The Religion of Law

Race, Citizenship and Children's Belonging

Suhraiya Jivraj

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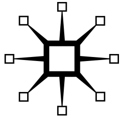

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Contents

Table of Cases x
Table of Legislation xii
Abbreviations xiii
Acknowledgments xiv

Introduction **1**
Towards a critical approach to law's religion 1
Context and background 3
Theoretical frameworks: a critical socio-legal approach 5
Case studies and key arguments 8
Chapter outline 13

1 Conceptualizing Law's Religion: Socio-Legal Perspectives **17**
Introduction 17
Religion conceptualized as theology 18
Religion conceptualized as identity 22
Religion as a matter of choice? 25
Children's rights versus parents' rights 26
Religion as relational 26
Concluding remarks 28

2 Interrogating Law's Religion: Critical Perspectives **29**
Introduction 29
The modern emergence of the concept of religion 29
Christian universality and the racialization of non-christianness 31
Re-politicizing the concept of religion 34
Secularism and the juridical 'authentication' of religion 36
The contingency of law's religion: non-christianness as race/ethnicity/culture 43
Religion, belonging and community/nationhood 48
Concluding remarks 51

3 Non-Christianness in Adoption and Child Welfare Cases: Prioritizing Racialized Religion **53**
Introduction 53
The facts of the *Jonathan Bradley* case 58
Prioritizing race: judicial conflations of race/ethnicity/nation with theology 60

Deprioritizing the racial link: religion as theology, community and cognitive processing 69
Towards a complex notion of religion: culture and personal identity 75
Concluding remarks 80

4 Orientalism, Belonging and Nationhood 82
Introduction 82
Religion as a signifier of 'proper' belonging 83
Nationhood and conflictual non-Christians 91
Anxiety and religious unbelonging 98
Concluding remarks 101

5 Religion in Education: Christian Legacy, Orientalist Positioning and Common Values 102
Introduction 102
Religion and education in England: a brief historical background 106
Collective worship and RE: from Christian heritage to shared values? 108
Socio-legal perspectives on religion in education: a Christian legacy? 112
Interrogating the onto-theological concept of religion in RE and 'knowing' non-christianness 116
Common values and the influence of Christianity: communitarian theory in education 119
Concluding remarks 125

6 Faith in Schools: Racialized Religion, Community Cohesion and belonging 127
Introduction 127
Faith Schools under New Labour 130
Racializing religion: Muslim schools as a threat to community cohesion 136
Citizenship, belonging and the de-racialization of non-Christians 140
The productivity of values: church schools and social capital theory in education 146
The co-imbrication of religion and politics: New Labour and the influence of Christian socialism 152
Concluding remarks 156

Conclusion **158**
Interrogating law's religion: the continued work of values in education 158
Same-race/religion-matching in adoption: the *exclusion* of white families 162

Bibliography 167
Index 185

Table of Cases

AM v Local Authority, The Children's Guardian, B-M (Children) [2009] EWCA Civ 205 97
Arrowsmith v UK (1978) 19 D&R 5 19
Azmi v Kirklees Metropolitan Borough Council UKEAT/0009/07/MA 4, 39
Campbell and Cosans v UK (1982) 4 EHRR 293 19
Chappel v UK (1988) 10 EHRR 510 19
Church of the New Faith v Commission of Pay-roll Tax (Victoria) [1982–83] 154 CLR 120 19
Eweida v British Airways plc [2010] EWCA Civ 80 4, 25
Ex Parte Ruscoe and Dando (1993) (unreported) 115
H v UK (1993) 16 EHRR CD 44 19
J v C [1970] AC 668 67, 73, 74
Ladele v London Borough of Islington (Liberty intervening) [2009] EWCA Civ 1357 4
Mandla v Dowell Lee [1983] 2 WLR 620 43, 44, 45, 61
Mcfarlane v Relate Avon Ltd [2010] EWCA Civ B1 2
Osman v Elasha [2000] Fam 62 90
Pawandeep Singh v Entry Clearance Officer [2004] EWCA Civ 1075, [2005] QB 608 14, 85, 86, 87, 89, 97, 103, 118, 139
Pendragon v UK (1998) EHRR CD 179 19
R (on the Application of Begum) v Headteacher and Governors of Denbigh High School [2006] All ER (D) 320 4, 39
R (on the Application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and Others [2010] IRLR 136 4–5
R (on the Application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and Others [2009] UKSC 15 103
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 4, 25, 86
R (X) by her Father and Litigation Friend v Y School [2007] ELR 278 4, 39
R v Cornwall County Council, Ex Parte E [1999] 2 FCR 685 99
Re A [1987] 2 FLR 429 67, 68–9, 74
Re B (A Minor) (Adoption Application) [1995] 2 FCR 749 1–2, 14, 25, 53, 56, 65–8, 69, 78, 80, 84–5, 86, 87
Re B (Adoption: Setting Aside) [1995] 1 FLR 1 53, 57–62, 64, 80, 97, 98, 99–100, 101

Re B (Adoption: Jurisdiction to Set Aside) [1995] Fam 239 53, 57–62, 64, 80, 86, 91, 97, 98, 99–100, 101, 103
Re C [2002] 1 FLR 1119 53, 76–8, 98
Re E (A Minor) (Wardship: Medical Treatment) [1993] 1 FLR 386; [1994] 5 Med LR 73 24, 25, 41
Re G (A Minor) [1990] FCR 881 84
Re H (1981) 2 FLR 253 24
Re J [1998] INLR 424, [1999] 2 FLR 678, [2000] 1 FLR 5717 1, 5, 25, 26–7, 28, 55, 69, 73, 74, 75–6, 78, 84, 85, 87, 88, 95, 98, 100–1, 104, 118
Re JK (Transracial Placement) [1990] 1 FCR 891 53, 62–4, 67, 70, 74, 98, 99, 103
Re JM Carroll [1931] 1 KB 317 (CA) 82
Re K (Adoption: Foreign Child) [1997] 2 FCR 389 86, 87–8, 107
Re M (Child's Upbringing) [1996] 2 FLR 546 67, 88–9
Re P (A Minor) (Residence Order: Child's Welfare) [2000] Fam 15 53, 72, 74, 75, 76, 77–8, 84, 87, 88, 95, 99–100, 101
Re S (Change of Name: Cultural Factors) [2001] 3 FCR 648 55, 75–6, 78, 96, 98, 107, 118, 139
Re T (Minors) (Custody: Religious Upbringing) (1981) 2 FLR 239) 24
Re W [1992] Fam 64 24
Re W [1993] 1 FLR 386 24
Re Weston's Settlements [1968] 3 All ER 338 92
S (Children) [2004] EWHC 1282 78, 97
X, Y and Z v UK (1982) 31 D&R 50 19
X, Y and Z v UK [1997] 24 EHRR 143 86

Table of Legislation

Academies Act 2010 134
Adoption and Children Act 2002 54, 55, 163, 165
Adoption Rules 1984 66
Children Act 1989 54, 55
Children's Bill 2002 53
Elementary Education Act 1870 106
Education Act 1880 106
Education Act 1891 106
Education Act 1902 106
Education Act 1918 106
Education Act 1944 107, 112, 113, 130
Education Act 1996 110, 111
Education Act 2002 112, 133, 134, 135
Education and Inspections Act 2006 112, 135
Education Bill 2001 127
Education Reform Act 1988 109, 110, 111, 113, 114, 115
Education (School Government) (Transition to New Framework) Regulations 1998 (SI 1998/2763) 131
Elementary Education Act 1870 106
Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660 4, 6, 17, 44
Equality Act 2010 4, 17, 42, 44, 152
European Convention on Human Rights 1950 17
Gambian Adoption Act 1992 66
Local Government Act 1988 114
Local Government Act 2000 114
Race Relations Act 1976 43, 44, 61, 76
Religious Character of Schools (Designation Procedure) Regulations 1998 130
Schools Standards and Framework Act 1998 107, 110, 111, 114, 130, 131
United Nations Convention on the Rights of the Child 1989 90

Abbreviations

CAFFCAS	Child and Family Court Advisory and Support Service
CoE	Church of England
CSM	Christian Socialist Movement
DCSF	Department for Children, Schools and Families
DfE	Department for Education
DfEE	Department for Education and Employment
DfES	Department for Education and Skills
ECHR	European Convention on Human Rights
ERA	Education Reform Act 1988
EU	European Union
LGA	Local Government Association
LAR	law and religion
LARSN	Law and Religion Scholars Network
LEA	Local Education Authority
NFER	National Foundation for Educational Research
NL	New Labour
NMS	National Minimum Standards (for Adoption)
OARS	Official Account of Religious Studies
RC	Roman Catholic
RE	religious education
SSFA	School Standards and Framework Act 1998
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
VA	voluntary aided
VC	voluntary controlled

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Introduction

> '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, either. (De Vries, 2008, p. 11)

Towards a critical approach to law's religion

In the case of *Re J* [1999] 2 FLR 678, a 'non-practising Muslim' father petitioned the court regarding matters pertaining to the religious upbringing of his son (J) who was living with his 'non-practising Christian' mother after the couple's separation. 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 recognize 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 (see Jivraj and Herman (2009) for a discussion of the medical case against circumcision which was also a key factor in this case.)

Wall J had also considered the importance of community and birthright to a child's best interests in the earlier case of *Re B (A Minor) (Adoption Application)* [1995] 2 FCR 749 involving a transracial/transreligious 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 remain in England with the foster carers she had been living with and with whom she had formed a psychological attachment. 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.

What these and other child welfare cases (discussed in Chapters 3 and 4) 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. It is, of course, not my contention that children's voices are entirely absent in the areas of law that I examine or that children have no agency; indeed, there is increasing concern for taking account of children's voices in child welfare cases. However, it is clear that 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.

Discourse on children's belonging, community and citizenship also interact with religion and identity 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 parents with non-Christian religious and racial affiliations can both maintain their 'own' sense of identity, and yet, also *belong* to the nation as citizens. The juridical discourse surrounding faith schools and the role of religion in education more generally, 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 and citizenship within it. What links the two juridical sites outlined above is that they both exemplify a key argument of the book, namely that the religion of law needs to be understood as contingent upon various socio-political and historical factors, which can themselves produce conceptualizations that become implicated in socio-political work such as nation-building. As I will discuss, the shaping and demarcating of children's identities and belonging is often a key battleground in law and policy that fosters nation-building. These analytical sites are therefore also relevant to debates beyond those surrounding individual child welfare cases or the case for or against

faith schools; in short, they go to the very heart of government regulation of minority children's lives using the rubric of religion.

The impetus behind this critical study of what I refer to as the religion of law (which I also 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. The sheer controversy surrounding 'religion' and its related issues within those areas of law and beyond has often made it difficult to grapple with the complexities of the concept itself. My aim is, therefore, to understand better what we mean by religion in given areas of juridical discourse by asking three key questions. Firstly, how is religion, particularly non-christianness conceptualized 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 conceptualizations of religion, 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? And, thirdly, what might be the socio-political effects of conceptualizing religion in particular ways, or, in other words, what work does law's religion do? Underpinning my exploration of these questions throughout the book is an urgent call for a more interrogative exploration of how religion circulates and can come to be configured within law and social policy; particularly amongst socio-legal law-and-religion (LAR) scholarship, which can often be influential on legal developments, as I discuss further below.

Context and background

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 much new legislation and social policy within Europe. These developments have themselves ignited controversy and debate which has tended to highlight the seeming lack of integration by people with minority religious beliefs. For example, the (legal) debates on religion have taken place around freedom of religion issues, most notably in relation to the wearing of religious dress and/or other religious symbols at work or school. The most recent and perhaps well-known examples of this include the banning of the wearing of religious symbols in public institutions in France (Asad, 2006; Brown, 2006; Razack, 2008). New laws banning the *niqab* or *burkha* (garments worn by some Muslim women that cover the face and body) were approved by both the French National Assembly and the Belgian lower house in 2010. Seemingly going against a multiculturalism policy agenda, there are also ongoing initiatives to introduce similar laws in the Netherlands, the UK

and elsewhere in Europe (BBC, 2010). In the British context, the most controversial cases involving the wearing of religious dress and/or symbols include: *R (on the Application of Begum) v Headteacher and Governors of Denbigh High School* [2006] All ER (D) 320; *Azmi v Kirklees 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 (see Motha, 2007; Vakulenko, 2007; and Bhandar, 2009, for a critical legal discussion of these cases). Another key issue that has caused much debate is around the recognition of minority religious laws, particularly Muslim or *shari'a* law relating to family issues in the UK and Canada (Bakht, 2004; Razack, 2007). The former Archbishop of Canterbury, Dr Rowan Williams also intervened in this debate in his foundation lecture at the Royal Courts of Justice (2008) outlining some reasons in favour of recognition of minority laws within the British civil legal system (see Bano, 2008).

With blasphemy laws being limited to Christianity in Britain – an issue which arose during the Salman Rushdie affair in the late 1980s – another key area of debate has been around balancing freedom of expression against hate speech, or incitement of religious hatred. Within Europe, a key instance of this has been the now infamous Danish newspaper depiction of the Muslim Prophet Muhammad as a terrorist (see Modood et al., 2006a; Mahmood, 2009). Perhaps one of the most significant developments of law relating to religion in Britain has been the anti-discrimination regulations banning discrimination on grounds of religion or belief (Employment Equality (Religion or Belief) Regulations 2003 incorporated into the Equality Act 2010). Already, a number of cases using this legislation have raised issues of the limits of religious freedom in the workplace (see, for example, *Eweida v British Airways plc* [2010] EWCA Civ 80, involving a British Airways employee seeking to wear a crucifix pendant at work). There has also been debate on the potential conflict of religious freedom with other anti-discrimination grounds, such as those protecting sexual orientation, as in *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.

The issue of faith schools and their increasing numbers in England, facilitated by former Labour government law and policy, has also been a flashpoint of controversy. This was reignited in 2010 with the then newly formed Supreme Court's decision on the discriminatory nature of the Jewish Free School's admissions policy (*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. In addition to the issues of discriminatory admissions policies, faith schools more generally have been widely criticized 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. 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 5 and 6. Interestingly, another area of law and religion relating to children receiving considerably less public attention is child welfare law. As I mentioned above, as with governmental discourse and policy on religion in education, child welfare cases are an area of law where judges – as state actors – are adjudicating on matters of children's religious upbringing and are, therefore, potentially impacting on the (future) religious identities of children.

Theoretical frameworks: a critical socio-legal approach

Much of the scholarship on religion in child welfare and education law and policy touches on the key debates around religion that exist within the socio-legal LAR and human rights literature more broadly (Bradney, 1993; Poulter, 1998; Jones and Welhengama, 2000; Freeman, 2001; O'Dair and Lewis, 2001; Ahdar and Leigh, 2005; Cumper and Lewis, 2008–09). 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, but rather choose a religion later in life for themselves (Alston, 1994; Hamilton, 1995; Ahdar, 1996; Douglas and Sebba, 1998; Freeman, 2001; Edge, 2002; Eekelaar, 2004; Ronen, 2004; Ahdar and Leigh, 2005). Similar debates arise in relation to faith schools and religious education (RE) where parents' rights to choose a faith-based education are pitted against what is viewed as an education that potentially indoctrinates children and produces communities divided across religious lines and lacking in social cohesion (Ahdar, 1996; Grace, 2003; Ahdar and Leigh, 2005; Brighouse, 2005; Halstead and McLaughlin, 2005; Pring, 2005).

Another strand within the socio-legal literature seeks to increase protection specifically of *minority* religion within European nations as well as religious autonomy within Western liberal democracies through the frameworks of legal pluralism and/or multiculturalism (Poulter, 1998; Jones and Welhengama, 2000; Menski, 2000). All this work also implicates earlier and continuing debates on the 'assimilation', 'integration' and 'recognition' of racial/ethnic minorities in what has been termed, in the British

context, the 'race-relations era' (Poulter, 1998; Jones and Welhengama, 2000; Menski, 2000). 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 2003 regulations banning religious discrimination, as well as governmental concerns and policy on community cohesion (particularly in the work of Tariq Modood, see Modood et al., 2006b). 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 (Ahdar, 2000a; O'Dair and Lewis, 2001; Rivers, 2001; Ghanea et al., 2007; Bradney, 2009). 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 (O'Dair and Lewis, 2001; Ghanea et al., 2007; Bradney, 2009).

