked her to remove it because it was incompatible with physical education lessons, but she refused. Eventually, Mme Dogru was expelled for failing to participate actively in the classes. After losing in the domestic courts, she subsequently applied to the ECtHR arguing that the expulsion violated her right to religious freedom as well as her right to an education as guaranteed by Article 9 of the Convention and Article 2 of Protocol No. 1.

The ECtHR had already considered the issue of headscarf bans in earlier cases from Turkey⁶³⁹ and Switzerland.⁶⁴⁰ In the Swiss case of *Dahlab*, the ECtHR agreed with the judgment of the Swiss domestic court, noting that it

⁶³⁶ Scott, JW. *The Politics of the Veil*, Princeton: Princeton University Press, 2007.

⁶³⁷ 'The Place of Religion and Belief in Public Spaces across the EU: Policy Dilemmas and Recommendations on Religious Symbols and Dress Codes' by Religare, A European Commission European Policy Brief part of the 'Religious Diversity and Secular Models in Europe: Innovative Approaches to Law and Policy' project, 2013, p.4.

⁶³⁸ *Dogru v. France* [2008] ECHR 1579.

⁶³⁹ *Karaduman v. Turkey*, Application no. 16278/90, 3 May 1993.

⁶⁴⁰ *Dahlab v. Switzerland*, Application no. 42393/98, 15 February 2001.

had already banned crucifixes in state school classrooms in order to preserve denominational neutrality. The ECtHR found that the headscarf was ‘a powerful religious symbol’ (a description agreed to by the teacher herself) which was ‘hard to square with the principle of gender equality’.⁶⁴¹ It stated that it ‘appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.’⁶⁴²

In its judgment in the *Dogru* case, the ECtHR considered whether the 2004 ban could be regarded ‘necessary in a democratic society’ as required by Article 9(2) ECHR. Referring to its judgments in *Leyla Sahin v. Turkey*⁶⁴³ and *Refah Partisi v. Turkey*⁶⁴⁴, the ECtHR stated that the principle of secularism was ‘undoubtedly one of the fundamental principles of the state which was in harmony with the rule of law and respect for human rights and democracy.’⁶⁴⁵ The Court concluded that France was entitled, under the margin of appreciation, to decide for itself whether pupils should be permitted to wear the headscarf in school because national courts should be given special importance on matters between the state and religion where opinions differed between democratic societies.⁶⁴⁶ France’s concept of laïcité proved decisive because in France (as in Turkey or Switzerland) secularism was a constitutional principle that applied to the whole population and its application

⁶⁴¹ Ibid.

⁶⁴² Ibid.

⁶⁴³ *Leyla Sahin v. Turkey*, Application no. 44774/98, 10 November 2005.

⁶⁴⁴ *Refah Partisi (The Welfare Party) and Others v. Turkey*, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

⁶⁴⁵ *Dogru v. France* [2008] ECHR 1579, para. 66.

⁶⁴⁶ Ibid, para. 63.

was particularly important in schools.⁶⁴⁷ The legality of the 2004 ban, having been upheld by the ECtHR, has not protected it from criticism.

4.4.2 *The legislative process and reasoning for the ban on whole face covering – an appropriate or distorted application of laïcité?*

Moves to ban the full face veil developed quickly. The first attempt in 2006 failed but it resurfaced in 2008 when the *Conseil d'Etat* denied French citizenship to Mme. Machbour, the Moroccan spouse of a French citizen due to her *défaut d'assimilation* (failure to assimilate) due to 'the radical practice of her religion [being] incompatible with the essential values of the French community, in particular with the principle of sex equality.'⁶⁴⁸ Wearing the full Islamic veil was deemed to be one element of her radical religious practice.

President Sarkozy (2007-2012) argued in 2009 that veils were 'not welcome' in France, and that legislation was necessary 'to protect women from being forced to cover their faces and to uphold France's secular values'.⁶⁴⁹ A Parliamentary commission was already under way and its investigation centred on the social utility of the full Islamic veil.⁶⁵⁰ Its report, published on 26 January 2010, showed that the practice of wearing of the full-face veil in

⁶⁴⁷ Ibid, para. 72.

⁶⁴⁸ Conseil d'Etat, 27 juin 2008, Mme Machbour, no. 286798.

⁶⁴⁹ Reported by Gabizon, C. 'Sarkozy: "la burqa n'est pas la bienvenue"', Le Figaro, 26 June 2009. See also Nicolas Sarkozy, New Year Speech, 13 January 2010 quoted in The Guardian on 14 January 2010 at <http://www.theguardian.com/world/2010/jan/14/sarkozy-full-veil-ban>, last accessed 24 January 2019.

⁶⁵⁰ National Assembly's *Mission d'information sur la pratique du port du voile intégral sur le territoire nationale* begun on June 23 2009.

France had arisen relatively recently.⁶⁵¹ Almost no women wore it before 2000 and it was estimated that approximately 1,650 women, mostly under 40 years of age, did so by 2009. The report asserted that the veil did not have a religious origin but was an ancient form of clothing originating prior to Islam. The report suggested that the increase in wearing the full veil stemmed from a 'radical affirmation of individuals in search of identity in society and from the action of extremist fundamentalist movements'.⁶⁵² Moreover, it criticised the practice for being contrary to the core Republican values of *liberté*, *égalité* and *fraternité* stating that it contravened *liberté* because it was a symbol of subservience, *égalité* because it only applied to women and *fraternité* because it contradicted the French interpretation of what it means to live together (*vivre ensemble*).⁶⁵³

The report made four proposals: (1) to reassert Republican values making it clear that wearing the full-face veil was contrary to such values; (2) to undertake a nationwide account of the extent to which there is perceived to be discrimination or exclusion on the basis of faith with a view to ensuring a fair representation of spiritual diversity; (3) to reconfirm the need for awareness and education for respect and diversity; and (4) to enact legislation to protect women who were victims of duress.⁶⁵⁴

⁶⁵¹ Rapport d'information au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national, Report of the Assemblée Nationale No.2262, Paris, 2010.

⁶⁵² Ibid, p.25.

⁶⁵³ Ibid, pp. 87 -120.

⁶⁵⁴ Ibid, pp.142-160.

The report emphasised that amongst the commissions' members and political parties represented in the Parliament there was not unanimous support for a law banning the wearing of the full Islamic veil in public.⁶⁵⁵ While this may have been true amongst politicians, it was not the majority view of the general public in France. The Pew Research Centre survey of attitudes towards the ban in a number of Western European countries showed a majority in favour of a ban in all the European countries with France showing an overwhelming endorsement of 82% approval.⁶⁵⁶

The law banning French citizens from concealing their face in public came into force on 11 April 2011.⁶⁵⁷ It had been passed in the National Assembly by 335-1 votes and in the Senate by 246-1 votes and 100 abstentions. The principal reasons for supporting the ban were essentially (1) it posed a security risk; and (2) it was anti-social in a society that valued facial expression in order to communicate effectively within the public arena. On 10 October 2010, the *Conseil Constitutionnel* declared that the law was compatible with the Constitution with one reservation. The Council analysed the law against Articles 4, 5 and 10 of the Declaration of the Rights of Man and the Citizen 1789 and paragraph 3 of the Preamble to the Constitution of 1946 concerning the equal rights of men and women in all spheres. It accepted arguments that concealing the face could have implications for public safety and fell below the minimum requirements for life in society. It found that whether worn voluntarily or involuntarily, it placed women in a

⁶⁵⁵ Ibid, pp.161-184.

⁶⁵⁶ The Pew Global Attitudes Project, 8 July 2010 at <http://www.pewglobal.org/files/pdf/pew-global-attitudes-report-on-veil-ban-july-8.pdf> - last accessed 24 January 2019.

⁶⁵⁷ Law no. 2010-1192 of 11 October 2010, '*Loi interdisant la dissimulation du visage dans l'espace public*'.

situation of exclusion or inferiority that was incompatible with the constitutional principles of liberty and equality.⁶⁵⁸ The Council's reservation was that the law could not apply to places of worship open to the public as this would contravene the freedom of religion protected by Article 10 of the Declaration.

The ban made it illegal to wear, with certain exceptions, any kind of headwear that covered the face in public.⁶⁵⁹ This included masks, balaclavas, helmets, *niqābs* and also the *burqa* if it also covers the face.⁶⁶⁰ Under the law, a woman may wear the *niqāb* in public while travelling by car or when at worship in a religious setting. The law's requirements are stated in general terms but its objective is clearly to ban the full Islamic veil in public. The law applies to all French citizens and visitors to the country and those who do not comply are subject to a fine of €150 and are required to participate in citizenship education.⁶⁶¹

Commentators criticised the process by which the ban came into force in France on a number of fronts including the lack of empirical evidence, especially from veil wearers, and generally as a ban violating human rights.⁶⁶² Myriam Hunter Henin labelled the 2010 ban 'a distortion of laïcité'

⁶⁵⁸ Conseil Constitutionnel 7 October 2010 (no. 2010-613 DC), paragraph 4.

⁶⁵⁹ Law no. 2010-1192 of 11 October 2010.

⁶⁶⁰ For detail of the extent of the ban and derogations from it see the Prime Minister's Circular of 2 March 2011 on the implementation of Law no. 2010-1192 of 11 October 2010 and published in the Official Gazette of 3 March 2011.

⁶⁶¹ Other Western European countries that have since considered a ban or implemented one include Belgium 2015, Latvia 2016, Austria 2017, Bulgaria 2017, Netherlands 2017, Denmark 2018, Norway 2017/18 and in 2017 Germany imposed a ban on soldiers and state workers.

⁶⁶² Brems, E. 'Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings' in *Journal of Law & Policy*, 22, 2014. Bouteldja, N. 'France vs. England'

and a mere 'political slogan'.⁶⁶³ Why then did the ECtHR agree with the reasoning of the French government that the veil was contrary to the core Republican values?⁶⁶⁴

4.4.3 The veil ban challenged in the ECtHR and the extent to which the French concept of laïcité was accepted by the Court as a legitimate reason for the ban

A French national referred to as SAS, challenged the 2010 law in an application to the ECtHR on 11 April 2011, the actual day the law came into force. She alleged that the ban violated Articles 3, 8, 9, 10 and 11 ECHR taken together and separately with Article 14. A number of other agencies intervened including the Belgian Government (which had also recently introduced a ban), Amnesty International, Liberty and the Ghent Human Rights Centre.

In May 2013, the application was moved from the Court's Fifth Section directly to the Grand Chamber which accepted that wearing the veil was common practise for a minority of Muslim women and as such fell within Article 9. It dismissed claims by SAS that her human rights had been violated in relation to Articles 3 (inhuman or degrading treatment) and 11

in Brems, E. (ed.), *The Experiences of Face Veil Wearers in Europe and the Law*, Cambridge, Cambridge University Press, 2014, p.115.

⁶⁶³ Hunter-Henin, M. 'Why the French don't like the Burqa: Laïcité, National Identity and Religious Freedom' in *International and Comparative Law Quarterly*, 61:3, 2012.

⁶⁶⁴ Rapport d'information au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national, Report of the Assemblée Nationale No.2262, Paris, 2010, pp. 87-120.

(freedom of association) but found that the claims under Articles 8 (private life) 9 (freedom of religion) and 14 (discrimination) were admissible.

4.4.3.1 The Applicant's arguments

SAS claimed that the intention of the ban was not to protect democratic society or to ensure public safety. She claimed that the State had taken no account of minority practices motivated for religious reasons and that the State's arguments about gender equality and oppression were simplistic as women often wore the veil for reasons of emancipation and self-assertion. She pointed to the fact that other Member States with significant Muslim populations did not ban the veil and that the State's claim that the ban had the legitimate aim of respecting human dignity, interpreted human dignity from a strongly stereotyped perspective. In her view, being a free member of society required the State to accommodate a wide variety of beliefs and practices and that although a practice may not have the support of political or public opinion, it may nevertheless be necessary to allow it in a liberal democratic society. In dismissing the claim that the ban protected vulnerable women from undue pressure from paternalistic sources, she argued that it actually punished the very people it was meant to support. Lastly, she found it irrelevant that the State permitted the veil to be worn in places of worship as its essential function was also necessary on religious grounds in public.

SAS claimed her right to private life under Article 8 was infringed because there was a nexus of shared space between private life and social interaction

in the public sphere and that going out wearing the veil once the ban was in force would have made her vulnerable to social hostility and criminal sanction. The overall result for her was that she could only wear it at home 'as if she was a prisoner' and was forced to adopt a 'Jekyll and Hyde' personality.⁶⁶⁵

Under Article 14, SAS claimed discrimination on the grounds of sex, religion and ethnic origin. She claimed that the exceptions to the ban allowing faces to be concealed in the context of 'festivities or artistic or traditional events' was discriminatory because it favoured Christian religious practice where, for example, religious festivals had traditionally involved face covering as seen in some Catholic Holy Week and Easter processions. With regard to Muslims, the ban remained applicable even during the holy month of Ramadan.

4.4.3.2 *The Government's view*

The Government sought to rebut each of these arguments. It claimed that the ban had the legitimate aim of protecting the rights and freedoms of others and ensuring the 'respect for the minimum set of values of an open and democratic society'.⁶⁶⁶ The Government argued that in meeting those aims, three values were at stake: (1) the importance of facial expression was a minimal requirement for life in society because it expressed the existence of the individual as a unique person and concealment was 'to break the social

⁶⁶⁵ SAS v. France [2014] ECHR 695, para.79.

⁶⁶⁶ Ibid, para 82.

tie and to manifest a refusal of the principle of “living together” (*le “vivre ensemble”*)⁶⁶⁷; (2) the ban sought to protect equality between men and women; and (3) the veil effectively ‘effaced’ those who wore it from society and this was degrading and inconsistent with human dignity.

4.4.3.3 *The judgment of the ECtHR*

The Court focussed on whether the ban fulfilled a ‘legitimate aim’ as is required for Articles 8 to 11. It noted that the Government had claimed the ban pursued two legitimate aims, ‘public safety’ and ‘respect for a minimum set of values in an open and democratic society’. It stated that ‘public safety’ was only directly expressed in Articles 8 and 9 and accepted that the legislature had sought to address this issue when it passed the law.

In addressing the second aim, the Court focussed on Article 9 noting the Government’s arguments (above) which placed the three values of gender equality, respect for human dignity and a respect for the minimum requirements of society together with the protection of the rights and freedoms of others, under the wording of Article 8(2) and 9(2). The Court dismissed gender equality and human dignity as legitimate aims but accepted the Government’s argument that under certain conditions ‘respect for the minimum requirements of life in society’ expressed as ‘living together’

⁶⁶⁷ Ibid, para. 82.

can be part of what constitutes ‘the protection of the rights and freedoms of others’.⁶⁶⁸

The Court was persuaded by the weight the French authorities had attached to this claim and accepted that it fell to the State to organise diversity. It explicitly referred to the reasoning that in French society, concealing the face fell below ‘the minimum requirements of civility that is necessary for social interaction’.⁶⁶⁹ Referring to recent case law including *Eweida and Others v. United Kingdom*⁶⁷⁰ and *Ahmet Arslan and Others v. Turkey*⁶⁷¹, the Court found this aim to be proportionate despite the large number of interveners, international and national bodies including non-radical sections of the Muslim community.

Whilst the Court stressed its concern at the Islamophobic remarks that had surfaced throughout the debate in France preceding the law’s adoption, it did not find the law’s application too broad or that the criminal sanctions were too onerous.⁶⁷² Critics of the 2010 ban had thought that even if the Court accepted that the ban could fall within Article 9(2) ECHR, it would find the scope of the law disproportionate but this proved not to be the case.

In determining the scope ‘living together’ the Court accepted that in matters of general policy the State, as domestic policy-maker, should be given

⁶⁶⁸ Ibid, para, 120.

⁶⁶⁹ Ibid, para 141, quoting the explanatory memorandum attached to the Law’s draft Bill as set out in para. 25 of the judgment.

⁶⁷⁰ *Eweida and Others v. United Kingdom* [2013] ECHR 37, para. 81.

⁶⁷¹ *Ahmet Arslan and Others v. Turkey* No. 41135/98, 23 February 2010.

⁶⁷² *SAS v. France* [2014] ECHR 695, para,49.

special weight and that in this matter and in relation to 2010 ban France had a wide margin of appreciation. This was particularly so as there was little congruence amongst the approach of other Member States to this issue. Given the breadth of the margin of appreciation, the law was proportionate to the aim of the State to preserve the conditions required to 'live together' and this could be considered an element of the 'protection of the rights and freedoms of others'. By 15 votes to 2, the ECtHR held that there had been no violation of Article 9.

The judgment appears to recognise that a notion of what constitutes 'living together' is an aspect of French laïcité and forms part of the mechanism by which the State organises diversity. The Court accepted the Government's view that fraternity, as an essential value of the French Republic, was contravened by wearing the full-veil as it damaged the individual's relationship with other non-Muslim citizens. The Court accepted the State's role in striving to create the conditions by which citizens can interact and that this could include restricting freedom of religion to benefit those who would be adversely affected by those who may cover their face in public.

The judgment has provoked intense academic debate, much of which has been divided along the arguments proposed by the applicant and the Government.⁶⁷³ My interest in the case study is less to do with the merits or

⁶⁷³ Recent examples focussing on the concept of 'living together' include, Daly, E. 'Fraternalism as a Limitation on Religious Freedom: The Case of *S.A.S. v. France*' *Religion and Human Rights*, 11:2, 2016, pp.140-165; Trispiotis, I. 'Two Interpretations of "Living Together" in European Human Rights Law', *The Cambridge Law Journal*, 75:3, 2016, pp.580-607; and Tsevas, C. 'Human rights and religions: 'living together' or dying apart? A

otherwise of preventing someone from wearing the clothes they choose and more to do with understanding the how making that decision is context specific and has a bearing on a person's sense of belonging and ability to participate fully in democracy. There remains a residual fear of religious dominance in France and, in that context, religious symbolism stirs powerful emotions. The ban raises deep questions about the association of social forces and real or perceived political memories in and surrounding the practice of law-making. A new model of religion-state relations needs to consider the extent to which all citizens can participate equally in democracy and how this may sometimes need to be balanced against concerns over religious restrictions on personal freedom. We will consider this issue further in Chapter 6.

critical assessment of the dissenting opinion in *S.A.S. v. France* and the notion of 'living together' *Religion, State and Society*, 45:3-4, 2017, pp.203-215.

4.5 Concluding remarks

There are a number of competing critiques of laïcité. A majority of commentators regard it as merely the expression of French law on religion which has retreated from its anticlerical origins in order to permit the peaceful coexistence of religions within in plural society.⁶⁷⁴ Politically and academically, many aspects of laïcité, for example, the de-confessionalisation of the State, are now largely uncontested by the French public, whilst other areas are disputed.⁶⁷⁵

A philosophical issue, predominantly from orthodox Catholic academics, that continues to challenge the secular political consensus, includes questions to do with the foundation of human rights legislation and the fundamental authority of the political order.⁶⁷⁶ For them, the source of the State's authority to govern is both metaphysical and theological.⁶⁷⁷ The constitutional affirmation of laïcité stands in the way of this recognition and secularism means that France's polity is based solely on the sovereignty of the people.⁶⁷⁸ This view would entail the re-establishment of the Catholic

⁶⁷⁴ Le Goff, J., Rémond, R. and Joutard, P. (eds.), *Histoire de la France religieuse 3: Du roi très chrétien à la laïcité républicaine 18ème-19ème siècle*, Paris: Seuil, 2004, p.540. Airiau, P. *Cent ans de laïcité française. 1905-2005*, Paris: Presses de la Renaissance, 2005.

⁶⁷⁵ See Baubérot, J. *Laïcité 1905-2005 Entre Passion et Raison*, Paris, Seuil, 2004.

Baubérot, J. 'Laïcité' in Berensen, E., Duclert, V. and Prochasson, C. (eds.), *The French Republic: History, Values, Debates*, London: Cornell University Press, 2011, pp.127-135.

Chadwick, K. *Catholicism, Politics and Society in Twentieth-Century France*, Liverpool: Liverpool University Press, 2000.

⁶⁷⁶ Ratzinger, J. and Pera, M. *Without Roots: The West, Relativism, Christianity and Islam*, New York: Basic Books, 2006.

⁶⁷⁷ Perreau-Saussine, E. *Catholicism and Democracy: An Essay in the History of Political Thought*, Princeton: Princeton University Press, 2012, p.36.

⁶⁷⁸ See https://lannuaire.service-public.fr/gouvernement/administration-centrale-ou-ministere_180130 - last accessed 24 January 2019.

Church as the state church and that is not going to happen in an exclusivist form.

A more political interpretation of *laïcité* sees it as a means of shaping notions of French citizenship and, in turn, the individual's relationship with the French state.⁶⁷⁹ Here, a strict divide between the State and religion is necessary in order to protect people from the illiberal effects of religion on the freedom of conscience and thought. For some proponents of strict *laïcité*, the French state itself is the bulwark against this threat and for them the State is referred to as a secular ideal or *l'idéal laïque*.⁶⁸⁰ On this interpretation, *laïcité* becomes a transcending political ideology capable of creating a humanistic society which becomes progressively freer over time.

Critics argue that this approach results in an overly assertive stance towards religion and that it is ultimately hostile towards religion.⁶⁸¹ They reject the *l'idéal laïque* in favour of giving focus to the constitutional principle of *laïcité* and its application as a tool under the rule of law. This approach would see *laïcité* develop in a direction whereby it embraces diversity to the extent it becomes the mechanism for allowing and organising the diversity necessary in a plural democratic society.⁶⁸²

⁶⁷⁹ Troper, M. 'French Secularism or *Laïcité*' in *Cardozo Law Review*, 21, 2000, p.1266. Baubérot, J. *Laïcité 1905-2005 Entre Passion et Raison*, Paris, Seuil, 2004, p.139-162.

⁶⁸⁰ Berthélemy M. and Michelat, G. 'Dimensions de la *laïcité* dans la France d'aujourd'hui' in *Revue Française Science Politique*, 57:5, 2007, pp.649-698.

⁶⁸¹ Ahmet Kuru labels France's approach as 'assertive secularism' in Kuru, AT. *Secularism and State Policies Toward Religion: The United States, France, and Turkey*, Cambridge: Cambridge University Press, 2009, p.12. See also Pena-Ruiz, H. *La laïcité* Paris: Flammarion, 2003 and *Histoire de la laïcité : Genèse d'un idéal*, Paris: Gallimard, 2005.

⁶⁸² Taylor, C. 'Why we need a radical redefinition of secularism' in Mendieta, E. and Van Antwerpen, J. (eds.), *The Power of Religion in the Public Sphere*, Columbia: Columbia

We have seen that the practical application of laïcité means the separation between the State and religion is not as strict as some interpretations would suppose. But how strict is it? Can it still be regarded as liberal?

4.5.1 How 'strict' is French secularism?

Separation operates primarily at the institutional level. Clearly, there is no establishment of religion and religious organisations are not represented in the legislature. Nevertheless, there are anomalies as, for example, state finance of some religious schools and buildings.⁶⁸³ Despite this, the general rule is that matters of government, public policy and administration should be kept separate from religious organisations and should certainly not be used to fund a particular vision of how society should be structured and governed. Consequently, laïcité is not anti-religious *per se*, but it is fundamentally non-religious.⁶⁸⁴ Keeping religion and government apart can have benefits for both the independence of religion and government.

We have seen that French laïcité, is based on three principles: (1) the freedom of conscience and the freedom to manifest one's convictions within

University Press, 2011, pp.34-59 and Baubérot, J. *Vers un nouveau pacte laïque?* Paris: Seuil, 1990, p.266.

⁶⁸³ Daly, E. 'Public Funding of Religions in French Law: The Role of the Council of State in the Politics of Constitutional Secularism' in *Oxford Journal of Law and Religion*, 3:1, 2015, p.103.

⁶⁸⁴ Weil, P. *Politique de la laïcité au XXème siècle*, Paris: PUF, 2007. Weil, P. 'Why the French Laïcité is Liberal' in *Cardozo Law Review*, 30:6, 2009, p.2699.

the limits of respect for public order; (2) the separation of public institutions and religious organizations; and (3) the equality of all before the law.⁶⁸⁵

In relation to the freedom of conscience, what laïcité seeks to achieve is the same opportunity and rights for believers and non-believers to express those views and opinions. In doing so, it ensures the right to change religion and belief and the right not to hold a particular belief. Moreover, whilst religious organisations are free to practice within the law, non-believers cannot be compelled by the State to respect religion or agree with the doctrines or ideologies of others.

Laïcité presupposes the institutional separation of the State and religious organizations. In doing so, the French understanding of the liberal democratic order created by the Constitution is legitimate because it is based solely on the sovereignty of the citizen. The State does not contribute towards the confessional activities of religion and nor does it involve itself in the internal governance of religious organisations except under strict circumstances like national security.

Finally, equal treatment before the law requires a degree of state neutrality in terms of impartiality so that there is no discrimination by the State towards those who use public services. Neutrality of this type means that the same criteria must be used to make judgements in order to assess the extent of

⁶⁸⁵ See the French Ministry of the Interior at From: https://lannuaire.service-public.fr/gouvernement/administration-centrale-ou-ministere_180130 - last accessed 24 January 2019.

engagement, co-operation or provision of public resources. The criteria should be applied in order to ensure the fairness of the provision and, subject only to minimal provisions such as are required by national security and the rule of law, should be regardless of religion, belief or the lack thereof.

A strict separation between religion, law and politics would see no place for religion in public or political life. Here, it is not just in relation to the state and government but also in relation to the public sphere generally that the religious presence is unacceptable. There is scepticism towards the public expression of religion to the extent that it is actively discouraged by the state. In the same way, public religious discourse is relegated to an inferior position when compared with secular discourse.⁶⁸⁶ This aggressive form of secularism would be supported by the so-called New Atheists who include such authors as Sam Harris, Richard Dawkins, Daniel Dennett and Christopher Hitchens.⁶⁸⁷ Between 2004 and 2007, they published a series of books which became best sellers, in which they attempted to argue against religion and in favour of a scientific and atheistic world view.⁶⁸⁸ Briefly, their view is that superstition, religion and irrationalism should not simply be tolerated but should be countered, criticized, and exposed by rational argument wherever their influence arises in government, education, and

⁶⁸⁶ Audi, R. *Religious Commitment and Secular Reason*, Cambridge: Cambridge University Press, 2000.

⁶⁸⁷ Pinker, S. *Enlightenment Now: The Case for Reason, Science, Humanism and Progress*, Allen Lane: London, 2018, p.430.

⁶⁸⁸ Harris, S. *The End of Faith: Religion, Terror and the Future of Reason*, Simon & Schuster: London, 2004; Dawkins, R. *The God Delusion*, Transworld Publishers: London, 2006; Dennett, D. *Breaking the Spell: Religion as a Natural Phenomenon*, Penguin: London, 2006; Hitchens, C. *God is Not Great: How Religion Poisons Everything*, Atlantic Books: London, 2007.

politics.⁶⁸⁹ They are particularly concerned about the indoctrination of children with supernatural ideologies for which there is no proof and the continued support for such ideologies by government. They would see themselves as the heirs to the Radical Enlightenment in the tradition of Spinoza and Bayle.⁶⁹⁰

What would strict separation mean in practice? A concept of strict separation would go beyond maintaining a degree of separation between organised religion and government. Certainly, the institutional establishment of religion would be prohibited and the involvement of religious people for religious reasons in politics would be rejected. Religion would be removed from the public sphere or relegated to the extent that it would have little or no value in public discourse.

The main problem with this approach, apart from the fact that it discriminates against religion and religious people, is that it violates one of the fundamental principles of secularism. Secularism is implicitly pluralistic. By refusing to organise society according to the strictures of one religion, it cannot thereby supplant religion with an alternative which must be uniformly applied to everyone. We have seen that secularism can in theory at least be supported by religious people, atheists and humanists. Once secularism becomes hostile towards one of these groups it ceases to be pluralistic. This is why

⁶⁸⁹ Zenk, T. 'New Atheism' in Bullivant, S. and Ruse, M., *The Oxford Handbook of Atheism*, Oxford: Oxford University Press, 2013, pp.245ff.

⁶⁹⁰ Israel, JI. *Radical Enlightenment: The Making of Modernity 1650-1750*, Oxford: Oxford University Press, 2001.

the secular state is usually required to be neutral in relation to religious and non-religious views.

It is crucial that secularism is distinguished from both atheism and humanism. In order to do this, I would propose that French laïcité is a form of 'liberal secularism'. Liberal secularism can be distinguished from strict secularism because it espouses a commitment to liberal democratic institutions and so it must necessarily be pluralistic. This means that whilst some atheists may oppose and argue against religion, if they are liberal secularists, they cannot argue in favour of the eradication of religion. To do so would be to undermine the validity of their liberality. A degree of toleration, subject only to such minimal restrictions the 'harm principle' is a fundamental and indispensable value of liberal democracy.

On this interpretation, liberal secularism is not an opinion among others but the mechanism which allows the freedom for someone to have an opinion. It is not an ideology in itself but a principle which permits all other ideologies and points of view, subject to the respect of public order. As a result, French laïcité, is not hostile to religion in the strict sense of the term as it does not support the complete removal of religion from the public sphere. Liberal secularism ought to allow religious perspectives to play a fair yet unprivileged role in public debate.

However, questions remain as to whether religion is relegated too much into the private sphere and it is arguable that the law banning face coverings falls

into this category. Is the ban on face coverings an example of strict separation? If we accept that its primary purpose was to remove the full Islamic veil from the public sphere, how can support for such an intrusion into an individual's freedom of choice be justified?

We have seen how France has struggled to free itself from clerical control. Whilst opposing religious symbolism has played a part in that process, it was not its primary purpose. Does a liberal secular state really want to restrict the freedom of someone to wear what they choose? This leads me to the conclusion that the only justification for the ban on face coverings is the fear of the State succumbing to Islamic religious control in the future. There is evidence that this is perceived as a significant, if not realistic, fear.⁶⁹¹ Islam is regularly portrayed as a significant threat to French laïcité.⁶⁹² The long-term effects of laïcité, for example, whether it has resulted in promoting a deeper process of secularization or discriminates against immigrant populations are contested and opinions are sharply divided.⁶⁹³

Laïcité as a concept is, therefore, something that is not static. It needs to be flexible and responsive to change. As a constitutional principle, laïcité has the potential to articulate the nature of the separation of religious and secular power as expressed through religious and public institutions and embodies key elements of the rule of law, most notably equal treatment under the law regardless of religious conviction and the protection of minority beliefs. It is,

⁶⁹¹ Louati, Y. 'L'Exception Française: From Irrational Fear of Muslims to their Social Death Sentence', *Islamophobia Studies Journal*, 3:1, 2015, pp.90-95.

