Introduction

International law has a standard account of the nature of both international law and human rights. Hugh Thirlway states that ‘all subsystems or specialized fields of international law will operate on the basis that they derive their force from the established sources of Article 38 of the ICJ Statute’. Therefore, religion does not provide international law with an established source, and ‘in principle, the individual legal, political, or religious system of a State does not impinge on its acceptance of, and compliance with, general international law’. Further, Thirlway remarks, since ‘the waning of the influence of the teachings of the Catholic Church on moral and legal concepts, it has become possible for at least half a century to say that international law is now free from any religious input—that it is “laicized”’. The formal sources of international law, which are by and large viewed as pragmatic agreements founded in a secular positivistic legal science developed since the nineteenth century, have had to engage again with religion in a manner that was unanticipated.

That paradoxical arrival of a cosmopolitan Christian and Catholic rights-based tradition in the early twentieth century problematises histories of international law and human rights. An historical presentation

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2 Mashood A. Baderin, ‘Religion and International Law: Friends or Foes?’ European Human Rights Law Review (October 2009), 641. Baderin observes that the adoption of the United Nations Charter in 1945 can be described as the climax in the formal substantive secularisation and politicisation of modern international law, as none of its provisions refer directly to religion as a legal or normative source of international law, except for its provisions on prohibition of religious discrimination.
3 Thirlway, The Sources of International Law, 26–7.
Introduction

of the emergence of international law tends to move progressively from Grotius and the Enlightenment period of natural rights towards the nineteenth century’s classical formulations of international law.\(^5\) From there an account of the development of international law from the League of Nations to the construction of the United Nations after World War II, and the process of building institutions and international mechanisms, agreeing treaties and establishing Courts to settle disputes unfolds. The advancing era for international law and politics initiated an alignment of global institutions that included the participation of the human rights project, bringing rights ideas into the era’s normative assumptions.\(^6\) Nevertheless, this account creates its own boundaries, setting some normative values at the centre and others at the periphery.

One striking question that drives this study is how religion moved as cosmopolitan enterprise, and continues to move, across and through that standard narrative, from the centre to the periphery, and back again. It is because Catholicism played such a formative role in the construction of Western legal culture that it became the focal point of this enquiry. The account of international law from its origin in the treaties of Westphalia, and located in the writing of the Grotian tradition, had lost contact with another cosmopolitan history of international law that reappeared with the growth of the early twentieth century human rights movement. This study seeks to relocate and reunite that history of law and political theory that has shadowed this dominant narrative.\(^7\) Western legal culture had looked to the Christian religion for its foundational cosmopolitan ideas, and at the beginnings of the human rights movement returned to that moral vocabulary to ground the further growth of international order in the twentieth century. In recognising this technique of periodically returning to Western cosmopolitan legal culture, this study endeavours to provide a more complete account of understanding the human rights project that factors in the contribution Catholicism made to a general theory of sovereignty, international


INTRODUCTION

law and human rights.8 Engaging this broad canvas is necessary, as Martti Koskenniemi argues, ‘it is very hard to see the “international” apart from through state centric lenses’.9 Koskenniemi observes, ‘merely to examine statehood may even leave the most interesting and powerful phenomena responsible for the organization of life on the globe invisible’.10 Therefore, As long as we are preoccupied by states, we miss something of perhaps even greater importance, something that gives statehood its substance, directing it in particular ways, and accounting for our own ambivalence about the moral value or explanatory force of statehood as a principle of human organization. State-centrism in the histories of international law may also contribute ideologically by making it harder to have a full grasp of the mechanisms of global politics.11

