Introduction

Church "capture" of the state, a phenomenon most usually associated with mediaeval Christian Europe and thought safely consigned to history, has proven to be alive and well. Having confidently established itself in the Middle East, it is currently surging through the African continent, destabilising societies from the Caucasus to the Urals and posing a clear and present danger to ostensibly secular regimes in a range of countries including Turkey, Pakistan, India, the Philippines, Indonesia and Egypt. The ISIS campaign – aspiring to lead a global *jihad* against non-Muslims – is one that pitches religion against states.[1] The obverse of the same phenomenon can be seen in the Rohingya genocide in Myanmar and the suppression of the Uighurs in China, both providing evidence, if that were needed, of the state's willingness and ability to crush religion.

It might be thought that matters would necessarily be wholly different as regards modern democratic nations, but that would be to ignore the risks associated with an absence of any natural synergy between religion and democracy. The former is predicated on exclusiveness, a particular set of mandatory beliefs differentiating it and setting its adherents apart from those of all other religious beliefs and those of none. The latter is as equally firmly rooted in inclusiveness, in fostering pluralism and diversity and in welcoming and respecting difference. The capacity for this in-built antithesis to play out in much the same way as above has been graphically demonstrated in the past decades of wars prosecuted by democratic and still largely Christian states against Islamic fundamentalists in Muslim countries. While this dynamic very largely concerns Islam, the repercussions – accelerated by the 2015–2017 migrant crisis – would seem to be awakening a new political awareness of religion in the traditionally Christian Western nations with unpredictable consequences. At present,

[1] Abu Bakr al-Baghdadi, ISIS leader from 2010 until his death in 2019, proclaimed his intention to establish a Caliphate in the Middle East to which Muslims were invited to migrate and from which ISIS would conquer Italy, Spain and then all of Europe.

the domestic and international responses of the latter indicate that the management of religiously based social division is set to become a priority for government in the twenty-first century.

The above provides a backdrop for *State Neutrality: The Sacred, the Secular and Equality Law*. This book explores how the state relates to religion and to religious and secular entities in contemporary Western democracies and considers how that relationship is affected by the cross-cutting provisions of equality law. It takes as a baseline the requirement, firmly established by the judiciary in North America and in Europe, that states should maintain a careful neutrality or even-handedness when relating to religion, its organisations and adherents. This is accompanied by the obligation embedded in international treaties and domestic legislation that states respect and apply the principles of equality and non-discrimination when dealing with such matters. To assess how these requirements of neutrality and equality affect the church–state relationship in practice, the experiences of six quite different states – the USA, Canada, England, France, Germany and Israel – are analysed, compared and evaluated. While each is a signatory state to much the same set of international human-rights treaties, conventions and protocols, they have all also, to varying degrees, been involved in US-led wars in Muslim countries, suffered domestic Islamic terrorism and been exposed to the challenges of the migrant crisis. Despite that shared framework, the experience of each state has been significantly different, producing contrasting outcomes and some interesting challenges for the future of democratic society.

This comparative legal analysis of the church–state relationship in six leading Western democracies is timely and appropriate given the contemporary context, in which Christianity and Islam are developing fundamentalist fringes, new religions or forms of belief are mutating and proliferating, where secularism has become a potent political force and where the application of equality law – subject to important exemptions favouring religion – is having an overall levelling effect. There is now a pressing need to consider how and why the church–state relationship works as it does. This requires an analysis of how the state accommodates diversity and gives effect to the equality imperative; the extent to which legislation addresses, explicitly or otherwise, matters of religion and belief; the relevance of multiculturalism and pluralism policies; and the pattern of related issues that then come before the courts. Policy outcomes, their veracity and shortcomings, will ultimately be revealed in the case law, which is why this book focuses on judicial and regulatory decisions to abstract and collate any insight they may offer regarding governing principles and related trends.

The principle that the state should adopt a neutral approach towards religion offers a tool for identifying and assessing the nature of the actual balance currently struck between sacred and secular matters within nations. By defining the principle – or at least establishing its basic benchmarks – and then applying it to examine national law and constitutional underpinnings, as contrasted with the provisions of

international conventions and protocols and illustrated by related case law, it is possible to disclose national characteristics of the church–state relationship, identify areas of jurisdictional commonality and difference, track trends in evolving judicial principles and draw conclusions as to the type of issues likely to generate future flashpoints. Having first outlined the developmental history of state neutrality, the book considers the judicial rulings that have now come to define the principle. Using this as a baseline, it compares and contrasts the *rationes decidendi* of judicial decisions in different jurisdictions, on a specific set of issues intrinsic to the church–state relationship.