⁶⁹² See for example, Houellebecq, M. *Submission*, London: Vintage, 2015.

⁶⁹³ Battut, J., Join-Lambert, C. and Vandermeersch, E. *1984: La guerre scolaire a bien eu lieu*, Brussels: Desclée de Brower, 1995.

however, accepted that the principle of neutrality is easier to articulate in theory than recognise in practice. Nevertheless, whilst specific applications of laïcité may be questioned, the neutrality of the French state is no longer questioned in academia.⁶⁹⁴ The State leaves the internal freedom of conscience to its citizens, protects the freedom from religion and largely allows religious organisations to organise their own internal affairs.⁶⁹⁵

There are signs of a greater appreciation from those in public office that laïcité could be used inappropriately to relegate all religion to the private sphere rather than it being used to pursue a more balanced approach which promotes the kind of discretion and tolerance necessary in a plural society. In a speech by Emmanuel Macron given on 9 April 2018 to the French bishops of the Catholic Church, the President attempted to promote a more positive role for the relations between the State and the Church, including an invitation to the Church to contribute to public debates on ethics in order to 'give wisdom not solutions'.⁶⁹⁶ Welcomed by some liberals, the speech has also been heavily criticised by the far-left and also by Freemasons as a violation of laïcité, which remains contentious and divisive.⁶⁹⁷

⁶⁹⁴ Chelini-Pont, B. and Ferchiche, N. 'Religion and the Secular State: French Report', Publicaciones facultad derecho Universidad Complutense, 2015, p.310.

⁶⁹⁵ See Heneghan, T. 'Church warns against applying tax reform to all faiths' *The Tablet*, 15 November 2018. The proposed reforms to the Law of 1905 may allow some financial aid to religions in exchange for 5 yearly state reviews to ensure non radicalisation and compliance with the law. At <https://www.thetablet.co.uk/news/11013/church-warns-against-applying-tax-reform-to-all-faiths> - last accessed 24 January 2019.

⁶⁹⁶ Macron, E. 'Cultes et laïcité, culture et communication, nation, institutions and réforme de l'état' 9 April 2018.

⁶⁹⁷ Heneghan, T. 'Macron outlines positive view of Church-State links' in *The Tablet*, 10 April 2018.

Chapter 5

Italy

5 Introduction

Italy represents the most prevalent model of religion-state relations in Europe. It is a model of 'co-operation' sometimes referred to as the 'hybrid' model.⁶⁹⁸ Essentially, this means that the state can remain to some degree separate from religion in terms of its administrative functions whilst co-operating with religious bodies on matters of mutual concern. The form and substance of co-operation may vary but it is usually set out in a number of agreements. It can allow the state a degree of control over the independence and regulation of religion and also delegate certain functions, for example, involvement in education and family law matters.

In relation to the Roman Catholic Church (the 'Catholic Church') the agreement is principally the Concordat between Italy and the Holy See of 1984 which replaced the Lateran Concordat of 1929. The legal form of the Concordat is that of a treaty in international law because it is between two sovereign entities. This contrasts with the agreements, known as *intesa*, entered into between Italy and other non-catholic religious organisations because these are a form of domestic internal public law.⁶⁹⁹ We can already

⁶⁹⁸ Other European countries with a similar model include Germany, Portugal and Spain.

⁶⁹⁹ Law no 1159 of 24 June 1929 provides for the Italian state to enter into *intesa*. Texts of the agreements are available at

see that the relationship between the Italian state and the Catholic Church is different from the State's relationship with all other religions. It is because of this that any account of Italy's relationship with religion must by necessity focus primarily on its relationship with the Catholic Church.

The influence of the Catholic Church on Italian history, society and politics cannot be overstated. Since Unification in 1861, there has been a transition from Italy as a Catholic state to one where the Catholic Church is institutionally separate and independent from it. Whilst there is no explicit reference to secularism in the Italian Constitution, from a legal perspective, the State has developed its own distinctive form secularism, *laicità*, but as we shall see, its definition and application by the courts remains contentious.

Section 1 of the chapter is a brief review of the political and religious demography of Italy. Section 2 sets out the key features of the co-operative model. *Laicità* has emerged gradually and Section 3 provides some historical context to explain why it remains a disputed 'constitutional principal'. Section 4 investigates the now famous case of *Lautsi v. Italy*, where a law from Italy's Fascist era requiring a crucifix to be placed in every state school classroom was challenged in the Italian domestic courts and then controversially at the ECtHR.

http://presidenza.governo.it/USRI/confessioni/intese_indice.html last accessed 24 January 2019.

5.1 Political and religious demography

5.1.1 Political Demography

Italy became a nation state in 1861 but following the end of World War II, the monarchy, tainted by its support for the Fascist regime, was abolished.⁷⁰⁰ A new constitution was drafted based on liberal democratic principles and since then, Italy has been a republic with a parliamentary democracy.⁷⁰¹ In 1949 it became a founding member of Council of Europe and in 1959, a founding member of the European Communities, now the European Union. In the domestic arena, Italy guarantees the freedom of religion for its citizens in its Constitution of 1948.⁷⁰²

Italy is often seen as having a weak form of democracy having had 61 governments since 1946 many of which were fragile coalitions.⁷⁰³ The most recent parliamentary elections took place on 4 March 2018 and resulted in a populist led hung parliament. The landscape of Italy's political parties changed dramatically after 1992 following a series of corruption investigations and a change in the voting system. The once dominant and

⁷⁰⁰ The National Fascist Party under Benito Mussolini ruled Italy from 1922 to 1943. It had its roots in Italian nationalism and claimed to be fulfilling the promises of Italian unification. It opposed the previous liberal political regime.

⁷⁰¹ Italy is sometimes referred to as having had two republics the first being 1948 - 1992 and the second from 1992 to the present. The second republic was not marked by major constitutional change but rather a series of changes to political parties following the *Mani pulite* or 'clean hands' judicial investigation into corruption.

⁷⁰² Article 3 states that all citizens 'are equal before the law, regardless...of religion' and Article 19 states that everyone has the right to 'profess faith freely' and to 'exercise worship in public or private, provided that the rites involved do not offend common decency', Constitution of Italy, 1948.

⁷⁰³ See the Democracy Index 2017 published by the Economist Intelligence Unit at <https://www.eiu.com/topic/democracy-index> last accessed 24 January 2019.

historically influential Christian Democratic Party was dissolved. It had dominated Italian politics for 48 years having seen its primary purpose as opposing communism.⁷⁰⁴ It had been supported in this aim by the Catholic Church which regarded a vote for communism as a mortal sin requiring excommunication. The end of the Christian Democratic Party has arguably led to the distinction between religion and politics becoming even more blurred. When the Christian Democratic Party was in power, Catholic lay people interpreted Catholic doctrine and teaching and moulded it into policy. Since its demise, the bishops of the Catholic Church in Italy have played a more prominent role in attempting to influence the public directly in ethical and political matters.⁷⁰⁵

5.1.2 Religious demography - Catholicism in contemporary Italy

The influence of the Catholic Church continues to be seen in two ways (1) pervasively through its presence in Italian society and in the different levels of adherence to the faith seen in the lives of Italian citizens; and (2) through the spiritual and institutional presence of the Pope and the Curia, the Church's central administration, in the Vatican.⁷⁰⁶

⁷⁰⁴ See Donovan, M. 'The Italian State: No Longer Catholic, no Longer Christian' in Madeley, JTS. and Enyedi, Z. (eds.), *Church and State in Contemporary Europe: The Chimera of Neutrality*, Abingdon: Routledge, 2003, p.95.

⁷⁰⁵ Ferrari, S. 'State regulation of religion in the European democracies: the decline of the old pattern', in Motzkin, G. and Fischer, Y. (eds.), *Religion and democracy in contemporary Europe*, London: Alliance Publishing Trust, 2008, pp.103-112 at p.105.

⁷⁰⁶ The papacy continues to be regarded as a quasi-monarchy by many Italian citizens. See 'Council of Cardinals Gives Pope Francis Vote of Confidence' in *The Tablet*, 13 February 2017 at <http://www.thetablet.co.uk/news/6727/0/council-of-cardinals-gives-pope-francis-vote-of-confidence> last accessed 24 January 2019.

Recent surveys of religious opinion have shown Italy to be unusual in comparison to other European countries for the high level of religious belief. A 2012 poll reported that 73% of Italians defined themselves as religious making Italy one of the most religious countries in Western Europe after Romania (89%) and Poland (81%) in terms of EU Member States.⁷⁰⁷ Despite this, the continuing influence of the Catholic Church on society remains contentious. Whilst most Italians see the spiritual and moral contribution of the Catholic Church in largely positive terms, concern is levelled at church politics and its involvement in non-religious issues.

In a wide ranging survey of Italian religious attitudes, Franco Garelli, concluded that 24.7% of Italians were in favour of a Catholic Church exclusively concerned with spiritual questions. He found that 25.3% of the population considered that the Catholic Church should voice its opinion of social questions on condition that it addresses fundamental principles and does not go on to provide specific solutions to social problems. However, despite this, almost half of Italians thought that the Catholic Church had a right and duty to communicate its vision for society to the public.⁷⁰⁸

There is considerable diversity within Italian Catholicism and in 2011, Roberto Cartocci conducted research analysing the differences in commitment to the Church of those who call themselves Roman Catholics ('Catholics'). He found that 10% of Italians would identify as militant

⁷⁰⁷ WIN-Gallup international 'global index of religiosity and atheism' p.12 at <http://www.wingia.com/web/files/news/14/file/14.pdf> last accessed 24 January 2019.

⁷⁰⁸ Garelli, F. *Religion Italian Style: Continuities and Changes in a Catholic Country*, Farnham: Ashgate, 2014, p.154.

Catholics whilst 20% were practising Catholics and 50% were what he termed 'majoritarian Catholics' i.e. baptized and relating to the Church at various levels but seldom practice religion. Of the remaining 20%, he found that half were non-Catholics who were nevertheless positive about the Catholic Church whilst the remainder either belonged to other religions or were agnostics or atheists.⁷⁰⁹ The picture is a complex, but Cartocci's research has shown falls in church attendance and startlingly different rates of attendance between the industrial north and rural south, e.g. 29.1% attendance once per week in Piedmont compared to 42.8% in Campania. An interesting indicator is that the number of civil marriages has increased from 2.4% in 1951 compared to 36.54% in 2010.

There are a range of Catholic movements and groups that cater for a diverse Catholic population.⁷¹⁰ The main division within Catholicism itself is the split between liberals who support the reforms of Vatican II and those conservatives who are sceptical of a Catholic Church which acknowledges and responds positively to liberal values. Liberal Catholics tend to want a greater separation of Church and State and the retreat of Church authorities from proactive involvement in politics.⁷¹¹ Sociologically, Italian culture is deeply intertwined with Catholicism but it is no longer as monochrome or

⁷⁰⁹ Cartocci, R. *Geografia dell'Italia cattolica*, Bologna: il Mulino, 2011, p.23.

⁷¹⁰ See for example, *Azione Cattolica* (Catholic Action) at <http://azionecattolica.it/> last accessed 24 January 2019.

⁷¹¹ Ventura, M. *Religion and Law in Italy*. AH Apphen aan den Rijn: Kluwer Law International, 2013, p.27.

homogenous as it once was.⁷¹² It is increasingly plural and this has implications for the relationship between religions and the State.

⁷¹² The *Global Religious Landscape* survey undertaken by the Pew Forum on Religion and Public Life in 2012 stated that 83.3% of Italy's population are Christians, 12.4% are non-religious (including atheists and agnostics), 3.7% are Muslims and 0.6% follow other religions.

5.2 The Model – Co-operation

Italy respects religious diversity and organises it using a 'principle of secularism'. The principle is not set out expressly in the Constitution but was defined in a 1989 case concerning the teaching of the Catholic religion in public schools.⁷¹³ The ruling was based on an interpretation of a number of articles in the Constitution which the Constitutional Court decided, when taken together, created a principle of secularism.⁷¹⁴

In the judgment, the principle of secularism consists of: Article 2 which recognises the civil rights of individuals and social groups and Article 3 which opposes discrimination. Article 7 fixes the independent and sovereign status of the State and the Catholic Church and Article 8 protects religious freedom generally. Article 19 protects the communication and expression of religious faith in private or public and Article 20 protects the practice of religion, worship and the free association of religious bodies.

The State interacts with religion on the basis of principle of secularism or *laicità*.⁷¹⁵ The judgment stated that *laicità* was not to be interpreted as being 'synonymous with indifference towards the experience of religion' but represents 'the State's guarantee that religious freedom will be safeguarded,

⁷¹³ Constitutional Court 11 April 1989, No.203. See, Panara, C. 'In the Name of God: State and Religion in Contemporary Italy', in *Religion and Human Rights*, 6:80, 2011.

⁷¹⁴ The decision of the Constitutional Court 11 April 1989, No.203 established the 'principle of secularism' from Articles 2, 3, 7, 8, 19 and 20 of Italy's Constitution.

⁷¹⁵ Section 3 of the chapter explains how Italy evolved in this direction from Unification in 1861.

in a framework of denominational and cultural pluralism'.⁷¹⁶ In a subsequent 1997 ruling the Constitutional Court stated that, '[The principle of secularism] . . . implies equidistance and impartiality of the law with respect to all faiths'.⁷¹⁷ *Laicità* envisages a plurality of value systems and also the protection of religious and non-religious beliefs.

In this sense, *laicità* can be said to take on a positive hue whereby the State's interaction with religion is one of potential co-operation based on an initial stance of openness and welcome. It is for this reason that Alessandro and Silvio Ferrari see religion in Italy as being permitted to play a full and dynamic role in society. They say that, in the Italian context, *laicità* 'could be interpreted as a 'habermasian' and 'rawlsian' *laicità* at the same time – a positive and active *laicità*'.⁷¹⁸

The extent to which the Catholic Church dominates the religious demography of Italy is reflected in the model of religion-state relations. The Catholic Church has a relationship with the State governed by a legal framework different from all other religions. Article 7 of Italy's constitution provides that the 'State and Catholic Church are, each within their own reign, independent and sovereign'. This confirms the organisational separation of the State from Catholicism as the former state religion. The relationship is regulated by the 'lateran pacts' which can be amended between the parties without reference to the Constitution.

⁷¹⁶ Constitutional Court 11 April 1989, No.203, para 4.

⁷¹⁷ Constitutional Court 14 November 1997, No. 329.

⁷¹⁸ Ferrari, A. and Ferrari, S. 'Religion and the Secular State: The Italian Case' as part of Monateri, RG. (ed.), *The Italian National Reports to the 18th World Congress of Comparative Law in The Cardozo Electronic Law Bulletin*, 16:1, 2010, p.433.

The autonomy of religions other than the Catholicism is guaranteed by Article 8 which describes relations with the State as 'regulated by law on the basis of agreements with their representatives'. The key difference between the constitutional treatment of the Catholic Church and other religions is that only the Catholic Church is acknowledged to be an independent sovereign entity.⁷¹⁹ Articles 7 and 8 of the Constitution provide the basis of what is regarded as the 'co-operative' model of religion-state relations in Italy.

Co-operation highlights the interaction between religion and the State but this takes place between distinct and separate entities. Collaboration does not arise from a fusion or overlapping organisational jurisdictions. The State is independent and officially 'neutral' with respect to all religion. It recognises the distinctive status of the Catholic Church and the role of Catholicism in Italy's history but also protects the independence of other religions on the basis for 'equal freedom'. The model is underpinned by the protection of individual and collective religious freedom and a desire to protect religious and political pluralism.⁷²⁰

⁷¹⁹ This refers to the State relationship with the Holy See (see Chapter 1). The Catholic Church in Italy does not have a separate legal personality as such. See Ventura, M. *Religion and Law in Italy*. AH Apphen aan den Rijn: Kluwer Law International, 2013, p.94.

⁷²⁰ Article 2 and 3 of the Constitution.

5.2.1 Contractual co-operation

The nature of the collaboration between religion and the State is contractual. In relation to the Catholic Church it is set out in the *Accordo di Villa Madama*, (the 'Accordo') which is a 1984 revision of the 1929 Concordat.⁷²¹

Space does not permit a comprehensive analysis but under the terms of the *Accordo*, the Church has full organizational freedom and autonomy to pursue its theological, educational and pastoral mission. It has independence in the public exercise of worship and legal jurisdiction in relation ecclesiastical matters. The status of the Pope and the Vatican City are protected as are its role in marriage, the regulation of religious orders and Christian public holidays. The *Accordo* envisages other agreements being reached with the State and these have included issues ranging from Church property and finance to involvement in the army, policing and education. Through these agreements the Catholic Church is granted certain privileges for example, it is permitted to select the teachers who deliver optional religion courses in public schools despite them being paid for by the State.

Similar privileges can be granted to non-Catholic religions if they enter into an agreement with the State known as an *intesa*.⁷²² The *intesa* must be approved by Parliament and Silvio Ferrari questions whether the public

⁷²¹ The Lateran Pacts of 1929 comprised a treaty, a Concordat and a financial convention.

⁷²² *Intesa* have been entered into with: Waldensian Church (21 Feb. 1984); Seventh-Day Adventists (29 Dec. 1986); Union of Jewish Communities (27 Feb. 1987); Union of Evangelical and Baptist Churches (29 Mar. 1993); Mormon Church (4 Apr. 2007); Hindu Union (4 Apr. 2007) and Buddhist Union (4 Apr. 2007). Texts of the agreements are available at http://presidenza.governo.it/USRI/confessioni/intese_indice.html last accessed 24 January 2019.

authorities have too much discretion in deciding whether to enter into negotiations for an intesa.⁷²³ He makes the point that intesa provide for 'equivalent' treatment with the Catholic Church rather than 'equality' with it.⁷²⁴

All the agreements take broadly the same form and Ferrari points out that the State is really using them to concede a range of rights but only to 'recognised' religions.⁷²⁵ They permit a wide range of activities including access by clergy to minister in state hospitals, prisons and to the military. They allow the foundation of religious schools, the civil registration of religious marriages and the authorisation for religious practice in relation to the provision of funerals. Unlike the Accordo, which is regarded as an international treaty giving the Catholic Church capacity in public law, intesa are governed by domestic law.⁷²⁶

Marco Ventura makes the point that what often matters more in terms of religious freedom is not the regulation of individual freedom but collective freedom.⁷²⁷ The Catholic Church has a greater collective religious freedom under its regime with the State than non-Catholic religions have under the intesa. In drawing attention to the fact that Islam does not have an intesa with the State, Ventura comments that 'marginal religious groups, like those stigmatized as 'sects' and 'defiant religions like Islam' are less protected in

⁷²³ Ferrari, S. 'State and Church in Italy' in Robbers, G. (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, 2005, p.214.

⁷²⁴ Ibid, p.213.

⁷²⁵ Ferrari, A. and Ferrari, S. 'Religion and the Secular State: The Italian Case' as part of Monateri, RG. (ed.), *The Italian National Reports to the 18th World Congress of Comparative Law in The Cardozo Electronic Law Bulletin*, 16:1, 2010, p.439.

⁷²⁶ Foreign States are granted a public law status in Italian law.

⁷²⁷ Ventura, M. *Religion and Law in Italy*. AH Apphen aan den Rijn: Kluwer Law International, 2013, p.65.

terms of their collective religious freedom.⁷²⁸ As in other European countries Italy has had a significant amount of recent Muslim immigration.⁷²⁹ The lack of an intesa has been recognised as a serious limitation for the religious freedom of Islam and Muslims in Italy.⁷³⁰ Because of this, there is little scope for support from the State in relation to e.g. financing, religious education and the provision of pastoral care.⁷³¹ Muslims report difficulties in gaining permission from public authorities to build mosques.⁷³²

In terms of religious communities, any group with a religious aim can be set up without authorisation from the State. The Civil Code permits the establishment of non-recognised associations with legal capacity.⁷³³ It is possible to be a recognised association and this requires regional registration. This grants legal personality on the basis that the group fulfils a socially useful purpose and has sufficient funds.⁷³⁴ Important minority religious groups, including Muslims have legal capacity for their organisation under Law No.1159 of 1929. This governs the exercise of all religions in Italy and puts groups with religious objectives on the same footing as those providing social services and education and makes them eligible for certain tax benefits. At the same time, it gives certain regulatory powers to the State, e.g. to remove the group's management in certain circumstances.

⁷²⁸ Ibid, p.65.

⁷²⁹ Falletti, E. 'The Cultural Impact of Islamic Mass Immigration on the Italian Legal System', in *Journal of Law, Religion and State*, 6:1, 2018, pp.1-28.

⁷³⁰ Mezram, K. 'Muslims in Italy: The Need for an 'Intesa' with the Italian State', in *Italian Journal of International Affairs*, 48:1, 2013, pp.58-71.

⁷³¹ Ibid.

⁷³² Berretta, D. 'Building a mosque in Italy where Islam is without official status' in *TRTWorld*, 13 June 2017 at <https://www.trtworld.com/europe/building-a-mosque-in-italy-where-islam-is-sans-official-status-378347> - last accessed 24 January 2019.

⁷³³ Articles 36-38 Civil Code.

⁷³⁴ Articles 14-35 Civil Code and Dpr, 10 February 2000, No.361.

Critically, this form of authorisation is a pre-condition for the group to be considered for an intesa with the State under Article 8.⁷³⁵

The contractual approach, setting out mutual duties and obligations is fundamental to Italy's religion-state relations. By establishing formal bilateral agreements through which the State and religion can regulate their relations, religions have similar opportunities as those granted to the Catholic Church to engage in a potentially mutually beneficial and co-operative relationship with the State.

5.2.2 State financial support for religion

The Accordo changed the system of state funding of the Catholic Church. Clergy had been funded through property attached to their benefice but the system was seen as unfair because income varied between parishes. In circumstances where it fell below a certain level, the State would pay a supplement from general taxation meaning that every citizen contributed to financing the Catholic Church. In order to remove this inequality, the system introduced under the Accordo allowed Church property to be vested in dioceses which could use profits from it to pay clergy stipends. Whilst the supplement has gone, three forms of State funding of religion remain.

Tax payers can choose where 0.8% (known as the *otto per mille*) of the total income tax collected by the State should go.⁷³⁶ The choice is made on an

⁷³⁵ Ferrari, S. 'State and Church in Italy' in Robbers, G. (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, 2005, p.216.

individual basis between (1) international aid and heritage; (2) the Catholic Church; and (3) other denominations with an intesa with the State.⁷³⁷ A failure to elect (usually around 40% of citizens) means that the tax will be distributed to the groups according to the proportion elected by the population as a whole.⁷³⁸ The amount to be distributed in 2018 relates to information from tax returns in 2015 and income generated in 2014. In 2015, the Church received more than 81% of the tax amounting to some 997.9 million Euros.⁷³⁹ The second form of funding, also based on income tax, is called the *cinque per mille* and was introduced in 2006. It allows individual taxpayers to allocate 0.5% of their income tax towards a 'not for profit' body which can include religious groups. If the taxpayer does not make an election, the tax goes to the State. The final method is a form of indirect funding (*offerte deducibili*) which allows the Church and recognised religions to reclaim income tax from donations they receive up to 1,032 Euros per person.

5.2.3 Education

Education has been an area of tension between the State and religion since Unification. At that time, Catholic doctrine opposed the principles of

⁷³⁶ Article 47, section 2 of Act No.222 of 1985.

⁷³⁷ The proportion of citizens choosing the Church has risen since the funding system was introduced.

⁷³⁸ Some denominations either refuse to take the money or use it solely for humanitarian purposes.

⁷³⁹ See <https://www.statista.com/statistics/714702/individuals-devolving-otto-per-mille-to-the-catholic-church-italy/> - last accessed 24 January 2019. Reported in *La Repubblica* at http://www.repubblica.it/economia/2018/05/24/news/otto_per_mille_alla_chiesa_cattolica_un_miliardo_di_euro-197243539/ - last accessed 24 January 2019.

liberalism on which the State was founded.⁷⁴⁰ There is a split in schooling between state (public) schools and private schools which are mostly Roman Catholic. Historically, the State has not funded private schools but there is increasingly a debate over whether it should fund both types.

Religion can be taught freely in private schools. In state schools, the *Accordo* allows the Church to select teachers, paid for by the State, to provide an optional weekly 'hour of religion' in doctrinal Catholicism.⁷⁴¹ The rationale for this was to recognise the importance of Catholicism to Italian culture.⁷⁴² Course content is agreed between the Minister for Public Education and the Bishops' Conference and there is an on-going debate over whether the classes should see the Catholic Church teach public morality in the context of a more secular, multi-religious society.⁷⁴³

State schools are required to operate according to the principle of *laicità* and this has recently been disputed in relation to a law requiring a crucifix to be placed in every public school classroom in Italy. The controversial approach of the national courts and the ECtHR to this issue is investigated as a case study in the final section of the chapter.

The Catholic Church jealously guards its independence from the State in relation to its own seminaries and educational establishments. There is no

⁷⁴⁰ Ventura, M. *Religion and Law in Italy*. AH Apphen aan den Rijn: Kluwer Law International, 2013, p.195.

⁷⁴¹ Other religion with *intesa* can make the same provision if parents decide that is what they want in the school.

⁷⁴² Article 9, section 2 1984 Concordat, Act No.121 of 1985.

⁷⁴³ DiMarco, E. 'The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction' in *Rutgers Journal of Law and Religion*, 10, 2009, p.1.

role for the State and they are solely under the authority of the Church e.g. appointments of professors at the Catholic University of the Sacred Heart are subject to Church approval in terms of any religious aspect to their work. Moreover, there are no theological faculties in State universities.

Contentious areas of legal debate revolve around ethical issues where the Catholic Church takes a conservative stance. These include abortion, artificial insemination, stem cell research, homosexuality and marriage and euthanasia.⁷⁴⁴ Having outlined the current model of religion-state relations in Italy, we now consider how the State moved from having a state church and state religion to becoming a State embodying the principle of laicità.

⁷⁴⁴ See Panara, C. 'In the Name of God: State and Religion in Contemporary Italy', in *Religion and Human Rights*, 6 (2011) pp.75-104.

5.3 Italy's long transition: from state church to 'secular' state?

We have seen that the relationship between the Italian state and the Catholic Church is different from that between the State and all other religions - it is unique. At Unification, in 1861, the Constitution of the Kingdom of Sardinia-Piedmont was adopted as the Constitution of Italy. Article 1 defined Italy as a Catholic state but also granted religious freedom to other forms of religion subject to conformity with the law.⁷⁴⁵ The Constitution established a constitutional monarchy and Catholicism as the state religion.

Italy remained a Catholic state until the beginning of the Fascist regime in 1922 but, in practice, it had already begun to develop in a predominantly liberal direction. As the nineteenth century progressed, the government introduced policies which had the effect of weakening the established status of the Church e.g. civil marriage, a state school system and a nascent system of welfare assistance.⁷⁴⁶ The hope of many liberals was for the full separation of Church and State, a political mood summed up in the famous phrase of Italy's first Prime Minister, Count Camillo Benso of Cavour, who spoke of the hope of 'a free Church in a free State' (*'libera Chiesa in libero Stato'*).⁷⁴⁷ The policy called for a political settlement allowing the Church to

⁷⁴⁵ Article 1 of the *Statuto Albertino* stated that '*La Religione Cattolica, Apostolica e Romana è la sola Religione dello Stato. Gli altri culti ora esistenti sono tollerati conformemente alle leggi.*'

⁷⁴⁶ E.g. civil marriage was introduced in the Civil Code of 1865.

⁷⁴⁷ Cavour, C. claimed this as a political principle in a speech to the Italian Parliament on 27 March 1861. See Vinet, AR. *An Essay on the Profession of Personal Religious Conviction, and on the Separation of Church and State, Considered with Reference to the Fulfilment of that Duty* (first published 1826), Memphis: General Books, 2010.

be free to pursue its spiritual mission whilst allowing the State to reflect the democratic will of the people in civil affairs.

There was a significant anti-clerical sentiment and the Church responded in 1868 with a '*non expedit*' meaning 'it is not expedient' - this was essentially a command by the Church for Catholics to shun taking an active part in politics, even voting in elections.⁷⁴⁸ In 1870, Italy took over the Papal States causing a major crisis between Church and State. The Pope proclaimed himself a voluntary prisoner in the Vatican, a state of affairs which became known as the Roman Question or *questione romana*. From the State's perspective it passed Law No. 214 on 13 May 1871 by which it unilaterally sought to regulate Church-State relations.⁷⁴⁹ The law allowed the Pope to continue to exercise sovereignty in the Vatican City and permitted the Church to minister within Italy. There was a growing sentiment towards the formal separation of Church and State.

The notion of separation was a comparatively novel idea and concepts and terminology were in their infancy. In a discussion of what were referred to as 'modern liberties' the public law scholar Angelo Fani attempted to define the secular state ('*stato laico*') and the secularism of the state ('*laicità dello stato*') as being the opposite of both atheism or the tyranny of a dominant majority religion. He looked to a future where the freedom of conscience for

⁷⁴⁸ The '*non expedit*' was only formally revoked by Pope Benedict XV in 1919.

⁷⁴⁹ Known as the '*Legge delle Guarentigie*.'

each individual was respected and where all religions were treated equally by the State.⁷⁵⁰

Fascism ended the progress of political liberalism and sought a superficially close relationship with the Church so that it could maximise political support from Catholics.⁷⁵¹ Fascism abandoned the anticlerical stance it had held since 1919 and pledged to restore the place of Catholicism as the *de facto* state religion.⁷⁵² Whilst the Church's opposition to communism was absolute, its preparedness to co-operate with Mussolini's regime was one of compromise and complicity.⁷⁵³ Pius XI deeply mistrusted liberal democracy including the kinds of policies advocated by the Catholic political party, the *Partito popolare* formed by the priest Luigi Sturzo in 1919 e.g. proportional representation and female suffrage. In particular, the Pope resented the fact that the party had no policies to resolve the Roman Question.⁷⁵⁴

Central to the relationship between the Church and the Fascist regime was the signing of the Lateran Pacts on 11 February 1929. Essentially, the Pacts did three things. Firstly, they included the Concordat which regulated the relationship between the Church and the State at an internal or domestic level. Secondly, by establishing the Vatican City State via the Lateran Treaty

⁷⁵⁰ Fani, A. *Le basi giuridiche della libertà moderata*, Rome: Bocca, 1909 referred to in Ventura, M. *Religion and Law in Italy*. AH Apphen aan den Rijn: Kluwer Law International, 2013, p.37.