Viewing Catholicism as a liminal international actor and a ‘fringe player’ acknowledges that the driving forces that create international order, and develop international law, are not always visible but located in the deeper history of international legal culture.12 Therefore, this book engages with the process of the laicisation of law, and scrutinises the standard narrative by striving to establish how international law became involved in a partial turn back towards a Catholic natural law tradition, which made a contribution to the development of modern international law, through the process of defining human rights. That contribution implies relating the history of international law’s roots in older categories and cosmopolitan traditions to those located in the nineteenth and twentieth centuries, which allowed a fusion of two quite different traditions: the positive law tradition developed from the Enlightenment’s natural rights tradition, and the Catholic natural law tradition to shape human rights.13 A recognisable prisa theologia or philosophia perennis emerged to become a basis to support the common task of democracy and human rights as a cosmopolitan project for Catholicism. This also implies engaging with authors who would not be considered as contributing to ‘the teachings of the most highly qualified publicists of

10 Ibid., 108.
11 Ibid.
the various nations’, or those who would provide a ‘subsidiary means for the
determination of rules of law’. Nevertheless, underlining the emergence of
human rights law, initiated in the Universal Declaration of Human Rights
(UDHR), are principles drawn from the Enlightenment and European
religious and legal traditions. As this study proposes, it would seem there
was a fusion of those two very different cosmopolitan traditions in the
development of the UDHR, one from a liberal Enlightenment tradition
and another from a conservative Christian rights-based tradition. It is
this point, recognised by the legal historian Samuel Moyn, which under-
pins this study but disagrees with his timeline. The paradoxical arrival of
a Christian rights-based tradition into a predominantly secular and posi-
tivistic legal discourse was more than happenstance or opportunism.

A Catholic cosmopolitan undertaking draws upon a wider and richer
resource, located in a longer historical tradition of reflection on the nature
of sovereignty and political power. The writing of Jacques Maritain is cen-
tral to this enquiry because of his pivotal role as intermediary between
Catholicism's political, legal and theological thought and the modern legal
and democratic project that emerged in Europe. Similarly, the development
and role of Christian democracy in shaping European sensibilities and
ideas about the future of the Western democratic project is reconsidered.

An outcome of this enquiry is to recognise, as Koskenniemi has shown,
that international law did not completely exclude the idea of natural law,
even as jurists emphasised legal positivism in the nineteenth century. If
natural law waned in influence, though it was disseminated partially by the
thoughts of Grotius and Vattel, natural law theory nevertheless had poten-
tial to arise in a new context. A return of natural law thought would seem
to abandon ‘the liberal distinctions between morality/law, or imperfect/
perfect rights, and reopening the early faith/sin debate which it was the
purpose of the classical [legal] discourse to close’. However, that debate

14 See Statute of the International Court of Justice, Article 38 (1) (d).
15 Samuel Moyn, Christian Human Rights (Kindle ed.; Philadelphia, PA: University of
16 Koskenniemi, From Apology to Utopia, 131.
17 Koskenniemi, ‘Expanding Histories of International Law’, 105. However, Koskenniemi
writes,

When Georg Friedrich Martens produced his first textbook on international law
in Göttingen in 1788, he did this in order to depart from the declining tradition of
natural law at German universities and to offer his students a more practical type
of instruction in the technical aspects of foreign policy statecraft. In this, he was
immensely successful. (Footnotes omitted.)
18 Koskenniemi, From Apology to Utopia, 131.
INTRODUCTION

did reopen with the construction of an argument for human dignity and human rights at the start of the twentieth century, originating by and large in a developing cosmopolitan Catholic political thought. Catholic jurists and philosophers regained access to the development of international law, not to restore the faith/sin distinction but to resolve the problem of the political form of the state in the Western legal tradition in the twentieth century. Catholic political thought encountered a deeply polemical period about the nature of the state, and the value of democracy, through a confrontation with the jurist Carl Schmitt in the early twentieth century, leading to a firmer embrace by Catholic academics of Christian democracy. It is argued that this foundation led to a Catholic contribution to the human rights project and democratisation of European institutions. Today, the bridge built between the secular and religious, rooted in that newfound cosmopolitan Christian humanism in the twentieth century, appears to be at risk. Nevertheless, by detailing and expressing the integrity of this cosmopolitan vision to realise grounds for supporting the democratic and human rights project, we may locate the first steps to its renewal. Cosmopolitanism in the sense applied here simply means recognising the long Catholic tradition of looking to both rational and transcendent origins for universal order and purpose, which in turn defines both the exercise of political power and sovereignty.19 There are, in the words of Pope Emeritus Benedict XVI, ‘self-subsistent values that flow from the essence of what it is to be a man, and are therefore inviolable: no other man can infringe them’.20

