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Church–State Relations in Europe

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Abstract

Academic lawyers frequently distinguish between three models of church–state relations in Europe: state–church systems, separation systems and hybrid systems. However, the sociologist of religion Grace Davie has suggested that by using sociological, historical and legal evidence to understand religion in Europe, we can reveal a basic common 'European' approach to religion, which also acknowledges the differences between the northern Protestant state–church systems and the southern Catholic separation systems. This article seeks to elucidate the legal model and to assess whether Davie's analysis is preferable in light of the legal evidence. This will enable a tentative conclusion to be made as to the religious identity of the continent: Is Europe Christian or secular?

The legal regulation of religion differs considerably across the globe. Historical events in various different countries have resulted in a plurality of current religio-legal realities. Grace Davie (2002) has contended that it is possible to articulate a shared European approach to religion and its regulation. She contends that Europe is an exceptional case: the status, role and significance of religion are common throughout the continent and distinct from the rest of the world. For Davie, although precise details differ, the same patterns emerge: the pattern of an 'unchurched and residually Christian religion' is 'widespread if not universal' in Western Europe (2002, pp. ix–xi).[1] Furthermore, this retreat of public religion into the background has not been replicated in other continents: 'It is simply not the case that patterns of religious activity discovered in Western Europe are those of the modern world more generally' (2002, p. ix). Across the globe, in both Christian and non-Christian states, religion continues to be a potent force.

Of course, despite the common historical evidence of a powerful Christian church and the sociological decline of the church's public role, there remain significant differences within the religious makeup of Europe. As Davie (2002, p. 11) points out, there remains a broad distinction between the Protestant North and the Catholic South with a variety of mixed types in between. Although some countries fail to fit this pattern, most notably Catholic Ireland, this North–South distinction rests on a

basic historical difference that has ongoing sociological repercussions: the indicators of religious activity have fallen faster in the Protestant North than the Catholic South, which is perhaps a generation behind (Davie 2002, p. 11). From a sociological and historical perspective, therefore, a common and specifically European trend may be identified, albeit one that is more advanced in the North than the South.

Davie (2002, p. 11) contends that the legal evidence also reveals the 'commonalities of European religion'. As Davie recognises, 'the constitutional connections between Church and State are part of Europe's history, whether they are retained or rejected, applauded or critiqued'; the existence of a constitutional connection between church and state is a 'common thread within West Europe' (2002, pp. 2–3, 12). Furthermore, for Davie, the legal evidence follows the broad distinction that may be sketched historically and sociologically: 'contrasts lie in the specificities of these relationships' and the key distinction is between the Protestant North and the Catholic South (2002, pp. 12–3). In Protestant Europe, ecclesiastical arrangements are often in the form of a state church 'which embodies, in benign form, national as well as religious identity' (Davie 2002, p. 12). Although indicators of religious activity are relatively low, there is little hostility between church and people. This arrangement also applies to Greece, the sole Orthodox country, where Greek identity is 'virtually indistinguishable from Greek orthodoxy' (Davie 2002, p. 13). In Catholic Europe, in contrast, ecclesiastical arrangements take the form of a separation between church and state, often as a reaction against historic events. This has resulted in more complex church–state relations: at one end the 'extreme case' is France, 'an impatiently secular State' while at the other end there is noted cooperation between state and religious communities (Davie 2002, p. 12). The differences often betray the legacy of the past: for example, the positive role played by the Spanish church in the rebuilding of Spanish democracy and the presence of the Holy See in Italy partially explain their ecclesiastical polity (Davie 2002, p. 13).

However, Davie's model suggesting a common European model marked by some difference, most notably a broad distinction between Protestant state church systems and Catholic separation systems, differs from that employed by most academic lawyers (most notably Robbers 2005). Effectively, they separate the Catholic countries into two creating a firmer tripartite distinction between state church systems, separation systems and hybrid or cooperation systems. This article seeks to outline the legal model and to assess whether Davie's analysis is preferable. This article is concerned with whether the legal evidence supports Davie's proposition that European countries share a common religious makeup. This will enable a tentative conclusion to be made as to the religious identity of the continent: Is Europe Christian or secular?

For European lawyers, church–state relations and the legal regulation of religion are subsumed under the heading of 'ecclesiastical law': that is,

state law concerning religion.[2] This can be contrasted with systems of religious law, that is, the laws or regulatory instruments made by religious bodies themselves.[3] As we have seen, European jurists frequently distinguish between three ecclesiastical law models (Robbers 2005, pp. 578–80). These systems are:

(i) State church systems. These are characterized by the existence of close links between the state and a particular religious community. These close links have a great significance upon the legal position of the religious community and upon religious liberty generally, and are often defined by constitutional law. The religious community may be styled as a 'state', 'national', 'established', or 'folk' church. Generally, constitutional links exist between the church and the state executive; between the church and the state legislature; and between the church and the people (Sandberg 2006a). Examples of state church systems include England, Denmark, Greece, Finland, Malta, Bulgaria and (historically) Sweden.

