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# Editorial

Do words matter? According to the trite sayings, actions speak louder than them, a single image is worth a thousand of them, and they can never hurt me. But in the distinct fields of religion and law, words matter a great deal. In the history of Christianity, the early ecumenical councils shaped orthodoxy and heresy (matters of life and death, for some) through charged controversy and debate by formulating precise verbal articulations of perceived truth. In law, ‘mere’ words can lead to severe and tangible consequences, both civil (such as in defamation) and criminal (such as in hate speech). It should be no surprise then, that when we study the intersection of law and religion we see a tremendous amount of attention being given to words of ambiguous or contested meaning.

Where law and religion meet, we often find that denotation (the literal meaning of the word) matters less than connotation (the broader, often emotive baggage accompanying the word). For example, political theorists of the 18<sup>th</sup> and 19<sup>th</sup> centuries used to discuss, in great detail, the ‘toleration’ of religion. In one sense, this is simply the familiar and still-relevant question of what rights and privileges religious groups and individuals should be afforded by law. But in everyday conversation, we *tolerate* behaviour we do not like but reluctantly have to put up with. By implying that religion is a problem, it is easy to see why ‘religious toleration’ has become a less common phrase.

The modern alternative, ‘accommodation of religion’, is an intriguing formulation. In general conversation, we often use ‘accommodate’ in the sense of a host making room for a guest’s special needs: the wedding caterer can accommodate the gluten-free bridesmaid by preparing a special meal, the motel can accommodate the guest walking in crutches by changing their booking to a room on the first floor, etc. ‘Accommodation of religion’ seems to mean more than mere *freedom* of religion (the absence of legal restraint or coercion), and instead implies a positive duty on behalf of the government or society (the host) to do something in recognition of the special needs of religion (the guest). This raises important and fascinating questions about how far this purported duty extends, whether it is *religion* that is being accommodated or *religious people*, and whether (to carry the metaphor on) it can reach a point where the host’s non-religious guests start to feel slighted. But of course, even this formulation can have problematic connotations, treating as it does secular society as the baseline and religion as the “special need” some people have.

A perfect example of the debate over the meaning of words at the intersection of law and religion has played out very publicly in Australia over the past few years in the context of the *Sex Discrimination Act 1984* (Cth) and its provisions relating to religious schools and LGBTIQ+ students and staff. If a school chooses not to hire an openly gay teacher, have they engaged in ‘selecting and preferencing’ their ethos (a positive connotation), or engaged in ‘discrimination’ (a negative connotation)? The result is the same, but the feelings we attach to the description matter in whether we view it favourably or not. Should the law’s current provisions, which provide legal protection for religious schools to make decisions in employment and admissions while taking into account sex, gender, and sexual orientation, be characterised as ‘exemptions’ (implying everyone has to follow the law but religious schools do not, a negative connotation) or ‘balancing clauses’ (implying the law is respectfully

acknowledging multiple interests and weighting them carefully, a positive connotation)?<sup>1</sup> In this issue, Joel Harrison continues the debate in the context of the Australian Law Reform Commission's report that recommended major changes to the provisions.<sup>2</sup> Specifically, Harrison argues against attempts to have courts and administrative tribunals attempt to resolve these issues by recourse to 'maximising' or 'balancing' rights — which, in his view, leads to religion being seen as just another 'individual interest' to throw onto the scales, thus diminishing religion's importance. In other words, whether we see 'balancing' as a good way to resolve these issues may depend on what connotation we give the term.

Contested definitions are indeed a coincidental — or some might say providential — theme for this issue of the *Australian Journal of Law and Religion*. Renae Barker and Tania Pagotto take on the weighty task of trying to formulate verbal descriptions for how to categorize the different ways countries around the world handle the relationship between law and religion. Michael Quinlan, recently retired from a long stint of service as head of University of Notre Dame Australia's law school, discusses what a specifically *Catholic* legal education should look like. And in a parallel exercise in a different setting, Salim Farrar examines what a specifically *Islamic* liberal arts education looks like in the United States. The issue also has shorter comments by Gabriël Moens on the cultural and religious implications of voluntary assisted dying and Suzanne Rutland on Australian Catholic University's response to anti-semitism. It concludes with book reviews by David VanDrunen on theological approaches to civil law (Benjamin Saunders) and Jeremy Patrick on religious liberty in our polarised age (Thomas Berg). As a package, these contributions demonstrate that the meaning of words change and evolve over time — much like, separately and sometimes in concert, law and religion do.

Alex Deagon  
Jeremy Patrick  
Co-Editors

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<sup>1</sup> See, eg, Neil Foster, 'Religious Freedom, Section 109 of the *Constitution*, and Anti-discrimination Laws' (2022) 1 *Australian Journal of Law and Religion* 36, 38.

<sup>2</sup> See Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, December 2023).

# Modelling the Anchor and Range of State-Religion Relationships in Australia and Italy: Towards a New Understanding of State-Religion Typologies

Renae Barker\* and Tania Pagotto\*\*

*This article argues that states exhibit characteristics of multiple categories of state-religion relationships, which may be adjacent to one another on a continuum or other model, but that state-religion relationships should first be understood as existing within a range of potential relationships permitted by a jurisdiction's foundational documents. This paper therefore proposes a new methodology to interpret and apply the Durham and Scharffs loop model which first identifies anchors to the state-religion relationship before interpreting those anchors to determine the range of all potential state-religion interactions. In order to demonstrate how this methodology might be applied, it is used to compare the state-religion relationships in Australia and Italy, exploring why Durham and Scharffs classify both Australia and Italy as cooperationist states, despite very different underlying foundational documents.*

## 1. INTRODUCTION

Typologies, also called models, of state-religion relationships can be useful tools in better understanding state-religion dynamics as well as comparing the interaction between the state and religion across jurisdictions. However, such models are inevitably an oversimplification and can obscure important similarities and differences between states. As a result, how you use typologies and the interpretation of results when applying them to a specific jurisdiction is important. While some typologies, such as that articulated by Fox<sup>1</sup> or by Temperman<sup>2</sup> assign jurisdictions to specific categories, others such as Durham and Scharffs<sup>3</sup> or Babie<sup>4</sup> argue that jurisdictions may exhibit characteristics of multiple categories of state-religion interactions. Babie, for example, describes this as '[oscillating] around a number of points along, or [in] a "zone" of the continuum.'<sup>5</sup> This article goes further, arguing not only that states do in fact exhibit characteristics of multiple categories of state-religion relationships, which may be adjacent to one another on a continuum or other model, but that state-religion relationships should first be understood as existing within a range of potential relationships permitted by a jurisdiction's foundational documents. This paper therefore proposes a new methodology to

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\*\* Post-doctoral research fellow in Law and Religion, School of Law, Università degli Studi di Milano-Bicocca. Although this article is the product of a collaboration between both authors, Tania Pagotto is the primary author of Sections 2.2, 4.2, and 5.2; Renae Barker in the primary author of all other sections.

<sup>1</sup> Jonathan Fox, *Political Secularism, Religion, and the State: A Time Series Analysis of Worldwide Data* (Cambridge University Press, 2015).

<sup>2</sup> Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Brill, 2010).

<sup>3</sup> W C Durham Jr and B G Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Wolters Kluwer, 2<sup>nd</sup> ed, 2019) 121.

<sup>4</sup> Paul Babie, 'Religion and Constitutionalism: Oscillations Along a Continuum' (2015) 39(1) *Journal of Religious History* 123 ('Religion and Constitutionalism').

<sup>5</sup> *Ibid* 125.

interpret and apply the Durham and Scharffs loop model which first identifies anchors to the state-religion relationship before interpreting those anchors to determine the range of all potential state-religion interactions. In order to demonstrate how this methodology might be applied, it is used to compare the state-religion relationships in Australia and Italy, exploring why Durham and Scharffs classify both Australia and Italy as cooperationist States despite very different underlying foundational documents.<sup>6</sup>

As this paper will highlight, Australia and Italy are very different jurisdictions with notably different constitutional arrangements in relation to religion. Yet multiple models of state-religion relationships, including as we have already highlighted, Durham and Scharffs, place Italy and Australia in the same category. Similarly, yet by contrast at the same time, Temperman identifies both as embodying forms of separation between state and religion.<sup>7</sup> However, not all models place Australia and Italy in the same category. For example, Fox classifies Australia as accommodation, while Italy is classified as multi-tiered preferences — one religion.<sup>8</sup> The differing approaches and classifications need further examination and explanation. Indeed, the differing approaches to classification of jurisdictions by the various models of state-religion relationship need to be explained. The proliferation of models has also produced a proliferation of categorisations, with often inconsistent results.<sup>9</sup> This paper provides one explanation for this divergence in classification using Australia and Italy as comparative exemplars.

We argue that, as a result of the operation of the anchor and potential range of each state-religion relationship, the differences in approach of the various models such as Durham and Scharffs, Temperman, and Fox can be explained by emphasis on different aspects of the relationship. For example, while some models focus on the anchor of the state-religion relationship when classifying specific jurisdictions, others take a wider approach looking at other laws and public policies as well as their operation in practice. Further, we argue Australia and Italy are often classified in similar ways, despite their different constitutional anchors, due to overlap in the potential range of their respective state-religion relationships.

The paper therefore begins by delineating the foundational components of the diverse Australian and Italian legal systems, establishing the basis for comparative analysis. It then scrutinises the Durham and Scharffs model of state and religion, outlining its unique characteristics, potentials, and applications before turning in Parts Four and Five to our proposed methodology for a deeper understanding of state-religion dynamics focusing on the anchor and potential range of that relationship. We argue that these foundational laws enable a spectrum, or “range”, as we term it, of state-religion relationships. We have undertaken a comparative analysis, utilising our proposed methodology to highlight points of convergence and divergence between Italy and Australia. We conclude that the Durham and Scharffs model, and indeed all models of state-religion relationships, are better understood as signalling a predominant category of church-state relations, without excluding the coexistence of elements that also align with alternative categories. Indeed, when our methodology is applied, apparent inconsistencies in laws, public policies, and state practice, as well as within the literature, can be understood as manifestations and reflections of part of the overall potential range of state-religion relationships in a given jurisdiction.

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<sup>6</sup> Durham and Scharffs (n 3) 124, 126-127, 145-146.

<sup>7</sup> Temperman, (n 2) 70, 102-103, 118-119, 121-123, 135.

<sup>8</sup> Fox (n 1) 44-45.

<sup>9</sup> Renae Barker, ‘Law and Religion in the Classroom: Teaching Church-State Relationships’ (2022) 1 *Australian Journal of Law and Religion* 1, 12-14.

## 2. AUSTRALIA AND ITALY

The juxtaposition of Australian and Italian states provides interesting insights, not only despite but because of their structural, cultural, historical, and legal differences. As outlined in Table 1 below, Australia and Italy have notably different religious demographics. Both have dominant Christian populations. However, in Italy, Roman Catholics alone make up over 74% of the population. In contrast Australia's composite Christian population has dropped to just under 44%. While Roman Catholicism is the largest Christian denomination at 20%, the largest single 'religious' grouping is 'no religion' at nearly 39%.<sup>10</sup> Both have significant minority Muslim populations. Overall, however, Australia's religious demographics are more diverse than Italy's. These religious demographic differences hint at deeper structural, cultural, historical, and legal differences which are both the product and cause of the religious demographic differences.

	Australia	Italy
Population	26.01 million	58.94 million
Majority Religion (> 50%)	N/A	Roman Catholicism (74.5%)
Significant Minorities (>10%)	Christian (43.9%) No religion (38.9%)	Atheist and Agnostic (15.3%)
Other Minorities (>2%)	Muslim (3.2%) Hinduism (2.7%) Buddhism (2.4%) No answer (6.9%)	Other Christian (4.1%) Muslim (3.7%)

*Table 1: Religious Demographics of Australia and Italy*<sup>11</sup>

### 2.1 AUSTRALIA

Australia is a federation made up of six former British colonies, with the first European settlers arriving in 1788 bringing with them 'so much of English law as is applicable to their own situation and the condition of an infant colony'.<sup>12</sup> However they did not find a 'formless void'.<sup>13</sup> Instead, they found a land inhabited by First Nations people. As explained by Tanganeald, Meitangk, and Boandik academic Irene Watson:

[W]e have been here forever and we have an ancient constitution through our ancient connections to law and country ... our claims to our country have been confirmed forever and, indeed, acknowledged in non-Aboriginal discourses as extending for more than 65,000 years.<sup>14</sup>

<sup>10</sup> As at 2021. See Australian Bureau of Statistics, *Religious Affiliation in Australia: Exploration of the changes in reported religion in the 2021 Census* (online, 4 July 2022) <<https://www.abs.gov.au/articles/religious-affiliation-australia>> (accessed 25 June 2024).

<sup>11</sup> Data Commons, 'Australia', (Web Page, 2022) <<https://datacommons.org/place/country/AUS?category=Demographics#Population>> (accessed 25 June 2024); Data Commons, 'Italy', (Web Page, 2022) <<https://datacommons.org/place/country/ITA?category=Demographics#Population>> (accessed 25 June 2024); Australian Bureau of Statistics (n 10).

<sup>12</sup> See *Ex parte The Rev George King* (1861) 2 Legge 1307, 1313 (Dickinson J), 1323 (Wise J).

<sup>13</sup> Vicki Grieves, *Aboriginal Spirituality: Aboriginal philosophy, the Basis of Aboriginal Social and Emotional Wellbeing* (Cooperative Research Centre for Aboriginal Health, 2009).

<sup>14</sup> Irene Watson, 'Aboriginal Recognition: Treaties and Colonial Constructions, We Have been Here Forever ...' (2018) 30(1) *Bond Law Review* 7, 12.

However European settlers failed to recognise First Nations people, instead declaring Australia to be *terra nullius*, a legal fiction which was not overturned until 1992, in the landmark First Nations land rights case *Mabo v Queensland*.<sup>15</sup> As a result it is English law which predominantly shaped the Australian state-religion relationship.<sup>16</sup> The Australian colonies federated on 1 January 1901 following the passage of the *Commonwealth of Australia Constitution Act 1900* (Imp) by the British parliament bringing together the six former colonies.<sup>17</sup>

The *Constitution* established a unique system of representative democracy with limited, responsible parliamentary government. The system is an amalgam of the British parliamentary system and that of the United States of America, sometimes referred to as the ‘Washminster’ system.<sup>18</sup> Power is divided between three branches of government: Executive, Legislature, and Judiciary, as well as three levels of government: Commonwealth, State (and Territory), and local. Formally, legislative power is divided in the *Australian Constitution* between the Federal Commonwealth government and State governments, with the Federal government having exclusive power over matters listed in ss 52, 86, 90, and 122 of the *Constitution* and concurrent power over matters listed in s 51 (with any conflict between state and federal legislation resolved ‘to the extent of the inconsistency’ in the favour of the Commonwealth per s. 109).<sup>19</sup> Areas of legislative power not listed in the *Constitution*, known as residual powers, are within the exclusive competence of State legislatures. Referendums in 1974 and 1988 on constitutional recognition of local government bodies were unsuccessful.<sup>20</sup> Local governments therefore derive their power from State legislation,<sup>21</sup> with responsibility for areas such as town planning, animal control, and local roads. Religion is principally dealt with by section 116 of the *Constitution*:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

As will be discussed below, section 116 has been interpreted narrowly by the Australian High Court and its drafting history suggests its inclusion in the *Constitution* was as much about balancing the inclusion of a reference to ‘Almighty God’ in the Preamble of the *Constitution* and the power of the States to control and regulate religion in their own jurisdiction as it was about freedom of religion and the separation of church and state. Indeed, its inclusion in the part of the *Constitution* labelled ‘the States’ suggests such an interpretation.<sup>22</sup>

While legislation plays an increasing role within the Australian legal system, Australia inherited and retains a common law legal system applying the concept of *stare decisis*.

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<sup>15</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>16</sup> Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 43 (‘*State and Religion*’).

<sup>17</sup> Watson (n 14) 8.

<sup>18</sup> Elaine Thompson, ‘The “Washminster” mutation’ (1980) 15(2) *Politics* 32.

<sup>19</sup> *Australian Constitution* s 109. The Commonwealth also has power over matters not enumerated in the *Constitution* as a result of judgments of the High Court, treaty, or convention.

<sup>20</sup> George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 91.

<sup>21</sup> See for example *Local Government Act 1995* (WA).

<sup>22</sup> See Renae Barker, *State and Religion* (n 16) 73-86; see also Luke Beck, *Religious Freedom and the Australian Constitution* (Routledge, 2018).

Significant areas of law remain exclusively within case law, although these are increasingly being modified by legislation.

Australia does not have a National Bill or Charter of Rights.<sup>23</sup> However, this does not mean that there are no protections for human rights. Protection is instead provided via what has often been described as a ‘patchwork’ of federal and state legislation, including narrow rights contained in the *Australian Constitution*, anti-discrimination laws at both the National and State levels, and state-based statutory human rights charters.<sup>24</sup> This approach has also been referred to as an ‘ethos’ of rights.<sup>25</sup>

## 2.2 ITALY

Italy belongs to a complex and multi-layered legal space. It was one of the founding members of the European Union project. In 1951, the country signed the *Treaty of Paris*, establishing the European Coal and Steel Community (‘ECSC’) alongside France, Germany, Belgium, Luxembourg, and the Netherlands.<sup>26</sup> Moreover, in 1957, the country hosted the signing in Rome of two other treaties, establishing the European Atomic Energy Community (‘EAEC Euratom’)<sup>27</sup> and, most importantly, the European Economic Community (‘EEC’).<sup>28</sup> The three treaties together represent the initial concept of a shared, common, and unified market and legal space where the movement of capitals, goods, services, and people is unrestricted. They eventually evolved into the European Union (‘EU’) as it is known today, composed of 27 member states, governed by the *Treaty of Lisbon*<sup>29</sup> and subject to the mandatory rulings of the Court of Luxembourg.<sup>30</sup>

Italy is also a signatory party of the *European Convention on Human Rights* (‘ECHR’) that was ratified in 1955.<sup>31</sup> This international treaty reflects the commitment of the contracting parties to safeguard fundamental rights and freedoms both at the national level and in the space of the Council of Europe. This is an organisation of states, much wider than the EU: it is made up of 46 countries and subject to the jurisdiction of the Court of Strasbourg.

The Italian legal order belongs to the family of civil law countries. It is rooted in ancient Roman law and has been significantly influenced by the Napoleonic Code. According to its current Constitution, justice is administered in the name of the people and judges are subject only to the law. Unlike in common law jurisdictions, written statutes hold greater formal significance than case law, and judges primarily interpret and apply these codes to individual cases.

<sup>23</sup> Louise Chappell, John Chesterman, and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 27–9.

<sup>24</sup> Renae Barker, *State and Religion* (n 16) 105–9.

<sup>25</sup> See Paul T Babie, ‘The Ethos of Protection for Freedom of Religion or Belief in Australian Law’ (2010) 47 *University of Western Australia Law Review* 64–91 (‘The Ethos of Protection’).

<sup>26</sup> *Treaty Establishing the European Coal and Steel Community*; ELI: <<http://data.europa.eu/eli/treaty/ceca/sign>>.

<sup>27</sup> *Treaty Establishing the European Atomic Energy Community*, opened for signature on 25 March 1957, 298 UNTS 167 (entered into force 1 January 1958) (‘EAEC Treaty’).

<sup>28</sup> *Treaty Establishing the European Community*, opened for signature on 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958) (‘EEC Treaty’).

<sup>29</sup> *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ 191/1 (entered into force 1 November 1993) art 2, as amended by *Treaty of Lisbon amending the treaty on European Union and the treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) art 1(4).

<sup>30</sup> See Robert Schütze, *An Introduction to European Law* (Oxford University Press, 2020).

<sup>31</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

The country is a parliamentary democratic republic featuring a decentralised regional system. Since its coming into force in 1948, the Italian Constitution<sup>32</sup> has undergone one of the most significant reforms in 2001, aimed to enhance and clarify the interactions among the State (central government), the regions, and local authorities (municipalities).<sup>33</sup> This decentralisation reflects the country's diverse economic landscape and regional needs, while harmonising the guarantee of essential levels of services throughout the whole territory.<sup>34</sup> The country is divided into twenty regions, with five of these having a special status, greater legislative powers, and financial independence.<sup>35</sup> Regional governments are vested with exclusive authority in some specific sectors, for example local economic development or vocational education.<sup>36</sup> Some other matters fall within a concurring competence, where the central government sets the general framework legislation, and each Region implements the details.<sup>37</sup> These include, for example, sports, disaster relief, and land-use planning. The State has *exclusive* legislative powers in listed matters, such as the relations between the Republic and religious denominations.<sup>38</sup>

### 3. TYPOLOGIES OF STATE-RELIGION RELATIONSHIPS

Typologies of the relationship between the state and religion (or church and state) are usually used to identify the specific state-religion relationship of a given jurisdiction at a particular point in time. However, state-religion relationships change over time. Australia, for example, has been described as having transitioned through four separate state-religion models in its brief history since colonisation.<sup>39</sup> During the early colonial period, colonial officials treated the Church of England as the established church — although historians and legal scholars continue to debate whether this establishment was *de jure* or *de facto*.<sup>40</sup> This was followed by a period of plural establishment from the 1830s through to the 1860s to 1890s characterised by the Church Acts in the various colonies which provided direct financial aid to the dominant Christian denominations.<sup>41</sup> With the repeal of the Church Acts in the late 19<sup>th</sup> century, Australia moved into a period of liberal separation. While the Australian state-religion relationship maintained certain aspects of its Christian heritage during this time, such as prayers in parliament, the level of interaction between the state and religion was generally lower than in previous and subsequent periods. Today, the Australian state-religion relationship is typically described as some variation of pluralism or separation.<sup>42</sup> Most recently, Barker has attempted to reconcile the disagreement within the literature by rearticulating the Australian state-religion

<sup>32</sup> *Costituzione della Repubblica Italiana di 22 dicembre 1947* [The Constitution of the Italian Republic of 22 December 1947] (*Costituzione*).

<sup>33</sup> *Legge Costituzionale 18 ottobre 2001*, n 3 [Italian Constitutional Law no 3 of 18 October 2001].

<sup>34</sup> For a general overview, see Erika Arban, Giuseppe Martinico, and Francesco Palermo, *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism* (Routledge, 2021).

<sup>35</sup> Sicily, Sardinia, Trentino-Alto Adige/Südtirol, Aosta Valley, and Friuli-Venezia Giulia.

<sup>36</sup> *Costituzione* (n 32) art 117 para 4.

<sup>37</sup> *Ibid* art 117 para 3.

<sup>38</sup> *Ibid* art 117 para 2 (c).

<sup>39</sup> J Christopher Soper et al, *The Challenge of Pluralism: Church and State in Six Democracies* (Rowman & Littlefield, 2017) 121; Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination* (Hart, 2023) 121.

<sup>40</sup> Barker, *State and Religion* (n 16) 49–67.

<sup>41</sup> See Renae Barker, 'Under most peculiar circumstances: The church acts in the Australian colonies as a study of plural establishment' (2016) 3(3) *Law & History* 28–52.

<sup>42</sup> Renae Barker, 'Pluralism versus Separation: Tension in the Australian Church-State Relationship' (2021) 16(1) *Religion and Human Rights* 1, 6–8 ('Pluralism versus Separation').

relationship as ‘non-establishment pluralism’<sup>43</sup> while Deagon has proposed that Australia moved from ‘pragmatic pluralism’ to, what he terms, ‘mild establishment’.<sup>44</sup>

Similarly, Italy’s journey of legal and societal transformation in church-state relations can be divided into different phases.<sup>45</sup> The first phase occurred in the 19<sup>th</sup> century, as liberal states were emerging across Europe. In Italy, a form of liberal separation between secular and religious realms developed, treating religion as a private matter and prohibiting religious discrimination.<sup>46</sup> The second phase began after Italy’s unification in 1861, characterised by a conflictual separation and laws weakening the Catholic Church’s power, which included confiscating its properties.<sup>47</sup> After Rome’s capture in 1870, Pope Pius IX declared himself a prisoner of the Italian State, expressing dissatisfaction with the unilateral guarantees granted to him by the newly formed Italian State.<sup>48</sup> The third phase commenced with the rise of fascism, which made the country a confessional state, using the Catholic Church to garner political support. This phase peaked with the 1929 Lateran Pacts, when the Concordat signed between the Kingdom of Italy and the Holy See recognised Catholicism as the only State religion.<sup>49</sup> The fourth phase commenced after World War II, with Italy becoming a republic and adopting a new constitution in 1948. Articles 7 and 8 of the Constitution govern the relationship and the possible agreements between the Catholic Church and other religious groups. This marks a shift from merely tolerating non-Catholic religions, as was the case under the monarchy’s Constitution of 1848, to recognising their equal freedom under the law as proclaimed by the republican Constitution of 1948. The fifth phase, initiated with the revision of the Concordat in 1984, promoted greater separation between the State and the Catholic Church and fostered religious pluralism. Agreements with non-Catholic religious groups were signed, facilitated by the presence of new minoritarian religions due to increased immigration.<sup>50</sup>

State-religion relationships are complex. The above summaries and categories obscure many complexities and apparent inconsistencies. As we have already explained above, and as Babie has observed, many state-religion relationships cannot be easily assigned to a single category. Instead, they ‘approximate several, perhaps many points along [a] continuum’.<sup>51</sup> Babie described this phenomenon as ‘oscillation’, noting that states exist in zones along a continuum of possible state-religion relationships rather than a single point.<sup>52</sup> However, once this oscillation has been recognised, it is still necessary to define the zone in which the state-religion relationship operates and the outer boundaries of that oscillation. To do so it is necessary to define the breadth of possible state-religion relationships. Numerous models for doing so have

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<sup>43</sup> Ibid.

<sup>44</sup> Deagon (n 39) 153–182.

<sup>45</sup> Simone Martino, ‘L’Italia: un modello concordatario nell’epoca del pluralismo’ [2014] (66) *Quaderni di Sociologia* 27.

<sup>46</sup> See, for example, Legge 19 giugno 1848, n. 735, prohibiting discrimination on grounds of religion in the enjoyment of civil and political rights.

<sup>47</sup> Regio decreto 7 luglio 1866, n. 3036.

<sup>48</sup> *Ubi Nos*, encyclical letter on Pontifical States, Pope BI. Pius IX-1871. Legge 13 marzo 1871, n. 214 (“delle guarentigie”), which granted the Pope - whose person was declared sacred and inviolable - full freedom in the exercise of his spiritual magisterium and sovereignty over the Vatican palaces.

<sup>49</sup> As explained in greater details below, the Lateran Pacts of 1929 contained three legal documents: the Treaty, the Concordat, and the financial convention. See the English version of the Lateran Pacts of 1929 at <<https://www.uniset.ca/nold/lateran.htm>>.

<sup>50</sup> For a general overview see Marco Ventura, *Religion and Law in Italy* (Kluwer Law International, 2013).

<sup>51</sup> Babie, ‘Religion and Constitutionalism’ (n 4) 123, 131.

<sup>52</sup> Ibid 131–132.

been proposed with different categorisations and levels of generalisation or granularity.<sup>53</sup> The models outlined by Durham and Scharffs, Temperman, and Fox referred to above are just three such models.

It is not the purpose of this paper to propose a new model for understanding state-religion relationships. Instead, this paper proposes a new methodology for *using* these models and as a consequence, a new way to understand state-religion relationships. We have therefore chosen an existing model outlined by Durham and Scharffs in *Law and Religion: National, International and Comparative Perspectives*.<sup>54</sup> While a number of different typologies would be suitable for this analysis, we have chosen the one outlined by Durham and Scharffs for five reasons: (1) it is not context specific; (2) it is comprehensive; (3) it is detailed; (4) it has been modelled graphically; and, (5) it offers insights into the interaction between the state-religion relationship and freedom of religion and belief ('FoRB').

First, the model was developed in abstraction rather than in the context of considering a specific state-religion relationship.<sup>55</sup> While typologies focusing on the range of current, historical, or potential relationships within a particular jurisdiction are useful, they are bespoke and therefore inevitably need to be adjusted to suit other jurisdictions. The Durham and Scharffs typology was not developed with a particular state in mind and is therefore more readily applicable to different jurisdictional contexts.

Second, it is comprehensive. A typology which is to be used to understand the full range of state-religion relationships within a particular jurisdiction must include a full range of possible relationships. The Durham and Scharffs model includes a full range of state-religion models

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<sup>53</sup> See for example Shimon Shetreet, 'The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel' in Winfried Brugger and Michael Karayanni (eds), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer, 2007) 87, 87–93; Winfried Brugger, 'On the Relationship Between Structural Norms and Constitutional Rights in Church–State Relations' in Winfried Brugger and Michael Karayanni (eds) *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer, 2007) 21, 31–48; Viet Bader, 'Religions and States A New Typology and a Plea for Non-Constitutional Pluralism' (2003) 6(1) *Ethical Theory and Moral Practice* 55, 65–72; Carl Esbeck, 'A Typology of Church-State Relations in Current American Thought' (1998) 15(1) *Religion & Public Education* 43; Temperman (n 2) 118–119; W Cole Durham, 'Perspectives on Religious Liberty: A Comparative Framework' in John Witte Jr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff Publishers, 1996) bk 2, 1, 20–23; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2<sup>nd</sup> edition) 88–124; Michel Rosenfeld, 'Introduction: Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religion Review' (2009) 30(6) *Cardozo Law Review* 2349–2351; Cécile Laborde, 'Political Liberalism and Religion: On Separation and Establishment' (2013) 21(1) *Journal of Political Philosophy* 67, 68; Richard Albert, 'The Separation of Higher Powers' (2012) 65(1) *Southern Methodist University Law Review* 3, 3–69; Barker, *State and Religion* (n 16) 21–29; Darryn Jensen, 'Classifying Church-State Arrangements: Beyond Religious Versus Secular' in Nadirsyah Hosen and Richard Mohr (eds), *Law and Religion in Public Life: The Contemporary Debate* (Routledge, 2011) 15; Julian Rivers, 'Irretrievable Breakdown? Disestablishment and the Church of England' (1994) 3 *Cambridge Papers* 2–4; Adrian Hastings, *The Faces of God: Reflections on Church and Society* (Orbis Books, 1976) 47–67; Renae Barker, 'Pluralism versus Separation' (n 42); Deagon (n 39); Soper *et al* (n 39); R Hirschl, *Constitutional Theocracy* (Harvard University Press, 2012) 26–40; Babie, 'Religion and Constitutionalism' (n 4); Ahmet Alibašić, 'Models of State-Church Relations in Europe and the USA and Their Consequences' (2008) 2(1) *Archers Quarterly* 42.

<sup>54</sup> Durham and Scharffs (n 3) 124–129; an earlier version of this typology can be found in Durham (n 53). The Durham and Scharffs model is based on one proposed by Ryskamp. See George R Ryskamp, 'The Spanish Experience in Church–State Relations: A Comparative Study of the Interrelationship between Church–State Identification and Religious Liberty' [1980] *Brigham Young University Law Review* 616.

<sup>55</sup> For a jurisdiction-specific typology, see Esbeck (n 53).

from a complete fusing of the state and religion at one extreme<sup>56</sup> through to the elimination (or at least complete suppression) of religion by the state in both the public and private sphere.<sup>57</sup>

Third, it is detailed. In order to fully appreciate subtle as well as dramatic shifts in the state-religion relationships that may be possible within a given jurisdiction it is necessary to have a model which makes relatively fine distinctions between different models of state-religion relationships. The Durham and Scharffs typology includes ten state-religion models: theocratic states, established religions, religious status systems, endorsed religions, preferred set of religions, cooperation, accommodation, separation, laicite, secular control regimes, and abolitionist states. However, it does not include all possible categories of state-religion relationship. Like all models, it is inevitably a simplification of the real world. Other similarly comprehensive models include different sets of state-religion relationship. In some cases, these differences are a matter of nomenclature. For example, pluralism, as described by Ahdar and Leigh<sup>58</sup> could arguably be equated with Durham and Scharffs' cooperation category. In other cases, the different categories result from different emphasis in where to draw distinctions. Ahdar and Leigh, for example, include pragmatic pluralism, principled pluralism, formal neutrality, substantive neutrality, and the competitive market,<sup>59</sup> where Durham and Scarffs have just two categories: cooperation and accommodation.<sup>60</sup> Similarly, Temperman identifies both non-establishment and separation of state and religion as separate categories,<sup>61</sup> both of which would arguably fall within Durham and Scharffs' separation category. Temperman also includes non-identification as a separate category of state-religion relationship, which does not have an obvious equivalent in the Durham and Scharffs model, fitting in between accommodation and separation.<sup>62</sup>

Fourth, the Durham and Scharffs model has already been represented graphically. The method for understanding state-religion relationships proposed in this paper is best understood when represented in a graphical form. The fact that the Durham and Scharffs model has already been drawn removed the need to recreate this step.

Finally, the Durham and Scharffs model offers insights into the relationship between the state-religion relationship and FoRB. While traditional state-religion models present relationships between state and religion as a continuum, they do not offer any explanation of the interaction between the state-religion relationship and other related concepts such as FoRB, security, equality, or social harmony.<sup>63</sup> While the Durham and Scharffs model does not provide insight into all of these public goods, it does articulate the relationship between state-religion categories and FoRB providing additional insights not available in other models.

#### 4. IDENTIFYING THE ANCHOR

The first step in our methodology is to identify the anchor of a state's state-religion relationship. In many jurisdictions there will be a fundamental law or structural element which is at the heart

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<sup>56</sup> Usually referred to as theocracies and erastianism or caesaropapism.

<sup>57</sup> Usually referred to as an abolitionist and secular control regimes.

<sup>58</sup> Ahdar and Leigh (n 53) 109–112.

<sup>59</sup> Ibid 109–122.

<sup>60</sup> Durham and Scharffs (n 3) 126–127.

<sup>61</sup> Temperman (n 2) 115–124.

<sup>62</sup> Ibid 103–109.

<sup>63</sup> Renae Barker and Georgina Clarke, 'Understanding Models of State-religion Relationships' in Renae Barker, Camilla Baasch Andersen, and Mohammad Rasmi Alumari (eds), *Comparative Approaches to Law and Religion* (Routledge, 2025) 42.

of the state-religion relationship. It is this that forms the foundation or anchor for that relationship. Other laws, state practices, and policies build upon the anchor, giving the state-religion relationship form and detail. In many jurisdictions this anchor, or core, will be a constitutional provision. In some cases, such provisions enshrine FoRB, prohibit the establishment of a state church, or mandate a secular state. In others, it recognises a particular religion, establishes a state church, or provides that the laws of the state must conform with the doctrine of a particular faith.

For example, the First Amendment of the *United States Constitution* states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

While in the Iranian Constitution, art 1 establishes the country as an Islamic Republic and art 2 states:

The Islamic Republic is a system based on belief in:

- 1 The One God (as stated in the phrase ‘There is no God except Allah’), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands;
2. Divine revelation and its fundamental role in setting forth the laws;
3. The return of God in the Hereafter, and the constructive role of this belief in the course of man’s ascent towards God;
4. The justice of God in creation and legislation;
5. The continuous leadership (*imamah*) and perpetual guidance, and its fundamental role in ensuring the uninterrupted process of the revolution of Islam;
6. The exulted dignity and value of man, and his freedom coupled with responsibility before God

In which equity, justice, political, economic, social and cultural independence, and national solidarity are secured by recourse to:

- a. Continuous *Jihad* of the *fuqaha*’ possessing necessary qualifications, exercised on the basis of the *Qur’an* and the *Sunnah* of the *Ma’sumun*, upon all of whom be peace;
- b. Sciences and arts are the most advanced result of human experience, together with the efforts to advance them further;
- c. Negation of all forms of oppression, both the infliction of and the submission to it, and of dominance, both its imposition and its acceptance.

While the anchor to the state-religion relationship will often be found in a constitution, it may also be found in other fundamental documents and in convention or practice. For example, the guarantee of FoRB in art 9 of the *ECHR* forms part of the anchor for all state parties to that convention. The anchor may also be found in more than one legal text and may be a combination of laws, state conventions, and practice. For example, in England a foundation point is the establishment of the Church of England (manifested in the monarch as the head of the Church of England, the involvement of the state in church procedures, and the involvement

of the church in state processes).<sup>64</sup> These incidents of establishment, taken together with art 9 of the *ECHR*, form the anchor to the English state-religion relationship.<sup>65</sup> Similarly, New Zealand lacks a single written constitution, with its constitutional provisions found in a number of sources including legislation, the Treaty of Waitangi, other legal documents, and common law. As a result, the anchor of the state-religion relationship must, like the United Kingdom, be found across multiple laws including the *Bill of Rights Act 1990* (NZ).<sup>66</sup> The exact location of the anchoring law/s is not as important as the role it plays and its stability.

In order for a law to form the anchor of a state-religion relationship it must be stable. The law must hold fast and not be easily changed in response to political forces. This does not mean that it cannot or has never changed. However, changing these particular features of the relationship must take such monumental effort legally, culturally, or politically that the change is effectively revolutionary. This is an extremely high bar and it may be that in some jurisdictions there may be no law which is enshrined sufficiently to form a true anchor to the state-religion relationship.

#### 4.1 AUSTRALIA'S ANCHOR

As a western democratic nation with a written constitution, the obvious place to look for the anchor to Australia's state-religion relationship is the *Australian Constitution*. As outlined above, the principal provision of the *Australian Constitution* concerned with religion, and the only operative provision to explicitly mention religion, is section 116.

Amendments to the *Australian Constitution* are both technically and historically difficult to secure.<sup>67</sup> They are governed by s 128 which requires, inter alia, that the proposed amendment must be approved by a double majority at a referendum. This has been notoriously difficult to obtain. Of the 45 proposed amendments put to the people in referendums since federation in 1901, just eight have been successful.<sup>68</sup> The last successful amendment of the *Australian Constitution* was in 1977.<sup>69</sup> There have been two referendums which included proposals to amend section 116. In 1944 and 1988, the people were asked to vote on proposals to extend the operation of section 116 to the States. On both occasions, the referendum failed.<sup>70</sup> As a result, the text of section 116 has remained unchanged since its enactment on 1 January 1901, thereby meeting the stability requirement for an anchor to the Australian state-religion relationship.

In addition to section 116, the Preamble to the *Australian Constitution* begins with the words 'Whereas the people .... Humbly relying on the blessing of Almighty God ...'. Like section 116, these words have remained unchanged since their enactment in 1901. However, the Preamble has not been used in any meaningful way to interpret the *Constitution*. While it is occasionally referred to in debates about the Australian state-religion relationship, such

<sup>64</sup> Ahdar and Leigh (n 53) 101.

<sup>65</sup> The *European Convention on Human Rights* ('*ECHR*') is incorporated into United Kingdom domestic law via the *Human Rights Act 1998* (UK).

