Secularism, Constitutionalism and Sovereignty: A Critical Investigation into the Role of Limiting Religion in Governance

Darshan Datar

Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

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European University Institute
Department of Law

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Supervisor

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Researcher declaration to accompany the submission of written work
Department of Law –LL.M. Programme

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I confirm that chapter III was the result of previous study February Paper I undertook at European University Institute institution.

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This thesis has not been corrected for linguistic and stylistic errors.

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Thesis Statement.

Liberal democracies are currently being scrutinized for their radical restrictions of religious practice. The liberal states have embarked on a new agenda to limit religion to ensure that the public sphere is free from ideological conflict. This thesis will examine what the obligations of a liberal state are towards religious groups. The thesis concerns itself with asking what the principles of secularism mean to a liberal state beyond the standard question of how it must set up its State-Church relationship. The core question this thesis asks is: Whether liberal constitutionalism requires a constitutional dominance over religion and if so what are the means by which it must protect religious rights and autonomy?

In the First substantive section of this thesis, the author will attempt to demonstrate why we need to move past a view of secularism as merely a State-Church relationship, this section will demonstrate why the mode of State-Church relationship does not affect the amount of pluralism and autonomy which is present in a state. This thesis will argue that liberal states with an established Church are just as capable of having an egalitarian religious polity based on liberal neutrality as a state which has a wall of separation between religion and politics.

The second substantive part will argue that moving towards a principled explanation of political secularism and its correlation to liberal tolerance yields better results. It will empirically demonstrate that all constitutions have a functional dominance over religious rhetoric within the political sphere. It will further argue that liberal states balance the dominance of religion through giving neutral reasons for limiting religious practice coupled with the abstinence by state organs from interfering with the ideological development of religions, so as to allow them to play a role in Liberal politics by translating religious reasons into public reasons.

Finally, the last substantive part of this thesis will empirically demonstrate the impacts of liberal states interfering in the ideological development of religious ideologies by demonstrating how liberal states that engage in this practice harm the very foundations of religious pluralism and freedom. The two case studies which will be utilized for this section will be India and the United Kingdom.

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First and foremost, I would like to thank my supervisor and mentor, Professor Gabor Halmai for his unyielding support and hands-on supervision. His supervision on a professional level has been vital to this thesis and to my year at the European University Institution. I would also like to thank all the members of the Constitutionalism and Politics working group for their comments on my ideas and for their support on a personal level. Elena, Theo, and Oliver have been vital to my thesis and deserve the highest praise for their professional support and personal friendship. My thesis has also greatly benefited from the events organized by the working groups which are active at the EUI.

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I Introduction.

In the European University Institute, on the terrace of the Mensa, high above Florence there stands a statute. The statute has a Halo carve over its head and stands upright looking up at the heavens. In the hand of this sculpture is a book which has the initial letters of the word constitution engraved on it. The sculpture perfectly illustrates the tussle between religion and the modern state. Both entities assert moral authority on the subject (the citizen) and tussle for power over the public and the political sphere.[1] The primary question that underpins this thesis is how the liberal, secular state interacts with religion in a political setting. What are the obligations of the liberal state and how does this impact the religious sphere of life? All too often we have been told that religion is dealt with exclusively by liberal constitutions by separating it from the political process. Any deviation from this model leads to a complete annihilation of the liberal legal order. This thesis will attempt to investigate this hypothesis on its merits. However, before going into the merits of these very intriguing questions we must first lay out the groundwork for the thesis. In order to achieve its goals, this thesis will first describe a brief history of freedom of conscience and the liberal state before entering the first substantive chapter of this thesis. In part II, this thesis will attempt to debunk arguments that state that only a separationist model of State-Church relationships is conducive to liberal religious freedoms within nation-State, it will do so by adopting a comparative theoretical methodology to demonstrate how an equalitarian and free society can form despite the presence of an established Church. Part III and IV will attempt to demonstrate that the answer to why liberal states have a high degree of freedom of religion is not because of the State-Church setup but, because of the principles of tolerance that underpin the state's attitude towards religious difference. In doing so this paper will argue that secularism and freedom of religion should be looked at as a check on the liberal states urges to homogenize. The conclusion that section IV will reach is that the liberal state is made up of the balance of two principles, dominance over religious rhetoric in the political sphere and a corresponding check on dominance through the granting of group autonomy and individual rights. These two sections will utilize a comparative methodology do demonstrate how liberal states moderate dominate religion as opposed to illiberal states who either assimilate religion for a political end or dominate religion totally giving no religious freedoms or group autonomy. Finally the last part will attempt to demonstrate the impacts of violating the balance between

[1] ROBERT AUDI, DEMOCRACY, AUTHORITY AND SEPARATION OF CHURCH AND STATE (2011)

autonomy and domination. It will utilize two case study of liberal jurisdictions who judicially violate religious group autonomy to demonstrate the possible impacts. The jurisdictions which will be used are India and The United Kingdom (U.K).

The current and historical context of liberal secularism and freedom of conscience is vital to understand before we move into a more radical assessment of these concepts. This thesis will aim to utilize this introduction to first acquaint the reader with the essential background information which informs the thesis. Furthermore, the introductory chapter will be used to clarify the methodological issues in this thesis as well as a brief introduction to the chapters that lie ahead.

Constitutionalism has been traditionally associated with one species of governance and constitutional drafting. It was argued by scholars that a constitution with constitutionalism was unique to a liberal constitutional democracy.[2] Any deviation from having a constitutional model which contains checks on governmental authority, via the insertion of provisions of separation of powers, the right to vote and individual liberties was deemed to be authoritarian in nature. Miguel Schor distinguished a constitution which was conducive to a liberal, democratic government as one which had elements of constitutionalism which both horizontally and vertically provided a check on power. His assessment of Latin America was that even with the presence of rights as well as horizontal separation of powers, there was a lack of checks on the government on a vertical level. Scor was of the opinion that liberal constitutionalism had a requirement of curbing amendment powers in order to protect a liberal polity. Liberalism thus forms a critical check on government to reduce the ability of the ruling power to be overly fluid in policymaking. What is at stake according to liberal theorists is the protection of a theory of the good which confers individual agency as well as an egalitarian impulse to create an equitable society. Modern democratic regimes with liberal constitutions all meet four minimum criteria: "*1) Executives and legislatures are chosen through elections that are open, free, and fair; 2) virtually all adults possess the right to vote; 3) political rights and civil liberties, including freedom of the press, freedom of association, and freedom to criticize the government without reprisal, are broadly protected; and 4) elected authorities to possess real authority to govern, in that they are not subject to the tutelary control of military or clerical leaders*."[3]

[2] ANDRAS SAJO, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM (1999).
[3] Gabor Halmai, *Religion and Constitutionalism*, MKT WORKING PAPERS 2015/5 at 3.

At the heart of liberal constitutionalism is a constitutionally constructed polity which is often referred to as the demos. The demos typically vests popular sovereignty with the people and in an act of self-conferral of sovereignty, notional sovereignty is bestowed upon a preordained governmental apparatus setup by the people, for the people. This project predicates itself on a form of moralizing tolerance wherein citizens are vest with rights and liberties to enable them to choose their own conception of the good.

Illiberal constitutionalism, on the other hand, is no longer as traditionally defined. Traditionally an illiberal constitution would be a political arrangement which was authoritarian in nature. It would have no checks and balances and political decision-making would completely hinge on the common of the sovereign. The presence of any constitution within such a regime was characterized by scholarship as a sham constitution which was neither the source of sovereign power nor a real check on the exercise of such power. The dictatorship was deemed to be an internally homogenous phenomenon and each regime was described as a phenomenon independent of a countries unique genealogy.[4] The Illiberal project has been based of the divinity of the ruling class and the outward rejection of theology in favor of the divine word of the king.[5]

Furthermore, Illiberal regimes were often deemed by scholars to be a by-product of a lack of constitutionally entrenched political accountability. However, as demonstrated by Ginsberg and simpler, illiberal regimes benefit from the use of constitutions to help codify the scope of the dictator's powers. In some events, it even begins to legitimatize their authority through an unfortunate path dependence on the entrenched system of governance. Ran Hirschl articulated this point when he meticulously demonstrated how constitutions influence the contours of permissible and impermissible discourse.[6] In doing this a Constitution and the values implicated through constitutional politics trickle down to society and inform their political values and create a situation where only one notion of the good prevails which is that which is endorsed by the dictator.[7] On certain occasions, law and order and the aesthetics of a city could be valued more highly by citizens than their own freedom and the rights of others.[8] This form of government has typically been characterized by the presence of a negative identification regime towards religion to help entrench the status of the dictator with the view

[4] Steven Levitsky & Lucas Way, *Elections Without Democracy: The Rise of Competitive Authoritarianism*, 13 JOURNAL OF DEMOCRACY 51 (2002)
[5] SAMUEL HUNTINGTON, CLASH OF CIVILIZATOINS AND THE REMAKING OF WORLD ORDER, 70 (1996)
[6] *Supra* note 4.
[7] Ozan O Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1687 (2015).
[8] *Id*.

of entrenching only one notion of the good.[9]

What is most peculiar, however – specifically with respect to liberal backsliding *vis' a vis* religion, is the rise of the third kind of hybrid regime. Over the nineteen seventies and eighties scholarship started to recognize the possibility of a hybrid regime, one which was neither authoritarian nor democratic. The hybrid regime operated through a systematic erosion of liberal constitutional structures from within. These constitutions were not sham constitutions, they had the necessary provision in theory to create a stable constitutional democracy. As described by Levitsky and Way a hybrid or competitive democratic structure: "*In competitive authoritarian regimes, formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority. Incumbents violate those rules so often and to such an extent, however, that the regime fails to meet conventional minimum standards for democracy*".[10] This scholarship was initially trying to explain the rise of authoritarian regimes in Latin America and South East Asia and did not achieve the attention it required. However, with the rise of hybrid regimes in Poland and Hungary amongst other formerly liberal democratic states has had scholarship revisit this concept. Mark Lilla has argued that liberal democracies have not flourished in the period that followed the cold war, instead, liberal democracies have reverted to a system where they prioritize national and ethnic identity. It is critical to note that Lilla's observation does not stand alone.[11] Levitsky and Way has also made a similar observation with respect to the re-emergence of a softer form of authoritarianism.

Understanding this and its relationship with liberal structure and particularly secularism and freedom of religion is essential. Levitsky and Way argues that there are four basic categories that are utilized to achieve illiberal ends. In hybrid regimes, there is a fairly independent judiciary, however; soft coercive tactics and incentives that enhance a social homogenization of society are used to ensure that judges and civil society are churning out a favorable narrative to the ruling party. Court-packing, as witnessed in Hungary and Poland, may also be a very useful means to achieve this end. An endorsed religion has been utilized in many soft authoritarian states to ensure that the population is kept content and the illusion of competitiveness is preserved with no real risks to the losing party. A classic example of this is the Hungarian state utilizing religion to create a common historical identity to help keep

[9] *Id*.
[10] *Supra* note 4, at 51.
[11] MARK LILLA, THE STILLBORN GOD, RELIGION, POLITICS AND THE WEST(2007).

the ruling party popular amongst the masses. The preamble of the Hungarian constitution, which is taken into account while interpreting the text of the constitution, mentions the endorsement of the state to Christianity. The preamble of the constitution states that: "*We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe*."[12] Furthermore, the "*role of Christianity in preserving nationhood*" and honor the fact that the Holy Crown "*embodies the constitutional continuity of Hungary's statehood*." Is recognized in the Hungarian preamble so as to endorse Christianity. As Gabor Halmai notes, there is a space for other religions and liberal tolerance within the Hungarian constitution. However, the reference to Christianity as a dominant binding force of the nation-state marginalizes minorities through the use of rhetoric.[13]

This preamble must be situated in the backdrop of the recent recession of Hungary away from being a liberal country within the Eurozone to one that is skeptical of liberal EU values.[14] The insertion of this clause in the preamble clearly uses the Christian faith to endorse only one faction of society and neglect minorities. Even though the constitution on the face of it exhibits certain liberal features, the use of religion to marginalize minorities and European Countries which are lobbying for policies that support religious pluralism.[15]

In light of the seemingly constitutionally approved use of religion to entrench an authoritarian vision of society, the Hungarian State enacted the Churches act, which was designed to stifle religious pluralism, further appease the majority and create a homogenous state which would aid the sustenance of the competitive authoritarian regime.

As noted above, Hybrid constitutions utilized liberal structures – including secularism and freedom of religion - to achieve illiberal ends. This scholarship was initially trying to explain the rise of authoritarian regimes in Latin America and South East Asia and did not achieve the attention it required. However, with the rise of hybrid regimes in Poland and Hungary amongst other formerly liberal democratic states has had scholarship revisit this concept. Mark Lilla has argued that liberal democracies have not flourished in the period that followed the cold war, instead, liberal democracies have reverted to a system where they prioritize national and ethnic identity – often this identity has been consolidated through an appeal to the religious homogeneity of the ethnic majority. What is most curious about the hybrid

[12] *Supra* note 4.
[13] Gabor Halmai, *Varieties of State-Church Relations and Religious Freedom Through Thee Case Studies*, 2017 MICH ST. L. REV. 175, 183-88 (2017).
[14] *Id*.
[15] *Id*.

regime is that it utilizes liberal structures to achieve this end. Endorsing a religious history is common in many different liberal regimes, however, it is the appeal to majoritarian unity and the vilification of religious difference that demonstrates how a typically liberal arrangement can backslide and aid a comparative authoritarian regime.

Liberal Constitutions are prone to a backsliding is not a specifically surprising phenomenon. Carl Schmitt demonstrated that liberal politics had within its inherent limits. However, the recent activities within liberal states are important to note, there has been a Defacto entrenchment against religious practice within a liberal state wherein liberal states are beginning to radically police religions which they believe to be dangerous. At this stage, the States are not giving any room for religious freedoms and are ideologically marginalizing religious groups. The question we must ask is why this is happening? The answer lies in the urge of a liberal state to homogenize its population.[16] The liberal state exerts a moderate amount of dominance over rival ideologies so as to preserve itself and the rights of all its citizens. Since pluralism of ideology is essential to the liberal state, it must regulate ideologies moderately in other to allow for other ideologies to flourish.[17] Freedom of religion has historically been moderately regulated and ideally should continue to do so. The problem we face is the current liberal state has ruptured from its historical roots and started to rationalize other ideologies, changing them in an authoritarian way as opposed to merely limiting their practice.[18]

History of secularism.

Much like the concept of constitutionalism, the history of secularism and the freedom of religion is marred by a very particular combination of the freedom of religion being intrinsically tied together with the concept of nationalism.[19] The history of freedom of religion and by implication secular structures is that they too, like constitutionalism are fighting a battle between being liberating and secondly balancing the new found liberation with constitutionally entrenched values.[20]

Nehal Bhuta and John Dunn demonstrate how the freedom of religion which is often cited as

[16] Stephen Marcedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POLITICAL THEORY 56, 58 (1998) .
[17] *Id*. at 58.
[18] *Id*.
[19] Silvio Ferrari, *Who Is Afraid of Religious Freedom? The Right to Freedom of Religion and Belief and Its Critics,* 11 RELIGION & HUMAN RIGHTS 214-15 (2016).
[20] *Id*.

one of the prime reasons for the presence of political secularism is rooted in a regulatory urge of a state as much as it is rooted in individual freedoms.[21] As mentioned by Bhuta the history of freedom of conscience – in its most nascent historical state - was neither rooted in individual autonomy nor was it rooted in a natural right. Instead, the freedom of religion was necessarily given to individuals to ensure the regulation of religion was more palatable. John Dunn eloquently describes this by stating that freedom of religion was: "*a discretionary concession on the part of the custodians of the state's absolute power*"[22].

John Dunn, in his spectacular excavation of the right to conscience, was not merely a restatement of state power. However, it was a by-product of the cultural wars that were prevalent during the 16th and 17th century. This is an incident which is cited by Silvio Ferrari as the reason for the birth of modern secular structures as well. It is a concept that has through the process of constitutional borrowing, be imported into most democratic states beyond the west and Europe. However, contrary to popular opinion it is unlikely that the end of the war brought with it a space for unrivaled freedom or even an entrenched sense of political secularism.[23]Bhuta, in fact, observed that the historical attempt points to the opposite. Religion was a tool to be utilized in the further consolidation of State power and this was achieved through the emphasis on creating a national identity. Speaking of the end of the religious wars, Nehal Bhuta, observed that: "*The end of the conflict was not characterized by a sudden de-confessionalization of the states that had endured it, but a variety of national religious settlements aimed at preserving civil peace under the conditions of the balance of forces that prevailed. Thus, the English state remained confessionalized, excluding Catholics and unreconciled Presbyterians from public office and reinstating Anglican hegemony. At the same time, a modus vivendi was created by widening the space for toleration of certain doctrines previously penalized as heretical, and deeming them adiaphoric or indifferent with regards to salvation .. Offences of heresy and blasphemy remained on the books and continued to have a religious content, prosecuted as offences which breached the peace by denying certain doctrinal religious foundations of the civil order. In practice, private worship by Catholics, dissenting Protestants, and free-thinkers were admitted, but not on the grounds that religious belief is arrived at through the free exercise of religion. It was admitted to the extent that it did not challenge a public order*

[21]Nehal Bhuta, Two *Concepts of Freedom in the European Court of Human Rights*, EUI WORKING PAPERS , 3(2012).
[22] JOHN DUNN,THE HISTORY OF POLITICAL THEORY AND OTHER ESSAYS ,101 (1996). See also, Nehal Bhuta, *Id*. at 3.
[23] Dunn, *Id*.

reconstituted on the basis of Anglican "national worship" after almost a century of civil war."[24]

In light of the religious wars of the 16th century, it was clear that religion could be utilized by the state to either subvert it into ordinary political life and hence forge a national identity by means of the state having an ideological fidelity with a theory of the good which implicated through the conferral of the freedom of religion.[25]National and constitutional identity thus acted as trumps to the freedom of religion. Freedom of religion was historically conferred on states as the means to the end of the unification of the nation-state.[26]

With the emergence of natural justice as a legal concept and the increasing influence of international human rights treaties, freedom of religion moved from a tool in the kitty of the sovereign to a more uniform right which was founded in an inviolable sphere of human autonomy. As noted by scholars this move was very heavily influenced by the Catholic Churches whose move to convert individuals required a conception of religion is a choice rooted in an inviolable sphere of human autonomy. The compromise between the religious organs and liberal states forms the backdrop to modern freedom of conscience and secularism.

This historical trajectory leaves freedom of religion and secularism as very important parts of modern constitutionalism. The backsliding on these two constitutional variables in a religious or militantly secular direction has large reaching ramifications on the health of a democracy. By backsliding on secularism Liberal state beings to prioritize national utility and identity over a plural democratic and egalitarian polity. However, what is curious to note, as I will demonstrate through this thesis, the modern definition of secularism is highly rooted in justifying a lack of religious freedom in and through the rhetoric of national identity, egalitarian mandates upon the liberal state and the specific genealogy of secularization that is observable in the specific nation-state.

It is at this stage where we must revisit the arguments made by Mark Lilla.[27] Mark Lilla was of the opinion that secularism and freedom of religion standards could not be held to a universal standard and he argued that the uniquely western genealogy of the secularism

[24]Bhuta, *Supra* note 21, at 4.
[25] Ferrari, *Supra* note 19.
[26]Steven Homes, *Constitutions and Constitutionalism*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Rosenfeld & Sajo Eds 2012).
[27]Lilla, *Supra* note 11.

should mean that the west ought to accept alternative theories of what church-state relationships ought to be. Mark Lilla was of the opinion that religious rights need not be protected to the extent that they are in liberal democracies. Lilla demonstrated how liberal democracies must be open to this idea as an alternative plan . I will engage with this argument further in the next section however intuitively the genealogical history of a liberal secular order as highlighted in this specific text has spawned a plethora of different Church-state relationship. While Mark Lilla is correct in highlighting the need for some flexibility, there is also a need to look past Church-state relationships and find a normative core meaning to secularism and the freedom of religion. As demonstrated above the European history and the history constitutions provide a lesson we can going forward to help reformulate the meaning of secularism and the scope of the freedom of religion.[28]

Almost fittingly, it doesn't seem to be the mode through which state church relations are constitutionally formulated but, instead of the method through which political and legal narrative frames them that is implicated in the systematic erosion of democratic structures through the relationship of the state towards religion. For example, on the face it Denmark had a far more potent form of state endorsement of religion in its constitutional text than Hungary. However, the Hungarian government framing of religion as a source of national identity is what is causing the backsliding. I will utilize the next section to briefly theorize about different state-church relationships and how ostensible secular regimes function. An important take away from this section is that secularism and constitutional have historically provided for the same conundrum for a liberal state. They are both agents which balance national identity with pluralism. In light of the rise of hybrid regimes, it is essential that the liberal state protects these institutions which balance identity. What I am attempting to do in the next section is arrive at a normative position of how best they must achieve this goal.

[28] *Id*.