As highlighted in the quote at the beginning of this book, in which Hent De Vries questions whether religion can be fully understood as having any single meaning, he and other scholars, predominantly outside of law, are more critical about the possibilities of religion having any kind of stable meaning; and they consequently also challenge the idea of making meaningful distinctions between 'the religious' and 'the secular' – or non-religious – particularly within a European context. Indeed, their work from the disciplines of anthropology and religious studies engages more in an interrogation of the conceptualization and deployment of the terms 'religion' and 'secularism' themselves (Asad, 2003; De Vries, 2008; Jakobsen and Pelligrini, 2008; Bhandar, 2009; Mahmood, 2009). For example, De Vries and others challenge the very conceptualizing of religion in 'onto-theological terms', namely as having a theological 'essence' comprising of belief or faith in a transcendent type being (God-head) (De Vries, 2008, p. 12). Similarly, for Timothy 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, p. 4)

These scholars try to understand religion contextually or historically, as contingent upon and part of particular political, economic and other circumstances (Asad, 1993; Fitzgerald, 2000; 2007; De Vries, 2008, p. 12). This critical approach or methodology, they argue, tends to be marginalized in favour of understanding religion as a 'total social fact' (De Vries, 2008, p. 12; see also Asad, 1993; Fitzgerald, 2000; 2007). 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 (2008, p. 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 (2008, p. 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, pp. ix–xi). Thus, he seeks to analyse more clearly the various relational ideologies and processes that inhabit the term as well as to demonstrate how and why these aspects have come together under the rubric of religion (2000, pp. ix–xi).

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, p. 3). He does this by allowing various conceptualizations of religion to sit alongside each other as part of a 'constellation' of conceptualizations (2008, p. 5).[1] This approach allows him to problematize 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 (2008, pp. 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, pp. 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 socio-politically contingent and fluid concept within law (see, for example, Sullivan, 2010). Part of this critical work is to highlight the presence of racialized and orientalist knowledge or way-finding that can bring non-Christian religion into being, in and through juridical discourse (Cheyette, 1993; Valman, 2007). As Edward Said notes, the importance of studying representations is in uncovering their discursive power and material effects (1994, pp. 6–7). This methodology also draws from critical race, feminist and queer theory approaches that read legal texts to uncover how race, gender and other social relations come

1 Drawn from Adorno in *The Actuality of Philosophy* (1930 inaugural address) and *Negative Dialectics* (1966) cited in De Vries (2008, p. 5).

to be produced and deployed through law (on critical race theory see, in particular, Crenshaw et al, 1995; Omni and Winant, 1994; Delgado and Stefanic, 2001; Goldberg, 2002; Wing et al., 2003; Herman, 2011).

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 conceptualized 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.

Case studies and key arguments

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 a racial genetic marker that prioritizes a 'racial' or ethnic lineage; and, thirdly, as a cultural identity relating to the child's community context. In addition to the argument that minority religion comes to be conceptualized in these different ways, what is perhaps more interesting and significant is the basis upon which these conceptualizations come into being. Thus, a second key argument of this case study and the book as a whole is that the juridical conceptualizations of religion that I explore reveal ways of thinking that draw upon orientalist and racialized knowledge, as well as being from a European Christian epistemic standpoint.

My use of the term 'orientalism' in this book draws upon the work of Said (1994) 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. He argued that orientalism was: 'a system of knowledge about the Orient' offering 'positional authority' to those espousing it (1994, pp. 6–7). By this he meant that Western Christian academic thought had developed a systemized knowledge-base to understand and represent 'the orient', which also came to circulate within popular culture, including art and literature, in ways that placed Western *values*, rooted in and co-imbricated with Christian values, as the superior civilization or civilizational apex (1994, p. 43). As I elaborate in more detail in Chapter 2, Said's work is therefore key to understanding how non-christianness came to be viewed from a Christian European, and later Western, standpoint.

Whilst Said's analysis does not specifically theorize the relationship between race and religion in his work, scholars in the disciplines of history

(Masuzawa, 2005) and religious studies (King, 1999; Fitzgerald, 2000; 2007) 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 (see also Fitzgerald, 2000; Boyarin, 2008; De Vries, 2008, p. 28). She notes how the categorization 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 civilization (Masuzawa, 2005). As Robert Miles and Malcolm Brown highlight, categorization of this kind is a key feature of the process of racialization, indeed they use the concept (of racialization) 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, p. 157)

Although there are a number of ways scholars have come to understand the term 'racialization' or 'race-thinking' (see critical race scholars, such as Omni and Winant, 1994; Goldberg, 2002; Razack, 2008), I draw on Miles and Brown's concept and specifically refer to it to mean a particular form of understanding and/or of representing persons perceived as alien to the 'home' environment, namely Christian Europe. Whilst, Said's analysis does not specifically espouse the language of racialization 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 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 (Said, 1994; Miles and Brown, 2003, p. 100). 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 2, 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 a too totalizing and over-determined 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 homogenizing 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, the demarcating between them on the basis of religion/race. As I demonstrate in my case studies, 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.

Moreover, I wish to clarify that, in highlighting the role of Christianity and a European/Western Christian viewpoint, my intention is not to homogenize 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 I explore throughout the book, a number of scholars have argued that Christianity – in particular Protestantism – can nonetheless be understood in a de-theologized form – particularly as a set of universally applicable values – despite the different forms it takes (De Vries, 2008, p. 11; Asad, 1993; 2000; Rosenblum, 2000; Fitzgerald, 2007; Jakobsen and Pelligrini, 2008; Bradney, 2009). I use the terms Christian and christianness in this sense, *as a set of universalized, secular values* that underpin a way of thinking that has become embedded in Western culture, judicial discourse and are increasingly being asserted as *state values*, as I discuss in my 'Conclusion'. In stating the 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, indeed, by interrogating law's religion, it is my aim to excavate intellectual space to focus on complex notions of religious subjectivity (see Jivraj and de Jong, 2011). I also do not wish to perpetuate a polarized view of issues such as the integration of ethnic minorities in Western nations as a problem that relates to a 'clash of civilizations' between the 'Christian West' and 'Islam', a view put forward, for example, by Samuel Huntington (1993) in his now (in)famous article.[2] Rather, I wish to foreground the fact that Christianity has had, and continues to have, an embedded, dominant and regulatory role within juridical state discourse, even despite the different theological and cultural forms it takes in particular contexts.

In my first case study, for example, I explore how judges come to understand and conceptualize 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

2 The clash-of-civilizations discourse was put forward by Samuel Huntington (1993) drawing on the idea of Bernard Lewis (1990).

'conflictual' non-Christians, from a Western Christianized viewpoint (see Chapter 4). Whilst, in some of the cases discussed, this positionality is clearly expressed by the judge, in others it remains obscured. The effects of judges conceptualizing 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 distinguish and demarcate between the secular Christian West and (uncivilized) racialized non-Christian others.

This subjective way of thinking about minority religion – and Islam in particular – is also revealed in my second case study relating to religion in education. Here, I explore the influence of the onto-theological conceptualization of religion stemming from a Christian viewpoint that still underpins RE and the study of non-christianness more generally (see Chapter 5). 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, have been and continue to be viewed by government ministers as potentially influencing children's behaviour; more specifically, nurturing the children into becoming productive and tolerant citizens. As I discuss in Chapter 6, despite the former 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 church schools that have been viewed as the benchmark for other schools – including schools of other faiths – to follow. Moreover, a clear justification for doing so is that these values are also secular and therefore universally applicable. Yet, I suggest that both the historically privileged status of Christianity in the English education system and the prevalence of a Christian/secular values discourse should be viewed more broadly within the wider political context of the 'war on terror' and the integration of 'minorities' and community cohesion within the nation; particularly as schools, since 2006, are under a legal duty to promote community cohesion in addition to the teaching of citizenship and Christian values within RE and the wider curriculum. As I discuss in the 'Conclusion', under the Coalition government the fusing of Christian values with a sense of proud Britishness, or rather Englishness, is further underway with proposals to change the national curriculum. These proposals include ensuring children learn more about the 'facts' of *English* history, including the story of the British empire, an episode that the Education Minister Michael Gove explains is something to be proud of rather than be thought about in a critical way or from other perspectives.

Indeed, developing other perspectives is critical to the significance of my analysis which seeks to understand how religion comes to be deployed in

potentially orientating the lives of children towards belonging and citizenship within the nation. Thus, both my case studies, in highlighting the existence of different juridical conceptualizations 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 conceptualizations, 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, racialized and culturally embedded Christian ways of understanding non-christianness. This analysis demonstrates why it should be possible to name the asymmetric power that Christianity in various cultural forms – whether as a standpoint and/or underpinning values – has in the world today, despite its divisions and internal conflicts. As I will elaborate on further throughout the book, 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 civilization associated with the Christian values of North America and Europe should be advanced, underlies contemporary political discourse deployed to justify the post-9/11 war on terror (Gregory, 2004; Brown, 2006; Razack, 2008).

Attending to the various ways in which religion and non-Christian religion in particular can come to be understood in and regulated through juridical discourse and policy-making is therefore critical to my argument in this book. I suggest that that fixed onto-theological notions of religion do not attend to how religion can come to be authenticated, demarcated and therefore produced in and through law; namely, that judges and government ministers participate in the formulation of the parameters of religion which in turn can influence and impact upon children's lives. Nor do fixed onto-theological notions of religion capture the socio-political factors at play in relation to how non-christianness comes to be conceptualized. Moreover, perpetuating essentialist notions of religion does not allow us to view the effects of the privileged position of Christianity, whether in terms of how non-christianness is understood through the onto-theological paradigm, as belief and practice, or how it underpins the discourse of universal and secular values and, indeed, culminates as state (i.e. British, European, American or Canadian) values. My 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 recognize religious identities. Rather, it is an analysis that seeks to highlight *what is at stake* for non-Christian – and other – subjects in only focusing on religion as *the* problematic, rather than on the *ways* in which religion comes to circulate in juridical discourse. It is for this

reason that I do not seek to promulgate or advocate for a particular normative legal paradigm or 'solution' to the supposed problematic of religion's proper place in law. Instead, I employ an interdisciplinary 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. The arguments which I put forward here about the contingency of the concept of law's religion are therefore not exclusive to the case studies that I examine. Rather, I suggest that a more critical approach to the religion of law, one that uncovers racialization inherent within it as well as its potential effects, needs to be further attended to within and beyond other areas of law relating to children.

Chapter outline

In this introductory chapter I have already signalled some of the key theoretical frameworks from within socio-legal literature that address the various problematics of religion within law. In chapter 1, I explore this important and influential body of work in detail. The impetus for doing so is that this literature 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, but also seeks to influence legal developments within these areas. Yet, as I argue, it does so without challenging the predominantly onto-theological conceptualization of religion or attending to the ways in which religion can come to be produced through law. 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 conceptualization of religion, even in relation to non-christianness. My analysis of this area of work therefore lays the groundwork for understanding the need to interrogate law's religion and take a more critical approach.

In Chapter 2, I then examine critical perspectives on religion from anthropology and religious studies, as well as from critical race studies, which I bring to bear on some key work from within the socio-legal LAR literature discussed in Chapter 1. In doing so I argue that there is relatively little recognition in the socio-legal literature of how the modern concept of religion emerged, nor of the privileged role of Christianity, albeit in a de-theologized form, in contemporary juridical discourse. Moreover, I also suggest that attending to the contingency of religion as a concept within law is imperative both as a theoretical position and a methodology, not only for the case studies that I examine in this book but also beyond.

In Chapter 3, 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? 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 racialized 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.

I continue this analysis in Chapter 4 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 *racialized* understandings of non-christianness, drawing on Said (1994) and specifically Gil Anidjar's (2008) analysis of orientalism, I point to the ways in which religion circulates in a manner that *distinguishes* between people along racial lines. The demarcating of people through racialized 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 birthright cannot always be achieved; a reality that seems to cause anxiety to some of the judges. This concern for belonging within a particular nation appears again in Chapter 6.

In other cases, orientalist thinking invokes civilizational discourse in the judgments, both in overt and subtle ways. For example, in the case of *Pawandeep Singh v Entry Clearance Officer* [2004] EWCA Civ 1075, 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-civilizations discourse focusing on Muslims even though the claimants are actually Sikh and Muslims are not in any way subjects of the case. Rather, the 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' standpoints, sometimes articulated as being secular, remains largely unremarked upon.

In Chapters 5 and 6, I move to my second case study on religion in education. In the first of these two chapters 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 6 in relation to faith schools, I first discuss the linkages between community cohesion and the concept of 'common values' in the New Labour (NL) governmental discourse.[3] 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. Indeed, this link to Christianity is a point that is increasingly being made explicit by the Coalition government and Prime Minister David Cameron in particular. In short, in this chapter, I highlight the predominance or embeddedness of Christianity, albeit de-theologized, 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 6, I focus in particular on law, policy and political discourse on faith schools under the NL government. I discuss how the purported divisiveness of faith schools, particularly Muslim ones, was a key concern

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3 I refer to the Labour government (1997–2010) as New Labour (NL) to denote the particular influence of 'third-way' thinking discussed in Chapter 6.

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

Similarly to the communitarian perspectives discussed in Chapter 5, 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 universalizing 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 racialize 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 universalized 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-racialize non-Christian children in cultural terms, albeit in an obscured manner. In the final section of Chapter 6, I explore a more explicit influence of Christianity in governmental policy, particularly that of Christian socialism, on the former NL government. 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.

In the 'Conclusion', I explore the continuities of the role of Christian values in the Coalition government education discourse and policy, highlighting its more explicit and avowed connections with Christianity as the religion of the state. I also examine emerging developments in adoption law and government draft legislation seeking to repeal same-race/religion-matching policies with the aim of facilitating more transracial adoption. I argue that such measures would only move us further away from developing more complex understandings of the many possible instantiations of religion, not to mention the potentially detrimental impact, particularly upon ethnic minority non-Christian children.

1
Conceptualizing Law's Religion: Socio-Legal Perspectives

Introduction

In this chapter, I first critically examine some of the key perspectives from within socio-legal literature around religion, focusing on how they come to conceptualize law's religion in predominantly onto-theological terms. The impetus for doing so is that this scholarship has come to be particularly influential in debates impacting upon and shaping juridical developments on religious freedom, as well as other law-and-religion (LAR) issues in Britain and in relation to the European Union (EU) and the European Convention on Human Rights (ECHR) (Bradney, 1993; Hamilton, 1995; Ahdar, 2000a; Oliver et al., 2000; O'Dair and Lewis, 2001; Edge, 2002; Eekelaar, 2004; Ahdar and Leigh, 2005; Barzilai, 2007; Ghanea et al., 2007; Vickers, 2008; Bradney, 2009).[1] Moreover, as I discuss later in my case study chapters, the role of religion, particularly the issue of religious/civic values in education policy within Britain and northern Europe, is increasingly being influenced by public policy thinkers and scholars from the United States. Whilst 'character education' has a long history in England, for example, there is clearly a resurgence of this values discourse within current socio-legal and juridical thinking more broadly, where Christian values are believed to play a significant role in engendering children, in particular, with a greater sense of citizenship and community.

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

1 I have noted some of the key texts from the LAR literature. See also the catalogue of work including LAR 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 LAR available at www.law.cf.ac.uk/clr/networks/lrsn2.html.

non-christianness within this scholarship. My analysis in this chapter, therefore, covers a broader scope than just child welfare and education law, particularly as I argue that there is also an urgent need to attend to juridical conceptualizations of religion beyond areas of law relating to children. The LAR 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 (see, for example, Ahdar and Leigh, 2005). My key argument in this chapter is that this literature tends to prioritize 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 despite there being some acknowledgment by some scholars 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; Edge, 2000b; O'Dair and Lewis, 2001; Ahdar and Leigh, 2005; Vickers, 2008; Bradney, 2009).

I also argue that in largely failing to challenge this onto-theological notion of religion, the LAR literature marginalizes *how* law's religion might come into being. I draw on the scholarship from cultural studies, anthropology and religious studies discussed in the next chapter in order to undertake this critique. Although, the socio-legal 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; Edge, 2000b; O'Dair and Lewis, 2001; Ahdar and Leigh, 2005; Knights, 2007; Vickers, 2008; Bradney, 2009). It is for this reason that I bring to bear upon 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.