<sup>66</sup> For a discussion of the New Zealand state-religion relationship, see Rex J Ahdar, 'Reflecting on the Path of Religion-State Relations in New Zealand' (2006) 3 *Brigham Young Law Review* 619–660.

<sup>67</sup> See Williams and Hume (n 20).

<sup>68</sup> Ibid 88; Australia's 45<sup>th</sup> referendum, on the creation of an Indigenous Voice to Parliament, was unsuccessful in 2023.

<sup>69</sup> Williams and Hume (n 20) 154–67.

<sup>70</sup> Andrew Byrnes, Hillary Charlesworth, and McKinnon Gabrielle, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2007) 26–27, 32–33; Beck (n 22) 137–142, 152–155.

reference is usually a matter of principle or history rather than a binding element of the relationship. As such, its ability to anchor the state-religion relationship is minimal.

There are few other sources of law or state practice or custom in Australia which would satisfy the stability element necessary for the law, practice, or custom to anchor the state-religion relationship. As outlined above, Australia does not have either a legislative or constitutionally enshrined federal Bill of Rights. The practices of saying prayers at the beginning of each session of federal parliament is governed by the Parliamentary standing orders, which could be readily changed if the necessary political will was present.<sup>71</sup> Section 116 is therefore the primary, if not only, anchor to the federal state-religion relationship in Australia.

Section 116, however, has some limitations relevant to its status as an anchor. As alluded to above, section 116 does not apply to the States. Further, Australia does not have an equivalent of the United States' Fourteenth Amendment, the so-called 'Equal Protection Clause'.<sup>72</sup> This has ramifications for a federation where there is a division of legislative power between the state and federal legislatures. In the Australian context, significant areas of intersection between the state and religion such as education, healthcare, and criminal law are formally within the exclusive legislative competence of the States.<sup>73</sup> A full consideration of the anchors of the state-religion relationship in each Australian state is beyond the scope of this paper but would include legislative bills of rights and charters of rights in the Australian Capital Territory,<sup>74</sup> Queensland,<sup>75</sup> and Victoria,<sup>76</sup> as well as Tasmania's constitutional freedom of religion provision.<sup>77</sup> While some have argued for the existence of a right to freedom of religion at common law, which could arguably act as an anchor to the state-religion relationship if it existed, it is doubtful such a right exists.<sup>78</sup>

## 4.2 ITALY'S ANCHOR

Italy's anchor can be found in the existing constitutional provisions dedicated to the regulations of religion. Italy operates as a Republic under a written and entrenched Constitution established in 1948, which includes a Bill of Rights.<sup>79</sup>

To fully understand the current Italian state-religion model and the anchor to that model found in the 1948 Constitution, it is essential to first compare the 1948 Constitution with the previous Albertine Statute of 1848. This was the Constitutional Charter of the Kingdom of Sardinia-Piedmont, that was extended after the unification to the newly formed state.

Article 1 of the Albertine Statute of 1848 stated that:

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<sup>71</sup> See Parliament of Australia, Order 38, Acknowledgment of Country and Prayer, *House of Representatives Standing and Sessional Orders* (2 August 2022); Parliament of Australia, Order 50, Acknowledgment of Country and Prayer, *Standing Orders and Other Orders of the Senate* (October 2022).

<sup>72</sup> Barker, *State and Religion* (n 16) 87.

<sup>73</sup> The Commonwealth does, however, exercise significant influence in these areas.

<sup>74</sup> See *Human Rights Act 2004* (ACT).

<sup>75</sup> See *Human Rights Act 2019* (Qld).

<sup>76</sup> See *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>77</sup> *Constitution Act 1934* (Tas) s 46.

<sup>78</sup> See *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376.

<sup>79</sup> See Marta Cartabia and Nicola Lupo, *The Constitution of Italy: A Contextual Analysis* (Bloomsbury Publishing, 2022). For FoRB, the relevant constitutional provisions in the Italian Constitution are arts 3 para 2, 7, 8, 19, 20.

The Catholic, Apostolic, and Roman religion is the sole religion of the state. All other forms of worship now existing are tolerated in conformity with the law.

The legal distinction between the establishment of Catholicism as the state religion and the toleration of non-Catholic religions, however, was accompanied by the enactment of other laws that introduced and substantially strengthened civil and political rights for all citizens, in accordance with the principles of a liberal state.

The dramatic shift brought about by the rise of a totalitarian and fascist state saw a significant development in 1929, with the signing of the Concordat between the Catholic Church and the Italian state. This agreement compromised the principle of religious equality by elevating Catholicism to the privileged status of the sole state religion. The Concordat was part of the so-called Lateran Pacts, signed when Benito Mussolini was in charge, and consisted of three different agreements:

1. An International Treaty granting full sovereignty of the Holy See, establishing the State of Vatican City and recognizing to it international personhood (the Lateran Treaty or Conciliation Treaty);
2. A Concordat regulating the relations between the Roman Catholic Church in Italy and the Italian state; and
3. A financial Convention finally settling the loss of territory and properties by the Pontifical State after its annexation to the Kingdom of Italy in 1870.<sup>80</sup>

Article 1 of the 1929 Lateran Treaty granted the Catholic Church a privileged position by recognising and reaffirming that ‘the Catholic, Apostolic, and Roman Religion is the only State religion’.<sup>81</sup> To counterbalance this clear breach of religious equality, the State attempted to preserve religious freedom, at least formally, by promulgating Law No 1159 of 1929.<sup>82</sup> This law, titled ‘Provisions on the Exercise of the Approved Religions and on Marriages Conducted by their Ministers’, addressed the practice of approved religions. It reflected, however, a fascist ideology, aiming to regulate religious practices to control them. It also underscored Mussolini’s strategy of using religion to strengthen political control and enforce national unity.<sup>83</sup>

The 1948 Republican Constitution eliminates the principle of a State religion, although it continues to differentiate between the Catholic Church and other non-Catholic religious organisations.

Article 7 of the modern Italian Constitution states that the relations between the Catholic Church and the Italian State are regulated by means of International Treaties (the Lateran Pacts). Article 7 prevents the Italian state from amending unilaterally the Lateran Pacts and states:

The State and the Catholic Church are independent and sovereign, each within its own sphere.

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<sup>80</sup> The legal text can be read at <<https://www.uniset.ca/nold/latran.htm>>. For comment, see e.g., Vincent P. Bucci, *Chiesa e Stato: Church-State Relations in Italy within the Contemporary Constitutional Framework* (Springer Netherlands, 1969).

<sup>81</sup> See Lateran Pacts of 1929 <<https://www.uniset.ca/nold/latran.htm>>.

<sup>82</sup> Legge 24 giugno 1929, n 1159 [Law 24 June 1929, n 1159].

<sup>83</sup> See Roberto Mazzola, ‘State and Church in Italy’ in Gerhard Robbers (ed) *State and Church in the European Union* (Nomos Verlag, 2019) 265–280.

Their relations are regulated by the Lateran Pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments.

Article 8 acknowledges equal freedom for all religious organisations and grants the right to self-organisation to religions other than Catholicism. It provides that relationships between non-Catholic groups and the Italian state *can* be regulated through mutual agreements, which must be approved by law. The provision States:

All religious denominations are equally free before the law.

Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law.

Their relations with the State are regulated by law, based on agreements with their respective representatives.

For a religious group, entering into an agreement with the State has two primary legal implications. Firstly, religious denominations can negotiate specific aspects concerning their religious practices, such as religious holy days and receiving funding through taxpayer contributions. Secondly, upon agreement approval, religious denominations depart from the application of the illiberal and fascist Law No 1159 of 1929. Italy has not enacted a new general statute on FoRB to replace the fascist-era law and despite several modifications to its substantive scope by case law of the Italian Constitutional Court,<sup>84</sup> this Law remains formally applicable to organisations that have failed to enter an agreement with the State, such as Islam.<sup>85</sup> Therefore, while not as entrenched as art 7 and 8 of the Constitution, it forms part of the anchor to the Italian state-religion relationship.

The Italian Constitution also enshrines the right to individual and collective religious freedom and belief for all, regardless of the existence of a specific agreement with the Italian state.<sup>86</sup> Article 19 provides that:

Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality.

Finally, as outlined above, Italy is party to the *ECHR* and the *Charter of Fundamental Rights of the European Union*,<sup>87</sup> leading to the incorporation of arts 9 and 10, both of which deal with FoRB and thus form part of the anchor to the Italian state-religion relationship.

<sup>84</sup> See, eg, Corte costituzionale [Italian Constitutional Court], No 59, 18 November 1958.

<sup>85</sup> Marco Canonico, 'La stipulazione di intese con lo Stato: diritto delle confessioni religiose o libera scelta del Governo?' ['The signing of agreements with the State: a right of religious groups or a free choice of the Government?'] (2012) 15 *Stato, Chiese e pluralismo confessionale* [State, Church and Confessional Pluralism] Rivista telematica [online] 1, 2.

<sup>86</sup> *Costituzione* (n 32). Important provisions related to religious freedom more generally include: Article 2, protecting the inviolable rights of the person; Article 3, protecting from discrimination on religious grounds; and Article 20, stating the 'No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organisation on the ground of its religious nature or its religious or confessional aims'.

<sup>87</sup> *Charter of Fundamental Rights of the European Union* [2012] OJ C 326 /02, arts 9, 10.

## 5. UNDERSTANDING THE POTENTIAL RANGE

It is often the anchor of the state-religion relationship which forms the focus of analysis of many state-religion models. Temperman, for example, focuses his analysis on constitutions and other formal documents of state.<sup>88</sup> However, identifying the anchor is just the first step in our methodology for applying the Durham and Scharff model for a more holistic and comprehensive understanding of state-religion relationships. To go deeper requires an analysis of the full range of potential state-religion relationships permitted by the anchoring law/s. The range is not limited to the current interpretation or application of the anchoring law. Nor is it limited to historical interpretations of the law, although the history of its interpretation is important. Nor is it limited to the probable or likely interpretations. Rather, the full range of possible interpretations reasonably open on the law must be considered.

Interpretations can change over time, allowing new expressions of the state-religion relationship which may have been considered unthinkable at another time. Understanding the potential range involves examining all interpretations — even those that have been rejected by the majority — and testing hypothetical laws to determine whether they could, at least theoretically, be permitted by the anchor. Here the work of scholars, dissenting judicial opinions and historical understandings of the state-religion relationship can be drawn upon to understand the full scope of the potential range of the relationship.

It is important to distinguish between laws or public policy which are possible and permitted by the anchoring law and those which have in fact been enacted. For example, a state's anchoring laws may permit state funding of religious schools, but that does not necessarily mean that the government will choose to fund religious schools. Similarly the anchor may permit the state to enter into agreements with religious bodies, however, that does not necessarily mean those religious organisations will necessarily be required or desire to enter into such agreements.

Once the potential range of the state-religion relationship has been identified, historical or proposed changes in law can be analysed considering that potential range. Shifts in the relationship which occurred within the range are likely to be the work of ordinary political processes. While ordinary laws may have been changed, the anchoring law (and therefore the bedrock of the state-religion relationship) is likely to have remained the same. However, where a proposed or historical change takes the state-religion relationship outside the identified potential range it is more likely to be revolutionary and fundamental, or alternatively impermissible.

### 5.1 AUSTRALIA'S POTENTIAL RANGE

As Beck has observed '[t]he standards and principles employed by section 116 are capable of broad and narrow construction'.<sup>89</sup> This opens the way for a wide range of state-religion relationships stretching from cooperation through to separation and *laïcité*. This potential can be seen in the divergent descriptions in the literature. Scholars have variously described Australia's state-religion relationship as non-sectarian Christianity,<sup>90</sup> formal establishment

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<sup>88</sup> Temperman (n 2); see also Barker and Clarke (n 63).

<sup>89</sup> Beck (n 22) 161.

<sup>90</sup> Stephen Chavura, John Gascoigne, and Ian Tregenza, *Reason, Religion and the Australian Polity: A Secular State?* (Routledge, 2019) 254–257; see also Deagon (n 39) 155.

(symbolic),<sup>91</sup> pragmatic pluralism,<sup>92</sup> cooperation,<sup>93</sup> accommodation,<sup>94</sup> non-establishment pluralism,<sup>95</sup> non-establishment,<sup>96</sup> neutral separation / neutrality,<sup>97</sup> and flexible separation.<sup>98</sup> While in some instances this difference is merely a matter of nomenclature, in others it stems from a fundamental disagreement about the nature of the Australian state-religion relationship.<sup>99</sup> It is beyond the scope of this analysis to attempt to solve this debate; however, we would argue that all of these understandings of the Australian state-religion relationship are within the potential range permitted by section 116 of the *Australian Constitution*.

Beck has argued that contrary to the approach of the Australian High Court, section 116 should be interpreted broadly, arguing that this was the original intention of the section. He notes that in *A-G (Vic) ex rel Black v Commonwealth* ('*DOGS Case*'),<sup>100</sup> the majority consciously interpreted section 116 narrowly by inferring the intention of the framers from the words of the provision rather than by direct reference to the constitutional convention debate. However, as Beck correctly points out, the convention that judges not refer to the convention debates was abandoned after the *DOGS Case*, opening the possibility that future High Court decisions could have reference to the drafting history of section 116.<sup>101</sup> Whether this would result in a broader interpretation of section 116, and the prohibition on the Commonwealth 'establishing any religion', is a matter for future High Courts.<sup>102</sup> A glimpse of what this might look like can be seen in Murphy J's dissenting judgment in the *DOGS Case*. Unlike the majority, Murphy J held that 'establishing any religion' should be interpreted as including any support or sponsorship, including financial, of any religion.<sup>103</sup> In that case, he found that federal funding of religious schools, even on a non-discriminatory basis, was a breach of the establishment clause in section 116. Had Murphy J's view prevailed, a significant element of the modern federal state-religion relationship — the funding of religious schools<sup>104</sup> — would not exist, leading to a greater separation between state and religion. While a reinterpretation of section 116 is a possibility, it is not necessary to re-interpret section 116 for there to be a strict separation between state and religion at the federal level; all that would be required is a change of federal policy.

While the current interpretation of section 116 permits the federal government to fund religious schools on a non-discriminatory basis, it is not required to do so. As late as 1960, the federal government maintained that education, including the funding of schools, was purely a matter

<sup>91</sup> Ahdar and Leigh (n 53) 104.

<sup>92</sup> Soper et al (n 39) 121; Deagon (n 39) 154–155.

<sup>93</sup> Durham and Scharffs (n 3) 124, 126–127, 145–146.

<sup>94</sup> Fox (n 1) 45.

<sup>95</sup> Barker, 'Pluralism Versus Separation' (n 42).

<sup>96</sup> Temperman (n 2) 118–119.

<sup>97</sup> Shetreet (n 53) 90.

<sup>98</sup> Paul Babie et al, *Religion and Law in Australia* (Kluwer Law International, 2<sup>nd</sup> ed, 2019) 52–56; Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 221–222.

<sup>99</sup> Barker, 'Pluralism Versus Separation' (n 42).

<sup>100</sup> (1981) 146 CLR 559.

<sup>101</sup> Beck (n 22) 116–163. For the drafting history of section 116, see also Barker, *State and Religion* (n 16) 73–86.

<sup>102</sup> For a discussion raising doubt as to the correctness of the interpretation of section 116 in the *DOGS* case, see *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 165 (Basten JA); Luke Beck, 'Dead DOGS? Towards a Less Restrictive Interpretation of the Establishment Clause: *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)*' (2014) 37(2) *University of Western Australia Law Review* 59; Luke Beck, 'The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study' (2014) 35(2) *Adelaide Law Review* 226.

<sup>103</sup> *Attorney-General (Vic); Ex Rel Black v Commonwealth*, 146 CLR 559 622–623 (Murphy J).

<sup>104</sup> For the emphasis placed on this aspect of Australia's state religion relationship see Soper et al (n 39) ch. 5.

for state governments.<sup>105</sup> Just three years later, in 1963, the Menzies government introduced the School Science Laboratories Scheme<sup>106</sup> which provided funding for the building of science classrooms in both government and non-government schools. While ‘the amount of funding was targeted and relatively small, it was an important first step in the federal government’s funding of education’,<sup>107</sup> most notably because it was the first time since federation that a government at any level had provided direct funding to religious schools. However, had circumstances been different, this aspect of the modern state-religion relationship may never have existed. Other factors that are often pointed to as part of the federal state-religion relationship, such as prayers in parliament and tax exemptions for religious charities, are similarly not required by section 116. Indeed, there have been significant campaigns arguing for the abolition of both.

While section 116 prohibits the federal government from making laws prohibiting the free exercise of religion, this has not stopped the federal government imposing significant restrictions on religion. Just like the ‘establishment clause’, the ‘free exercise’ clause has been interpreted narrowly by the High Court. In particular, the High Court has found that the use of the word ‘for’ prior to each of the first three clauses of section 116 requires that any imputed law have the purpose of, for example, prohibiting the free exercise of religion. Laws which do not have this purpose, but which may impact on the free exercise of religion in their application do not breach section 116. As Gaudron J explained in *Kruger v Commonwealth*:<sup>108</sup>

[t]he use of the word ‘for’ indicates that purpose is the criterion and the sole criterion selected by section 116 for validity. Thus, a purpose must be taken into account. Further, it is the only matter to be taken into account in determining whether a law infringes section 116.<sup>109</sup>

In *Adelaide Company of Jehovah’s Witnesses v Commonwealth*,<sup>110</sup> the court found that a wartime ban on the Jehovah’s Witnesses did not breach section 116. Similarly, in *Krygger v Williams*,<sup>111</sup> the Court found that laws requiring a religious conscientious objector to undertake military training did not breach section 116. In *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association*,<sup>112</sup> the full federal court found that the Minister had not breached section 116 when he cancelled the visa of an Imam. In each case, the decision turned on the fact that the purpose of the relevant law was not to prohibit the free exercise of religion. Indeed, no law has ever been found to be invalid via operation of section 116. Other examples of federal restrictions on freedom of religion and belief include the removal of religious exemptions from childhood vaccination requirements,<sup>113</sup> declared area laws under the terrorism provisions of the *Criminal Act 1995* (Cth),<sup>114</sup> and exclusion of religious bodies from the exceptions provided

<sup>105</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 August 1960, 514 (Mr James and Robert Menzies).

<sup>106</sup> *States Grants (Science Laboratories and Technical Training) Act 1964* (Cth) assented to 28<sup>th</sup> May and commenced on 25<sup>th</sup> June 1964.

<sup>107</sup> Barker, *State and Religion* (n 16) 252.

<sup>108</sup> *Kruger v Commonwealth* (1997) 190 CLR 1.

<sup>109</sup> *Ibid* 132 (Gaudron J).

<sup>110</sup> (1943) 67 CLR 116.

<sup>111</sup> (1912) 15 CLR 336.

<sup>112</sup> *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373.

<sup>113</sup> See Renae Barker, ‘No Jab – No Pay, No Jab – No Play, No Exceptions: The Removal of Conscientious and Religious Exemptions from Australia’s Childhood Vaccination Policies’ (2017) 20(2) *Quaderni di diritto e politica ecclesiastica* [Notebooks of Ecclesiastical Law and Politics] 513.

<sup>114</sup> Section 119.3 gives the Foreign Affairs Minister the power to declare an area in a foreign country. Once declared it is an offence to enter the area. The broadness of this power opens up the possibility of religiously

to religious organisations in the *Sex Discrimination Act 1984* (Cth) where they are also a Commonwealth funded aged care provider.<sup>115</sup> Hewitt and Koch have also argued that a federal ban on religious face coverings would be valid.<sup>116</sup> Following their logic, so long as the federal government was legislating within an area of legislative competence, laws prohibiting religious practices and dress which were enacted for a legitimate purpose other than restricting ‘the free exercise of religion’ would similarly be valid.<sup>117</sup>

At the other end of the spectrum, Deagon has argued that Australia should move towards mild establishment (of Christianity) in order to better reconcile ‘religious freedom and equality to facilitate peaceful coexistence’.<sup>118</sup> Despite the use of the term ‘establishment’ he argues that:

[M]ild establishment . . . does not amount to formal or substantive state identification with a religion or legally preferring one religion to another. Mild establishment is also conceptually consistent with the acknowledgment of God in the preamble of the Constitution and the understanding of section 116 as a pluralist freedom of religion provision.

Deagon’s concept of mild establishment requires a recognition of a shared Christian heritage and history in political decision-making while at the same time ‘not imposing religious belief or coercing religious actions’.<sup>119</sup> In his emphasis on Australia’s historical Christian basis, and contrary to Beck’s position, he argues that ‘[p]eople at the time of federation did not believe in a separation of religion and state and were not, for the most part, suspicious of the influence of religion’<sup>120</sup> and therefore section 116 should be interpreted in light of this history. Arguably a federal *Religious Discrimination Act*, should one ever be passed, would move the relationship between the state and religion closer together, with greater accommodations and protections for the exercise of religion in the public sphere. Babie has similarly suggested in relation to section 116 that a wider interpretation incorporating personal religious freedom may have been accepted by constitutional scholars, contrary to the High Court’s later interpretation of the provision.<sup>121</sup>

While Beck’s, Deagon’s, and Babie’s advocated interpretations of section 116 (and consequently the Australian state-religion relationship) are outside the current High Court’s interpretation, they are at least plausible. Indeed, as outlined above, even without a reinterpretation of section 116, both mild establishment and strict separation could be achieved via ordinary legislation and public policy. As shown in Figure 1, this provides a wide range of potential state-religion relationships:

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significant sights becoming declared areas, potentially prohibiting the exercise of religious practices such a pilgrimages or Hajj.

<sup>115</sup> *Sex Discrimination Act 1984* (Cth) s 23(3A).

<sup>116</sup> Anne Hewitt and Cornelia Koch, ‘Can and Should Burqas Be Banned: The Legality and Desirability of Bans of the Full Veil in Europe and Australia’ (2011) 36(1) *Alternative Law Journal* 16, 20.

<sup>117</sup> While the focus of this paper is on the federal state-religion relationship it is worth noting significant restrictions on religious belief and practice have been enacted at the state level. For example, Victoria, Western Australia, and South Australia attempted to ban the Church of Scientology in the 1960s and 1970s. See Barker, *State and Religion* (n 16) 201–209.

<sup>118</sup> Deagon (n 39).

<sup>119</sup> *Ibid* 167–168.

<sup>120</sup> *Ibid* 167.

<sup>121</sup> Babie, ‘The Ethos of Protection’ (n 25) 71–73.

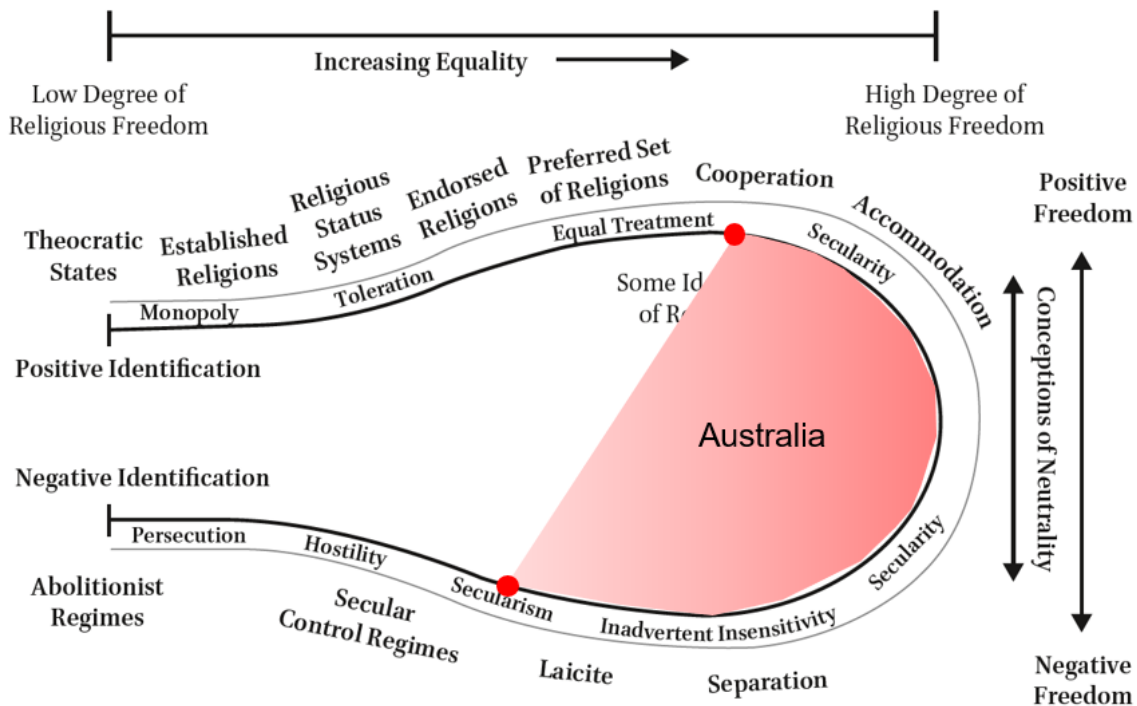


Figure 1: Range of the Australian state-religion relationship.

## 5.2 ITALY'S RANGE

As with Australia, and as alluded to above, Italy has been variously classified in the international literature on religion-state relationships: one religion,<sup>122</sup> confessional secularism,<sup>123</sup> cooperationist,<sup>124</sup> or even anti-church.<sup>125</sup> Indeed, Temperman discusses Italy in the various contexts of State-supported Roman Catholicism,<sup>126</sup> Cooperation,<sup>127</sup> and Separation between state and religion,<sup>128</sup> noting 'there may in practice be a discrepancy between constitutional separationism and actual state practice'.<sup>129</sup> In the Italian literature, debate focuses on categories such as separatism, re-confessionalisation, and cooperation.<sup>130</sup> As with Australia, we would argue that most, if not all of these, understandings of the Italian state-religion relationship fit within the potential range permitted by the anchoring provisions.

<sup>122</sup> Fox (n 1) 44–45.

<sup>123</sup> Rosenfeld (n 53) 2349–2350.

<sup>124</sup> Durham and Scharffs (n 3) 124, 126–127, 145–146.

<sup>125</sup> Alibašić (n 53) 46. Although it must be noted that, in this context, Alibašić did not intend anti-church to mean anti-religion but rather anti-establishment or non-identification.

<sup>126</sup> Temperman (n 2) 69.

<sup>127</sup> Ibid 102–103.

<sup>128</sup> Ibid 102–103, 121, 123.

<sup>129</sup> Ibid 122–123.

<sup>130</sup> See, eg, Arturo Carlo Jemolo, *Chiesa e Stato in Italia negli ultimi cento anni* [Church and State in Italy in the Last Hundred Years] (Einaudi, 1975); Francesco Ruffini, *Corso di diritto ecclesiastico italiano: la libertà religiosa come diritto pubblico subiettivo* [Course on Italian ecclesiastical law: freedom of religion as a subjective public entitlement] (F.lli Bocca, 1924); Salvatore Berlingó and Giuseppe Casuscelli, *Diritto ecclesiastico italiano: I fondamenti. Legge e religione nell'ordinamento e nella società d'oggi* [Italian ecclesiastical law: The fundamentals] (Giappichelli, 2020); Francesco Finocchiaro, Andrea Bettetini, and Gaetano Lo Castro, *Diritto ecclesiastico* [Ecclesiastical law] (Zanichelli, 2015).

Article 7, para 2 (regarding the Lateran Pacts with the Catholic Church) and art 8, para 3 (concerning agreements with non-Catholic religions) of the 1948 Italian Constitution form the foundational pillars of what is known as Italian bilateralism.<sup>131</sup> These agreements with religious denominations serve as instruments that, while upholding general constitutional rights and freedoms, consider the religious identity of each denomination.<sup>132</sup> In the mind of the constitutional fathers and mothers, entering into an agreement with the Italian state could foster and value religious pluralism and diversity: an agreement could create a ‘tailor-made dress’ crafted for each religious community.<sup>133</sup> The main issue is that, as we will see, the implementation of this constitutional project partly failed.

As outlined above, while all religious communities in Italy enjoy the collective constitutional right to religious freedom (art 19), in practice a four-tier system has emerged:<sup>134</sup>

- i) The Catholic Church is regulated under the Lateran Pacts as outlined in art 7 of the Constitution and enjoys a unique constitutional status;
- ii) There can be religious (non-Catholic) communities that may be self-organized according to their own statutes and, in addition to that, may have entered successfully into agreements with the Italian state (art 8 paras 2 and 3);
- iii) There can be religious (non-Catholic) communities that may also have exercised their right to self-organization and have obtained legal capacity according to Law No 1159 of 1929 on ‘admitted religions’;<sup>135</sup>
- iv) There can be religious (non-Catholic) communities that may have self-organized themselves, but according to the relevant and general provisions of the Civil Code (as any other type of associations, such as unions or political parties).

Articles 7, 8, and 19 of the Constitution have remained unamended since 1948. Yet, a broader analysis reveals that in the latter half of the 20th century, Italy’s approach to bilateralism underwent significant changes.

<sup>131</sup> Francesco Alicino, ‘The Legal Treatment of Muslims in Italy in the Age of Fear and Insecurity’ (2022) 37(3) *Journal of Law and Religion* 478.

<sup>132</sup> Jlia Pasquali Cerioli, ‘L’approvazione delle intese ex art. 8, 3° comma, Cost. nella XVI legislatura: luci e ombre di una nuova «stagione»’ [‘The approval of agreements pursuant to Article 8, paragraph 3, of the Constitution in the XVI legislature: lights and shadows of a new “season”’] (2013) 16(2) *Quaderni di diritto e politica ecclesiastica* [*Notebooks of ecclesiastical law and politics*] 395; Pierluigi Consorti, ‘1984-2014: le stagioni delle intese e la «terza età» dell’art. 8, ultimo comma, della Costituzione’ [‘1984-2014: the seasons of agreements and the “third age” of Article 8, last paragraph, of the Constitution’] (2014) 17(1) *Quaderni di diritto e politica ecclesiastica* [*Notebooks of ecclesiastical law and politics*] 90.

<sup>133</sup> Francesco Margiotta Broglio, ‘I culti in sartoria: uguaglianza giuridica e tutela delle specificità confessionali’ [‘Religion in tailoring: legal equality and protection of religious specificities’] (2009) 2(1) *Percorsi costituzionali* [*Constitutional Pathways*] 181.

<sup>134</sup> Alessandro Ferrari and Silvio Ferrari, ‘Religion and the Secular State: The Italian Case’ in Javier Martínez-Torrón and W Cole Durham (eds) *Religion and the Secular State: National Reports* (online, 2010) 440 <<https://classic.iclrs.org/content/blurb/files/Religion%20and%20the%20Secular%20State%20-%20Interim%20Reports%202010.07.27.pdf>> accessed 26 June 2024.

<sup>135</sup> This is an essential requirement to launch negotiations with the State. To sign an agreement, the acknowledgement of legal capacity according to Law No 1159 of 1929 has great significance, because it confirms the religious nature of the recognized group. It forms the basic precondition (in fact, if not in law) for an application for an agreement with the Italian State. See Ferrari and Ferrari (n 134) 441.

A pivotal transformation occurred in 1984 with the revision of the Lateran Pacts, bringing them in line with a more modern understanding. This revision was formalised through the so-called Villa Madama Accord, with the Preamble acknowledging ‘the process of political and social transformation that has taken place in Italy in recent decades and the developments promoted in the Church by the Second Vatican Council...’<sup>136</sup> Among the key amendments, Catholicism ceased to be the state religion; the compulsory church tax was replaced with a voluntary contribution system; and the teaching of Catholic religion in public schools transitioned from mandatory to optional, premised on the assumption that the principles of Catholicism constitute part of the historical heritage of the Italian people.

In the same year, the first agreement with a non-Catholic religion (the Waldensian Church) was approved by Parliament and paved the way for others with various non-Catholic religious communities. There are now 13 such agreements, reflecting Italy’s cooperative model of state-religion relations.<sup>137</sup> However, agreements signed to date are essentially ‘photocopy agreements’, crafted in a highly similar manner. They replicate each other’s content and emulate the Accords with the Catholic Church in key areas.<sup>138</sup> This implies that the ‘agreements are seen by the religious groups more as an instrument of political legitimation than as an opportunity for expressing their identity’.<sup>139</sup> As a consequence, they establish privileges reserved to few minority religions and result in discriminatory treatment between the 13 denominations that benefit from bilateralism (and the Catholic Church) and those that remain subject to the restrictive Law No 1159 of 1929 concerning admitted religions.<sup>140</sup> The overall result is a far cry from the ‘tailor-made dress’ intended by the founders of the 1948 Constitution.<sup>141</sup> But importantly, the nature of the Italian state-religion relationship could change simply by embracing the intended bespoke agreements and bringing more and more diverse religions into the fold through bilateral pacts.

A third milestone of the changed landscape of the Italian state-religion model is represented by the recognition of the supreme, fundamental, and overriding constitutional principle of *laicità* (secularism) by the Constitutional Court. In 1989 the Court was called upon to scrutinise the optional teaching of the Catholic religion in public state schools, particularly addressing the alleged detrimental effects on students who chose not to attend such instruction (today 15.95% of all students).<sup>142</sup> For the first time, the Court defined Italy as a ‘*stato laico*’ and articulated

<sup>136</sup> *Accordo di Villa Madama [Villa Madama Accord]* and Legge 25 marzo 1985, n 121 [Law, 25 March 1985, n 121].

<sup>137</sup> The text of all the agreements with non-Catholic religions can be found (in Italian language only) at <[https://presidenza.governo.it/usri/confessioni/intese\\_indice.html#3](https://presidenza.governo.it/usri/confessioni/intese_indice.html#3)>. The 13 religions with agreements are: Union of Methodist and Waldensian Churches, Evangelical Christian Churches Assemblies of God in Italy, Italian Union of Seventh-day Adventists Christian Churches, Union of Jewish Communities in Italy, Baptist Evangelical Christian Union of Italy, Evangelical Lutheran Church in Italy, Sacred Orthodox Archdiocese of Italy and Exarchate of Southern Europe, The Church of Jesus Christ of Latter-day Saints in Italy, Apostolic Church in Italy, Italian Buddhist Union, Italian Hindu Union, Soka Gakkai Italian Buddhist Institute, and Association Church of England.

<sup>138</sup> Alicino (n 131): ‘the practical implementation of relations between the state and minority religions has been characterized by “copy-and-paste” production of law’.

<sup>139</sup> Ferrari and Ferrari (n 134) 439.

<sup>140</sup> Alicino (n 131). See also Rossella Bottoni, ‘The Legal Regulation of Religious Minorities in Italy’ in Helena Vilaça, Maria João Oliveira, and Anne-Laure Zwillig (eds), *Contemporary Challenges to the Regulation of Religions in Europe* (Universidade do Porto Press, 2023) 177.

<sup>141</sup> Broglio (n 133).

<sup>142</sup> According to 2023 statistics available at <<https://irc.chiesacattolica.it>>. There are four options available to those who do not participate in Catholic religious instruction: (i) attending other educational activities; (ii) studying with the assistance of a teacher; (iii) studying independently; or (iv) leaving the school premises. See *Circolare ministeriale [Ministerial circular]* No 51, 8 December 2014.

‘the overriding principle of the *laicità* of the State, which is one of the aspects of the form of State outlined in the Constitution of the Republic’.<sup>143</sup> Italian *laicità* ‘emerges from arts 2, 3, 7, 8, 19 and 20 of the Constitution’ and ‘does not imply the indifference of the State to religions but rather a guarantee of State protection of the freedom of religion, in a regime of confessional and cultural pluralism.’<sup>144</sup>

This brief overview indicates that although the constitutional provisions anchoring and delineating the cooperative or bilateral model of the state-religion relationship in Italy have not been formally amended, significant changes have occurred in the policy and implementation of that constitutional framework — indicating the full potential range of the state-religion relationship in Italy. It is not by chance that Italian doctrine urges an examination not only of ‘hard’ laws about religion, but also of all the players responsible for implementing the constitutional project.<sup>145</sup>

Consequently, within the current Italian cooperation model, which is unequivocally identified by the Constitution, there exist laws or areas of law and religion that align with different categories of state-religion relationship.

The Catholic Church enjoys a preferential endorsement in some areas, such as the teaching of Catholic religion in public schools. Although the Constitutional Court has declared the optional teaching as compatible with the principles of the Republican Constitution of 1948, some concerns persist. Specifically, teachers of the Catholic religion are appointed by school authorities in line with the Catholic Church, which must approve their ‘suitability’ and approve the syllabus and textbooks. While the optional teaching of Catholic religion is funded via general taxation, the financial responsibility for the study of minority religions is borne by the respective religious communities.<sup>146</sup>

On the other hand, Catholicism and the 13 denominations with agreements with the Italian state enjoy a set of rights not afforded to religions without such agreements. These include the recognition of legal personhood for religious, educational, and charitable entities; the guarantee of spiritual assistance in hospitals, prisons, and in the military; the observance of religious holidays; and the recognition of religious marriages for civil purposes and effects. Most importantly, ‘agreed religions’ can participate in the *otto per mille* (eight per thousand) system<sup>147</sup>. At the end of each fiscal year, Italian taxpayers can choose to allocate 8% of their income tax to either state-run social programs, to the Catholic church, or to non-Catholic denominations that have signed an agreement with the state.<sup>148</sup>

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<sup>143</sup> Corte costituzionale [Italian Constitutional Court], No 203, 7 March 1989 reported in [1989] p 2 [4] <[https://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/Sentenza\\_203\\_1989\\_Casavola\\_en-fin.pdf](https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_203_1989_Casavola_en-fin.pdf)>.

<sup>144</sup> Ibid.

<sup>145</sup> Pietro Faraguna, ‘Regulating Religion in Italy: Constitution Does (Not) Matter’ (2019) 7(1) *Journal of Law, Religion and State* 32.

<sup>146</sup> See, e.g., the Agreement with the Jewish community of 27 February 1987, approved by Law no. 101 of 8 March 1989. The Agreement was amended on 6 November 1996 and approved by Law no. 638 of 20 December 1996.

<sup>147</sup> See, e.g., the Agreement with the Jewish community, as amended on 6 November 1996 and approved by Law no. 638 of 20 December 1996, Art. 2, titled ‘Distribution of the revenue arising from the personal income tax’.

<sup>148</sup> If no choice is made, the contribution is distributed proportionally based on the preferences specified by all taxpayers.

