

Law, Morality and Religion in the courts in England and Wales in the twenty-first century

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Introduction

The relationship between law and society is inherently influenced by the nature of the society in which the law operates – it is a product of that society, whether we perceive law from a natural law, legal positivism or realist perspective. It is important to consider the attitude of the legal system to the dominant or prevailing cultural environment. In this context, any changes in this environmental background, such as changing demographics, can cause tensions between law and society. One example, of the many possible, is the changing attitude of the courts in England and Wales to religion.

The law has a neutral view of religious belief, the President of the Family Division of the High Court of England and Wales, has said, in a keynote address to the first annual conference of the Law Society's family law section, in 2014. On the theme "the sacred and the secular", the Right Honourable Sir James Munby said that the courts and society as a whole face "enormous challenges" in today's largely secular and religiously pluralistic society. In this context, Lord Justice Munby stressed the secular nature of the judges' job.

"We live in a society, which on many of the medical, social and religious topics that the courts recently have to grapple with, no longer speaks with one voice," he said. "These are topics on which men and women of different faiths or no faith at all hold starkly different views. All of these views are entitled to the greatest respect, but it is not for a judge to choose between them," he said.

Although historically the country has an established Christian church, Munby insisted judges sit as "secular judges serving a multicultural community of many faiths sworn to do justice to all manner of people".

"We live in this country in a democratic and pluralist society in a secular state, not a theocracy," he said, in which judges have long since "abandoned their pretensions to be the guardians of public morality".

This view of the relationship of law and religion is one which is open to challenge, at least in part. Indeed, it comes close to conflating the linked but distinct concepts of individual freedom of religion, separation of church and state, and the underlying Christian basis of much of the law in the United Kingdom and many other countries. This grows out of the undoubted rise of secularism, in a society which has now only nominally a Christian majority.

This chapter will consider the role of religion in law. It commences with a brief comment on the rise of secularism and the absence of an underlining Grundnorm.

The rise of secularism

One of the aspects of twenty-first century culture which is most remarkable is the intellectual dominance of secularism (Cox 2012a). Society is undergoing – in the West at least – a rapid and seemingly irreversible secularisation. This evolution has not been without its effects on the constitution of states – despite the oft-quoted principle of the separation of church and state (Smith 2008). A state is not without some elements of an ethos, or an underlying philosophical or moral identity (Cox 2012b). But a widespread disillusionment with liberal democratic models of government, with capitalism, and with materialism (Taylor-Gooby 1991), has left the state, in many societies, unable to provide the degree of conceptual unity of focus which it might be expected to do. This has been exasperated by declining homogeneity and increased political, social, cultural and economic polarisation and marginalisation. Increased diversity in a pluralist society is said to bring strength (Bohman 2006), but it maybe cannot do so if it means there is little or no common identity to the state. Only when diversity becomes the underlying principle of the state – as arguably it has in several countries including the United Kingdom and the United States of America – can it strengthen it. However, there is already something that provides legal and societal cohesion – the law, and the law, in our Western democratic liberal society, has undoubted Christian influences and themes, though it may be true that society itself no longer speaks with one voice, if indeed it ever did. That is not to say that the courts, as the interpreters and developers of the law, should not do so.

Something must maintain state cohesion, even if this is merely brute force. Some states are more homogenous than others, and the unifying elements vary – in the case of the ancient Austrian empire it was the rule of the Hapsburgs, a dynasty, rather than social, religious or racial unity. But brute force is inadequate in the longer term, and it will scarcely suffice today as even a temporary expedient (see, for example, Al Namlah 1992). So we must search for some other element of conceptual unity. This could focus on a person or institution, or an abstract philosophical or religious ideology. Having a common law based, at least in part, on Christian principles, does not make the state a theocracy (there has never been a theocracy in the British Isles), but it does us no good to deny that the law does in fact have strong Christian principles behind it – the matrimonial and succession laws were developed in ecclesiastical, not secular, courts, until the mid-nineteenth century, and their underlying principles remain largely unchanged. The rise of institutional pluralism and systematic moral

relativism is a pernicious development that has, it is suggested, sapped much of the vitality of European society in the past century.