Religion conceptualized as theology

As Neil Addison puts it, the question of what *is* religion, is one for theologians, however, the question of whether 'a belief constitutes a religion, philosophy or political opinion' can be a question for lawyers (2007, p. 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

(Ahdar and Leigh, 2005, p. 110; Edge, 2006, p. 28; Vickers, 2008, p. 13; see also in relation to US constitutional law: Freeman, 1983; Greenwalt, 1984; and, more generally, Sadurski, 1989; Hall, 1997). These scholars nonetheless agree that there should be some definition, despite the fact that courts are hesitant to come up with an all-encompassing one (Ahdar and Leigh, 2005, p. 110; Edge, 2006, p. 28; Vickers, 2008, p. 13). Lucy 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 recognized as 'world religions'. Part of the difficulty for these scholars is in relation to less 'well-known 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 included (Vickers, 2008, p. 13; Cumper, 1995; Ahdar and Leigh, 2005; Edge, 2006, pp. 27–33; see also Edge, 2006, and Vickers, 2008, for a detailed discussion of whether these beliefs are protected under freedom of religion Article 9). Although there is no definition in international law, Article 9 of the ECHR refers to religion *or* belief which, according to Vickers, means that the European Court of Human Rights does not have to distinguish what might constitute religion *as opposed to* belief (2008, p. 14). The Universal Declaration of Human Rights (UDHR) definition is explicitly broader still, including theistic, non-theistic and atheistic beliefs (UN Human Rights Committee, 1994). However, as Vickers notes from the cases *X, Y and Z v UK* (1982) 31 D&R 50 and *Campbell and Cosans v UK* (1982) 4 EHRR 293, the overlap between religion and belief is that the belief in question needs to 'attain a certain level of cogency, seriousness, cohesion and importance' (discussed in Vickers, 2008, p. 14). This requirement has also been brought up in relation to other belief systems, such as Druidism, in, for example, *Chappel v UK* (1988) 10 EHRR 510 and *Pendragon v UK* (1998) EHRR CD 179 (Vickers, 2008, p. 14).

Similarly, the Employment Equality (Religion and Belief) Regulations 2003, now covered by the Equality Act 2010, applied to religion or philosophical belief, so that humanism and atheism could be protected despite their non-religious content (Vickers, 2008, p. 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, 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) (Vickers, 2008, p. 15). 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 (Cumper, 1995; Ahdar and Leigh, 2005; Edge, 2006, pp. 27–33; Vickers, 2008).

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, pp. 15–22; Ahdar and Leigh, 2005, pp. 115–25). 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 recognized; and, thirdly, to come up with a list of 'key indicators of religion' against which to test those that are less well known (Vickers, 2008). 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 discusses the (de)merits of the various approaches (Vickers, 2008*;* see also Edge, 2006, pp. 27–32). 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 way to mitigating the situation where there is a vacuum for judges by having a set of key indicators of what religion might be. Thus, for example, summarizing 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 that are the most important (Vickers, 2008, p. 22 drawing on Macklem, 2000).

This configuration does reflect the definition of religion set out in the Australian High Court case ruling on Scientology: *Church of the New Faith v Commission of Pay-roll Tax (Victoria)* [1982–83] 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, p. 174, discussed in Edge, 2006, p. 31; Vickers, 2008, p. 19).

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, p. 22;

see also Cumper, 1995; Macklem, 2000; Ahdar and Leigh, 2005). Defining religion in this way avoids under-inclusiveness, but is also 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, p. 22). It seems then that there are 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 (p. 22). 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 about 'man's place in the world' (p. 22). Although there is no view on a clear legal definition of religion amongst these LAR scholars, there does seem to be a prioritizing of 'belief' as a key element whether that be in a God or not, but nonetheless in some kind of transcendent, or 'irrational', other-worldliness (Macklem, 2000). As Vickers highlights, drawing on Timothy 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 otherwise rational system. Other irrational views, about the importance of football or country dancing do not qualify for the same protection. (2008, p. 21)

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 (Bradney, 1993; Edge, 2006; Vickers, 2008; Bradney, 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 conceptualization 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, p. 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 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 (1993, p. 5; see also Poulter, 1998; Ahdar and Leigh, 2005 who take a similar view). 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 conceptualization 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, which I discuss further below (Poulter, 1986; 1998; Menski, 2008).

Religion conceptualized as identity

In a later article, Bradney expands further on his conceptualization of religious belief, particularly what he refers to as 'obdurate' belief (2000, p. 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.' (p. 90) 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' (p. 91). Both Bradney and Macklem view this kind of belief as a 'polar opposite' to modernity and rationality in contemporary British society (Bradney, 2000, p. 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 racialization of religion. The point I wish to emphasize here is that Bradney, like the LAR scholars discussed above, also highlights the other-worldliness or extra-temporal dimension of religious belief or faith, namely its transcendental nature. Whilst of course this conception is clearly linked to a number of legal claims within human rights law, there is nevertheless barely any interrogation of the predominance of this conceptualization of religion and how it has come about. Rather it is taken for granted as an almost self-evident, cross-cutting feature of 'religion' which –- as I argue in the next chapter – is a somewhat partial, decontextualized and ahistorical view of how the modern concept of religion has come into being.

Another related conceptualization of religion in the LAR scholarship already mentioned above is that of identity. In his later 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, p. 1). Rex Ahdar and Ian Leigh (2005) put forward a similar view to Bradney's, but they make their argument from an explicitly Christian perspective which is significant to their notion of identity and is

also related to a sense of belonging within a (church-based) community. Similarly, for Bradney, 'obdurate' belief is more apparent in religious *communities* that he claims are relatively new to Britain, such as Sikhs, Hindus and Muslims (Bradney, 2000, p. 90; and 1993). This conceptualization of religion, namely one that is tethered to community and identity, is not really explicitly elaborated upon and yet, as I discuss in the next chapter, is critical to understanding contemporary discourse on religion. Rather, Bradney's focus returns to the onto-theological albeit in a more complex and nuanced way:

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

There is a seeming decoupling of 'religiosity' and 'spiritual sentiments' from belief and, indeed, an acknowledgment that religion seems to cover more than just belief and practice, namely a type of personal religiosity emerging from individual experience as well as religious doctrine (Bradney, 2009, p. 4, citing the work of Yip, 2003, p. 143). However, for Bradney, 'tenets and precepts', namely, theology, are still crucial elements to his conceptualization (2009, p. 4). In this latest book, again, his examples of religious manifestation – in relation to Christianity and non-christianness – focus on worship, institutionalized religion (organizations) and values that emanate from faith-based doctrine (2009, p. 4; see also Edge, 2002). 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, pp. 44 and 55). This concept, taken from the work of Shachar (2001, p. 117), is put forward as a legal framework that would 'accommodate the most vulnerable constituents' within society (Bradney, 2009, p. 51; see also Poulter, 1998; Edge, 2002; Menski, 2008). As I will discuss in the next chapter and throughout the rest of the book, there are a number of racialized problematics that are associated with the 'accommodation' of those that come to be labelled and categorized as vulnerable, particularly non-Christian minority populations within Western liberal states. However, the point I wish to highlight here is how Bradney, indicative of key thinking within socio-legal studies on religion, stops short of really probing at an onto-theological understanding of religion.

One area in which there is perhaps a little more exploration of how personal religiosity might emerge from personal cultural experience as well as religious doctrine is in relation to child welfare cases. Bradney argues that generally courts are not 'comfortable with strong religious belief' involving what he terms 'minority faiths outside the mainstream', such as Jehovah's Witnesses, for example, where religious upbringing or medical treatment are at issue (Bradney, 2009, p. 117). In one such case *Re H* (1981) 2 FLR 253, he offers a more complex analysis of how religion as identity might be understood beyond the theological paradigm by supporting the fact that the Jehovah's Witness mother in this case was allowed to retain custody of her child, despite having to agree to conditions 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). Bradney also cites from the case of *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386 involving a 15-year-old child refusing life-saving treatment, where Ward LJ stated: 'this court … should be very slow to allow an infant to martyr himself' (cited by Balcombe LJ in *Re W* [1993] 1 FLR 386 and in *Re W* [1992] Fam 64, 88). 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, p. 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, pp. 269–92; Ahdar, 1996; see also Edge, 2002, for a perspective that is not explicitly Christian). Bradney articulates this sentiment as there being a gap in cognitive understanding or empathy with religious belief between the believer and the judge with regard to the extra-temporal or transcendent, onto-theological dimension of what is at stake after death for the believer (Bradney, 2009, p. 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 conceptualization of religion as an affective attachment linked to certain beliefs which might be understood as cultural and, therefore, going beyond a mere theological definition.[2]

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2 What Motha (2007) refers to as a heteronomy, drawing on Mahmood (2005) and others who explore conceptualizations of religion as 'affect' (see ch. 4 and 'Conclusion').

Religion as a matter of choice?

It is unclear, however, whether the discussion of religion as identity is just another aspect of what Bradney calls 'obdurate' belief, as discussed above; particularly as his notion of identity is intertwined with the notion of religion as something one chooses. The question of religion as a matter of choice was a deciding factor for Sedley LJ in the 2010 *Eweida* case involving a British Airways employee claiming religious discrimination against the company which had asked her not to wear her Christian cross symbol on a necklace whilst at work (*Eweida v British Airways plc* [2010] EWCA Civ 80). The judge found that wearing a cross was a matter of choice and not integral to the religious belief itself and therefore dismissed the appeal.[3]

Bradney bases his argument that religion is a matter of choice on a radical autonomy perspective (1993, pp. 22, 28; discussed in Edge, 2000b; Bradney, 2009, p. 1); giving an example of how 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, p. 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 (*Re J* [1999] 2 FLR 678 and [2000] 1 FLR 5717). Or, alternatively, in *Re B (A Minor) (Adoption Application)* [1995] 2 FCR 749, where 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 whether, if Bradney had examined these and other child welfare cases involving non-Christian families, 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,

3 In the *Watkins-Singh* case [2008] ELR 561, a self-identified Sikh child was prevented from wearing her *kara* (a metal bangle) as it contravened the uniform policy which banned the wearing of religious symbols on health and safety grounds. In contrast to Sedley LJ in *Eweida*, Silber 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 the child's identity (p. 577, para. 56B).

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.

Children's rights versus parents' rights

Adopting a somewhat different approach, Carolyn 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, p. 231). John Eekelaar, another key scholar of children's rights and religion, also makes this observation (2004). Yet this is a curious argument they make because, as I discuss in Chapters 3 and 4, this judicial line of reasoning barely comes up at all in the child welfare judgments examined. Whilst Hamilton and Eekelaar both recognize 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 (Hamilton, 1995, p. 231; Eekelaar, 2000; p. 181). Like Bradney, but in relation to child welfare and education, Hamilton and Eekelaar seek to theoretically foreground the importance of children's autonomy and conceptualize 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 (Hamilton, 1995, p. 231; Eekelaar, 2000, p. 181).

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, p. 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 next 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.

Religion as relational

Peter 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 (*Re J* [1999] 2 FLR 678, [2000] 1 FLR 5717). Edge goes on to ask: 'are they [the children] an integral, organic, part of broader communities, both religious and familial'? (2002, p. 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, p. 336). Edge and others therefore contest the conceptualization of religious identity as involving choice (Edge, 2000a; 2000b; Rivers, 2001; Ahdar and Leigh, 2005; Vickers, 2008). 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, pp. 47–71; 2011, p. 138; Edge, 2000b; Ahdar and Leigh, 2005).[4]

In relation to children and child welfare cases, Ahdar articulates his argument in terms of parents' rights to choose a 'godly future' for their children, namely, to be able to influence and shape their spiritual development (2002; Ahdar and Leigh, 2005, p. 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, pp. 190–2; Edge, 2002, p. 280). This analysis is in relation to cases involving custody disputes where one of the parents was a Scientologist or Jehovah's Witness and custody of the child was granted to the other parent (Ahdar, 1996, p. 190; Edge, 2002, p. 279; Ahdar and Leigh, 2005, pp. 269–92). Ahdar's perspective, however, explicitly remains tethered to an onto-theological conceptualization 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, 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, p. 307; 2000a).

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4 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, p. 140). See also Razack (2004) who complicates the notion that women can 'exit' their communities even when they are being subjected to violence.

Another approach that can be viewed as building on Edge's work is put forward by Ya'ir Ronen, 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 make her notions of religion/culture meaningful and therefore important to her psychological well-being (2004; see also Van Praagh, 1999). This approach explores in depth what religion might mean in children's lives and how religious/cultural identity comes into being, an approach which I advocate in relation to my case studies and also beyond. 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 marginalized in the judgments (Edge, 2000a, p. 336). I will return to this discussion in more depth in the following chapters.

Concluding remarks

Here, I wish to point out that the predominant conceptualization of religion in the socio-legal 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 conceptualization 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. Their arguments as to how religion should be conceptualized 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 conceptualization of religion itself is not fully interrogated in this literature. In the next chapter, I examine theoretical perspectives that would enable socio-legal scholars to challenge the perceptions we have of a term that is so often left un-interrogated. After all, the question of what religion is is not just for theologians, as Addison claims, but also for lawyers in so far as it is and remains the subject of legal discourse and controversy. I therefore argue that we should add to that question a more critical one of *how* religion comes to be demarcated through juridical discourse. This kind of analysis would enable us to reflect more closely on what might be the effects of such discourse, particularly on minority subjects for whom the regulatory stakes can be significant, as I explore in the following chapters.

2
Interrogating Law's Religion: Critical Perspectives

> The term 'critical religion' is shorthand for the theoretical and methodological practice of taking 'religion' not as an isolated stand-alone category but as a term in a configuration of related categories. (Fitzgerald, 2009, Critical Religion Category Network, www.crcn.stir.ac.uk; see also www.criticalreligion.org)

Introduction

In this chapter I shift my discussion from socio-legal perspectives on religions to critical ones that make up, for example, the Critical Religion Category Network. These perspectives predominantly come from within anthropology and religious studies as well as the more interdisciplinary field of critical race studies. In particular, I examine how the term religion has come to be understood as a predominantly onto-theological phenomenon, not just within law, but also more broadly. I highlight its emergence as a modern term from within orientalist academic scholarship during the nineteenth and early twentieth centuries. I argue that this historicized perspective is an important analytical frame within which to understand how onto-theological and racialized notions of religion have become so embedded in contemporary juridical discourse. This approach also facilitates a closer study of the ways in which religion can come to be conceptualized and authenticated through various socio-political, historical *and* juridical discourse.

The modern emergence of the concept of religion

Talal Asad, in his book *Genealogies of Religion*, contests what he refers to as the 'universalist' or essentialist conceptualization of religion; namely one that considers religion as a transhistorical phenomenon with an essential core (1993, p. 29). He argues instead, that 'religion' 'must be understood as

being constituted and constructed in a specific historicity' (1993, p. 29). Tomoko 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 (2005, p. xii; see also Fitzgerald, 2000; Boyarin, 2008; and De Vries; 2008, p. 28, on the Christian invention of Jewishness).

Although religion was not defined in the early texts from this period, Masuzawa (2005, p. 24) describes religion as emerging in the work of comparative philologists, for example, that of Sanskrit scholar Freidrich Max Müller author of *The Origin and Growth of Religion as Illustrated by the Religions of India* (1878). Masuzawa describes him as 'preeminent among the founders of the science of religion' most of whom were studying non-European languages (Masuzawa, 2005, p. xii). As part of their work philologists categorized non-European peoples into one of three linguistic groups: Semitic, Aryan and Turanian, which related to the people's geographical location and perceived racial characteristics (2005, p. xii). These categories then gave rise to religious categorizations; 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' (2005, p. 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' (2005, p. 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' (2005, p. 18).

Timothy 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 in the study of comparative religion (2000, p. 6). He adds that, although non-theological arguments were incorporated in the work of prominent scholars of religion of the twentieth century (for example, Max Müller, 1878; Otto, 1917; and Smart, 1984), in many cases their analysis tended to be an indirect extension of Christian theism (Fitzgerald, 2000, p. 4). 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, p. 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, p. 5). 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 (RE) curriculum today (2000, p. 30; see Chapter 5 and also King, 1999, specifically in relation to the conceptualization of Hinduism in world religion scholarship). 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 conceptualization within the work of comparative theology, philology and world religion scholars, that is, from a Christian epistemic viewpoint. 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 which all other religions may be surveyed, and from which their bad and their good features, their defects and their merits, are equally visible. (From his St Giles lecture which appeared as the concluding chapter 'Christianity in Relation to Other Religions' in *Faiths of the World* (1882, p. 336) cited in Masuzawa, 2005, p. 102)

As I discuss in Chapter 5, the modern concept of religion with this Christian epistemic viewpoint deeply embedded within it is very much prevalent within the English education system, particularly RE. Perhaps this prevalence has partly come to be obscured by the lack of critical reflection on the historic emergence of religion as a concept which I now go onto discuss further.