(ii) Separation systems. These systems have a strict separation of state and church. Such a system is usually based upon a constitutional barrier that forbids intervention by the state in the affairs of the church by preventing the financial support and establishment of any one religion. Examples of such a separation in Europe are France (with the exception of the three eastern *dēpartements*), The Netherlands and Ireland; this system is epitomized, however, by the polity of the USA (as a matter of law if not a matter of fact).[4]

(iii) Hybrid systems. Also known as cooperationist systems or sometimes concordatarian systems, these states are characterized by a simple separation of state and church coupled with the recognition of a multitude of common tasks that link state and church activity. While the lack of a state church and vague references to cooperation can often be found in constitutions, the terms of agreements between the state and individual religious groups often take the form of agreements, treaties and concordats. Examples include Spain, Italy, Germany, Belgium, Austria, Hungary, Portugal and the Baltic States.

These three models will now be examined in turn. However, before doing so it should be noted that this model focuses upon the constitutional position of religion. If that focus is altered then the limitations of the model are soon evident. For example, various means of state funding exist throughout Europe including direct financing of religious communities; indirect funding by the allocation of tax revenue or the facilitation of a church tax system; and systems that offer minimal financial support. These do not coincide neatly with the three ecclesiastical law systems: for example, in England, there is minimal financial support while in Spain and Italy there is indirect support in the form of the allocation of tax revenue. The question of state funding thus serves as an important critique of the current tripartite system. A further alternative would be to focus

on the means by which religion is regulated rather than the effect. This would enable a distinction to be drawn between England and Wales as a common law jurisdiction and continental civil law systems. Leaving these points aside, we will now assess the merits of the current tripartite distinction by looking in detail at each model.

The state church model seems the least controversial: it is a mark of distinction used both by lawyers and sociologists. Such systems are distinguished on account of a special constitutional position of a certain religious community and special benefits and burdens resulting from that special position. For example, in Denmark, there is a high degree of state involvement mainly in the form of control (see, generally, Dübeck 1996/2005). Article 4 of the Danish Constitution of 1849, as amended in 1953, states that 'The Evangelical Lutheran Church shall be the Folk Church of Denmark, and as such shall be supported by the State.'[5] In the words of Dübeck (1996, p. 41), the Danish National Church is a 'state agency for administration' and not 'a legal organ with autonomy'. It has no synod, no legal personality and is not a corporate body.[6] The state Ministry of Ecclesiastical Affairs determines rules concerning membership, the creation of new parishes, and approves the appointment and dismissal of clergy who have the status of civil servants.[7] Local churches operate as state agencies performing different administrative functions for the central administration.[8] Furthermore, all taxpayers who are members of the national church pay a church tax.[9]

However, other state church systems in Europe differ substantially from the Danish model. For example, although a state church exists in Greece, the assumption by the state of ecclesiastical functions is minimal. Although Article 3 of the Greek Constitution 1975 states that, 'The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ,' the Orthodox church has its own legal status as a legal person: the article provides that the Orthodox church is 'autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod.'[10] The Constitution thus guarantees the self-government of the church. The Holy Synod has administrative, legislative and judicial competence. Although there is some state interest in church affairs, this is exceptional.[11] There is no church tax but the Greek state has 'almost entirely assumed the financing of the prevailing religion.'[12]

The juxtaposition of church–state relations in Denmark and Greece indicates the breadth of the state church category. Finland provides an alternative contrast in that two churches are treated favourably by the state.[13] The status of the Finnish Evangelical Lutheran Church is analogous to that of the Orthodox church in Greece; while the status of the Orthodox church, Finland's second largest religious community, is not dissimilar to that of the Evangelical Lutheran Church in Denmark. A further complication is posed by states where although there was formerly a state church that legal status has been removed but some special bond still exists. This has

occurred in Sweden and Wales.[14] It is difficult to place these countries within the model: Robbers simply omits them from his categorization (2005, pp. 578–80). These considerations cast doubt upon the usefulness of the distinction.

A more compelling criticism is that the focus upon the relationship between the state and one religious group (or in the case of Finland, two groups) does not paint an accurate picture of the legal regulation of religion in those countries. The existence of state churches has itself prompted concern as to whether they are consistent with religious equality and freedom. For example, Papastathis (1997) has argued that the existence of a state church alongside other religious groups 'is bound to generate unfair discrimination and abridge religious tolerance.' However, as Ahdar & Leigh (2005, pp. 129–30) point out, legal preference for a certain religion is not antithetical to religious freedom 'at least in its contemporary, milder form': the two can co-exist as a matter of principle provided that legal preference is not accompanied by distinct civil and legal disabilities for the non-adherents of the official religion. The authors thus make the distinction between 'weak' and 'strong' establishment.[15] None of the European state church systems constitute a form of 'strong' establishment but that in itself will not placate critics. Furthermore, the legal focus upon the state church removes focus away from the position of religious minorities. If the state church category is to be sustainable, it is imperative that it takes into account the position of other faiths. An analysis of how minority religions, such as Islam, are accommodated may serve as a useful measure of the commonalities and differences across European national contexts. In relation to the state church systems discussed the general picture is that generally religious groups other than the state church are treated as private organizations but the degree of state involvement differs greatly. While in England and Denmark such groups have no special legal status,[16] in Finland and Sweden there are complex registration requirements.[17] Such groups are also protected by freedom of religious clauses found in national and international law.[18] If such equality provisions are seen as the main source of law in relation to religion, then characterizing these countries on the basis that they have a state church seems outdated. The state church categorization often has more to do with the historical theory than sociological reality.