State Neutrality: The Sacred, the Secular and Equality Law considers how the fundamental human right to freedom of religion is treated in six modern Western democracies with quite different religious and cultural traditions. It deals with the interplay between religious belief, the state, and the equality principle in a range of everyday secular activities, as experienced by those democratic societies, within the framework of domestic and international equality law. While internationally the state–religion relationship continues to be unstable and threatening – and this is taken into account – the primary question for this book is the extent to which that relationship, in a domestic context, is currently governed by the principle that the state should be neutral with regard to religion. The approach adopted is to apply a template to profile each jurisdiction in accordance with the same specification of sacred and secular characteristics so as to facilitate the collation of comparable data. The "sacred" section examines the law and practice relating to the right to freedom of religion and its manifestation giving particular attention to the ways in which religion is protected from state intervention. The "secular" considers the extent of state authority to intervene in religious affairs, to support or constrain religion, to regulate religious organisations and to balance such interests against those of secularism. As in practice both strands intersect in matters such as abortion and gay marriage, where equality legislation most often frames the issues and determines the outcome, the template centres on a checklist of everyday settings – education, employment, health and such – and analyses the related case law.

This book considers the similarities and differences in the relationship between church and state, on a range of contemporary matters, in six countries. These – the Part II jurisdictions – are chosen on the basis of the contrasts they offer: the USA and Canada, built on the contribution of immigrants but with sizeable indigenous populations, have distinctively different constitutional interpretations of that relationship; England and Wales and its five centuries of an "established Church"; France, where *laïcité* resolutely dictates the place of religion; Germany, which struggles to overcome its Nazi past and re-integrate its eastern communist citizens; and the outlier, Israel, "a Jewish State for a Jewish people", established and maintained to provide distinctly non-neutral protection for a specific religion and one where Judaism and the state are, seemingly, moving ever closer to a theocratic relationship. All six jurisdictions are modern democracies and all are signatory

nations to international treaties that require states to respect the rights to freedom of religion and to equality and non-discrimination.

Part I of the book, in three chapters, explores the background, beginning with the developmental history and differing interpretations of the principle of state neutrality. It then explains how this principle was initially articulated by various academics and applied by the courts. It examines what constitutes "religion", "beliefs" and "worship", the freedom of religion, its manifestation, and the respective roles of church and state in determining these matters. It introduces the concept of civil society, explains the importance of a more assertive secularism and considers the relative significance of policies focused on multiculturalism or pluralism and those that further the current general drift towards a "nation State" ideology. It relates this to the growing tensions, between the citizens of developed Western societies and incoming religious–ethnic groups, that constitute the ongoing migrant crisis. It explains the intent and effect of national equality and non-discrimination legislation on the church–state relationship. It then details the supranational framework of treaties, conventions, protocols and such relating to religion and equality and identifies significant principles with reference to the burgeoning body of European case law.

Part II, the core of the book, is in six chapters, each of four parts, and examines the church–state relationship in the above-mentioned countries by applying the template to produce comparable case-law data. Each chapter begins by providing an introductory background history of the national characteristics of that relationship and an overview of evolving government policy. Secondly, it briefly outlines the relevant legal framework, international and domestic. This is followed by an assessment of the church–state relationship as it interfaces with the fundamental freedoms of religion, association/assembly and expression, giving particular attention to the nature and extent of contemporary state intervention in religious matters – to protect, support or to regulate – and its capacity to determine religion, beliefs and places and modes of worship, to moderate public manifestations of religious belief and so forth. The bulk of each chapter then deals with how religion–equality intersect in secular matters – education, health services, employment and such – governed by statutory law. It establishes where, when and how the courts in each jurisdiction have addressed the same or similar issues on the church–state interface and considers the extent to which they have, or have not, applied similar rulings in accordance with the requirements of equality legislation. It identifies and contrasts such rules or principles as the judiciary have in fact relied upon and takes into account the relevance of cultural context and the fragmentation of social relationships perpetuated by the pernicious "culture wars" to explain why there are jurisdictional differences in the interpretation and application of the state-neutrality principle.