Christian universality and the racialization of non-christianness

As highlighted above, a key aspect of how non-christianness came to be judged was through racialized and orientalist thinking.[1] Yet, there are

1 As Lewis (1996; 2004) and others (Kabbani, 1986; Yeğenoğlu, 1998; Abu-Lughod, 2001) 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

relatively few perspectives that highlight the ways in which non-christianness has come to be understood and represented, particularly within the socio-legal law-and-religion (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 spiritualized these practices and depicted them as 'expressions of something timeless and suprahistorical', that, in short, it depoliticized them (Masuzawa, 2005, p. 20). De Vries describes this depoliticizing as maintaining 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, p. 28). In short, that religion has come to be depoliticized through its onto-theological conceptualization which may account somewhat for how it has come to be embedded in contemporary political and juridical discourses as a predominantly fixed, transhistorical category.

Yet, as the critical religion scholars discussed above argue, conceptions of non-christianness also came to be racialized as part of a larger, *political* transformation of a modern European identity, or the 'making of the West' (Masuzawa, 2005, p. xi; Asad, 1993, p. 24; Miles and Brown, 2003, p. 29). As I highlighted in my 'Introduction', Edward Said argues that much of the academic knowledge about the 'Orient' posited European civilization, both in terms of religion, namely Christianity, and race (whiteness), as superior to non-Christianity (Masuzawa, 2005, p. 3; Fitzgerald, 2000; Fitzpatrick, 2001; Goldberg, 2002; Miles and Brown, 2003). Within philology this orientalist racialization of religion took the form of a drive to Hellenize and Aryanize Christianity, whilst simultaneously racially Semitizing Islam, 'rigidly stereotyped as the religion of Arabs' despite knowing that Muslims were far from being exclusively Arab (Masuzawa, 2005, p. xiii). Going beyond a mere technical study of language, philologists were tracing the genealogical link of languages spoken in Europe to pre-Christian Hellenic civilization – viewed as the epitome of 'timeless modernity' – and even further back to an Aryan ancestry (Masuzawa, 2005, p. 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) (2005, p. xii). She describes the success of a number of treatises positing the idea of an Aryan

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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.

Christianity with its true origin not in the Hebrew Bible (Torah) but in Hellenic traditions, as well as possibly Indo-Persian traditions (2005, p. xiii; see also Anidjar, 2003; 2008, discussed in Chapter 4). Thus, for Masuzawa, 'Islam came to stand as the epitome of the racially and ethnically determined, non-universal religions' (2005, p. xiii).

Robert Miles and Malcolm Brown (2003) trace the representation of non-christianness further back to the crusader and medieval period in their work. They highlight how European perceptions of Muslims came to circulate either in theological terms or in racial terms, or indeed both. For example, they point out that in the crusader period, the key characterization of Muslims and Islam was that of a theological heresy and 'negation of Christianity' (2003, p. 29). The Prophet Muhummad was an 'imposter, an Antichrist in alliance with the Devil' and, as a result, viewed suspiciously (Miles and Brown, 2003, p. 29; Kabbani, 1986, p. 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 civilization. These uncivilized characteristics, whilst represented mainly in a religious discourse, came also to circulate in 'quasi-"racial"' terms (Miles and Brown, 2003, p. 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, pp. 17–19, cited in Miles and Brown, 2003, p. 29).Therefore, the concept of non-Christian religion was, arguably, from its inception not only a modern and onto-theological concept, but also a racialized one, brought into being predominantly from a European Christian point of view. Consequently, Masuzawa and others argue that a key effect of this orientalist scholarship was the emergence of an 'epistemic regime' (2005, p. xii) or way of thinking about and understanding non-European non-Christians ('world religions') (Asad, 1993, p. 24). As well as the representations of Muslims and Jews, these scholars 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 (Asad, 2003, pp. 33–8).[2]

Whilst it is my intention to highlight the racialized ways in which the modern concept of religion has emerged, I should clarify that it is not my

2 For example, see 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 racialized 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.

intention to misrepresent the study of world religion over the course of its establishment as a modern academic discipline by ignoring the tensions and debates that have 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 the grounds upon which Christianity itself could continue to be regarded as universal (Masuzawa, 2005). This was a key question for Ernst 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, p. 323). Troeltsch acknowledged different peoples as configuring their own 'foundational truths' within the framework of 'their own personal or racial psychic life' (Masuzawa, 2005, p. 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 (in its Protestant form) and certainly it being the religion of Europe (2005, p. 319). Thus, for Troeltsch and his contemporaries, religion as a concept largely remained the 'general and transcultural' and therefore universal phenomenon that had emerged from the Christian theological framework (Masuzawa, 2005, p. 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, p. 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, p. 323). In examining the work of Troeltsch and his contemporaries both Hent 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, p. 327; De Vries; 2008, p. 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' (1993, p. 24).

Re-politicizing the concept of religion

As I have suggested above, the historicized study of religion is significant in highlighting the role of an eighteenth and nineteenth-century Christian theological epistemic view in the conceptualizing of religion as

an onto-theological and, in the case of non-christianness, as a racialized concept. Yet, the critical analysis of the emergence of religion as a *modern* rather than fixed, transhistorical concept is almost entirely marginalized 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 mainly 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 (see Chapter 5). 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 socio-legal LAR literature is to better understand the influence of racialized thinking and a Christian onto-theological paradigm of religion in contemporary conceptualizations 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 conceptualization of religion can be viewed as separable from politics but rather are implicated in particular socio-political work, within areas of law and policy relating to children. In my education case study, I suggest that the embedded role of Christianity and its continuing influences are not only overt but also rendered invisible, for example, in the move towards a more multi-faith RE curriculum (see Chapter 5), as well as in the former Labour government's values discourse to defend faith schools (see Chapter 6). I suggest that the inclusive 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.

Secularism and the juridical 'authentication' of religion

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 conceptualized within the academy through an orientalist and racialized 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 not only contests the 'essentialist' and transhistorical theological notion of religion discussed in Chapter 1, it also foregrounds and shifts the focus onto *how* symbols and practices as manifestations of religion can come into being through juridical authentication. Asad begins his critique of the onto-theological model of religion through his analysis of the work of the prominent anthropologist of religion Clifford Geertz. Geertz' conceptualization of religion echoes the predominant onto-theological belief/practice model prevalent in socio-legal perspectives. Geertz's renowned definition posits religion 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, p. 19, discussed in Asad, 1993, p. 53).

Yet, 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, p. 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, p. 53)

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, p. 37–9; see also Said, 1994; Herman, 2006; and Mahmood, 2009,

discussed below). This point is also made by Abdullahi 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. Asad uses this analytical frame to examine the French 'headscarf affair' where strong public 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; this later led to a further ban in July 2010 on the wearing of a face covering or *niqab* in public. Both Asad and Sherene 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, p. 500; Razack, 2008; see also Motha, 2007; Vakulenko, 2007; Bhandar, 2009). In the discourse surrounding the headscarf affair, Asad and Razack argue that the 'secular' and 'modern' came to represent the universal standards of civilization, whereas the religious and pre-modern came to signify particularity (Asad, 2006, p. 500; Razack, 2008). Religion was posited in contradistinction to secularism – a public space free of religion – whilst secularism was associated with rationality, progress and modernity (Jakobsen and Pelligrini, 2008, p. 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, p. 500; see also Cristi, 2001; Wallerstein, 2006; Jakobsen and Pelligrini, 2008; and Razack, 2008, on the co-imbrication of Christianity and secularity in Europe/the West).

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, p. 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, p. 501). What is important in recognizing 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 racialization 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 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 (2006, p. 501). This representation of Islam and Muslims was not particular to this one controversy. As Razack (2008), Asad (2006) and Wendy 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.[3]

Yet, this racialized 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. As Janet Jakobsen and Ann 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, p. 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, p. 8).

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 (Asad, 2006; Jakobsen and Pelligrini, 2008, p. 9; Razack, 2008, p. 21). 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). 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, p. 163). In doing so, secularism facilitates managing the conduct of immigrant racialized populations by positing practices such as 'veiling' as 'antithetical to

3 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 which involved a depiction of the Prophet Muhammad. See also Said (1994).

citizenship' (2008, p. 163). In short, citizenship and secularism both circulate in ways that 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 arose in and around the *Begum, Azmi* and *X v Y* cases (*R (on the Application of Begum) v Headteacher and Governors of Denbigh High School* [2006] All ER (D) 320; A*zmi v Kirklees Metropolitan Borough Council* UKEAT/0009/07/MA*; R (X) by her Father and Litigation Friend v Y School* [2007] ELR 278; see Motha, 2007; Vakulenko, 2007; Bhandar, 2009). 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; 2007) and, most recently, around citizenship and community cohesion (Fortier, 2008).

Drawing on this analysis in Chapters 3 and 4, I discuss similarly how notions of the secular mask a Christianized normativity underpinning the judicial conceptualizing, understanding and adjudication of children and their parents' non-christianness. In Chapters 5 and 6, 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 delimit 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 (Mamdani, 2005; Asad, 2006). Indeed, José Casanova (2008) argues, in his revised secularization 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 no longer essential to modernity (see also Asad, 2003, p. 182).[4]

Casanova's examples of 'acceptable' forms of de-privatized religion are Poland, where religious values played a role in the construction of civil

4 In his seminal book *Public Religions in the Modern World* (1994), Casanova stipulated that the conditions for the existence of modernity included the privatization of religion which would result in the separation of religion from politics and a decrease in the social importance of religious belief, commitment and institutions. However, more recently, he has pointed out how this 'secularisation thesis' has been seen to be disproved by the rising importance of religion in public and political discourse (2008, p. 103).

society and in the United States where Christian ideas also have a role in public debate on shaping (liberal) common values (1994, p. 92). 'Unacceptable' examples of de-privatized religion, for Casanova, include what he views as the undermining of individual liberties by politicized religion in countries such as Iran and Egypt, in short, Islam (1994, p. 225). Thus, in Casanova's (1994) secularization 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, p. 183).[5]

In short, 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 (Asad, 2003, p. 183; see also Jakobsen and Pelligrini, 2008, and Casanova's reply to Asad, 2006). Thus, 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 Mahmood Mamdani's (2005) terms, liberalism comes to distinguish between 'good Muslims and bad Muslims' or, in the discourse of the former Labour government, between 'progressive' Muslims, namely those who share cross-cultural universal values, and the oppositional fundamentalists or Islamists (see Chapter 6). As Asad notes, the secularization 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, pp. 187–90). Asad argues that the categories of 'politics' and 'religion' implicate each other more than has been recognized and is only now increasing with the development of understanding 'the powers of the modern nation-state' (2003, p. 200). The secularization 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 secular and universal values discourse, it also obscures the constitutive relationship between religion (Christianity) and secularism during the Enlightenment period (Asad, 2003, p. 183; De Vries, 2008; Jakobsen and Pelligrini, 2008).

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 socio-legal LAR literature. Moreover, the deployment of secularism as a tool that can be, at times, used to police the boundaries of acceptable forms

5 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 book. See, for example, Phillips, 2002; 2007; Taylor, 2007.

of religion is another key point that needs further attention in the LAR scholarship. Peter 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, p. 377). However, what is not made explicit in Edge's analysis is the role of racialization in the regulation of religion. There is very little discussion in the LAR perspectives of how racialization of non-Christian religion interacts with secularism, both in conceptualizing non-christianness and in the juridico-political work – such as the Anglicanization of Islam – that religion might do. I would suggest that there is an absence of analysis of racialization in the LAR literature, both in relation to how judges adjudicate on the religious/cultural upbringing of a child as well as with regard to the role of religion and values discourse in education (see case study chapters).

Before elaborating further on the issue of racialization, it is important to note that, although the LAR scholarship that I have explored 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 Anthony Bradney's term – is not sufficiently accommodated within current legal frameworks (Bradney, 1993; Poulter, 1998; Ahdar and Leigh, 2005; Bradney, 2009; 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 in Chapter 1 – reflects on the role of judges in their adjudication of religious belief. In relation to the *Re E* case (*Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386, [1994] 5 Med LR 73) where a 15-year-old Jehovah's Witness refused life-saving medical treatment, Bradney concludes that, in not understanding the child's unwillingness to jeopardize his life after death (as the child saw it), 'the court's approach is dominated "by a secular humanist world view"' (Bradney, 2009, p. 120, citing Montgomery, 2000, p. 161). There is somewhat of a tension in his work in this regard, because of recognizing, on the one hand, the privileged role of Christianity, particularly in areas of family and education law, and, on the other, taking for granted the fact that the legal system is secular and neutral in matters of religion (Bradney, 2009, pp. 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 (2009, p. 121). Thus, he concludes that: 'The secular liberal State's attitude towards religion might equally be thought to contain a non-neutral value judgment.' (2009, p. 31) 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 male Sikhs wearing turbans; *since it is neutral about the values of religion*, it cannot accept, on their own terms, the claims of any religion. (emphasis added) (2009, p. 31)

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.[6] 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 racialized in being deemed a form of (non)acceptable religion. Moreover, as discussed above, the notion of toleration itself, according to Brown, can be a tool of regulation based on distinguishing between those who are civilized and those who are deemed barbaric (2006; see also Mahmood, 2009, p. 853), a theme I return to in my analysis of child welfare cases and the values discourse in education.[7] Indeed, this critical analysis of the work of secularity or secular values and/or tolerance discourse is even acknowledged in the work of Casanova (1994) who, in his revised secularization thesis, has moved 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 Saba Mahmood (2005), Casanova does not view this demarcation of (un)acceptable manifestations of religion, nor the racialized grounds upon which it might occur, as problematic; rather, he and other 'secularists' view this delimitation as legitimate and a necessary aim of public policy.

There are some LAR scholars who would also contest law's purported neutrality, claiming, for example, that 'liberalism is just another ideology

6 For a history of the development of toleration of religion, see Bradney (2009, pp. 35–8).

7 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, p. 853).

reflecting a partisan belief culture' (Ahdar, 2001, p. 3). These perspectives, like those of Bradney (2009) and Sebastian Poulter (1998), tend to be arguing for more accommodation of religious freedoms (Yousif, 2000, p. 32; Ahdar, 2001, p. 113, both discussed in Bradney, 2009, p. 31; see also Martinez-Torron, 2001; Rivers, 2001, p. 246). 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 obfuscated in their analyses of religious freedom and their predominantly theological conceptualization 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 (Jakobsen and Pelligrini, 2008; Razack, 2008; Mahmood, 2009). 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.

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

In this section, I wish to return to the conceptualization of religion as race/ethnicity and/or culture. Above, I considered the role of racialization in the authenticating of religion through law. I ask to what extent does the LAR literature engage with the critique of law as racialized or, indeed, itself harness racialized notions of religion?

Much of the relevant LAR literature deals with issues of race/ethnicity, as discussed above, within the frameworks of accommodation of religious practices, for example, under the now replaced Race Relations Act 1976 (by the Equality Act 2010) and/or calling for legal pluralism. Much of this discussion engages with the case of *Mandla v Dowell Lee* [1983] 2 WLR 620, a landmark decision in the legal configuration of 'ethnic origin' (Bradney, 1993; Poulter, 1998; Jones and Welhengama, 2000; Bamforth et al., 2008). 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. 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 Nicholas Bamforth et al. state, Lord Templeman's categorization 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) (*Mandla* [1983], p. 569, discussed in Bamforth et al., 2008, p. 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 (*Mandla* [1983], p. 562, discussed in Bamforth et al., 2008, p. 805; see also Poulter, 1998; Jones and Welhengama, 2000; Herman, 2011).

