INTERROGATING LAW'S RELIGION: NON-CHRISTIANNESS, BELONGING AND NATIONHOOD

SUHRAIYA JIVRAJ

Submitted in fulfilment of the requirements
of the degree of Ph.D.

Kent Law School, University of Kent

March, 2011

ABSTRACT

Religion regularly circulates in juridical discourse as comprising of belief or faith in a transcendent being. The thesis challenges this notion of religion, adding to the existing socio-legal law-and-religion literature by examining *how* religion comes to be conceptualised, represented and produced through law (law's religion), as well the effects that this conceptualisation of religion may have. Central to this examination is the relationship between religion and race, ethnicity and/or culture in juridical discourse, and how non-Christianness, in certain instances, comes to be understood through a racialised and orientalist lens.

The analytical sites are two areas of law relating to children, precisely because children's religious identities often come to be drawn for them, usually by their parents. In the case studies examined, judges and government Ministers are placed in a position of deciding on, and actively influencing, children's future religious identities and values. The first case study examines judicial discourse in child welfare cases where the religious upbringing of a child is adjudicated upon. The second case study discusses the discourse on law and policy relating to religious education and faith schools in England. Drawing out the relationship between religion and race, ethnicity and/or culture, the case studies explore juridical conceptualisations of non-Christianness. This focuses the analysis on the relationship between Christianness and secularity in the English context, as well as the convergences between religion, community, belonging and nationhood.

The central argument developed here is that religion itself can come to be authenticated, demarcated and therefore produced in and through law; judges and

government Ministers participate in the formulation of the parameters of religion. Key instances of this argument include firstly, judicial involvement in adjudicating upon a child's religious identity within family law, along racialised and orientalist lines; and secondly, the former Labour government's promotion of 'common values' based on Christian values within education. I suggest that these 'values' alongside the 2006 legal duty on schools to promote community cohesion, can come to regulate faith schools that are deemed to be divisive within society, in ways that, again, rely on racialised and orientalist notions of non-Christian religion.

Highlighting the existence and potential effects of racialised and orientalist discourse in juridical conceptualisations of non-Christianness, the thesis demonstrates that fixed notions of religion do not then capture what is at play in relation to how non-Christianness comes to be conceptualised. Nor do essentialist notions of religion allow us to view the effects of the privileged position of Christianity whether in terms of how non-Christianness is understood through the Christian theological paradigm, as belief and practice, or how it underpins the discourse of universal and secular values. This analysis provides another perspective or entry point to what is often posed as the problematic of religion for law, namely, the extent to which law ought to protect religious freedom or recognise religious identities. It is an analysis that seeks to highlight what is at stake for non-Christian subjects in only focusing on religion as *the* problematic rather than on the ways in which religion comes to circulate.

Table of Contents

ABSTRACT i

ACKNOWLEDGEMENTS vi

ABBREVIATIONS viii

CHAPTER ONE 1

INTRODUCTION: THE CONCEPT OF RELIGION, A CRITIQUE 1

1.1 Introduction 1

1.2 Contextualising law's religion 5

1.3 Key concepts, themes and literatures 10

1.3.1 Studying religion as a concept: methodological influences 10

1.3.2 Orientalism, racialisation and Christianity in law's conceptualisation of non-Christianness 16

1.3.3 Secularism, values and citizenship in contemporary juridical regulation of non-Christianness 21

1.4 Chapter outline and arguments 30

CHAPTER TWO 36

CONCEPTUALISING LAW'S RELIGION: TOWARDS A CRITICAL APPROACH ... 36

2.1 Introduction 36

2.2 Religion conceptualised as theology/identity 38

2.3 Critiquing an onto-theological conceptualisation of religion: a historical perspective 53

2.3.1 The modern emergence of the concept of religion 53

2.3.2 Christian universality and the racialisation of non-Christianness 56

2.3.3 Re-politicising the concept of religion 59

2.4 The juridical 'authentication' of religion and regulation of non-Christianness 61

2.5 The contingency of law's religion: non-Christianness as race/ethnicity/culture... 67

2.6 Religion, belonging and community/nationhood ... 75

2.7 Concluding remarks ... 81

CHAPTER THREE ... 83

JUDICIAL CONCEPTIONS OF NON-CHRISTIANNESS IN ADOPTION AND CHILD WELFARE CASES: PRIORITISING RACIALISED RELIGION ... 83

3.1 Introduction ... 83

3.2 The facts of the Jonathan Bradley case ... 89

3.3 Prioritising race: judicial conflations of race/ethnicity/nation with theology ... 93

3.4 De-prioritising the racial link: religion as theology, community and cognitive processing ... 105

3.5 Towards a complex notion of religion: culture and personal identity ... 115

3.6 Concluding remarks ... 123

CHAPTER FOUR ... 125

ORIENTALISM, BELONGING AND NATIONHOOD ... 125

4.1 Introduction ... 125

4.2 Religion as a signifier of 'proper' belonging ... 127

4.3 Nationhood and conflictual non-Christians ... 139

4.4 Anxiety and religious unbelonging ... 149

4.5 Concluding remarks ... 154

CHAPTER FIVE ... 156

RELIGION IN EDUCATION: CHRISTIAN LEGACY, ORIENTALIST POSITIONING AND SHARED VALUES ... 156

5.1 Introduction ... 156

5.2 Religion and education in England: a brief historical background ... 162

5.3 Collective worship and religious education: from Christian heritage to shared values? 166

5.4 LAR perspectives on religion in education: a Christian legacy? 172

5.5 Interrogating the onto-theological concept of religion in RE and 'knowing' non-Christianness 177

5.6 Common values and the influence of Christianity: communitarian theory in education 182

5.7 Concluding remarks 191

CHAPTER SIX 194

FAITH SCHOOLS: RACIALISED RELIGION, COMMUNITY COHESION AND BELONGING 194

6.1 Introduction 194

6.2 Faith Schools under New Labour 198

6.3 Racialising religion: Muslim schools as a threat to community cohesion 207

6.4 Citizenship, belonging and the de-racialisation of non-Christians 213

6.5 The productivity of values: church schools and social capital theory in education 222

6.6 The imbrication of religion and politics: New Labour and the influence of Christian socialism 231

6.7 Concluding remarks 238

CHAPTER SEVEN 239

CONCLUDING REMARKS AND FURTHER EXPLORATIONS 239

BIBLIOGRAPHY 250

TABLE OF LEGISLATION 267

TABLE OF CASES 268

ACKNOWLEDGEMENTS

I am grateful to a number of people for their support whilst undertaking this thesis, not all of whom can be mentioned here.

I would like to thank Didi Herman for being so generous in her supervision. I have benefitted so much from her expertise, original *oeuvre* and all round wisdom. Her constant encouragement, patience and good humour got me through the difficult periods and I am indebted to her for insightful guidance in keeping my project focused.

I am also extremely grateful to my second supervisor Stewart Motha for always challenging me and broadening my horizons. I have gained much from his valuable comments on my work, discussions in reading groups, rigorous approach to research and teaching, and warm support.

As if this supervision dream team wasn't enough, I am extremely privileged to have been surrounded by phenomenal scholars at the AHRC Centre for Law, Gender and Sexuality and Kent Law School. In particular, I would like to thank Davina Cooper for her initial interest in my project, her inspirational work and her ongoing professional and personal support. I would also like to thank her and others involved in the running of the centre for what has been a truly unique intellectual environment in which to develop as a researcher; I have benefitted from its activities immensely.

A special thanks goes to Donatella Alessandrini for being my PhD. mentor, friend extraordinaire and being available any time to help with crises, trivial or otherwise. Thanks to her for her unfailing enthusiasm, push to finish, love, laughter and care. Thanks also to Lorenzo Corsini for his friendship and positivity.

I have also been extremely fortunate in being able to share my PhD. trajectory with a truly amazing group of postgraduate researchers at Kent law school, especially Toni Johnson, Sarah Lamble, Sarah Keenan and Stacy Douglas. Their intellectual brilliance has sustained me more than I can thank them for. I have

also had incredible fun and learnt so much from our joint intellectual and political activities. Long may it live on!

I would also like to thank other members of KLS in particular, Emily Grabham, Emily Haslam, Kate Bedford, Toni Williams, Joanne Conaghan, Brenna Bhandar and Mima Vicentijevic, all of whom have supported my research in various ways. Thanks also to Kent Law School for providing me with a studentship and fostering such a lively postgraduate community.

I am grateful to my colleagues at Oxford Brookes University including Peter Edge and Lucy Vickers for discussions on all matters law-and-religion related. Thanks also to Illan rua Wall and Julie McCandless for reading drafts and helping me navigate my first year in post.

I am indebted to my parents Mehboob and Rehana Jivraj for supporting me in my perpetual educational endeavours, for instilling me with determination and for graciously grappling with the various challenges I have placed in their path. Thanks also to my aunts Thomina and Sultana for leading the way in going against the grain and being so generous in spirit. I am also grateful to have shared much laughter, food and moments of resilience with my siblings Aliya, Abdul and Habib. Thank you to Koen and Corrie de Jong for their love and care.

Finally I would like to thank three very special people, firstly, Nuri for challenging me to finish the PhD before she reached adulthood. Her love and humour have kept me grounded and her curiosity has been a constant joy. To Anisa I owe so much, from re-igniting my thirst for intellectual knowledge, nurturing my confidence to undertake the thesis, reading drafts, cooking gourmet meals, and loving me more than I have deserved.

I would like to dedicate this thesis to my grandmother Nozma Meah, a courageous person who has always been there for me.

ABBREVIATIONS

CoE	Church of England
DCSF	Department for Children, Schools and Families
DfE	Department for Education
DfES	Department for Education and Skills
ECHR	European Convention on Human Rights
ERA	Education Reform Act 1988
LAR	Law and Religion
LEA	Local Education Authority
NL	New Labour
RC	Roman Catholic
RE	Religious Education
SSFA	School Standards and Framework Act 1998
VA	Voluntary aided
VC	Voluntary controlled

CHAPTER ONE

INTRODUCTION: THE CONCEPT OF RELIGION, A CRITIQUE

1.1 Introduction

In the 1999 case of *Re J* a 'non-practising Muslim' father petitioned the court regarding matters pertaining to the religious upbringing of his son (J) living with his 'non-practising Christian' mother after the couple's separation.[1] The father requested that he have the right to teach J about Islam, celebrate the festival of *Id* with him, and that J should not be given pork to eat. Despite the mother's objections the father also requested that J be circumcised on the basis that it was an essential part of J's personal identity as a Muslim. The conundrum for the judges in this case, both at first instance (Wall J) and at appeal (Thorpe, Butler-Sloss and Schierman LJs) partly revolved around how to recognise J's Muslimness. All the judges acknowledged J's Muslim identity as being part of his birthright. Despite this recognition, the court viewed J's lifestyle with his mother to be essentially secular. In effect, the father's application was dismissed as J was deemed to have no ostensible exposure to a Muslim community or upbringing.[2]

Wall J had also considered the importance of community and birthright to a child's best interests in the earlier case of *Re B* involving a so-called trans-racial/religious adoption. The judge was called upon to adjudicate on whether the child (B) should be returned to live with her Muslim birth parents in the Gambia or

---

[1] *Re J* [1999] 2 FLR 678 and [2000] 1 FLR 5717.

[2] I discuss this case in more detail in chapter two. See Jivraj and Herman (2009) for a discussion of the medical case against circumcision which was also a key factor in this case.

remain in England with the foster carers she had been living with and with whom she had formed a psychological attachment.[3] Interestingly, in this case, Wall J decided that B not only belonged with her birth parents because of the natural birth parent assumption, but that the Muslim community and heritage into which she 'was born' was also a key part of determining where she *properly* belonged.[4]

What these and other child welfare cases I discuss later in the thesis highlight, is the different ways in which religion comes to be a marker of a child's identity and belonging. Religion is not only conceived of by judges as a birthright, a question of ancestral inheritance and lineage, it is also understood as relating to 'heritage' and 'culture', and interlinked with community and nationality or nationhood. In situations where parents and/or carers are in dispute over matters of religious upbringing, and in the absence of children expressing their own voices, courts are called upon to adjudicate and delineate the parameters of a child's religion or future religious/cultural identity and belonging.[5]

Belonging, community and nationhood are themes that also interact with religion in another area of law and policy relating to children, that of education. Here state actors have had to respond to the claim that faith schools exacerbate racial and religious divisions within society, which in turn has seemingly led to a lack of 'community cohesion'. The social and juridical dilemma here is how children and

---

[3] *Re B* (A Minor) (Adoption Application) [1995] 2 FCR 749.

[4] I discuss this case and the natural birth parent assumption in detail in chapter three.

[5] It is not my contention that children's voices are entirely absent in the areas of law that I examine or that children have no agency. However, a discussion of these issues is beyond the scope of this thesis although see chapter three where I do point to literature that that deals with taking account of children's voices in child welfare cases.

parents with non-Christian religious and racial affiliations can both maintain their 'own' sense of identity, and yet, also *belong* to the nation as British citizens. The juridical discourse surrounding faith schools, again, brings into relief the different and contingent ways in which religion comes to circulate as a marker of religious/ethnic identity and belonging within (the incomplete) process of nation-building. What links the two juridical sites outlined above, is that they both exemplify the two key themes of this thesis: firstly, the contingency of religion as a concept and secondly, that religion can come to be implicated in particular kinds of socio-political work.

The impetus behind this study of what I refer to as 'law's religion' is born out of a desire to reflect upon my own experience of working on issues of religion within the human rights/anti-discrimination/equalities and anti-racism fields. Within those fields, the sheer controversy surrounding 'religion' and its related issues has often made it difficult to grapple with the complexities of the concept itself. My aim is, therefore, to further understand what we mean by religion, its relationship with race and how discourses of religion and race interact together; particularly when deployed in relation to law (reform) or social policy that seeks to address material social inequality or discrimination faced by 'minority religious' communities. I therefore argue throughout the thesis for a more interrogative exploration of how religion circulates and can come to be configured within law and social policy.

Both instances of law and juridical discourse that I analyse touch on some of the key debates that exist within the socio-legal law-and-religion literature

(hereinafter LAR), as well as in other literatures relating to children within family law and human rights. For example, a key point of contention that cases such as *Re J* have sparked is the seeming conflict between parents' rights to bring up the children in their own faith, versus children's rights not to be indoctrinated or physically marked in childhood, and choose a religion later in life for themselves (Ahdar and Leigh, 2005; Ahdar, 1996; Edge, 2002; Alston, 1994; Eekelaar, 2004; Freeman, 2001; Ronen, 2004; Hamilton, 1995; Douglas, 1998). Similar debates arise in relation to faith schools and religious education where parents' rights to choose a faith based education which may be indoctrinating their children is fiercely debated (Pring, 2005; Halstead and McLaughlin, 2005; Brighouse, 2005; Grace, 2003; Ahdar and Leigh, 2005; Ahdar, 1996). However, the key contention against faith schools of the moment, arguably, is their perceived divisiveness within multicultural society.[6] In this thesis the juridical sites that I analyse are merely an entry point to interrogate law's religion. In other words, I seek to identify the ways in which religion comes to be conceptualised, represented and produced through law, as well as to explore the potential effects of these judicial understandings of religion. As such, the thesis seeks to intervene in what I view as a lacuna in the socio-legal literature around the very concept of religion itself, particularly around the relationship between religion and race, ethnicity or culture, within law.

As is obvious through the sheer extent of controversy that the issue of religion within law generates, and the significant literature on the topic which I introduce below, the complexities of the concept of religion are manifold. I suggest

[6] See chapter five and six where I discuss these debates in detail.

that it is precisely this complexity that socio-legal scholars of religion must grapple with further; that religion itself - as a concept in law - should not remain as un-interrogated within some parts of the academy as it is. As Fitzgerald (2000) describes, the 'existence' and 'essence' of religion are conceptually, empirically and theoretically not warranted to be of interest. It is for this reason that I do not engage directly with the literatures that consider normative (legal) paradigms or 'solutions' to the problematic of religion's proper place in law. Instead, I employ an interdisciplinary methodology and approach in bringing various critical perspectives on race and religion from beyond law, to bear on current socio-legal analyses of law's religion; a study which I contend is urgently needed *alongside* considering legal frameworks for the protection and/or recognition of religion or minority rights.

To this end, I ask three key questions: firstly, how is religion, particularly non-Christianness conceptualised and represented; or in what ways does it circulate in juridical discourse; secondly, what is the relationship between religion and race, ethnicity and/or culture within these conceptualisations of religion; and thirdly, what might be the socio-political effects of conceptualising religion in particular ways, or in other words, what work does law's religion do?

1.2 Contextualising law's religion

The broader impetus for examining the issue of law's religion is that within at least the last decade it has been the subject of new legislation and social policy which has been controversial. For example, contemporary juridical debates on

religion in Western societies have taken place around a wide range of areas including: the freedom of religion, most notably in relation to the wearing of religious dress and/or other religious symbols at work or school (in France[7], the UK[8] and Turkey[9]), and the recognition of minority religious laws, most recently in the UK and Canada of Muslim or *shari'a* law relating to family issues (Bakht, 2004; Razack, 2007; Bano, 2008).[10] Another key area of debate has been around balancing freedom of expression against hate speech, or incitement of religious hatred, as in the now infamous Danish cartoon affair and before that, the Salman Rushdie affair in the late 1980s.[11] The UK anti-discrimination regulations banning discrimination on grounds of religion or belief (Employment Equality (Religion or Belief) Regulations, 2003) also raised issues of the limits of religious freedom in the workplace, for example in the *Ewieda*[12] case involving a British Airways employee seeking to wear a crucifix pendant at work.[13] There has also been debate on the

---

[7] The banning of wearing religious symbols in public institutions is discussed by Asad, 2006; Razack, 2008; Brown, 2006; Scott, 2007. There have also been new laws approved by the French National Assembly in July and Belgium lower house in April 2010 banning the *niqab* or *burkha,* garments worn by some Muslim women that cover the face and body. There are ongoing debates to introduce similar laws in the Netherlands, the UK and elsewhere in Europe ('The Islamic veil across Europe' (15 June 2010) http://news.bbc.co.uk/1/hi/world/europe/5414098.stm accessed 3 November 2010).

[8] Most recent UK cases include *R (on the application of Begum) v Head teacher and Governors of Denbigh High School* [2006] All ER (D) 320; *Mrs Azmi v Kirkless Metropolitan Borough Council* UKEAT/0009/07/MA; *R (Watkins-Singh, A Child Acting by Sanita Kumari Singh, her Mother and Litigation Friend) v Governing Body of Aberdare Girls High School and Rhondda Cyon Taf Unitary Authority* [2008] ELR 561 and *R (X) by her Father and Litigation Friend v Y School* [2007] ELR 278. The literature analysing some of these cases includes Motha, 2007; Vakulenko, 2007; Bhandar, 2009.

[9] For example *Sahin v Turkey* (2005) 19 BHRC 590.

[10] The Archbishop of Canterbury, Dr. Rowan Williams, also intervened in the debate in the UK in his foundation lecture at the Royal Courts of Justice ('Archbishop's Lecture - Civil and Religious Law in England: a Religious Perspective', 7 February 2008 <http://www.archbishopofcanterbury.org/1575> accessed 19 June 2010).

[11] The 'cartoon affair' in which Muslims took offence to the Prophet Muhammad being depicted in cartoon form because of the belief that prophets should not be depicted in drawing and because the cartoon depicted him as a terrorist, see Modood, 2006a; Mahmood, 2009.

[12] *Eweida v British Airways Plc* [2010] EWCA Civ 80.

[13] Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660; now covered by the Equality Act 2010.

potential conflict with anti-discrimination on grounds of sexual orientation as in the *Ladele* and *McFarlane* cases.[14]

The issue of faith schools and their increasing numbers in England, facilitated by Labour government law and policy, has also been a flashpoint of controversy. This was re-ignited most recently with the new Supreme Court's decision on the discriminatory nature of the Jewish Free School's admissions policy.[15] In addition to the issues of discriminatory admissions policies, faith schools more generally have been widely criticised within the political context of the 'war on terror' and the 2001 'race-riots' in the north of England for fuelling divisiveness within local communities and society.[16] The issue of religion in education and its potentially divisive or indeed cohesive role in citizenship and nation building is a key area I explore in chapters five and six. Another area relating to law and religion receiving less public attention is child welfare law. In chapters three and four I explore cases from this area of law where judges adjudicate on matters of religion in situations of conflict over religious, ideological or other beliefs between parents or where the beliefs of the parents might be considered to be contrary to the welfare of the child principle. These cases raise issues of religious pluralism as well

---

[14] *Ladele v London Borough of Islington (Liberty intervening)* [2009] EWCA Civ 1357 and *Mcfarlane v Relate Avon Ltd* [2010] EWCA Civ B1 involving employees refusing to conduct a gay civil partnership ceremony in the first case and provide relationship counselling to gay couples in the second.

[15] *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2010] IRLR 136 in which their Lordships considered and adjudicated upon the notion of Jewishness for the purposes of admission to the school.

[16] See chapter six for a detailed discussion of these criticisms.

as children's rights versus the freedom of religion of the parents as mentioned above in relation to *Re J.*[17]

There is a significant legal literature exploring these cases and their surrounding controversies, for example, in relation to the freedom of religion (Article 9) within UK and European human rights law.[18] Much of the socio-legal scholarship from this literature focuses on protecting and expanding the scope of the freedom of religion and highlights the seeming discrepancy in the separation of protection of religious belief and the protection of manifestation of that belief (Bradney, 1993; O'Dair and Lewis, 2001; Cumper and Lewis, 2009). Another socio-legal literature which similarly seeks to increase further protection specifically of *minority* religion, namely, non-Christianity within European nations and religious autonomy within liberal democracies, does so within the frameworks of legal pluralism and/or multiculturalism (Poulter, 1998; Jones and Welhengama, 2000; Menski, 2000). This latter literature also implicates earlier and continuing debates on the 'assimilation', 'integration' and 'recognition' of racial/ethnic minorities in what has been termed the 'race-relations era' (*ibid*).[19] More recently scholarship within this literature has developed to take account of identity based on religion as well as racial/ethnic identities, both pre-empting and following the new legislation

---

[17] The most well known of these instances probably relate to medical cases involving Jehovah Witnesses refusing blood transfusions for their children, see chapter two.

[18] See for example, Bradney, 1993; Poulter, 1998; Jones and Welhengama, 2000; Ahdar and Leigh, 2005; Freeman, 2001.

[19] See also Herman (2011) for a detailed discussion of Race-Relations Law and Jewishness and Bamforth *et al* (2008) for an overview of the legal developments relating to this area.

banning religious discrimination, as well as governmental concerns and policy on community cohesion.[20]

Another key set of literatures that frame and interlink with much of the scholarship mentioned above - particularly around the wearing of religious symbols in public places - relates to secularism and questions on the 'proper' role of religion within law and policy (Bradney, 2009; Ahdar, 2000a; Rivers 2001; Ghanea *et al,* 2007; O'Dair and Lewis, 2001).[21] Some of these perspectives address the issue of the place of religion in law from a 'classical' liberal democracy position, seeking to retain a secular public sphere with religion being consigned to the so-called private sphere (Bradney, 2009; Ghanea *et al,* 2007; O'Dair and Lewis, 2001). Others, predominantly outside of law, are more critical about the possibilities of making meaningful distinctions between 'the religious' and 'the secular' or non-religious particularly within a European context (Asad, 2003; Jakobsen and Pelligrini, 2008; De Vries, 2008; Mahmood, 2009; Bhandar, 2009).[22] Rather, their work from the disciplines of anthropology and religious studies, engage more in an interrogation of the conceptualisation and deployment of the terms 'religion' and 'secularism' themselves (*ibid*). In the next section I explore these perspectives further, setting out the key concepts and methodological insights upon which I draw to make my central thesis argument about the contingency of religion as a concept.

---

[20] Particularly in the work of Tariq Modood (2006b and 2009). See also chapter six.

[21] The latter two are edited collections containing a number of relevant essays discussing the issue of where to draw the limits for protection of religion in law. See also Edge (2002). Whilst I do not address this particular question, I do discuss the issue of the role of religion in education in chapters five and six.

[22] This secularisation thesis is perhaps most famously articulated in the work of Casanova (1994) but see also other scholars' position on 'civil religion' discussed in chapter six.

1.3 Key concepts, themes and literatures

1.3.1 Studying religion as a concept: methodological influences

> "Religion", like everything else, is nothing outside or independent of the series of its metamorphoses.... But "it" (but "what," exactly?) cannot fully be analysed in terms of any single one - or even the sum total – of these instantiations[23], either (De Vries, 2008:11).

In exploring critical perspectives of religion this next section outlines my methodological approach and theoretical framework for the analysis of religion in the thesis as a whole. I do not attempt to offer a counter normative definition or concept of law's religion but rather to interrogate its production and circulation within law. Particularly, as Hent De Vries and other critical theorists of religion and secularism point out, religion is often conceptualised according to a received wisdom; a predominantly theological conceptualisation that focuses on religion as transcendental or pertaining to "the world beyond..." (2008:1).[24] De Vries has termed this conceptualisation of religion as "onto-theological" because it equates religion with being transcendent or distinctly divine *as* its very being or essence, namely, that it is *its* ontological status (*ibid*:12).[25] Fitzgerald points out how prominent anthropologists and sociologists of religion have come to expand this onto-theological understanding of religion to include ritual, myth, values and institutions as symbols and signifiers of a transcendental religious experience

[23] Defined as "words, things, gestures, powers etc." (De Vries, 2008:12).

[24] See also Asad, 2003; Fitzgerald, 2000 and 2007.

[25] A view of religion that is derived from Protestant theology; see Fitzgerald (2007:165-192) for a detailed account of the modern emergence of religion as a concept from a specifically Christianised view of 'religion'.

(Fitzgerald, 2007:4).[26] However, within their disciplines of anthropology, religious and cultural studies, De Vries and others challenge the very conceptualising of religion as having an ontological 'essence' because of the sheer expanse of what it might include (De Vries, 2008:10; Fitzgerald, 2000 and 2007). For Fitzgerald:

> Religion cannot reasonably be taken to be a valid analytical category since it does not pick out any distinctive cross cultural aspect of human life (2000:4).

He and the other scholars mentioned try to understand religion contextually or historically, as contingent upon and part of particular political, economic and other circumstances (Fitzgerald, 2000 and 2007; Asad, 1993; De Vries, 2008:12). This critical approach or methodology, they argue, tends to be marginalised in favour of understanding religion as a "total social fact" (De Vries, 2008:12).[27] De Vries highlights the extensive literature from various disciplines spanning centuries as well as a global geographic expanse that might challenge not only the onto-theological notion of religion through various methodological routes, but also, the idea, that there can be any fixed concept of religion at all (*ibid*:2). He posits religion as a concept that has "an excess of detail" as a "saturated phenomenon" that blurs or obscures itself as a result of that detail (*ibid*, 2008:8). Similarly, Fitzgerald draws our attention to how religion as an analytical category or concept has come to be filled with various theological *and* sociological phenomena (2000:ix-xi). Thus, he seeks to analyse more clearly the various relational ideologies and processes that

---

[26] Perhaps most famously in the work of Clifford Geertz within the anthropology field. Geertz's work includes *Religion as a cultural system* (1966 reprinted in 1973).
[27] See also, Fitzgerald, 2000 and 2007; Asad, 1993.

inhabit the term as well as to demonstrate how and why these aspects have come together under the rubric of religion (*ibid*).[28]

De Vries, despite viewing religion as a "saturated phenomenon", also seeks to employ a strategic rather than limiting methodological approach to make the concept of religion "readable" (2008:3). He does this by allowing various conceptualisations of religion to sit alongside each other as part of a "constellation" of conceptualisations (*ibid*:5).[29] This approach allows him to problematise both the modern definition of religion as "a set of beliefs" as well as the proliferation of what he refers to as modern "God-talk", for example, the identity claims for religious autonomy or rights such as those mentioned above (*ibid*:5-7). Thus, despite the many ways in which religion can manifest itself and therefore cannot be captured in its entirety, De Vries argues that religion can be caught "in a moment", like a "cinematic still" where it shows itself whilst at the same time moves on and shifts (2008:5-7). Drawing from this methodological approach I also seek to make religion readable through a textual analysis of the juridical moments or sites in the primary materials (cases, legislation, official documents and political discourse) that are examined in my case studies. In doing so I explore the work of these critical scholars of religion arguing that their analyses in the disciplines of social/cultural anthropology and religious studies may also be relevant to exploring religion as a

---

[28] See below in relation to his argument on the role of Christianity in the invention of 'world religions' as a category of understanding non-Christianness.

[29] Drawn from Adorno in *The actuality of philosophy* (1930 inaugural address) and *Negative dialectics* (1966) cited in De Vries (2008:5).

socio-politically contingent and fluid concept within law.[30] Part of this critical work is to highlight the presence of racialised and orientalist knowledge or way-finding (I will explain these terms below) that can bring non-Christian religion into being, in and through juridical discourse.[31] As Said notes, the importance of studying representations is in uncovering their discursive power and material effects (1994:6-7). This methodological approach also draws from critical race approaches that read legal texts to uncover processes of racialisation (defined below) (Goldberg, 2002; Omni and Winant, 1994; Cooper and Herman, 1999; Herman, 2006 and 2008).[32]

In short, the aim of my analysis of law's religion is not to provide a 'truth' of the notion and work of religion but to offer a study that foregrounds the *different* ways in which religion comes to circulate in the 'cinematic stills' of child welfare cases and education law, policy and political discourse. I suggest that studying these juridical sites facilitates a study of how religion *can* come to be conceptualised and deployed by state actors whether judges, government or other social policy makers in a number of ways. This is precisely because, despite being the subjects of the discourse, children are largely not in a position to intervene on the issues themselves.

---

[30] This methodological approach has been employed by the US legal scholar Winnifred Fallers Sullivan who gave a paper entitled 'Naturalizing religion: the new establishment' at the Critical Religion Network conference on *Religious-Secular Distinctions* 14-16 January 2010 at the British Academy in London.

[31] There is also a scholarship in literary and cultural studies, for example the work of Bryan Cheyette (1993). More recently, see also Valman (2007).

[32] See also Delgado *et al*, 2001; Crenshaw *et al*, 1995; Wing *et al*, 2003; Bamforth et al, 2008. My methodological approach also draws from a feminist scholarship that has studied legal discourse to explore how judges understand, produce, and deploy gender. See for example the work of Smart, 1992; Graycar and Morgan, 2002.

In my first case study relating to child welfare cases I explore how religion circulates in three distinct but also overlapping ways: firstly, as an onto-theological concept based on belief and (ritual) practice as manifestation of that belief; secondly, as racial genetic marker that prioritises a 'racial' or ethnic lineage, and thirdly, as a cultural identity relating to the child's community context.[33] In addition to the argument that minority religion comes to be conceptualised in these different ways, what is perhaps more interesting and significant is the basis upon which these conceptualisations come into being. Thus, a second key argument of this case study and the thesis as a whole is that the juridical conceptualisations of religion that I explore, reveal ways of thinking that are, at times, orientalist, racialised, and from a Christian standpoint. I will discuss these terms further below.

This orientalist, racialised, and Christianised way of thinking about minority religion - and Islam in particular - is also revealed in my second case study relating to faith schools. Here, I explore the influence of the onto-theological conceptualisation of religion stemming from a Christian viewpoint that I suggest still underpins religious education (RE) and the study of non-Christianness more generally. I also examine how Christian based values came to circulate and justify the proliferation of faith schools under the former Labour government. These values along with the teaching of RE were viewed by government Ministers as potentially influencing children's behaviour; more specifically, nurturing the children into becoming productive and tolerant citizens.[34] As I discuss in chapter six,

---

[33] See chapters three and four.
[34] See chapters five and six.

despite Labour government legislation having facilitated the proliferation of *various* faith schools, my analysis of this values discourse highlights how it has been the values of Christian faith schools in particular that were viewed as the benchmark for other schools - including schools of other faiths - to follow.

I suggest that the historically privileged status of Christianity in the English education system not only continues, but is also obscured by the seemingly inclusive language of 'faith' schools, meaning schools of *all* faiths. I also suggest that the work of faith schools' values should be viewed in conjunction with governmental discourse on citizenship values/education as well as the 2006 legal duty placed on schools to promote community cohesion; and more broadly viewed within the wider political context of the 'war on terror' and the integration of 'minorities' within the nation. Particularly as citizenship values, RE and community cohesion have been cited by former Labour government Ministers as ways of regulating 'divisive' schools, usually Muslim ones. The significance of this discourse is to understand how religion comes to be deployed in potentially orientating the lives of children towards citizenship within the nation.

Thus, both my case studies in highlighting different juridical conceptualisations of religion demonstrate the contingency of how religion circulates in two areas of law relating to children. The case studies also foreground the effects and implications of these conceptualisations, or the work that religion can do in these instances; as well as revealing how different juridical notions of religion come into being, often in ways that draw on orientalist, racialised and Christian ways of thinking. I now turn to explain these terms further.

1.3.2 Orientalism, racialisation and Christianity in law's conceptualisation of non-Christianness

At certain points in the thesis I argue that, at times, juridical discourse can be read as orientalist and racialised in terms of its understanding of non-Christian, non-western culture.[35] My use of the term 'orientalism' draws on the work of Edward Said (1994)[36] who used the concept and its evolution as a European discipline, to develop a reading of western thought on the East, particularly the Middle East.[37] He argued that orientalism was: "a system of knowledge about the Orient" offering "positional authority" to those espousing it (1994:6-7). By this he meant that western, Christian academic thought had developed a systemised knowledge-base, to understand and represent 'the orient' in ways that placed western values, rooted in and co-imbricated with Christian values, as the superior civilisation or civilisational apex (*ibid*). Out of this orientalist constellation came the 'truth' of the east, for the Christian West which came to circulate in various representations of the Middle East within academic scholarship, as well as within popular culture including art and literature (*ibid*:43).[38] As I go on to explore in more detail in chapter two, Said's work highlights a key point about how non-

---

[35] See chapters four and five.

[36]

[37] *Orientalism* was first published in 1979 and reprinted with a new afterword by Said in 1994. The concept has also been used to understand non-European, non-Christian cultures or religion beyond the Middle East including Hinduism and Buddhism (Fitzgerald, 1990 and 2007; King, 1999).

[38] As Lewis (1996 and 2004) and others (Kabbani, 1986; Abu-Lughod, 2001 and Yeğenoğlu, 1998) note a key theme of orientalist discourse revolved around gender. Lewis (1996), for example, argues that representations of Middle Eastern women within nineteenth century European art and travel writing perpetuated a predominant stereotype of these women as silenced and oppressed. Although, Lewis (2004) points out in her later work, that by the twentieth century there was more challenging of western assumptions about Middle Eastern life within English popular cultural representations of Middle Eastern women.

Christianness came to be viewed from a Christian European, and later Western standpoint.

Whilst Said's analysis does not specifically theorise the relationship between race and religion in his work, scholars in the disciplines of history (Masuzawa, 2005) and religious studies (Fitzgerald, 2000 and 2007; King, 1999) have drawn out the relevance of his analysis of orientalist thought in the formulation of the modern concept of religion. Masuzawa (2005) for example, confirms Said's analysis in highlighting how the term religion, as well as race, was effectively 'invented' in nineteenth century European academic discourse to describe non-European, non-Christian peoples and their cultures.[39] She notes how the categorisation of non-Christian, non-Europeans in various racial and geographical groups, also came to be a constitutive part of the orientalist notions about the East as an inferior civilisation (Masuzawa, 2005). As Miles and Brown highlight, categorisation of this kind is a key feature of the process of racialisation, indeed they use the concept (of racialisation) as a synonym for "racial categorisation" which they define as:

> A process of delineation of group boundaries and of allocation of persons within those boundaries by primary reference to (supposedly) inherent and or/biological (usually phenotypical) characteristics (1982:157).[40]

Although there are a number of ways scholars have come to understand the term 'racialisation', in this thesis, I draw on Miles and Brown's concept and specifically

---

[39] See also De Vries, 2008:28; Fitzgerald, 2000; Boyarin, 2008.

[40] See also Goldberg, 2002; Omni and Winant, 1994; Kline, 1994. I will return to the issue of racialisation in more depth in the next section.

refer to it to mean a particular form of understanding and/or representing persons perceived as alien to the 'home' environment, namely Christian Europe. Whilst, Said's analysis does not specifically espouse the language of racialisation in the way that critical race theorists such as Miles and Brown do, his analysis, however, also foregrounds ways of thinking that distinguish non-Christian, non-Europeans from its others on the basis of phenotypical signifiers or characteristics. These distinguishing markers are perceived to relegate the people possessing them to a distinct and racial or ethnic collectivity (Miles and Brown, 2003:100; Said, 1994). As part of Said's argument about the orientalist imaginaries of the East, then, race and religion might be understood as interdependent concepts. As I elaborate in more detail in chapter two, the link between religion and race is deeply rooted in orientalist understandings of non-Christianness.

A key critique of Said's *Orientalism* is that his argument is perhaps too totalising and over-determined a view of what is a large and diverse body of academic scholarship and popular discourse (Lowe, 1991). I highlight this critique here in order to clarify that whilst I draw on Said's notion of orientalism, I do so reflexively and without wanting to perpetuate a homogenising view of the internal variations in the subjects of orientalism or the effects that the discourse may have had. Rather, my aim, in drawing on Said is to bring to the surface the prevalence of a key discourse in my case studies, namely the distinguishing between the East and the West and indeed demarcating between them on the basis of religion/race. What is uncovered through this analysis is firstly, how religion can come to be discursively produced, for example through law, and secondly, how religion becomes implicated in particular socio-political work such as nation-building. As

well as demonstrating this analysis in my case studies, in the next section, I discuss some critical perspectives that draw out other contemporary instances of how religion might be understood as a contingent concept that can come to be deployed politically.

First I wish to clarify that in highlighting the role of Christianity and a European/Western Christian viewpoint, my intention is not to homogenise Christianity or ignore the fact that it takes many different forms and has a very significant history including the divisions of Protestantism and Catholicism in England. Rather, as a number of scholars have argued Christianity - in particular Protestantism - can nonetheless be understood in a de-theologised form despite the different forms it takes (De Vries, 2008:11: Bradney, 2009; Rosenblum, 2000; Jakobsen and Pelligrini, 2008; Asad, 1993; Fitzgerald, 2000 and 2007).[41] It is in this sense, as a set of universalised, secular values that underpin a way of thinking that has become embedded in western culture that I use the terms Christian and Christianness.

In my first case study for example, I explore how judges come to understand and conceptualise non-Christianness of children and their (birth) parents from a purportedly secular viewpoint. I suggest, however, that this 'secular' viewpoint draws on orientalist signifiers and representations of 'conflictual' non-Christians, from a Western Christianised viewpoint.[42] Whilst in some of the cases discussed,

---

[41] These secular values also become associated with for example, reason, civility, and progress as described by Razack, 2008; Brown, 2006. See further discussion of this work below and the work of Fitzgerald (2000) and Masuzawa (2005) on this point in chapter two.

[42] See chapter four.

this positionality is clearly expressed by the judge, in others it remains obscured. The effects of judges conceptualising non-Christian religion from this viewpoint is that religion can often come to be conflated with race/ethnicity and/or nationality. In short, religion comes to circulate as a signifier of belonging, community and nationhood in ways that distinguishes and demarcates between the secular Christian West and non-Christian others.

Similarly in my second case study, I explore the embedded nature of Christianity within education in England as well as the more explicit role of Christian values as essential to productive citizenship amongst children. As described above these Christian based values, even when posited as secular, juxtaposed against governmental discourse on 'divisive' Muslim schools, can invoke orientalist and racialised notions of the non-Christian other as a threat or uncivilised. In turn, as I argue in chapter six, this discourse can serve to justify the legal regulation of non-Christian faith schools and potentially children's future identities.

My analysis of the role and importance of de-theologised Christianness as a way of understanding non-Christianness in my case studies demonstrates why it should be possible to name the asymmetric power Christianity has in the world today, despite its divisions and internal conflicts.[43] As I will elaborate on further below, this is a power that has had material effects amongst other things through a long European history of anti-Jewish and anti-Islamic thinking and practice and in past colonial projects of domination. Moreover, a similar premise, that civilisation

[43] A point that is perhaps more readily accepted of the historic position of Christianity since its early form fused with imperial state power in the Roman and Byzantine empires.

associated with Christian values of North America and Europe should be advanced, underlies contemporary political discourse deployed to justify the post 9/11 'war on terror' (Razack, 2008; Brown, 2006; Gregory, 2004).

In stating these historical linkages, I do not seek to refer to Christianity in a way that obfuscates the diversity of theological opinions or variations, or the many ways in which self-identified Christians inhabit their lives. Nor do I wish to perpetuate a polarised view of issues such as the integration of ethnic minorities in Western nations as a problem that relates to a 'clash of civilisations' between the 'Christian West' and 'Islam', a view put forward, for example, by Huntington (1993) in his now (in)famous article.[44] Rather, I wish to foreground the fact that Christianity has had, and continues to have, an embedded, dominant and regulatory role within juridical discourse, even despite the different theological and cultural forms it takes in particular contexts.

1.3.3 Secularism, values and citizenship in contemporary juridical regulation of non-Christianness

Having highlighted some of the historical sources outlining the role of orientalism, racialisation and Christianity in the emergence and work of the concept of religion, I now turn to other critical scholarship, that whilst recognising the heterogeneity of Christianity, at the same time highlights its privileged, imperial, cross-cultural, and transnational dimensions in the present.

---

[44] The 'clash of civilisations' discourse was put forward by Samuel Huntington (1993) drawing on the idea of Bernard Lewis (1990). See discussion below.

A number of scholars have demonstrated how contemporary racialised and orientalist representations of non-Christianness are similar to those of the nineteenth century (Razack, 2008; Goldberg, 2002; Gregory, 2004). After the events of 9/11 in 2001, Muslims and Islam in particular have been increasingly caught up in a 'clash of civilisations' discourse in which the West is presented as secular and modern, whilst the non-West and its people and cultures, are associated with pre-modern religion (Razack, 2008:21; Asad, 1993; Jakobsen and Pelligrini, 2008). This dichotomy between modernity and secularism on the one hand and religion and pre-modernity on the other, is rooted in enlightenment thinking but also more recently apparent in the 'secularisation thesis' posited by sociologists of religion such as José Casanova.[45]

In his seminal book *Public religions in the modern world* (1994) Casanova stipulated that the conditions for the existence of modernity included the privatisation of religion which would result in its separation from politics and a decrease in the social importance of religious belief, commitment and institutions. However, he more recently points out how this 'secularisation thesis' has been seen to be disproved by the rising importance of religion in public and political discourse (2008:103).[46] Putting the problematic nature of the public/private division in Casanova's formulation of the secularisation thesis to one side, according to his

[45] For a discussion of theories of secularisation from the enlightenment period see Gauchet, 1997. I also briefly discuss the work of twentieth century sociologist Max Weber (1930) on secularism and religion in chapter six.

[46] For a more detailed account of the secularisation thesis beyond the scope of this study, see Norris and Inglehart (2004). I should also clarify that my critical discussion of secularism as a juridical discourse refers to the concept as it circulates in the West specifically North America and Western Europe, as part of the narrative of modernity and progress as in Casanova's work (1994). My analysis, therefore, does not take account of the complexities that relate to, for example, secularism in Turkey, India or elsewhere.

own original criteria, the increased role of religion in society and politics, or the 'public' domain, may be viewed as a failure of the modernisation process in bringing about full secularisation.[47] However, Asad claims that Casanova's reading - of the failure of modernity - nonetheless, maintains the idea that secularisation, as a normative concept, is still a prerequisite for modernity to exist (Asad, 2003:182). Asad argues that the essence of the 'secularisation thesis' remains that:

> In order for a society to be modern it has to be secular and for it to be secular it has to relegate religion to non-political spaces because that arrangement is essential to modern society (*ibid*).[48]

A key contemporary instance of religion being relegated to the private domain is that of the headscarf, and more recently the *burka,* being banned in France. Both Asad and Razack, explore how the French state, through the discourse of the Stasi Commission's report of 2004 on the state of secularity in French schools, posited the headscarf worn by some Muslim women in the public arena as a religious sign that conflicted with the French Republic's secularity (*laïcité*) (Asad, 2006:500; Razack, 2008).[49] In the discourse surrounding the 'headscarf affair' Asad and Razack argue that the 'secular' and 'modern' came to represent the universal standards of civilisation, whereas the religious and pre-modern came to signify particularity (Asad, 2006: 500; Razack, 2008). Religion was posited in contra-

---

[47] For a key feminist critique of the notion of the public/private divide see Pateman (1983).

[48] See also Jakobsen and Pelligrini (2008) and Casanova's reply to Asad (2006).

[49] On the issue of headscarves in Britain see also Bhandar, 2009; Motha, 2007; Vakulenko, 2007. The strongly held swathe of opinion in France eventually led to a ban on the wearing of religious symbols in public institutions, passed by the French National Assembly in February 2004, as well as a more recent ban on the wearing of the face covering *niqab* in public July 2010.

distinction to secularism - a public space free of religion - whilst secularism was associated with rationality, progress and modernity (Jakobsen and Pelligrini, 2008:6). Asad critiques the French state discourse because secularism brought religion into relief as the expression of cultural particularity and lack of progress, and at the same time it masked its own religious co-imbrication, namely, its own historical coming into existence from Protestant Christianity (Asad, 2006: 500).[50]

As Asad argues, another significant consequence of the 'headscarf affair' was that whilst the Stasi report did not define religion, it did nonetheless authenticate the religious view that wearing the headscarf is a divine commandment for Muslim women, over other Muslim views that disagree with this position (2006:501). For Asad, the fact that the headscarf or other religious symbols come to signify religion is something that points to how religion can come to be politically constituted, a juridical move or choice that can have political effects (2006:501). What is important in recognising that religion can come to be signified and authenticated through state discourse and law in the way Asad discusses, is the basis upon which it is done, namely, through the racialisation of non-Christianness which also needs to be understood as having significant juridico-political effects. As Asad argues, in the authenticating of the headscarf as a religious symbol to signify Islam, the Stasi commission effectively perpetuated equating the headscarf with the subordination of Muslim women. It did so by claiming that the state principles of *laïcité* - which allowed for the guaranteeing of women's equality – would be

---

[50] See also Razack, 2008; Jakobsen and Pelligrini, 2008; Cristi, 2001; Wallerstein, 2006 on the co-imbrication of Christianity and secularity in Europe/the West.

threatened by the wearing of the headscarf. In this sense, Islam was produced and represented by the *power* of state discourse - through the headscarf - as subordinating women. This signification in turn facilitated the state 'protecting' its (French) secular values (*ibid*). This representation of Islam and Muslims was not particular to this one controversy. As Razack (2008), Asad (2006) and Brown (2006) all point out, the discourse surrounding the headscarf affair and other representations associating Islam and Muslims with pre-modern 'religious' behaviour draws on the orientalist representational legacy and imaginative geography of the colonial past as discussed in the sections above.[51]

Yet this racialised and orientalist discourse which I also explore in the context of my case studies, where children are the subjects of adjudication and regulation, comes to be somewhat obscured or justified by the notions of secular universalism and citizenship values.[52] As Jakobsen and Pelligrini state:

> If secularism represents rationality, universality, modernity, freedom, democracy, and peace, then religion (unless thoroughly privatised) can only present a danger to those who cherish these values. So the story goes, but how adequate is it in either historical or ethico-political terms? (2008:9).

Razack also highlights how 'values' discourse is underpinned by race thinking in that it reveals that something (American or Canadian values) must be defended (2008:8).

---

[51] Other examples include the shooting of Theo van Gogh in the Netherlands because of a film he made on the Quran's misogyny; the Danish cartoon affair; as well as a general perception of Muslims as terrorists. See also Said (1994).

[52] See case study chapters three, four, five and six.

These scholars, as well as others, point out that secularism comes to operate as a way of regulating manifestations of non-Christianness that are deemed to fall outside the parameters of proper citizenship, as discussed above (Jakobsen and Pelligrini, 2008:9; Razack, 2008:21; Asad, 2006). The notion of secularism and citizenship embodying universal values is posited as shared and cross-cultural because of the very condition of their universality (Wallerstein, 2006).[53] However, as Razack argues, France used the notion of religious signs to mark the Muslim population as one "that must be forcibly brought into the modern through secularism" (2008:163). In doing so, secularism facilitates managing the conduct of immigrant racialised populations by positing practices such as 'veiling' as "antithetical to citizenship" (*ibid*). In short, citizenship and secularism both circulate in ways to ensure that religious particularity, whether the veil or otherwise, should not be in conflict with the values of Western modernity. If they are, they come to be regulated, for example, with the 2004 ban on the wearing of religious symbols in France. Of course this debate is not exclusive to France, in the UK the wearing of Muslim religious dress and its potential 'threat' to democratic values took place in and around the *Begum, Azmi* and *XvY* cases.[54] The perceived 'threat' to Britishness and British values also circulates in relation to migrant communities around the issues of multiculturalism and integration (Yuval-Davis, 2006 and 2007) and most recently around citizenship and community cohesion (Fortier, 2008).[55]

---

[53] See chapter six for a detailed analysis of this discourse in NL governmental social policy relating to faith schools.

[54] See Bhandar, 2009; Motha, 2007; Vakulenko, 2007.

[55] I discuss citizenship and community cohesion in more detail in relation to education law and policy in chapter six.

Drawing on this analysis in chapters three and four of this thesis, I discuss similarly how notions of the secular mask a Christian normativity underpinning the judicial conceptualising, understanding and adjudication of children and their parents' non-Christianness. In chapter five and six I examine how the role of Christianity becomes more explicit in the articulation of universal values, whether secular and/or faith based, and how this political discourse is deployed to justify the regulation of non-Christian faith schools in England through citizenship education and community cohesion legislation. I argue that there are significant implications that result from secularism, citizenship or universal value discourses. Namely, they circulate in ways that de-limit certain non-Christian manifestations of religion or culture, which do not necessarily ensure that the public sphere remains free of religion, but rather produce notions of what 'acceptable religion' might be (Asad, 2006; Mamdani, 2005). Indeed, Casanova (2008) argues, in his revised secularisation thesis, that the existence of religion does not have to threaten the secular public sphere if it does not go beyond the limits of what modern society would require, and thus, for him, an entirely secular public sphere is not essential to modernity.[56]

Casanova's examples of 'acceptable' forms of de-privatised religion are Poland, where religious values played a role in the construction of civil society and in the United States where Christian ideas also have a role in public debate on shaping (liberal) common values (1994:92). 'Unacceptable' examples of de-privatised religion, for Casanova, include what he views as the undermining of

---

[56] See also Asad (2003:182).

individual liberties by politicised religion in countries such as Iran and Egypt, in short, Islam (1994:225).[57] Thus, in Casanova's (1994) secularisation theory, delimiting or regulation of 'pre-modern' religion that is perceived to be a threat to modernity is justifiable within Western European states. In Asad's words Casanova's vision is that "only religions that have accepted the assumptions of liberal discourse" are able to have a place in the public sphere (Asad, 2003:183).[58]

As Jakobsen and Pelligrini (2008) note, secularism can come to produce religion in ways that can be viewed as compatible with modernity's universal values. In Mamdani's (2005) terms, liberalism comes to distinguish between "good Muslims and bad Muslims" or in the discourse of the Labour government, between 'progressive' Muslims namely, those who share cross-cultural universal values, and the oppositional fundamentalists or Islamists.[59] As Asad notes, the secularisation thesis is not just outdated because of the recent increased role of religion in the public sphere, but always obscured the state policing of the boundaries of acceptable religion or "the world of power" (Asad, 2003:187-190). Asad argues that the categories of 'politics' and 'religion' implicate each other more than has been recognised and is only now increasing with the development of understanding "the powers of the modern nation-state" (*ibid*:200). The secularisation thesis, prevalent in contemporary juridico-political discourse, not only obscures the ways in which non-Christian religion comes to be produced and delimited through the power of

---

[57] Etzioni, a public education theorist has similar views discussed in chapter six.

[58] A detailed analysis of this particular debate around issues of multiculturalism and/or integration and their challenge for Western liberal states is beyond the scope of this thesis. See for example Taylor, 2007; Phillips, 2002 and 2007.