⁷⁵¹ Jemolo, AC. *Church and State in Italy 1850 – 1950*, (first published 1949) Oxford: Basil Blackwell, 1960 p.228ff – a translated and revised version of the original book, '*Chiesa e Stato in Italia negli ultimo cento anni*'.

⁷⁵² Kertzer, DI. *The Pope and Mussolini: The Secret History of Pius XI and the Rise of Fascism in Europe*, Oxford: Oxford University Press, 2014.

⁷⁵³ Atkin, N. and Tallett, F. *Priests, Prelates & People: A History of European Catholicism Since 1750*. London: IB Tauris, 2003, p. 202.

⁷⁵⁴ *Ibid*, pp. 204-205.

of Conciliation, they effectively settled the Roman Question. Drafted as an international treaty, it recognised the Vatican City as a sovereign state under the authority of the Holy See. Thirdly, they established a form of financial support for the Church by the State.

In return, the Church recognised the Italian State for the first time since Unification. Article 1 of the Lateran Treaty of Conciliation stated that, 'the Catholic Apostolic Religion is the only state religion'.⁷⁵⁵ At the same time, the Concordat (Article 26) required bishops to swear an oath of allegiance.⁷⁵⁶ The relationship saw Catholicism restored as a national state church bound to a nationalist government. The hope of many for a separation of Church and State was ended.⁷⁵⁷

The Church used its relationship with the Fascists to further its theocratic influence on Italian society whilst the Fascists sought to exert a degree of control over the Church. The deal proved ultimately unsatisfactory for both parties and when Fascism eventually collapsed after World War II, the Italians voted for a new political settlement ending the monarchy and creating a republic founded on the Constitution of 1948.⁷⁵⁸ The principles of the new Constitution, like many of the period, were rooted in democracy,

⁷⁵⁵ The English text of the Treaty of Conciliation can be found at <http://www.aloha.net/~mikesch/treaty.htm> last accessed 24 January 2019.

⁷⁵⁶ The text of the oath is at <http://www.concordatwatch.eu/topic-39251.834> last accessed 24 January 2019.

⁷⁵⁷ Tesauro, A. and Capocelli, G. 'The Fundamentals of the New Italian Constitution' in *The Canadian Journal of Economics and Political Science*, Vol. 20, No.1, February, 1954, pp.44-58.

⁷⁵⁸ Ibid.

equality and human rights.⁷⁵⁹ Institutions of a predominantly fascist nature were abolished.⁷⁶⁰

In terms of the State's relationship with the Church, theological language, e.g. references to the Holy Trinity, were rejected for a more inclusive concern for religious freedom. Catholicism was no longer referred to as the state religion and instead Article 3 sought to ensure equality before the law based on a number of characteristics including religion which could not be a basis for discrimination. Under Article 8, all religious denominations, other than Catholicism, were accorded equal treatment under the law. Article 7 required that the relationship regulated by the Lateran Pacts could only be amended by both parties using a procedure separate from that used for other Constitutional amendments.⁷⁶¹

The distinguished legal scholar Arturo Carlo Jemolo (1891-1981) pioneered the study of Church-State relations in Italy and is widely regarded as preparing ground for Italy's particular type of secularism. Gradually, the legal doctrine of *laicità*, a term used to describe the secular nature of the Italian state began to emerge. Co-operation between the State and religion became a central feature of *laicità*.

⁷⁵⁹ The full text of the 1948 Constitution can be found at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf last accessed 24 January 2019.

⁷⁶⁰ Ferrari, S. 'State regulation of religion in the European democracies: the decline of the old pattern', in Motzkin, G. and Fischer, Y. (eds.), *Religion and democracy in contemporary Europe*, London: Alliance Publishing Trust, 2008, pp.103-112.

⁷⁶¹ Article 7 Constitution of Italy 1948 at <http://www.constitutionnet.org/files/Italy.Constitution.pdf> last accessed 24 January 2019.

Pivotal to the development of religion-state relations was the Second Vatican Council 1961-65.⁷⁶² In broad terms, the trajectory of the Council's decisions reflects a limited reconciliation between the Church and liberal democracy.⁷⁶³ Some of the more 'progressive' initiatives made by the Council have subsequently been disputed and remain areas of contention between conservative and progressive Catholics.⁷⁶⁴ This new form of engagement between the Church and the modern world was important for the subsequent development of the State itself in the years leading up to the renegotiation of the Concordat and the definition of *laicità* as a constitutional principle.⁷⁶⁵

Despite the influence of the Church on politics and society generally, Italy, like other European countries during the 1960s and 1970s, saw the law liberalise including the legalisation of divorce and abortion, both of which were confirmed in subsequent referenda.⁷⁶⁶ Throughout the 1970s tensions between the Constitution and the Concordat became increasingly apparent. Typically, disputes were over contested social and moral issues e.g. marriage, where both the Church and the State had competing visions and jurisdictions. During this period, the Constitutional Court became more active in adjudicating the nature of the relationship between the Church and the State.

⁷⁶² Perreau-Saussine, E. *Catholicism and Democracy: An Essay in the History of Political Thought*, Princeton: Princeton University Press, 2012, pp.127-132.

⁷⁶³ Oftestad, BT. *The Catholic Church and Liberal Democracy*, Abingdon: Routledge, 2018.

⁷⁶⁴ Ferrari, S. 'States and Religious Communities in Italy', in the International Conference on Comparative Constitutional Law 2005, *Church and State towards Protection for Freedom of Religion*, Tokyo: The Japanese Association of Comparative Constitutional Law, 2006, pp.204-30.

⁷⁶⁵ Bianchi, EC. and Reuther, RR. (eds.), *A Democratic Catholic Church: The Reconstruction of Roman Catholicism*, New York: Crossroad Publishing Co, 1959.

⁷⁶⁶ Divorce was legalised in 1970, see *Legge* 1 Dec. 1970, No.898 and confirmed by a 1974 referendum with 60% approval. Abortion was legalised in 1978, see *Legge* 22 May 1978, No. 194 and was confirmed in a 1981 referendum with 68% approval.

In 1971, the Court ruled that several supreme principles could be discerned from the Constitution and that those principles could not be violated by the Concordat. As a result, the Court found that the 1929 Article referring to marriage law was unconstitutional because it did not treat each party equally where the decision to nullify the marriage was based on incapacity.⁷⁶⁷ Similarly, in 1982 the Constitutional Court found the provision in the Lateran Concordat that guaranteed the automatic recognition of Church rulings on annulled marriages by the civil authorities to be unconstitutional.⁷⁶⁸ This created a way for the terms of the Concordat to be amended without the approval of the Church.

The new Concordat, referred to as the *Accordo di Villa Madama* was signed on 18 February 1984 and ratified by the Italian Parliament on 25 March 1985.⁷⁶⁹ It made significant structural changes to the nature of the Church-State relationship e.g. Catholicism was no longer referred to as the sole religion of the Italian State, the requirement for bishops to swear an oath of allegiance was removed and compulsory attendance at Catholicism classes became optional. The State entered into a separate agreement with the Church providing for the civil status and regulation of certain Catholic bodies and the introduction of the *otto per mille*.⁷⁷⁰

⁷⁶⁷ Constitutional Court 24 Feb. 1971, No. 32.

⁷⁶⁸ Constitutional Court 22 Jan. 1982, No. 18.

⁷⁶⁹ *Legge* 25 Mar. 1985, No.121. An English translation can be found at http://home.lu.lv/~rbalodis/Baznicu%20tiesibas/Akti/Arvalstis_ligumi/Italijas&Sv.Kresla_konkordats.pdf - last accessed 24 January 2019.

⁷⁷⁰ Act 206 and 222 of 1985.

Of course, the new Concordat did not use the term *laicità*, but its intention was clear. The Prime Minister, Bettino Craxi, in his ratification speech to the Senate on 3 August 1984, stated that the purpose of reform stemmed from the desire for a complete *laicità dello stato*.⁷⁷¹ Whilst the nature of *laicità* remained as yet undefined, the terms of the new Concordat meant that no one could continue to claim that Italy was a Catholic state. Features of the former Catholic state were removed e.g. laws on blasphemy and the requirement to swear an oath based on religious precepts in court.

As the Concordat was being revised, non-Catholic religious organisations began to enter into *intesa*. This marks a distinctive element of *laicità*. According to Ventura, co-operation was intentionally written into Article 1 of the 1984 Concordat:

‘The Italian Republic and the Holy See reaffirm that the State and the Catholic Church are each in their own way independent and sovereign and committed to this principle in all their mutual relations and to *reciprocal collaboration* for the promotion of man and the good of the Country.’⁷⁷²

Co-operation or ‘reciprocal collaboration’ was intended to reflect the hope of ‘sunder co-operation’ between the Church and the ‘political community’ as outlined during the Second Vatican Council and described in its document

⁷⁷¹ B. Craxi, ‘Discorso a conclusion del dibattito per law ratifica degli Accordi di Villa Madama’, Senato, 3 agosto 1984, in Ventura, M. *Religion and Law in Italy*. AH Apphen aan den Rijn: Kluwer Law International, 2013, p.49 footnote 108.

⁷⁷² Article 1 of the Lateran Concordat being an agreement between the Holy See and the Italian Republic signed by the Italian Republic and the Holy See on 18 February 1984 and ratified by the Italian Parliament on 25 March 1985. [My emphasis.]

Gaudium et Spes.⁷⁷³ The State is not indifferent towards religion. When applied equally to other religions, it means the State has a duty to engage not only in active dialogue but also mutually agreed action through its agreements. Affirming this approach, the Constitutional Court in 1988, stated that although Catholicism was the majority religion, that could not result in discrimination by the State towards the members of minority religions.⁷⁷⁴

A further pivotal moment occurred in 1989 when the Constitutional Court declared that the principle of *laicità* was one of the 'supreme principles' of the Italian Constitution.⁷⁷⁵ The case, *Corte costituzionale* 11 Apr. 1989, No.203 (1990), represents one of Italy's most important constitutional law judgments. In considering how Catholicism should be taught in state schools, the Court stated that the type of secularism inherent in the concept of *laicità* was not one of indifference but guaranteed the protection of religious freedom in a societal framework based on confessional and cultural pluralism.⁷⁷⁶ Some legal scholars refer to this type of definition of secularism as 'positive secularism'.⁷⁷⁷ It implies a constructive and co-operative approach on

⁷⁷³ *Gaudium et spes* is what is known as a Pastoral Constitution on the Church in the Modern World. It is a wide ranging summary of the Church's view of humanity's relationship to society, especially in terms of economics, poverty, social justice, culture, science, technology and ecumenism.

⁷⁷⁴ Constitutional Court 8 Jul. 1988, No.925 at para.10.

⁷⁷⁵ Constitutional Court 11 Apr. 1989, No. 203 (1990) 1 *QDPE* 193.

⁷⁷⁶ *Ibid*, at para. 4.

⁷⁷⁷ See Sicardi, S. 'Il principio di laicità nella giurisprudenza della Corte costituzionale (e dei giudici comuni)' 2 *Diristo pubblico* (2007), pp.504-505.

behalf of the State towards religion in the public sphere as opposed to either a passive or negatively assertive type of secularism.⁷⁷⁸

The Catholic Church remains a dominant force in Italian society, a society which, like other European countries, is moving in an increasingly pluralistic direction. A key consideration is the extent to which society can move away from supporting religious as opposed to non-religious worldviews. Is the Catholic Church increasingly content to deal only with its internal concerns and membership or does it retain the belief that it bears a responsibility to provide a Christian vision for all people in Italian society?

In the next section of the chapter we will consider how the principle of secularism is contested as we consider the ECtHR judgments in the now infamous 'crucifix' case of *Lautsi v. Italy*.

⁷⁷⁸ For a discussion of the relevant terms see Kuru, AT. *Secularism and State Policies Toward Religion: The United States, France and Turkey*, Cambridge: Cambridge University Press, 2009, pp.114-118.

5.4 Contemporary Italy – ‘secularism’ contested

The case that has become totemic in recent years in demonstrating the desire of the Catholic Church to maintain its visible presence and influence in the public sphere is the so-called *Lautsi* case. The case challenged the law that there must be a crucifix placed in every state school classroom in Italy. It represents a clash between religious and secular world views and through conflicting judgments at the ECtHR, it exploded onto the European stage.⁷⁷⁹

5.4.1 *Lautsi v. Italy*

The decision of *Lautsi v. Italy* on 18 March 2011 by the Grand Chamber of the ECtHR is a landmark case on the treatment of religious symbols in public schools. Much has been written on the case and I do not wish to repeat that here.⁷⁸⁰ Pressure from the Catholic Church and other European governments and organisations across Europe led the ECtHR to overturn its initial, Second Section decision, requiring Italy to remove crucifixes from state schools.⁷⁸¹ The Grand Chamber ruled that the decision was a matter for Italy under the margin of appreciation.⁷⁸² The Catholic Church in its submissions heavily criticised the Second Section judgment as an example

⁷⁷⁹ Leigh, I. and Ahdar, R. ‘Post-secularism and the European Court of Human Rights (or how God never really went away)’ in *Modern Law Review*, 75:6, 2012, pp.1064-98 at p.1066.

⁷⁸⁰ For example, Garcia Oliva, J. and Cranmer, F. ‘Education and Religious Symbols in the United Kingdom, Italy and Spain: Uniformity or Subsidiarity?’ *European Public Law*, 19(3), 2013, pp.555-582; McGoldrick, D. ‘Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?’ *Human Rights Law Review*, 11, 2011, pp.451-502; Mancini, S. and Rosenfeld, M. ‘Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere’ in Ungureanu, C. and Zucca, I. (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas*, Cambridge: Cambridge University Press, 2012, p.160-191.

⁷⁸¹ ECtHR *Lautsi v. Italy* 3 November 2009, Application no. 30814/06.

⁷⁸² *Ibid.*

of the ECtHR attempting to impose an aggressively secular form of jurisprudence that would have a chilling effect across Europe by imposing oppressive uniformity, limiting personal identity and communal choices based on faith.

5.4.2 Background and context

Most states in Europe do not have laws either requiring or preventing religious symbols in schools.⁷⁸³ Where laws exist, they can be contentious. For example, in Austria, a cross must be displayed in classrooms which are used for teaching religious education in circumstances where the majority of the students belong to a Christian denomination.⁷⁸⁴ In Spain, crucifixes in public schools have been classified as both religious and cultural symbols and their presence in the school is a matter for the school authorities.⁷⁸⁵ In Germany, there are some states which allow the presence of crucifixes on the walls of public schools while others prohibit them.⁷⁸⁶ Historically, only Bavaria required the presence of a crucifix in every classroom.⁷⁸⁷

⁷⁸³ Doe, N. *Law and Religion in Europe: A Comparative Introduction*, Oxford: Oxford University Press, 2011, p.197.

⁷⁸⁴ Austria: RelUG 1949, s.2(b)(1).

⁷⁸⁵ Supreme Court of Madrid (15 October 2002 and Supreme Court Castilla-Leon, 20 September 2007) – note that the latter court decided on 14 December 2009 that a crucifix may violate the negative right to freedom of religion of parents and children and so must be removed if the parents so request.

⁷⁸⁶ Mahlmann, M. 'Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's decision on the Headscarf Case', *German Law Review*, Vol. 4 No. 11, 2003, pp.1999-1116.

⁷⁸⁷ See Lock, T. 'Of Crucifixes and Headscarves Religious Symbols in German Schools' in Hunter-Henin, M. (ed.), *Law, Religious Freedoms and Education in Europe* Farnham: Ashgate Publishing, 2012, pp.347-69.

In Italy, the presence of crucifixes and crosses remain an integral part of the cultural iconography. It has been mandatory to place crucifixes in all Italian state school classrooms since the 1920s. The law requiring a crucifix to be placed in all public school classrooms, courts of law and hospitals was enacted during the Fascist period and Article 118 of the Royal Decree of 30 April 1924 and Article 119 of the Royal Decree of 26 April 1928 remain in force. They were introduced as part of Mussolini's attempts to court favour with the Catholic Church in return for Catholic votes.

The challenge to the place of the crucifix in public school classrooms was brought by Finnish-born Italian citizen Mrs. Soile Lautsi. The family requested that crucifixes should be removed from the classrooms in the primary school that her two sons attended because they were to be brought up as atheists. Mrs. Lautsi justified the request with reference to a decision of the Italian Court of Cassation which had already decided that the presence of the crucifix in polling stations ran counter to the Italian Constitution's principle of *laicità*.⁷⁸⁸ She first took her challenge through the Italian administrative courts and lost and subsequently applied to the ECtHR in 2006. She argued that the compulsory presence of the crucifix in school classrooms breached her right to ensure that her children received education conforming to her parental religious and philosophical beliefs under Article 2 of Protocol No.1 to Article 9 ECHR.

⁷⁸⁸ Corte di Cassazione, decision No 439, 1 March 2000.

5.4.3 Conflicting judgments at the ECtHR

The *Lautsi* case is remarkable for the ECtHR's conflicting judgments. At first instance, on 3 November 2009, the Court's Second Section, in a unanimous 7-0 decision found against Italy and ruled that there had been a violation of Article 2 of Protocol 1 and also a violation of freedom of religion under Article 9 ECHR. This would have required Italy to revoke the law requiring the compulsory presence of crucifixes in state school classrooms. The judgment emphasised the importance of the state from refraining to impose beliefs especially on children at an early age.⁷⁸⁹ Following its case law, it insisted that the state had a duty to ensure that in exercising its functions of educating and teaching, knowledge was communicated objectively and in a way which respected the religious and philosophical convictions of parents.⁷⁹⁰ It emphasised how a religious symbol could be interpreted in radically different ways by a range of pupils.⁷⁹¹ It also found that the negative freedom from religion needed to be especially protected where the state expressed a belief in an environment, like a school classroom, where attendance was compulsory. Indeed, the duty to uphold confessional neutrality in public education was crucial where school attendance was compulsory regardless of religion.⁷⁹² It concluded that the presence of the crucifix conflicted with educational pluralism which was essential for the preservation of 'democratic society' as defined in the ECHR.⁷⁹³

⁷⁸⁹ ECtHR *Lautsi v. Italy* 3 November 2009, Application no. 30814/06, para. 48.

⁷⁹⁰ *Ibid*, para. 49.

⁷⁹¹ *Ibid*, para. 55.

⁷⁹² *Ibid*, para. 58.

⁷⁹³ *Ibid*, para. 58.

The decision provoked an intense and angry outcry across Europe from those who supported the public display of the crucifix and objected to the law being used to limit its visibility. The Italian government, led by Silvio Berlusconi, appealed the decision and at the same time co-ordinated a European wide coalition of national governments in support. Separately, several other organisations and thirty-three members of the European Parliament also supported the stance of the Italian state.

In 2011, the Grand Chamber ECtHR reversed the Second Section decision and arguably buckled to external religious pressure.⁷⁹⁴ In its judgment, the Grand Chamber rejected the notion that it had to decide upon the incompatibility of the Italian state imposing the mandatory requirement of religious symbolism in its schools when, under its Constitution, Italy is a secular state.⁷⁹⁵ This approach has been criticised by Lorenzo Zucca for its determination to avoid the issue of secularism and for reducing the scope of the questions at issue to their narrowest possible terms.⁷⁹⁶ Joseph Weiler, however, sympathised with the Grand Chamber's approach because he objected to the ECtHR being used as the ultimate constitutional court for Europe.⁷⁹⁷

The Grand Chamber decided on narrow grounds that the mere presence of the crucifix was not sufficient to constitute a violation of the ECHR. In

⁷⁹⁴ See Perez, N. 'Lautsi vs. Italy: Questioning the Majoritarian Premise' Forthcoming: *Politics and Religion*, 14 May 2015 available at SSRN: <https://ssrn.com/abstract=2606133>.

⁷⁹⁵ ECtHR Grand Chamber *Lautsi v. Italy* 18 March 2011, Application no. 30814/06 para. 57.

⁷⁹⁶ Zucca, L. 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber', *International Journal of Constitutional Law*. Vol. 11 No. 1, 2013, pp.218-229 at pp.221-222.

⁷⁹⁷ Weiler, JHH. 'Lautsi: A reply', *International Journal of Constitutional Law*, 11:1, 2013, pp.230-233 at 232.

applying the margin of appreciation, the Grand Chamber referred to a lack of consistent approach to religious symbolism across European countries and called attention to the diversity of cultural and historical development which exists amongst Member States.⁷⁹⁸ The decision, by a majority of 15-2, stated that there was no evidence that the presence of the crucifix had or did not have an effect on the children's educational experience and whilst the domestic regulations were intended to meet the needs of the faith of a majority of Italians, that in itself did not constitute indoctrination.⁷⁹⁹ Astonishingly, the Court concurred with the judgments of Italy's domestic courts in concluding that 'a crucifix on a wall is an essentially passive symbol' and as such, 'it cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities'.⁸⁰⁰ Whilst it may be true that a crucifix in isolation is not as potent a means of expression as the spoken word or when accompanied by religious practice, it is surely going too far to call the image of Christ crucified a passive symbol especially in the predominantly Catholic context in which it exists.

In overturning the decision of the Second Division, the Grand Chamber arguably placed Italy's domestic interpretation of religious symbolism ahead of an applied doctrine of state neutrality.⁸⁰¹ Whilst the Grand Chamber did not decide on the merits or otherwise of Italy's approach, it is clear that by allowing the margin of appreciation, the Grand Chamber was prepared to

⁷⁹⁸ ECtHR Grand Chamber *Lautsi v. Italy* 18 March 2011, Application no. 30814/06 para. 68.

⁷⁹⁹ *Ibid*, para. 66 and 71.

⁸⁰⁰ *Ibid*, para. 72.

⁸⁰¹ See Evans, MD. 'Lautsi v. Italy: An Initial Appraisal', *Religion and Human Rights*, 6, 2011, pp.237-244.

recognise Italy's constitutional interpretation of the meaning of the display of the crucifix.⁸⁰² The judgment raises two questions that must be addressed by a new model of religion-state relations: (1) to what extent can theological language and symbolism underpin a principle of secularism, and (2) has the decision in *Lautsi* effectively brought to an end a perceived shift towards an increasingly secular and religiously hostile trajectory in the jurisprudence of the ECtHR.

⁸⁰² Wouter de Been argues that while the Second Division's decision was more convincing, the Grand Chamber's judgment was an attempt to be sensitive to the social context, see de Been, W. 'Lautsi: A Case of "Metaphysical Madness"?' in *Religion and Human Rights* 6, 2011, pp.231-235.

5.5 Concluding remarks

Italy is both a religious and secular country with an increasingly secular demographic. It upholds the freedom of religion but its model of religion-state relations gives precedence to religions who qualify to enter into agreements with the State. For historical reasons and because of Italy's majority Catholic population, the Catholic Church has a special status and a unique legal regime which makes it resemble an 'established' church in all but name. The model is difficult to justify in the context of religious equality and Islam appears disadvantaged by not entering into an *intesa* with the State.

Characterised as co-operative, the model professes to be 'friendly' and 'welcoming' towards religion and so it is positive and not indifferent to the presence of religion in society. Through the agreements, religion is able to operate with considerable independence from the State and in this way the State and religion together can aim to meet the religious and secular needs of society. To this end, the State and religion co-operate in providing a range of public services where education and marriage are chief amongst them. However, the legal framework within which co-operation takes place is rigid and too static. It fails in its capacity to be able to change and adapt to the context over time. Whilst a new model would need to be able to withstand the whims and dictates of rapidly changing political regimes, it would also need to be responsive to societal changes. The co-operation model can be defended if there is scope and potential for the relationship between the state

and religion to react to change and increasingly diverse societies.⁸⁰³ The priority given to Catholicism has enabled the Church to maintain its influence in public life and law-making to a degree that is exceptional within Europe.⁸⁰⁴ However, there is nothing to guarantee that its significance will remain as relevant in the future and this raises questions over such issues as its role in education and being financed through the taxation system.

We have seen how the Constitutional Court has formulated a principle of secularism or *laicità* from a number of articles in the Constitution. However, Italy's type of secularism, *laicità*, is contested and that has given rise to radically conflicting judgments in the *Lautsi* case at the ECtHR. In the next chapter, we will see how attempts to reassert the influence of Catholic doctrine challenged the grounding of Italy's principle of secularism and the values which underpin the concept of a 'secular' state or *stato laico*.

My research has shown that the model of co-operation, in the Italian context, inevitably favours a religious perspective over other non-religious perspectives and usually favours one particular religious perspective over all others. The risk is that the state becomes an unwitting collaborator in religion's desire to pursue its own objectives in the public space. A new model must seek to recognise and resist the religious zeal and desire to dominate.

⁸⁰³ Bader, V. *Secularism or Democracy? Associational Governance of Religious Diversity*, Amsterdam: IMISCOE/Amsterdam University Press, 2007.

⁸⁰⁴ Ferrari, S. 'State regulation of religion in the European democracies: the decline of the old pattern', in Motzkin, G. and Fischer, Y. (eds.), *Religion and democracy in contemporary Europe*, London: Alliance Publishing Trust, 2008, pp.103-112 at p.104.

Chapter 6

Towards a new model of religion-state relations

6 Introduction

The final chapter aims to propose a new model of religion-state relations based on the analysis of religion-state relations in the three preceding chapters.

The first section focuses on the tensions that have marked the historical encounter between religion and emerging liberal democracy. Despite being no longer a relationship of outright hostility, disputes remain over the sources of ethical norms and the application of human rights law.⁸⁰⁵ The new model acknowledges this and proposes a mechanism to ameliorate it. However, the collision of different perspectives is valued in the hope that deeper truths may be revealed from the agonistic exchange.

The final section of the chapter is an attempt to craft in outline a new model of religion-state relations based on a critique of the classical models. The new model is one of critical engagement between the state and religion from a position of mutual separation. It relates the achievements and problems of the existing models to the key aspects of liberal democracy identified in

⁸⁰⁵ For example, the symposium exploring human rights 'Fundamental Rights and Conflicts Among Rights' held by the Ratzinger Foundation in Rome on 15-16 November 2016 to mark the 70th Anniversary of the adoption of the Universal Declaration of the Rights of Man by the United Nations on 10 December 1948.

Chapter 2: participation and the democratic processes; the rule of law; the separation of powers in the context of separating political and religious power; and human rights. Whilst it is not possible to present a comprehensive account of the new model, the outline will endeavour to highlight explicitly the key differences between the way the case studies under the classical models in Chapters 3 to 5 would or could be treated under the new model. It is hoped that the new model may serve to enhance the development of liberal democracy, enable flourishing yet tolerant religious communities and benefit wider society in the future.

6.1 Religion and liberal democracy - the historical legacy

History has played a significant part of the analysis of religion-state relations in Chapters 3 to 5. Historically, Christianity has dominated the public sphere and has usually taken a reactionary position in relation to the development of liberal democracy.⁸⁰⁶ Rapprochement has been slow, often partial and sometimes resented.⁸⁰⁷ Indeed, there are some who retain a desire to re-Christianise Europe.⁸⁰⁸

My research has been designed to throw a spotlight on how the evolution of liberal democracy has challenged religious dominance. The liberation of the public sphere from the control of religion has been arduous and challenging. What stands out is the level of 'friction', opposition and hostility between religion and evolving liberal democracy. This process, often as brutal as it is passionate, continues in a somewhat more civilised way today as traditional values are challenged and new ideas scrutinised. These tensions are, I believe, inevitable, implicit and valuable.

Religion in Europe has at times been marked by alliances between authoritarian religious administrations collaborating with absolutist political

⁸⁰⁶ Notwithstanding the influence of dissenting voices within Christendom like the Quakers and Unitarians.

⁸⁰⁷ For example, the changes in Roman Catholicism from the period of the First Vatican Council (1869-1870) to the Second Vatican Council (1962-1965).

⁸⁰⁸ Luxmoor, J. 'Pope and Patriarch urged to "speak with a single voice"' in *The Tablet*, 26 January 2017. Referring to an interview with France's 'Famille Chretienne' the Russian Orthodox Metropolitan Hilarion Alfeyev said, 'Our Christian identity gives us strength stemming from God in Christ, when the secularised societies typical of Europe can be described as spiritually weak....[a] catastrophe is taking place in Western Europe because of the enormous efforts today being made to prevent the Christians from authentic understanding of the Divine moral law.'

regimes.⁸⁰⁹ Some religions still continue to favour authoritarian or non-democratic regimes to achieve their ends.⁸¹⁰ Put simply, it is easier to dominate politically and legally without engaging in the struggle to win hearts and minds.

These types of theocratic aspiration can too often be underplayed or ignored by some liberal scholars who appear to suggest that liberal democracy can accommodate and embrace liberal or illiberal religion without both parties being affected by the encounter.⁸¹¹ Equally, some of those working in the area of law and religion can harbour undisclosed bias in favour of religion generally or one particular 'brand' of religion.⁸¹² In standing against what is perceived to be intolerant secularism, the claim is often made that religion is being persecuted whilst in reality a process of re-balancing is underway that allows others to speak.⁸¹³ Claims of religious discrimination or victimisation can result from the painful recognition that organised religion is losing some of the ground it once held in the public and political consciousness. Even though the liberal democratic state may attempt to be neutral in terms of the criteria it applies when dealing with religion, the encounter itself will not be neutral; there will be consequences to the interaction.

⁸⁰⁹ See Chapter 5.

⁸¹⁰ For example, Shia Islam in Iran and the Russian Orthodox Church.

⁸¹¹ See for example, Woodhead, L. 'Liberal religion and illiberal secularism' in D'Costa, G. *et al* (eds.), *Religion in a Liberal State*, Cambridge: Cambridge University Press, 2013, p.93.

⁸¹² For example the support of The Ecclesiastical Law Society for the establishment of the Church of England.