Christianity as a basis of the law in the West

We saw some of the thinking underlying this admittedly bold claim reflected in the Regensburg lecture delivered 12 September 2006 by Pope Benedict XVI at the University of Regensburg in Germany. The lecture, entitled “Faith, Reason and the University — Memories and Reflections” [German: Glaube, Vernunft und Universität — Erinnerungen und Reflexionen] (http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html), is considered to be among the most important papal statements on world affairs since John Paul II's 1995 address to the United Nations, and sparked international reactions and controversy. Key to this was Benedict's assertion that conversations between Christianity and Islam could no longer avoid substantial, more difficult questions: most notably, how Christianity and Islam understand God's nature. At Regensburg the Pope reminded us that it matters whether God is essentially *Logos* (Divine Reason) or *Voluntas* (Pure Will). In his thesis, the first understanding facilitates civilizational development, true freedom, and a complete understanding of reason. The second sows the seeds of decline, oppression, and unreason. Whether this is wholly or even partially correct is not for discussion here, but it does reflect the extent to which popular and intellectual discourse have diverged from traditional channels.

But perhaps above all, Regensburg asked the West to look itself in the mirror and consider whether some of its inner demons reflected the fact that it, like the Islamic world, was undergoing an inner crisis: one which was reducing Christian faith to subjective opinion, natural reason to the merely measurable, and love to sentimental humanitarianism. The West, Benedict suggested, was in the process of a closing of its own mind. It is not surprising that such arguments attracted an emotional response, but that is not to suggest that they do not have, at the very least, an element of truth in them.

In Benedict's view, it's precisely the Christian understanding of God as *Logos* that opens our minds to their full potential. This theme was developed by Benedict two years after Regensburg, in a lecture that largely escaped popular notice. This time in Paris, the Pope argued that *quaerere Deum* (the search for God) — and not just any god, but the God who incarnates Reason itself — was *the* indispensable element that allowed European culture to attain its heights of learning

(http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/september/documents/hf_ben-xvi_spe_20080912_parigi-cultura_en.html).

However, attempts to acknowledge the Christian heritage of Europe have tended to fail. Discussion over the draft texts of the European Constitution and later the Treaty of Lisbon have included proposals to mention Christianity and/or God in the preamble of the text. This call has been supported by Christian religious leaders, and some political leaders. But explicit inclusion of a link to religion faced opposition from secularists and the final Constitution referred to Europe's "Religious and Humanist inheritance". A second attempt to include Christianity in the treaty was undertaken in 2007 with the drafting of the Treaty of Lisbon, but was equally unsuccessful.

Some states have greater claim than do others to possessing an underlying moral or philosophical principle. This is easier to identify in smaller, especially non-pluralist societies, or where a single religion dominates – as for instance in some of the smaller Islamic countries where there is a high degree of religious, tribal, racial and cultural homogeneity. However the common modern adherence to the concept of pluralism renders such ideals not merely unattainable, but apparently undesirable, for Western liberal democracies. It is perhaps easier to achieve where the focus is on an individual or institution than where it is on an ideology. The aphorism that "Christianity is part of the common law of England" is mere rhetoric; at least since the decision of the House of Lords in *Bowman v Secular Society Limited* (1917) AC 406 it has been impossible to contend that it is law, in England and Wales today, - subject to the qualification that the Church of England is established in England. But that does not mean that the law itself is amoral, or not based on Christian principles, and that conformity with those principles is not possible or desirable today, in an increasingly secularised and multicultural society.

We may question whether there need be a state ethos or culture at all, or whether there is such a thing. Yet, when we consider the origins of and justification for the state it will be seen that a philosophical element is necessary, even if it is mere utilitarianism – the state exists because it is necessary, and the people and state exist in a condition of mutual dependency. Thus there is a need for an underlying ideology of some form, however broad. The laws of England were once seen to embody – however imperfectly – such an underlying principle, but we are told that this is no longer so.