[59] See chapter six for a further discussion of this point.

secular and universal values discourse, it also obscures the constitutive relationship between religion (Christianity) and secularism during the enlightenment period (Asad, 2003:183; Jakobsen and Pelligrini, 2008; De Vries, 2008).

In my first case study, an analysis of child welfare cases where religious upbringing is at issue, I draw out how this relationship or co-imbrication of Christianity and secularism remains obscured in the demarcating of children's' (future) religious identities.[60] Christianised normative understandings of non-Christianness that draw on orientalist and racialised discourses underpin this judicial discourse. A similar understanding of non-Christianness also circulates in the former Labour government's regulation of faith schools that focused on divisive Muslim ones in particular. In chapter six I specifically analyse the implications of Casanova's revised secularisation thesis (2008) which posits certain kinds of religion as compatible with modernity in the public sphere. I focus on how racialised and orientalist notions of non-Christianness facilitate demarcating the boundaries between 'acceptable' and 'non-acceptable' religion. In particular, I emphasise the discourse of 'civil religion' and citizenship education as a way non-Christianness comes to be mitigated and bounded because it allows for values to be posited as both religious and secular at the same time.[61] Whilst I do not argue that civilisation discourse is explicit in the production of acceptable religion, I do highlight the shared goal or underpinning organising principle of both civilisational discourse and

---

[60] See chapters three and four.
[61] Discussed in chapter six.

citizenship discourse - through education - in the regulation of children's identities within the nation.

1.4 Chapter outline and arguments

In this introductory chapter I have signalled some of the critical perspectives on which I draw throughout the thesis. In doing so, my aim has been to set out my theoretical position and methodology in undertaking an interrogation of law's religion in the two particular areas of child welfare cases and education law and social policy. In chapter two I explore in more detail critical perspectives on religion which I bring to bear on some key work from within the LAR literature. In doing so I seek to highlight how religion, within conventional socio-legal work, comes to be viewed in predominantly onto-theological terms with very little recognition of the history of the emergence of the modern concept of religion. Whilst the privileged role of Christianity is somewhat acknowledged, particularly in the area of education, what remains obfuscated is the 'inventedness' of the concept of religion itself, and therefore the contingency of religion within law.

The impetus for my engaging with the LAR literature is that it not only responds to the various issues pertaining to religion in law, whether that be the religious upbringing of children or the 'proper' place of religion in education, it also seeks to influence legal developments within these areas. I therefore suggest that it is imperative to analyse the different ways in which religion is produced through law, an analysis which I suggest is largely absent in the LAR literature. As well as focusing on the perspectives from this literature pertaining to children, particularly child welfare law, I examine the broader work on freedom of religion, in order to

draw out the predominant onto-theological conceptualisation of religion, even in relation to non-Christianness. My analysis of this area of work therefore lays the groundwork for understanding, and taking a more critical approach to law's religion.

In chapter three, the first part of my case study on child welfare cases, I explore the ways in which notions of non-Christian religion circulate in complex, and often contradictory and conflated ways. As children are the primary subjects in these cases, judges are pushed further in thinking about religion which, in child welfare cases, they must consider in light of the paramountcy principle, namely, what is in the best interests of the child involved.[62] In focusing specifically on cases involving non-Christianness I am able to examine how race and religion interrelate in this juridical discourse. From my analysis of how judges adjudicate on a child's religion or what might be required as part of her religious upbringing, I suggest that religion comes to be predominantly racialised or viewed in terms of genetic inheritance, in short as a racial genetic marker. I argue that in these cases the boundaries between religion, race, ethnicity and even nationality are often blurred and spill over into one another.

---

[62] Abramovicz identified early developments of the judicial concept of the 'interest' or 'welfare' of the child in her analysis of case law on disputes about private adoption 'contracts' pre-1920 (when adoption in the UK was legalised). Judges insisted that parental ties could not be transferred in private contracts, yet if a child had spent a considerable amount of time with the 'adoptive' parent and, as such, had developed certain 'expectations' with regards to wealth, socio-economic status, religious identity, affiliations etc., the custodial outcome could be that - for reasons of consistency - the child should remain with the 'adoptive' family (Abramovicz, 2009: 57-62 and 71-80). In current adoption legislation this principle is enshrined in the Adoption and Children Act 2002 s 1(2): "[T]he paramount consideration of the court or adoption agency must be the child's welfare, throughout his life".

I continue this analysis in chapter four where I specifically examine orientalist representations of non-Christianness, in particular in relation to Jewishness and being Arab/Muslim. Whilst these representations clearly also invoke *racialised* understandings of non-Christianness, drawing on Said (1994) and specifically Anidjar's (2008) analysis of orientalism, I point to the ways in which religion circulates in a way that *distinguishes* between people along racial lines. The demarcating of people through racialised religion also comes to invoke ideas of proper belonging. Thus, in the case of *Re B,* mentioned earlier, a child born in Gambia with Muslim birth parents was deemed to properly belong in Gambia, despite having lived in England and formed a psychological attachment to her English foster carers. However, as I discuss, belonging in what is viewed to be the community to which one is linked by virtue of birth or even birth right, cannot always be achieved; a reality that seems to cause some of the judges anxiety. This concern for belonging within a particular nation appears again in chapter six.

In other cases orientalist thinking invokes civilisational discourse in the judgments, both in overt and subtle ways. For example, in the case of *Pawandeep Singh v Entry Clearance Officer,*[63] Munby J catalogues at length the various behaviours of Muslims that he views as so alien to English culture and values, ranging from Muslim polygamous marriage, 'female genital mutilation' and honour killings to child abduction. This is a case in which the judge rather bizarrely invokes a 'clash of civilisations' discourse focusing on Muslims even though the claimants are actually Sikh and Muslims are not in any way subjects of the case. Rather, the

[63] *Pawandeep Singh v Entry Clearance Officer* [2004] EWCA Civ 1075.

case involved the issue of whether a Sikh child born and living in India was entitled to enter England to live with a couple who had adopted him under a Sikh adoption ceremony in India, rather than through the formal inter-country adoption procedure. Non-Christians in the examined cases, even when they are not the subject of the cases themselves, come to be represented as conflictual and even tribal in their ways. Whilst at the same time the Christian Englishness of the judges' standpoint, sometimes articulated as being secular, remains largely unremarked upon.

In chapters five and six I move to my second case study on religion in education. In chapter five I again draw on the history of how the modern concept of religion came to be understood in predominantly onto-theological terms. In doing so I highlight the continuation of this onto-theological understanding of religion and the fact that it still circulates in largely the same way within the RE curriculum in schools. I suggest that this concept of religion might even remain despite the adopting of a more 'multicultural education approach' which sought and still does seek, to take account of the increasing presence of non-Christian children in schools. Indeed, drawing on Fitzgerald (2007), I argue that the configuration of religion in RE draws on an orientalist positioning in which non-Christianness comes to be viewed and understood from the viewpoint of the Christian West. A further point I discuss in this chapter is how RE and an 'understanding of different world religions' became increasingly viewed under the former Labour government as an important contributor to fostering tolerance between different religious/ethnic groups. In turn this came to be part of a governmental community cohesion strategy and as such an important instrument in nation building and managing

diversity. Whilst I explore the issue of community cohesion in more detail in chapter six in relation to faith schools, I first discuss the linkages between community cohesion, and the concept of 'common values' in New Labour (NL) discourse.[64] In particular, I examine the influence of communitarian theories on education and their emphasis on a set of civic values or 'civil religion' which whilst posited as universal, cross cultural and secular, I argue might be understood as rooted in Christian thinking. In short, in this chapter I highlight the predominance or embeddedness of Christianity, albeit de-theologised, in both the concept of religion within RE and also the values discourse prevalent in education to bring about cohesion and nation building.

In chapter six I focus in particular on law, policy and political discourse under the NL government on faith schools. I discuss how the purported divisiveness of faith schools, particularly Muslim ones, was a key concern that circulated in the critique of faith schools and the government support for them. My focus on religion in this chapter is to interrogate how and why faith schools' values come to be posited by NL Ministers as part of the solution to tackling divisiveness. I argue that on the one hand Muslim schools came to be viewed as divisive and conflictual, a representation that draws on and perpetuates a wider racialised 'clash of civilisations' discourse around Muslims. Yet on the other hand church schools came to be presented as the gold standard of faith schools. In making this argument I explore the influence of social capital theory on NL policy, in particular those

---

[64] I refer to the Labour government (1997-2010) as New Labour (NL) to denote the particular influence of 'third way' thinking discussed in chapter six.

perspectives that highlight Christian schools as a benchmark of good citizenship and social capital production.

Similarly to the communitarian perspectives discussed in chapter five, I suggest that it is Christian values that come to underpin the focus on faith as instilling children with values, rather than the values of schools of other faiths. In short, the 'faith' in the term faith schools obscures the universalising tendencies of a Christian formulation of religion and its value to children in their education and upbringing. Thus, whilst the judges in my first case study come to predominantly racialise non-Christianness with the effect of distinguishing between peoples along racial/religious lines, in my second case study, religion comes to be regulated and demarcated by a purportedly universalised standard which is tied in with community cohesion and nation building. I suggest that religion as Christian values in education can come to effectively de-racialise non-Christian children in cultural terms, albeit in an obscured manner. In the final section of chapter six, I explore a more explicit influence of Christianity in NL policy, that of Christian socialism. My analysis of the influence of Christian socialism further entrenches my argument challenging the notion of law's religion as an apolitical and predominantly onto-theological concept.

CHAPTER TWO

CONCEPTUALISING LAW'S RELIGION:

TOWARDS A CRITICAL APPROACH

2.1 Introduction

The aim of this thesis is to interrogate the concept of religion in areas of law pertaining to children. Before moving onto a study of how religion circulates in child welfare cases (chapters three and four) and education law, policy and political discourse (chapters five and six), in this chapter I first critically examine some of the key LAR literature. The impetus for doing so is that this literature is the main scholarship within socio-legal studies focusing on issues pertaining to religion. Moreover, it has come to be particularly influential in debates impacting upon and shaping juridical developments on religious freedom as well as other law-and-religion issues, both in Britain and in relation to EU and European Convention (ECHR) law (Barzilai, 2007; O'Dair and Lewis, 2001; Ahdar, 2000a; Edge, 2002; Ahdar and Leigh, 2005; Bradney, 1993 and 2009; Oliver *et al*, 2000; Ghanea *et al*, 2007; Vickers, 2008; Hamilton, 1995; Eekelaar, 2004).[65]

In examining the concept of religion in this literature I specifically focus on perspectives that explore issues of religious freedom in regards to children, although there is relatively little analysis of cases involving non-Christianness within

[65] I have noted some of the key texts of the LAR literature. See also the catalogue of work including law and religion case analyses listed under the Law and Religion Scholars Network (LARSN) based at Cardiff University which holds an annual conference as well as workshops on various issues pertaining to law and religion available at <www.law.cf.ac.uk/clr/networks/lrsn2.html> accessed 5 July 2010.

this scholarship.[66] My analysis in this chapter therefore, covers a broader scope than just child welfare and education law.[67] My key argument in this chapter is that the LAR literature tends to prioritise an onto-theological paradigm of religion, namely, as belief in a transcendent being, and ritual practice as manifestation of that belief. I make this argument even despite there being some acknowledgement that legal definitions of religion are increasingly difficult to pin down or that religion might be understood in more complex terms as part of a person's cultural/ethnic identity (Bradney, 1993 and 2009; Vickers, 2008; Edge, 2000b; O'Dair and Lewis, 2001; Ahdar and Leigh, 2005).

I also argue that in largely failing to challenge this onto-theological notion of religion, the LAR literature marginalises *how* law's religion might come into being. I draw on the scholarship from cultural studies, anthropology and religious studies mentioned in chapter one in order to undertake this critique which I seek to interject into the LAR literature. Although, the LAR perspectives I discuss in this chapter come from an analysis of human rights, anti-discrimination and education law, and therefore, are partly a response to them, they are nonetheless not just a mirroring of juridical discourse. They are themselves working to influence the parameters of how religion should or might otherwise be protected through law (Bradney, 1993 and 2009; Vickers, 2008; Edge, 2000b; O'Dair and Lewis, 2001; Ahdar and Leigh, 2005; Knights, 2007). It is for this reason that I bring to bear upon

[66] I examine the LAR perspectives on education in more detail in chapter five.

[67] The literature can also be viewed as broadly being divided into two perspectives; one being concerned with the rights of ethnic minority religion, what I refer to as non-Christianness, and the other from a Christian perspective arguing against an alleged erosion of religious autonomy for Christian institutions, for example, Ahdar and Leigh (2005).

the LAR literature, what I refer to as critical perspectives on religion and race. I therefore suggest that adopting a critical study of law's religion is necessary alongside working within a liberal (rights) framework to come up with normative juridical solutions to the various problems supposedly raised by the issue of religion.

2.2 Religion conceptualised as theology/identity

As Addison puts it, the question of what *is* religion, is a question for theologians, however, the question of whether "a belief constitutes a religion, philosophy or political opinion" can be a question for lawyers ((2007:1). Whilst putting the validity of Addison's assertion to one side (an issue to which I will return later), it is important to note here that a number of LAR scholars highlight the difficulties of having a legal definition of religion (Edge, 2006:28; Ahdar and Leigh, 2005:110; Vickers, 2008:13).[68] They nonetheless agree that there should be some definition despite the fact that courts are hesitant to come up with an all encompassing one (*ibid*). Vickers, for example states that a belief in God may unite the monotheistic faiths of Judaism, Islam and Christianity but would not include polytheistic faiths such as Hinduism or non-theistic beliefs such as Buddhism, despite these latter two being recognised as 'world religions' (2008:13). Part of the difficulty for these scholars is in relation to less 'well know religions' such as paganism, new religions or those adhered to by few followers; and, moreover the extent to which beliefs such as veganism, pacifism, atheism or humanism might be

[68] See also in relation to US constitutional law: Greenwalt, 1984; Freeman, 1983 and more generally Sadurski, 1989; Hall, 1997.

included (*ibid*, Edge, 2006:27-33; Cumper, 1995; Ahdar and Leigh, 2005).[69] In relation to this point, although there is no definition in International law, Article 9 of the ECHR refers to religion *or* belief, which Vickers states, means the European Court of Human Rights does not have to distinguish what might constitute religion as opposed to belief (Vickers, 2008:14).[70] However, the overlap between religion and belief is that the belief in question needs to "attain a certain level of cogency, seriousness, cohesion and importance" (*X, Y and Z v UK* and *Campbell and Cosans v UK*, discussed in Vickers, 2008:14).[71]

Similarly, the Equality (Religion and Belief) Regulations 2003, now covered by the Equality Act 2010, applies to religion or philosophical belief, so that humanism and atheism could be protected despite their non-religious content (Vickers, 2008:15). For Vickers, this development or 'inclusion' does not avoid the difficulty of definition but rather merely shifts or widens the parameters of the problematic (*ibid*).[72] Nevertheless, these scholars agree that not having any kind of definition or guiding principles leaves a court in a "vacuum", in turn making it difficult (for lawyers and claimants) to predict how a court will make its decision (*ibid*, Edge, 2006:27-33; Cumper, 1995; Ahdar and Leigh, 2005).

---

[69] For a detailed discussion of whether these beliefs are protected under freedom of religion Art 9 see Vickers, 2008; Edge, 2006.

[70] See also the Universal Declaration of Human Rights definition which is broad including, theistic, non-theistic and atheistic beliefs (General Comment No 22 (48) on Article 18 UDHR by the UN Human Rights Committee' (1994) 15 Human Rights LJ 222, para 2.

[71] *X, Y and Z v UK* (1982) 31 D&R 50, and *Campbell and Cosans v UK* (1982) 4 EHRR 293. See also in relation to Druidism, for example, *Chappel v UK* (1988) 10 EHRR 510 or *Pendragon v UK* (1998) EHRR CD 179.

[72] Particularly in relation to for example, pacifism (*Arrowsmith v UK* (1978) 19 D&R 5) or veganism (*H v UK* (1993) 16 EHRR CD 44).

To that end, Vickers and Ahdar and Leigh discuss two or three possible approaches that might be taken towards formulating a legal definition of religion (Vickers, 2008:15-22; Ahdar and Leigh, 2005:115-125). These would be firstly, to adopt a 'content based definition' for religion based on core beliefs; secondly, to reason 'new' or potential religions by analogy with those religions which are already universally recognised and thirdly, to come up with a list of 'key indicators of religion' against which to test those that are less well known (*ibid*). The final approach Vickers suggests is to take a purposive approach in seeking to protect religion, and from there work towards a purposive definition. However, Vickers as well as Ahdar and Leigh also discuss the (de)merits of the various approaches (*ibid*).[73] It is not my intention to rehearse those discussions in any detail here, rather, I merely wish to highlight the unstable way in which religion circulates in law, to the point that LAR scholars more or less agree that there should be some kind of way to mitigate there being a 'vacuum' for judges by having a set of 'key indicators' of what religion might be. Thus, for example, summarising the prevalent position within LAR scholarship Vickers concludes that:

> it is the belief in some form of external reality, and the belief that this has some link to man's place in the world, that is most important in helping adherents makes sense of the unknowable, and it is thus these elements

[73] See also Edge (2006:27-32).

that are the most important (Vickers, 2008:22 drawing on Macklem, 2000).[74]

Defined in this way, protection of religion and belief is not limited to those belief systems that have already been defined and protected in the past, but is "open to development as human thought develops" (Vickers, 2008:22).[75] Defining religion in this way avoids under-inclusiveness but also is only available to those beliefs which are sufficiently serious to the individual to affect his or her sense of identity and understanding of the world (Vickers, 2008:22).[76] In short, it is these two elements ("belief in some form of external reality, and the belief that this has some link to man's place in the world") that are core in giving religion its value within law; not whether an adherent claims to have a 'religious' identity which may be less important (*ibid*). Belief - separate from religion - has also come to be understood as similar to religious belief, and through analogy, in terms of being a philosophy of life

---

[74] This configuration does reflect the definition of religion set out in the Australian High Court case ruling on Scientology: *The Church of the New Faith v The Commission of Pay-roll Tax (Victoria)* [1982-3] 154 CLR 120 as: "a belief that reality extends beyond that which is capable of perception by the senses; that the ideas relate to man's nature and place in the universe and his relation to things supernatural; that the ideas are accepted by adherents as requiring or encouraging themselves to observe particular standards or codes of conduct, or to participate in specific practices having supernatural significance; that adherents constitute an identifiable group (even if loosely knit); and that adherents themselves see the ideas as religious" per Wilson and Dean JJ, 174 (discussed in Vickers, 2008:19; Edge, 2006: 31).

[75] See also Cumper, 1995; Ahdar and Leigh, 2005; Macklem, 2000.

[76] Although not in relation to a 'new' religion this sentiment of a belief being important in affecting a person's identity was articulated in the *Watkins-Singh* case in which a self-identified Sikh child was prevented from wearing her *kara* (a metal bangle) to school as it contravened the uniform policy which banned the wearing of religious symbols on health and safety grounds, and also to promote a sense of unity amongst pupils in the school. The school also claimed that they were not discriminating between pupils as Christian children were not allowed to wear crosses. However, the judge Munby J, decided that the wearing of the *kara* was of such exceptional importance to the pupil's racial and religious identity, that even though it was not an actual compulsory requirement of Sikhism to wear it, it was nonetheless integral to her identity (p 577 para 56B). However, as Bhandar (2009) points out, this decision is also significant in the ways it comes to distinguish acceptable manifestations of religion from unacceptable ones in particular, the wearing of ostensible religious dress such as the *niqab* (veil) in *R (X) v Y* and *Begum*. What this analysis also points to is the racialisation of non-Christianness which I come onto in the next section.

about "man's place in the world" (*ibid*). Although there is no view on a clear legal definition of religion amongst these LAR scholars, there does seem to be a prioritising of 'belief' as a key element whether that be in a God or not, but nonetheless in some kind of transcendent, or 'irrational' other worldly-ness (Macklem, 2000).[77] It follows then, that attached to belief are manifestations of those beliefs, which for example, may include worship or other symbolic or ritualistic practices; these outward expressions of an 'inner' belief are viewed as a critical part of the (legal) concept of religion (Edge, 2006; Vickers, 2008; Bradney, 1993, 2009).

The work of Anthony Bradney, another key LAR scholar, particularly in the emergence of the field with his book *Religion, Rights and Laws* (1993) also foregrounds a theological conceptualisation of religion:

> Religion is both belief and practice. The two are inseparable. To say 'I adhere to a particular faith' is also to say I believe I should follow the precepts of that faith. Believers may fail in their practice. However, they will account that failure blameworthy. What they cannot do is deny the necessity of such practice (1993:5).

Bradney is asserting that religion is *both* belief and practice as part of his critique of the way human rights law separates the two, namely on the one hand, human

---

[77] As Vickers highlights drawing on Macklem (2000): "... the function and purpose of protections of religious beliefs within the legal system is that protection enables non-rational views about the nature of the world, views that have an effect on some individuals ability to make sense of the world, to be protected via an effect on some individuals ability to make sense of the world, to be protected via an otherwise rational system. Other irrational views, about the importance of football or country dancing do not qualify for the same protection." (2008:21).

rights jurisprudence acknowledges an individual's right to belief but, on the other hand, it does not necessarily protect the right to manifest that belief (*ibid*).[78] For Bradney, manifestations of religious belief - that might require legal protection or recognition - would include the observance of religious dress or freedom to worship whilst at work, non-Christian marriage and custody rules, and more state funded non-Christian faith schools (1993). His conceptualisation of 'religion' is very much tethered to the rules and rituals set down by theological dogma and/or clerical 'authorities' and to the practice of these rules and rituals. This view of religion is also apparent in relation to work on non-Christianness (Menski, 2008; Poulter, 1986 and 1998).

In a later article, Bradney expands further on his conceptualisation of religious belief particularly what he refers to as "obdurate" belief (2000:90). This is where "...religion is the key to their [people's] own sense of their self-identity. For such individuals religion is central to their lives, determining most or all respects" (*ibid*). His reasoning for this view is that the believer's faith is "timeless and boundless" meaning that their identity and actions "are tied to what is, for them, a pre-ordained system of values and commitments" (*ibid*:91). Both Bradney and Macklem view this kind of belief as a "polar opposite" to modernity and rationality, in contemporary British society (Bradney, 2000:91; Macklem, 2000). The implication of this argument, that religious belief is pre-modern and irrational, is a point I will come back to below in relation to the racialisation of religion. The point I wish to emphasise here is that, Bradney, like the LAR scholars discussed above, also

[78] Ahdar and Leigh (2005) and Poulter (1998) take a similar view.

highlights the other worldly-ness or extra-temporal dimension of religious belief or faith, namely its transcendental nature. There is barely any exploration of how that conceptualisation of religion has come about; rather it is taken for granted as almost self evident which - as I argue below - is a somewhat de-contextualised and ahistorical view of the emergence of religion as a concept.

Another related conceptualisation of religion in the LAR scholarship already hinted at above is that of identity, which seems to be tethered to an onto-theological concept of religion. In his most recent book, *Law and faith in a sceptical age'* (2009) Bradney is less hopeful about the possibilities of a liberal rights framework being able to accommodate the religious freedom of the 'obdurate' believer for whom "religion is the most important part of their sense of identity" (2009:1).[79] This notion of identity is also related to a sense of belonging within a community; for example, Bradney states that 'obdurate' belief is more apparent in religious communities that he claims are relatively new to Britain, such as Sikhs, Hindus and Muslims (Bradney, 2000:90 and 1993).[80] This conceptualisation of religion (which is not really explicitly elaborated upon) seems to become a more complex and nuanced one:

> Religiosity, individual religious or spiritual sentiments, still has a place, albeit usually a limited place, in the lives of the majority of the population, but belief in a religion, a commitment to an identifiable institutional structure

[79] See also Ahdar and Leigh (2005) who put forward a similar view argued from a mainly a Christian perspective.
[80] I will return to this point about identity and community again below.

with its own tenets and precepts that believers undertake to obey, does not *(Bradney, 2009:*4).

However, despite the seeming decoupling of "religiosity" and "spiritual sentiments" from belief, and the acknowledgement that religion seems to cover more than just belief and practice, for Bradney, "tenets and precepts", namely, theology is still a crucial element to his conceptualisation (*ibid*).[81] In this latest book, again, his examples of religious manifestation - in relation to Christianity and non-Christianness - focus on worship, institutionalised religion (organisations) and values that emanate from faith based doctrine (*ibid*).[82] Bradney discusses personal law systems, also derived from these doctrines or sacred scripts and the religious systems of law to which they have given rise. He further discusses the possibilities and imperatives for the recognition of marriage, divorce and other matters such as those relating to children, within a multicultural or "transformative accommodation" framework (Bradney, 2009:44 and 55).[83]

Bradney does, however, begin to probe more at his predominantly theological conceptualisation of law's religion through the notion of 'identity' in his analysis of child welfare cases. He argues that generally courts are not "comfortable with strong religious belief" involving what he terms "minority faiths outside the mainstream" such as Jehovah Witnesses, for example where religious

---

[81] In doing so Bradney, cites the work of Yip whose study argues that personal religiosity can emerge from personal experience as well as religious doctrine (2003:143 cited in Bradney, 2009:4).

[82] See also Edge (2002).

[83] Bradney takes the notion of "transformative accommodation" from the work of Shachar, who argues for a legal framework that would 'accommodate the most vulnerable constituents' within society (Shachar, 2001:117 cited in Bradney, 2009:51). See also Edge, 2002; Poulter, 1998; Menski, 2008.

upbringing or medical treatment are at issue (Bradney, 2009:117).[84] In doing so, he offers a more complex analysis of how religion as identity might be understood beyond the theological paradigm. For example, Bradney cites from the case of *Re E* involving a fifteen year child refusing life saving treatment, where Ward LJ stated: "this court...should be very slow to allow an infant to martyr himself" (unreported case but cited by Balcombe LJ in *Re W*).[85] Bradney views this statement as indicative of the courts' inability to understand the child's attitudes to death and the jeopardy he views putting himself into in the afterlife (2009:119).

This argument is also put forward by Ahdar and Leigh (2005) approaching the issue of medical treatment as well as other child welfare issues from a Christian perspective. They argue that courts should take more account of parents' decisions especially when they might potentially concern the life and death of their children. Ahdar and Leigh are critical of the courts in these cases for not being able to fathom the importance of religious belief from a 'religious' perspective (Ahdar and Leigh, 2005:269-292; Ahdar, 1996).[86] Bradney articulates this sentiment as there being a gap in cognitive understanding or empathy with religious belief between the believer and the judge in regards to the extra-temporal or transcendent, onto-theological dimension of what is at stake after death for the believer (Bradney, 2009:119). He also views the 'attitude' of the believer as in part 'cultural', which he posits may be a religious culture; this may hint at a conceptualisation of religion as

[84]For example, *Re H* (1981) 2 FLR 253 involving a Jehovah's Witness mother who was allowed to retain custody of her child on the condition that she allow the child to celebrate birthdays as well as Easter and Christmas and also ensure that the child did not accompany her whilst out witnessing. See also similarly *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239.
[85] [1993] 1 FLR 386 and [1994] 5 Med LR 73. Also cited in *Re W* [1992] Fam 64 at 88.
[86] See also Edge (2002), but not from a Christian perspective.

an affective attachment linked to certain beliefs which might be understood as 'cultural,' and therefore going beyond a mere theological definition.[87] However, it is unclear whether this discussion of religion as identity is just another aspect of what he calls 'obdurate' belief as discussed above, particularly as his notion of identity is intertwined with the notion of religion as something one chooses.[88]

Bradney bases this argument on a radical autonomy perspective (1993:22, 28 discussed in Edge, 2000b; Bradney, 2009:1).[89] To given an example of how Bradney views a believer might exercise this religious choice in relation to employment, he states:

> in times of high unemployment it might be considered unrealistic to ask a worker to leave his or her employment...to leave one's employment because of one's religious convictions might be a hard choice. Nevertheless it is a choice which can be made (Bradney, 1993:114).

Unfortunately, he does not discuss this notion of religious choice in relation to the child welfare cases. How might choice have featured in *Re E* if the child had been younger or in cases where children are not explicitly able to express an opinion on matters relating to their religious upbringing? As for example, in the case of *Re J* where a Turkish Muslim father sought specific issue orders for his five year old son to be circumcised and to be brought up as a Muslim. Or alternatively in *Re B* where

[87] What Motha (2007) refers to as a heteronomy, drawing on Mahmood (2005) and others that explore conceptualisations of religion as 'affect'.

[88] A point that has recently been a deciding factor in *Eweida* involving a British Airways employee claiming religious discrimination by her employer for asking her not to wear her cross symbol whilst at work. The judge found that wearing a cross was a matter of choice.

[89] See also Vickers (2008:38) for an erudite summary of individuals enjoying the freedom to choose their own conception of good from the point of view of human dignity.

the case revolved around whether a child should be returned to Gambia to her birth parents despite forming a psychological attachment with foster parents in England. I wonder if Bradney had examined these and other child welfare cases involving non-Christian families whether his discussion of religion might take account of the different and complex ways in which religion circulates, particularly as he argues that the state largely fails to accommodate minority religion. He, however, does not examine child welfare cases involving non-Christianness, rather he focuses more generally on what for him is the key concern, namely, the seeming incommensurability of law and religion in liberal nation states.

Adopting a somewhat different approach, Hamilton, in her work on family law and religion, takes the view that cultural upbringing - of which religion is a part - is something that judges feel obliged to take account of, for example in custody and adoption cases, in order to safeguard the preservation of minority rights (1995:231). Eekelaar, another key scholar of children's rights and religion, also makes this observation (2004). Whilst Hamilton and Eekelaar, both recognise the importance of cultural heritage in extreme cases such as the forcible adoption policy in existence in Australia until the 1950s, where aboriginal children were taken from their families and placed with white families or in mission schools, they nonetheless question what they view as judicial overemphasis on religion and culture (Eekelaar, 2000:181; Hamilton, 1995:231). Like Bradney, but in relation to child welfare and education, Hamilton and Eekelaar seek to foreground the importance of children's autonomy and conceptualise religion as a matter of choice, something that children should be able to adopt for themselves in later life,

albeit being aware of the culture or religion of their birth parents (Eekelaar, 2000:181; Hamilton, 1995:231).

Whilst Eekelaar discusses religious identity as fluid and shifting, Hamilton views cultural heritage as "an unnecessary fiction" that comes to be imputed upon children by judges or through education (Hamilton, 1995:231). What is interesting about their work, which is viewed as highly influential in the debates on children's religious upbringing, is that religious culture tends to be understood as something that can somehow be acquired or chosen, rather than brought into being through lived experience. Another point, to which I return in the second section of this chapter, is that in seeking to frame religion as a matter of choice, it comes to be understood primarily as an onto-theological concept which obfuscates *how* religion, particularly non-Christianness, comes to be produced through law.

Edge, in his analysis of child welfare, probes further at the concept of religion (2002). In relation to *Re J* and the issue of circumcision or cultural practices, he specifically poses the question of whether children should only be viewed as "hyper-autonomous individuals" or also as having a relational identity with family. Edge goes on to ask: "are they [the children] an integral, organic, part of broader communities, both religious and familial"? (2002:336). Quoting Bridge (1999), Edge seeks to understand circumcision differently in a context where the child's "culture, religion and family [life] is enhanced" (2002:336). Edge and others therefore contest the conceptualisation of religious identity as involving choice, (Edge, 2000a

and 2000b; Ahdar and Leigh, 2005; Rivers, 2001).[90] They contend, for example, that the 'right to exit' argument, namely that you can choose to either leave your employment if it offends your religious convictions, or confine the practice to the private sphere, does not take into account the "supernatural significance [of religion] to the believer" nor that "religious adherence" may not be an optional requirement from the perspective of the believer (Vickers, 2008:47 and 51; Edge, 2000b and Ahdar and Leigh, 2005). [91]

In relation to children and child welfare cases, Ahdar articulates his argument in terms of parents' rights to choose a "godly future" for the children, namely be able to influence and shape their spiritual development (2002; Ahdar and Leigh, 2005:225). Ahdar argues that often judges are unfamiliar with the religious beliefs and practices of the parents and therefore may make implicit or explicit assumptions about them and in particular, the religion's impact on the child in question (Ahdar, 1996:190-2; Edge, 2002:280).[92] Ahdar's perspective, however, explicitly remains tethered to an onto-theological conceptualisation of religion with an extra-temporal dimension as it is avowedly a Christian perspective. Edge, in relation to his examination of some of the same child welfare cases, is perhaps one of the few LAR scholars going beyond an onto-theological understanding of religion,

---

[90] See also Vickers (2008).

[91] See also Motha who, commenting on the veil debate in the UK and France raises the problem of how the veiled woman troubles both secularism and feminism in the same way; namely that feminists need to find a consistent position that respects individual autonomy and concomitantly sustain a conception of politics freed from "heteronymous determination" that sidelines religion as affect (feeling or emotion) (2007:140). See also Razack (2004) who complicates the notion that women can 'exit' their communities even when they are being subjected to violence.

[92] This analysis is in relation to cases involving custody disputes where one of the parents was a Scientologist or Jehovah Witness and custody of the child was granted to the other parent (Edge, 2002:279; Ahdar, 1996:190; Ahdar and Leigh, 2005:269-292).

both Christian and non-Christian. Rather, he seeks to understand the significance of religious/cultural practices to the lives of children within their family and community contexts (2002:307 and 2000a).

Another approach that can be viewed as a building on Edge's work is put forward by Ronen (2004) who argues for taking a psycho-legal perspective in relation to the issue of transracial adoption and custody/access issues in child welfare cases. She contends that religion/culture should be understood as relational and contextual namely, that a child's existing relationships are what makes her notions of religion/culture meaningful and therefore important to her psychological well being (2004).[93] This approach explores in depth what religion might mean in children's lives and how religious/cultural identity comes into being.[94] For example in relation to *Re J* the decision effectively diminishes the importance of the father's relationship with his child and the integral importance of a Muslim identity within that relationship. It is this relational context that might be of great significance to the child's well being and sense of self that can often seem to be marginalised in the judgments (Edge, 2000a:336). I will return to this discussion in more depth in the following chapter.

---

[93] See also Van Praagh (1999).

[94] See also the work of Mahmood, who in a completely different context (an anthropological study of the women's mosque movement in Egypt) explores a much more complicated notion of how piety is formed through *habitus* (drawing on Bourdieu, 1990) or the reiteration of ritualistic practices that become embodied and internalised as integral to the person's sense of selfhood (2005:136; see also Mahmood, 2009:847). Mahmood (2009) also explores religious affect by way of explaining the injury or offense that some Muslims felt at the Danish cartoons that depicted the Prophet Muhammad as a terrorist. Her work complicates the notion of religious identity and the influence and role of theology in the concept of religion as meaningful to the individual.

Here, I wish to point out that the predominant conceptualisation of religion in the LAR scholarship is based on an onto-theological model of belief and ritual practice, even when related to more complex notions of religious identity. This conceptualisation of religion is as I mentioned, reflected in the key LAR scholars' analysis of freedom of religion cases relating to child welfare and the issue of religious education and faith schools.[95] Their arguments as to how religion should be conceptualised in these two areas are therefore important and must be considered thoroughly. Whilst it is not my aim to suggest that religion cannot legitimately be used as a term to denote the various theological and identity aspects that Bradney, Macklem and others refer to, I do however, wish to highlight the point that the onto-theological conceptualisation of religion itself is not fully interrogated in this literature. For example, the emergence of the term religion as a predominantly onto-theological phenomenon from within orientalist academic scholarship during the nineteenth and early twentieth centuries, is an important analytical frame within which to understand religion, and how it has come to circulate in contemporary juridical discourse (Masuzawa, 2005). As I noted in chapter one, Masuzawa (2005), Asad (2003), De Vries (2008) and Fitzgerald (2000) for example, highlight the way that the theological model of religion has come to be so embedded within Western notions of religion, obfuscating the ways in which religion can come to be conceptualised and authenticated through various socio-political, historical - and I would add - juridical discourse. It is this juridical discourse and the various ways in which religion comes to be conceptualised within it that I

[95] See also chapter five.

explore in my case studies.[96] Yet these critical perspectives and their implications, in terms of the work that certain conceptualisations of religion may do within the realm of law, is almost entirely marginalised in the LAR scholarship (although see Edge, 2010 discussed below) It is therefore to these critical religion perspectives – as I refer to them – that I now return in more detail.

2.3 Critiquing an onto-theological conceptualisation of religion: a historical perspective

2.3.1 The modern emergence of the concept of religion

Asad, in his book *Genealogies of religion* contests what he refers to as the 'universalist' or essentialist conceptualisation of religion; namely one that considers religion as a trans-historical phenomenon with an essential core (1993:29). He argues instead, that 'religion' "must be understood as being constituted and constructed in a specific historicity". (*ibid*). As highlighted in chapter one, Masuzawa undertakes this historical study and argues that the term religion was effectively "invented" in nineteenth century European academic discourse within the disciplines of theology and philology and later within the study of 'world religions' set up to document the lives of non-Christian, non-European peoples (Masuzawa, 2005: xii; De Vries; 2008:28; Fitzgerald, 2000).[97]

Although religion was not defined in the early texts from this period, Masuzawa describes religion as emerging in the work of comparative philologists,

---

[96] See chapters three, four, five and six.
[97] See also Boyarin (2008) on the Christian invention of Jewishness.

studying non-European languages (Masuzawa, 2005:xii).[98] As part of their work philologists categorised non-European peoples in one of three linguistic groups: Semitic, Aryan and Turanian which related to the people's geographical location and perceived racial characteristics (*ibid*). These categories then gave rise to religious categorisations; namely Judaism and Islam in the "ancient Near East", Hinduism, Buddhism, Zoroastrianism, and Jainism in "South Asia" and Confucianism, Taoism and Shinto in the "Far East" (Masuzawa 2005:3). As Masuzawa argues, it was not until the early decades of the twentieth century, with the study of "world religions", that the term 'religion' began to circulate as it does today; with the onto-theological meaning of having a "sense of objective reality [and] concrete facticity" (Masuzawa, 2005:2). This onto-theological configuration of religion developed from an assumption within comparative theology, 'world religions' predecessor, that just as Christianity had moulded and regulated European nations for centuries, other nations would also have a similar 'religion' that functioned as "the backbone of its ethos" (Masuzawa, 2005:18).

Fitzgerald argues that various scholars in the eighteenth century, inheriting the theological idea that Christianity was universal, transformed the meaning of 'religion' to reduce its specifically Christian elements in order to extend it as a cross cultural category (2000:6). He adds that although non-theological arguments were incorporated in the work of prominent scholars of religion, in many cases their analysis tended to be an indirect extension of Christian theism (Fitzgerald,

---

[98] For example in the work of Sanskritist Freidrich Max Müller (*The origin and growth of religion as illustrated by the religions of India* (1878)) who Masuzawa describes as "preeminent among the founders of the science of religion" (2005:24).

2000:4).[99] The central defining feature of religion for these scholars would therefore, be its universalistic, transhistorical and divine essence, which Fitzgerald describes as a "natural or a supernatural reality in the nature of things that human individuals have a capacity for, irrespective of their contexts" (Fitzgerald, 2000:5). He further contends that the Christian core understanding of religion as having a supernatural or divine essence was retained, whilst simultaneously stretching the meaning of God and related Christian biblical notions such as the Lord's providence "to include a vast range of notions about unseen powers" (Fitzgerald, 2000:5).[100] Thus, a key point made in this critical religion literature is that the circulation of religion as an onto-theological concept is a continuation of its conceptualisation within the work of comparative theology, philology and 'world religion' scholars, that is, from a Christian epistemic viewpoint.[101] This is a viewpoint which is apparent, for example, in the words of Reverend Robert Flint, professor of divinity at the University of Edinburgh:

> Christianity is the only religion from which, and in relation to which all other religions may be viewed in an impartial and truthful manner. It alone raises us to a height from which all the religions of the earth may be seen as they really are...No other positive religion thus affords us a point of view from

---

[99] He discusses the work of some of the 'founding fathers' of comparative religion to more recent twentieth century works for example: Max Müller, 1878; Rudolf Otto, 1932 and Ninian Smart, 1978 (Fitzgerald, 2000 and 2007).

[100] Thus, in relation to Hinduism, for example, Fitzgerald argues that its emergence as a concept was very much linked to colonial influences that drew on Protestant incarnational theology, which he argues is still in existence in the religious education curriculum today (2008:30). See also Fitzgerald, (1990) specifically in relation to the conceptualisation of Hinduism in world religions' scholarship and King (1999) in relation to Hinduism and Buddhism.

[101] As I discuss in chapter five, the modern concept of religion is also embedded within the English education system, particularly religious education, with hardly any critical reflection on the historic emergence of religion as a concept discussed here (Fitzgerald, 2000; Jackson, 1995).

which all other religions may be surveyed, and from which their bad and their good features, their defects and their merits, are equally visible (1882:336 cited is Masuzawa, 2005:102).[102]

2.3.2 Christian universality and the racialisation of non-Christianness

As highlighted above, a key aspect of how non-Christianness came to be judged was through racialised and orientalist thinking. Yet, there are relatively few perspectives that highlight the ways in which non-Christianness has come to be understood and represented, particularly within the LAR literature. Masuzawa claims that one reason for this is that the conceptual framing of social and cultural practices of non-Christians, as derived from a religious heritage, was from a viewpoint that spiritualised these practices and depicted them as "expressions of something timeless and suprahistorical", that in short, it de-politicised them (Masuzawa, 2005:20).[103] The depoliticising of religion - through its onto-theological conceptualisation - may account somewhat for how it has come to be embedded in contemporary political and juridical discourses as a predominantly fixed, trans-historical category. Yet, as the critical religion scholars discussed above argue, conceptions of non-Christianness came to be racialised as part of a larger, *political* transformation of a modern European identity, or the 'making of the West' (Masuzawa, 2005:xi; Asad, 1993:24; Miles and Brown, 2003:29).

---

[102] From his St. Giles lecture which appeared as the concluding chapter "Christianity in relation to Other Religions" in *Faiths of the World,* cited in Masuzawa (2005:102).

[103] Or as De Vries describes it maintained religion as "a unified field of meaning, an ontological, existential, and social constant, regardless of the de facto diversity of cultural manifestations whose identity with religion was taken for granted" (2008:28).

As I highlighted in chapter one, Said argues that much of the academic knowledge about the 'Orient' posited European civilisation, both in terms of religion namely, Christianity and race (whiteness), as superior to non-Christianity (Masuzawa 2005:3; Goldberg, 2002; Miles and Brown, 2003; Fitzgerald, 1999; Fitzpatrick, 2001). Within philology this orientalist racialisation of religion took the form of a drive to Hellenise and Aryanise Christianity, whilst simultaneously racially Semitising Islam, "rigidly stereotyped as the religion of Arabs" despite knowing that Muslims were far from being exclusively Arab (Masuzawa, 2005:xiii).[104] Thus, for Masuzawa "Islam came to stand as the epitome of the racially and ethnically determined, non-universal religions" (*ibid*).[105] Therefore, the concept of non-Christian religion was, arguably, from its inception not only a modern and onto-theological concept, but also a racialised one, brought into being predominantly from a European Christian point of view. Consequently, Masuzawa and others

---

[104] Going beyond a mere technical study of language, philologists were tracing the genealogical link of languages spoken in Europe to pre-Christian Hellenic civilisation - viewed as the epitome of "timeless modernity" - and even further back to an Aryan ancestry (Masuzawa, 2005:xii). According to Masuzawa this significantly influenced and transformed the sense of European identity because it disrupted the mode of thought that Christianity was linked to Semitic origins (and therefore linked to Jews and Muslims) (*ibid*). She describes the success of a number of treatises positing the idea of an Aryan Christianity with its true origin not in the Hebrew bible (Torah) but in Hellenic traditions as well as possibly Indo-Persian traditions (*ibid*:xiii). See also Anidjar (2003 and 2008). I discuss his work further in chapter four.

[105] Miles and Brown (2003), in their work trace the representation of non-Christianness further back to the crusader and medieval period. They highlight how European perceptions of Muslims came to circulate in theological terms or in racial terms, or indeed both. For example, they point out that in the crusader period, the key characterisation of Muslims and Islam was that of a theological heresy and "negation of Christianity" (2003:29). The prophet Muhummad was an "imposter, an Antichrist in alliance with the Devil," and, as a result, viewed suspiciously (*ibid*; Kabbani, 1986:5). However, as Miles and Brown (2003) and Said (1994) discuss, these theological concerns were also combined with orientalist accounts of Muslim characteristics, from being licentious to possessing an inferior civilisation. These uncivilised characteristics, whilst represented mainly in a religious discourse, came also to circulate in "quasi-'racial'" terms (Miles and Brown, 2003:29). Thus, for example, crusaders did not distinguish between, Muslims, Jews, pagans and indeed Eastern Christians, the latter being supposedly defended by European Christians because of the cultural, somatic and linguistic similarities between them all (Jones and Ereira, 1996:17-19, cited in Miles and Brown, 2003:29).

argue that a key effect of this orientalist scholarship was the emergence of an "epistemic regime" (*ibid*:xii) or way of thinking about and understanding non-European, non-Christians ("world religions") (Asad, 1993:24). [106]

I should clarify however, that it is not my intention to misrepresent the study of world religion by ignoring the tensions and debates that existed within it. For example, one such debate revolved around whether non-Christian religions - such as Buddhism and Islam - could be viewed as universal and therefore also be classified as world religions. Some twentieth century scholarship on religion even considered how the grounds upon which Christianity itself could continue to be regarded as universal (Masuzawa, 2005). This was a key question for Troeltsch, a contemporary of Max Weber and leading early twentieth century figure writing on religion, whose views were also indicative of other scholars of religion at the time (discussed in Masuzawa, 2005:323). Troeltsch acknowledged different peoples as configuring their own "foundational truths" within the framework of "their own personal or racial psychic life" (*ibid*: 2005:319).

However, as Masuzawa argues, the language of religious plurality within the work of scholars such as Troeltsch only hid what many religion scientists believed to be the truth about Christianity's universality and certainly it being the religion of Europe (*ibid*). Thus for Troeltsch and his contemporaries, religion as a concept

[106] As well as the representations of Muslims and Jews, they also explore the different perceptions of non-Christianness in Africa and the Americas, and the ways in which these ideas evolved into different representations over time (2003:33-38). See also Anidjar (2008) on 'the Semites' and (2003) on 'the Jews and Arabs'; Herman (2011) and Cheyette (1993) on representations of 'Jews'; also Fitzpatrick (2001) and Anghie (1996) on colonialism and the encounter with indigenous people in South America; Slaughter (2000) on the racialised conceptions of Indigenous American identities in Indian child welfare law and Kline (1992) in relation to representations of first nations within legal discourse in the Canadian context.

largely remained the "general and transcultural" and therefore universal phenomenon that had emerged from the Christian theological framework (Masuzawa, 2005:319). In Masuzawa's words, 'world religion' in this exclusivist, universal sense was not synonymous with, but rather distinct from and diametrically opposed to, the "religions of the world" that is, other religions (Masuzawa, 2005:119). In short, for Troeltsch and his contemporaries, Europe's superiority particularly in the face of the prosperity to be obtained from the European colonial project, was in part attributed to Christianity as part of its (Europe/the West's) identity and consciousness (Masuzawa, 2005:323). In examining the work of Troeltsch and his contemporaries both De Vries and Masuzawa argue that the emergence of the concept of religion - from a Christian theological viewpoint - can be understood as having facilitated a notion of European universalism even amid de facto religious pluralism (Masuzawa, 2005:327; De Vries; 2008:28; see also Asad, 1993). In Asad's words Christianity's role was that of a "mobile power" which played a significant part in producing the West, "its structures projects and desires" as well as its "cultural hegemony" (Asad, 1993:24).

2.3.3 Re-politicising the concept of religion

As I have suggested above, the historicised study of religion is significant in highlighting the role of an eighteenth and nineteenth century Christian theological epistemic view in the conceptualising of religion as an onto-theological, and in the case of non-Christianness, as a racialised concept. Yet, the critical analysis of the emergence of religion as a *modern* rather than fixed, transhistorical concept is almost entirely marginalised in the LAR scholarship particularly in relation to child

welfare cases. In relation to education the embedded role of Christianity is acknowledged more widely, even by scholars such as Bradney, despite his view that British society is largely secular (Bradney, 2009). This recognition of the influence of Christianity in education is largely due to the Church of England's historic and continued role as a provider of education through church schools, as well as the existence of legal requirements for Christian collective worship and a predominantly Christian RE curriculum in schools.[107] Nonetheless, the *significance* of this deeply rooted Christian presence within education is largely unacknowledged. I therefore contend that the importance of bringing the critical religion analysis to bear upon the LAR literature is to better understand the influence of a Christian onto-theological paradigm of religion in contemporary conceptualisations of non-Christian religion. Moreover, this analysis also points to the contingency of how religion comes to circulate in different contexts and areas of law.

Thus, neither the historic emergence nor the contemporary conceptualisation of religion, as I go onto explore in the next section, can be viewed as separable from politics but rather is implicated in particular socio-political work, within areas of law and policy relating to children. For example, in my education case study I suggest that the embedded role of Christianity and its continuing influences are not only overt but also invisibilised, for example, in the move towards a more multi-faith RE curriculum, as well as in the former Labour government's values discourse to defend faith schools. I suggest that the inclusive

[107] See chapter five for an in depth discussion of this point.

rubric of faith, apparently including all faiths, obfuscates what was and may continue to be, the government emphasis on church schools' values as the benchmark for other schools to emulate. Moreover, values discourse also circulates in relation to citizenship education and again I suggest that the co-imbrication of Christianity and secularity in upholding these values as secular and universal hides how non-Christianness comes to be demarcated through these values. I am not suggesting in this section that religion, including non-Christian religion, may not be viewed in onto-theological terms or that values stemming from Christianity may not be shared across cultures. Rather, I merely wish to highlight that religion *also* needs to be understood as produced and represented in particular ways within juridical discourse with socio-political effects, as I now go on to elaborate.

2.4 The juridical 'authentication' of religion and regulation of non-Christianness

The contingency of religion as a concept raises the issue of *how* certain things, such as beliefs and practices, come to be labelled as religion, namely, through what kinds of socio-political, historical and juridical processes? I have already discussed above the work of scholars who demonstrate how non-Christianness was conceptualised within the academy through an orientalist and racialised lens. Drawing again from that work, a second key theme I wish to explore here is what Asad refers to as the "authentication" of particular so-called manifestations of religion, such as symbols and practices, over others. This kind of analysis, discussed in chapter one, not only contests the 'essentialist' and

transhistorical theological notion of religion, it also foregrounds and shifts the analysis onto how symbols and practices as manifestations of religion can come into being through (juridical) authentication. [108] In doing so, Asad questions whether the meaning that religious symbols are supposed to embody can be established independently from the context in which they come into existence or are used (1993:53). He states:

> ...if religious symbols are to be taken as the signatures of a sacred text, can we know what they mean without regard to the social disciplines by which *their correct reading is secured*? If religious symbols are to be thought of as concepts by which experiences are organised can we say much about them without considering how they come to be authorized...Even if it be claimed that what is experienced through religious symbols is not, in essence the social world but the spiritual, is it possible to assert that conditions in the social world have nothing to do with making that kind of experience accessible? (1993:53).[109]

For Asad then, religious symbols cannot be signifiers of religion in and of themselves; rather, it is the representation of certain behaviours or symbols in governmental discourse that systematically (re)define and create religion (1993: 37-

---

[108] Which Asad does through a critique of the work of anthropologist Clifford Geertz, who echoes the LAR belief/practice predominant conceptualisation of religion, namely as: "...the system of meanings embodied in the symbols which make up the religion proper, and, second, the relating of these systems to social-structural and psychological processes" (Geertz, 1966:19, discussed in Asad, 1993:53).

[109] This point is also made by An-Na'im (1992) in relation to the hermeneutic process through which 'sacred' sources become interpreted by human beings before becoming formulated into what we understand as the law.