On the surface, separation systems seem to be homogenous in that they are characterized by a strict separation of state and church usually in the form of a constitutional prohibition forbidding intervention by the state in religious affairs. It is often thought that such separation systems are characterized by indifference. However, although this is a possibility, it is by no means certain: for Ahdar and Leigh, separation systems may take two different paths (2005, p. 130). Separation systems may view separation itself as the pre-eminent goal, the desired result; however, it is also possible for separation to be used as an important instrumental means towards a

larger end of protecting religious freedom. This second path, seeing separation as a means of fulfilling religious freedom, requires from the state not indifference but positive action to facilitate religious freedom. Separation requires neutrality from the state but this is not a passive obligation: in its pursuit of religious freedom, liberty and equality, the state actively seeks to remove all existing boundaries and often seeks to provide the means whereby all citizens – regardless of their religious convictions – enjoy the equal right to manifest their religiosity throughout their everyday life. This means in practice there is little to distinguish so-called separation systems from the third category. The only difference is not constitutional relationship but the emphasis of the letter of the law.

For example, France is seen as a separation system *par excellence*: the legacy of the historical conflict between clericalism (the claim of religion to political domination) and anticlericalism (the ultimately prevailing counter claim) is still found in the modern law (see Basdevant-Gaudemet 1996, 2000; Baubérot 2003). Article 2 of the French law of 1905 (The Republic does not recognize, remunerate, or subsidize any religious denomination)[19] and Article 1 of the Constitution of 1958 (France shall be an indivisible, secular, democratic and social Republic) establish the 'régime of the neutrality of the state,' a position that can also be described 'perhaps with a different shade of meaning' as the secular posture, or the *laïcité*, of the state (Basdevant-Gaudemet 1996, p. 123). However, somewhat ironically, achieving this secular posture and ensuring religious freedom and equality requires positive action by the state. Gradually, France has adopted the understanding that the relationship requires a 'positive separation'; a *laïcité positive*. As Basdevant-Gaudemet points out, 'A "*laïcité positive*" requires frequent intervention in order to bring into being everywhere the necessary practical conditions for public worship in respect of each religion' (1996, p. 123). The *Bureau des Cultes* of the Ministry of the Interior plays an active role in this. Thus, although no special status is conferred upon a certain religion, religious groups are subject to special rules under French law. Basdevant-Gaudemet (1996, pp. 125–9) explains how French law draws a complex distinction between religious associations,[20] diocesan associations,[21] charitable and educational associations,[22] religious orders,[23] and new religious movements and sects.[24] Moreover, as Robert (2003, p. 641) points out, the law of separation does not outlaw state subsidiaries for activities that have a general character despite having a religious setting, such as the administration by public collectives of religious services deemed indispensable to ensure freedom and equality of religion and the payment of religious minister when they render services to the general public. Although religious groups are mostly funded by private donations, they still enjoy some indirect state support, most notably, the state is owner of Catholic places of worship built before 1905, and it undertakes major works of repair (see Basdevant-Gaudemet 1996, p. 139 for details).

Although the paradoxes of the French system question the usefulness of the separation category, it is an examination of church–state relations in Ireland that illustrates the limitations of this category. For Robbers (2005, p. 578), Ireland is an example of a 'separation system', because such a separation exists 'to a great extent'. However, although the Constitution of Ireland spells out fairly precisely the terms of the separation of church and state, it does this by means of an express legal recognition of the value of religion. Article 44(2) of the Constitution currently provides that 'The State guarantees not to endow any religion' and 'shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status', but Article 44(1) states that 'The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.' Although the Constitution review group in 1996 called for Article 44(1) to be replaced by the phrase 'The State guarantees to respect religion', this has not been put to the people (Colton 2006, p. 97). The interpretation of Article 44(1) is open to doubt. Although the article has been interpreted as underpinning Christianity,[25] the benefits are not confined to Christians.[26] It is 'unclear' whether the guarantee extends beyond world religions (Casey 1996, p. 152). Furthermore, as Casey explains that although the Constitution forbids the endowment of religion, this is not equivalent to a ban on establishment (1996, p. 151):[27] The only reason why Ireland has no state church is because no religious group has made such a claim.

Like France, Ireland, at the very least, operates a system of positive separation.[28] Indirect financial aid is provided for religious groups.[29] Colton contends that Irish church–state relation is actually characterized by the 'inextricable interdependence' of church and state (2006, p. 101). For Colton, 'Education is an area manifestly so fertile with Church-State synergy, both historically and administratively, that it dents any theory of total separation between the two.' Primary and secondary education is organized predominantly on denominational lines and is extensively supported by state funding. It is difficult to disagree with his conclusion that the relationship between church and state in Ireland 'is sufficiently developed and implemented to call it an active partnership/tacit partnership model' (2006, p. 111). This interpretation would place Ireland within the hybrid category. At the very least, such a conclusion requires modification of the separation system category.