⁸¹³ MacDonald, S. 'Good done by the Catholic Church in Ireland at risk of being 'obliterated' by secularisation, says Archbishop' in *The Tablet*, 9 May 2017.

Certainly, religion can act as a bulwark against the potentially oppressive and totalitarian state actions. Religious freedom serves to challenge accepted norms and can resist attempts to manoeuvre society towards intolerant secular dominance.⁸¹⁴ Equally, religion offers competing visions of human and societal flourishing, ideas which should be welcomed in democratic debate without the obligation for comprehensive implementation. Religion can also be one of a number of instruments for understanding today's world but whilst religion may influence public policy, it should not control public policy.

The positive aspects of the type of critical engagement proposed lie in the dialogue that the participation in liberal democracy affords. Religion can posit its social and ethical ideas but should not try to impose doctrinal solutions by claiming theocratic superiority. This type of distanced relationship allows for the mutual awareness, understanding and experience of religion by the state and vice versa. It prevents confusion between those who embrace God's will and its implications for their own life with the notion that it should, therefore, have a wider authoritative application controlling universal law and morals. Of course, the historical record does not necessarily mean that the same kind of encounter will continue and nor should it – the past does not predict the future. Critical co-existence rather than co-operation should be the preferred option.

⁸¹⁴ For example, Catholicism's stance against atheistic communism and Dietrich Bonhoeffer's resistance to Nazi Germany.

6.2 A new model - critical engagement from a position of mutual separation

The new model for religion-state relations takes seriously the historical legacy of the encounter between religion and liberal democracy. Indeed the encounter lies at the heart of the model and, to some extent, the model is already in operation.⁸¹⁵ Built on a concept of critical engagement, it is not easy or perfect, nor is it one whose destination is certain. It is, however, a model fitted to the demands of globalisation and digitization whilst also respecting diversity and difference. In that sense, it is inclusive, plural and potentially a model of hope. The model requires a priority in favour of liberal democracy and a robust defence of its four core elements.⁸¹⁶ It does not require all religions to engage with the tenets of liberal democracy but not to do so may leave that religion culturally isolated and facing the consequences which may flow from that, e.g. an unhealthy and detached introspection, diminished influence in the public sphere and a reducing membership.

We now consider in relation to each element of liberal democracy how key aspects of the model would operate in practice. In doing so, it is possible to learn from the classical models in order to see where they respect the four pillars of liberal democracy and equally where they honour them in the breach. Further analysis of each of the case studies in Chapters 3 to 5 will

⁸¹⁵ See for example, Pongratz-Lippitt, C. 'Schönborn: all religions must respect rule of law' in *The Tablet*, 18 June 2018 at <https://www.thetablet.co.uk/news/9261/sch-nborn-all-religions-must-respect-rule-of-law> - last accessed 24 January 2019.

⁸¹⁶ For a counter-view opposing the priority of liberal democracy see, Pabst, A. *Liberal World Order and Its Critics: Civilisational States and Cultural Commonwealths*, London: Routledge, 2018.

illustrate how they would or could be treated differently under the new model. The ban on face coverings in France is considered in relation to the importance of identity and the right to participate freely and fairly in democratic processes. The dispute over the place of the crucifix in Italian classrooms provides the basis for a discussion on the ethical foundations of a substantive approach for the rule of law. The Church of England's role in attempting to prevent the introduction of gay marriage is examined in the context of separating political and religious power. Finally, further reflection on each case study reveals how an aspect of human rights law may need to respond under the premise of the new model.

6.2.1 Participation and the democratic processes

All three classical models protect the freedom of religion and this makes a degree of pluralism inescapable. The UK and Italy welcomes and recognises religious identity offering positive accommodation. France's interpretation of laïcité, on the other hand, promotes religious freedom but in so doing sees the State's role in that protection as being religion blind when it comes to personal identity. We have seen that France maintains a policy of not recording identity data on its citizens, including information on religious belief. There is little doubt that this approach is perceived by many religious people in France as hostile towards religious practice, especially with

regards to Islam where religious practice is a core requirement and seemingly indivisible from religious identity.⁸¹⁷

6.2.1.1 Participation and identity - was it necessary for France to ban the veil?

France's ban on face coverings in public disproportionately affects Muslim women. Even so, the ECtHR accepted the arguments of the French government that the ban was necessary in order to protect France's concept of 'living together' understood to be an essential component of France's constitutional principle of *laïcité*. The ban remains contentious and is a tangible sign of the French state seeking to make religious identity invisible in order to preserve a more unified and cohesive view of French citizenship. Does the ban take the application of *laïcité* from the public to the private sphere, away from institutions and onto individuals? To what extent should the need for social cohesion and aspirations of a shared vision of citizenship restrict individual choice and religious practice? Does France's approach enhance democratic participation?

Cécile Laborde writing from the perspective of political philosophy condemns the ban on face coverings in public, whilst at the same time arguing for a more radical interpretation and application of *laïcité*.⁸¹⁸ She also rejects the conventional interpretation of *laïcité* used to introduce the 2004 ban on

⁸¹⁷ See Shachar, A. *Multicultural Jurisdictions: cultural differences and women's rights*, Cambridge: Cambridge University Press, 2001.

⁸¹⁸ Laborde, C. *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford: Oxford University Press, 2008.

wearing religious symbols in school and challenges what she considers the in-built biases in French society that fails to acknowledge historical inequalities including the legacy of France's Christian past.⁸¹⁹ In rejecting all forms of domination, she supports the rights of women to choose what they want to wear free from the influence of both the State and religious patriarchy.⁸²⁰ She is critical of France for not recognising the systemic socio-economic bias in society, and the failure of the public authorities to apply laïcité in a way which ought to be neutral and support of civic integration.⁸²¹ Laborde identifies an in-built bias towards Catholicism. Despite the Law of 1905 separating the Church and State, the State continues to accommodate vestiges of its Catholic past in way that is not provided for other religions. Whilst the 1905 Law could not possibly foresee a changing religious demography, the consequences of its application on Laborde's reading, means that some citizens are more genuinely French than others.⁸²²

Sylvie Bacquet is also critical of French Republicanism because it is 'universalist in nature in that it purports to establish a French identity and requires that the individual transcends any cultural, social or religious belonging in order to achieve individual autonomy'.⁸²³ This interpretation is shared by many religious people who put their religious identity before everything else. Sheika Moza, a senior member of the Qatar royal family,

⁸¹⁹ Ibid, p.66ff.

⁸²⁰ Ibid, p.101ff.

⁸²¹ Ibid, p.202ff.

⁸²² Robert, J. 'Religious liberty and French secularism' in *Brigham Young University Law Review*, 637, 2003, p.656.

⁸²³ Bacquet, S. 'Religious freedom in a secular society: an analysis of the French approach to manifestation of beliefs in the public sphere' in Cumper, P. and Lewis, T. (eds.), *Religion, Rights and Secular Society: European Perspectives*, Cheltenham: Edward Elgar Publishing Ltd, 2012, p.147 at p.151.

speaking at Oxford University criticised distorted perceptions of Islam in the West and claimed that 'a Muslim is first and foremost identified as a Muslim, rather than simply a human being.'⁸²⁴ Moza's position is hard to reconcile with Bacquet's conceptualisation of French citizenship where the expectations of Muslim religious practice and the expectations of French citizenship clash. French history suggests that religious identity does not fare well in circumstances where the two forms of identity are perceived to be incompatible.

The new model would require greater recognition and acknowledgment by France of personal identity characteristics. France should begin to collect data on its citizens relating to personal and religious identity. Not to do so may prove counter-productive in a future where the State is required to implement policies respecting greater individualism and choice. Greater knowledge of its demographic would allow the State to be more empathetic in its treatment of religious minorities. It would also enable a wider representation in the participation of religious minorities in consultation processes and decision-making where they are directly affected. The lack of Muslim participation in both enquiries leading up to the bans on religious clothing are indefensible in terms of democratic process.

At the same time, symbolism can send important messages about civic engagement and democratic participation. It can also have an important bearing on a person's freedom of choice. France's ban on face coverings in

⁸²⁴ Moza, S. Speech to mark the opening of the Middle East Centre at St. Anthony's College, Oxford University. Oxford, 26 May 2015.

public and the ban on wearing religious symbols in school could be conceived as attempt to balance the freedom to choose with the freedom *from* religion. To illustrate the point, imagine a street where five Muslim married couples, currently without children, live next door to one another.

The wives in the first two houses are great friends and together with their husbands make a pilgrimage to Mecca. It is one of the most wonderful experiences of their lives and on return they decide to wear the veil as a way of continuing the experience and deepening their devotion. The woman in the third house has always respected the first two women in fact she has always been somewhat envious of them. In an attempt to get to know them better she decides to wear the veil as it will make her friendship with them easier. Sometime later, the husband and wife in the fourth house have a terrible row during which the husband says to his wife, 'Why can't you wear the veil and make me a proud Muslim husband like the others in this street?' His wife has never considered wearing the veil and doesn't really want to do so, however, she acquiesces in order to keep the peace and out of a sense of duty to her husband.

Given that the women in the first four houses now all wear the veil, what freedom does the remaining woman have whether or not to do so as well? Not wearing the veil used to be the norm but now she is in a minority. Her freedom to choose may be limited and her decision may depend upon her sense of peer pressure, real or perceived. Her sense of the scope of her

freedom may have changed; once an insider, she may now feel like an outsider.

Consider further what may happen if she reluctantly decides to wear the veil and, in time, each couple have children? For them, the new norm is that all women wear the veil. Without careful instruction on freedom of choice, the implied or express message for both sexes is that wearing the veil is an expected norm or perhaps even required. Within a generation, what had previously been a free choice has become a fixed religious pattern. Rebellion against the norm becomes not merely a matter of personal autonomy and judgement but a sign of disrespect and rejection of one's religion.

Under the new model a ban on wearing religious symbols in school would be supported on the grounds that school is the place where the critical faculties to determine individual choices are developed. However, face coverings in public would not be banned outright except in the exceptional circumstances we will consider in the final section of the chapter on human rights. Rather than use the severity of the law to ban forms of clothing, other more balanced potential solutions to the perception of the veil's illiberal or anti-social effects should be sought. Whilst it is good to be free to make a choice that does not necessarily make the choice a good one.⁸²⁵ What kinds of behaviour embody good citizenship?

⁸²⁵ Woodhead, L. 'Liberal religion and illiberal secularism' in D'Costa, G. *et al* (eds.), *Religion in a Liberal State*, Cambridge: Cambridge University Press, 2013, p.93 at p.111.

One possibility may involve the state entering into discussions with Muslim communities on the need to balance wearing the veil in public with concern for broad range of social interaction and good community relations. Clearly, at the time of the bans, some views within the Muslim community in France showed a political astuteness and sensitivity to wider public opinion. Whilst the leader of the *Conseil français du culte musulman* (CFMF) Mohammed Moussaoui opposed the law, he stated that he was also not in favour of women wearing the full veil in public. Perhaps the most significant and influential Muslim evidence paving the way for the ban came from Dalil Boubakeur, the grand mufti of the Paris Mosque, who, in testifying before the parliamentary enquiry gave three reasons why, although not supporting a ban, he thought the full veil should not be worn in public. Firstly, he stated that ‘from a religious point of view, neither the burqa nor the niqāb, nor the integrated veil, are religiously prescribed in Islam’. Secondly, he described parts of the Islamic world where wearing the veil was wearing the full veil was associated with Islamic fundamentalism, forced religious prescription and criminal activities. Thirdly, he respected and called attention to the secular nature of the French state and laïcité stating that:

‘France is a secular state, a vector of humanist values, linked to human rights such as freedom, equality, parity between men and women ... In short, this republican modernity is the guarantor of the diversity of our society. The social pact ensuring this secularism is accepted by all: citizens or Muslim

residents of France participate in this consensus and this commitment to respect the law and customs of our country.⁸²⁶

It is deplorable that as a result of his testimony to the enquiry Boubakeur himself subsequently faced a terrorist assassination plot.⁸²⁷ Violence and threats of violence for political ends are manifestly unacceptable in a liberal democracy. The context and terms necessary for peaceful democratic dialogue and deliberation require careful consideration.

6.2.1.2 Dialogue and deliberation - participation without domination

Participation in the democratic process should allow engagement with religion but not religious dominance. As Ferrari says, the problem is that 'when ethical and cultural choices are directly connected to the will of God, they tend to become non-negotiable.'⁸²⁸ This is what Richard Rorty calls a 'conversation-stopper'.⁸²⁹ Secular and religious voices must be able to co-exist and ways need to be investigated to facilitate this.⁸³⁰ Mechanisms to allow civil dialogue between the state and religious and secular perspectives

⁸²⁶ Dalil Boubakeur testimony to the *Mission d'information sur la pratique du port du voile integral sur le territoire nationale* at http://www.assemblee-nationale.fr/13/cr-miburqa/09-10/c0910010.asp#P2_103 - last accessed 24 January 2019. (My translation.)

⁸²⁷ Euro-Islam.info 22 November 2010 at <http://www.euro-islam.info/2010/11/22/dalil-boubakeur-target-of-assassination-plot/> last accessed 24 January 2019.

⁸²⁸ Ferrari, S. 'State regulation of religion in the European democracies: the decline of the old pattern', in Motzkin, G. and Fischer, Y. (eds.), *Religion and democracy in contemporary Europe*, London: Alliance Publishing Trust, 2008, pp.103-112, p105.

⁸²⁹ Rorty, R. 'Religion as Conversation-stopper' in *Common Knowledge*, 3:1, 1994, p.1-6. For a counter view see, Rosenbaum, S. 'Must religion be a Conversation stopper?' in *The Harvard Theological Review*, 102:4, 2009, pp.393-409.

⁸³⁰ Bardon, A. 'Religious Arguments and Public Justification' in Cohen, J. and Laborde, C. (eds.), *Religion, Secularism and Constitutional Democracy*, New York: Columbia University Press, 2016, p.273.

and inter-faith dialogue should be promoted. A minimal degree of mutual tolerance is required on the part of religion and the state.⁸³¹

Unfortunately inter-faith dialogue has shown itself to be slow, overly structured and formal.⁸³² This approach is of limited value in a world where communication is instantaneous and inclusive. Whilst dialogue should not be rushed or points of principle diminished, there is little point in trying to engage with inflexible positions or succumb to political stalling tactics.⁸³³ Religion should participate in the public sphere at a level where it is one voice amongst many and not the dominant player. Levelling the field of play between religion and non-religious arenas like science, health and ecology etc. could serve to lessen problems associated with religious sectarianism.⁸³⁴

Participation in democracy would occur at individual and organisational levels. Religious people would be wholly free to participate and use religious arguments as and whenever they wish to do so. Critical and important voices are to be found at the individual level from the grassroots of religious communities.⁸³⁵ Here, dialogue cannot be controlled or shaped but is open, free, random and unstructured. What is required in these circumstances is a

⁸³¹ See Stepan's 'twin toleration thesis' in Stepan, A. *Arguing Comparative Politics*, Oxford : Oxford University Press, 2001 and Stepan, A. 'The Multiple Secularisms of Modern Democratic and Non-Democratic Regimes' in Calhoun, C. Juergensmeyer, M. and Van Antwerpen, J. (eds.), *Rethinking Secularism*, Oxford, Oxford University Press, 2011, pp.114-144.

⁸³² Cornille, C. *The Im-Possibility of Interreligious Dialogue*, Login: Independent Publishers Group, 2008.

⁸³³ Pratt, D. *The Challenge of Islam: Encounters in Interfaith Dialogue*, London: Routledge, 2018.

⁸³⁴ Bhargava, R. 'Is European Secularism Secular Enough?', in Cohen, JF. and Laborde C. (eds.), *Religion, Secularism & Constitutional Democracy*, New York: Columbia University Press, 2016, p.157.

⁸³⁵ Council of Europe and the Congress of Local and Regional Authorities of the Council of Europe. *Gods in the city: intercultural and interreligious dialogue at local level*, Strasbourg: Council of Europe, 2008.

minimal level of educational attainment in order to achieve the basic level of civility and preconditions for tolerance required for democratic participation.⁸³⁶ Much work is already underway investigating how deliberation can be used constructively to enhance and legitimize the democratic process.⁸³⁷ It does not necessarily require virtuous citizens but the public institutions that gather that information need to be willing to listen and be led by fundamentally honest and uncorrupted citizens.⁸³⁸ Government consultations processes and the treatment of religion in broadcasting and other media would facilitate and promote access to public discourse.

Organisational dialogue with government would have to be structured and here the EU model discussed in Chapter 2 may serve as a good example to follow at the national level.⁸³⁹ It gives the opportunity for religious bodies and those who lead them to express their concerns about proposed legislation especially on matters which may affect them directly. It may also, in certain circumstances, allow them 'to speak "truth" to power' without being part of the system of government itself. However, religious arguments should not be considered persuasive merely because they originate from a source held to be authoritative by a religious organisation or a community of believers. Equally, there should be no commitment to legislate or form policy on the

⁸³⁶ Zucca, L. 'The Classroom as a Tolerance Lab' in Hunter-Henin, M. (ed.), *Law, Religious Freedoms and Education in Europe*, Farnham: Ashgate, 2011, p.37 at p.45.

⁸³⁷ Fishkin, JS. *Democracy When the People Are Thinking: Revitalizing Our Politics Through Public Deliberation*, Oxford: Oxford University Press, 2018. Cohen, J. 'Democracy and Liberty' in Elster, J. (ed.), *Deliberative Democracy (Cambridge Studies in the Theory of Democracy)*, Cambridge: Cambridge University Press, 1998, p.185. Gutman, A. and Thompson, D. *Why Deliberative Democracy?*, Princeton: Princeton University Press, 2004.

⁸³⁸ Levitsky, S. and Ziblatt, D. *How Democracies Die: What History Reveals About Our Future*, New York: Penguin, 2018, p.72ff.

⁸³⁹ Article 7 of the Lisbon Treaty.

basis of the results of the dialogue. Religions would be able to campaign for change, influence policy and critique liberal democracy itself but religious bodies would have no direct role in the legislative process; they would play their part alongside other groups in civil society. President Macron of France seems to welcome this kind of encounter when he says to French bishops that he would value their wisdom but does not want them to insist on political solutions.⁸⁴⁰

There are risks and opportunities for religious and non-religious organisations from this type of interaction. It may be that a religion chooses not to engage with the process. Such a religion would have to face the consequence of being a rule taker when it came to law affecting religious bodies. For those religions that do participate, the process may not be comfortable. Such a religion would no longer be able to exist in isolation and may experience change from the encounter just as liberal democracy will also be influenced by the experience.⁸⁴¹ Will there be convergence amongst religions, as some commentators suggest, in the ways that they adapt in order to interact with liberal democracy? As Casuscelli says, 'The difficult convergence not only between secular and Christian thought, but also among the religious ways of thinking, is seen precisely when the most pressing ethical themes of contemporary society come into play.'⁸⁴²

⁸⁴⁰ Macron, E. 'Cultes et laïcité, culture et communication, nation, institutions and réforme de l'état' 9 April 2018.

⁸⁴¹ Hertzberg, BR. *Chains of Persuasion: A Framework for Religion in Democracy*, Oxford: Oxford University Press, 2019, pp.103ff.

⁸⁴² Casuscelli, G. 'State and Religion in Europe' in Ferrari, S and Cristofori, R. (eds.), *Law and Religion in the 21st Century: Relations between States and Religious Communities*, London: Routledge, 2010, pp.131-146 at p.137.

6.2.1.3 Critical engagement as deliberation

Whilst the instrumentality of the approach of the state towards religion must be neutral in terms of process, the engagement itself should be critical and not impartial. Critical in this sense implies that the engagement should be analytical, considered and judicious rather than aggressively hostile or evaluative from a consistently negative perspective. The state's assessment of religion should take into account a religion's history as well as its current goals and objectives and the ways it seeks to achieve them.⁸⁴³ As Habermas says, 'If both sides agree to understand the secularization of society as a complementary learning process, then they will also have cognitive reasons to take seriously each other's contributions to controversial subjects in the public debate.'⁸⁴⁴ As an example of the kind and quality of engagement required, Fishkin proposes five characteristics that he sees as essential for legitimate deliberation:

- *Information*: Accurate and relevant data is made available to all participants.
- *Substantive balance*: Different positions are compared based on their supporting *evidence*.
- *Diversity*: All major positions relevant to the matter at hand and held by the public are considered.

⁸⁴³ See 'Religious dialogue can prevent conflict' at the University of Oslo and the work of Professor Oddbjørn Leirvik on the philosophy of dialogue at <https://www.uio.no/english/about/facts/how-uio-changed-norway/religious-dialogue.html> - last accessed 24 January 2019.

⁸⁴⁴ Habermas, J. 'Pre-political Foundations of the Democratic Constitutional State?' in Habermas, J. and Ratzinger, J. *The Dialectics of Secularization: On Reason and Religion*, San Francisco: Ignatius Press, 2006, p.46 at p. 47.

- *Conscientiousness*: Participants sincerely weigh all arguments.
- *Equal consideration*: Views are weighed based on evidence, not on who is advocating a particular view.⁸⁴⁵

Whilst clearly a counsel of perfection, the motivation and intention is designed to strive for a dialogue which is open, transparent and inclusive. In this context, the crucial question is not whether the arguments are religious or secular but whether they are sincerely held, respectful of others and non-corrosive of the fundamentals of liberal democracy.⁸⁴⁶

The nature of the dialogue should respect the rules of critical free speech. It should be tolerant and non-coercive without reducing or down-playing genuine disagreement. I agree with Rawls that public reason of this kind is not the same as secular reason.⁸⁴⁷ All parties must attempt to listen and communicate as best they can even if the limits of their language and comprehension of ideas and metaphors is strained and difficult.⁸⁴⁸ What religion cannot do by engaging in the process is to insist on its own rules being applied outside its own community or organisation. This is especially true when religious arguments rest solely on an absolute source of authority

⁸⁴⁵ Fishkin, JS. *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford: Oxford University Press, 2009.

⁸⁴⁶ Bader, V. 'Religious Pluralism: Secularism or Priority for Democracy?' in *Political Theory*, 27, 1999, p.597- 632 at p.614.

⁸⁴⁷ Rawls, J. *Political Liberalism*, New York: Columbia University Press, 2005, p.212ff and Rawls, J. 'The Idea of Public Reason Revisted' in Rawls, J. *Political Liberalism*, New York: Columbia University Press, 2005, p.440ff.

⁸⁴⁸ Habermas, J. 'Religion in the Public Sphere' in *European Journal of Philosophy*, 14:1, 2006, p.1. See also Milbank, J. 'What lacks is feeling: Hume versus Kant and Habermas' in Calhoun, C. *et al* (eds.), *Habermas and Religion*, Cambridge: Polity Press, 2013, p.322.

for the content of their moral truth.⁸⁴⁹ Dialogue could result in being able to cultivate broader reasoned conversations and develop deeper empathy.⁸⁵⁰ As Bader says, liberal democracy thrives on many lively, competing and often 'incompatible symbolic universes clashing'.⁸⁵¹ In playing a non-privileged, non-monopolistic role in democratic debate, religion faces a situation where every opinion counts and in open dialogue truth has the same right as error.⁸⁵²

6.2.2 The Rule of Law

We have seen that the rule of law is fundamental to liberal democracy and how it is crucial that citizens, public authorities and other organisations including religions respect and observe it. In Chapter 2, we contrasted formal and substantive approaches to the rule of law. Raz typified the formal approach where the only morality required was that which governed the technical workings of the legal system itself. Bingham and Dworkin supported a substantive approach where, in their view, human rights were integral to a full understanding of the rule of law.

⁸⁴⁹ Bardon, A. 'Religious Arguments and Public Justification' in Cohen, J.L. and Laborde, C. (eds.), *Religion, Secularism and Constitutional Democracy*, New York: Columbia University Press, 2016, p.273 at p.282.

⁸⁵⁰ Compare to the mission and ethos of the 'Heterodox Academy' which was started in New York in 2015 by Jonathan Haidt in order to improve the quality of research and education in universities by promoting 'viewpoint diversity' and constructive disagreement. See <https://heterodoxacademy.org/> - last accessed 24 January 2019.

⁸⁵¹ Bader, V. 'Excluded, included or foundational? Religions in liberal democratic states' in D'Costa, G. et al (eds.), *Religion in a Liberal State*, Cambridge: Cambridge University Press, 2013, p.139.

⁸⁵² Ibid, p.135.

Part of Dworkin's purpose was to assert that there *are* absolute moral values.⁸⁵³ He makes this claim against a culture of relativism and subjectivism which basically says that there are no right answers and/or my answer is right because this is the answer I choose. Dworkin characterises the period before the scientific Enlightenment as the period of God, and during that time God decided morality. He claims that science and rationality led to scepticism about God's existence and doubt that God's morality was true. At the same time, science also questioned whether there were any objective values at all because rationality and physical science challenged metaphysical thought.⁸⁵⁴ From this standpoint, it is just another short step to conclude that there is no morality – if moral judgements are not true, why do we need them at all?

Religion stands with Dworkin against this type of moral nihilism and moral relativism.⁸⁵⁵ But where religion seeks to provide comprehensive answers, Dworkin locates his faith in the right to ethical independence.⁸⁵⁶ The issue becomes one of confidence in the law. If you believe that Dworkin's rights based conception is good, then you will trust the law. If a substantive approach is to be preferred over the formal approach, then questions arise over whose morality should underpin the rule of law? It is here that the models or religion-state relations become significant - the issue is about the exclusivity of foundationalism.

⁸⁵³ Dworkin, R. *Justice for Hedgehogs*, Harvard: Harvard University Press, 2011.

⁸⁵⁴ Ibid, p.69ff.

⁸⁵⁵ Dreier, J. 'Moral Relativism and Moral Nihilism' in Copp, D. (ed.), *The Oxford Handbook of Ethical Theory*, Oxford: Oxford University Press, 2007, p.240.

⁸⁵⁶ Dworkin, R. *Religion Without God*, Cambridge, Massachusetts: Harvard University Press, 2013, p105ff.

In relation to the UK, we saw that the purpose of establishment was to provide a substantive foundation for the UK's polity based on Anglican theology embodied in the Monarchy and symbolised in the Coronation Service. Because the establishment of the Church of England persists, Anglicanism acts as a religious bulwark in the UK's political landscape, stubbornly refusing access to its space. Whilst it has lost much of its raw political influence over matters of state, its attempts to prevent the introduction of gay marriage show that it is far from benign. Religions question the legitimacy of competing moral codes like human rights where they clash with religious doctrine.

The critical issue is that because of its exclusive position, other forms of moral and ethical grounding (e.g. atheistic or scientific) have no formal or recognised access to this ground. Why should the ban on the Monarch being a Roman Catholic remain in place if it is not to calm residual fears that Catholic ideology could once again permeate and, in time, dominate politics and law-making? Despite a plural demographic and the application of human rights law, the symbolic expression of the ethical and moral underpinning of the rule of law remains ostensibly religious so conceptually constrained. Such arguments seldom surface in the general public consciousness and so have little place on the political agenda - but that is not a reason for considering them more deeply.

The French approach shows that laïcité similarly acts as a bulwark against religious exclusivity. France's constitution rejects a theological foundation preferring secularism in a more Kantian guise. Laïcité stands in the way of any form of religion being singled out in order to provide a metaphysical foundation for its polity. Consequently, the removal of religion from the public sphere has led to the criticism that France fails to value the religious presence and consequently fails to recognise the positive role and beneficial contribution that religious people could make to society.

That the issue of foundationalism and exclusivity remains disputed can be seen in the clash between the Italian state and the ECtHR over whether Italy could maintain a law requiring a crucifix to be placed in each state school classroom. By revisiting the *Lautsi* case it is now possible to set out, in a broader context, the case's potential implications for the rule of law in relation to (1) the theo-political circumstances that laid the ground-work for Italy's support for retention of the crucifix in state school classrooms, and (2) how the judgments of Italy's domestic courts contested a secular foundation for laicità.

6.2.2.1 Conflicting visions: the theo-political context in Italy prior to the Lautsi case

The ideological groundwork for legal arguments put forward by the State in *Lautsi* was prepared by the thought and writings of Pope Benedict XVI. His concern was over the extent to which secularisation was marginalising the

Church in Italy and preventing it from participating in public life and presenting a Christian vision to the whole population. The Pope called on the Church to resist secularisation in Italy and in so doing become an example for the rest of Europe.⁸⁵⁷ He set out his position in a speech to the General Assembly of the Italian Catholic Church on 19 October 2006. He called on the Church to re-evangelise Italy because secularism created a trap for human beings because individual choice and freedom had come to underpin ethical reasoning rather than Christian principles. He criticised secularisation for moving society towards relativism and utilitarianism, a move which excluded other moral principles. He claimed that contemporary culture represented a not just a radical and profound break with Christianity but also with the established religious and moral traditions of humanity. He said, '*the grave risk of detaching itself from the Christian roots of our society is sensed....If we [the Church] can do it [re-evangelize Italy], the Church in Italy will render a great service not only to this Nation, but also to Europe and to the world...*'⁸⁵⁸ On this view, anti-religious secularism is seen as a trap to imprison a person in individualism and isolation.

The issue is not that Benedict was concerned that the Church's mission should be theologically underpinned but that he believes that Italian society and politics should be theologically underpinned. He rejects moral relativism

⁸⁵⁷ Cartabia, M. and Simoncini, A. (eds.), *Pope Benedict XVI's Legal Thought: A Dialogue on the Foundation of Law*, Cambridge: Cambridge University Press, 2015. Ratzinger, J. (Pope Benedict XVI). *Values in a Time of Upheaval*, San Francisco: Ignatius Press, 2006. Ratzinger, J. and Pera, M. *Without Roots: The West, Relativism, Christianity and Islam*, New York: Basic Books, 2006.

⁸⁵⁸ Speech by Pope Benedict XVI to the Fourth National Ecclesial Convention of the Italian Church, 19 October 2006 at https://w2.vatican.va/content/benedict-xvi/en/speeches/2006/october/documents/hf_ben-xvi_spe_20061019_convegno-verona.html last accessed 24 January 2019. [My emphasis.]

proposing a conversation within political philosophy that could 'consider Christianity and its moral message to be a point of reference of political conduct, without thereby blurring the borders between politics and faith.'⁸⁵⁹ Benedict is calling for what Ventura calls a 'Christian secular Italy'.⁸⁶⁰ This is a policy of imbuing the Constitution and institutions of state with Christian principles whilst at the same time striving to influence political opinion towards laws and policies based on them. The practical working out of the policy requires a strong defence of Catholic doctrine in Italian law on key ethical and social issues. Furthermore, Benedict's vision was not reserved for Italy but also intended for the rest of Europe.