39).[110] As discussed in chapter one, Asad discusses this analytical frame in relation to the French 'headscarf affair' arguing that Islam or Muslim identity was given meaning and *authenticated* through a process of signification (1993, 2006:501).[111] Moreover, Asad and others also highlight how the banning of the headscarf came to be justified through an orientalist and racialised view of the Muslim other as pre-modern which nonetheless, comes to be obscured by the language of secular universalism and citizenship values (Asad, 2006; Razack, 2008; Brown, 2006).

This analysis of how particular representations or signifiers of religion come to be authenticated and represented in juridical discourse, an analysis that is also apparent in both my case studies, remains largely absent in the LAR literature. Moreover, the deployment of secularism as a tool that can be, at times, used to police the boundaries of acceptable forms of religion, is another key point that needs further attention in the LAR scholarship. Edge has made an important contribution towards this work in highlighting how Islam comes to be 'Anglicised' through state regulation of mosques (2010). He argues that the charity commission, in deciding to grant charitable status to mosques or not (what he terms 'soft law') is effectively demarcating the parameters or acceptable forms of Islam in the public domain (2010:377). However, what is not made explicit in Edge's analysis is the role of racialisation in the regulation of religion. There is very little discussion in the LAR perspectives of how racialisation of non-Christian religion interacts with secularism, both in conceptualising non-Christianness, and in the juridico-political work - such

[110] See also Mahmood, 2009; Said, 1994; Herman, 2006 discussed below.
[111] See also Razack (2008) discussed in chapter one.

as the Anglicanisation of Islam - that religion might do. I would suggest that there is an absence of analysis of racialisation in the LAR literature both in relation to how judges adjudicate on the religious/cultural upbringing of a child, as well as in regards to the role of religion and values discourse in education.[112]

Before elaborating further on the issue of racialisation, it is important to note that although the LAR scholarship that I have referred to discusses how religion comes to be defined in law, this work is on the whole from the point of view that 'obdurate belief' - to use Bradney's term - is not sufficiently accommodated within current legal frameworks (Bradney, 1993, 2009; Ahdar and Leigh, 2005; Poulter, 1998; see also Edge, 2006). This view tends to be an analysis of the failures of the liberal rights framework rather than a critique of the contingency of religion as a concept or an interrogation of the work it does through law. For example, Bradney in relation to the child welfare cases that he analyses - discussed above - reflects on the role of judges in their adjudication of religious belief. In relation to the *Re E* case, where a fifteen year old Jehovah Witness refused life saving medical treatment, Bradney concludes that in not understanding the child's unwillingness to jeopardise his life after death (as the child saw it) "the court's approach is dominated 'by a secular humanist world view'" (*ibid*:120; citing Montgomery, 2000:161). There is somewhat of a tension in his work in this regard, because of recognising, on the one hand, the privileged role of Christianity, particularly in areas of family and education law; and on the other hand, taking for

---

[112] See case study chapters for my analysis of religion and race in these areas of law (chapters three, four, five and six).

granted the fact that the legal system is secular and neutral in matters of religion (2009:1 and 121). Bradney's position is somewhat summed up in his statement that whilst Britain may once have been a Christian country it "is now largely a secular" one (*ibid*). Thus, he concludes that: "The secular liberal State's attitude towards religion might equally be thought to contain a non-neutral value judgment" (*ibid*). Bradney states:

> Even when it makes special provision for believers, the law never recognises the claims of those believers in their own terms. When for example British law grants Sikhs exemption from crash-helmet laws it does so because of arguments such as tolerance. It does not do so because it accepts the intrinsic values of Sikh's faith claims about the importance of males Sikhs turbans; *since it is neutral about the values of religion*, it cannot accept, on their own terms, the claims of any religion (emphasis added) (*ibid*).

I would suggest that Bradney, rather paradoxically argues that British law is not expressing a view about the *value* of religion because of state neutrality and toleration in matters of religion, yet, at the same time, he is acknowledging the role of the state in drawing the boundaries of religion from a secular point of view.[113] Following the analysis put forward by Asad (2006), Razack (2008) and Brown (2006) in relation to the 'headscarf affair' and the analysis in my case studies, it is my contention that productions of religion in law are not necessarily always neutral, but indeed a particular kind of value judgment that is often racialised in being deemed a form of (non)acceptable religion. Moreover, as discussed above, the

[113] For a history of the development of toleration of religion see Bradney (2009:35-38).

notion of toleration itself, according to Brown, can be a tool of regulation based on distinguishing between those who are civilised and those who are deemed barbaric (2006; see also Mahmood, 2009:853), a theme I return to in my analysis of child welfare cases and the values discourse in education. [114] Indeed, this critical analysis of the work of secularity or secular values and/or tolerance discourse is even acknowledged in the work of José Casanova (1994). As I outlined in chapter one, he has revised his original secularisation thesis from arguing for complete separation of religion from state and the public sphere to identifying acceptable and non-acceptable manifestations of religion (2008). However, unlike Asad (2003, 2006) Brown (2006) and Mahmood (2005), Casanova does not view this demarcation of (un)acceptable manifestations of religion, nor the racialised grounds upon which it might occur, as problematic.

Whilst some other LAR scholars would also contest law's purported neutrality, claiming for example that "liberalism is just another ideology reflecting a partisan belief culture" (Ahdar, 2001:3) these perspectives, like those of Bradney (2009) and Poulter (1998), tend to be arguing for more accommodation of religious freedoms (Ahdar, 2001:113; Yousif, 2000:32; both discussed in Bradney, 2009:31).[115] I would suggest that whether Bradney and other LAR scholars view the state as neutral or not, there are two key points that come to be somewhat

---

[114] Mahmood traces through McClure's work on *The limits to toleration* (1990) how certain practices and rituals "had to be made inconsequential to religious doctrine in order to bring them under the purview of the law". This depended on "securing a new epistemological basis for religion and its various doctrinal claims..." in order to ensure the safety and security of the state and its citizens, namely civic order (drawing on John Locke's *A letter concerning toleration* (1692) (Mahmood, 2009:853).

[115] See also Martinez-Torron, 2001; Rivers, 2001:246.

obfuscated in their analyses of religious freedom and their predominantly theological conceptualisation of religion. These points are firstly, the deeply embedded co-imbrication of Christianity and secularism in Anglo-European or 'Western' culture and legal systems and secondly, as discussed above, the political work that juridical discourse on religion, secularity and/or universal values does, in demarcating the boundaries of non-Christian identities (see Mahmood, 2009; Razack, 2008 and Jakobsen and Pelligrini, 2008).[116] This is an analysis I explore in both my case studies where I focus on the impact or significance of juridical discourse on religion/secularity/universal values for non-Christian children.[117]

2.5 The contingency of law's religion: non-Christianness as race/ethnicity/culture

In this section, I wish to return to the conceptualisation of religion as race/ethnicity and/or culture. Above, I considered the role of racialisation in the authenticating of religion through law. To what extent does the LAR literature engage with the critique of law as racialised or indeed, itself harness racialised notions of religion?[118]

Much of the relevant LAR literature deals with issues of race/ethnicity, as discussed above, within the frameworks of accommodation of religious practices,

[116] All these perspectives are discussed in chapter one.
[117] See chapters three, four, five and six.
[118] For a discussion of a view of law as inherently racialised, see Fitzpatrick (1987) and Tuitt (2004) in the UK context and Critical Race Legal Studies in the USA discussed in chapter one.

for example under the now replaced Race Relations Act 1976[119] and/or calling for legal pluralism. Much of this discussion engages with the case of *Mandla v Dowell Lee*[120] a landmark decision in the legal configuration of 'ethnic origin' (Bradney, 1993; Bamforth *et al*, 2008; Poulter, 1998; Jones and Welhengama, 2000). The case was brought as a result of a school refusing to allow a Sikh pupil to wear his turban to school and it involved the key question of whether Sikhism could be regarded as an ethnicity under the Race Relations Act with the school arguing that Sikhism constituted a cultural or *religious* identification and not a racial one.[121] It is not my aim to discuss this case in particular, as my own focus is on religion in areas of law pertaining to child welfare and education. Nonetheless, it is an important case to note here as much of the LAR literature discussing minority religion refers to this key case.

For example, Bradney views religion, particularly that of Sikhs, Hindus and Muslims (obdurate believers), as part of their sense of self-identity (2009:20). That is, he views religion not just as a set of ritualistic practices stemming from theological sources, but also as a cultural way in which individuals and/or communities of people live. He identifies community, and belonging within a

---

[119] First amended by the Race Relations (Amendment) Act 2000 and now replaced by the Equality Act 2010.

[120] *Mandla v Dowell Lee* [1983] 2 WLR 620.

[121] In addressing this question, the two main judgments given by Lord Templeman and Lord Fraser addressed a number of key aspects that they believed to be necessary to constitute an ethnicity. As Bamforth *et al* state, Lord Templeman's categorisation has been understood as positing a more essentialist view of race, focusing on descent, geographical origin and group history (being more than a religious sect) (1983 at 569 discussed in Bamforth *et al*, 2008:805). Lord Fraser's judgment, giving a broader less biologically determined definition included: a long shared history, cultural tradition, common geographical origin or descent, as well as common language, literature and also religion (1983 at 562 discussed in Bamforth *et al*, 2008:805; see also Herman, 2011; Poulter, 1998; Jones and Welhengama, 2000).

community, as highly significant and determinative of the social life of these religious communities (*ibid*). Bradney also views these 'communities' as demarcated by nationality of 'origin' which also came to be a key determining factor in the *Mandla* case (*ibid*). This racialised conceptualisation of religion as a cultural, shared group and inter-relational identity also runs through the work of Poulter (1998) and Jones and Welhengama (2000). It stands to reason then, that before the 2003 Regulations banning discrimination on grounds of religion or belief, all these scholars argued for further protection under the Race Relations Act for ethnic/religious minorities in addition to Jews and Sikhs (*ibid*). Although the legal framework is now different as all discrimination legislation has been brought together under the Equality Act 2010, it is nonetheless important to note the presence of a racialised conceptualisation of non-Christian religious identity within the work of Bradney, Poulter and Jones and Welhengama.[122]

The work of Poulter (1998) and Jones and Welhengama (2000), somewhat differs from Bradney, in that their work does not specifically focus on 'religion' but rather on 'ethnicity' and ethnic minorities of which religious minorities are a part. In their work, religion comes to be conceptualised as part of the matrix of 'ethnicity' attributed to certain faith based, and/or cultural practices which may also cover nationality (of origin) (Poulter, 1998:3; Jones and Welhengama, 2000:27-29). Although this work problematises the biological notion of race as an inherited

---

[122] See also the work of prominent sociologist of multiculturalism Tariq Modood (2000). He acknowledges the tension of a racialised logic (in categorising people as races because of ancestry or origin) underpinning the Race Relations Act which existed to offer protection against precisely such racialised constructions of individual identities. However, for Modood at the time the tension within the Race Relations Act case law and its conception of race constituted a strategic essentialism that was necessary for legal protection on grounds of race (2000:194).

characteristic, their use of the all-inclusive term 'ethnicity' and culture seems to assume a possibly inherent link to specific religious and cultural beliefs/practices as characteristic of that group. This is not only in the case of Jews and Sikhs (2000:36-39) but, for Jones and Welhengama, also in relation to Muslims, Hindus and Rastafarians (*ibid*: 244). They argue in response to the *Mandla* decision that the "presence of a unifying religion", for example amongst Muslims, is as integral to an ethnic identity as 'race':

> Muslims, who have continued to assert their separate ethnic identity based on religion rather than geographical or biological differences have constantly experienced rejection. The claims for recognition of Muslims as a racial group ...all serve to enhance and assert Muslim ethnic identity (2000:244).

I would suggest that their reference to 'ethnic minorities' combined with the contention that they are held together by "a unifying religion" points to their belief in the existence of a homogenous set of communities. Moreover, it may imply that these communities have fixed cultural and/or religious beliefs and practices that flow from the fact of their 'ethnicity'. Although of course, these scholars are in part responding to the *Mandla* decision and may be espousing the language of the judgment. However, their conceptualisation of religion is nonetheless that of beliefs/faith and/or practices that flow from cultural sources. The explicit absence of pinpointing theology as a source of culture does not exclude the presence of an underlying assumption that theology constitutes a source of culture as, for

example, in Bradney's work. Indeed theology and culture come to be part of the same thing (Jones and Welhengama, 2000:245; Bradney, 2009 discussed above). These 'cultural' sources - in the view of these commentators - are rooted in a racialised identity linked to nation or sense of nationhood outside of Britain. Religion is therefore, not only a faith that one can find and develop oneself, it is also depicted as flowing from the non-English/British/European persons' ethnic or national origins or those of their birth parents, such as in the case of adoptive children.[123] Yet, this racialised conceptualisation of 'religion' seems to be assumed as given and therefore, naturalised and barely interrogated as a sociological construct or phenomena in ways that 'race' isolated from religion has been in other contexts (Goldberg, 2002; Banton, 1998; Miles, 1993). Some of the LAR scholarship and particularly the work of Poulter (1998), Jones and Welhengama (2000) in relation to ethnic minorities, does recognise and problematise the prevalence of racialisation of non-Christianness within law, particularly judicial attitudes in the past (2000:63). Nonetheless, in arguing for accommodation, religious autonomy and/or legal pluralism, their analysis does not probe at the contingencies of religion as a concept, how racialisation plays a role in the authentication of non-Christianness through law, nor the work that religion/race/ethnicity can come to do through law. Rather, their use of ethnicity as an umbrella term including, race, religion and/or culture, I suggest, perpetuates a *fixed* and essentialist onto-theological view of religion tethered to belief/faith and ritual practice. Moreover,

---

[123] See chapter three for further discussion of this point.

this configuration of ethnicity keeps the notion of religion as distinct from the secular and therefore *apart* from being involved in socio-political work.

There are relatively few perspectives from within law that interrogate how religion comes to circulate in juridical discourse and the work that this discourse might do. The critical perspectives of Asad (1993) and Mahmood (2009) that, for example, undertake an interrogation of both the concept and work of religion/secularism are barely addressed at all in LAR scholarship. However, this kind of much needed critical analysis is undertaken by Cooper and Herman who go beyond an acceptance of a theological notion of religion in seeking to examine the representational role of law, which they view as constitutive of reality or social life (1999:341). This constitutive role echoes Asad and Mahmood's arguments discussed above, namely that law as a process legitimises and gives legal status (authentication) to certain social formulations or articulations of religion (Asad, 1993 and Mahmood, 2009). In the case of Jews, Cooper and Herman contend that the "law does not encounter a fully formed Judaism that it simply reflects but rather discursively produces its own Jews" (1999:341). Their analysis raises a key question about contingency and the unpredictability of legal knowledge and therefore the fact that Jewishness, as in their study of English trusts law cases, can also come to be produced through law. Moreover, they also highlight the need to attend to what they refer to as "asymmetricality of legal position and power" (1999:340).

Cooper and Herman's analysis of law as racialised is almost entirely absent in the work of LAR scholars discussed above. Cooper and Herman argue that

Jewishness circulates - as both faith (belief/practice) *and* race revealing particular ways that judges respond to Judaism, Jews and Jewishness (1999:340). They firstly examine the notion of Jewishness as a faith. They find that in the earlier trusts cases the term Jewish faith was considered to be uncertain, with "inner faith, self definition and outward manifestations" offering "insufficient evidence" (1999:358). They continue that even though the courts accept that 'real' Jews exist, in a similar way to Bradney contending "true believers" exist, they have "no way of determining who such real Jews are." (*ibid*: 358). Thus, judges identify Jewish faith to be more amorphous and uncertain a term than Christianity. For Cooper and Herman, the fact that the judges find Jewishness an uncertain concept, when it is already accepted that Jews exist, presents a situation where "epistemological uncertainty confronts ontological uncertainty." (*ibid*:359). Faith in these cases becomes a conceptual issue not able to be evidenced because the liberal approach to law is unable to take account of the "history, experiences and context within which legal subjects operate" (*ibid*:364).

This argument is similar to that of Ronen (2004) discussed above who states that religion needs to be understood as the relational context of children, in which religion is given particular meaning. For Cooper and Herman, it is only in relation to later trusts cases in which the judges take account of self-definition in relation to religion, for example in terms of recognising "endogenous religious knowledge" and the "interpretative authority of religious communities" (*ibid*:361). However, as they argue, this recognition of religion as requiring interpretation or contextualisation only reinforces the need to examine who can know, and is chosen to know (namely, experts), the religious subject of law (*ibid*:361; see also Edge, 2000b).

Cooper and Herman also examine the circulation of Jewishness as race. In their discussion of the cases they explore how the courts draw on a discourse of race "as familial descent, focusing on lineage and kinship" combined with biological metaphors that emphasise corporeal connection between Jews as well as between modern Jews and the ancient Israelite people (1999:354).[124] Cooper and Herman ask whether espousing this kind of 'ancestry and lineage' discourse in contrast to using the more recent language of ethnicity, serves to link the racialisation of Jews to a production of nationhood (1999:352). I would add that even if the term ethnicity was used instead of race, there might still be a conceptual slippage, in the way that ethnicity still comes to be understood as an inherent and ontological characteristic, as discussed above in relation to the work of Poulter (1998) and Jones and Welhengama (2000). Clearly from Cooper and Herman's analysis of trusts law cases and those I discuss in chapters three and four, religion does come to be conflated with nationality whether through the rubric of race or ethnicity. Moreover, as Cooper and Herman state, in viewing Jews as a nation, a separate national entity, albeit through ancestry rather than being attached to land, not only is this a racialised production of Jews as a nation, it also implies that there are *other* races/nations which are separate to each other (*ibid*:341). Cooper and Herman contend that this discourse reveals as much about Englishness and how it comes into being, as it does about Jews; and that therefore, trusts law may be viewed as "an expression of English national identity" (*ibid*; see also Herman, 2006 and 2011).

[124] See also Anidjar, 2003 and 2008. Also discussed in chapter three.

This then raises the question: what work is done through collapsing a racialised and ontological conceptualisation of religion with nationhood?

2.6 Religion, belonging and community/nationhood

In her later work, Herman continues her analysis of judicial discourse in twentieth century English cases involving Jews (2006). She argues that part of this discourse involved judges commenting on what they viewed as 'national characteristics' of both the English as well as of Jews (2006:288). Drawing on Ahmed, the nation can be understood as a site where personal characteristics can come to be associated with a particular place (Ahmed, 2000:99 discussed in Herman, 2006:288). Applied to Jews then, judges have distinguished between Anglo-Jews and alien Jews, the former more likely to demonstrate the 'good' character associated with English culture, as opposed to the more orientalised, threatening and ill-mannered character of the latter, associated particularly with 'Eastern' immigrant Jews (2006:291). Thus, race and nationality have circulated as co-dependent in these racialised representations. Notions of strangerhood and rootlessness also appear in the discourse even when, as Herman argues, the individual in question had British legal citizenship status; nonetheless, certain characteristics could mark the Jew as inassimilable, foreign and never really natural or belonging to the English nation (*ibid*:292-293). Even after the second world war when liberal states seem to have less explicit statements of racial superiority within juridical discourse, Herman argues, that nonetheless certain characteristics still marked out the Jew's difference to the English (*ibid*:294). Again, notwithstanding

the terminology of ethnicity, religion - in this case Jewishness and Christian Englishness - can be understood as race tethered ontologically to nationhood, which thereby comes to be associated with inherent characteristics relating to temperament and behaviour.[125] In short, her analysis demonstrates how judges participate in the demarcating of boundaries of belonging within the nation, and indeed conceptualising nationhood, on the basis of racialised or ethno-religious characteristics.

Religion as racialised non-Christianness within these cases can, therefore, be understood as integral to nation-building, both in terms of inclusion and exclusion (Herman, 2006:288). It is also an argument that emerges from both my study of child welfare cases as well as governmental discourse on citizenship and values in (faith schools) education.[126] For example, in my first case study I discuss how judges refer to children's religious/cultural identities as belonging within a particular national identity because of birth parental lineage that is not English. Religion and race, and therefore nationality are in the blood and also attached to a place. In my second case study I discuss how citizenship values and community cohesion legislation are deployed by Ministers following the 2001 riots in the north of England, as a defence to the charge that faith schools, Muslim ones in particular, are divisive. The image of warring tribal Muslims becomes a potential threat to community cohesion. This analysis of how racialised religion circulates and the work

---

[125] Although, the 'inferior' characteristics of alien Jews it seems may be addressed over time through breeding and education as in the case of Anglo-Jewish gentry (2006:282). See also Goldberg (2002) who discusses the approach of 'racial upliftment' through education and breeding as part of a British colonial and missionary history (discussed further in chapter five).
[126] See chapters three, four, five and six.

that it can come to do within juridical discourse, namely regulating non-Christianness through being marked as not *naturally* belonging, is again largely absent in the LAR literature. As discussed above, Bradney (2009), Poulter (1998) and Jones and Welhengama (2000) all tend to de-politicise belonging as something individuals feel in relation to their religious, cultural and/or ethnic communities or nations. They do not discuss the ways in which English law can come to fold in or exclude non-Christianness, or other 'alien' identities, through racialised notions of religion and nationhood. How this demarcation occurs through juridical discourses that invoke notions of the secular or citizenship is also sidelined. In fact, as discussed above, ethno-religious identity, including that associated with nationhood or community, is taken as an ontological given or as self evident rather than as produced through and part of the socio-political work of religion.

As signalled in chapter one, belonging and nationhood are complex concepts. How can we understand these concepts better in order to interrogate religion both as a concept and the work it does? There is a significant body of work on the notion of belonging and nation.[127] Here I draw on the work of Yuval-Davis who argues that we need to understand belonging through two different, albeit overlapping analytical frameworks. Firstly, drawing from psychological literature, she argues belonging is about emotional attachment, feeling safe and secure (2006:197). This kind of belonging is often viewed in an essentialist way, as a natural feeling or attachment that is integral to one's social location, identity -

---

[127] See for example, Probyn (1996) and Fortier (2000) on migrant or outsider (un)belongings; and Grabham (2009) and Cooper (2007) on propertied belonging; an exploration of this work, is however, beyond the scope of this thesis.

whether age-group, kinship group, gender, race, or religion - or value system (2006:199). This conceptualisation of belonging seems to reflect the view of the LAR scholars discussed above, which as Yuval-Davies notes, often relates "to the past, to a myth of origin" (*ibid*:202). She draws on Probyn (1996) and Fortier (2000) to discuss how a seemingly stable narrative of identity needs rather to be understood as transitional: "always producing itself through the combined processes of being and becoming, belonging and longing to belong" (*ibid*). This analysis of religious identity also reflects Ronen's approach discussed above (2004), in relation to how religion comes to be meaningful to individuals and groups of individuals through relational ties.

Yuval-Davis' second analytical frame, which I wish to bring to bear on the LAR literature's conceptualisations of minority religious belonging, is that of 'the politics of belonging'. She describes this as:

> comprising specific political projects aimed at constructing belonging in particular ways to particular collectivities that, are at the same time, themselves being constructed by these projects in very particular ways (2006:197).

Drawing from Crowley, Yuval-Davis views the politics of belonging as doing 'the dirty work of boundary maintenance' (Crowley, 1999:15-41; discussed in Yuval-Davis, 2006:204) particularly in relation to citizenship within the nation and who is entitled to status, for example, around immigration (Yuval-Davis, 2006:199). Echoing the arguments of Asad, Razack and others discussed above, she highlights how specific symbols or practices can come to signify (un)belonging or citizenship

as part of political projects, whether articulated as border patrolling, nation building or community cohesion (2006, see also 2004). Citizenship in this sense is not just the holding of a passport that gives you legal status and particular rights and obligations in a particular nation state. It can also be understood as multi-layered, so that it relates not just to the state but also to other political, ethnic or cultural communities. In this sense it has a participatory character which gives rise to individual belonging within these communities (2006:206). Within the framework of a liberal state citizenship, Yuval-Davies identifies the problem of there being a universalist standard by which certain people have to be judged as deserving of it through their participation or lack thereof; implicating a discourse on who belongs and who does not (*ibid*:207). This discourse, she argues gives rise to exclusionary practices from a "westocentric" position (drawing on Balibar, 1990) that comes to be posited in terms of "origin, culture, and normative behaviour" (Yuval-Davis, 2006:207). She cites the example of the 7/7 bombings in London, where there was a crisis in the notion of belonging because the bombers were born and lived in Britain; terrorism could be home-grown (*ibid*). This concern with ensuring (a secure kind of) belonging in a multicultural context, is also reflected in the discussion of racialised religious behaviour in relation to the headscarf in France, that came to be deemed unacceptable by the standards of the French state's universal, secular values.

This raises the question: who is entitled to belong, where, and on what basis? Whilst (the myth of) common descent is one determining factor, as Herman notes, for Jews in England after the second world war and the holocaust, a racialised construction of belonging was temporarily avoided in official discourse

(Herman, 2006). Although the use of the term ethnicity came to mitigate this racialisation, as I discuss in my first case study on English child welfare cases, lineage and common descent still circulate as a signifier of nationhood in relation to non-Christianness.[128] More prevalent in contemporary governmental discourse, however, is the notion of universal/common values as forming the basis of a kind of 'civic religion'.[129] Yuval-Davis argues that this citizenship values discourse themselves circulate as markers of belonging (2006:209). As Fitzpatrick argues, universal values itself is an invented paradigm inherited from a Christian point of view, suffering from the inherent paradox that because it comes from that (Christian) particularity it can never be universal enough (Fitzpatrick, 2001:147; Balibar, 1990). Anderson (1983) has also argued that nationhood is itself imagined, a cultural artefact that comes into being through, for example, print media, rather than there being a factual situation of people in any one place actually knowing one another and having common ties (see discussion in Yuval-Davis, 2006:204). Thus, there is an inherent tension or anxiety that pervades the politics of belonging and nation-building or community cohesion. I chart this anxiety for children's religious/cultural belonging and identities in relation to conflicts between birth parents and/or adoptive parents or carers in chapters three and four. In chapter five and six I explore this tension in relation to children's education particularly exploring how church schools values alongside citizenship education is viewed by government ministers as nurturing children to be good citizens; in turn producing community cohesion within the nation.

---

[128] See chapter three.
[129] See chapter five.

2.7 Concluding remarks

In this chapter I have sought to outline the impetus for a more in depth study of the ways in which religion circulates in law, particularly in areas relating to children. I have brought critical religion perspectives to bear upon relevant LAR scholarship as this latter body of work is the only substantive academic socio-legal literature in the area and also because of its influence on the development of law. Moreover, foregrounding current understandings of religion in law also provides the basis for my critique in the following chapters, where I analyse the complex ways in which non-Christian religion comes to be conceptualised.

In this chapter I have made two key arguments. Firstly, that the history of the emergence of religion highlights the 'inventedness' of religion as a modern concept. Moreover, religion as a concept in law has come to mirror the Christian onto-theological paradigm of religion – as belief and practice - precisely because of the influence of Christianity in the world religions scholarship from which the concept came into circulation. The significance of this history, then, is its present continuities, in terms of its influence on the shaping and demarcating of the boundaries of non-Christianness. I have argued that this socio-political work of religion, often articulated through the discourse of secular, universal values, is largely obscured in the LAR literature.

The second argument I make is that racialisation and orientalism can also be an integral part of the contingency and conceptualising of non-Christian religion, again an analysis which is at times, in my view, insufficiently taken up in the LAR

literature. Moreover, the relationship and role of racialised non-Christianness in demarcating nationhood and belonging also comes to be marginalised. I suggest that racialised religion comes to signify belonging as well as acceptable manifestations of religion for citizens within the nation, as Yuval-Davis argues (2006). The socio-political work of religion comes to be highlighted again, in terms of folding peoples into and out of the nation through the politics of belonging.

In exploring critical perspectives that illuminate an understanding of how non-Christianness, as well as religion more generally, comes to be conceptualised in law, it has been my modest aim to interject this analysis into a body of work that influences the development of law and legal understandings in this area. To elaborate on my arguments further, I now turn to my case studies, firstly of religion in child welfare cases in chapters three and four, and then in education in chapters five and six.

CHAPTER THREE

JUDICIAL CONCEPTIONS OF NON-CHRISTIANNESS IN ADOPTION AND CHILD WELFARE CASES: PRIORITISING RACIALISED RELIGION

3.1 Introduction

In the previous chapter I argued that the LAR literature has tended to conceptualise religion predominantly as an onto-theological belief and practice phenomenon, one that also sometimes comes to be an ethnicised/cultural phenomenon in relation to non-Christianness.[130] I offered a critique of this view of religion as I suggest that it obfuscates the contingencies of religion. Firstly, as a concept that emerged from a particular orientalist historicity, and, secondly, in terms of the work it has done in the past and in the contemporary period, in authenticating particular signifiers of religion over others with regulatory effects for manifestations of non-Christianness.

In this chapter, I extend this analysis through an examination of judicial conceptualisations of religion in child welfare cases where non-Christianness namely, being Muslim, Jewish, Sikh and in one case Jain, is at issue. I begin my discussion with, and focus on, so called trans-racial adoption cases: *Re JK* (1990); *Re B (A Minor)* (1995); *Re B (Adoption: Jurisdiction to set aside)* (1995); *Re P* (2000),

[130] By way of reminder, I use the term onto-theological to denote a conceptualisation of religion as belief in a transcendent or distinctly divine being *as* the very essence or ontological status of religion itself (De Vries, 2008:12) as discussed in chapter one.

and *Re C* (2002).[131] As Lord Hunt of Kings Heath stated in a parliamentary debate on the 2002 Children's Bill:

> Of course, the best adoptive placement for a child should reflect his/her religious persuasion, racial origin, cultural linguistic heritage (2002).[132]

This statement became enshrined in the Children Act 2002 and underpins the practice of 'same-race/religion' matching within adoption.[133] In implementing this legislation, judges' consideration of religion goes beyond the protecting of an adult person's right to religious freedom discussed in chapter two, and they are therefore not confined to conceptualising religion in line with the theological, belief and manifestation model of human rights law. Rather, in these adoption cases where race/religion is at issue, judges are in a position to adjudicate upon and influence the future religious identity of a child, by agreeing placements with an adoptive 'forever family' that may, or may not, be of the same ethnicity, including religion, as the child's birth parent(s). I then turn to cases relating to residence or specific issue

---

[131] Re *JK (Transracial Placement)* [1990] 1 FCR 891; *Re B (A Minor) (Adoption Application) [1995] 2 FCR 749; Re B (Adoption: Jurisdiction to set aside)* [1995] Fam 239 *Re P (A Minor) (Residence Order: Child's Welfare)* [2000] Fam 15; *Re C* [2002] 1 FLR 1119. See also the first instance decision *Re B (Adoption: Setting Aside)* [1995] 1 FLR 1.

[132] Hansard HL vol 636 col 22 (10 June 2002).

[133] The Children Act 1989 was the first formal statute recognition of 'race' in child care law. It required local authorities to give due consideration to "religious persuasion, racial origin and cultural and linguistic background" (s 22 (5) (c)) in decisions made for children 'looked after' by them. There was also a "requirement that in efforts to recruit foster carers, local authorities should have regards to different racial groups to which children within their area who are in need belong" (2(11)(b). The accompanying official guidance to the 1989 Act stated: "since discrimination of all kinds is an everyday reality in many children's lives, every effort must be made to ensure that agency services and practices do not reflect or reinforce it" (cited in Freedman 1992:74). Paragraph 2.40-42 of *Guidance and Regulations*, Vol 3, Family Placements states: "A child's ethnic origin, cultural background and religion are important factors for consideration. It may be taken as a guiding principle of good practice that, other things being equal, and in a great majority of cases, placement with a family of similar ethnic origin and religion is most likely to meet a child's needs as fully as possible and to safeguard his or her welfare most effectively". See also Jones and Welhengama (2000:139) and see the current government's proposals to change the policy discussed in chapter seven.

orders (*Re J* (1999), *Re S* (2001), *S (Children)* (2004)).[134] In these cases judges have had to decide on aspects of a child's 'religious upbringing', such as circumcision or name changes, in circumstances where there is a dispute between parents of different 'heritage', which again places them in a position of influencing the future religious identity of the child.

Although child welfare cases are the subject of analysis by some LAR scholars, particularly relating to medical treatment and custody as discussed in chapter two, they barely consider the cases relating to non-Christianness that I discuss here.[135] One exception that I have discussed is that of Jones and Welhengama (2000); they focus on the issue of legal pluralism and autonomy for ethnic minorities to bring up their children according to the beliefs and practices of their culture/religion rather than interrogating the notion of religion itself.[136]

Some of the cases discussed by the LAR scholars are also discussed within other literatures such as those on children's rights (Eekelaar, 2004; Freeman, 2001; Ronen, 2004) and on children's belonging (Van Praagh, 1999).[137] The more empirical literature on transracial adoption, for example, focuses on whether ethnic minority children adopted or fostered by white English families suffer

---

[134] *Re J* [1999] 2 FLR 678 and [2000] 1 FLR 5717; *Re S (change of name: cultural factors)* [2001] 3 FCR 648; *S (Children)* [2004] EWHC 1282.

[135] See also the healthcare literature that touches on issues of religion/culture and ethnicity in relation to cases where parental beliefs impact on children's medical treatment or health care; for example see, Gilbert, 2007; Fox and Thomson, 2005; Thomson, 2008, but contrast with Edge (2000a) discussed in chapter two.

[136] See also Bradney, 1993; Ahdar, 2000b; Poulter, 1998 in relation to other child welfare cases from the perspective of religious freedom discussed in chapter two. See also Van Praagh (1999) on 'deep legal pluralism' in relation to the Canadian context.

[137] Van Praagh's work (1999) highlights the notion of belonging in order to discuss issues of children's/parents rights and legal pluralism.

(psychological) loss of identity, culture and/or a sense of belonging by not growing up in families and communities of the same ethnic origin as their birth parents (Gaber and Aldridge, 1994; Griffith and Silverman, 1995; Hollingsworth, 1998; Husain and Husain, 1996; Kirton, 2000). Although much of the academic debates on 'same-race/religion' matching take place within the identity and ethnic minorities paradigm (see Kirton, 2000), this literature tends to treat religion as part of a matrix of intersecting identities and the notion of religion itself is not significantly interrogated. Consequently perhaps, the literature also takes for granted popular conceptualisations of religion as faith or culture, manifested through ritualistic practices (Kirton, 2000:79-101). These autonomous conceptualisations of religion often marginalise a more complex exploration and interrogation of religion, and the different ways it comes to be, for example, racially produced as in *Re B* mentioned in the previous chapters and the other cases mentioned below. Moreover, the effects of the specific ways in which religion is racialised, or otherwise conceptualised, becomes sidelined.

Unlike the discussion in these socio-legal literatures, I do not explore the cases focusing on the issue of religious or cultural 'dilemmas', children's rights or even critique child welfare principles. Rather, it is important to analyse these cases in relation to the topic of law's religion, namely, how religion is conceptualised within law as judges are required to adjudicate upon a non-Christian child's future cultural/religious identity. As noted above, this has the effect of demarcating the

boundaries and direction that those identities might take (Van Praagh, 1999).[138] In doing so, judges become involved in considering what it means for a child to be 'of' a particular religion and therefore, what that religious identity is, or might mean.

Thus, in my analysis of the cases I explore the key thesis questions of how religion (in this case study, non-Christianness) comes to be conceptualised by judges; and what the relationship between religion and race is in the judicial configurations of religion. I argue that judges in these cases sometimes consider religion in theological terms as belief and practice as the LAR scholars do; but tend mainly to racialise religion, namely view it as something that is innate and inherited from the birth parents.[139] Religion, as well as being conflated with 'race', also comes to implicate 'culture' and nationality/nationhood, once again racialised as a matter of inherited lineage or genetic marker (Lentin, 2005).[140] Less often, judges consider religion in more cultural (as environment), relational or contextually meaningful terms within which the child grows up.

My analysis highlights the point made by Cooper and Herman (1999) that religion, in relation to Jewishness in their study, can circulate as both faith and race.[141] I therefore suggest that the shifting and contingent circulation of religion in judicial discourse may be linked back to, and even be a legacy of, the history of the emergence of the term religion. This history, as the critical scholars of religion have

---

[138] See also the work of Kline (1992) and Slaughter (2000) in relation to racialised conceptions of identity in law pertaining to the adoption of American aboriginal children.

[139] What Slaughter refers to as 'transgenerational' in her discussion of the contested identities and the adoption of American Indian Children (2000:230).

[140] Lentin (2005) discusses how 'culture' has come to circulate in political discourse as a "replacement" for race.

[141] See chapter two.

argued, points to how the term religion came to be invented within the academy to describe non-Christianness from a Christian point of view; an epistemic legacy that came to circulate as the universal standard by which to both understand and judge the cultures, norms and ritual practices of others outside Europe.[142] A further argument I make is that this position from which non-Christianness comes to be understood, conceptualised and judged, whilst referenced as secular, reveals a Christian, albeit de-theologised and racialised, way-finding.[143]

To this end, the chapter is divided into two sections where I explore firstly, the prioritising of race in the conceptualisation of religion and secondly, how religion is conceptualised in onto-theological terms as belief and practice. I also examine what I refer to as the mitigating factors, such as the need for community or cognitive processing, that cause children's racial 'birth right' to be either extinguished or overridden.

I begin by setting out the facts of one case in particular, *Re B,* a 1994 case which whilst not strictly a welfare case, nonetheless involves a 'trans-racial/religion' adoption.[144] Although I use this case as the starting point of my analysis, I do not wish to overly reify its importance in my analysis. Rather, as it involves the extreme step of an adoptee, Jonathan Bradley, seeking to set aside his adoption order later in adulthood, its interest and significance lies in revealing the extent to which judges might go in conceptualising non-Christianness. This and the other welfare

---

[142] See chapter one and two.

[143] I make this point following the arguments on the co-imbrication of Christianity and secularism in the European context discussed in chapters one and two.

[144] I will refer to this case hereinafter as the *Jonathan Bradley* case.

cases, the facts of which I set out as I discuss them, reveal how non-Christian identifications can come to be signified and represented racially as well as linked to nationality and nationhood.

3.2 The facts of the Jonathan Bradley case

In the 1995 Court of Appeal case *Re B,* an adoptive child (B), now an adult, applied to have his adoption order set aside. B, named Jonathan Bradley on his birth certificate, was the subject of a film documentary and newspaper articles at the time and therefore his story was openly publicised.[145] Jonathan was put up for adoption in the late 1950s by a woman whilst she was at university because she was unmarried when she got pregnant. We are told in the first instance judgment that his birth mother had converted from Anglicanism to Catholicism.[146] A Jewish couple, Sidney and Bessie Rosenthal adopted Jonathan soon after he was born (1959) believing him to be a Jewish baby. He was circumcised, although it is not clear when, and the Rosenthals renamed him Isaac, which was then anglicised to Ian in adulthood until he identified himself as Jonathan.

In 1968, almost ten years after the adoption, the Beth Din made inquiries to ensure Jonathan's adoption was in accordance with Jewish law as part of the

---

[145] I will refer to him as Jonathan as this is how he self-identifies in the BBC Everyman documentary 'Jon's Journey' (aired 22 May 1994, BBC1). See also Clare Dyer, 'Pitching a tent in no-man's land', *The Guardian* (15 March, 1993).

[146] Although Jonathan's birth mother is described as Roman Catholic at the time of Jonathan's birth in the judgment, the media reports tells us that she had originally been Anglican and converted to Roman Catholicism at University, Clare Dyer, 'Pitching a tent in no-man's land', *The Guardian* (15 March 1993).

preparation for his *bar mitzvah*.[147] As a result of these inquiries Jonathan and his adoptive parents discovered that because his birth mother had not been Jewish but Catholic, he could not be considered Jewish under Jewish law, which assigns Jewishness through the maternal line. There was some confusion as to how this 'mistake' had been made as his birth mother had stated much later in an affidavit (in 1993) that she informed Miss W (the matron at the unmarried mothers' home where Jonathan had been born) that his birth father came from the Persian Gulf area.[148] Contrary to what the Rosenthals had believed, the birth mother denied having told Miss W that B's birth father was of "Syrian/Jewish stock" (243).[149] In a statement to the Beth Din in 1968, Miss W claimed to have told the Rosenthals that Jonathan was only half Jewish when arranging the adoption ("his birth father being a Jewish boy called David Bloom" (244). Swinton Thomas LJ recounts how despite the discovery of the "religious background of the baby", the Rosenthals continued to care for Jonathan (known to them as Isaac), as their son and - as instructed by the Beth Din - Jonathan converted formally to the Jewish faith in 1970 (244). The judge, however, did highlight the fact that the Rosenthals were not "then in possession of the full facts, in particular that the father was a Muslim Arab." (244).

[147] *Bar mitzvah* refers to the point at which Jewish children are deemed under Jewish law to become responsible for their own religious life (at the age of thirteen for boys and twelve for girls) and it is marked with a ceremony. A Beth Din refers to a rabbinical court with varying degrees of authority for making decisions on various matters pertaining to Jews.

[148] It is not clear from the judgment what the Rosenthals were told about the birth mother's ethnicity and religion but clearly they were under the impression that Jonathan was Jewish so probably assumed that the birth mother was Jewish. It is interesting to consider what the outcome might have been had Jonathan's birth mother been Jewish. Would the judges still consider Jonathan to be Arab or mixed-heritage?

[149] The numbers in brackets refer to the relevant page from the judgments.

Meanwhile, Jonathan became devout in his faith and was also involved in Jewish nationalist politics.[150]

In 1996 Jonathan decided to "emigrate to Israel" after having studied Semitic languages at University and becoming interested in Arab culture (244). However, as the judge recounts "people in Israel assumed that he was an Arab" and later "he was suspected of being a spy… and asked to leave and return to his country" (244).[151] On his return to England Jonathan attempted to trace his birth parents by obtaining a copy of his birth certificate which noted both his birth mother's name and that his father was a Syrian Jew. Sometime after, Jonathan found his birth mother who admitted to him that his birth father was not a Syrian Jew but rather an Arab Muslim from Kuwait. He eventually found his birth father who was from a prominent Kuwaiti family. Jonathan decided to travel and work in the Middle East. However he experienced difficulties in doing so as he was not able obtain work or visit Israel or any Arab country. The exact circumstances are not discussed in the cases; we are only told in the first instance decision that Jonathan was restricted in his ability to travel to Kuwait to see his birth father because of his previous travels to Israel (1). After the death of the Rosenthals, Jonathan changed his name from Ian and applied to the court to have his adoption order set aside on the grounds of mistake; namely that he was a Jewish baby.

[150] BBC Everyman documentary 'Jon's Journey'.

[151] These 'facts' of the case are rather vague so it is not clear whether Jonathan had officially immigrated to Israel or whether his departure was a deportation or revoking of his citizenship (if that would indeed be possible).

Although the court of Appeal dismissed the application, because there was no 'mistake' in the legal sense, Simon Brown LJ stated that there had been a "fundamental mistake" where the parties' belief was that a Jewish baby was being matched with Jewish parents (249).[152] All of the three judges expressed their sympathy for Jonathan and Simon Brown LJ was particularly moved by his circumstances:

> My sympathy for B. is profound. It is difficult to imagine a more *ill-starred adoption placement* than that of a Kuwaiti Muslim's son with an Orthodox Jewish couple. B. was brought up believing himself a Jew, against a background of deep prejudice and hostility between Jews and Arabs, discovering only in adult life that ethnically he belongs to the opposing group. I cannot think that, had the true circumstances been known at the time, anyone concerned would have permitted this order to have been made, not the Roman Catholic mother, nor the adoptive parents, nor the court.' (emphasis added) (249).

It is the site of the 'mistaken' belief that Jonathan is Arab and not Jewish that I wish to explore. Although, of course, Jonathan himself brought the case on grounds there had been a mistake in his identity, what I am interested in is how the *judges* conceptualise religion/'race' in the configuring of Jonathan's identity. What does it mean for him to 'be' Arab, rather than Jewish or Christian English like his birth

---

[152] See *Re K (Adoption: Foreign Child)* [1997] 2 FCR 389 discussed in chapter four where an adoption order in relation to a foreign child was also set aside by the Court of Appeal because the original order was made in disregard of the embargo on adoptions from the child's country of origin (Bosnia).

mother? Does the fact that he is Arab, and not Jewish, denote that he is also Kuwaiti and Muslim like his birth father? [153] If so, can Muslim/Arabness or Jewishness be construed as an ontological racial/religious category, and how might we then make sense of, or categorise, the identities of Arabs of Christian or Jewish faith/culture (such as Iraqi Jews or Christian Palestinians)?

3.3 Prioritising race: judicial conflations of race/ethnicity/nation with theology

In this case Simon Brown LJ describes Jonathan first, as a "Kuwaiti Muslim's son"; however thereafter Jonathan is only referred to indirectly as Arab.[154] In the judgment of Swinton Thomas LJ, religion/faith, nationality and lineage are somewhat more demarcated. He refers to Jonathan's birth father as "An Arab from Kuwait and by religion Muslim" (242) and also as "Muslim Arab" (244). In addition, he refers to the Muslim "religious background of the baby" (244) suggesting that he considers Jonathan to be assigned a specific religious identification, separate - and in addition to - a national/ethnic one of being Kuwaiti Arab. Swinton Thomas LJ also describes Sidney and Bessie Rosenthal as an "Orthodox Jewish couple" and refers to Jonathan as having been brought up in the Jewish faith; these references to "orthodox" and "faith" suggests a specifically theological (belief/practice)

---

[153] According to the Oxford English Dictionary the term Arab means "one of the Semitic race inhabiting Saudi Arabia and neighbouring countries" (*OED, Second Edition*, 1989, accessed on-line on 25 March 2008. This definition probably refers to the etymology of the term Arab which pre-dates Islam and would have included Jewish and Christian peoples.

[154] The judge describes how Jonathan grew up: "against a background of deep prejudice and hostility between Jews and Arabs, discovering only in adult life that ethnically he belongs to *the opposing group*" (249) (emphasis added to denote that the judge views Jonathan as Arab).

understanding of Jewishness, rather than just an ethnic one (244). He discusses the issue of when Jonathan had been circumcised as this was unclear, implying recognition of circumcision as a Jewish religious practice (239). However, despite these references to being Muslim and Jewishness as faith/belief (orthodox) and cultural/ritual practice (circumcision), it seems that similarly to Simon Brown LJ, Swinton Thomas LJ also conflates theology/belief/faith with nationality, culture and genealogy in his subsequent use of the terms 'Arab' and 'Jew. Moreover, it is interesting to note that Simon Brown LJ also uses the term *ethnicity* to refer to Jonathan's Arab identity (249).

Although ethnicity has also become a relatively contested term as I discussed in chapter one, it remains widely used in political and legal language in a way that encompasses religious beliefs and national origins, for example under the former Race Relations Act 1976 (now replaced by the Equality Act 2010). [155] This usage of ethnicity as an umbrella term to include religious beliefs and/or culture might have some bearing on Simon Brown LJ's rendering of Jonathan as an *ethnic* Arab, denoting that he is also Muslim like his birth father, rather than Jewish. Yet, Simon Brown LJ's use of *ethnicity* as an identity categorisation seems to stem from the implicit assumption that ethnicity is an inherent and inherited attribute of human beings rather than a term that might refer to a person's religious belief/practice or cultural identities and affiliations. Thus, as religion/faith/culture

[155] See for example the *Mandla* case and those that have followed it (its influence and importance is mentioned in chapter two the references cited). See also Miles and Brown (2003:52) and Winant (2000:185) cited in Bamforth *et al* (2008:801).

and nationality become conflated and reduced to the terms Jew and Arab, I suggest that religion itself becomes a racialised articulation of ethnicity.[156]

Whilst the contested nature of nomenclature will no doubt always be at issue, what is significant for my analysis is how the language of ethnicity as including a theological conceptualisation of religion in the judicial narratives, masks the conceptual slippage to 'race' or bloodline and lineage. This slippage from ethnicity to 'race' has the effect of eradicating the legal possibilities of mixed ethnicity and multiple religious identifications. It leads to a decision that divests Jonathan of any Jewishness as this categorisation becomes entirely construed and attributable through lineage. Thus, Simon Brown LJ not only marginalises Jonathan's past Jewishness as faith or belief affirmed through his conversion and devoutness, but also sidesteps his Jewish culture and affective attachments acquired through having grown up in a Jewish family and community.[157] For Simon Brown LJ, Jonathan's identity shifts quite simply from being Jewish to becoming Arab/Muslim - or perhaps the judge doesn't even perceive this as a shift at all, because through his privileging of patrilineal lineage, Jonathan was always an ethnic Arab; he had just been 'raced' wrongly. The judicial concern with Jewishness as race, bloodline or lineage reflects Cooper and Herman's analysis of judicial understandings of Jewishness in trusts cases discussed in chapter two (Cooper and

---

[156] This raises the more general question of the extent to which ethnicity is, or indeed can be, distinct from 'race', in terms of also denoting a group that is "signified according to genetic or phenotypical indicators" (Miles and Brown, 2003:93). However, that is a question not germane to my thesis and is explored by others (*ibid.*) See also Cornell and Hartmann (1998) for a detailed summary of this discussion.

[157] Not that religion and culture can be distinguished from each other so clearly; for example, see Berger (2007) where he discusses both law and religion as 'cultures'.

Herman, 1999). However, it also points to the contingency of Jewishness as a category of understanding 'religious' identity more generally (Herman, 2011). The inventedness of religion as a modern category and in particular how non-Christianness came to be understood in racialised terms in orientalist scholarship, is also obfuscated in this conflation of religion as faith and race. Thus, a critical understanding of religion as a concept that has come to be produced in a particular historical context is one that illuminates the contingency rather than the fixedness of religion. I will return to a discussion of the significance of the racialisation of religion and its history for the contemporary circulation of religion below.

The Jonathan Bradley case is not an isolated example of judicial conflations of theology, culture, ethnicity or nationality and understanding them as related to bloodline and lineage.[158] For example, in *Re JK, a* 1990 case, the local authority refused an application by white Christian foster parents to adopt a child whose birth mother identified as Sikh Asian, despite the birth mother's support for the foster carer's adoption application. The local authority had tried but failed to find Sikh adopters, because of their policy to: "match children of particular racial backgrounds with families of similar racial background" (894).[159] The local authority attempted to weaken the child's bond with the foster parents in order to put her in a bridging home whilst finding other Asian adoptive families. They claimed that the foster mother was not:

---

[158] See also Herman (2006:286) for a discussion of judicial discourse on Jews and Jewishness as implicating bloodline and lineage, in English twentieth century (mainly trusts) cases.

[159] Pursuant to Social Services Inspectorate Guidelines (29 January 1990) on issues of race and culture in family placement of children.

> ...capable of undertaking the difficult and sensitive task of helping this little girl to come to terms with her different background and to help her to become more aware of her Sikh traditions and her Sikh culture (emphasis added) (896).

There were three other adoptive couples that the local authority was assessing. Two of them were Asian Hindu and the third Asian Roman Catholic, thus, for the local authority at least, being Asian was considered more of a qualifying factor for understanding and nurturing Sikh identity. The judge, Stephen Brown P, sympathised with the local authority's position of being a "prisoner of policy" and seemed to agree that another Asian family, albeit not Sikh, would make a better racial match (895). He stated:

> It is quite clear from the evidence that I have heard that the social workers have been and are very concerned about the future which may lie ahead in the child's adolescent years when she will inevitably become more aware of her own racial background (894).

Nonetheless, he decided in favour of the child remaining with the foster family, with a view to her adoption by them, because of the 'psychological scar' that the child might incur as a result of being removed. In coming to his decision, Stephen Brown P also considered the foster carers' capacities to deal with "preserving this child from any *racial problems*":

> Whilst they are not of an advanced intellectual standard which can assimilate easily the *finer details of different races and religions*, they have been making a very praiseworthy attempt to help the little girl in this

> respect: they take her weekly to a Sikh temple in the area. One of the features of the area is that there are these facilities there which has now become well accustomed to various racial groups, and they say...that they will see to it that her contact with her own background is followed up and that they will seek assistance in order to be able to deal with this matter (emphasis added) (898).