If the constitution is seen as the rules and procedures through which a state is governed, to understand the constitution it is first necessary to consider the nature of the state. The constitution may be seen to be the result of a formal process of development or adoption, or it may be as a result of evolutionary or revolutionary development (and in many cases a combination of the three). However, although the form and content of the constitution will vary considerably, due to the internal and external influences which have shaped it, including the specific history, politics, culture, geography and so on of the country concerned, the nature of the state itself is perhaps seen more readily as

being generic. This is in part because it is a simpler or less multifaceted concept, but also because it is an artificial product of the evolution of international law – though a concept which may have much to commend it in principle. Since the development of the modern nation-state the concept of the state has dominated international law, but it has always been present, in one form or another, since the development of the first city-states, tribal federations and complex social alliances of this nature (Finley 1982, Keith 1984).

The modern state evolved in Europe in the wake of the fall of the classical world and under the impetus of the crusades against what Islamic aggression in Europe and to recover the Holy Land in Palestine (Weiss and Lisa Mahoney 2004). It gained encouragement from the growth of trade and commerce, and from the rediscovery of Roman laws and classical learning, in the years after the collapse of the Eastern Empire based on Constantinople (Stewart 1947). Following the advent of the modern nation-state political and legal theory tended to exalt the state as the pinnacle of authority – though this was disputed both by the Church (Cardinale 1976 and Ullmann 1965) and, at times, by mesne feudal lords, burghers and other communities.

During what might be terms the classical period of statehood – from the Treaty of Westphalia 1648 to the Treaty of Versailles 1919 – the study of politics tended to centre on the state. But for much of the twentieth century it had focused on political behaviour and policy-making, with governmental decisions explained as a response to societal forces. In part this has been due to a growth in awareness of the limitations of studies based on political events which might themselves be the product of underlying stresses and dynamics. It also suited the increased emphasis in Western debate upon countries outside Europe and North America and those countries within their direct and indirect spheres of influence.

But the state is not dead. In recent decades state-centred theorists have sought to bring the state back into the forefront of research, arguing that it is more autonomous than society-centred theorists (such as neo-liberals) (Goldfinch 2003) have suggested. They have argued that the state is indeed an independent player, with interests of its own, independent of those of the leadership of the state. The recent growth of a ‘new institutionalism’ has placed the state at the very centre of political science, ironically at a time when the state has arguable become less involved in society (Kelsey 1993), at least in many countries of the industrialised world, due to policies of economic liberalisation.

The traditional understanding of public law (and more especially the more narrowly defined constitutional law) emphasised particular ideas of power that are associated with territory, sovereignty, and law, all concept about which there is often uncertainty – though some legal systems tend to imply a form of permanence, even akin to Platonic forms (Plato 2000, Dancy 2004). The ideas of state, and state power expressed through law, however remain central to understanding government (Morison 2003).

The constitution is more than a mere document – and more than the rule of law (though both of these constitute part of the constitution). The heart of the constitution is a warm, beating organ, not a dry, ossified or macerated relic. This beating heart sets the tone for the country as a whole, and is influenced, in its turn, by the society of that country. It not only enhances the identity, but helps to give legitimacy to what might otherwise be little more than a mere set of amoral and ahistorical rules. It is manifested in the daily operation of the courts.

Does this mean that there must inherently be core values in a state, to ensure structural integrity and cohesion? Perhaps it does. Is it appropriate for judges to deny these core values, if indeed they exist? Arguably not, though they may be personally uncomfortable with following a moral code that they do not adhere to as an individual, and there may indeed be no sanctions for so acting.