We have seen how since Unification, Italy has struggled to find a way of evolving from being a Catholic state to one which promotes both religious freedom and cultural pluralism. In 1997 the Constitutional Court decided that the concept of *laicità* imposed a duty of religious neutrality on the State. It required the State to protect religious freedom positively beyond mere indifference, and to demonstrate it had impartial in its dealings with all religious denominations.⁸⁶¹ Moreover, in 2000 the Constitutional Court confirmed *laicità* as a fundamental constitutional principle that embodied pluralism and included equal freedom before the law for religions, cultures and traditions regardless of the number of adherents.⁸⁶²

⁸⁵⁹ Ratzinger, J. (Pope Benedict XVI), *Values in a Time of Upheaval*, San Francisco: Ignatius Press, 2006, p.67.

⁸⁶⁰ Ventura, M. 'The rise and contradictions of Italy as a secular state' in Cumper, L. and Lewis, T. (eds.), *Religion, Rights and Secular Society: European Perspectives*, Cheltenham: Edward Elgar, 2012, p. 136.

⁸⁶¹ Constitutional Court 10 November 1997, 329.

⁸⁶² Constitutional Court 20 November 2000, 508 in (2000) QDPE 1041, 1042 [3].

The Catholic Church's response has been to renew its historic mission of re-Christianizing Italy.⁸⁶³ The pontificates of John Paul II and Benedict XVI saw a return to conservative theology and a traditional approach to doctrine. Cardinal Camillo Ruini, a close collaborator with both Popes, became influential in opposing liberals and other progressives within the Italian Catholic Church and promoted the widespread re-adoption of conservative Catholicism within Italy.⁸⁶⁴ The ultimate task was to renew the efforts of the Church to shape Italian law and politics in accordance with the Magisterium. Ruini led Pope Benedict XVI's challenge to secularisation in Italy encouraging bishops to once again play a pro-active and interventionist role in Italian politics, especially in matters of Catholic moral and social teaching.

Political support for the policy came from the then Prime Minister, Silvio Berlusconi, and leader of the pro-Catholic centre-right party then called 'Forza Italia'.⁸⁶⁵ He allied himself with the Catholic Church to implement policies aligned to Catholic doctrine.⁸⁶⁶ When subsequent governments have sought to introduce socially liberal and progressive policies the Catholic Church vociferously opposed them. Panara describes the Catholic Church's influence in shaping Italian law according to Catholic doctrine arguing that 'Vatican-inspired' have allowed the Catholic Church to institute a hyper-

⁸⁶³ Immigration over the past thirty years has led to Italy becoming a multi-national country with an increased Muslim minority population.

⁸⁶⁴ See the article 'Cardinal Ruini's Mission to Pope Francis: "In seeking after lost sheep, do not put the faithful sheep in danger', 29 September 2016 at <http://eponymousflower.blogspot.co.uk/search/label/Cardinal%20Ruini> last accessed 24 January 2019.

⁸⁶⁵ Ventura, M. 'The rise and contradictions of Italy as a secular state' in Cumper, L. and Lewis, T. (eds.), *Religion, Rights and Secular Society: European Perspectives*, Cheltenham: Edward Elgar, 2012, p. 141.

⁸⁶⁶ See Legge 19 February 2004, n 40, which prevented non-married couples receiving assisted donor reproduction services.

conservatism that has led to individual rights and freedoms being restricted.⁸⁶⁷ He sees this as ultimately undermining the secular nature of the Italian state and the liberal-democratic inspiration of its constitution.⁸⁶⁸

6.2.2.2 *Lautsi and the judgments of Italy's domestic courts: sacred and secular symbolism – blurring the distinction or shared values?*

The Grand Chamber's treatment of the crucifix in *Lautsi* as a 'passive' symbol stemmed from arguments within the Italian domestic courts. Indeed, the judges of the Grand Chamber accepted that Italy's Administrative Court of Appeal, the *Consiglio di Stato* and the Court of Cassation (Italy's supreme criminal court) had different interpretations on the meaning of the crucifix and that the Constitutional Court had not given a view.⁸⁶⁹

Italy's Court of Cassation had already decided on the case of a prosecution brought against a scrutineer who refused to serve in a polling station on the grounds that a crucifix was displayed there in 2000.⁸⁷⁰ The Court of Cassation held that the presence of the crucifix in this context infringed the principles of secularism and the impartiality of the State, and the principle of the freedom of conscience of those who did not accept any allegiance to that symbol. It rejected the argument put forward by the State that displaying the crucifix was justified because it was the symbol of 'an entire civilisation or the

⁸⁶⁷ Panara, C. 'In the Name of God: State and Religion in Contemporary Italy', *Religion and Human Rights*, 6 (2011) pp.75-104.

⁸⁶⁸ Ibid, pp.81-95.

⁸⁶⁹ ECtHR Grand Chamber *Lautsi v. Italy* 18 March 2011, Application no. 30814/06 para. 68. The Constitutional Court had already declared the question of constitutionality inadmissible.

⁸⁷⁰ Corte di Cassazione, decision No 439, 1 March 2000.

collective ethical conscience'. The judgement and its reasoning are in line with the decision of the Second Division in *Lautsi* and, had that decision been upheld by the Grand Chamber, both approaches would have been consistent. However, the Vatican had already viewed this judgment as a significant threat to Italy's Catholic heritage and a clear example of what it has come to refer to as 'aggressive secularism'.

The Italian state had argued that the Christian faith had been responsible for evoking a range of principles including the primacy of the individual over the group and the importance of the freedom of choice and the separation of religion from politics. It argued that today's democratic values were rooted in the biblical message, especially the Christian gospel.⁸⁷¹ The message of the cross was therefore a humanistic message which could be read independently of its religious dimension and created the principles and values for the foundation of democracy.⁸⁷²

The influence of the Roman Catholic Church had convinced the Italian state and its judges to attempt to re-cast the principle of secularism derived from the constitution in terms of Christian doctrine. The result is an attempt to ground the polity and interpretation of justice that underpins the rule of law in a particular form. Given the Grand Chamber's acquiescence to the Italian government's arguments in *Lautsi*, the reasoning in the decisions of the domestic courts is illuminating.

⁸⁷¹ ECtHR *Lautsi v. Italy* 3 November 2009, Application no. 30814/06, para. 35.

⁸⁷² *Ibid*, para. 35 and 57.

6.2.2.2.1 *The judgment of the Administrative Court*

In dismissing Mrs. Lautsi's application in 2005, Italy's Administrative Court gave detailed consideration to the nature of the crucifix as a symbol. It recognised that the notion of a secular state was now part of the legal heritage of Europe and western democracies but argued that the presence of crucifixes in state school classrooms did not offend against that principle. Whilst accepting the crucifix was a religious symbol, it was primarily a Christian symbol rather than the symbol of Catholicism. In the Court's view the crucifix was a historical and cultural symbol possessing an 'identity-linked value' for the Italian people.⁸⁷³

The Administrative Court claimed that the crucifix should also be considered a symbol of value *underpinning* the Italian Constitution. This links the Court's reasoning with the political and philosophical thought of Pope Benedict XVI. The Administrative Court referred to the tolerance and protection of the dignity of others that Christianity and Judaism placed at the centre of their faith claiming that this interpretation of love contained the ideas of tolerance, equality and liberty which form the basis of the modern secular state, and of the Italian state in particular.⁸⁷⁴

The Administrative Court went on to make the bold claim that the Enlightenment itself (despite significant aspects being strongly opposed to religion) was the result of Christianity's affirmation of the liberty and freedom

⁸⁷³ Administrative Court, 17 March 2005.

⁸⁷⁴ *Ibid*, para. 11.1.

of every person, the declaration of the rights of man and ultimately the modern secular state. It even claimed 'that the rallying call 'liberty, equality, fraternity' can easily be endorsed by a Christian, albeit with a clear emphasis on the third word.' In its conclusion, the Administrative Court stated that:

'it does not seem to be going too far to assert that, through the various twists and turns of European history, the secular nature of the modern state has been achieved at a high price, and was prompted in part, though of course not exclusively so, by a more or less conscious reference to the founding values of Christianity.'⁸⁷⁵

It may be sometimes easier to see where Church and State have clashed rather than tease out Christianity's role in the development of liberal values.⁸⁷⁶ However, is it really credible, as the Administrative Court claims, that Christianity is responsible 'in the last analysis, [for] the foundations of the secular state'?⁸⁷⁷ The Court concluded that the crucifix should be regarded as a symbol of a historical and cultural development central to national identity and 'the secular nature of the state - principles which underpin our Constitution'.⁸⁷⁸ As a result, it would be paradoxical to exclude a Christian sign from a public institution in the name of secularism because, the Court claimed, Christianity is a source of secularism. A more balanced and modulated view would surely refer to the important contribution of humanistic and other cultural traditions.

⁸⁷⁵ Ibid, para. 11.2.

⁸⁷⁶ Ibid, para. 11.5.

⁸⁷⁷ Ibid, para. 11.6.

⁸⁷⁸ Ibid, para. 11.9.

6.2.2.2.2 *The judgment of the Consiglio di Stato*

Mrs Lautsi's appeal was also rejected in the *Consiglio di Stato*.⁸⁷⁹ The *Consiglio di Stato* confirmed that secularism was a supreme constitutional principle deduced from various articles of the Constitution.⁸⁸⁰ It held that, despite this, secularism was a flexible term which did not possess an ideological basis but operated by reference to the cultural traditions and customs reflected in the legal order.

The Court distinguished between the crucifix as a religious and non-religious symbol. It did not define the religious element but went to great lengths to define its meaning in a non-religious context. Once again, the crucifix was attributed to be imbued with the values of liberalism. It is difficult to reconcile that a judgment purportedly supporting the concept of state neutrality implicit in the principle of secularism could also conclude that the symbol of the crucifix represented a refusal of 'any form of discrimination'. The *Consiglio di Stato* asserted that the crucifix was primarily a symbol of the Christian origin of liberal values. It disassociated the crucifix's relationship with the Catholic Church preferring to describe it as a symbol capable of reflecting the 'values which define secularism in the State's present legal order.'⁸⁸¹

Whilst the Grand Chamber of the ECtHR may have neither authorised nor condoned Italy's decision to require state schools to display a crucifix in each

⁸⁷⁹ *Consiglio di Stato*, 13 April 2006, no.556.

⁸⁸⁰ Articles 2,3,7,8,19 and 20 of the Constitution.

⁸⁸¹ *Consiglio di Stato*, 13 April 2006, no.556.

classroom, the domestic judgments illustrate Italy's reasons for doing so. In the light of the judgments in the Administrative Court and the *Consiglio di Stato*, two things become clear. The first is that the Italian state has a very flexible interpretation of when something ostensibly religious can at the same time perform a 'secular' function. Secondly, it also has a very Christo-centric view of the origin and foundation of its 'secular' constitutional order.

6.2.2.3 *The foundational basis of the rule of law under the new model*

Establishment and the concepts of secularism in the countries studied are attempts to provide an answer to the question of what concepts and values underpin polity and the rule of law. The new model seeks to provide an inclusive answer to this question without falling into divisive religious/secular antipathies. It is perhaps the most contentious area because it places the clash between the extremes of theological supposition and atheistic perspectives centre stage. It seeks to force together one of the most fundamental tenets of the Abrahamic faiths, that 'God is love' with the recent and devastatingly stark atheistic view of Steven Pinker that one of the first 'truths' of modernity to understand is 'that wisdom is the realization that the laws of the universe don't care about you'.⁸⁸²

An issue which is often overlooked is that liberal democracy itself needs public as well as institutional support. John Rawls developed a theory of justice where the values of freedom, equality and tolerance were best

⁸⁸² Pinker, S. *Enlightenment Now: The Case for Reason, Science, Humanism and Progress*, Allen Lane: London, 2018, p.434.

preserved when religion was removed from public affairs.⁸⁸³ However, in his later work Rawls came to the view that a liberal view of justice needed to achieve support from a range of world views – what he called reasonable comprehensive doctrines.⁸⁸⁴ Amongst these Rawls would include his own non-religious secular Kantianism but also certain liberal versions Christianity and Islam. Is it not the case that in a diverse society, support for the rule of law should come from as broad a base as possible within the populace? In societies where religious observance is reducing but where a religious presence remains significant, there would seem to be persuasive arguments for widening the scope of those who can invest their support for the rule of law. Indeed, on the grounds of fairness and inclusivity, support for the rule of law cannot relate to one religion exclusively in a plural society, but nor should it exclude it. Public institutions should encourage public support for the rule of law from the broadest possible base.

I acknowledge Biggar's fear that a more inclusive approach may create a dissonant incoherence in terms of the values being affirmed.⁸⁸⁵ In this context, it becomes clear why some religions are content to take the role of 'state church' or 'established church' where *it* can have a privileged and/or dominant position whilst at the same time resenting a state which may, for example, choose to make atheism its preferred option. Clearly, it is because,

⁸⁸³ Rawls, J. *A Theory of Justice*, Harvard: Harvard University Press, 1971. See also Audi, R. 'The separation of church and state and the obligations of citizenship' in *Philosophy and Public Affairs*, 18, 1989, pp.259-296. Audi, R. *Democratic Authority and the Separation of Church and State*, Oxford: Oxford University Press, 2011.

⁸⁸⁴ Rawls, J. *Political Liberalism*, New York: Columbia University Press, 2005, p.58ff.

⁸⁸⁵ Biggar, N. 'Why the 'establishment' of the Church of England is Good for Liberal Society', in Chapman, M, Maltby, J and Whyte, W (eds.) *The Established Church: Past, Present and Future*, London: Y&T Clark International, 2011, p.5-6.

at root, its interpretation of justice prevails over others; but such an approach ignores the diversity of society. Because the Church of England remains the established Church, arguments over what underpins the rule of law are subdued. However, as we have seen, they are more cogent in the arguments and disputes put forward in the *Lautsi* case under the Italian model. The arguments underpinning the decision in *Lautsi* are an attempt to Christianise laicità. The risk is that language and symbolism become blurred so that matters manifestly religious became secularised. How else could a symbol as iconic and potent and the crucifix be categorised as passive?

The new model aims to keep the space for foundation of the rule of law open whilst not allowing fundamental religious and non-religious values and symbolism to become confused. Rather than conceiving the rule of law as built on a closed set of doctrines, would it be possible to expand its scope so that it was accessible to as many citizens as possible in affirming and guaranteeing a commitment to human dignity that is shared? In this sense, rather than promoting a range of identity specific concepts, it may be better conceived as a way of protecting citizens from the loss of their fundamental freedoms. In other words, the rule of law would guarantee freedom and personal autonomy and would require the state to provide clear reasons where it sought to infringe them.⁸⁸⁶

This approach would not rely on direct theological affirmations, something which would be impossible for humanists and atheists, nor would it deny

⁸⁸⁶ See Williams, R. 'Civil and religious law in England: a religious perspective', *Ecclesiastical Law Journal* 10, 2008, pp.262-282 at p.271.

them. However, if expressed in the right way, an approach could garner common support from religious and non-religious people and communities. The moral content of the rule of law would have to exhibit some moral constraints if it were to be considered legitimate by those bound by it. Equally, the goal of inclusivity could not be used to establish a form of common denominator universalism which superficially sought to ignore genuine difference.⁸⁸⁷ Worst still, it would need to avoid the risk of thinly veiled relativism and perhaps certain aspects of natural law may provide a good starting point.⁸⁸⁸ Re-imagining the rule of law in this way would not deny the specific ways that religious organisations and other groups understand and organise themselves. Conceived in this way, the rule of law would not lead to a monopoly of secular jurisprudence but could be viewed as laying the ground from which the *internal* rules of religious communities emerge. It would also function as a block to communities who sought to deny human diversity and a reminder that valuing difference is an important aspect of human dignity.⁸⁸⁹

Recognising the fundamental importance of the rule of law may encourage a greater sense of societal belonging. A wider cross-section of groups and individuals could come to see themselves as stakeholders capable of investing in society with the confidence that they were contributing to its

⁸⁸⁷ Rosenblum, N. *Membership and Morals*, Princeton: Princeton University Press, 1998. Rosenblum, N. 'Introduction: Pluralism, Integralism and Political Theories of Religious Accommodation' in Rosenblum, N. (ed.), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, Princeton: Princeton University Press, 2000.

⁸⁸⁸ Plant, R. *Politics, Theology and History*, Cambridge: Cambridge University Press, 2001, p.142ff.

⁸⁸⁹ Williams, R. 'Civil and religious law in England: a religious perspective', *Ecclesiastical Law Journal* 10, 2008, pp.262-282 at p.272.

success; it may also improve religious and political literacy and aid social cohesion. One possible way of proceeding initially may be to propose a form of declaration that relevant groups committed to supporting the rule of law could subscribe to. As an example, an amended version of the following proclamation signed on Thursday 6 June 2019 by sixteen countries to commemorate the 75th Anniversary of D-Day could provide a model:

'...our [*faith groups and non-faith groups*] have stood up for [...] democracy, tolerance and the rule of law. We re-commit today to those shared values because they support the stability and prosperity of our nations and our people. We will work together as [*partners*] and friends to [*uphold and*] defend these freedoms whenever they are threatened.'⁸⁹⁰

The proclamation was signed by countries who had fought each other during World War II and who continue to pursue their own interests which are sometimes competitive and conflicting. And yet, for a higher purpose, they are prepared to come together to affirm a shared support for the values of liberal democracy. Liberal democracy must accept and value political and religious plurality. Pluralism allows ethical diversity without falling into relativism and ought to enable a society built as a 'common-unity' rather than a homogenous community. Law and religion are required to deal with cultural and ethical pluralism and, according to Berlin, this requires political maturity.⁸⁹¹ I would suggest that it needs religious maturity as well.

⁸⁹⁰ Amendments shown in italics.

⁸⁹¹ Berlin, I. 'Two Concepts of Liberty' (first published 1969) in Hardy, H. (ed.), *Liberty*, Oxford: Oxford University Press, 2008, p.217.

6.2.3 The Separation of Religious and Political Power

6.2.3.1 Institutional separation

We saw in Chapter 2 how liberal democracy has developed a form of separation of powers focused on the distinction between the different branches of government. Under this constitutional doctrine, checks and balances resist the dominance of one branch of government over the rest. Whilst the UK integrates a religious element in its Parliament, both France and Italy have developed principles of secularism, designed to keep religious and political institutions separate. The new model rejects theocratic and erastian traits and techniques and proposes that the best way to achieve this is to separate religious and political power.

In plural societies, separating religious and political power, particularly at the institutional level, is intended to ensure good governance in-line with democratic credentials. This is because it enables the tendency of religion to acquire political power in order to press for comprehensive religious solutions to political problems to be resisted. Whilst religious views ought to be welcomed within deliberative democracy, direct and permanent religious influence and control of the executive, legislature and judiciary would undermine liberal democracy. In the three countries investigated, we have seen the appetite of religious groups for political power and how this distinguishes them from other social action groups which also claim to benefit human wellbeing.

The new model supports the ideal of strict institutional separation of religious and political power that is most clearly visible in the concept of French *laïcité*. At the same time, it also rejects forms of co-operation between the state and religious bodies that effectively entrench that body's position, making it equivalent to a quasi-public body as in the Italian model. Agreements between faith groups and the Italian state, especially those with the Catholic Church, can be construed as a form of state aid effectively privileging that religion in ways not available to other religions or groups. The type of separation proposed would reject laws requiring religious symbolism in government buildings or those funded by the state, although outright bans may require exemptions. As a result, the law challenged in *Lautsi* requiring a crucifix to be placed in every state school classroom would be rejected as would similar laws, for example, the recent decision of the government of Bavaria to place crosses in all public buildings.⁸⁹² Whilst separation should ensure that religion does not participate at an institutional level it does not mean that religion should be ignored. It merely recognises that the state and religion ultimately have different goals and different ways of achieving them. If the traditional doctrine of the separation of powers is protected in this way, it ought to allow the state and religion to be appropriately categorised without confusion over roles, objectives and status.

The established status of the Church of England in the UK context directly contravenes the separation of religious and political power on a number of

⁸⁹² Announcement by the Bavarian State Chancellery on 24 April 2018.

levels and would be incompatible with the new model. Whilst it is clear that religious and non-religious people would still sit in the legislature, it would not be possible for one particular faith group to be represented in the way Bishops of the Church of England sit in the House of Lords. This recognition privileges the theology of one Christian denomination over others and also excludes non-religious organisations. It gives a degree of political influence and voice to the Church of England on matters which affect the UK as a whole and not just England.

We saw in the case study on the introduction of same-sex marriage how the Church of England played a central role in trying to prevent such a move. It had the tremendous advantage over other campaign groups of access to parliamentarians and members of the government. As an organisation already intimately intertwined with the parliamentary process, it could motivate and develop its case from the inside; a level of political access unavailable to most other campaign groups.

The Church used its position to argue not just that it should not be required to officiate at same-sex weddings but that any introduction of same-sex marriage at all would be detrimental to society as a whole. This approach failed to respect the views of other religious groups supportive of the introduction of gay marriage. Rather than advocating for the religious freedom of other faith groups to conduct gay weddings if they chose to do so, the Church of England campaigned resolutely to protect its own doctrinal position. We have seen how the consequences of this approach led to a

legislative ‘Gordian’s knot’ designed by the Church to thwart opposition from those within the Church, future human rights challenges and accusations of discrimination. A once erastian Church, controlled by government, is now largely free to behave theocratically, should it choose to do so.

We have also observed that a central criticism of the Church’s established role is that it fails to observe the equality of the State towards religion; it is not neutral. Under the new model, the Church of England would be encouraged to disestablish to the extent that the right of bishops to sit in the House of Lords was removed. There would be no need for the Church of England to have a special status for its legislation and so the connection between ecclesiastical law and the general law of the state would be severed. If, as proposed by the new model, the ethical basis for the rule of law is widened, then the link between the Church of England and the Monarchy would no longer be an exclusive relationship but one amongst many.

In mature liberal democracies, religious support for political parties and the lobbying of politicians by faith groups would not be prevented but neither would it be encouraged.⁸⁹³ Both issues would need to be regulated in order to guarantee the transparency of managerial direction, funding and commitments to support of the pillars of liberal democracy. As an example, a political party would not be permitted to stand for election where its actions and funding were directed by a religious organisation, especially one located

⁸⁹³ Mohseni, P. and Wilcox, C. ‘Organizing Politics: Religion and Political Parties in Comparative Perspective.’ In Haynes, J. (ed.), *Routledge Handbook of Religion and Politics*. New York: Routledge, 2016.

in a foreign jurisdiction or where such a group failed to comply with human rights law. Such a political party would fail the tests on all counts. In less mature liberal democracies, religious involvement in political parties may have to be more closely monitored and/or regulated in order to protect liberal democratic values.

Religion can critique the state and its motives and such scrutiny is to be welcomed. However, this must be carried out from a perspective of distance and not from within the structures of liberal democratic governance.⁸⁹⁴ The separation of religious and political power may be the most difficult aspect of the model for some religions to accept for two reasons: (1) separation may give rise to contested cases where institutional separation is difficult to distinguish from personal religious identity; and (2) a religion may be illiberal or anti-liberal and desire to assert its theological vision for society on society.

We will consider the second of these issues in detail in the next section of the chapter on human rights. In relation to the first issue, 'strict' separation often ignores the fact that public institutions, and the public sphere generally, consists of people with diverse beliefs and world views. Those who participate in public life, for example, by staffing public institutions, increasingly represent the diversity of society and that includes religion. In carrying out their work on behalf of the state, it is not possible for civil servants to eliminate or suppress totally their identity or ethics but neither

⁸⁹⁴ See the work carried out by Rajeev Bhargava on the concept of 'principled distance', Bhargava, R. 'Is European Secularism Secular Enough?', in Cohen, JF. and Laborde C. (eds.), *Religion, Secularism & Constitutional Democracy*, New York: Columbia University Press, 2016, p.157 at pp.172-173.

can they allow religious strictures to bias their work. Whilst a person's identity should be respected by the state, the law should operate so as to achieve this in ways that are reasonable and proportionate. We have seen how the French ban on face coverings in public goes beyond the institutional separation of religion from the state but there are persuasive arguments for banning the veil in contexts where a civil servant is required to deal with the public as part of their role.⁸⁹⁵ Anyone involved in public life, whether elected or through roles in private or public employment, are usually required to moderate the expression of their opinions and behaviours in ways that demonstrate the degree of tolerance and sensitivity necessary for civil society to function peaceably.

Institutional separation is not based on an *a priori* theoretical model but on empirical historical fact and the consequences of religious dominance. In short, the state should be wary of any religious tendencies towards tyranny, oppression and hierarchical structures.⁸⁹⁶ It is a question of praxis based on the historic encounter between nascent liberal democracies and powerfully dominant religions. At the personal level, the state and its institutions should be equally welcoming of suitable people from all faiths and none, who have the skills and abilities required to operate public bodies for the benefit of society. In promoting diversity, the structure of governance would demonstrate that it did not automatically favour any one group or faction.

⁸⁹⁵ See also 'French lawmakers banned from wearing religious symbols' in *The Tribune*, 25 January 2018 at <https://tribune.com.pk/story/1617927/3-french-lawmakers-banned-wearing-religious-symbols/> - last accessed 24 January 2019.

⁸⁹⁶ Bhargava, R. 'Is European Secularism Secular Enough?', in Cohen, JF. and Laborde C. (eds.), *Religion, Secularism & Constitutional Democracy*, New York: Columbia University Press, 2016, p.157 at p.159.

6.2.3.2 Critical engagement and the possibility of limited co-operation

Inherent to the model is the concept of critical engagement and so although there should be no institutional blurring at the governmental level that does not mean that the state could not enter into arrangements of limited co-operation. The state would have to decide in what areas it was prepared to contract with religion and explain its reasons for doing so. Assessments of religious bodies would need to be made according to pre-determined criteria applied equitably. The state should be neutral in terms of the impartiality of its assessment of religion and religious organisations, considering them in the same way that charities and other non-governmental organisations are assessed when deciding whether to use them to deliver of public services. There would be no deference to a religious organisation because of its religious objects.

Co-operation would be permitted where the religious organisation is transparent to public scrutiny in things like safeguarding, governance, accounting. It should also be fully open to investigation on matters relating to the area of co-operation by the appropriate public authorities. An essential criteria for co-operation would be the religious body's affirmation that it respects and upholds the pillars of liberal democracy. An illiberal religious organisation, not compliant with liberal democratic values, would not be able to enter into government contracts to provide public services. Co-operation which facilitated access to religion e.g. in hospital, prison or the armed

services should equally apply to non-religious groups e.g. humanists, according to need. All groups would meet the same service levels and contracts should be terminable by either side with the capacity for the state to upgrade its requirements to meet changing circumstances.

Perhaps the most contentious area of co-operation would involve religious schooling. Some acknowledgment would need to be given to the historical involvement of religion in education as well as recognizing the complexity of the status quo.⁸⁹⁷ At the same time, past performance should not be the determining factor on future development. The question becomes to what extent non-state actors are capable of providing resources and facilities which offer levels of education and socialisation which meet or exceed the state's offering. The legal requirement in Article 2 of Protocol 1 ECHR, that state education meets the needs of parents is an important factor both in determining the substance of state education and co-operation would need to take this into account.⁸⁹⁸

Reflecting further on the Church of England's failed attempt to prevent introduction of same-sex marriage in the UK, it is interesting to note how quickly it made moves to assuage concern that in future assessments of its role as major provider of religious schooling it could be perceived as a homophobic organisation. The legislation for same-sex marriage came into force on 13 May 2014 and on the day before, the Church of England

⁸⁹⁷ Cumper, P. 'Religious Education in Europe in the Twenty-First Century' in Hunter-Henin, M. (ed.), *Law, Religious Freedom and Education in Europe*, Farnham: Ashgate, 2011, p.207ff.

⁸⁹⁸ Arthur, J. and Holdsworth, M. 'Secular Education in European Public Schools' in *British Journal of Educational Studies*, 60:2, 2012, pp.129-149.

published its guidance on combating homophobic bullying in schools.⁸⁹⁹ The Church, like other religions opposed to homosexuality and yet involved in providing education, continue to tread a fine line between retaining access to the provision of state education whilst maintaining traditional doctrines on sexual ethics.

Finally, co-operation between the state and religion would not allow direct financial contributions or subsidies by the state to religion especially in ways that funds could be used to further religious purposes. The types of direct funding of religion seen in Italy would not be permitted. Indirect funding may be permitted on condition that it related to a recognised group e.g. religion or charity, and the choice of where the funds should go is made afresh each year by an individual contributor e.g. tax relief on donations to a particular church limited to a certain amount or percentage. Funding may also be provided for the maintenance of historic buildings for heritage purposes but not for confessional purposes.⁹⁰⁰ Arguments favouring such support would include considering the wider public benefit in a way comparable to that assessing state support for culture and art. There should be no direct funding from government for confessional or theological purposes.

⁸⁹⁹ The updated Autumn 2017 version of the report and guidance, 'Valuing All God's Children: Guidance for Church of England schools on challenging homophobic, biphobic and transphobic bullying' can be found at https://www.churchofengland.org/sites/default/files/2017-11/Valuing%20All%20God%27s%20Children%27s%20Report_0.pdf - last accessed 6 June 2019.

⁹⁰⁰ It is accepted that if religion is not required to spend on its buildings it may use the money for religious purposes instead. What matters is that the wider community is receiving a benefit through cultural and heritage protection.

6.2.4 Human Rights

We saw in Chapter 2 how there is no consensus on the philosophical (or theological) foundation of human rights. As the fourth pillar of liberal democracy, questions arise as to how the jurisprudence of the ECHR should relate to the proposed model for religion-state relations. Three areas are considered here that relate directly to critical issues raised by the application of the new model to the classical models: (1) the extent to which ECHR jurisprudence should actively support the separation of church and state; (2) whether ECHR jurisprudence should reflect a plural approach capable of maintaining the trust of religious groups; and (3) the extent to which religious independence from the state should be preserved subject to state responses towards anti-liberalism. Each aspect draws on conclusions from one of the relevant case studies in Chapters 3 to 5.