Edge, in his brief analysis of this case, views this statement as indicative of how the courts are willing to consider the importance of religious context for a child (2002:290). This is certainly a valid point because it takes account of the complexities of religion and religious identity. Hamilton, on the other hand critiques, this judicial approach which she views as attempting to preserve the cultural heritage of minorities potentially at the cost of deciding on what is in the best interests of the child if religion were not taken into account (1995:231). In my view, what is interesting about the judicial statement from *Re JK* is the very complexity of the notion of religion itself. Religion comes to include practices such as attending temple for worship, which in turn becomes ethnicised as culture that is shared with the religious/ethnic community. Yet at the same time, there is a suggestion that (advanced) intellect is also required for the foster parents to *understand* "the *finer details of different races and religions*" (emphasis added) (898). I will return to the point of cognitive processing of religion below, here I merely wish to flag what I suggest is another example of the conflation of religion, with race, culture, ethnicity and theology as belief practice; as well as a judicial concern for "preserving the child from any racial problems" (898) to which I will return in chapter four.

Hamilton does seem to question the ways in which what she refers to as cultural heritage, comes to be conceptualised, namely, that the adoption agency was not seeking to match religious but *ethnic* heritage (1995:229). However, she does not question religion itself as a complex notion nor scrutinise what its relationship to race, culture and ethnicity might be beyond being an aspect of a racialised conceptualisation of ethnicity. Rather Hamilton dismisses cultural heritage as "an unnecessary fiction" (1995:231). The fact that in, for example, the Jonathan Bradley case as well as *Re JK*, the children's religious or cultural identity comes to be inextricably linked to their genetic/racial inheritance is not warranted to be of analysis itself. Neither is the concern or anxiety about the consequences of not growing up in the families and communities with which they are linked by race. In short, what Hamilton does not discuss is how the judicial concern about unbelonging may be somewhat about the child's personal development in terms of their sense of self, which as Van Praagh (1999) and Ronen (2004) suggest, are crucial to a child's well being. Moreover, as I go on to explore in the next chapter, there is also a concern about where children 'properly' belong that is inherently based on a racialised logic. This is a point that both Hamilton (1995) and Eekelaar somewhat acknowledge (2004), for example in the need to protect minority rights in some extreme cases such as the forcible adoption policies of aboriginal children in Australia.[160] However, neither of these scholars address the issue of racialisation in any detail, perhaps because of their view that children should be able to choose their religion themselves; although this is a question that Slaughter (2000) and Kline

[160] For a detailed account of the history of racial and religious matching policy and the specific concerns of the Association of Black Social Workers see Kirton (2000). See also Eekelaar (2004).

(1992) in relation to American Indian children, attend to much more willingly and in detail.

As both Slaughter (2000) and Kline (1992) argue, conceptualising cultural identity or religion in terms of choice fails to attend to judicial logics of racialised belonging or unbelonging. They explore the complexities of religion linked to community, ethnicity and so on but *without* being essentialised in racial terms (*ibid*). Slaughter and Kline's analysis is also relevant for another case in which judicial concern for proper belonging appears again. In the 1995 *Re B* case, the birth parents of a child from Gambia (Mr and Mrs B) agreed to an informal placement or long holiday for their child with a couple (Mr and Mrs W) in England, as the two families had developed a friendship during Mr and Mrs W's two visits to Gambia. Mr W was described in the case as English and Mrs W as "Danish by origin" (752). After the child had been in England for about ten weeks, Mr and Mrs W contacted the child's birth parents about adopting her. They came to an agreement, adoption proceedings were begun and a guardian *ad litem* was appointed. In a telephone conversation between the guardian and Mr B, the latter stated that he wanted the child to keep her name and religion, maintain contact with her birth parents and return to Gambia when she was sixteen. However, the Bs then received official documentation stating that if an adoption order was made they would have no right to see the child, despite the contact agreement they had made with Mr and Mrs W. It was noted in the judgment that the Bs had confused the English concept of adoption with traditional African adoption which was, in English terms, a form of long term fostering. In short, the birth parents had not envisaged a UK adoption of their child to extinguish their parental responsibility, including their right to see the

child. As Mrs Biggs, the social worker who is described as "having a detailed knowledge of the West African extended family system and a full understanding of the cultural and social mores of the case" (774) stated:

> Particularly in Muslim families the concept of adoption is unthinkable. A child is always part of his genetic family, wherever he lives, whoever cares for him, the link cannot be severed (775).

In addition, the adoption documentation had been sent to social services in Gambia pursuant to Schedule 2 Adoption Rules 1984. It was then revealed that a foreign adoption of a Gambian child was in breach of the Gambian Adoption Act 1992. As a result, B's birth parents withdrew their consent to the adoption and Wall J faced the question of whether breaking the bond between the prospective adopters and the child - and the harm that this would cause - outweighed the benefits to her of being returned to her birth parents. This case was somewhat unusual compared to the majority of transracial adoption disputes because it involved the question of returning the child to her birth parents rather than another prospective adoptive couple. Wall J, therefore, did not approach the decision as a residence dispute which would require him to use the welfare principle to decide what was in the child's best interests. Rather, the judge began with what he viewed to be the underlying premise of adoption law, namely the 'natural parent presumption'. As a result, instead of assessing the harm that might be done to the child from being removed from the prospective adopters, the judge sought to establish if there was any "basis in law or morality whereby the court could properly deprive the parents of their parental responsibility" (756).

In making this argument, he clarified that the natural parent factor was not to be understood in terms of parental rights to their birth child in the proprietary sense, but instead should be viewed as the child's right. For the judge it is clear this *prima facie* right trumps any other (health) rights that she may have, such as not being deprived of her psychological parents. It seems then that the deployment of a 'rights language' in relation to the natural parent presumption masks the judicial privileging of bloodline and the blood relationship between the birth parents and child.[161] This is further illustrated by Wall J's concluding remarks:

> This is a sensitive area and I am conscious that I am dealing with a Muslim couple living in an ethos which is not my own. But the father is right, in my view, when he now says that his wife's views must be paramount, and the mother undoubtedly wants the child home (749).

Despite Wall J's rhetoric that the natural parent factor is not to be understood in terms of parental rights to their birth child in the proprietary sense, but instead should be viewed as the child's right "to have the ties of nature maintained, wherever possible, with the parents who gave it life" (749), it is clear from the above quote that the "mother's" wish to have *her* child home "must be paramount". After all, as Wall J states early in the judgment, the prospective adopters are "strangers in blood" to the child. Thus, although it is not entirely clear

---

[161] This privileging of blood link is also clearly apparent in the case of *Re M (Child's Upbringing)* [1996] 2 FLR 546. As in *Re B* the judges decided that the child (P) had a right to be reunited with his Zulu birth parents and extended family in 'his' native country despite the potential psychological harm of being separated from his foster parents. Ward LJ also confirmed the first instance judge's "master plan" that P's development "must be, in the last resort and profoundly, Zulu development and not Afrikaans or English development" (453). See Ronen (2004) for a detailed commentary on this case from a children's rights perspective taking account of the child's psychological needs, the importance of which was discussed in chapter two.

from the judgment whether the determining factor is primarily the right of the child or that of the parents "wish" to have their relationship restored, what is evident is the importance of maintaining their 'blood link'. The prospective adopters are clearly distinguished by not having this 'blood link' with the child and for the judge, unlike in *Re JK,* it seems that this *lack* cannot be replaced or compensated for by the development of a psychological attachment between foster carer or adoptive parent and child.[162]

Interestingly, Wall J also states "In my view a child has in principle a right to be brought up by his or her parents *in the ways of life and in the religion practised by the parents*" (emphasis added) (758). So whilst there is recognition that Muslimness pertains to a theological model of belief and practice - "ways of life and religion" - again it becomes racialised in being posited as a consequence and right of birth, thus intertwined with the natural parent presumption. There is also a simultaneous ethnicising of religious practices into the melting pot of "cultural heritage and traditions" (753) effectively marginalising an understanding of religion as individual and cognitively developed religious belief and/or practice. The judge refers to Mr B as a "practising Muslim" and the child's birth family as "well respected in their community"- this is given prime importance in what he calls the "heritage argument" (753). In this configuration, religion is posited as a communal

[162] However, see Jones and Welhengama (2000:158) for a discussion of two cases in which attachment was prioritised over blood link: the case of *J v C* [1970] AC 668 where the House of Lords refused to return a Spanish boy living in England with an English foster carers to his birth parents (in Spain) in order to maintain the attachment and stability that had been established in his life; and *Re A* [1987] 2 FLR 429 involving a child (M) from Nigeria being unofficially fostered by an English couple (Mr and Mrs N).

entity of 'culture' shared with others of the same race, and its very existence becomes affirmed through public recognition by and of that group.[163]

Moreover, the importance of 'blood' does not stop with the genetic link to birth parents or even wider family and community; it also extends to nationality where the nation is one's "native country":

> In my judgment the child is a black Gambian child. Her place is in the Gambia. That is her heritage and her culture, that is where she belongs and that is where she should be (Wall J at 778).

For the child in this case, she is a "native" and *belongs* to the nation of Gambia because it was the country "into which she was born".[164] In short, for the judge, 'blood' becomes a racialising brush with which to paint religion, culture, community *and* nation, (not to mention her skin colour as black). Social relations of religion, culture, community *and* nation are primarily viewed by the judge as ontological entities inherent to the child rather than experienced or developed in life. Thus, for Wall J, the importance of the child being linked by blood to a family and ethnic community is part of the reason for her "resuming her natural and cultural heritage" (778). This view may partly have been influenced by Mrs Biggs, the social

---

[163] See also Ronen (2004) who argues that judges 'cultural sensitivity' is a misplaced cultural consciousness or ethnocentrism (discussed in chapter two).

[164] See also the case of *Re A* [1987] 2FLR 429 with similar facts to *Re B* [1995] involving a child (M) from Nigeria being 'fostered' by an English couple (Mr and Mrs N). The importance of a child to be brought up within her 'own' culture (Nigerian) was also emphasised by the judge stating: "I do not in any way underestimate the loss to a degree of M's Nigerian culture and background and her own family if she remains with Mr and Mrs N" (437). Nevertheless, the judge decided in favour of M staying with the English couple Mr and Mrs N on grounds that this would provide the child with continuity and stability. In addition, he stated that the birth parents had no "insight" into the problems that would arise as a result of removing her (437).

worker's evidence on the notion of adoption being unthinkable in the context of a Muslim family. Nonetheless, the judicial discourse itself, particularly in light of the psychological attachment to the foster carers and the fact that Wall J could have considered other Muslim views on adoption might reveal, I would suggest, his own racialised logic.[165] As I will discuss in the next chapter, racialisation also comes to play as a factor in the judge's configuring of the child's citizenship as well as nationality as non-British.

3.4 De-prioritising the racial link: religion as theology, community and cognitive processing

In relation to the cases discussed above, I have argued that whilst judges conceptualise religion in theological terms as belief/faith and practice, they also, at times, tend to conflate this notion of religion with an ethnicised notion of religion as part of a child's racial inheritance and/or nationality. In the next set of cases I examine how conceptualisations of religion as belief and practice come to be decoupled, although not entirely, from race and therefore be more demarcated. Considering that the LAR perspectives discussed in chapter two focus on onto-theological notions of religion and sometimes explore religion as part of ethnicity, it is interesting to note when and why judicial de-prioritising of race occurs in the cases relating to non-Christianness.

---

[165] See also Sardar Ali, 'To Adopt or Not to Adopt? Some Muslim Jurisprudential Perspectives'. Paper presented at a seminar at Birkbeck University on *Erasing the natural family? Rethinking adoption* (Tuesday 7 July 2009).

I begin with the case of *Re J* mentioned at the outset of the thesis. By way of reminder, this case involved a Turkish Muslim father of a five year old child (J) who wished to have his son circumcised. However, the English Christian mother objected. The parents were separated, and the mother had been granted residency of the child. In May 1999, Wall J found for the mother and the father appealed. However, his appeal was rejected in November of the same year. The extent of the boy's 'Muslimness' was a key factor in both judgments as was the medical case against circumcision.[166] In the first instance decision, Wall J Stated:

> Although born a Muslim, it is clear to me that J is going to have an essentially secular upbringing in England. He is not going to mix in Muslim circles, and his main contact with Muslims and the Muslim community will be his contact with his father (699).

Notwithstanding the judge's affirmation of racialised identity through the patrilineal line, namely, J being "born a Muslim", the reasoning behind Wall J's refusal of the father's application was that he was not a "practising" Muslim within a Turkish/Muslim community in the UK (682). For Wall, J's Muslimness, whilst acknowledged in racialised terms, comes to be extinguished because of the lack of opportunity and community with whom to engage collectively in religious/cultural practices and rituals. In legal terms, Wall J justified his decision on the basis that there was a presumption that a child's religious upbringing should be in the religion of the residential parent and that, in any event, this was subject to the child's best

---

[166] Discussed further in the next chapter. See also Jivraj and Herman (2009) and Edge (2000a) for a discussion of the circumcision issue.

interests more generally. J's welfare came to be determined by the fact that neither his mother's nor his own immediate environment, including at his primary school, were Muslim. One of the "risks" of circumcision, as the judge put it, was that J could therefore "be picked on or teased by his peers", and that this would be an additional harmful "psychological effect" of the procedure (699).[167]

It is also interesting that J's mother's Christian identity, described as non-practicing, comes to be understood by Wall J as meaning secular; particularly given the father also described himself as a "secular Muslim". Whilst, for the judge, lack of religious practice could not extinguish his racialised Turkish Muslimness, the mother and therefore the child's lifestyle were viewed as secular. Thus, in the judge's words, J becomes a child who "does not have a settled religious faith" (689). Moreover, there is an assumption that the boys that J will mix with throughout his childhood will be neither Muslim nor Jewish as they will be uncircumcised. Following on from the previous quote, he states:

> J is therefore not going to grow up in an environment in which circumcision is part of family life; or in which circumcision will be in conformity with the religion practised by his primary carer; or in which his peers have all been circumcised and for him not to be so would render him either unusual or an outsider. To the contrary, circumcision in the circles in which J is likely to move will be the exception rather than the rule. Circumcision is an effectively irreversible surgical intervention which has no medical basis in J's

[167] This judicial sentiment echoes those of *Re JK* in terms of "preserving the child from racial problems"; a point I return to in the next chapter.

> case. It is likely to be painful and carries with it ... risks.... As I have already made clear, he is not going to be brought up as a Muslim child (669).

Can we assume then, from the above statement, that Wall J might believe none of J's peers will be of a religious or cultural identity other than English Christian? Is there an implication that J is living in an uncircumcised England, the England of his Christian mother? The fact that England itself seems in this formulation to be equated with Christian Englishness, albeit in secularised terms, is never expressly articulated, but in my view, the question remains. The effect of this configuring of J's relational context is also that his father's Muslimness, of which circumcision is a marker, becomes entirely associated with his Turkish origins. As Wall J states "in Turkish society, a Muslim male child's peers will all be circumcised" (697); this Muslim world it seems is outside of England's Christian/secular borders, or at least the England in which J is living. Through the discourse of secularism, J's future Christianness becomes decided upon by the court. The only thing his Muslim father can do to nurture his child's Muslim identity is to "provide information" about Islam and/or "the Turkish side of his inheritance", a phrase the judge repeats several times (699). The implications of this reasoning are not only, as Edge notes, that J's religious identity is one that assumes children as being "hyper-autonomous" individuals rather than deeply connected and enhanced by the relationships around them, of which in this case, J's father is a part (Edge, 2000a:336). I would also suggest that a further significant and unremarked upon implication is what remains

unacknowledged by Wall J, namely, the inevitability of J's Christianised/secular future.[168]

On appeal before Thorpe LJ, Schiemann LJ and Butler-Sloss P, Wall J's decision was confirmed. Much of Thorpe LJ's leading judgment, with which the other two judges concurred, consisted of quotations from Wall J's judgment. It is not surprising then, that in one key passage Thorpe LJ states:

> Some faiths recognise their religion as a birthright derived from either the child's mother or the child's father. Some recognise religion by some ceremony of induction or initiation. But the newborn does not share the perception of his parents or of the religious community to which the parents belong. A child's perception of his or her religion generally depends on involvement in worship and teaching within the family. From this develops the emotional, intellectual, psychological and spiritual sense of belonging to a religious faith. ... the realities of child development [are that] fear, pain, despair or a sense of betrayal may all be transient in the temporal sense but still inflict emotional and psychological trauma that will burden a child for life (575).

Again, like Wall J, Thorpe LJ viewed being Muslim as requiring an active element of "involvement in worship" rather than just a matter of birth right. For him, it was the engendering of *belonging* within a community that was the key ingredient and because the father could not offer that to his son in the UK, the mere fact of him

[168] Although this judicial perspective is also being shaped by normative medical discourse on the issue of male circumcision as discussed in Edge (2000a).

wanting J to have a Muslim identity through circumcision was not sufficient. It seems that Thorpe LJ's view was also based on the premise that the public space in which J would be growing up was viewed as nominally non-religious, or secular; the embedded and dominant position of Christianness within the public space remained invisibilised.[169] There seems to be little judicial focus on J himself and the possibilities of him having a complex identity. For example, why could J not be secular *and* Muslim with his Muslimness being conceived of other than in racialised or indeed theological terms? Does being circumcised have to denote a religious practice based on faith rather than a mere cultural one? If so, does a cultural practice need to be experienced in community with people of same faith/culture to be meaningful to the individual child, particularly as the father argues that it was important for his bond with his son? This case therefore, highlights the effects of essentially de-prioritising J's potential Muslim identity through the decoupling of race and theological notions of religion, understood through the judges' view as religious upbringing within a community.

The separation of race and faith and the significance of community, but this time with an emphasis on cognitive understanding of ritual practice, appears in the case of *Re P*. This case involved a child referred to as N in the judgments. She was

---

[169] Wall J considered J's views entirely irrelevant, stating: "Given J's age and level of understanding, I do not think I can place any weight on J's wishes and feelings" and the appeal court made no reference to J's own understanding of his religion, culture, or identity. Thorpe J only referred to a "newborn's" perception of religion which is in itself odd as J was aged seven and therefore he may well have had something to say on the matter. There is of course, a whole body of literature, beyond the scope of this thesis that deals with taking account of children's voices in these kinds of cases. See for example, the special issue of *International Journal of Children's Rights* (2007). On children's spirituality more generally, see Coles (1990), and Benson *et al* (2003) more recent follow-up to Coles' work.

born with Down's syndrome and had other medical issues such as severe respiratory problems. When she was seventeen months old her orthodox Jewish birth parents felt unable to cope with her needs on their own and requested that the local authority find temporary foster care with another orthodox Jewish family. However, the local authority was unable to find a placement that met the parent's wishes. As a result, the child's parents reluctantly agreed for her to be placed with a Christian couple and they maintained regular contact with her. After four years in the placement, the foster carers applied for and were granted a residence order, despite the birth parents objections. This gave the foster carers some decision making power relating to for example, N's education and religious upbringing. The birth parents subsequently applied to have the residence order varied. This was denied both at first instance and finally in 1999 by the court of Appeal.

As in *Re J* there was much discussion about N's religious identity, in this case Jewishness, and its significance or the weight 'it' should be given in assessing her best interests as a reason to vary the residence order. Similar to *Re J,* at first instance Wall J recognised that the child had a "right to be brought up by her parents in their religion and way of life" (483).[170] Although agreeing with Butler-Sloss LJ in dismissing the appeal, Ward LJ nevertheless affirmed the birth parent's claim that being Jewish was part of N's birthright (41). He even compared the situation in *Re P* to another case, *J v C,* known as the "blood tie baby case" involving a child with Spanish parents being fostered by an English couple. Ward LJ stated that in the present case, religion was a "further knot" that needed to be considered

[170] All quotes from Wall J's decision are taken from Butler-Sloss LJ's appeal court judgment.

in addition to the child's 'blood tie' to her birth parents (40). In the leading judgment, Butler-Sloss LJ also considered the place and weight to be given to N's Jewish birthright stating:

> No one would wish to deprive a Jewish child of her right to her Jewish heritage. If she had remained with a Jewish family it would be almost unthinkable, other than in an emergency, to remove her from it. I have no doubt, like the judge, that the Orthodox Jewish religion provides a deeply satisfying way of life for its members and that this child, like other Down's syndrome children, would have flowered and prospered in her Jewish family and surroundings if she had continued to live with them. But in the unusual circumstances of this case her parents were not able to accommodate her within her community. The combination of the family illness and difficulties together with N's real medical problems as a young child made it impossible for her to be cared for within her family circle and it was *then, not now*, that she was deprived of her opportunity to grow up within the Jewish community. The un-contradicted evidence of the way Down's syndrome children are cared for in the Orthodox Jewish community, which I do not doubt for a moment, is not relevant to the issue whether N can move (emphasis added) (30).

Thus, N's racial Jewishness, as with J's racialised Turkish Muslimness in the *Re J* case, was never in dispute. However, it seems that despite the acknowledgement of the importance of growing up in the Jewish community, that "opportunity" now bypassed N despite having maintained contact with her birth parents. The evidence

adduced by N's birth parents about the beneficial effects of growing up in the Jewish community for children with Down's syndrome was viewed as irrelevant to N as she no longer lived in the Jewish community. However, this reasoning was combined with a further, decisive element that swayed the judges' opinion, namely that N had no cognitive understanding of an orthodox Jewish upbringing. The expert opinion to this effect stated:

> N will never have any real appreciation of her Jewish heritage, and that her understanding of her religion will be limited to a rudimentary perception of God as Creator and as a Beneficent Being and that in addition she will have a capacity to participate in (and no doubt enjoy) certain rituals without any full understanding of their significance (17).

Jones and Welhengama view this and similar cases such as *J v C* as revealing the "inherent indeterminacy" of the welfare principle which for them is wide open for courts to interpret according to "whatever current welfare factor is in vogue" (2000:160).[171] They argue that leaving a child with foster parents while refusing or limiting contact with both parents may possibly increase stability for the child, but nonetheless it damages the child's sense of identity as religious and cultural factors become de-prioritised (*ibid*). This is of course a valid point which I would build upon to suggest, in relation to *Re P,* that the child's 'religious' identification should not only be decided on the basis of whether a child has the capacity to enjoy *and* understand religious rituals. As discussed above in relation to *Re J*, judges could

---

[171] The other case that Jones and Welhengama discuss is *Re A* mentioned above involving a child (M) from Nigeria being unofficially 'fostered' by an English couple (Mr and Mrs N).

better understand the various relational aspects that make an individual child's life and context meaningful (Ronen, 2004; Van Praagh, 1999). I would add that 'religion' or the religious culture of the family may be understood as a key part of a child's context and indeed what makes religion itself meaningful to a child. In taking such an approach judges would not be limited to conceptualising religion just in terms of race, faith, ritual practices, cognitive appreciation or even intellectual understanding as in *Re JK*. In *Re P,* the child is eventually denied contact with her orthodox Jewish family with the effect that she is essentially Christianised, a move that I also discussed, albeit perhaps more subtly, in relation to *Re J*. The implications of such a move for her family life as well as that of her birth family remain entirely unremarked upon (Herman, 2011). Again, this raises the question, to which I will return in the next chapter, about the secular/Christian position and viewpoint of the judges from which non-Christianness - its parameters, content and importance - comes to be adjudicated upon.

A further point I would add to Jones and Welhengama's analysis of child welfare cases is that where race and religion become de-coupled as in *Re P* and *Re J,* religion needs to be understood not just as linked to ethnic communities but as a contingent concept that can come into being in law through particular judicial configurations. Moreover, in recognising the contingency of religion as a concept, as the critical religion scholars discussed in chapter two have demonstrated, we are perhaps better able to understand how religion or culture might rather be understood in terms of its meaningfulness and enhancement of family life to the individual child. It is this critical perspective of religion that I suggest needs further

attending to within the LAR perspectives that tend to view religion in these cases in more fixed rather than contingent ways.

3.5 Towards a complex notion of religion: culture and personal identity

To further add to my analysis of how religion might be conceptualised in somewhat more complex terms, this section explores two cases in which judges seem to take a more nuanced approach to understanding religion. The case *Re S (Change of Names: Cultural Factors)* involved a dispute between a mother described by the judge as "Muslim by religion and culture, [she] came to England with her family from Bangladesh" and who is "British by nationality" (648). The father is described as "Sikh by religion and culture" and of Indian nationality (*ibid*).[172] They had met in England when they were respectively eighteen and twenty three years old. The mother had run away to be with, and soon after marry, the father. As her family disapproved of the relationship and she was not living in her community she seemed to be willing - at the time - to register the child with three Sikh names. In 2001 after they divorced, the mother applied to change the child's Sikh names so that he would be accepted within the Muslim community of which she was again a part. Her application included changing the child's names officially by deed poll and she also wanted the child to be circumcised, again so he

[172] It is interesting here how both their identities are demarcated into religion as faith and culture, from place of origin to current nationality. I return to this point in the next chapter where I discuss further the demarcating of these categories from each other in the cases, particularly *Re B* [1994] and also *Re B* [1995].

would be accepted in the community. However, the father objected to both applications.

In relation to the name change, Wilson J decided that only informally changing the child's names from Sikh to Muslim ones would be in his best interests. Regarding the circumcision, in contrast to *Re J*, Wilson J, with barely any consideration of medical or other issues, authorised it. However, some of the legal reasoning was similar to that of *Re J*, namely that he should be brought up as a Muslim, as he would be living with his mother (the residential carer) and within her community; and in contrast to *Re J*, this required and justified his circumcision. Religion then, comes to be conceptualised as involving ritual practices such as circumcision, embedded as a norm or culture, to use the judge's words, within a community. Wilson J also acknowledged the child's "half Sikh" identity, something that he states the mother could not "re-write" (649) presumably because it was a genetic link or characteristic.[173] He states:

> A child cannot be brought up in two faiths simultaneously so, admirable though Sikhism is, he cannot be brought up as a Sikh. That however in no way precludes his becoming aware of his Sikh identity (660).

It is in protecting this aspect of the child's Sikh identity, as he puts it to prevent the "comprehensive elimination of his [the child's] half Sikh identity" that Wilson J does not authorise the change of the Sikh names by deed poll (648). Thus, although being Sikh and Muslim is viewed as equally a part of the child's racial identity,

---

[173] Perhaps influenced by the Race Relations Act case law in particular *Mandla v Dowell* Lee (see chapter two).

religion in the theological sense of belief and practice - here, being Muslim - comes to be tethered to upbringing within a particular community. The norms of that community come to be associated with 'culture' and religion, the terminology Wilson J used at the beginning of the judgment in describing both the Muslim mother and Sikh father. Although, the judge's approach was to facilitate and accommodate the complexity of the child's identity, albeit on racialised lines, he did so by demarcating religion as race, from religion as faith. The effect of this reasoning was that in his view the child could not be both Sikh *and* Muslim in terms of faith, maybe because the child could not be engendered into faith through practice, traditions and culture within both communities. Nonetheless, this case stands in contrast to *Re J* and *Re P* in taking into account the child's relational context, that of his father. As both Ronen (2004) and van Praagh (1999) argue, the meaning a child derives from her context should be integral to what is considered to be in her best interests.[174] Whereas in both *Re J* and *Re P* the implications of the judicial discourse *is*, in effect, to authorise the "comprehensive elimination" of the children's Muslim and Jewish identities.

In another case, *Re C,* presided over by Wilson J the following year, a Jewish couple (Mr and Mrs A) sought to adopt a two year old girl. She was described in the case head note as having mixed heritage that included Jewish, Irish Roman Catholic, and Turkish-Cypriot Muslim elements. Her birth parents - both of whom were described as having learning disabilities - are stated as having "no

---

[174] Ronen (2004) argues for taking a psycho-legal approach to the child's welfare that would take account of how religion comes to be meaningful for the individual child in his or her context discussed in chapter two.

religion" (1119, para 3). Her birth mother had described herself as Church of England, but Wilson J dismisses this as an "empty label" (*ibid*). The case came to court as the official CAFCASS guardian (Mrs Smith) believed the adopters to be "too Jewish" (*ibid*). Mrs Smith claimed that the other aspects of C's identity had not been taken into account and she therefore applied to the court to prevent the adoption (1119). She stated that she would prefer a more 'secular' family or "religiously neutral" environment that would be able to expose C to the different aspects of her birth parentage that she was used to in her birth and foster homes (1129, para 36). The guardian also stated that if the family that adopted her "took C to church on Christmas day and Easter day [that] might be acceptable if it was also prepared to introduce her to worship in a synagogue twice a year" (*ibid*). The opinion of the birth parents was not clarified in the case, only described as neither for nor against the proposed adoption.

In response to the guardian's argument, Wilson J extensively examined the issue of Mr and Mrs A's Jewishness, for example the fact that they had been married in a synagogue, the extent of their practice of Jewish (Sabbath related) rituals and the extent of their social and family life with other Jews. He concluded that whilst Mr and Mrs A had a "strong Jewish identity" their religious observance was "low level" (1128, para 32) and that he did not accept the guardian's argument which he found to be "inflexible and doctrinaire" (1129, para 37). However, despite this willingness to understanding the A's religious identity more complexly, not necessarily dependent on race as genetic inheritance or on theological belief and practice, his approach differed in relation to the religious identifications of C's birth parents. He stated that:

> The mother describes herself as Church of England but it is unclear whether she has ever attended a church service, still less whether Anglican teaching holds any meaning for her. When on 18 June she indicated opposition to the placement on the basis that C was Church of England, it is hard to discern any meaning behind that label; and the father's contribution at that time was to say that C had a "London religion" (1132, para 42).

It seems that in relation to C's birth parents, Wilson J views their complex religious identification through a theological, belief practice lens. As in *Re P,* there is a need to understand religion; something that C's birth father, clearly in the opinion of the judge, is not able to do. Wilson J makes no effort to fathom what the complexity of a "London religion" might mean, and instead treats the statement as evidence of his (C's birth father's) lack of intellect. Thus, like N, the learning disabled child in *Re P*, C's birth parents are not able to cognitively process religion as he (the judge) understands it. The judge therefore takes this to mean that they do not have any religion, that instead they live in a "religious void" and their lives are "tragically barren" (1131, para 42).

It is interesting how this understanding of what religion is *not* in relation to C's birth parents, contrasts with Wilson J's exploration of the adopter's religious identity. Mr and Mrs A are effectively recognised in a rather nuanced way, what he refers to as a "liberal" Jewish identity that combines some ritual practice, perhaps belief or faith or not, and community or kinship relations. Yet they are also described as living in a non-Jewish area and not observing the Sabbath. They are cited as willing to observe Christmas and not *bat mitzvah* the child; this seems to

denote the kind of religiously neutral or secular family environment that the guardian had originally wanted in adoptive parents for C. It may even perhaps be a marker of their adaptability to the ethos of Christian England.[175] I will return to this point in the next chapter.

In the case of *S (Children)* [2004] Baron J, similarly to Wilson J in *Re C and Re S*, also took a less restrictive approach to understanding religion in the context of a child's mixed identity. This case involved a Muslim mother and Jain father who were now divorced with joint residency of two children aged ten and eight years old. The issue before the court was the future religious identity of the children and whether the eight year old boy (K) should be circumcised according to his mother's wishes. However, the father objected, wanting the child to grow up with both cultures and be free to choose later in life. Although the judge found circumcision to be "relatively safe" (para 72), (unlike the judges in *Re J*) she nonetheless did not grant the application as she agreed with the father that the child should "have the best of both worlds" (para 83). She believed that authorising the circumcision might restrict the boy's later choices to be Jain, so she preferred to wait till the child was 'Gillick competent' and could make his own choice (para 83). The fact that circumcision at a later age would not violate Muslim law also influenced her decision. Baron J also recognised K's cognitive abilities to appreciate his ethno-religious worlds:

---

[175] Whilst Wilson J does not use the word ethos in this judgment, it is interesting to note that the term does appear in *Re B* (1995) and *Re J* to refer to the supposedly different values system of the child's Gambian Muslim parents in the first case and the Turkish Muslim father in the latter. I will return to a discussion of the notion of ethos and values and the significance of this kind of language in the following chapters.

> K's understanding of his dual heritage is well established. Therefore, obviously, both Muslim and Hindu elements of his identity will require validation if he is to grow up with a proper knowledge of his true self (para 71).

Committed to the possibility of mixed identity and the court's duty to facilitate this, Baron J refused the mother's application and instead took into account the necessity to consider the complex and relational aspect of the children's lived reality. As in the other cases discussed above, the judge deploys a complex mixture of the theological belief/practice model of religion and culture. For example in relation to the mother, religion becomes a matter of devoutness and choice:

> their mother is a devout Muslim but she has put her religion in second place when it has suited her... for most of her adult life, the mother was not a fully practising Muslim (para 83).

Similarly the father's religious observance is commented on in some detail:

> He accepts that in adulthood he has been less than observant, although, he says, that he continues to strive to keep the main tenets of his religion. In many respects he has failed. For example, he smokes, drinks and eats beef, all of which are forbidden by his religion. Moreover, he agreed that on one occasion he was violent...Violence is abhorred by Jains. Despite his lapses, the father is, I accept steeped in the Hindu culture, tradition and way of life. He genuinely considers his Jain origins and ethos are an integral, and extremely important element in his own identity (para 5).

Thus, whilst Baron J views the father's religious observance as "patchy" she recognises that both his and the mother's religious identifications are embedded within the contexts within which they have lived. Rather than religion being racialised either through the language of ethnicity or nationhood, Baron J, acknowledges the complex and lived realities of religious identities of both the adults and children in this case. In short, Baron J is willing to recognise religion and religious identity more in terms of a process of becoming through culture and environment that might also involve children and adults living in a number of overlapping communities.[176] In short, her conceptualisation of non-Christianness is not entirely dependent upon racialised thinking.[177]

In all three of the decisions I discuss here, religion comes to be conceptualised in a more complex way than the cases explored in the previous sections. Religion as belief or faith comes to be demarcated from race to varying degrees but is still somewhat racialised through conflations of religious/cultural/ethnic identity circulating as the genetic inheritance, birthright or heritage of the children involved. Religion conceptualised along the theological model comes to be signified through participation and recognition (names) within a community and its cultural norms and practices such as circumcision. However, what is different about these cases is the fact that the judges do not entirely rely on any one of these conceptualisations of religion to delineate the religious upbringing and future of the child. Rather they attempt to think somewhat more complexly

---

[176] This process of religious becoming through *habitus* and embodied practices in community with others is discussed by Mahmood (2005) mentioned in chapter two.
[177] See also Slaughter (2000) for a similar analysis in relation to conceptualising American Indian identity.

about the character of non-Christianness and do not shy away from the possibilities of a mixed and complex identity. Although there are problematic aspects to these judgments which I discuss in the next chapter, both Wilson and Baron JJ view the more complex aspects of children's identities as something that the courts should facilitate or at least take into account.

3.6 Concluding remarks

My analysis of the cases discussed above reveal how religion comes to circulate in particular ways, predominantly as a genetic racial marker linked to community, nationhood and/or nationality. Religion is also conceptualised by judges in theological terms as belief/faith and practice, and again comes to be tethered to community where children develop their faith, identity and belonging in conjunction with others of the same religion. Sometimes, but very rarely, the judges are willing to understand the importance of religion in the context of children with mixed identities in a more complex way, that is as relating to what is meaningful to the children themselves. This does not depend necessarily on the cognitive understanding of the child but more on the attachments children might have with people and the environment around them.

Drawing on the critical religion perspectives discussed in the previous chapter, my analysis of the cases corroborates the view that religion is a contingent and invented concept. My analysis also reveals how, even in the context of child welfare cases, articulations of religious practices, such as attending temple in *Re JK,* or racialised configurations of religion, nationality and culture, as in *Re B* or the

Jonathan Bradley case, come to be authenticated as religion within and through judicial discourse. In the next chapter, I draw again on the work of scholars discussed in chapter two that take a more critical approach to the concepts of race and religion than the LAR perspectives, particularly in seeking to highlight the socio-political work that religion can come to be part of. In doing so I suggest that the predominant circulation of religion, as race *and* faith, is perhaps a legacy of the emergence of the concept of religion in orientalist scholarship, one that particularised non-Christian 'religion' along racialised lines, from a European Christianised viewpoint.

CHAPTER FOUR

ORIENTALISM, BELONGING AND NATIONHOOD

> The Court is perfectly impartial in matters of religion, for the reason that it has as a Court, no evidence, no knowledge, no views as to the respective merits of the religious views of various denominations (Scrutton LJ in *Re J.M. Carroll,* 336).[178]

4.1 Introduction

In my analysis of the cases in the previous chapter, I argued that non-Christian religion circulated in the cases mainly as a racialised concept, implicating lineage and belonging within a nation that one is linked to by blood. In chapter two I argued that the LAR scholarship, in conceptualising religion in predominantly theological terms as belief/faith and practice, marginalises this racialisation of non-Christianness. I made a further point that as religion circulates in different yet overlapping ways, for example as faith, race and nationality, it also needs to be understood as a contingent concept that can come to be produced within law.

Here I examine more closely the ways in which religion circulates as a signifier of belonging and nationhood in the cases already outlined in the previous chapter. In doing so, I extend my analysis of racialisation in the judicial discourse in these cases and focus on the role of orientalism within them. As outlined in chapter

---

[178] *Re J.M. Carroll* [1931] 1 KB 317 (CA).

one, the concepts of racialisation and orientalism overlap. However, interrogating orientalism facilitates an analysis not just of the role of 'race' as a somatic genetic marker, but also of how religion or cultural practices become implicated as signifiers of (un)belonging (Miles and Brown 2003:19).[179] Orientalism as an analytical lens also highlights the positionality, that of a de-theologised Christian, secular viewpoint, from which non-Christianness can come to be adjudicated upon (Masuzawa, 2005). For example, as I discussed in chapter two in relation to the critical religion perspectives on the 'headscarf affair' in France, non-Christianness can come to be judged as inferior because of practices that are deemed to be pre-modern (barbaric), violent or conflictual (tribal) and uncivilised (Said, 1994; Miles and Brown, 2003:19-53; Fitzgerald, 2007; Lewis, 1995). I will go on to discuss the prevalence of these orientalist discourses in terms of how non-Christian religion comes to be configured in the child welfare cases, which I argue illuminates the socio-political and juridical work of religion in this area.

I will also use this critical analysis to problematise the judicial discourse on religious/racialised notions of nationhood, pointing to the positionality of the judges that might influence these conceptualisations. As Brown argues, juridical positionality may circulate as a "cultureless and culturally neutral" or secular space, however this does not take account of particular kinds of subjective way-finding

[179] Miles and Brown articulate their analysis as "representations of the Other" rather than specifically espousing the language of orientalism (2003:19). Nonetheless, as I discuss here, their arguments echo many of those made by Said (1994).

(2006:170).[180] Finally, I also attend to the appearance of judicial anxiety in the cases around the issue of where children are deemed to properly belong and indeed, when they are perceived not to belong but instead to embody a kind of liminality. I suggest this anxiety reveals a concern not just relating to the non-Christian children themselves but also about Christian Englishness.

4.2 Religion as a signifier of 'proper' belonging

As discussed in the previous chapter, there is much judicial discourse that focuses on the 'proper' community to which children belong. Some of this discourse is clearly concerned with belonging as an emotional or psychological attachment, which, as Van Praagh (1999)[181] and Ronen (2004) argue, are essential to the wellbeing of the child. However, as I have discussed, there is an overwhelming tendency in the judicial discourse to understand 'belonging' as part of a child's 'birthright' rather than in psychological terms, with the effect that religion also becomes a signifier of a racialised conception of belonging.[182] As Yuval-Davis puts it, we can understand belonging, or rather the 'politics of belonging' as a discourse that circulates in particular ways to signify particular, distinct communities (Yuval-Davis *et al*, 2006:3). She claims that the notion of belonging becomes central to a 'self-other' dialectic (*ibid*) in which the existence of the self is reinforced through its

---

[180] "[r]endering liberal legal principles as universal and culture as inherently particular" which in turn both legitimates itself and subordinates the culture of the particular, in this case non-Christianness (Brown, 2006:170). I discuss this point further below and in chapter five.

[181] Belonging for Van Praagh requires an understanding of the individual child, his or her development, particularly in relation to others including families but also "religiously and other culturally-defined communities" (1999:158).

[182] See my discussion of the cases such as *Re B*, *Re J* and *Re P*, in chapter three.

relation, one of distinction to the other(s) (Miles and Brown, 2003:19). As discussed in chapter two, this 'self-other' dialectic is also a key feature of orientalist discourse which distinguishes between the civilised Christian/secular West and its foreign others. I will return to this latter point below, here I wish to highlight how within this process, identities, including religion, cultures and traditions, become essentialised and fixed as significations of borders, boundaries and distinct nationhood in relation to children (Yuval-Davis *et al*, 2006:3).[183]

The deployment of 'belonging' is perhaps most clearly articulated in the 1995 *Re B* case, involving a child from Gambia who had stayed with a couple in England on a "long holiday".[184] In deciding that she should be returned to her birth parents, Wall J stated that the child *belonged* within her native Gambia, the country in which she was born and where her family and community were well known. The judge did not take account of the psychological attachment that the child had to the foster carers despite the expert opinion stating that separation could cause psychological damage. Rather the foster carers were described as 'strangers in blood' to the child and the respectability of the birth family in their community was given prime importance in what the judge referred to as the 'heritage argument'. In short, Wall J's conceptualisation of religion comes to be an ethnicised one in which

---

[183] See also the case of *Re G (A Minor)* [1990] FCR 881, where the child, Tarquin, the subject of dispute between his Christian grandmother and his Jewish aunt and uncle was deemed to be of 'fair complexion' unlike the 'darker' complexion of his Jewish family. Thus, physical characteristics such as facial complexion also comes to signify a child's potential (un)belonging.

[184] See chapter three for a fuller description of the facts of the case.

community, religion, culture, race, nationality and even 'ethos' is part of the same pot.[185]

This ethos, presumably meaning the value system of the Muslim Gambian family, is sharply distinguished with that of the judge and indeed, with the possibilities of the child being British. As he states: "it would be wrong to make an adoption order in this case [as] it was plain that the primary objective of an adoption order would be to secure British nationality for the child" (751). This raises the question of why it would be wrong to make an adoption order in this case? Is it only because of public policy concerns about immigration procedures? Or perhaps there is, I would suggest, an orientalist ordering of where the child properly racially belongs. Is the child's non-Britishness in this case a factual statement of her current nationality, or is there an implicit judicial logic that 'race'/ethnicity, namely whiteness and religious or cultural identity (Christianity), are as integral to nationality and citizenship in the British context as Muslimness and blackness seem to be in the Gambian context? This is a question that resonates with the tensions and complexities of diasporic integration and cultural identity within the nation state.[186]

For example, it is interesting to note the case of *Pawandeep Singh v Entry Clearance officer*[187] which demonstrated that immigration rules and procedures can be overcome when judges deem 'attachment' to be sufficiently important. In this

---

[185] Ethos is a term that is also used in *Re J* ("Muslim Ethos") to refer to the Turkish Muslim father's values (699).

[186] I will return to this point further in the next two chapters.

[187] [2004] EWCA Civ 1075.

case, the child, who resided in India with his birth family, was adopted by his biological uncle and aunt who were resident in England as British nationals. The adoption had taken place in India according to Sikh religious custom and was recognised as a valid adoption under Indian domestic law. However, as the ceremony did not comply with international requirements on inter-country adoption it was not recognised under UK law. The child's entry into the UK therefore fell foul of UK immigration rules. The adoptive parents complained on behalf of the child that the refusal to allow him entry into the UK infringed his human right to family life under Article 8 of the European Convention. The judges (Chadwick, Dyson LJJ and Munby J) granted the appeal on the basis that family life did exist between the child and the adoptive parents, despite the fact that the child remained in India whilst the parents were domiciled in the UK. They also decided that the international agreements did not preclude or apply to what they called an intra-family adoption, which was supposedly a common arrangement under Sikh and Muslim custom in India.[188] By invoking legal pluralism arguments, the judges contended that this practice should be accorded respect on the basis that there may be other jurisdictional understandings of what is in the best interests of the child.[189]

This is an important judgment in terms of its willingness to recognise that the welfare principle does not have to be based on a universal standard, but that it can be a principle that "should not be isolated from its social, cultural and religious

[188] *Re J* [1998] INLR 424 discussed in *Pawandeep* at 639.
[189] Echoing An-Na'im's (1994) argument on the issue of pluralistic understandings of the welfare principle.

context" (630).[190] However, as in *Re B* above, the importance of the biological family link between the child and the adopters is at the core of this judgment in justifying that family life existed between them even despite the lack of physical proximity.[191] Rather, attachment and belonging is seen as flowing naturally from the adoption ceremony and having been established by virtue of the child growing up and being told that his adoptive parents were his 'parents' and his birth parents, with whom he lived in India, were his uncle and aunt. The fact that they are genetically linked within a kinship group is taken very seriously by the court, even to the point that they dismiss this adoption arrangement as being governed by inter-country adoption rules. Both couples being in favour of the adoption is also likely to be significant to the outcome in this case, particularly as compared to the other cases such as *Re B*, where the adoption was contested by the Gambian birth parents.[192] Nonetheless, it is interesting that the child is deemed to 'belong' to the adoptive parents through the performance of a religious, cultural ceremony affirming that he is linked to them genetically. This decision then, affirms the court logic in *Re B* where the child's 'natural' and heritage link to the birth parents, their

---

[190] See also *Watkins-Singh,* although not a child welfare case it involved a school pupil wearing a Sikh religious symbol in contravention of her school's uniform policy. In that case the judge, Silber J also taking a broader view of diverse cultural standards stated that in recognising the "special needs of minorities" there was an obligation to protect minority identity and lifestyles not only for themselves but also to preserve a cultural diversity which he deemed to be of value to the "whole community" (579 para 67).

[191] It is interesting that the case of *X, Y and Z v UK* 24 EHRR 143 involving a couple where one of the partners was a female to male transsexual with a child conceived by artificial insemination is cited as precedent for interpreting the notion of family life widely. As Munby J states in his judgment, the fact that the child was deemed to have family life with his birth parent's partner challenged and indeed overturned the idea that family was limited to relationships based on marriage or blood or even formal relationships recognised in law (631).

[192] It also had approval from the Indian government which distinguishes it somewhat from *Re B* and *Re K (Adoption: Foreign Child)* (discussed below) where the Gambian and Bosnian respective governments did not approve of the foreign adoptions sought in those cases.

community and indeed to Gambia, legitimately overrides her attachment to her foster carers. Moreover, this racialised judicial logic is also affirmed by the fact that in *Pawandeep,* immigration rules in the end are overcome, whilst in *Re B* they were viewed as a serious 'public policy concern'.

It is also interesting to compare the *Pawandeep* case to that of *Re J* and *Re P* discussed in the previous chapter, although of course they involve different legal frameworks. Nonetheless, both the conceptualisation of religion and its significance to the child involved are of interest to my analysis because of the ways in which religion becomes implicated with children's (religious) belonging. In both *Re J* and *Re P,* the children's Turkish Muslim and Jewish identity respectively were effectively overridden. Race as an inherited genetic link was not deemed sufficiently important for the children despite the clear existence of family life between both sets of children and the parent(s). In both those cases the judicial role in facilitating the children to effectively live in a Christian world of the English nation, namely with the secular Christian mother in *Re J* and the Catholic foster carers in *Re P*, was made invisible. Perhaps this is because the children's belonging within those worlds did not seem to be disturbed or be of relevance to the future identity or family life of either of the children. J was viewed as living in a world where the children he would be surrounded by would not be Muslim and therefore not circumcised. Indeed circumcision was viewed by Butler-Sloss LJ as negatively marking him out amongst his peers at school. As for N, the child in *Re P,* her learning disability came to be understood by the judges as a determining factor in her not being able to cognitively understand her Jewish heritage. In these cases the influence of the embedded nature of Christianity, albeit articulated in the language of secularity, is

almost entirely unremarked upon by the judges themselves. The fact that Christian judges adjudicate on matters of religious identity and effectively demarcate the trajectory of a child's belonging in a community or nation - what Yuval-Davis (2006) refers to as the politics of belonging - is also largely sidelined in the analyses of child welfare issues in the LAR literature.[193] The positionality of judges being able to 'know' non-Christianness, in order to adjudicate on where children belong, often along racialised lines, echoes an orientalist 'positional authority' which again remains largely invisibilised in both the cases and socio-legal analyses of them. I will return to these points and their implications for interrogating the concept and work of religion in nation building below.

In another case, *Re K,* the appeal judges including Butler-Sloss LJ set aside an adoption order sought by a Christian English couple who had brought over a child from Bosnia for treatment of injuries she had incurred during the war there.[194] The adoption was approved by the county court despite the Bosnian government declaring that it opposed all adoptions of Bosnian children who might leave Bosnia as a result of the war. The child also had a grandfather and other family who had been separated and scattered as a result of the war. Based on a joint report from the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF), the Refugee Council had issued a letter pointing out that family reunion would be in the best interests of unaccompanied children from Former Yugoslavia. Another key element of the case was that it had

---

[193] See chapter two.
[194] *Re K (Adoption: Foreign Child)* [1997] 2 FCR 389.

been indicated in the child's placement that the child's language, religion, culture and ethnicity were to be maintained and strengthened whilst in England (394). In adjudicating on this case, Butler-Sloss LJ believed the welfare of the child to include "balancing the natural family with the prospective adoptive family" rather than the attachment of the child to the foster family with whom that she had spent the first years of her life. Butler-Sloss LJ, in deciding not to allow the adoption to stand, categorised her decision as one of public policy because of the Bosnian government's stand on adoption. It is interesting to note in this case that despite the fact that the maintaining of the child's language, religion, culture and ethnicity had been a point that was emphasised, nonetheless, the foster carers had had the child baptised. Whilst Butler-Sloss LJ did note this in her judgment she did not discuss it or remark on the fact that the child was being converted to Christianity even more explicitly than in *Re J* and *Re P* discussed above. Rather the judge merely alluded to the fact that the foster carers had not fully taken account of the policy on the adoption of Bosnian children.

Clearly in this case there were serious and complex issues at stake regarding the adoption of children during war and indeed the public policy issue was probably rightly insurmountable. The case nonetheless raises a key question about the basis upon which a child is deemed to properly belong. The tension between racialised and onto-theological conceptions of religion as well as nationhood underpins these cases in which the embedded place and influence of Christianity in children's future identities tends to remain opaque. These cases also illustrate the tension that arises

with seeking to ensure that children properly belong in ways that draw on racialised religious thinking.[195] I will return to explore this tension further in the last section of this chapter and in more detail in the next two chapters where I suggest that the discourse surrounding religion in education law and policy similarly effects a tension about the belonging of non-Christian children within the nation.

I return now to the *Pawandeep* case in which a Sikh child was adopted in India by his paternal uncle and aunt living in England. He was ultimately granted entry clearance into Britain because he posed no threat to the proper ordering of belonging as he was deemed to remain with parents, albeit adoptive ones, but nonetheless to whom he was linked genetically. Moreover, his future in his rightful community, with *their* distinct traditions, values and practices would be guaranteed. This view is clearly apparent in a long quote from Munby J which deserves citing in full:

> Although historically this country is part of the Christian West, and although it has an established church which is Christian, we sit as secular judges serving a multicultural community of many faiths in which all of us can now take pride. We are sworn to do justice "to all manner of people". Religion-whatever the particular believer's faith- is no doubt something to be encouraged but it is not the business of government or the secular courts, though the courts will of course, pay every respect and give great weight to

[195] See chapter three where I also discuss the case of *Re M* regarding P a child born in South Africa to Zulu parents who was then taken to England by the appellant, a woman for whom P's mother had worked as a nanny and housekeeper. The English courts decided in favour of sending P back to his birth family in South Africa on grounds that was where he belonged, again despite the attachment he had formed with his foster carer.

> a family's religious principles…. the starting point of law is a tolerant indulgence to cultural and religious diversity and essentially agnostic view of religious beliefs. A secular judge must be wary of straying across the well recognised divide between church and state. It is not for a judge to weigh one religion against another. The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect, whether in times of peace or, as at present, amidst the clash of arms (633).