Legitimacy and the constitutional order

Recognising the Christian basis of the law in Western Europe is important, as it helps to give legitimacy to the law. This may seem perverse if we emphasise that society in the West is diverse and multicultural, with only a minority adhering to Christianity. However, statistics show that a majority are still Christian – over 70% in 2012 (“Discrimination in the EU in 2012”), (although religious belief was weaker in the United Kingdom than in a number of Western European countries). This underlying religious belief means that whatever the relationship between church and state may be in an individual country, it is not necessarily inappropriate to acknowledge – and even celebrate – the Christian origins of much of our law. Nor has this necessarily offended non-Christians of faith – Jewish and Muslim leaders have often commented that they preferred a state to have a religious element to its laws, than be driven solely by amoral or purely humanist principles. This faith-based law provides an element of legitimacy that a purely positivist law, based on humanistic principles – or none at all – cannot offer.

Legitimacy is a more supple and inclusive idea than sovereignty, or of continuity (Barker 1990, p. 4; For a general discussion of aspects of legitimacy in relation to the Crown, see Brookfield 1972 and Brookfield 1999). Legitimacy offers reasons why a given state deserves the allegiance of its members. Max Weber identifies three bases for this authority – traditions and customs; legal-rational procedures (such as voting); and individual charisma (Collins 1986). Some combination of these can be found in most political systems.

With the dominance of democratic concepts of government, it might be thought that if the people believe that an institution is appropriate, then it is legitimate (1997). But this scheme leaves out substantive questions about the justice of the state and the protection it offers the individuals who belong to it (see Al Namlah 1992). It is generally more usual to maintain that a state’s

legitimacy depends upon its upholding certain human rights (Rawls 1993, Honderich 1995, p. 477, and Swanson 1995).

There are three currently prevailing alternative definitions of legitimacy. The first is that it involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society (Lipset 1960, p. 77). Second, in the tradition of Weber, legitimacy has been defined as “the degree to which institutions are valued for themselves and considered right and proper” (Lipset 1964, p. 386). Third, political legitimacy may be defined as the degree of public perception that a regime is morally proper for a society (Merelman 1966).

Whichever definition is preferred, all are based on belief or opinion, unlike the older traditional definitions which revolved around the element of law or right (in an extreme form, the divine right of kings; Figgis 1914). These traditional concepts of legitimacy – and the newer ones – were built upon foundations external to and independent of the mere assertion or opinion of the claimant (Schaar 1984, p. 108 and Waskan 1998). These normative or legal definitions included laws of inheritance, and laws of logic. Sources for these included immemorial custom, divine law, the law of nature, or a constitution (Arendt 1958, p. 83). It is not merely public opinion.

Legitimacy is sought through the advancing and acceptance of a political formula, a metaphysical or ideological formula that justifies the existing exercise or proposed possession of power by rulers as the logical and necessary consequence of the beliefs of the people over whom the power is exercised (Tarifa 1997). Just what this formula is depends upon the history and composition of a country.

In modern democratic societies, popular elections confer legitimacy upon governments. But legitimacy can also be independent of the mere assertion or opinion of the claimant. This has been particularly important in late twentieth century discussion of indigenous rights (Lauterpacht 1997). The emphasis in modern rights law on individual rights has, perhaps perversely, not worked to the advantage of Christianity, as the individual rights of freedom of religious belief and expression have been interpreted by the courts, both in the United Kingdom, and in Europe, in a very individualistic manner.

The challenge to legitimacy in a post-Christian, pluralist and moral relativist society

The extent to which contemporary democratic political systems are legitimate depends in large measure upon the ways in which the key issues which have historically divided the society have been resolved. Not only can regimes gain legitimacy, but they can lose it also (Brookfield 1985, p. 5). The threat to Western society from the prevailing emphasis on diversity, relativism

and individual right trumping collective rights and responsibilities, should not be underestimated.

If a regime is both legitimate and effective (in the sense of achieving constant economic growth), it will be a stable political system. From a short-range point of view, a highly effective but illegitimate system is more unstable than regimes which are relatively low in effectiveness, and high in legitimacy (the principle of popular sovereignty, hitherto vague, has acquired sufficient determinacy to serve, in a limited range of circumstances, as a basis for denial of legal recognition to putative governments; Roth 1996). Prolonged effectiveness can give legitimacy (Lipset 1984, p. 92). Yet legitimacy cannot be determined solely by majoritarian principles alone, though democratic states tend to emphasise this aspect of their authority (Passerin d'Entrèves 1967, p. 141).