Whatever the faults of the state church and separation categories, these pale into insignificance when compared with the final and most contentious category. Hybrid or cooperationist systems are characterized by a simple separation of state and church coupled with the recognition of a multitude of common tasks that link state and church activity, usually in the form of an agreement, treaty or concordat.

Spain and Italy are seen as the classic examples. In Spain, Motillia notes that the Constitution has led to a system of 'constitutionally mandated

cooperation' (2004, pp. 574–5): Article 16(3) of the Constitution of 1978 outlines the non-established character of all religions: 'No religion shall have a state character' and also places a duty on public authorities to cooperate with religious communities (see Rodriguez Blanco 2006). This has been put into practice by the state through the creation of agreements and concordats that regulate the state's interactions with the Catholic church and other religions.[30]

In Italy, Ferrari (1996, p. 171) terms the system 'bipartite': the Constitution aims to safeguard liberty and equality of the individual in religious matters while simultaneously guaranteeing a system of cooperation between the state and religious bodies.[31] Article 7 of the Constitution provides that both the state and the Roman Catholic church are 'according to its own order, independent and sovereign' and that their 'relations are ruled by the Lateran Treaties.' Article 8 provides that all other religious denominations 'are equally free before the law'. Further, the relations of non-Catholic denominations with the state are to be defined 'on the basis of agreements with their respective representatives'. Indeed, Ventura notes that non-covenantal cooperation is not recognized in the Italian constitution and it is difficult on an empirical basis to assess the extent to which it is practized (2006, p. 125).[32]

The hybrid category is problematic as it is difficult to distinguish hybrid systems from separation systems. The test cannot simply be the existence of a formal agreement. As Ferrari (1995, pp. 421–2) contends that the signing of such an agreement is not 'the definitive element of a state's attitude towards a church' either politically or legally. He gives the example of the Roman Catholic church in Belgium where the absence of a concordat has not prevented the church from enjoying a better legal position than it does in some countries where there is a concordat. The answer for Robbers (2005, p. 579) is simply that the existence of a formal agreement is merely a reflection of the cooperationist nature of the system rather than the proof of the existence of a cooperationist system. This is why Belgium falls into this category.

However, this raises the question of what the definitive element of this type of system is. From Robbers, one may infer that the definitive element is entirely negative: a hybrid system is characterized by the lack of both a formal state church and a strict system of separation. However, in some cases it is difficult to distinguish hybrid countries from state church systems as there is a clear legal favouring of the Roman Catholic church in Italy, Spain and Belgium. In all three countries, there operates a three-tier distinction between the Roman Catholic church, other religious communities with whom the state has made agreements with and all other religious groups with whom no agreement has been made (Martinez-Torrön 2000, p. 49; Ferrari 1996, p. 173; Torfs 1996/2005). In Spain, the Catholic church receives direct and indirect funding from the state.[33] These benefits are generally not received by other religious

organizations (see Ibán 1996, pp. 110–1).[34] In Italy, there exist two systems of finance that benefit not only the Catholic church but also the other denominations who have signed an agreement (Ferrari, 1996).[35] In Belgium, although six denominations enjoy the status and financial benefits of being a recognized religious groups,[36] Roman Catholicism is still regarded as 'the legally recognised and, in real terms, the major religion' (Torfs 2006, p. 16). Therefore, the only distinction between Italy, Spain and Belgium as opposed to the state church system is that the constitutional favouring of a particular religious group is provided in a different constitutional form. Church–state relations in Italy, Spain and Belgium clearly favour the Roman Catholic church but do so in terms of agreements as opposed to classical establishment. These Roman Catholic countries seem to favour one religious denomination to the same, if not to a greater extent, than the Protestant state church countries.

Distinguishing hybrid systems from the other two categories seems impossible. Robbers characterizes Germany as a hybrid system on the basis that it 'takes a middle of the road approach between that of having a State Church and having a strict separation between Church and State' (1996, p. 60). However, this is questionable: Monsma & Soper (1997, p. 11) note that 'some observers would make the case that in Germany there is an informal multiple establishment' and conclude that church–state relations in Germany are characterized by the two basic principles of 'partnership and autonomy.' Robbers (1996, p. 60) notes somewhat ambiguously that Germany state–church relation is structured around three basic principles: 'neutrality, tolerance, and parity.' Regardless of the precise terminology used, it is difficult to see how these principles characterize a distinct German approach to religion. Surely, all European states embody these principles. It remains unclear what, in particular, is unique about the hybrid systems.

Monsma & Soper (1997, p. 11) adopt the same tripartite distinction to propose three models of church and state at a global level but frame their third model as 'the pluralist or structural pluralist' model. This is characterized by the fact that religion seems to be 'not as a separate sphere with only limited relevance to the other spheres as the liberal strict separationists so, but as having a bearing on all of life.' However, this rests upon the assumption that separation systems are indifferent towards religion and do not facilitate it. As we have seen, this is incorrect. There seems nothing to exclude France, The Netherlands and Ireland from this model and no definitive and distinct element common to the hybrid systems. The mere fact that the state cooperates with religious groups is not definitive. Indeed, Doe (2006) contends that it is possible not only recognize such cooperation in the UK but to actually conceive of it as an 'informal' or 'quasi concordat' in a non-technical sense. For Doe, constitutional conventions concerning state cooperation with religious bodies are 'informal' or 'quasi-concordats' in substance if

not in form. If such cooperation can be found in a state church system, then surely it is characteristic of Europe as a whole rather than simply the hybrid model. In short, the characteristics commonly attributed to hybrid states are invariably characteristics common to Europe as a whole and cannot distinguish or justify the existence of separate 'catch-all' category.