Precisely what 'clash of arms' Munby J is referring to, is not made clear. However, what is certainly apparent from this statement is the distinction between the "Christian West" - albeit the 'secular' position of the judges - and 'other' cultures and religions. This distinction between particular nations and the religion/culture deemed to be 'native' to that nation is typical of an orientalist configuration. As I discussed in chapter two the notion of a clash of civilisations between the 'Christian West and the rest,' can underpin how non-Christianness comes to be represented and clearly this orientalist configuration is also at play in how 'proper belonging' comes to be constructed and understood in judicial discourse. Particularly as, for Munby J, religion and culture come to be the context in which practices such as polygamous, arranged and forced marriage are all prevalent but that cannot be accommodated by English (family) law. As he goes on to state:

> Within limits the law -*our* family law- will *tolerate* things which society as a whole may find undesirable. Where precisely those limits are to be drawn is

> often a matter of controversy. There is no "brightline" test that the law can set. The infinite variety of the human condition precludes arbitrary definition. As *Alhaji Mohamed v Knott* [1969] 1 QB 1 shows, our law is prepared to recognise as valid a potentially polygamous marriage entered into by a girl who *in our eyes* would be under age. That was a case of a 26-year-old Nigerian Muslim man who entered into a potentially polygamous marriage in Nigeria with a Nigerian girl aged 13; both were domiciled in Nigeria and the marriage was valid according to Nigerian law. Our law also, of course, recognises arranged marriages. But forced marriages, what the social or cultural imperatives that may be said to justify what remains a distressingly widespread practice, are rightly considered to be as much beyond the pale as such barbarous practices as female genital mutilation and so-called "honour-killings" (emphasis added) (634-5).

Munby J in this understanding of non-Christian practices from a western positionality, cites examples from female cutting and honour killings to child abduction[196] as part of the list of issues that are the subject of 'culture clash' between 'our' English family law or indeed international law on children's rights, and Muslim laws or traditions.[197] Whilst many of these issues will clearly affect the wellbeing and welfare of the children involved, the point I wish to make clear here is the orientalism at play in judicial representations of non-Christianness. Particularly as it seems possible to adjudicate on the issues at hand without needing

---

[196] *Osman v Elasha* [2000] Fam 62.
[197] United Nations Convention on the Rights of the Child (1989) cited at 635.

to reinstate and designate non-Christian practices as "barbaric" or "beyond the pale" or indeed non-Christians as subjects to be 'indulgently' tolerated (Brown, 2006).[198] The effect of configuring non-Christian religion in this orientalist way, through "the eyes" of the judges, has the material effect of placing children into communities within which they are deemed to properly belong. It also does this artificially along racialised lines, with the effect of distinguishing non-Christianness from a civilised Christian/secular West.

As I discussed in chapter two and mentioned above, this critical understanding of how non-Christian religion comes to be understood *and* deployed as part of a Christianised and universalising secular discourse in the judgments, is one that remains largely absent in the LAR literature. There is, for example, very little, if any questioning of the ways in which judges draw on racialised notions of religion or deploy religion as a signifier of belonging. As I will go on to argue in chapter six, in failing to undertake a study of the relationship between religion and race and the role of orientalism in discourses around religion, what is at stake is that religion comes to remain a largely de-politicised concept. It is therefore crucial to develop a better understanding of the contingency of religion as a concept and to interrogate the socio-political work of religion in demarcating the parameters of children's belonging, as well as its role in nation building more generally. It is to this latter theme I now turn.

---

[198] See chapter one for a more detailed discussion of the prevalence of this kind of orientalist views of non-Christianness in contemporary juridico-political discourse.

4.3 Nationhood and conflictual non-Christians

The theme of (un)belonging and (un)civilised characteristics, particularly tribalistic conflict, appears in a number of the other adoption and child welfare cases discussed in chapter three, particularly where the children involved are from mixed parentage. In the 1994 *Re B* case, Jonathan sought to have his original adoption order set aside because of the 'mistake' of having been adopted by Jewish parents because he was thought to be of Jewish 'stock'. In actual fact, Jonathan's birth mother was English Christian and his birth father a Muslim Arab from Kuwait.[199] In that case, the judges agreed that there had been a 'racial mistake' and Simon Brown LJ in particular was concerned to which ethnic, or rather racial community Jonathan properly belonged. Simon Brown LJ states:

> B was brought up believing himself a Jew, against a background of deep prejudice and hostility between Jews and Arabs, discovering only in adult life that ethnically *he belongs* to the opposing group (emphasis added) (249).

Through the rhetoric of racialised belonging - and a judicial narrative of 'opposition' between Jews and Arabs, to which I will return later - two ideas emerge: first, that the Jewish and Arab nations are racially distinct from each other and secondly, that Jonathan must therefore belong within the nation to which he is linked through lineage or race. As discussed in chapter three, this judicial logic of racialised nationhood marginalises the Jewish aspects of his identity, such as faith, the culture in which he grew up, and the affectivity he may have from his Jewish familial/social

[199] See chapter three for a fuller account of the facts of the case.

relations. In obfuscating these significant aspects of Jonathan's Jewish life, the notion of belonging itself also becomes racialised. However, what is significant about this notion of racialised belonging, is not so much that he does belong, but rather that he does not now, as an adult, seem to belong anywhere. It is Jonathan's unbelonging, as a 'wandering Jew' who has now become a 'wandering Arab', that concerns the judges and causes them anxiety.[200] Whilst Simon Brown LJ, in particular, considers Jonathan's unbelonging to stem from the 'racial mistake' of placing a "Kuwaiti Muslim's son" with an orthodox Jewish couple (p.249), this 'mistake' seems to be further exacerbated by the fact that "ethnically he [Jonathan] belongs to the *opposing* group" and, consequently, "feels he does not belong now to either the Jewish or Arab community" (245). Thus, for the judge, the tragedy of this story emerges from the fact that Jonathan does not feel he belongs to the Arab community despite being racially Arab, and nor can he properly belong to the Jewish Community, because he is not racially Jewish.

What is interesting, but largely left unexplained in the Court of Appeal judgment, is *how* Jonathan comes to feel this sense of unbelonging in the Arab community.[201] Swinton Thomas LJ states that:

> The present position undoubtedly causes B very considerable hardship...He wants to work in the Middle East and is qualified to do so. It is extremely difficult, if not impossible, for him in his present position to obtain work or

---

[200] See Herman (2006:285). She points out the image of 'the wandering Jew' in the case of *Re Weston's Settlements* [1968] 3 All ER 338. See also Cheyette (1993) for a discussion of popular representations of the Middle Eastern Jew.

[201] Although there is more information given by the first instance court [1995] 1 FLR 1 at 4. See discussion below and in the BBC Everyman documentary 'Jon's Journey'.

> even visit Israel or any Arab country...He feels that he does not belong now to either the Jewish or the Arab community (245).

Yet, what is Jonathan's "present position" and why can he not "obtain work or even visit" any Arab country? The Court of Appeal only state that Jonathon was considered "a persona non grata in Israel" and asked to leave (244). The circumstances of this exclusion are not elaborated upon despite the judges recognising that it has caused "B very considerable hardship" (245), indeed, bringing Jonathan to the very extreme position of petitioning the court to have his adoption order set aside. Perhaps there is an implication that it is obvious from popular perceptions of the Middle East, why he "feels that he does not belong now to either the Jewish or the Arab community" (245). I suggest that, through the judges' lack of consideration of Jonathan's factual "present position" (244), and instead evoking an 'opposition' between Jews and Arabs, it is the 'opposition' between Jews and Arabs that becomes a key feature of this judicial narrative. Simon Brown LJ also seems to effect a spatial transference, by positing the Middle East as the "background against which B was brought up" (249), when in actual fact he grew up in Toxteth (Liverpool) England.[202] In doing so, Simon Brown LJ adjudicates upon the question of Jonathan's ethnic identity, the "ill-starredness" of his adoption and his consequent unbelonging, within the context of the Middle East conflict. This raises the issue of what the significance of the Middle East conflict is to the question of Jonathan's 'mistaken' identity. Perhaps, in the judicial imaginary, there is a biblical inevitability to the opposition, stemming from a conflict between

[202] We know this from the BBC Everyman documentary 'Jon's Journey'.

the two sons of Abraham - Isaac and Ishmael - over the 'promised land'. [203] Despite these descendents of Abraham being one Semitic people, they appear in the judicial narrative as, eventually, the warring Jewish and Arab peoples or tribes, between whom there exists "*deep* hostility and prejudice" (249). Perhaps the reference to 'deep' hostility and prejudice is also a temporal evocation of the ancient biblical past.[204] As Anidjar highlights, this oppositional narrative between Jew and Arab was frequent in orientalist imaginations of the nineteenth century; he describes how it becomes represented as "the ineluctable legacy of the "Middle East", a region and a land eternally ravaged by war and conflict" (Anidjar, 2008: 34). In juxtaposing Jews or the "Jewish community" as being "opposed" to Arabs and the "Arab community", Jews and Jewish identities become reduced to a conflation with Israelis. In addition, Arabs come to be conflated with those in the Middle East opposing the Israeli state. In short, both Jewish and Muslim Arab identities are reduced to those of two *paradigmatic nations*, who are in conflict with each other.

In his theorising of race and religion in relation to Jews and Arabs, Anidjar discusses how, in the orientalist imaginary, a once imagined Semitic unity came to later circulate as a separation and then opposition (2008:21).[205] Following Said, he also views orientalism as a distinctively Western way of thinking and "of

---

[203] The anachronistic recalling of biblical formulations in the construction of non-Christian others, particularly the Jew has also been observed by Herman where the cases she examines "shares a conception of 'the Jew' that is, literally Hebraic in the biblical sense (2006:286). See also Cooper and Herman (1999) for a more detailed discussion of the judicial construction of Hebraic Jews and Kline (1992) on racial authenticity in relation to the adoption of 'Canadian Indian children'.

[204] Perhaps there is also a temporal as well as spatial transference with the biblical resonance of Semites in perpetual conflict.

[205] Anidjar describes this Semitic unity as "a historically discursive moment whereby whatever was said about Jews could equally be said about Arabs and vice versa" (Anidjar, 2008:18).

formulating and organising concepts" (*ibid*).[206] Anidjar describes the orientalist conceptualisation of Semites as both race and religion as not being a truth, but imagined as part of Europe's view of non-Christianness.[207] He therefore contends, following Asad, that this history of the emergence of religion, and specifically Semites, is not about the history of the East or of the Middle East but that of Christian Europe (2008:21). He posits Christianity, albeit de-theologised or secularised Christian Europe, as wanting to define itself "vis-à-vis Judaism and Islam by reassigning roles, by drawing the borders" (Anidjar, 2008: 13-39).

Anidjar's analysis echoes Yuval-Davis' point about the linkage between borders and belonging mentioned earlier, which she argues highlights the fact that it is "the hegemonic position of the English or European and its normative way of life that is at stake" (Yuval-Davis *et al.,* 2006:3). This argument is also put forward by Miles and Brown (2003:19) who describe the prevalence of an oppositional narrative as part of a 'self-other' interaction, in which the existence of the self - Christian/secular Europe - is reinforced through its relation, one of distinction, to its foreign others.[208] As outlined in chapter two, their analysis of European 'representations of the other' is described as having begun from a time namely, the medieval and crusader period when Europe was not imagined and therefore "to all

---

[206] Anidjar concludes that the "Semite", is a paradoxical "double internalisation and exteriorisation" because it signified "the enemy within, the enemy without: the Arab, out of the Jew, and the Jew, out of Europe, exported, deported." (2008:33).

[207] See also Anderson (1983).

[208] See also Cooper who argues that belonging can come into being through exclusion and boundaries as that facilitates knowing who we are by knowing who we are not (1998:61).

intents and purposes did not exist" (2003:22).[209] It was in the subsequent conflicts with Muslims, whether "wild Saracens" or "wild Turks", and perhaps now "bearded fundamentalists" who resort to terrorism, that the conflictual nature of Semites/Muslims/non-Christians came about and continues to circulate (Miles and Brown, 2003:26).

Following this critical analysis, I suggest that the depiction of opposition between Jews and Arabs in the Jonathan Bradley case, and the collapsing of the complexity of all the aspects of Jonathan's individual identity, is part of an orientalist imaginary that perpetuates the notion of distinct ethnic nationhood and racialised belonging. Particularly, as the significance of the paradigmatic configuration of 'the Jew and Arab' in conflict has a number of displacing effects. For example, Simon Brown LJ's spatial transference of "where he [J] was brought up" to the "background" of the Middle East conflict hyperbolises the presence of the Middle East in the former part of Jonathan's life and sidelines the fact that he grew up and was educated in England as a British Jew. Furthermore, taking the racialised judicial logic to its conclusion would also mean that Jonathan was 'half' Christian English through the maternal line. However, his Christian Englishness is also invisibilised. In the judicial narrative, Jonathan's *racial* Arabness trumps and eradicates his Jewishness, as well as his 'Englishness'. How then might we understand the implications of Jonathan's Christian Englishness being effectively erased or not racialised in the same way as Jewishness and Arabness are? Perhaps

[209] Miles and Brown describe Christian Europeanness as having developed particularly during the Crusader period; the 'other', whilst imagined somatically or racially in European representations, also had a theological character (because the material world in those times was primarily understood through religion) ((2003:29).

to be English is to be entirely or *purely* English.[210] Or maybe the evoking of the Middle East conflict, of warring and tribalistic Arabs and Jews, might be indicative of a privileging of the English/European self through the exclusion of the Semitic 'other'.[211] As Herman notes:

> English and history scholars repeatedly remind us, understanding the role of 'The Jew' is as important for what it reveals about 'the English' and Englishness as for what it tells us about Jews and Jewishness. Legal discourse...is one of the key sites throwing this encounter 'of the interior' into relief (2006: 281).[212]

Indeed, at the very least, the invisibilising of Jonathan's Englishness produces a spatial and temporal distancing of Christian English nationhood from that of an 'uncivilised' Jewish and Arab nationhood. Particularly, as Herman argues, the characteristics of English nationhood and law have been partly constituted through the racialisation of 'the alien', foreigner figure of 'the Jew', focusing on its characteristics, whether religious or otherwise; a process in which judges are instrumental (Herman, 2006: 288 – 300).[213] In this process of nation building through reinforcing the boundaries and norms of national character and behaviour, religion might be viewed as playing a particular signifying role. Religion circulates in various ways, being conflated with, or distinguished from, race, culture, nationality

---

[210] Or perhaps even just ostensibly English, for example, in *Re J* and *Re P* discussed in chapter three and below.
[211] Not to mention the invisibilisation of British colonialism and the hasty withdrawal from Palestine and its impact on the ensuing conflict there.
[212] See also Miles and Brown (2003:18) and Yuval-Davis *et al* (2006:2).
[213] See also Yuval-Davis *et al*? (2006) and Anthias *et al* (1992) who discuss the racialisation of ethnic minorities in the UK context.

and value systems, as part of an orientalist judicial production of racialised nationhood and belonging. As Anidjar points out:

> *[Orientalism]* reveals that religion is a discursive device that enables the workings of power....The device operates in such a way that the key distinctions it produces or participates in producing, whether epistemologically, politically or legally, are made to disappear and reappear in tune with their strategic usefulness (2008:53).

Thus, for Anidjar, the orientalist preoccupation with "the separation, the transcending of particularity whether race or religion" occurs in the name of what he refers to as the orientalists' "new universal", namely the Christian European/Western nation (2008:53). Whilst his analysis is perhaps less obviously apparent in relation to child welfare cases, the circulation of this 'new universal' in the form of Western values circulates more explicitly in another area relating to children namely, education law and policy, as I will explore in the next chapter. Certainly, one commonality between the two juridical sites of child welfare law and education, is *how* the boundaries between the 'self' and the 'other' come to be drawn within juridical discourse. As the scholars I have discussed above highlight, juridical discourse comes to rely on marking inclusions and exclusions on the basis of birth and lineage, ancestral history or heritage and character or behaviour, to which I would add, religion becomes a key part (Herman, 2006; Yuval-Davis, 2006; Ahmed, 2000).

The idea of conflictual and tribalistic non-Christians also features in the 2001 case of *Re S*. This case involved a specific issue order requested by a Muslim mother

to have the child's Sikh names changed to Muslim ones as well as to have him circumcised. She argued that this was necessary so she could bring her children up as Muslim and so they would be accepted within the Muslim community of which she had become a part after divorcing her Sikh husband. Whilst Wilson J, as I discussed in chapter three, took a nuanced approach in relation to preserving the child's mixed identity, he nonetheless deployed an orientalist view of non-Christianness in the case. In seeking to understand through his own lens as a white judge, similarly to Munby J in *Pawandeep*, Wilson J comments on the strength of the mother's feelings about having her child accepted into her Muslim community. He states:

> It is difficult for a white judge to understand, let alone articulate the depth of shock the mother's family suffered and of the shame that she brought upon it as well as upon herself by running away and marrying a Sikh man (650).

He continues that whilst it is a "great strength" of Islam that it draws loyalty from its members, nonetheless "every strength has its downside" (*ibid*). For Islam, he views this as:

> a concomitant intolerance, the strength of which, even in East London *only ten miles from where I speak*, is astonishing. Analogous problems are reflected in today's news of ugly clashes between Muslims and Hindus in Bradford (emphasis added) (651).

Thus, again similarly to Munby J in *Pawandeep*, with his long list of barbaric behaviours ranging from forced marriage, honour killings to child abduction, for

Wilson J, non-Christianness also comes to be painted with the orientalist brush of being conflict prone. Such uncivilised behaviour, depth of passionate feeling (in regards to shame and guilt felt by the mother and her family) is something that a "white judge", whilst sitting only ten miles away, nonetheless remains a world apart from. It is interesting that whilst in the Jonathan Bradley case, the positionality of the judge remains unremarked upon, in both *Pawandeep* and *Re S*, both Wilson J and Munby J comment on their position as white or Western secular judges. For example, Wilson J specifically identifies how the "elements" of the case were "foreign" to him, despite his ability to elucidate on the "great strengths of Islam" (650). Even in the 2004 case of *S* (children), in which Baron J takes a more contextual and nuanced approach to the child's mixed Muslim and Jain upbringing, the judge nonetheless quotes the very sections cited above from Wilson J's judgment in *Re S*. As outlined in more detail in chapter three, the *S* case involved a Muslim mother and a Jain father, where similarly to *Re S*, the mother, after divorcing, wanted to have her child circumcised but the father objected. Although neither of these cases invoke the same discourse around the barbarity of circumcision as the judges in *Re J* did, they nevertheless perpetuate an orientalist way-finding around the characteristics and cultural practices of non-Christianness.

In all of these cases then, the judges engage in an orientalist ordering of distinct nations whether on the basis of 'blood ties' as in *Re B,* or on the basis of racialised characterisations of conflictual behaviour between Jews and Arabs as in the Jonathan Bradley case; or even the intolerant and barbaric behaviour of

Muslims and Sikhs and Hindus in *Re S.*[214] Moreover, this orientalist ordering and knowing about non-Christianness becomes articulated from the position of secular or rather de-theologised Christian whiteness. This positionality sometimes comes to be made visible but only in terms that distinguish and problematise the behaviour of non-Christianness against its own notions of tolerance and secular rationality.[215]

4.4 Anxiety and religious unbelonging

I have explored above how the idea of the nation circulates as culturally and/or religiously distinct in the orientalist imaginary. As Stychin (1991) points out, despite Anderson's thesis (1983)[216] that nations are not a truth but involve an imagined sameness, the nation remains, nonetheless, one of "the most durable political imaginings we encounter" (1998:2). Stychin goes on to argue that this durability can be somewhat attributed to the fact that the nation is viewed by the state and within society as a 'naturalised' phenomenon, because it is something that individuals are born into and 'of' (1998:3).[217] Thus, as I have discussed above, race, religion and nationality become connected, even intersect, circulating as

[214] See also the recent case of *AM v Local Authority, The Children's Guardian, B-M (children)* [2009] EWCA Civ 205. In this case a Muslim father of three children sought permission to appeal against care and other orders in respect of those children. The children had been placed in care as the mother had been thought to have caused a fire at her own home placing her children at risk (the father was not involved). Whilst the question arose about the appropriateness of the foster care home (which was a white non-Muslim family), this was eventually dismissed because of the perceived likelihood of the children being discovered if they were placed in a Muslim family, despite the fact that the psychologist in the case described the foster parents' fears as possibly having "clinical paranoia of huge proportions" (para 111). In rejecting the father's application, Wall J, similar to Munby J in *Pawandeep* also comments on the tolerance "manifested in the English child care jurisprudence" which he views as enabling the father to put his concerns forward (para 115).

[215] See chapter one in relation to a similar narrative around the emergence of religion as a modern concept within Western orientalist academic scholarship.

[216] See the more detailed discussion of Anderson's argument in chapter two.

[217] See also Stychin for a more detailed exploration of the definitions of nation (1998:3-4).

signifiers of belonging within particular nations. This raises the question of what happens in the situation where children are of mixed parentage, as was the case in *Re B* and *Re J.* Whilst in *Re S* and *Re C,* Wilson J was willing to recognise and accommodate the children's complex identities, for the judges in the Jonathan Bradley case and in Re *J,* the proper belonging or rather unbelonging and potential liminality of the children became the cause of judicial anxiety.

In *Re J,* although there is no *explicit* judicial articulation of anxiety, Butler-Sloss LJ - in making her decision on whether J should be circumcised - expresses a concern that he should have a sense of 'belonging' in a community. She states that were he to be uncircumcised in the situation where his "... peers have all been circumcised...for him not to be so would render him either unusual or an outsider" (310). Similarly in *Re JK* - discussed in chapter three - the judge commends the Christian white foster family seeking to adopt a child relinquished by her Sikh birth mother, for "preserving her from any racial problems thus far" (898). Presumably the racial problems arise from the potential for religious liminality or what Cooper refers to as "religious miscegenation", which she argues does not necessarily involve "the reproductive mixing of genes"; it is the effects of the mixing that are significant (1998:62).

The issue of anxiety over 'racial problems' arose but was practically ignored in the case of *R v Cornwall County Council, Ex Parte E.*[218] In this case the birth father of a white child S, had been threatening towards the child's foster carers where she had been placed. He objected to the placement apparently because he did not want

---

[218] [1999] 2 FCR 685.

S to be placed in a "mixed race" family home.[219] The local authority had sought to remove the child from the foster home and rejected the foster family's application to adopt her. In dismissing the adoption application, the judge, Cazelet J, did not explicitly consider race as a factor in the case at all until the end of the judgment. There he rather oddly stated: "generally, as to race and culture" and then quoted the relevant paragraphs from the guidance to the Children Act 1989 on same race-religion matching with no further comment.[220] Why does the judge ignore the 'race aspect' of the case and the possibility that it may have been a reason for why the E family were not considered by the local authority for adopting S, and yet also quote the same race-religion matching guidelines?

The judgement in this case stands in contrast with some of those in the cases discussed in chapter three, for example, *Re JK* and *Re P,* which despite prioritising attachment as the key welfare factor, nonetheless, discussed the importance of the child's 'race', culture and religion as part of the child's heritage or birthright. What is absent in the judgment of *Ex Parte E* is not only a consideration of the local authority's race policy which was not mentioned at all but also of the significance of the same race-religion matching guidelines. Might this oversight suggest that the judge implicitly agreed with the local authority, that the foster family should not adopt S because they were a mixed race family, particularly as Cazelet J otherwise praised the foster family for the care that they had taken of S and her medical conditions? Perhaps one explanation for the judge not considering

---

[219] The details of this "mixed race family" are not elaborated upon.

[220] Paragraphs 2.40 and 2.41 of the Guidance and Regulations to the Children Act 1989.

'race' and the placing of a white child with a mixed race family is an anxious concern for the child's cultural liminality. As discussed earlier this was a key concern for the judges in the Jonathan Bradley case, only in this case, it remains almost entirely unspoken.

In *Re P*, Ward LJ gave "anxious consideration" to the question of the child's religious needs in deciding to grant her Jewish birth family further contact against the wishes of her Roman Catholic foster carers who became her adoptive parents (761). Judicial anxiety in this case, like in the Jonathan Bradley case, emerges from the fact that the child is 'racially' Jewish and therefore has a right to her Jewish heritage, but cannot be brought up with her birth family or another Jewish family. How can she 'belong' as a Jewish child with a Roman Catholic family? These cases highlight how religion or aspects of religious upbringing or heritage become factors that are judicially racialised or not - as in the case of *Re J* - in what becomes an anxious process for the judges to ensure that children grow up within the communities or nations to which they are deemed to racially belong, albeit under the rubric of ethnicity.

Perrin (1999) has argued that there is an anxiety that emerges from a tension in the 'self-other thesis' and particularly in Said's *Orientalism*. Drawing on Homi Bhabha (1994), he contends that these analyses do not account for an anxiety that emerges from the orientalist imaginings or processes of 'othering' (Perrin, 1999:20). Perrin highlights how the distancing of the self, through the process of excluding or distinguishing the 'other', is one that is never complete (Perrin, 1999). He gives the example of the Declaration on the Rights of Indigenous Peoples in

which "indigenous peoples and individuals" are simultaneously referred to as "both indigenous (in the sense of first nations) and modern, in the sense of nation-states" (1999:21). He argues that through this reference to indigenous peoples as occupying "two places at once", the nation produces a "splitting or doubling" of itself, as well as of the 'other' (indigenous nation) which in turn evokes an anxiety within the nation (1999:21). This anxiety arises then, because indigenous people become 'hard to place'; they cannot be fully excluded or distinguished so the process of othering and therefore reinforcing the self, is never one that can be fully completed (*ibid*:25).[221]

This anxiety may be akin to the judicial anxiety in the Jonathan Bradley case which emerges from the fact that Jonathan is not only 'hard to place', he is in fact liminal; there is no place for him to belong. Jonathan's outsider status is then not only a fundamental racial mistake, it also features as a failure of the production of distinct nationhood in itself - both of 'self' and 'other' - in the orientalist judicial imagination. He is racially Arab but he does not feel he belongs in the Arab community. J's liminality on the other hand, between his Turkish Muslim father and his secular Christian mother, is somewhat resolved by him not being circumcised so he can effectively pass in what is deemed as his secular environment. In *Re P*, N's liminality between her Jewish birthright and the Christian environment of her foster

[221] See also Fitzpatrick (1995) who argues that there is somewhat of a tension within orientalist configurations of the 'nation' as being ethnically/naturally distinct and yet simultaneously embodying universal values and standards of civilisation (as well as religion), discussed in chapter one. See also the discussion of this work in Stychin (1998:4). In short, there is an inherent contradiction in the orientalist narrative of the West as both distinct, defined in opposition to and excluding the uncivilised non-European, non-Christian other, and its simultaneous seeking to be universal. This is a point I return to in chapter five and six.

home becomes mitigated by her own supposed inability to cognitively understand this racial/religious disjuncture.

4.5 Concluding remarks

In this chapter I have explored how non-Christian religion is not only predominantly racialised in many of the judgments, but also viewed through an orientalist imaginary of conflictual and uncivilised non-Christian behaviours. Whilst in some of the cases, judges explicitly articulate the Christian/secular/Western positionality from which they speak, for example in *Pawandeep* and *Re S,* in other cases the embedded role of Christianity and its influence on judicial thinking remained unremarked upon as in *Re J, Re P* and *Re K.* The effects of having this 'positionality authority' to use Said's terms (1994), is not only to be in a position to survey what non-Christianness might or might not be, but also to distinguish 'nations' of people from each other. Religion in this judicial discourse, I have argued, becomes a signifier of racialised belonging. However, if this proper belonging is disturbed because of racial/religious miscegenation, as in the Jonathan Bradley case, anxiety emerges because of the tension and problematic of liminality and unbelonging. In other cases such as *Re J* this tension came to be resolvable by virtue of the fact that the child lived with his English Christian mother and could therefore inhabit the neutral secular space of Christian England.

In the next two chapters I shift my focus to the realm of education law and social policy, where I continue to examine the theme of racialised belonging within which religion circulates as a signifier as well as a marker of nationhood. In

particular, I explore how belonging within the host nation, rather than in the (birth) family or community, comes to be disturbed through a failure to meet a Christianised Western standard. I attend to how this problematic becomes addressed through a governmental discourse of common values, which seem to be exemplified by faith, or as I suggest, *church* schools, as well as citizenship and religious education. As with this case study, I again highlight the embedded place of Christianity in the production of religion as a concept in law.

CHAPTER FIVE

RELIGION IN EDUCATION: CHRISTIAN LEGACY, ORIENTALIST POSITIONING AND SHARED VALUES

> Either overtly or by default, this country is still a Christian one (spokesman for the Church of England, 2007).[222]

> Every school ... is responsible for educating children and young people who will live and work in a country which is diverse in terms of cultures, religions or beliefs, ethnicities and social backgrounds (DCSF, 2007b:1).

> Schools have always had leading roles to play ... developing a sense of shared values .... The new duty to promote community cohesion recognises the importance we place on this (Jim Knight, 2007).[223]

5.1 Introduction

In the previous case study I examined the circulation of religion, particularly non-Christianness, in cases relating to trans-racial/religious adoption and other child welfare issues. I highlighted the presence of orientalist positioning, racialised views and concerns over the (un)belonging of children within the judicial discourse.

---

[222] The spokesman was responding to Dr Paul Kelley's (head of Monkseaton High School in Tyneside) challenge to the legal requirement that in all state schools pupils take part in a daily act of worship of a broadly Christian nature (Anushka Ashtana, 'Crisis of faith in first secular school', *The Observer* (23 September 2007) <www.guardian.co.uk/uk/2007/sep/23/schools.faithschools> accessed 3 June 2010).

[223] Schools Minister Jim Knight, quoted in DCSF *Press Notice* (2007/0175) *£3 Million to Encourage School Linking and Community Cohesion* <www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2007_0175> accessed 15 September 2010.

In this case study I explore how similar ways of understanding non-Christianness pervades the conceptualisation of religion in education law and policy. I suggest that within this juridical sphere, the increased presence of non-Christian children in schools has challenged a predominantly Christian, mainly Church of England (CoE), legacy. A legacy not only present in the actual provision of education through faith schools, but also in the ethos and values that inform the religious, spiritual and moral instruction of children. In seeking to accommodate non-Christian children in schools, law and policy makers have sought to find a balance between recognising diversity, promoting equality, maintaining social cohesion, and finding common 'values' that are not (seen to be) merely based on a Christian heritage.

Other scholars have discussed the presence of orientalist, racialised and Christianised views of non-Christian children within the judicial discourse on schooling, for example, in disputes over admission to (minority) faith schools such as the recent Supreme Court decision on the *Jewish Free School* (Herman, 2011), and in relation to cases on the wearing of religious dress or symbols at school (Vakulenko, 2007; Scott, 2007; Bhandar, 2009; Razack, 2008).[224] However, I will not be addressing these issues in any detail in this case study as they have been explored thoroughly elsewhere. Instead, I will examine key legislative and social policy developments, as well as governmental discourse, in relation to religion, or faith, in education. The areas on which I focus in this chapter are the controversial issues of collective worship and religious education (RE), and the development of

---

[224] See also the discussion in chapter two, and Motha (2007). The issue of religion in education also arises with regards to single sex schooling, discipline, time off and transport (see Knights, 2007:122-125).

'common values'. In the next chapter I examine the role of publicly funded faith schools as either threats to, or providers of, social cohesion and social capital. In these particular areas of education law and policy, it was the presence of non-Christian children that instigated a questioning of, and shift from, the predominant Christian legacy in the English education system. Moreover, as I will go on to discuss, both RE and faith schools have come to be seen as instrumental in contributing to combating prejudice and creating community cohesion (Keast, 2005:215).[225] This promotion of community cohesion within schools, in particular through the promotion of 'common values', is seen as essential to nation building projects on various levels: the school community, the local community, the national community and the global community (DCSF, 2007b:7). Thus, religion, as conceptualised and deployed through RE and values discourse, comes to play a crucial role in shaping children's 'belongings', particularly within the nation.

In the previous case study I demonstrated how non-Christian children came to be predominantly thought of as belonging to their birth families through racialised links. As such, they were thought to be best placed with adoptive families that closely mimicked the birth family in religious or racial terms, for example in the cases of *Pawandeep* and *Re JK*. We also saw an anxiety that emerged when it was not clear to which racialised/ethnic or cultural/religious community a child properly belonged, for example in the *Jonathan Bradley* case, or in the cases involving disputes between parents of different religious/cultural backgrounds about the

---

[225] See also 'Joint statement from the Department for Education and Skills and Faith Communities on the importance of religious education' (2006) <www.cofe.anglican.org/news/pr2106b.html> accessed 14 September 2010; Local Government Association (2002); Annette (2005:194), and further discussions below and in chapter six.

religious upbringing of their children, for example as in the case *Re J*. Whilst in the previous case study judges faced the challenge of dealing with complex identities, where a child might belong to multiple racialised/ethnic or religious/cultural groups, in this case study I will examine the challenges posed by the tensions between children's belongings to those families and communities on the one hand, *and* to the wider local and national community as citizens, on the other. As providers of state funded education, and within the context of the Christian heritage of the education system in England, state actors are required to make decisions on how - and where - children are 'taught' to belong, and according to which values their spiritual and moral 'character' is shaped in schools. Like the judges in the welfare cases, state actors display some anxiety about the role of the state in making decisions on the shaping of children's 'belongings' and 'values', in particular in relation to non-Christian children.[226] This case study will look at how state actors, in shaping non-Christian children's 'belonging' and 'values' in education, conceptualise religion (chapter five), and how this conceptualisation relates to race/ethnicity.

Whilst there is some acknowledgement of the role of 'character education' and identity formation within the more critical education literature (Arthur, 2000; Annette, 2005; Gamarnikow and Green, 2003) there is very little recognition of this in the LAR perspectives.[227] Rather, much of the existing literature has come to be

[226] See also the report by the Commission on Multi-Ethnic Britain (2000:40) cited in Malik (2008:3).
[227] However, see Ahdar and Leigh's analysis of the various approaches to education including "the formation of good citizens" in which they recognise the impact of a liberal approach to education on identity formation in particular as citizens of the nation. They are critical of this approach, albeit

polarised around the (de)merits of religion in education. For example, on the one hand, there is a body of literature arguing in favour of religion in education, particularly from a liberal tolerance or legal pluralism point of view (Bradney, 2009; Cumper, 1998). On the other hand, there is a body of opinion arguing against religion in education, particularly those pointing to the lack of equality for children of non-Christian or non-faith backgrounds in relation to worship and religious education in schools (Hamilton, 1996; Poulter, 1990). Perhaps the most controversial objection to religion in education relates to faith schools and what is viewed as their divisive nature and threat to social cohesion, particularly following the so-called race-riots in the north of England (Bradford, Burnley and Oldham) in 2001; an issue to which I will return in the next chapter.

However, as I discussed in chapter two and in the previous case study, I again suggest here that within the existing debates, the notion of religion itself is insufficiently attended to or interrogated by the commentators. For example, within discussions about RE - as explored in this chapter - religion circulates as a predominantly onto-theological concept. Yet, as Fitzgerald argues, this conceptualisation is not merely indicative of the 'truth' about religion. Rather, it is the legacy of the category of religion having emerged from a particular history, and from a particular Christian epistemic point of view of itself, and of non-Christianness (Fitzgerald, 2000 and 2007; Masuzawa, 2005; Asad, 1993; King, 1999). In drawing on this history, we discover not only how the concept of religion came to

---

from the perspective that "devout" parents would prefer their children to be able to have a specifically Christian religious education (2005:230-231). Also discussed in the next chapter (six).

be 'invented', as Fitzgerald and other critical scholars refer to it, but also how non-Christianness has come to be conceptualised through an orientalist and racialised lens (*ibid).*[228] I have already explored how this critical religion analysis challenges fixed notions of religion that predominate in juridical discourse, and yet this is largely obfuscated in the LAR and other literature on religion generally (chapter two); and on child welfare law in particular (chapter three). My argument here is that this obfuscation is also taking place in relation to the LAR and other literature on religion and education law. This critical analysis not only facilitates an interrogation of fixed onto-theological conceptualisations of religion that circulate in LAR and other scholarship implicating religion as discussed in chapter two. It also provides a basis for understanding the mutually constitutive connections *between* religion, secularism and the socio-political factors that influence their coming into being.

In this chapter, I first provide a background to the historic role and subsequent embedding of Christianity within education in England, concentrating on the role of collective worship and RE. I then explore the debates on what has been referred to as the 'Christianisation' of education particularly from within the LAR scholarship, pointing to the circulation of religion as a mainly onto-theological concept. I revisit the critical religion perspectives discussed in chapters one and two and bring them to bear on the issue of RE in particular. In doing so I highlight the influence of the history of the emergence of the concept of religion on the onto-theological formulation of religion within RE. I will then explore the concept of

---

[228] See chapter two.

'common values', central to New Labour's (NL) project of promoting social cohesion.[229] I will examine the Christian heritage of these values that are posited as 'neutral' or 'universal' through communitarian theories relating to education.

5.2 Religion and education in England: a brief historical background

Education provision in England, and elsewhere in Britain, has its roots in the church. According to Gillard, the first schools in England were the 'Song Schools' set up by the church during the Middle Ages to educate and train the sons of 'gentlefolk' to sing in Cathedral choirs (Gillard, 2002:15). From the sixteenth century, the church also set up schools for the rest of society; these would eventually become the first publicly funded 'board schools' (Statham and Mackinnon, 1989:41). Church schools became more formal and institutionalised in the early nineteenth century as churches filled a vacuum left by a lack of state provision (Judge, 2001:466). The most significant form of education provision was centrally organised by the National Society, part of the CoE, supporting local efforts by clergy and laity to provide schooling for the general public (*ibid*; Wright, 2003:142). Between 1811 and 1851 the National Society "was responsible for the establishment of 17,000 schools" (Wright, 2003:142). The state began to fund some of these efforts in 1833 in a limited way, in return for exercising minimal inspection and control (Holt *et al*, 2002:1; Wright, 2003:142). Up until this point "virtually all education in England was provided by the church" (Gillard, 2002:15). Gradually,

[229] As mentioned in chapter one, I refer to the Labour government (1997-2010) as New Labour (NL) to denote the particular influence of 'third way' thinking, discussed in chapter six.

funding for CoE church schools was extended to a Protestant interdenominational body and eventually also to Roman Catholic (RC) and a very limited number of Jewish schools (Judge, 2001:466, Bradney, 2009:122-123).

When the 1870 Elementary Education Act established school boards to raise rates for the local board (also later known as elementary) schools for the first time, publicly funded education became available throughout the country. These schools were still required to provide non-denominational Christian worship and instruction, although parents could withdraw their children from religious instruction (Holt *et al*, 2002:1; Jackson and O'Grady, 2007:183).[230] The industrialisation of society led to a growing demand for education, and as schooling became more costly during the twentieth century, church schools increasingly sought financial support from the state (Judge, 2001:466). By the time the state had begun to recognise the need for a national state education system it was deemed too difficult to abolish the CoE and other faith based school provision, despite public funding of church schools already being controversial at that time (Brooksbank and Ackstine, 1984 cited in Gillard, 2002:15; Wright, 2003:142).

The 1944 Education Act, which replaced essentially all previous legislation, established the modern contemporary system of education. A Ministry of Education with a creative role for promoting education was established, and the

---

[230] Other legislative developments included the 1880 and 1891 Education Acts which gave School Boards the power to ensure attendance for children under ten and to make schooling increasingly free (Holt *et al*, 2002:1; Statham and Mckinnon, 1989:41). The 1902 Education Act replaced the School Boards with Local Education Authorities (LEAs) with a remit for both elementary and secondary education (Statham and Mckinnon, 1989: 42). The 1918 Education Act set about ensuring a fully national system of education was established through measures such as reducing exemptions to the requirement to attend school (*ibid*:43).

three phases of primary, secondary and further, now known as higher, education were introduced. Essentially the Act formalised a compulsory and free education for all children aged 5 to 15 (Statham and Mckinnon, 1989:44; Holt *et al*, 2002:1). The 1944 Act also enshrined the 'dual education system' that still endures today, namely, a system where the state funds both comprehensive *and* faith-based schooling. Gillard describes the 1944 statute as "the result of negotiations between Education Minister RA Butler and Archbishop William Temple", because it sought to bring church schools under the remit of the state (Gillard, 2002:15). The 1944 Act classified Local Education Authority (LEA) schools as county schools, and other - mainly CoE and RC owned - schools as voluntary schools (Gillard, 2002:15).[231] Voluntary schools, or church schools, were given financial support whilst maintaining varying degrees of independence (Parker-Jenkins *et al*, 2005:26, Jackson, 2003:89).[232] The schools were either voluntary aided (VA), where the church paid for most of the maintenance costs and therefore kept control of the schools, or voluntary controlled (VC) where the LEA paid for the maintenance and had more control of the school (Gillard, 2002:15). In short, the 1944 Act formalised the relationship between the church (predominantly the CoE) and the state in education. This was not just through the provision of public funding for, and establishing a certain level of state control over, faith schools, but also through requiring religious instruction and daily collective worship in *all* fully state funded schools (Statham and Mckinnon, 1989:44; Jackson and O'Grady, 2007:183).

[231] County schools became community schools under the 1998 Schools Standards and Framework Act.

[232] Although the term voluntary schools is often used interchangeably with church schools, the 1944 Act also afforded a limited number of Jewish schools voluntary aided status (Parker-Jenkins *et al*, 2005:33).

Although the particular nature of the worship and religious instruction was not specified in the Act, perhaps because it seemed obvious and therefore unnecessary, it was Christian worship and instruction that was followed and implemented.[233]

There had been opposition to the public funding for church schools with a preference for a common comprehensive system from early on (see Holt *et al*, 2002 and Cumper, 1998:55). Opposition to the 'dual education' system reached a pitch in the 1960s when the Labour government called for LEAs to reorganise the education system to become more fully comprehensive, seeking to move to a less Christian based schooling in what was seen as a more multicultural society (Holt *et al*, 2002:1; Cumper, 1998; Jackson, 1995). Further expansion of faith schools was not encouraged, and some Labour quarters even sought their abolishment (*ibid*). Labour party policy in opposition in the 1980s was initially unsympathetic to state funded religious schools on the basis of their potential divisiveness, but this shifted due to concerns over both racism and a lack of respect for cultural diversity in county (now community) schools (Jackson, 2003:90-91). As a result, whilst in opposition, the Labour party agreed a policy to uphold the right of religious minorities to establish state funded schools, which was implemented, along with a significant expansion of Christian faith schools, once they came into power in 1997. I will discuss the subsequent development of faith schools under the NL government (1997-2010) in further detail in chapter six, and will concentrate now on the developments in the provision of RE and worship in schools.

---

[233]The government did state publicly that the expectation was that religious instruction and worship should be Christian in its nature, for example, in a statement by the Earl of Selbourne in the House of Lords (Hansard HL vol 132 col 336 (21 June 1944) cited in Bradney (2009:123). See also Cooper (1998:52).

5.3 Collective worship and religious education: from Christian heritage to shared values?

Despite increasing unease over state funding for faith schools, and the prevalence of a Christian legacy in the provision of education from the 1960s onwards, the predominant approach to religion in education remained a liberal education philosophy, as opposed to seeking to ban religion from education all together. Within the liberal education philosophy, an attempt was made to respond to the increasingly multicultural demographic of British cities (Cole, 1972). Following a 1969 conference on comparative religion in education, held in the town of Shap, a Shap working group on religious studies propagated an approach to religion in schools that arose from the work of Ninian Smart. His methodology was to encourage young people to empathise with the religions of others (Smart, 1968; Schools Council, 1971, both cited in Jackson, 1995:273-274; Fitzgerald, 2007:27). Jackson notes that this development meant that RE in Britain "led the way in trying to generate understanding of and positive attitudes towards Asian and black religious minorities" (Jackson 1995:273-274).

A multicultural education approach was articulated in the 1980s in what Jackson refers to as the "'Bible' of multiculturalism" in Britain: the 1985 Swann Committee Report *Education for All* (Jackson, 1995:274). The Swann Committee had been set up to undertake an enquiry into the education of children from ethnic minority groups. In the report, it argued that all pupils should have an understanding of a variety of "religious beliefs and practices", and that this understanding should be achieved not through induction into a religion (Swann, 1985:466, discussed in Jackson, 1995:274). Instead the report contained

recommendations to adopt a more empathetic, phenomenological approach in order to help pupils to understand what it would be like for a believer to participate in various religious experiences or practices (*ibid*; Ahdar and Leigh, 2005:245; Bradney, 2009:123). The Committee felt that this approach to religion merely reflected the practice that was already prevalent within many schools (Swann, 1985:471, discussed in Jackson 1995:274).

Nevertheless, the 1988 Education Reform Act (ERA), the most important piece of education legislation under the Conservative government (1979-1997), made explicit that Christianity was to remain the dominant religion in schools that were fully state funded, although other faiths in the community were to be acknowledged.[234] Daily collective worship was still required, but it was now made explicit in the Act that this must be "wholly or mainly of a broadly Christian character".[235] The Act introduced the term 'religious education' to replace the term 'religious instruction' (Jackson and O'Grady, 2007:184). Despite establishing a national curriculum with regards to most other subjects, the syllabus for RE remained to be set within each LEA in partnership with representatives from local faith groups that must include representatives from the CoE (*ibid*).

In 1991 a guidance was issued in response to a 1989 survey of RE advisers to local education authorities indicating a lack of consensus and confusion amongst

---

[234] s 8(3) ERA 1988.

[235] s 7. However, the 1988 Act did not require that each *day's* worship should be Christian as long as "taking any school term as a whole," most acts of worship are wholly or mainly of a broadly Christian character" (s 7(3)). Schools were allowed to take into account the family background of their pupils in determining the specific form and content of acts of worship (s 7(4)), and in the situation where the majority of pupils are from non-Christian backgrounds, a school may be exempted from the "broadly Christian" worship requirements (s 7(6) and 12(1),(9)). In addition, s 9(3) allows parents to opt their children out of worship. See also Cumper (1998) on exemptions for Muslim schools.

teachers about what should be included in school worship and RE classes (Bradney, 2009:125). A 1994 Department for Education circular, *Religious education and collective worship*, provided detailed instructions for schools on the provision of worship and RE, in line with the aforementioned legislation. With regards to RE in particular, it stated that it should be designed to:

> to ensure that pupils gain both a thorough knowledge of Christianity reflecting the Christian heritage of this country, and knowledge of the other principal religions represented in Great Britain (DfE, 1994).

The provisions in the 1988 Act demonstrate that there may have been a growing anxiety about the need to assert a Christian social and moral order. An anxiety that is reflected in the shift from what was a silent assumption of Christianity in 1944, to an explicit legal requirement that all children in the publicly funded county schools, including non-Christian children, should experience Christian worship and be educated mainly on the 'Christian heritage of this country'.[236] It also illustrates the inherent tensions in seeking to acknowledge and understand religious diversity within a country that is considered to be "[E]ither overtly or by default ... still a Christian one".[237]

---

[236] Indeed, during the passage of the Bill through Parliament some politicians demanded "the teaching of confessional Christianity as a means to preserving 'British culture' and ordering society morally" (Jackson and O'Grady, 2007:185). The specific mentioning of the Christian nature of worship was introduced via an amendment to the Act in the House of Lords, proposed by the Bishop of London (Hamilton, 1996:28-9). See also Cooper (1998:51-67).

[237] Spokesman for the CoE responding to Dr Paul Kelley's (head of Monkseaton High School in Tyneside) challenge to the legal requirement that in all state schools pupils take part in a daily act of worship of a broadly Christian nature (Anushka Ashtana, 'Crisis of faith in first secular school', *The Observer* (23 September 2007) <www.guardian.co.uk/uk/2007/sep/23/schools.faithschools> accessed 3 June 2010).

The next major piece of legislation relevant to worship and RE in education to be passed was the Schools Standards Framework Act (SSFA) 1998, implemented under the NL government (1997-2010).[238] The SSFA 1998 replaced county schools with community schools and entrenched faith schools, as 'schools with a religious character' within the law.[239] Repeating the wording of the ERA 1988, the SSFA 1998 stipulates that worship in community and VC schools should be "wholly or mainly of a broadly Christian character".[240] Although, the Act also states that the school assembly may take account of "circumstances relating to the family backgrounds of the pupils which are relevant for determining the character of the collective worship which is appropriate in their case".[241] With regards to RE, the SSFA 1998 reinforces previous legislation, requiring local authorities to establish an RE syllabus for their local schools in partnership with faith representatives which *must* include the CoE.[242]

The Labour government continued to emphasise the importance of RE in schools, in particular in relation to understanding 'others'. The Department for Education and Skills (DfES) published for the first time a non-statutory national framework for RE in 2004 (DfES, 2004), identifying important principles for religious education, although the local arrangements for setting the syllabus remained in

---

[238] The last piece of legislation on education under the previous Conservative government was the 1996 Education Act, which brought all the previous Acts and strands of education legislation into one statute, although the substance of these laws was not significantly changed (Holt *et al*, 2002:2).
[239] The subsequent proliferation of state funding for faith schools, including non-Christian schools, under the NL government will be discussed in the next chapter.
[240] Schedule 20 s 3(2). Schedule 20 s 5 states that schools with a religious character could have collective worship that reflects the school's trust deed or be in accordance with the traditional practice of the school, which took account of non-Christian faith schools.
[241] Schedule 20 s 6(a).
[242] SSFA 1998 Part II Chapter 6 s 69 & Schedule 19, originally in Education Act 1996 Part 5 Chapter III s 376-384.

place. In 2006 the government and faith leaders made a joint statement on the importance of RE, recognising it as making an important contribution to developing respect for, and sensitivity to, others in particular those whose faith and beliefs are different from their own.[243] The commitment made by both parties in the joint statement, was reaffirmed in a joint vision statement *Faith in the system* in 2007 stating that RE "should promote discernment and enable pupils to combat prejudice and contribute to community cohesion" (DCSF, 2007a:10). In January 2010 the Department for Children, Schools and Families (DCSF – the new name for the former DfES) published a new non-statutory guidance, *Religious education in English schools*, replacing the elements on RE from the 1994 circular.[244] Under this latest DCSF guidance, community schools and other types of schools *without* a religious character, must teach an RE syllabus that is adopted by the school's local authority (DCSF, 2010:15). This syllabus must "reflect that the religious traditions of Great Britain are in the main Christian, while taking account of the teaching and practices of the other principle religions represented in Great Britain" (DCSF, 2010:14).[245] The syllabus will be set by a local committee that must include representations from the Christian denominations and religions that "appropriately reflect the principle religious traditions in the area", and it must *always* include representatives of the CoE, regardless of the religious composition of the local area (DCSF, 2010:10). This syllabus must also be taught by VC and Foundation schools 'with a religious character', whilst VA schools and denominational Academies

[243] 'Joint statement from the Department for Education and Skills and Faith Communities on the importance of religious education' (2006) <www.cofe.anglican.org/news/pr2106b.html> accessed 14 September 2010.
[244] *Religious education and collective worship.*
[245] Also enshrined in the Education Act 1996 s 375.

should determine RE in accordance with their designated religion (DCSF, 2010:15-16).[246] The 2010 guidance also reaffirms the importance of RE, not only in relation to pupil's spiritual, moral, social, cultural and personal development, but also in relation to community cohesion (DCSF, 2010:7).

The concept of community cohesion had in the mean time also found a place in its own right within education law and policy. In 2006 a legal duty on maintained schools was introduced to promote community cohesion.[247] The promotion of community cohesion, not only through RE but also in citizenship education and indeed across the curriculum, was to be achieved by finding a "common vision and sense of belonging", and by respecting diversity and promoting "shared values" (DCSF, 2010:3 and 6). I will discuss community cohesion and citizenship education in relation to faith schools in the next chapter. At the end of this chapter I will return to the concept of 'shared values' which I argue has come to circulate as being secular or 'universal' despite its normative force having Christian underpinnings. Thus, I will argue that this move away from RE as the main instrument through which to achieve social cohesion to a promotion of 'common values', further obscures the Christian legacy and embeddedness within the English

---

[246] Foundation schools replaced the 'grant maintained schools' that had been created by the 1988 Act. Foundation schools may or may not have a religious character, they are state funded and controlled by a Board of Governors. Academies are schools set up as public/private partnerships where the 'private' body might be a religious or charitable organisation, or a business, sponsoring and managing the school. They were created in 2000 and became embedded in the 2002 Act. The scheme was the brainchild of Tony Blair's chief education adviser, Andrew Adonis (Gillard, 2002:16). Under some circumstances parents may request of schools with a religious character that the school makes provision for the teaching of RE either in accordance with the school's designated denomination, or the locally agreed syllabus, whichever is in contrast with the schools policy (DCSF, 2010:15).