II State Church Relationships

It is commonly understood in scholarship that the Institutional arrangement of State-Church relationships plays a critical role in the level of tolerance towards religious practices that persist within a state. However, this seems to be a claim that is not empirically or theoretically salient. However, before moving into the argument as to why there are other important factors that have a greater bearing on the level of religious freedom and equality in a state we must first appreciate the arguments that give the aforementioned claim its normative force.

To truly understand why liberal democracies are backsliding into a more illiberal form of democracy when dealing with religion, we must first understand the mandates of liberal constitutionalism on states *vis' a vis'* the religious sphere. Through this section, I will attempt to articulate what the mandate of political secularism is on liberal systems. In doing so, I hope to highlight the importance of being politically and institutionally secular as opposed to being ideologically secular.[29] Political secularism is a form of secularism where the State-Church relationship reflects the values of pluralism and tolerance towards religious practice. There needs to only be minimal structural checks on power to ensure that this happens. Ideological secularism, on the other hand, is a political ideology which persists within political structures towards religious practice and ideology.[30] Often this reflects itself in negative identification states where there is no space to be a religious citizen or community due to the demands of homogeneity which is imposed upon individuals and groups by the constitutional demos.[31]Marxist states happen to be a classic example of this form of secularism as they clearly follow the tenants of Marx – wherein religion is deemed to be one of the primary threats to the formation of a collective and egalitarian ideology.[32]

One of the first points that require being engaged with is how liberal state structures deal with religion. Traditionally in western liberal democracies, it was argued that religion ought to have no privileges in the political realm and in extreme circumstances it was argued that it

[29] Michel Rosenfeld, *Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity* in Constitutional SECULARISM IN AN AGE OF RELIGIOUS REVIVAL (Rosenfeld and Mancini eds 2014). Rosenfeld's theories was that secularism could be used as an institutional arrangement as opposed to an ideological arrangement and thereby making it more tolerant towards pluralism. However, what is critical to note is that there was a level of constitutional dominance over religion exerted even in the model which mandated an institutional level of secularism. Equality, Freedom of Expression and scientific knowledge all benefited from secular law protecting them regardless of the religious dialogue around them.

[30] *Id*.

[31] *Id*.

[32] COLE DURHAM AND BRET SCHARFFS, LAW AND RELIGION (2010).

ought to have no place in the public sphere.[33] However, this is indigenous to very few nation states even in very tolerant and liberal societies. A radical separation is more an anomaly than it is the norm. As Mark Lilla argued, secularism is perhaps an indigenous concept to the history of the West. It has however been adopted by liberal democracies all around the world, through the colonial experience and through constitutional transplants.[34] The historical experience of colonialism has given rise to a plethora of State-Church relationships within the broad definition of liberal democracies.[35]The presence of such pluralism is often explained away by citing the unique genealogy that countries have through their specific processes of secularization.[36] Scholars have recently started to question whether such a pluralism is indeed desirable and many have advocated for a new theory of secularism to be created to engage with what they believe to be a re-emergence of religion in the public sphere.[37]Often these theories have taken the shape of advocating for one specific type of State-Church relationship as is the case with Rosenfeld or with Sajo who both prioritize a specific form of State-Church relationship. Sajo believes in a radical separation while Rosenfeld believes that religious freedom is optimized through non-identification and the understanding of religion as one among the many theories of the good.[38]

With secularism's place as a principle inherent to constitutionalism is currently debated by scholars on the basis of the re-emergence of religion in the public sphere. The re-emergence of religion seems to be a fact that has been noted by social scientists as well as constitutional lawyers.[39] The discovery of the religious revival in the public sphere has sparked the aforementioned debates and it would seem as though scholars are unable to reach a consensus on how to deal with religions visceral return to the forefront. Before I begin with my description of why lawyers believe that we must reformulate the secular space, I will first begin by describing what people believe to be a re-emergence of religion in the public sphere. Karl Marx and Max Weber are among the great philosophers of the past who had predicted

[33] Mark Lilla, *The Truth About Our Libertarian Age. Why the Dogma of Democracy Doesn't Always Make the World Better*?', THE NEW REPUBLIC, 9 (2014).
[34]*Id*
[35]*Id*.
[36]OLIVIER ROY, SECULARISM CONFRONTS ISLAM (2007), 7; LORENZO ZUCCA, A SECULAR EUROPE (2012), 27-28.
[37] Andras Sajo, *Secularism & Constiutionalism: The need for Public Reason*, 22 CARD. L. REV. 2401, 2402 (2010)
[38] *Id*.
[39]Seyla Benhabib, *The return of Political Theology: The head scarf Affair in a Comparative Constitutional Perspective in France, Germany and Turkey,*Politics Religion and Political (2017)

that the rise of reason would lead to the demise of religion within the public sphere.[40] Charles Taylor added credence to this theory by demonstrating how the history of religion in the west is a history of the gradual process of secularization.[41] Religion stopped being a major part of the public sphere mainly because it gradually lost meaning to the population.[42]In light of this, the historical trajectory noted in the previous section has yielded a range of different State-Church relationships but ensured that the states retained a constitutional superiority to religious law.[43]

Saylela Benhabib is a social scientist who warned us about the end of secularization. Benhabib argues that there has been a revival of religious sentiments within liberal and illiberal states.[44] She concludes that religion, once deemed to be a relic of identity, has now returned to the forefront of the political realm.[45]Constitutional lawyers have also been influenced by the rise in high profile cases involving religious rights and religious discrimination have also observed that such a trend exists.

Andras Sajo along with many other theorists have argued that secularization was a half-hearted compromise and betray the true meaning of secularism.[46]As noted in the previous section, the history of secularism and freedom of religion in the west is partially distinct from the history of secularization. The genealogy of bestowing the right to worship on people is distinct from why religion stopped being a part of public life.[47]He argues that the secularization is a social and historical phenomenon that lacks intellectual consistency and betrays the constitutional project of secularism.[48] The distinction made by Sajo is in fact quite critical particularly in light of the work by Charles Tayor which demonstrates that secularization is the reason why religion is no longer playing a part in the public sphere.[49]According to Sajo, secularism is merely a constitutional commitment and not a mode

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[40] Andras Sajo, *Supra* note 37, at 2402.*: The need for Public Reason*, 22 CARD. L. REV. 2401, 2402 (2010) Michel Rosenfeld, Supra note 29. Andras Sajo argues that secularism as a constitutional principle is necessarily at odds with the rise of the strong religion. According to Sajo, the strong religion present in the public sphere due to the lack of scientific advancement. However, they believed that with the birth of the industrial revolution and the heightened value given to rational though the influence of religion was gradually reducing and would continue to do so till it had no role to play in the public sphere.

[41]CHARLES TAYLOR, A SECULAR AGE (2007)

[42]*Id*.

[43]*Id.*

[44] Seyla Benhabib, *Supra* Note 39

[45] *Id*.

[46]Andras Sajo, *Preliminaries to the Concept of Constitutional Secularis*m, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 605, 605-629 (2008).

[47] *Id*.at 605-06..

[48] *Supra* note 37. at 2402-20.

[49] See contra, *Supra* note 41.

of secularization, Sajo's opinion is that secularism in an aggressive form is tantamount to force-feed liberalism to religious head in light of the failure of organic secularization. He believes that secularism is a fundamental requirement for a polity based on public reason as secularism defends reason against the heated passion of religious unreason. He further advocates, in a response to Lorenzo Zucca,[50] that secularism was a protection of constitutional values from the influence of the strong religion.[51] He argued that religious practices can threaten the constitutional identity of the state and advocated for a radically separate space between religion and politics and rigorously policed the public sphere to ensure that constitutional identity was not threatened by religion.[52]Secularism, therefore, according to Sajo is the separation of politics, completely from religion. He champions the theory that the state must be agnostic towards religion and ideologically must protect itself from the threat of religion.[53] Sajo thus believes that the principles of public reason can only be upheld if religion is not accommodated into the political and public sphere.[54]

Other scholars including Michael Rosenfeld and Susana Mancini have all alluded to this sociological phenomenon and urged lawyers to be mindful of a possible solution.[55]Michael Rosenfeld like Lorenzo Zucca, argues for a highly accommodationist framework to protect religion. The crux of their argument is that religion must be accommodated in political and social life so long as it doesn't threaten certain core values. For Zucca, the core value was non-moralizing tolerance – which in his opinion was the source of meaningful political dialogue.[56] While Lorenzo Zucca's framework goes a long way in giving us a principled account of secular, he too recedes into arguing that a particular accommodationist State-Church relationship is better than others.[57] Zucca's theory when closely analyzed argues that there must be a non-establishment model which is accommodating towards all religions so that dialogue can begin with a religious idea. *Ergo*, the state may accommodate a specific religious symbol according to Zucca but, it must equally embrace and accommodate criticism

[50] *Supra* note 36. See generally chapter two. This chapter provides a holistic engagement with Sajo to demonstrate the value of relativism.
[51] Andras Sajo, *The Crisis was not there: Notes on a Reply*, 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 515,516-18(2009)
[52] *Id*.at 16-18.
[53] *Id*.
[54] *Id*.at 519-21.
[55] Rosenfeld, *Supra* note 29, Rosenfeld believed that there has a been a re-emergence of religion in the public Sphere however, he is of the opinion that the solution does not lie in trying to restrict it but, instead in trying to accommodate it. Therefore, Ronsefeld's idea of a state Church relationship hinges on a radical accommodation of religion as a legitimate theory of the good.
[56]Zucca, *Supra* note 36, at 25-30.
[57]*Id*.at 30.

of that symbol.[58]Unfortunately, in this account, the criticism of Sajo seems to hold weight, the approach recedes into a relativistic account which does not even in the most minimal of ways protect the identity of the liberal state. Often leaving a space as wide open as Zucca does would yield the result that all practices ought to be tolerated no matter how malignant they are towards the collective identity of the citizenship. Both Zucca and Sajo, suffer from an infirmity that the other sought to protect the state against. Perhaps they both have a point, one which can be seen more clearly through an investigation of why State-Church relationships have little meaning in today's politically secular state.

What we must take away from these very meaningful debates is that at the heart of this strand of legal scholarship is a search for the meaning of secularism independent State-Church relations.[59] Prior to evaluating the normative desirability and my opinion on what the core meaning of normative secularism is, it would be desirable to highlight where the problem lies for scholars like Sajo, Rosenfeld[60], and Zucca.[61] In order to do so, we must have a brief interaction with the different State-Church relationships across the world. I will highlight in detail some of the positions taken by scholars on the normative core meaning of secularism. However, at this stage, it would seem prudent to look at the State-Chruch relationship and understand which ones are compatible with liberal constitutionalism and political secularism so as to fully engage with the strand of scholarship which is represented by Professor Sajo.

Analyzing State-Church Relations

The modes of State-Church relationships have often been highlighted by scholars to demonstrate the level of freedom of religion that persists within a particular nation-state.[62]It has been the failure of this scholarship to have any practical force in changing secular structures that have caused scholars to abandon this approach in search of a politically secular set of principles which transcends the mere inquiry of what sort of State-Church relationship should a state follow.[63]

In their model, Durham and Schraffs refer to what they call the loop configuration. They argue that standard ideas that establishment is inconsistent with religious freedom are only

[58]*Id*, at 30.
[59]*Supra* note 29.
[60]*Zucca, Supra* note 36, at 39-44.
[61] Sajo, *Supra* note 51, 516-18 .
[62]*Id*.
[63]*Supra* note 32, at 26-30,113-146.

partially correct.[64] They believe that establishment has a large set of variables within it that make it at times consistent with political secularism and the freedom of religion and at others inconsistent. Similarly, they believe that non-establishment also exists as a spectrum and can in extreme instance transcend into being a form of negative establishment where once again religious freedom does not thrive. With such a rich and diverse study being present today, we can revisit the impact State-Church practices have the freedom of religion and demonstrate why it would be valuable to move toward a thicker normative theory of secularism which is founded on principles and not on a structural relationship between the state and the Church.

Durham and Scharffs envisaged the relationship between the State-Church relationships by diagrammatically representing it. For the benefit of the reader I have given a representation of their diagram below:

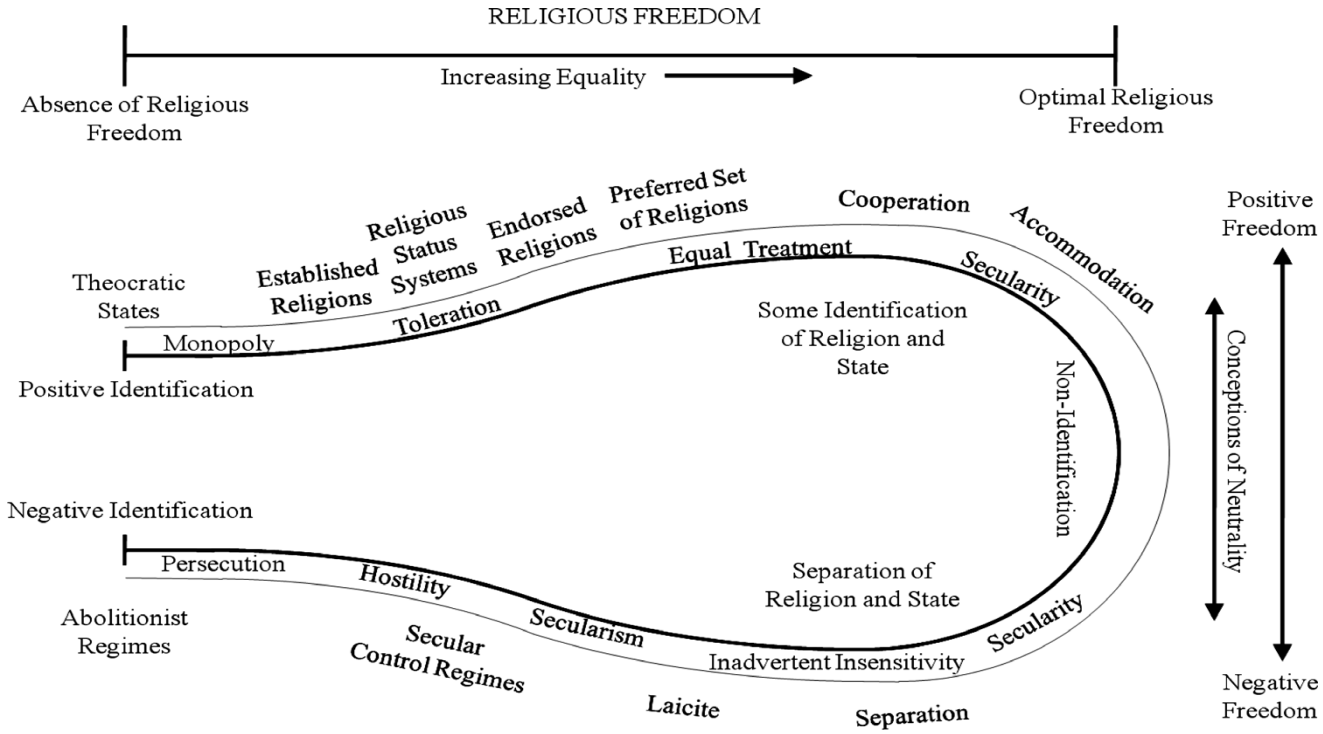

Figure 1. [65]

Durham and Schraffs argue that State – Church relationships exist as a loop when measured against freedom of religion.[66]They indicate that the greater the non-identification of the state with religion the greater the freedom and equality present within the system. What they also demonstrate by this particular diagram is that the absence of religious freedom corresponds to either a theocratic entrenchment of a specific religious denomination or to an entrenchment of

[64] *Id*. at 113-146.
[65] *Id*. at 114-116.
[66] *Id*. at 116.

a militantly intolerant secular regime which heavily corresponds to the expulsion of religion from the public sphere.[67]The latter arrangement also corresponds to the complete annihilation of religious freedom and equality.

Cole Durham and Brett Scraffs, through their loop configuration, demonstrate the importance of the State Church relationship to preserve liberal values. Durham and Schraffs theoretically argue that the State Church relationship has a tangible correlation to the existence of freedom and equality.[68] Theocracies and Negative identification regimes are deemed to have no religious liberty, while non-identification regimes have the highest amount of religious freedom and equality.[69] The greater the level of negative identification has a corresponding impact on reducing the burden on an-adherents and giving them a high level of negative liberty against the domination of religion but, also has the alternative impact of creating an overall decline in the level of freedom which adherents of a religious faith have. On the other end of the spectrum, the greater the influence of religion in politics, the greater the positive freedom of individual adherents of the endorsed faith, however, this leads to an overall lack of equality and freedom for nonadherence of the endorsed faith. Therefore, with this theoretical model, Cole Durham and Bret Scharffs argue that religious freedom is negatively impacted when there is either a state establishment of a religion or when there is a complete negative identification which corresponds to the establishment of an ideological form of secularism which mandates that the citizens ought not to be religion. The model proposed by Cole and Schraffs seems to partially be in consonance with the theory of Andras Sajo, they agree with Sajo to the extent that the establishment of a state church or the endorsement of a religious practice within the political set leads to a dilution of equality and overall freedom, and therefore, such an endorsement threatens the liberal constitutional order. Many different scholars have followed a similar logic to this and demonstrated that separation is the only State-Church relationship which is compatible with liberal democracies. Most scholars have a loose definition of separation which could range between non-identification regimes and a Laicite regime.[70] However, scholars seem to neglect the importance of underlying values who give constitutions their true secular definition.[71]

[67] *Id*.
[68] *Id*. at 113-16.
[69] *Id*. at 116.
[70] Sajo, *Supra* note 45, at 606-7.
[71] *Id*.

Before assessing the merits of the theoretical justifications of the model and theoretical frameworks that have been discussed in this part, it would be prudent to very briefly clarify the role of State-Church relations in different constitutional systems. The first head that is noted in this specific configuration is a theocracy. A theocracy as defines by Ran Hirschl and in a separate paper by Gabor Halmai is a system of governance where a religious text or doctrine assumes the position of being "an or the source of law".[72] This system of governance can within it all the attributes of constitutional governance outside liberal constitutionalism.[73] According to the loop configuration, a theocracy is a model of state Church relationships that do not have any capacity for the religious freedom or equality between the religious majority and the religious minority. In the model given by Durham and Schraffs, a theocracy is necessarily accompanied by a complete absence of religious liberty, this model has been noted by Paul Weber in his seminal article on theocracies in the encyclopedia of politics and religion.[74]A classic example of a theocracy would be the Egyptians constitution. The 2014 constitution promulgated in Egypt retained a pre-existing provision which declared Sharia'h to be the source of law in Egypt, such a provision effectively makes a country a theocracy as per Hirschl's definition, which is in consonance with the view that was elaborated by Cole and Scharffs.[75] The preamble of the Egyptian constitution gives us a further indication of what a theocracy is. The preamble states the following: "*We are drafting a constitution that affirms that the principles of Islamic Sharia are the principal source of legislation and that the reference for interpretation thereof is the relevant texts and the collected rulings of the supreme constitutional court*".[76] Article 2 of the 2014 constitution reaffirms and constitutionalizes the principle that Sharia is the source of legislation in Egypt. While a lot of attention has been given to this form of constitutional arrangement, it is relatively unpopular. Only 9 Muslim-majority states declare themselves as theocracies which is fewer than the 11 that declare themselves to be secular or laic.[77]Furthermore, as I will address in more detail in my critique at the end of this section, how these regimes often become ostensibly secular and ensure religious freedoms for minorities and non-adherents. On the corresponding end of the spectrum is a negative identification state. These states follow a form of militant secularism

[72]RAN HIRSCHL, CONSTITUIONAL THEOCRACY 21-50 (2010); For an alternative explanation reaching similar ends. LON PFEFFER, CHURCH, STATE AND FREEDOM, (1967), 26
[73] *Id*. at 107.
[74]*Id*.
[75]*Id*.
[76] Preamble, Egyptian constitution.
[77] John T.S. Madekey, *Consitutional Models and the Protection of Religious Freedom* in ROUTLEDGE HANDBOOK OF LAW AND RELIGION 209, 212 (Silvio Ferrari ed. 2015). See also, Gabor Halmai, *Supra* note 13.

and they entrench they ideology to monopolize and expel religious narrative from the public as well as the private realm.[78]A classic example of this model is the former soviet union.[79]

Having a system with an established religion is when a state has an official constitutional fidelity towards a particular religious faction. An example of this would be the U.K. with their constitutional fidelity to the Church of England. An established religion has structural preferences given to the religion that is established by law and aids them in multiple different ways. According to the model proposed above states with an endorsed religious set-up have a difficult relationship with freedom of religion. It has been argued that this form of State-Church relationship leads to the alienation of citizens who are not part of the established religious denomination.[80] As noted by Garcia, the establishment can vary in its degree, it can exist either as a high establishment or as a low establishment.[81] A high establishment is when the established order does not impact the day to day life of the ordinary citizen.[82] High establishment extents to scenarios where there is a notional representation in an honorary house within parliament, such as the case in England. This is because the establishment and privileges of the Church of England do not political or morally impact the ordinary citizen such an endorsement of a church is largely a high establishment. A low establishment is when the established church plays an active role in politically and morally ordering the lives of the ordinary citizen.[83]

A religious endorsement is a tricky and sometimes more problematic state Church relationship than an establishment. Endorsing, within a preamble, a particular religion often has a function of further entrenching a religion into government by utilizing it as a tool to legitimize the government. A recent example of this form of governance is the Hungarian model. In Hungary, the Constitution states that: "*We recognize the role of Christianity in preserving nationhood. We value the various religious traditions of our country*."[84] This does not establish a national Church or privilege a specific faith. Instead, it endorses the role of a particular faith in the nation-building project. Thus religion becomes intertwined with the political project of nationalism. These cases usually preserve secular governance up till the

[78] Ran Hirschl, *Supra* note 72.
[79] *Supra* note 32, at114.
[80] JARCÍA OLIVA GARCIA, AND HELEN. HALL, BALANCEING BELIEFS IN BRITAIN (2017).
[81] Søren Holm & Javier García Oliva , *Religion and Law in Twenty-First Century England: Tradition and Diversity in* RELIGIOUS RULES, STATE LAW, AND NORMATIVE PLURALISM - A COMPARATIVE OVERVIEW (Battoni et.al. 2016).
[82] Wesley Carr*, A developing establishment, 805* THEOLOGY 2, 2–10 (1999).
[83] *Id*. at 2-10.
[84] Preamble, Hungarian Constitution.

point that a populist government comes to power, it is at that point that rhetoric is used to privilege individual practitioners of a specific faith. Cole and Scharffs argue that this form of State-Church relationship correlates to a high degree of religious pluralism and freedom.