Finally, the Italian legal system incorporates elements of an accommodation category. A notable example is the recent legal development concerning the display of crucifixes in classrooms. This issue has prompted extensive interventions from both Italian and European judges, including the European Court of Human Rights,<sup>149</sup> and has sparked considerable scholarly debate.<sup>150</sup> It has garnered renewed attention following the ruling by the United Sections of the Supreme Court of Cassation in 2021. According to this judgment, the mandatory display of Catholic religious symbols violates several constitutional principles, foremost among them the principle of *laicità*. Conversely, an absolute prohibition of any religious symbols in public schools would also be incompatible with a regime of religious and cultural pluralism. As a result, not only crucifixes but also other religious and cultural symbols can be ‘accommodated’<sup>151</sup> on the walls of public schools, with each school community deciding upon the presence of such symbols in its classroom. It is premature to fully predict the legacy and implementation of this judgment, yet it undeniably represents a significant and transformative shift. However, we would argue, despite the transformative nature of the shift, it still falls within the potential range permitted by the anchor of the Italian state-religion relationship.

The primary unresolved issue in Italy’s state-religion dynamic is the lack of new comprehensive legislation on religious freedom,<sup>152</sup> which allows the illiberal Law No 1159 of 1929 to remain in force for religions without formal agreements with the state, such as Islam. Despite various interventions by the Constitutional Court, this law frequently fails to align with the principles enshrined in the Constitution.<sup>153</sup>

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<sup>149</sup> See, eg, *Lautsi v Italy* (European Court of Human Rights, Grand Chamber, Application No 30814/06, 18 March 2011); *Lautsi v Italy* (European Court of Human Rights, Second Section Chamber, Application No 30814/06, 3 November 2009); Corte di cassazione [Italian Supreme Civil Court] it., sezioni unite, sent. No 24414, 9 September 2021; Consiglio di Stato it [Council of the State of Italy], sez. VI, [sixth sessions] sent, no 556 del 13 febbraio 2006 [no 556 of 13 February 2006]; T A R. Veneto, sez. III, sent. n. 1110 del 22 marzo 2005.

<sup>150</sup> Susanna Mancini, ‘Taking Secularism (Not Too) Seriously: The Italian “Crucifix Case”’ (2006) 1(2) *Religion & Human Rights* 179; Andrea Pin, ‘Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State’ (2011) 25 *Emory International Law Review* 95; Luca P Vanoni, ‘La sentenza della Grande Camera sul crocifisso: è una pronuncia corretta’ [‘The Grand Chamber’s ruling on crucifixes: it is a correct decision’] (2011) 31(2) *Quaderni costituzionali* [Constitutional Notebooks] 419; Joseph H H Weiler, ‘Lautsi: A Reply’ (2013) 11(1) *International Journal of Constitutional Law* 230; Nahshon Perez, ‘Lautsi v Italy: Questioning the Majoritarian Premise’ (2015) 8(3) *Politics and Religion* 565; Andreas Follesdal, ‘Religion and the State: The “Lautsi” Case of the European Court of Human Rights about Crucifixes in Italian Class Rooms’ in Dirk Ehlers and Glaser Hennig (eds), *State and Religion: Between Conflict and Cooperation* (Momos, 2020); Jeroen Temperman, *The Lautsi Papers* (Martinus Nijhoff, 2012).

<sup>151</sup> Marcello Toscano, ‘Il crocifisso “accomodato”: Considerazioni a prima lettura di Corte cass., Sezioni Unite civili, n 24414 del 2021’ [‘The Crucifix “Accommodated”: Considerations at First Reading of the Judgment No 24414/2021 by the United Sections of the Italian Supreme Court of Cassation’] [2021] (18) *Stato, Chiese e pluralismo confessionale* [State, Church and Confessional pluralism] (Rivista telematica) [Online Journal] 45 <www.statoechiese.it>.

<sup>152</sup> Roberto Zaccaria et al (eds), *La legge che non c’è. Proposta per una legge sulla libertà religiosa in Italia* [The law that does not exist. Proposal for a law on religious freedom in Italy] (il Mulino, 2020). The government has also a discretionary power to decide whether to initiate negotiations for new agreements with religious denominations: see Corte costituzionale [Italian Constitutional Court], No 52, 26 January 2016; Elena Ervas, ‘The Agreements Between Church and State: The Italian Perspective’ [2017] (4) *Brigham Young Law Review* 869; Adelaide Madera, ‘Atheism in Judicial Discourse: An Analysis of the Italian Constitutional Scenario’ (2023) 16(2) *International Journal for Religious Freedom* 57.

<sup>153</sup> Cerioli (n 132) 405. The legal doctrine suggests that the general set of rights granted by these agreements may be the basis for a new general law on religious freedom, in substitution of Law 24 giugno 1929, No 1159 [Italian Law 24 June 1929, No 1159].

Numerous oscillations have occurred over time within the Italian landscape of bilateralism or cooperation model. An enquiry of the ‘living constitution’ — not limited to the Italian Constitution only — reveals that ‘the constitutional provisions have been implemented in diverging directions throughout the history of Italian secularism’.<sup>154</sup> Negotiating an agreement with the State remains within the spectrum of constitutional possibilities rather than mandatory obligations, and various other indicators suggest the presence of elements typical of other categories of state-religion relationships. As outlined in Figure 2 below, the potential range therefore stretches from endorsed religion (Roman Catholic Church), equivalent to Fox’s multi-tiered preferences — one religion category, through to accommodation and possibly non-establishment. While a number of commentators have described Italy as having a separation between state and religion or as being secular (*laicità*), arts 7 and 8 which explicitly provide for agreements between the state and religious organisations precludes a complete separation of state and religion.

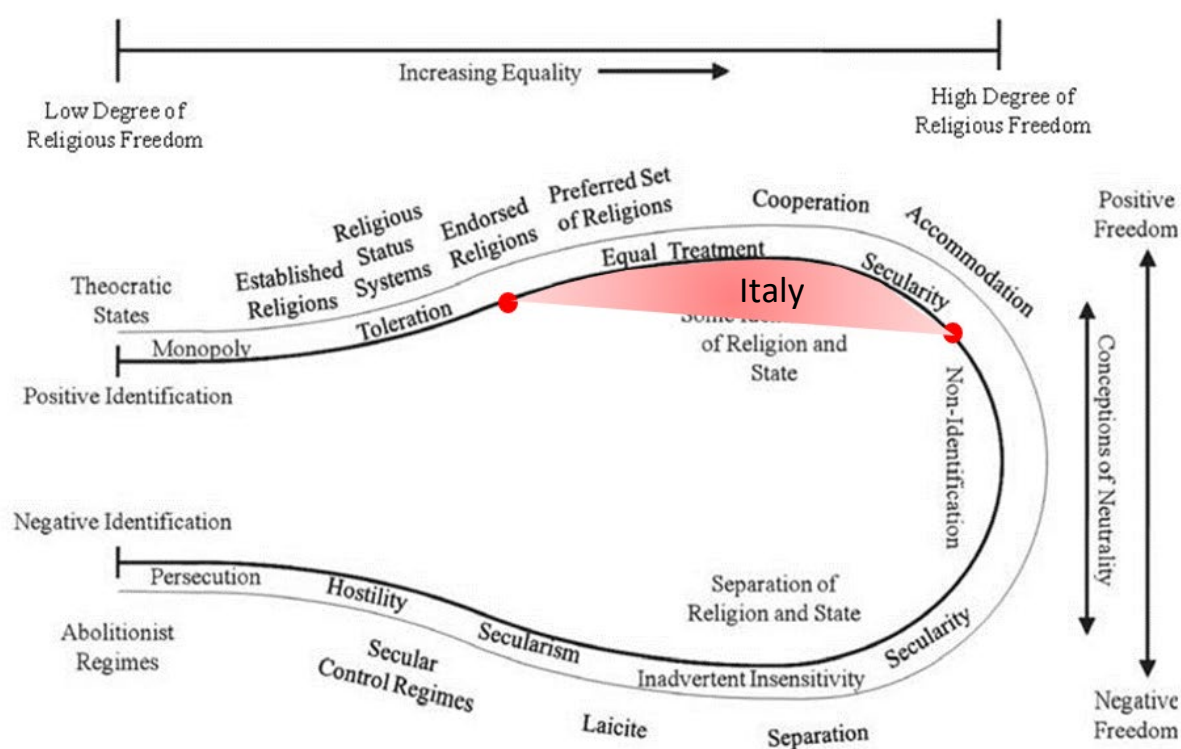


Figure 2: Range of the Italian state-religion relationship.

## 6. DISCUSSION

As observed at the outset, Australia and Italy, despite prima facie differences in the constitutional articulation of their respective state-religion relationships, ultimately manifest a similar interaction between state and religion. Both preclude the establishment of a state religion or church via their constitution, while at the same time there are significant areas of cooperation between the state and religion generally. In Australia, this can be seen in, for example, federal funding of religious schools, while in Italy it is manifested in policies such as the *otto per mille* taxation. Similarity can also be seen in the manifestation of FoRB in practice. In the 2021 Pew Research Centre Government Restriction Index (‘GRI’), Australia and Italy

<sup>154</sup> Faraguna (n 145) 32.

scored 1.6 and 2.9 respectively, placing them in the ‘low’ and ‘moderate’ restriction categories.<sup>155</sup> Both States, however, were categorised as ‘moderate’ on the Pew Research Centre’s Social Hostility Index, with scores of 2.7 and 3.1 respectively.

Overlaying the range of possible state-religion relationships for the two jurisdictions on the Durham and Scharffs loop model (Figure 3) highlights this area of overlap in the current manifestation of the respective relationships.

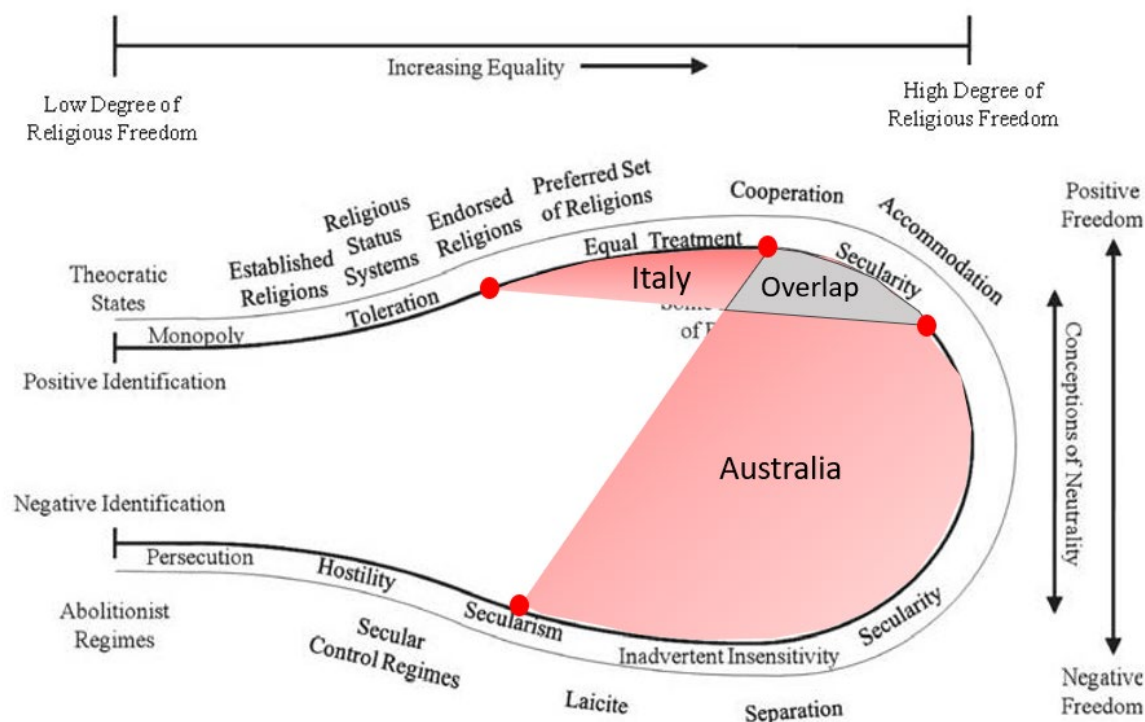


Figure 3: Overlay of Australian and Italian state-religion relationships.

However, as highlighted in our discussion above, the way in which the state-religion relationship has manifested historically is very different. So too are potential alternative manifestations of the relationship. These historical and alternative manifestations pull in opposite directions. In Australia, as observed by Durham and Scharffs, there ‘is a vacillation between cooperation and a reasonably robust secularism’.<sup>156</sup> Consequently, and due to the operation of section 116 of the *Australian Constitution* as the anchor to the Australian state-religion relationship, the relationship cannot move beyond cooperation towards preferencing one or even a defined set of religions — although arguably Deagon’s suggestion of a form of mild (Christian) establishment may well do just that. The Australian State could not, for example, establish a series of agreements with religious organisations in a similar way to that contemplated under art 8 of the Italian Constitution. Instead, tension exists between cooperation and separation.

<sup>155</sup> Samirah Majumdar and Sarah Crawford, *Globally, Government Restrictions on Religion Reaches Peak Levels in 2021, While Social Hostilities Went Down* (Pew Research Centre 2024) online, accessed 26 June 2024 <[https://www.pewresearch.org/wp-content/uploads/sites/20/2024/03/PR\\_2024.3.5\\_religious-restrictions\\_REPORT.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2024/03/PR_2024.3.5_religious-restrictions_REPORT.pdf)>.

<sup>156</sup> Durham and Scharffs (n 3) 124.

By contrast the operation of arts 7 and 8 of the Italian Constitution sets up a special relationship between the state, the Roman Catholic Church, and religions which choose to enter into agreements with the State. While, at least theoretically, the Italian State could enter into agreements with all religious organisations operating in Italy, this would only enable the relationship to move towards cooperation and accommodation — true separation is impossible. The agreements, and therefore at least some level of cooperation or accommodation, are inevitable and inherent. Consequentially the tension in the Italian state-religion relationship is between accommodation / non-identification and the endorsement of a single (or a small number of) historically favoured religions.<sup>157</sup>

## 7. CONCLUSION

State-religion relationships are complex. The nature of that relationship at any given point in time is determined not only by constitutional provisions (anchors) but also by less permanent laws, state practice, public policy, and public opinion. Yet it is constitutional provisions which have tended to be the focus of analysis in models of state-religion relationships. In this paper we have proposed a new methodology for applying models of state-religion relationships using the Durham and Scharffs loop typology as applied to Australia and Italy as an exemplar of the method we propose. Rather than focusing on constitutional provisions alone, we argue that regard should be had to the less permanent and, therefore changeable, elements in the relationship. This includes not only current laws, public policy, and state practice, but also historical interpretations and applications of the anchoring law as well as proposed or imagined possibilities which are permissible under the anchoring constitutional arrangements. Further, and as a consequence of the broader approach, rather than being fixed within a single category of relationship, state and religion interactions exist within a potential range permitted by changeable interpretations and applications of the anchoring laws. As demonstrated via the Australian and Italian case studies discussed above, the size of this potential range will vary.

The methodology we propose for better understanding state-religion relationships via their anchor and potential range assists in explaining apparent inconsistencies in the literature regarding state and religion. It can explain why two scholars working on the same jurisdiction may ascribe the state-religion relationship to two different categories. It is simply that they are focusing on different aspects of the relationship within the range of possible relationships or are interpreting the anchoring constitutional arrangements in differing (narrower or broader) ways. Understood in this way, competing interpretation of a jurisdiction's state-religion relationship are not inconsistent with one another. Rather, they add further depth to our understanding of the full potential range of the relationship. Similarly, ascribing jurisdictions such as Australia and Italy with *prima facie* very different constitutional arrangements into the same category can be explained by the crossover of the full potential range of their individual state-religion relationships. Analysing a range of different jurisdictions in the way we propose should lead to an overlapping mosaic of differing potential ranges of state-religion interaction reflecting the intricate complexities of state-religion relationships.

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<sup>157</sup> Ibid 126.

# Skilful Navigators or Guerrilla Subversives? Accommodating Colleges of Islamic Higher Education in the West

Salim Farrar\*

*This paper explores the accommodation of Islamic educational institutions in the secular, democratic West through the prisms of comparative law and legal pluralism, focusing on the United States, but with lessons for like states, such as Australia, with federal legal structures, constitutional protections for freedom of religion, common law backgrounds, and with relatively small Muslim populations. It takes a socio-legal approach, applying a case study method, with the focus on Zaytuna College in California, the first Muslim Liberal Arts College in America. Borrowing from Menski and Yilmaz, the paper demonstrates that Zaytuna educators are more like 'kite flyers', than guerrilla subversives; skilful navigators who purposefully pursue distinct educational strategies that attempt to balance competing norms of cultural, legal, social, political, and religious values. The kite stands as a metaphor for the plural forces and competing tensions which the flyer must skilfully navigate to avoid crashing. Far from subverting the educational system for covert 'Islamist' purposes, the paper argues that Zaytuna transparently recognises the state and 'flies their kite' by an 'active incorporation of norms' thereby properly enabling state accommodation.*

## 1. INTRODUCTION

In the United States, perhaps paradoxically given its secularity and the constitutional separation between church and state, there has been a growth spurt in recent years in students enrolling in educational religious institutions, which has included Islamic schools and colleges.<sup>1</sup> There has been a similar expansion in the UK<sup>2</sup> and Australia.<sup>3</sup> Most of this growth has been in the form of Islamic schools,<sup>4</sup> with colleges of Islamic higher education, bodies offering post-secondary degree programs, still a relative rarity. Nevertheless, new (or revived) Islamic institutions are emerging, offering young Muslims a new educational pathway that both nurtures their Islamic

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<sup>1</sup> See AL Stanton, 'Islamic Colleges and Universities in North America' *Oxford Research Encyclopedia of Religion* (2024) 3 <<https://doi.org/10.1093/acrefore/9780199340378.013.864>>.

<sup>2</sup> See JM Halstead, 'Islamic Education in England' in H Daun and R Arjmand (eds), *The Handbook of Islamic Education* (Springer, 2018) 855, 867. There are about 184 Muslim Faith schools in the UK (141 independent, 34 state-funded). There are also about 2000 'madrasahs' unregulated by the UK Department of Education. Cf B Jefferys, 'Plans to Regulate Madrassas Published by the Government', *BBC News* (online, 26 November 2015) <<https://www.bbc.com/news/education-34933970>>.

<sup>3</sup> See JA Ali, 'Muslim Schools in Australia: Development and Transition' in M Abdalla, D Chown, and M Abdullah (eds), *Islamic Schooling in the West: Pathways to Renewal* (Palgrave Macmillan, 2018) 35, 40–1.

<sup>4</sup> There are currently 54 Islamic Schools in Australia, based on 2023 figures: see Statista Research Department, 'Number of Independent Schools in Australia 2023, by Affiliation' *Statista* (Report July 10, 2025) <<https://www.statista.com/statistics/1166041/australia-number-of-independent-schools-by-affiliation/>>. On the growth and development of Islamic schools in the United States post-9/11, see ZA Grewal and RD Coolidge, 'Islamic Education in the United States: Debates, Practices, and Institutions' in J Hammer and O Safi (eds), *The Cambridge Companion to American Islam* (Cambridge University Press, 2013) 246, 246–65.

faith and provides them with the intellectual and practical skills to engage with the broader society.<sup>5</sup>

The expansion of private Islamic schools and colleges raises the question whether they can and should be ‘accommodated’ by the state. Farrar and Krayem have questioned whether the concept of accommodation is fit for purpose in multicultural states<sup>6</sup> such as Australia, Canada, the UK, and the US, amid the factual realities of legal pluralism and respect for human rights. For linguistically, the term implies not just compromise and adaptation but also doing a favour.<sup>7</sup> It connotes the dispensing of privileges more than the acknowledgment of equal rights and freedoms, and in equality debates, use of this terminology tends to put discriminated minority communities onto the backfoot. Hence, calls for ‘accommodation’ are frequently constructed rhetorically as a case for exemption and ‘special treatment’ when they are only asking for equality and inclusion — in other words, a ‘level playing field’ — which respects their human rights.<sup>8</sup>

The legal concept of accommodation, however, has a life beyond the dictionary, and can mean different things depending on the political, religious, and constitutional context. Under the First Amendment of the *United States Constitution* (and arguably under s 116 of the *Australian Constitution* also because of similar language),<sup>9</sup> accommodation represents a reasonable compromise between two opposites: the free exercise of religion and the prohibition of establishment.<sup>10</sup> The former envisages state non-interference with religious practice, the latter separation from and non-identification with the state. Accommodation operates in this context as a conceptual buffer, denoting ‘a practice undertaken for the purpose of facilitating the free exercise of religion’,<sup>11</sup> while avoiding ‘excessive entanglement’ with the state.<sup>12</sup>

For our purposes, accommodation is not merely asking whether Islamic educational entities should be allowed to operate or exist (albeit informally) in a liberal democratic and secular state: It also asks whether they should be ‘accredited’; that is, officially recognised and effectively endorsed by the state, together with the advantages that come with it, such as charitable status, exemptions from anti-discrimination laws, and access to state subsidies (should they want them).

But accommodation through accreditation is not a simple matter for the state or Islamic communities. Islamic educational entities themselves may not *want* the recognition because of the imprimatur of the secular state and the degree of secular control carried with it. According

<sup>5</sup> Stanton (n 1).

<sup>6</sup> See S Farrar and G Krayem, *Accommodating Muslims under Common Law: A Comparative Analysis* (Routledge, 2017) 6–9.

<sup>7</sup> *The New Shorter Oxford English Dictionary* (1993) ‘accommodation’.

<sup>8</sup> The case of Islamic banking and finance across western jurisdictions provides a good example. See further S Farrar, ‘Accommodating Islamic Banking and Finance in Australia’ (2011) 17(1) *University of New South Wales Law Journal Forum* 100, 111–12.

<sup>9</sup> On discussion of an Establishment clause in the Australian context, see Luke Beck, ‘The Establishment Clause of the *Australian Constitution*’ (2014) 35 *Adelaide Law Review* 225, 235: see especially at 240. *Australian Constitution* s 116 states: ‘The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion ...’.

<sup>10</sup> See *McDaniel v Paty*, 435 US 618 (1978) (‘*McDaniel*’).

<sup>11</sup> MW McConnell, ‘Accommodation of Religion’ [1985] *Supreme Court Review* 1, 2-3. See also the judgment of Brennan J in *McDaniel* (n 10) 639.

<sup>12</sup> According to the still leading US case of *Lemon v Kurtzman*, 403 US 602 (1971), the Establishment Clause is violated if the proposal lacks a secular purpose, if its primary purpose is advancing or prohibiting religion, or it would lead to ‘excessive entanglement’ between church and state.

to Menski '[Muslims] do not start their decision-making processes from a state-centric position of citizen, but think and act first as Muslim individuals and members of communities'.<sup>13</sup> The state also may have reservations, perhaps due to underlying 'Islamophobia',<sup>14</sup> and public fears that Muslim traditional educational institutions are guerrilla subversives,<sup>15</sup> perceiving them as divisive and separatist,<sup>16</sup> rather than genuine contributors to the common weal. They may fear Islamic schools and colleges covertly undermine the common values of a secular western society;<sup>17</sup> supporters of a 'heterodox counterculture'<sup>18</sup> at best, and jihadist 'Trojan horses' at worst.<sup>19</sup>

The issue for Islamic colleges wanting official recognition — those who seek 'active citizenship'<sup>20</sup> beyond being merely 'members of communities' — becomes whether a middle ground can be found; whether they can discover epistemic meeting points between the state's legal, religious, and value traditions while crafting an authentic Islamic educational institution of their own. The issue for the state and accrediting body is whether their endorsement will necessarily identify them with a religious body, 'excessively entangling' them in religious questions and adopting, by proxy, positions contrary to liberal democratic values.

I explore accommodation of Islamic educational institutions in the secular, democratic West through the prisms of comparative law and legal pluralism, focusing on the United States, but with lessons for like states, such as Australia, with federal legal structures, constitutional protections for freedom of religion, common law backgrounds, and with relatively small Muslim populations. I take a socio-legal approach, applying a case study method, with my

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<sup>13</sup> Werner Menski, 'European Muslims as Skilled Kite-Flyers' in Werner Menski, *Exploring the Multitude of Muslims in Europe* (Brill, 2018) 20.

<sup>14</sup> ABC Radio National, 'How Do We Combat Islamophobia in Australia', *Radio National Breakfast* (17 December 2024) <<https://www.abc.net.au/listen/programs/radionational-breakfast/how-do-we-combat-islamophobia-in-australia-/104734508>> (a segment with Aftab Malik, the Special Envoy to Combat Islamophobia, on the prevalence of 'hate-based' Islam prejudice in Australia, or 'Islamophobia'). See also, Aftab Malik, 'Islamophobia is an Everyday Reality for Too Many Australians', *The Guardian* (online, 18 December 2024) <<https://amp.theguardian.com/commentisfree/2024/dec/18/islamophobia-is-an-everyday-reality-for-too-many-australians-ntwnfb>>.

<sup>15</sup> The term 'guerrilla' is commonly applied beyond military contexts including a) political economy: see, eg, Danny Lam and Cal Clark, 'Beyond the Developmental State: The Cultural Roots of "Guerrilla Capitalism" in Taiwan' (1994) 7(4) *Governance* 412; and b) including cultural studies and sociology: see, eg, Michael Goddard, *Guerrilla Networks: An Archaeology of 1970s Radical Media Ecologies* (Amsterdam University Press, 2018).

<sup>16</sup> See Halstead (n 2) 857, 861, 863.

<sup>17</sup> Che Guevara, the eponymous guerrilla, encouraged clandestine activities to beguile the target society. He urged: 'the guerrilla fighter must have a degree of adaptability that will enable him to identify himself with the environment in which he lives, to become a part of it, and to take advantage of it as his ally to the maximum possible extent': Ernesto Che Guevara, *Guerrilla Warfare*, tr and ed Brian Loveman and Thomas M Davies Jr, (Bloomsbury Academic, 1997) 75.

<sup>18</sup> Lam and Clark (n 15) 413.

<sup>19</sup> Samira Shackle, 'Trojan Horse: the Real Story Behind the Fake "Islamic Plot" to Take over Schools', *The Guardian* (online, 1 September 2017) <<https://www.theguardian.com/world/2017/sep/01/trojan-horse-the-real-story-behind-the-fake-islamic-plot-to-take-over-schools>>. This is not an exaggerated claim, or 'straw man' set up for the purposes of argument. Fears of cultural subversion and extremism in the UK in 2014 led to the schools inspectorate, OFSTED, carrying out emergency investigations into 21 schools in Birmingham. See 'Forgotten Investigation, Emails, Offer Insight into IIIT Probe', *The Investigative Project on Terrorism News* (online, 3 August 2008) <<https://www.investigativeproject.org/737/forgotten-investigation-emails-offer-insight-into-iiit-probe>>. A similar fear in the US of Islamic/Islamist think-tanks, led to an FBI investigation of the International Institute for Islamic Thought ('IIIT'). For further discussion of IIIT, see below n 42 and accompanying text.

<sup>20</sup> See also Mario Peucker and Shahram Akbarzadeh, *Muslim Active Citizenship in the West* (Routledge, 2014).

focus on Zaytuna College in California,<sup>21</sup> the first Muslim Liberal Arts College in America.<sup>22</sup> Borrowing from both Menski and Yilmaz,<sup>23</sup> I demonstrate that Zaytuna educators are more like ‘kite flyers’<sup>24</sup> than guerrilla subversives: skilful navigators who purposefully pursue distinct educational strategies that attempt to balance competing norms of cultural, legal, social, political, and religious values. The kite stands as a metaphor for the plural forces and competing tensions which the flyer must skilfully navigate to avoid crashing.<sup>25</sup> Far from subverting the educational system for covert ‘Islamist’ purposes, I argue Zaytuna transparently recognises the state and ‘flies their kite’ by an ‘active incorporation of norms’<sup>26</sup> thereby properly enabling state accommodation.

The data for this case study has been drawn from site visits to Zaytuna College and from semi-structured interviews conducted between December 2022 and January 2023 with Zaytuna’s founders, administration, and teaching faculty. I begin, however, with a discussion of the contested notion of Islamic higher education, why it is important for Muslims, and to what extent it is consistent with an education in the West.

## 2. ISLAMIC HIGHER EDUCATION

The concept of ‘higher education’ and the justification for the university in the West have been contested and considerably expanded in the last 100 years.<sup>27</sup> The main divide, however, has been between those who see higher education in vocational terms, preparing and equipping the next generation with the knowledge and skills for the workplace, with the more liberal and transformational understanding that it is for developing individual students to take their place in society.<sup>28</sup> This dual civic purpose has not been lost in the Muslim world either, and has provided the main reason for the shift in educational strategy of the International Islamic University of Malaysia (‘IIUM’) in the early 2000s.<sup>29</sup>

Nevertheless, what distinguishes traditional ‘Islamic’ higher education from the ‘Western’ is that its ultimate purpose is not civic but religious. Syed Muhammad Naquib al-Attas clarifies:

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<sup>21</sup> This case study is part of my broader study on ‘Practical Sufism’ and Islamic educational networks carried out at the University of Oxford; partially funded by a research grant from the University of Sydney. The interviews for this study received ethics clearance from the University of Oxford (Research Ethics Approval Ref No: R68827/RE001).

<sup>22</sup> See generally Scott Korb, *Light without Fire: The Making of America’s First Muslim College* (Beacon Press, 2013). For an analytical and academic discussion: see N Spannaus and C Pooya Razavian, ‘Zaytuna College and the Construction of an American Muslim Identity’ in Masooda Bano (ed), *Modern Islamic Authority and Social Change: Volume 2, Evolving Debates in the West* (Edinburgh University Press, 2021) 39.

<sup>23</sup> I Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Taylor & Francis, 2005) 26.

<sup>24</sup> Menski, ‘European Muslims as Skilled Kite-Flyers’ (n 13), 27–8.

<sup>25</sup> Ibid.

<sup>26</sup> Gordon R Woodman, ‘Customary Law in Common Law Systems’ (2001) 32(1) *IDS Bulletin* 28, 29.

<sup>27</sup> See RY Chan, ‘Understanding the Purpose of Higher Education: An Analysis of the Economic and Social Benefits for Completing a College Degree’ (2016) 6(5) *Journal of Educational Policy, Planning and Education* 1

<[https://scholar.harvard.edu/files/roychan/files/chan\\_r\\_y\\_2016\\_understanding\\_the\\_purpose\\_aim\\_function\\_of\\_higher\\_education\\_jeppa\\_65\\_1-40.pdf](https://scholar.harvard.edu/files/roychan/files/chan_r_y_2016_understanding_the_purpose_aim_function_of_higher_education_jeppa_65_1-40.pdf)>.

<sup>28</sup> M Tight, ‘The Idea of the University: Towards a Contemporary Formulation’ (2024) 46(1) *Journal of Higher Education Policy and Management* 48, 48.

<sup>29</sup> See SS Abdallah, S Hussein and NA Hisham ‘The Experience of Islamization of Knowledge at the International Islamic University Malaysia: Successes and Challenges’ (2017) *New Intellectual Horizon in Education* 91, 95 <[http://irep.iium.edu.my/14493/1/The\\_Experience\\_of\\_Islamization\\_of\\_Knowledge.pdf](http://irep.iium.edu.my/14493/1/The_Experience_of_Islamization_of_Knowledge.pdf)>.

[T]he concept of education peculiar to Islam ... we ... define as: recognition and acknowledgement, progressively instilled into ... man, of the proper places of things in the order of creation, such that it leads to the recognition and acknowledgement of the proper place of God in the order of being and existence.<sup>30</sup>

Rather than prioritising the needs of the state and civic responsibilities, traditional Islamic higher education, as al-Attas defines it, positions God at the apex of its priorities. Further, in terms of developing students, according to al-Attas, Islamic higher education seeks not to make a ‘good citizen’ but ‘a good man’ which is modelled on the knowledge and right actions of the ‘Perfect Man’ (*al-insān al-kāmil*), Prophet Muhammad.<sup>31</sup> While on the one hand this might look highly subversive to the secular state, Al-Attas argues that by making individual ‘good men’ and instilling the virtues and discipline that entails, an Islamic higher education *indirectly* makes ‘good citizens’ and a better society as a result. This qualification notwithstanding, the Islamic notion of higher education is particularly problematic in the western context as the state, and its liberal educational institutions, are not only not associated with Islam, but they are also not associated with religion nor even in the business of dictating what amounts to a ‘good man’ (or ‘woman’). The liberal state is secular and neutral between life choices.

Traditional Islamic higher education has been associated with the *madrasah*, an institution of central importance in Muslim societies as they interpreted the religious texts helping to define virtues and what it meant to be a good Muslim.<sup>32</sup> Their ancient seats of learning (such as the Azhar in Egypt and the Qarawiyyin in Fes) were also, in many respects, the forerunners of the modern university.<sup>33</sup> The contemporary image of the *madrasah*, especially in the West, however, is not favourable: backward, poorly managed, archaic (in content and pedagogy), unsuited to modern urban lifestyles (as found mostly in rural areas),<sup>34</sup> and reliant upon a religious personality rather than the systemic quality of instruction.<sup>35</sup> In modern times, they have also been associated, though lacking direct evidence, with terrorism and militant tendencies.<sup>36</sup>

Since the 1970s and 1980s, Muslim scholars and reformers have worked on addressing the weaknesses and shortfalls in Islamic higher education,<sup>37</sup> not in the historical *madrasah* specifically, but conceptually and in establishing new institutions. Malaysia has been at the forefront of these developments and in the 1980s, with the assistance of an international consortium, established the International Islamic University of Malaysia. Its educational curricula were initially based on the ‘Islamization of Knowledge’: an educational agenda that

<sup>30</sup> Syed Muhammad Naquib al-Attas, *The Concept of Education in Islam: A Framework for an Islamic Philosophy of Education* (International Institute of Islamic Thought and Civilization, 1999) 21.

<sup>31</sup> *Ibid* 22–3.

<sup>32</sup> Masooda Bano, ‘Engaging Madrasas to Meet the EFA Targets: Evidence from South Asia’ (Conference Paper, International Conference on Islamic Economics and Finance, 2011) 1.

<sup>33</sup> See G Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh University Press, 1981).

<sup>34</sup> See MM Wijaya, ‘Islamic Education Model in Madrasah in the Perspective of Islamic Education Philosophy’ (2021) 8(1) *Ar-Raniri International Journal of Islamic Studies* 1, 1.

<sup>35</sup> A Khan, ‘Sunni Higher Education: Can it be Liberal?’ in H Daun and R Arjmand (eds), *Handbook of Islamic Education* (Springer, 2018) 514. See also Grewal and Coolidge (n 4) 256.

<sup>36</sup> Much of this impression has derived from *madrasahs* in South Asia. This is despite the fact there remains no direct link between terrorism and the *madrasah*: see MW Malla, ‘Madrasas and Extremism’ in R Lukens-Bull and M Woodward (eds), *Handbook of Contemporary Islam and Muslim Lives* (Springer, 2021) 1171.

<sup>37</sup> A Sahin, ‘Critical Issues in Islamic Education Studies: Rethinking Islamic and Western Secular Values of Education’ (2018) 9(11) *Religions* 335.

sought to re-assert Islamic identity and intellectually re-build Muslim societies in the post-colonial context.

Although it was not always clear what the ‘Islamization of Knowledge’ meant,<sup>38</sup> two distinct approaches and conceptions emerged. The first, following Syed Muhammad Naquib al-Attas,<sup>39</sup> sought a clear distinction between Islamic and secular worldviews. He argued Muslim education had become dominated and confused by secular viewpoints and that a process of de-westernisation and de-secularisation was required. This did not entail any reform of the traditional religious disciplines but rather the ‘Islamization’ of the intellectual, natural, and philosophical sciences. They would be purged of their secularity, and subsequently infused with an Islamic worldview.<sup>40</sup> The second approach, proposed by Ismā‘īl al-Fārūqī<sup>41</sup> and subsequently developed by his think-tank, the International Institute for Islamic Thought (‘IIIT’),<sup>42</sup> was more integrative and reformist in approach. It generally accepted western knowledge and disciplines ‘as is’ but sought to infuse them with extracted Islamic principles. Drawing upon Salafist ideas, they also sought to bring greater flexibility and adaptability to Islamic law, with an interpretative shift from established rules to broad principles and values.

Over the next two decades, these ideas were tested at IIUM, transforming the conventionally separate study of Islamic and secular sciences through integrated curricula and juxtaposed study of ‘western’ with the Islamic. There were advantages and disadvantages to this accommodation, especially in the context of a pluralistic legal system such as Malaysia’s. Practically speaking, students benefitted by graduating with double degrees enabling them to provide services not just within the narrow confines of Islamic communities but also within the broader society. This enabled Law graduates, for example, armed with an LLB and an LLB (*Sharī‘ah*), to practice in both the *Sharī‘ah* and the Civil Law courts. Also, and from a political perspective, the government now had a new cadre of officials more inclined and willing to implement their reformist legislative agenda.

Intellectually and educationally, however, the ‘Islamization of Knowledge’ program was problematic. First, it required students to master inter- and multi-disciplinary knowledge across a plurality of languages and contexts. While desirable (from an Islamic perspective), it

<sup>38</sup> This was a controversial term that seemed to imply that knowledge, which was God-given, needed to be made ‘Islamic’: see Fazlur Rahman, ‘Islamization of Knowledge: A Response’ (1988) 5 *American Journal of Islamic Social Sciences* 196. While this made sense for the social sciences and humanities, it was argued it had no application to the revealed religious sciences that, by definition, were ‘Islamic’. See also R Hashim and I Rossidy, ‘Islamization of Knowledge: A Comparative Analysis of the Conceptions of al-Attas and al-Faruqi’ (2000) 8(1) *Intellectual Discourse* 19; A Sahin (n 37) 335.

<sup>39</sup> Syed Muhammad Naquib al-Attas, *The Concept of Education in Islam: A Framework for an Islamic Philosophy of Education* (International Institute of Islamic Thought and Civilization, 1999). This book is an aggregation and development of his ideas originally set out in a paper presented in 1977 at the First World Conference on Muslim Education held in Mecca from 31 March to 8 April 1977. This small book was originally completed in 1980 and then reprinted by the International Institute of Islamic Thought and Civilization in 1999.

<sup>40</sup> Ibid.

<sup>41</sup> See Ismā‘īl R al-Fārūqī, *Islamization of Knowledge: General Principles and Workplan* (International Institute for Islamic Thought, 1982).