[247] Education and Inspections Act 2006, inserting section 21(5) into the Education Act 2002.

education system. However, first I will turn to the LAR perspectives on religion in education and interrogate the conceptualisation of religion in these debates.

5.4 LAR perspectives on religion in education: a Christian legacy?

The Christian legacy in the English education system has been discussed in the LAR scholarship. Bradney (2009), for example, recognises the historic role of Christianity in education within England and its privileged role in the areas of worship and instruction following the 1944 Act. Nonetheless, he argues that the dual education system created by the 1944 Act was "not an expressly Christian" one, although he does acknowledge it was "in fact overwhelmingly Christian" (Bradney, 2009:122-123). He premises his somewhat hedged argument on the fact that the Act also allowed for denominational schools to be state funded, and that these denominations were not limited to Christian ones (*ibid*:122).[248] Thus "in strict terms", for Bradney, the 1944 Act resulted in a multi-faith system (*ibid*:122). Moreover, Bradney argues that the Swann Committee report gave rise to the shift from religious instruction to religious education, and that other religions came to be studied alongside Christianity, presumably as part of what he views as a multi-faith system (Bradney, 2009:123).

Cooper argues that the initial move away from Christian based schooling under the 1960s Labour government was halted under the subsequent eighteen year Conservative government which was not as keen on encouraging more

---

[248] I will return to the specific issue of faith schools in more detail in chapter six.

comprehensive schooling (Cooper, 1998). In fact, in relation to worship and religious instruction, Cooper describes the 1980s and early 1990s as a period where the "place of Christianity within the British polity and community" was revitalised (Cooper, 1998:51).[249] She cites as an example the ERA 1988, mentioned above, restating the 1944 Act's requirement for all state schools to provide religious education and collective worship (Cooper, 1998:56).[250] Moreover, she also discusses how the 1988 Act filled the gap left by the 1944 Act by stipulating that worship: "shall be wholly or mainly of a broadly Christian character"; contain some elements which "relate specifically to the traditions of Christian belief", and "accord a special status to Jesus Christ"[251] (Cooper, 1998:56; Cumper, 1998:47; Edge, 2002:304; Bradney, 2009:123). Cooper also cites s 8(3) of the same Act as evidence of the reassertion of Christianity in education. This section requires LEAs to draw up syllabi that:

> reflect the fact that the religious traditions in Great Britain *are in the main Christian* whilst taking account of the teaching and practices of the other principal religions represented in Great Britain (emphasis added) (s 8(3) ERA 1988).

Bradney acknowledges that these legislative developments did seek to 'Christianise' education and worship, despite the liberal multicultural educational philosophy, or "orthodoxy" as he refers to it, at the time (2009:124). Nonetheless,

---

[249] See also Cumper (1998).
[250] s 2(1) & s 6(1)) ERA 1988.
[251] s 7(1-3) ERA 1988.

he gives a number of arguments as to why this did not occur, including the lack of certainty in the 1988 Act on what was meant by 'broadly Christian' worship to which he attributes the lack of universal implementation within schools (*ibid*:125). As further evidence of the inclusion of non-Christian religions in the curriculum Bradney cites the 1991 DfES guidance on RE syllabuses being required to include material on other religions in addition to Christianity, as well as the DfES (2004) non-statutory national framework for RE which gave suggestions of what should be included in the curriculum (*ibid*:125-126). He concludes that the 1988 legislation "all sides largely agree has failed" (*ibid*:130). He goes on stating:

> When the 1988 legislation had first been passed, Harte had written that the legislation 'provides an opportunity to reassert the Christian heritage of the nation's schools. Whether this opportunity is taken will show whether that heritage is still the bedrock of the nation' (Harte 1987-89, p52). In fact the 'opportunity' was not taken. The law has failed to 'Christianise' religious education and collective worship in a way that a minority had wished; something that was probably almost inevitable in the context of the dominant secular liberal approaches described in Chapters 1 and 2 of this book (Bradney, 2009:130).

Whether the ERA 1988 did succeed, or indeed fail, to Christianise education does not seem to be, as Bradney suggests, an issue that "all sides largely agree" upon. As well as Cooper's arguments discussed above,[252] LAR scholars such as Ahdar and

---

[252] For a more extensive discussion of the proliferation of Christianity and Christian values in education during this period see Cooper (1998: 51-71). For example, she discusses the notorious s 28

Leigh, writing from a Christian perspective, argue that the collective worship provision favouring Christianity in law is not to be viewed as a matter of concern because neither students nor teachers from other faiths are "coerced" to join in (Ahdar and Leigh, 2005:242). On the other hand, Cumper, similarly to Cooper, also highlights how the Conservative party legacy, taken up and further entrenched by the subsequent Labour government in the SSFA 1998, "is one that has failed to accord equal respect to the many different religious traditions in the classroom" (Cumper, 1998:45).[253] According to Cumper there are at least six different arguments that can be advanced for abolition of the collective worship requirement (1998:55). Poulter also argues that there are "extremely persuasive arguments" for abolishing school worship, pointing out that:

> collective worship is not primarily or essentially educational and is almost certainly an activity which is best organised by the faith concerned within the child's local community and subject to the continuing direction and supervision of parents (1990:2).[254]

(Local Government Act 1988) which was brought in by the Conservative government during the same period as the ERA 1988. The s 28 LGA 1988 clause aroused widespread opposition within lesbian, gay & bisexual communities because it stated that local authorities "shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality" or "promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship". Although this clause was repealed by the Blair government (on 18 November 2003 by s 122 of the Local Government Act 2000), it is interesting to note that homophobic bullying and homophobia in general have been one of the key arguments given by some figures arguing against NL support of faith schools (for example John Harris, 'Lessons from your sponsor', *The Guardian* (22 November 2005) <www.guardian.co.uk/education/2005/nov/22/schools.uk2/> accessed 18 August 2008.

[253] s 70 & Schedule 20 s 2(5-7) SSFA 1998, relating to collective worship and religious education, are also discussed in Edge (2002:304); Hamilton (1995 and 1996).

[254] See also Hamilton (1995 and 1996).

Edge suggests that even with the exemptions for parents to opt out their children from collective worship, the general statutory regime privileges a particular, namely Christian, form of worship as "an integral part of the public schooling system" (Edge, 2002:305).[255] This embeddedness of Christianity within schools can also affect children's education with religious implications even outside of RE or worship, because of the way that schools with a religious character can authorise particular beliefs and practices (Edge, 2002:306).[256] Hull takes this argument further stating that the Education Reform Act 1988 and the 1994 DfE accompanying circular "turn[s] the school into a worshipping community" so that "being registered on the school roll becomes an act of religious commitment." (1994:10).[257] These critiques also reflect Asad's (1993) argument about how particular instantiations of religion come to be authorised.[258]

What is interesting about the range of LAR and other perspectives on the issues of collective worship and RE is that despite the agreement on the lack of certainty about the level of Christianity as opposed to multi-faith orientation, the concept of religion itself is barely interrogated. As Fitzgerald argues, religion circulates as if it were a self-evident cross cultural category, that it is "in the nature of things" and therefore requires no interrogation or clarification (2000:4). It is precisely to this analysis, marginalised in the LAR and other perspectives discussed

---

[255] Edge also cites the Court of Appeal case of *ex parte Ruscoe and Dando* (1993) (unreported) in which parents felt that the school their child was attending had not provided a daily act of collective worship that was wholly or mainly of a broadly Christian character because of the multi-faith worship that was being offered instead (2002:305). See also Hamilton (1996:30).

[256] See also Addison (2007) and Knights (2007) on issues of religious discrimination in education.

[257] *Islamia National Muslim Newsletter* (March 1994, Number 23, 10) discussed in Cumper (1998:55). See also Hull, 1975:91 and 1984; Khan, 1995.

[258] See chapter one and two.

above, that I turn to next. In particular, my aim is to address the problem of religion in education not in terms of the level or degree of Christianisation, but rather attend to religion as a notion that often circulates as a referent to variations of Christian truth (Fitzgerald, 2007).

5.5 Interrogating the onto-theological concept of religion in RE and 'knowing' non-Christianness

> the best path for the county school in a pluralistic society is to teach nothing, [*sic*] to present nothing as if it were necessarily true (Hull, 1976:91).

As discussed in chapters one and two, critical religion scholars such as Fitzgerald challenge the onto-theological conceptualisations of religion that predominate in academic discourse. They claim that religion cannot be reduced and understood only as having an ontological 'essence' nor can it be taken to be a cross-cultural aspect of human life because of the sheer expanse of what it might include (Fitzgerald, 2000:4 and 2007; De Vries, 2008:10). Fitzgerald and the other critical scholars seek to understand religion contextually or historically, as contingent upon and constituted through particular socio-political, economic or other circumstances and social relations (Fitzgerald, 2000 and 2007; De Vries, 2008; Asad, 1993). As discussed in chapter one and two, and I will return to the point below, this tension came to be mitigated by a racialised and orientalist view of non-Christianness, as analysed for example in the work of Masuzawa (2005).

Here, drawing on the work of Fitzgerald (2000; 2007) and Masuzawa (2005) I wish to highlight the continuance of a Christian view of non-Christian 'religion' as an onto-theological concept within the contemporary English RE curriculum.[259] This conceptualisation of religion comes to be articulated by academics, educators and politicians making authoritative statements about religion in the school curriculum (Fitzgerald, 2007:26). Fitzgerald cites as a key example an article entitled 'Let's talk about religion and keep teaching it' written by Joyce Miller, chair of the Association of Religious Education Inspectors, Advisors and Consultants in the UK, where she states:

> For the first time, in 1988, the law required pupils to learn about the principal faiths in Britain, and common educational practice since then has included teaching about the world's six major faiths...Religion is in the world, it is a formative influence in every society, found in every culture in human history (Miller, 2006 cited in Fitzgerald, 2007:26).[260]

Among other points, Fitzgerald suggests that this statement indicates how the English-language word 'religion' is assumed to be translatable into all languages and cultures of the world; and indeed that it exists and can be "found in every culture in human history" (2007:27). He argues that this assumption has been disseminated within the UK by the Shap working party on religious studies since the late 1960s, and has now become entrenched in religious education (*ibid*). As mentioned above, this includes the work of religionists and in particular a phenomenological approach

---

[259] See also Jackson (1995).

[260] Miller's article was published on 22 July 2006 in *The Edge*, a magazine published by the Economic and Social Research Council (ESRC).

to religion proposed by Ninian Smart (Fitzgerald, 2007:27).[261] The evidence of their influence can be seen in the teaching materials 'Photopak 3: Discovering Religion in Festivals' which contains "photographs, illustrative material and a series of work units to encourage young people to discover for themselves the *nature* of religion" (emphasis added) (Fitzgerald, 2007:27-28).[262] Fitzgerald's analysis of this material highlights how the visual cues and 'work unit' pathways direct children towards organising their understanding of religion in terms of "ritual and sacraments" and awareness of "the holy", namely a divine being which can manifest itself in different forms and cultures (*ibid*). Moreover, the sacredness of religion is highlighted through notions of spirituality, a religious experience brought about through ritual performance, traditions and festivals (*ibid*).[263] In short, as Fitzgerald argues, the impression given of religion is a model of "essence and manifestation", what he refers to as a modern liberal theology focusing on the individual private experiences of the numinous (*ibid*:28-29).

Of course, it is not my aim to judge that such things as spirituality or rituals are definitively religion or not, or that they do not exist in particular cultures; clearly

---

[261] For example, Rudolf Otto's *The Idea of the Holy* (1917) and F.J. Streng's *Understanding Religious Man* (1969) as well as Ninian Smart's *Religious Experience of Mankind* (1984), all discussed in Fitzgerald who notes their influence on onto-theological notions of religion and religious experience within RE (2007:27). See also the work of I'Anson and Jasper (2006) who describe this conceptualisation and approach to religion as "the Official Account of Religious Studies", also discussed in Fitzgerald (2007:27).

[262] 'Photopak 3: Discovering Religion in Festivals' (Longley and Kronenberg, 1973) is discussed in Fitzgerald 2007. For example, 'sacred time and place' include the Western Wall in Jerusalem, the *Ka'bah* in Mecca, Benares in India and the shrine of the Footprints of the Buddha at Bodh Gaya. These and other photos are described as 'responses to the numinous', discussed in Fitzgerald (2007:27-28).

[263] In relation to Islam the examples of religious experience cited include Muhammad experiencing the presence of Allah (God); these unseen presences are described as personal or impersonal, thus including religious experience as also relevant to non-monotheism such as Hinduism and Buddhism (Fitzgerald, 2007:27). See also my discussion in chapter two in relation to how non-monotheism has been included under the category of religion for the purposes of discrimination law (Vickers, 2008).

they do.[264] However, I would concur with the critical religion scholars who argue that it is too broad brush an approach to use the rubric of religion to refer to every eventuality of cultural or extra-temporal experience.[265] The point here is that religion, as a category and concept circulating in education, has come into being and continues to be authenticated in very particular ways, through a Christianised lens. I add to this a further critique, namely, that the apparent certainty about religion as onto-theological, having an essence and existing everywhere, is one that seems to be 'all knowing'.[266] This viewpoint that Miller and others within the secular liberal education movement occupy, reproduces a "positional authority" which Said reminds us underpinned the European discipline of Orientalism "as a system of knowledge" about the non-Christian East (Said, 1994:6-7). As I discussed in the previous case study, judges also espouse this Christian and orientalist positional authority from which to adjudicate on the (non-)Christianness of children's and their (birth) parents identities and proper racial belonging. This position also comes to be articulated as one that is neutral and/or secular, for example in the case of *Re J, Re S* or *Pawandeep,* leaving Christian Englishness unremarked upon.[267]

In relation to RE specifically, Fitzgerald argues that a key effect of the conceptualisation of religion as having a fundamental essence – and therefore,

---

[264] I therefore do not go into a detailed analysis of the RE curriculum here, which is beyond the scope of this study and has been done in the work of Fitzgerald (2007 and 1990 in relation to the inclusion of Hinduism as a world religion). See also Jackson, 1995; King, 1999.

[265] See chapter one.

[266] For example as stated by Joyce Miller in the quote above indicating that religion is a formative influence in every society, found in every culture in human history, and that it can even be categorised into six major world faiths.

[267] See chapters three and four.

being sacred or extra-temporal – fuels the notion that all that is non-religion, namely the profane world, including politics, is secular (2007:39-40). Yet for Fitzgerald, the language of secularity is a rhetoric used to persuade others to view the world in specific ways. He argues that both religion and secularity are, therefore, inherently political and both implicate power (2007:36-40).[268] For example, in reference to the RE materials mentioned above, he states:

> The purpose of the pack is to persuade young people and their teachers to believe in some modern, ahistorical, theological invention, an unseen essence that manifests itself in the various media of different 'religions' which are tacitly voluntary acts of individuals essentially divorced from power and the modern nonreligious state. *Yet it is of course itself an act of power, an ideological rhetoric designed to influence* (emphasis added) (2007:28).

Fitzgerald traces the religion-secular binary, and therefore the de-politicisation of religion, to the Enlightenment period. He argues that, for example in the work of John Locke (1689) and William Penn (1680), there was a "heterodox position that religion *ought"* (original emphasis) to be an essentially private matter and distinct from matters of the state (Fitzgerald, 2007:36; Masuzawa, 2005:20).[269] However, as a number of critical religion scholars argue this distinction between religion and

---

[268] See also Bhandar, 2009; Mahmood, 2009. Masuzawa makes a similar argument particular in relation to the colonial context in which non-Christianness and religion came to be understood in orientalist scholarship (2005:20). See also Mahmood's (2009) work on secularism as a regulatory discourse discussed in chapter two.

[269] Fitzgerald goes on to discuss how various Christian thinkers did not imagine the idea of a neutral, nonreligious state to actually be separated from religion; rather this idea appeared later, for example in relation to the American Constitution (2007:36).

secularity and therefore religion and politics is not only a product of a specifically Christian European history, it is also a somewhat false dichotomy (Asad, 1993 and 2003; Masuzawa, 2005; Jakobsen and Pelligrini, 2008).[270] In Asad's terms, the 'phenomenological' approach to religion within RE can be viewed as an authentication of certain instantiations of religion over others (1993:37-39); [271] and this process cannot be entirely de-politicised through the so-called secular authority of educators or the state (Fitzgerald, 2007:36).[272]

I now go on to discuss the religion-secular binary in relation to what is being posited as 'common values' derived and justified through communitarian theory. Here too I suggest that these are in essence Christian values that come to circulate in governmental discourse as universal and secular.

5.6 Common values and the influence of Christianity: communitarian theory in education

In response to the presence and awareness of non-Christian children in schools, it was not only the content of RE that was affected, but also the purpose and aims of its teaching. As outlined earlier in this chapter, RE became increasingly viewed as an important contributor to community cohesion. At the same time, community cohesion and citizenship education were gaining their own independent prominence in education law and policy.[273] A crucial influence on this process, and

[270] Not least because of the role of colonialism and racialisation in the production and representation of non-Christianness (Fitzgerald, 2007). See also Miles and Brown (2003), and chapter two in relation to racialised representations of non-Christianness and colonialism.
[271] This is discussed in the context of Asad's critique of the anthropologist Clifford Geertz's conceptualisation of religion discussed in chapter two (Asad, 1993: 27-54).
[272] See also chapters two and six.
[273] I will discuss their role in relation to faith schools in further detail in the next chapter.

an attempt to move away from a specific religious heritage in the teaching of children's morality, is the concept of 'common values' developed under the NL government to which I now return. Values were a critical element in the homogenising and nation building strategies in NL discourse, which claimed that there are 'common' or universal values essential to social cohesion. In this section, I examine the particular religious influences underpinning the normative force of these 'common values' within the education field.

Tony Blair referred to the importance of values under his premiership on numerous occasions. Early on in *The Third Way,* a document often referred to as his 'personal manifesto', Blair articulated his commitment to the notion of values (Blair, 1998).[274] In this document he outlined what he believed to be the four essential values to achieve social justice, two of which are community and responsibility (Blair, 1998:3). It is this statement of the importance of community, particularly within social policy, that led commentators, such as Annette and Arthur, to highlight the 'communitarian' philosophy within NL education policy (Annette, 2005; Arthur, 2000:22; Driver and Martell, 1997).

Although communitarianism covers a diverse range of perspectives, it broadly revolves around re-establishing the importance of community (the collective) in order to curb the emphasis placed by key liberal thinkers such as Rawls (1971) or Dworkin (1978) on individualism and individual rights (Etzioni,

---

[274] My aim is not to explore Blair's 'Third Way' politics or to pinpoint the exact nature of the Christian moral philosophy that underpins NL policies, particularly as this is a subject of analysis undertaken by others, see Arthur (2000:23) and Annette (2005:195). Rather it is my objective to interject the relevant parts of this literature to the debate on faith schools as the impact of this remains largely unexplored by the education studies literature.

1996; Arthur, 2000:5-26; Delanty, 2002:163).[275] Etzioni, a key proponent of a communitarian approach to education, views the 'rights culture' as ignoring the need for individual responsibilities and social obligations (Etzioni 1996:163). He and other key communitarians argue that these 'values' would better facilitate members of society working towards the "common good", in turn creating a more cohesive and productive society (Etzioni 1996:163).[276] I will return to this productive aspect of (religious) values in relation to children in my discussion of social capital theory in the next chapter. Bearing in mind the identification of communitarianism by Arthur (2000) and others in NL social policy (Delanty, 2002; Driver and Martell, 1997), it follows that 'responsibility' goes alongside 'community' as one of the four values in Blair's *The Third Way*. For example, in his famous Wellingborough speech (1993) Blair specifically addressed resolving the issues of family breakdown and crime, in the wake of the James Bulger killing, in communitarian terms:

> The importance of the notion of community is that it defines the relationship not only between us as individuals but between people and the society in which they live, one that is based on responsibilities as well as

---

[275] See Delanty (2000) for a discussion of the different conceptualisations of community, from classic sociological functionalist theories (Tönnies, 1957; Durkheim, 1960) to the later work of writers such as McIntyre, 1981; Taylor, 1989; Sandel, 1982; Bellah, 1992. These latter perspectives are discussed in more detail in Driver and Martell, 1997:28; Arthur, 2000:5-26; Delanty, 2002. Also, note that I do not wish to oversimplify the distinction and the nuanced differences between the communitarian and liberal positions mentioned, particularly for example in the work of Kymlicka (1989 and 1995) which as Delanty states, demonstrates many communitarian arguments from a liberal perspective (2002:161). See also his discussion of the work of Taylor (2002) as a form of liberal communitarianism (Delanty, 2002:163-164).

[276] Other key communitarians include McIntyre, 1981; Sandel, 1982; Taylor, 1989. See also the work of Phillip Selznick (1992) and Michael Walzer (1983).

rights, on obligations as well as entitlements. Self-respect is in part derived from respect for others. (Blair, 1993, cited in Rentoul, 1996:293).

Tony Blair's communitarianism is self avowed; he himself acknowledged the intellectual influence of various communitarians such as the moral philosopher John Macmurray,[277] (Blair, 1996:59) and the key communitarian proponent in the USA, sociologist Amitai Etzioni (Arthur, 2000:21 and Annette, 2005:192).[278] However, this communitarianism has not been just a particular personal philosophy of Blair with no wider impact on NL policy as a whole. Indeed, Stephen Timms, the former Schools Secretary, made the communitarian element in NL education policy clear in a speech on 'Values in Education':

> Values have been key to our educational policy...We need a new sense of civic involvement and responsibility in a new generation of voters...We want pupils to develop into confident members of society to contribute to their own communities, because community involvement is an important way of generating a vital sense of shared responsibility for what is happening (Timms, 2002).[279]

As Tony Blair highlights, an important method of promulgating communitarian ideas is through the notion of values and different communitarians have proposed different forms that 'public' values might take. For example, in the US context,

---

[277] Macmurray emphasised communitarianism in his brand of ethical socialism; see Bevir and O'Brian (2003) for a detailed exploration of Macmurray's work.

[278] See also the biographies of Blair for example, Stephens (2004:29) and Rentoul (1996:291).

[279] Speech at the Greenbelt festival 26 August 2002 available on <www.stephentimms.org.uk/969df3e6-f62d-0f44-d14d-641da4e3aa04> accessed 14 November 2008.

Bellah (1992) discusses the notion of a value system that would act as a "civic" or "public religion" which again, would serve to counter the rise of individualism and "community breakdown" (discussed in Annette, 2005:191).[280] Arguably Bellah's vision echoes Blair's thinking on the importance of community "to maximise a just society" (Blair, 1998:3) and to deal with "the wreckage of our broken society[281]" (Blair, 1996:68).[282] Moreover, citizenship education has also been cited by NL government Ministers as another vehicle of values to engender a sense of civic responsibility amongst young people in particular. For example, Stephen Timms stated on 26 August 2002:

> "Take Citizenship Education. Low turnouts at elections and rising apathy on politics is alarming. Citizenship Education becomes compulsory on the curriculum next month and it will help pupils to form their own opinions on political issues, and to deal with the difficult moral and social questions that arise in their lives and in society."[283]

Yet, what role does faith or religion and specifically Christianity play in these communitarian debates on strengthening community, citizenship and engendering

---

[280] See also Bellah (1967:1-21) following Rousseau's usage: "On Civil Religion" in *The Social Contract,* book 4, chapter 8 (1762).

[281] Incidentally, a term that is now being heavily deployed by the new and current Conservative Prime Minister David Cameron, see for example 'Let's mend our broken society' (27 April 2010) <www.conservatives.com/News/Speeches/2010/04/David_Cameron_Lets_mend_our_broken_society.aspx> accessed 28 May 2010, and also in the faith politics of the former Conservative party leader Iain Duncan Smith, discussed in Annette, 2005:192.

[282] These communitarian ideas discussed have also been influential amongst neo-liberal conservatives in the USA and Annette claims that the political language used by both the New Democrats (for example, in the language of "restoring broken covenants" also espoused by the Republican George W. Bush administration) and NL follows a similar vision in highlighting the need to 'revitalise' communities (Annette, 2005:192-4).

[283] At the Greenbelt festival. Speech available <www.stephentimms.org.uk/969df3e6-f62d-0f44-d14d-641da4e3aa04> accessed 14 November 2008.

more social responsibility amongst young people? One such role is that religion, particularly Christianity, is viewed as providing a ready source of values such as community and responsibility. This is not only apparent in, for example, the work of key communitarian thinkers from North America but also in the UK context (Arthur, 2000:8).[284] For example, in the next chapter I examine the role of Christian socialism as a prime example of the role of Christianity in politics reflected in communitarian values. Indeed, Tony Blair explicitly made the point that faith is a source of values and therefore has an important role to play in politics in his speech to the 2001 Christian Socialist Movement conference:[285]

> Politics without values is sheer pragmatism. Values without politics can be ineffective. The two must go together. So faith in politics isn't only about the relationship between faith and politics. It is also about having faith in the political process itself and its capacity to achieve a better society. In an age of cynicism about politics, this cannot be emphasised too strongly.[286]

This importance given to faith in the formation of values for society and education is inherent within the communitarian education movement. As stated above, Etzioni, one of the most vociferous and influential proponents of values in education in the USA but also the UK, explicitly views schools as having a role in the

---

[284] North American key thinkers include: McIntyre, 1981; Sandel, 1982; Taylor, 1989; Selznick, 1992; Walzer, 1983. Although note Aristotle (in his work 'Politics') also formulated a concept of the "common good" which was taken up in the work of Thomas Aquinas (1225-75) an influential Christian theologian (discussed in Arthur, 2003:49; see also Cristi, 2001).

[285] And this point is reiterated by other government ministers, such as Stephen Timms, see above.

[286] 'PM Speech to the Christian Socialist Movement', 29 March 2001 <webarchive.nationalarchives.gov.uk/+/www.number10.gov.uk/Page3243> accessed 4 June 2010.

character development and even formation of children (1995:8.).[287] He and others, such as Haldane (1995) and McIntyre (1987), believe that "the purpose of education is the reinforcement of values" (Etzioni, 1997:92). Although Etzioni views himself as a secular communitarian, he nonetheless views religion, like natural law, as a source of universal values that make up the common good (1996:163).[288] He contends, however, that these common or "overarching values" - such as "thou shalt not kill" - can be understood as secular when derived from "deontological normative factors" such as ethics (1996:164).[289] However, Minogue claims Etzioni's conception of the common good and traditionalist views on the family and education, whilst not derived from belief, have much in common with Catholic social teachings (1997:163). Moreover, Etzioni's examples (such as "thou shalt not kill") tend to be explicitly biblical or couched in biblical language. Even his argument on the secular sourcing of these values by virtue of the fact that all people "are basically the same" - is backed up in reference to Christianity:

> This notion is well captured in the refrain: "We are all God's children" and in the religious ideal of condemning the sin but reaching out to the sinner (1996:166).

I suggest that this fusion of faith based, and what Etzioni refers to as "deontological normative factors" (1996:164), is not easily separable. Or as Minogue puts it,

---

[287] See also Arthur, 2000:50; Minogue, 1997:161

[288] Ignoring the co-imbrication of natural law and Christianity, see Arthur for a discussion of this (2003:53).

[289] Although a discussion of the ethics literature and its interrelationship with religion is beyond the scope of this thesis, it is worth noting that Etzioni himself fails to discuss this literature at any length (only in a footnote) and therefore does not substantiate this (rather significant) claim. Also see Rosenblum who claims that "the connection between secular ethics and religion is undisputed" (2000:74), and Arthur for a discussion of Neo-Aristotelian ethics in Christianity (2003:48).

Etzioni's values discourse is 'Old (communion) wine in new bottles' (1997). Etzioni's brand of values discourse may be understood as part of the co-imbrication of the religious and the secular, or what De Vries has referred to as the 'post-secular' (De Vries, 2008).[290] This co-imbrication between the so-called religious and secular is also analysed by Arthur (2000) within education. According to his analysis, the expectations/ethos of church schools reflect the goals of the avowedly secular communitarian education movement in Britain which advocates for a restoration of 'civic virtues' through a moral education in schools (Arthur, 2000:49).[291]

In 1996, a forum on 'values in education and the community' was formed to come up with a statement of values commonly held by most people (Keast, 2005:214). The agreed statement was sent to "the main religious groups in England" who endorsed it, and it was used in the review of the national curriculum in 1999 (*ibid*).[292] As a result, the new 2002 national curriculum included the first ever statement of the aims, values and purposes of the school curriculum (*ibid*).[293] Alongside this, as part of what Keast describes as the 'social curriculum' namely, adding a social inclusiveness dimension, citizenship was introduced for the first time into the national curriculum for secondary schools.[294] As Keast notes, these measures were viewed as part of having some more control over the "potentially

---

[290] See also Jakobsen and Pelligrini (2008) and chapter one.

[291] Although the secular British community education movement has not gone as far as radicals in the US such as Etzioni who calls for the 'internalisation' of values in schools (Arthur, 2000:57). Annette also accords the NL support for faith schools to their communitarian goals (2005:191). See further discussion on this below.

[292] The source is not clear who these 'main religious groups' are.

[293] *National curriculum handbook for secondary teachers* (DfEE, 2000) and *National curriculum handbook for primary teachers* (DfEE, 2000).

[294] As well as a non-statutory framework for Personal, Social and Health Education for all key stages with links to citizenship (published in both national curriculum handbooks (DfEE, 2000). See also Keast (2005:214).

divisive" effects of faith schools (*ibid*). Arthur goes further, arguing that the incorporation of values into the national curriculum was a continuation or re-emergence of a 'character education', seeking to instil children with morality and notions of good citizenship (Arthur, 2000:24). He contends that this kind of education has always explicitly been part of the British education system, stemming from the fact that most public education had traditionally been provided by churches (Arthur, 2000:24).[295] Arthur also cites as evidence for this argument the fact that schools must provide a social, moral, cultural and spiritual education throughout the curriculum as well as pastoral support and guidance for all pupils (*ibid*); activities which he believes to be either inspired by, or remnants of, Christianity's historic and privileged role in education. Indeed, values such as promoting a sense of social responsibility as well as social cohesion and community involvement is, as mentioned above, now stipulated in the preamble to the national curriculum.[296] The co-imbrication of Christianity and the secular is also apparent in the call for religious organisations, including church schools, to play a bigger role in society. I return to this point in the next chapter where I explore how church schools values' in particular are viewed as productive of good citizenship and community cohesion.

[295] See also Arthur (2003) for an in depth study of 'education with character' and its role in British educational history.

[296] See also Dwyer (1993) who also notes that the current legal requirements to have a daily collective act of worship and teach RE programmes that 'reflect the dominant Christian culture within society' might be viewed as evidence of the hegemonic position of Christianity within the education system, discussed in Arthur (2000:24).

5.7 Concluding remarks

In this chapter I have explored perspectives from the LAR literature that debate whether or not the legal requirement that collective worship in schools be 'wholly or mainly of a broadly Christian character' signals a reinforcement of a Christian social and moral order within education law. I also examined key LAR scholarship discussing how the problematic of accommodating an increasing non-Christian student population within an educational system with a strong Christian legacy, was sought to be resolved by a liberal and secular education philosophy of moving from 'religious instruction' to 'religious education' and by developing a 'phenomenological' approach to religion within the teaching of RE. Drawing on the work of Fitzgerald (2007), I argued that this 'phenomenological' approach to religion is premised on a notion of religion as a mainly onto-theological concept, one that revolves around empathising with how a believer might experience their faith through certain ritual practices related to worship or the celebration of religious festivals. In making this argument I sought to highlight how the LAR literature, whilst debating the pre-dominance of Christianity within education, nonetheless, largely fails to acknowledge how the onto-theological model of religion promulgated through RE, *itself* came into being. As I argued in chapter two the onto-theological model of religion was one that emerged or, as Masuzawa (2005) puts it, was 'invented' in a particular historical period of orientalist scholarship.

In bring this critical religion perspective to bear upon the LAR literature, it has been my contention that a key analysis that comes to be sidestepped within that latter literature, is an interrogation of the concept of religion itself. It has been

my aim to add to the socio-legal literature on religion the need to challenge the way an onto-theological notion of religion has come to circulate as a universal, cross-cultural and de-politicised category, particularly within RE and within juridical discourse on religion and education. I have argued that what is at stake in undertaking this analysis is an acknowledgment of how religion within RE, even when seeking to be inclusive of non-Christianness has, nonetheless, been formulated from the 'positional authority' of a Christian viewpoint, albeit that it has come to be promulgated as part of a contemporary liberal and 'secular' educational movement.

The onto-theological understanding of 'all religions' within RE is all the more relevant as the subject became increasingly posited by educationalists and government Ministers as an important part of how children might learn about and become 'tolerant' of children from other ethnic and religious backgrounds. I explored how more recently this function of RE has come to be seen as part of a wider citizenship and 'community cohesion' strategy in which a core set of values has come to circulate. I argued that this values discourse whilst at times articulated as secular and universal, nonetheless, might also be understood as underpinned by Christian thinking. I suggested therefore, that there are two key points that need further study within the LAR literature: firstly, the necessity to uncover the history and positional authority behind *how* religion has come to circulate both onto-theologically and as part of a values discourse within education. The second key point is to attend more closely to the political work these instantiations of religion seek to achieve through education, namely managing diversity within society and

nation building. I now turn to exploring these themes further in relation to church schools' values in the next chapter.

CHAPTER SIX

FAITH SCHOOLS: RACIALISED RELIGION, COMMUNITY COHESION AND BELONGING

6.1 Introduction

> Through their ethos and curriculum schools can promote discussion of a common sense of identity and support diversity, showing pupils how different communities can be united by shared values and common experiences. One of the aims of the new secondary curriculum is for all young people to become responsible citizens who make a positive contribution to society and citizenship education offers opportunities for schools to promote community cohesion (DCSF, 2007b:1).[297]

Under the Labour party government (1997-2010), which I will refer to as New Labour (NL),[298] faith schools (re)gained an increasingly prominent place in the public consciousness, causing a barrage of media controversy and anxiety over the divisiveness of these schools, particularly the Muslim ones. Within their first year in office, the government agreed state funding for two Muslim schools for the first time (Burtonwood, 2003:415); and in 2001 the NL Government outlined their plans for the expansion of a range of faith schools, including a significant expansion of

---

[297] *Guidance on the duty to promote community cohesion.*

[298] I refer to the Labour government (1997-2010) as New Labour (NL) to denote the particular influence of 'third way' thinking, discussed later on in this chapter.

CoE schools.[299] These plans elicited heavy criticism from various quarters, including from within the NL party.[300] Particularly in the wake of 9/11 and the 'race-riots' in the north of England (Oldham, Bradford and Burnley) in that same year (2001), religion became increasingly profiled as a factor that gave rise to social divisiveness and political radicalisation.[301] It was feared that an expansion of faith schools would only contribute to this. Nonetheless, the NL government maintained its position that faith schools constituted a positive part of the educational system, attributing academic success to the values that these schools enshrined in their ethos (DCSF, 2007a). Interestingly, they even posited that faith schools had an important role to play in achieving community cohesion (*ibid*).

Much of the academic debate on faith schools has become polarised, either making the case for faith schools in support of government policy, or critiquing it.[302] The grounds for support and critique invoke a number of different, but overlapping, dichotomised issues similar to those relating to the child welfare issues, for example, children's rights to autonomy versus parental rights (Parker-Jenkins *et al* 2005).[303] Other points of debate include whether there should be public state funding for religious orientated education, which echoes wider debates on the erosion of secularism in the public sphere (British Humanist Association, 2006).

---

[299] Green paper, *Schools: Building on success (*DfES, 2001a); White paper, *Schools: Achieving success* (DfES, 2001b).

[300] For example NL MPs critiquing government policy in select committees; a cross party amendment to the Education Bill with the support of 45 NL MP's and tabled by NL MP Frank Dobson (not passed due to Conservative support for the Bill); and Estelle Morris, then NL Secretary of State for Education, privately expressing doubts about the expansion of faith schools (Gillard, 2002:18).

[301] For example independent reports following the riots and comments by Union bosses discussed below. See also Short, 2002; Gillard, 2002 and 2007.

[302] See Gardner *et al* (2005) for an overview of the debate.

[303] See also Ahdar (2000b).

Perhaps the most contentiously debated issue has been the question raised above, of whether faith schools are divisive and undermining community cohesion (Judge 2001; Pring, 2005; Halstead and McLaughlin, 2005; Burtonwood, 2003, Parker-Jenkins *et al*, 2005), *or*, on the contrary, play an important part in facilitating community cohesion (Short, 2002; De Jong and Snik, 2002).[304] The aim of this chapter is not to add to this body of literature by setting out an argument for or against faith schools. I do not seek to intervene in the 'rights' debates, nor do I seek to argue for or against an entirely secular education system.[305] I also do not focus my analysis on the issue of whether faith schools are divisive.[306] Rather, my analysis contributes a different perspective to the faith schools debate by foregrounding the role of religion.

In the previous chapter I argued that the cross-cultural approach to, or universal language used in, conceptualising 'religion' in RE, and promoting 'common values' across the curriculum, obfuscates the Christian underpinnings of these

---

[304] See Burtonwood (2003) for a critique of the perspective put forward by Short (2002), and De Jong and Snik (2002). These academic debates, which occur mainly within the education studies field, tend to base their arguments either within a liberal philosophy framework (Short, 2002; De Jong and Snik, 2002), or in empirical studies including statistics on, for example, schools' performance tables and/or the (class/poverty) demographics of schools (Schagen and Schagen, 2005). Some of the literature attempts to marry the liberal philosophical arguments with empirical data (Grace, 2003).

[305] Although my discussion below will make reference to issues of secularity, my focus is on critiques of the secularism-religion dichotomy as one that masks the Christian genealogy of secularism and the enduring co-imbrication of religion and secularism (Jakobsen and Pelligrini, 2008; De Vries, 2008; Asad, 2003).

[306] That debate needs to be "grounded in deeper questions of socio-economic and demographic marginalisation of minorities ...in contemporary society" (McKinney, 2006:109), and in broader issues taking account of poor schooling (Judge, 2001:473). See also the literature on institutional racism within the education sector, for example, Modood and May (2001) and Jackson (1995). Parker-Jenkins *et al* (2005) have also stated - in their study of the social, cultural and religious context in which newer forms of faith schooling has emerged - that such schools need to be analysed as part of the ways in which minority ethnic peoples are struggling to advance themselves on the basis of the multiplicity as well as inseparability, of their religious, ethnic and cultural identities.

normative forces at work. Thus, I outlined how the historical legacy of Christianity in education continues implicitly and explicitly through the development of an onto-theological model of religion in RE, and the influences of contemporary communitarian theory on values in education. In this chapter I suggest that the NL discourse supporting faiths schools also masks a normative Christian framing of religion. NL argued their support for faith schools mainly by holding up their particular values and ethos, thereby implying that it is the values of schools of all faiths that are referred to. However, I suggest it was in effect the values of Christian schools in particular that circulated as the normative influence, and that were considered by the NL government as a productive force in children's lives and education. I examine the influence of social capital theory, highlighting how it is church schools in particular that are viewed as producers of good citizenship and cohesion

In this chapter I also highlight the work that these Christian/secular values do in being posited by the government as a universal benchmark for other schools. I suggest that through citizenship and community cohesion discourse, Christian values implicitly and explicitly play a role in drawing the parameters of acceptable non-Christian religion, predominantly in this case study, Islam. Christian values are held up as a universalised standard to be achieved by schools that are perceived as potentially divisive, a concern that concentrates on Muslim schools in particular. Thus, the key argument in this chapter is that the values and cohesion discourse might be understood as racialising non-Christianness as divisive and conflictual. Yet, the values discourse might also be understood as de-racialising in seeking to shape

children's identities through education to meet the Christian/universal standard of citizenship and behaviour within the nation.

6.2 Faith Schools under New Labour

As mentioned in chapter five, the Labour position on religion in education, including on faith schools, had shifted in the 1980s from being opposed, to being in favour. This was reflected in the SSFA 1998, which made clearer the definition of faith schools, or rather 'schools with a religious character'.[307] Fearing Labour's traditional opposition to faith schools, Anglican Bishops, who are entitled to sit in the House of Lords, initially threatened to defeat the Bill (Gillard, 2002:15). In response, David Blunkett, the then new Secretary of State for Education assured the Bishops that he "did not want to upset the compromises of the 1944 Education Act which allowed church schools a considerable degree of autonomy within the state system" (Gillard, 2002:15). Blunkett stated "we value the role that church schools play and therefore we will not be introducing any measures which would weaken or diminish that position".[308]

Labour's original opposition to state funding for faith schools because of their "potential for increasing religious, racial and cultural divisiveness",[309] was

---

[307] Schools with a religious character are defined as having "at least one governor representative of the interests of the religious group concerned, and which has school premises operating for the benefit of the religious group or is providing education according to the tenets of the faith group" (s 5(1)(a-b) Religious Character of Schools (Designation Procedure) Regulations 1998, cited in Parker-Jenkins *et al*, 2005:33).
[308] Reported in John Carvel, *The Guardian* (1997) cited in Gillard (2002:15).
[309] Anon (1988) quoting from a Labour party circular on *Education in a Multicultural Society,* cited in Jackson (2003: 91).

particularly influenced by a 1987 Commission for Racial Equality report, *Terror in Our schools,* that highlighted widespread racism and a lack of respect for cultural diversity in county (now community) schools (Jackson, 2003:91).[310] This initial impetus towards policy that favoured faith schools, was later compounded by a strong belief amongst several NL Ministers, including the Prime Minister Tony Blair, that faith schools, in particular church schools, nurture an 'ethos' that produces academic success and moral character. Indeed, school 'ethos' was explicitly incorporated into the SSFA 1998, which required all schools with a religious character to have an 'ethos statement' stipulated in the school's Instrument of Government (Jackson, 2003:89).[311] Perhaps one of the most notable examples of a government Minister highlighting the importance of church schools 'ethos' was in a speech made by David Blunkett to the Anglican Diocesan Directors of Education in England and Wales in 1999. He stated that church schools have an ethos that he wished could be bottled so that it could be distributed to other schools (Brown, 2003:103; Gillard, 2002; Parker-Jenkins *et al,* 2005:109).[312]

It seems then that although NL favoured the 'ethos' demonstrated by church schools in particular, they also recognised the discrimination faced by ethnic and religious minorities in mainstream schooling and indeed had made a manifesto promise to extend public funding to schools of other faiths on this basis. Perhaps

---

[310] Creating more faith schools has been criticised in the literature against faiths schools cited above, as an inappropriate and ineffective way to deal with racism in schools and society at large.
[311] Regulation 6(4) of the Education (School Government) (Transition to New Framework) Regulations 1998 (SI 1998/2763).
[312] These sources discuss Blunkett's speech as reported in Polly Toynbee, 'Religion must be removed from all functions of state', *The Guardian* (12 December 2001) <www.guardian.co.uk/society/2001/dec/12/communities.comment> accessed 1 June 2010.

this was also partly to do with the government not wanting to be seen as discriminatory by providing state funding mainly to Christian schools in an increasingly multicultural society (Gillard, 2002:15).[313] Thus, in 1998, Orders under the new SSFA created new state funded faith schools including Islamia Primary School in London (Brent) and Al Furquan Primary School in Birmingham (Sparkhill), which were the first state-funded Muslim schools in England (Gillard, 2002:15), and in 1999 two more Jewish schools as well the first Sikh school received state funding (Gillard, 2002:16). Whilst the state funding of non-Christian schools continued to expand,[314] the Anglican Church commissioned Lord Dearing to write a report on the future of CoE schools in England and Wales. The Dearing report, *The Way Ahead,* published by the Archbishops Council in 2001, outlined proposals to expand CoE primary schools and add one hundred new secondary schools in five years, either by expanding existing ones, opening new ones or taking over failed schools (Gillard, 2002:16).

NL support for the expansion of faith schools, and in particular the emphasis on the excellence of church schools, gained increasing momentum in their second term in office. In the run-up to the 2001 general election, Tony Blair told a conference of faith groups organised by the Christian Socialist Movement that church schools were "a pillar of the education system, valued by very many parents

---

[313] This is, in fact, clearly stated by the former Labour party Home Secretary Charles Clarke in an interview by Professor Richard Dawkins on a recent Channel 4 documentary entitled 'Faith School Menace?' (broadcast 19 August 2010) <http://www.channel4.com/programmes/faith-school-menace/episode-guide/series-1/episode-1> accessed 15 October 2010.

[314] For example, in 2001 the previously independent Feversham College in Bradford became Britain's first state funded Muslim secondary school for girls (Gillard, 2002:16). Faith school expansion also included Christian denominations that had not previously received state funding, for example, the John Loughborough secondary school in London (Haringey) ran by Seventh Day Adventists, also received state funding in 1998.

for their faith character, their moral emphasis and the high quality of education they generally provide".[315] A few months later the then school standards minister Stephen Timms stated:

> eventually the great majority of secondary schools would soon either be specialist or boast a distinctive character or ethos as a "beacon" school or one based on a single religious faith.'[316]

Outside of the faith communities and groups these comments were sceptically received; particularly in light of the 'race riots' in Bradford which then spread to Oldham and Burnley in mid July of that year (2001) (Jackson, 2003:94). These events fuelled the contention that faith schools were divisive and contributed to 'ghettoisation' within certain areas. Opposition to faith schools became even more fervent as the government white paper, *Schools: Achieving success* (DfES, 2001b), was published on the 5th of September 2001, only a week before the events of September 11th in New York and Washington. The white paper demonstrated the government's clear commitment to significantly expanding faith schools, stating:

> we wish to welcome faith schools, with their distinctive ethos and character into the maintained sector where there is clear local agreement. Guidance to School Organisation Committees will require them to give proposals from faith groups the same consideration as those from others, including LEAs (DfES, 2001b:45).

---

[315] <www.number10.gov.uk/output?Page3243.asp> accessed 3 June 2009; also reported in Stephen Bates, *The Guardian* (30 March 2001), cited in Gillard (2002:16).
[316] Reported in Rebecca Smithers, *The Guardian* (19 July 2001) cited in Gillard (2002:16).

The white paper supported the proposals from the Dearing report for a significant expansion of CoE schools (Gillard, 2002:16); whilst considerable interest was also expressed by minority faith communities in setting up maintained faith schools.[317]

Notwithstanding the delight at the white paper from certain religious quarters, the 2001 events of 9/11 coupled with the hyped coverage of the Holy Cross incident[318] were held up as prime examples of the dire consequences for religious divisions in society.[319] Faith schools were posited as key sites contributing to this segregation as well as being potential breeding grounds for religious radicalisation and extremism (Gillard, 2002 and 2007; Short, 2002). The Ouseley report (2001),[320] commissioned by Bradford Vision after the Bradford riots, appears to confirm these opinions stating:

> There are signs that communities are fragmenting along racial, cultural and faith lines. Segregation in schools is one indicator of this trend... There is "virtual apartheid" in many secondary schools in the District (2001:6).

Despite this significant criticism levelled against faith schools generally, some of which was specifically aimed at the newly opened Muslim secondary school in Bradford, as well as Muslim schooling in general, the government continued to

---

[317] A newspaper report stated that: "Forty projects were already being planned, including £12m for an Islamic secondary school for girls in Birmingham, an evangelical Christian school in Leeds and a new Jewish school in London. The Salvation Army and the Seventh Day Adventists said they were evaluating 'opportunities created by the white paper" (Tracy McVeigh, *The Observer* (30 September 2001), cited in Gillard, 2002:17).

[318] Allegedly involving Protestant residents shouting abuse and throwing stones at five year old Catholic girls going to their RC school 'the Holy Cross' in Ardoyne, Northern Ireland in June and September 2001.

[319] HC debate col 448 on the Education Bill, 22 Nov 2001.

[320] By the Bradford District Race Review Panel chaired by Sir Herman Ouseley (2001) entitled *Community pride not prejudice. Making community work in Bradford.*

defend its white paper proposals, and the plans to expand the number of faith schools were eventually implemented in the Education Act 2002 (schedule 8).[321]

At times the tensions between these proclaimed benefits of the faith schools 'ethos' and fears of their potential divisiveness were apparently 'resolved' through 'parental rights', or 'parental choice', as well as 'diversity' or 'tolerance' arguments. For example, Estelle Morris, the Secretary of State for Education - taking over from David Blunkett - had privately warned for caution in pursuing the faith schools expansion.[322] Nevertheless, at a later speech to the CoE General Synod, Morris seemed to go beyond towing the party line saying that anyone who was against government proposals for more faith schools was intolerant (quoted in Gillard, 2002:18). She also stated:

> for hundreds of years we have tolerated and respected parents' right to choose a faith-based education. Are we now saying that in 2001 we can no longer be tolerant about that? (Gillard, 2002:18).

Jackson (2003) also points out that the NL government continually justified the expansion of the various types of faith schools on the basis of enhancing parental choice in providing a diversity of schools. Chitty notes how the 2001 white paper "pursues the idea of extending choice and diversity with a single-minded devotion.

---

[321] Criticism of Feversham college included for example "some of Bradford's most moderate and liberal politicians" (Martin Wainwright, *The Guardian* (17 April 2001), cited in Gillard, 2002:17). David Bell, Chief Inspector of Schools, in a speech to Hansard Society singled out Muslim schools calling them a "threat to national identity". 'Full text of David Bell's speech', *The Guardian* (17 January 2005) <www.guardian.co.uk/education/2005/jan/17/faithschools.schools> accessed 3 June 2010.

[322] TES, 1 March 2002 cited on <www.learning-together.org.uk/docs/called9.htm> accessed 13 August 2008.

Indeed, the word 'diversity' appears seven times in the space of a short three-page introduction" (Chitty, 2002:13). Moreover, some of the proliferation of faith schools was obscured in the creation of a new type of school intended to create 'better choice' for parents, namely, Academies.[323] These schools are public/private partnerships where the 'private' body might be a religious or charitable organisation, or a business, which in return for providing funding to the school, could exercise significant control. Gillard discusses how this new type of school seemingly privileges religion through the back door (Gillard, 2007:4).[324]

A more comprehensive response to the concerns over divisiveness, as well as the criticism that it was mainly the parental choice for *certain* faith groups that was increased, became apparent in 2006-2007. In 2006 the CoE made a commitment that any new CoE schools should have at least 25% of places available to children with no requirement that they be from practising Christian families.[325] This commitment became formalised in a 2007 joint vision statement, *Faith in the system* (DCSF, 2007a).[326] In this document, the government and faith school

---

[323] Academy schools were the brainchild of Blair's chief education adviser, Andrew Adonis (Gillard, 2002:16). They were first created in 2000 and became embedded in the 2002 Act.

[324] See Gillard (2007:216) for a comprehensive discussion of the opposition to Academies. See also Bradney, (2009:131) and Edge (2002:306) noting how these types of schools privilege a great deal of space within education for religion. Concerns over the sponsoring of Academy schools by faith groups have also been expressed, for example, in <www.humanism.org.uk/news/view/555> accessed 28 May 2010. Since 2004 the NL government has significantly expanded this type of school, see the DfES (2004) *Five-year strategy for children and learners*. The current Conservative and Liberal Democrat coalition government has also expressed its support for Academies.

[325] Alexandra Smith, 'Church promises school places to non-Christians', *The Guardian* (3 October 2006) <www.education.guardian.co.uk/faithschools/story/0,,1886650,00.html> accessed 28 May 2010.

[326] However, the document refers to a prioritisation of 25% of places for children in CoE schools from "non-practising Anglican families", which appears more restrictive than the earlier CoE commitment to prioritise places for children of "non-practising Christian families". There is also a further question about whether the 'non-practising' reference means that this measure might include families of any non-Christian background. The document also stated that the new Academies with a religious

providers set out more broadly their shared understanding of the contribution faith schools (or 'school with a religious character') make to education and to society in England (DCSF, 2007a:1). The document reinforces the role of RE in promoting community cohesion, a role that had increasingly become more prominent within RE, as discussed in chapter five (DCSF, 2007a:10). At the same time the promotion of community cohesion in schools beyond RE was also developed. In 2006 a duty to promote community cohesion was imposed on all maintained schools,[327] and a *Guidance on the duty to promote community cohesion* was published in 2007 (DCSF, 2007b).