However, as I will demonstrate in my critique this is not always the case. The Hungarian model demonstrates the interdependence between the authority to rule and religion. The impact of the Hungarian endorsement can be seen in the way in which national symbols are intertwined with religious meaning. Schanda notes that: "*The anthem is sometimes sung at the end of church services, and in this context, it has a religious content. At soccer games or other public events, however, it is likely that many Hungarians sing it (or listen to it) without any religious feelings. In this case, the national anthem is the manifestation of patriotism, with a text that is deeply rooted in the national culture. At the very end of the Basic Law, there is a solemn declaration which recalls the wording of the preamble of the Basic Law of Germany, where the members of Parliament passing the Basic Law declare to be aware of their responsibility before God and man. It can be noted that the everyday Hungarian language has preserved a religious vocabulary (literary "happy birthday" translates as "God shall make you live"; "Welcome" is "God has brought you".*[85] While this system has no establishment or privilege towards the majority religion the use of rhetoric to confuse nationality with ethnicity is largely problematic insofar as it benefits the authoritarian state to polarize the population.

American style non-interference has been deemed by Durham and Schraffs to be the ideal form of State-Church relationship to guarantee religious freedom. The American model oscillates between a weak separation and the accommodation of religious factions. The difference in cases highlights the difference in the two poles of non-identification. Separationist tendencies are characterized by cases such as *Oregon v. Smith*[86], where group autonomy was granted to the religion to establish it's own practice and separation were upheld in that regard. However, the religious practice of consuming piety was not deemed to be a practice which could be exempted from a general and neutral law. The example of accomodationist tendencies can be found in the *Bob Jones case*[87]. The Bob Jones case

[85] Balazs Scanda, *Boarders of religious Autonomy in Hungary, in* RELIGIOUS RULES, STATE LAW, AND NORMATIVE PLURALISM - A COMPARATIVE OVERVIEW , 195 (Battoni et.al. 2016).
[86] 494 U.S.872 (1990).
[87] Bob Jones University v. United States, 461 U.S. 574 (1983). This case is in contrast with the case of Oregan v. Smith as it allows for the government to accodmodate religious difference as long as the belief is sincere enough. However, in both instances the Court is firm on the 1st amendments lack of establishment, the court merely moves between a non establishment model of separation and accommodation.

illustrates quite perfectly the distinction between separationist theory of non-establishment and the accommodationist theories. Bob Jones allowed for the government aid to religious schools so long as there were secular alternatives. This further demonstrates how non-identification according to schraffs and Durham maximizes equality as a value. This form of State-Chruch relationship in the traditional view is the ideal State-Church relationship to maximize freedom of religion.

The school of thought which is compatible with the Loop configurations explanation as to what allows for religious practice and rights to flourish levels three basic charges against any form of establishment or pluralism. The first is the alienation charge, the second is the inequality charge and the third is the conservation complaint that liberal states ought not to extend the boundaries of neutrality which they would defacto do if they had an established religion.

All three justifications for the logic of the loop configuration must be looked into at length to demonstrate the argument. First I will describe the alienation charge. Part of the reason why Durham and Schraff's model has been justified with establishment regimes being rated lowly is a relatively unquantifiable argument. Which is even in the face of equal rights and perfect liberty, there is a notional value added to being perfectly included. Full citizenship cannot be granted unless there is a lack of establishment.[88] Sandra O'Connor captured this in her dissenting opinion in the case of Lynch v. Donnelly.[89] O'Connor observed the following: "*Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message*"[90]

Scholars who support this argument argue that the symbolic approval of one religion is deemed to – even in the face of substantively equal rights – create a psychological inferiority which the liberal state ought to avoid creating. Rex Adhar, in the process of criticizing this argument, gives us a powerful analogy. He inadvertently demonstrated that certain scholars seem to implicitly analogies a symbolic endorsement of religion to be similar to a symbolic endorsement of race.[91]With this in mind, it would be prudent to note that there are two lines of criticism leveled against the establishment which is necessary to note at this stage to all

[88] Michael McConnell, *Religious Freedom at a Crossroads,* 59 CHICAGO L REV1 15, 160 (1992)
[89]465 U.S. 668 (1984), 668.
[90]Lynch v. Donnelly, 465 U.S. 668 (1984).
[91] REX ADHAR AND IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE, 139 (2013).

those who believe that the meaning of secularism resides within a specific State_Church relationship. The first line of argument is the argument that establishment leads to the alienation of religious minorities. This is eloquently described as the alienation charge bt Adhar and Leigh.[92] The Alienation charge states that establishment is incompatible with liberalism because it symbolically excludes non-adherents of the constitutionally established religion.[93]Sune Laegaard described the alienation charge in a very comprehensible and compact manner in her recent article. Laegaard described alienation in the following way: "*Alienation involves a deficient relation between [the] citizen and [the] state. The relation is reminiscent of the classical Marx[ist] notion but has different subjects and objects. Alienation according to Marx was a relation between laborer and the laborer's labor or what the laborer produces. Citizens are instead alienated from the state when they feel unable to identify with the state of feeling excluded from the political community; the state is no longer something which they feel represented by, the no longer feel it exercises power in their name*".[94] Laegaard's reconstruction of the alienation claim is elegant insofar as it captures the core claim. The argument hinges on the assumption that religion is an integral part of personal identity and within liberal structures, the hurting of religious sentiments is capable of destabilizing the political demos created by a constitutional order. In order words, unity in a liberal order can only be achieved through the neutral accommodation of ideological and religious difference.[95]This account is based on the assumption that "Psychological harm" is a strong enough reason to both destabilize constitutional identity and create a situation which causes the discrimination of ideological difference.[96]This account argues that the broader psychological connection of the community to a political order is important for the proper functioning of constitutional norms within that community.[97]Concepts such as republicanism, living together and equal citizenship are, according to this charge, destabilized even by a symbolic rupture in a liberal - egalitarian constitutional order.[98]Cecile Laborde is a prominent theorist who has vocally supported the

[92] Tariq Modood, Establishment, *Multiculturalism and British Citizenship,* 65 POLITICAL QUARTERLY53 (1994) Modood's analysis makes an important point. Which is, in an established system, individuals outside the established religion must get used to the historical roots that they share with individuals who belong to the established faith.
[93] Supra note 91. at 138.
[94]Sune Laegaard, *What's the Problem with Symbolic Religious Establishment*, in LIBERAL POLITICAL PHILOSOPHY, 121 (Laborde & Bardon 2017)
[95] Chirstopher Eberle, *Religion and Insularity: Brian Leiter on Accommodating Religion*, 51 SAN DIEGO L. REV. 977, 1017-20 (2014).
[96]*Id*. at 977.
[97] Daniel Brudney, *On noncoersive establishment*, POLITICAL THEORY, 812 (2005).
[98]*Id*. at 812-815.

alienation charge by arguing that the problem with the establishment is that *"[it creates] a conception of citizenship which postulates that all citizens should be able not to feel alienated by their political institutions*"[99]. Once again Laborde seems to be of the opinion that the psychological alienation of citizens undermines the primary role of liberal institutions – or constitutional institutions- to perform a crucial role in "*entrenching and representing the equal status of citizens*."[100]

Laborde expansion of the Alienation account gives the theory real force insofar as she argues that alienation can move on to be troublesome in a liberal environment for multiple reasons, not just merely psychological reasons. If Laborde is taken to her logical end, her theory would imply that alienation has the impact of the erosion of social togetherness and political participation. This would, in turn, destabilize the entire republican project by ensuring that religious difference corrodes the ability of the state to represent it's citizens in the best possible way and therefore, it begins to corrode the most basic constitutional commitment of one person one vote.[101] This would according to some theorists alienate the population to the extent where they no longer feel represented by the state or by constitutional norms flowing from the foundation of the state and therefore, break apart the constitutional demos.

The second theoretical justification about freedom of religion hinging on the State-Church relationship and the level of establishment that persists within such a relationship is the symbolic equality charge.[102] The symbolic equality charge distinguishes it from the alienation charge by arguing that the harm created by the establishment is comparative to harm created by discrimination and unequal treatment.[103] Martha Nussbaum powerfully argued that establishment is problematic in the liberal state due to the fact that it symbolically sends a message from the state to the citizens (who are non-adherents of the established church) that they are not equal citizens.[104] Thus, it does not purely psychologically alienate them but, it also notionally discriminates against them by not upholding the fundamental democratic commitment of equal citizenship and equal civic status.[105]It is important to note that this

[99]CECILE LABORDE, CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY & POLITICAL PHILOSOPHY, 85 (2013).
[100] *Id*.
[101]*Id*.
[102]*Id*.
[103] Sune Laegaard, *What's the Problem with Symbolic Religious Establishment*, in Liberal Political Philosophy, 123 (Laborde & Bardon 2017) .
[104] MARTHA NUSSBAUM, THE NEW RELIGIOUS INTORERANCE: OVERCOMING THE POLITICS OF FEAR IN ANXIOUS AGE (2012) AT 225-27.
[105]*Id*.

strand of criticism is both expressive and comparative in nature.[106]It first illuminates a normative feature of the establishment as an expression of symbolic inequality.[107]Second, it demonstrates by comparing individuals who are adherents of the established religion to the non-adherents that there is actual harm caused by the latter not being treated as equal citizens.[108] The critical point made by the symbolic equality view is that it extends the constitutional concept of equality from being merely equal rights and duties to a right to symbolic equality before the state.[109] The harm here is notional and created by the value of equality. The harm is the unraveling of equality and it is not tied to psychological harm.

Both accounts suffer from infirmities that make them untenable as possible theories that explain why a State-Church set up is the sole metric that creates religious discrimination in a liberal society. First and foremost, it is important to note that while the alienation theory presents itself in a deeply persuasive manner, it is in desperate need of empirical proof. The theoretical foundations themselves appear slightly whimsical and not capable of serious academic consideration. The alienation charge is subject to a critical problem. The assumption is that all citizens care about their religion being accepted by the state and value the endorsement of the state of their personal religion and beliefs.[110] The second assumption is that seems to hinge on the assumption the alienation of an individual of the state automatically results in a moral and political harm.[111]Adhar and Leigh persuasively argue that the alienation charge's assumption is that citizens care about a symbolic endorsement.[112]Rex Adhar persuasively demonstrate that citizens may not care about a symbolic establishment or endorsement of a belief which they are not believers in.[113]However, the critical infirmity with this account is that in the event that the liberal state does not discriminate against citizens and gives them an equal right to practice their religion there will be no political or moral harm flowing from a symbolic establishment of religion.[114]

In conclusion, the alienation account has been largely dubbed as being unpalatable by theorists for three reasons. The first is the view that alienation in bad in itself notwithstanding

[106] Sune Laegaard, *Supra* note 94, at 124.
[107]*Id*.
[108] *Supra* Note 99, at 85 (2013) .
[109]*Id*. at 85-87.
[110] *Supra* note 94 at 121
[111]*Id*. at 122
[112] Supra note 91, at 138.
[113]*Id.* at 139-146.
[114] Rosenfeld *Supra* note 29. So long as religions other than the established faith are not treated as being outside the purview of a theory of the good there will be little discrimination that flows from the liberal state towards religious practice.

a comparison to any other form of harm. It is deemed to be a unique circumstance that is different in it's moral harm to society from any other phenomenon.[115] Secondly, because of the psychological assumptions which are empirically unviable. The understanding that a notional and symbolic establishment is enough to alienate citizens from the state on a psychological level – even when the state ostensibly grants them equal rights and citizen is not empirically viable as it disregards the very real possibility that citizens simply do not care about whether the state endorses their views symbolically so long as it provides them with the space to formulate and practice their beliefs.

The symbolic equality account further suffers from similar infirmities. While the account does distinguish itself in principle from the alienation charge it's normative force still comes from the assumption that the state sending a message alienates citizens. It thus recedes into the same conundrum which the alienation charge suffers from. This is particularly the case when we search for whether there is any tangible harm flowing out of the sending of a message. Furthermore, the privileging of an institution does not correlate to the privileging of individuals who follow the tenants of the privileged faith. Therefore, while certain institutions may be endorsed the individual practitioners do not benefit in any way in order to allow for us to assume that there is any symbolic inequality on the individual level.[116] Multiple secular states have within them established Churchs and retain a high level of pluralism and equality.[117] These examples accurately show the shortcomings of the alienation and the symbolic equality charge. England, for instance, declares that the Monarch is the "supreme governor of the Church of England" and the "defender of faith".[118] However, England operates in a highly egalitarian society with a high degree of pluralism within it.[119] England achieves this by giving individuals equal rights to practice their faith.[120] Faith as per the text of English law can only be limited in the instance that a constitutional value is threatened, therefore, all religious practice is only limited by the rights of others.[121] The limitation of religious practice is egalitarian in the sense that it applies equally to all religions including the members of the Church of England. As the abolishing of blasphemy as a crime in 2008 demonstrates, England is committed to giving no real privilege to the Church of

[115] LEO PFEFFER, CHURCH, STATE AND FREEDOM(1953).
[116] SUNE *Supra* note 94, at 127
[117] Supra note 13.
[118] *Id*.
[119] Silvio Ferrari, *Religion in European Public Spaces: A Legal Overview*, *in* RELIGION IN PUBLIC SPACES: A EUROPEAN PERSPECTIVE, 148 (Ferrari&Pastorelli eds. 2012).
[120] *Id*. at 148.
[121] *Id*. at 148.

England.[122] This renders the establishment of the Church of England as the religion of the state pointless as no real benefits flow from this.[123]Therefore, the establishment is symbolic only on an institutional level and does not even symbolically privilege individual practitioners. The conclusion that can be derived from the English model is that in some instances establishment does not provide any symbolic promises or benefits to individual practitioners and functions an empty institutional endorsement.[124]As noted by Garcia*" it would be misleading not to stress that nowadays this model of the establishment has become predominantly symbolic, and it comes alongside the recognition of a wider and enriching religious plurality, which has been strengthened by recent legislative developments, such as the Human Rights Act 1998. This statute confi rms the principle of religious freedom in the UK, whilst making most provisions of the European Convention on Human Rights justiciable in the domestic courts. Furthermore, a second important trend concerning discrimination law has taken place in recent years in the UK, as the legislature has aimed to combat forms of discrimination on religious grounds, whether direct or indirect. This development in the employment fi eld is exemplifi ed by the Equality Act 2010.*"[125]Ahdar and Leigh also state that "*Establishment, at least in a modern mild form exemplifi ed by the United Kingdom, we believe, is consistent with religious freedom*"."[126] The analysis by Garcia demonstrates that the symbolic establishment in the U.K's constitutional framework does not have any real impact on the rights and values of the ordinary citizen. Such high establishment often has no impact on the common man.[127]

The same empirical set is visible in Danish endorsement of a Church. Section 4 of the Danish constitution states that: "*Evangelical-Lutheran Church is the Danish People's Church and, as such, is supported by the state*". While the wording of this provision is much more severe on minorities than the English statute, the constitution of Denmark does not discriminate on the right to practice religion. In fact, the ongoing Koran-burning case has demonstrated an egalitarian use of blasphemy laws wherein the individual accused of burning a Koran was charged with Blasphemy.[128] This further consolidates the argument that the recipients of the symbolic message are given enough freedom for the endorsement of a church to be

[122] *Supra* note 82, at 2-10.
[123] *Supra* note 81, at 379.
[124]RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE ?, 57 (2006).
[125] *Supra* note 81, at 379.
[126] Adhar & Rex, *Supra* note 91
[127] *Supra* note 81 at 379.
[128]*Id*.

meaningless to them. Whether, adherents of the said faith or not, the ordinary citizen is – at least within liberal states which have an endorsed religion – guaranteed equal treatment.[129]

Theories which criticize establishment neglect the inherent complexity of the different structures of State-Church relationships.[130] For instance, the coercive establishment can be differentiated from revenue establishment which in turn can be starkly contrasted with symbolic established. In all three of these particular sub-categories, there are further subcategories.[131] All forms of establishment can be segregated into high and low forms of establishment. The high establishment is when the symbolic establishment of a religion has little or no bearing on the life of the ordinary citizen. A tax of 1 pound a person, for instance, would qualify as such in a revenue system.[132] While in a low establishment there is a real and tangible impact on the life of an ordinary citizen. This necessarily demonstrates a policy based role for the religious organ.

What is clear is that the U.K and Denmark are examples of a weak establishment which is vastly distinct from the strong establishment which was prevalent during the regimes in medieval Europe.[133] Strong establishment correlates to the high establishment, wherein the individual citizens' ordinary activities are impacted by the establishment. As Rex Adhar notes: "'*Strong' establishment accompanies state privilege for the favoured religion with distinct civil and legal disabilities for the non-adherents of the official religion*"[134] This was noted many years ago by Francesco Ruffini who argue that a state performs its duty to preserve religious freedom and pluralism when it does everything in its power to ensure the "least possible prejudice" while dealing with cases of the exercise of religious rights.[135] Ruffini, in his seminal work, was clear that establishment was not a model that defacto could lead to religious discrimination.[136] The symbolic equality charge and the alienation charge is in many ways responding to Ruffini's line of thought by arguing that even weak establishment has an alienating impact, however, they neglect to differentiate this from the harm created by a strong establishment. The establishment can come in many forms, Formal,

[129] Sune Lægaard, *Unequal Recognition, Misrecognition and Injustice: The Case of Religious Minorities in Denmark*. 12 ETHNICITIES 197 (2012).
[130]Kevin Vallier, Religious Establishment and Public Justification, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY, 111 (Laborde & Bardon 2017)
[131]*Id*. at 111
[132] *Supra* note 81.
[133] Adhar & Leigh, *Supra* note 91 at 131.
[134]*Id*.at 131
[135]FRANCESCO RUFFINI, RELIGIOUS LIBERTY, 521 (1912).
[136]*Id*.

dejure, informal, defacto, symbolic and substantive establishments are all different forms of establishment within the larger spectrum.[137] As noted by John Courtney Murray, any ordered form of the establishment which does not burden non-adherents of the established faith is compatible with religious freedom and pluralism.[138] Furthermore, the establishment in its weak sense is merely a relic which alludes to a specific history which is not a problematic reference for liberal governance, so long as the historical reference does not reflect or order the way in which individuals ought to live within the public sphere.[139] Ronald Dworkin summarized this point by eloquently observing that: *"[An] established church owes more to its love of tradition and ceremony, I think that to any genuine shared national religious commitment*."[140]

[137] *Supra* note 91.
[138] JOHN COURTNEY MURRAY, THE PROBLEM WITH RELIGIOUS FREEDOM, 131 (1965).
[139] *Id*.at 131.
[140] *Supra* note 124, at 57.

III Beyond State-Church Relationship: Towards a Principled Approach to Secularism

State-Church relationships can be structured in numerous different ways in western democracies. The various international treaties which are pertinent to freedom of religion do not impose on a state any obligation to follow a specific kind of State-Church relationship.[141] European Court of Human Rights in the case of Darby v. Sweden[142] went on to observe that: "*A State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in the several Contracting States and existed there when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy Article 9, include specific safeguards for the individual's freedom of religion*."[143] It is decipherable that international legal orders instead seem to preface that States govern religious practice through norms of non-discrimination.[144] Through a meticulous review of international documents concerning freedom of religion, Adhar concludes that: "*There is no presumption against the existence of an established church under the other, UN-sponsored, international human rights treaties. The International Covenant on Civil and Political Rights 1966 refers to a person's right to religious freedom. Article 18 does not, however, prohibit a state religion that acts non-coercively. The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief 1981 provides in Article 2 that 'no one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief'. By virtue of Article 4, states are to take measures to enact protections against religious discrimination and to rescind the discriminatory legislation. Adherence to the detailed list of the incidents of freedom of religion in Article 6 would prevent the denial by a state of these entitlements to non-preferred religions."*[145]What is unclear is the scope of these principles of non-discrimination and how they are to be integrated into dualist constitutions which hold the State-Church relationship as an integral part of their constitutional identity and further as an important argumentative veto when confronted with the question of the role of a religion in public life. International law has much to teach national governments as it treats secularism as a principle and a way of governance as opposed to a structural constitutional arrangement.