<sup>42</sup> The International Institute for Islamic Thought (‘IIIT’) was set up by Ismā‘īl R al-Fārūqī in 1981, in Herndon Virginia, USA. It also has several offices and branches throughout the world: see ‘Offices & Representatives’ *International Institute for Islamic Thought* (Web Page, 2025) <<https://iiit.org/en/offices-affiliates/>>. In addition to International Islamic University of Malaysia, al-Fārūqī’s ideas were also foundational to the American Islamic College (‘AIC’) in Chicago following its establishment in 1981, but the influence waned subsequent to his violent death in 1986 and financial difficulties experienced by the college. In 2010, the AIC took a different intellectual direction when its leadership was assumed by the Turkish Gülen Movement: see further Grewal and Coolidge (n 4) 257–58.

was over ambitious and did not account for the capacity and motivation of students to manage such a packed curriculum. Secondly, IIUM did not have sufficient teaching resources and could not recruit the necessary calibre of staff to implement its grandiose plans. The Islamization of Knowledge university education agenda was eventually deemed a failure and abandoned in favour of more practical approaches.<sup>43</sup>

Nevertheless, the underlying ideas of addressing secularism and replacing or juxtaposing its perspectives with Islamic worldviews within educational curricula remain influential. One of the most prominent current thinkers and Islamic scholars in this subject is Shaykh ‘Abdullah bin Bayyah, President of the Humanities Division and Chair of the Supreme Academic Council at the recently established Muhammad bin Zayed University for the Humanities (‘MBZUH’) in the UAE. In conference speeches given in 2022,<sup>44</sup> he criticised the continuing fragmented nature of Islamic education and the strict separation between the ‘Islamic’ and ‘Western’ which, he said, had only served to produce a ‘sick state of narrow-mindedness, exotericism, literalism, backwardness and intolerance’.<sup>45</sup>

Bin Bayyah’s reforms of Islamic Higher Education focus instead on a theorised Islamic accommodation with and integration of human sciences and philosophy. The post-colonial focus and emphasis on resistance, identity, and separatism that characterised the Islamization of Knowledge (at least in the conception of Syed Muhammad Naquib al-Attas) is replaced with a civilisational enterprise ‘based on building bridges of connection between fields of knowledge and cultural spaces.’<sup>46</sup> The proposed educational agenda seeks ‘a comprehensive perspective that encompasses the diversity of sciences and brings together their disparities coherently and within a unified epistemology: through interdisciplinarity, multi-disciplinarity, and trans-disciplinarity.’<sup>47</sup>

Bin Bayyah suggests a pluralistic and diverse educational curriculum that represents ‘an alliance of virtue and shared universal concerns.’<sup>48</sup> Islamic education, therefore, is not only to explain the textual and received Islamic tradition but also to engage constructively with the religious beliefs and secular ideas of the contemporary society in which it inhabits. This is not theosophy or perennialism but rather a normative dialogic approach to inter-faith relations.<sup>49</sup> The emphasis on inclusion in the educational space is to open the channels of communication and to further the causes of peace.<sup>50</sup>

Bin Bayyah’s program of Islamic higher education deploys the rational sciences within a comprehensive Islamic frame, but is traditional in its deference to the scholastic heritage of the

<sup>43</sup> A Sahin (n 37) 3. Acknowledging its troubled legacy, even the IIIT no longer uses the terminology of ‘Islamization of Knowledge’, preferring the ‘integration’ of knowledge through Islamic principles: see ‘About Us’ *International Institute for Islamic Thought* (Web Page, 2025) <<https://iiit.org/en/home/>>.

<sup>44</sup> *Al-Kalimat al-Ta’ṭīriyyat, Mu’tamar al-Akhlāq wa al-Falsafah* (Keynote Speech, 17 November, Conference on Ethics and Philosophy, MBZUH, Abu Dhabi, 17–18 November 2022); *Al-Kalimat al-Ta’ṭīriyyat, Mu’tamar al-Dirāsāt al-Islāmiyyah* (Keynote Speech, Conference on Islamic Studies, MBZUH, Abu Dhabi, 21 November 2022). These speeches were delivered in Arabic. There is an official English translation of the former speech, but not of the latter (translations are my own).

<sup>45</sup> *Ibid* (Keynote Speech, 17 November 2022).

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid*. This is clearly an extension of the ‘Alliance of Virtue’ and the law-focused work conducted at the 2019 Peace Forum (Forum for Peace in Muslim Societies, Abu Dhabi, 9-11 December 2019).

<sup>49</sup> Interview with Zeshan Zafar (Salim Farrar, Zoom, 13 December 2022) (‘Interview with Zeshan Zafar’).

<sup>50</sup> Abdullah bin Bayyah, (Keynote Speech, 17 November 2022).

past (*al-turāth*).<sup>51</sup> In contrast to Salafist notions of renewal in which revealed texts are detached from tradition to promote fundamental ‘correction’ (*iṣlāh*),<sup>52</sup> this educational renewal is ‘precedent-oriented’, in which not just the text and scripture but also schools (*al-madhāhib*) and the learned imams of the past are accorded due weight and the tradition affirmed.<sup>53</sup> Bin Bayyah states:

We must instill in our students...that the scientist or philosopher does not think alone, but rather through ancient traditions of knowledge, and in constant dialogue with those who preceded him in this field.<sup>54</sup>

Bin Bayyah’s specific reforms, the details of which are beyond the confines of this article, have focused on new educational institutions in the Muslim world, and are yet to be fully operationalised. However, his integrationist and civilisational approach to Islamic higher education has already been implemented in the West by his student, Shaykh Hamzah Yusuf Hanson, at Zaytuna College in California. In the following section, I examine Zaytuna College in detail as a case study of Islamic higher education in the West and explore to what extent it has been able to successfully balance and accommodate apparently competing normative orderings of Islamic and Western higher education. But I first contextualise this analysis with a discussion of Islamic higher education in the West and examine why separate Muslim educational institutions are increasingly being deemed necessary (by Muslims).

### 3. ISLAMIC HIGHER EDUCATION IN THE WEST

In contrast to the normative Islamic higher education as conceived by Syed Naquib al-Attas, Islamic higher education in the West has served the interests more of the secular state than of producing ‘good men’ or ‘good Muslims’. For most of the last century, Islamic higher education has been taught within general universities as ‘Islamic Studies’ and as a sub-discipline of ‘Oriental Studies’.<sup>55</sup> Far from an academic discipline centring on Muslim perspectives, Oriental Studies was ‘conceptualised or conceived of first and foremost as an intellectual facet of Western civilisation’s engagement with non-Western peoples, societies and civilisations.’<sup>56</sup> In other words, Islamic Studies reflected western culture and the biases and critical frames embedded within it. In the modern period, Islamic Studies has moved away from and become more aware of latent biases. But for the most part, Islamic Studies is still studied as an element of other disciplines such as Areas Studies, Political Science, Sociology, Anthropology, Theology, and Religious Studies rather than as an integral discipline in its own right.<sup>57</sup> Moreover, as noted by Kamali and Nalla, Islamic Studies in the West ‘is rarely

<sup>51</sup> The reference to the *turāth* does not necessitate a normative canon, but rather a historical repository of texts transmitted from one generation to the next. It may include reliable and authentic works but also those that are not intended to be acted on or followed. It may even include works deemed heretical (within the Sunni tradition). It should be distinguished, therefore, from *taqlid*, which implies both normativity (as works have been placed within a hierarchy of authenticity and reliability) and adherence. See further Walaa’ Quisayy, *Neo-Traditionalism in the West* (Edinburgh University Press, 2023) and her cited interview with Ḥabīb ‘Alī al-Jifrī, who understood the word ‘tradition’ as the ‘authentic school’ (*madrasa al-aṣīla*), at 37-38.

<sup>52</sup> Mohamed Hashim Kamali, *Tajdid, Islah and Civilisation Renewal in Islam* (IIIT Occasional Papers Series 27, 2018) 14.

<sup>53</sup> *Ibid* 24–5.

<sup>54</sup> Keynote Speech, (17 November 2022, above n 46).

<sup>55</sup> For a critical and historical account of approaches towards the study of Islam: see M Daneshgar and AW Hughes (eds), *Deconstructing Islamic Studies* (Harvard University Press, 2020).

<sup>56</sup> H Rane, A Duderija and J Mamone, ‘Islamic Studies in Australia’s Higher Education Sector’ (2021) 6(1) *Australian Journal of Islamic Studies* 1, 5.

<sup>57</sup> *Ibid* 5–6. See also A Sahin (n 37) 2.

presented as a religion, and all that this implies.’<sup>58</sup> To this, of course, we have to add the concerns with extremism and ‘de-radicalisation’ which continue to cast their shadows and to give the impression that the study of Islam in western institutions is to control and monitor rather than to facilitate the development of individual Muslims, as Muslims, and their contributions to western society.

Scepticism towards Islamic Studies in western universities has led Muslims in the west to call for their own institutions so that they can pursue advanced Islamic studies in an environment supportive rather than critical of their faith. Many have preferred to attend unaccredited Islamic seminaries rather than state universities. In the UK, for example, more than 25 such Islamic seminaries now exist,<sup>59</sup> often supported by transnational Muslim movements, of various orientations, where Muslims can study classical Islamic sciences (eg Qur’an, Hadith, and Fiqh). But this development is problematic in several respects. From the perspective of the state, as there is generally no access to these institutions, there is no independent oversight of their courses or curricula. The Islamic seminary could well comprise ‘guerrilla subversives’ teaching particular interpretations of texts that support militant activity, violent extremism, or other matters that are contrary to or otherwise undermine public policy. From a state educationalist perspective, it is also unclear what, if any, critical, rational, and civilisational skills are taught beyond religious dogma and how this form of education would suit living in a democratic, multicultural, and secular state. From the perspective of Muslim communities, although the Muslims develop individually and spiritually, as the Islamic seminary is not part of a mainstream education, its graduates lack formal qualifications and so face disadvantages when it comes to seeking employment in the jobs market. Rather than integrating Muslims into western societies, the proliferation of Islamic seminaries thus appears to isolate them and further their marginalisation.

These problems have energised Muslim intellectuals living in the West in recent decades and there has been a move towards Islamic institutions seeking accreditation<sup>60</sup> and a more integrative approach between Western and Islamic models of education. In Australia, for example, we are witnessing the emergence of hybrid institutions, such as the Islamic Sciences and Research Academy (‘ISRA’) and its Islamic Studies courses conducted through the Centre for Islamic Studies and Civilisation at Charles Sturt University,<sup>61</sup> but there is no independent accredited Islamic college or university. The following section provides a case study of one of the most innovative attempts to establish such an institution in the United States and charts how its founders, teachers, and administrators have sought to bridge the Liberal West/Islamic epistemic and pedagogic divide.

I have chosen Zaytuna primarily for two reasons: first, because of its ‘civilizational approach’ that projects Islam not just in terms of theological texts, but also ‘in the light of the creative spirit that it has inspired since its revelation: a spirit that led to the birth of a dynamic Islamic civilization’;<sup>62</sup> and secondly, because of its standing among other Islamic colleges in the world

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<sup>58</sup> MH Kamali, and Z Nalla, ‘The Teaching of Islam in Western Universities: Reflections and Impressions’ in P Morris et al (eds), *The Teaching and Study of Islam in Western Universities* (Routledge, 2014) 65, 65.

<sup>59</sup> A Sahin (n 37) 18.

<sup>60</sup> See Stanton, above n 1.

<sup>61</sup> See ‘Centre for Islamic Studies and Civilisation’ *Charles Sturt University* (Web Page, 2025) <<https://arts-ed.csu.edu.au/centres/cisac/home>>.

<sup>62</sup> M Bano (ed), *Modern Islamic Authority and Social Change: Volume 1: Evolving Debates in Muslim Majority Countries* (Edinburgh University Press, 2021) 3.

and the inspiration it has provided.<sup>63</sup> In addition, America's common law legal system, federal legal structure, constitutional guarantees of freedom of religion and equality, as well as its multicultural and secular educational contexts make the case study suitable for comparative purposes in similarly situated countries, like Australia. It should provide insights, therefore, on accommodating Islamic higher education institutions also in Australia.

#### 4. ZAYTUNA COLLEGE, A CASE STUDY

##### (a) Backstory, Concept, and Founding

The 'civilizational approach' of Zaytuna College is based on the vision and concept of Shaykh Hamza Yusuf Hanson (hereinafter, "Hamza Yusuf"). That vision seeks to 'renovate'<sup>64</sup> and restore intellectual discussion and reasoning to contemporary Islamic Studies while remaining within the accepted and transmitted understandings of Sunni dogmas<sup>65</sup> and frames (*al-naql*). It consists of two aspects: first, the identification and recovery of the totality of the Islamic heritage (*al-turāth*) with a focus on the Islamic scholars' 'lost' engagement with metaphysics; and second, the attempt to make 'Traditional Islam'<sup>66</sup> relevant to contemporary western society through social engagement. In the words of Aftab Malik, one of Hamza Yusuf's students:

I understood the mission of Shaykh Hamza ... was to revive a classical understanding that would elevate Muslims: spiritually, intellectually, and philosophically. It would provide us with an intellectual rigour and a spiritual humility that would reignite religious creativity.<sup>67</sup>

For Hamza Yusuf, the way to dispel the perceived 'mis-match' or cultural dissonance of being Muslim while living in the West has been to link Islam's scholarship on metaphysics to and indigenise it with the West's (and specifically America's) study of the 'Liberal Arts'. He comments:<sup>68</sup>

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<sup>63</sup> This includes the Ma'din Academy in Kerala, India, established by Sayyid Ibrahim Khaleel al-Bukhari. According to Feraidoon Mojadedi, Ma'din is explicitly based on the Zaytuna model. See Salim Farrar, 'Interview with Feraidoon Mojadedi', Zoom, 5 June, 2023 ('Interview with Feraidoon Mojadedi'). The Ma'idin Academy website proudly proclaims it is both traditional and modern, and founded 'to accelerate universal endeavors in pursuit of achieving world peace, sustainable development and educational excellence by translating knowledge into social-minded action' <<https://madin.edu.in/>>. Zaytuna has also influenced Al-Qadir University in Pakistan: see <<https://alqadir.edu.pk/team/#faculty>>. Zaytuna shares approaches with Dar al-Hadith al-Hassaniyyah in Rabat, Morocco, and the MBZUH, both of which are guided under the auspices of Shaykh Hamza's Mauritanian shaykh, Shaykh 'Abdullah bin Bayyah.

<sup>64</sup> This explains the title of the Zaytuna College journal, *Renovatio*, which invites diverse philosophical and theological discussion from inside as well as beyond the Islamic communities: see *Renovatio*, Zaytuna College (Web Page, 2025) (<<https://renovatio.zaytuna.edu/>>).

<sup>65</sup> Interview with Hamza Yusuf (Salim Farrar, Zoom, 5 December 2022) ('Interview with Hamza Yusuf'). Hamza Yusuf affirmed during the interview: 'we restore metaphysics because you need defenders of the religion, and they must be intellectual defenders. Blood is no argument'.

<sup>66</sup> 'Traditional Islam' is a term endorsed by a group of Western Muslim scholars, including Hamza Yusuf, representing a minimum set of beliefs of classical theology, adherence to one of the four schools of Sunni law, transmission-based scholarship, traditional teaching methodologies, Sufism, and social engagement: see further, S Hamed, *Sufis, Salafis and Islamists: The Contested Ground of British Islamic Activism* (Bloomsbury Publishing, 2016) 81.

<sup>67</sup> Interview with Aftab Malik (Salim Farrar, Quakers Hill, Sydney, 20 May 2023) ('Interview with Aftab Malik').

<sup>68</sup> Interview with Hamza Yusuf (n 65).

You know Van Doren<sup>69</sup> wrote a poem about the seven Liberal Arts<sup>70</sup> — and he called them the ‘Seven Sleepers’<sup>71</sup> and likened them to the ‘*Aṣḥāb al-Kahf*’ — they wake up after 300 years and people re-discover them. I feel fortunate that I did have some role in helping people discover these things, but I got them from my father. And when I went to study in the Islamic world, especially with the Mauritians, I was like, ‘this was all the stuff my father told me we should learn’. So, I was kind of struck by that fact and that these are the same traditions. The Liberal Arts tradition is as much Islamic as it is Western. That was a big eye-opener for me to see that.

The reference to Van Doren and ‘The Seven Sleepers’ is ingenious. Hamza Yusuf not only locates a cultural and educational link to the secular educational curriculum of the Romans and Greeks, a curriculum that the West (since the Renaissance) has generally claimed as its own, exclusive cultural inheritance, but he also draws a subtle *religious* link between Islam and America’s Christian and Bible communities. The story of the ‘Seven Sleepers of Ephesus’ who flee to a cave to avoid persecution (250 CE) and then ‘re-awaken’ some three hundred years later, affirming the resurrection of the dead, though not present in extant texts of the Bible, is well-known in Christian teachings. The Arabic reference to the ‘*Aṣḥāb al-Kahf*’<sup>72</sup> — the Companions of the Cave — was not made by Van Doren (he was not Muslim nor referencing Qur’anic text), but it is Hamza Yusuf pointing out a common reference point between Muslims and Christians and him indigenizing Islamic tradition within America’s predominant religious community.

The drawing of linkages between the ancients and the present, and between the Muslim East with the Christian West, represent Hamza Yusuf’s attempt to make Islamic scholarship relevant and *part* of the West as much as it is of the Islamic ‘East’. It also underpins the establishment and development of Zaytuna College.

Zaytuna College was established in recognition that the system of learning and education as currently applied in the West was not able to meet the needs and requirements of Muslims.<sup>73</sup> Part of the problem has also been the complexity of re-working Islamic higher education, as I have already discussed with the ‘Islamisation of Knowledge’, and the shortage of elite Muslim scholars to perform this task.<sup>74</sup> By and large, excellent students have been diverted to the sciences and away from the humanities, depriving the tradition of the potential of its most agile minds.<sup>75</sup> The other difficulty has been the religious/secular divide and the relegation of a religious ‘rump’ of students to a seminary. ‘I think one of the biggest problems with Islamic education’, Hamza Yusuf states, ‘is that it has become a seminary education, whereas the ‘*ulema*’<sup>76</sup> studied everything. They studied medicine, music, literature, philosophy, and mathematics. They all studied Euclid ... The Muslims never had a solely religious education.’<sup>77</sup>

<sup>69</sup> Mark Van Doren (1894-1972) was an American poet, writer, and teacher.

<sup>70</sup> This refers to the trivium (Grammar, Logic and Rhetoric) and quadrivium (Geometry, Arithmetic, Astronomy and Music).

<sup>71</sup> See Mark Van Doren, *The Seven Sleepers and Other Poems* (Henry Holt, 1944).

<sup>72</sup> The story of the Companions of the Cave is encapsulated in *Surah al-Kahf*, ch 18 of the *Qur’an*.

<sup>73</sup> See above Interview with Hamza Yusuf (n 65).

<sup>74</sup> Interview with Hamza Yusuf (n 65).

<sup>75</sup> Ibid.

<sup>76</sup> This is the Arabic plural of ‘alim’, meaning religious scholar.

<sup>77</sup> Interview with Hamza Yusuf (n 65). This is historically accurate. In the Ottoman Empire, Mehmet II, for example, helped plan the curriculum of Ottoman schools which comprised: *fiqh*, geometry, geography, astronomy,

For Hamza Yusuf, the task has been to combine and integrate the study of disciplines within a holistic, American, and Islamic understanding. That has meant restoring the ‘Great Books’ and Liberal Arts tradition through an Islamic frame. As this could not be achieved through the current educational system and colleges available, he has argued the solution is to ‘build our own educational institutions because we have to educate our own community’;<sup>78</sup> a crucial element of the need for greater Muslim ‘self-governance’ and their ‘mobilisation of social capital’.<sup>79</sup>

The foundations of Zaytuna College were laid in early 1995 through an Islamic Studies School set up in Hayward, California, run by the Afghan American community.<sup>80</sup> Hamza Yusuf was invited to give classes at their weekend school, teaching classes on Arabic, the Qur’ān, Qur’anic interpretation (*tafsīr*), Prophetic Biography (*sīrah*), Creed (‘*aqīdah*’), and Islamic Law (*fiqh*) — subject matter common to all *madrasahs* — but structured according to his understanding of ‘Traditional Islam’ and the central concepts: ‘*Islām*, *Imān* (Faith) and *Ihsān* (Goodness)’.<sup>81</sup> It was here that the ‘Zaytuna Institute’<sup>82</sup> was formed in 1996, and where Shaykh Hamza recorded the 24 cassettes on ‘The Life of the Prophet Muḥammad’<sup>83</sup> as well as translating and commenting on ‘The Purification of the Hearts’ (*Maṭharat al-Qulūb*),<sup>84</sup> a poem by the Mauritanian scholar Imām al-Mawlūd al-Ya‘qūbī al-Musāwī, which is a practical text on Sufism based on Imām al-Ghazālī’s *Ihyā‘ ‘Ulūm al-Dīn*. Even at this early stage, however, the Hamza Yusuf canon was broader than the usual *madrasah* and prefaced the ‘Great Books’ approach he would adopt with Zaytuna College. This included, arguably, the first great work in anthropology and sociology, Ibn Khaldun’s *Al-Muqaddimah*, as well as texts not written by Muslims, such as Sun Tzu’s ‘The Art of War’.<sup>85</sup>

Between 2003 and 2008, the Zaytuna Institute operated a pilot seminary program (with four students) which retained Hamza Yusuf’s philosophy but was taught predominantly by Imam Zaid Shakir (Zaytuna’s second co-founder). But for Shaykh Hamza, an ‘ad hoc’ seminary was never the objective. He wanted their students to have a broad-based, holistic education so that they could form a ‘spiritual and intellectual leadership’.<sup>86</sup> So In 2007, with the collaboration of Dr Hatem Bazian (Zaytuna College’s third co-founder), a Professor of Islamic Studies at Berkeley and long-time contributor to Zaytuna Institute’s Arabic language program, a decision was made to convert the Zaytuna Institute from a seminary into a College, and to make a move from the Bay Area to Berkeley.

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medicine, and ‘the art of speaking well and kindly’: see Diana Darke, *The Ottomans: A Cultural Legacy* (Thames & Hudson, 2022) 30.

<sup>78</sup> Interview with Hamza Yusuf (n 65).

<sup>79</sup> Ibid. See Hamza Yusuf and Zayd Shakir, *Agenda to Change Our Condition* (Zaytuna Institute, 2<sup>nd</sup> ed, 2007). See also Hamza Yusuf and Zayd Shakir, ‘Civic Involvement: An Islamic Imperative’ (2007) 20 *Islamic Magazine* 84, 86.

<sup>80</sup> Interview with Feraidoon Mojadedi (Salim Farrar, Zoom, 5 June 2022) (‘Interview with Feraidoon Mojadedi’).

<sup>81</sup> This is taken from the Hadith Jibril (Gabriel), narrated by Imam Muslim, in which the Prophet was asked about the ‘*arkān al-Islām*’ (Islamic fundamentals). It is common for the ‘Traditional Islam’ scholars to commence their classes and teaching with this hadith.

<sup>82</sup> Interview with Feraidoon Mojadedi (n 63). The name ‘Zaytuna’ was chosen in emulation of the Islamic Zaytuna University in Tunisia. Originally, Shaykh Hamza had wanted to call the Institute, the Qarawiyyin, after the famous institution in Fes, Morocco, but it was felt westerners would not be able to pronounce it.

<sup>83</sup> Hamza Yusuf, *The Life of the Prophet Muḥammad* (Sandala, 1998).

<sup>84</sup> Hamza Yusuf, *Purification of the Heart: Signs, Symptoms, and Cures of the Spiritual Diseases of the Heart* (Sandala, 2012).

<sup>85</sup> Interview with Hamza Yusuf (n 65).

<sup>86</sup> Ibid.

Zaytuna College was officially launched in 2009, and initially rented classrooms from the American Baptist Seminary of the West, close to the University of California, Berkeley, opposite the large homeless population in Berkeley's People's Park.<sup>87</sup> It stayed there until 2014 when the College moved to Berkeley's northside. The College's 'Lower Campus' is now found at 2401 Le Conte Avenue and 1712 Euclid Avenue, in the area nicknamed 'Holy Hill' as it houses a high concentration of religious seminaries. In 2017, Zaytuna College purchased an additional two mansions in a nine-acre site, 2770 Marin Avenue, forming a new 'Upper Campus' that sits above Grizzly Peak, two miles from 'Holy Hill'. Since 2018, this has provided its main undergraduate teaching facilities, a residential block for female students, and administrative facilities. In recognition of Shaykh 'Abdullah Bin Bayyah's contribution and illustrating the continuing influence on Hamza Yusuf, the main teaching block, 'Bin Bayyah Hall', is named after him.

The new locations of Zaytuna College are important for symbolic and practical reasons. First, they are no longer in the city. The Upper Campus sits atop a steep hill overlooking the entire San Francisco Bay Area. Nestling in rolling green hills, it has an air of spirituality. In keeping with Shaykh Hamza's vision of an Islamised Liberal Arts, the location encourages contemplation of 'beauty': promoting both the classical Greek notion of the truly 'free' person as well as concepts of Islamic spirituality (the steep climb to get there and the location is reminiscent of a remote, North African Sufi mountain-lodge). Secondly, the location is strategic. As stated in the 'College Catalog', Holy Hill is also home to the Graduate Theological Union ('GTU'), the largest consortium of academic centres for the study of religion in the country, allowing students and staff 'an unparalleled opportunity to engage inside and outside the classroom with educational communities from different faith traditions'.<sup>88</sup> It provides what Dr Hatem Bazian refers to as a 'critical, intellectual mass'.<sup>89</sup> Practically, it has enabled Zaytuna and the GTU to share resources and contribute towards each other's courses,<sup>90</sup> demonstrate the integrated and inter-religious nature of its programs, as well as facilitate its official accommodation and accreditation under American state and federal laws.

(b) *Accommodation and Accreditation under U.S. Education Law*

State accommodation of 'Institutions of Higher Education', including private religious colleges, such as Zaytuna, is governed by US federal law, the *Higher Education Act 1965*. This delegates legal authorisation and the accreditation process to the local state educational authorities, here the Western Association of Schools and Colleges ('WASC'), to determine in accordance with their own guidelines and standards. Under section 101, the WASC can accredit a non-profit educational institution so long as the latter offers an approved bachelor's degree program to official school leavers 'or the recognized equivalent of such a certificate'. The recognition of 'equivalents' is important for institutions, such as Zaytuna, as many of their students are 'home-schooled' or otherwise have had an education in the private religious sector.<sup>91</sup>

<sup>87</sup> Korb (n 22). See also 'Muslim College Embraces Religion Over Controversy', *The Augusta Chronicle* (online, 11 September 2010) <<https://eu.augustachronicle.com/story/lifestyle/faith/2010/09/11/muslim-college-embraces-religion-over-controversy/14583271007/>>.

<sup>88</sup> 'College Catalog: Academic Year 2022–2023' *Zaytuna College* (printed version), 6.

<sup>89</sup> Hatem Bazian, cited in Korb (n 22) 14.

<sup>90</sup> The Graduate Theological Union ('GTU') for example, runs courses on Islam in collaboration with Zaytuna College: see 'Home Page', *GTU* (Web Page, 2025) <<https://www.gtu.edu/tags/zaytuna-college/>>.

<sup>91</sup> Hamza Yusuf actively dissuades American Muslims from sending their children to state schools. He states: 'You cannot send your kids to school — you will lose your children, generally. There are exceptions, but they

Accreditation is the locus for accommodation and provides the legal context in which the state both facilitates the free exercise of religion and avoids establishment. It facilitates free exercise by officially endorsing education programs drawn from and inspired by religious teachings, enabling graduates of that institution to use its degrees for further education elsewhere, as a basis for professional qualifications, and to assist in career development. It avoids establishment if the state body complies with the *Lemon* test.<sup>92</sup> Namely, if the functions and actions of the state body have a ‘secular purpose’, do not have the ‘primary effect’ of advancing or inhibiting religion, and do not result in ‘excessive entanglement’ between church and state.

The three criteria are clearly inter-related. If the function of the state body is deemed to be for a secular purpose, then it is highly likely the ‘primary effect’ of its activities will not be to ‘advance religion’<sup>93</sup> even though that may be the primary motivation of the educational institution itself.<sup>94</sup> In this instance, the accrediting body, the WASC, has ‘a secular purpose’: to scrutinise Zaytuna College’s programs and processes in accordance with the educational criteria set out by the ‘Handbook of Accreditation’<sup>95</sup> which applies to all ‘Institutions of Higher Education’, whether religious or secular. Further, their scrutiny relates to secular educational standards and quality assurance processes, not to approval or disapproval of substantive religious doctrines. Although its standards on academic freedom,<sup>96</sup> as well as on equity and inclusion,<sup>97</sup> may indirectly conflict with religious normative values and teachings, that is for the educational institution to navigate,<sup>98</sup> and in so doing, the WASC may avoid ‘excessive entanglement’. Some ‘entanglement’ and interference are unavoidable as accreditation requires a site visit and regular reviews, but this is minimised because accreditation applications must

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prove the rule’: see Interview with Hamza Yusef (n 66). On Hamza Yusuf’s role in popularizing home-schooling for Muslims, see Grewal and Coolidge (n 4) 254–255.

<sup>92</sup> *Lemon v Kurtzman*, 403 US 602 (1971).

<sup>93</sup> See *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559 (‘*DOGS case*’). In Australia, the High Court has upheld state funding of religiously affiliated schools, stating that this does not violate Australia’s Establishment clause (s 116 of the *Constitution*) where the funding is for ‘ordinary educational activities’ and not for any religious activities. The funding scheme in that case had the ‘secular legislative purpose’ of upgrading the quality and range of education in primary and secondary schools throughout Australia. According to Wilson J, ‘one effect was to advance religion appreciably but ... such a result [was] not central to the operation of the legislative scheme’: at 656.

<sup>94</sup> In any event, according to the US Supreme Court, it may not always be necessary to look for a ‘purely secular purpose’: see O’Connor J, in *Wallace v Jaffree*, 105 S Ct 2497 (1985) at 2504. See also McConnell’s discussion on whether this is a strict requirement: see McConnell (n 11) at 44.

<sup>95</sup> There are four standards set by the Western Association of Schools and Colleges (‘WASC’) as stated in their ‘2013 Handbook of Accreditation’ (rev November 2021) [a new Handbook was adopted in June 2023]. These are: Defining Institutional Purposes and Ensuring Educational Objectives (Standard 1); Achieving Educational Objectives through Core Functions (Standard 2); Developing and Applying Resources and Organizational Structures to Ensure Quality and Sustainability (Standard 3); and Creating an Organization Committed to Quality Assurance, Institutional Learning, and Improvement (Standard 4). See further, ‘The Core Commitments and Standards of Accreditation Overview’, *WASC 2013 Handbook of Accreditation Pt II* (Web Page, rev November 2021) <<https://www.wscuc.org/handbook2013/#understanding-the-wsuc-standards>>.

<sup>96</sup> ‘Standard 1: Defining Institutional Purposes and Ensuring Educational Objectives’, *WASC 2013 Handbook of Accreditation* (Web Page, rev November 2021) criterion 1.3 (‘Standard 1’) <<https://www.wscuc.org/handbook2013/#standard-1--defining-institutional-purposes-and-enduring-educational-objectives>>.

<sup>97</sup> ‘Standard 1: Defining Institutional Purposes and Ensuring Educational Objectives’, *WASC 2013 Handbook of Accreditation* (Web Page, rev November 2021) criterion 1.4 <<https://www.wscuc.org/handbook2013/#standard-1--defining-institutional-purposes-and-enduring-educational-objectives>>.

<sup>98</sup> Accreditation refusals on the grounds of discriminatory hiring and firing policies, especially where they conflict with established civil rights laws, would likely be upheld by the US courts. See also *Bob Jones University v United States*, 461 US 574 (1983).

be supported by a self-study containing evidence collected by the institution itself that shows how the accreditation agency's standards have been met.

Zaytuna College obtained accreditation for its undergraduate programs in 2015 and for its master's program in 2018.<sup>99</sup> Space does not allow for a detailed explanation how it met each of the four standards, but instead I will focus on Zaytuna's educational objectives and demonstrate how it has sought to achieve those objectives through its curricula, considering the civic values and secular purposes the accreditation standards express. I will argue there has been no surreptitious subversion of higher education standards, but rather a very skilful and subtle interweaving and integration of Islamic norms with Western educational traditions and practices.

Standard 1 defines institutional purposes and educational objectives and requires Zaytuna to demonstrate it has 'a clear and explicit sense of its essential values and character, its distinctive elements, its place in both the higher education community and society, and its contribution to the public good'.<sup>100</sup> Zaytuna illustrates this, first and foremost, through its stated 'Mission': 'to educate and prepare morally committed professional, intellectual, and spiritual leaders who are grounded in the Islamic scholarly tradition and conversant with the cultural currents and critical ideas shaping modern society.'<sup>101</sup> The college clearly identifies as Islamic but also locates itself within rather than external to contemporary civil society, and envisions its role is to produce leaders of that society. Blending and building upon the Syed Muhammad Naquib al-Attas notion of the 'good man'<sup>102</sup> with the role of the modern university in the West I set out earlier, Zaytuna seeks to provide modern (specifically American) society with holistically educated Muslims who have the intellectual and personality tools to contribute to the 'public good' and not operate solely within enclosed Muslim communities. As Hamza Yusuf states: 'I'm trying to create, produce, spiritual, intellectual leadership for the Muslim community of the US.'<sup>103</sup>

Holistic education in this context entails the integration of a broad-based and interdisciplinary 'Liberal Arts' education with the 'comprehensive studies' (*dirāsāt jāmi'ah*) found in Muslim civilisation.<sup>104</sup> *Dirāsāt jāmi'ah*, as Zaytuna College and Shaykh Hamza Yusuf define it, is academic ecumenicism that is both inter-faith and intra-faith but based on a Sunni understanding. Dr Jawad Qureshi, Zaytuna's then Director of Graduate Studies, comments:

I think Zaytuna has its own form of ecumenicism. It's rooted in a kind of conception of the 'Islamic tradition' writ-large with an interest in the intellectual tradition and with its grounding in Sunnism ... Our ecumenicism is also reflected in that we see Islam is part of this bigger Abrahamic religions' meeting (with)

<sup>99</sup> See 'Accreditation', *Zaytuna College* (Web Page, 2025) <<https://zaytuna.edu/accreditation>>.

<sup>100</sup> 'Standard 1' (n 99).

<sup>101</sup> See 'About', *Zaytuna College* (Web Page, 2025) <[https://zaytuna.edu/about/our\\_mission](https://zaytuna.edu/about/our_mission)>.

<sup>102</sup> Syed Muhammad Naquib al-Attas is specifically referenced as an inspiration on the website and mentioned explicitly in interviews. The former Provost of Zaytuna College, Dr Omar Qureshi, states: 'the College, the President, myself, and others, we take and are very influenced by Professor Attas's works': see Interview with Omar Qureshi (Salim Farrar, Zaytuna College, 24 January 2023) ('Interview with Omar Qureshi').

<sup>103</sup> Interview with Hamza Yusuf (n 65).

<sup>104</sup> 'College Catalog 2022–2023' (n 88) 1. See also the extrapolation of Zaytuna College's Mission Statement: 'About', *Zaytuna College* (Web Page, 2025) <[https://zaytuna.edu/about/our\\_mission](https://zaytuna.edu/about/our_mission)>.

Hellenic thought, or Greek thought.<sup>105</sup> So, we are happy to look back at the ‘Ancients’ and benefit from them as well.<sup>106</sup>

The curriculum thus emphasises ‘commonality’ and ‘universal principles.’ The combining of traditions even includes the teaching of Christian philosophy and theology.<sup>107</sup> This is for comparative and civilization purposes, comprising a search for common ground, common articulations of the human condition, and a common language — not a common theology or theosophy.

Indeed, the ‘Catalog’ affirms Zaytuna’s Islamic theology but acknowledges the complexity of developing and clearly communicating such an ecumenical approach while also remaining true to Sunni orthodoxy. This is a matter also relevant to integrity and transparency, one of the clauses attached to Standard 1 of the WASC Accreditation Standards.<sup>108</sup> The curriculum is taxed with the burden of reconciling what might appear to be irreconcilable. Ambiguously, the ‘Catalog’ asks:

Having a confessional imperative, how do we teach Euro-American texts — even the one such as *Summa Theologica* of Thomas Aquinas — which at times seems to contradict the fundamental teachings of Islamic scholastic theology (*kalām*)?<sup>109</sup>

It offers no answers other than to imply that they lie in the hands of the teachers, who give live commentary to the texts through their didactic style lectures and through the dialectics of in-class discussions.<sup>110</sup> Where the line is drawn is left to the instructor and student.

The educational objective is that Zaytuna graduates will be ‘rigorously trained’ in the two classical traditions such that they can ‘grasp the actual complexity of inner and outer experiences with the completeness demanded by a love of Truth and to communicate that Truth’.<sup>111</sup> The advocacy of Sunnī orthodoxy in a Liberal Arts college that, by definition and educational requirements,<sup>112</sup> would claim religious neutrality and demand academic freedom, also raises the difficult question of indoctrination. However, according to Dawood Yasin, then Director of Student Life, while Zaytuna teaches ‘from a Tradition,’ this fact does not negate a student’s own search. He states: ‘I would have to say that eighty per cent we are going to teach

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<sup>105</sup> It should not be thought from this statement that Dr Jawad Qureshi is endorsing a common ‘Abrahamic religion.’ It is simply referencing the common heritage of Judaism, Christianity, and Islam.

<sup>106</sup> Interview with Jawad Qureshi (Salim Farrar, Zaytuna College, 18 January 2023).

<sup>107</sup> Christian philosophy and theology have been taught by Assistant Professor Fr Francisco Nahoe, a Franciscan friar, and Roman Catholic priest. See Zaytuna College, ‘Academic Profiles’ <<https://zaytuna.edu/academics/faculty>> (accessed 2 November 2023).

<sup>108</sup> Guideline for criteria 1.6 demands the institution ‘truthfully represents its academic goals, programs, services, and costs to students and to the larger public’: *WASC 2013 Handbook of Accreditation* (Web Page, rev November 2021) criterion 1.6 <<https://www.wscuc.org/handbook2013/#standard-1--defining-institutional-purposes-and-enduring-educational-objectives>>.

<sup>109</sup> ‘College Catalog 2022–2023’ (n 88) 4.

<sup>110</sup> Ibid 5.

<sup>111</sup> Ibid 6.

<sup>112</sup> ‘Standard 1’ (n 99) criterion 1.6. Where Standard 1 criterion 1.6 provides: ‘The institution publicly states its commitment to academic freedom for faculty, staff, and students, and acts accordingly. This commitment affirms that those in the academy are free to share their convictions and responsible conclusions with their colleagues and students in their teaching and writing.’

something...and twenty per cent you find that Truth'.<sup>113</sup> What 'Truth' ultimately means, therefore, will be personal but 'directed' via Zaytuna's educational method.