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, p. 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 community, as highly significant and determinative of the social life of these religious communities (2009, p. 20). Bradney also views these 'communities' as demarcated by nationality of 'origin', which also came to be a key determining factor in the *Mandla* case (2009, p. 20). This racialized conceptualization 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 (Employment Equality Regulations 2003, now covered by the Equality Act 2010), all these scholars argued for further protection under the Race Relations Act for ethnic/religious minorities in addition to Jews and Sikhs (Jones and Welhengama, 2000). 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 racialized conceptualization of non-Christian religious identity within the work of Bradney, Poulter and Jones and Welhengama.[8]

The work of Poulter (1998) and Richard Jones and Gnanapala Welhengama (2000) somewhat differs from Bradney in that it does not specifically focus on 'religion' but rather on 'ethnicity' and ethnic

8 See also the work of the prominent sociologist of multiculturalism Tariq Modood (2000). He acknowledges the tension of a racialized logic (in categorizing people as races because of ancestry or origin) underpinning the Race Relations Act which existed to offer protection against precisely such racialized 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, p. 194).

minorities, of which religious minorities are a part. In their work, religion comes to be conceptualized 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, p. 3; Jones and Welhengama, 2000, pp. 27–9). Although this work problematizes the biological notion of race as an inherited 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 (Jones and Welhengama, 2000, pp. 36–9) but, for Jones and Welhengama, also in relation to Muslims, Hindus and Rastafarians (2000, p. 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, p. 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 homogeneous 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 conceptualization 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, p. 245; Bradney, 2009, discussed above). These 'cultural' sources – in the view of these commentators – are rooted in a racialized 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 (see Chapter 3). Yet, this racialized conceptualization of religion seems to be assumed as given and, therefore, naturalized and barely interrogated as a sociological construct or phenomenon in ways that 'race' isolated from religion has been in other contexts (Miles, 1993; Banton, 1998; Goldberg, 2002). Some of the

LAR scholarship, and particularly the work of Poulter (1998) and Jones and Welhengama (2000) in relation to ethnic minorities, does recognize and problematize the prevalence of racialization of non-christianness within law, particularly judicial attitudes in the past (Jones and Welhengama, 2000, p. 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 racialization 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, 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 Davina Cooper and Didi 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, p. 341). This constitutive role echoes Asad and Mahmood's arguments discussed above, namely that law as a process legitimizes and gives legal status (authentication) to certain social formulations or articulations of religion (Asad, 1993; 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, p. 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, p. 340).

Cooper and Herman's analysis of law as racialized is almost entirely absent in the work of the 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, p. 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, p. 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' (Cooper and Herman, 1999, p. 358). Thus, judges identify Jewish faith to be a 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' (1999, p. 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' (1999, p. 364).

This argument is similar to that of Ya'ir Ronen (2004), discussed in Chapter 1, who states that religion needs to be understood as the relational context of children in which religion is given particular meaning. As Cooper and Herman highlight, it is only in later trusts cases in which the judges take account of self-definition in relation to religion, for example, in terms of recognizing 'endogenous religious knowledge' and the 'interpretative authority of religious communities' (1999, p. 361). However, as they argue, this recognition of religion as requiring interpretation or contextualization only reinforces the need to examine who can know, and is chosen to know (namely experts), the religious subject of law (1999, p. 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 emphasize corporeal connection between Jews as well as between modern Jews and the ancient Israelite people (1999, p. 354; see also Anidjar, 2003; 2008, discussed in Chapter 3). 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 racialization of Jews to a production of nationhood (1999, p. 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 3 and 4, 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 racialized production of Jews as a nation, it also implies that there are *other*

races/nations which are separate from each other (1999, p. 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' (1999, p. 341; see also Herman, 2006 and 2011). This then raises the question: what work is done through collapsing a racialized and ontological conceptualization of religion with nationhood?

Religion, belonging and community/nationhood

In her later work, Herman continues her analysis of judicial discourse in twentieth-century English cases involving Jews. 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, p. 288). Drawing on Sara Ahmed, the nation can be understood as a site where personal characteristics can come to be associated with a particular place (Ahmed, 2000, p. 99, discussed in Herman, 2006, p. 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 orientalized, threatening and ill-mannered character of the latter, associated particularly with 'Eastern' immigrant Jews (2006, p. 291). Thus, race and nationality have circulated as co-dependent in these racialized 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 (2006, pp. 292–3). 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 from the English (2006, p. 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. In short, her analysis demonstrates how judges participate in the demarcating of boundaries of belonging within the nation and, indeed, conceptualizing nationhood on the basis of racialized or ethno-religious characteristics such as 'inferior' characteristics of 'alien' Jews. However, as I explore in more detail in Chapter 6, there is also scope in this racialized thinking for what Goldberg (2002) has referred to as the 'racial upliftment' of uncivilized native subjects in the colonial context. In relation to English Jews, Herman argues this is

apparent in the case of the Anglo-Jewish gentry which developed through breeding and education over time (Herman, 2006, p. 282).

Religion as racialized non-christianness can, therefore, be understood as integral to nation-building, both in terms of inclusion and exclusion (Herman, 2006, p. 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. 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 racialized religion circulates and the work 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 depoliticize 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 racialized 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 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 1, 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 (see, for example, Probyn, 1996; and Fortier, 2000, on migrant or outsider (un)belongings; and Cooper, 2007, and Grabham, 2009, on propertied belonging). Whilst a detailed exploration of this work is beyond the scope of this book, here, I draw on the work of Nira Yuval-Davis who argues that we need to understand belonging through two different, albeit overlapping, analytical frameworks. Firstly, drawing from psychological literature, she argues that belonging is about emotional attachment, feeling safe and secure (2006, p. 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 – whether age group, kinship group, gender, race, or religion – or value system (2006, p. 199). This conceptualization of belonging seems to reflect the view of the LAR scholars discussed above, which, as Yuval-Davis notes, often relates 'to the past, to a myth of origin' (2006, p. 202). She draws on Elspeth Probyn (1996) and Anne-Marie 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' (Yuval-Davis 2006, p. 202). 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's second analytical frame, which I wish to bring to bear on the socio-legal conceptualizations of minority religious belonging discussed in Chapter 1, 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, p. 197).

Drawing from Crowley, Yuval-Davis views the politics of belonging as doing 'the dirty work of boundary maintenance' (Crowley, 1999, pp. 15–41, discussed in Yuval-Davis, 2006, p. 204), particularly in relation to citizenship within the nation and who is entitled to status, for example, around immigration (Yuval-Davis, 2006, p. 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 (Yuval-Davis, 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 multilayered, 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, p. 206). Within the framework of a liberal state citizenship, Yuval-Davis 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 (2006, p. 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, p. 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 (2006, p. 207). This concern with ensuring (a secure kind of) belonging in a multicultural context is also reflected in the discussion of racialized 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 racialized construction of belonging was temporarily avoided in official discourse (Herman, 2006). Although the use of the term 'ethnicity' came to mitigate this racialization, 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 (see Chapters 3 and 4). More prevalent in contemporary governmental discourse, however, is the notion of universal/common values as forming the basis of a kind of 'civic religion' (see Chapters 5 and 6). Yuval-Davis argues that citizenship values themselves circulate as markers of belonging (2006, p. 209). Fitzpatrick also points to the inherent paradox of universal values, namely, that they can never be truly universal as they have developed from a Christian epistemic standpoint (Fitzpatrick, 2001, p. 147; Balibar, 1990). Benedict 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, p. 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 3 and 4. In Chapters 5 and 6, I explore this tension in relation to children's education, particularly exploring how church schools' values alongside citizenship education are viewed by government ministers as nurturing children to be good citizens; in turn producing community cohesion within the nation.

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 conceptualized.

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 religion 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 socio-legal LAR literature.

The second argument I make is that racialization and orientalism can also be an integral part of the contingency and conceptualizing 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 racialized non-christianness in demarcating nationhood and belonging also comes to be marginalized. I suggest that racialized 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 conceptualized 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, in relation to religion in child welfare cases (Chapters 3 and 4) and then within education law and policy, as well as governmental discourse (Chapters 5 and 6).

3
Non-Christianness in Adoption and Child Welfare Cases: Prioritizing Racialized Religion

Introduction

In the previous chapter I argued that the socio-legal law-and-religion (LAR) literature has tended to conceptualize religion predominantly as an onto-theological belief and practice phenomenon, one that also sometimes comes to be an ethnicized/cultural phenomenon in relation to non-christianness. By way of reminder, I use the term onto-theological to denote a conceptualization of religion as belief in a transcendent or distinctly divine being *as* the very essence or ontological status of religion itself (De Vries, 2008, p. 12). I offered a critique of this view of religion as I suggested that it obfuscates the contingencies of what might be included under the rubric of religion. My critique focused, firstly, on religion as a concept that emerged from a particular orientalist historicity and, secondly, in terms of the work it has done, in the (colonial) 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 conceptualizations 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 by examining a number of so-called transracial adoption cases: *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; and *Re C* [2002] 1 FLR 1119 (see also the first instance decision *Re B (Adoption: Setting Aside)* [1995] 1 FLR 1). 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. (HL Deb 10 June 2002, vol. 636, col. 22)

This statement became enshrined in s. 1(5) of the Adoption and Children Act 2002 and underpins the practice of 'same-race/religion'-matching within adoption. Arguably, it has added religion/race as factors to the paramountcy principle, namely, what is in the best interests of the child involved. This paramountcy principle as it informs adoption law is also enshrined in the 2002 Act in s. 1(2) which states: '[T]he paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.' It is interesting to note here that this principle developed from judicial notions of a child's 'interest' or 'welfare' in case law on disputes about private adoption 'contracts' before the 1920s when adoption in the UK had not yet been legalized (Abramovicz, 2009, pp. 57–62). 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 – for reasons of consistency – that the child should remain with the 'adoptive' family (Abramovicz, 2009, pp. 71–80). As I will discuss below, what has come to be known as the 'birth-parent presumption' is still strongly entrenched within adoption cases generally, but particularly in transracial adoption cases involving non-Christian and ethnic minority children; sometimes even when the child has developed psychological and/or other ties to the adoptive parent or foster carer.

The focus on a racial link with birth parents was first formally recognized in law in the Children Act 1989 which 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' (s. 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.

Paragraph 2.38–9 of *Guidance and Regulations*, vol. 3, 'Family Placements', also 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. (DHSSPSNI, 1995; see also Jones and Welhengama, 2000, p. 139)

Whilst dealing with racism and discrimination is one factor that is identified in the guidance to the 1989 Act to justify the same-race/religion-matching policy, nothing is mentioned in the guidance to the later 2002 Adoption and Children Act (DfE, 2005). The National Minimum Standards (NMS) for Adoption (DoH, 2003) which are issued by OFSTED and are non-binding, state that where a same ethnic match cannot be found: 'the adoption agency makes every effort to find an alternative suitable family within a realistic timescale to ensure the child is not left waiting indefinitely in the care system'.[1] I will return to a discussion of how racism as a factor for justifying same-race/religion-matching has been effectively ignored in adoption policy within emerging changes to adoption law in the concluding chapter.

Despite the lack of discussion around the need to tackle racism for children in care, there is, however, significant deliberation by judges on the importance and meaning of race/religion for the children involved in the cases I examine. In implementing the legislation and guidance on same-race/religion-matching, judges' consideration of religion goes beyond the protecting of an adult person's right to religious freedom, discussed in Chapter 1, as they are not confined to conceptualizing religion in line with the theological, belief and manifestation model of human rights law. Rather, in these cases, 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). After examining the trans-racial adoption cases, in the second part of this chapter I turn to cases relating to residence or specific issue orders (*Re J* [1999] 2 FLR 678, [2000] 1 FLR 5717; *Re S (Change of Name: Cultural Factors)* [2001] 3 FCR 648; *S (Children)* [2004] EWHC 1282). 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 judges 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 1, they barely consider the cases relating to non-christianness

1 The NMS are issued by the Secretary of State under ss. 23 and 49 of the Care Standards Act 2000. They are intended to facilitate agencies to 'develop their own particular ethos and approach based on evidence that this is the most appropriate way to meet the child's needs' (General introduction).

that I discuss here.[2] One exception that I have discussed is that of Richard Jones and Gnanapala Welhengama (2000) who 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 (see Chapter 1 for a detailed discussion of this scholarship). The more empirical literature on transracial adoption, for example, focuses on whether ethnic minority children adopted or fostered by white English families suffer (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; Husain and Husain, 1996; Kirton, 2000). Although much of the academic debate on same-race/religion-matching takes 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 conceptualizations of religion as faith or culture, manifested through ritualistic practices (Kirton, 2000, pp. 79–101). These autonomous conceptualizations of religion often marginalize a more complex exploration and interrogation of religion and the different ways it comes to be, for example, racially produced, as in *Re B (A Minor) (Adoption Application)* mentioned above and in the previous chapters and the other cases mentioned below. Moreover, the effects of the specific ways in which religion is racialized, or otherwise conceptualized, becomes sidelined.

Unlike the discussion in these 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, I argue that it is important to analyse this area of law in a way that facilitates an understanding of how religion is conceptualized within law by judges who 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). 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 questions underlying this book, namely, how religion (in this case study, non-christianness) comes to be conceptualized by judges; and what the relationship between

2 There is also a growing 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 (see, for example, Fox and Thomson, 2005; Gilbert, 2007; Thomson, 2008, but contrast with Edge, 2000a, discussed in Chapter 1).

religion and race is in the judicial configurations of religion. I argue that judges sometimes consider religion in theological terms as belief and practice as the LAR scholars do; but tend mainly to racialize religion or view it as something that is innate and inherited from the birth parents. This is not a new approach, Marlee Kline (1992) and M M Slaughter (2000, p. 230), for example, have discussed what the latter refers to as a 'transgenerational' logic in racialized conceptions of identity in law pertaining to the adoption and contested identities of American aboriginal children. Both in this and the British child welfare context, religion, as well as being conflated with race, also comes to implicate culture and nationality/nationhood, once again racialized as a matter of inherited lineage or genetic marker (Lentin, 2005). After all, as Lentin explains, 'culture' has come to circulate in political discourse as a 'replacement' for race (2005). Less often, judges consider religion as cultural, referring to it as being about the child's environment or something that is relational or contextually meaningful to how 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. 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 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. A further argument I make is that this position from which non-christianness comes to be understood, conceptualized and judged, whilst referenced as secular, reveals a Christian, albeit de-theologized and racialized, way-finding. As discussed earlier the co-imbrication of Christianity and secularism in the European context would seem to problematize any reference to secularity as neutral and entirely free of what might be termed religious.

The chapter is divided into two sections where I explore, firstly, the prioritizing of race in the conceptualization of religion and, secondly, how religion is conceptualized 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 'birthright' to be either extinguished or overridden. I begin by setting out the facts of one case in particular, *Re B (Adoption: Setting Aside)* [1995] 1 FLR 1, *(Adoption: Jurisdiction to Set Aside)* [1995] Fam 239 (the *Jonathan Bradley* case), a 1995 case which, whilst not strictly a welfare case, nonetheless involves a transracial/transreligious adoption. Although I use this case as the starting point

of my analysis, I do not wish to overly reify its importance in my analysis. It involves the extreme step of an adoptee, Jonathan Bradley, seeking to set aside his adoption order later in adulthood. Its interest and significance in my view lies in revealing the lengths to which judges might go in conceptualizing non-christianness. This and the other welfare 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.

The facts of the *Jonathan Bradley* case

In the 1995 Court of Appeal case *Re B (Adoption: Jurisdiction to Set Aside)*, 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 BBC *Everyman* documentary 'Jon's Journey' (1994, BBC1, aired 22 May) and newspaper articles at the time and therefore his story was openly publicized (see also Dyer, 1993). I will therefore refer to him as Jonathan (as this is how he self-identifies in the BBC documentary) and the case as the *Jonathan Bradley* case. 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.[3] 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 anglicized 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 preparation for his *bar mitzvah*.[4] 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 had informed Miss W (the matron at the unmarried mothers' home where Jonathan had been

3 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 (Dyer, 1993).

4 *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 13 for boys and 12 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.

born) that his birth father came from the Persian Gulf area. 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 may have assumed that she was also Jewish. Contrary to what the Rosenthals had believed, the birth mother later denied having told Miss W that B's birth father was of 'Syrian/Jewish stock' (243).[5] 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). Meanwhile, Jonathan became devout in his faith and was also involved in Jewish nationalist politics (BBC *Everyman* documentary 'Jon's Journey', 1994).

In 1996 Jonathan decided to 'emigrate to Israel' after having studied Semitic languages at university and become 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). These 'facts' surrounding his travels are rather vaguely stated in the case so it is not clear whether Jonathan had officially emigrated to Israel or whether his departure from there was a deportation or revoking of his citizenship (if that would indeed be possible). 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 to obtain work in 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.

5 The numbers in brackets refer to the relevant page from the judgments.

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). 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* conceptualize 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 mother? It is also 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? Does the fact that he is deemed Arab, and not Jewish, denote that he is also Kuwaiti and Muslim like his birth father? If so, can Muslim/Arabness or Jewishness be construed as ontological racial/religious categories, and how might we then make sense of, or categorize, the identities of Arabs of Christian or Jewish faith/culture (such as Iraqi Jews or Christian Palestinians)? It would have been interesting if the judges had consulted the *Oxford English Dictionary* which defines the term Arab as 'One of the Semitic race inhabiting Saudi Arabia and neighbouring countries' (*OED Online*, June 2013). This definition probably refers to the etymology of the term Arab which pre-dates Islam and would have included Jewish and Christian peoples.

Prioritizing race: judicial conflations of race/ethnicity/nation with theology

In this case Simon Brown LJ refers to Jonathan at first as a 'Kuwaiti Muslim's son'; however, thereafter Jonathan is only referred to indirectly as Arab. He then 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).