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[141] *Id*.
[142] Darby v Sweden, (1991) 13 EHRR 774.
[143] *Id*. at ¶45.
[144] *Supra* note 91, at 131.
[145] *Id*. at 131.

Donna Sullivan described the International convention on civil and political rights (ICCPR) as having no mandate on the nature of a State-Church relationship neither condoning establishment nor promoting non-establishment.[146] She instead viewed the ICCPR as mandating an order of non-discrimination with respect to religious practice.[147] While the ICCPR does not provide a method to achieve its goal, general comment 22 is a useful guideline. General comment 22, on the scope and applicability of the ICCPR, clarifies that: "*The fact that a religion is recognized as a state religion shall not result in any impairment of the enjoyment of any of the rights … including articles 18 and 27 [of the ICCPR], nor in any discrimination against adherents to other religions or non-believers*"[148] It is further clarified in paragraph 10 that: if a set of beliefs is established as the official ideology of a constitution it under no circumstances shall "*result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it*"[149].This demonstrates that international law does mandate upon a state any obligation to adopt a specific form of State-Church relationship. The obligation imposed on states by international law is limited to them observing rules of neutrality and non-discrimination. The reason the principle of neutrality is implicit is that the states themselves, even with their affiliation towards a religious faction must necessarily be neutral to not discriminate against other religious factions. This has been further been noted by the UN special rapporteur as well that there are no provisions in international law to ensure that a specific State-Church relationship is followed. Special rapporteur Arcot Krishnaswamy delivered a report on religious freedom in the year 1956.[150] In this report, Krishnaswamy studied 86 monographs from different countries to demonstrate just why State-Church relationships have no bearing on the freedom of religion within the nation-state.[151] International dispute resolution bodies such as the European Court of Human Rights have also neglected the establishment theory.[152]

This indicates that we must move past understanding freedom of religion as hinging on the principles of State-Church relationships. In the previous section of this thesis, I provided a

[146]Donna Sullivan, *Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM J. INT. L. 487, 490 (1988).
[147]*Id*. at 490.
[148] General Comment 22, Article 18 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).
[149]*Id*. at ¶10
[150] *Supra* note 91
[151] Arcot Krishnaswamy, Study of Discrimination in the Matter of Reigious Rights and Practices, Special Rapporteur of Sub Commission on Prevention of Discrimination and Protection of Minorities (1960).
[152] Darby v. Sweden, *Supra* note 142, at ¶45

detailed description of why State-Church relationships were not indicative of the level of religious freedom which is prevalent in a given State. The historical trajectory of the liberal state demonstrates that religious tolerance has traditionally gone hand in hand with the integration of religious minorities.[153] There have been regimes which have had relationships with the religious sphere which have either had an overly close relationship with one religion or had a radical fidelity towards an ideological secularism.[154] As discussed in the previous section, militantly secular states often do not fare well when asked about religious freedom.[155] But, if the level of religious freedom has nothing to do with the State-Church relationship, we must ask the question of why there is a religious intolerance within certain regimes. Why are certain regimes less tolerant towards others when multiple tolerant states share the exact same State-Church arrangement?

The answer to this question seems to find roots in the contemporary understanding of what the purpose of political secularism is. It is not as previously thought a connotation for separationist regimes. Secularism has in today's world assumed a much broader meaning of describing a tolerant political system which envisages the dominance of the state apparatus over religion.[156] This conception of secularism seems to think of it as a universal political organizer, one which transcends a State-Church relationship and moves into a more politically universal sphere. The understanding of secularism as being a universal principle has been advocated quite frequently over the last few years. Silvio Ferrari even called for the scholarly community to collectively ask the question of what principles make secular states- Ferarri did preface that these principles move past the mere State-Church relationship.

Francesco Ruffini noted that: "*true and complete religious liberty can exist also apart from Separation. When the State has assured full liberty of belief or disbelief to its own citizens, without this implying the least prejudice in the enjoyment of their rights as citizens; when the State has guaranteed to religious associations full liberty for the manifestation of their forms of worship, protecting them against any sort of attack, the State has done all that can be demanded of it in regard to religious liberty*."[157] Through this quote and Ruffini's analysis, it is clear that the ability of a state to give rights and limit state intervention is at the very core

[153] CHARLES TAYLOR & JOCELYN MACLURE, SECULARISM & FREEDOM OF CONSCIENCE , 5 (2010)
[154] *Id*.
[155] *Id*.
[156] Darshan Datar, *Secularisms Silent Partner: Religious Autonomy*, RELIGIOUS THEORY (2017)
[157] Ruffini, Supra note 135 at 521..

of creating a plural constitutional identity. Equal treatment and non0interference seem to be vital to his analysis to mobilizing a tolerant population.

However, with the State attempting to do as Ruffini suggests, it highlights the critical clash of authority that liberal states have with religious orders which is: whose authority creates moral obligation? At the heart of the secular project exists principles of balancing theological authority with state authority? What is being competed for is a universal right to define public morality.Private or personal moral norms are outside the scope of the liberal state. However, what seems to be present within all regimes which are ostensibly secular is a palpable tension between the liberal constitutional identity and the moral ordering of public life along religious lines. Take the example of *S.A.S v. France*[158], the European Court of Human Rights was unequivocal in the function of a liberal constitutional identity. The Court argued that preserving the constitutional identity of the Country enable the state to better ensure that people could "live together" in an orderly fashion. This approach implies that religion may be limited, not when it poses tangible harm but when the practice involves pluralism to tolerate practices which outside the established contours of constitutional morality.[159] This is prevalent in many different states. In India, the Supreme Court has constantly been called upon to adjudicate matters of religious pluralism. In their case law, the Indian Courts have also limited religious choice through the rhetoric of the common identity forged by a respect for fundamental rights.[160] The case of *Shah Banoo*[161] is a classic example wherein a constitutionally guaranteed right to religious personal laws was overturned due to its tension with the right to maintenance which is statutorily given to all individuals after divorce. Furthermore, in a recent case involving the triple talaq, the Justice Nariman argued that the Islamic divorce procedure was in violation of the constitutional identity of the Indian constitution which included the values of equality and dignity.[162] As noted by Silvio Ferrari the U.K. also utilizes universal constitutional values to restrict religious practice without regard to whether those values themselves justify the protection of religious practice. The

[158] S.A.S. v France, 2014 ECHR 695.
[159] In the case of S.A.S v. France, *Supra* note 138, there was a paternalistic use of constitutional Identity, the European Court of Human Rights allowed states to invoke constitutional identity to unify society even without the threat of actual harm arising out of a practice. Mere cultural difference was something which the Court argued could be extinguished due to a shared constitutional history and Identity.
[160] Mohd. Ahmed Khan v. Shah Bano Begum 1985 SCR (3) 844.
[161] *Supra* note 119.
[162] Sayara Bano v. Union of India, Writ Petition (c) No. 118 of 2016 (2017).

value of equality is used in the U.K. to limit religious practices such as acceptance into Jewish institutions on the basis of the matrilineal inheritance of the Jewish religion.[163]

The principles of secularism are this not merely to do with State-Church relationships but, also with principles through which religion is limited and empowered.[164] The justification of the use of constitutional values to regulate religion is that religion is disconnected from a secular constitution on three levels: Ends, Institutions and Public policy.[165] This forms the broad base for the ends of a liberal politically secular state to form an identity around moral values such as equality of all citizens, the tolerance of difference and the preservation of dignity. The liberal politically secular state is not neutral towards its foundational values such as the aforementioned values however, it is neutral towards all non-political values. Salvation and the ultimate meaning of life are not political ends that are universally applicable, they are instead deeply personal pursuits which a politically secular state enables but does not interfere with.[166] This leads to the disaggregation of political institutions from religious influence.[167] According to Rajeev Bhargava, these two facets are non-negotiable in a liberal constitution. There is a third facet of law and public policy where the government can limit the influence of religion by interfering with its practice and actively getting involved in the practice.[168]Jean Cohn has articulated the obligation of a state to utilize constitutional values to limit religion by arguing that: "*The third level pertains to laws and policy. Here, flexibility is advisable—a constitutional democracy based on equal citizenship may require intrusive regulation of religion and indeed of some religions more than others as in the Indian case that made suttee and penalties attached to untouchables illegally*".[169]Theoretically, this seems to explain why the liberal state is obliged to engage with religious practice and further when it's engagement ought to be restrictive.

However, there is a further element that I would like to theoretically add. By looking at the limitation of religion as being one which is rooted only in a limitation based on the fundamental rights of others, scholars have had a restrictive understanding of what the

[163] Ferrari, Supra Note 119.
[164]Rajeev Bhargava, *Political Secularism*, in A HANDBOOK OF POLITICAL THEORY, 636-55.(Dryzek et.al., 2006).
[165] Jean Cohn, Rethinking, *Political Secularism and the American Model of Constitutional Dualism*, in RELIGION, SECULARISM & CONSTITUTIONAL DEMOCRACY, 118 (Cohn & Laborde eds. 2015).
[166] *Id*. at 118.
[167] *Id*.
[168] Rajeev Bhargava*, Is European Secularism Secular Enough?,* in RELIGION, SECULARISM & CONSTITUTIONAL DEMOCRACY, 157 (Cohn & Laborde eds 2015).
[169] *Supra* note 165, at 117- 118.

relationship between the state and religion truly is like.[170] The state limits religion at every point where it is a threat to sovereignty.[171] Cohn has made this observation when he stated that: "*Religion and the state can also be disconnected on the level of power and jurisdiction. Political secularism associated with the modern state presupposes that the latter is sovereign. From a legal and constitutional perspective, the idea of "strict separation" is incoherent because the modern state qua sovereign has legal supremacy and a monopoly over the publicly enforceable coercive law. It governs religious conduct to the extent to which it forbids or permits it*".[172] Secularism is, therefore, the balance between the individual rights of religion and the homogenous identity and theory of the good that the liberal state seeks to protect.[173] Even in very plural systems, this relationship with authority is prevalent. Cohn further observed that: "*Religion and the state can also be disconnected on the level of power and jurisdiction. Political secularism associated with the modern state presupposes that the latter is sovereign. From a legal and constitutional perspective, the idea of "strict separation" is incoherent because the modern state qua sovereign has legal supremacy and a monopoly over the publicly enforceable coercive law. It governs religious conduct to the extent to which it forbids or permits it*".[174] Finally we must note that: "*The modern democratic, constitutional, politically secular state in principle lays to rest the political relevance of the Christian two-world theory and its attendant jurisdictional problems by acquiring full legal jurisdiction and political capacity (sovereignty) within its territory and by drawing all its authority from the governed rather than from "higher" transcendent sources. Indeed, political secularism, separation, and nonestablishment properly understood are meant to preclude any return to the premodern, antidemocratic deep structure of dual sovereignty despite the current revival of the medieval slogan "libertas ecclesiae," in deceptively innocent versions of "freedom of religion," legal pluralism, or "accommodation" of "the Church.*"[175]

It is clear that it is not only regimes which are separationist in nature that have a functional sovereign dominance over religion. Even highly plural accommodationist regimes, which function in a really liberal manner, also assert a functional dominance over the religious

[170] *Supra* note 168; Bhargava, Supra note 164, at 636-55.
[171] Dieter Grimm, Sovereignty and Religious Norms in the Secular Constitutional State, in RELIGION, SECULARISM & CONSTITUTIONAL DEMOCRACY, 341 (Cohn & Laborde eds 2015).
[172] *Supra* note 165, at 119.
[173] *Id*.
[174] *Id*.at 119.
[175] *Id.* at 120.

sphere.[176] Over the course of this thesis, it is prudent for us to understand that religious dominance requires a level of religious autonomy within liberal settings. This is predominantly because the liberal state deals with religion using two principles. The first is the liberty principle where the liberal state is obliged to protect religious liberty as part of a larger obligation to protect liberty within society. This is not merely an obligation on the state to negatively promote liberty *vis' a vis'* state action but a broader obligation to protect liberty and promote tolerance within society. Robert Audi argues that coercion – which is the limitation of liberty, not notionally but via restrictions negates the values of liberty and equality thereby rendering one group of people unequal compare to others.[177] Audi argues that when a sovereign dominates religion without granting autonomy, there is harm to the collective identity of a group as it antagonizes a group.[178]

Audi observed that secular governance applied to Church and State alike.[179] He articulated the following position: "*The deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments tends to be*"[180]. When there is a deep theological commitment flowing from a group and a fidelity towards a doctrine, it is important for the state to not restrict the formation of this doctrine, the practice may be limited on a case by case basis, however, domination cannot be exerted upon the institution where the ideology emits from.[181] By attempting to interfere in this the state will lose democratic legitimacy as individuals will not feel represented by the state. Therefore, there is a palpable weakening of sovereign authority when there is overly state intervention in religious activity.[182]

It is from these principles that I deduce what I call the dominance approach as an alternative way of describing the relationship between the secular state and the state. There are two predominant values protected by the liberal state when dealing with religion. The first is the dominance over religion in the political sphere and the second is the preservation of religious autonomy. Alfred Stephan described a similar approach as the approach of twin tolerance, Stephan's account argued that the obligation resided with the Church as well as with the state. Gabor Halmai eloquently explains Stephan's twin tolerance as follows: *"(1)religious*

[176] Darshan Datar, Supra note 156.
[177] Supra note 1, at 40-42.
[178] *Id*.
[179] *Id*. at 42.
[180] *Id.* at 42.
[181] *Id. at* 33.
[182] *Id*.

institutions should not have constitutionally privileged prerogatives that allow them to mandate public policy to democratically elected governments; and (2) at the same time, individuals and religious communities, consistent with our institutional definition of democracy, must have complete freedom to worship privately"[183] What is plainly apparent in Stephan's account poses a dual obligation, one upon the state and one upon religion.

To Stephan religion, in order to have the right to individual and community life, must ensure that it stays clear of political life.[184] The dominance approach advocated in this thesis differs from the approach taken by Stephan on the grounds that it is this thesis of the opinion that religion has and always will continue to try and influence sovereign authority. However, the independence of constitution power from religion enables the state to functionally dominate religion in the political sphere through the supremacy of constitutional identity to religious identity.[185] However, in the private sphere, the same constitutional identity that the liberal state invokes to prevent illiberal religious functions in the political sphere must guarantee autonomy to religious orders, communities, and individuals to help them craft the scope of their political objections privately. While these need to be translated into neutral public reasons to be acceptable on a constitutional level, there is a strong obligation on the liberal state to provide this autonomy to ideological and religious factions.[186] The state may not use its constituent power to influence any act of private belief even if it is prevalent as a universal ideology in a community as long as this belief does not threaten the sovereigns monopoly of the political process. In other words, only when constituent power is threatened can the state limit religious practice, it can under no circumstances interfere and try to reform belief by preempting religious conflicts.[187] This approach can be empirically described in greater detail and finds a great deal of empirical evidence within constitutional structures. It would at this stage, be prudent to analyze the empirical evidence present within constitutional systems to better understand the dominance principle. Through the empirical study, I aim to demonstrate that within every State-Church relationship there exists a relationship of the dominance of constituent power over religion.[188] I will further aim to demonstrate that in liberal

[183] Gabor Halmai, *Supra* note 13, at 177; Alfred Stephan, *Twin Tolerations*, in WORLD RELIGIONS AND DEMOCRACY 18 (Diamond et.al. 2005).
[184] Stephan, *Id*. at 18.
[185] KEITH WARD, RELIGION & COMMUNITY 106 (2000).
[186] *Id*.
[187] *Id*. I have derived this argument by via a plain reading of Ward's argument on constituent power. He does not expressly reach this conclusion however, it is a derivative which is backed by the text.
[188] *Id*.

constitutions, this dominance must be limited by providing an autonomous sphere for the individual and community norm building undertaken by religious orders.

IV The Dominance Approach[189]

As demonstrated in the first section, freedom of religion and secularism are not necessarily guarantors of religious pluralism.[190] They guarantee it only in the event that they are utilized in a principled way which maximizes pluralism.[191]Perhaps the European Court of Human rights with all its constraints of not having a State-Church relationship offers us the best example of a definition of secularism that moves past the understanding of secularism being but one of many legitimate State-Church relationships. In the case of Leeyla Sahin, The Court oh Human Rights observed that:

> *[S]ecularism is the civil organizer of political, social and cultural life, based on national sovereignty, democracy, freedom, and science. Secularism is the principle which offers the individual the possibility to affirm his or her own personality through freedom of thought and which, by the distinction it makes between politics and religious beliefs, renders freedom of conscience and religion effective. In societies based on religion, which function with religious thought and religious rules, political organization is religious in character. In a secular regime, religion is shielded from a political role. It is not a tool of the authorities and remains in its respectable place, to be determined by the conscience of each and everyone.*[192]

The Court of human rights as a neutral transnational adjudicator was able to cull out what I believe to be a comprehensive principled definition of secularism; one that could persist in any State-Church arrangement.[193] While the Court of human rights is not specifically kind to regimes which offer a minimal symbolic role to religion, such as the U.K. it seems to be quite emphatic in its understanding of secular regimes to be those who exert a sovereign dominance over religion. When this quote is read in the broader backdrop of the European Convention the quote demonstrates an interesting interpretation of a universal secular principle. Secularism, if understood like the Court of Human Rights does is a two-pronged principle. Secularism is first the principled dominance of the state and public reason over

[189] This section is reworked from my paper published as: Darshan Datar, *Secularisms Silent Partner: Religious Autonomy*, RELIGIOUS THEORY (2017).
[190] *Id*.
[191] Patrick Weil, *Headscarfs v. Burqua's: Two French Bans With Different Meanings in*CONSTITUIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL,195-215 (Rosenfeld & Mancini eds. 2014); Michael McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).
[192] Leyla Sahin v. Turkey, App. No. 44774/98, Eur.Ct.H.R., ¶ 108 (2004).
[193] *Supra* note 119.

religious organization but, consequently, it is also the individual and collective autonomy of the religious sphere over the secular sphere with the liberal values of tolerance and the need for neutral justifications shielding the religious sphere from an overt dominance over religion. Lorenzo Zucca has normatively asked for secularism to be looked at as a principled distance as opposed to a moralizing tolerance or separation. However, it appears that there would be value in looking at it as a principled domination of the sovereign over the religious sphere.

In the previous section, we discussed and determined that separation was deemed to be the most appropriate response to the cultural wars, specifically in light of the French revolution. However, there were many states, who in the aftermath of the religious wars, adopted different State-Church set-ups. Norway, Denmark, and the U.K. adopted an established Church, the United States adopted a weaker version of a separationist regime and India was political secular through a narrative of adopting a separation of State and Church. In all these systems, religious liberty has flourished for the most part of their history. Secularism and freedom of religion, once deemed to be eternal partners are currently seemingly separate.

The answer to the separation is that secularism has traditionally had two specific values at its very core. Tolerance and neutrality have been at the very heart of the enterprise to guarantee religious freedom in a liberal constitutional order. Both tolerance and neutrality have had the impact of not just domination over religion but also limiting the state's ability to interfere in religious practice through a structural and principled check on the authority of the state.[194] This is persistent in most politically secular states. Even in the most radically separationist regimes, there is a tangible link between state dominance over religion and the necessary minimum level of tolerance that the state must accord religious group in order to maintain the structural spine of being a separationist state.

In a paper that I published earlier this year, I had argued that: "*An example of this was France through its constitutional as well as a legal commitment to the separation of State and Church.*[195] *Frances legal history with the separation of Church and State stems from the 1905 law, one which is commonly credited for being the legal start of the system dubbed as laicite.*[196] *There has been some literature which has portrayed the French system as a radical*

[194] Robert Audi, *Supra* note 1.
[195]Michael Troper*, Sovereignty and Laïcité*, 30 Cardozo L. Rev. 2560, 2560-65 (2009).
[196]Patrick Weil, *Headscarfs v. Burqua's: Two French Bans With Different Meanings in*CONSTITUIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL,195-215 (Rosenfeld & Mancini eds. 2014). Weil and Troper argue against each other but reach similar conclusions. Both scholars argue that Laicite is Liberal. They both agree that the historical trajectory of Laicite is in the prevention of religious domination of minorities and

dominance over religion to the extent that it gives no space for religious autonomy. However, this is largely incorrect.[197] *As demonstrated by Patrick Weil in his classic article titled as: " why laicite is liberal", Weil demonstrates how the French system in and of itself is not merely the dominance of religion, it is the granting of a corresponding private autonomy to both religious groups and individuals to give religion a space in the lives of the general public.*[198] *He demonstrates through his analysis that the 1905 law does not deviate from the previous law that allowed for the state to own religious groups. According to Troper, the 1905 law predicates itself on the same governmental domination over religion and the more recent uses of it as rhetoric and legal reasoning to justify the Burqa bans are essentially incorrect interpretations of the 1905 law.*"[199]

The reason for this, according to scholars is that secularism as a concept is necessarily created to protect individuals from the domination of religion.[200] Therefore, by separating religion and politics the state apparatus is capable of better protecting the liberty of individuals who do not want to profess an institutionalized religion.[201] The same would theoretically be an argument, which is also applicable for the protection of religious minorities. The separationist regime should theoretically allow for minority religious ideas to be exempt from the dominance of a majority religion.[202]

A close investigation of the French system reveals that even this highly separationist regime doctrinally requires both sovereign dominance over religion as well as a corresponding amount of autonomy granted to religious organizations- albeit privately. French republicanism is underpinned by the egalitarian principle: which is that no religion is privileged by the state over another.[203]A second closely related principle which underpins French secularism is the libertarian principle. The libertarian principle was first asserted in the 1789 revolution.[204] Article 10 of the declaration of Man (A part of the constitutional bloc in France) states that: "No one should be persecuted for their opinions, even religious

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therefore both believe that laicite protects religious freedom, they merely disagree on whether it forms a distinct system of governance from the previous systems.