It is, thus, clear that tripartite distinction traditionally adopted by ecclesiastical lawyers (which analyses the ecclesiastical polities of European legal systems as being state church systems, separation systems or hybrid systems) is seriously flawed. Robbers concedes that this classification 'according to legal and theoretical considerations is constantly overrated and rendered questionable by social circumstance which suggests different groupings' and highlights two problems in particular (1996, pp. 324–5). First of all, he concedes that the 'religious influence on the state in mainly Catholic Ireland is probably stronger and more direct than the constitutional provisions suggest'; second, he notes that some hybrid countries have more in common with some state church countries than other state church countries do: 'there could be a closer similarity in the social relevance of religion as between Greece, Spain and Italy than would be revealed in a comparison of Greece with Denmark or the United Kingdom.' Both of these points have been elucidated in more depth above: it seems that Ireland is not really a separation system and it is difficult to classify those states that are commonly placed in the hybrid model. The three legal categories seem overly formulaic.

Ferrari (1997) thus advocates that the tripartite system should be abandoned. He laments what he perceives to be the 'persistent recourse (to a large extent due to mental laziness) to an outmoded classification' that 'grants excessive importance the formal element of the relationship between church and state' that 'overlooks its legal substance' (1997, p. 78). However, the legal approach has some benefits: as Monsma & Soper (1997, p. 10) point out, no country embodies any model 'in a pure form, but by starting out with these models in mind will help to organize and focus the mass of observations' that can be made by studying each system. This may be true but the usefulness of the particular distinctions currently employed by ecclesiastical lawyers remains questionable for a variety of reasons elucidated above. Davie's approach seems preferable. The problematic third category put forwards by ecclesiastical lawyers should be disregarded in favour of a broad distinction between northern Protestant state church systems and southern Roman Catholic separation systems. Furthermore, as it has also been shown that these categories too are disputed, this broad distinction should not be treated as harsh dichotomy but rather as an obvious difference, accepted within the context of framing a common European approach to the regulation of religion. As Ferrari urged, we should focus upon the 'legal substance'. Although this recognizes some differences in terms of details, the legal

evidence reveals common legal sources and resulting common legal characteristics that not only permits conclusions to be made in relation to what extent Western Europe shares a common legal position of religion but also in relation to what common conception of religion Western Europe shares.

Although church–state relations in different European States show a degree of diversity that itself 'mirrors the diversity of the national cultures and identities,' the different systems nevertheless 'have common roots in the basic experiences of shared history' (Robbers 1996, p. 323). They also share common sources of law. All are members of the European Union (EU) who entail acceptance of the supremacy of EU law, which guarantees religious diversity and outlaws discrimination on grounds of religion.[37] Moreover, all states are signatories of various international treaties, most notably human rights guarantees. All members of the EU are signatories to the European Convention of Human Rights (ECHR), a human rights treaty that originates not from the EU but from the Council of Europe. Article 9 of the ECHR guarantees an absolute right to hold or change one's religion and belief and a qualified right to manifest religion or belief (see Evans 2002). The extent to which this international treaty is binding within each European country depends upon the laws of that country. In the UK, for example, following ratification, the ECHR was only binding as an international treaty. However, following the Human Rights Act 1998, which largely incorporated the ECHR into domestic law, it is now part of English law: English courts are now under an obligation to interpret UK legislation so far as possible in a manner compatible with the rights outlined in the ECHR and must take into account – though not necessarily follow – the decisions of the European court at Strasbourg. The written constitutions of many European countries include guarantees that are similar, if not derived, from the ECHR.

Common characteristics of a European legal approach to religion can also be identified. Ironically, under this approach, the third legal category of hybrid systems becomes the answer rather than the problem as writings on these systems illustrate common characteristics that are shared not only be the so-called hybrid systems but by the states of Europe in general. It seems that the European approach is characterized by the recognition of religious freedom and the autonomy of religious organizations. Cooperation exists between the state and at least some religious groups and such partnerships may be formulated as being an 'informal' or 'quasi-concordatian' in substance if not in form (Doe 2006). A basic level of neutrality, tolerance and parity is common to the whole continent. No country has a 'strong' state church system where other religious groups are not tolerated (Ahdar & Leigh 2005, pp. 129–30) and no country has a 'strong' separation system whereby the state is indifferent to religion and religious liberty.

Ferrari (1997, pp. 77–9) suggests that a common model of the relationship between the state and religious faiths in Western Europe may be defined by reference to three characteristics: first, the state is 'neutral towards the various individual religious subjects'; second, a 'religious sub-sector is singled out within the public escort' as a 'playing field' or 'protected area' in which religious subjects are 'free to act in conditions of substantial advantage compared to those collective subjects that are not religious'; and third, the state 'has the right to intervene in this area only to see that the players respect the rules of the game and the boundaries of the playing field'. However, he notes that this model is now 'outmoded' as it embodies 'a specific vision of the world that is unable to include the variety of existing experiences' (1997, pp. 77, 84, 88).