Part III, in two chapters, draws from the findings in Part II to consider what is revealed by the established facts, trends, anomalies and the like, and to analyse their

significance. It reflects on areas of jurisdictional commonality and difference. In the light of the findings, it reassesses the principle of state neutrality: its role, weighting and its viability; it considers the principle's potential to contribute to consolidating a pluralistic and stable civil society. It examines the proposition that the principle must be interpreted with sensitivity to cultural context and that its effectiveness will be determined by the extent to which it takes fully into account, and balances, the interests of the sacred and the secular, which, in turn, will mean making hard policy decisions in relation to the levelling effect of the equality principle.

The Conclusion closes the book by introducing a sense of perspective. It suggests that the principle of state neutrality, and with it justification for this book, rests primarily on the importance of learning from the destruction caused by reliance on the alternative.

PART I

Background

1

State Neutrality: Background History, Concepts, Definitions and Principle

INTRODUCTION

This chapter begins with an overview of the church–state relationship across time and nations, drawing attention to countries and circumstances in which the principle of state neutrality cannot be said to apply. It then explores the origins of the principle, traces its developmental history in relation to religion in various countries, explains key concepts and identifies some different academic interpretations. It discusses the public–private dimensions to religious belief and their balancing within contemporary democratic society. It gives an overview of the law relating to religious freedom.

In so doing, the chapter considers the role of established institutional religions – defined by their reliance upon indices such as belief in a supreme being, worship, tenets and doctrines – and distinguishes between organised religion and religious belief with reference to the range of new religions, philosophies and moral or ethical belief systems and to public–private interests. This leads into a discussion as to what now constitutes a legal definition of "religion" and "belief". It draws attention to the counterbalance provided by secularism as defined by atheism, agnosticism, impartiality of state institutions and considers its political significance. It introduces key themes that will be tracked through Parts II and III. Particular attention is therefore given to the growing importance of secularism and to the impact of human rights, equality and non-discrimination legislation. The chapter closes with a review of the broader public policy context, its importance in shaping how the church–state intersect, in determining what constitutes a "democratic society" and the threats presented by the current religiously driven acts of international and domestic terrorism.

THE CHURCH–STATE RELATIONSHIP

"Church" and "state" – once among the most concrete of concepts – would both seem to have lost their former coherence, parameters and currency. Throughout

their shared history, state and religion – whether Christian, Muslim or any other institutional faith – have been jointly engaged in the same complementary purposes of, respectively, protecting lives in this world in a manner conducive to saving their souls – *salus animarum suprema lex* – in the next.[1] To the state fell the responsibility of ensuring the safety, well-being, civility and orderliness of its citizens while the church was left to regulate beliefs, morality and worship. Their respective spheres of influence overlapped in the religious requirement for such citizens to perform "good works" for their "souls to attain everlasting life", opportunities for which the state was always prepared to make provision; dual service to church and state was duly performed by the many who volunteered for duties ranging from enlistment in the "religious crusades" to care duties in the almshouses. However, due to factors that include globalisation, neither can any longer guarantee the permanence and exclusivity that membership once promised, nor can non-members be certain what it is that either is now offering. Such fluidity has implications for their relationship that could not have been foreseen a few generations ago.

Historical Context: The Sacred and the Secular

Are the sacred and the secular mutually exclusive? In most modern democratic societies, there is a dividing line, usually clear and respected, allowing both to function in tandem, private piety being left at the door of secular processes and institutions and the state refraining from overtly aligning itself with religion in general or any one in particular. However, for the sincerely religious, certainly for adherents of the more traditional religions with their prescriptive doctrines, the sacred–secular distinction is a false dichotomy: they believe they are required to manifest and give effect to their beliefs, through everyday tasks and settings, in public as much as in private; arguably, a society that considers itself democratic must reasonably accommodate the public manifestation of such beliefs. Equally, in non-democratic societies and to a varying extent in those where democracy is not fully embedded, the state may consider it has the right or duty to represent the religion of the majority of its citizens if this has significantly contributed to shaping their collective cultural identity. Moreover, although the modern democratic society is becoming more secular, the growing raft of international human rights, uniformly binding on signatory nations, require a state to facilitate the right to freedom of religion and to respect and protect the culture and beliefs of all its citizens. As those societies now become more religiously and culturally pluralistic, so the dividing line between the sacred and the secular is becoming increasingly fudged.

[1] See further O. Chadwick, *The Secularisation of the European Mind in the 19th Century*, Canto Original Series, Cambridge University Press, Cambridge, 1990.