[197]Stéphanie Hennette Vauchez, Is French *laïcité* Still Liberal? The Republican Project under Pressure(2004–15), 17 HUMAN RIGHTS LAW REVIEW 285, 285-312 (2017).

[198] Weil

[199] *Supra* note 191, at 195-214. See also Darshan Datar, *Supra* note 156.

[200]*Id*.

[201]*Id*.

[202]*Id*.

[203] Cecile Laborde, Supra note 99, at 35.

[204]*Id.*

ones"[205] Later in the third republic there was an uprising which leads to the 1905 law of separation. The 1905 law was a highly liberal law which segregated the religious sphere from the political sphere in order to preserve equality amongst religions as well as prevent the domination of religious minorities by a majority. Therefore, the purpose of the law was to allow individuals to develop and practice their faiths autonomously from state and religious coercion. As Laborde concludes: " *The 1905 law of Separation graphically symbolized the removal of state control of religion and the recognition of the pluralist structure of background religious institutions*".[206] Laborde argues that these two principles read with French republicanism lead to the birth of a third principle which is the agnostic principle. This principle is vital as it provides the French system with a notion of balancing the dominance of religion. The agnostic principle as elaborated by Laborde advocates that the French constitutional commitments towards religion mandate that the state be agnostic and neutral towards religion. Practice must, therefore, be judged independently of ideology. It further has an obligation of state officials being agnostic and not demonstrating their religious affiliation while they are performing state duties. The lack of religious affiliation while holding public office is to ensure that there is no symbolic affiliation with religion.

While the French principle of Laicite mandates that individual rights are paramount and therefore, no collective religious practice can supersede the individual's rights. There is a strong urge within the French system to protect religious practice from the domination of the state. The very setup of Laicite ensures that the state must stay out of religious doctrine as it must be functionally agnostic and therefore judge practices. As per this principle, a wearing a veil should be permissible as – while on a technicality it shows a fidelity to a more archaic ideology, it is currently a practice which often reflects the empowerment of women to chose how they dress.[207] This is juxtaposed with the practice of female genital mutilation where the practice is both cruel and inhuman, therefore, warranting a limitation by the French authorities.[208] This demonstrates how the institutional set-up of Laicite not only demands a strict policing of religious practice but also requires that the French state stays out of religious ideologies – thereby warranting some amount of collective autonomy to religious bodies to expand the scope of their own doctrine without a state reformation of the doctrine through

[205] Article 10 declaration of man
[206] *Id* at. 34
[207] Weil, *Supra* note 191.
[208] *Id*.

intervention.[209] It is in light of this interpretation of Laicite that Patrick Weil wrote his seminal piece on why Laicite is liberal.[210] Weil understood that the liberal state must, dominate religion in order to ensure the rights of religious minorities but, at the same time, it must not reformulate religion to the point where it no longer can exist. It would defeat the principle of separation or any other State-Church arrangement in a Liberal State to have the right which the state is attempting to protect disappear because it protects the rights of a few others too well.[211]

Theoretically, this state dominance is seen as a necessary facet of the traditional separationist view, however, what is also necessary to note is the religious autonomy is necessary to balance the dominance of religion to ensure that the liberal state performs its duty in giving rights to citizens.[212]In the absence of this, the liberal state will recede into an illiberal constitutional setup, as discussed in the introduction. A good example of how a state should balance the different rights is given by Rajeev Bhargava in his analysis of India. He clarified that in the Indian context secularism assumed the role of maintaining a separate religious realm to a secular realm, creating an egalitarian society by preventing religious domination and finally, ensuring that the state only intervenes in the event that a religion dominates another's rights in practice[213]. Bhargava's theory perfectly illustrates why the liberal state must dominate religion, it is in order to ensure that the liberal state has control over any violation of the rights of others caused by the religious practice. However, he also demonstrates that there need to be religious rights in the liberal state, in the absence of this, the liberal State exceeds it's mandate and violates the principle of Human Autonomy and dignity, both integral to the liberal political order.[214]

In light of the aforementioned analysis, it would be prudent to demonstrate instance when States give no religious autonomy to demonstrate why the liberal state requires it. When a state experts dominance without a corresponding religious autonomy claim, the results are a stark deviation from a liberal order. Take the examples of theocracies. Egypt, for instance, has a legal order which I briefly described in the previous section. Egypt functions as a theocracy where the Supreme Constitutional Court is the final arbiter of disputes arising out of the religious law. In this setup, Egypt exerts a dominance over religion but does not have a

[209] *Supra* note 197.
[210] *Id*.
[211] *Id*.
[212] *Id*.
[213] *Supra* Note 164, at 636-55.
[214] *Supra* note 72, at *51*.

corresponding right to religious autonomy. All reasons given by the court are tantamount to a reformation of religion to ensure that the political system thrives with the religious authority conferred on it.[215] Hirschl concluded that: "In countries struggling with the complex issue of constitutional theocracy, constitutional courts may also be viewed as the guardians of secularism, modernism, and universalism against the increasing popularity of theocratic principles."[216]

In the absence of religious autonomy liberal constitutions begin to treat religion in a very similar way to authoritarian constitutional theocracies, Egypt being a prime example under the Mubarak era.[217] Simple dominance on religious grounds with the absence of religious autonomy and individual religious rights mimics authoritarian regimes, which often have structures that perpetuate leadership without any systemic checks on authority.[218]Egypt provides an avenue to study how authoritative regimes exert an overt dominance over religion even in the face of the establishment of a theocratic regime.[219] The SCC of Egypt – during the Mubarak regime – was entrusted with the interpretation of the Koran, a practice which continues to be entrenched within the constitutional text of Egypt.[220] The Courts in Egypt provide for no religious autonomy and are the final arbiters of what are core Islamic practices which cannot be amended and practices which may be amended.[221] In 1996 the Supreme Constitutional Court released a series of Judgements which were intended permit the guardian's children to request schools to allow them to wear the Hijab in contravention to school uniform which mandated a Niqab.[222] The Court held that the doctrines concerning the Niqab were not theologically entrenched in Islamic conduct and thus ruled it to be mailable. Therefore the Court permitted the government to pass a law which enabled the wearing of a Hijab as a viable substitute.[223] The Court argued that so long as girls did not maintain the Islamic rule of Aurat, which loosely translates to the maintaining of respect through modest clothing, they could wear a Hijab as opposed to a Niqab[224] Furthermore, the Supreme Constitutional Court advocated for a harmonious interpretation of the Koran with other constitutional norms. This phenomenon was not unique to the specific case. In 1996 the Court

[215] Id.
[216] *Id.* at 103
[217] *Id*. at 51-52(2010).
[218] *Id*. at 107.
[219] *Id*.
[220] *Id*.
[221] *Id.at 110*
[222] *Id*. at 110
[223] *Id*. at 100
[224] *Id*. at 100.

ruled on the circumcision of women by individuals. The Court upheld a ban on medical practitioners from circumcising women. The Court opinion reflected a progressive reformation of *Sharia'h*. The Court stated that: "*With this ruling, it has become prohibited for all to perform the operation of female circumcision, even with the consent of the girl or her guardians. Violators will be subjected to criminal, disciplinary and administrative punishment*"[225] The Court even mandate a term of three years in prison for a violation of the constitutionally upheld law.

Through this decision, it can be seen that the interpretation of the religious text by the government was not intended to put Sharia'h on a pedestal making it a norm which informed governmental action. Instead, the interpretation softened Sharia'h and contorted the doctrine within the religious text in order to allow for constituent power to dominate the religious doctrine. This, in essence, secularized Sharia'h making it compatible with Egypt's dictatorial regime. What is critical to note is that in doing this the Supreme Constitutional Court did not leave any space for religious autonomy and it subjected Islam's doctrine to the reinterpretation through a harmonious reading of Sharia'h with other constitutional norms. Article 2, which stated that Sharia'h was the source of law was diluted through this interpretation and religious rights suffered not because of the presence of a theocracy, but, because of an excessive interference in religious orders by the government. This was an interference with the majority religion by the dictatorial regime, proving that the presence of theocratic regime in Mubarak's Egypt was a ploy to garner political legitimacy. In reality, the constituent power and the sovereign retained a secular dominance over religion. What makes this system undesirable is not the progressive outcomes that it achieves, but, the lack of autonomy and rights given to the majority religion. Religious doctrine gets politicized through an overt dominance and theology is re-read and used as a political ploy to garner legitimacy. Religious practice is not being limited but religious ideology is being re-read and citizens are not being told how to behave within a political polity but they are being told what to believe in and thus they are forced to believe in the supremacy of the constitutionally instituted regime.

What is critical to note here is that the theocracy functions in a way where religions sole role is to garner political legitimacy; it is disaggregated from any aspects of it which pose a threat to the established legal order. This is accomplished through the use of interpretation to

[225] *Id*.at 111.

dominate religious practice. The so-called reformation of religion is then used as a political ploy to gather liberal support for the government. In Egypt, Courts interfered in the doctrine of the religion and violated religious rights in the name of the reformation of religion.

Hungary, on the other hand, poses a distinct problem; however, it too utilizes political rhetoric to dominate the religious sphere. The Hungarian example is rooted in a governmental intermingling of religious doctrine with political doctrine in order to may a personal religion seem compatible solely with the political regime.[226] The Hungarian government – the Fidesz party has repeatedly recognized the role of Christianity in the Nation building process. They have accurately recognized how religion is a political mobilize and thus used it to consolidate their grip on the Hungarian political system.

While the preamble does mention the presence of religious pluralism as a value of the Hungarian constitution,[227] it also does preface the historical role of Christianity in the Hungarian nation-state. The Hungarian state has thus strictly governed the contours of public life to make it compatible with its Christian nation-building project. As demonstrated by the infamous Church's act, the government utilizes its own understanding of Christian morality to parliamentary de-recognize religious practices and organizations which are not compatible with its own theological views.

The Church's act allows for the Hungarian government to enter into cooperative agreements with Churches that it recognizes on an arbitrary basis. The Church's act has a three-tier recognition system wherein the parliament may arbitrarily recognize of derecognizing a church. Without going into a comprehensive overview of the Church's Act. The European Court of Human Rights struck the act down as being arbitrary. The Court concluded that even with the reformed three their recognition system, the reasons for recognizing churches had no guidelines and often led to the arbitrary derecognition of religious organizations. The Court found that: "*discretionary powers afforded the state would continue the arbitrary recognition procedure criticized by both the ECtHR and the Venice Commission*"[228]

[226] *Supra* note 13, last page.
[227]"[w]e value the various religious traditions of our country." Is also a statement which features in the constitution however, the manner in which the Hungarian constitution endorses Christianity renders this statement meaningless.
[228]See Forum for Religious Freedom Eur., Hungary: Amended Church Law Remains at Variance with OSCE Standards and the European Convention on Human Rights,O RG.SECURITY &C O-OPERATION EUR. (Sept. 30, 2015), http://www.osce.org/odihr/186866?download=true [https://perma.cc/48QA-BNCB].

What is empirically clear is that religious domination is necessarily problematic, take the example of Egypt, the overt domination of the sovereign over the religious sphere caused there to be a complete subordination of religious life in public – this in spite of the fact that Egypt is facially a theocracy.[229]While too much influence of religion within the public sphere allows for a contortion of governmental agenda's to derive power from the religious majority while disregarding religious minorities. Hungary is a classic example of this. What is critical to note is that both in the Hungarian experience as well as in the experience of Egypt the space for secular politics shrinks, regardless of the nature of the State-Church relationship.[230] A similarity between both Egypt and Hungary is that there are not neutral reasons given by the government to limit religion, the use of religion is exclusive as a political tool. This does not allow for religious minorities to have any part in the political process as religious dialogue is always exclusive in nature and therefore is not understood by individuals outside the religion.

What this chapter empirically demonstrates is that for there to be true religious pluralism, there must be both a primacy of neutral public reason in the political sphere which necessitates an independence given to religions in the private sphere.[231] The dominance approach theorizes that truly secular regimes, balance the constitutional urge to unify with diversity. In order to do so, constitutions must provide for autonomy in the private sphere to create a space for individuals to translate their political objections into neutral reasons.[232] Therefore, Neutrality allows for religious reasons in private to emerge as public reasons so long as there is no governmental interference. As seen in Egypt, an interference at a nascent stage does not allow for an ideology to thrive.

Jurgen Habermas was a proponent of this and when he wrote about a post-secular legal order he was of the opinion that secularism required not the extinguishing of religious ideologies but the nurturing of them within the larger rubric of public reason.[233] To put it more simplistically, Habermas was of the opinion that religious orders had to be nurtured and given autonomy so that they would be able to better integrate themselves by voicing their religiously motivated concerns (which were developed autonomously) in public forums using

[229] Ran Hirschl, Constitutional Theocracy (2010).
[230] Supra note 13.
[231] *Supra* note 183, at 18.
[232] JURGEN HABERMAS, BETWEEN NATURALISM AND RELIGION, POLITY. (2008)
[233] Maeve Cooke, Conscience in public Life, in LIBERAL POLITICAL PHILOSOPHY, 302 (Laborde & Bardon 2017).

public reason.[234] Unlike Rawls, he did not believe that all religiously motivated reasons were problematic.[235] As noted by Robert Audi, all religious people undertake a mandate to accept democratic life when they are a part of a constitutional order. They accept that their religion is a private affair – which in specific circumstance can be manifested in public spaces.[236] However, they do not give up the autonomy of their ideology, the religious order is not subject to state dominance, it is merely the practice of the ideology which can when in contravention of public policy and justified by neutral on theistic reasons be banned.

Robert Audi demonstrated that religion doesn't lose it's moral authority upon its adherents as soon as they enter democratic life. He merely suggests that religious adherents submit to the democratic will as they have the same presupposition of the good as the democratic order. Religion, as mentioned by Audi, does not create, independently a notion of the good, it is based on presuppositions of the same. He argues that to be religious, there must be a presupposition of the good which cognitively resides with each individual citizen. Take the following analogy as an example.[237] Most religions mandate that though shall not kill. The moral authority that flows from this is not a value that is derived from nothing, it is derived from a thick presupposition of the meaning of living well within society.[238] Audi argues that this makes citizens accept democratic authority as religion is not based on its own independent theory of the politically desirable. However, they do not give up their moral authority which is a religious head.[239] Therefore, it is important for the democratic state as a trade-off to give religious autonomy to enable individuals to be morally guided by religion so long as they conform to general and neutral laws.[240] Michel Rosenfeld had a very similar theory where he argued that apart from a basis number of laws which allow for free political dialogue religion must be treated as one amongst many perceptions of the good.[241] While I do not agree with professor Rosenfeld about the moral authority of religion having anything to do with a thin or thick theory of the good, I do agree that in order to have a politically secular state we require a combination of political autonomy from religion and religious autonomy from politics. Wherein both spheres of life interact using neutral public reasons.

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[234] *Id*. at 306.
[235] *Supra* note 233.
[236] *Supra* note 1.
[237] *Id*.
[238] *Id*.
[239] *Id*.
[240] *Id*.
[241] *Supra* note 29

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V Impact of Violating Religious Autonomy.

The obligation to translate the limitation or acceptance of religious practice into neutral reason has a profound impact on how liberal judiciaries and administrative bodies ought to act when confronted with cases of questionable religious practice. I contend that there are two parts to the liberal inquiry both rooted in secular reasons. The first is that a Court must determine what is religious and secondly, once it determines what is religious it cannot question the historical and ontological understanding of the faith, the state may merely limit a practice out of a paternalistic urge or the urge to protect the rights of others. By violating religious autonomy to define practice and membership, the liberal judiciaries and administrative bodies run the risk of completely extinguishing the right to profess religion. By reading into the ideology of a religion and reforming it from within, liberal courts fall prey to essentially rationalizing a religion to what they want it to be and therefore, violating not just the right to community life – inclusive of religion but also the individual right to practice unhindered, while a liberal limitation merely gives good secular reasons for why a practice should not be allowed in light of its ability to violate the rights of others. When such an inquiry is undertaken, the burden is on the religious order to prove why the practice does not fall foul of universal public policy standards. The religion itself is under an obligation to neutrally justify this as opposed to using theological reasons as a crutch to act as an argumentative veto. Over the course of this section, I will demonstrate in great length what the difference between theological reasons and secular reasons. Furthermore, I will use the examples of India and the U.K. to better illustrate the ill effects of Courts and Administrative tribunals venturing into Religious doctrines with a view of reforming them.

First, it is important for us to determine the normatively desirable means through which a state may limit religion. First and foremost the liberal state may define the contours of what it believes to be religious in nature. This is a practice which is prevalent universally in liberal constitutions. General Comment 22 gives a broad overview of what religion is and critically demonstrates that the liberal government at some rudimentary level must understand what the object it is protecting is when concerning religious practice.[242] Not everything can be religious and at the same time, religion cannot be so narrowly defined that nothing is protected. The complexity of definition is present for all to see and while it is an interesting topic, it is beyond the purview of this thesis.[243] However, it is important to understand the

[242] Supra note 148
[243] For a detailed assessment see generally Cole Durham and Brett Scharffs, *Supra* note 32, at 39-43.

distinction between defining religion and re-defining a specific religion and thus intervening in the ideology and belief of a religion.

The defining of religion merely looks at a practice from above to ask whether it fits the criteria of being religious in a heuristic sense. This is to say that all Courts do is to judge whether a practice has attained a level that makes it a religion. [244]They do not venture into asking a second question as to whether that practice belongs to an organized faith and they further do not ask the question of whether the tenants of the said organized faith mandate the practice.[245] This is clearly decipherable from early cases emitting out of liberal courts, where a conservative definition of religion was adopted.

To make matters more cut and dry, most Courts have moved from a highly theistic definition of religion – which is a definition that states that only religious practice which is tied to the worship of a deity is religious. The U.K which moved from its traditional theistic definition in 2013 is the finest example of a Court which has adopted the modern definition of religion. In the case *of R v. Registrar General of Births and Deaths and Marriages*[246], Lord Loulson declared that religion deserves a broader definition than the mere worship of a deity.[247] This transition was long overdue as the European Court of Human Rights, a supranational body whose jurisprudence is binding on the English legal system, had long recognized that religion transcended the mere theological claims of worshiping a deity.[248] The United States has in the *United States v. Seegar* defined religion to mean something that functionally similar to the belief in a creator – theistic religion. According to the Court, any personal or organizational belief that attempted to find the ultimate concern of life was analogous to a religious concern and therefore protected by law.[249] In this case, it was held that a man who objected to a military conscription on philosophical grounds was protected as his philosophical concerns were analogous to traditional religious claims as it reflected an opinion that mirrored the ultimate question of the meaning of life (referred to as the ultimate concern by the Court). The Court in the United States v. Seegar held that ultimately, an investigation must not be leveled against the tenants of the faith but, instead of on the sincerity with which the believer holds the tenants on which s/he believes in. *Torcaso v. Watkins*[250] further entrenched this test

[244] *Id.* at 45-47.
[245] *Id*.
[246] [2013] UKSC 77 on appeal from [2012] EWHC 3635.
[247] *Id*.
[248] 380 U.S. 163 (1965)
[249] *Id*.
[250] 367 U.S. 488 (1961).

by demonstrating that religion was wider than just theistic beliefs, it was entrenched in this case that religion in the United States was any belief that attained the requisite level of seriousness in the mind of the believer.[251] The case of Torcaso, in footnote 11 clarified that ethical culture and secular humanism, amongst others, must be considered in specific cases by case circumstances, as being religious.[252]

The aforementioned description demonstrates that the inquiry to determine whether a specific practice requires religious protection is an objective standard, imposed on a subjective personal inquiry on the nature of the belief and the impact it has on the believer.[253]It does not put a mandate on the liberal courts to read into religious doctrine and tell them what to believe in or what is essential to their faith.[254] On the contrary, the test mandates that when a practice is deemed to be religious it is given insulation from governmental interference. This has proved to be difficult for certain liberal states to follow as I will demonstrate later in this section. But, often cases are wrongly classified as in interference within religious affairs which falls foul of the obligation to give neutral reasons.