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) 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 it remains widely used in political and legal language in a way that encompasses religious beliefs *and* national origins. This is perhaps partially following the legal approach adopted in the *Mandla* case (*Mandla v Dowell Lee* [1983] 2 WLR 620) and other subsequent Race Relations Act 1976 case law (see discussion in Bamforth et al. (2008, p. 801). 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 categorization 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 and nationality become conflated and reduced to the terms Jew and Arab, I suggest that religion itself becomes a racialized articulation of ethnicity. Of course, this conflation raises more general questions about 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, p. 93). That is a question that has been explored in detail by others (see Cornell and Hartmann, 1998, for a detailed summary of this topic) and one that is beyond the scope of my discussion. However, 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 conceptualization 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 categorization becomes entirely construed and attributable through lineage. Thus, Simon Brown LJ not only marginalizes 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. Of course, religion and culture cannot be distinguished from each other so clearly (for example, see Berger, 2007,where he discusses both law and religion as 'cultures'). However, 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 2 (Cooper and 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 racialized 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 racialization 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 the understanding of them as related to bloodline and lineage. 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 carers' adoption application. The local authority had tried to find Sikh adopters because of its

policy to 'match children of particular racial backgrounds with families of similar racial background' (Social Services Inspectorate Guidelines, 29 January 1990, p. 894, on issues of race and culture in family placement of children) but had failed. The local authority attempted to weaken the child's bond with the foster parents by putting her in a bridging home whilst finding other Asian adoptive families. They claimed that the foster mother was not:

> … 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 (896).

There were three other adoptive couples that the local authority was assessing. Two of them were Asian Hindu and the third was Asian Roman Catholic, thus, for the local authority at least, being Asian was considered the most important qualifying factor for understanding and nurturing Sikh identity, overriding being Hindu or Roman Catholic. The judge, Stephen Brown P, sympathized 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, p. 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, p. 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 ethnicized 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 4.

Hamilton does seem to question the ways in which what she refers to as cultural heritage comes to be conceptualized, namely, that the adoption agency was not seeking to match religious but *ethnic* heritage (1995, p. 229). However, she does not question religion itself as a complex notion nor scrutinize what its relationship to race, culture and ethnicity might be beyond being an aspect of a racialized conceptualization of ethnicity. Rather, Hamilton dismisses cultural heritage as 'an unnecessary fiction' (1995, p. 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 worthy 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, is 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 racialized logic. This is a point that both Carolyn Hamilton (1995) and John Eekelaar somewhat acknowledge (2004), for example, in the need to protect minority rights in some extreme cases such as the policy of forced adoption of aboriginal children in Australia. There is, after all, an important and significant history of anti-racist campaigning which, in the British

child welfare context, was led particularly by the British Association of Black Social Workers resulting in the racial and religion-matching policy (see Kirton, 2000). Whilst Eekelaar briefly acknowledges this history, neither he nor Hamilton addresses the issue of racialization and its consequences for adoptive children in any detail. Perhaps this is because of their view that children should be able to choose their religion themselves later in life. This is a question that scholars such as Slaughter (2000) and Kline (1992), in relation to the adoption of American Indian children, attend to much more willingly and in detail. They both argue that conceptualizing cultural identity or religion in terms of choice fails to attend to judicial logics of racialized belonging or unbelonging. They explore the complexities of religion linked to community, ethnicity and so on but *without* being essentialized in racial terms.

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 (A Minor) (Adoption Application)* 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 16. 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 of the 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. 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 from the judgment whether the determining factor is

primarily the right of the child or 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.

However, scholars such as Ronen explicitly argue that it is precisely the psychological well-being of the child that should be paramount. For example, she discusses *Re M (Child's Upbringing)* [1996] 2 FLR 546 in which, similarly to *Re B (A Minor) (Adoption Application),* the judges at appeal 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 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). Ronen (2004) in her detailed commentary of this case – from a children's rights perspective – critiques the judges' failure to take account of the child's psychological needs including the need for stability. Interestingly, there are a few cases in which attachment has been prioritized over blood link, for example, in *J v C* [1970] AC 668 where the House of Lords refused to return a Spanish boy living in England with English foster carers to his birth parents (in Spain) in order to maintain the attachment and stability that had been established in his life. A similar outcome was reached in the case of *Re A* [1987] 2 FLR 429 involving a child (M) who had been unofficially fostered from Nigeria by an English couple (Mr and Mrs N).

Yet, it is clear that, in the decision-making of the present case of *Re B* (1995) *(A Minor) (Adoption Application),* Wall J is concerned with more than what he considers as the fundamental natural parent presumption or blood link. He 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 racialized in being posited as a consequence and *right* of birth, thus intertwined with the natural parent presumption. There is also a simultaneous ethnicizing of religious practices into the melting pot of 'cultural heritage and traditions' (753), effectively marginalizing 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 entity of culture shared with others of the same race, and its very existence becomes affirmed through public recognition by and of that group.

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, 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'. In short, for the judge 'blood' becomes a racializing 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 worker's) evidence on the notion of adoption being unthinkable in the context of a Muslim family. Or, indeed, it may also be a 'culturally sensitive' approach being adopted by the judge, one which has been critiqued by Ronen (2004) as being a form of a misplaced cultural consciousness or ethnocentrism (see Chapter 1). In any case, the judicial discourse itself, particularly in light of the psychological attachment to the foster carers and the fact that Wall J could have considered what other Muslim views on adoption might reveal, I would suggest, is his own racialized logic (see also Ali, 2009). Why, for example, was he not persuaded by similar cases, such as that of *Re A* [1987] mentioned above, where the child (M) from Nigeria was being 'fostered' by an English couple (Mr and Mrs N). The importance for a child to be brought up within her 'own' (Nigerian) culture was also emphasized 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. He also raised concerns about the fact that the birth parents would have no 'insight' into the problems that would arise as a result of removing her from her foster carers (437). Of course, there may be various reasons specific to the cases as to why two otherwise seemingly similar cases have been decided differently. Nevertheless, the judicial discourse in *Re B (A Minor) (Adoption Application)* is clearly underpinned with a racialized thinking which, as I will argue further in the next chapter, also comes into play as a factor in judicial configuring of children's citizenship as well as nationality as non-British.

Deprioritizing the racial link: religion as theology, community and cognitive processing

In relation to the cases discussed above, I have argued that whilst judges conceptualize religion in theological terms as belief/faith and practice, they also, at times, tend to conflate this with an ethnicized notion of religion as part of a child's racial inheritance and/or nationality. In the next set of cases, I examine how conceptualizations of religion as belief and practice come to be decoupled, although not entirely, from race and therefore be more demarcated. Considering that the socio-legal LAR perspectives discussed in Chapter 1 focus on onto-theological notions of religion and sometimes explore religion as part of ethnicity, it is interesting to note when and why judicial deprioritizing of race occurs in the cases relating to non-christianness.

I begin with the case of *Re J* mentioned at the outset of the book. 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 (see further Jivraj and Herman, 2009; and Edge, 2000a, for a discussion of the circumcision issue). 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 racialized 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 racialized 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 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). 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.

Interestingly, J's mother's Christian identity, described as non-practising, 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 racialized 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 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 secularized 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, p. 336). Although no doubt this judicial perspective is also being shaped by normative medical discourse on the issue of male circumcision (see Edge, 2000a), I would suggest that there is yet another aspect of J's future that remains unacknowledged and unremarked upon; namely the inevitability of J's Christianized/secular future.

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 birth right 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 being a matter of birthright. 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 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 invisibilized. 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 (698). Thorpe J only referred to a 'newborn' not being able to share his/her parents' 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, which I cannot discuss in detail here, 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) 12(2); on children's spirituality more generally, see Coles, 1990, and Benson et al.'s, 2003, more recent follow-up to Coles' work).

It seems odd that there seems to be so little judicial focus on J himself – particularly as he is far from being a 'newborn' – and the possibilities of him already having a complex identity. For example, why could J not be secular *and* Muslim with his Muslimness being conceived of other than in racialized 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 deprioritizing 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 born with Down's syndrome and had other medical issues such as severe respiratory problems. When she was 17 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 recognized that the child had a 'right to be brought up by her parents in their religion and way of life' (483).[6] Although agreeing with Butler-Sloss LJ in dismissing the appeal, Ward LJ nevertheless affirmed the birth parents' 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 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 racialized Turkish Muslimness in the *Re J* case, was never in dispute. However, it seems that, notwithstanding the

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

acknowledgment 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* and *Re A* (involving a child from Nigeria being unofficially 'fostered' by an English couple) 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, p. 160). 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 deprioritized (2000, p. 160). 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 better understand the various relational aspects that make an individual child's life and context meaningful (Van Praagh, 1999; Ronen, 2004). 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 conceptualizing 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 Christianized, 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 decoupled, 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 recognizing the contingency of religion as a concept, as the critical religion scholars discussed in Chapter 2 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 socio-legal perspectives that tend to view religion in these cases in more fixed rather than contingent ways.

Towards a complex notion of religion: culture and personal identity

To further add to my analysis of how religion might be conceptualized 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 Name: 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). Demarcating religion as both faith/belief and culture, the father is described as 'Sikh by religion and culture' and of Indian nationality (648). They had met in England when they were 18 and 23 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 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, authorized 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 conceptualized 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, this was because either he believed the Sikh identity to be a genetic inheritance or characteristic and/or perhaps the judge was following Race Relations Act case law, in particular *Mandla v Dowell Lee*. Yet, he goes on to state:

> 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 authorize 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, 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 racialized 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. As discussed earlier 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. This is clearly not an approach taken in *Re J* or *Re P* where conversely the implication of the judicial discourse *is*, in effect, to authorize 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 religion' (1119, para. 3). Her birth mother had described herself as Church of England, but Wilson J dismisses this as an 'empty label' (1119, para. 3). The case came to court as the official CAFCASS[7] guardian (Mrs Smith) believed the adopters to be 'too Jewish' (1119, para. 3). 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' (1129, para. 36). 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 understand the As' 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*

7 Child and Family Court Advisory and Support Service.

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 child with learning disabilities 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 recognized 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. 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 (A Minor) (Adoption Application)* 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 role this kind of language can play in shaping children's future identities in the following chapters.

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 authorizing 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 recognized K's cognitive abilities to appreciate his ethno-religious worlds:

> 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 recognizes that both his and the mother's religious identifications are embedded within the contexts within which they have lived. Rather than religion being racialized 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 recognize religion and religious identity more in terms of a process of becoming through culture and environment – what Saba Mahmood (2005) refers to as *habitus* or embodied practices in community with others – that might also involve children and adults living in a number of overlapping communities. In short, Baron J's conceptualization of non-christianness is not entirely dependent upon racialized thinking; an

approach that scholars such as Slaughter (2000) have been advocating for elsewhere, for example, in relation to conceptualizing the complex identities of adopted American Indian children.

In all three of the decisions I discuss here, religion comes to be conceptualized 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 racialized through conflations of religious/cultural/ethnic identity circulating as the genetic inheritance, birthright or heritage of the children involved. Religion conceptualized 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 conceptualizations of religion to delineate the religious upbringing and future of the child. Rather they attempt to think somewhat more complexly 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.

Concluding remarks

My analysis of the cases discussed above reveals how religion comes to circulate in particular ways, predominantly as a genetic racial marker linked to community, nationhood and/or nationality. Religion is also conceptualized 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 racialized configurations of religion, nationality and culture, as in *Re B (A Minor) (Adoption Application)* 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 2 who take a more critical approach to the concepts of race and religion than the socio-legal 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 particularized non-Christian religion along racialized lines, from a European, Christianized viewpoint.

4 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.[1] (Scrutton LJ (336) in *Re JM Carroll* [1931] 1 KB 317 (CA))

Introduction

In my analysis of the cases in the previous chapter, I argued that non-Christian religion circulated in the cases mainly as a racialized concept, implicating lineage and belonging within a nation that one is linked to by blood. In Chapter 2, I argued that socio-legal law-and-religion (LAR) scholarship, in conceptualizing religion in predominantly theological terms as belief/faith and practice, tends to marginalize this racialization of non-Christianness. I made a further point that, because 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 racialization in the judicial discourse in these cases and focus on the role of orientalism within them, although of course the two concepts overlap, as I have discussed in Chapter 2. However, interrogating orientalism facilitates an analysis not just of the role 'race' as a somatic genetic marker, but also of religion or cultural practices as a signifier of belonging (Miles and Brown, 2003, p. 19). Miles and Brown articulate their analysis as 'representations of the Other'

1 The numbers in brackets refer to the relevant page from the judgments.

rather than specifically espousing the language of orientalism (2003, p. 19). Nonetheless, as I discuss here, their arguments echo many of those made by Edward Said (1994). Orientalism as an analytical lens also highlights the positionality, that of a de-theologized, Christian, secular viewpoint, from which non-Christianness can come to be adjudicated upon (Masuzawa, 2005). For example, as I discussed in Chapter 2 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 uncivilized (Said, 1994; Lewis, 1996; Miles and Brown, 2003, pp. 19–53; Fitzgerald, 2007). 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 problematize the judicial discourse on religious/racialized notions of nationhood, pointing to the positionality of the judges that might influence these conceptualizations. 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 or, indeed, the '[r]endering [of] liberal legal principles as universal and culture as inherently particular' (Brown, 2006, p. 170). This 'rendering' in turn both legitimates itself *and* subordinates the culture of the particular, in this case non-Christianness, as I go on to discuss further below. 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.

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 Shauna Van Praagh (1999) and Ya'ir Ronen (2004) argue, are essential to the well-being of the child. Their conception of belonging 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' (Van Praagh, 1999, p. 158). However, there is an overwhelming tendency in the judicial discourse to understand belonging as part of a child's 'birthright' rather

than in psychological terms. As I discussed in relation to cases such as *Re B (A Minor) (Adoption Application)* [1995] 2 FCR 749, *Re J* [1999] 2 FLR 678, [2000] 1 FLR 5717, and *Re P (A Minor) (Residence Order: Child's Welfare)* [2000] Fam 15 in Chapter 3, the effect of such judicial discourse is that religion also becomes a signifier of a racialized conception of belonging. As Nira 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, p. 3). She claims that the notion of belonging becomes central to a 'self–other' dialectic (2006, p. 3) in which the existence of the self is reinforced through its relation, one of distinction to the other(s) (Miles and Brown, 2003, p. 19). As discussed in Chapter 2, this self–other dialectic, is also a key feature of orientalist discourse which distinguishes between the civilized 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 essentialized and fixed as significations of borders, boundaries and distinct nationhood in relation to children (Yuval-Davis et al., 2006, p. 3).[2]

The deployment of belonging is perhaps most clearly articulated in the 1995 *Re B (A Minor) (Adoption Application)* case (discussed in Chapter 3), involving a child from Gambia who had stayed with a couple in England on a 'long holiday'. 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 conceptualization of religion comes to be an ethnicized one in which community, religion, culture, race, nationality and even 'ethos' are part of the same pot.

This ethos (a term which was also used in *Re J* to refer to the Turkish Muslim father's values) presumably implicates the value system of the Muslim Gambian family. These values in turn are sharply distinguished with those 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

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2 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 come to signify a child's potential (un)belonging (discussed further in Herman, 2011).

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, themes that I will return to in the next two chapters on religion in education.

However, it is interesting to note here the case of *Pawandeep Singh v Entry Clearance Officer* [2004] EWCA Civ 1075, which demonstrated that immigration rules and procedures can be overcome when judges deem 'attachment' to be sufficiently important. In this 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 recognized 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 recognized 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 on Human Rights. 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 had 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 (see *Re J* [1998] INLR 424, discussed in *Pawandeep* [2005] QB 608, 639). 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.

This is an important judgment in terms of its willingness to recognize 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 context' (630). This is a key point made by Abdullahi An-Na'im (1994) who, in the international human rights law context,

argues for pluralistic understandings of the welfare principle. Indeed, this approach has had some limited application elsewhere in English law. The *Watkins-Singh* case (*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) brought under human rights law, involved a school pupil wearing a Sikh religious symbol in contravention of her school's uniform policy. Similarly to judges in *Pawandeep*, Silber J in *Watkins-Singh* also took a broad view of diverse cultural standards stating that in recognizing 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).