Nevertheless, the basics of this common model may be used to understand and elucidate a common European approach to religion in the twenty-first century. As Ferrari points out, the position of states in relation to religion is invariably characterized by neutrality as the state is obliged not only to endorse but also to facilitate religious equality and pluralism.[38] As Rivers (2004) has noted, the apparent neutrality is nothing of the sort but is rather 'an expression of regionally specific post-Christian religiosity.' This accords well with the sociological evidence put forwards by Davie (2002) of a continent that is 'unchurched' but shares a 'residually Christian religion'. It also needs to be understood against the background of the current post-9/11 climate where the divisive role of religion is emphasized and where states find the loyalty of the individual towards religion troubling in terms of security and national identity.

For Sandberg (forthcoming), the position of the previously dominant Christian religion in Europe can be understood as a form of 'banal religiosity'. Europe is no longer Christian, nor is it secular. Instead, in the public sphere Christianity simply serves as a vague moral source of identity. Building upon Billig's concept of 'banal nationalism' (1995), 'banal religiosity' may be seen as being constantly perpetuated by everyday habits. It is a civic religion based upon basic ethical principles traditionally aligned with religious traditions that has grown as a response to religious difference. In the same way that banal nationalism can be contrasted with 'hot nationalism' that occurs at time of 'social disruption', banal religiosity can be contrasted with fundamental religiosity. In an age where the 'otherness' of different religious traditions is stressed, Europeans seem to cling to what Davie describes as a 'residually Christian religion'.

In sum, it is clear that Davie's sociological analysis of religion in Europe is invaluable for understanding the legal regulation of religion. Rather than being obsessed with an inadequate overly formulaic tripartite distinction, Davie's focus upon the commonalities of the European experience allows a clearer analysis of how religion is regulated

in Europe and the religious makeup of the continent. While it is important to recognize differences such as those between the Protestant North and the Catholic South, it is vital to recognize that these affect specific details rather than the general trend. Focussing upon the broader general trends will enable a clearer analysis of the changing European attitude towards religion. For example, although it is often claimed that the European approach is predicated upon neutrality, a closer socio-legal analysis may well reveal that a specific view and conception of religion remains influential.

Short Biography

Russell Sandberg is an associate tutor at Cardiff Law School, a Research Associate of the Centre for Law and Religion and a Doctoral Associate of the Centre for Islam in the UK, Cardiff University. After graduating from the Law School with First Class Honours in July 2005, he commenced doctoral study at Cardiff University, entitled 'Religion, Society and Law: An Analysis of the Interface between the Law on Religion and the Sociology of Religion'. He has written widely on religion and human rights, discrimination law, church state relations, law and morality and religious law and has had work published in a range of journals in a number of different disciplines, including Public Law, the Ecclesiastical Law Journal, Sewanee Theological Review, Sociology and a number of European periodicals.

Norman Doe is a Professor and the Director of the Centre for Law and Religion, Cardiff Law School. He studied law at Cardiff, a Master's degree in theology at Oxford, and, for his doctorate, at Cambridge. He is an associate professor at the University of Paris, a member of the European Consortium for Church and State Research, and is author of *Fundamental Authority in Late Medieval English Law* (Cambridge, 1990), *The Legal Framework of the Church of England* (Oxford, 1996), *Canon law in the Anglican Communion* (Oxford, 1998), and *The Law of the Church in Wales* (Cardiff, 2002); editor of *Essays in Canon Law* (Cardiff, 1992); and co-editor, with Mark Hill and Robert Ombres OP, of *English Canon Law* (Cardiff, 1998). He is a member of the general committee of the Ecclesiastical Law Society and was a member of the Lambeth Commission (2004).

Notes

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[1] This survey focuses solely upon the countries of Western Europe. For an analysis of church–state relations in Eastern Europe, see Schanda (2005).

[2] See Doe (1996, p. 13–5) for a fuller elucidation, including the narrower English interpretation of this term.