To violate the obligation to give neutral reasons, a court must move beyond defining religion to an objective non-theological criteria. This caused an uproar not just liberal academic circles but also with adherents of the faith who believe that they are being told what their faith says. These cases have proved popular across liberal courts. The United States in *Lynch v. Donnelly*[255] argued that the nativity scene was a cultural reference and not a religious reference when displayed during Christmas.[256] The European Court of Human Rights accepted an argument that the display of a cross in a school was compatible with cultural norms which persist in Europe.[257] The French Courts have argued that the nativity scene during Christmas may receive a place in the public sphere so long as it is portrayed in a cultural context. Finally, the Indian Courts have argued that Hindutva is a cultural norm and not a religious one. In all these cases, the Courts have not been prolific, they have been far from prolific. However, there is still an element of Courts assessing whether a practice is taken seriously enough for it to amount to a religion. The inquiry by the Courts was, on the level narrative sometimes even bigoted. However, it is clear that when assessing whether a

[251] *Id*.
[252] *Id*.
[253] *Supra* note 32, at 40-48.
[254] *Id*.
[255] *Supra* note 90.
[256] *Id*.
[257] Lautsi v. Italy,[2011] ECHR 2412.

practice is cultural or religious, there were always neutral reasons given. Even though the Court expressly didn't envoke doctrinal test, the nature of the inquiry was to determine whether the practice was serious enough to be considered religious. On a neutral level, the Courts found that they were not. This sort of inquiry has many problems however, it is important at this stage to note that it is not a problem with neutral reasons, it is a problem with the neutral inquiry of how to define religion which is outside the purview of this thesis.

At this point, it becomes necessary to understand religious autonomy and the obligations created in liberal states to protect the collective right and ensure that governmental organs restrict religion solely through neutral and secular means. Perry Lane described religious autonomy as an enabling law to ensure freedom of religion. Religious autonomy moves beyond the traditional understanding of religious freedom. It is a collective right given to an ecclesiastical order – the group right serves the purpose of consolidating a religious identity to help enable an individual to practice the tenants of the said religion.[258] It would be helpful to utilize an analogical strain of thought to better explain this. Imagine a situation where religion X was founded on the tenant of non-violence. Religion X selects its own head responsible for interpreting religion – a living god- to put it simplistically. Cole Durham articulated this perfectly when he argued that without the group right of religious autonomy: *"[I]ndividual conscience is likely to feel alienated and cut off. It will not have a home*"[259]

By not giving the collective right to the religious body to interpret the tenants it becomes impossible for individuals to follow the religion. It is thus party an enabling law and partly a structural check on an excessive encroachment of governmental power on a religion. Dane observed this and articulated it as follows:*[R]eligious autonomy is a species of religious liberty. But it is a species with its own attributes. For one thing, it generally involves a well-defined institutional or communal interest, and not merely an individual one. Moreover, at least the paradigmatic claims to religious autonomy do not depend for their force on the specific norms of a particular religious community. Rather, they invoke limitations on government intrusion in any religious community*. [260]

Religious autonomy cases are distinct from cases of religious practice on the level that they emerge out of cases where the governments intervene in religious doctrine while secular laws

[258] Perry Dane, *The Varieties of Religious Autonomy in* CHURCH AUTONOMY: A COMPARATIVE SURVEY 197 (Gerhard Robbers, ed., Peter Lang 2001).
[259] Cole Durham, The right to Autonomy in religious affairs in CHURCH AUTONOMY: A COMPARATIVE SURVEY 713 (Gerhard Robbers, ed., Peter Lang 2001).
[260] *Id*

are attempting to make sense of religious doctrine. They are not simple limitations on religious practice. An intervention is distinct from a limitation a limitation always is based on a practice and not a belief. This flows from the state's obligation to limits practices by giving neutral reasons.

Historically States have protected religious autonomy for two reasons. First due to the Religious autonomy cases seem to consistently arise out of the law exerting normative superiority over a religious order and therefore, restructuring a religious order's internal functioning in line with the universal values derived from the secular order.[261]Therefore, it would be prudent to conclude that religious autonomy amounts to a structural limitation on secularism for two reasons: First because it is an implied limitation on the doctrine itself and second because it amounts to a rights-based check on secular governance.[262]

The has been a wealth of jurisprudence emitting out of courts which clarify what religious autonomy means in a liberal constitutional context. It is important to note that the definition is almost universally the same and the nature of the juridical inquiry is always identical when liberal courts deal with questions of religious autonomy. Perhaps the only distinction is when a system abjectly denies the existence of such a group right. As demonstrated earlier, this is normatively undesirable in a liberal state.

General Comment 22 gives a broad outline of the obligation on liberal states to ensure a base amount of Autonomy. The general comment outlines that: "*includes acts integral to the conduct by religious groups of their basic affairs*"[263] General comment 22 is not the only document in international law which clarifies the obligations imposed on the liberal state. The UN-declaration on the Elimination of all forms of intolerance and discrimination based on religion or belief includes a paragraph which mandates that States confer upon religious organization the freedom to: "[T]rain, appoint, elect or designate by succession appropriate *leaders*"[264] What is being referred to in the document is the need to keep religious doctrine and the evolution of the same separated from governmental dominance. Other international bodies such as the European Court of Human Rights have taken cognizance of this as well. The cases of Serif v. Greece and *Hasan and Chaush v. Bulgaria*[265] are both examples of the European Court of human rights, conferring on religious organizations the right to govern

[261]*Supra* note 32.
[262]*Id*.
[263] *Supra* note 148, at ¶4.
[264] Id. at ¶g.
[265]Application no. 30985/96

their own practices without state interference. It would be prudent to go into the details of the case of Serif. The Court of Human Rights held that even though article 9 protected primarily individual practice it also included freedom in community settings, specifically in public spaces.[266]

What is also critical to note at this stage is the distinction between violating the religious autonomy of a religious order and the right to profess the religion of an individual is determined by the scope and nature of the right. The right to profess religion is founded on the negative notion of individual liberty, which is applicable to an individual.[267]However, the right to religious autonomy is a group right that solidifies a religious orders' right to manage its own affairs. Some jurisdictions like the United States seem to treat this as a group right while others like the European Court of Human Rights treat it as a right which acts in the extension of the individual right to worship.

It is clear from the above analysis that a group right of religious autonomy forms the foundation of all rights to profess an individual's conscience. Without religious autonomy, there can be no right to freedom of conscience as the liberal state envisages. Constitutional Courts in most liberal regimes have taken note of this and have granted the collective right to religious autonomy in most liberal regimes. Germany, for instance, guarantees the right in its constitutional practice.[268] Article 140 of the German Basic Law states that: "*Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all*". The emphasis here is that the government may limit practice only through a secular law and not interfere with the ideological framework which a religion is free to choose. As clarified by Alex Campenhausen, Church autonomy has an important role to play in German Secularism as it structurally limits the German State from entangling secular law with religious ideologies. This serves to both protect the German State from religion as well as religions from the German State.[269]

The Commonwealth has seen religious autonomy attain an important place in their unique brands of political secularism. With Canada's established Church, religious autonomy plays a vital role in ensuring that the state maintains an egalitarian framework which does not disadvantage one religion over another. This example, with an established church, is

[266]Id. at ¶38, 50-51

[267]*Id*. A classic example of this is in the United States, the United States treats the right to profess one's religion as an individual right. However, the right of a religion to define its own practices is treated as a group right. Therefore, religious autonomy is also conferred on the group to ascertain their own practices.

[268] *Supra* note 32, at 371-402.

[269] Axel Greiherr von Campenhausen, *Church autonomy in Germany*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY)PETER LAND AND GERHARD ROBBERS EDS 2001)

specifically indicative of the important role religious autonomy and the giving of neutral reasons plays in preserving an ostensibly secular regime when the principles of secularism are reductively stated as dominance counterbalanced by autonomy.

In the case of Lakeside Colony of *Hutterian Brethren v. Hofer, The Supreme Court of Canada*[270] was called upon to adjudicate a dispute which arose out of a dispute about the title of communal property between Hofers and a religious colony. Hofers were deemed to have expelled themselves for violating the code of the religion. When the Hofers refused to leave there was a dispute as to who owned the property.[271] The Court made two important findings; they found that they could not review the theological law to determine what the text said. But, much like the German example, there is a dominance of neutral laws which act as ostensible guidelines to theological law. In *Davis v. Church of Canada*[272], it was clarified that an intervention which limited religious practice on the grounds that it ought to conform to norms of natural justice was a limitation on practice and not an intervention into doctrine. This follows the German model.[273]

The United States is the most visible example of religious freedom being granted to religious communities as a collective right. Watson v. Jones provides the first example of the United States venturing into the question of when a collective right could be granted. The Court in *Watson v. Jones*[274] culled out the principle that a secular court exceeded it's mandated as per the United States Constitution when it reviews according to universal standards religious laws. The only exceptions when the Court could review the law was in the event of Fraud or malice.[275] In delivering the judgment, the U.S. Supreme Court rejected the common law *departure from doctrine*.[276] The departure from doctrine is a former common law doctrine which mandates that a Court, in the event of a dispute between two rival factions of the same religion, decide the dispute between the two rival religious factions by a determination of which faction bears the closest doctrinal link with the original tenants of the religion.[277]

The U.S. Supreme Court argued that the structure and wording of the first amendment meant that such a doctrine was incompatible with the liberal government instituted in the United

[270] [1992] 3 SCR 165
[271] *Id*.
[272] 92 DLR (4th) 678
[273] *Id*.
[274] 80 U.S. 679 (1871),
[275] *Id*.
[276] *Supra* note 32, 389-402.
[277] *Id*.

States. In the case of *Jones v. Wolf*[278], it was held that civil courts were prohibited from resolving church property disputes on the basis of religious doctrine and leave the resolution of internal Church disputes to the highest Court of the hierarchal church organization.What is clear about religious Autonomy Laws is that they prevent a governmental intervention in religious orders and only permit a limitation. What is established in all the aforementioned liberal systems is that the collective right of religious autonomy necessitates that the government regulates religion only through neutral secular reasons. An intervention in religion is tantamount to a reformation of doctrine to secularize religious laws. This as per the dominance theory of secularism is incompatible with the obligations imposed on the liberal state. When there is an intervention within religious doctrine, liberal states begin to backslide into more illiberal regimes. Courts are beginning to play a central role in this form of backsliding, as the guarantors of liberal policy, Courts play an integral role in both ensuring neutrality as well as observing it. However, recently liberal courts have not been having a fidelity to Neutral reasons. They have started to violate it in various ways. Using France, the U.K and India as case studies the next section will attempt to demonstrate what the implications of Courts not giving neutral reasons are. It has been established in this paper that secular dominance over theology is not problematic so long as it dominates through neutral reasons and secular law. Limitations are permissible but, interventions fly against the liberal mandate that state claims to be protecting.

a) The Indian case.

The history of the essential practice test cannot be severed from the colonial history of India.[279] The warrant hasting regulations ensured the codification of the Hindu and the Muslim texts. Multiple scholars attempted to codify the informal norms of the Hindu and the Muslim religions. It set the first precedent where the judicial wing or scholars could substitute for the heads of a specific religion to determine what tenants of a religion were part of the religion and what tenants could be excluded. Thomas Macaulay's arrival in India during the year 1933 marked a change in the attitude of the British towards indigenous law. Being a Utilitarian, Macaulay was of the opinion that codes were necessary to have legal certainty and therefore was instrumental for the push to codify law in the colonies. In 1833 the East India Company declared that: "*Not all the people of India should live under the same law... Our principle is simply this – uniformity where you can have it and diversity when you*

[278]443 U.S. 595 (1979).
[279]RONOJOY SEN, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE SUPREME COURT (LAW IN INDIA), 42 (2009).

must have it".[280] The entire debate surrounding codification hinged on the three essential values which were deemed by the utilitarians to be necessary to make good law, legal certainty and maximizing utility by giving diversity on essential practices so as to avoid conflict.

However, the process was set in motion even though codification had not fully happened by the early twentieth century, there was a significant body of legal literature which had accumulated in front of colonial courts. Courts were presented with a very large body of literature which dates back to the mid-nineteenth century.[281] Ronojoy Sen has argued that this was the start of the Bhraminization of religion and this necessarily corresponds to the later urge of the Indian judiciary to rationalize religion specifically Hinduism.[282] This is not a unique claim and is backed up y many historians. Cohn, for instance, observed that the impact of English judges presiding over cases which had a religious connotation had " *transformed Hindu law into a form of English case law*"[283]. Cohn was referring to the fact that the English judges presiding over the colonial courts were, in fact, using a form of stare decisis and therefore coming to conclusions about Hindu law and codifying this into the common law which was being systematically churned out in the Indian colony.[284] Sen also notes that in instances where there was a gap in law the English standard of "justice equity and good conscience"[285] was being utilized to fill the gap in the law.[286]Perhaps it is curious that the British were so intent on finding a theological certainty in Hindu and Muslim law. It mimics the British doctrine of departure which was present at the point in time.[287] This doctrine has largely been done away with in British law now, however, the presence of this doctrine provides an explanation as to why the British felt such a need to codify religious law.

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[280] *Id*. at 43
[281] *Id* at 44
[282] *Id*. Bhraminization refers to the process by which the British in their consultation with pundits only took into account the opinions of Brahmins. In doing so the text of the codified Hindu Law was diluted with the opinions of just Brahmins. As demonstrated by Ronojoy Sen, the Hindu religion is more diverse than the mere opinions of Brahmins and therefore it was necessary for the religion to be given the autonomy it required. Instead there was a prioritization of Brahmin norms within all the codified Hindu texts. This has led to a loss of recognition for many of the more philosophical aspects of Hinduism such as Adviata.
[283] *Id*. at 44.
[284] *Id*.
[285] J.D.M. Derrett, *Justice Equality & Good Conscience in India*, in ESSAYS IN CLASSICAL MODERN HINDU LAW IV (1978)
[286] Supra note 279 at 44-45.
[287] Supra note 32.

As the Indian Constitution was being drafted, it was clear that religion played a very important role in a polarizing debate which required many different religious and ideological factions to be accommodated into the shared constitutional ethos of the newly founded national state. By the end of the drafting process, it was perhaps fitting that the Indian Constitution had a very secular outlook. Nehru even described it as separationist. Nehru was quoted in 1945 as saying the following: "*I am convinced that the future government of free India must be secular in the sense that government will not associate itself directly with any religious faith but will give freedom to all religious functions."*[288]The Supreme Court of India excavated a key passage of the constituent assembly debates during their decision in the case of S.R. Bommai, The Court went on to quote Pandit Laxmi Misri and determine that he echoed an important understanding of Indian secularism; He was quoted as saying that: "*By Secular State, as I understand, it is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever. The State is not going to establish, patronize or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be discriminated against simply on tile ground that he professed a particular form of religion. In other words, in the affairs of the State, the preferring of any particular religion will not be taken into consideration at all. This I consider being the essence of a Secular State. At the same time, we must be very careful to see that in this land of ours we do not deny to anybody the right not only to profess or practice but also propagate any particular religion."*[289]Dr. Radhakrishnan an integral member of the constituent drafting committee stated that: *"When India is said to be a secular State, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives.*"[290] While writing this passage in this book, it was clear that the author was referencing the outcomes of India's constituent assembly debates. What we establish from this is the Indian experience did, at that state value not just separation of religion from

[288] SR Bomai v Union of India, ¶ 25. Thequote by Nehru establishes that the key figures in the founding of the Indian State were committed to a form of religious Autonomy. Nehru's reference to all religious functions necessitates there was an intent by Nehru to provide a space for group autonomy. This is integral to my assessment as it is reflected in both the constituent assembly debates as well as in the final text of the Indian Constitution.
[289] Id. at ¶26.
[290] SARYEPALLI RADHAKRISHNAN, RECOVERY OF FAITH, 202 (1955).

politics but the separation of politics from religion. i.e. religious autonomy which would render the practices of codification as well as the political intervention of politics in faith – as prevalent in the colonial era impossible in the further. The purpose of this was to ensure that the constitution unified the country as opposed to communally divide it.[291]

This is reflected in the text of The Indian Constitution. Religious rights are protected through Article 25 and 26 of the Indian constitution both the individual right to profess religion as well as the group right to religious autonomy of a religious community. Article 25 states that: "*Subject to public order, morality, and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion*".[292] Article 25(2)(a) states that nothing will prevent the state from limiting religion on the grounds that it is limiting religious rights for the purpose of: "*regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice*".[293] Article 26 of the Indian Constitution allows religious organizations to acquire and manage the property, set up charitable foundations and trusts and most importantly, manage their own "*religious affairs"*.[294] Article 26 is also subject to the inherent textual limitation of public order, morality, and health.[295]

India's constitution does have within it a unique provision that enables the government to intervene in cases where caste-based discrimination occurs.It would be impossible to delve into and accurately explain the history of cast discrimination in India.[296] However, very briefly, it is a unique species of intra-religious discrimination wherein Hindu's of higher casts, the casts of the priesthood, warriors, and traders treat lower casts (defined by their profession) which usually denote blue collared work as untouchable.[297]While the Constitution does expressly grant permission to secular organs to ensure that caste-based discrimination is limited and explicitly. Rajeev Bhargava argues that the Indian state has a principled distance towards religion wherein it may intervene with religious practice when there was a need to protect the rights of the individual against the domination or persecution of religious

[291] Supra Note 279.
[292] Article 25, Indian Constitution 1950
[293]*Id*. Article 15 and 16 allow for the Courts to prohibit the practice of untouchability and actively work to do so. However, the movement which allows for the practice of untouchability to be prohibited is not problematic towards the dominance approach as it is a limitation of a practice and doesn't flow out of the doctrine of Hinduism.
[294] Gautam Bhatia, *Freedom from Community: Individual Rights, Group Life, State Authority, and Religious Freedom Under the Indian Constitution*, GLOBAL CONSTITUTIONALISM 351, 356 (2016).
[295]*Id*.
[296] *Supra* note 279.
[297] Id.

orders.[298] He argued that at some points, the ideological faction would have to be banned for the purpose of preventing caste-based atrocities such as temple bans against untouchables as well as violent crimes.[299] However, what is clear is that the Indian government for policy reasons based on equality, can ban the practice of caste-based discrimination, it cannot as per the text of the constitution intervene in the ideology, Hinduism does not have a state church and the state has no possible way of intervening in what is an independent faith in a separationist regime.[300] Therefore, the equality articles do not dilute the impact of the freedom of religion clauses, they, in fact, strengthen the claim for religious autonomy and merely allow for secular governance of religious faiths and orders when their practice leads to an undesirable impact on public policy.[301]

What can be deciphered from the text of the Indian constitution is that there is an express distinction between religious activity and secular activity.[302]Secular activities can be regulated even when performed by a religious order under Article 26 or by an individual under Article 25.[303]It is for this reason that, while determining the level of protection conferred on a religious belief and practice, a dichotomy, which the Indian Courts cleverly avoided;[304] the courts must first determine whether the practice/belief is religious in nature or secular in nature.[305] If the courts find the belief to be secular, there is a constitutional mandate on the courts, flowing from the text to reduce the level of protection. The constitution of India has however, not specified how to make the distinction between religious activities which are religious in nature and activities which are secular in nature. This has led to the Courts battling on the definition of religion and what religious practices count as being truly religious. The Courts have reached disastrous conclusions and come up with a test, which blatantly violates religious organizations, autonomy.

The essential practice emerged out of the traditional liberal inquiry of what religion is. There is a rich heritage of Indian Courts asking whether a particular practice is religious or not. This is, as mentioned earlier a very standard question asked by Liberal Courts. It is, in fact, essential to ask this question in light of the fact that the scope of freedom of religion must be

[298] Id.
[299] Id.
[300] Id.
[301] Id.
[302] See generally, *Supra* note 279.
[303]*Id*.
[304] Ronojoy Sen, *Freedom of religion*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTIONAL LAW (Khosla etal. 2015)
[305]*Id*.

judicially clarified. *Ratilal v. the State of Bombay*[306]provides the first insight into what Indian Courts believed was religious. There was an express movement towards narrowing the definition of religion to a theistic religion. The Court argued that any meaning giving belief vis' a vis the creator or an agent of creation was a religious belief.[307]

This position was put to the test in the Supreme Court for the First time in 1951. The case of *Shirur Mutt*[308] came before the Supreme Court of India. In the case of *Shirur Mutt*, the Indian Supreme Court came to the consensus that religion was a broader quantum than being solely theistic. However, they argued that there were normative limits to the concept of religion as envisaged by the Indian Constitution. However, with their broad definition, they have gone past the traditional liberal question of whether a practice is religious or not and moved into the question of whether a practice is essential to a particular religion.[309] In this case, Justice Mukherjee wrote that: "*A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and ceremonies and modes of worship which are regarded as integral parts of religion*."[310]

In their constant effort to separate the religious action from the secular action the Indian Courts have relied on a test called the *essential practice test*. This flows from an interpretation rooted in the constituent assembly debates where Ambedkar argued that freedom of religion protect what was essentially religious.[311] Courts in India have taken this to mean that the scope of religious activity is only that which is essential to a particular religion.[312] By assuming this, the Courts in India have assumed the role of being interpreters of not just secular law but also of religious doctrine. The Courts have thus assumed the role of theologians who are qualified to make judgments about the internal functioning and doctrine of all religious orders.