In normal times it may be hard to distinguish feelings about legitimacy from routine acquiescence. But it has been often said that legitimate authority is declining in the modern state, and all modern states are well advanced along a path towards a crisis of legitimacy (Tarifa 1997). Obedience looks more like a matter of lingering habit, or expediency, or necessity, but no longer a matter of reason and principle, and of deepest sentiment and conviction (Schaar 1984, pp. 104-106).

In the long term, if the established order does not sufficiently fulfil the aspirations of the population, the legitimacy of that order may in turn come into question (Or indeed may never have been accorded. See, for example, Jackson 1991, p. 19, Wilson 1997 and Booth 1998), and itself be in danger of overthrow (Brookfield 1985, p. 5).

Crises of legitimacy occur during a transition to a new social structure, if the status of major established institutions is threatened during the period of structural change, and all the major groups in the society do not have access to the political system in the transitional period, or at least as soon as they develop political demands (Lipset 1984, pp. 88-90). These transitional periods occur when for example decolonisation takes place without a nationalist struggle, and where interstate conflict is absent – in other words, when a colonial power freely confers independence upon a colony (Collins 1986). They can also occur when the hitherto prevailing societal and legal norms are discarded, deliberately or through ignorance or inaction.

A serious challenge to continued legitimacy comes from the changing popular perceptions of government. A regime which was once legitimate, in that the popular perception was that it was the proper government for that country, can potentially become illegitimate. This might be because it ceases to follow the principles of the rule of law, or otherwise departs from the accepted conduct (thus the German government after 1933, while still adhering to legal form, departed from accepted standards of behaviour and so lost its legitimacy). Or, it might be because doubts arise over the suitability or appropriateness of

the particular form of government. This could perhaps occur in Australia, were a second republican referendum to fail to achieve the necessary overall majority, but enjoy a popular majority nonetheless, or indeed in Scotland, were a second independence referendum to again fail to secure a majority in favour of independence, but nevertheless a large proportion of the total vote. In these later cases, however, dissatisfaction should lead to legal change, not violent change. Only if justifiable attempts at change are unjustly blocked would more extreme measures be justified (Strickland 1994, p. 56).

Munby observed that:

These are topics on which men and women of different faiths or no faith at all hold starkly different views. All of these views are entitled to the greatest respect, but it is not for a judge to choose between them.

This is true, but where choice must be made, it is better for it to be based, consistent with the principle of *stare decisis* upon which the common law is built, upon a line of cases imbued with a Christian consciousness and ethos, than not. Consistency in the law is important, and where this consistency is based on a coherent approach, a systematic and moral code or principle, then this must logically be preferable to an entirely amoral or even immoral approach. Men and women are not to be reduced to the status of mere machines; they are living spiritual beings, entitled to be treated as individuals and as part of a long-flowing river of community life. In the West this underling ethos is Christianity; elsewhere it has other complexions.

Legal positivism and natural law

The basis of law matters because, even though we may argue over the different conceptual models, any system requires a conceptual underpinning. Not all of these philosophical models, however, are equally amenable to the recognition of a Christian – or religious – basis to the law.

In the natural law tradition, especially as understood in the seventeenth century, the law was the true sovereign. With the Reformation a fuller theory of sovereignty became possible, because of the vast increase in the powers and activity of the legislature. Later, and especially after the Enlightenment, judges, as professors of the law, claimed for it supreme authority. Had this been admitted they would have been the ultimate authority in the state (Figgis 1914, p. 230), as perhaps they are in the United States, where the Supreme Court is the final arbiter of the law. But in such a model the recognition of an underlying ethos to the law is conceivable, if not mandatory.