The 'absorbing' of a certain number of non-Christian children in CoE schools, and the increased duties to promote 'awareness of others', and 'community cohesion' through RE and citizenship education, may be viewed as an attempt to assuage those concerned about the potential divisiveness of faith schools. They may also be viewed as a presentation by the NL government of faith schools and RE as part of the solution to overcoming lack of community cohesion, rather than being part of the problem (Keast, 2005:215). Indeed, a school linking project became an integral part of the promotion of community cohesion (DCSF, 2007b:10).[328] The government clearly stated its belief that faith schools "can make an important

---

character would be *expected* (not required) to give priority to pupils of other faiths or of no faith for at least 50% of their places (DCSF, 2007a:18).

[327] The Education and Inspections Act 2006 inserted a new section 21(5) to the Education Act 2002 which introduces a duty on the governing bodies of maintained schools to promote community cohesion. The duty came into force on 1 September 2007. Alongside this, Ofsted are required to include schools' contributions to promoting community cohesion in their inspection reports.

[328] As recommended in Sir Keith Ajegbo's 2007 *Diversity and Citizenship Curriculum Review* (DCSF, 2007b:13).

contribution to community cohesion by promoting inclusion and developing partnerships with schools of other faiths, and with non-faith schools" (*ibid*).

Clearly NL was committed to faith schools, as well as to maintaining the position of religion within schools 'without a religious character' through RE and worship as discussed in chapter five. This commitment was also apparent in the government's blocking of an attempt to create the first secular school in Britain in 2007, despite their rhetoric of 'increasing parental choice' and 'diversity'. Whilst, the government "accepted it would be popular ... said it was politically impossible"; presumably because it would bring about "a fundamental change in the relationship with the school and the established religion of the country" (Asthana, 2007).[329]

I have highlighted how the NL government supported faith schools expansion despite significant opposition from within the party, teaching unions and wider society. Ministers defended the policy against claims that point to the divisive effects of faith schools, mainly by promoting the particular ethos and values of faith schools, and their role in tackling social problems including divisiveness within communities.[330] In the remainder of this chapter I will address some of the themes

---

[329] Dr Paul Kelley, head of Monkseaton High School in Tyneside - who had argued against faith schools, stating that they "directly or indirectly influence children into a belief that a particular faith is preferable either to other faiths or to a lack of faith" - proposed plans to eliminate the daily act of Christian worship. Anushka Asthana, 'Crisis of faith in first secular school', *The Observer* (23 September 2007) <www.education.guardian.co.uk/faithschools/story/0,,2175879,00.html> accessed 23 November 2008.

[330] A discourse that is also apparent in the new Conservative – Liberal-Democrat coalition government's rhetoric on faith schools. For example, Nick Clegg, the deputy Prime Minister, stated to the Jewish News: "If we are to create a society in which everyone has a fair chance in life, we need to focus on education, above all. Faith schools have an important role to play in that, and I am keen that they become engines of integration, not of segregation. I would like to see faith schools

that arise from this overview of the development of, and discourse on, faith schools under the NL government. First, I will examine the focus on Muslim schools within the debate in relation the perceived threat of faith schools to community cohesion. Next, I will turn to the focus in the debate on the ethos and role of church schools in encouraging and promoting an 'awareness of others' and 'community cohesion'. Lastly, I will further highlight the prevalence of Christian thinking embedded within NL law and policy, through a discussion of the influence of Christian socialism.

6.3 Racialising religion: Muslim schools as a threat to community cohesion

As mentioned above, in the wake of the events of 9/11 and the riots in the north of England, Muslims schools were identified in particular as a being potentially divisive, and even a "threat to national identity".[331] However, the number of faith schools, including Muslim schools, continued to grow. Responding on the specific issue of their divisiveness, the then Schools Minister Stephen Twigg made a statement urging Muslim schools to "promote tolerance and harmony".[332] He also warned that that "religious segregation in schools must not put 'our' (the nation's) coherence at risk".[333] The House of Commons' Children, Schools and Families Select Committee also expressed concern about continued government

---

working together, so you get a network of different schools and faiths. That way, children will grow up in an environment where they are aware of the plurality of faiths and views around them." <www.libdemvoice.org/nick-clegg-on-faith-schools-1890.html> accessed 28 May 2010. However, it is beyond the scope of this thesis to discuss in any detail.

[331] David Bell, Chief Inspector of Schools in a speech to Hansard Society, reported in 'Full text of David Bell's speech', *The Guardian* (17 January 2005) <www.guardian.co.uk/education/2005/jan/17/faithschools.schools> accessed 3 June 2010.

[332] Reported in Press Association, 'Minister urges greater tolerance from faith schools', *The Guardian* (18 February 2005) <www.guardian.co.uk/education/2005/feb/18/schools.uk> accessed 4 June 2010.

[333] *ibid.*

support of faith schools, despite their perceived threats to the nation and social cohesion. In January 2008, the committee's chairman, Barry Sheerman, stated:

> Faith schools are an important area of concern. This is something the government should look at in a focused way, rather than drifting into the proliferation of faith education. I am getting reports from people in local government who find it difficult to know what is going on in some faith schools - particularly Muslim schools.[334]

The concerns were echoed by the general secretary of the Association of Teachers and Lecturers, Mary Bousted, who told the Guardian newspaper that it was time the government answered "searching questions" about how its policies on faith schools fit with those on social cohesion:

> Unless there are crucial changes in the way many faith schools run we fear divisions in society will be exacerbated. In our increasingly multi-faith and secular society it is hard to see why our taxes should be used to fund schools which discriminate against the majority of children and potential staff because they are not of the same faith. Why should state-funded schools be allowed to promote a particular faith rather than educate children to understand and respect all faiths so they are well able to live in our diverse, multicultural society?[335]

---

[334] Reported in Anthea Lipsett, 'MPs to voice concern over faith schools', *The Guardian* (2 January 2008) <www.guardian.co.uk/education/2008/jan/02/schools.faithschools/> accessed 16 August 2008.

[335] *ibid.*

Steve Sinnott, general secretary of the National Union of Teachers issued a similar statement about faith schools' selection criteria being discriminatory.[336] However, Chris Keates, general secretary of the National Association of Schoolmasters Union of Women Teachers, focused her statement more on how the focus on Muslim schools in the faith schools debate risked fuelling Islamophobia.[337] She was one of the few non-Muslim people to do so in public.

The NL government responded to the concerns over divisiveness by asserting the role of RE and citizenship education in promoting community cohesion, based on 'common values', as discussed in the previous chapter and above. A number of commentators have noted how 'community cohesion' became the official NL government strategy for 'managing diversity' in a broader sense (Fortier, 2008:3; Choudhury *et al*, 2005; Malik, 2008). An independent review team of the north of England riots, led by Ted Cantle, recommended that the institutionalisation of 'mixing' should be at the core of managing the diversity in local communities (Home Office, 2001b).[338] This recommendation was taken up by the Local Government Association in 2002, and in its guide *Faith and community: a good practice guide for local authorities*, it defines cohesive communities as founded upon a shared sense of belonging and positive inter-group contact (LGA, 2002 cited in Annette 2005:194). The guide states that:

> [M]ost of our towns and cities are places of great diversity – that is one of their great strengths. Faith is an element of this diversity. But the benefits of

---

[336] *ibid.*
[337] *ibid.*
[338] Known as the *Cantle Report.*

> this diversity cannot be taken for granted. This guide points to the fundamental importance of community cohesion, in building a prosperous and fair society where people from diverse backgrounds can flourish" (*ibid*).

As Fortier notes, this LGA guidance came to inform both local and national government policy, including within education (2008:194-195). For example, the DCSF guidance to the 2006 duty placed on schools to promote community cohesion, similarly to the LGA guidance describes it as where there is a "common vision" and all communities have a "sense of belonging" (DCSF, 2007b:3).[339] Choudhury *et al* view community cohesion as a way in which "a greater sense of citizenship" can be achieved which in turn brings about political stability (2005:46).[340] In relation to citizenship as a national curriculum subject, David Bell, the schools inspector, in 2005, stated that:

> Principally, it has brought to the fore a belief that our education system and the curriculum taught in schools, has a role to play in fostering a sense of community and social responsibility and awareness among today's younger generation.[341]

Thus, we can trace a developmental journey of the concept of 'social cohesion' from the riots on the streets of Oldham, Bradford and Burnley, to RE and citizenship

---

[339] Also, in 2006 a fixed term 'Commission on Integration and Cohesion' had been set up to develop strategies to prevent social segregation caused by several factors, including the dissemination of extremist ideologies. See Commission's final report 'Our Shared Future' (2007) <www.collections.europarchive.org/tna/20080726153624/www.integrationandcohesion.org.uk/Our_final_report.aspx> accessed 4 June 2010.

[340] See also Malik (2008).

[341] David Bell, Chief Inspector of Schools, in a speech to Hansard Society reported in 'Full text of David Bell's speech', *The Guardian* (17 January 2005) <www.guardian.co.uk/education/2005/jan/17/faithschools.schools> accessed 3 June 2010.

education in the classroom. Given this background, it is not surprising that NL discourse highlights the need for Muslim schools to ensure that they promote community cohesion. Perhaps, the increased prominence of citizenship education and the development of the concept of 'common values' to complement (or replace) RE as the vehicle through which social cohesion can be promoted, should also be understood in this context.[342] It is, of course, not my contention that all Muslims schools have been viewed by the NL government as a threat to social cohesion, although clearly there is an overwhelming criticism of Muslim schools from various quarters, including the inspector of schools, as I have outlined above. Nonetheless, it is my contention that Muslim schools have appeared to be disproportionately highlighted as the threat to social cohesion, particularly juxtaposed with church schools, posited by the NL government as the exemplary conduit of values, social capital, high standards and responsible citizenship as I will discuss below.

Drawing on the work of scholars discussed in chapter one, the focus on Muslims as a key cause of the divisiveness of faith schools, needs to be understood within the context of the broader politics of the 'war on terror' in a post 9/11 era, as well as fears about immigration and lack of integration or citizenship, within some European/Western nation state(s). Razack, commenting on the 'casting out' of certain political subjects within the nation, describes how a certain narrative has emerged in which allegorical figures such as "the dangerous Muslim man" or

---

[342] A further examination of this falls beyond the scope of the thesis. See also Osler (2009) for an overview of the development of citizenship education.

"imperilled Muslim woman" circulate in the popular consciousness (2008; see also Mamdani, 2005). These narratives, she argues, provides a "scaffold" within which the debates around, for example, the banning of 'the headscarf' in France, or the question of legal recognition for elements of *shari'a* law in Canada and the UK have come to be received (*ibid*; Bano, 2008).[343]

I would contend that singling out Muslim schools as having to "promote tolerance and harmony" in itself seems to signal a fear of the "home grown" terrorist; 'grown' perhaps in closed off communities or schools within the nation.[344] As Razack contends, even Muslim children are becoming objects of fear and certainly the discourse around the 'race riots' in Oldham, Bradford and Burnley seem to reflect that fear of Muslim youth as a threat to community cohesion (2008:11). Wendy Brown (2006) has also discussed how a governmental discourse of 'tolerance' and values has come to regulate 'aversion', namely unwanted or deviant behaviour which comes to be predicated on the civilisational discourse of "why we are civilised and they are barbarians". Similarly, Razack argues that the narrative of minority religion - or non-Christianness as I have referred to it - and Muslims in particular, has become marked by "race thinking" or racialisation and orientalism (Razack, 2008: 10-11). As I have discussed in my previous case study, for example in the *Pawandeep* and *Re S* cases, racialisation is often underpinned by the idea that people in the West "must protect themselves from pre-modern, religious

---

[343] Bano (2008) discusses *shari'a* debate in the UK context and Bakht (2004) in the Canadian context.
[344] "Home grown" denoting British (or US) nationals committing acts of terrorism. See for example, Alan Cowell, 'Blair Says Homegrown Terrorism Is Generation-Long Struggle' 11 November 2006 <www.nytimes.com/2006/11/11/world/europe/11britain.html> accessed 4 June 2010.

peoples whose loyalty to tribe and community reigns over their commitment to the rule of law" (Razack, 2008:10). As Razack goes on to argue:

> There is a disturbing spatializing of morality that occurs in the story of the pre-modern peoples versus modern ones. We have reason; they do not. We are located in modernity; they are not. Significantly, because they have not advanced as we have, it is our moral obligation to correct, discipline and keep them in line and to defend ourselves, against their irrational excesses (*ibid*).

In the next section I examine how this key problematic of the 'conflictual other' comes to be addressed in law and policy.

6.4 Citizenship, belonging and the de-racialisation of non-Christians

Although the 'disciplining' that Razack is referring to in the quote above does not relate specifically to education, her words nonetheless echo communitarian 'disciplinary' ideas, in which children are shaped through RE and citizenship education and Christian/secular/universal values towards becoming good citizens.[345] Moreover, as Yuval-Davis (2004 and 2006) and Fortier (2008) have argued in relation to NL discourse on immigration and citizenship more generally, the notion of 'British' values has been used as a way to establish 'belonging' within the nation, a key element of community cohesion. This discourse is apparent, for

---

[345] In particular, see the work of Arthur (2003 and 2005) on the role of Christianity in character education.

example, in Gordon Brown's green paper *The governance of Britain,* where he outlined his ideas on citizenship and national identity as well as 'our common values' (2007:53).[346] Tony Blair also stated in a 2006 speech that it was a duty for "them", namely foreigners seeking citizenship within the nation, to embrace the nations' values such as tolerance, "because that is what makes Britain, Britain".[347] He explicitly articulated the "anxiety" around issues such as forced marriage, but also "*madrassahs*"[348]; which he stated were to be brought under a National Centre for supplementary schools that would encourage best practice around tolerance and respect for other faiths.[349] Moreover, he stated:

> Integration... is not about culture or lifestyle. It is about values. It is about integrating at the point of shared, common unifying British values. It isn't about what defines us as people, but as citizens.... Those whites who support the BNP's policy of separate races and those Muslims who shun integration into British society both contradict the fundamental values that define Britain today: tolerance, solidarity across the racial and religious divide, equality for all and between all.[350]

---

[346] Secretary of State for Justice and Lord Chancellor (2007).

[347] Reported in 'Our Nation's Future: multiculturalism and integration', 8 December 2006, available at <www.number10.gov.uk/output/Page10563.asp> accessed 24 August 2007. For a discussion of various NL speeches on education, values and citizenship see Osler (2009) and Yuval-Davis (2006).

[348] Supplementary Muslim schools.

[349] Reported in 'Our Nation's Future: multiculturalism and integration', 8 December 2006, available at <www.number10.gov.uk/output/Page10563.asp> accessed 24 August 2007.

[350] See Edge (2010) who argues that in regulating the granting of charitable status to mosques as part of the wider anti-terrorism 'Prevent' strategy, that there is a creeping establishment of Anglican Islam; namely, that Islam is being de-limited through an Anglican model of religion, policed by the Faith and Social Cohesion Unit of the Charity Commission. A similar move is apparent in the Dutch policy of stated-funded training for Imams.

Amongst other things, a key point this statement elides is the regulatory implications of the "unifying" force of British values.[351] Blair's sentiment also masks the particularity of the purported universality of values that are deemed to be "common" as I have discussed in relation to the communitarian values discourse in the previous chapter. In terms of conceptualisations of non-Christianness, it seems that through an implicit racialisation, minority religion becomes "evicted from the universal, and thus from civilisation and progress" (Fitzpatrick, 1995).[352] In short, whilst the normative Christian underpinning of universal, secular values circulates as a discourse of good citizenship, "values talk conceals the hierarchy", racialisation and orientalist configurations expressed about non-Christianness (Razack, 2008:8 and Goldberg, 1993:63).[353] As Isin and Turner (2002) highlight, citizenship as a concept itself emerged from a racialised and orientalist formulation, for example in the work of Weber (1905).[354] Isin states that Weber "mobilised images of citizenship as a unique occidental invention that oriental cultures lacked" and in which the citizen was both secular and universal (Isin, 2002:117). This reading of Weber's work highlights the Weberian notion that "developing societies would eventually evolve or modernise" once their irrational values came to be eliminated and replaced with democratic forms of citizenship and modernisation; for Weber –

---

[351] A point worth noting but beyond the scope of this thesis is what is the relationship between BNP politics and the proliferation of Muslims who "shun integration"; a point that Blair seems to ignore in this rather simplistic juxtaposition.
[352] See also Stychin (1998).
[353] See also Fortier who states that "one of the effects of the language of values is to conceal the historical articulations that constitute them as universal, timeless and unquestionable" (2008:5).
[354] "...as the main proponent of an occidental conception of citizenship" that became the foundation of the modern idea of citizenship (Isin, 2002:117). However, see also the work of Turner (2002) for a discussion of the history of the concept of citizenship, for example Aristotle's formulation from the Athenian period, however, Turner also views Weber's orientalist work as pivotal to the modern idea. This history is also more briefly discussed in Yuval-Davis (1997).

in Isin's reading – these values would come to constitute the measure of the "universal citizen" (Isin, 2002:122).

As Turner (2002), Fitzgerald (1999), and Goldberg (2002) note, there is a clear etymological as well as political relationship between notions of the civil, civility and civilisation and, of course, citizenship. From Said's work, we know that this configuration featured heavily in the orientalist view of the Christian West as the apex of civilisation (1994) and, later, universal values and standards. Cristi in particular draws out these connections in her book, entitled *From civil to political religion* (2001), where she explicitly charts the interrelationship of Christianity and notions of civil religion in the works of Rousseau and Durkheim; as well as their influence on current communitarian thinking on 'civic religion' as key to citizenship that in turn brings about social cohesion. As Fortier argues in relation to NL community cohesion policy, this cohesion is achieved through the 'rising above' of ethnic and religious differences through the "glue of values" rather than "the glue of ethnicity" (2008:5).[355] Whilst the scholars discussed here do not highlight the role of values in education within their analyses, Goldberg nevertheless charts the historic role of education in the colonial era when native subjects were civilised through the education meted out by colonial rule and civilising missions (Goldberg, 2002; Comaroff and Comaroff, 1997). For example colonial administrators in India such as James Mill and his father John Stuart Mill:

> viewed 'natives' as children or childlike to be directed in their development by rational, mature administrators concerned with maximizing the well

---

[355] Citing Goodhart (2004). See also Stychin (1998).

being of all. Natives ought not to be brutalized... nor enslaved but to be directed-administratively, legislatively, pedagogically and socially. Paternalistic colonial administration was required in their view until the governed sufficiently mature [sic] and throw off the shackles of their feudal condition and thinking and are then to assume the civilized model of reasoned self-government (Goldberg, 1993:35)

Mill (the father's) ideas justifying the regulation of non-Europeans on the grounds that they lacked rationality, were representative not only of late seventeenth century and Enlightenment thinking in the eighteenth century but also beyond (Goldberg, 2002). In short, Lockean ideas of autonomy and equality - that came to characterise the enlightenment - not only came to be de-limited by racialisation, they also justified colonial regulation as part of the project of what Goldberg refers to as "racial upliftment" (Goldberg, 2002:88). The uncivilised character of the non-European, non-Christian was seen to be rectifiable through, for example, missionary work or education; the latter was the "principal mode" through which 'natives' were 'civilized', so that they could acquire the customs and learn about the values of the colonizers and thereby cease to be 'native'. (Goldberg, 2002:89).[356] For example, within the Australian context, Goldberg notes how Merivale, a colonial administrator commented on how natives should be amalgamated, so that they could potentially be regarded as citizens, and if possible,

[356] There is an extensive literature on the colonial and civilizing missions including converting the colonised to Christianity "and in conversion to introduce the infidels to the virtues of civilisation, to the habits and manners of righteousness..." (Goldberg, 2002:92). See also Comaroff and Comaroff, 1997; Comaroff, 2001; McClintock, 1995.

be connected by intermarriage which he viewed as resulting in the improvement of inferior races once influenced by their European superiors (*ibid*).

This aspect of "racial upliftment" through intermarriage, the forcible taking and adopting of aboriginal children by white families and educating them according to European Christian values, has been the subject of scholarship on the "stolen generation" within Australia (Haebich *et al*, 1999; Read, 1981). Goldberg notes how the assimilation of these children stripped them of family and culture and in a sense "de-racialised them so they could be recreated, racially configured – as white... in terms of custom, habit, culture, practice" (Goldberg, 2002:88).[357] Goldberg further highlights, as I have discussed above, that the imposed aspirations to universal ideals were "embodiments of European, Christian virtue and practice, morality and truth" (Goldberg, 2002:92).[358]

Within the European context, according to Turner, the idea of 'upliftment' was also present in Weber's articulation of citizenship which, as he saw it, would ensure that the European medieval city could evolve without the divisive complication of ethnic identity in the post reformation era (Turner, 2002:263). In examining this history of the 'racial upliftment' and subsequent de-racialisation of non-Christianness, my aim is to suggest that current citizenship and values discourse also may also be understood as potentially having similar effects.[359]

---

[357] See Spring (1996) for a study of how native Americans came to be civilised through education programmes and Christian values; see also Fitzpatrick (2001:173).
[358] See also Fitzgerald (2000).
[359] Although I am not suggesting that children have no agency in how their identities and lives develop. I do not focus on this aspect in this thesis but rather seek to interrogate the underpinning logic that circulates in juridical discourse around citizenship and values in education.

Within the contemporary education literature there is some acknowledgement of the 'character' education of children in which Christian/universal/secular values including citizenship has been used to bring about forms of social capital or social cohesion (Arthur, 2000; Annette, 2005; Keast, 2005). However, what this literature does not address is the dynamic tension between racialisation of non-Christianness on the one hand, and yet on the other, how non-Christianness comes to effectively be de-racialised through the promulgating of a Christian universal standard of behaviour or citizenship.[360] A recognition of this tension relating to the circulation of religion within education is also largely absent in the LAR literature.[361]

It is by looking at literature on citizenship outside of LAR perspectives that we might understand its potential regulatory impact upon children, namely the de-racialising or racial upliftment of non-Christian identity. As mentioned above, current citizenship discourse has been circulating more widely beyond education, particularly in relation to immigration. For example in the US context, Ong discusses what she terms the "engendering [of] religious modernity" by church groups in the USA "converting immigrants into acceptable citizens...in sponsoring, helping and socialising newcomers to Western culture" (1996:277). Ong views the citizenship process as a form of subjectification through which "cultural citizens" are made in Western democracies (1996:263); giving "unitary and unifying expression to what

[360] See Blair's quote above where Muslims come to be singled out (along with the BNP) as being particularly in need of Christianised values based education.

[361] Although see Edge (2002) discussed earlier and also the implications of his work on the anglicanising of Islam in the charities field; an analysis of the regulating impact of law that may well be analogous to education. See also Ahdar and Leigh's (2005) critique of the education as part of the "formation of good citizens" from a Christian perspective, discussed above.

are in reality multifaceted and differential experiences of groups within society" (Corrigan and Sayer, 1985:4-5 in Ong, 1996:263). By "cultural citizen" she specifically refers to:

> the cultural practices and beliefs produced out of negotiating the often ambivalent and contested relations with the state and its hegemonic forms that establish the criteria of belonging within a national population and territory. Cultural citizenship is a dual process of self-making and being-made within webs of power linked to the nation-state and civil society (Ong, 1996:264).[362]

In the UK context Yuval Davis argues that citizenship has been a key element in the discourse of belonging (2004). She contends that citizenship can be based on (the myth of) common descent as in many of the case of child welfare cases explored in chapters three and four, or common culture and/or language (2006:211). However, in pluralistic societies it can also be based on common values and a projected myth of common destiny (*ibid*).[363] Thus, ethical and political values can become "the requisites of belonging" as those relating to social locations such as origin, 'race' or place of birth, being the most racialised, according to Yuval-Davis, would be the least permeable (*ibid*). Using a common set of values - such as citizenship values - as the signifiers of belonging can be seen as having the most permeable boundaries of all; which can present themselves as promoting more

---

[362] See also Yuval-Davis, 2009; Goldberg, 2002 and others who analyse the way citizenship (values) becomes a marker of civilised and civil/civic behaviour as a form of regulating the conduct of subjects in the interests of security within the nation state.
[363] See also Stychin (1998).

open boundaries than they actually do (*ibid*). As she argues, both the NL white paper *Secure borders, safe haven* (Home Office, 2001a) and the Cantle Report (Home Office, 2001b)[364] both "construct cultural diversity as a direct result of migration and thus link the need to contain it with the need to train the immigrants in English and civic values" (2004:29).

In my first case study, 'belonging' seemed to be judicially construed racially - as a genetic link between particular ethnic groups - underpinning the policy of same-race and religion matching in adoption. In this case study on faith schools, the notion of belonging is somewhat more complex perhaps, in that there is a tension between belonging to one's 'own' particular racial or ethnicised religious group, *and* belonging to and within the nation.[365] Indeed, as the recent 2010 RE guidelines state:

> RE "makes as important contribution to a school's duty to promote community cohesion...promote shared values" at four levels: firstly, at the level of the school community, secondly at the level of the "community within which the school is location", thirdly the "UK community" and finally the "global community" (DCSF, 2010).[366]

Children, thus, should not only belong to the families in which they grow up, a sense of belonging we saw pervading the child welfare cases. Rather, children

---

[364] Commissioned by the NL government after the riots in the north of England.

[365] Although this tension is also seen to exist in the adoption cases where children are placed with white adoptive families and yet must be brought up to know about their 'heritage' (see chapters three and four).

[366] This guidance reiterates the relevance of community cohesion on both local and national levels stipulated in the 2007b guidance for schools on promoting community cohesion discussed above. See also Choudhury *et al* (2005).

through education, must have their racial or kinship belonging mitigated to ensure their *national* belonging and citizenship. This added dimension of belonging, as Fortier (2008 and 2010) argues manages the 'national unease' or anxiety about the belonging of the children of immigrants who are citizens by nationality yet still 'strangers' within the nation.[367] It seems unequivocal though, that the making of nationhood, through the regulatory effects of universal values and citizenship described above, are at work.[368] This is both through religion circulating as Christian/universal/secular values – or in Casanova's terms "acceptable" forms of non-Christian religion (Asad, 1993).[369] It also circulates in representations of non-Christianness, here particularly Islam, as needing to be yet more 'civil-ised' towards full citizenship.[370]

6.5 The productivity of values: church schools and social capital theory in education

I will now return to the idea that schools play a pivotal role in bringing about community cohesion and nurturing children to be good citizens. Building on my exploration of communitarian thinking in education in chapter five, in particular the role of values in bringing about a cohesive national community, in this section I

---

[367] See Yuval-Davis' discussion of how this tension between belonging to race/community and the nation has been articulated by Ministers and politicians through sporting analogies, positing for example, the problematic of who minority populations might support in an international cricket or football match between say England and Pakistan (2006:210). See also Ahmed (2000).

[368] See also Stychin (1998).

[369] As part of Casanova's revised secularisation thesis whereby religion either becomes increasingly privatised or marginalised with the advance of modernity or it only circulates in the public sphere in a way that is delimited by universal values (Asad, 1993). See my discussion of this in chapter one.

[370] As Yuval-Davis (2006) notes, the *Cantle report* (Home Office, 2001b) hardly mentions the issue of racism at all and when it does it is in relation to being an obstacle to social cohesion.

explore the influence of social capital theory in NL policy. I argue that social capital theory, which posits church schools as a model of how values work in the production of good citizenship and cohesion, might also be viewed as based on a racialised logic, in which Muslim schools, viewed predominantly as a potential threat to community cohesion, is juxtaposed with church schools as the benchmark of these values. Therefore, I suggest that the role of Christian/universal standards and church schools' values, as a benchmark for Muslim and other non-Christian faith schools to emulate, requires further study.

Although social capital theory is diverse, Coleman (1988), Putnam (1994, 2000), and Fukuyama (1995) are recognised as its key proponents alongside Bourdieu (1983) who provides a different and more critical analysis of the concept to these others (Gamarnikow and Green, 2003:212; Franklin, 2007:1). However, as Gamarnikow and Green highlight, the "traditionally recognised ingredients" for all these theorists of social capital are: "norms of trust and reciprocity, networks, civic engagement" (2005:93). Without unpacking the notions of trust and reciprocity, social capital theory can mainly be associated with the idea that individuals benefit from associations or being in social networks (Franklin, 2007).[371] This view is similar to the communitarian perspectives discussed in chapter five where *values* such as trust and reciprocity embedded within social or religious networks, are viewed as resources to support individuals. Social capital theory also reflects communitarian ideals in which social structures and social relations are viewed not just in terms of

[371] See further Franklin (2007) for a detailed discussion of trust and reciprocity.

benefitting the individual, but also the community as a whole.[372] This is attributed to a cycle in which greater economic productivity results from individuals who have benefitted from the community in the first place and therefore, in turn, have become more economically productive (Fukuyama, 1995 discussed in Gamarnikow and Green, 2003:93).

This understanding of social capital and its productivity was reflected in NL government discourse. For example, David Lammy - at the time MP for Tottenham and Minister for Higher Education - defined social capital as "the norms, networks and relationships which create trust and social cohesion, and enable communities to address problems for themselves".[373] Emphasising the role of public social structures he also states:

> As part of a growing recognition that formal public institutions can only do so much, considerable emphasis has been placed on the need to support people like Susie Constantinides [a volunteer in a Greek Cypriot community centre] in nurturing this social capital if communities are to thrive and prosper. Building social capital is seen as an important way of enabling local communities even in the most deprived circumstances to address all kinds of problems from social exclusion and ill-heath to crime and anti-social behaviour by mobilising the time, energy and resources of citizens.[374]

---

[372] See Edge for a discussion of religious sacred places and social capital (2010:362).
[373] David Lammy, 'Citizenship Article', *Progress Magazine* (11 June 2004) <www.davidlammy.co.uk/da/21601> accessed 14 November 2008.
[374] *ibid.*

A number of scholars have noted how social capital theory has played a pivotal role in NL's support for expanding faith schools and social policy related to community regeneration/cohesion and education more generally (Gamarnikow and Green, 2003; Annette, 2005; Franklin, 2007). Education is viewed by social capital theorists and NL Ministers as key to the formation and maintaining of networks/communities that produce social capital. This is also true of communitarian thinkers, such as Etzioni, discussed in chapter five, for whom families are seen as the key primary educators of children but schools are also viewed as critically important in their function as the main education network (1997:92).[375] This is particularly the case where, as Etzioni describes it, there is a "parenting deficit" and schools are seen as a "second line of defence" (*ibid*).[376]

Although social capital theory is not explicitly linked to Christianity or Christian groups and is referred to as a secular philosophy, there are a number of connections between the theory and Christian religion in relation to the education field. Most obvious of these is that the key proponents of social capital theory view Christian faith schools as exemplars of social capital production; foremost amongst these is James Coleman.[377] From his study of Catholic schools in the United States, Coleman concluded that disadvantaged children in these schools attained better results than their "similarly disadvantaged peers" in community schools (Coleman *et al* 1982, cited in Gamarnikow and Green, 2005:91). Whilst Coleman's underlying concern is that of distributive justice, his theory also posits children as potential

---

[375] See also Gamarnikow and Green (2003:212).
[376] See Arthur (2000:49) for a more detailed discussion of Etzioni's work on this issue.
[377] See also Putnam (2000).

productive citizens, and schools as social structures that aim to shape that potential (*ibid*). Gamarnikow and Green have thus described social capital theory in this context as a means of "contemporary governmentality through education policy" (Gamarnikow and Green, 2005:93).[378] For them, the governmentality is derived from requiring social networks to produce goals such as social integration but that this, in turn, facilitates the particular formation of children's identity (*ibid*). Moreover, Gamarnikow and Green critique the way deficits of social capital are framed as problems of the social rather than the economic (*ibid*).

Despite mentioning what are perceived to be the regulatory effects of the NL policy on non-Christian children, my analysis does not seek to espouse a specifically Foucauldian or even Marxist critique of this kind of social capital theory as Gamarnikow and Green do.[379] Rather, I contend that what remains "obscured" and *yet also* "reinforced" is not just the economic disadvantage and level of government regulation, but also the role of religion - through church schools and Christian values - in the shaping of social policy and education. Christianity after all acts as an exemplary capital resource, not only in terms of its network of social structures, namely, schools, but also in terms of its *means* of producing social capital within those educational structures. The means or source of the success of Catholic schools, yet again is posited by Coleman as the values and norms that it

---

[378] This has been termed by Nikolas Rose as "government through community" which he describes as:
"in the institution of community, a sector is brought into existence whose vectors and forces can be mobilised, enrolled, deployed in novel programmes and techniques which encourage and harness active practices of self management and identity construction, of personal ethics and collective allegiances" (1999:176).
[379] On the basis that it obscures and reinforces "structures of inequality and social justice" Gamarnikow and Green (2005:93); see also Bourdieu (1983).

embodies and promulgates. He views these values as forming a coherent and common link within a closed network comprising of family, faith based neighbourhood community and the faith school.[380]

Coleman justifies the exclusivity of these schools/networks with reference to Rawls' view that "social inequalities can be justified if they benefit the worst off" (Rawls, 1973 cited in Gamarnikow and Green, 2005:91).[381] The benefits for social capital theorists such as Coleman, as they clearly were for the NL government, are that faith schools produce social capital which in turn results in "a cohesive, well functioning society with improving socially desirable outcomes and fewer negative ones, such as crime and social exclusion" (Gamarnikow and Green, 2003:212).[382] In short, although both communitarian and social capital theory have influenced NL policy on issues of social cohesion and regeneration, this took place within the framework of "managed capitalism" in which I contend Christianised values has come to play a productive role (Arthur 2002:20 and 2005).[383]

---

[380] See also chapter five.

[381] See also Annette (2005).

[382] Despite the processes of governmentality that Gamarnikow and Green observe as emerging from drawing on social capital "mechanisms" (networking, structures, communities etc. - which they also identify as having the "ideological effect of both obscuring and reinforcing structures of inequality and social injustice (2005:93) - Coleman's social capital theory is very much linked to a Rawlsian social justice agenda (2005:93). How is it then that a policy aiming for social justice (based on an economic redistribution model) is thought to be achieved in ways that ignores economic factors and focuses on the 'social' solution of strengthening community. Gamarnikow and Green point to this tension in NL's policy application of (Coleman's) social capital theory as a tension that lies between the "equity agenda" (raising standards and wider access to a variety of schools; equality of opportunity being viewed as a social good) and the "market agenda" that differentiates schools on the basis of their level of "excellence" (2005:90). This tension may partly stem from the fact that NL's social policy although operating in a broadly neo-liberal context also has "old-style social democracy" elements (as in the equity agenda mentioned above) (*ibid*, see also Driver and Martell, 1997).

[383] Thus, the fact that Coleman's studies are based on Catholic schools does not mean that for example, black churches working along a different theological framework, are nonetheless not viewed as able to produce social capital. My point is that there is a set of core universalised values,

As Driver and Martell highlight, the economic benefits of communitarianism in NL's "dynamic market economy policies" were based on the idea that community, and therefore all the faith based structures and networks that facilitate it, are good for business, economic productivity as well as individual opportunity (1997:27).[384] This vision, which is very much reflected in Coleman's social capital theory and its NL 'third way' application, highlights the role of Christianity as a social resource - or 'capital' - of networking and values, but also as part of a process that envisages economic productivity.[385] I suggest that this understanding of the role and influence of social capital theory in NL policy might somewhat explain why and how it is that church schools are viewed as the benchmark of values and standards, of citizenship and cohesion, by which other schools are judged. In other words, I am not suggesting that, for example, Muslim schools might not be viewed as potentially producing social capital. Rather, it is my contention that this potentiality has barely been articulated in the government discourse, as compared to church schools.[386] Furthermore, as I discussed earlier in this chapter, Muslim

---

derived from a Christian heritage and still epitomised by some church organisations, including schools that were viewed by NL as the benchmark of behaviour.

[384] The NL government did not refer to their policies as specifically communitarian, but more as an articulation of a 'third way' politics which navigates between the path of the traditional British welfare state and that of a more individualistic welfare model of the USA (Arthur, 2000:20; Blair, 1998). See also Annette for a discussion of how George W. Bush supported the role of faith communities in providing social services as part of a new "compact with the voluntary and community sectors" which Annette views as a "neo-liberal policy of cutting back welfare state spending" (2005:194).

[385] For studies on the religion/capitalism matrix for example see Roberts (1995) in which the work of Weber on this issue particularly his *The Protestant Ethic and the Spirit of Capitalism* (1930) is discussed.

[386] In relation to Islam and social capital more generally see Ahmed, 'Social Capital: Women in British Muslim Communities' Policy Research Centre, available at <www.ncvovol.org.uk/.../Social_Capital/Social%20Capital_Women_in_British_Muslim_Communities .ppt> accessed 14 June 2010. In relation to economic development, particularly in Sub-Saharan Africa, see Harrigan and El-Said (2009) on 'Economic Liberalisation, Social Capital and Islamic Welfare Provision'. There is also some interesting work on differentiating social capital within a

schools feature mainly in the discourse as requiring regulation, in order to be brought in line with the "common values" of Britain, to promote tolerance and not divisiveness within society.[387]

As Edge has argued in relation to the Charity Commission's Faith and Social Cohesion Unit, mosques and their potential to generate Muslim social capital seems to be regulated through the granting or withholding of charitable status (Edge, 2010:362). The effect of this regulation, as he suggests, is the "creeping establishment of an Anglican Islam". In other words, a state-sanctioned and arguably somewhat engineered version of Islam comes to be regulated through the mosques that exist because they are granted charitable status. This 'Anglican Islam' is not necessarily one that correlates with the diverse, complex and affective identities of Muslims in Britain. Even Bradney takes issue with the fact that a social cohesion agenda that "insists on common British values" is at odds with the liberal state's own notion of each person pursuing their own notion of the "good", and he points out that even schools of the same 'religion' have differing variations of theology and practice (Bradney, 2009:139). However, his analysis does not discuss the racialisation involved within the discourse that "insists on common British values". Similarly Ahdar and Leigh (2005) also ignore the effects of racialisation and

---

particular social group and forms of engagement that cut across groups in relation to the communal riots in India (Varshney, 2008 discussed in Narayan, 1999:7 available at <www.psigeorgia.org/pregp/files/social%20capital.pdf> accessed 20 August 2010.

[387] This sentiment was most recently articulated in a documentary presented by Professor Richard Dawkins, an avowed secular atheist, entitled 'Faith Schools A Menace?' Channel 4, aired 19 August 2010. He states that unlike CoE schools who, for example have reconciled the theory of evolution with the creationist story within the curriculum, Muslim schools like the one he visited in Leicester, had not yet achieved this important development in line with modern progress and science. In the programme, there is both an implicit and explicit commentary that both Muslim and Jewish schools in particular are creating a divisive education system in England.

orientalism in conceptualisations of non-Christianness. This is perhaps not surprising considering their view is avowedly from a Christian perspective which seeks to justify the predominance of Christianity within education as a natural and desirable consequence of Britain being a Christian state; something that they wish to see further entrenched rather than watered down (2005:232-233). Interestingly though they do respond, albeit rather fleeting, to Cooper's analysis of how the legal preference for Christianity undermines attempts to forge a more multicultural education, one that she views as reinforcing a particular cultural and ethnic vision of Britishness (Cooper, 1995:253; discussed in Ahdar and Leigh, 2005:238). Ahdar and Leigh, calling her argument "confused", believe there to be a "fallacious equation of Christianity and ethnicity" on the basis that "contemporary Christianity is predominantly a 'third world' religion, most of whose adherents are non-white, including substantial numbers of people of African, Caribbean and Asian descent in Britain" (2005:238). I would suggest that this analysis rather misses the point of how religion comes to be implicated in political projects, whether from the past – such as colonialism, which resulted in much of what is now understood by Ahdar and Leigh as contemporary Christianity in the 'third world' - or in contemporary policy thinking based on ideas of schools as producing social capital. It is precisely this de-politicised and ahistorical view of religion that has been the object of my analysis throughout this thesis.

6.6 The imbrication of religion and politics: New Labour and the influence of Christian socialism

Finally, to end this chapter I revisit the issue of the Christian normativity that, as I have illustrated in this case study, underpins the communitarian and social capital ideas within NL education policy. I do so in order to foreground my interrogation of the concept of religion and how it circulates in law. In particular, I have argued that law's religion ought not to be viewed predominantly in onto-theological terms but also as a concept that is imbricated in socio-political work (Fitzgerald, 2007).[388] As I suggested above, Christian normativity underpinning the values discourse in education has come to be largely obscured; perhaps this is because of its embeddedness in British culture. As Bhandar argues, Christianity's de-theologised influence is maybe too subtle in its imbrications with secularity and universalising discourse to even be noticed (Bhandar, 2009).

In this next section I examine an area where both the influence of Christian thinking and the interrelationship between (Christian) faith and politics has been clearly articulated within the longstanding links between 'Christian socialism' and NL. Whilst NL was in power, the UK Christian Socialist Movement (CSM) was an affiliated organisation to the party with members including both Prime Ministers as well as the former schools secretary and Labour Party vice chair for faith groups at the time, Stephen Timms.[389] Other members have included Ben Bradshaw, David

---

[388] See chapter five.

[389] Blair declared himself to be a member in his speech to the CSM on 29th March 2001 <www.number10.gov.uk/Page3243> accessed 27 October 2008. Arthur notes that Tony Blair's communitarianism was influenced by the Christian socialism of the party leader at the time, John Smith (Arthur, 2000:21). Gordon Brown is mentioned explicitly as a member on the CSM website:

Lammy, described in a news article as "a committed Christian" and Ruth Kelly, described in the same article as a "devout Roman Catholic" (Ahmed, 2002).[390] The CSM at the time claimed that they had "40 members in the House of Lords and the House of Commons, including current and former Cabinet members" (CSM, 2008).[391] The movement has existed in varying forms since 1848. In a statement from 2008 they described themselves as having a "commitment to social justice born of their Christian faith".[392] Although neither their conception of Christianity nor social justice has been outlined in great detail, one might recognise from their "values, objectives and aims" the traditional socialist objective of economic redistribution: "to close the gap between the rich and the poor, and between rich and poor nations" and work towards "a classless society".[393]

One key difference then between this Christian form of socialist practice and that of what is more commonly thought of as 'socialist' ideology, namely, the political ideology born in the nineteenth century and followed more recently by the

---

<www.thecsm.org.uk/lpaffiliation.html> accessed 16 October 2008. Stephen Timms is explicit about his membership on his website: <www.stephentimms.org.uk/biography> accessed 22 October 2008.

[390] David Lammy was at the time MP for Tottenham and Minister for Higher Education and Intellectual Property. See also <www.davidlammy.co.uk/da/52513> for his speech to the CSM on 'Faith and Politics', 17 March 2007 and 'The Silent Majority? Religion and the Left' - Christian Socialist Movement Fringe at Labour Party Conference, 28 September 2005, <www.davidlammy.co.uk/da/25316> both accessed 14 November 2008. Ruth Kelly was at the time MP for Bolton West, former Education Secretary and Communities Secretary; see also <www.women.timesonline.co.uk/tol/life_and_style/women/article4886642.ece> where she talks about her Catholic beliefs and the importance of faith in politics – accessed 14 Nov 2008. Ben Bradshaw was at the time MP for Exeter and Minister for South West and Health, See also <www.thecsm.org.uk/policydiscussion.html> for his involvement in an event hosted by CSM on Christian political engagement on the Left, accessed 14 November 2008. Kamal Ahmed, 'Inside Labour's young boy (and girl) network', *The Observer* (2 June 2002) <www.guardian.co.uk/politics/2002/jun/02/tonyblair.schools> accessed 4 June 2010. See also the *Tablet* (2008) outlining the problem of conscience that the gay adoption issue evoked for Catholic MPs such as John Cruddas <www.gla.ac.uk/media/media_62232_en.pdf> accessed 14 November 2008.

[391] <www.thecsm.org.uk/lpaffiliation.html> accessed 16 October 2008.

[392] <www.thecsm.org.uk/whatwestandfor.html> accessed 16 October 2008.

[393] *ibid.*

Socialist Workers Party or 'Old Labour', is the source of the political objectives. For Christian socialists it is "Christian teaching" rather than Marxian or other philosophical or political socialist ideology that is impetus for their politics – this point has been explicitly articulated by Blair (1996:59). [394] The underlying political aim for the CSM is to strive for "Christian teaching" to be "reflected in laws and institutions", and seek that "the Kingdom of God" should find "its political expression in democratic socialist policies".[395] In aiming to "promote Christian values in politics" the CSM is not just linking faith with politics but working towards embedding a particular - socially democratic - interpretation of Christianity into state law and policy. Notwithstanding that the CSM uses the language of 'democracy' to suggest that there should be consensus in law and policy formation, it seems that the overall objective of the movement is one of further entrenching 'Christian teaching' within the state.

Christian socialism and particularly what it stands for has clearly influenced Tony Blair's political ideas but, as his biographies recount, his interest in religion and Christian belief took hold when he was studying at University. In Blair's own account of *why I am a Christian* he talks about the influence of John Macmurray, a socialist philosopher who emphasised an individual's duty to others (Blair, 1996:58-9). He articulates this duty as providing him with a moral purpose, attributing the values of "duty" and "service" to Christianity, citing the examples of Jesus and Paul

---

[394] Of course socialism as an ideology is wide in scope and diverse in its variations and I do not seek to distort that complexity. However, a fuller discussion of this is beyond the scope of the thesis and my aim is to merely draw out the nature of Christian socialism which also has a complex history that some would argue predates Marx and the workers movements of the nineteenth century, see for example *A Dream of John Ball* (Morris, 1888).

[395] <www.thecsm.org.uk/whatwestandfor.html> accessed 16 October 2008.

(*ibid*).[396] It was not until after he joined the Labour Party that Blair joined the CSM in June 1992 under the influence of John Smith, the former party leader and long standing CSM member (Rentoul, 1996:293). It seems that Blair was particularly inspired by the communitarian vision outlined in Smith's 'Tawney Memorial Lecture' (1993) in which he refuted the idea that human beings conduct their lives on the basis of self interest "in isolation from others" challenging that viewpoint as ignoring "the intrinsically social nature of human beings" (Smith, 1993:132).[397] For Smith, social freedom needed to be expressed in "fellowship" where people have a duty or "obligation of service" to one another, namely "to family, to community and to nation" (*ibid*). Blair had emphasised the importance of community in his Labour party speeches even before he entered Parliament (Arthur, 2000:21).[398] Thus, becoming a member of the CSM, because of its tying of social justice to Christian values of duty and "fellowship", may have been an inevitable step. Up until this point Blair had kept his religion private but then, as Rentoul puts it, he found "it was a good time to make political use of a long-held conviction" in a form of "social moralism" (1996:293).[399]

I have outlined one such "political use" in relation to church schools and their values; how Christianity could contribute to the production of social capital

---

[396] Note that my analysis does not include a reading of Tony Blair's very recently published auto-biography (September 2010).

[397] This lecture was compiled into a collection of Christian socialist essays entitled 'Reclaiming the Ground' (Bryant (ed.), 1993).

[398] As an idea of associational and affective human behaviour running through communitarianism: "We are what we are because of the other"; the words of John McMurray cited by Blair in the foreword in Wilkinson (1998).

[399] Another example of this moralism given by Rentoul from Blair's Wellingborough speech is the following statement: "It is easy to deny the idea of community and some may feel unhappy with it. But call it community values, family values, spiritual values, what they have in common is something bigger than 'me'" (Rentoul, 1996:293).

and in turn strengthen community (cohesion). The effect of this moralism in Blair's politics was outlined explicitly in a speech addressing the CSM on 'faith in politics' in March 2001. Blair on the issue of 'values and politics', stated that values were "fundamental to" his "political creed" (Blair, 2001). [400] In an even earlier statement he referred to Christian socialism as a way of being able to morally judge between what was good and bad:

> Christianity is a very tough religion. It may not always be practised as such. But it is. It places a duty, an imperative on us to reach our better self and to care about creating a better community to live. It is not utilitarian though socialism can be explained in those terms. It is judgmental. There is right and wrong. There is good and bad. We all know this, of course but it has become fashionable to be uncomfortable about such language. But when we look at our world today and how much needs to be done, we should not hesitate to make such judgments. And then follow them with determination. That would be Christian socialism (Blair, 1993:12).[401]

Taking 'inspiration' from faith, or rather Christianity, in the formulation of values in politics was not particular to Tony Blair. Stephen Timms, former Schools Minister, also outlined in numerous speeches, listed on his website under a tab

---

[400] <www.number10.gov.uk/Page3243> accessed 27 October 2008.

[401] Clearly his Christianity became increasingly important and explicit throughout his term as evidenced in his resignation statement that it was God who would judge his decision to go to war in Iraq <www.news.bbc.co.uk/go/em/fr/-/1/hi/uk_politics/4773124.stm> accessed 17 November 2008. Note also his speedy conversion to Catholicism (from Anglicanism) on leaving office (Press Association, 'Blair converts to Catholicism', *The Guardian* (22 December 2007) < www.guardian.co.uk/politics/2007/dec/22/labour.uk> accessed 4 June 2010; and role of faith groups in policy (Kamal Ahmed, 'And on the seventh day Tony Blair created...', *The Guardian* (3 August 2003) <www.guardian.co.uk/politics/2003/aug/03/religion.tonyblair> accessed 4 June 2010).

entitled 'Christian socialism', that his political inspiration was derived from his Christian belief.[402] In one speech he explains that his political career is a form of "calling" and "discipleship", echoing Blair's biblical references to the story of Jesus' disciple Paul.[403] Timms has also articulated the importance of Gordon Brown's Scottish Presbyterian background and upbringing in his politics:[404]

> Gordon Brown set out in his speech ... how his own faith background formed *values* which now gives a strong sense of moral purpose to the Government which he leads... (Timms, 2007).[405]

Moreover, like Blair had done previously, Timms also highlighted the continued (potential) role of faith in politics:

> We want people whose starting point is faith to come and work with us, join us, tell us your ideas – because we know that your ideas can have very broad appeal. I think it is true that the Labour Party has sometimes found it a bit embarrassing to talk about God. *"We don't do God"*, as Alistair Campbell famously said. Well, if you do want to talk about God, that's fine by us... we simply want to listen to what you have to say, to welcome the fact that your thinking starts with faith in God, because we think you can

---

[402] <www.stephentimms.org.uk/christiansocialism?PageId=a9071e8c-d2e2-d874-9138-e6bfb5de7f08> accessed 14 November 2008.
[403] *ibid.*
[404] <www.labour.org.uk/images/uploads/200050/58b31300-0987-5b84-b104-8e01f1ceccf6.pdf.> accessed 14 November 2008.
[405] 'Speech to Faith Groups Reception at the Labour Party Conference' (24 September 2007) <www.stephentimms.org.uk/christiansocialism?PageId=43481e8d-921b-c194-6968-1a095de058ab> accessed 14 November 2008.

help us develop the policies which will be the right way forward for Britain (*ibid*).

Whilst I am not claiming that finding expression for the "Kingdom of God" has been the explicit aim of the NL government[406], it is apparent, however, that Christianity - at least in the form of 'values' such as community and responsibility - more than seeped into NL politics and policy. Moreover, as discussed above, Christian organisations such as church schools were seen as having a significant influence in social welfare areas, including educating children according to a particular set of values which were seen to nurture both citizenship and community cohesion. Part of the government rationale for this inclusion of faith into public life was that Christian values were seen to be common to other, particularly monotheistic faiths, as well as being more generally universal and therefore also secular. Consequently, as discussed in relation to communitarianism in chapter five and church schools as producing social capital in this chapter, civic values as a concept has also become enshrined in citizenship education. It is not my aim to challenge the alleged cross-cultural nature of these values, merely to highlight the imbrications of religion and politics within education.

---

[406] Although see Ben Bradshaw's comment in his column *Christmas*, 15 December 2004: "The "incarnation" – God becoming human – is central to Christian belief. It tells us that the Kingdom of God, talked about in the Old Testament and shared with other faiths, is not somewhere else in another life or world, but to be built here in the world we live in now" <www.benbradshaw.co.uk/column/> accessed 14 November 2008.