Echoing Shaykh Bin Bayyah and Hamza Yusuf's emphasis on traditionality, that method is transmission-based knowledge through authoritative texts and the 'Great Books' Liberal Arts approach. Thus, according to Dr Omar Qureshi,<sup>114</sup> Zaytuna's former Provost, the 'search for truth' occurs *within* the Tradition. Zaytuna has its canon and authoritative discourse comprising authorities, set positions, and a hierarchy of different received texts. 'So', he states, 'we work within that'. This is not 'neutral' any more than any other tradition (including secular tradition) but are 'consistent with its purpose and character' as required by the Accreditation Standards. When looking at heterodox positions on homosexuality or feminism, for example, he observes:

There are all these interpretations...but are they convincing? Do they meet up to our scholarly standards? We don't just say this is a 'feminist interpretation' and dismiss them.<sup>115</sup>

Similarly, Associate Professor Abdullah Hamid 'Ali, reflecting on the same topic, agrees that students may 'articulate' the heterodox arguments that reinterpret the Qur'anic story of Prophet Lūṭ for endorsing homosexual practice but 'red flags are raised' if they 'advocate' for it.<sup>116</sup>

Moreover, the interpretations offered are not 'free-wheeling' applications of teacher/student reason, detached from the Tradition's hierarchy of sources and commentaries. Shaykh Faraz Khan, who teaches 'Readings on Muslim Spirituality' (Sufism) to undergraduates, states that Zaytuna educators 'use the Tradition to explain the Tradition'.<sup>117</sup> For example, he teaches the text, *Risālah Qushayriyyah* of Abū al-Qāsim al-Qushayrī, but explains it through the established '*sharḥ*' (explanation) of Shaykh Zakariyya al-Anṣārī, and the *ḥāshiyah* (gloss) of the nineteenth century Rector of the Azhar, Mustafā al-'Arūsī, *Natā'ij al-Afkār al-Qudsiyyah*.

The work of the teachers, therefore, is to inculcate 'intellectual habits ... how to read texts, how to do exegesis of law, and different philosophical approaches.'<sup>118</sup> In terms of the accreditation standards, the teaching approach thus ensures the development of core competencies, especially critical thinking, and significant in-depth study of subject matter.<sup>119</sup> The teachers draw upon inter-disciplinarity and engage across religious and legal boundaries, providing students with the opportunity 'to practice, generalise and apply what they have learned.'<sup>120</sup> Through their pedagogical methods, for example, students learn how to apply Islamic reasoning in the context of American constitutional law. Thus, Dr Omar Qureshi, when teaching a class on *uṣūl al-fiqh*,<sup>121</sup> draws parallels with methods of interpreting the Second

<sup>113</sup> Interview with Dawood Yasin (Salim Farrar, Zaytuna College, 19 January 2023) ('Interview with Dawood Yasin').

<sup>114</sup> Interview with Omar Qureshi (n 102).

<sup>115</sup> Ibid. On a critique of contemporary approaches to Islamic Studies and the influence of critical theory and identity politics: see AW Hughes, *Islam and the Tyranny of Authenticity: An Inquiry into Disciplinary Apologetics and Self-Deception* (Equinox, 2016).

<sup>116</sup> Interview with Abdullah Hamid (Salim Farrar, Zaytuna College, 19 January 2023) ('Interview with Abdullah Hamid').

<sup>117</sup> Interview with Faraz Khan (Salim Farrar, Zoom, 23 January 2023) ('Interview with Faraz Khan').

<sup>118</sup> Interview with Omar Qureshi (n 102).

<sup>119</sup> 'Standard 2: Achieving Educational Objectives Through Core Functions', *WASC 2013 Handbook of Accreditation* (Web Page, rev 2021) criterion 2.2a ('Standard 2') <[www.wscuc.or/handbook2013/#standard-2--achieving-educational-objectives-through-core-functions](http://www.wscuc.or/handbook2013/#standard-2--achieving-educational-objectives-through-core-functions)>.

<sup>120</sup> Ibid criterion 2.5.

<sup>121</sup> This is the Islamic science on how Islamic rules are juristically gleaned from the revealed religious sources.

Amendment to the *United States Constitution*. They note the importance of grammar, identifying clauses, independent clauses, dependent clauses, and modifying clauses. He states,

Students are able to understand that there is overlap between constitutional law, interpreting it, and what goes on in our legal system too in our legal tradition. There is no attempt to ‘Islamise’ — in the sense of ‘let’s make constitutional law ‘Islamic’... We realise that it is an independent legal system, and it has its own first principles that it starts with, its own commitments. We may share a lot of them, but we may also depart on many.<sup>122</sup>

The pedagogical approach is not limited to specific teachers, one of the encountered problems with a traditional *madrrasah*, but is systematic and applied across the institution.<sup>123</sup> To better ensure cohesion, integration, and college uniformity, Hamza Yusuf provides readings, topics, and suggested texts. This includes an induction program for all new staff.<sup>124</sup> Even though Hamza Yusuf claims he does not have everything ‘his way’,<sup>125</sup> clear direction comes from the President. Dr Qureshi notes:

Shaykh Hamza — he’s given a certain set of essays that are really important to understand the Liberal Arts. We read them all and then Shaykh Hamza has us discuss each and every one of them, so we are all on the same page as to what a Liberal Arts education means.<sup>126</sup>

Presidential direction is buttressed by a system of internal monitoring, with scheduled observations to avoid any deviations from these norms and to ensure teaching quality.<sup>127</sup> Teaching of teachers, as with the students, follows a dialectical process: ‘You need to be reflecting on your craft at all times. Your life as a teacher. That’s our philosophy here.’<sup>128</sup>

Notwithstanding a ‘Sunni Liberal Arts’ approach is clear, and made clear, in the minds of staff and students, arguably the Liberal Arts Sunni blend has not been communicated sufficiently to the ‘Muslim masses.’ Feraidoon Mojadedi relates that one section of the community thinks of Zaytuna as a ‘mullah school’, like the Al-Azhar in Egypt, while another sees it as Muslims running a Western Liberal Arts college. He states: ‘They just ... don’t think there is anything Islamic ... It’s really hard marketing these words.’<sup>129</sup> Aftab Malik agrees, saying: ‘I find when I speak to people, they don’t understand what a Liberal Arts education means. Most who I have spoken with often think it means the promotion of liberalism.’<sup>130</sup>

<sup>122</sup> Interview with Omar Qureshi (n 102).

<sup>123</sup> This also reflects the Accreditation Standards. See ‘Standard 3: Developing and Applying Resources and Organizational Structures to Ensure Quality and Sustainability’ *WASC 2013 Handbook of Accreditation* (Web Page, rev 2021) criterion 3.2 <[www.wscuc.org/handbook2013/#standard-3--developing-and-applying-resources-and-organizational-structures-to-ensure-quality-and-sustainability](http://www.wscuc.org/handbook2013/#standard-3--developing-and-applying-resources-and-organizational-structures-to-ensure-quality-and-sustainability)>.

<sup>124</sup> Interview with Omar Qureshi (n 102).

<sup>125</sup> Interview with Hamza Yusuf (n 65).

<sup>126</sup> Interview with Omar Qureshi (n 102).

<sup>127</sup> See ‘Standard 4: Creating an Organization Committed to Quality Assurance, Institutional Learning, and Improvement’. *WASC 2013 Handbook of Accreditation* (Web Page, rev 2021) Pt II <[www.wscuc.org/handbook2013/#standard-4--creating-an-organization-committed-to-quality-assurance--institutional-learning--and-improvement](http://www.wscuc.org/handbook2013/#standard-4--creating-an-organization-committed-to-quality-assurance--institutional-learning--and-improvement)>.

<sup>128</sup> Interview with Omar Qureshi (n 102).

<sup>129</sup> Interview with Feraidoon Mojadedi (n 63).

<sup>130</sup> Interview with Aftab Malik (n 67).

Although Hamza Yusuf and many Zaytuna staff have been very outspoken, and take conservative public stances on social issues, such as sexual and family relations, gender, and ‘wokeism’, there is a tacit admission of confusion surrounding their use of the word ‘liberal’. The 2023–2024 ‘College Catalog’ includes a new section entitled, ‘The Trivium: the Arts of Freedom.’<sup>131</sup> The etymological origins of the word ‘liberal’ are explained in depth: from the old English meaning of ‘noble’ and ‘generous’ and contemporary meaning of ‘free from prejudice and tolerant’, to the nineteenth century iteration derived from the French, ‘libéral’, referring to one who promoted political freedoms. But they emphasise, the word ‘liberal’ *here* refers to a traditional educational process, taken from the ancient Greeks, but historically applied by other traditions (including the Islamic) to produce a fully educated citizen. A person is only properly educated once they are ‘fully conversant with both language and numbers’ and ‘able to reason in both’.<sup>132</sup> The 2024 amendment and extrapolation to the Mission Statement also makes the claim, referencing the work of George Makdisi, that the ‘Liberal Arts’ originated in Islamic civilization<sup>133</sup> thereby identifying the integrative educational approach not only as Western but specifically Islamic.

So far, I have looked at Zaytuna’s academic curriculum and examined how its holistic, integrative, inclusive, and largely intellectual approach skilfully weaves together an Islamic and Western identity to accommodate accreditation standards and the civic values they represent. According to the former Director of Student Life, Dawood Yasin, however, cultivating student intellectuality is only one half of what happens at the undergraduate level. The College, through its co-curricular programs, also actively supports students’ personal and professional development.<sup>134</sup> Dawood Yasin tells students during orientation: ‘Make your Zaytuna experience an experience that is transformative and not transitional, so you won’t transition as you arrived.’<sup>135</sup> The knowledge gained from being an academic student provides the foundation of the ideal ‘Prophetic character’<sup>136</sup> and the ‘good men’ (and women) indicated by the Syed Muhammad Naquib al-Attas Islamic education model. But ‘knowledge in and of itself can be the antithesis of what we would see from Prophetic virtues if unchecked,’ says Dawood Yasin. ‘Knowledge has to be modelled, irrespective of how many times you read it, how many times you see it or how many times it’s been explained to you.’<sup>137</sup>

At the undergraduate level, ‘modelling’ occurs through Zaytuna’s experiential learning program. This comprises two elements: ‘Sunna Sports’ and community service/civic engagement. ‘Sunna Sports’ is Zaytuna’s attempt to ‘revive’ the Islamic tradition of swimming, archery, and horseback riding that are mentioned in *ḥadīths* and *athar*<sup>138</sup> and to integrate with the Liberal Arts notion of a fully educated person.<sup>139</sup> The intent is to see sport as more than technical disciplines and as ways of ‘thoroughly integrating the spiritual development of the body with the spiritual development of the mind.’<sup>140</sup> Students are required to learn and

<sup>131</sup> ‘College Catalog: Academic Year 2023–2024’, *Zaytuna College* (Web Page, 2025) 5 <[zaytuna.edu/files/galleries/Zaytuna\\_\\_College\\_\\_Catalog\\_2023-2024.pdf](https://zaytuna.edu/files/galleries/Zaytuna__College__Catalog_2023-2024.pdf)>.

<sup>132</sup> *Ibid.*

<sup>133</sup> See ‘About’, *Zaytuna College* (Web Page, 2025) <[https://zaytuna.edu/about/our\\_mission](https://zaytuna.edu/about/our_mission)>.

<sup>134</sup> See ‘Standard 2’ (n 120) criteria 2.11, 2.2a, 2.3.

<sup>135</sup> Interview with Dawood Yasin (n 113).

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> The emphasis on the three sports together is taken from the *athar* (sayings of companions) and *qawl* (saying) of ‘Umar ibn al-Khattāb: ‘*Allimū awlādakum as-sibāḥah wa al-rimāyah wa rukūb al-khayl*’ (‘Teach your children swimming, archery and horse riding’).

<sup>139</sup> ‘College Catalog 2022–2023’ (n 88) 47.

<sup>140</sup> *Ibid.*

participate in these sports for each semester of each school year and receive one credit unit for each sport.<sup>141</sup>

Sunnah Sports play an important part in the curriculum and in Zaytuna's holistic approach to education. They are an inculcation of 'virtue ethics' and demonstrate the attributes of the religious person Zaytuna would like them to be.<sup>142</sup> They represent a deliberate<sup>143</sup> alignment with the inculcation of *akhlāq* (morality) and *adab* (etiquette) from the Sūfī tradition of *futuwwah* (spiritual chivalry) with the 'cardinal virtues' of classical philosophy<sup>144</sup> and Christian theology. The 'Catalog' explains these moral qualities in relation to each sport:

Swimming presents an environment in which students learn to overcome fears, such as fear of bodily harm, fear of failure, and fear of pushing one's body beyond its capacity. Therefore, completing the swimming requirement builds courage and develops resilience in students. Archery compels an inner struggle with the self to reach one's target, despite distractions and preoccupations. Therefore, to be successful in archery, students must demonstrate temperance, which leads to inner stillness and sharp focus. Horseback riding presents the challenge of working with another living being that has its own will and intelligence. Therefore, horseback riding teaches students how to regulate relationships with others, to be fair and just in their interactions, and to respect all of God's creatures.<sup>145</sup>

Courage (*shujā'*), having trust in Allāh (*tawakkul*), resilience (*istiqāmah*), overcoming the ego (*jihād al-nafs/mukhālafat al-nafs*), temperance (*ṣabr*), having respect for God's creatures (*karam*), and justice ('*adl*) are all facets of excellence and Prophetic character (*ḥusn al-khuluq/makārim al-akhlāq*) embedded within Sufism. Archery, for example, says Dawood Yasin, is not just shooting arrows at a target – it is a metaphorical re-enactment of prayer (*ṣolāh*).<sup>146</sup> It has a cycle (*rak'at*): 'stance, nock, grip, and shot'; and it has purpose (*maqṣid*) - the target – seeking the acceptance of Allāh (*riḍā*). Also, just like the prayer has pre-requisites, such as purification (*ṭahārah*), to facilitate its purpose, so too in archery as archers dispense with all distractions and focus on their target.

*Futuwwah*, as the 'great books' of Sufism state, is not just the inculcation of virtues obtained through the practice of certain sporting disciplines; it is also acquired through '*khidmah*' — or service to others.<sup>147</sup> The second element of Zaytuna's experiential learning program is thus community service/civic engagement. Students are required to undertake at least fifty hours of community service (at a location approved by the Director of Student Life), to be completed by the end of their junior year, and to write a ten-page reflection paper.<sup>148</sup> Here, students gain 'real work experience'.<sup>149</sup> The idea, according to Dawood Yaseen, is '*tarbiyyah*' (education

<sup>141</sup> Ibid 8.

<sup>142</sup> Interview with Dawood Yasin (n 113).

<sup>143</sup> Ibid.

<sup>144</sup> Prudence, Justice, Fortitude and Temperance. See Plato's *Republic* [trans. Benjamin Jowett, 1892 edition] (The Floating Press, 2009), *Book IV*, 97-119 and the elaboration of virtues in *Aristotle's Nichomachean Ethics* [trans. Terence Irwin] (Hackett, 2019), *Book III to Book VI*, 79-151. Both books are taught at Zaytuna.

<sup>145</sup> 'College Catalog 2022–2023' (n 88) 47–48.

<sup>146</sup> Interview with Dawood Yasin (n 113).

<sup>147</sup> Abū al-Qāsim al-Qushayri, *Al-Qushayri's Epistle on Sufism*, tr A Knysh (Garnet Publishing, 2007).

Al-Qushayri said in his *Risālah*, 'The foundation of chivalry is that the servant of God always exerts himself in the service of others': at 237.

<sup>148</sup> 'College Catalog 2022–2023' (n 88) 48.

<sup>149</sup> Ibid.

through interacting with others) and ‘of pushing them out of their comfort zones.’<sup>150</sup> They learn humility (*tawāḍūʿ*), how to interact with others, and to disseminate knowledge of the religion through good practice.

Although students have their own civic engagement project, the College also engages groups of Zaytuna students during the Spring Break in group community projects as part of their ‘Alternative Spring Break’ program. As with the integrative nature of the curriculum as a whole, attempts are made to align the field trips with the academic curriculum. For example, following their study of *sīrah* (Prophetic Biography), noting its anti-racism message and constitutional law, the students have gone to Selma, Alabama, the birth of the Civil Rights movement in America, to learn more about civil rights in practice through working on projects there.<sup>151</sup> Students have also been engaged in inter-faith work. One project included working with a team helping a flood-devastated community in Princeville, North Carolina, the first emancipated town after the end of slavery. For Dawood Yaseen, this represented an important sharing of values and a constructive form of student activism.<sup>152</sup>

## 5. CONCLUSION

Zaytuna College is an innovative civilizational experiment for Islamic education in the West (and in Islamic education generally) and a test case for accommodation. In essence, the project is to develop Muslims intellectually, culturally, and spiritually, and to bring them into conversation with the cultures they inhabit, whether they be in the West, the East, America, or Australia, to co-exist and to contribute. The former Provost of Zaytuna College, Dr Omar Qureshi, summarises aspirations well and the role of Zaytuna College:

Again, we always encourage these conversations, but we have to understand - do you have the tools to carry them out? And that’s what we believe the liberal arts is about – to have these conversations, but also to have the tools to carry them out. If someone doesn’t know how to fix a car, we want him to fix the car – but we want him to know how to fix the car first. So, get the right tools first, otherwise you will make a mess of things. So, get the tools of learning and then they will order these conversations and these inquiries, and make sure that they are structured. Then ask all the questions you want.<sup>153</sup>

The results of the Zaytuna experiment are promising, though the project is still very much in its infancy. The numbers of students studying at Zaytuna are relatively small, perhaps indicative of the complexity of marketing an integrated vision in a contested polemical field; but also, part of a deliberate policy to keep numbers low to maintain teaching quality.<sup>154</sup> Admitted students represent an elite and eclectic crop. In 2023, after 14 years of operation, the College had enrolled 75 students, 14 graduates and 61 undergraduates, with about 28 per cent of undergraduate students from overseas. Notwithstanding the Syed Muhammad Naquib al-Attas engendered educational model of the ‘good man’, it is important to note that the majority

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<sup>150</sup> Interview with Dawood Yasin (n 113).

<sup>151</sup> ‘Standard 2’ (n 122) criterion 2.2a: which provides an institution’s undergraduate programs should demonstrate an ‘appreciation for diversity, ethical and civic responsibility, civic engagement and the ability to work with others’.

<sup>152</sup> Interview with Dawood Yasin (n 113).

<sup>153</sup> Interview with Omar Qureshi (n 102).

<sup>154</sup> Ibid.

of Zaytuna's students are female, not male, and without any affirmative action.<sup>155</sup> Attrition rates are also low, no doubt served by a rigorous admissions process<sup>156</sup> and a generous financial scholarships policy that ensures students can focus on their study without the distractions of having to work.<sup>157</sup> In terms of civic contribution, Zaytuna's students have gone on to study and practice law, medicine, counselling, and other professions. Many have also 'given back' to Muslim communities, teaching at private Islamic schools in the Bay Area and further afield, leading curriculum reform with a Liberal Arts approach.<sup>158</sup>

The question remains, however, to what extent the Zaytuna experiment can be replicated and be exported to countries like Australia? Certainly, a Zaytuna 'educational transplant' or foreign franchise is within the purview of Zaytuna's founder, Hamza Yusuf.<sup>159</sup> The constitutional and legal contexts are also similar. Section 116 of Australia's *Constitution*, as with the US First Amendment, provides for free exercise of religion and non-establishment. The limited case law that exists in Australia has also protected state funding of religious educational institutions,<sup>160</sup> including Islamic ones, although they must be for educational and not religious purposes, such as the building of a mosque.<sup>161</sup>

Nonetheless, obstacles exist, culturally, politically, and financially. Zaytuna is a self-sustaining institution that has relied upon financial donations from a relatively wealthy migrant Muslim population in the United States.<sup>162</sup> Although the education profile of Muslim Australians is improving, economically and socially, they are amongst the most marginalised communities in Australia.<sup>163</sup> It is more likely that a Zaytuna transplant would require assistance from state funding, much like their Islamic schools, or from sources overseas, which is not necessarily objectionable from a state perspective as it would justify increased regulation and more oversight. On the other hand, these options give rise to potential objections, and the possibilities

<sup>155</sup> Ibid. From figures provided by the former Provost, 57 per cent of the 2023 student cohort was female and 43 per cent male.

<sup>156</sup> Interview with Omar Qureshi (n 102). According to Dr Omar Qureshi: 'when we are admitting students, we are very careful... Every student is interviewed, some more than once. A committee deliberates on the candidates. I view all the applications as well, and sometimes Shaykh Hamzah will view the applications as well, and then the admissions committee carries out the interviews. We then have a discussion and make a decision. We look closely at their transcripts and recommendations. We call up their recommenders, contact them, set up conversations with them.' Shaykh Hamza also states: 'Overall, it's a rigorous program and people have to have some level of preparation, or they are going to fail. And it's not healthy for people to come in unprepared and then not succeed. It's going to affect their own esteem and sense of self. So, I would rather keep them out than watch them fail': Interview with Hamza Yusuf (n 65).

<sup>157</sup> Interview with Hamza Yusuf (n 65). Shaykh Hamza states: 'Anybody who qualifies to get into the college, money is not an obstacle'.

<sup>158</sup> Interview with Omar Qureshi (n 102).

<sup>159</sup> Interview with Hamza Yusuf (n 65).

<sup>160</sup> See *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559 ('DOGS case').

<sup>161</sup> See *Hoxton Park Resident Actions Group Inc v Liverpool City Council* (2010) 246 FLR 207.

<sup>162</sup> In 2017, the Pew Research Center noted US Muslims are about as likely as Americans overall to report household incomes of \$100,000 or higher (24% of Muslims and 23% of Americans in general), although they were also more likely to be at the lower end of the income scale and to be without jobs: see, 'Demographic Portrait of Muslim Americans' *Pew Research Center* (Report, 26 July 2017). <<https://www.pewresearch.org/religion/2017/07/26/demographic-portrait-of-muslim-americans/>>.

<sup>163</sup> The contrast with the United States is stark. Not only do they figure more prominently in the lowest income bracket than Australians in general, but there is also a big gap for individuals earning over \$1000 per week; 14% for Muslim Australians and 25% for the whole population: see 'Australian Muslims: the Challenge of Islamophobia and Social Distance', International Centre for Muslim and non-Muslim Understanding, University of South Australia (Report, 2018) 30 <<https://www.unisa.edu.au/contentassets/4f85e84d01014997a99bb4f89ba32488/australian-muslims-final-report-web-nov-26.pdf>>.

of both government and overseas political interference and a diminution in institutional independence. They also feed into a current national debate about non-discrimination and equality in religious educational institutions. Whether a Zaytuna transplant would be able to exist, survive and flourish in these rough waters and cross winds is an open question, but if Muslims must aim to navigate these seas and fly their kites, they will.

# Maximising or Determining Rights? On Using (and Discarding) Statutory Exceptions

Joel Harrison\*

*This article argues that the framework of ‘maximising’ or, equally, ‘balancing’ rights (a) transforms groups into vehicles for individual interests, against understanding the group as having a ‘real life’; (b) requires a hierarchy of goods or claims beyond the abstraction of maximising in principle equal rights in order to be comprehensible; and (c) precipitates an increasing shift to the courts or commissions as decision-makers in contrast to the people determining the scope of a rights claim through legislative enactment. These arguments are developed through an analysis of the Australian Law Reform Commission’s December 2023 report into exceptions to anti-discrimination laws for religious educational institutions, arguing against its adoption of a ‘maximisation’ framework and its scepticism towards using statutory exceptions.*

## INTRODUCTION

In its report, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (‘the Report’), the Australian Law Reform Commission (‘ALRC’) recommended removing sections in the *Sex Discrimination Act 1984* (Cth) (‘SDA’) that provide for the liberty of religious educational institutions to select staff and treat existing and prospective students in a manner designed to ‘avoid injury to the religious susceptibilities of adherents of that religion or creed’.<sup>1</sup> The relevant sections are exceptions to the general duty not to discriminate on the ground of a person’s sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. The ALRC’s recommendation was coupled with others. It concluded that a religious educational institution should be permitted to give preference to a person of the same faith, but only when selecting staff for employment<sup>2</sup> and only where this is ‘reasonably necessary to build or maintain a community of faith’, is proportionate to that aim and in light of any disadvantage or harm caused to persons not preferred, and ‘does not amount to conduct that is unlawful’ under the *SDA*.<sup>3</sup> Combined, these core recommendations were seen as implementing the Australian Government’s terms of reference for the ALRC’s inquiry. The Government considered that religious educational institutions ‘must not discriminate’ against both students and staff ‘on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy’ and must be able to ‘continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff’.<sup>4</sup>

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<sup>1</sup> Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, December 2023) 13 (‘*Maximising the Realisation of Human Rights*’). The central exception is found in the *Sex Discrimination Act 1984* (Cth) s 38 (‘SDA’).

<sup>2</sup> The ALRC recommended maintaining existing provisions in the *Fair Work Act 2009* (Cth) permitting discrimination when consistent with inherent requirements of a role. See *Maximising the Realisation of Human Rights* (n 1) 15.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid* [1.1].

The ALRC is Australia's peak legislative reform body, typically led by a judge, retired judge, a senior civil servant, or senior member of the legal community and undertaking independent reviews into areas of law in Australia at the request of the Commonwealth Attorney-General. Its recommendations, while not binding on the legislature, are frequently implemented. This article analyses the goal the ALRC adopts in its Report: maximising human rights. The Report assumes that disputes over the scope of rights entail the need to maximise different interests, principles, or values, or more typically different claims of personal autonomy, that compete with one another. Such maximisation is then very often to be undertaken by a court, against the idea of a statutory provision that would specify the rights in question and generally preclude the need for case-by-case adjudication. This 'maximising' approach is commonly assumed to be natural to rights disputes and matters involving the freedom of religion, but it contrasts with what has been a significant Australian approach — Parliament specifying the right in question by enacting a provision (the exceptions) that gives effect to a collective judgment.

This article examines how maximisation in the ALRC's Report is linked with 'balancing', a core component of proportionality analysis, and how balancing is then deployed at two levels within the Report. First, balancing as a method is central to justifying the recommendations the ALRC proposes. Second, balancing is central to the ALRC's preference for case-by-case analysis, a preference that justifies a movement away from statutory exceptions towards an increased role for a human rights commission or court. The article argues that the ALRC's approach transforms the religious group into a vehicle for individual interests, participates in a method of deliberation that encourages obfuscation in legal and political reasoning, and detracts from maintaining legislative enactments as the site for determining what is needed for the common good or what is due to persons.

The ALRC's Report is the latest in a long line of reports, inquiries, and debates concerning exceptions to anti-discrimination laws for religious bodies.<sup>5</sup> Its immediate origin lies in the extension of marriage to same-sex couples, after which the Commonwealth Government instituted a review into religious freedom in Australia, colloquially known as the '*Ruddock Review*'.<sup>6</sup> The *Ruddock Review* brought to public attention the exceptions afforded to religious educational institutions. This precipitated further reviews and reform debates: the Senate Legal and Constitutional Affairs Committee inquired into whether religious schools should continue to be afforded an exemption from elements of the *SDA* when selecting students, a predecessor referral to the ALRC on the same question was made, and finally multiple exposure drafts of a now-shelved Religious Discrimination Bill were circulated.<sup>7</sup>

The ALRC's Report may not be the last word on the matter. Following the release of the Report, the Hon Stephen Rothman, the Supreme Court of New South Wales justice that led the ALRC's inquiry, suggested that some of its recommendations should be nuanced. He argued publicly that religious schools should be granted a 'positive right' permitting them to hire staff based on their religious ethos and permitting them to require staff to teach the tradition's beliefs, enacted in a future *Religious Discrimination Act*. He considered that the ALRC was 'constrained' in

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<sup>5</sup> See Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413.

<sup>6</sup> *Religious Freedom Review: Report of the Expert Panel* (Final Report, 18 May 2018) ('*Ruddock Review*').

<sup>7</sup> See Patrick Parkinson, 'Adolescent Gender Identity and the *Sex Discrimination Act*: The Case for Religious Exemptions' (2022) 1 *Australian Journal of Law and Religion* 76, 79-81 (discussing the *Ruddock Review*, the Senate Committee Review, and the Religious Discrimination Bill exposure drafts).

what recommendations it could make by the terms of reference given.<sup>8</sup> The Commonwealth Government has not yet acted on any of these recommendations, and media reports indicate that the Prime Minister has expressed support for something like Rothman J's view.<sup>9</sup> Nevertheless, examining the ALRC's Report is important. The Report crystallises not only how objections to including exceptions within the *SDA* are commonly framed but also the methodology of analysis that such objections assume is necessary in contrast. It is this default setting that this article questions. In this way, the article does not propose what the precise boundaries of any exception for a religious educational institution should be (although it does advocate for the use of exceptions); instead, it is principally concerned with the mode and venue of argument.

### WHAT DOES IT MEAN TO 'MAXIMISE' RIGHTS?

The ALRC contends that when faced with competing rights, the goal is to 'best ... maximise the realisation of all human rights'.<sup>10</sup> This is further elaborated as maximising the 'ability of all people to live in accordance with their convictions'.<sup>11</sup> Such maximisation is to take place *within* the vehicle of a religious educational institution. The ALRC's core proposal — removing the exception in s 38 of the *SDA* — is justified as the result that best maximises the rights raised in this context.

What does it mean to maximise rights? The ALRC argues that 'maximisation' as the frame of reference adheres to international law criteria, especially the adoption of proportionality analysis.<sup>12</sup> Proportionality analysis is, as Grégoire Webber puts it, the 'received approach' for human rights adjudication and human rights deliberation more generally.<sup>13</sup> Courts initially examine whether the measure in question has interfered with a right. This is ordinarily a low hurdle, with almost any interest seen to be associated with a right forming the basis for a finding that the right has been interfered with.<sup>14</sup> The bulk of the analysis focuses on whether the interference is justifiable. To answer this, courts and decision-makers may move through a series of structured questions. Is the measure pursuing a legitimate aim? Is the measure rationally connected to the aim being pursued? Is the measure necessary, or are there any compelling alternatives? And does the measure strike the right or appropriate balance between the benefits gained by the measure and the harms caused to the right that has been interfered with? Maximisation as the goal of deliberation could be viewed as the result of the entire proportionality exercise. If the limitation on rights is in the end found to be proportional and therefore justified, then the right in question remains 'maximised' in relation to the legitimate aim that is being pursued (even if only in the sense that it has reached the point where it is buttressed by a competing interest). But maximising as a paradigm is more specifically concerned with the central feature of proportionality analysis, as illustrated in the ALRC's own

<sup>8</sup> Greg Brown and Rhiannon Down, 'NSW Supreme Court Judge Stephen Rothman Urges Anthony Albanese to Grant "Positive Rights" to Faith Schools', *The Australian* (online, 12 April 2024)

<<https://www.theaustralian.com.au/nation/politics/nsw-supreme-court-judge-stephen-rothman-urges-anthony-albanese-to-grant-positive-rights-to-faith-schools/news-story/05ea33192eeb1f78f82c1a29ce262152>>.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Maximising the Realisation of Human Rights* (n 1) [1.52].

<sup>11</sup> *Ibid* [2.7].

<sup>12</sup> *Ibid* [4.28], [4.47], [4.114]–[4.115], [8.51]. See the ALRC's general discussion of proportionality under international law: at ch 10.

<sup>13</sup> Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 55–6.

<sup>14</sup> See John Tasioulas, 'Saving Human Rights from Human Rights Law' (2019) 52 *Vanderbilt Journal of Transnational Law* 1167, 1186–87.

reasoning in its Report. This is proportionality's final step: balancing. It is this that fits with the goal to 'maximise ... the realisation of all human rights'.

Quoting its 1992 report *Multiculturalism and the Law*, the ALRC elaborates that maximisation demands ensuring 'the greatest possible freedom to express individual cultural values in a way which is compatible with respect for the same freedom of others'.<sup>15</sup> In the context of a religious educational institution, the conflict is principally between the right to religious freedom being asserted by a religious community, or at least its members, and the right to non-discrimination or equality being asserted by students and staff who are not aligned with the religious community's doctrine or practices on matters of gender and sexuality in particular. Both rights are said to be recognised, both rights are said to raise distinct interests, and both rights must accordingly be assessed for their 'weight' in this context to reach a conclusion as to how far each may extend — what the correct or appropriate balance is. Within proportionality analysis, each right, recognised as engaged or infringed, is cast as representing a value, interest, or principle that must be realised in some degree.<sup>16</sup> Each principle or value is one amongst potentially many. Each of the rights at stake — religious liberty and equality in this case — are 'principles aspiring for maximum realization', as formally in-principle equal claims.<sup>17</sup> Rights analysis consequently becomes both an assessment of the degree to which we can infringe upon each other, and an attempt on the part of decision-makers to reach some kind of balanced equilibrium or *détente* between the 'respective spheres of liberty between equal right-bearers'.<sup>18</sup>

The ALRC states that the language of balancing should be avoided because it invokes a notion of trade-offs rather than the maximal realisation of rights.<sup>19</sup> But the methodological steps that the ALRC takes are essentially the same, being within the discourse of proportionality analysis with the central feature of balancing. Trade-offs is another way of expressing the necessary result of proportionality analysis: a recognised interest, value, or principle collides with another and the task of the decision-maker is to determine the degree to which the diminishing of this value is a justifiable response to realising the other value at stake, ie balancing. Indeed, alongside alluding to Robert Alexy's concept of optimisation (an elaboration on balancing),<sup>20</sup> the ALRC refers to reaching a 'practical concordance'.<sup>21</sup> The very idea of a practical concordance entails each party, whose interests are now recognised as necessarily engaged, striving to end a conflict by *not* pressing their own interest to its logical limit.<sup>22</sup>

<sup>15</sup> *Maximising the Realisation of Human Rights* (n 1) [1.20], quoting Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, April 1992) [1.23].

<sup>16</sup> See, eg, Kai Möller, 'Proportionality and Rights Inflation' in Grant Huscroft, Bradley W Miller, and Grégoire Webber (eds), *Proportionality, and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 155 (writing of rights as autonomy interests). See generally Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017) 19.

<sup>17</sup> Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 88.

<sup>18</sup> Matthias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlalos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Bloomsbury, 2007) 131, 144.

<sup>19</sup> *Maximising the Realisation of Human Rights* (n 1) 36 Figure 1.1.

<sup>20</sup> *Ibid* [4.47]. See Robert Alexy, *Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2002) 47–8.

<sup>21</sup> *Maximising the Realisation of Human Rights* (n 1) 36 [10.21], Appendix I.7.

<sup>22</sup> See Christopher McCrudden, 'Dignity and Religion' in Robin Griffith-Jones (ed), *Islam and English Law* (Cambridge University Press, 2013) 94, 104.

What then are the consequences of the ALRC adopting ‘maximisation’ as its paradigm? Here I want to focus on two consequences that are evident from the ALRC’s Report. First, how adopting maximisation as the lens leads the ALRC to see the religious educational institution as the site for such maximisation: rights must be recognised in each context and accordingly balanced (values maximised when in a collision) within that context. Second, how the language of balancing and maximisation results in a kind of obfuscation. The competing values are in principle equal: each is to be recognised and in that sense equally valued within the balancing rubric. However, faced with such a clash, what is needed in reality is substantive valuing and assessment — a hierarchy of value.

### *The Group as a Vehicle for Balancing*

Underlying the arguments of religious groups is a claim that they are pursuing and protecting the capacity to pursue a shared purpose. The group has a ‘real life’, as John Neville Figgis said. This lies in its ‘unity of life and action’ or ‘permanent end’.<sup>23</sup> A group may be made of individual parts but it is nevertheless characterisable as a unit ordered towards a common goal. The religious school may welcome and contain a diverse array of persons in its midst, but it is nevertheless defined by its ends (the purposes for which it exists). Even the argument for parental choice — prominent in the ALRC’s Report<sup>24</sup> — only makes sense as a choice to opt-in to *something*. It is a choice for this purpose or end pursued by this school and not another. On this basis, the school can be said to be a ‘body’. Typically, though, this characterisation of a ‘body’ is treated with some scepticism or else seen as merely a metaphor for what is the more fundamental reality of a group — individuals exercising a right of association or a right to develop their own personality, albeit collectively. When the then Liberal Government released its exposure draft for a Religious Discrimination Bill in 2019, the Australian Human Rights Commission (‘AHRC’) objected to including religious corporations (institutions, schools, charities, businesses) as potential victims of religious discrimination. The AHRC considered that human rights laws should ‘protect only the rights of natural persons’.<sup>25</sup> It made the same point to the ALRC, which the ALRC seemed to accept (or at least relay without question): ‘freedom of religion or belief is a right held by individuals, not a right held by institutions’.<sup>26</sup> Of course, such a view could be questioned. For example, it does not sit easily with the jurisprudence of the European Court of Human Rights, which at least holds that a religious body is capable of exercising the rights guaranteed under art 9 of the *European Convention on Human Rights*.<sup>27</sup> As Redlich JA in the Victorian Court of Appeal noted, ‘Corporations have a long history of association with religious activity’.<sup>28</sup> But the AHRC’s claim continues a common argument found often in writers wedded to liberalism’s methodological individualism: groups are simply the sum of individual interests. For example, Cécile Laborde

<sup>23</sup> John Neville Figgis, ‘Ultramontanism’ in John Neville Figgis, *Churches in the Modern State* (Longmans, Green and Co, 1913) 135, 146–7; John Neville Figgis, ‘The Great Leviathan’ in John Neville Figgis, *Churches in the Modern State* (Longmans, Green and Co, 1913) 54, 64.

<sup>24</sup> See, eg, *Maximising the Realisation of Human Rights* (n 1) [2.20].

<sup>25</sup> Australian Human Rights Commission, Submission to Attorney-General’s Department, Parliament of Australia, *Religious Discrimination Bills – First Exposure Drafts Consultation* (27 September 2019) [12]. See also Australian Discrimination Law Experts Group, Submission No 14926 to Department of the Prime Minister and Cabinet, *Religious Freedom Review* (14 February 2018) at [11] (‘[h]uman rights are vested in human beings, not in corporations’).

<sup>26</sup> *Maximising the Realisation of Human Rights* (n 1) [4.105].

<sup>27</sup> See, eg, *X & Church of Scientology v Sweden* (1976) 16 DR 68 (Commission Decision); *Svyato-Mykhaylivska Parafin v Ukraine* (European Court of Human Rights, Fifth Section, App No 77703/01, 14 June 2007) [150].

<sup>28</sup> *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [481]. See also Mark Fowler and Alex Deagon, ‘Recognising Religious Groups as Litigants: An International Law Perspective’ (2024) 13(2) *Laws* Article 16.

argues that freedom of association for religious groups concerns individuals and their capacity to join a group that pursues a conception of the good central to the individual's identity.<sup>29</sup> On this basis, it becomes much easier to argue that a religious school is simply the vehicle for expressing and balancing individual interests.