Legal positivism (particularly as described by Austin (Austin 1995 and 1873)) asserts the dominance of the sovereign authority – the state; from Holmes' American vantage point, the decisions of the courts were the final

source of the law (Holmes 1963). For the natural law adherent the law always was pre-eminent; basic human goods, such as human life, are self-evident and intrinsically worthwhile (Finnis 1980).

Hart's *The Concept of Law* (1961) contained a critique of John Austin's (Austin 1959) theory that law is the command of the sovereign backed by the threat of punishment. He also drew a distinction between primary and secondary legal rules, where a primary rule governs conduct and a secondary rule allows of the creation, alteration, or extinction of primary rules. A distinction was also made between the internal and external points of view of law and rules, close to (and influenced by) Max Weber's distinction between the sociological and the legal perspectives of law (Weber 1994). He also criticised the idea of the rule of recognition, a social rule that differentiated between those norms that have the authority of law and those that do not. Hart viewed the concept of rule of recognition as an evolution from Kelsen's *Grundnorm* (Kelsen 1945).

Hart rejected two distinctive features of Kelsen's positivism: the idea that law necessarily requires sanctions; and the neo-Kantian idea that a normative social phenomenon could not be explained purely in terms of social facts.

Raz (Raz 1970) has been important in continuing Hart's arguments of legal positivism since the latter's death. Raz's most recent work has dealt less with legal theory proper and more with political philosophy and practical reasoning. In political philosophy Raz is a proponent of a Perfectionist Liberalism.

Dworkin disagreed with Hart and Raz's legal positivism. He sets forth the fullest statement of his critique in his book *Law's Empire* (1986). Dworkin's theory is what has been described as "interpretive". According to this theory, the law is whatever follows from a constructive interpretation of the institutional history of the legal system. In order to discover and apply these principles, courts interpret the legal information that is available to them, in the form of legislation and judgements. They develop an interpretation which best explains – to the best of the Court's opinion – and justifies past legal practice.

Out of the idea that law is "interpretive", Dworkin argues that in every situation where people's legal rights are controversial, the best interpretation involves the right answer thesis. Dworkin opposes the notion that judges have such discretion in difficult cases. Dworkin's model of legal principles is also connected with Hart's notion of the Rule of Recognition. Dworkin rejects Hart's conception of a master rule in every legal system that identifies valid laws, on the basis that this would entail that the process of identifying law must be uncontroversial, whereas (Dworkin argues) people have legal rights even in cases where the correct legal outcome is open to reasonable dispute.

While Dworkin moves away from positivism's separation of law and morality, his concept suggests that the two are related in an epistemic rather than ontological sense as posited by traditional natural law.

To the positivist, legal validity has no essential connection with morality or justice (Fuller 1964), and positivist law is changeable law – it is neither immutable nor immanent. Similarly in the legal realism school, popular in the United States of America and Scandinavia, all law is made by mankind and is therefore inherently flawed. Legal realism emphasises the indeterminacy of law, and legal instrumentalism (Ross 1958). In these models, the existence of a moral or religious underpinning of the law is not essential, and may indeed be unhelpful. This does not mean, however, that there is in fact no such ethos or Grundnorm.

Legal interpretivism, which has been suggested as a *via media* between natural law and legal positivism, argues that law is not a set of given data. Instead, it is the construct of the lawyer. There is therefore no separation between law and morality, although there are distinctions between the two, as law may be moral, immoral or amoral. Law is not immanent in nature and nor do principles of law exist outside the legal system itself (Dworkin 1986). In this model of the law there is no room for a natural law.

Fuller's *The Morality of the Law* (1964) sees the inner morality of law as a "model of law as a body of general, clear, stable, and proscriptive rules, capable of obedience, and faithfully applied by judges and other public officers" (1964, p. 61).

Whichever view of law is to be preferred – and certain approaches find greater favour in some states than in others – we can see how this can have a practical application when we consider the political and legal discourse that preceded the civil wars in seventeenth century England, and indeed the period up until the so-called Glorious Revolution in 1688. This latter event was the deposition of a king whose religious and political policies were anathema to the political elite (and to many, if not the majority, of his subjects), and the victory of parliamentary government – ostensibly in the name of the ancient laws and liberties of the land.