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[306] Ratilal v. State of Bombay, 1958 SCC 731.
[307] *Id*.
[308] Comissioner v. Sri Lakshimindra Thirtha Swamiar, 1954 AIR 282.
[309] *Supra* note 304.
[310] 1954 SCA 430.
[311] OLIVER MENDELSOHN & MARIKA VICZIANY, THE UNTOUCHABLES: SUBORDINATION, POVERTY & THE STATE IN MODERN INDIA, 77 (1998).
[312] *Supra* note 71.

It has been noted by scholars that Indian Courts have constantly undertaken the responsibility of defining religion.[313] As mentioned previously, this is a task, which is undertaken by multiple constitutional courts. Indian Courts undertake this task due to the wording of Article 25 & 26 of the Indian Constitution, which mandates the separation of the religious sphere from the secular sphere. The constitution mandates this distinction to protect religious rights and functions, which does not transcend into the realm of secular governance.

However, Indian courts ask a second question which is whether a practice is essential to the religion once it has been determined that a practice is indeed religious. In asking this second question they deviate from other Courts in the liberal constitutional setting. The second question is rooted in the assumption that only essential practices of religion can be protected. This is distinct from them looking into the practices to determine what qualified as religious practices.[314]This goes a step further and violates the right of a religious order to define the contours of its own doctrine. In doing this, the Indian Courts violate the religious autonomy clause which vests in Article 26 of the Indian Constitution. Fali Nariman and Rajeev Dhavan have flamboyantly argued that the Indian Supreme Court acted: "*With a power greater than that of a high priest... [J}udges have virtually assumed the theological authority to determine which tenets of faith are 'essential' to any faith and emphatically underscored their constitution power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution* "[315]J.D.M Derrett slated the practice of Courts interfering in the doctrine of religious ideologies by stating that it opens the door to a great deal of judicial indeterminacy, arguing that the essential practice test allowed Judges the space to arbitrarily decide what is essential to a religion and what is not. Therefore Derrett correctly observes that this practice could essentially distinguish all religious protections which are constitutionally guaranteed. Adding to the normative concerns of the test, as I have noted earlier, the text of the Indian Constitution which is quintessentially liberal does not allow for this mandate. Marc Galanter argued that the essential practice test is tantamount to an intervention within religions to help rationalize their practice.[316]

[313] Marc Galanter, *Hinduism, Secularism and The Indian Judiciary*, 21 (4) PHILOSOPHY EAST AND WEST 467, 469-70 (1971).
[314] *Id.* at 472-74.
[315] AIR 1954 SC 282; Rajeev Dhawan & Fali Nariman, *The Supreme Court and Group life: Religious Freedom, Minority Groups and disadvantaged groups, in*SUPREME NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal Eds 2000); J.D.M. Derrett, zreligion, Law and the State in India, 447 (1968)
[316] *Supra* note 313, at 469

Notwithstanding all the scholarly and judicial dissent towards the essential practice test, the doctrine has now been entrenched into Indian Constitutional law.[317]Indian Courts first committed this cardinal sin in what is perhaps the first case where they adopted a working definition of religion. The case of *Madras v. Shri Lakshmindra Thirtha Swamiar of Sirur Mutt*[318] is perhaps the first case in which a working definition of religion was established. The case was born out of a challenge to the Madras Hindu Religious and Charitable Endowments Act of 1951, on the claim that it infringed Article 26 (the Collective right to religion) of the Constitution.[319] In the aforesaid act, the State did not recognize the mathadhipati as the manager of the faith but, mandated that the *Mathadhipatiwas* a servant of the state department, giving the government great power to interfere with the running of the religion.

In the case of Shirur Mutt, the Supreme Court defined religion in a wide way, arguing that religion amounted to more than just belief and doctrine,[320] the Supreme Court also included Religious practices in its definition.[321] However, the Supreme Court asserted in the ratio that religious practices would be protected by the constitution only if they were integral to the religion at hand.[322] The Court observed that: "*A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else, but doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."*[323]This decision to strike down the Madras Endowments act was in perfect consonance with the liberal practice of defining religion without venturing further into religious law.

However, from the ratio of this decision a series of decisions have taken the definition one step further to ask whether a practice is essential to a specific faith.The Supreme Court through its effort to define religion inserted a textual glitch, which had an immense normative impact. By stating that religion is worship, which is integral to the religion in question, the

[317] *Supra* note 279, at 58-60.
[318] AIR 1954 SC 282; Id.
[319] *Id*.
[320]*Supra* note 71.
[321]*Id*.
[322]*Supra* note 67, at 357-60.
[323] The version of this case utilized by me, lacked page numbers the quotation may be found at the following link. https://indiankanoon.org/doc/1430396/ .

Court created a second tier of inquiry, which leads to it necessarily having to investigate the doctrine of religion.[324]From the ratio of *SirurMutt* case, there were a series of cases, which consolidated the essential practice test. The first of these cases was *Durgah Committee v. Syed Hussain Ali*[325], in this case, the Court made a distinction between what was religious and what was superstitious.[326] As observed by Ronojoy Sen, this enabled the Court not only to use superstition to narrow the definition of religion but also enabled the Court to debunk internal religious doctrine as being merely superstitious and thus not essential to a specific religion.[327]*In Durgah Committee v. Syed Hussain Ali*, the majority reached the conclusion that K.C. Dasgupta held that excommunicating members was not essential to the religion and furthermore, that the power of excommunication cannot be used for maintaining the cohesion of the religious order.[328] However, it was in a dissent that the Supreme Court really clarified how the essential practice test works. Justice Sinha wrote that the excommunication is a purely religious act which is essential to the faith.[329] He argued that such practices cannot be conflated with the more secular aspects of a faith which is open to the Courts to reinterpret.[330]There was no reasoning as to what counts as essential to religion, Justice Sinha's reasoning almost implies that judges know it when they see it.[331]

In the case of *Shri Govindlaji v State of Rajasthan*,[332] The traditional Spiritual leader of the Nathdwara temple in Rajasthan challenged the Nathdwara Temple Act on the grounds that it violated Article 26 of the Constitution. The complex factual matrix is unnecessary to delve into, however, what must be kept in mind is that the Act allowed for a great deal of governmental interference in the religious doctrine of the Nathdawara faith. The Court, in this case, entrench the theological inquiry that started to take shape in Yagnapurushdasji, the Court observed that " *In cases where conflicting evidence is produced in respect of rival contentions as to competing for religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. The question will always have to be decided by the*

[324]*Supra* note 304.
[325] AIR 1961 SC 1402
[326]*Id*. at 1405-10.
[327]*Supra* note 279.
[328] Durgah Committee, *Supra* note 325, at 1405-10.
[329]*Id*.
[330]*Id*.
[331]*Id*.
[332]Shri Govindlaji v State of Rajasthan , AIR 1963 SC 1406

Court and in doing so, the Court may have to inquire whether the practice in question is religious in character and if it is, whether it can be regarded as integral or essential part of religion."[333] This case solidified the three-stage questioning of the Indian Supreme Court. First, is a practice religious?Second, the Court asks whether the practice is essential to the religion that it claims to be a part of and third the Court asks whether the practice falls foul of normative public policy aspirations. In this set of questions, only two of them are traditionally asked by liberal Courts while dealing with religion. Most Liberal Constitutional orders are prohibited from asking the question of whether a practice is essential to a religion by religious autonomy laws and the obligation to give neutral reasons.

The next case, which made a meaningful intervention, was the case of *Yagnapurushdasji*[334], in this case, the Court defined Hinduism as not a religion but, a way of life. However, the court argued that Hinduism had within it a certain number of essential practices, which could be deciphered as being religious.[335] The Supreme Court argued that Hinduism always had a belief in the afterlife with the final aim of life being the ending of the cycle of rebirth; which was attained by the fulfilling and balancing of karma. Ultimately since the petitioner's claim did not fall within this narrow definition of Hinduism it was not protected by the Courts.

The Court, in this case, was fundamentally unaware of the complexity of Hinduism and the multiple subsets of Hinduism and therefore, was in blatant violation of the Hindu order and it's sub-sects to be able to manage their own doctrine. This is an example of how the definition has been used to deny a claim for religious autonomy by pigeonholing the complexity of a religion into one standard definition. However, the aforementioned judgment was just the beginning of a judicial violation of religious autonomy and self-determination in India. Once again this case was an expansion of the essential practice test.

Rajeev Dhawan and Nariman argued that *Yagnapurushdasji* was the first case where a three-stage test was conclusively used to determine whether a practice was legally protected. According to the authors, the Court first ascertains whether a practice is religious. After determining that a practice is indeed religious, the Court asks whether the specific practice is

[333] *Id*. at 1410.
[334] 1966 AIR 1119.
[335] *Id*.

essential to the religion in question and finally, determining that even if the practice is essential to the religion whether it can be limited on grounds which are constitutional.[336]

Finally, in what is the most iconic case to Indian law students and practitioners concerning the essential practice test, the Supreme Court was called upon to adjudicate a case involving a faith performing a very public Tandava dance.[337] This case is specifically significant as it arose out of an appeal by a previous decision rendered by the Calcutta High Court. The High Court rejected the essential practice test and held that: " *If Courts started enquiring and deciding the rationality of a particular religious practice then there might be confusion and the religious practice would become what the Courts wish the practice to be*"[338]. In responding to this case the Supreme Court – in 2004 – finally entrenched beyond doubt that the judiciary in India has the mandate to interfere in religious politics and determine what practices are essential. The majority rebuked the assessment of the Calcutta High Court and the Court clarified the scope of the essential practice test. The Court held that "*Essential part of a religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief*."[339] In holding this, the Supreme Court settled the issue of the Essential Practice test. The Court confirmed that the Judges of the Supreme Court were the ultimate custodians of both religious as well as secular law. This is in Stark contrast with the liberal definitional doctrine which was handed down by Justice Mukherjee in the case of Shirur Mutt.

Unfortunately, this change has had a massive impact on religious autonomy in India. In a recent case, the Court defined essentially to a religion as a core tenant. In the specific case, the Court deemed a particular dance as not being a core value of the religion because of the fact that it was a relatively recent development in the history of the religion.[340] This alludes to the fact that the Court seems to be arbitrary in the method in which it gauges the importance of the practice. It most certainly begins a judicial reinterpretation of the doctrines. This has been a very problematic trend in Indian Jurisprudence as it denies any claim of real autonomy to religions and vests the right of defining religious practices with judicial authorities. [341]

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[336] *Supra* note 304.
[337] Jagadishwaranand v. Police commissioner of Calcutta, AIR 1990 Cal 336
[338] *Id*. at 350.
[339] The Commissioner of Police v. Acharya Jagishwarananda Avadhuta, 2004 (12) SCC 782,783.
[340] *Id*.
[341] RONOJOY SEN, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE SUPREME COURT (LAW IN INDIA) (2009)
[341] *Id*. Commissioner of Police & Ors v. Acharya J. Avadhuta & anr Case no: Appeal (civil) 6230 of 1990.

The Indian Authorities seem to be following an egalitarian approach o religious freedom, which necessarily believes that the value of equality trumps any internal religious doctrine. *As Narayana v. State of Andra Pradesh* provides an empirical example of the Court siding with the proposition. The Court in Narayana observed that: " *[Indian Secularism] intended to be a guide to a community life and ordain to ensure that every religion is governed around it's cultural and social demands to establish an egalitarian order.*"[342]This has now become the justification for the Supreme Court to rationalize religion, the egalitarian urge of the constitution has been given supremacy to all forms of religious liberty except arbitrary notions of essential parts which are easily circumvented by the Indian Judiciary. In a recent case challenging the constitutionality of the triple talaq, the two majority judges did not adequately perform a secular analysis of why the triple talaq should be banned. There were secular neutral reasons by which the Supreme Court could have done that. However, it abandoned the secular reasons in favor of theological reasons. The Court, in that case, held that the triple talaq was a practice which was not essential to the Muslim faith due to the text of the Koran condemning it. The theocratically analyzed the Koran in light of different Muslim majority countries banning the practice of triple talaq and reached the conclusion that the triple talaq was a practice that was condemned in Islam. Furthermore, in their complex reconstruction of the Koran, the Indian Supreme Court went on to hold that what is *bad in theology is bad in law.While there were attempts by Justice Nariman to utilize secular reasons to ban the practice, ultimate the entire majority receded into an analysis wherein it normally reread Islam as a religion which was compatible with women's rights and Article 14 of the constitution. The Court took great care in reinterpreting Islam as a religion which condemned the cruel divorce practice and they essentially argued that no such practice could be an integral part of the religion. This case demonstrates that religious autonomy in India is merely a textual guarantee which has no normative political force. While the Court has now taken on the mandate of interfering in religion. No longer does India need to give secular reasons to limit religion, on the contrary, religion is secularized to be comparable with constitutional norms*

The impact of the Indian Constitutions essential practice test is that it has almost completely extinguished the right to religion as a doctrinal ideal. It is now more a norm which is based on whims and arbitrary opinions of judges. Judges are not qualified theologist and do not have a textual mandate to assess what religion is. Furthermore, they are ignoring the early

[342] AS Narayana v. State of Ap, AIR 1996 SC 1765.

decision of the Supreme Court which bind them to a broad definition of religion which confers on both private as well as institutional religion a broad mandate to define their own rituals and practices. The Court was in the earlier cases only allowed to limit that religious practice in the event that they were in contrast with public policy. The limitation as independent of the ideology of the religion and merely judged the impacts of the said practice. However, the norm in the Indian judiciary is now intrusive and it reforms religion as opposed to limiting it. Religion is now essentially what the state wants it to be.

b) The U.K. Experience

The U.K. has long been the subject of intrigue for comparative lawyers studying religion. It is uniquely situated as a liberal state with an established Church and a past wherein the government utilized its position and a lack of a written constitution to dominate the public sphere and be frugal in their assessments of acceptable religious practice. However, over the decades the United Kindom has transformed into one of the most facially liberal constitutional orders which guarantee religious rights including religious autonomy. As mentioned in the second section the U.K. no longer suffers from the infirmity of having an established Church which leads to the government treating citizens unequally. The U.K clearly has evolved into a very modest form of separation which has no role in the political system or in the ordinary life of non-adherents. It makes it the perfect testing ground to understand the importance of maintaining a balance between governmental dominance over religion and a corresponding amount of individual and collective liberties given to religious orders.

There has been a long-held belief that the U.K. is somewhat of an anomaly in its reason giving in religious cases. The earliest cases followed the "doctrine of departure", which enabled common law Courts to go into theological reasons when there was an internal conflict within a Church. There were no norms of common law to be applied, but, the Courts viewed themselves as the highest appellate body in the land to judge the merits of the religious law. This has led many scholars to argue that there has never been and continues to be a lack of religious autonomy in the U.K.[343] It was concluded quite definitely in early scholarship that religious autonomy was never a part of British culture and secularism. However, the Human Rights Act of 1998 has changed the nature of Human rights in the U.K.

[343] *Supra* note 81.

In addition to the Human Rights Act, The European Convention on Human Rights is applicable within the territory of the U.K. It has been utilized in the adjudication of domestic human rights disputes and is a guide for the judiciary as it grapples with Human rights issues. Article 9.1 of the European Convention on Human Rights states that "*Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance*.". Article 9.2 states that "*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."*A bare reading of Article 9.1. gives the impression that religion in the U.K is protected on both an individual and on a group level. In order to effectively protect a group right the group in question must be granted the autonomy of choosing the contours of their own membership and their own rules. The necessary implication of a group right is the ability for the group itself to chose its members and the need for the state apparatus to tolerate the exclusion of certain people. On an analogical level, we could argue that in the instance that a right-wing group decides that it is better off without a particular section of society, the government must tolerate the group's misgivings but, not endorse it. This is the primary function of a group right and thus; it broadly requires religious autonomy of communities. This is specifically important as Courts in the U.K. use the European Convention on Human Rights as a domestic adjudication tool.[344] More recently, since the Human Rights Act, religious organizations in England and Wales (this of course, notwithstanding the Church of England) are organized privately and are treated as voluntary associations.[345] This too ought to have acted as a structural check on governmental organs from an interference in religious life by redefining the doctrine to either secularize or rationalize religion. Section 13 of the Human Rights Act lends credence to my analysis as it states that: "*If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience, and religion, it must have particular regard to the importance of that right*".[346]

[344] Mentioned in Section 2 of the Human Rights Act.
[345] *Id*.
[346] Section 13 Human Rights Act

Silvio Ferrari has accurately demonstrated how the Human Rights Act has changed the nature of secularism within the U.K. – at least facially.[347] He argues that there has been a shift in the jurisprudence concerning secularism after the Human rights Act, where the State of the U.K. has moved away from the model of dominating religion through it's establishment of the Church of England towards a model where all religion is treated equally with limitations on practice being imposed only in the event that there is a violation of a universal human rights norm in the practice of a religious belief. In his wonderful analysis of British politics, Rivers noted that schools with a religious ethos were supported by the then coalition government as well as by the former Labour government. [348] This is supported by the fact that in 2009 the Supreme Court of the U.K. declared that racial discrimination had taken place when a child was denied a place in an Orthodox Jewish School because his mother was a convert to Judaism. In this case, they treated Jewism as both a religion and a race and decided to give neutral reasons on the basis of the racial discrimination that had taken place, in their opinion. However, what is critical to note is not the normative desirability of the decision but, the fact that the Court did not venture into religious doctrine and respected the autonomy of the religion. What has been very well demonstrated by Ferrari and by analysis of the case is that the U.K. should ideally have a system of religious autonomy which robust and egalitarian.[349]

Unfortunately, The U.K. continues to following its historical tradition of not respecting religious autonomy. The U.K has a historical doctrine know as the "departure from doctrine". This doctrine has is rooted in the judicial philosophy that *awarded property in internal church disputes to the group that retained the closest position to original church doctrines.*[350] While, we have moved a long way from the departure from doctrine, the U.S Supreme Court has consistently cited to the fact that the principle of the crown being the sole sovereign which later morphed into parliamentary sovereignty has the effect of a radical policing of religion in the U.K which was distinct and incompatible with the establishment clause in the United States.[351]

While the Courts in the U.S. were correct in their observation about the British Courts, it is necessary to note that Courts in The U.K. have now started to recognize the notion of group

[347] *Supra* note 119.
[348] *Id*.
[349] *Supra* note 199, at 150.
[350] *Supra* note 32.
[351] *Id*..

rights flowing from religious orders.[352] Furthermore, the U.K's signature of the European convention on human rights means that there is an inherent notion of religious autonomy within the British legal system.[353] The claims of the British system being outdated are rather dated, to be very blunt.[354] The Human Rights Act has endowed a group right on the population of the U.K., which necessarily demands that the decisions of the particular community must be respected.[355]

However, this has not been the case. Similar to the Indian experience, the U.K. too has had the problem of religious organizations being policed by the Courts. A leading case which demonstrates this is the case of *Shabina Begum*.[356] Shabina Begum was a teenage student who was refused permission by her High School to wear the traditional jilbab coat.[357] The school however offered her the alternative of wearing the Indian dress of a *shalwar kameez*.[358] However, on the 13th of February, Begum filed for judicial review. The administrative Court delivered the first opinion in this case and the Court necessarily argued that the freedom of religion residing in article 9 of the Human Rights Act was not implicated in this case. The House of Lords reached the conclusion that the wearing of the religious dress could be legitimately limited on the grounds of the rights of others. Here the court was incompatibility with the rulings of the European Court of Human Rights in *Leeyla Sahin*[359] and in the case of *Dahlab v Switzerland*.[360]

Moving forward, though, the Courts in the U.K. started to use the case of *Shabina Begum* as a president to not only deny religious rights but also religious autonomy. This has been termed by Sandberg as "*Begums' curse*".[361] Much like in India, this concept transcended just violating the autonomy of minority religions; it amounted to a systemic review of all the tenants of both minority and majority religions. Javier Garcia argues very eloquently that there is a justification/interference conflation by the Courts in the U.K because the Courts are constantly moving to assess whether there is a justification before actually coming to a

[352] *Supra* note 199 at 148.
[353] *Id*. at 148.
[354] *Supra* note 154
[355] Javier Garcia Oliva, *Religious Dress Codes in the United Kingdom*, *in* RELIGION IN PUBLIC SPACES: A EUROPEAN PERSPECTIVE, 217 (Ferrari&Pastorelli eds. 2012).
[356] Begum v. Denbigh High School [2005] 1 W.L.R. 3372
[357] *Supra note 355*.
[358] *Id*. at 227-28.
[359] *Supra* note 20.
[360] App no. 42393/98 (2001).
[361] RUSSELL SANDBERG, LAW & RELIGION, 198 (2011). Sandberg did not explore the impact in the same way in which I am exploring the impact of the case for Sandberg the impact was more notional on cases concerning other Muslim women and this has evolved into the doctrine harming individuals from all religions.

consensus on whether there is an interference with the right of conscience; this leaves the scope of religious freedom very underdeveloped.[362]