However, in *Pawandeep*, as in *Re B (A Minor) (Adoption Application)* discussed earlier, the importance of the biological family link between the child and the adopters is at the core of the judgment; particularly in justifying that family life existed between them even despite the lack of physical proximity.[3] 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. The fact that both couples were 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 (A Minor) (Adoption Application)*, where the adoption was contested by the Gambian birth parents. It also had approval from the Indian government which distinguishes it somewhat from *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239 (the *Jonathan Bradley* case) and *Re K (Adoption: Foreign Child)* [1997] 2 FCR 389, discussed below, where the respective Gambian and Bosnian governments did not approve of the foreign adoptions sought in those cases. Nonetheless, it is interesting that the child in *Pawandeep* 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

3 It is interesting that the case of *X, Y and Z v UK* [1997] 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 in *Pawandeep*, 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).

the court logic in *Re B (A Minor) (Adoption Application)* where the child's 'natural' and heritage link to the birth parents, their community and indeed to Gambia, legitimately overrides her attachment to her foster carers. Moreover, this racialized judicial logic is also affirmed by the fact that in *Pawandeep,* immigration rules in the end are overcome, whilst in *Re B (A Minor) (Adoption Application)* 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*, also discussed in the previous chapter, although of course they involve different legal frameworks. Nonetheless, both the conceptualization 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 wider socio-legal LAR literature. The positionality of judges being able to 'know' non-Christianness, in order to adjudicate on where children belong, often along racialized lines, echoes an orientalist 'positional authority' which again remains largely invisibilized 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. 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 and the United Nations Children's Fund, 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 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, categorized 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 emphasized, nonetheless, the foster carers had had the child baptized. 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 racialized 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 racialized religious thinking, as I discussed in the previous chapter in relation to the case of *Re M (Child's Upbringing)* [1996] 2 FLR 546. This case involved 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 that was where he *belonged*, again despite the attachment he had formed with

his foster carer. I will return to explore this concern for children's proper belonging in more detail in the next two chapters where I suggest that the discourse surrounding religion in education law and policy similarly results from an anxiety 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 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 2, the notion of a clash of civilizations 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 (*Osman v Elasha* [2000] Fam 62) as part of the list of issues that are the subject of a 'culture clash' between 'our' English family law or, indeed, international law on children's rights, and Muslim laws or traditions (United Nations Convention on the Rights of the Child 1989, cited at 635). Whilst many of these issues will clearly affect the well-being 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. Given the debates over the prevalence of this kind of orientalist view of non-christianness in wider contemporary political discourse, it seems possible to adjudicate on the issues at hand without needing 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). 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 racialized lines, with the effect of distinguishing non-Christianness from a civilized Christian/secular West.

As I discussed in Chapter 2 and mentioned above, this critical understanding of how non-Christian religion comes to be understood *and* deployed as part of a Christianized and universalizing secular discourse in the judgments is one that remains largely absent in the socio-legal LAR literature. There is, for example, very little, if any questioning of the ways in which judges draw on racialized notions of religion or deploy religion as a signifier of belonging. As I will go on to argue in Chapter 6, 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 depoliticized 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.

Nationhood and conflictual non-Christians

The theme of (un)belonging and (un)civilized characteristics, particularly tribalistic conflict, appears in a number of the other adoption and child welfare cases discussed in Chapter 3, particularly where the children involved are from mixed parentage. In the 1995 *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239 or *Jonathan Bradley* 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. 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 racialized 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 3, this judicial logic of racialized nationhood marginalizes 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 relations. In obfuscating these

significant aspects of Jonathan's Jewish life, the notion of belonging itself also becomes racialized. However, what is significant about this notion of racialized 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. As Didi Herman (2006, p. 285) points out, this trope of 'wandering', in relation to Jews in particular, appears elsewhere in English law, for example, 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). 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 (*Jonathan Bradley* case, 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 (although there is more information given by the first instance court *Re B (Adoption: Setting Aside)* [1995] 1 FLR 1 at 4 and in the BBC1 *Everyman* documentary 'Jon's Journey' (BBC, 1994)) is *how* Jonathan comes to feel this sense of unbelonging in the Arab community. 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 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 states 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 recognizing 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 their evoking of 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, as we know from the BBC documentary, Jonathan grew up in Toxteth (Liverpool), England. 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 the two sons of Abraham – Isaac and Ishmael – over the 'promised land'. Despite these descendants 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 which seems to effect a spatial as well as temporal transference with the biblical resonance of Semites in perpetual conflict. As Gil Anidjar highlights, the 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, p. 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 theorizing of race and religion in relation to Jews and Arabs, Anidjar discusses how, in the orientalist imaginary, there was initially an imagined Semitic unity: 'a historically discursive moment whereby whatever was said about Jews could equally be said about Arabs and vice versa' (2008, p. 18). However, this unity came to later circulate as a separation and then opposition where the 'Semite' became 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, pp. 21–33). Anidjar describes the orientalist conceptualization of Semites as both race and religion as not being a truth, but imagined as part of Europe's view of non-christianness. 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, p. 21). He posits Christianity, albeit de-theologized or secularized Christian Europe, as wanting to define itself 'vis-à-vis Judaism and Islam by reassigning roles, by drawing the borders' (Anidjar, 2008, pp. 13–39).

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 'share a conception of "the Jew" that is, *literally* Hebraic in the biblical sense' (2006, p. 286). Of course, this judicial construction of Hebraic Jews seems to be part of a wider judicial concern for 'racial authenticity' (Cooper and Herman, 1999), particularly of children, as Marlee Kline (1992) points out in her work on the adoption of 'Canadian Indian children'. This concern echoes Yuval-Davis's 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, p. 3). This argument is also put forward by Miles and Brown (2003, p. 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. Similarly, Davina Cooper also 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, p. 61). As outlined in Chapter 2, Miles and Brown's 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 intents and purposes did not exist' (2003, p. 22). They 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, p. 29). 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, p. 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 racialized 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 hyperbolizes 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 racialized judicial logic to its conclusion would also mean that Jonathan was 'half'-Christian English through the maternal line. However, his Christian Englishness is also invisibilized. 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 racialized in the same way as Jewishness and Arabness are? Perhaps to be English is to be entirely or *purely* English; or perhaps even just ostensibly English, as in, for example, *Re J* and *Re P.* 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': not to mention the invisibilization of British colonialism and the hasty withdrawal from Palestine and its impact on the ensuing conflict there. 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, p. 281; see also Miles and Brown, 2003, p. 18; and Yuval-Davis et al., 2006, p. 2)

Indeed, at the very least, the invisibilizing of Jonathan's Englishness produces a spatial and temporal distancing of Christian English nationhood from that of an 'uncivilized' Jewish and Arab nationhood. Particularly, as Herman argues, the characteristics of English nationhood and law have been partly constituted through the racialization 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, pp. 288–300). 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 and value systems, as part of an orientalist judicial production of racialized 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, p. 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, p. 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 (Anthias et al., 1992; Ahmed, 2000; Herman, 2006; Yuval-Davis, 2006).

The idea of conflictual and tribalistic non-Christians also features in the 2001 case of *Re S (Change of Name: Cultural Factors)* [2001] 3 FCR 648. 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 3, 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' (650). 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 and honour killings to child abduction, for Wilson J, non-christianness also comes to be painted with the orientalist brush of being conflict prone. Such uncivilized 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)* [2004] EWHC 1282, 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 3, 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 (A Minor) (Adoption Application)*; or on the basis of racialized characterizations 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*.[4] Moreover, this orientalist ordering and knowing about

4 See also *AM v Local Authority, The Children's Guardian, B-M (Children)* [2009] EWCA Civ 205 in which a Muslim father of three sought permission to appeal against care and other orders in respect of the children who were in care as the mother was thought to have caused a fire placing her children at risk. The question about the appropriateness of the foster home (a white non-Muslim family) was eventually dismissed because of the perceived likelihood of the children being discovered if placed in a Muslim family, despite the case psychologist describing the fosterers' fears as 'clinical paranoia of huge proportions' (para. 111). Rejecting the application, Wall J, similar to Munby J in *Pawandeep,* comments on the tolerance 'manifested in the English child care jurisprudence' enabling the father to put his concerns forward (para. 115).

non-christianness becomes articulated from the position of secular or rather de-theologized Christian whiteness. This positionality sometimes comes to be made visible, but only in terms that distinguish and problematize the behaviour of non-christianness against its own notions of tolerance and secular rationality.

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. Despite arguments that the idea of commonality within nations has largely come to be imagined (Anderson, 1983), Carl Stychin (1998) points out that, whilst we should not consider nations to be a truth, they do still involve an imagined sameness and therefore the nation remains, one of 'the most durable political imaginings we encounter' (1998, p. 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, p. 3). Consequently, race, religion and nationality become connected, even intersect, circulating as 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 the *Jonathan Bradley* case and *Re J*. Whilst in *Re S* and *Re C* [2002] 1 FLR 1119*,* Wilson J was willing to recognize 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 (Transracial Placement)* [1990] 1 FCR 891 – discussed in Chapter 3 – 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, p. 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* [1999] 2 FCR 685. In this case, the birth father of a white child, S, had been threatening towards the child's foster carers in whose home she had been placed. He objected to the placement apparently because he did not want S to be placed in a 'mixed-race' family home although the specific reasons or details of the family are not elaborated upon. 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 and Regulations to the Children Act 1989 on same-race/religion-matching with no further comment (paras 2.40 and 2.41). 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 judgment in this case stands in contrast with some of those in the cases discussed in Chapter 3, for example, *Re JK* and *Re P,* which despite prioritizing 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 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 racialized 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 racially to 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* (1994). 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, p. 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, p. 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, p. 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 (1999, p. 25). Fitzpatrick (1995) 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 civilization, as well as religion (see also Stychin, 1998, p. 4). In short, there is an inherent contradiction and consequent anxiety in the orientalist narrative of the West as both distinct, defined in opposition to and excluding the uncivilized non-European, non-Christian other, and its simultaneous seeking to be universal.

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. In *Re J*, 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 home becomes mitigated by her own supposed inability to cognitively understand this racial/religious disjuncture.

Concluding remarks

In this chapter, I have explored how non-Christian religion is not only predominantly racialized in many of the judgments, but also viewed through an orientalist imaginary of conflictual and uncivilized 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 racialized 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 racialized 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 Christianized 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.

5

Religion in Education: Christian Legacy, Orientalist Positioning and Common Values

> Either overtly or by default, this country is still a Christian one. (spokesman for the Church of England (CoE), (2007)[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. (Former Schools Minister, Jim Knight quoted in, DCSF, 2007c)

Introduction

In the previous case study I examined the circulation of religion, particularly non-christianness, in cases relating to transracial/transreligious adoption and other child welfare issues. I highlighted the presence of orientalist positioning, racialized views and concerns over the (un)belonging of children within the judicial discourse. In this case study I explore how similar ways of understanding non-christianness pervade the conceptualization 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 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 recognizing diversity, promoting equality, maintaining social cohesion, and finding common 'values' that are not (seen to be) merely based on a Christian heritage.

1 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 (Ashtana, 2007).

Other scholars have discussed the presence of orientalist, racialized and Christianized views of non-Christian children within the judicial discourse on schooling, for example, in disputes over admission to (minority) faith schools such as the Supreme Court decision on the *Jewish Free School* (*R (on the Application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and Others* [2009] UKSC 15; Herman, 2011), and in relation to cases on the wearing of religious dress or symbols at school (Motha, 2007; Vakulenko, 2007; Razack, 2008; Bhandar, 2009). 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 '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 schooling have come to be seen as instrumental in contributing to combating prejudice and creating community cohesion (Keast, 2005, p. 215; see also the joint statement on the importance of RE from the Department for Education and Skills (DfES) and Faith Communities, 2006). 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 (Department for Children, Schools and Families (DCSF), 2007b, p. 7). Thus, religion, as conceptualized 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 racialized 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 Singh v Entry Clearance Officer* [2004] EWCA Civ 1075, [2005] QB 608, and *Re JK (Transracial Placement)* [1990] 1 FCR 891. We also saw an anxiety that emerged when it was not clear to which racialized/ethnic or cultural/religious community a child properly belonged, for example, in the *Jonathan Bradley* case (*Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam 239), or in the cases involving

disputes between parents of different religious/cultural backgrounds about the religious upbringing of their children, for example, as in the case *Re J* [1999] 2 FLR 678, [2000] 1 FLR 5717. Whilst in the previous case study judges faced the challenge of dealing with complex identities, where a child might belong to multiple racialized/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 (see, for example, the report by the Commission on Multi-Ethnic Britain, 2000, p. 40, discussed in Malik, 2008, p. 3). This case study will look at how state actors, in shaping non-Christian children's belongings and values in education, conceptualize religion and how this conceptualization relates to race/ethnicity.

Whilst there is some acknowledgment of the role of 'character education' and identity formation within the more critical education literature (Arthur, 2000; Gamarnikow and Green, 2003; Annette, 2005), there is very little recognition of this in the socio-legal law-and-religion (LAR) perspectives discussed in Chapter 1. Although Rex Ahdar and Ian Leigh undertake an analysis of the various approaches to education, including 'the formation of good citizens' in which they recognize the impact of a liberal approach to education on identity formation in particular as citizens of the nation. They are critical of this approach but from the perspective that 'devout' parents would prefer their children to be able to have a specifically Christian RE (2005, pp. 230–1). Much of the remaining literature has come to be polarized 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 (Cumper, 1998; Bradney, 2009). 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 RE 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 have highlighted throughout the book so far, the notion of religion within the existing debates is itself insufficiently attended to or interrogated by the commentators. For example, within discussions about RE – as explored in this chapter – religion continues to circulate as a predominantly onto-theological concept. Yet, as Fitzgerald argues, this conceptualization 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 (Asad, 1993; King, 1999; Fitzgerald, 2000; Masuzawa, 2005; Fitzgerald, 2007). In drawing on this history which I discussed in detail in Chapter 2, we discover not only how the concept of religion came to be 'invented', as Fitzgerald and other critical scholars refer to it, but also how non-christianness has come to be conceptualized through an orientalist and racialized lens (Asad, 1993; King, 1999; Fitzgerald, 2000; Masuzawa, 2005; Fitzgerald, 2007). I have already argued that this critical religion analysis challenges fixed notions of religion that predominate in juridical discourse and in child welfare cases. My argument here is that the notion of religion as it circulates within the literature on religion and education law must also, likewise, be challenged. This critical analysis not only facilitates an interrogation of fixed onto-theological conceptualizations of religion that circulate in scholarship on education and religion; 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.

To that end, 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 'Christianization' of education particularly from within socio-legal LAR scholarship, pointing to the circulation of religion as a mainly onto-theological concept. I revisit the critical religion perspectives discussed in earlier chapters 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 'common values', central to the former New Labour (NL) government's project of promoting social cohesion. I will examine the Christian heritage of these values that are posited as 'neutral' or 'universal' through communitarian theories relating to education but which are now more readily being pronounced as Christian values under the current Coalition government.

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, p. 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 et al., 1989, p. 41). Church schools became more formal and institutionalized in the early nineteenth century as churches filled a vacuum left by a lack of state provision (Judge, 2001, p. 466). The most significant form of education provision was centrally organized by the National Society, part of the CoE, supporting local efforts by clergy and laity to provide schooling for the general public (Judge, 2001, p. 466; Wright, 2003, p. 142). Between 1811 and 1851 the National Society 'was responsible for the establishment of 17,000 schools' (Wright, 2003, p. 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 and National Foundation for Educational Research (NFER), 2002, p. 1; Wright, 2003, p. 142). Up until this point 'virtually all education in England was provided by the church' (Gillard, 2002, p. 15). Gradually, 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, p. 466, Bradney, 2009, pp. 122–3).

When the Elementary Education Act 1870 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 and NFER, 2002, p. 1; Jackson and O'Grady, 2007, p. 183). Other legislative developments included the Education Acts 1880 and 1891 which gave School Boards the power to ensure attendance for children under ten and to make schooling increasingly free (Statham et al., 1989, p. 41; Holt and NFER, 2002, p. 1). The Education Act 1902 replaced the School Boards with Local Education Authorities (LEAs) with a remit for both elementary and secondary education (Statham et al., 1989, p. 42). The Education Act 1918 set about ensuring that a fully national system of education was established through measures such as reducing exemptions to the requirement to attend school (Statham et al., p. 43). The industrialization 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, p. 466). By the time the state had begun to recognize 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, p. 15; Wright, 2003, p. 142).

The Education Act 1944 (the 1944 Act), which essentially replaced 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 three phases of primary, secondary and further, now known as higher, education were introduced. The Act effectively formalized a compulsory and free education for all children aged 5 to 15 (Statham et al., 1989, p. 44; Holt and NFER, 2002, p. 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 Act 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, p. 15).