Each of these philosophical models of legal systems are likely to contain an element of truth. Each allows, to some degree, the recognition, or the necessity, of a system of underlying moral or religious coherence. Pluralism does not necessarily exclude it. There was never a time when, to paraphrase Lord Justice Munby, "on many of the medical, social and religious topics that the courts recently have to grapple with, [we speak] with one voice." The role of the courts, and of individual judges, was not to identify individual views, and form an opinion of the majority or universally accepted position. It was, rather, to identify the true position of the common law, in a manner that was without influence from any personal favour or belief.

That is not to say that the common law is, or was, uninfluenced by changes in societal attitudes. But it cannot be unduly influenced by what may be short-term social attitudes, and not sufficiently alert to the long heritage of the law, that has

changed and evolved over a thousand years. Whether a church is established or not is immaterial; whether the law continues to recognise Christianity – or another religion – as one of the key elements in its structure and approach, is the material question. The fundamental change inherent in proceeding from a positive to a negative answer to the question is not something that can occur overnight – except perhaps in the case of revolutions – nor can it be achieved by the actions or individuals, however exalted their status in the legal system.

Conclusion

The relationship of church and state is a matter which touches the very core of society in Christian, post- and semi-Christian countries. It is a relationship which illuminates and helps define the nature of a country, even (and perhaps especially) one which may be categorised as containing a pluralist society. There is an important contemporary debate over the question, conceptually if not necessarily always practically important, of whether Western states are fundamentally Christian or post-Christian (or even non-Christian). This debate has been marked, generally speaking, by a comparatively cursory consideration of the history of the Church, or of the relationship between church and state, or of the informal or normative influence of the church upon the state.

The law in many respects historically favoured religion in general, and Christianity in particular, as against agnosticism and atheism (Richardson 1962, p. 61), though this favouritism may be said to be in decline (note however that in 2007 moves were made in Thailand to include a declaration in the draft constitution that the state religion was Buddhism). Until the mid-nineteenth century the Church of England retained a formal role with respect to the legal regulation of marriage (until the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85) (U.K.)) In Ireland, ecclesiastical courts lost their matrimonial jurisdiction only under the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 (33 & 34 Vict. c. 110) (U.K.), and the jurisdiction survived until 1884 in the Isle of Man; the Diocese of the Bishop of Sodor and Man Ecclesiastical Judicature Transfer Act 1884 (Statutes, vol. V, pp. 352-73) (Isle of Man). The Church of England retained a formal role with respect to divorce until the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85) (U.K.), and succession to property (until the Court of Probate Act 1857 (20 & 21 Vict. c. 77) (U.K.)). The Poor (Burials) Act 1855 (18 & 19 Vict. c. 79) (U.K.) had the same effect in Ireland, for succession to property. In earlier centuries its jurisdiction was much broader. By the end of the nineteenth century the scope of ecclesiastical influence on secular government had greatly diminished in the Christian world, though it retained a strong informal role. Being largely informal it was also subject to uncertainty, and to subtle change without overt paradigm shifts.

Today we are told that secular judges cannot and should not make a distinction in the law based on religious principles. Technically this is true, for a secular judge does not have jurisdiction over matters of the doctrine or liturgy of the Christian church – or over any other religious questions. But this has been true since the churches secular and ecclesiastical separated in England in the twelfth century. What is different now is that it has been said, in effect, that the law itself has no religious or even moral underpinnings. This cannot be so, and is a view that does considerable discredit to the common law, especially, ironically perhaps, as practised in the Family Division of the High Court of England and Wales. What has changed, with increasing pluralism and reduced adherence to organised religion, especially Christianity, is that judges are less able and willing to openly acknowledge the Christian origins of much of the law, or indeed its moral content. This may lead, inexorably, to a weakening of the consistency, the morality and even the humanity of the law, in a search for the universalist lowest common denominator.

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