This interference/justification conflation by the Courts has led to them searching in religious doctrine for answers about whether religious symbolism is essential to a religion without even sparing a thought for whether the individual concerned was treated unequally. Much, like Garcia's observation, the Courts are ready with a justification before they even have the answer to the question of whether there was discrimination. In *Playfoot v Millias School,*[363]a member of a Christian group was intent on wearing a purity ring to school. The defendant school decided that the purity ring could not be in conformity with proper uniform and thus was under no obligation to wear such a ring.[364] The Court thus went on to argue that the claimant was under no strict obligation to wear the purity ring as it fell outside the mandated tenants of Christianity. Therefore, the Court's conclusion was that the claimant was under no obligation due to her institution's doctrine to wear a chastity ring, *ergo* the Court ruled that the claim fell outside the scope of a religious discrimination case. The Court differentiated the case filed by *playfoot* in a seemingly arbitrary way from cases which occurred in the past. The Court merely asserted that the wearing of a purity ring was not essential to the practice of the Christian group. In making this assertion, the Court distinguished the wearing of a purity ring, from the wearing of a bangle in Sikhism. The Court in its obiter went on to say the following: "*In [our] judgment the School was fully justified in acting as it did. The School recognizes exceptions to its general ban on jewelry where the imposition of the strict rule would impose a disproportionately harsh result on a pupil. "(i) first*$_s$ *on health and safety grounds, in particular where there is a specific medical need. This exception has no application in the present case.(ii) second, where enforcing the policy would be likely to result in an unlawful breach of the pupil's human rights. The School has permitted a Muslim girl to wear a headscarf where it was considered by her to be a requirement of her faith; two Sikh girls have been allowed to wear a Kara bangle on a similar basis; and a pupil was allowed to wear a headscarf as it was believed that this form of dress was required as part of her faith as a member of the Plymouth Brethren. By contrast, there is no evidence in the present case that the Claimants religious belief required her to wear the ring and she did not*

[362]This can be seen first in the case of Begum where the court first argued that there was no infringement of the right because the argued that the restriction was necessary in a democratic society to protect the rights of others. This one the face of it is a limitation and no an interference.
[363] R (on the application of Playfoot (a child) v. Millais School Governing Body [2007] EWCH Admin 1698 (2007). *Supra* note 93, at 229.
[364]*Id*.

suggest that it did;(iii) third, where there are exceptional and compelling grounds. There are no such grounds in the present case. The Claimant was not obliged by her religious faith to wear the ring and the School offered her other means by which she could express her belief (see para 30 (i-iii) above)."[365]

What is clearly demonstrated in the aforesaid quotation is that the Labour tribunal was operatively stating that the reason why a religious exemption was not given was that the practice of wearing a chastity ring was not essential to the religion of the practitioner. Furthermore, it is clear that the investigation through the use of multiple witnesses assessing whether the practice is essential or not is indicative of the Court not giving neutral reasons and instead proceeding to rationalize theocratic commitments which are not permitted under the human rights act. When a religious autonomy argument was made under article 13, the Court merely stated that it was not applicable. The court gave no good reasons for this and merely said that: *"In my judgment Section 13 has no application in the present case.*"[366] The judiciary in the U.K believed it to be the part of its mandate to assess what religion means on an objective level and to tell adherents of a faith what that particular faith mandates. In the underlined sections of the quote, the British judiciary is reading into a religious orders ideology to understand what is required as a core practice and what is not required as a core practice. It seems as though they have reached the conclusion that only core practices may be protected by law and other practices are not to be protected. This strand of reasoning is not neutral and is highly theological. What is concerning, however, is that the Court does not give evidentiary reasons from the doctrine of the religion it simply relies on expert testimony.

A stance that echoed the judgment of *Playfoot*[367] was taken in the case of *Eweida v. British Airways*[368]. The Court, in this case, came to the conclusion that wearing a cross was not an authentic practice in Christianity. In the aforementioned judgment, British Airways had a uniform policy, which prohibited the wearing of a cross. The Court of appeals clearly stated that the appellant was not required to wear a cross according to the tenants of Christianity.[369]The Court made a telling observation which determines just how arbitrary it's intervention and subsequent attempts at standardization of religious practice are. The Court

[365] *Supra* note 363, at ¶38 see also ¶38 to 45
[366] *Id*. at ¶40, Section 13 is widely considered the clause which most vocally protects religious autonomy. Section 13 states that: ""If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right".
[367] *Supra* note 363
[368] [2010] EWCA Civ. 80.
[369] *Id*.

stated that: "*only circumstances in which religious items could be visibly worn outside the uniform were if wearing the item was a "mandatory" scriptural requirement and the item could not be concealed under the uniform, and even then the wearing required management approval. Examples of such items given management approval included the hijab, the turban, and the skull cap which some Muslims, Sikhs, and Jews respectively believe they are obliged to wear*."[370]The Court reached a similar conclusion when they argued that beliefs about marriage and sexuality were not a core Christian beliefs.[371] In the case *of Ladele v. Islington Borough Council*[372], The Court of appeals relied upon a decision by the European Court of Human Rights to arrive at it's conclusion – this relying on the Court of Human Rights is perhaps fallacious as it has been settled that there is a requisite amount of religious autonomy in the European Court of Human rights jurisprudence. Furthermore, the Court of Human Rights is not a body which has a State Church separation or setup – therefore, placing reliance on a judgment of the Court of Human Rights is problematic. However, The Court of Appeals in England relied on the case *Pichon and Sajous v France*[373] to reach the conclusion that all religious practice is not permitted. However, when the Court proceeded with its analysis, it gave a reason which was very different to the cases it cited by the Court of Human Rights. The Court of Human Rights in *Pichon and Sajous v. France* was neutral in the reasons it gave to restrict religious activity and did not venture into the validity of the beliefs of the specific claimant's vis' a vis the religious order that they were part of.[374] However, the Court of Appeals investigated whether the practice was shared by enough people of a faith and therefore made an assessment as to whether it was an integral part of the religion.[375] The Court concluded that the regulation they were dealing with protected only "*those circumstances are essentially limited to the membership and operation of 'organisations relating to religion or belief', which plainly does not cover performing civil partnership unions, which is self-evidently a secular activity carried out in a public sphere under the auspices of a public, secular body*"[376]

[370] R (on the application of Playfoot (a child) v. Millais School Governing Body [2007] EWCH Admin 1698 (2007).
[371] [2007] UKEA/0134/07/DM.. This case demonstrates quite perfectly why there is a need for religious autonomy. Other reasons which were neutral could have been given by the Court. However, the Court chose to move into the realm of theology.
[372] *Id*.
[373]Application 49853/99 (2 October 2001)
[374] Id.
[375] Ladele at ¶67
[376] *Id*. at ¶70

While Christian faith is the primary recipient of the Courts theocratic ventures, it is not limited to this. In *Harris v. NKL Automotive Ltd.,*[377] A Rastafarian driver was denied a permanent position as a driver on the grounds that his appearance was untidy. The specific reason was made with reference to his hair. Both the appeals tribunal and the employment tribunal held that there was no violation, as it was not mandated by the Rastafarian faith. This was a specifically irresponsible decision, as it seemed as though the logic was a placeholder for a preconceived decision. There was no consultation with religious heads or no attempt to read the faith; it was merely a value-laden assertion made by the Court. Furthermore, a close reading of the religion would result in the verdict that the hair is quite an essential part of the religion. This highlights the problems of courts not respecting religious autonomy. Through their interference in doctrine, they are prone to get the doctrine wrong and they often discriminate on this basis without being fully aware of it.

What is most curious is the method in which the UK. has a different standard to race-based discrimination. In the case of *Warkins-Singh*[378], the Courts permitted a boy to carry a *Kirpal* to school not on the basis of religious ideologies of Sikhs but on the basis that the measure of not allowing the religious symbol had the impact of violating a race-based head. This is both perplexing and rather confusing, as the Court necessarily did not explain why a religious symbol was treated as a racial one in this case while in other cases it was not treated as one.[379] However, the Court here managed to dodge the question of whether the symbolic carrying of a knife was essential to the religion of Sikhism.[380] While the Sikh Skullcap(turban) has been given the status of being essential to the religion, however, the Kirpal was noted as being essential to race.[381] There is little logic in the way that Employment tribunals and Courts of appeals deal with these cases in the U.K. and there seems to be no doctrinal coherence in the adjudication of religious discrimination. Unfortunately, the Courts inconsistency is consistent.

In a similar case, indirect discrimination has been justified as a legitimate ethnic practice but not as a religious one. In a case very similar to that of *Harris*, A man of African dissent was permitted to keep his untidy hair; even in the face of protests from his company as they argued it to be a form of race-based discrimination. This is an arbitrary distinction between

[377] [2007] UKEA/0134/07/DM
[378] Watkins-Singh R v. Governing Body of Aberdeen girls High School [2008] EWHC 9admin0 1865.
[379] *Id*.
[380] *Id*.
[381] *Id*.

being Rastafarian and being ethnically African with a *Rastafari* heritage. The distinction is loosely explained and seems to use racial indicators to identify not just what is authentically religious but who can be authentically religious. This conflation moves past the perils of the Indian Supreme Court into a completely different territory where religion and race are conflated so that the Court may determine just what sort of person may authentically believe in a religion.[382] Therefore, in the U.K. like in India, the authenticity of a religious practice determines the level of protection and thus there is a stark violation of religious autonomy.

The practice of reinterpreting religion within the system in the U.K is a clear infringement of Section 13 of the Human Rights Act as well as theoretical understanding of how the liberal state must act towards organized religion. There is clearly no neutrality in the reason giving by the courts in the U.K., there has been a blatant interference into the doctrinal truths of religious practice. Furthermore, the violation of religious autonomy does not seem to have any doctrinal coherence. The Courts in England merely seem to be acting in an erratic manner while deciding what is essential to a religion and what is not essential to a religion. Furthermore, in the hard cases, where there is scope for backlash, the Court dangerously equates a religious practice to an ethnic or racial practice and holds that there has been discrimination. Unfortunate, the ration in*Warkins-Singh* could not have been ethnic in nature. This is one of the examples I have cited but, it by no means stands alone. By not having a standardized jurisprudence on religious autonomy, despite a textual obligation to maintain it a doctrinal test to define religion, the Courts in the U.K are threatening the very fabric of religious pluralism. Like with the Indian case, British Courts now seem to be heading towards having a monopoly on how citizens should practice religion. This is too much power for the liberal state, it extinguishes rights upon which the liberal state is built upon and is reminiscent of the experience of Egypt.

[382] G v St Gregory's Catholic Science College, [2011] EWCH1452 (admin)

VI Conclusion

It is clear that Liberal Secularism mandates a standardization of society and a moderate domination over religion to ensure that minorities are represented. This mandates that the liberal state give neutral reasons and tolerate religious practices without any bias or favor. Bias is a standard that moves beyond symbolic establishment, it is the causing of actual harm to religious minorities or to religious adherents.

The Liberal state, however, must balance its urge to prevent conflict in the public sphere by creating a liberal constitutional identity with the demands of individual and group rights, so as to enable individuals to search for their independent notion of the good, within the larger rubric of liberal democratic life. This includes the possibility of finding ones understanding fo the good within a group. Collective rights often help individuals with this form of communal life and therefore, become essential to the expression of the individual rights of the citizens who are part of the collective groups. When such groups are not given the autonomy to communally evolve their own notion of the good the liberal state fails one of its primordial mandates of treating all citizens equally.

India and the U.K. have been redefining communal religious life constantly through their respective judiciary's reluctance to accept the constitutionally elaborated right to religious autonomy of groups. The Courts in India and the U.K demonstrate how by taking away the ability for individuals to come together and collectively attempt to gather an understanding of the good, they are ensuring that the individuals within these groups are also stripped of their individual rights. These Courts demonstrate the real threat that the Judiciary and administrative organs pose towards communal life when they overstep their liberal mandate.

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VII Bibliography.
Books

ADHAR, Rex and LEIGH, Ian, *Religious Freedom in the Liberal State*, Oxford University Press, 2013

BOWEN, R. John, *Why the French don'tLikeHeadscarfs: Islam the state and the Public Space*, Princeton University Press 2006.

BOYRON, Sophie, *The Constitution of France*, Hart, 2013.

BHARGAVA, Rajeev, *Secular States & Religious Diversity*, UBC Press, 2010.

DUNN, John , *The History of Political Theory and Other Essays* , Kluwer, 1996.

DURHAM, Cole &Scharffs Brett, *Law & Religion*, Aspen 2010.

DWORKIN, Ronald, *Is Democracy Possible Here?,* Princeton University Press, 2006.

EVANS, Malcolm, *Religious Liberty and International Law in Europe*, Cambridge University Press, 1997.

GARCIA, Javier and HALL,Helen Law Religion and The Constitution: Balanceing Beliefs in Britain, Routledge, 2017

HABERMAS, Jurgen *, Between Naturalism and Religion, Polity* Wiley, 2008

HIRSCHL, Ran, *Constitutional Theocracy*, Harvard University Press, 2010.

LABORDE, Cecile, *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford University Press, 2008

LEITER, Brian, *Why Tolerate Religion*, Princeton University Press, 2013

LILLA, Mark, *The Stillborn God, Religion, Politics and the West*, Penguin, 2007

NUSSBAUM, Martha ,*The New Religious Intorerance: Overcoming the Politics of Fear in Anxious Age* , Harvard University Press, 2012.

RADHAKRISHNAN, Saryepalli , Recovery of faith, (1955).

SAJO, Andras, Limiting Government, *Central European University Press*, 1999.

SANDBERG, Russell, *Law & Religion* , Cambridge University Press, 2011.

SEN. Ronojoy, *Articles of Faith*, Oxford University Press, 2010.

SULLIVAN, Winnifred, *The Impossibility of Religious Freedom* (2011)

ROSENFELD, Michel & MANCINI, Susana*, Constitutional Secularism in an Age of Religious Revival*, Oxford University Press, 2014.

ROSENFELD, Michael & SAJO, Andras, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press 2012.

ROY, Oliver, *Holy Ignorance*, Columbia University Press, 2010.

ROY, Oliver, Secularism Confronts Islam , Columbia University Press, 2007

SEHAT, David, *The Myth of American Religious Freedom*, Oxford University Press, 2010.

TUSHNET, Mark & Jackson Vicki, *Comparative Constitutional Law*, 2nd ed., Foundation Press 2006

TAYLOR, Charles, *A Secular Age*, Harvard University Press, 2007.

Taylor Charles, Maclure, Joslyn, Secularism and Freedom of Conscience, Harvard University Press , 2011.

Zucca, Lorenzo, *A secular Europe*, Oxford University, Press 2012

Articles & Online sources

BENHABIB, Seyla , *The return of Political Theology: The head scarf Affair in a Comparative Constitutional Perspective in France, Germany and Turkey,*Politics Religion and Political (2017)

BHATIA, Gautam, *Freedom From Community: Individual rights, Group Life, State Authority & Religious Freedom Under the Indian Constitution* 5 GLOBAL CONSTITUTIONALISM 351 (2016)

BHANDAR, Brenna The Ties that Bind: Secularism and Multiculturalism Reconsidered, 36 JOURNAL OF LAW & SOCIETY 302 (2012).

BHARGAVA, Rajeev, *Political Secularism*, in A HANDBOOK OF POLITICAL THEORY, 636-55.(Dryzek et.al., 2006).

BHUTA, Nehal Two *Concepts of Freedom in the European Court of Human Rights*, EUI WORKING PAPERS (2012)

COHN, Jean ,Rethinking, *Political Secularism and the American Model of Constitutional Dualism*, in RELIGION, SECULARISM & CONSTITUTIONAL DEMOCRACY, 118 (Cohn & Laborde eds. 2015).

COOKE, Maeve, *Conscience in public Life*, in LIBERAL POLITICAL PHILOSOPHY, 302 (Laborde & Bardon 2017).

DANE, Perry, *The Varieties of Religious Autonomy in* CHURCH AUTONOMY: A COMPARATIVE SURVEY 197 (Gerhard Robbers, ed., Peter Lang 2001).

DATAR, Darshan, *Secularisms Silent Partner: Religious Autonomy*, RELIGIOUS THEORY (2017).

DURHAM, Cole,The right to Autonomy in religious affairs in CHURCH AUTONOMY: A COMPARATIVE SURVEY 713 (Gerhard Robbers, ed., Peter Lang 2001).

FERRARI, Silvio Who Is Afraid of Religious Freedom? *The Right to Freedom of Religion and Belief and Its Critics*, 11 Religion & Human Rights 214 (2016).

GALANTER, Marc, *Hinduism, Secularism and The Indian Judiciary*, 21 (4) PHILOSOPHY EAST AND WEST 467, 469-70 (1971).

GARCIA Oliva, *Religious Dress Codes in the United Kingdom*, *in* RELIGION IN PUBLIC SPACES: A EUROPEAN PERSPECTIVE, 217 (Ferrari&Pastorelli eds. 2012).

GREIHERR, Axel *Church autonomy in Germany*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY)PETER LAND AND GERHARD ROBBERS EDS 2001)

HOLM Søren & GARCÍA Javier Oliva , *Religion and Law in Twenty-First Century England: Tradition and Diversity in* RELIGIOUS RULES, STATE LAW, AND NORMATIVE PLURALISM - A COMPARATIVE OVERVIEW (Battoni et.al. 2016).

MARCEDO, Stephen, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POLITICAL THEORY 56, 58 (1998) .

EBERLE, Chirstopher *Religion and Insularity: Brian Leiter on Accommodating Religion*, 51 SAN DIEGO L. REV. 977, 1017-20 (2014).

GUNN, Jeremy, *Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laicite in France*, 46 JOURNAL OF CHURCH & STATE 7 (2004).

Halmai, Gabor,*Religion and Constitutionalism*,MTA Law Working papers 2015/5. http://jog.tk.mta.hu/uploads/files/mtalwp/2015_05_%20Halmai.pdf

HALMAI, Gabor, *Varieties of State-Church Relations and Religious Freedom Through Thee Case Studies*, 2017 MICH ST. L. REV. 175, 183-88 (2017).

KAPUR, Ratna& COSSMAN, *Brenda, Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*,38 HAVARD INTERNATIONAL LAW JOURNAL 113 (1997).

LEVITSKY, Steven & WAY, Lucas *Elections Without Democracy: The Rise of Competitive Authoritarianism*, 13 JOURNAL OF DEMOCRACY 51 (2002)

LILLA, Mark, *The Truth About Our Libertarian Age. Why the Dogma of Democracy Doesn't Always Make the World Better*?', THE NEW REPUBLIC, 9 (2014).

J.D.M. Derrett, *Justice Equality & Good Conscience in India*, in ESSAYS IN CLASSICAL MODERN HINDU LAW IV (1978)

KAPUR, Ratna& COSSMAN, *Brenda, Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*,38 HAVARD INTERNATIONAL LAW JOURNAL 113 (1997).

LAEGAARD, Sune, *What's the Problem with Symbolic Religious Establishment*, in Liberal Political Philosophy, 123 (Laborde & Bardon 2017) .

LILLA, Mark, *The Truth About Our Libertarian Age. Why the Dogma of Democracy Doesn't Always Make the World Better*?', THE NEW REPUBLIC, 9 (2014).

MODOOD, Tariq Establishment, *Multiculturalism and British Citizenship,* 65 POLITICAL QUARTERLY53 (1994)

MCCONNELL Michael, *Religious Freedom at a Crossroads,* 59 CHICAGO L REV1 15, 160 (1992)

MADEKEY, John , *Consitutional Models and the Protection of Religious Freedom* in ROUTLEDGE HANDBOOK OF LAW AND RELIGION 209, 212 (Silvio Ferrari ed. 2015).

OLIVA, Javier, *Religious Dress Codes in the United Kingdom*, *in* RELIGION IN PUBLIC SPACES: A EUROPEAN PERSPECTIVE, 217 (Ferrari&Pastorelli eds. 2012).

ROSENFELD, Michel ,*Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity* in Constitutional SECULARISM IN AN AGE OF RELIGIOUS REVIVAL (Rosenfeld and Mancini eds 2014)

SAJO, Andras, *The Crisis was not there: Notes on a Reply*, 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 515,516-18(2009)

SAJÓ,András,*Constitutionalism and Secularism: The Need for Public Reason*, 30 CARDOZO LAW REVIEW. 2401 (2009).

SAJO, Andras, *Preliminaries to the Concept of Constitutional Secularis*m, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 605, 605-629 (2008).

STEPHAN, Alfred, *Twin Tolerations*, in WORLD RELIGIONS AND DEMOCRACY 18 (Diamond et.al. 2005).

TROPER, Michael, *Sovereignty and Laïcité*, 30 CARDOZO LAW REVIEW2560 (2009).

VALLIER, Kevin, *Religious Establishment and Public Justification,* in RELIGION IN LIBERAL POLITICAL PHILOSOPHY, 111 (Laborde & Bardon 2017)

VAROL, Ozan, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1687 (2015).

VAUCHEZ, Stéphanie Is French *laïcité* Still Liberal? The Republican Project under Pressure(2004–15), 17 HUMAN RIGHTS LAW REVIEW 285, 285-312 (2017).

WEIL, Patrick, ,*Why the French Laïcité Is Liberal*, 30 CARDOZO LAW REVIEW2699 (2009).