Catholicism is marked by the paradoxical need to remain the same and constantly reform. In this study there is an acknowledgement of the distinct difference between religion, law and politics, even though each discipline contributes to the morality and rhetoric of human rights. While not a theological treatise, this study acknowledges that to understand Catholicism, there is a need to draw upon the moral and theological sources that are familiar to an academic theologian. Past research on human rights and the Catholic Church is mainly addressed through the prism of the Church’s extensive social justice tradition.21 The research

19 Tertullian had proposed, ‘Nobis ... nec ulla magis res aliena quam publica. Unam omnium rem publicam agnoscimus, mundum’ [nothing is more foreign to us than public matters. We acknowledge one public thing, the world].
21 For a good overview see Kenneth R. Himes and Lisa Sowle Cahill, Modern Catholic Social Teaching: Commentaries and Interpretations (Washington DC: Georgetown University Press, 2005), xii, 563 pp.
INTRODUCTION

sought to inspire interaction with the human rights project as a social justice and moral commitment. However, those approaches have not sought to engage with the historical and international legal perspective of the human rights project. Against this backdrop this study seeks to fill the space between the disciplines of international law, human rights and its associated discourse with Catholicism, both institutionally, and as a political and legal engagement with the modernising state.

Chapter Outline

The period between the French Revolution and the mid-twentieth century was a period of significant upheaval for Catholic political thought and in its interpretation of its role in relationship to the growth of nationalism, human rights and international relations. Chapter 1 examines how the Church developed Catholic social and political thought through human rights ideas. To examine this question, Section 1.1 begins by examining how the Catholic Church developed a body of ethical reflection on contemporary issues called 'Catholic Social Thought'. Catholicism gradually responded to the emergence of rights-based language, which it initially rejected, and only later engaged in active participation in its development, providing propositions for foundational principles upon which human rights ideas might be based. Section 1.2 appraises in what manner the Catholic Church had available a long cosmopolitan tradition of reflection on the natural law, and this tradition in particular became a resource to a changing political landscape. Therefore, this chapter broadly sets out an assessment of the Catholic tradition of natural law, and the political factors during the French Revolution that shaped Catholic understanding of the nation state. Section 1.3 appraises the Catholic resolution of the tensions in rights language through the development of the philosophy of personalism, and a reassessment of democracy as a foundation of cosmopolitan political life. This chapter concludes in Section 1.4 by presenting where those ideas were reaffirmed in later papal declarations and

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encyclicals, which offered a point of reference for rights language in cosmopolitan Catholicism in the future.

Chapter 2 undertakes to provide a critical narrative of the development and direction of international law as it was characterised by Catholic preoccupations from the Medieval and Early Modern eras. Therefore, Section 2.1 surveys the theological and philosophical contribution to the structure of premodern international law by Augustine, Thomas Aquinas, Francisco de Vitoria and Robert Bellarmine. They assisted the Catholic Church at crucial moments in its history and left an enduring legacy, which could broadly be described as a foundation for a Catholic cosmopolitan approach to international law. Collectively, they provided opportunities for reflection on the meaning and purpose of sovereignty and a cosmopolitan international order. Their contribution might well be described as ‘hinge moments’ in shaping of a cosmopolitan Catholic approach to the development of international law. This process is highlighted and then in Section 2.2 is contrasted with the way Early Modern international law was constructed. The structure of international law that emerged during the eventful sixteenth and seventeenth centuries led to Catholic political and legal thought becoming a minor key in the development of a secularised public international law in the nineteenth century. This distinctively different approach to sovereignty and international order provides an opportunity to examine the peripheral place of religion, particularly Catholicism, in the structure of nineteenth century international law. This chapter concludes by observing the manner of the Catholic Church’s participation in the emergence of temporal and religious sovereignty, and enquires if the development and structure of international law is a construct of history, marked by its interaction with religion, and in the European context, with a cosmopolitan Catholicism.