6.2.4.1 Human rights and the separation of religion and the state

Although the point is contested, we have seen how the Council of Europe regards the separation of religion from the state as a principle more in-line with democratic credentials than other models.⁹⁰¹ We have also seen how the ECtHR recognises that there is no single model in operation and that it acknowledges the three models discussed in this thesis.⁹⁰² The non-separatist models are not rejected as impermissible, merely less compliant

⁹⁰¹ Recommendation 1804 (2007) of the Council of Europe Parliamentary Assembly.

⁹⁰² See *Darby v. Sweden*, (1991) 13 EHRR 774; *Otto-Preminger Institute v. Austria* (1995) 19 EHRR, paras.57-58 and *Asatruarfelagid v. Iceland* (dec.), Application No. 22897/08, 18 September 2012.

with democracy primarily because they favour one form of religion over all others. The proposed model supports this separationist view and so the question arises whether the Council of Europe and the ECtHR should become more actively engaged in, for example, promoting the transition of states with a church-state system away from that model.

In terms of realpolitik, a dictatorial approach by the Court which expressly insisted on separation would be both counter-productive and probably unenforceable. The Court, however, did set a benchmark in relation to political parties when it banned the Islamic *Refah Partisi* in Turkey as incompatible with Turkish secularism.⁹⁰³ The comparison, whilst not identical allows parallels to be drawn with future religion-state systems which may not meet democratic criteria. In *Refah Partisi*, the Court established some important limits for what was permissible under the ECHR in challenging democracy and the rule of law under the constitution. The Court held that it was permissible for a political party inspired by the moral values imposed by a religion to oppose the fundamental principles of democracy.⁹⁰⁴ What was unacceptable was the refusal to rule out the use of violence in an attempt to establish either a parallel religious jurisdiction or a new legal system conceived on religious foundations.⁹⁰⁵

We have seen how the classical models have evolved and been shaped by political and social forces over a long periods of time. It would be wrong for

⁹⁰³ *Refah Partisi v. Turkey*, (2003) 37 EHRR 1.

⁹⁰⁴ *Ibid*, para.100.

⁹⁰⁵ Zucca, L. *A Secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford: Oxford University Press, 2012, p.114.

the ECtHR to interfere in these kinds of domestic arrangements and to do so could risk undermining the Court's authority. Consequently, changes to the religion-state arrangements in each country should remain a question for that country to be decided by the religious organisation or according to democratic processes. The new model, whilst requiring an end to religious establishment, would not seek to impose that requirement outside of the operation of accepted democratic processes e.g. changes to the law or referendum. The Archbishop of Canterbury has recently indicated that in his view any moves towards disestablishment would have to be decided democratically.⁹⁰⁶ It is likely that clashes between the Church and State, especially those resulting in the types of legal exemption for the Church of England on the introduction of gay marriage, will only serve to hasten calls for disestablishment. However, the ECtHR's present position of not requiring the separation of Church and State, whilst borne out of legal pragmatism, is correct.

Where the Court could play a greater role is in ruling on issues arising from the nature of religion-state relations which result in inequalities in the treatment of religion. This would apply to all three models. Indeed, the Court already has established jurisprudence in some of these areas. The financing of religious organisations is a good example and the Court has considered the implications of a church tax on a number of occasions. It has found that financing through a tax system does not interfere with an individual's freedom for religion on condition that the individual is free to leave the church

⁹⁰⁶ An interview between Archbishop Justin Welby and Harriet Sherwood in the *Guardian* on 8 May 2018 at <https://www.theguardian.com/world/2018/may/18/justin-welby-separation-of-church-and-state-not-a-disaster> - last accessed 24 January 2019.

in question.⁹⁰⁷ It has also found that a tax regime which distributes funds to religious bodies against the wishes of a non-member is a breach of that person's freedom of religion under Article 9.⁹⁰⁸ Equally, the state funding of religion through a tax system must be non-discriminatory and any distribution must be made on the basis of neutral criteria based on civil functions rather than religious functions.⁹⁰⁹ The Court has also made a number of judgments in relation to the provision of education in counties which have established churches.⁹¹⁰ These are examples of ways in which the Court indirectly monitors the consequences of religion-state relations in an attempt to ensure that the state acts as 'the neutral and impartial organizer of the exercise of various religions, faiths and beliefs'.⁹¹¹

Having recognised the limitations of the legal process in requiring an end to religious establishment, it should also be recognised that institutions like the Council of Europe have a powerful advocacy role in shaping the policy of Member States. Therefore, whilst the ECtHR should not impose disestablishment on states that contravene the separatist model, it is still open to the Council of Europe to recommend and advance the benefits of separation and commend its adoption.

⁹⁰⁷ *E&GR v. Austria*, no 9781/82 (1984) 37 DR 42.

⁹⁰⁸ *Darby v. Sweden*, (1991) 13 EHRR 774; *Bruno v. Sweden*, no32196/96 (2001) and *Lundberg v. Sweden*, no36846/97 (2001).

⁹⁰⁹ *Iglesia Bautista El Salvador v. Spain*, no 17522/90 (1992), 72 DR 356.

⁹¹⁰ See for example, *Fogerø v. Norway* (2008) 46 EHRR 47.

⁹¹¹ *Hasan and Chaush v. Bulgaria*, no 30985/96, 2000.

6.2.4.2 Human rights and diversity

Human Rights are almost wholly supported by secularists who are humanists and also by many religious secularists.⁹¹² However, the legal protection of human rights is a source of contention for some religious organisations.⁹¹³ A principal concern is the belief that human rights law is fundamentally secular and perceived as primarily protecting secular interests. This can lead to claims that human rights law has the potential to trump, relegate or exclude religious interests.⁹¹⁴ Some religious people want the general legal system to affirm and reflect their own religious views e.g. the opposition to the introduction of gay marriage in Northern Ireland which is at variance to the rest of the UK.⁹¹⁵ The sentiment lying behind this is that the general law should reflect God's law and the morality which is grounded within it.⁹¹⁶ At the same time, there are those who see religion as a stumbling block to the development and dissemination of human rights.⁹¹⁷ On this view, a theocratic influence on politics too often serves to reduce tolerance and diminish human rights.⁹¹⁸

⁹¹² Grayling, AC. *Ideas that Matter: A Personal Guide for the 21st Century*, London: Phoenix, 2010, p.255.

⁹¹³ Raday, F. 'Secular Constitutionalism Vindicated' in *Cardozo Law Review*, 30, 2008/09, pp. 2771-2775.

⁹¹⁴ Rivers, J. *The Law of Organised Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010, pp.330-334.

⁹¹⁵ See *In the Matter of an application by Close (Grainne), Sickles (Shannon), Flanagan Kane (Christopher) and Flanagan Kane (Henry)* [2017] NIQB 79.

⁹¹⁶ Bamforth, NC. and Richards, DAJ. *Patriarchal Religion, Sexuality and Gender: A Critique of New Natural Law*, Cambridge: Cambridge University Press, 2008.

⁹¹⁷ Raday, F. 'Human Rights and the Confrontation between Religious and Constitutional Authority: A Case Study of Israel's Supreme Court', in Cosman, BA. and Keysar, A. (eds.), *Secularism, Women and the State: The Mediterranean World the 21st Century*, Institute for the Study of Secularism and Culture, 2009.

⁹¹⁸ Nehushtan, Y. *Intolerant Religion in a Tolerant Liberal Democracy*, Oxford: Hart Publishing, 2015, p.93ff.

It is true that religion has a poor track record at respecting the rights and freedoms of others; either those who belong to a different religion or to no religion.⁹¹⁹ Religions usually value tradition, tend to be conservative and patriarchal and this can contribute to making them, in some cases, illiberal.⁹²⁰ They have developed governance structures designed to withstand external societal change and often retain theocratic traits and techniques intended to maintain control and influence over believers and non-believers.⁹²¹ Consequently, religions can be slow to adapt to new situations.

It is critical to recognise that contemporary discussions about human rights follow a period of unrivalled Christian dominance in terms of the way it has influenced European culture, law, politics and morals. For a significant part of the past two millennia Christian ethics have held a dominant and hegemonic position. In the UK context, the Archbishop of Canterbury, Justin Welby, writing in his blog in 2014 said, 'it is an historical fact (perhaps unwelcome to some, but true) that UK law, ethics and culture were based on its [Christianity's] teachings and traditions.' Human rights law is perceived by some as threatening Christianity's historically dominant position; a threat to the Christian national identity.⁹²² It is against this backdrop that the jurisprudence of the ECtHR has been accused of taking an increasingly secular trajectory.

⁹¹⁹ For example, in the Bible, Matthew's Gospel 12:30a, 'He who is not with me is against me'.

⁹²⁰ Bardon, A. 'Religious Arguments and Public Justification' in Cohen, J. and Laborde, C. (eds.), *Religion, Secularism and Constitutional Democracy*, New York: Columbia University Press, 2016, p.273.

⁹²¹ For example, circumcision, religious food laws and sacred texts intended to preserve the group.

⁹²² Wood, JC. (ed.), *Christianity and National Identity in 20th Century Europe: Conflict, Community, and the Social Order*, Göttingen: Vandenhoeck & Ruprecht, 2016.

There is a legitimate question over the extent to which many of the developments in human rights law and other equality laws are 're-balancing' an historical pro-Christian legacy which in some cases may serve to prevent some aspects of diversity and pluralism.⁹²³ The religious critique identifies human rights jurisprudence as being too secular or using confused definitions of secularism.⁹²⁴ Human rights law under the ECtHR has been criticised for applying a sterile positivistic attitude towards religion which overemphasises a rule based culture over an ethos based culture.⁹²⁵ However, some commentators have seen a sign that this criticism is being recognised in the decision of the Grand Chamber in the *Lautsi* case.⁹²⁶

The proposed model does not promote a view of human rights that sees them being used as a sword by liberal democracy in order to liberalise religion. Rather, a form of liberal secularism should enable the law to respect plurality. The model would concur with Taylor when he says that secularism in the context of liberal democracy should be defined as the way in which the state organises diversity.⁹²⁷ Liberal democracy should not be used by accident or design as a tool to liberalise conservative religions. It should, however, protect non-group members from the religious prescriptions

⁹²³ Levy, DL. and Lo, JR. 'Transgender, Transsexual, and Gender Queer Individuals with a Christian Uprising: The Process of Resolving Conflict Between Gender Identity and Faith' *Journal of Religion & Spirituality in Social Work: Social Thought*, 32:1, 2013, pp.60-83.

⁹²⁴ Leigh, I. 'The European Court of Human Rights and religious neutrality' in D'Costa, G. *et al* (eds.), *Religion in a Liberal State*, Cambridge: Cambridge University Press, 2013, p.38.

⁹²⁵ Plant, R. *Politics, Theology and History*, Cambridge: Cambridge University Press, 2002, p.225. MacIntyre, A. *After Virtue*, London: Duckworth, 1981, p.69.

⁹²⁶ Leigh, I. 'The European Court of Human Rights and religious neutrality' in D'Costa, G. *et al* (eds.), *Religion in a Liberal State*, Cambridge: Cambridge University Press, 2013, p.63.

⁹²⁷ Taylor, C. 'Why we need a radical redefinition of secularism' in Mendieta, E. and Van Antwerpen, J. (eds.), *The Power of Religion in the Public Sphere*, Columbia: Columbia University Press, 2011, pp.34-59 at p.36.

of conservative religions being applied to them.⁹²⁸ The ECtHR must be prepared to intervene when the theocratic tendencies of religion are applied outside the parameters of that religion. Unsolicited and coercive proselytism for example and laws on apostasy and blasphemy should be rejected. These types of religious stricture restrict a person's positive freedom to act. Isaiah Berlin was characteristically astute when he explained that a law offering the freedom of religion is in fact is a law that prevents the freedom of others to restrict your freedom to believe.⁹²⁹

The new model accepts that the voice of religion in protecting the freedom of religion (not advocating religious doctrines) should be taken seriously by the courts. Consequently, I would suggest that important freedom of religion cases brought before the ECtHR should benefit from an additional procedure similar to that of the Advocate General's opinion in relation to judgments of the European Court of Justice.⁹³⁰ The opinion would be sought from someone legally and religiously literate who specialises in the law relating to religious freedom. This does not mean that the person should be a practising member of a faith but they would need to be trained and have the support of a department which was capable of understanding religious, theological and ecclesiastical issues. The opinion may be prepared following consultation with interested parties both religious and secular in order to try to reach a deeper pre-court assessment of the issues or problems that are of

⁹²⁸ Blackford, R. *Freedom of Religion and the Secular State*, Chichester: Wiley-Blackwell, 2012, p.65.

⁹²⁹ Berlin, I. 'Two Concepts of Liberty' (first published in 1969) in Hardy H. (ed.), *Liberty*, Oxford: Oxford University Press, 2002, pp.166-219, at p.169f.

⁹³⁰ Burrows, N. and Greaves, R. *The Advocate General and EC Law*, Oxford: Oxford University Press, 2007.

most concern. Such an approach would have a number of benefits including making the application of ECHR on the freedom of religion more consistent in relation to the substance of judgments and in relation to the use of key terms. It may have avoided the unfortunate volte-face in the judgments of the ECtHR in *Lautsi*.

An advantage of this approach may be that it reduces the reliance of the court on the margin of appreciation.⁹³¹ Whilst a degree of cultural and traditional approaches are important and human rights law should certainly not be used to impose a uniformity whether secular or otherwise, there are times when the freedom of or from religion may supersede these. With reference to the *Lautsi* case, if it is accepted that the decision of the Second Section was overly secular in its analysis, potentially bordering on being anti-religious, is that necessarily a reason for the Grand Chamber to essentially wash its hands of the matter by referring it back to Italy? By so doing, crucifixes remain in all state school classrooms. It remains unclear why a more moderate or balanced approach could not be found which, for example, either reduced the number of crucifixes in schools to assembly halls and religious education rooms or made the issue a matter for individual schools and parents.

Accepting that a religion has and does play an important role in the educational and cultural landscape should not mean that a crucifix should be displayed in every state school classroom. The judgment of the Grand

⁹³¹Legg, A. *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford: Oxford University Press, 2012.

Chamber in *Lautsi* displayed a lack of moral courage and legal confidence in the face of religious dominance. For Italy to moderate its law requiring crucifixes in every classroom would not be to concede to an ever expanding secular legal monopoly but could create the chance and space for other cultural and ethical voices. An over use of the margin of appreciation in this area could simply allow past practice to dictate future practice rather than providing the kinds of justice necessary for rapidly changing plural societies.

There is a dilemma at the heart of the *Lautsi* case that remains unresolved. The decision of the Second Chamber may have been overly secular in its approach but it was right when it identified the crucifix as the pre-eminent symbol of Christianity. The Italian courts were correct in claiming that Christianity is a source of *some* of the values underpinning the Italian Constitution but they failed to clearly differentiate that from a religious desire to dominate the public space. One of the consequences of the judgment of the Grand Chamber may serve to constrain a developing secular jurisprudence and correctly prevent the protection of religious freedom from being conflated with strict secularist demands to remove all religion from the public sphere. And yet, despite this, the fact remains that the compulsory presence of a symbol as potent and evocative as the crucifix in every Italian state school classroom retains at least the aura of a religious dominance and powers of persuasion more fitted to an earlier period. In recognising the risk of pursuing an increasingly secular trajectory the ECtHR must not fail to resolve the substantive issues raised by cases like *Lautsi*.

6.2.4.3 Liberal democracy and illiberal minorities

We have seen that too close an alignment between state and religious objectives gives rise to either theocracy or erastianism both of which are incompatible with liberal democracy. This kind of illiberalism would need to be resisted by the state as unconstitutional. But when should the state interfere in the internal workings of a religious organisation? How should it deal with illiberal or anti-liberal minorities and their practices? Whilst recognising the benefits of the French concept of *laïcité* in relation to the separation of religious and political power and institutions, the new model requires further reflection on whether the ban on face coverings in France, despite being accepted by the ECtHR, is nevertheless wise.

Issues of this kind affect both religious and non-religious groups, e.g. radical Islamic groups and 'far right' political groups. Rubinstein distinguishes between those he describes as 'merely illiberal' because they do not seek to endanger others and those who are 'anti-liberal' because they seek to impose their beliefs on others or threaten liberal democracy.⁹³² He makes the point that under human rights legislation religious freedom and the freedom of expression are protected as long as those who profess illiberal beliefs do not act or engage in practices that are unlawful.⁹³³ Commentators like Rubinstein and Nehushtan writing in this area develop the approach taken by Kymlicka who, when writing about multiculturalism, distinguishes

⁹³² Rubinstein, A. 'Unashamed liberalism: illiberal and anti-liberal minorities' *Public Law*, 2017, p.271.

⁹³³ *Ibid*, p.271.

between what he calls 'internal restriction' and 'external protection'.⁹³⁴ The theory is that external protection is required to preserve minorities even where their practices are illiberal, whereas interference with internal restrictions can only be justified where there is no right of exit from the minority group.⁹³⁵ To this, I would add the need to protect children and the vulnerable.

For Rubinstein, 'illiberal minorities are communities that have learned to compromise with the liberal democracy in which they live on the 'live and let live' basis, without endangering in any way the functioning of liberal society'.⁹³⁶ He contrasts this type of group with anti-liberal groups who are not content with merely preserving their own culture but go beyond this by attempting to use their influence in order to affect wider society and those not within their membership. Usually, this means imposing their will on those outside the group. Practically, it is often difficult to know where to draw the line between illiberal and anti-liberal. Democracy needs to be careful to protect itself in circumstances where an ostensibly illiberal group could cross the line to become an anti-liberal group where, for example, the number of adherents moves from being a minority to the majority.

⁹³⁴ Kymlicka, W. and Cohen-Almagor, R. 'Democracy and Multiculturalism' in Cohen Almagor, R. (ed.), *Challenges to Democracy: Essays in Honour and Memory of Isaiah Berlin*, London: Ashgate Publishing, 2000, pp.89 and 98. Nehushtan, Y. *Intolerant Religion in a Tolerant Liberal Democracy*, Oxford: Hart Publishing, 2015.

⁹³⁵ Kymlicka, W. and Cohen-Almagor, R. 'Democracy and Multiculturalism' in Cohen Almagor, R. (ed.), *Challenges to Democracy: Essays in Honour and Memory of Isaiah Berlin*, London: Ashgate Publishing, 2000, p.106.

⁹³⁶ Rubinstein, A. 'Unashamed liberalism: illiberal and anti-liberal minorities' *Public Law*, 2017, p.277.

Joppke gives an interesting example of this in discussing the Muslim Community in Germany.⁹³⁷ He says that the community is generally considered to be moderate, not fundamentalist and its leaders professed compliance with the liberal democratic demands of the German state in a written statement. However, the statement also contained a caveat to the extent that the German basic law would only pertain as long as the Muslim community are not a majority in Germany. In other words, the attachment to liberalism is politically expedient rather than preferred.

The challenge to the liberal state by non-liberal minorities has been carefully considered by García Oliva and Hall who agree that the liberal democratic state has an obligation to be proactive in preserving its character calling this duty 'imperative self-preservation.'⁹³⁸ They propose that any action designed to pursue the duty of imperative self-preservation should not, at the same time, violate the competing liberal imperative to respect minority rights.⁹³⁹ They point to the importance of the proper application of human rights law insisting that it goes to the heart of what constitutes the liberality of the liberal state. The proper application of the imperative of self-preservation in the view of García Oliva and Hall is only acceptable when it is done in order to defend the fundamental principles of the liberal democratic state e.g. a fairly

⁹³⁷ Joppke, C. *Veil: Mirror of Identity*, Cambridge: Polity Press, 2009, pp.112–113.

⁹³⁸ García Oliva, J. and Hall, H. 'Responding to non-liberal minorities within a liberal state: the challenge posed by children and vulnerable adults'. *Public Law*, 2018, pp.258-276 at p.258. See also the work of Gibney, M. 'Liberal Democratic States and Responsibilities to Refugees' *American Political Science Review*, 93:1, 1999, p.169 and 171; Levinson, M. 'Liberalism, Pluralism and Political Education: Paradox or Paradigm', *Oxford Review of Education*, 25, 1999, p. 39 and Lukes, S. 'Liberal Democratic Torture', *British Journal of Political Science*, 36:1, 2016, p.1.

⁹³⁹ García Oliva, J. and Hall, H. 'Responding to non-liberal minorities within a liberal state: the challenge posed by children and vulnerable adults'. *Public Law*, 2018, p.258.

and freely elected democratic government which is subject to the rule of law and human rights.⁹⁴⁰ They assert that:

'...if the philosophical foundations for a liberal democratic state are accepted as the fount of legitimacy for the constitution, then the state cannot retain its legitimacy whilst allowing these principles to be eroded or sacrificed. Following this reasoning, self-preservation is an imperative, rather than a choice'.⁹⁴¹

This means that anti-liberal groups can be prevented from having a detrimental effect on the liberality of liberal democratic states because the state has a duty to protect its foundational principles. Whilst emphasising the importance of context, Ekeli points towards how this could work in practice by proposing two grounds on which the state could act: (1) as a precautionary measure of self-defence in order to protect the free and equal moral status of persons; and (2) in order to protect the foundation of liberal democratic rights and institutions because it is built on the principle that all human beings, as moral agents, should be free and equal.⁹⁴²

García Oliva and Hall recognise the limitations of the internal/external distinction insisting that non-liberal communities belong to the same society, exist under the same legal framework and as such are not exiles living behind a self-imposed metaphorical wall. Consequently, the state should

⁹⁴⁰ Ibid, p.263.

⁹⁴¹ Ibid, p.264.

⁹⁴² Ekeli, KS. 'The Political Rights of Anti-Liberal Democratic Groups' *Law and Philosophy*, 31, 2012, p.269.

only intervene to the extent it would do so in relation to other members of society. They conclude by proposing that the criterion for state action in the interest imperative self-preservation should be to ask the question: ‘is the behaviour of the individual or group undermining the basis of the liberal democratic state in which we live?’⁹⁴³ Human rights law, whilst giving protection to illiberal organisations cannot for the reasons outlined above offer the same protection for anti-liberal minorities.

In the light of this approach, it is possible to reflect upon the ban on face coverings in public in France. Given the relatively few Muslim women who wore the veil in public at the time of the ban, should the fact that the practice is deemed merely anti-social be sufficient for a ban? Recognising that there is a sliding scale whereupon merely illiberal behaviour could develop and transform into expressing anti-liberal sentiment, clearly a state should be alert to this as a possibility. If wearing the veil in public became ‘weaponised’ by being adopted as a potent symbol of radical Islam and was used as a means to communicate and advocate support for anti-liberal policies and aggression towards liberal democracy, then, in those circumstances, the state would have significantly stronger grounds upon which to legislate for an outright ban. This approach would be adopted by the new model and so the treatment of the ban on wearing the veil in public would contrast with its current treatment under the classical model of separation in France.

⁹⁴³ García Oliva, J. and Hall, H. ‘Responding to non-liberal minorities within a liberal state: the challenge posed by children and vulnerable adults’. *Public Law*, 2018, pp.275-276.

Chapter 7

Conclusion

The new model of religion-state relations proposed in Chapter 6 has evolved from the findings of my research. It attempts to draw on the positive aspects of existing models whilst adapting or discarding those aspects which fail to meet liberal democratic credentials.

Historical research has shown how liberal democracy has emerged from an intellectually rich yet turbulent period during which religious dominance was challenged. The model recognises that tensions remain and seeks to integrate them creatively in the hope that they may contribute to future human well-being and flourishing. It recognises that the ultimate goals of human beings are many and the belief that a single formula could bring them together harmoniously is false.⁹⁴⁴ The model could reduce risks of violence and conflict but it cannot eliminate the possibility.

I reject the concept of a state church, national church or established church being compatible with the demands of a plural society. Ways need to be found to encourage inclusivity rather than preserve an exclusive role for one faith group. Liberal democracy would do well to develop a sense of historical remembrance and commemoration similar to those which form such a prominent feature of the religious landscape. My research acknowledges

⁹⁴⁴ Berlin, I. 'Two Concepts of Liberty' (first published in 1969) in Hardy H. (ed.), *Liberty*, Oxford: Oxford University Press, 2002, pp.166-219, at p.214.

that the rule of law needs as wide a support as possible from across society if it is to be able to guarantee the personal autonomy, freedom (including the freedom of religion) and restraint necessary to ensure peaceful social stability.

My findings go further and lead me to conclude that there should be a separation between religious bodies and public authorities. The separation should be strict in the sense that it should be regulated and enforced but not strict in the sense that it should be absolute. The French model of laïcité is often criticised as attempting to separate public and religious bodies but, when combined with the protection of the freedom of religion, it prevents religious dominance. I believe this may be crucial to the future safety, if not the sanity of the world.

The problems associated with the contractual approach in Italy which favours one religion over all others and effectively entrenches that religion in Italian society should be avoided. Such rigid arrangements would appear to be unsustainable for increasingly diverse societies where many people do not subscribe to a religion. There appears to be little scope to vary these arrangements even when aspects of them become obsolete. The new model allows for a limited degree of co-operation between the state and religious organisations on condition it is appropriately regulated by the state and involves no public finance for exclusively religious purposes.

My findings value the participation of religious individuals and religious bodies at the civic level and as part of democratic deliberation. The approach by the French state of being indifferent and effectively ignoring religious identity is rejected. At this level, religion is regarded as a powerful motivator and source of moral vision. Whilst recognising the diminished political power and influence of organised religion, it does not necessarily imply a reduction in the potency of the theological voice. Different perspectives should be welcomed in democratic discourse but not privileged.

In illustrating how the model would work in practice, it becomes clear that the results of the case studies in Chapters 3 to 5 would have markedly different outcomes. In the UK, the Church of England would not be compelled to conduct gay marriages but, being disestablished, would also not have an influential role or voice in the legislature. In France, there would not be a blanket ban on face coverings in public but restrictions may apply to civil servants and others in public life. However, Muslim women would be encouraged to consider whether the choice was wise and in the interests of good citizenship and social cohesion. In Italy, the law requiring the display of a crucifix in state schools would be moderated to the extent that whilst the crucifix would not be banned, it would no longer be compulsory to display one in every classroom.

The primary role for law in my model is to ensure a level and fair playing field for religion and non-religious world views. It requires a levelling up for non-religious perspectives. The law must accommodate and value diversity and

expand freedom to cater for a wider range of individual choices. At the same time, it is not for liberal democracy to use the law to inappropriately coerce religion. The law's role is to promote tolerance and respect and prevent religious and non-religious groups from coercing each other. It should seek to protect the religious freedom even of illiberal religious minorities recognising that in so doing it protects the freedom of all. Ironically, whilst legal studies of public law and the constitution have often relegated the role of religion to a footnote, my thesis may encourage greater engagement between legal scholars and the deep traditions of religious thought that have been so instrumental in creating our culture, law, society and politics.

Finally, my findings have made me an optimistic and hopeful advocate of liberal democracy because it creates what Walzer calls 'a politically stable and morally legitimate arrangement'.⁹⁴⁵ I have also become conscious that liberal democracy is fragile, vulnerable to abuse and as such it needs to be sustained through active support and commitment. It requires co-existence, tolerance and a respect for difference, although not every aspect of it. Above all, it deserves to be cherished.

⁹⁴⁵ Walzer, M. *On Toleration*, New Haven: Yale University Press, 1997, p.xii.

Bibliography

- Ackroyd, P. *The Life of Thomas More*, London: Vintage, 1999.
- Ahdar, R. and Leigh, I. *Religious Freedom in the Liberal State*, Oxford: Oxford University Press, 2005.
- Ahdar, R. and Aroney, N. (eds.), *Shari'a in the West*, Oxford: Oxford University Press, 2010.
- Airiau, P. *Cent ans de laïcité française. 1905-2005*, Paris: Presses de la Renaissance, 2005.
- Allan, TRS. *Law, Liberty and Justice: The Legal Foundations of UK Constitutionalism*, London: Clarendon Press, 1993.
- Allan, TRS. 'Judicial deference and judicial review: legal doctrine and legal theory' in *Law Quarterly Review*, 127, 2001, p.96.
- Alston, P. 'The Populist Challenge to Human Rights' in *Journal of Human Rights Practice*, 9:1 2017 pp.1-15.
- Amghar, S. 'Le Salafisme en France: de la révolution islamique à la révolution conservatrice' in *Critique Internationale*, 3, 2008, p.95-113.
- Anderson, S. 'Law in Nordic Lutheranism' in Christoffersen, L., Modéer, K. and Anderson, S. (eds.), *Law and Religion in the 21st Century – Nordic Perspectives*, Copenhagen: DJØF Publishing, 2010, p.393.
- Aquinas, T. *Summa Theologiae* (1266-1273), London: Eyre & Spottiswoode, 1964-80.
- Arthur, J. and Holdsworth, M. 'Secular Education in European Public Schools' in *British Journal of Educational Studies*, 60:2, 2012, pp.129-149.
- Atkin, N. and Tallett, F. *Priests, Prelates & People: A History of European Catholicism Since 1750*, London: IB Tauris, 2003.
- Audi, R. *Religious Commitment and Secular Reason*, Cambridge: Cambridge University Press, 2000.
- Audi, R. *Democratic Authority and the Separation of Church and State*, Oxford: Oxford University Press, 2011.
- Bacquet, S. 'Religious freedom in a secular society: an analysis of the French approach to manifestation of beliefs in the public sphere' in Cumper, P. and Lewis, T. (eds.), *Religion, Rights and Secular Society: European Perspectives*, Cheltenham: Edward Elgar Publishing Ltd, 2012, p.147.

Bader, V. *Secularism or Democracy? Associational Governance of Religious Diversity*, Amsterdam: IMISCOE/Amsterdam University Press, 2007.

Bader, V. 'Excluded, included or foundational? Religion in liberal-democratic states', in D'Costa, G, *et al* (eds.), *Religion in a Liberal State*, Cambridge: Cambridge University Press, 2013, p.135.

Bagehot, W. *The English Constitution* (first published 1867), London: Fontana, 1993.

Bahlul, R. 'Modernity and Islamic religious consciousness' in Akbarzadeh, S, (ed.), *Routledge Handbook of Political Islam*, London: Routledge, 2011, pp.35-50.