[3] On which see, for example, Huxley (2002) and Doe (forthcoming).
[4] The relationship between church and state in the USA is outside the scope of this article. For an analysis see, among others, Noonan & Gaffney (2001) and Ariens & Destro (2002).
[5] This 'legally prescribed inter-relationship' (Dübeck 1996, p. 39) is further buttressed by Article 6, which states that 'The King shall be a member of the Evangelical Lutheran Church'.
[6] It has no written constitution. Although Article 66 states that, 'The constitution of the Established Church shall be laid down by statute,' no written constitutional statute has actually been written despite several commissions. Dübeck contends that Article 66 has been interpreted as providing that 'the conditions of the National Church shall be regulated by law' (1996, p. 38).
[7] The clergy of the church have the legal status of civil servants and are normally appointed in accordance with Danish civil service legislation (Dübeck 1996, p. 50). (See Sandberg 2006b for a discussion of the status of clergy as civil servants). Danish law also obliges the state through the Ministry of Finance to pay clergy salaries and pensions. The law confers on church authorities only the right to negotiate salaries and for clerics to form Trade Unions for this purpose. The law denies the clergy a right to strike. Priests enjoy full civil liberties of the Danish constitution and the ECHR, with the exception that their freedom of expression is limited by 'freedom of confession'; their right to preach the gospel (Dübeck 1996, p. 53).
[8] Since 1903, all members of the Danish National Church over the age of 18 are eligible to vote and stand for election to Parochial Church Councils. For Dübeck, the parishes 'are the fundamental, democratic unit of the Danish National Church', laymen at parish level have a central position in relation to the administration and use of churches and church grounds as well as the election of Bishops (Dübeck 1996, p. 38).
[9] The National Church is also funded by state aid under Article 4 and by the Common Fund for the maintenance and restoration of churches, historic furnishings and monuments.
[10] As Papastathis explains, Orthodox churches may either be autocephalous or autonomous: 'A church is autocephalous when it is spiritually self-sufficient and independent in administration. It is autonomous when it is only impendent in administration' (1996, p. 78).
[11] Article 33 states that the President on taking office must take a Christian oath 'in the name of the Holy and consubstantial and Indivisible Trinity.' Under Article 59 a similar oath is required of Members of Parliament but that Article also provides that 'Members of Parliament who are of a different religion or creed shall take the same oath according to the form of their own religion or creed.' General questions concerning churches and parishes are determined by a metropolitan council, consisting of a judge, an official from the Ministry of Finance, two priests and a parish council. Official records on the election of archbishops and metropolitan are submitted to the Minister of Education and Cults who orders the publication of a presidential decree; following that, the elected prelate submits his confirmation to the President and assumes his duties (Papastathis 1996, p. 86).
[12] This direct funding takes a number of forms such as grants, the payment of salaries, tax exemption and rights under property law, see Papastathis (1996, p. 87).
[13] For details see Heikkilä, Knuutila & Scheinin (2005) and Kotianta (2004).
[14] In Sweden, the relevant legislation is the Religious Communities Act 1998 and the Church of Sweden Act 1998 on which see Cranmer (2000) and Friedner (2005, 2006). In Wales, the relevant legislation is Welsh Church Act 1914, Welsh Church (Temporalities) Act 1919, Welsh Church (Burial Grounds) Act 1945 on which see Doe (1992, 2002) and Watkin (1990, 1992).
[15] A similar distinction has been purported by bodies seeking to enforce international human rights guarantees.
[16] In England, since the toleration legislation of the seventeenth century, religious groups other than the church of England have been lawful. They are usually treated as voluntary associations whose members are bound together as part of a private agreement. Civil courts will uphold the internal rules of the association upon assenting members but will generally only interfere to protect a civil right or to administer property [*Forbes v Eden* (1867) LR Sc & Div 568] In Denmark, dissenting religious communities are seen legally as independent autonomous, private institutions. Although they have no special legal status, they have special connections with different public authorities: for example, the Minister of Ecclesiastical Affairs has the capacity to decide questions about the authorization of marriages (Dübeck 2006, p. 43).

[17] In Finland, all other religious communities – other than the Lutheran and the Orthodox Churches – are private law subjects which operate under the Freedom of Religion Act 2003. Once they met the detailed requirements, they may be registered by the National Board of Patents and Registration and can enjoy full legal capacity as autonomous juridical persons and members are not personally responsible for their debts. In Sweden, all religious communities are now subject to the Religious Communities Act 1998, which provides a registration scheme whereby religious communities can be recognized by law as a legal personality. Friedner notes that forty groups have registered so far, including the Roman Catholic Church, some Muslim organisations and a denomination dedicated to the old Nordic heathen gods (2005, p. 544). However, a registration application from the Swedish Humanist Association has been refused as the statutory definition of a religious community has not been met (Friedner 2006, p. 540).
[18] The European Convention on Human Rights is explored below as a common source of European regulation of religion.
[19] This law does not apply to the three Eastern *dẽpartements*, namely, Huat-Rhin, Bas-Rhin and Moselle, which were under German rule until 1918. The following thus relates to France with the exception of the three Eastern *dẽpartements*.
[20] The Law of 1905 provided for the formation of 'Religious Associations' that would be capable of receiving the property of the former public church establishments that disappeared in 1905. In addition to meeting the requirements of the law on associations, religious associations must comply with additional rules, including the requirement that they be 'exclusively for the purpose of the Church.' 'Religious Associations' have benefited from advantages in taxation law. Ownership of church buildings is bestowed in the Religious Association. The State courts have deemed themselves competent to resolve the matter of defining what constitutes a 'church'.
[21] The Catholic church refuses to use the law of 1905, mainly due to the fear of the emergence of a multitude of different associations outside the mainstream of the church. Consequentially, a law of 1907 provided that an association could advance the public exercise of religion without being a 'Religious Association'. The Roman Catholic church was, thus, able to set up 'Diocesan Associations', following the rules of Canon law and being 'in communion with the Holy Sea and in conformity with the constitution of the Catholic Church.' The Laws of 1907 and 1908 transferred ownership responsibilities of existing Catholic church buildings to the state. Since 1924, the construction and ownership of new places of worship rests with the diocesan association.
[22] These are other associations who work in liaison with religious authorities but do not have exclusively religious purposes and have relied upon the freedom of association provided by the law of 1901. Muslims have used this legal form to establish Islamic schools, for example.
[23] From 1942, the offence of being an 'illicit order' was abolished; religious orders thus existed as de facto groups without legal existence or personality. A judicial decree could provide legal recognition and confer legal capacity. Such orders are subject to a form of trustee supervision on the part of the state.
[24] French courts have refused to define some new religious movements as religions or sects. Although such groups have the legal right to exist (provided that they are not contrary to law, good morals or public policy), their legal position is ambiguous.
[25] *Norris v Attorney General* [1984] IR 36.
[26] In *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484, J. Barrington held that: '[The] State acknowledges that the homage of public worship is due to Almighty God. It promises to hold his name in reverence and to respect and honour religion. At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be they Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists'.
[27] Although he contends that, Article 44(2) precludes giving any legal privileges to the members of an established church that is denied to others.
[28] In *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484, J. Barrington held that 'Article 44.1 goes further and places the duty on the State to respect and honour religion as such. At the same time the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality.' The way in which the state facilitates