For the ALRC then, the task of maximising rights must take place where individual interests are expressed — presumably any context, given the almost nominalistic understanding of groups, but certainly the school, where a significant proportion of an individual's time and energy is spent. Article 18 of the *International Covenant on Political and Civil Rights* ('*ICCPR*') refers to the freedom to manifest religion or belief 'individually or in community' and through 'worship, observance, practice and teaching'. But the communal component on the ALRC's account is framed as a matter of respecting individual choices to opt-in to an association with other individuals, while remaining in significant ways unchanged by that election or capable of choosing to remain unchanged. It is a communal context, but one that exists for the sake of recognising and furthering instances of individual authenticity, identity, or personal conviction. This makes sense of the ALRC's frequent emphasis on the individual person being able to express dissenting views or 'an alternative view' within a religious educational institution as a central act of religious freedom.<sup>30</sup> Removing the exception in s 38 would support 'intra-religious pluralism ... and subsequently, freedom of religion or belief for all students and staff, as well as promoting respect for diversity and pluralism as a central aim of education'.<sup>31</sup> It would 'require staff, students, and families involved in religious educational institutions to tolerate the expression of alternative perspectives'.<sup>32</sup> No doubt teaching toleration is a good thing, and something that religious schools are keen to impart to their students; indeed, toleration presupposes that the institution has a prior commitment from which to base its subsequent need to tolerate any differences. But the framing is in reality based on the assumption that the purpose of an institution is to be a vehicle for realising an individual's interest, characterised as pursuing his or her own convictions or authenticity.<sup>33</sup> This extends not only to the member of the school who, while identifying with the faith tradition, does so alongside expressing views or practices inconsistent with the school's stated ethos. It also extends to facilitating the interests of those parents who the ALRC says send their child to a religious school for reasons other than the stated religious ethos.<sup>34</sup> Some religious schools in Australia adopt an all-comers approach, seeking to educate any person that comes through its doors and potentially expanding its employment opportunities to many persons. But this is done on the premise that any person walking through the school's gates has committed to operating within and being educated within *this tradition*, according to the purposes of the institution. For the ALRC, such a commitment must always be subject to the priority of remaining open to individual choice and consequently individual construal of the tradition.

<sup>29</sup> Cécile Laborde, *Liberalism's Religion* (Harvard University Press, 2017) 174.

<sup>30</sup> See, eg, *Maximising the Realisation of Human Rights* (n 1) [1.42], [4.65].

<sup>31</sup> *Ibid* [4.94].

<sup>32</sup> *Ibid*.

<sup>33</sup> See also *ibid* [4.103], [4.125]. On removing s 38(1) of the *SDA* covering the treatment of staff and prospective staff, the ALRC equally states, '[S]ome staff members, including prospective employees, may feel less pressured to commit to religious beliefs or interpretations that they do not hold, or no longer hold, to retain their employment. This outcome could be characterised as an enhancement of the right to freedom of religion or belief for those staff members': at [8.116].

<sup>34</sup> *Ibid* [2.20]. See Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Legislative Exemptions that Allow Faith-Based Educational Institutions to Discriminate Against Students, Teachers, and Staff* (Report, November 2018), quoting the former Anti-Discrimination Commissioner for Tasmania, Robin Banks' evidence to that committee, that '[religious liberty] is a highly personal right. The idea that an institution has a right that overrides the individual's rights seems to me somewhat problematic, because parents do want to be able to choose the school children go to': at [2.20].

On this basis, the Report de-emphasises a right of exit — that those incapable of committing to the religious school's ethos or requirements can exercise their liberty by not joining or by leaving.<sup>35</sup> The boundaries of any right of exit could certainly be debated. But as a possible principle that may at times be applicable, a right of exit is contrary to what the ALRC sees as the reality of the group: a context or vehicle for the balancing of individual interests that are carried by the individual and consequently needing to be recognised wherever he or she goes. In an appendix on institutional autonomy, the ALRC quotes the former Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, who considers that the right to equality and non-discrimination can never be said to have been 'waived ... even by voluntarily joining an organization'.<sup>36</sup> The comment surely relies on significant ambiguity surrounding 'waived'. One could say that the right remains inalienable (and so cannot be lost) consistent with the language of 'waiving', but that does not determine when the right is in fact applicable. The boundaries of an unalienable right can still be specified. How else can we explain a provision like s 37(1)(a) of the *SDA*, which creates an exception to the duty not to discriminate on the ground of sex, for example, with respect to ordination? The Roman Catholic woman seeking ordination in the Catholic Church simply does not have a claim of non-discrimination when she is denied entry on the basis of sex. Some advocates do share Shaheed's view, of course. The Discrimination Law Experts Group reaches the logical, if for now minority view, that an exception for ordination should be removed because it defers to 'self-declared principles' that are 'inconsistent with Australia's commitment to equality'.<sup>37</sup> As it stands, however, s 37(1)(a) indicates not so much that a right is waived as that its boundary does not extend to this context. The reason for this is that the legislature understands here at least that the group is not simply a venue for the individual carrying and exercising a bundle of liberty rights.

### *Balancing as Obfuscation*

Typically, then, as leading advocates of balancing argue, the interest at stake in a balancing exercise is the value an individual has in leading an autonomous life.<sup>38</sup> Again, the ALRC frames this as maximising the 'ability of all people to live in accordance with their convictions'. The group then becomes an aggregation — a set of competing instances of persons exercising or pursuing an autonomous life to then be weighed in the midst of inevitable conflict. It is the context where claims of recognition are to be advanced, because the argument is fundamentally individualistic as a matter of commitment (what matters is individual autonomy) and this commitment must be advanced in the spaces that the individual rights-bearer is at least principally located or moves through.

Framed in such a way, there is at least the impression that the claims raised by individuals or collectives of individuals are of equal value. They are in principle equally recognised and they at least appear to be rooted in the same normative value. Some argue that for this reason deliberating between claims of religious liberty and equality or non-discrimination, to take a prominent conflict from the past 15 years at least, is so difficult. The conceptual similarity between a right to religious liberty, framed typically as furthering individual autonomy or

<sup>35</sup> For an example of a case emphasising exit as a solution, see *Sindicatul "Păstorul Cel Bun" v Romania* (2014) 58 EHRR 10.

<sup>36</sup> *Maximising the Realisation of Human Rights* (n 1) Appendix I [1.7], quoting Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43<sup>rd</sup> Sess, UN Doc A/HRC/43/48 (24 August 2020) [50]–[51].

<sup>37</sup> Australian Discrimination Law Experts Group (n 25) 8.

<sup>38</sup> See, eg, Möller (n 16) 155.

‘ethical freedom’ as Ronald Dworkin put it,<sup>39</sup> and a right to equality framed often as facilitating the ‘deliberative freedoms’ of individuals,<sup>40</sup> gives rise to a distinct aporia — what is to be valued more, or indeed how are each to be valued, when both are apparently of the same quality but clash? Kept at this abstract level, the goal is to ‘maximise’ the value at stake. But such a goal is incomprehensible. If the task of the decision-maker is to maximise conceptually similar instances of autonomy, identity, convictions, or authentic expression, how does one determine what the optimal scope of each instance is that results in a maximal fulfilment of the value? Would allowing a religious school to enforce codes of conduct that discriminate (directly or indirectly) maximise autonomy more than prohibiting such codes of conduct? It is akin to calculating the ‘harm’ of different possible decisions as an abstract category. What is more harmful, diminishing the school’s capacity to instil a way of life through a more complete exploration of its tradition, or the restraint imposed upon a person who cannot express their convictions completely in this setting?<sup>41</sup> This is the second issue with the ALRC’s Report and use of maximising as a frame: the language of balancing and maximisation results in a kind of obfuscation of the substantive valuing that necessarily takes place.

To answer such a question demands more than an invocation of maximisation. It demands moving from abstraction to narrating in some way a hierarchy of claims and arguments. Such a hierarchy then allows the possibility of detailing that it is not simply an abstract value that is being maximised, or abstract harm that is being contained, but rather a goal. Claims and arguments are incorporated into and given boundaries and scope within this goal. If the goal is harm prevention, then it is not simply harm that we are then interested in preventing, but harm of a certain kind; or, equally, if the goal is maximising authentic expression, then it is not simply everyone’s autonomous pursuit of convictions that we are interested in supporting, but autonomy itself as an end unrestrained by the commitments of a tradition or group, for example. Remaining at the level of abstraction — harm, autonomy — is simply impossible (the concepts must be nested within a context and purpose), and so narrating a real hierarchy as between claims is needed. For the ALRC, what results is what Steven Smith calls ‘smuggling’.<sup>42</sup> Invoking an abstract value or framing the argument in abstract terms (like maximisation) is in reality shaped by substantive or comprehensive claims as to what is really important. Indeed, we might also say it smuggles in a claim as to what is metaphysically real or true to the nature of persons in community with one another.<sup>43</sup> ‘Smuggling’ may give the impression that the act is conscious. The reality may be much less nefarious. In adopting the apparatus of proportionality, and the linked goals of balancing or maximisation, the impression given is that this is a distinctly legal argument shaped by the norms of a legal system.<sup>44</sup> In this way, the claim can be made that something other than moral and political argument is taking place.<sup>45</sup> Proportionality analysis becomes perhaps less conscious smuggling and more default legal

<sup>39</sup> Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006) 61, 73.

<sup>40</sup> Sophie Moreau, ‘What Is Discrimination?’ (2010) 38 *Philosophy & Public Affairs* 143, 147.

<sup>41</sup> See further, Timothy Endicott, ‘Proportionality and Incommensurability’ in Grant Huscroft, Bradley W Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 311.

<sup>42</sup> Steven D Smith, *The Disenchantment of Secular Discourse* (Harvard University Press, 2010) 35.

<sup>43</sup> See Joel Harrison and Lukas Opacic, ‘Challenging the Unreal: The Future of Australian Law and Religion’ in Jonathan Crowe, Joshua Neoh, and Constance Lee (eds), *Jurisprudence and Theology: The Australian School* (Routledge, forthcoming).

<sup>44</sup> See Barak (n 17) 349 arguing proportionality is disciplined by the ‘normative structure’ of the legal system.

<sup>45</sup> See similarly Jeremy Waldron’s contention, in the context of judicial review, that framing deliberation as a legal, analytical exercise ‘distracts [judges’] attention from direct consideration of moral arguments’: Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346, 1359.

obfuscation: what is really at stake, what is really valued, what is the hierarchy of claims is obscured by a default analysis that asserts in-principle equal values are simply being balanced.

Understanding the ALRC's Report requires then going beyond the abstraction of maximisation and with it the impression of equally poised values or equal assertions of a liberty. In itself, the idea that the ALRC's recommendations are shaped by an implicit hierarchy of value that shapes the respective claims is not a criticism. I am contending that this is always necessary. But what is adopted as the shaping narrative of value (or what we should assess different claims in light of) and how the respective claims are then characterised *is* contestable.

The ALRC affirms that the right to religious liberty is fundamental but characterises it as fundamentally individual. Of course, religious liberty does have a distinctly personal component. Comparative jurisprudence affirms that one of the core components of the right to religious liberty is to protect against coercing persons into belief.<sup>46</sup> Equally, Christian thought has frequently affirmed that for faith to be real a person must come to accept God as the subject of one's own commitment and love.<sup>47</sup> But for the ALRC, religious liberty protects a conception of religion that is fundamentally individual in its ends. Not much detail or argument is given to the nature and ends of religion in the Report. Instead, the ALRC relies briefly on a common conception: religion concerns the pursuit of individual autonomy. This is seen in how the group is characterised, discussed above. It is also expressed at the level of general principle. The Report states that religious freedom protects the importance of religion 'in the lives of religious believers or people who are culturally religious'.<sup>48</sup> Immediately, this frames religious liberty as a matter of individual interest — a concern for the individual persons who pursue religion as a matter of personal autonomy, rather than a concern for how religious liberty might further societal ends. Religious liberty concerns instead facilitating 'competing lifestyles' and the ability of persons 'to live in accordance with their convictions'.<sup>49</sup> Religion here is not a distinct good, an end that may be integral to personhood and the life of the community. Rather, it is, as some contend, fundamental to cultivating pluralism in the sense that choices and convictions as such are in general a good thing to have.<sup>50</sup> The specific weight that should be given to religion, so characterised, is diminished. Characterised in this way, why should it not be subject to the law in precisely the same way as any other choice or conviction that might equally make up a pluralistic civil society and set of individual options?

In the specific context of religious educational institutions, the ALRC's emphasis on personal autonomy as the end served by religious liberty is coupled with a surprising reticence to recognise forming a religious community through education as a central act of religious expression. The ALRC first critically queries the extent to which 'teaching' under art 18(1) of the *ICCPR* extends to the provision of education generally within a religious school in contrast to specific religious instruction. It then continues with a seemingly reluctant allowance: 'The ALRC has proceeded on the basis that, *in some institutions*, religious worship, observance,

<sup>46</sup> See, eg, *Ivanova v Bulgaria* (2008) 47 EHHR 54.

<sup>47</sup> See, eg, Pope Paul VI, 'Dignitatis Humanae: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious' (Declaration on Religious Freedom, Vatican, 7 December 1965) [3] <[www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html)>. See also Joel Harrison, 'Christian Accounts of Religious Liberty: Two Views of Conscience' (2021) 46 *Brigham Young University Law Review* 1273, 1277-1279.

<sup>48</sup> *Maximising the Realisation of Human Rights* (n 1) [2.6].

<sup>49</sup> *Ibid* [2.7].

<sup>50</sup> For an account of religious liberty serving the need for pluralism, see Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy: Comparative Reflections from Britain and France for a Democratic "Vivre Ensemble"* (Hart, 2020).

practice, and teaching is sufficiently infused into the provision of education to warrant the conclusion that *some level of protection* under art 18(1) applies.’<sup>51</sup>

In contrast, the ALRC’s Report gives a much more extended and detailed account of the other rights that it says are at stake in this debate. It characterises the right to non-discrimination as also concerning the capacity to live according to one’s convictions or ‘personal autonomy and development’.<sup>52</sup> But this is further coupled with discussion of its centrality to personhood and dignity,<sup>53</sup> citing Victorian equality and *Charter* jurisprudence and statements from Bell J in a case where the judge went on to describe equality and non-discrimination as ‘the keystone in the protective arch of the *Charter*’.<sup>54</sup> The ALRC consequently frames equality and non-discrimination more as a ‘hyper-good’, a good that, as Charles Taylor explains, ‘has an incomparable place in their lives ... this above all others provides the landmarks for what they judge to be the direction of their lives’.<sup>55</sup> The ALRC couples this with extensive arguments as to how the well-being of different persons is affected by discrimination or the existence of an exemption.<sup>56</sup> The pre-eminence given to equality and non-discrimination is then followed by the ALRC listing and elaborating upon various supporting rights (almost close synonyms in many cases, aimed at the same end) that it identifies as affected by any exception — children’s rights, the right to education, the rights to health and life, the right to privacy, the right to work, freedom of expression, and, as discussed, the religious liberty of both dissenting members of a faith and non-adherents who want nevertheless to attend the school for non-religious reasons.<sup>57</sup> The Report consequently combines hierarchy (which good at stake is of greater significance or how does the good in question integrate into a vision of shared life) with an argument from aggregate weight (listing the multitude of interests arrayed against the competing claim).

## PREFERRING COURTS AND COMMISSIONS?

In the previous section, I considered the conceptual problems with the ALRC’s ‘maximisation’ or balancing framework: how it characterises the group as a vehicle for furthering individual interests, and how it is obfuscatory — it masks the substantive (and hierarchical) assessment of ‘value’ that must take place within a vision of a shared life. In themselves, these are reasons to question the framework adopted. What is needed instead is a method of deliberation that can take seriously the real life of the group and deliberate upon not simply a balance of interests but what is in fact the ‘right answer’, in which the goods in question are composed in line with a vision of our shared life. In this Part of the article, I do not propose to develop such an account in full. Rather, I make a step towards it by considering an *institutional* question: where should such deliberation take place? I will suggest that the ALRC’s reliance on maximising or balancing reflects a tendency to understand the court or a commission as the main actor in considering claims of right, against a different view that has been central to Australian practice: the legislature specifying rights.

This movement towards focusing on a court assessing claims of right can be seen, first, in the ALRC’s appeal to religious schools being able to justify indirect discrimination. Before

<sup>51</sup> *Maximising the Realisation of Human Rights* (n 1) [4.100] (emphasis added).

<sup>52</sup> *Ibid* [2.13].

<sup>53</sup> *Ibid*.

<sup>54</sup> *Lifestyle Communities Ltd Case (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [277].

<sup>55</sup> Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989) 62, 63.

<sup>56</sup> *Maximising the Realisation of Human Rights* (n 1) [3.55]–[3.69].

<sup>57</sup> *Ibid* [11.53]–[11.136].

considering this, however, it is useful to explore the ambiguity of such an appeal — namely, whether matters like school conduct rules would in fact be capable of being assessed as instances of indirect discrimination.

*An Aside: Does Indirect Discrimination Analysis Even Apply?*

Section 38(3) of the *SDA* provides religious schools with an exception to the duty not to discriminate ‘in connection with the provision of education or training’. This is broad enough to include a liberty to admit students and expel them on the basis solely of, for example, a student’s stated sexual or gender identity. However, generally speaking, religious schools are not interested in protecting such a bare liberty.<sup>58</sup> In its response to the ALRC’s initial consultation paper, the National Catholic Education Commission referred to adopting an all-comers approach: many of its schools will accept anyone through their doors, so long as the student is willing to be educated in a Catholic setting.<sup>59</sup> Instead, the core concern of religious education providers has been maintaining the capacity to teach the doctrines of the religion and instilling conduct rules to reflect their beliefs and practices.<sup>60</sup> For example, a religious tradition may hold that the differentiation and relationship between the sexes is a matter of created order, an order that is to be confirmed and creatively participated in within the lives of persons born into sexed bodies. On this basis, the religious school might require that student leaders support the school’s understanding of morally permissible sexual relations. It might want to evidence sex differentiation and the important given status of persons’ bodies through a uniform policy. It undoubtedly wants to explore the tradition’s understanding of sex and relationships through education.<sup>61</sup> Or, to take an example from the ALRC’s Report, a religious school might refuse a student request to establish an LGBTQ+ student club that advocates for change within the school or policies in the wider community at odds with the religious tradition’s own understanding.<sup>62</sup>

If s 38(3) of the *SDA* were removed, the school would no longer be able to point to a positively enacted liberty in Commonwealth law as a response to a claim of discrimination. If conduct requirements or actions on the part of the school like those above amounted to direct discrimination on a protected ground, they would be unlawful. There is no legal capacity to justify an act of direct discrimination.

The ALRC rejected proposals to craft a narrower exception, one dealing with conduct and behavioural requirements. It generally considered that an exception, even a narrow exception, ‘prefers one right over another and precludes any consideration of where the balance between rights should be’.<sup>63</sup> Instead, it considered that general limitations clauses allowing for case-by-case determinations on the justifiability of the discrimination are preferable.<sup>64</sup> To this end, it

<sup>58</sup> See, eg, Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (Report, February 2019) quoting the then Anglican Archbishop of Sydney, Glenn Davies: at [3.75].

<sup>59</sup> National Catholic Education Commission, Submission No 409 to Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper* (23 February 2023) 15.

<sup>60</sup> See, eg, *ibid* 16; Freedom for Faith, Submission No 203 to Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws* (Consultation Paper, February 2023) 5–6 (‘ALRC Submission’).

<sup>61</sup> See, eg, ‘ALRC Submission’ (n 60) 6.

<sup>62</sup> *Maximising the Realisation of Human Rights* (n 1) [5.22]–[5.25].

<sup>63</sup> *Ibid* [1.21], quoting Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69, July 1994) [3.78].

<sup>64</sup> *Maximising the Realisation of Human Rights* (n 1) [1.24].

identified a continuing capacity (with some ambiguity, discussed below) to justify indirect discrimination and proposed introducing a new provision in the *Fair Work Act 2009* (Cth) that would permit a religious educational institution to give preference to a co-religionist in limited circumstances.<sup>65</sup> In both cases, a form of proportionality analysis is advocated. Whereas the proposal to remove the exceptions in the *SDA* followed for the ALRC from a proportionality analysis balancing the interests at stake, here the claim is that a proportionality analysis should be undertaken on a case-by-case basis. In this way, the ALRC advances moving away from the legislature specifying the boundaries of a right to religious liberty (and specifying then the scope of anti-discrimination duties), towards religious liberty being considered as part of a balancing exercise undertaken by a commission or a court.

The ALRC's references to indirect discrimination in the context of potential school conduct rules do not appear always to say the same thing. At times the Report seems to intimate that such rules may no longer be lawful because in the absence of an exception they will amount to direct discrimination, which is not capable of being justified.<sup>66</sup> Elsewhere, the Report appears to punt for ambiguity, simply restating the legal alternatives that a rule may be direct discrimination or else indirect discrimination that will be justifiable if reasonable.<sup>67</sup> However, in direct response to religious bodies' emphasising a desire to maintain behavioural rules or the capacity to require staff to affirm a religious belief, the ALRC points to the capacity to justify indirect discrimination.<sup>68</sup>

There appears then to be a potential assumption that conduct rules might amount to indirect discrimination only (raising justifiability). As an initial point, this assumption can be questioned. Whether an indirect discrimination jurisdiction would apply or has significant application to the types of rules that religious bodies are raising is, I suggest, unclear. For example, the ALRC discusses *Gay Rights Coalition v Georgetown University*,<sup>69</sup> a United States case in which a Catholic university originally denied official recognition for a gay and lesbian student support society. It cites the case as a good example of proportionality analysis in action, with the end result in the case being an ongoing agreement that the group would be granted access to practical resources (like room bookings), without the university being compelled to endorse its message. However, it is not at all clear that under Australian law any proportionality — or similar 'reasonableness' — assessment could be made. If a religious school in Australia denied official recognition to a gay and lesbian student support society in the absence of an exception to the *SDA*, this would have a significant chance of simply being direct discrimination.

Direct discrimination entails different treatment between an aggrieved person and a relevant comparator 'because of a protected attribute'.<sup>70</sup> It requires asking 'why was the aggrieved person treated as he or she was?'<sup>71</sup> In this scenario, it is possible to say that the school is applying a general policy facially neutral with respect to the protected characteristic. Any student group that wants to develop a student society contrary to the teachings of that tradition is excluded. To take again a Catholic institution, the rule would apply equally to a group

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<sup>65</sup> Ibid 15.

<sup>66</sup> Ibid [5.6], [5.20], [5.23].

<sup>67</sup> Ibid [4.20], [5.24].

<sup>68</sup> Ibid [4.157]–[4.158].

<sup>69</sup> *Gay Rights Coalition of Georgetown University Law Center v Georgetown University*, 536 A 2d 1 (DC Cir, 1987). See *Maximising the Realisation of Human Rights* (n 1) [5.25].

<sup>70</sup> See generally Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2016) 105. See *Sex Discrimination Act 1984* (Cth) s 5.

<sup>71</sup> See *Purvis v New South Wales* (2003) 217 CLR 92 [236] (Gummow, Hayne and Heydon JJ).

exploring the liberalisation of abortion laws. In this way, the rule arguably gives rise to indirect discrimination. The neutral rule has a disparate effect on some groups (the LGBT students) attempting to manifest their identity because they are more likely to be affected by the rule. Such indirect discrimination could then be assessed for its reasonableness.<sup>72</sup>

But is the selection criterion here itself in fact neutral? The school is arguably not simply applying the criterion that the group's aims must not be contrary to doctrine; rather, in applying what the doctrine itself demands, it is required to engage in different treatment for the lesbian and gay support group. In this case, that criterion of exclusion (consistency with doctrine) becomes indistinguishable from the protected characteristic (sexual orientation).<sup>73</sup> Put another way, a comparator — say, a group supporting relationship-building consistent with the religion's teaching — is not disadvantaged because it is at one with the doctrine, whereas the gay and lesbian support group is treated differently because the protected characteristic (as manifested in this context at least) is specifically identified as contrary to doctrine.

The legal position of schools in this scenario seems at least to be uncertain. Potentially, the ALRC's suggested reform would in effect create more of a bright-line rule: if direct discrimination, these acts are unlawful as not saved by any exception. One of the proffered salves — that the justifiability for indirect discrimination remains — is of uncertain status in at least many flashpoint cases. Nevertheless, the ALRC rejected crafting narrowing exceptions to determine such cases as a matter of legislative drafting.

### *The Turn to Courts and Commissions*

For present purposes, assuming there can be an added reliance on the indirect discrimination jurisdiction, relying on this illustrates the ALRC's preference for case-based proportionality analysis.

Indirect discrimination analysis in effect requires assessing the balance of interests: the court must 'weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other.'<sup>74</sup> The ALRC frames this as 'facilitat[ing] a fact-specific analysis of the proportionality of any disadvantage in light of the legitimate aims of the institution'.<sup>75</sup> It fits with the ALRC's other major proposal: enacting a narrow provision in the *Fair Work Act 2009* (Cth) to permit religious educational institutions to preference new hires on the basis of religion. The proposed provision is narrow for several reasons. First, it would only apply to hiring new staff rather than, say, a promotion. Second, the preferencing must be 'reasonably necessary to build or maintain a community of faith'. Third, the preferencing must be proportionate to that aim, having assessed (balanced) the disadvantage or harm to persons not preferred. Fourth, the preferencing cannot amount to conduct that is unlawful under the *SDA*.<sup>76</sup> In its scope then, the provision would amount to something like this: a conservative evangelical Christian school could potentially preference for hire a person who ascribes to the Nicene Creed and accepts the soteriology of penal substitutionary atonement but could not then preference commitment to the tradition's ethic on sexual relations or its understanding of sex differentiation as created and embodied as male and

<sup>72</sup> *Sex Discrimination Act 1989* (Cth) s 7B.

<sup>73</sup> See *Bull v Hall* [2013] 1 WLR 3741, [30] (Lady Hale) (UKSC).

<sup>74</sup> *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J).

<sup>75</sup> *Maximising the Realisation of Human Rights* (n 1) [5.59].

<sup>76</sup> *Ibid* 15.

female. The latter would need to be an inherent requirement (under the *Fair Work Act*) or else fall within the exception in s 37 of the *SDA* for performance of religious observances. Anti-discrimination law separates out grounds of discrimination, meaning the holistic and complete way of life that goes under the name ‘religion’ becomes at law one ground separable from others (‘sex’, ‘gender’, ‘sexual orientation’, etc). Importantly, the preferencing under this proposal would remain *potentially* legal only. Once again, it would be subject to an assessment from a commission or court as to whether the preferencing was proportional, including whether it adequately balanced the interests at stake.

Removing the exceptions from the *SDA* is of course a significant proposal for the boundaries of a religious educational institution’s liberty. But the ALRC’s proposals are also jurisprudentially and politically significant: they reflect an increasing confidence that courts or commissions should be the site for deliberating upon rights disputes by applying a distinct proportionality methodology. Here, in the context of exceptions to anti-discrimination law, the ALRC’s approach is a shift away from what is the current approach — the legislature specifying the boundaries of anti-discrimination and the liberty of religious groups.

The ALRC is not alone in this shift. The AHRC agrees that courts (and itself) should be assessing limitations upon rights through the ‘proportionality test’.<sup>77</sup> On this basis, it has recently recapitulated the proposal of a *Human Rights Act* for Australia, much like those statutory charters of rights found in Victoria, Queensland, and the ACT.<sup>78</sup> The AHRC’s model has found favour with a majority of the current Parliamentary Joint Committee on Human Rights, although no bill seems to be on the horizon.<sup>79</sup>

Many commentators agree. Harry Hobbs and George Williams argue that a *Human Rights Act* will allow a ‘framework that enables’ increasingly complex issues of religious liberty conflicting with other rights ‘to be resolved as they arise.’<sup>80</sup> A *Human Rights Act* would allow religious liberty to be considered, but within a ‘level playing field’ that balances all rights and interests.<sup>81</sup> For some, there is a general scepticism against legislative enactments that focus on the particular concerns of religious liberty, contrasting this ‘special status’ with the ‘equal standing’ found under *Charter* or *Human Rights Act* analysis.<sup>82</sup>

But the movement away from the legislature specifying the scope of a liberty or the reach of anti-discrimination law through exceptions should be questioned as a matter of principle. The legislative act can be understood as ‘the community deliberating about how it should order itself’.<sup>83</sup> Persons deliberate together, through representative structures and the legislative process, to reach a view as to what the common good demands in this context. In Australia, the

<sup>77</sup> Australian Human Rights Commission, *Free & Equal: Revitalising Australia’s Commitment to Human Rights* (Final Report, 8 November 2023) 62.

<sup>78</sup> *Ibid.* See *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Rights and Responsibilities Act 2006* (Vic).

<sup>79</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia’s Human Rights Framework* (Report, May 2024).

<sup>80</sup> Harry Hobbs and George Williams, ‘Protecting Religious Freedom in a Human Rights Act’ (2019) 93 *Australian Law Journal* 721, 732.

<sup>81</sup> *Ibid.*

<sup>82</sup> Carolyn Evans and Cate Read, ‘Religious Freedom as an Element of the Human Rights Framework’ in Paul T Babie, Neville G Rochow, and Brett G Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020) 20, 39.

<sup>83</sup> Richard Ekins, ‘Legislation as Reasoned Action’ in Grégoire Webber et al, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2018) 86, 114.

debate over non-discrimination norms and the liberty of religious institutions garners significant public participation. The Ruddock Review received over 15,000 submissions.<sup>84</sup> The Morrison Government's Religious Discrimination Bill received over 6,000 submissions for its first exposure draft and over 7,000 submissions for its second exposure draft.<sup>85</sup> The ALRC's own Report included speaking with 131 consultees, receiving 428 formal submissions, and examining over 41,000 survey results.<sup>86</sup> Proportionality analysis as it is currently embedded in courts frames persons within the political community as pursuing distinct interests that collide with one another and must, as distinct, be optimised. It focuses on a single case that often takes on elevated importance for the parties and for interested NGOs.<sup>87</sup> In contrast, the legislature has a better capacity to hear from different communities. This then supports its capacity to constitute and reflect 'a people', understood as a complex body that is aimed at some common good or sense of right action.<sup>88</sup>

This is to say that the legislature can, where possible, specify what is just or what is due to persons in a particular context. Religious groups responding to the ALRC's interim report understandably emphasised legal certainty. In asking that a narrower exception be crafted, they were wanting to avoid the dilemma of whether a rule of conduct is direct or indirect discrimination, the legal contests that would ensue, and the need to undertake a case-by-case analysis with a commission or court. The ALRC offered a partial response. It opted for the possibility that extrinsic materials could offer guidance on how the indirect discrimination jurisdiction should be exercised and how the proportionality standard with respect to preferring prospective employees on the basis of religion should be applied.<sup>89</sup> How such guidance would be promulgated is unclear. The ALRC refers first to an explanatory memorandum. With respect to guidance on how 'reasonableness' is determined in the indirect discrimination jurisdiction, this is strange — if we are discussing an explanatory memorandum to an Act removing the exceptions, why would this offer guidance on an unamended indirect discrimination clause? The ALRC then suggests that a non-legislative body — the AHRC — could develop guidance.<sup>90</sup> Leaving aside that religious groups of late appear openly to be expressing distrust towards the AHRC,<sup>91</sup> they were also no doubt hoping for a public commitment represented in a public enactment.

To craft a specific exception entails reaching a clear conclusion on the liberty that is owed, in this case, to religious education institutions. Proportionality demands balancing competing interests in every instance of apparent clash. The court invariably recognises that a right is engaged and then proceeds to assess the detriment to it in relation to competing interest(s) advanced. What this means is that the right itself is open and capacious, capable of always giving rise to new claims that must be settled through the same methodology. In contrast, to

<sup>84</sup> *Ruddock Review* (n 6) 104.

<sup>85</sup> Attorney-General's Department, 'Religious Discrimination Bill – First Exposure Drafts: Consultation' (2 October 2019) <<https://www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-first-exposure-drafts>>; Attorney-General's Department, 'Religious Discrimination Bill – Second Exposure Drafts: Consultation' (3 March 2020) <<https://www.ag.gov.au/rights-and-protections/publications/submissions-received-religious-discrimination-bills-second-exposure-drafts-consultation>>.

<sup>86</sup> *Maximising the Realisation of Human Rights* (n 1) [1.36].

<sup>87</sup> See Christopher McCrudden, 'Transnational Culture Wars' (2015) 13 *International Journal of Constitutional Law* 434.

<sup>88</sup> See also Richard Ekins, 'How to Be a Free People' (2013) 58 *American Journal of Jurisprudence* 163, 170.

<sup>89</sup> *Maximising the Realisation of Human Rights* (n 1) [8.75].

<sup>90</sup> *Ibid* [4.161]–[4.162], [8.75], [9.11]–[9.12].

<sup>91</sup> See, eg, Freedom for Faith, Submission No 119 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (30 June 2023) [68].

specify a right is to determine its boundary or application in light of a claim of justice.<sup>92</sup> It is making a determination that, for example, a person's right to freedom of expression simply does not extend to producing and disseminating pornography because such a right would be contrary to what is owed as a matter of right relationship especially between men and women. Similarly in this case, the legislature would be reaching the conclusion that the liberty of a religious school entails, as one possible example, the capacity to preference members of the faith for any staff position. (Or it could, of course, reach different conclusions.) The flipside is that the right to non-discrimination is then specified also — it simply does not apply where the exception is active. Reaching these conclusions, whatever they are, relies on formulating an argument as to what is just in this scenario based on deliberating upon what is required in our shared life or what is demanded for our common good. As it stands, such deliberation has within the Australian system been significantly a matter for the legislature.

## CONCLUSION

How such a conclusion or determination is reached is of course difficult, but that should not prevent the attempt, an attempt which I am arguing is a familiar one common to legislative acts.<sup>93</sup> The goal should be a 'unity in plurality'.<sup>94</sup> I think a more social pluralist vision is needed, in which different attempts to pursue a vision of our common good (the end persons seek and enact, right relationship between persons and with God) that co-constitute our public life can be recognised and supported.<sup>95</sup> Such a vision undoubtedly demands a much more detailed account of the role and importance of religion as a good in our common life.<sup>96</sup> It is also a vision that, I think, should be explored and enacted together.

The ALRC's Report proposes a different vision and a different deliberative methodology. It frames the group as the site for balancing the interests of individuals. One could say that the ALRC simply does not give enough weight to the communal interest of the religious group, but this does not quite capture what is at issue. The very goal proposed by the ALRC is maximising interests, or the capacity to pursue one's own convictions. That goal leads to a failure to characterise the group as anything other than the set of individual interests to be aggregated. It is not then that the group is not given enough weight, it is that the framework is at root individualistic. In keeping with the maximisation goal, the ALRC also continues a common move: centring courts (or commissions) as the site for case-by-case decision-making applying a proportionality analysis. I have argued that there are good reasons for adopting a model of exceptions, which instead centres the legislature as the site for a common deliberation on what is just.

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<sup>92</sup> See, eg, John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 *Oxford Journal of Legal Studies* 127; Urbina (n 16) 215–52.

<sup>93</sup> Urbina (n 16) focusing on specifying what is just in the circumstances, deliberation on human rights is 'more like the rest of law': at 217.

<sup>94</sup> Augustine, *Concerning the City of God against the Pagans*, tr Henry Battenson (Penguin, 2003) Bk 12.23 503.

<sup>95</sup> See Joel Harrison, *Post-Liberal Religious Liberty: Forming Communities of Charity* (Cambridge University Press, 2020) 142–82.

<sup>96</sup> *Ibid.*

# A Legal Education ‘Born from the Heart of the Church’: Reflections of a Catholic Law School Dean

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*This paper is in part a personal reflection from the author’s leadership of the law school at Notre Dame Australia. The paper provides a very brief history of the institution and an introduction to the official Vatican guidance for Catholic Universities, Ex Corde Ecclesiae. This paper seeks to consider the particular role of religious faith-based institutions of higher learning in Australia and to develop some understanding of the nature of Catholic universities. It also seeks to differentiate the approach of a Catholic law school from the criticisms made of Australian universities – including some law schools – for allegedly straying into ideology which have appeared in the legacy media this year. It considers the benefits of faith-based institutions for staff and for students. It also considers the special obligations and duties of members of the Catholic faith tradition, working within Catholic universities, and some of the very particular challenges and issues that arise for those in leadership roles in such institutions.*

## INTRODUCTION

‘You will shine in the world like bright stars because you are offering it the word of life.’<sup>1</sup>

This paper considers my experiences of studying, teaching, researching, and exercising leadership roles over 14 years at a religious faith-based Australian university: The University of Notre Dame Australia (‘Notre Dame’). The paper contains my reflection on that experience and on the value of religious faith-based, and specifically Catholic, legal education more generally.

The paper covers my completion of a *Master of Arts (Theological Studies)* and my 12 years in School leadership from 2013 until my retirement in December 2024. I served for eight years as the Dean of Law of Notre Dame’s School of Law in Sydney. I then served for four years as the inaugural National Head of School of Law and Business following the merger of what had been separate Schools of Law and of Business on the Sydney campus and on the Fremantle Campus to form one new combined and national School.

This paper is in part a personal reflection — and it begins with a brief discussion of my road to Notre Dame for that reason — but it seeks to be more than that. After discussing my journey to Notre Dame, the paper provides a very brief history of Notre Dame and an introduction to the official Vatican guidance for Catholic Universities, *Ex Corde Ecclesiae*.<sup>2</sup> This paper seeks to consider the particular role of religious faith-based institutions of higher learning in Australia

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<sup>1</sup> Philippians 2:15–16 (New Jerusalem Bible).

<sup>2</sup> Pope John Paul II, *Ex Corde Ecclesiae: Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities* (Apostolic Constitution On Catholic Universities, Dicastery of Communication Vatican, 15 August 1990) <[https://www.vatican.va/content/john-paul-ii/en/apost\\_constitutions/documents/hf\\_jp-ii\\_apc\\_15081990\\_ex-corde-ecclesiae.html](https://www.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html)> (‘*Ex Corde Ecclesiae*’).

and to develop some understanding of the nature of Catholic universities. It also seeks to differentiate the approach of a Catholic law school from the criticisms made of Australian universities — including some law schools — for allegedly straying into ideology which have appeared in the legacy media, this year.<sup>3</sup> It considers the benefits of faith-based institutions for staff and for students. It also considers the special obligations and duties of members of the Catholic faith tradition, working within Catholic universities, and some of the very particular challenges and issues that arise for those in leadership roles in such institutions. The paper aims to encourage both academics and students to take up these opportunities and challenges.