Baldry, T. 'Parliament and the church' in *Ecclesiastical Law Journal*, 17:2, 2015, p.202.

Bamforth, NC. and Richards, DAJ. *Patriarchal Religion, Sexuality and Gender: A Critique of New Natural Law*, Cambridge: Cambridge University Press, 2008.

Baranger, D. 'Executive Power in France' in Craig, PP, and Tomkins A, (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective*, Oxford: Oxford University Press, 2006, pp.217 – 242.

Barber, NW. and Young, AL. 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty', (March 8 2016) [2003] *Public Law* 113.

Bardon, A. 'Religious Arguments and Public Justification' in Cohen, J, and Laborde, C, (eds.), *Religion, Secularism and Constitutional Democracy*, New York: Columbia University Press, 2016, p.273.

Barnett, H. *Constitutional and Administrative Law*, London: Routledge, 2017.

Barsotti, V., Carozza, PG., Cartabia, M., and Simoncini, A. *Italian Constitutional Justice in Global Context*, Oxford: Oxford University Press, 2017.

Bartole, S. 'The Doctrine of the Separation of Powers and the Italian Constitution', *Javnost - The Public*, 2:1, 1995, pp.33-44.

Basdevant-Gaudemet, B. 'State and Church in France' in Robbers, G (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, p.157.

Battut, J., Join-Lambert, C. and Vandermeersch, E. *1984: La guerre scolaire a bien eu lieu*, Brussels: Desclée de Brower, 1995.

Baubérot, J. *Vers un nouveau pacte laïque?* Paris: Seuil, 1990.

Baubérot, J. 'Laïcité' in Berenson, E., Duclert, V. and Prochasson, C. (eds.), *The French Republic: History, Values and Debates*, London: Cornell University Press, 2001.

Baubérot, J. *Laïcité 1905-2005 Entre Passion et Raison*, Paris, Seuil, 2004.

Bazargan, M. 'Religion and Liberty' in Kurzman, C. (ed.), *Liberal Islam: A Sourcebook*, Oxford: Oxford University Press, 1998, p.85.

Bell, J. 'What is the role of the *Conseil d'Etat* in the Preparation of Legislation?' in *International and Comparative Law Quarterly*, 49, 2000.

Bell, J. *French Legal Cultures*, Cambridge: Cambridge University Press, 2001.

Benne, R. 'Martin Luther on the Vocations of the Christian' in the entry for Theology and Philosophy of Religion, Christianity, The Reformation in the Oxford Research Encyclopaedia, on-line publication date August 2016.

Bennett, WL. 'The Personalization of Politics: Political Identity, Social Media, and Changing Patterns of Participation' in *The Annals of the American Academy of Political and Social Science*, 644, 2012, pp.20-39.

Benvenisti, E. 'Embracing the tension between national and international human rights law: the case for discordant parity', in *International Journal of Comparative Law*, 15:1, 2017, p.57.

Berenson, E. 'The Second Republic' in Berenson, E., Duclert, V. and Prochasson, C. (eds.), *The French Republic: History, Values, Debates*, London: Cornell University Press, 2011, pp. 27-44.

Bergin, J. *The Politics of Religion in Early Modern France*, Yale: Yale University Press, 2014.

Berlin, I. 'Two Concepts of Liberty' (first published 1969) in Hardy, H. (ed.), *Liberty*, Oxford: Oxford University Press, 2008.

Berthélemy M. and Michelat, G. 'Dimensions de la laïcité dans la France d'aujourd'hui' in *Revue Française Science Politique*, 57:5, 2007, pp.649-698.

Besser-Jones, I. and Slote, M. (eds.), *The Routledge Companion to Virtue Ethics*, London: Routledge, 2015.

Beyers, J., Eising, R. and Maloney, W. 'Researching Interest Group Politics in Europe and Elsewhere: Much We Study, Little We Know?' in *West European Politics*, 31:6, 2008, pp.1103-1128.

Bhargava, R. 'States, Religious Diversity, and the Crisis of Secularism' in *Hedgehog Review*, 12:2, 2010, p. 8.

Bhargava, R. 'Is European Secularism Secular Enough?', in Cohen, JF. and Laborde C. (eds.), *Religion, Secularism & Constitutional Democracy*, New York: Columbia University Press, 2016, p.157.

Bianchi, EC. and Reuther, RR. (eds.), *A Democratic Catholic Church: The Reconstruction of Roman Catholicism*, New York: Crossroad Publishing Co, 1959.

Biggar, N. 'Why the 'establishment' of the Church of England is Good for Liberal Society', in Chapman, M., Maltby, J. and Whyte, W. (eds.), *The Established Church: Past, Present and Future*, London: Y&T Clark International, 2011, pp.1-25.

Bingham. [Lord Bingham of Cornhill]. 'The House of Lords: its future?', in *Public Law*, 2010, pp.261-274.

Bingham, T. *The Rule of Law*, London: Penguin, 2011.

Blackford, R. *Freedom of Religion and the Secular State*, Chichester: Wiley-Blackwell, 2012.

Blom-Cooper, L., Dickson, B. and Drewry, G. (eds.), *The Judicial House of Lords 1876–2009*, Oxford: Oxford University Press, 2009.

Bogdanor, V. *The Monarchy and the Constitution*, Oxford, Clarendon Press, 1995.

Bogdanor, V. *The New British Constitution*, Oxford: Hart Publishing, 2009.

Bolter, JD. *The Digital Plenitude: The Decline of Elite Culture and the Rise of Digital Media*, Cambridge, Massachusetts: MIT Press, 2019.

Bondy, W. *The Separation of Governmental Powers: in History, in Theory and in the Constitution*, New Jersey: The Law Book Exchange, 2004.

Bonhoeffer, D. *Ethics*, (first published in 1949), London: Simon & Schuster, 1995.

Borzou, D. 'Erdogan has Mastered Democracy' in *Foreign Policy*, 25 June 2018 at <https://foreignpolicy.com/2018/06/25/erdogan-has-mastered-democracy/>

Bosson, R. *The Evolution of EU Counter-Terrorism: European Security Policy after 9/11 (Contemporary Terrorism Studies)*, London: Routledge, 2012.

Boucek, F. *Factional Politics: How Dominant Parties Implode or Stabilize*, Basingstoke: Palgrave Macmillan, 2012.

Bouteldja, N. 'France vs. England' in Brems, E (ed.), *The Experiences of Face Veil Wearers in Europe and the Law*, Cambridge, Cambridge University Press, 2014.

Boyd, C. (ed.), *Mr Chamberlain's Speeches*, Volume 1, London: Constable, 1914.

Boyron, S. *The Constitution of France; A Contextual Analysis*, Oxford: Hart Publishing, 2013.

Bradley, A. and Ewing, K. *Constitutional and Administrative Law*, London: Pearson, 2014.

Bradley, I. *God Save the Queen: The Spiritual Heart of the Monarchy*, London: Continuum, 2012.

Brague, R. *La Loi de Dieu: histoire philosophique d'une alliance*, Paris: Gallimard, 2005.

Brazier, R. *Constitutional Practice: The Foundations of British Government*, Oxford: Oxford University Press, 1999, pp.217-219.

Brazier, R. *Constitutional Reform: Reshaping the British Political System*, Oxford: Oxford University Press, 2008.

Brems, E. 'Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings' in *Journal of Law & Policy*, 22, 2014.

Brown, A. and Woodhead, L. *That Was The Church That Was: How the Church of England Lost the English People*, London: Bloomsbury Continuum, 2016.

Brown, F. *For the Soul of France: Culture Wars in the Age of Dreyfus*, New York: Alfred A. Knopf, 2010.

Brownlie, I. *Principles of Public International Law*, Oxford: Oxford University Press, 2008.

Bruce, S. *Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis*, Oxford: Clarendon Press, 1992.

Bruce, S. *God is Dead: Secularization in the West*, Oxford: Blackwell, 2002.

Bryce, J. *Flexible and Rigid Constitutions*, in *History and Jurisprudence*, Vol. 1, Oxford: Oxford University Press, 1901 (the original essay is dated 1884).

Buchanan, C. *Cut the Connection: Disestablishment and the Church of England*. London: Darton, Longman and Todd Ltd, 1994.

Buisson, F. *Law foi laïque*, Paris, Hachette, 1912.

Burleigh, M. *Earthly Powers: Religion & Politics in Europe from the French Revolution to the Great War*, London: Harper Collins, 2005.

Burrows, N. and Greaves, R. *The Advocate General and EC Law*, Oxford: Oxford University Press, 2007.

Bursell, R. 'The clerical oath of allegiance' in *Ecclesiastical Law Journal*, 17:3, 2015, p.295.

Butler-Sloss [The Rt. Hon. Baroness Elizabeth Butler-Sloss], Report of the Commission of Religion and Belief in Public Life, 'Living With Difference: Community, Diversity and the Common Good', Cambridge: The Woolf Institute 2015.

Byrnes, TA. 'Sovereignty, Supranationalism, and Soft Power: The Holy See in International Relations' in *The Review of Faith & International Affairs*, 15:4, 2017, pp.6-20.

Cahm, E. *The Dreyfus Affair in French Society and Politic*, London: Routledge, 1996.

Calhoun, C., Juergensmeyer, M. And Van Antwerpen, J. (eds.), *Rethinking Secularism*, Oxford: Oxford University Press, 2011.

Carr, W. 'A Developing Establishment' in *Theology*, 1999, pp.2-10.

Cartabia, M. and Simoncini, A (eds.), *Pope Benedict XVI's Legal Thought: A Dialogue on the Foundation of Law*, Cambridge: Cambridge University Press, 2015.

Cartocci, R. *Geografia dell'Italia cattolica*, Bologna: il Mulino, 2011.

Casanova, J. *Public Religions in the Modern World*, Chicago: University of Chicago Press, 1994.

Casuscelli, G. 'State and Religion in Europe' in Ferrari, S and Cristofori, R (eds.) *Law and Religion in the 21st Century: Relations between States and Religious Communities*, London: Routledge, 2010, pp.131-146.

Cecil of Chelwood, *Church and State – Report of the Archbishops' Commission on the Relations between Church and State* London: Church Assembly, Vol.2, 1935.

Chadwick, K. *Catholicism, Politics and Society in Twentieth-Century France*, Liverpool: Liverpool University Press, 2000.

Chadwick, O. *The Secularisation of the European Mind in the 19th Century*, Cambridge: Cambridge University Press, 1975.

Chelini-Pont, B. 'Papal Thought on Europe and the European Union in the Twentieth Century' in Leustean, LN and Madeley, JTS (eds.), *Religion, Politics and Law in the European Union*, Abingdon: Routledge, 2010.

Chelini-Pont, B. and Ferchiche, N. 'Religion and the Secular State: French Report', Publicaciones facultad derecho Universidad Complutense, 2015.

Chevallier, P. *La séparation de l'Église et de l'école: Jules Ferry et Léon XIII*, Paris: Fayard, 1981.

Christofferson, L. and Vinding, N. *Danish Regulation of Religion, State of Affairs and Qualitative Reflections*, Copenhagen: University of Copenhagen, 2012.

Clément, D. 'Human rights or social justice? The problem of rights inflation.' *International Journal of Human Rights*, 22:2, 2017, pp.155-169.

Clements, B. and Spencer, N. 'Public Opinion in Britain towards the Disestablishment of the Church of England', in *Journal of Anglican Studies*, 13, 2015, pp.30-49.

Cohen, J. 'Democracy and Liberty' in Elster, J. (ed.), *Deliberative Democracy (Cambridge Studies in the Theory of Democracy)*, Cambridge: Cambridge University Press, 1998.

Coleridge, ST. 'On the Constitution of the Church and the State' (first published 1830) in *The Collected Works of Samuel Taylor Coleridge*, Volume 10, Princeton: Princeton University Press, 1976.

Cornille, C. *The Im-Possibility of Interreligious Dialogue*, Login: Independent Publishers Group, 2008.

Craig, P. 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, (1997).

Craig, P. 'Political constitutionalism and the judicial role: A response', in the *International Journal of Constitutional Law*, 9:1, 2011.

Cranmer, F. 'Religion, human rights and the Council of Europe: a note' in *Law and Justice*, 162:36, 2009.

Cranmer, F., Lucas, J. and Morris, R. *Church and State: A Mapping Exercise*, London: The Constitution Unit of UCL, 2006.

Cranmer, F. 'Notes on Church and State in the European Economic Area 2011', p.45 at http://www.law.cf.ac.uk/clr/networks/Frank%20Cranmer_%20Church%20&%20State%20in%20W%20Europe.pdf

Cross, FL. and Livingston, EA. (eds.), *The Oxford Dictionary of the Christian Church*, (2nd Ed.), Oxford: Oxford University Press, 1974.

Cumper, P. 'The protection of religious rights under section 13 of the Human Rights Act 1998', in *Public Law*, 2000, p.254.

Cumper, P. 'Religious Education in Europe in the Twenty-First Century' in Hunter-Henin, M (ed.) *Law, Religious Freedom and Education in Europe*, Farnham: Ashgate, 2011, p.207ff.

Curtice, J. 'A Return to Normality? How the Electoral System Operated', *Parliamentary Affairs*, 68:1 (supp.), 2015, pp.25-40.

Curtis, S. *Educating the Faithful: Religion, Schooling and Society in Nineteenth Century France*, Delkalb: Northern Illinois University Press, 2000.

Cushion, S., Lewis, R. and Roger, H. 'Adopting or resisting 24-hour news logic on evening bulletins? The mediatization of UK television news 1991–2012' in *Journalism*, 16:7, 2014, pp.866-883.

Dahl, RA. *Democracy and its Critics*, New Haven: Yale University Press, 1989.

Daly, E. 'Public Funding of Religions in French Law: The Role of the Council of State in the Politics of Constitutional Secularism' in *Oxford Journal of Law and Religion*, 3:1, 2015.

Daly, E. 'Fraternalism as a Limitation on Religious Freedom: The Case of *S.A.S. v. France*' *Religion and Human Rights*, 11:2, 2016, pp.140-165.

Daly, E. *Rousseau's Constitutionalism: Austerity or Republican Freedom*, Oxford: Hart Publishing, 2017.

Davidson, S. and Elstub, S. 'Deliberative and Participatory Democracy in the UK', *British Journal of Politics and International Relations*, 16:3, 2014, pp.367-385.

Davie, G. *Religion in Britain Since 1945: Believing Without Belonging*, Oxford: Blackwell Publishers, 1994.

Davie, G. *Europe: The Exceptional Case: Parameters of Faith in the Modern World*, London: Longman Todd, 2002.

Dawkins, R. *The God Delusion*, Transworld Publishers: London, 2006.

De Beauvoir, S. *The Second Sex* (first published 1949) London: Vintage, 1997.

de Been, W. 'Lautsi: A Case of "Metaphysical Madness"?' *Religion and Human Rights* 6, 2011, pp.231-235.

Debré, JL. *La laïcité à l'école: Un principe républicain à réaffirmer* un rapport de la mission d'information de l'Assemblée nationale, Paris: Odile, 2004.

DeHanas, DN. 'Elastic Orthodoxy: The Tactics of Young Muslim Identity in the East End of London' in Dessing, NM, Jeldtoft, N and Woodhead, L (eds.), *Everyday Lived Islam in Europe*, Abingdon: Routledge, 2016.

Dennett, D. *Breaking the Spell: Religion as a Natural Phenomenon*, Penguin: London, 2006.

d'Entrèves, AP. *Natural Law*, 2nd edn, London: Hutchinson, 1970.

Dershowitz, A. *Rights from Wrongs: A Secular Theory of the Origins of Rights*, New York: Basic Books, 2004.

Dicey, AV. *Introduction to the Study of the Law of the Constitution*, (originally published in 1895) London: McMillan and Co., 1982.

Dillon, P. *The Last Revolution: 1688 and the Creation of the Modern World*, London: Pimlico, 2007.

DiMarco, E. 'The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction' in *Rutgers Journal of Law and Religion*, 10, 2009.

Doe, N. *The Legal Framework of the Church of England*. Oxford: Oxford University Press, 1996.

Doe, N. *Law and Religion in Europe: A Comparative Introduction*, Oxford: Oxford University Press, 2011.

Donnelly, J. *Universal Human Rights in Theory and Practice*, London: Cornell University Press, 2015.

Donovan, M. 'The Italian State: No Longer Catholic, no Longer Christian' in Madeley, JTS and Enyedi, Z (eds.) *Church and State in Contemporary Europe: The Chimera of Neutrality*, Abingdon: Routledge, 2003.

Doyle, W. *Oxford History of the French Revolution*, Oxford: Oxford University Press, 2002.

Dreier, J. 'Moral Relativism and Moral Nihilism' in Copp, D (ed.), *The Oxford Handbook of Ethical Theory*, Oxford: Oxford University Press, 2007.

Drewry, G. and Brock, J. 'Prelates in Parliament' in *Parliamentary Affairs*, 24:3, 1971, p 248.

Dübeck, I. 'State and Church in Denmark' in Robbers, G (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, 2005, p.58.

Dunn, J. *Western Political Theory in the Face of the Future*, Cambridge: Cambridge University Press, 1979.

Dunn, J. 'Secularizing the Sacred: The Effort to Dechristianize France During the Revolution' in *Primary Source*, 4:2, 2012, pp.26-32.

Dworkin, R. *Taking Rights Seriously*, Cambridge, Massachusetts: Harvard University Press, 1977.

Dworkin, R. *A Matter of Principle*, Oxford: Oxford University Press, 1985.

Dworkin, R. *Justice for Hedgehogs*, Cambridge, Massachusetts: Harvard University Press, 2011.

Dworkin, R. *Religion Without God*, Cambridge, Massachusetts: Harvard University Press, 2013.

Edge, P. 'Re-orienting the Establishment Debate: From Illusory Norm to Equality of Respect' in *Anglo-American L Rev*, 27, 1998, p.271.

Edge, PW. 'Determining Religion in English Courts' in *Oxford Journal of Law and Religion*, 1:1, 2012, pp.402-423.

Edge, P. and Vickers, L. 'Review of equality and human rights law relating to religion or belief', an Equality and Human Rights Commission Research Report, No. 97, 2015, pp.14-20.

Ekeli, KS. 'The Political Rights of Anti-Liberal Democratic Groups' *Law and Philosophy*, 31, 2012, p.269.

Elgie, R. *Semi-Presidentialism in Europe*, Oxford: Oxford University Press, 1999.

Eltahawy M. *Headscarves and Hymens: Why the Middle East Needs a Sexual Revolution*, London: Weidenfeld & Nicolson, 2015.

Emsley, C. *Napoléon: Conquest, Reform and Reorganisation*, Harlow: Pearson Longman, 2003.

Evans, C. *Freedom of Religion under the European Convention on Human Rights*, Oxford: Oxford University Press, 2001.

Evans, MD. 'Freedom of Religion and the European Convention on Human Rights: approaches, trends and tensions' in Cane, P et al. (eds.) *Law and Religion in Theoretical and Historical Context*, Cambridge: Cambridge University Press, 2008.

Evans, E. *The Forging of the Modern State in Early Industrial Britain, 1783 – 1870*. Abingdon: Routledge, 2001.

Evans, MD. 'Lautsi v. Italy: An Initial Appraisal', *Religion and Human Rights*, 6, 2011, pp.237-244.

Evans, M. 'The Freedom of Religion or Belief in the ECHR since *Kokkinakis*. Or "Quoting *Kokkinakis*" in *Religion and Human Rights*, 12, 2017, pp.83-98.

The Fabian Society, *The Future of the Monarchy*, The Report of the Fabian Commission: The Fabian Society, 2003.

Falconer. [Lord Falconer of Thoroton], 'Church, state and civil partners', *Ecclesiastical Law Journal*, 2007, 9(1), p.5.

Falletti, E. 'The Cultural Impact of Islamic Mass Immigration on the Italian Legal System', in *Journal of Law, Religion and State*, 6:1, 2018, pp.1-28.

Fani, A. *Le basi giuridiche della libertà moderan*, Rome: Bocca, 1909.

Feldman, D. 'The European Court of Human Rights and the UK' – Why Should Strasbourg Decide on Human Rights?' *UK Constitutional Law Association*, 2012 at <https://ukconstitutionallaw.org/2012/12/07/david-feldman-the-european-court-of-human-rights-and-the-uk-why-should-strasbourg-decide-on-our-human-rights/>

Fenwick, H. 'Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the court's authority via consensus analysis?' in *European Human Rights Law Review*, 3, 2016, p. 248.

Ferrari, A. and Ferrari, S. 'Religion and the Secular State: The Italian Case' as part of Monateri, RG (ed.), The Italian National Reports to the 18th World Congress of Comparative Law in *The Cardozo Electronic Law Bulletin*, 16:1, 2010, p.433.

Ferrari, S. 'State and Church in Italy' in Robbers, G (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, 2005.

Ferrari, S. 'States and Religious Communities in Italy', in the International Conference on Comparative Constitutional Law 2005, *Church and State towards Protection for Freedom of Religion*, Tokyo: The Japanese Association of Comparative Constitutional Law, 2006, pp.204-30.

Ferrari, S. 'State regulation of religion in the European democracies: the decline of the old pattern', in Motzkin, G. and Fischer, Y. (eds.), *Religion and democracy in contemporary Europe*, London: Alliance Publishing Trust, 2008, pp.103-112.

Ferrari, S. 'Law and Religion in Europe' in Christofferson, L *et al* (ed.), *Religion in the 21st Century*, Farnham: Ashgate, 2010, pp.149-159.

Ferrari, S. 'Conclusion', in Ferrari, S. and Cristofori, R. (eds.), *Law and Religion in the 21st Century: Relations between States and Religious Communities*, London: Routledge, 2010, pp.369-375.

Finnis, JM. *Natural Law and Natural Rights*, Oxford: Clarendon, 1980.

Finnis, J. *Aquinas: Moral, Political and Legal Theory*, Oxford: Clarendon Press, 1998.

Finnis, J. 'On the practical meaning of secularism' in *Notre Dame Law Review*, 73, 1998, p.491.

Fishkin, JS. *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford: Oxford University Press, 2009.

Fishkin, JS. *Democracy When the People Are Thinking: Revitalizing Our Politics Through Public Deliberation*, Oxford: Oxford University Press, 2018.

Fox, F. *A World Survey of Religion and the State*, Cambridge: Cambridge University Press, 2008.

Foyer, J. 'De la séparation aux associations diocésaines' in Imbert, J (ed.), *Etats et religions, Revue des sciences morales et politiques*, 2, 1994, 147-166.

Fuller, L. 'Positivism and fidelity to the law: a reply to Professor Hart' 11 *Harvard Law Review* 1958.

Fuller, L. *The Morality of Law*, New Haven: Yale University Press, 1964.

Garcia Oliva, J. 'Church, state and establishment in the United Kingdom in the 21st century: anachronism or idiosyncrasy?' in *Public Law*, 2010, pp.482-504.

Garcia Oliva, J. and Cranmer, F. 'Education and Religious Symbols in the United Kingdom, Italy and Spain: Uniformity or Subsidiarity?' in *European Public Law*, 19(3), 2013, pp.555-582.

García Oliva, J. and Hall, H. *Religion, Law and the Constitution: Balancing Beliefs in Britain*, London: Routledge, 2018.

García Oliva, J. and Hall, H. 'Responding to non-liberal minorities within a liberal state: the challenge posed by children and vulnerable adults' in *Public Law*, 2018, pp.258-276.

Garelli, F. *Religion Italian Style: Continuities and Changes in a Catholic Country*, Farnham: Ashgate, 2014.

Gaudin, P. 'République and laïcité': What is at stake in contemporary France? in *Philosophy and Social Criticism*, 42:4-5, 2016, pp.440-447.

Gibney, M. 'Liberal Democratic States and Responsibilities to Refugees' *American Political Science Review*, 93:1, 1999.

Gilson, E. *The Christian Philosophy of St Thomas Aquinas*, London: Victor Gollancz, 1957.

Grant, W. *Lobbying: The Dark Side of Politics*, Manchester: Manchester University Press, 2018.

Grayling, AC. *Ideas that Matter: A Personal Guide for the 21st Century*, London: Phoenix, 2010.

Griffith-Jones, R. and Hill, M. (eds.), *Magna Carta, Religion and the Rule of Law*, Cambridge: Cambridge University Press, 2015.

Grimm, D. *Constitutionalism*, Oxford: Oxford University Press, 2016.

Guerlac, O. 'The Separation of Church and State in France' in *Political Science Quarterly*, 23:2, 1908, pp. 259-296.

Gunn TJ. 'French Secularism as a Utopia and Myth' in *Houston Law Review*, 42:1, 2005a, pp.81-102.

Gutman, A. and Thompson, D. *Why Deliberative Democracy?*, Princeton: Princeton University Press, 2004.

Habermas, J. 'Religion in the Public Sphere' in *European Journal of Philosophy*, 14:1, 2006, p.1.

Habermas, J. 'Pre-political Foundations of the Democratic Constitutional State?' in Habermas, J and Ratzinger, J. *The Dialectics of Secularization: On Reason and Religion*, San Francisco: Ignatius Press, 2006, p.46.

Haines, RM. *Ecclesia Anglicana: Studies in the English Church of the Later Middle Ages*, Toronto: Toronto University Press, 1989.

Hammond-Sharlot, R. and Booth, P. 'Same sex marriage and the Church of England' in *Family Law*, 38:2, 2008, p.260.

Harlow, A., Cranmer, F. and Doe, N. 'Bishops in the House of Lords: a Critical Analysis', in *Public Law*, 2008, pp.508-509.

Harrigan, PJ. 'Church, State, and Education in France from the Falloux to the Ferry Laws: A Reassessment', in *Canadian Journal of History*, 36:1, 2001, pp.51-84.

Harris, R. 'The Assumptionists and the Dreyfus Affair' in *Past & Present*, 194:1, 2007, pp.175-211.

Harris, S. *The End of Faith: Religion, Terror and the Future of Reason*, Simon & Schuster: London, 2004.

Harris, T. *The Great Crisis of the British Monarchy, 1685 – 1720*, London: Allen Lane, 2006.

Hart, HLA. 'Positivism and the separation of law and morals', 71 *Harvard Law Review*, 1958.

Hart, HLA. *The Concept of Law*, Oxford: Oxford University Press, 1961.

Hayward, J. 'Parliament and the French Government's Domination of the Legislative Process', *Journal of Legal Studies*, 10, 2004.

Hazareesingh, S. *Political Traditions in Modern France*, Oxford: Oxford University Press, 1994.

Hazo, RG. 'Montesquieu and the Separation of Powers', *American Bar Association Journal*, 54:7, 1968, pp.665-668.

Held, D. *Models of Democracy*, Cambridge: Polity Press, 2006.

Herring, G. 'Devotional and Liturgical Renewal: Ritualism and Protestant Reaction' in Stuart, BJ and Nockles, P and Pereiro, J (eds.). *The Oxford Handbook of the Oxford Movement*, Oxford: Oxford University Press, 2017, p.398-409.

Hertzberg, BR. *Chains of Persuasion: A Framework for Religion in Democracy*, Oxford: Oxford University Press, 2019.

Hibbert, C. *The French Revolution*, London: Penguin Books, 1982.

Hinchliff, P. 'Church-State Relations' in Sykes, S and Booty, J (eds.), *The Study of Anglicanism*, London: SPCK, 1988.

Hitchens, C. *God Is Not Great: How Religion Poisons Everything*, London: Atlantic Books, 2007.

Hobbes, T. *De Cive* (first published 1651) Dumfries & Galloway: Anodos Books, 2017.

Hobbes, T. *Leviathan* (first published 1651) London: Penguin Books, 1985.

Hope. [Lord Hope of Craighead] in 'Voices from the past – the Law Lords' contribution to the legislative process', *Law Quarterly Review*, 123, 2007.

Houellebecq, M. *Submission*, London: Vintage, 2015.

Hughes, A. *Abrahamic Religions: On the Uses and Abuses of History*, Oxford: Oxford University Press, 2012.

Humphreys, J. 'The Civil Partnership Act 2004, same-sex marriage and the Church of England', in *Ecclesiastical Law Journal*, 8:3, 2005, p.289.

Hunter-Henin, M. 'Why the French don't like the Burqa: Laïcité, National Identity and Religious Freedom' in *International and Comparative Law Quarterly*, 61:3, 2012, pp.613-639.

Hunter-Henin, M. 'Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS', in *Oxford Journal of Law and Religion*, 4, 2015, p.94.

Huntington, SP. *The Clash of Civilisations and the Remaking of the World Order*, New York: Simon and Schuster, 1996.

Hutchinson, AP. and Monahan, P. (eds.), *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987.

Inglehart, R. and Norris P. *Modernization, Cultural Change and Democracy*, New York: Cambridge University Press, 2005.

Inglehart, R. and Norris P. *Sacred and Secular: Religion and Politics Worldwide*, New York: Cambridge University Press, 2nd Ed. 2011.

Israel, JI. *Radical Enlightenment: The Making of Modernity 1650-1750*, Oxford: Oxford University Press, 2001.

Israel, JI. *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750 – 1790*, Oxford, Oxford University Press, 2012.

Iversen, HR, 'Background of the Cartoon Crisis in Danish Mentality' in Christofferson, L et al (ed.), *Religion in the 21st Century*, Farnham: Ashgate, 2010, pp.191-205.

Jansen, T. 'Europe and Religions: the Dialogue between the European Commission and Churches or Religious Communities' in *Social Compass*, 47:1, 2000, p.103.

Jenkins, P. *God's Continent: Christianity, Islam and Europe's Religious Crisis*, Oxford: Oxford University Press, 2007.

Joppke, C. *Veil: Mirror of Identity*, Cambridge: Polity Press, 2009, pp.112–113.

Joppe, C. *The Secular State Under Siege: Religion and Politics in Europe and America*, Cambridge: Polity Press, 2015.

Kaehne, A. and Taylor, H. 'Do public consultations work? The case of the Social Services and Well-being (Wales) Bill' *Public Policy and Administration*, 31:1, 2015, pp.80-99.

Kaiser, W. 'Clericalism – that is our enemy!: European anticlericalism and the culture wars' in Clark, C and Kaiser, W (eds.), *Culture Wars: Secular-Catholic Conflict in Nineteenth-Century Europe*, Cambridge: Cambridge University Press, 2003, pp.47-76.