religion is shown in the decision in *Flynn v Power and Sisters of the Holy Faith* [1985] IR 648 that it was lawful for a religious organization to require higher standards from their employees than that which apply to average employees.

[29] Although state support is minimal, indirect aid is existent. For example, exemption from local rates is given to '. . . any church, chapel or other building exclusively dedicated to religious worship' under the Poor Relief (Ireland) Act 1838. Furthermore, although remuneration paid to ministers of religion, from whatever source, is liable to income tax (*Dolan v K* [1944] IR 470), income received by a church, religious order or religious group as a result of a gift or bequest which qualifies as charitable is exempt from taxation.

[30.] See Ibán (2005) for details. As Oliva & Alberca de Castro (2004) have noted that here are important differences between the Catholic treaties and the treaties concerning other religious groups. Furthermore, Oliva (2005) has documented how the socialist government elected in 2004 has been 'perceived as opposed to co-operation' with the Catholic church in relation to the teaching of Catholic education in state schools and same sex marriages.

[31] Religious freedom and equality is safeguarded by Articles 3 and 19 of the Constitution. Article 3 of the Constitution states that all citizens are 'equal before the law, regardless of . . . religion.' Article 19 bestows the right upon every person to 'profess faith freely' and to 'exercise worship in public or private, provided that the rites involved do not offend common decency.' Furthermore, Italian law permits conscientious objection to military service and the right of medical employees to refuse to participate to abortion.

[32] That said, some legal provisions permit and encourage such cooperation: this would include the right for individuals and social groups to express their personality under Article 2 and laws that protect the cultural and artistic heritage.

[33.] The system is governed by very detailed legislation: put simply, in his tax return the taxpayer can state whether a percentage of the sum he has to pay to the state is to go to either the Catholic church, or social purposes, or both, or to the general budget of the state. The Catholic church also received indirect funding: the state pays the wages of teachers of Catholic religious education and of Catholic clergy working in the armed forces and prisons. Furthermore, funds are provided for its social activities in relation to hospitals, schools and charity work.

[34] However, the registered confessions with whom a treaty has been concluded share a tax privilege in relation to donations with the Roman Catholic church: 10% of the sum given is deducted from the income tax of the donor. Furthermore, certain tax exemptions are enjoyed for religious activities.

[35.] The first allows a quota of an individual's income tax paid to the state to be designated by the taxpayer to one of three beneficiaries: the Italian state, for extraordinary measures against famine in the world, natural disasters, aid to refugees, the conservation of cultural monuments; the Catholic church, for the support of worship, the support of clergy, and for the churches welfare measures benefiting the national community or third world countries; or one of the denominations that have signed an agreement with the state. If a person does not make the declaration, the quota is distributed among these different classes in proportion to the choice made by the rest of the population liable to income tax. The second type of financing is the right of the religious denominations to off-set donations to religious organizations from taxable income. Other forms of indirect funding include tax advantages such as exemption from land transfer tax and inheritance tax. Furthermore, any property of the Holy See located on Italian territory is exempt form any kind of tax or duty towards the state or public entities (see Ferrari 1996, pp. 181–4).

[36] Namely: Catholicism, Protestantism, Judaism, Anglicanism, Islam and the (Greek and Russian) Orthodox church.

[37] Respect for national diversity is enshrined into the structure of the EU treaties; in relation to religious diversity, the appendix to the Treaty of Amsterdam entitled 'Declaration on the Status of Churches and Non-confessional Organisations' provides that: 'The European Union respects and does not prejudice the status under national laws of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations.' Directive 2000/78/EC states that discrimination on grounds of sex, race, sexual orientation, age, disability and religion or belief 'should be prohibited throughout the Community.' For further details, see Rivers (2004).

[38] The European Court of Human Rights at Strasbourg has recognised that, 'The State's role as the neutral and impartial organiser of the practising of various religions, denominations and beliefs is conducive to religious harmony and tolerance in a democratic society': *Refah Partsi v Turkey* (41340/98) (31 July 2001).

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