## I. DIVINE PROVIDENCE AND MY ROAD TO NOTRE DAME

I have met some people who have always had a clear idea of their future career and of the direction of their life. I am not one of those people. I have met other people whose lives align more closely with John Lennon's famous line, 'Life is what happens to you while you're busy making other plans'.<sup>4</sup> I have sympathy with that view, but it fails to provide sufficiently for choice and for divine providence.<sup>5</sup> The *Catechism of the Catholic Church* puts it this way:

God is the sovereign master of his plan. But to carry it out he also makes sure of his creatures' cooperation. This use is not a sign of weakness, but rather a token of almighty God's greatness and goodness. For God grants his creatures not only their existence, but also the dignity of acting on their own, of being causes and principles for each other, and thus cooperating in the accomplishment of his plan.<sup>6</sup>

Readers can decide whether it was divine providence or just a large number of coincidences which led me to Notre Dame. I undertook my schooling in Strathfield with the Dominican nuns at St Martha's Parish School and with the Christian Brothers at St Patrick's College. I completed the Higher School Certificate ('HSC') in 1982. At the time, I was interested in English literature, modern history, and playing music.<sup>7</sup> As it happened, my HSC results were sufficient to attract an offer to study, not only a *Bachelor of Arts* but also a *Bachelor of Laws*, at the University of New South Wales from which I graduated in 1989. My university results were strong enough for me to gain graduate employment as a solicitor with a large corporate and commercial law firm in 1989 and I worked there until I left to join Notre Dame in 2013.

<sup>3</sup> See, eg, Joanna Panagopoulos, 'Uni Law School Acknowledges Course "Hijack"', *Weekend Australian* (Sydney, 22–23 March 2024) 3; Janet Albrechtsen, 'Degrees Depend on Woke Ideology' *Inquirer, The Australian*, (Sydney, 22–23 March 2025) 18; Andrew Lynch, "'Black-letter" Law Alone Doesn't Make for Good Lawyers', *The Australian* (online, 26 March 2025); Noah Yim, 'Dean for the Defence of Law School', *The Australian* (online, 26 March 2025); The Editor, 'Law School Courses Should Not Stray into Ideology', *The Australian* (online, 26 March 2025) 20; Henry Ergas, 'Role of Law Schools is to Teach, Not Preach', *The Australian* (Sydney, 28 March 2025) 13; James Allan, 'Self-censorship a Common Theme on DEI Campuses', *The Australian* (online, 31 March 2025); Natasha Bitá and Noah Lim, 'Coalition Starts Wars on "Woke" Education', *The Australian* (online, April 2 2025); Natasha Bitá, 'No Woke Syllabus for Us: Schools', *The Australian* (Sydney, April 3 2025) 1, 7; Janet Albrechtsen and Noah Yim, 'Lecturer's Indigenous Warning to Students', *The Australian* (Sydney, April 7 2025) 1; Janet Albrechtsen and Noah Yim, 'Lecturer Lays Down the Law on Race', *The Australian* (Sydney, 7 April 2025) 2.

<sup>4</sup> John Lennon, 'Beautiful Boy (Darling Boy)', *Double Fantasy* (Geffen Records, November 1980) Side A track 7.

<sup>5</sup> See Matthew 6:25–35 (New Jerusalem Bible).

<sup>6</sup> *Catechism of the Catholic Church*, Catholic Church (online, 1993) Pt 1 s 2 Ch 1 art 1 para 4 [306] <[https://www.vatican.va/archive/ENG0015/\\_INDEX.HTM](https://www.vatican.va/archive/ENG0015/_INDEX.HTM)>.

<sup>7</sup> I sang in a psychedelic band ('Prince Vlad & the Gargoyle Impalers') at school and for some time afterwards and subsequently sang and played guitar in the moderately successful independent pop band, 'The Mexican Spitfires'.

My first experience of working as a lawyer was six months in Property Law, after which I moved to the Commercial Litigation and Dispute Resolution area, where I stayed. I enjoyed studying law and, after joining the profession, completed a *Master of Laws* part-time at the University of New South Wales. I also enjoyed working as a solicitor. I was appointed as a Senior Associate of the firm in 1993 and invited to join the partnership in 1998. I would have happily continued in that role until retirement, but I became disenchanted with the direction of the firm following a decision of the firm's Pro Bono Committee (of which I had been a long-term member) to support an enterprise which engaged in practices contrary to my religious beliefs.

At about the same time, I began a spiritual journey to better understand my religious faith (I am a cradle Catholic) following the death of both of my parents within a year. I was particularly troubled by my inability to satisfactorily respond to a theological question, posed to me by my deeply religious father, when he was close to death. On that journey, I read many works of apologetics and theology and I read myself into a much deeper Catholic faith. At this time, my brother-in-law suggested that I might join him in enrolling part-time in a *Master of Arts (Theological Studies)* at Notre Dame. Although my brother-in-law did not ultimately commence that degree, I took up his suggestion and completed the degree, with High Distinction, in 2012.

I studied at Notre Dame not with any clear objective other than self-edification. Soon after completing my studies, I overheard a conversation at a St Thomas More Society meeting which alerted me to the fact that Notre Dame was looking to appoint a new Dean of the School of Law in Sydney. I applied for and was the successful candidate for the role, and commenced as the Sydney Dean of Law in 2013. At that time, Notre Dame was structured around its Schools with separate Schools of Law (and of Business, Philosophy & Theology, and other disciplines) on the Sydney campus and on the Fremantle Campus--with each School, on each campus, led by their own Dean. In 2020, following a restructure, Notre Dame merged the Fremantle and Sydney Schools of Law with the Schools of Business on those two campuses, to form a new national School of Law and Business. The new School formed part of the new Faculty of Arts, Sciences, Law and Business. I was appointed the inaugural National Head of School of Law and Business and held that role until I retired in December, 2024. Prior to studying and then working at Notre Dame, my tertiary studies had been solely at a public university. I had worked in the law as described above and, prior to that in the New South Wales public service, but I had never worked in a faith-based institution. I found studying and working at Notre Dame to be a great liberation which gave me the opportunity to be fully myself in study and in the workplace.

## II. NOTRE DAME AUSTRALIA AND THE CATHOLIC INTELLECTUAL TRADITION

### *Notre Dame*

Notre Dame was established in 1989 by an act of the Western Australian parliament.<sup>8</sup> Section 5 of that founding legislation sets out Notre Dame's Objects as follows:

The objects of the University are —

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<sup>8</sup> *University of Notre Dame Australia Act 1989* (WA).

- (a) the provision of university education, within a context of Catholic faith and values; and
- (b) the provision of an excellent standard of —
  - (i) teaching, scholarship and research;
  - (ii) training for the professions; and
  - (iii) pastoral care for its students.<sup>9</sup>

The University's website also sets out a vision as follows:

We believe the role of a modern Catholic university is much more than the creation and transmission of knowledge. It's something much deeper.

Our students are our number one priority. We take great pride in educating the whole person, the academic, social, physical and spiritual dimensions and are deeply committed to supporting our students. In doing so, we encourage our students to thrive, and make important contributions to our communities.

We also encourage and support our staff in the same way — to ensure each them are not just employees of Notre Dame, but are part of a wider community with the opportunity to make a difference.<sup>10</sup>

Unusually for a Catholic university, Notre Dame was established by lay Catholics rather than by a religious order. It accepted its first students in 1992, on the Fremantle campus, and subsequently established a Broome campus in Western Australia's Kimberley region, a Sydney campus in New South Wales, and eight clinical schools in regional New South Wales and Victoria. Around 12,000 students now study across its campuses.<sup>11</sup> The University offers undergraduate and postgraduate programs in Law, Business, Philosophy, Theology, Education, Medicine, Nursing and Midwifery, Health Sciences, and Physiotherapy.<sup>12</sup> Law degrees are available on the Sydney and Fremantle campuses and a total of about 100 new law students enrol in coursework degrees at each of the campuses each year.<sup>13</sup>

Notre Dame is not a sectarian university and welcomes students and staff from a wide range of religious traditions (and of none), cultures, and backgrounds. Whilst some students choose to study at Notre Dame specifically because they adhere to the Catholic religious tradition, students are attracted to study at Notre Dame for a wide range of reasons. These include relatively small class sizes, the focus on training for the legal, accounting, or other profession, the focus on pastoral care, and prior favourable experience of learning at a Catholic school. Whilst the Catholic nature of the University is clear from the University's Vision and Objects, the University's website features a 'Why Choose Notre Dame?' section which does not even

<sup>9</sup>*Our Objects*, The University of Notre Dame Australia (2025) <<https://www.notredame.edu.au/about-us/vision-and-objects>>.

<sup>10</sup>*Our Visions*, University of Notre Dame Australia (2025) <<https://www.notredame.edu.au/about-us/vision-and-objects>>.

<sup>11</sup>*Our Objects*, University of Notre Dame Australia (2025) <<https://www.notredame.edu.au/about-us/vision-and-objects>>.

<sup>12</sup>University of Notre Dame Australia, 'Find an Undergraduate Program. Explore Programs by Study Area' (Web Page, 2025) <<https://www.notredame.edu.au/study/our-programs/undergraduate>>; University of Notre Dame Australia, 'Find an Postgraduate Program. Explore Programs by Study Area' (Web Page, 2025) <<https://www.notredame.edu.au/study/our-programs/postgraduate>>.

<sup>13</sup>*Bachelor of Laws, Bachelor of Laws (Graduate entry), Bachelor of Laws double degrees and Master of Laws*.

include a heading in answer to that question specifically referencing Catholicism, Christianity, or religion. Rather, it provides answers to that question under the following headings: ‘Ethical and Critical Thinking’, ‘Professional Experience’, ‘Our Distinctive Approach’, ‘It’s Personal’, ‘Graduate Job-ready’, and ‘A Global Perspective’.<sup>14</sup>

Just as there are a range of attractive forces which lead students to choose to study at Notre Dame, there are a variety of characteristics which attract staff to work at Notre Dame. Many staff are attracted to Notre Dame because it is a Catholic university — whether they are serious followers of the Catholic faith tradition, serious followers of other Christian or other religious faiths, or not particularly religious at all. Some staff are attracted to work at Notre Dame because it is an openly religious environment which, whilst unambiguously Catholic, is respectful of all religion. Different aspects of the Catholic nature of the University and the School appeal to different staff. All staff share a particular care for each student as a person with inherent human dignity as found in the focus on pastoral care in the Objects. All staff share a respect for the beliefs of each student and of each other — religious and otherwise — and perspectives formed by those beliefs are openly discussed in class. Among other perspectives, students are exposed to Catholic positions on issues where they are relevant in a course.

#### *The Relationship Between Faith and Reason in the Catholic Intellectual Tradition*

This year, the Australian media has criticised a number of Australian universities for an alleged tendency towards politicisation and indoctrination rather than impartiality and objectivity in education.<sup>15</sup> For example, Ergas, whilst accepting that law students should learn the law in context, expressed concern that:

It is, however, one thing to explore the social context and impact of the legal system; it is quite another to allow teaching to degenerate into preaching, imposing the lecturer’s conception of social justice on students who have little choice but to acquiesce.<sup>16</sup>

Whilst none of this media attention has been directed towards religious faith-based universities, some might consider that a Catholic university, like Notre Dame, might legitimately be criticised on a similar basis. From my experience, such a critique would be ill-founded as, far from indoctrination or preaching, Notre Dame and certainly the Schools which I led, were dedicated to excellence and to searching for the truth. To understand what this means, in a Catholic context, it is necessary to briefly discuss the relationship between faith and reason in the Catholic intellectual tradition. In essence, the Catholic intellectual tradition sees no conflict between faith and reason because there can only be one truth. In this tradition, if faith and science, or faith and reason, were delivering irreconcilably different outcomes, this would evidence a lack of understanding requiring more thought, discussion, and understanding in order to find the truth. There are two key passages of scripture which guide my thinking on this and which guided me in my roles at Notre Dame: Matthew 22:35–37 and 1 Thessalonians 5:21.<sup>17</sup>

<sup>14</sup> University of Notre Dame Australia, ‘Why Choose Notre Dame?’ (Web Page, 2025) <<https://www.notredame.edu.au/study/why-unda>>.

<sup>15</sup> See above n 3, all sources.

<sup>16</sup> Ergas (n 3) 13.

<sup>17</sup> Matthew 22: 35–37; 1 Thessalonians 5:21 (New Jerusalem Bible) (emphasis added).

Master, which is the greatest commandment of the Law? Jesus said to him, ‘You must love the Lord your God with all your heart, with all your soul, *and with all your mind*. This is the greatest and the first commandment.

[T]est everything and hold on to what is good.

What these passages evidence, is that reason is not at all antithetical to religious faith and that it is right to test propositions to discern the truth. The *Catechism of the Catholic Church* puts it this way:

Though faith is above reason, there can never be any real discrepancy between faith and reason. Since the same God who reveals mysteries and infuses faith has bestowed the light of reason on the human mind, God cannot deny himself nor can truth ever contradict truth. Consequently, methodological research in all branches of knowledge, provided it is carried out in a truly scientific manner and does not override moral laws, can never conflict with the faith, because the things of the world and the things of faith derive from the same God.<sup>18</sup>

As a result, I have always encouraged students and colleagues to debate and engage in dialogue on issues at Notre Dame with the objective always of searching for the truth. As a result, students with a religious tradition (whatever that tradition might be if they hold to one), are not discouraged from mentioning or discussing it alongside other approaches in the classroom where it is relevant. Whilst this may appear counter-intuitive, because the University is unapologetically Catholic, it is open to multiple perspectives.

Douglas Murray has recently — and accurately — observed:

Many people in the West today are not comfortable talking in terms like *good* or *evil*. In our increasingly secular societies, many people seem to think that such words are part of the past — too reductive an idea for our far more subtle and understanding times. But it seems to me that it is we who are missing something. Evil does exist as a force in the world. Indeed, it is the only explanation for why certain people do certain things. ... At the same time it seems to me that such as force as ‘good’ also exists in the world. ... The fight between good and evil may seem too Manichean for some. Yet it is they — in their search for endless subtlety and limitless understanding — who are actually missing out on one of the greatest divides of all.<sup>19</sup>

Notre Dame law students are not able to ignore questions of good and evil. Beginning in first semester first year, Notre Dame law students are expected to grapple with the meaning of law, to consider what makes a ‘good’ law and a ‘good’ lawyer, and indeed discuss and debate the existence of concepts such as truth, good, and evil. They return to these topics in their final year in *Legal Philosophy*. These are all matters which are most unlikely to be the subject of such rich and broad discussion at other Australian law schools. In my view, they are critical topics for inclusion in the curriculum of any law school but most particularly for a Catholic

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<sup>18</sup> *Catechism of the Catholic Church* (n 6) Pt1 s1 Ch3 art1 III [159] (citations omitted).

<sup>19</sup> Douglas Murray, *On Democracies and Death Cults: Israel, Hamas and the Future of the West* (Harper Collins, 2025) xxiii- xxiv.

law school. At Notre Dame, the Christian origins and influences on the common law and Australia's legal system, on human rights law, and on legal philosophy and Christian moral positions form part of the curriculum. Over the course of a law degree and in context, Notre Dame law students should be exposed to the Catholic intellectual tradition's position on controversial subjects such as marriage, euthanasia, abortion, religious confession, modern slavery, and human trafficking consistently with the official teaching of the Church. The objective is to present those positions and contrary positions clearly to facilitate conversation in which critique, debate, and discussion is welcome and encouraged. No part of the approach is indoctrination or clamping down on contrary views.

Those discussions were sometimes very challenging particularly at times when Commonwealth or State laws governing those issues were the subject of reforms which moved them away from alignment with the Catholic faith tradition. Marking of assessment work where such topics were relevant was not a question of alignment with Church teaching but with careful, rational, and clear reasoning based on referenced readings. Indeed, in my experience of marking student work over the eight years in which I taught *Legal Process & Statutory Interpretation* three times a year, papers which took positions contrary to my own and to those of the Church almost always attracted the highest marks. It may be that those students put more work into such papers given their knowledge of my own position.

#### *Servant Leadership and Student Engagement*

Scripture not only provided guidance to me on how students ought to be taught at Notre Dame but also as to my role in leadership and in student engagement. The two most influential passages were Mark 10:42–45 and John 13:34–35 which again I extract below:

You know that among the gentiles those they call their rulers lord it over them, and their great men make their authority felt. Among you this is not to happen. No; anyone who wants to become great among you must be your servant, and anyone who wants to be first among you must be slave to all.<sup>20</sup>

I give you a new commandment: love one another just as I have loved you. It is by your love for one another, that everyone will recognise you as my disciples.<sup>21</sup>

As a Dean of the School of Law, Sydney (2013–2020) and as a National Head of the School of Law and Business (2020–2024) I was responsible for such things as staff performance reviews, approval of leave, decisions on student applications for relief, and student discipline. As many staff and students with whom I interacted came from different (or no) religious traditions or had little formation in any religious tradition, the motivations for my actions may not always have been understood and may (I am sure) have been interpreted as signs of weakness at times. I am also sure that I did not always abide by those scriptural calls as perfectly as I might have hoped. Nevertheless, at least I endeavoured to exercise my leadership, administrative, and other roles in this way. This certainly did not mean that everyone agreed with my decisions or that I did not seek to comport my determinations to the policies and procedures of the University, which I did, but it did mean that, for example in disciplinary matters, students could expect a fair hearing and a serious effort to achieve just outcomes.

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<sup>20</sup> Mark 10:42–45 (New Jerusalem Bible).

<sup>21</sup> John 13:34–35 (New Jerusalem Bible).

*Vatican Guidance for Catholic Universities*

Papal encyclicals take their titles from the first few words of their text written in Latin. The opening words of the key Vatican document for Catholic universities are ‘[b]orn from the heart of the Church’ or *Ex Corde Ecclesiae*. Those words indicate very clearly just how important the author of that document, Pope John Paul II, considered Catholic universities were. When it was first published, *Ex Corde Ecclesiae* was controversial, challenging, and even threatening for some Catholic universities.<sup>22</sup> It was particularly so for those universities which had been operating for a long time and had developed habits or behaviours which did not readily align with the prescriptions of the document. For example, the obligations imposed by *Ex Corde Ecclesiae* did not fit well with the statement agreed in 1967 by US Catholic academic leaders in Land O’Lakes, Wisconsin, which became known as the ‘Land O’Lakes Statement’. It stated:

To perform its teaching and research function effectively, the Catholic university must have a true autonomy and academic freedom in the face of authority of whatever kind, lay or clerical, external to the academic community.<sup>23</sup>

Writing in 2022 and speaking of the situation, in the United States, Hendershott observed that:

As we approach the 20th anniversary of what was supposed to be the implementation of *Ex Corde Ecclesiae*, there still are very few Catholic college administrators willing to even discuss the document. And even fewer bishops willing to enforce it. Refusing to comply with the document’s *mandatum* requiring all Catholic colleges to teach ‘in communion’ with Church doctrine — and be accountable to their bishops — most Catholic college and university administrators have spent the past few decades to ignoring it .... [M]ost Catholic college faculty and administrators continue to resist any attempt by the bishops to ‘interfere’ with the activities on their campuses — even when those activities are blatant violations of Catholic moral teachings.<sup>24</sup>

The timing of the release of *Ex Corde Ecclesiae* was close to Notre Dame’s founding, to the commencement of its operations in Fremantle, and well before it established a campus in Sydney. Whatever the position adopted by some Catholic universities and their administrators in the US, along with Notre Dame’s Objects and the passages of scripture referenced earlier, *Ex Corde Ecclesiae* was the key document which guided me in my time at Notre Dame. I regularly referenced it in my dealings with the University’s administrative and academic leadership, with academic staff, and students. I heard not one criticism of its dictates or my references to it, during my studies of theology there in 2011 to 2012 or in my years working there from 2013 to 2024.

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<sup>22</sup> Anne Hendershott, ‘Catholic Universities and Colleges Continue to Ignore *Ex Corde Ecclesiae*’, *Catholic World Report* (Web Page, 17 March 2022) <<https://www.catholicworldreport.com/2022/03/17/catholic-universities-and-colleges-continue-to-ignore-ex-corde-ecclesiae/>>.

<sup>23</sup> North American Group, International Federation of Catholic Universities, ‘Land O’Lakes Statement: The Idea of the Catholic University’ *Cushwa Center* (23 July 1967) 6 [1] <<https://cushwa.nd.edu/assets/245340/landolakesstatement.pdf>>.

<sup>24</sup> Hendershott (n 22).

### III. THE ROLE OF FAITH-BASED INSTITUTIONS OF HIGHER LEARNING IN AUSTRALIA

There are currently 43 universities in Australia comprising 37 public universities and 6 private universities.<sup>25</sup> Only two of those 43 universities are Catholic: Notre Dame and the Australian Catholic University ('ACU'). They provide students with an option to pursue their university studies in a different context, each with their own particular Mission or Objects.<sup>26</sup>

*Ex Corde Ecclesiae* is a rich and dense work which has implications for many dimensions of everyday life in a Catholic university which seeks to orient its activities to its demands. These are not just in big and obvious areas such as rejecting relativism in favour of a search for the truth, including the Truth, the promotion of religious freedom and inter-religious dialogue and in making space for discussion and research, including in areas which might offend the moral zeitgeist, but they extend into more mundane and operational areas such as decision making in student applications and content and methods of teaching and modes of delivery. *Ex Corde Ecclesiae* makes real demands on all staff working in a Catholic university but makes very particular demands on Catholic staff. As a Catholic myself and one who took *Ex Corde Ecclesiae* seriously — as a teacher, researcher, and administrator — it added serious obligation to my roles. Because *Ex Corde Ecclesiae* is so central to my approach to the roles that I performed at Notre Dame, and so central to the activities of an authentically Catholic university, this section will, of necessity, include a number of sometimes lengthy quotations from that document.

#### *Ex Corde Ecclesiae and non-Catholic Staff*

*Ex Corde Ecclesiae* requires all staff to be informed of the university's Catholic identity and that they have a responsibility to promote or at least respect that identity. For this reason, when I was recruiting staff, I always sent them a link to *Ex Corde Ecclesiae* — and to the University's Objects — so that they might become familiar with them before interview. This is critical because they create quite different obligations and expectations than public universities — and *Ex Corde Ecclesiae* requires more of Christian staff than others. *Ex Corde Ecclesiae* relevantly provides:

All teachers and all administrators, at the time of their appointment, are to be informed about the Catholic identity of the Institution and its implications, and about their responsibility to promote, or at least to respect, that identity.<sup>27</sup>

Those university teachers and administrators who belong to other Churches, ecclesial communities, or religions, as well as those who profess no religious belief, and also all students, are to recognise and respect the distinctive Catholic identity of the University. In order not to endanger the Catholic identity of the University or Institute of Higher Studies, the number of non-Catholic teachers should not be

<sup>25</sup>Australian Trade and Investment Commission, 'Study Australia List of Australian Universities' *Study Australia* (Web Page, 2025) <<https://www.studyaustralia.gov.au/en/plan-your-studies/list-of-australian-universities>>.

<sup>26</sup>*Our Mission*, Australian Catholic University (2025) <<https://www.acu.edu.au/about-acu/mission-identity-and-values/our-mission>>;

*Vision and Objects*, University of Notre Dame (2025) <<https://www.notredame.edu.au/about-us/vision-and-objects>>.

<sup>27</sup>*Ex Corde Ecclesiae* (n 2) art 4 §2.

allowed to constitute a majority within the Institution, which is and must remain Catholic.<sup>28</sup>

Christians among the teachers are called to be witnesses and educators of authentic Christian life, which evidences attained integration between faith and life, and between professional competence and Christian wisdom. All teachers are to be inspired by academic ideals and by the principles of an authentically human life.<sup>29</sup>

I also provided candidates who were short-listed for interview in the School with a link to the relevant chapter of Piderit and Morey's *Teaching the Tradition: Catholic Themes in Academic Disciplines*.<sup>30</sup> I would expect that some self-selection would be occurring through this process with potential staff who were hostile to the Catholic Church choosing not to apply to work at a University obligated by its legislative frame to provide a 'university education, within a context of Catholic faith and values'. In my time at Notre Dame no staff ever expressed any concern to me about such features of the School or of the demands that *Ex Corde Ecclesiae* placed on them. On the contrary, staff spoke positively about the religious context of the University and most particularly my colleagues from the Muslim faith traditions. I witnessed staff deeply committed to their religious tradition and to the pastoral care of their students. It is, of course, always possible that there were some staff who were secretly unhappy about aspects of School life under my leadership, such as staff meetings commencing with a brief scripture reading and a prayer, with the annual School Prizegiving commencing with a Catholic mass, with the School's commitment to religious freedom evident through its Annual Religious Liberty lecture, regular Religious Liberty Conference, Annual Iftar dinner, and/or generally with the Catholic nature of the place. If so, they chose to keep those feelings to themselves.

#### *Ex Corde Ecclesiae and Catholic Staff*

*Ex Corde Ecclesiae* requires more of Catholic staff than other staff as it requires Catholic staff to be faithful to Catholic doctrine and morality in their work:

In ways appropriate to the different academic disciplines, all Catholic teachers are to be faithful to, and all other teachers are to respect, Catholic doctrine and morals in their research and teaching. In particular, Catholic theologians, aware that they fulfil a mandate received from the Church, are to be faithful to the Magisterium of the Church as the authentic interpreter of Sacred Scripture and Sacred Tradition.<sup>31</sup>

As a faithful Catholic this did not pose any challenge to me — but was rather a relief as it not only enabled me to be but required me to be authentically Catholic at work. In my time at Notre Dame no staff ever expressed any concern to me about the demands that this placed on them. I witnessed Catholic staff deeply committed to their religious tradition and to the pastoral care of their students.

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<sup>28</sup> Ibid art 4 §4.

<sup>29</sup> Ibid [22].

<sup>30</sup> John J Piderit and Melanie M Morey, *Teaching the Tradition: Catholic Themes in Academic Disciplines* (Oxford University Press, 2012).

<sup>31</sup> *Ex Corde Ecclesiae* (n 2) art 4 § 3.

### *The Promotion of Religious Freedom and Inter-religious Dialogue*

*Ex Corde Ecclesiae* encourages the promotion of religious freedom and inter-religious dialogue, as follows:

Besides cultural dialogue, a Catholic University, in accordance with its specific ends, and keeping in mind the various religious-cultural contexts, following the directives promulgated by competent ecclesiastical authority, can offer a contribution to ecumenical dialogue. It does so to further the search for unity among all Christians. In inter-religious dialogue it will assist in discerning the spiritual values that are present in the different religions.<sup>32</sup>

When I joined the School of Law in Sydney, it had already introduced an annual Religious Liberty Lecture, and the promotion of religious freedom and inter-religious dialogue were key areas of focus and research of a number of colleagues. The Religious Liberty Lecture expanded into a full-day conference in Sydney and from 2024 an annual Iftar dinner.

### *Research*

In my view, society benefits when a range of views are presented and considered, particularly to governments considering law reform. *Ex Corde Ecclesiae* encourages Catholic universities to engage in research which seeks to benefit society even though it may not be popular as follows:

A Catholic University, as any University, is immersed in human society; as an extension of its service to the Church, and always within its proper competence, it is called on to become an ever more effective instrument of cultural progress for individuals as well as for society. Included among its research activities, therefore, will be a study of *serious contemporary problems* in areas such as the dignity of human life, the promotion of justice for all, the quality of personal and family life, the protection of nature, the search for peace and political stability, a more just sharing in the world's resources, and a new economic and political order that will better serve the human community at a national and international level. University research will seek to discover the roots and causes of the serious problems of our time, paying special attention to their ethical and religious dimensions. *If need be, a Catholic University must have the courage to speak uncomfortable truths which do not please public opinion, but which are necessary to safeguard the authentic good of society.*<sup>33</sup>

Research areas in the School have included a focus on religious freedom, religious confession privilege, freedom of conscience and issues relating to abortion, euthanasia, and modern slavery and human trafficking. Colleagues in the School have also contributed to submissions in such areas to various government inquiries.

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<sup>32</sup> Ibid [57].

<sup>33</sup> Ibid [32] (emphasis added).

*Content and Methods of Teaching and Modes of Delivery*

*Ex Corde Ecclesiae* encourages an education which seeks to form good people rather than simply impart technical knowledge:

The education of students is to combine academic and professional development with formation in moral and religious principles and the social teachings of the Church; the programme of studies for each of the various professions is to include an appropriate ethical formation in that profession. Courses in Catholic doctrine are to be made available to all students.<sup>34</sup>

All undergraduate students at Notre Dame study a ‘core curriculum’ which includes philosophy, ethics, and theology. In compulsory courses, law students at Notre Dame can also expect to learn of and to discuss and debate the Christian background to the common law and to Australia’s legal system in *Legal History*, the virtues and natural law theory in *Legal Philosophy*, the constitutional protections for religious freedom in *Constitutional Law*, human dignity and modern slavery and human trafficking in *Criminal Law*, and religious confession privilege in *Evidence*. They will also be exposed to ethics from the beginning to the end of their degree with a particular focus in first year (in *Legal Process & Statutory Interpretation*) and in the final year (in *Commercial Practice and Ethics*). In other words, Notre Dame seeks to provide law students with both a legal education *and* an ethical education.

One of the most difficult areas I dealt with in my leadership roles related to modes of delivery. Prior to Covid, all law teaching at Notre Dame was in person. When this became impossible due to State lockdowns, all teaching moved on-line. During the Covid pandemic, the University never mandated that staff or students had to be vaccinated but there were some periods of time in which the University took the position that staff and students who were not vaccinated were not permitted to attend campus. There were several staff and students of the School who for various reasons, including religious and conscientious objections, did not take any of the Covid vaccines. Given my strong commitment to freedom of religion and freedom of conscience, enforcing this requirement on colleagues — and some very religious students with strongly held objections to the vaccines — for whom I had great respect was a significant challenge. Whilst teaching was on-line, the fact that some staff and students were prohibited from attending did not further disrupt teaching. It did mean that staff could not attend their offices to collect books or to work or meet in person with colleagues or with students when State law permitted it. It was a very difficult time in which I did my best to support all of my colleagues and all of the School’s students. There were periods on the Fremantle campus where this became a particular challenge as the State permitted movement and attendance at University campuses whilst the University’s requirements precluded this. With support from colleagues we were able to accommodate those students who were not able to attend campus during this period.

The Covid era move to online presented other challenges. Some students who had left to study online elsewhere, due to their distance from campus or their need to work, returned to study at Notre Dame when they could do so online. Since in person teaching again became possible, where accreditation has permitted it, Notre Dame law students have been permitted to choose to study in person or online. As community is such an important component of a Notre Dame

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<sup>34</sup> Ibid art 4 § 5.

education this approach was not universally popular among colleagues. I saw it as a necessary response to the following call in *Ex Corde Ecclesiae* to make university education accessible:

Every Catholic University feels responsible to contribute concretely to the progress of the society within which it works: for example it will be capable of searching for ways to make university education accessible to all those who are able to benefit from it, especially the poor or members of minority groups who customarily have been deprived of it.<sup>35</sup>

#### IV. THE BENEFITS OF CATHOLIC INSTITUTIONS FOR STAFF AND STUDENTS

##### *Staff*

As noted above, the expectations of staff at a Catholic university are different to those at a public university. All of the staff at a Catholic University will not be Catholic and, as noted above, that is certainly the case at Notre Dame which employs staff from many religious traditions and perspectives. Staff include serious religionists — including Catholics who are deeply committed to God within the context of their religious tradition. It is important that staff working in any Mission or Objects-driven institution, recognise the implications of doing so. As Levin has observed:

[T]here is ... an important role for understanding ourselves as formed by institutions and acting accordingly — for asking ourselves, in little moments of decision, ‘What should I do here, give my role or my position.... And there is a dire need, as well, for men and women at every level in each of our society’s institutions to channel their energies into that institution’s objectives and purposes — defining their ambitions by its distinct modes of integrity, seeing its aspirations as theirs, adopting its ethos for their own, and understanding its boundaries and not just its powers as formative.<sup>36</sup>

For staff who have sought employment with Notre Dame in order to experience religious tolerance — particularly but not only for faithful Catholics and Christians seeking to work in an environment of respect for the whole person — it offers a real alternative to working in a public university.

##### *Students*

Young Australians are experiencing serious levels of mental distress and suicidal ideation, with suicide now the leading cause of death for Australian children and young people.<sup>37</sup> Nearly a fifth (19%) of Australians aged 18–34 experienced suicidal distress in the 12 months to March 2025.<sup>38</sup> They are now the demographic with the highest level of distress.<sup>39</sup> Young Australians are the most likely Australians to have ‘serious thoughts of suicide, mak[e] a suicide plan, or

<sup>35</sup> Ibid [34].

<sup>36</sup> Yuval Levin, *A Time to Build* (Basic Books, 2020) 42.

<sup>37</sup> Sarah Ison, ‘Young Have Lost Hope, Suicide Figures Show’, *The Australian* (online, 6 March 2025).

<sup>38</sup> Suicide Prevention Australia, ‘Young Australians Demand Political Action on Suicide Prevention’ Media Release, (6 March 2025) <<https://www.suicidepreventionaustralia.org/young-australians-demand-political-action-on-suicide-prevention/>>.

<sup>39</sup> Ison (n 37).

attempt to take their life'.<sup>40</sup> According to Nieves Murray, the Chief Executive of Suicide Prevention Australia, 'that is a significant change. Historically, it has been people in the middle-aged groups. This is indicating something different, and that, I think, is problematic and indicates a group of people with a lack of hope for the future'.<sup>41</sup> Students at Notre Dame are certainly not immune from these issues.

Many studies have linked religion with positive health and mental health outcomes and with happiness. For example, in 2019, the Pew Research Centre published a report titled *Religion's Relationship to Happiness, Civic Engagement and Health Around the World*. It found:

Whatever the explanation may be, more than one-third of actively religious US adults (36%) describe themselves as very happy, compared with just a quarter of both inactive and unaffiliated Americans. Across 25 other countries for which data are available, actives report being happier than the unaffiliated by a statistically significant margin in almost half (12 countries), and happier than inactively religious adults in roughly one-third (nine) of the countries.

The gaps are often striking: In Australia, for example, 45% of actively religious adults say they are very happy, compared with 32% of inactives and 33% of the unaffiliated. And there is no country in which the data show that actives are significantly *less* happy than others (though in many countries, there is not much of a difference between the actives and everyone else).<sup>42</sup>

A Catholic University is not a place of indoctrination but nor is it a place in which religion is denigrated or ridiculed. Students who join the University from a religious tradition which gives their lives meaning and purpose and gives them hope for the future will not be disparaged for their beliefs. Through the availability of daily mass, the sacraments, and access to chaplaincy staff and to staff who live openly as Catholics — or religious believers from other traditions — some students experience a revival of their faith and some come to religious faith anew whilst they are students or sometimes afterwards. The School has seen some graduates join the Catholic Church, become Christians worshipping in another tradition, take religious orders as nuns, or join the seminary to study for the priesthood.

Notre Dame is a very special place and it was a great privilege for me to study and to work there. The continued ability of all religious faith-based institutions — whether they be universities, hospitals, schools, nursing homes, or others — to exist ultimately depends on the willingness of mission-aligned people to seek them out. This may sometimes involve sacrifice — sometimes considerable sacrifice — particularly for those already in established careers elsewhere in places which might be better resourced, have a stronger reputation, or which provide greater financial rewards. The continued existence and success of such institutions is, however, in my view critical for a multi-faith and pluralistic society. I would strongly encourage academics and students to work and study at faith-based institutions like Notre Dame.

<sup>40</sup> Suicide Prevention Australia (n 38).

<sup>41</sup> Nieves Murray, quoted in Ison (n 37).

<sup>42</sup> *Religion's Relationship to Happiness, Civic Engagement and Health Around the World*, Pew Research Center (Report, 31 January 2019) (emphasis in original) <<https://www.pewresearch.org/religion/2019/01/31/religions-relationship-to-happiness-civic-engagement-and-health-around-the-world/>>.

# Australia's Culture of Death: Rejecting the 'Sanctity of Life' Principle

Gabriël Moens\*

## INTRODUCTION

The eminent bioethicist John Fleming has noted that 'much of the contemporary push for legalised voluntary euthanasia is predicated on the idea that there are lives not worthy of being lived and that individuals should have the right to end their lives with the assistance of the medical profession when those individuals judge that their lives are no longer of benefit to them or to others but are, rather, a burden'.<sup>1</sup> The challenging nature of this statement invites people to soberly and objectively reflect on the confronting issue of euthanasia, also known as Voluntary Assisted Dying ('VAD'). In this paper, I will argue that VAD, in seeking to control how people die, constitutes a repudiation of the 'sanctity of life' principle, which is the *sine qua non* of all human rights, including freedom of religion.

## AUSTRALIAN VAD LEGISLATION

The legislative journey of euthanasia in Australia is almost complete. VAD has been available in Victoria since 19 June 2019, Western Australia since 1 July 2021, Tasmania since 23 October 2022, Queensland since 1 January 2023, South Australia since 31 January 2023, and New South Wales since 28 November 2023. The Australian Capital Territory ('ACT') scheme comes into effect on 3 November 2025.<sup>2</sup>

The only jurisdiction in Australia without euthanasia legislation is the Northern Territory ('NT'). This is ironic because the NT was the first jurisdiction to adopt, in 1995, a pioneering VAD law.<sup>3</sup> However, two years later, the federal government revoked this legislation, relying on s 122 of the *Australian Constitution*, according to which '[t]he Parliament may make laws for the government of any territory'. But in 2024, following community consultations, a *Report into Voluntary Assisted Dying in the Northern Territory* recommended the adoption of VAD legislation 'that is consistent with VAD legislation in other Australian States and Territories'.<sup>4</sup>

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\* Emeritus Professor of Law, University of Queensland. This Comment is a revised and expanded version of Gabriël A Moens, 'Euthanasia's Societal Death Knell' *Quadrant* (11 March 2025) <<https://quadrant.org.au/news-opinions/society/euthanasias-societal-death-knell/>> (reprinted with permission).

<sup>1</sup> John I Fleming, 'The Right to Life and the Persistence of Eugenics' (Speech, Campion College, 20 October 2004) later published as John I Fleming, 'The Right to Life and the Persistence of Eugenics', *Academia* (online, 2017). Cf John Fleming, *To Kill or Not to Kill: Euthanasia in a Society with a Cultural Death Wish* (Austin Macauley Publishers, 2021) 406–40.

<sup>2</sup> *Voluntary Assisted Dying Act 2024* (ACT); *Voluntary Assisted Dying Act 2022* (NSW); *Voluntary Assisted Dying Act 2021* (Qld); *Voluntary Assisted Dying Act 2021* (SA); *Voluntary Assisted Dying Act 2021* (Tas); *Voluntary Assisted Dying Act 2017* (Vic); *Voluntary Assisted Dying Act 2019* (WA). For a history of VAD in Australia, see Kerstin Braun, 'Looking Back to Look Forward: The History of VAD Laws in Australia and Future Law Reform in the Australian Territories' (2024) 32(1) *Medical Law Review* 42, 42–60.

<sup>3</sup> *Rights of the Terminally Ill Act 1995* (NT).