Kelly, M. 'Religion in France: Belief, identity and *laïcité*' in *French Cultural Studies*, 28:1, 2017, pp.3-4.

Kelstrup, JD. *The Politics of Think Tanks in Europe*, Abingdon, Routledge, 2016.

Kertzer, DI. *The Pope and Mussolini: The Secret History of Pius XI and the Rise of Fascism in Europe*, Oxford: Oxford University Press, 2014.

Kettani, H. 'Muslim Population in Europe 1950 – 2020' in *International Journal of Environmental Science and Development*, 1:2, 2010 pp.154-164.

Klausen, J. *The Islamic Challenge: Politics and Religion in Western Europe*, Oxford: Oxford University Press, 2005.

Knowles, D. *Bare Ruined Choirs: The Dissolution of the English Monasteries*, Cambridge: Cambridge University Press, 1976.

Kotiranta, M. 'Religion and the Secular State in Finland', ICLARS, Milano, 2011, pp.273-298.

Kreider, A. *English Chantries: The Road to Dissolution* Oregon: Wipf & Stock, 1979.

Kuru, A. 'Passive and Assertive Secularism: Historical Conditions, Ideological Struggles and State Policies toward Religion', *World Politics*, 59, 2007, p.568.

Kuru, AT. *Secularism and State Policies Toward Religion: The United States, France and Turkey*, Cambridge: Cambridge University Press, 2009.

Kymlicka, W. and Cohen-Almagor, R. 'Democracy and Multiculturalism' in Cohen Almagor, R (ed.), *Challenges to Democracy: Essays in Honour and Memory of Isaiah Berlin*, London: Ashgate Publishing, 2000.

Laborde, C. 'On Republican Toleration', in *Constellations. An International Journal of Critical and Democratic Theory*, 9, 2002, pp.167-183.

Laborde, C. *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford: Oxford University Press, 2008.

Laborde, C. 'Equal liberty, non-establishment and religious freedom' in Requejo, F. and Ungureanu, C (eds.), *Democracy, Law and Religious Pluralism in Europe*, Abingdon: Routledge, 2014.

Laborde, C, 'Liberal Neutrality, Religion and the Good' in Cohen, J. and Laborde, C. (eds.), *Religion, Secularism & Constitutional Democracy*, New York: Columbia University Press, 2016, p.249.

Lansley, A. 'Legislature and Executive: An Open Lecture', 24th April 2013 at <https://www.parliament.uk/get-involved/education-programmes/universities-programme/university-teaching-resources/the-legislature-and-the-executive/>

Larkin, M. *Church and State after the Dreyfus Affair*, London: Macmillan, 1974.

Larsen, T. *Friends of Religious Equality: Nonconformist Politics in Mid-Victorian England*. Woodbridge: The Boydell Press, 1999.

Lee, C. *Monarchy: Past, present...and future?*, London: Bene Factum Publishing, 2013.

Legg, A. *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford: Oxford University Press, 2012.

Le Goff, J., Rémond, R. and Joutard, P. (eds.), *Histoire de la France religieuse 3: Du roi très chrétien à la laïcité républicaine 18ème-19ème siècle*, Paris: Seuil, 2004.

Leigh, I. and Ahdar, R. 'Post-Secularism and the European Court of Human Rights (or How God Never Really Went Away)' in *Modern Law Review*, 75:6, 2012, pp.1064-98.

Leigh, I. 'The European Court of Human Rights and religious neutrality' in D'Costa, G. *et al* (eds.), *Religion in a Liberal State*, Cambridge: Cambridge University Press, 2013, p.38.

Leigh, I. and Hambler, A. 'Religious Symbols, Conscience, and the Rights of Others' in *Oxford Journal of Law and Religion*, 3:1, 2014, pp.2-24.

Levinson, M. 'Liberalism, Pluralism and Political Education: paradox or paradigm?' *Oxford Review of Education*, 25, 1999 p.41.

Levitsky, S. and Ziblatt, D. *How Democracies Die: What History Reveals About Our Future*, New York: Penguin, 2018.

Lewis, B. *Faith and Power: Religion and Politics in the Middle East*, Oxford: Oxford University Press, 2010.

Levenson, JD. *Inheriting Abraham: The Legacy of the Patriarch in Judaism, Christianity and Islam*, Princeton: Princeton University Press, 2012.

Levy, DL. and Lo, JR. 'Transgender, Transsexual, and Gender Queer Individuals with a Christian Upbringing: The Process of Resolving Conflict Between Gender Identity and Faith' *Journal of Religion & Spirituality in Social Work: Social Thought*, 32:1, 2013, pp.60-83.

Leyland, P. 'The multifaceted constitutional dynamics of U.K. devolution' in *International Journal of Constitutional Law*, 9:1, 2011, pp.251-273.

Liederman, LM. 'Religious Diversity in Schools: the Muslim Headscarf Controversy and Beyond' in *Social Compass*, 47:3, 2000, pp.367-381.

Liogier, R. 'Laïcité on the Edge in France: Between the Theory of Church-State Separation and the Praxis of State-Church Confusion' in *Macquarie Law Journal*, 9:1, 2007, pp.25-45.

Lock, T. 'Of Crucifixes and Headscarves Religious Symbols in German Schools' in Hunter-Henin, M. (ed.), *Law, Religious Freedoms and Education in Europe* Farnham: Ashgate Publishing, 2012, pp.347-69.

Locke, J. *Two Treatises of Government* (first published 1689) New Haven: Yale University Press, 2003.

Locke, J. *Second Treatise of Government and A Letter Concerning Toleration* (first published 1639) Oxford: Oxford University Press, 2016.

Louati, Y. 'L'Exception Francaise: From Irrational Fear of Muslims to their Social Death Sentence', *Islamophobia Studies Journal*, 3:1, 2015, pp.90-95.

MacCulloch, D. *Reformation: Europe's House Divided 1490 – 1700*, London: Penguin Books, 2004.

MacCulloch, D. *A History of Christianity*, London: Penguin Books, 2009.

MacIntyre, A. *After Virtue*, London: Duckworth, 1981.

Mackay. [Lord Mackay of Clashfern]. 'Does Establishment Have a Future?' in *Law and Justice*, 170, 2013, pp.7-18 at p.13.

Macknight, EC. 'The Catholic nobility's commitment to *écoles libres* in France 1850-1905' in *Historical Reflections / Réflexions Historiques*, 43(3), 2017, pp.18-41.

MacLean, M. 'The Church of Scotland as a National Church' in *Law & Justice*, 149, 2002, pp.125–133.

MacLehose, SH. 'Separation of Church and State in France in 1795' in *The Scottish Historical Review*, 4:15, 1907, pp. 298-308.

Mahlmann, M. 'Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's decision on the Headscarf Case', *German Law Review*, Vol. 4 No. 11, 2003, pp.1999-1116.

Mancini, S. and Rosenfeld, M. 'Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere' in Ungureanu, C. and Zucca, I. (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas*, Cambridge: Cambridge University Press, 2012, p.160-191.

Mancini, S. and Rosenfeld, M. (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press, 2014.

Maritain, J. 'Introduction' in *UNESCO, Human Rights: Comments and Interpretation*, 1949.

Marshall, G. *Constitutional Theory*, Oxford: Clarendon Press, 1971.

Masterman, R. *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*, Cambridge: Cambridge University Press, 2011.

Matthews, F. 'Majoritarianism Reinterpreted: Effective Representation and the Quality of Westminster Democracy', *Parliamentary Affairs*, 71:1, 2018, pp.50–72.

McCrea, R. *Religion and the Public Order of the European Union*, Oxford: Oxford University Press, 2010.

McGoldrick, D. 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?' *Human Rights Law Review*, 11, 2011, pp.451-502.

McGoldrick, D. 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' in *International and Comparative Law Quarterly*, 65:1, 2016, pp.21-60.

McGrade, AS. (ed.), *Hooker: Laws Ecclesiastical Polity: Preface, Bk.1 & Bk.8 (Cambridge Texts in the History of Political Thought)* (first published between 1594 and 1662), Cambridge: Cambridge University Press, 1989.

McLean, D. 'The changing legal framework of establishment' in *Ecclesiastical Law Journal*, 7:34, 2004, p.292.

McLean, I. and Peterson, S. 'A Uniform British Establishment', in Chapman, M. et al (eds.), *The Established Church: Past, Present and Future*, London: T&T Clark International, 2011, p.141.

McLeod, H. *The Religious Crisis of the 1960s*, Oxford: Oxford University Press, 2010.

Mersel, Y. 'The dissolution of political parties: The problem of internal democracy.' *International Journal of Constitutional Law*, 4:1, 2006, pp.84–113.

Mezram, K. 'Muslims in Italy: The Need for an 'Intesa' with the Italian State', in *Italian Journal of International Affairs*, 48:1, 2013, pp.58-71.

Mill, JS. *On Liberty* (first published 1859), London: Penguin, 1985.

Mill, JS. *Considerations on Representative Government*, (first published 1861) in Acton, HB (ed.) *Utilitarianism, Liberty and Representative Government*, London: Dent, 1951.

Milbank, J. 'What lacks is feeling: Hume versus Kant and Habermas' in Calhoun, c et al (eds.) *Habermas and Religion*, Cambridge: Polity Press, 2013.

Miller, J. *The Glorious Revolution*, Abingdon: Routledge, 1997.

Modood, T. 'Establishment, Multiculturalism, and British Citizenship', *Political Quarterly*, 65, 1994, p.53.

Mohseni, P. and Wilcox, C. 'Organizing Politics: Religion and Political Parties in Comparative Perspective.' In Haynes, J. (ed.), *Routledge Handbook of Religion and Politics*. New York: Routledge, 2016.

Montesquieu, C. *The Spirit of Laws*, (first published 1748) Cambridge: Cambridge University Press, 1989.

Morange, J. 'Le régime constitutionnel des cultes en France,' in *Le statut constitutionnel des cultes dans les pays de l'Union européenne*, Paris: Litec, 1995, pp.119-138.

Morris, R. *Church and State in 21st Century Britain: the Future of Church Establishment*, Basingstoke, Palgrave Macmillan, 2009.

Morris, R. 'The future of "high" establishment', in *Ecclesiastical Law Journal*, 13:3, 2011, p.260.

Morris, R. 'The Succession to the Crown Act' in *Ecclesiastical Law Journal*, 15:2, 2013, p.186.

Morrison, C. 'The Margin of Appreciation Doctrine Standards in the Jurisprudence of the European Court of Human Rights' in *Human Rights Quarterly*, 4, 1982, p. 47.

Morss, JR. 'The International Legal Status of the Vatican/Holy See Complex' in *European Journal of International Law*, 26:4, 2015, pp.927-946.

Moussalli, AS. 'Sayyid Qutb' in Akbarzadeh, S. (ed.), *Routledge Handbook of Political Islam*, London: Routledge, 2011, pp.9-26.

Murray, D. *The Strange Death of Europe: Immigration, Identity, Islam*, London: Bloomsbury Continuum, 2016.

Murray, J. and Redgrave, S. *Murray's Official Handbook Of Church And State* (first published 1852), London: Kessinger Publishing Co., 2008.

Murray, R. [Lord Murray] 'The Constitutional Position of the Church of Scotland' in *Public Law*, 1958 pp.155-162.

Nash, D. 'The (Long) Nineteenth Century' in Bullivant, S. and Ruse, M. (eds.), *The Oxford Handbook of Atheism*, Oxford: Oxford University Press, 2013, pp.212-228.

Nehushtan, Y. *Intolerant Religion in a Tolerant Liberal Democracy*, Oxford: Hart Publishing, 2015.

Neumann, F. *The Rule of Law: Political Theory and the Legal System in Modern Society*, Leamington Spa: Berg, 1986.

Nicholls, D. *Church and State in Britain Since 1820*, London: Routledge, 1967.

Nicolet, C. *L'idée républicaine en France (1789-1924): Essai d'histoire critique*, Paris: Gallimard, 1982.

Nielsen, MV. and Kühle, L. 'Religion and State in Denmark: Exception among exceptions' in *Nordic Journal of Religion and Society*, 24:2, 2011, pp.173-188.

Nietzsche, F. *The Gay Science*, New York: Vintage Books, 1974.

Nieuwenhuis, AJ. 'State and religion, a multidimensional relationship: Some comparative law remarks', in *International Journal of Constitutional Law*, 10:1, 2012, pp.153-174.

Nussbaum, M. *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*, New York: Basic Books, 2008.

Oftestad, BT. *The Catholic Church and Liberal Democracy*, Abingdon: Routledge, 2018.

Pabst, A. *Liberal World Order and Its Critics: Civilisational States and Cultural Commonwealths*, London: Routledge, 2018.

Paine, T. *Rights of Man*, (originally published 1792) Oxford: Oxford University Press, 1995.

Panara, C. 'In the Name of God: State and Religion in Contemporary Italy', in *Religion and Human Rights*, 6:80, 2011.

Pena-Ruiz, H. *La laïcité* Paris: Flammarion, 2003 and *Histoire de la laïcité : Genèse d'un idéal*, Paris: Gallimard, 2005.

Pepinster, C. *The Keys and the Kingdom: The British and the Papacy from John Paul II to Francis*, London: Bloomsbury T&T Clark, 2017.

Perreau-Saussine, E. *Catholicism and Democracy: An Essay in the History of Political Thought*, Princeton: Princeton University Press, 2012.

Perry, M. *The Political Morality of Liberal Democracy*, Cambridge: Cambridge University Press, 2010.

Pettersson, P. 'State and Religion in Sweden: Ambiguity Between Establishment and Religious Control', in *Nordic Journal of Religion and Society*, 24:2, 2011, pp.119 –135.

Pinker, S. *Enlightenment Now: The Case for Reason, Science, Humanism and Progress*, Allen Lane: London, 2018.

Plant, R. *Politics, Theology and History*, Cambridge: Cambridge University Press, 2001.

Plato, *The Republic* (first published 380 BC) London: Penguin, 1974.

Poole, T. 'United Kingdom: The royal prerogative' in *International Journal of Comparative Law*, 8:1, 2018, pp.146-155.

Poulat, E. 'Laïcité en France au vingtième siècle.' In *Catholicism, Politics and Society in Twentieth-Century France*, edited by Chadwick, K, Liverpool: Liverpool University Press, 2000.

Pratt, D. *The Challenge of Islam: Encounters in Interfaith Dialogue*, London: Routledge, 2018.

Prélot, H. 'Les religions et l'égalité en droit français', *Revue: Les Cahiers de droit* 40: 4, 1999, p.738.

Price, R. 'Ideology and Motivation in the Paris Commune of 1871' in *The Historical Journal*, 15(1), 1972, pp.75-86.

Proper, M. 'Sovereignty and Laïcité' in Mancini, S and Rosenfeld, M. *Constitutional Secularism in an Age of Religious Revival*, Oxford: Oxford University Press, 2014.

Pugh, M. *The Making of Modern British Politics 1867 – 1945*. Oxford: Blackwell Publishing, 2002.

Qurashi, A. and Vogel, F. *Islamic Marriage Contract: Case Studies in Islamic Family Law*, Harvard: Harvard University Press, 2009.

Raday, F. 'Human Rights and the Confrontation between Religious and Constitutional Authority: A Case Study of Israel's Supreme Court', in Cosman, BA. and Keysar, A. (eds.), *Secularism, Women and the State: The Mediterranean World the 21st Century*, Institute for the Study of Secularism and Culture, 2009.

Raday, F. 'Secular Constitutionalism Vindicated' in *Cardozo Law Review*, 30, 2008/09, pp. 2771-2775.

Ramadan, T. *Western Muslims and the Future of Islam*, Oxford: Oxford University Press, 2004.

Ratcliff, EC. *The Coronation Service of Her Majesty Elizabeth II*, London: SPCK and Cambridge: Cambridge University Press, 1953.

Ratnapala, S. 'John Locke's Doctrine of the Separation of Powers: A Re-evaluation' in *The American Journal of Jurisprudence*, 3:1 1993, pp.189-220.

Ratzinger, J. (Pope Benedict XVI). *Values in a Time of Upheaval*, San Francisco: Ignatius Press, 2006.

Ratzinger, J. and Pera, M. *Without Roots: The West, Relativism, Christianity and Islam*, New York: Basic Books, 2006.

Rawls, J. *A Theory of Justice*, Harvard: Harvard University Press, 1971.

Rawls, J. *Political Liberalism*, New York: Columbia University Press, 2005.

Raz, J. 'The Rule of Law and its Virtue' in *The Authority of Law*, Oxford: Oxford University Press, 1979 [1977].

Rich, J. 'The Bradlaugh Case: Religion, Respectability and Politics' in *Australian Journal of Political History*, 21:2, 1975, pp.35-51.

Reid, R. 'Do ideas matter? peers and reform of the House of Lords' in *Commonwealth and Comparative Politics*, 53:4, 2015, pp.497-515.

Requejo, F. 'Religions and Liberal Democracies' in Requejo, F. and Ungureanu, C. (eds.), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-secularism*, London: Routledge, 2014, pp.200-213.

Réville, J. 'Anticlericalism in France' in *The American Journal of Theology*, 9:4, 1905, p.605.

Rieffer, BJ. 'Religion and Nationalism: Understanding the Consequences of a Complex Relationship' in *Ethnicities*, 3:2, 2003, pp.215-242.

Rivers, J. *The Law of Organised Religions: Between Establishment and Secularism*, Oxford: Oxford University Press, 2010.

Rivers, J. 'The secularisation of the British constitution' in *Ecclesiastical Law Journal*, 14:3, 2012, p.371.

Robbers, G. (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, 2005.

Robert, J. 'Religious liberty and French secularism' in *Brigham Young University Law Review*, 637, 2003, p.656.

Roberts, W. 'Napoleon, the Concordat of 1801 and Its Consequences' in Coppa, FJ. (ed.), *Controversial Concordats: The Vatican's Relations with Napoleon, Mussolini and Hitler*, Washington: The Catholic University of America Press, 1999.

Rodes, RE. *Law and Modernization in the Church of England*, Notre Dame: University of Notre Dame, 1991.

Rolland P. 'La régulation de la liberté religieuse: le cas du prosélytisme', in *Chemins d'Europe: Mélanges en l'honneur de Jean Paul Jacqué*, Paris: Dalloz, 2010, pp. 577-589.

Rorty, R. 'Religion as Conversation-stopper' in *Common Knowledge*, 3:1, 1994, p.1-6.

Rosenblum, N. *Membership and Morals*, Princeton: Princeton University Press, 1998.

Rosenblum, N. 'Introduction: Pluralism, Integralism and Political Theories of Religious Accommodation' in Rosenblum, N. (ed.), *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, Princeton: Princeton University Press, 2000.

Rosenbaum, S. 'Must religion be a Conversation stopper?' in *The Harvard Theological Review*, 102:4, 2009, pp.393-409.

Rousseau JJ. *The Social Contract* (first published 1762) London: Penguin Books, 2012.

Rowell, G. 'The Ecclesiology of the Oxford Movement' in Stuart, BJ. and Nockles, P. and Pereiro, J. (eds.), *The Oxford Handbook of the Oxford Movement*, Oxford: Oxford University Press, 2017, p.216-230.

Roy, O. *Secularism Confronts Islam*, (translated by George Holoch) New York: Columbia University Press, 2007.

Rubinstein, A. 'Unashamed liberalism: illiberal and anti-liberal minorities' *Public Law*, 2017, pp.270-286.

Russel, M., Gover, D. and Wollter, K. 'Does the Executive Dominate the Westminster Legislative Process?: Six Reasons for Doubt' in *Parliamentary Affairs*, 69:2, 2016, pp.286-308.

Rynaert, C. 'The Legal Status of the Holy See' in *Goettingen Journal of International Law*, 3:3, 2011, pp.829-859.

Sagovsky, N. 'Hooker, Warburton, Coleridge and the "quadruple lock": state and church in the twenty-first century' in *Ecclesiastical Law Journal*, 16:2, 2014, p.140.

Salton, HT. 'France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law' in *Journal of Politics and Law*, 5:4, 2012, pp.30-41.

Sandberg, R. and Doe, N. 'Church-State Relations in Europe' in *Religion Compass*, 2007.

Sandberg, R. 'Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach' in *Journal of Religion in Europe*, 2008, pp.329-352.

Sandberg, R. *Law and Religion*, Cambridge: Cambridge University Press, 2011.

Saul, M. 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' in *Human Rights Law Review*, 15, 2015, pp.745-774.

Saunders, R. 'God and the Great Reform Act: Preaching against Reform, 1831–32', in *Journal of British Studies*, 53, 2014, pp.378-399.

Saunders, R. 'Human rights abuses at the limits of the law: Legal instabilities and vulnerabilities in the 'Global War on Terror' in the *Review of International Studies*, 44:1, 2018, pp.2-23.

Schama, S. *Citizens: A Chronicle of the French Revolution*, London: Viking, 1989.

Schultheiss, K. 'The Dreyfus Affair and History' in *Journal of the Historical Society*, 12:2, 2012, pp.189-203.

Schumpeter, J. *Capitalism, Socialism and Democracy* (first published in the UK 1943) Abingdon: Routledge, 2010.

Scott, JW. *The Politics of the Veil*, Princeton: Princeton University Press, 2007.

Sée, H. *Economic and Social Conditions in France During the Eighteenth Century* (first published in 1927 as *La France Économique et Sociale Au XVIIIe Siècle*), Kitchener, Ontario: Batoche Books, 2004.

Selbie, W. *Nonconformist Religion in England: The Struggle for Freedom of Religion*, published by Everard Publications as a Kindle eBook 2 April 2016, first published in 1912 with the title 'Nonconformity, Its Origins and Progress'.

Shachar, A. *Multicultural Jurisdictions: cultural differences and women's rights*, Cambridge: Cambridge University Press, 2001.

Shapiro, ST. 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed', *University of Michigan Law School Public Law and Legal Theory Working Paper Series*, Working Paper No. 77, March 2007, pp.44-45.

Short, K. 'The English Indemnity Acts, 1726-1867' in *Church History*, 43, 1973, p.366.

Silk, M. 'The Abrahamic Religions as a Modern Concept', in Silverstein, AJ and Stroumsa, GG (eds.), *The Oxford Handbook of the Abrahamic Religions*, Oxford: Oxford University Press, 2015.

Sowerwine, C. *France Since 1870: Culture, Society and the Making of the Republic*, Basingstoke: Palgrave Macmillan, 2001.

Spencer, K. 'Same sex couples and the right to marry – European Perspectives' in *Cambridge Student Law Review*, 6:1, 2010, p. 155.

Spielmann, D. 'Whither the Margin of Appreciation?' in *Current Legal Problems*, 67:1, 2014, pp.49-65.

Stan, L. and Turcescu, L. *Church, State, and Democracy in an Expanding Europe*, Oxford: Oxford University Press, 2001.

Stepan, A. *Arguing Comparative Politics*, Oxford: Oxford University Press, 2001.

Stepan, A. 'The Multiple Secularisms of Modern Democratic and Non-Democratic Regimes' in Calhoun, C. Juergensmeyer, M. and Van Antwerpen, J. (eds.), *Rethinking Secularism*, Oxford, Oxford University Press, 2011, pp.114-144 at p.114.

Stone, A. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford: Oxford University Press, 1992.

Strong, R. *Coronation: A History of Kingship and the British Monarchy*, London: HarperCollinsPublishers, 2005.

Szumigalsha, A. 'The Polish Catholic Church's perception of the processes of EU integration and Europeanisation in the context of traditional norms and values' in *Religion, State and Society*, 43:4, 2015, pp.342-356.

Tamanaha, B. *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press, 2004.

Tallett, F. 'Dechristianizing France: The Year II and the Revolutionary Experience', in Tallett, F. and Atkin, N. (eds.), *Religion, Society and Politics in France Since 1789*, London: The Hambledon Press, 1991.

Tawil, E. 'La police administrative des cultes en droit français' in *Revue de la recherche juridique-Droit prospectif*, 2004, pp.19-24.

Taylor, C. 'The Meaning of Secularism' *Hedgehog Review*, 12:3, 2010, p.23.

Taylor, C. 'Why we need a radical redefinition of secularism' in Mendieta, E. and Van Antwerpen, J. (eds.), *The Power of Religion in the Public Sphere*, Columbia: Columbia University Press, 2011, pp.34-59.

Taylor, PM. *Freedom of Religion: UN and European Human Rights Law and Practice*, Cambridge: Cambridge University Press, 2005.

Tesauro, A. and Capocelli, G. 'The Fundamentals of the New Italian Constitution'. *The Canadian Journal of Economics and Political Science*, Vol. 20, No.1, February, 1954, pp.44-58.

Tingle, E. 'Religion and Politics in France before 1800' in *European History Quarterly*, 46:1, 2016, pp.113-123.

Tocqueville, A. *Democracy in America*. (first published 1840), London: Penguin 2003.

Tripier, Y. *La laïcité, ses prémices et son évolution depuis 1905*, Paris: L'Harmattan, 2003.

Trispiotis, I. 'Two Interpretations of "Living Together" in European Human Rights Law', *The Cambridge Law Journal*, 75:3, 2016, pp.580-607.

Troper, M. 'French Secularism or Laïcité' in *Cardozo Law Review*, 21, 2000, p.1266.

Troper, M. 'Republicanism and the Freedom of Religion in France' in Cohen, JL and Laborde, C (eds.) *Religion, Secularism and Constitutional Democracy*, New York: Columbia University Press, 2016, p.316.

Tsevas, C. 'Human rights and religions: 'living together' or dying apart? A critical assessment of the dissenting opinion in *S.A.S. v. France* and the notion of 'living together'' *Religion, State and Society*, 45:3-4, 2017, pp.203-215.

Turnbull, M. and McFadyen D. *The state of the Church and the Church of the State*, London: Darton, Longman and Todd, 2012.

Tushnet, M. *The Constitution of the United States of America*, Oxford: Hart Publishing, 2009.

Van Dijck, J. *The Culture of Connectivity: A Critical History Of Social Media*, Oxford: Oxford University Press, 2013.

Ventura, M. 'The rise and contradictions of Italy as a secular state' in Cumper, L. and Lewis, T. (eds.), *Religion, Rights and Secular Society: European Perspectives*, Cheltenham: Edward Elgar, 2012, p. 136.

Ventura, M. *Religion and Law in Italy*. AH Apphen aan den Rijn: Kluwer Law International, 2013.

Vile, MJC. *Constitutionalism and the Separation of Powers*, Oxford: Oxford University Press, 1967.

Vinet, AR. 'An Essay on the Profession of Personal Religious Conviction, and on the Separation of Church and State, Considered with Reference to the Fulfilment of that Duty' (first published 1826), Memphis: General Books, 2010.

Walters, MD. 'The Unwritten Constitution as a Legal Concept' in Dyzenhaus, D. and Thorburn, M. (eds.), *The Philosophical Foundations of Constitutional Law*, Oxford, Oxford University Press, 2016.

Wade HWR. and Forsyth C. *Administrative Law*, Oxford: Oxford University Press, 2004.

Waldron, J. *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*, Cambridge: Cambridge University Press, 2002, p.108ff.

Waldron, J. 'The Core of the Case Against Judicial Review' in *Yale Law Journal*, 115:6, 2006, p.1346.

Walzer, M. *Spheres of Justice: A Defense of Pluralism and Equality*, New York, Basic Books, 1983.

Walzer, M. *On Toleration*, New Haven: Yale University Press, 1997.

Warnock, M. *Dishonest to God: On keeping religion out of politics*, London: Continuum International Publishing Group, 2010.

Watts, MR. *The Dissenters*, published in three volumes: Volume I: From the Reformation to the French Revolution: From the Reformation to the French Revolution, Oxford: Clarendon Press, 1985; Volume II: The Expansion of Evangelical Nonconformity: The Expansion of Evangelical Nonconformity, Oxford: Oxford University Press, 1995; Volume III: The Crisis and Conscience of Nonconformity, Oxford: Oxford University Press, 2015.

Weber, M. *Economy and Society*, (first published 1922) Berkeley: University of California Press, 1978.

Weil, J. 'Headscarf versus Burqa', in Mancini, S. and Rosenfeld, M. (eds.), *Constitutional Secularism in an Age of Religious Revival*, 2014, p.195.

Weil, P. *Politique de la laïcité au XXème siècle*, Paris: PUF, 2007.

Weil, P. 'Why the French Laïcité is Liberal' in *Cardozo Law Review*, 30:6, 2009.

Weiler, JHH. 'Lautsi: A reply', *International Journal of Constitutional Law*, 11:1, 2013, pp.230-233 at 232.

White, A. *Digital Media and Society: Transforming Economics, Politics and Social Practices*, Basingstoke: Palgrave MacMillan, 2014.

Williams, R. 'Civil and religious law in England: a religious perspective', *Ecclesiastical Law Journal* 10, 2008, pp.262-282.

Wood, JC. (ed.), *Christianity and National Identity in 20th Century Europe: Conflict, Community, and the Social Order*, Göttingen: Vandenhoeck & Ruprecht, 2016.

Woodhead, L. 'Liberal religion and illiberal secularism' in D'Costa, G. et al (eds.), *Religion in a Liberal State*, Cambridge: Cambridge University Press, 2013.

Woodhead, L. 'The rise of 'no religion' in Britain: The emergence of a new cultural majority', *Journal of the British Academy*, 4, 2016, pp.245-261.

Woodhead, L., Partidge, C. and Kawanami, H. (eds.), *Religions in the Modern World: Traditions and Transformations*, Abingdon: Routledge, 2016.

Wooldridge, A. and Micklethwait, J. *God is Back: How the Global Rise of Faith Changed the World*, London: Penguin, 2010.

Zenk, T. 'New Atheism' in Bullivant, S. and Ruse, M. (eds.), *The Oxford Handbook of Atheism*, Oxford: Oxford University Press, 2013.

Zuba, K. 'The Political Strategies of the Catholic Church in Poland' in *Religion, State and Society*, 38:2, 2010, pp.115-134.

Zucca, L. 'The Classroom as a Tolerance Lab' in Hunter-Henin, M. (ed.), *Law, Religious Freedoms and Education in Europe*, Farnham: Ashgate, 2011, p.37.

Zucca, L. *A Secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford: Oxford University Press, 2012.

Zucca, L. 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber', *International Journal of Constitutional Law*. Vol. 11 No. 1, 2013, pp.218-229.