6.7 Concluding remarks

I have analysed NL government discourse on faith schools and their role in the promotion of community cohesion. In doing so I have highlighted how the ethos and productive work of church schools, as well as Christian values, are explicitly and implicitly viewed as a universal benchmark for other (faith) schools to follow. At the same time Muslim schools have been posited as a source of concern because of their potential divisiveness and radicalisation; they have therefore been singled out as in need of regulation. I have argued that this NL discourse can be understood as both racialising non-Christianness on the one hand – as divisive and conflictual – and *yet also* de-racialising on the other, by seeking to shape children's identities through education to meet the Christian/universal standard of citizenship and behaviour within the nation. Thus, within citizenship and community cohesion discourse, and through the application of social capital theory, Christian values play a role in drawing the parameters of acceptable non-Christian religion. This produces an educational mode of civil-ising non-Christianness through education law and policy. I have also argued that the privileged role of de-theologised Christianity is not only historically embedded, it is also ongoing. Therefore, I suggest that law's religion ought not to be understood predominantly in onto-theological terms as a transcendental and ahistorical concept. Rather, it needs to be explored further as a contingent concept that is often deeply imbricated with politics.

CHAPTER SEVEN

CONCLUDING REMARKS AND FURTHER EXPLORATIONS

Throughout this thesis I have explored how religion circulates in two areas of law relating to children: child welfare cases and education law and policy. I have sought to add to the existing LAR literature by examining how religion comes to be conceptualised and deployed within law. I have concentrated on case studies where judges and law makers are deciding on - and actively influencing - children's future (religious) identities and values, particularly where this involves non-Christianness. This has focused my analysis on the relationship between Christianness and secularity in the English context, and understandings of religion as faith, race and/or related to community, belonging and nationhood. I have, in some modest way, challenged the onto-theological notions of religion - as comprising belief or faith in a transcendent being as religion's very ontological status - that circulates in juridical discourse.

In the areas of law relating to children that I have discussed, neither judges nor government Ministers respond to fully formed notions of religion. Rather, they participate in the formulation of the parameters of religion, and its significance for children and their future identities. Key instances of this argument include judicial involvement in adjudicating upon a child's religious identity along racialised and orientalist lines, and Labour government enacted regulation of faith schools, similarly relying on racialised notions of religion.

Highlighting the existence and potential effects of racialised and orientalist discourse in juridical conceptualisations of non-Christianness demonstrates that religion itself can come to be authenticated, demarcated and therefore produced in and through law. Fixed notions of religion do not then capture what is at play in relation to how non-Christianness comes to be conceptualised in child welfare cases or represented in political discourse in relation to faith schools. Nor do essentialist notions of religion allow us to view the effects of the privileged position of Christianity whether in terms of how non-Christianness is understood through the Christian theological paradigm, as belief and practice, or how it underpins the discourse of universal and secular values. My analysis provides another perspective or entry point to what is often posed as the problematic of religion for law; the extent to which law ought to protect religious freedom or recognise religious identities. It is an analysis that seeks to highlight what is at stake for non-Christian subjects in only focusing on religion as *the* problematic rather than on the ways in which religion comes to circulate. Before commenting on possible further explorations and directions that the analysis in this thesis might take, I first revisit the key themes and arguments of my chapters.

In chapter one I outlined some of the critical perspectives on religion that question the very concept of religion itself in order to foreground the analytical and methodological approach of this thesis. I highlighted perspectives that argue religion must be understood as having been invented as a category of understanding non-Christianness from a European Christian epistemic viewpoint particularly within eighteenth and nineteenth century academic scholarship. In exploring the 'inventedness' of religion, I sought to highlight the contingency of

religion as a concept as well as its co-imbrications with notions of secularity. The point of the latter being to challenge the notion that religion is somehow a fixed, onto-theological concept which is separate from the world of politics and law, as the popular secularisation story goes.

However, the distinctions between religion and the secular is not just a popular story but one that pervades the LAR literature explored in chapter two. There I brought the critical perspectives to bear upon the LAR literature in order to challenge the predominant onto-theological conceptualisation of religion that exist within that field. The impetus for doing this has been to interject an analysis of law's religion into debates that not only analyse and respond to the development of law relating to religion, but also influence these developments. Thus, I explored the LAR perspectives in relation to child welfare law as well as more broadly in order to highlight how non-Christian religion comes to be conceptualised. I suggested that what comes to obscured in these perspectives is how non-Christian religion might also be understood as racialised and configured through an orientalist lens, *as well as* onto-theologically. I argued that this analysis of law's religion might bring another perspective to how religion itself needs to be better understood as, at times, being socio-politically as well as juridically produced. This analysis of law as racialising non-Christianness also highlights the continued influence of the Christian epistemic viewpoint from which the modern concept of religion as a universal category emerged.

The problematic of understanding, labelling and judging non-Christianness is a key analytic that has continued into current times; an argument that I highlighted

particularly in my first case study on child welfare cases. In my analysis of these cases in chapter three, I discussed how religion comes to circulate predominantly as a genetic racial marker linked to community, nationhood and/or nationality. Religion is also conceptualised in these cases in theological terms as belief/faith and practice, and again comes to be tethered to community where children develop their faith, identity and belonging in conjunction with others of the same religion. I suggested that my analysis of the cases corroborates the view that religion is a contingent and invented concept.

In chapter four, I continued examining child welfare cases, drawing on the work of critical religion scholars. I focused on the orientalist positioning of the judges in both 'knowing' and adjudicating upon non-Christianness along racialised lines, and creating an imagery of non-Christian behaviours that is conflictual and uncivilised. Whilst in some of the cases, judges explicitly articulate the Christian/secular/Western positionality from which they speak, in other cases the embedded role of Christianity and its influence of judicial thinking remained unremarked upon. The effects of having this 'positional authority', to use Said's terms, is not only to be in a position to purvey what non-Christianness might or might not be, but also to distinguish 'nations' of people from each other. Religion in this judicial discourse, I have argued, becomes a signifier of racialised belonging and nationhood.

I also took the critical religion analysis a step further to point to the co-imbrications of religion and the secular, which can obfuscate the privileged position of Christian viewpoints in the conceptualising of non-Christianness. I argued that

this analysis of the Christian, albeit de-theologised, underpinnings of Western or British values often circulating as being secular and universal, remains largely absent in the LAR literature. The significance of this absence is the fact that Christian, orientalist and racialised way-finding can often come to be *the basis* for state actors to deem certain religious 'behaviours' or 'culture' as acceptable or civilised whilst others are not. In Asad's terms, state - or in my case study juridical - discourse can produce and authorise certain instantiations of religion over others. Religion must therefore, be understood as a contingent concept requiring constant interrogation.

I followed this critical analysis of religion through into my second case study on religion in education law. Here, I argued that the privileged position of Christianity in schools explicitly and implicitly provides the benchmarks, both in RE, as well as in terms of values that should be engendered in children in order to become productive - or civilised - citizens within the nation. In chapter four I outlined how a historically embedded Christianity within RE in England continues to be reinforced today, despite a growing recognition of diversity in the school population, and the need to develop a better understanding of 'others' and promote 'shared values'. I argued that the move to an onto-theological approach to religious education, conceptualising religion as a cross-cultural category, did not resolve this, drawing on the critical religion perspectives discussed in chapters one and two. Rather, I argued the configuration of religion in RE draws on an orientalist understanding of non-Christianness from a Christian perspective, albeit under the guise of liberal secularity. Moreover, I discussed how, increasingly, the promotion of 'common values' entered the wider curriculum beyond RE, for example in

relation to citizenship education and the promotion of community cohesion through schools. I examined the Christian underpinning of the governmental 'common values' discourse and explored the links with communitarian education theories, and argued once again that the cross-cultural or universal language of these values obfuscates their *normative* Christian basis.

In chapter six I analysed the NL discourse on faith schools. I highlighted how the ethos - and work - of church schools and their values, explicitly and implicitly produces a universalised standard for non-Christians to achieve. At the same time, I showed how Muslim schools in particular have been posited as being in need of 'regulation', and as a threat to 'social cohesion'. I argued that this discourse can therefore be understood as both racialising non-Christianness on the one hand – as divisive and conflictual – and *yet also* de-racialising on the other, by seeking to shape children's identities through education to meet the Christian/universal standard of citizenship and behaviour in order to belong within the nation. Thus, through citizenship education and community cohesion discourse in schools, and by applying social capital theory, Christian values play a role in drawing the parameters of acceptable non-Christian religion, and civilising non-Christianness.

Further explorations

In the last set of child welfare cases I examined in chapter three, I discussed how the judges took a nuanced approach to understanding non-Christianness and specifically how religion might be understood in terms that are meaningful to a child, in her own familial and community context. Drawing on the work of Edge (2000a) and Ronen (2004) I suggested that this approach to understanding religion

and in particular belonging is not linked necessarily and only to an onto-theological paradigm of religion, but one that recognises (psychological) attachment of a child to those around her in which religion/culture is understood in its relational context.

I also suggested that rather than drawing on racialised and orientalist notions of non-Christianness, issues of religious upbringing might be adjudicated upon in ways that recognise their complexity. For example, in ways which do not seek to reconfigure issues of religious identity that maybe contradictory as in the cases involving children with parents from different cultural backgrounds or beliefs such as *Re J.* Rather, religion might be better understood as fluid, constantly shifting particularly in the context of children's lives and indeed, that religion does not necessarily entail belief or practice and yet for children this may not make it any less significant and of importance within the context of their lives. Thus, further areas of exploration would be to examine how complex notions of religious/cultural identity might inform judicial decision making within family law as well as beyond.

In making this critical and more general point about how we might better understand and deploy complex notions of religion within law, I am acutely aware that as I complete this thesis, the issue of transracial/religious adoption has resurfaced as a political debate and talking point. Tim Loughton, the Children's Minister for the new coalition government, announced in November that: "too

many children languish in care because social workers hold out for 'the perfect match' " (Loughton, 2010).[407] He added:

> There is 'no reason at all' why white couples should not adopt children from different racial backgrounds. 'If it is a great couple offering a good, loving, stable permanent home, that should be the number one consideration'.[408]

The Minister is of course addressing the serious issue of children from non-white backgrounds remaining in care whilst 'white' children seem to be more quickly and more likely to be adopted. Nonetheless, in stating that there is "no reason at all" why a transracial adoption should not take place, the Minister is making a rather chilling reduction of the very complex issues that both social workers and judges need to consider. I would contend that this reduction is partly due to an under-interrogated and sometimes simplistic notion of both religion and race within discourse such as that of Tim Loughton. Particularly, as it is a discourse that largely fails to acknowledge how religion becomes meaningful to a child in the context of her lived reality. This is reflected in the fact that the current government only plan to reissue the guidance on trans-racial adoption to local authorities and adoption agencies rather than make any substantive changes to the law or policy.[409] It is therefore, all the more urgent that LAR and other perspectives that discuss and seek to influence issues of law and religion relating to children, and especially child

---

[407] Helen Pidd, 'Promote inter-racial adoption, children's minister tells social workers' *The Guardian* (3 November 2010) <http://www.guardian.co.uk/society/2010/nov/02/inter-racial-adoption-children-social-workers> accessed 29 November 2010.
[408] *ibid.*
[409] *ibid.*

welfare law, come to grapple with both the juridical production of religion and yet also the complexity of (children's) religious affectivity.

In regards to religion and education law I have described how the inclusion of the study of religions other than Christianity has been considered a move towards recognition of multicultural Britain. Yet, as I have suggested in chapter five, this 'progression' somewhat obfuscates both the historic and continued privileged position of Christianity in education and its role in defining the parameters of what might constitute religion at all. I am not suggesting that we abandon the study of religion within schools, particularly as there are important moves towards an 'internationalising of the curriculum' as well as more of a critical approach to RE being developed.

A key example of this work is being undertaken at the Warwick Religions and Education Research Unit and in particular in the work of its director Professor Robert Jackson (Jackson, 1995; Fitzgerald, 2007; Hull, 1983).[410] Rather, what I suggest is more subtle, namely, a shift of awareness so that religion as a modern concept might be understood within a historicised context with subjugating dimensions. What this shift might facilitate is more recognition of the contingencies of law's religion as well as perhaps a move away from the influence of racialisation and orientalist discourse around non-Christianness and its' supposed excesses. It is a shifting of perspective within these discourses that have come to dominate the socio-legal and other debates of law-and-religion, especially around 'divisive' faith

[410] He explores and critiques essentialist notions of religion within RE as well as orientalist notions of non-Christianness. See chapter five where I discussed some of this work.

schools, that I suggest require further attending to. Again, I make this argument aware that the current government has taken on the former's mantle in supporting faith schools as exemplary educational models. Moreover, as discussed in the previous chapter, both David Cameron and Nick Clegg have stated that the coalition government support the idea of private religious organisations participating in the running and funding of schools such as Academies.

In short, I am arguing that it is necessary that the problematic of religion also be understood as a problematic of racialised and orientalist way-finding. Such intellectual interrogation might, perhaps, create space for another viewpoint from which to survey the complexities of law's religion and begin to understand the many instantiations that fall under its rubric. Moreover, as I have intimated at certain points in the education case study, there are a number of ways in which 'religion' comes to play a role within the governance and regulation of migrant populations, through for example, community cohesion strategies, which again have been taken on as a policy by the current government. Another key area then, requiring further exploration and focus within LAR scholarship, is the relationship between religion, and what Fortier (2010) has referred to as the 'management of social unease'.

Finally, I wish to highlight that in exploring the productivity of religion, or rather Christianity, circulating within education in the form of 'civil values' or 'civil religion', I have perhaps only begun to embark on the in depth study required to critically examine and interrogate law's religion and its imbrications with politics. The points for further exploration I have outlined here may of course be

undertaken as part of a critique of the liberal legal framework and its supposed limited capacity to protect religion. However, critiques and studies of religion-and-law must also take into their purview the embedded normative power and positionality that has brought the *very* concept, as well as its' various corollaries, such as race and secularity, into being.

BIBLIOGRAPHY

Abramowicz, S. 2009. Childhood and the limits of contract. *Yale Journal of Law & the Humanities* 21 (Winter): 37-100.

Abu-Lughod, L. 2001. "Orientalism" and Middle East feminist studies. *Feminist Studies* 27 (1): 101-13.

Addison, N. 2007. *Religious discrimination and hatred law.* Oxford: Routledge-Cavendish.

Ahdar, R. 2002. The child's right to a godly future. *The International Journal of Children's Rights* 10: 89-107.

———. 2001. *Worlds colliding: Conservative Christians and the law.* Aldershot: Ashgate.

———. 2000b. Children's religious freedom, devout parents and the state. In *Law and religion in contemporary society: Communities, individualism and the state.*, eds. P. W. Edge, G. Harvey, 93-114. Aldershot: Ashgate.

———. 2000a. *Law and religion.* Aldershot: Ashgate.

———. 1996. Religion as a factor in custody and access disputes. *International Journal of Law, Policy and the Family* 10: 177-204.

Ahdar, R., and I. Leigh. 2005. *Religious freedom in the liberal state.* Oxford: Oxford University Press.

Ahmed, S. 2000. *Strange encounters.* London: Routledge.

Alston, P. 1994. The best interests of the child: Reconciling culture and human rights. In *The best interests of the child: Reconciling culture and human rights.* Oxford: Clarendon Press.

Anderson, B. 1983. *Imagined communities: Reflections on the origin and spread of nationalism.* London: Verso.

Anghie, A. 1996. Francisco de Vitoria and the colonial origins of international law. *Social & Legal Studies* 5 (3): 321-36.

Anidjar, G. 2008. *Semites: Race, religion, literature.* Stanford: Stanford University Press.

———. 2003. *The Jew, the Arab: A history of the enemy.* Stanford: Stanford University Press.

An-Na'im, A. 1994. Cultural transformation and normative consensus on the best interests of the child. In *The best interests of the child: Reconciling culture and human rights.*, ed. P. Alston, 62-81. Oxford: Clarendon Press.

———. 1992. Toward a cross-cultural approach to defining international standards of human rights: The meaning of cruel, inhuman or degrading treatment or punishment. In *Human rights in cross-cultural perspectives.*, ed. A. An-Na'im, 19-43. Philadelphia: University of Pennsylvania Press.

Annette, J. 2005. Faith schools and communities: Communitarianism, social capital and citizenship. In *Faith schools: Consensus or conflict?* eds. R. Gardner, J. Cairns and L. Lawton, 191-201. London: Routledge-Falmer.

Anthias, F., N. Yuval-Davis, and H. Cain. 1992. *Racialized boundaries: Race, nation, gender, colour and class, and the anti-racist struggle.* London: Routledge.

Archbishops' Council. 2001. *The way ahead: Church of England schools in the new millennium.* London: Church House Publishing.

Arthur, J. 2005. The re-emergence of character education in British education policy. *British Journal of Educational Studies* 53 (3): 239-54.

———. 2003. *Education with character.* London: Routledge-Falmer.

Arthur, J. (with Bailey, R.). 2000. *Schools and community: the communitarian agenda in education.* London: Falmer Press.

Asad, T. 2006. Trying to understand French secularism. In *Political theologies: Public religions in a post-secular world.*, eds. H. De Vries, L. E. Sullivan, 494-526. New York: Fordham University Press.

———. 2003. *Formations of the secular: Christianity, Islam, modernity.* Stanford: Stanford University Press.

———. 1993. *Genealogies of religion: Discipline and reasons of power in Christianity and Islam.* Baltimore: Johns Hopkins University Press.

Bakht, N. 2004. Family arbitration using sharia law: Examining Ontario's Arbitration Act and its impact on women. *Muslim World Journal of Human Rights* 1 (1): 1-24.

Balibar, E. 1990. Paradoxes of universality. In *Anatomy of racism.*, ed. D. T. Goldberg, 283-294. Minneapolis: University of Minnesota Press.

Bamforth, N., M. Malik, and C. O'Cinneide. 2008. *Discrimination law: Theory and context, text and materials.* London: Sweet & Maxwell.

Bano, S. 2008. In pursuit of religious and legal diversity: A response to the Archbishop of Canterbury and the 'sharia debate' in Britain. *Ecclesiastical Law Journal* 10: 283-309.

Banton, M. P. 1998. *Racial theories*. Cambridge: Cambridge University Press.

Barzilai, B., ed. 2007. *Law and religion*. Aldershot: Ashgate.

Bellah, R. 1992. *The broken covenant: American civil religion in time of trial*. Chicago: University of Chicago Press.

———. 1967. Civil religion in America. *Dædalus* 97 (1): 1-21.

Benson, P. L., C. Roehlkepartain, and S. P. Rude. 2003. Spiritual development in childhood and adolescence: Toward a field of inquiry. *Applied Developmental Science* 7 (3): 205-13.

Berger, B. L. 2007. Law's religion: Rendering culture. *Osgoode Hall Law Journal* 45 (2): 277-314.

Bernard, L. 1990. The roots of Muslim rage. *The Atlantic Monthly* 266 (3): 60-71.

Bevir, M., and D. O'Brien. 2003. *From idealism to communitarianism: The inheritance and legacy of John Macmurray*. Berkeley: University of California.

Bhandar, B. 2009. The ties that bind: Multiculturalism and secularism reconsidered. *Journal of Law and Society* 36 (3): 301-26.

Blair, T. 1998. *The third way : New politics for the new century*. London: Fabian Society.

———. 1996. *New Britain: My vision of a young country*. London: The Office of Tony Blair and Westview Press.

———. 1993. Foreword. In *Reclaiming the ground: Christianity & socialism by John Smith & others.*, ed. C. Byrant. London: Hodder & Stoughton.

Bourdieu, P. 1983. The forms of capital. In *Education: Culture, economy and society.*, eds. A. H. Halsey, H. Lauder, P. Brown and A. S. Wells. 1997, 46-58. Oxford: Oxford University Press.

Boyarin, D. 2008. The Christian invention of Judaism: The Theodosian empire and the rabbinic refusal of empire. In *Religion: Beyond a concept.*, ed. H. De Vries, 150-177. New York: Fordham University Press.

Bradford District Race Review Panel chaired by Sir Herman Ouseley. 2001. *Community pride not prejudice. Making community work in Bradford*. Bradford: Bradford Vision.

Bradney, A. 2009. *Law and faith in a sceptical age*. Oxford: Routledge-Cavendish.

———. 2001. Politics and sociology: New research agendas for the study of law and religion'. In *Law and religion.*, eds. R. O'Dair, A. Lewis, 65-81. Oxford: Oxford University Press.

———. 2000. Faced by faith. In *Faith in law: Essays in legal theory.*, eds. P. Oliver, S. D. Scott and V. Tadros, 89-106. Oxford: Hart.

———. 1993. *Religions, rights and laws*. Leicester: Leicester University Press.

Bridge, C. 1999. Religion, culture and conviction – the medical treatment of young children. *Child and Family Law Quarterly* 11: 1-15.

Brighouse, H. 2005. Faith schools based in the United Kingdom: An unenthusiastic defence of a slightly reformed status quo. In *Faith schools: Consensus or conflict?* eds. R. Gardner, J. Cairns and L. Lawton, 83-90. London: Routledge-Falmer.

British Humanist Association. 2002 [revised 2006]. *A better way forward: BHA policy on religion and schools*. London: British Humanist Association.

Brown, W. 2006. *Regulating aversion: Tolerance in the age of identity and empire*. New Jersey: Princeton University Press.

Burtonwood, N. 2003. Social cohesion, autonomy and the liberal defence of faith schools. *Journal of Philosophy of Education* 37 (3): 415-25.

Butler, J. 2008. Sexual politics, torture and sexual time. *The British Journal of Sociology* 59: 1-23.

———. 1999. *Gender trouble: Feminism and the subversion of identity*. London: Routledge.

Casanova, J. 2008. Public religions revisited. In *Religion: Beyond a concept.*, ed. H. De Vries, 101-119. New York: Fordham University Press.

———. 2006. Secularization revisited: A reply to Talal Asad. *In Powers of the secular modern.*, ed. D. Scott, C. Hirschkind. 12-30. Stanford: Stanford University Press.

———. 1994. *Public religions in the modern world*. Chicago: Chicago University Press.

Cheyette, B. 1993. *Constructions of "The Jew" in English literature and society: Racial representations, 1875–1945*. Cambridge: Cambridge University Press.

Chitty, C. 2002. The 2001 white paper and the new Education Bill. *FORUM* 44, (1): 13-15.

Choudhury, T., M. Malik, M. Halstead, Z. Bunglawala, and B. Spalek. 2005. *British Muslims - discrimination, equality and community cohesion.* Budapest: Open Society Institute.

Cole, W. O. 1972. Religion in the multi-faith school. *Learning for Living* 12 (2): 23-6.

Coleman, J. S. 1988. Social capital in the creation of human capital. *American Journal of Sociology* 94 (1): 95-120.

Coles, R. 1990. *The spiritual life of children.* Boston: Houghton Mifflin.

Comaroff, J., and J. Comaroff. 1997. *Of revelation and revolution: The dialectics of modernity on a South African frontier.* Chicago: University of Chicago Press.

Comaroff, J. L. 2001. Colonialism, culture, and the law: A foreword. *Law & Social Inquiry* 26 (2): 305-14.

Cooper, D. 2007. Opening up ownership: Community belonging, belongings, and the productive life of property. *Law & Social Inquiry* 32 (3): 625-64.

———. 1998. *Governing out of order: Space, law and the politics of belonging.* London: Rivers Oram Press.

Cooper, D., and D. Herman. 1999. Jews and other uncertainties: Race, faith and English law. *Legal Studies* 19 (3): 339-66.

Cornell, S. E., and D. Hartmann. 1998. *Ethnicity and race: Making identities in a changing world.* Sociology for a new century. London: Pine Forge Press.

Crenshaw, K., N. Gotanda, and G. Peller, eds. 1995. *Critical race theory: The key writings that formed the movement.* New York: The New Press.

Cristi, M. 2001. *From civil to political religion: The intersection of culture, religion and politics.* Ontario: Wilfrid Laurier University Press.

Cumper, P. 1998. School worship: Praying for guidance. *European Human Rights Law Review* 1: 45-51.

———. 1995. Freedom of thought, conscience and religion. In *The international covenant on civil and political rights and united kingdom law.*, eds. D. J. Harris, S. Joseph, 355-389. Alderly: Clarendon Press.

Cumper, P., and T. Lewis. 2008-2009. "Taking religion seriously"? human rights and hijab in Europe - some problems of adjudication. *Journal of Law and Religion* 24: 599-627.

De Jong, J., and G. Snik. 2002. Why should states fund denominational schools? *Journal of Philosophy of Education* 36 (4): 573-87.

De Vries, H., ed. 2008. *Religion: Beyond a concept*. New York: Fordham University Press.

Delanty, G. 2002. Communitarianism and citizenship. In *Handbook of citizenship studies.*, eds. E. F. Isin, B. S. Turner, 159-174. London: Sage.

———. 2000. *Citizenship in a global age: Society, culture*. Buckingham: Open University Press.

Department for Children, Schools and Families. 2010. *Religion education in English schools: Non-statutory guidance*. London: HMSO.

———. 2007a. *Faith in the system*. London: HMSO.

———.2007b. *Guidance on the duty to promote community cohesion*. London: HMSO.

Department for Education. 1994. *Circular 1/94: Religious education and collective worship*. London: HMSO.

———. 2000. *National curriculum handbook for secondary teachers*. London: HMSO.

Department for Education and Employment. 2000. *National curriculum handbook for primary teachers*. London: HMSO.

Department for Education and Skills. 2004. *Five-year strategy for children and learners*. London: HMSO.

———.2004. *Non-statutory national framework for religious education*. London: HMSO.

———. 2001b. *Schools: Achieving success*. London: HMSO.

———. 2001a. *Schools: Building on success*. London: HMSO.

Douglas, G., and L. Sebba, eds. 1998. *Children's rights and traditional values*. Aldershot: Ashgate.

Driver, S., and L. Martell. 1997. New labour's communitarianisms. *Critical Social Policy* 17 (52): 27-46.

Edge, P. W. 2010. Hard law and soft power: Counter-terrorism, the power of sacred places, and the establishment of an Anglican Islam. *Rutgers Journal of Law and Religion* 11: 58-541.

———. 2006. *Religion and law: An introduction*. Aldershot: Ashgate.

———. 2002. *Legal responses to religious difference*. The Hague: Kluwer.

———. 2001. Religious remnants in the composition of the United Kingdom parliament. In *Law and religion.*, eds. R. O'Dair, A. Lewis, 443-456. Oxford: Oxford University Press.

———. 2000b. Religious rights and choice under the European Convention on Human Rights. *Web Journal of Current Legal Issues* 3.

———. 2000a. Male circumcision after the Human Rights Act 1998. *Journal of Civil Liberties* 5: 320-37.

Eekelaar, J. 2004. Children between cultures. *International Journal of Law Policy and the Family* 18: 178-94.

———. 2000. Disputing children. In *Cross currents: Family law and policy in the United States and England.*, eds. S. N. Katz, J. Eekelaar and M. Maclean. Oxford: Oxford University Press.

Etzioni, A. 1997. *The new golden rule: Community and morality in a democratic society*. New York: Basic books.

———. 1996. A moderate communitarian proposal. *Political Theory* 24 (2): 155-71.

———. 1995. *Rights and the common good: The communitarian perspective*. Basingstoke: Palgrave Macmillan.

Fitzgerald, T. 2007. *Discourse on civility and barbarity: A critical history of religion and related categories*. Oxford: Oxford University Press.

———. 2000. *The ideology of religious studies*. Oxford: Oxford University Press.

———. 1990. Hinduism and the 'world religion' fallacy. *Religion* 20 (2): 101-18.

Fitzpatrick, P. 2001. *Modernism and the grounds of law*. Cambridge: Cambridge University Press.

———. 1995. *Nationalism, racism and the rule of law*. Aldershot: Dartmouth Publishing Company.

———. 1987. Racism and the innocence of law. *Journal of Law and Society* 14 (1): 119-32.

Fortier, A. M. 2010. Proximity by design? Affective citizenship and the management of unease. *Citizenship Studies* 14 (1): 17-30.

———. 2008. *Multicultural horizons: Diversity and the limits of the civil nation*. Oxford: Routledge.

———. 2000. *Migrant belongings: Memory, space, identity*. Oxford: Berg.

Fox, M., and M. Thomson. 2005. Short changed? The law and ethics of male circumcision'. *International Journal of Children's Rights* 13: 161-81.

Franklin, J. 2007. *Social capital: Between harmony and dissonance.* London: London South Bank University, Families and Social Capital ESRC Research group working paper no. 22.

Freeman, G. C. 1983. The misguided search for the constitutional definition of religion. *Georegtown Law Journal* 71: 1519-635.

Freeman, M. 2001. Whose life is it anyway? *Medical Law Review* 9 (3): 259-80.

Fukuyama, F. 1995. *Trust: The social values and the creation of prosperity.* London: Hamish Hamilton.

Gaber, I., and J. Aldridge, eds. 1994. *In the best interests of the child: Culture, identity and transracial adoption.* London: Free Association Books.

Gamarnikow, E., and A. Green. 2005. Keeping the faith with social capital. In *Faith schools: Consensus or conflict.*, eds. R. Gardner, D. Lawton and J. Cairns, 90-101. London: Routledge-Falmer.

———. 2003. Social justice, identity formation and social capital: School diversification policy under new labour. In *Social justice, education and identity.*, ed. C. Vincent, 209-223. London: Routledge-Falmer.

Gardner, R., D. Lawton, and J. Cairns, eds. 2005. *Faith schools: Consensus or conflict?* London: Routledge-Falmer.

Gauchet, M. 1997. *The disenchantment of the world: A political history of religion.* Trans. O. Burge. New Jersey: Princeton University Press.

Geertz, C. 1966 [1973]. Religion as a cultural system. In *The interpretation of cultures.* 2004. 1-44. New York: Basic Books.

Ghanea, N., A. Stephens, and R. Walden, eds. 2007. *Does god believe in human rights? Essays on religion and human rights.* Leiden: Martinus Nijhoff.

Gillard, D. 2007. Never mind the evidence: Blair's obsession with faith schools. 49 (3): 213-27.

———. 2002. The faith schools debate: Glass in their snowballs. *FORUM* 44 (1): 15-22.

Goldberg, D. T. 1993. *Racist culture.* Oxford: Blackwell.

———. 2002. Racial Rule. In *Relocating postcolonialism.*, ed. A. Quayson, 82-102. Oxford: Blackwell.

Grabham, E. 2009. Flagging the skin: Corporeal nationalism and the properties of belonging. *Body & Society* 15 (1): 63.

Grace, G. 2003. Educational studies and faith-based schooling: Moving from prejudice to evidence-based argument. *British Journal of Educational Studies* 51 (2): 149-67.

Graycar, R., and J. Morgan. 1990. *The hidden gender of law*. Sydney: Federation Press.

Greenwalt, K. 1984. Religion as a concept in American law. *California Law Review* 72: 753.

Gregory, D. 2004. *The colonial present*. Oxford: Blackwell.

Griffith, E., and I. Silverman. 1995. Transracial adoption and the continuing debate over the racial identity of families. In *Racial and ethnic identity, psychological development and creative expression.*, eds. H. W. Harris, H. Blue and E. Griffiths. New York: Routledge.

Haldane, J. 1995. Educating: Conserving tradition. In *Introducing applied ethics.*, ed. B. Almond, 73-88. Oxford: Blackwells.

Hall, C. G. 1997. Aggiornamento: Reflections upon the contemporary legal concept of religion. *Cambrian Law Review* 28 (7): 7-32.

Halliday, F. 1996. *Islam and the myth of confrontation: Religion and politics in the Middle East*. London: I.B.Tauris.

Halstead, J. M., and T. McLaughlin. 2005. Are faith schools divisive? In *Faith schools: Consensus or conflict?*, eds. R. Gardner, D. Lawton and J. Cairns, 61-73. London: Routledge-Falmer.

Hamilton, C. 1996. A discriminating education: Collective worship in schools. *Child and Family Law Quarterly* 8 : 28-40.

———. 1995. *Family, law and religion*. London: Sweet and Maxwell.

Harrigan, J., and H. El-Said. 2009. *Economic liberalisation, social capital and Islamic welfare provision*. Basingstoke: Palgrave.

Herman, D. 2011. *An unfortunate coincidence: Jews, Jewishness and English law* . Oxford: Oxford University Press.

———. 2008. 'I do not attach great significance to it': Taking note of 'the holocaust' in English case law. *Social & Legal Studies* 17 (4): 427.

———. 2006. 'An unfortunate coincidence': Jews and Jewishness in Twentieth-century English judicial discourse. *Journal of Law and Society* 33 (2): 277-301.

Holt, G., and National Foundation for Educational Research in England and Wales. 2002. *Education in England, Wales and Northern Ireland: A guide to the system*. Slough: NFER.

Home Office. 2001a. *Secure borders, safe haven*. London: HSMO.

Home Office. 2001b. *Community cohesion: A report of the independent review team chaired by Ted Cantle*. London: HSMO.

Hull, J. M. 1984. *Studies in religion and education*. Sussex: Falmer Press.

———. 1983. New directions in religious education. *Religious Education* 78 (3): 391-7.

———. 1976. Christian theology and educational theory: Can there be connections? *British Journal of Educational Studies* 24 (2): 127-43.

———. 1975. *School worship: An obituary*. Canterbury: SCM Press.

Husain, M., and S. Husain. 1996. Mix'n'match. In *After adoption: Working with adoptive families.*, eds. R. Phillips, E. McWilliams. London: BAAF.

Huntington, S. P. 1993. The clash of civilizations. *Foreign Affairs* 72 (3): 22-49.

Isin, E. F. 2002. Citizenship after orientalism. In *Handbook of citizenship studies.*, eds. E. F. Isin, B. S. Turner, 117-128. London: Sage.

Isin, E. F., and B. S. Turner. 2002. Citizenship studies: An introduction. In *Handbook of citizenship studies.*, eds. E. F. Isin, B. S. Turner, 1-10. London: Sage.

Jackson, R. 2003. Should the state fund faith based schools? A review of the arguments. *British Journal of Religious Education* 25 (2): 89-102.

———. 1995. Religious education's representation of religions and 'cultures'. *British Journal of Educational Studies* 43 (3): 272-89.

Jackson, R., and K. O'Grady. 2007. Religions and education in England: Social plurality, civil religion and religious education pedagogy. In *Religion and education in Europe: Developments, contexts and debates.*, eds. R. Jackson, S. Miedema, W. Weisse and J. P. Willaime, 181-200. Munster: Waxmann.

Jakobsen, J. R., and A. Pellegrini. 2008. *Secularisms*. Durham: Duke University Press.

Jivraj, S., and D. Herman. 2009. 'It is difficult for a white judge to understand': Orientalism, racialisation and Christianity in English child welfare cases. *Child and Family Law Quarterly* 21 (3): 283-308.

Jones, R., and G. Welhengama. 2000. *Ethnic minorities in English law*. Stoke-on-Trent: Trentham Books.

Judge, H. 2001. Faith-based schools and state funding: A partial argument. *Oxford Review of Education* 27 (4): 463-474.

Kabbani, R. 1986. *Europe's myths of the orient*. Bloomington: Indiana University Press.

Keast, J. 2005. Faith schools, religious education and citizenship. In *Faith schools: Consensus or conflict?* eds. R. Gardner, D. Lawton and J. Cairns, 213-221. London: Routledge-Falmer.

Khan, A. N. 1995. Daily collective worship and religious education in British schools. *Journal of Law and Education* 24: 601-12.

King, R. 1999. *Orientalism and religion: Post-colonial theory, India and "the mystic East"*. London: Routledge.

Kirton, D. 2000. *"Race", ethnicity, and adoption*. Buckingham: Open University Press.

Kline, M. 1994. The colour of law: Ideological representations of first nations in legal discourse. *Social & Legal Studies* 3 (4): 451-76.

———. 1992. Child welfare law, 'best interests of the child' ideology, and first nations. *Osgoode Hall Law Journal* 30 : 375-425.

Knights, Samantha. 2007. *Freedom of religion, minorities, and the law*. Oxford: Oxford University Press.

Kymlicka, W. 1995. *Multicultural Citizenship: A liberal theory of minority rights*. Oxford: Clarendon Press.

———. W. 1989. *Liberalism, community and culture*. Oxford: Clarendon Press.

Lentin, A. 2005. Replacing 'race', historicizing 'culture' in multiculturalism. *Patterns of Prejudice* 39 (4): 379-96.

Lewis, R. 2004. *Rethinking orientalism: Women, travel, and the Ottoman harem*. New Jersey: Rutgers University Press.

———. 1996. *Gendering orientalism: Race, femininity, and representation*. Gender, racism, ethnicity. London: Routledge.

Local Government Association. 2002. *Faith and community: a good practice guide for local authorities*. London: LGA.

Longley, P., and S. Kronenberg. 1973. *Photopak3: Discovering religion in festivals*. London: Lutterworth Educational.

Lowe, L. 1991. *Critical terrains: French and British orientalisms*. Ithaca: Cornell University Press.

Macklem, T. 2000. Reason and religion. In *Faith in law: Essays in legal theory.*, eds. P. Oliver, S. Douglas-Scott and V. Tadros, 69-88. Oxford: Hart.

Mahmood, S. 2009. Religious reason and secular affect: An incommensurable divide? *Critical Inquiry* 35 (4): 836-62.

Mahmood, S. 2005. *The politics of piety: The Islamic revival and the feminist subject*. New Jersey: Princeton University Press.

Malik, M. 2008. *From conflict to cohesion: Competing interests in equality law and policy.* London: Equality and Diversity Forum.

Mamdani, M. 2005. *Good Muslim, bad Muslim: America, the cold war, and the roots of terror*. New York: Three Leaves Press.

Martinez-Torron, J. 2001. The European Court of Human Rights and religion. In *Law and religion.*, eds. R. O'Dair, A. Lewis, 185-204. Oxford: Oxford University Press.

Masuzawa, T. 2005. *The invention of world religions, or, how European universalism was preserved in the language of pluralism*. Chicago: University of Chicago Press.

McClintock, A. 1995. *Imperial leather: Race, gender and sexuality in the colonial contest*. London: Routledge.

McIntyre, A. 1987. The idea of an educated public. In *Education and values: The Richard Peters lectures, delivered at the Institute of Education, University of London, spring term, 1985.*, ed. G. Haydon, 15-36. London: The Institute of Education.

———. 1981. *After virtue: A study in moral theory*. London: Duckworth.

McKinney, S. J. 2006. The faith-based schools debate: Challenging assumptions and stereotypes. *Journal of Moral Education* 35 (1): 105-15.

Meer, N., and T. Modood. 2009. The multicultural state we're in: Muslims, 'multiculture' and the 'civic re-balancing'of British multiculturalism. *Political Studies* 57 (3): 473-97.

Menski, W. 2008. Law, religion and culture in multi-cultural Britain'. In *Religion and law in multicultural societies.*, eds. R. Mehdi, E. R. Sand and H. Petersen. Copenhagen: DJØF Publishing.

———. 2000. Introduction: Ethnic minority studies in English law. In *Ethnic minorities in English law.*, eds. R. Jones, G. Welhengama, xiii-xxii. Stoke-on-Trent: Trentham Books.

Miles, R. 1993. *Racism after 'race relations'.* London: Routledge.

———. 1982. *Racism and migrant labour.* Boston: Routledge.

Miles, R., and M. Brown. 2003. *Racism.* London: Routledge.

Minogue, D. 1997. Etzioni's communitarianism: Old (communion) wine in new bottles. *Politics* 17 (3): 161-8.

Modood, T. 2000. Anti-essentialism, multiculturalism and the recognition of religious groups. In *Citizenship in diverse societies.*, ed. W. Kymlicka, 175-194. Oxford: Oxford University Press.

———. 1997. *Church, state and religious minorities.* PSI reports. Vol. 845. London: Policy Studies Institute.

Modood, T., E. Bleich, B. O'Leary, and J. H. Carens. 2006a. The Danish cartoon affair: Free speech, racism, Islamism, and integration. *International Migration* 44 (5): 3-62.

Modood, T., and S. May. 2001. Multiculturalism and Education in Britain: An internally contested debate. *International Journal of Educational Research* 35 (3): 305-17.

Modood, T., A. Triandafyllidou, and R. Zapata-Barrero, eds. 2006b. *Multiculturalism, Muslims and citizenship : A European approach.* Oxford: Routledge.

Motha, S. 2007. Veiled women and the affect of religion in democracy. *Journal of Law and Society* 34 (1): 139-62.

Norris, P., and R. Inglehart. 2004. *Sacred and secular: Religion and politics worldwide.* Cambridge: Cambridge University Press.

O'Dair, R., and A. Lewis, eds. 2001. *Law and religion.* Oxford: Oxford University Press.

Oliver, P., S. D. Scott, and V. Tadros, eds. 2000. *Faith in law: Essays in legal theory.* Oxford: Hart.

Oliver, P., S. D. Scott, and V. Tadros, eds. 2000. *Faith in law: Essays in legal theory*, eds. P. Oliver, S. D. Scott and V. Tadros. Oxford: Hart.

Omni, M., and H. Winant. 1994. *Racial formation in the United States: From the 1960's to the 1990's*. New York: Routledge.

Ong, A. 1996. Cultural citizenship as subject making: Immigrants negotiate racial and cultural boundaries in the United States. In *Race, identity, and citizenship: A reader.*, eds. R. D. Torres, L. F. Mirón and J. X. Inda. 1999. 262-295. Oxford: Blackwell.

Osler, A. 2009. Citizenship education, democracy and racial justice 10 years on. *Race Equality Teaching* 27 (3): 21-7.

Parker-Jenkins, M., D. Hartas, and B. A. Irving. 2005. *In good faith: Schools, religion and public funding*. London: Ashgate.

Pateman, C. 1983. Feminist critiques of the public/private dichotomy. In *Public and private in social life.*, eds. S. I. Benn, G. F. Gaus, 281-303. London: St Martins' Press.

Perrin, C. 1999. Approaching anxiety: The insistence of the postcolonial in the Declaration on the Rights of Indigenous Peoples. In *Laws of the postcolonial.*, ed. Fitzpatrick, P. and Darian-Smith, E. 2002. 19-38. Michigan: University of Michigan Press.

Phillips, A. 2007. *Multiculturalism without culture*. New Jersey: Princeton University Press.

———. 2002. Multiculturalism, universalism, and the claims of democracy. In *Gender justice, development and rights.*, eds. M. Molyneux, S. Razavi, 115-138. Oxford: Oxford University Press.

Poulter, S. 1998. *Ethnicity, law and human rights: The English experience*. Oxford: Clarendon.

———. 1990. The religious education provisions of the Education Reform Act 1988. *Education and the Law* 2 (1): 1-11.

———. 1986. *English law and ethnic minority customs*. London: Butterworths.

Pring, R. 2005. Faith schools: Can they be justified? In *Faith schools: Consensus or conflict?*, eds. R. Gardner, D. Lawton and J. Cairns, 51-60. London: Routledge-Falmer.

Probyn, E. 1996. *Outside belongings*. London: Routledge.

Razack, S. H. 2008. *Casting out: The eviction of Muslims from western law & politics*. Toronto: University of Toronto Press.

———. 2007. The 'Sharia law debate' in Ontario: The modernity/premodernity distinction in legal efforts to protect women from culture. *Feminist Legal Studies* 15 (1): 3-32.

———. 2004. Imperilled Muslim women, dangerous Muslim men and civilised Europeans: Legal and social responses to forced marriages. *Feminist Legal Studies* 12 (2): 129-74.

Read, P. 1981. *The stolen generations: The removal of aboriginal people in New South Wales 1883 to 1969*. New South Wales: New South Wales Ministry of Aboriginal Affairs.

Rentoul, J. 1996. *Tony Blair*. London: Warner Books.

Roberts, R. H., ed. 1995. *Religion and the transformations of capitalism*. London: Routledge.

Ronen, Y. 2004. Redefining the child's right to identity. *International Journal of Law, Policy and the Family* 18 (2): 144-77.

Rose, N. S. 1999. *Powers of freedom: Reframing political thought*. Cambridge: Cambridge University Press.

Rosenblum, N. L. 2000. *Membership and morals: The personal uses of pluralism in America*. Princeton: Princeton University Press.

Sadurski, W. 1989. On legal definitions of religion. *Australia Law Journal* 63: 834-43.

Said, E. W. 1979. *Orientalism*. 1994. New York: Vintage.

Samuel, H. 1993. The clash of civilizations. *Foreign Affairs* 72 (3): 27-49.

Sandel, M. 1982. *Liberalism and the limits of justice*. Cambridge: Cambridge University Press.

Schagen, I., and S. Schagen. 2005. The impact of faith schools on pupil performance. In *Faith schools: Consensus or conflict?* eds. R. Gardner, D. Lawton and J. Cairns, 202-212. London: Routledge-Falmer.

Secretary of State for Justice and Lord Chancellor. 2007. *The governance of Britain*. London: HMSO.

Selznick, P. 1992. *The moral Commonwealth: Social theory and the promise of community*. Berkeley: University of California Press.

Short, G. 2002. Faith-based schools: A threat to social cohesion? *Journal of Philosophy of Education* 36 (4): 559-72.

Slaughter, M. M. 2000. Contested identities: The adoption of American Indian children and the liberal state. *Social and Legal Studies* 9 (2): 227-48.

Smart, C. 1992. The women of legal discourse. *Social & Legal Studies* 1: 29-44.

Smith, J. 1993. Reclaiming the ground. In *Reclaiming the ground: Christianity & socialism by John Smith & others.*, ed. C. Byrant. London: Hodder & Stoughton.

Spring, J. H. 1996. *The cultural transformation of a native American family and its tribe, 1763-1995: A basket of apples.* New Jersey: Lawrence Erlbaum.

Statham, J., D. Mackinnon, and H. Cathcart. 1989. *The education fact file: A handbook of education information in the U.K.* London: Hodder and Stoughton in assoc. with the Open University.

Stepan, N. 1982. *The idea of race in science: Great Britain 1800-1960.* Basingstoke: Macmillan.

Stephens, P. 2004. *Tony Blair: The price of leadership.* London: Politico.

Stychin, C. 1998. *A nation by rights: National cultures, sexual identity politics, and the discourse of rights.* Philadelphia: Temple University Press.

Taylor, C. 2007. *A secular age.* Massachusetts: Belknap Press.

———. 1989. *Sources of the self: The making of the modern identity.* Cambridge, MA: Harvard University Press.

Thomson, M. 2008. *Endowed: Regulating the male sexed body.* New York: Routledge.

Tuitt, P. 2004. *Race, law, resistance.* London: The Glasshouse Press.

Turner, B. S. 2002. Religion and politics: The elementary forms of citizenship. In *Handbook of citizenship studies.*, eds. E. F. Isin, B. S. Turner, 259-290. London: Sage.

Vakulenko, A. 2007. 'Islamic headscarves' and the European Convention on Human Rights: An intersectional perspective. *Social and Legal Studies* 16 (2): 183-99.

Valman, N. 2007. *The Jewess in nineteenth-century British literary culture.* Cambridge: Cambridge University Press.

Van Praagh, S. 1999. Faith, belonging and the protection of our children. In *XVII Windsor Yearbook of Access to Justice.*, 154-203.

Vickers, L. 2008. *Religious freedom, religious discrimination and the workplace*. Oxford: Hart.

Wallerstein, I. 2006. *European universalism: The rhetoric of power*. New York: New Press.

Walzer, M. 1983. *Spheres of justice*. New York: Basic Books.

Weber, M. 1920. *The Protestant ethic and the spirit of capitalism*. Trans. Talcott Parsons. 1930. London: Unwin University Press.

Werbner, P., and T. Modood, eds. 1997. *Debating cultural hybridity: Multi-cultural identities and the politics of anti-racism*. London: Zed Books.

Wilkinson, A. 1998. *Christian socialism: Scott Holland to Tony Blair*. London: SCM Press.

Wing, A. K., R. Delgado, and D. Bell, eds. 2003. *Critical race feminism: A reader*. New York: New York University Press.

Wright, A. 2003. Freedom, equality, fraternity? towards a liberal defence of faith community schools. *British Journal of Religious Education* 25 (2): 142-52.

Yeğenoğlu, M. 1998. *Colonial fantasies: Towards a feminist reading of orientalism*. Cambridge: Cambridge University Press.

Yuval-Davis, N. 2009. Identity, citizenship and contemporary, secure, gendered politics of belonging. In *The ISA handbook in contemporary sociology.*, eds. A. B. Denis, D. Kalekin-Fishman, 29-39. London: Sage.

———. 2007. Intersectionality, citizenship and contemporary politics of belonging. *Critical Review of International Social and Political Philosophy* 10 (4): 561-74.

———. 2006. Belonging and the politics of belonging. *Patterns of Prejudice* 40 (3): 197-214.

———. 2004. Borders, boundaries, and the politics of belonging. In *Ethnicity, nationalism and minority rights.*, eds. S. May, T. Modood and J. Squires, 214-230. Cambridge: Cambridge University Press.

———. 1997. *Gender & nation*. London: Sage.

Yuval-Davis, N., K. Kannabirān, and U. Vieten. 2006. *The situated politics of belonging*. London: Sage.

TABLE OF LEGISLATION

Children Act 1989

Children Act 2002

Children's Bill 2002

Education Act 1902

Education Act 1944

Education Act 1996

Education Act 2002

Education and Inspections Act 2006

Education Reform Act 1988

Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660

Equality Act 2010

European Convention on Human Rights 1950

Local Government Act 1988

Local Government Act 2000

Race Relations Act 1976

Race Relations (Amendment) Act 2000

Schools Standards Framework Act 1998

TABLE OF CASES

AM v Local Authority, The Children's Guardian, B-M (children) [2009] EWCA Civ 205

Arrowsmith v UK (1978) 19 D&R 5

Chappel v UK (1988) 10 EHRR 510

Eweida v British Airways Plc [2010] EWCA Civ 80

Ex parte Ruscoe and Dando (1993) (unreported)

H v UK (1993) 16 EHRR CD 44

J v C [1970] AC 668

Ladele v London Borough of Islington (Liberty intervening) [2009] EWCA Civ 1357

Mandla v Dowell Lee [1983] 2 WLR 620

Mcfarlane v Relate Avon Ltd [2010] EWCA Civ B1

Mrs Azmi v Kirkless Metropolitan Borough Council UKEAT/0009/07/MA

Osman v Elasha [2000] Fam 62

Pawandeep Singh v Entry Clearance Officer [2004] EWCA Civ 1075 and [2005] QB 608

Pendragon v UK (1998) EHRR CD 179

R (on the application of Begum) v Head teacher and Governors of Denbigh High School [2006] All ER (D) 320

R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others [2010] IRLR 136

R (Watkins-Singh, A Child Acting by Sanita Kumari Singh, her Mother and Litigation Friend) v Governing Body of Aberdare Girls High School and Rhondda Cyon Taf Unitary Authority [2008] ELR 561

R (X) by her Father and Litigation Friend v Y School [2007] ELR 278

R v Cornwall County Council, Ex Parte E [1999] 2 FCR 685

Re A [1987] 2 FLR 429

Re B (A Minor) (Adoption Application) [1995] 2 FCR 749

Re B (Adoption: Setting Aside) [1995] 1 FLR 1

Re B (Adoption: Jurisdiction to set aside) [1995] Fam 239

Re C [2002] 1 FLR 1119

Re E [1993] 1 FLR 386 and [1994] 5 Med LR 73

Re G (A Minor) [1990] FCR 881

Re C [2002] 1 FLR 1119

Re E [1993] 1 FLR 386 and [1994] 5 Med LR 73

Re G (A Minor) [1990] FCR 881

Re J [1999] 2 FLR 678 and [2000] 1 FLR 5717

Re JK (Transracial Placement) [1990] 1 FCR 891

Re K (Adoption: Foreign Child) [1997] 2 FCR 389

Re M (Child's Upbringing) [1996] 2 FLR 546

Re P (A Minor) (Residence Order: Child's Welfare) [2000] Fam 15

Re S (change of name: cultural factors) [2001] 3 FCR 648

S (Children) [2004] EWHC 1282

Sahin v Turkey (2005) 19 BHRC 590

The Church of the New Faith v The Commission of Pay-roll Tax (Victoria) [1982-3] 154 CLR 120

X, Y and Z v UK (1982) 31 D&R 50