The State

Society in the Part II jurisdictions was founded on the mutuality of the throne and altar, the laws of the former enforcing the moral imperatives of the latter and adherents being enjoined to "render unto Caesar the things that are Caesar's, and unto God the things that are God's". This mutuality was explicitly reinforced by war (e.g. the Thirty Years War 1618–1648 in Europe), by laws to regulate offences (e.g. blasphemy, apostasy and heresy) and by processes (e.g. the Spanish Inquisition). The offence of blasphemy remains on the statute books in fifty-nine countries[2] but is now mostly significant in an Islamic context where expressions of irreverence towards Muhammad can have serious consequences and continues to cause the deaths of many in countries such as Pakistan.

THEOCRACY. History reveals that the sacred and the secular have always had an uneasy relationship – what is sacred for some is not so for others – which perhaps goes some way towards explaining why a state might align itself with one specific religion, providing a means of ensuring allegiance and facilitating the solidarity of its citizens. Such theocratic states have a long history. From the records of Mayan and Egyptian dynasties, with their worship of rulers who were held to be deities or the incarnation of deities, to the conduct of rulers in contemporary Islamic states, it is demonstrably clear that some cultures find it appropriate that their affairs be governed by an authoritative fusion of church and state. Currently Iran is perhaps the leading contender for recognition as a theocratic nation state.

Theocratic rule, or something like it, provided the environment in which the relationship between church and state was first formulated in Europe, where it established the presumptive dominance of Christianity, its institutions and moral imperatives, a structure for church–state relationships and a model for the social role of religion. Temporal and spiritual authority in Europe were conjoined, if not fused, under the Roman Empire and throughout the Middle Ages. Not until the end of the eighteenth century did they begin to separate.

Both civil law and the common law were grounded on religious precepts: the moral imperatives drawn from natural law as expounded by Thomas Aquinas and others, which builds on the categories of conduct that are to be universally regarded as "right" or "wrong", and immutable across cultures and time, because they are divinely inspired. The resulting body of secular law with its natural law characteristics, but shorn of any theocratic underpinnings, was duly transferred by colonialism to the Americas and elsewhere.

While the Christian theocratic states of feudal Europe have long since been consigned to history, their Muslim counterparts in the Middle East and elsewhere have proved more resilient and many – but not all – continue as they always have

[2] See 2011 Pew Research Centre report, www.pewforum.org/2011/08/09/rising-restrictions-on-religion6/

done to blend religious belief, governance and law. In such countries the organisations and citizens whose religious beliefs conform to those of the governing majority will be preferenced relative to all others.

As society in the Part II jurisdictions became less theocratic, with boundaries emerging between the spheres of interest of church and state, so the shared ground for their continued mutual support became less based on matters of religious doctrine. While this had been the case in the USA from the time of the Declaration of Independence, the loosening of the church–state relationship also became a feature of governance arrangements in most other jurisdictions, especially in France, where the ideals of the republican revolution erased the ancien régime and relegated religion to the status of just another non-government entity; the exception was England, where the "established" church retained its constitutional links with the Crown and government. Although scaled back, what did not change in most jurisdictions was the permeating social role of Christianity and its institutions – its presence in terms of buildings, music, literature, emblems and its customs and vernacular – which maintained a cultural overlay overshadowing that of all other religious communities.

STATE SOVEREIGNTY. Over the centuries, this concept has morphed from a reference to ruler control over people and territory within borders respected by other countries to indicating the sovereignty of the people within a state: from the absolute right of a sovereign ruler – "*l'etat, c'est moi*" – to the elective rights of citizens, representing a shift in focus away from the closed, exclusive powers of a ruler to the more open, sharing, will of the people. Parliamentary democracy in the Part II jurisdictions has gradually facilitated the range of cross-border arrangements and international commitments that would previously have compromised state sovereignty. The "state" in the present context of supranational treaties, conventions, courts and the broad forces of globalisation can no longer be the sovereign entity as initially conceived.

Religion

As Dillon J once confidently declared, the "two essential attributes of religion are faith and worship: faith in a god and worship of that god".[3] Traditionally these components have been held to comprise the essence of a religion, serving to affirm the beliefs that commit and bind the members and to differentiate a religion from all others. In the words of Lord Halsbury, "Speaking generally, one would say that the identity of a religious community described as a Church must consist in the unity of its doctrines".[4] Along with the associated values and rules for conducting everyday

[3] *Re South Place Ethical Society, Barralet* v. *Attorney General*, [1980] 1 WLR 1565.
[4] *Free Church of Scotland* v. *Overtoun*, [1904] AC 515, HL (Sc), per Lord Halsbury LC, pp. 612–613.