<sup>4</sup> *Report into Voluntary Assisted Dying in the Northern Territory* (Final Report, July 2024) 8 <[https://cmc.nt.gov.au/\\_data/assets/pdf\\_file/0018/1420722/vad-report-2024.pdf](https://cmc.nt.gov.au/_data/assets/pdf_file/0018/1420722/vad-report-2024.pdf)>.

It is thus apposite to describe the situation of euthanasia in the NT as an example of that well-known phrase from the Bible, 'the first shall be the last'.<sup>5</sup>

According to Vote Compass data — an Australian Broadcasting Corporation ('ABC') sponsored poll — almost 90 per cent of voters now support VAD for terminally ill patients. Andrea Carson, commenting on the poll results, opines that, '[w]e've had more conversations about it, the sky hasn't fallen in, a lot of concerns about the pendulum tipping too far the other way have not been realised at this time.'<sup>6</sup> Nonetheless, Carson's reference to the 'tipping' pendulum contains an ominous warning about the unexpected ways in which VAD legislation could erode the 'sanctity of life' principle.

### THE SLIPPERY SLOPE ARGUMENT

The 'sanctity of life' principle is eroded if, over time, voluntary assisted dying is made available to groups that, initially, were not its intended beneficiaries. These groups may include the mentally ill, people living with dementia, those who are tired of life, and even children. For example, in Belgium and the Netherlands, the law now allows children, even as young as nine years of age, to avail themselves of VAD to end their lives, and to make decisions about how and when to die. Moreover, the Dutch Parliament recently allowed the provision of euthanasia for children between the ages of one and twelve<sup>7</sup> who suffer from a serious illness or disorder that inevitably results in their death in the foreseeable future.<sup>8</sup> In this context, Madeleine Teahan, a perceptive commentator, asks: "How have liberal democracies become so enticed by the sinister notion that children should be eligible for euthanasia?"<sup>9</sup> The uncontrollable expansion of VAD is an example of the validity of the slippery slope argument.

Politicians around the world promote VAD unrelentingly. This promotion is based on various forms of utilitarianism that advocate the granting of benefits to the greatest number of people. For example, in Canada, VAD was only available to individuals with a terminal illness whose death was foreseeable. But the program now allows patients who are chronically ill or in severe pain to apply, even if they do not have a fatal or terminal condition. In 2023, 15,343 Canadians were euthanised as part of the government's medical assistance in dying (MAID) program.<sup>10</sup> And euthanasia is even supported by private organisations, as is seen in the refusal of some American insurance companies to cover expensive life-saving treatments for patients while they are simultaneously willing to assist them with euthanasia.<sup>11</sup>

<sup>5</sup> Matthew 19:30 and 20:16 (King James Version).

<sup>6</sup> Catherine Hanrahan, 'Euthanasia Support Strengthens to Nearly 90pc, Vote Compass Data Shows', *ABC News* (online, 8 May 2019) <<https://www.abc.net.au/news/2019-05-08/vote-compass-social-issues-euthanasia-transgender-republic-drugs/11087008>>.

<sup>7</sup> Dominic Wilkinson, 'Cross Post: Dutch Government to Expand Euthanasia Law to Include Children Aged One to 12: An Ethicist's View', *Practical Ethics* (Blog Post, 20 April 2023) <<https://blog.practicaethics.ox.ac.uk/2023/04/cross-post-dutch-government-to-expand-euthanasia-law-to-include-children-aged-one-to-12-an-ethicists-view/>>.

<sup>8</sup> Madeleine Teahan, 'The Alarming Spread of Child Euthanasia' (4 May 2023) *The Spectator Australia* <<https://www.spectator.com.au/2023/05/the-alarming-spread-of-child-euthanasia/>>.

<sup>9</sup> *Ibid.*

<sup>10</sup> Government of Canada, *Medical Assistance in Dying in Canada 2023* (Report No 5, 2023) <<https://www.canada.ca/en/health-canada/services/publications/health-system-services/annual-report-medical-assistance-dying-2023.html>>.

<sup>11</sup> Matthew Ogilvie, 'Are We a Culture That Celebrates Life or Death?', *The Epoch Times* (Opinion Post, 26 May 2024) <<https://www.theepochtimes.com/opinion/are-we-a-culture-that-celebrates-life-or-death-5657070>>.

Returning to Australia, the Western Australian Government Response to the report *My Life, My Choice*, which recommended the adoption of a VAD law in that State, is telling: all twelve recommendations regarding palliative care, while supported in principle, were subject to '[f]urther work ... to confirm dependencies and implementation (eg resources)' whereas its six recommendations on VAD were unconditionally supported.<sup>12</sup>

Australian academic and writer Matthew Ogilvie notes that, '[n]ormally one would caution against 'slippery slope' arguments because they rely on predictions that may or may not come true. But in the case of euthanasia, the slippery slope is a reality.'<sup>13</sup> In this context, Wesley J. Smith, who has been following the rise of medically assisted suicide in Western countries since the 1990s, argued that, 'when you turn ... from a value system of equal intrinsic dignity to ... values based on quality [of life], it becomes subjective and it becomes a real slippery slope leading to people being abandoned and exploited.' And 'once you say that killing is an acceptable and indeed a splendid answer to human suffering, how do you limit the ... suffering that would qualify for killing?'<sup>14</sup> Smith argues that medically assisted suicide is a symptom of a deep nihilism that is infecting society.

### THE CASE AGAINST VOLUNTARY ASSISTED DYING

The *first* point is that the journey of VAD legislation in Australia is an eye-opening account of the slipping medical standards of Western civilisation. Regardless of how one feels about VAD legislation, the erosion of these standards has contributed to the belief that our Western civilisation celebrates a 'culture of death', not a 'culture of life'. In addition to end-of-life legislation, the existence of this culture of death is evidenced by the widespread availability of abortion services, unwillingness to adopt legislation to provide medical assistance to babies who survive after a failed abortion, promotion of transgender ideology and its associated high level of suicide attempts, and the ubiquitous use of the Acute Resuscitation Plan ('ARP') which encourages patients to refuse resuscitation in the event of an acute deterioration or critical medical episode. As a result, the Hippocratic Oath, according to which medical practitioners shall not 'administer a poison to anybody when asked to do so,' and shall not 'suggest such a course,' has become an obsolete moral rule. Of course, the use of poison does not always constitute a violation of the Hippocratic Oath. Indeed, medical practitioners routinely administer poison to prolong life, not extinguish it. For example, poisons, such as chemotherapy, scorpion venom, and spider venom are used to treat cancer. This well-established practice does not violate the Hippocratic Oath because these poisons are used to lengthen life, whereas VAD involves the use of poison *to kill* people.

*Second*, Pope John Paul II, in his 1995 encyclical *Evangelium Vitae* (The Gospel of Life), described the VAD reality as the difference between a 'culture of life' and a 'culture of death'.

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<sup>12</sup> WA Government, *Government Response to the Joint Select Committee on End-of-Life Choices Report, My Life, My Choice* (Report, 23 August 2018) 5 <<https://www.health.wa.gov.au/~media/Files/Corporate/Reports-and-publications/End-of-life/End-of-Life-My-Life.pdf>>.

<sup>13</sup> Matthew Ogilvie, 'Are We a Culture that Celebrates Life or Death?', *The Epoch Times* (Opinion Post, 26 May 2024) <<https://www.theepochtimes.com/opinion/are-we-a-culture-that-celebrates-life-or-death-5657070>>.

<sup>14</sup> 'Death on Demand? Wesley J Smith Explains the Assisted Suicide Movement', *American Thought Leaders* (The Epoch TV, 12 November 2024) <<https://www.theepochtimes.com/epochtv/death-on-demand-wesley-j-smith-explains-the-assisted-suicide-movement-5745848>>.

He lamented that a 'culture of death' has created a hostile environment for freedom of religion and has infected the traditionally high moral standards of our Western civilisation.<sup>15</sup>

Noting the discernible deterioration of these standards, Brendan O'Neill, in a revealing article, characterises this deterioration as a 'moral disarmament' of the West, a process in which people are 'stripping away the values and virtues that once defined who we are as a society.'<sup>16</sup> Supporting his claim, O'Neill painstakingly and carefully pieces together the developments that resulted in this moral disarmament. He excoriates the role of government and private institutions, the decisions, and policies of which have accelerated the process of moral decay and disintegration. For him, there is no doubt that we are engaged in a culture war, in which opponents of euthanasia are accused of seeking moral absolutes, including, of course, the 'sanctity of life' principle.

But ironically, the relativists are equally seeking to entrench moral absolutes, including the allegedly undisputed validity and application of the principle of relativism and self-indulgent gratification. Could VAD be an example of this development?

*Third*, proponents of VAD characterise it as a 'human right' that should be granted to the greatest number of potential beneficiaries. The legislative creation of this 'right' is an example of human hubris, an attempt by people to arrogate to themselves the powers that only God possesses. In this era, there is a belief, among progressivists, that humans can control the uncontrollable. Hartmut Rosa, a German sociologist, recently published a book entitled *The Uncontrollability of the World* in which he argues that life is an unending and endless search for control.<sup>17</sup> He notes that, '[m]odernity is culturally geared and structurally driven towards making the world calculable, manageable, predictable, and controllable in every possible respect'.<sup>18</sup> For example, governments and the ruling elites seek to control the Earth's temperature, as evidenced by the pressure to achieve Net Zero emissions by 2050, by capturing and storing carbon dioxide, by increasing levels of digital censorship and dictating what we can see and say, by how people are born, marry, and die.

But such attempts to control the uncontrollable make life uninteresting. What makes life exciting is people's encounters with uncontrollability. We can see this in sporting competitions: as the outcome of a soccer or tennis match is unpredictable and uncontrollable, people enjoy it. People also relish a captivating and thrilling piece of music when, unexpectedly, they listen to it. Similarly, VAD, in effectively controlling the end of a person's life, deprives patients of the opportunity to know how long life can be extended and lived gracefully.

Hence, the 'right to die,' to the extent that it seeks to control how people end their life, is incompatible with the 'sanctity of life' principle — a pillar of Western civilisation — which holds that people may neither be deprived of their 'right to life' nor relinquish it. Both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political*

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<sup>15</sup> Pope John Paul II, *Evangelium Vitae* (Encyclical Letter, Dicastery of Communication Vatican, 25 March 1995) <[https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae.html](https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html)>.

<sup>16</sup> Quoted in Nina Nguyen, "The Undoing of Civilisation": What's Driving the West's Decline, British Pundit Discusses' *The Epoch Times* (Web Page, 27 April 2024) <<https://www.theepochtimes.com/world/the-undoing-of-civilisation-whats-driving-the-wests-decline-british-pundit-discusses-5638102>>.

<sup>17</sup> Hartmut Rosa, *The Uncontrollability of the World*, tr James Wagner (Polity Press, 2020).

<sup>18</sup> Ibid, quoted in Graham Tomlin, 'Why Religion Matters in the Assisted Dying Debate' (27 September 2024) *The Spectator Australia* <<https://www.spectator.com.au/author/graham-tomlinexample-com/>>.

*Rights* describe the 'right to life' as inalienable in art 3 and art 6 respectively. But the 'sanctity of life' principle and the 'right to life' provision of these international documents do not completely overlap: the 'sanctity of life' moniker intimates that the 'right to life' is a right of which we cannot be deprived *and* which we may not relinquish.

Once it is determined that people are 'killable,' they become an exploited commodity that facilitates personal gratification and serves the interests of society. As Pope John Paul II notes: 'Within this ... cultural climate, the body is no longer perceived as a properly personal reality, a sign and place of relations with others, with God and with the world. It is reduced to pure materiality: it is simply a complex of organs, functions and energies to be used according to the sole criteria of pleasure and efficiency.'<sup>19</sup> That is why in some countries, regulations pertaining to organ harvesting are embedded in 'right to die' legislation.<sup>20</sup>

The author of a recently published article speculates about the world entering a period of regressive evolution. He argued that a common symptom of regressive evolution 'is supporting grand schemes without investigating any downstream consequences.'<sup>21</sup> VAD is such a grand scheme which also constitutes a symptom of a dying civilisation and results in the demise of religious faith and practice.

### CONSCIENTIOUS OBJECTION TO PARTICIPATING IN VAD

All Australian VAD laws describe, in detail, the procedure that medical practitioners need to follow when participating in a VAD procedure. Involvement with this procedure requires the completion of compulsory training in VAD. And medical practitioners who have not undertaken such training must decline involvement in this end-of-life procedure.

The relevant VAD statutes typically allow medical practitioners to object conscientiously to the procedure and, hence, they are allowed to refuse to participate, for whatever reason, in VAD procedures, but mostly based on incompatibility with their religion. Specifically, doctors can typically refuse to accept a VAD request, participate in any assessments, and be present during VAD procedures. Depending on the state legislation applicable in each case, a medical practitioner, even if they decline involvement, may still have to inform the person who made the request of their refusal, or even refer the patient to practitioners able and willing to assist in the procedure. In this context, the Australian Health Practitioner Regulation Agency (AHPRA), working with the Medical Board of Australia, states in art 3.4.6 of its code of conduct for health practitioners the responsibility of: '[b]eing aware of your right to not provide or directly participate in treatments to which you conscientiously object, informing your patients and, if relevant, colleagues of your objection, and not using your objection to impede access to treatments that are legal'. At all times, in accordance with art 4.13.7, medical

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<sup>19</sup> Pope John Paul II, *Evangelium Vitae* (Encyclical Letter, Dicastery of Communication Vatican, 25 March 1995) 23 <[https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae.html](https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html)>.

<sup>20</sup> Charles Camosy, 'Right to Die, or Duty to Die? The Slippery Slope Argument Against Euthanasia Revisited', *Religion and Ethics* (ABC online, 1 September 2014) <<https://www.abc.net.au/religion/right-to-die-or-duty-to-die-the-slippery-slope-argument-against-/10099044>>.

<sup>21</sup> Peter Smith, 'To Whom Much is Gibbon, Much is Undesired' (16 June 2024) *Quadrant Online* <<https://quadrant.org.au/opinion/society/2024/06/to-whom-much-is-gibbon-much-is-undesired/>>.

practitioners are obliged to strive 'to communicate effectively with patients and their families so they are able to understand the outcomes that can and cannot be achieved'.<sup>22</sup>

The right of medical practitioners to refuse to be involved in this procedure (and other procedures) because of their religious beliefs is precarious in a secular society. Hence, the right to conscientious objection is a critical issue because Pope John Paul II's encyclical mandates that medical practitioners respect the human dignity of their patients and undertake positive action to object to their involvement in procedures that are incompatible with it. In this regard, members of the medical profession could rely on art 18(3) of the *International Covenant on Civil and Political Rights*, according to which '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'

Freedom of religion is dependent on the maintenance of the 'sanctity of life' principle. Once the State considers that it has the power to abandon this principle, then it follows that it can also impose on citizens, including medical practitioners and nurses, the obligation to assist either directly or indirectly in the VAD practice. If so, a legal obligation placed on medical professionals, who conscientiously object to euthanasia, to refer patients to doctors who are prepared to perform VAD procedures strikes against the right to liberty, of which freedom of religion is a particular case. Hence, freedom of religion is undermined when the legislature encourages people, even critically ill patients, to erode the 'sanctity of life' principle by allowing them to subjectively evaluate their quality of life, and to opt for VAD.

Medical practitioners, when practicing their faith, may conclude that a government that forces them, directly or indirectly, to participate in procedures which violate their religion is a government that abuses its power delegated to it by God.<sup>23</sup> As Greg L Bahnsen points out,

The fact that the civil magistrate makes a law does not mean it receives God's sanction. When civil magistrates (God's servants, Rom 13:4) exceed the limits of delegated power, enforcing laws not authorised by God, they come under his wrath and curse: 'Woe to those who make unjust laws' (Isa 10:1).<sup>24</sup>

Hence, if an irreconcilable conflict were to occur between medical practitioners and governmental authorities, the practitioners may well rely on civil disobedience to repel any government attempt at compelling them to participate in VAD procedures. In this context, it is useful to refer to the Athenian tragedy *Antigone* by Sophocles (496–406 BC): the protagonist, Antigone, makes a direct appeal to the natural or higher law to justify her refusal not to bury her dead brother. When asked by King Creon why she had disobeyed his legal command prohibiting the burial of her brother, who had died attacking Thebes, Antigone replied to the king:

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<sup>22</sup> Medical Board Ahpra, 'Good Medical Practice: A Code of Conduct for Doctors in Australia' (20 November 2024) <<https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>>.

<sup>23</sup> Romans 13:1 (English Standard Version); John 19:11 (English Standard Version).

<sup>24</sup> Greg L Bahnsen, 'The Theonomic Reformed Approach to Law and Gospel' in Stanley N Gundry (ed), *Five Views on Law and Gospel* (Zondervan, 1999) 127–28.

Yea, for these laws were not ordained of Zeus,  
 And she who sits enthroned with gods below,  
 Juste, enacted not these human laws.  
 Nor did I deem that thou, a mortal man,  
 Could'st by a breath annul and override  
 The immutable unwritten laws of Heaven.  
 They were not born today nor yesterday;  
 They die not; and none knoweth whence they sprang.<sup>25</sup>

## CONCLUDING COMMENTS

In summary, although all VAD laws feature ‘safeguards that ensure well-informed consent and protection of vulnerable individuals,’<sup>26</sup> it is useful to be reminded of St Paul’s aphorism: ‘Satan himself masquerades as an angel of light.’<sup>27</sup>

In this context, Pope John Paul II noted that a culture of death ‘betrays a completely individualistic concept of freedom, which ends up by becoming the freedom of "the strong" against the weak who have no choice but to submit.’<sup>28</sup> For him, it is no surprise that legally tolerated euthanasia has facilitated the non-voluntary killings of the weak, the seriously ill, and the disabled. This culture involves a ‘dramatic clash between good and evil, death and life, the ‘culture of death’ and the ‘culture of life’. We find ourselves not only ‘faced with’ but necessarily ‘in the midst of this conflict: we are all involved and we all share in it, with the inescapable responsibility of choosing to be unconditionally pro-life’.<sup>29</sup> The Pope’s encyclical constitutes an urgent call for ‘a general mobilization of consciences and a united ethical effort to activate a great campaign in support of life’.<sup>30</sup> It is a call for the nurturing of the ‘sanctity of life’ principle and religious freedom.

The message is clear: there is a need to enthusiastically support a ‘culture of life’ to defeat the ‘culture of death’ that is fatally infecting Australian society and adversely affects freedom of religion.

<sup>25</sup> Sophocles, *Antigone*, tr F. Storr (Harvard University Press and Heinemann Ltd, 1912).

<sup>26</sup> Celene Ignacio, ‘ACT Legalises Euthanasia, to Come Into Effect in 2025’, *The Epoch Times* (Web Page, 9 June 2024) <<https://www.theepochtimes.com/world/act-to-legalise-voluntary-assisted-dying-in-2025-post-5663774>>.

<sup>27</sup> 2 Corinthians 11:14 (New International Version).

<sup>28</sup> Pope John Paul II, *Evangelium Vitae* (Encyclical Letter, Dicastery of Communication Vatican, 25 March 1995) 19 <[https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae.html](https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html)>.

<sup>29</sup> Ibid 28.

<sup>30</sup> Ibid 95.

## The Australian Catholic University and Challenges after the 7 October Hamas Massacre

Suzanne D. Rutland\*

For Jewish students and staff on Australian campuses, the almost immediate upsurge of antisemitism and anti-Jewish attacks in the response to the 7 October Hamas massacre in southern Israel was highly distressing. The attack stands as one of the most traumatic events in modern Jewish history since the Holocaust. Over 1,193 were murdered on that day, with 251 being taken as hostage.<sup>1</sup> As Bar-Halpern and Wolfman stress, the trauma created within the Jewish community was triggered not only by ‘the events themselves, but also from the response of others in the aftermath’.<sup>2</sup> Despite the brutality and atrocities of this pogrom, for Jewish people worldwide, the response of glorifying Hamas and blaming Israel for the attack lifted a veil on age-old antisemitism, also known as Jew-hatred, breaking inhibitions and allowing this oldest hatred to resurface in stark and unsettling ways.<sup>3</sup>

It is important to stress that the anti-Jewish attacks on university campuses, which manifested themselves both overseas and in Australia after October 7, did not suddenly emerge in a vacuum. They were part of a growing trend which began with the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in South Africa in 2001. Subsequently, the Boycott, Divestment, and Sanctions (‘BDS’) movement emerged, especially on university campuses. These developments were heightened by the accusations of apartheid and settler-colonialism against Israel,<sup>4</sup> with the theoretical constructs of intersectionality and critical race theory adding to the growth of campus antisemitism.<sup>5</sup> This situation has further deteriorated since 2021, evidenced by a study conducted in the first half of 2023 which showed that most Australian universities have become increasingly toxic for Jewish students.<sup>6</sup>

The academic response to the immediate intensification of antisemitism post October 7 was the formation of the Australian Academic Alliance Against Antisemitism (‘5A’). It expanded quickly as Jewish staff — both academic and professional — found themselves deplatformed,

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<sup>1</sup> October 7<sup>th</sup> Geo-visualization Project, *Mapping the Massacre* (Web Page, 7 October 2023) <<https://oct7map.com/>>.

<sup>2</sup> Miri Bar-Halpern and Jaclyn Wolfman, ‘Traumatic Invalidation in the Jewish Community after October 7’ *Journal of Human Behavior in the Social Environment* (13 May 2025) <<https://doi.org/10.1080/10911359.2025.2503441>>.

<sup>3</sup> Anti-Defamation League, *One Year Later: Antisemitic Trends Post 10/7* (Report, 10 February 2024) <<https://www.adl.org/resources/report/one-year-later-antisemitic-trends-post-107>>. See also Herbert D Katz Center for Advanced Judaic Studies, ‘October 7 as a Turning Point in Jewish History’, (Blog post, October 18 2024) <<https://katz.sas.upenn.edu/resources/blog/october-7-turning-point-jewish-history>>.

<sup>4</sup> Adam Kirsch, *On Settler Colonialism: Ideology, Violence and Justice* (Norton, 2024).

<sup>5</sup> Suzanne D Rutland, Unpublished Expert Report for *Riazaty v UMSU Inc* (Supreme Court of Victoria, S ECI 2023 01945, 25 October 2022). See Daniel Ian Rubin, ‘Hebcrut: A New Dimension of Critical Race Theory’ (2020) 26(4) *Social Identities* 499.

<sup>6</sup> Social Research Centre, *The Jewish University Experience Survey July 2023*, *Zionist Federation Australia* (Report, July 2023) <[https://www.education.gov.au/system/files/2023-09/AUA\\_inter\\_tranche7\\_166%20Zionist%20Federation%20Australia%20Attachment.pdf](https://www.education.gov.au/system/files/2023-09/AUA_inter_tranche7_166%20Zionist%20Federation%20Australia%20Attachment.pdf)>.

cancelled, and even doxxed. A core value of universities is academic freedom, including free, scholarly, and respectful debate. Since 7 October, this core value has been undermined with strident protests, university encampments, and ‘cancel culture’. Tribalism has continued to be entrenched, with a polarising effect, so that Jewish students and staff who believe Israel has the right to exist have felt excluded.

Within this broader picture, the experience at ACU as a Catholic university is of interest. All ACU students must take core units on ethics and social justice. The teaching of very popular courses on the archaeology, history, and language of Ancient Israel and the Bible contributes to a better understanding among ACU students of the ancient Jewish connections to the Land of Israel, helping to increase this positive atmosphere. While not all students take these courses, the courses are in the humanities, a field which often tends to be a focus of anti-Zionist attitudes which can also become antisemitic. The ACU is the only Australian university continuing to offer these courses, reflecting its religious connections and creating a different atmosphere for Jewish students and staff after 7 October. These units are coordinated by Professor Gil Davis who has found the university management to be very supportive.<sup>7</sup>

Apart from these units, there are other factors that have created a more positive atmosphere for Jewish students and staff. The university management prohibited posters dealing with the Israel-Gaza conflict. When a campus is covered with anti-Israel posters, this creates a very difficult environment, as do the encampments, which also were not permitted at ACU. As well, international speakers including Israeli academics have regularly given talks at the university with full support from the senior executive without any issue or blowback. For example, Professor Wayne Horowitz from the Institute of Archaeology at the Hebrew University<sup>8</sup> was Professor Davis’ guest in giving public lectures, lectures, and tutorials in May 2025. He was warmly welcomed by the university management and there were no protests or problems.

Other Israeli academics have been visiting speakers at ACU without any issues. which contrasts with other Australian universities. For example, representatives from the Lowy International School at Tel Aviv University were invited to participate in the University of Sydney’s Study Abroad Partner event held on 23 March 2024. However, after the Israeli representatives set up their stall, they experienced a student and staff pro-Palestinian sit-in, with the protesters shouting antisemitic and anti-Israel slogans. After an hour and a half, they were forced to close their stall and were escorted out by the university security.<sup>9</sup>

The combination of strong management at ACU, imposing limits on the physical environment in terms of posters and encampments, combined with its more religious ethos with Biblical Studies and Ancient Israel courses, has contributed to a more positive experience for Jewish students and staff. However, research is needed to get a clearer picture of the comparative nature of the experiences of Jewish students and staff across the university sector and the comparative situation with religiously-affiliated universities in terms of these experiences.

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<sup>7</sup> Email Correspondence between Suzanne Rutland and Gil Davis (6 June 2025) (on file with the author).

<sup>8</sup> See ‘Wayne Horowitz’, *Hebrew University of Jerusalem* (Web Page, September 2025)  
<<https://archaeology.huji.ac.il/people/wayne-horowitz>>.

<sup>9</sup> Peter Kohn and Sharon Desiatnik, ‘Israeli Academic Recounts Ordeal’ *Australian Jewish News* (28 March 2024)  
<<https://www.australianjewishnews.com/israeli-academic-recounts-ordeal/>>.

## Book Review

### *Religious Liberty in a Polarized Age*

*Religious Liberty in a Polarized Age*. By Thomas C. Berg. William B. Eerdmans, 2023. Pp. 359. ISBN: 978-0-8028-8169-4.

Review by Jeremy Patrick\*

One of the unavoidable dangers of writing a book about contemporary politics and law is that events on the ground can quickly make its analysis seem outmoded, irrelevant, or even quaint. Thomas Berg's *Religious Liberty in a Polarized Age*<sup>1</sup> may unfortunately be just such a book: a victim of an America where just a year or two of dramatic developments are enough to completely change the context it was written to address. Every book is a product of its time, of course, but by relying so heavily on then-contemporary political issues and conceptions of how law and governance work, already the cultural and policy prescriptions in the book (although laudable in the abstract) can seem hopelessly naïve.

The book's overarching theme is that religious liberty, properly understood, can reduce political polarisation in the United States. This is a principled stance, and one Berg develops well.

Using Donald Trump's early Muslim-majority country travel ban (upheld by the Supreme Court in 2018<sup>2</sup>) and litigation over a conservative Christian baker's refusal to sell a custom cake to a same-sex couple (upheld by the Supreme Court the same year<sup>3</sup>) as recurrent examples, Berg argues that both conservatives and liberals display inconsistency and hypocrisy in their support for religious liberty.<sup>4</sup> On Berg's account, conservatives should have supported the religious liberty of Muslims in the first case, and liberals should have supported the religious liberty of the conservative Christian in the second case. The argument, which is perhaps oversimplistic, is that genuine fear of liberal overreach on matters of sexuality and gender fuelled evangelical support for Trump even in the face of his dubious (to say the least) moral character and policies: '[A]s to matters of religious liberty, the fear and resentment of the last decade are understandable. Progressives have disregarded or denigrated important rights of traditionalists. Reducing traditionalists' understandable fears is a necessary part of reducing polarization.'<sup>5</sup> But, by the same token according to Berg, there has been a tendency for the right to strongly support religious freedom for themselves but to a far lesser degree for non-Christian and minority faiths.<sup>6</sup> He also discusses the seemingly intractable challenge of reconciling conservative Christians and LGBTQI+ people:

Conflicts between LGBTQ people and conservative religious believers present one of the greatest religious-freedom challenges to our polarized nation. For one thing, the interests on both sides are deeply felt, and strong. LGBTQ people face discrimination, especially in conservative parts of America. They must have the

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<sup>1</sup> Thomas Berg, *Religious Liberty in a Polarized Age* (William B Eerdmans, 2023).

<sup>2</sup> *Trump v Hawaii*, 585 US 667 (2018).

<sup>3</sup> *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*, 584 US 617 (2018).

<sup>4</sup> Berg (n 1) 14.

<sup>5</sup> *Ibid* 146.

<sup>6</sup> *Ibid* 229.

ability to live their lives, form families, and participate fully in the economy and civil society. On the other side, teachings about sex and marriage are central to many religious traditions, including those widely practiced in America. Religious groups cannot exercise religion freely if they are penalized for acting according to those teachings. The harms and potential harms to each side provoke fear and resentment, aggravating polarization.<sup>7</sup>

In conjunction with an excellent first chapter discussing how political tribalism became so extreme in the country, Berg offers the following thesis on how the problem can be ameliorated:

*First*, we should place a strong value on religious freedom, which I define as the ability of people and religious communities to live consistently with their deepest, most comprehensive beliefs and identity, unless there is a very strong reason to prevent them from doing so. We must balance that freedom with other values. But it should receive heavy weight in the balance. *Second*, that strong freedom must extend equally to all faiths. We need to protect Muslims *and* traditionalist Christians. . . . *Finally*, the commitment to religious freedom must recognize boundaries on that freedom, set by the rights of other individuals and the interests of society. If religious freedom becomes a trump on all other interests, it will inflame conflict rather than soothe it. The same will happen if we protect only religious freedom and not other important rights.<sup>8</sup>

More concretely, Berg argues that non-discrimination laws need ‘meaningful religious exemptions’, discrimination against LGBTQI+ people shouldn’t be treated as analogous to racial discrimination (but instead as analogous to religious discrimination), and nonprofit religious organisations should have strong religious liberty rights but that commercial religious providers should receive ‘significantly narrower protections’.<sup>9</sup>

Australian readers can find value in the book, despite Berg’s often excessive focus (like many American legal scholars) on US Supreme Court doctrine to the exclusion of broader philosophical or pragmatic concerns that would inform his analysis. Many of the issues that Berg canvasses — like the relationship between religious liberty and queer equality — are ones that hold obvious resonance with Australian politics over the past few years. There are certainly strong analogies that can be made between his recommendations for resolving these issues in the US and insights that could be developed in the Australian context.

*Religious Liberty in a Polarized Age* is well researched and persuasive. However, from one vantage point it is hard to see who it is written *for*. One of the unfortunate side effects of the vicious downward spiral of tribalism and politics-as-identity is that notions of sound policy, principle, reason, and the ‘greater good’ all fall away: What matters is *winning*. In a zero-sum game, there is no incentive for one side to give in on any particular policy battle in the hopes that such a good faith step will be reciprocated. And in the world of realpolitik and legal realism, the dominance of the Supreme Court by one party, control of the House and Senate by MAGA-linked Republicans, and the clear willingness of Trump to defy conventional norms and legal niceties all point to the possibility that ‘compromise’ or ‘fairness’ are sadly past their sell-by date as solutions. At this point, politics has arguably become a new religion for most

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<sup>7</sup> Ibid 257.

<sup>8</sup> Ibid 7–8.

<sup>9</sup> Ibid 260.

Americans,<sup>10</sup> and it is hard to see how a book like Berg's — no matter how well-intended and well-written — can possibly contribute to lowering the temperature in the country. Still, for those readers who maintain hope that the law and politics of religious liberty can be set on a better course in the US, the book offers a valuable roadmap.

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<sup>10</sup> See, e.g., Perry Bacon Jr., Kate Cohen, and Shadi Hamid, 'Are politics replacing religion in American life?' *Washington Post* (9 May 2024) <<https://www.washingtonpost.com/opinions/2024/05/09/america-religion-impromptu-podcast/>> (stating that "political intensity is replacing religious intensity as the grounding force of what Americans believe in. We've become political believers rather than religious believers.").

## Book Review

### *The Crisis of Civil Law: What the Bible Teaches about Law and What It Means Today*

*The Crisis of Civil Law: What the Bible Teaches about Law and What It Means Today* by Benjamin B. Saunders. Lexham Press, 2024. Pp. 276. ISBN: 9781683597575.

Review by David VanDrunen\*

As his title indicates, Benjamin Saunders writes this book to address a perceived crisis in contemporary civil law, a crisis marked by loss of recognition for a higher law or moral order underlying Western legal systems.<sup>1</sup> Saunders' solution is the recovery of a classical Christian understanding of law, particularly in the Reformed theological tradition, which he believes reflects the teaching of Scripture.

The first Chapter presents several foundational principles for a 'Christian view of law'. It also provides an overview of relevant biblical themes and theological ideas and discusses how Christianity shaped law in the West. The next Chapter focuses on biblical teaching, especially about natural law and the traditional Christian categorisation of the Old Testament Mosaic legislation into moral, civil, and ceremonial law. Chapter 3 takes readers through the Ten Commandments, which encapsulates God's unchanging moral law, according to Saunders. He summarises the meaning of each commandment and reflects on the relevance of most of them for civil law. Chapter 4 considers a variety of issues, including the proper role of civil government, how laws are made, how much of God's moral law civil law ought to enforce, and the proper priorities of legislators when making law in a contemporary context. This Chapter concludes with case studies of gun control and abortion. The fifth Chapter turns to Christians' obligation to obey civil law and government. It lays out multiple criteria for what makes a law unjust and reflects on when a law's injustice may permit or require Christians to disobey it. The final Chapter identifies several erroneous views of law among Christians that Saunders urges readers to avoid.

Saunders deserves commendation for many aspects of this book. Not least of all, he writes in a clear and accessible style. Although he does not specify his intended audience, the introductory nature of the work suggests he aims for an intelligent but general readership, and his lucid presentation makes that audience well within reach. Saunders also succeeds in presenting a generally coherent framework for thinking about law. Readers who are traditional Christians, and especially those of Reformed persuasion, will appreciate this framework considerably more than others, to say the least. But Saunders makes his assumptions and guiding principles clear and thus allows all readers to evaluate, agree, and/or argue with him. No readers should find themselves unengaged. Another strength of the book, in my judgment, is the sense of moderation or balance

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<sup>1</sup> By *civil* law here, Saunders refers to the positive law created and enforced by civil governments, in distinction from natural law, biblical law, or other laws that have purported moral authority without binding authority in our political communities.

that characterises it. Saunders emphasises the need for civil law to be grounded in the moral law, yet he also insists that lawmakers have considerable discretion in applying moral principles to particular circumstances. Saunders gives extensive attention to Scripture as the clearest source for knowing the moral law, but he eschews asking the Bible to answer every question, advocates a robust view of natural law, and seeks insight from older Christian thinkers. He supports a high view of civil authority and Christians' deference to lawmakers' discretion, yet he also leaves room for civil disobedience. To whatever extent readers agree with Saunders' conclusions, they should appreciate his recognition of the complexities of his subject and his desire to account for them.

Amidst Saunders' laudable attempts to keep potentially competing considerations in balance, a couple of unresolved tensions arguably run through the work. One of them concerns his treatment of the first four commandments of the Decalogue. On the one hand, he expresses agreement with the now widespread Christian conviction that civil law should not enforce these commandments:<sup>2</sup> 'Attempting to enforce the first four commandments would be inconsistent with the true nature of the lawmaker's role'.<sup>3</sup> His helpful explanation of the differences between Old Testament Israel as God's Holy Covenant people and political communities today<sup>4</sup> corroborate such claims. On the other hand, Saunders also asserts that 'there is a case for arguing that some aspects of the first four commandments may receive recognition in civil law'.<sup>5</sup> He states (without much argument) that, when Christianity is widespread in a society, it would be permissible to recognise Christianity in its constitution, prohibit open blasphemy, and institute Sabbath observance laws. Given the topic of his book, Saunders leaves the issue of religious liberty — as a matter of principle — surprisingly unclear.

Another issue of some tension pertains to the scope of government authority, and hence the proper reach of civil law. On the one hand, Saunders several times expresses dismay about government overreach and excessive law-making. Governmental response to Covid-19 especially seems to pique his concern. On the other hand, Saunders is also intent on defending legislators' discretion in deciding whether and how to regulate a host of human activities. This is evident, for instance, in his disproportionately long discussion of property laws under the Eighth Commandment<sup>6</sup> and in his treatment of civil disobedience.<sup>7</sup> Whether one can be simultaneously this supportive of government discretion and this concerned about government overreach is at least open to question.

I also mention two gaps in the book. They are *gaps* because these are themes one might have expected Saunders to utilise, given his intellectual commitments. The first is the absence of customary law. The idea that custom can make, interpret, and even change law is a common feature of traditional Christian legal thought, finding clear expression in Thomas Aquinas's *Summa Theologiae*, for example. But Saunders treats law-making almost entirely as a matter of legislation.<sup>8</sup> The only exception I noticed is when he refers to judges 'making law' through

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<sup>2</sup> See, eg, Benjamin B Saunders, *The Crisis of Civil Law: What the Bible Teaches about Law and What It Means Today* (Lexham Press, 2024) 127, 191.

<sup>3</sup> Ibid 127.

<sup>4</sup> See, eg, ibid 51–2, 59, 124–5.

<sup>5</sup> Ibid 128.

<sup>6</sup> Ibid 97–103.

<sup>7</sup> Ibid 154–5.

<sup>8</sup> See, eg, ibid 11, 109, 116–21, 139.

common-law adjudication.<sup>9</sup> Since Saunders is concerned about excessive legislation, as noted above, and also frequently mentions the need for wisdom in forming law appropriate to the changing circumstances of life, granting a place for customary law would seem to advance his agenda on several fronts.

The other gap I perceive is the absence of a developed theology of the two kingdoms, and/or some other conception of ‘the two’. Classical Christian legal and political thought has frequently utilised distinct but related categories such as the two kingdoms, two cities, two powers, and two swords to explain the limited authority of law and government and the place of Christians and the Church in the broader world, issues highly pertinent to Saunders’ book. Yet instead of developing one or more of these categories positively, Saunders reserves two pages late in the book<sup>10</sup> for a rather confusing dismissal of the two kingdoms idea, at least in ‘extreme’ form. Yet most or all of the proponents of the idea he cites (including the present reviewer) do not actually hold the position he seems most eager to reject, namely, that ‘Scripture has little or no applicability outside the church’.<sup>11</sup> Developing a positive doctrine of ‘the two’ would not only put Saunders’ work in close contact with older Christian thought but may also help to clarify his discussions of the First Table of the Law.

Saunders’ work offers a great deal of insight and much stimulation for those interested in law from a Christian perspective. His attention to Scripture, grounding in the natural law tradition, and knowledge of the contemporary legal scene, combine to make this a book of gravity that deserves a wide readership.

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<sup>9</sup> Ibid 190.

<sup>10</sup> Ibid 182–3.

<sup>11</sup> Ibid 182.