By the end of the nineteenth century Catholicism had become a peripheral player in the international arena. This would change in the twentieth century as Catholicism would re-emerge as a formative participant in the creation of the Human Rights movement. To examine this question, Chapter 3 seeks to comprehend in what manner Catholicism began moving from the periphery to the centre of international law. The first half of the chapter traces the narrative and begins to distinguish how Catholicism began drawing upon its own understanding of the natural law and the formation of the state. The next segment of this chapter explores in what manner the Catholic Church would shape democratic constitutions and international law across Europe. The Catholic Church’s engagement with the construction of human rights became a
cosmopolitan vehicle to participation in the international legal system, which mapped out in a number of ways. The chapter first turns to the evolution of the Catholic Church as it began to prioritise the civil sphere, becoming more engaged as a non-state actor and developing a theoretical groundwork for a cosmopolitan Christian democracy which appeared in the post-World War II democratic movements. Secondly, Section 3.3 appraises the Catholic Church’s advancement by prioritising the soft power diplomacy of the Holy See, and looks to modern theoretical concepts to understand this process. This emphasis on soft power became a cosmopolitan way to counter its isolation from the international community, particularly during the period of the loss of the Papal States and the formation of the League of Nations. Thirdly, Section 3.4 proceed to assess in what manner the Catholic Church began to prioritise the role of the Holy See as an observer state at the United Nations. This reveals increasingly broader participation in the formation of future human rights treaties, with activism taken up by Catholics, after the establishment of the United Nations. This chapter concludes by ascertaining how this latter engagement provided the Catholic Church with theoretical underpinnings to further shape the direction of human rights, in its negotiation and engagement with a globalised world. It reveals how Catholic cosmopolitanism was understood as the political form of sovereignty.

The sixteenth-century jurist, Thomas More, developed the distinction between a Christian utopia and the political autonomy of the state through the formula of a rhetorical work of fiction (Utopia). Chapter 4 recognises religion’s role in contributing to cosmopolitan ethical principles to guide political power, without becoming a justification for a political theology of the state. Section 4.1 proceeds with More’s emphasis on a common humanism that brought accommodation between temporal and spiritual sovereignty. There is resemblance in More’s approach to the writing of Francisco de Vitoria, the fruition of which is reviewed through the contemporary thought of John Courtney Murray and Jacques Maritain. Section 4.2 ascertains in what manner the Second Vatican Council of the Catholic Church recognised that, not freedom alone, but the search for the truth is central to political democracy and an open public sphere. Catholic theorists recognise a *prisca theologia* or a semblance of the natural law, and thereby advance in what way the expression of the political form the state takes as a basis for a common cosmopolitan humanism. Section 4.3 details Maritain’s proposed model of Church and state, and delineates Maritain’s principle contribution, and cosmopolitan vision, of a theory of ‘secular democratic faith’, as a bridging of Catholicism with
liberal democracy and human rights. However, for the Catholic Church this conduit required a culture open to the idea of religion and built upon a common idea of human dignity and human rights. This chapter concludes by enquiring if a ‘secular democratic faith’ in democracy and human rights is possible today.

Human rights would become instrumental in trying to resolve the tensions between religion and the modern state. Chapter 5 commences with the Irish Constitution, which illustrates how Catholic political thought would evolve as a cosmopolitan civil society project. The use of rights-based language within this Constitution was part of the trend to both restrain a newly forming nation state, while at the same time acknowledging the limits of religion in such a new political polity. During the Cold War, the Christian democratic parties consolidated and expanded European political and economic co-operation, and Section 5.2 of the chapter looks at how those who shaped that era began drawing human rights into the confrontation between Eastern and Western Europe by emphasising religious freedom. In Latin America, human rights became a distinctively different project, and Section 5.3 examines in what manner human rights were used against state authority and part of a programme of liberation and democratisation. In each of these many contexts, a cosmopolitan Catholicism presented the value of participating in the human rights project with varying degrees of success.