The 1944 Act classified LEA schools as county schools (which later became community schools under the Schools Standards and Framework Act 1998 (SSFA)) and other – mainly CoE and RC-owned – schools as voluntary schools (Gillard, 2002, p. 15). Voluntary schools were given financial support whilst maintaining varying degrees of independence (Jackson, 2003, p. 89; Parker-Jenkins et al., 2005, p. 26). 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 (VA) status (Parker-Jenkins et al., 2005, p. 33). Of these, the church schools were either 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, p. 15). In short, the 1944 Act formalized 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 et al., 1989, p. 44; Jackson and O'Grady, 2007, p. 183). 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. However, the government at the time did state publicly that there was an expectation 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 (HL Deb 21 June 1944, vol. 132, col. 336; see also Cooper, 1998, p. 52; Bradney, 2009, p. 123).

There had been opposition to the public funding for church schools with a preference for a common comprehensive system from early on (see Cumper, 1998, p. 55; Holt and NFER, 2002). Opposition to the dual education system reached a pitch in the 1960s when the Labour government called for LEAs to reorganize 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 (Jackson, 1995; Cumper, 1998; Holt and NFER, 2002, p. 1). Further expansion of faith schools was not encouraged, and some Labour quarters even sought their abolishment (Jackson, 1995). 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, pp. 90–1). 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 the next chapter and will concentrate now on the developments in the provision of RE and worship in schools.

Collective worship and RE: 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 altogether. 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 empathize with the religions of others (Smart, 1968, and Schools Council, 1971, both cited in Jackson, 1995, pp. 273–4; Fitzgerald, 2007, p. 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, pp. 273–4).

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, p. 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, p. 466, discussed in Jackson, 1995, p. 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 (Swann, 1985, p. 466, in Jackson, 1995, p. 274; Ahdar and Leigh, 2005, p. 245; Bradney, 2009, p. 123). The Swann Committee felt that this approach to religion merely reflected the practice that was already prevalent within many schools (Swann, 1985, p. 471, in Jackson 1995, p. 274).

Nevertheless, s. 8(3) of the Education Reform Act 1988 (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. Daily collective worship was still required (under ERA, s. 7), but it was now made explicit in the ERA that this must be 'wholly or mainly of a broadly Christian character'. However, the ERA 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 (ss. 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).

The ERA also introduced the term 'religious education' to replace the term 'religious instruction' (Jackson and O'Grady, 2007, p. 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 (2007, p. 184). In 1991, guidance was issued in response to a 1989 survey of RE advisers to LEAs indicating a lack of consensus and confusion amongst teachers about what should be included in school worship and RE classes (Bradney, 2009, p. 125). A 1994 Department for Education (DfE) 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 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 ERA 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'. 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, p. 185). The specific mentioning of the Christian nature of worship was introduced via an amendment to the ERA in the House of Lords, proposed by the Bishop of London (Hamilton, 1996, pp. 28–9: see also Cooper, 1998, pp. 51–67). Perhaps making the worship requirement explicitly Christian also illustrates the inherent tensions in seeking to acknowledge and understand religious diversity within a country that is mainly considered to be '[E]ither overtly or by default … still a Christian one' as the Spokesman for the CoE stated in his response 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 (Ashtana, 2007).

The last piece of legislation on education under the previous Conservative government was the Education Act 1996, 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 and NFER, 2002, p. 2). The next major piece of legislation relevant to worship and RE in education to be passed was the SSFA in 1998, implemented under the NL government (1997–2010). The SSFA replaced county schools with community schools and entrenched faith schools, as 'schools with a religious character' within the law (I will return to the issue of faith schools in the next chapter). Repeating the wording of the ERA, the SSFA stipulates that worship in community and VC schools should be 'wholly or mainly of a broadly Christian character' (sch. 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. Although the SSFA 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' (sch. 20, s. 6(a)). With regards to RE, the SSFA reinforces previous legislation, requiring LEAs to establish an RE syllabus for their local schools in partnership with faith representatives which *must* include the CoE (pt II, ch. 6, s. 69 and sch. 19 of the SSFA, originally in the Education Act 1996).

The New Labour government continued to emphasize the importance of RE in schools, in particular in relation to understanding 'others'. The DfES published for the first time a non-statutory national framework for RE in 2004 (DfES, 2004b), identifying important principles for RE, although the local arrangements for setting the syllabus remained in place. In 2006, the government and faith leaders made a joint statement on the importance of RE, recognizing it as making an important contribution to developing respect for, and sensitivity to, others, in particular, those whose faith and beliefs are different from one's own (DfES and Faith Communities, 2006). 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, p. 10). In January 2010, the Department for Children, Schools and Families (DCSF – the new name for the former DfES) published new non-statutory guidance, *Religious Education in English Schools*, replacing the elements on RE from the 1994 circular on RE and collective worship. 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 LEA (DCSF, 2010, p. 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, p. 14), also enshrined in s. 375 of the Education Act 1996. The syllabus is 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, p. 10). This syllabus must also be taught by VC and foundation schools 'with a religious character' (the latter replaced the 'grant-maintained schools' that had been created by the 1988 Act). VA schools and denominational academies should determine RE in accordance with their designated religion (DCSF, 2010, pp. 15–16). Foundation schools may or may not have a religious character as 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 organization, or a business, sponsoring and managing the school particularly if it is 'failing'. They were created in 2000 and became embedded in the Education Act 2002. The scheme was the brainchild of Tony Blair's chief education adviser, Andrew Adonis (Gillard, 2002, p. 16,) and, as I will discuss more in the next chapter, Academies are key to the Coalition government's education policy. Under some circumstances, parents may request of any of these types of schools with a religious character to make provision for the teaching of RE either in accordance with the school's designated denomination, or the locally agreed syllabus (DCSF, 2010, p. 15).

The 2010 guidance also reaffirms the importance of RE, not only in relation to pupils' spiritual, moral, social, cultural and personal development, but also in relation to community cohesion (DCSF, 2010, p. 7). The concept of community cohesion had in the meantime 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 (Education and Inspections Act 2006, inserting s. 21(5) into the Education Act 2002). 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, pp. 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 education system. However, first I will turn to socio-legal LAR perspectives on religion in education and interrogate the conceptualization of religion in these debates.

Socio-legal perspectives on religion in education: a Christian legacy?

The Christian legacy in the English education system has been discussed in the socio-legal LAR scholarship. Bradney (2009), for example, recognizes 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, pp. 122–3). 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 (2009, p. 122). Thus, 'in strict terms', for Bradney, the 1944 Act resulted in a multi-faith system (2009, p. 122). Moreover, Bradney argues that the Swann Committee Report gave rise to the shift from religious instruction to RE, and that other religions came to be studied alongside Christianity, presumably as part of what he views as a multi-faith system (Bradney, 2009, p. 123).

Cooper argues that the initial move away from Christian-based schooling under the 1960s Labour government was halted under the subsequent 18-year Conservative government, which was not as keen on encouraging more 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 revitalized (Cooper, 1998, p. 51; see also Cumper, 1998). She cites as an example the ERA, restating the 1944 Act's requirement for all state schools to provide RE and collective worship (Cooper, 1998, p. 56). Moreover, she also discusses how the ERA 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' (ERA, s. 7(1–3); see Cooper, 1998, p. 56; Cumper, 1998, p. 47; Edge, 2002, p. 304; Bradney, 2009, p. 123). Cooper also cites s. 8(3) of the ERA 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) (ERA, s. 8(3)).

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, p. 124). Nonetheless, he gives a number of arguments as to why this did not occur, including the lack of certainty in the ERA on what was meant by 'broadly Christian' worship to which he attributes the lack of universal implementation within schools (2009, p. 125). As further evidence of the inclusion of non-Christian religions in the curriculum, Bradney cites the 1991 DfES guidance on RE syllabi being required to include material on other religions in addition to Christianity, as well as the DfES (2004b) non-statutory national framework for RE which gave suggestions of what should

be included in the curriculum (Bradney, 2009, pp. 125–6). He concludes that the 1988 legislation 'all sides largely agree has failed'. 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, p. 130)

Whether the ERA did succeed, or indeed fail, to Christianize education does not seem to be, as Bradney suggests, an issue that 'all sides largely agree' upon. Cooper's analysis mentioned above, extensively explores discussion of the proliferation of Christianity and Christian values in education during this period (1998, pp. 51–71). For example, she discusses the notorious s. 28 (Local Government Act 1988) which was brought in by the Conservative government during the same period as the ERA. The Local Government Act 1988 s. 28 clause aroused widespread opposition within lesbian, gay and bisexual communities because it stated that LEAs '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 speaking out against NL support of faith schools (see, for example, Harris, 2005).

Other prominent LAR scholars, such as Ahdar and 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, p. 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 (s. 70 and sch. 20 s. 2(5–7)), 'is one that has failed to accord equal respect to the many different religious traditions in the classroom' (Cumper, 1998, p. 45; see also Hamilton, 1995; 1996; Edge, 2002, p. 304). According to Cumper, there are at least six different arguments that can be advanced for abolition of the collective worship requirement (1998, p. 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, p. 2).

Edge suggests that, even with the exemptions for parents to opt their children out of 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, p. 305). This is an issue that has even come to court in 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 (Edge, 2002, p. 305; see also Hamilton, 1996, p. 30). The 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 authorize particular beliefs and practices (Edge, 2002, p. 306), and can, indeed, lead to religious discrimination within education (Addison, 2007; Knights, 2007). Hull takes this argument further stating that the ERA 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’ (*Islamia National Muslim Newsletter*, March 1994, No 23, p. 10; discussed in Cumper, 1998, p. 55; see also Hull, 1975, p. 91; 1984; Khan, 1995). These critiques of religion in education also reflect Asad’s (1993) argument explored in Chapter 2 about how particular instantiations of religion come to be authorized by state actors.

What is interesting about the range of socio-legal 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, p. 4). It is precisely to this analysis, often marginalized in the LAR and other perspectives discussed 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 Christianization, but rather attend to religion as a notion that often circulates as a referent to variations of Christian truth (Fitzgerald, 2007).

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, p. 91).

As discussed in Chapter 2, critical religion scholars, such as Fitzgerald, challenge the onto-theological conceptualizations of religion that predominate in academic discourse. They claim that religion cannot be reduced to 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, p. 4; 2007; De Vries, 2008, p. 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; including being mitigated by a racialized and orientalist view of non-christianness (Asad, 1993; Fitzgerald, 2000; Masuzawa, 2005; Fitzgerald, 2007; De Vries, 2008).

Here, drawing on the work of Fitzgerald (2000; 2007) and Masuzawa (2005) in particular, 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 (see also Jackson, 1995). This conceptualization of religion comes to be articulated by academics, educators and politicians making authoritative statements about religion in the school curriculum (Fitzgerald, 2007, p. 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, p. 20)

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, p. 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 RE (2007, p. 27). As mentioned above, this includes the work

of religionists and in particular a phenomenological approach to religion proposed by Ninian Smart. This approach was also propagated by others, including Rudolf Otto in his *The Idea of the Holy* (1917) and F J Streng in *Understanding Religious Man* (1969), as well as in Smart's own *Religious Experience of Mankind* (1984). As Fitzgerald notes, these scholars had a significant and enduring influence on onto-theological notions of religion and religious experience within RE (2007, p. 27). John I'Anson and Alison Jasper (2006) go further in describing this conceptualization and approach to religion as 'the Official Account of Religious Studies' (OARS).

The evidence of the influence of OARS can be seen in teaching materials such as 'Photopak 3: Discovering Religion in Festivals' (Longley and Kronenberg, 1973). The pack contains 'photographs, illustrative material and a series of work units to encourage young people to discover for themselves the *nature* of religion', for example, sacred time and places, including 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 (Fitzgerald, 2007, pp. 27–8). These and other photos are described as 'responses to the numinous' (2007, pp. 27–8). Fitzgerald's analysis of this material highlights how the visual cues and 'work unit' pathways direct children towards organizing 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 (2007, pp. 27–8). Moreover, the sacredness of religion is highlighted through notions of spirituality, a religious experience brought about through ritual, traditions and festivals (2007, pp. 27–8); what I'Anson and Jasper (2006) view as different forms of religious performativity. This is taken to a deeper level of attempting to understand the numinous as the presence of God, for example, in Islam Muhammad experiencing the presence of Allah (God) at various points in his prophethood. 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, p. 27). 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 (2007, pp. 28–9).

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, they do. 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 elsewhere (Fitzgerald, 2007, and 1990, in relation to the inclusion of Hinduism as a world religion; see also Jackson, 1995; King, 1999). However, I would concur with these critical religion scholars who argue that it is too broad a brush an approach to use the rubric of religion to refer

to every eventuality of cultural or extra-temporal experience. 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 Christianized 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'. This is particularly apparent in the way that, for example, Joyce Miller (chair of the Association of Religious Education Inspectors, Advisors and Consultants in the UK) indicates in the quote above that religion is a formative influence in every society, found in every culture in human history, and that it can even be *categorized* into six major world faiths. This viewpoint, indicative of others within the secular liberal education movement, 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, pp. 6–7). As I discussed in the previous case study, judges also espouse this Christian and orientalist positional authority from which to categorize (like Miller above) and 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 cases of *Re J, Re S (Change of Name: Cultural Factors)* [2001] 3 FCR 648, or *Pawandeep,* leaving Christian Englishness unremarked upon.

In relation to RE specifically, Fitzgerald argues that a key effect of the conceptualization of religion as having a fundamental essence – and therefore, being sacred or extra-temporal – fuels the notion that all that is non-religion, namely the profane world, including politics, is secular (2007, pp. 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, pp. 36–40: see also Bhandar, 2009; Mahmood, 2009).[2] 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

2 Masuzawa (2005, p. 20) makes a similar argument, particularly in relation to the colonial context in which non-christianness and religion came to be understood in orientalist scholarship in ways that justified colonial regulation as well as missionary education, as I discuss in more detail in the next chapter. See also my discussion of Mahmood's (2009) work on secularism as a regulatory discourse in relation to the modern context, discussed in Chapter 2.

> individuals essentially divorced from power and the modern non-religious state. *Yet it is of course itself an act of power, an ideological rhetoric designed to influence*. (emphasis added) (Fitzgerald, 2007, p. 28)

Fitzgerald traces the religion–secular binary, and therefore the depoliticization 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, p. 36; Masuzawa, 2005, p. 20). Fitzgerald goes on to discuss how various Christian thinkers did not imagine the idea of a neutral, non-religious state to actually be separated from religion; rather this idea appeared later, for example, in relation to the American Constitution (2007, p. 36). However, as a number of critical religion scholars argue, this distinction between religion and 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; 2003; Masuzawa, 2005; Jakobsen and Pelligrini, 2008), not least because of the role of colonialism and racialization in the production and representation of non-christianness (Miles and Brown, 2003). Applying Asad's critique of the 'phenomenological' approach, used, for example, by prominent anthropologist Clifford Geertz in his significant work on world religions (1993, pp. 27–54; see Chapter 2), I would suggest that religion within RE can be viewed as an authentication of *certain* instantiations of religion over others. This process of understanding religion cannot, therefore, be entirely depoliticized through the so-called secular authority of educators or the state.

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

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. 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, as I explore in the next chapter. A crucial influence on this

process, and an attempt to move away from a specific religious heritage in the teaching of children's morality, is the concept of common values. I return to a discussion of how this values discourse developed under the NL government and will discuss its continuation under the current government more in the next chapter. Values were a critical element in the homogenizing and nation-building strategies in NL discourse, which claimed that there are common or universal values essential to social cohesion. However, as I examine here, there are clear religious influences underpinning the normative force of these common values within the education field.

This is perhaps most obvious in the discourse of the former NL Prime Minister Tony Blair who 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).[3] 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, p. 3). It is this statement of the importance of community, particularly within social policy, that led commentators, such as John Annette and James Arthur, to highlight the 'communitarian' philosophy within NL education policy (Arthur, 2000, p. 22; Annette, 2005; 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 John Rawls (1971) or Ronald Dworkin (1978), on individualism and individual rights (Etzioni, 1996; Arthur, 2000, pp. 5–26; Delanty, 2002, p. 163).[4] 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, p. 163). He and other key communitarians

3 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, p. 23) and Annette (2005, p. 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.

4 See Delanty (2000) for a discussion of the different conceptualizations 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, p. 28; Arthur, 2000, pp. 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; 1995) which as Delanty states, demonstrates many communitarian arguments from a liberal perspective (2002, p. 161). See also his discussion of the work of Taylor (2002) as a form of liberal communitarianism (Delanty, 2002, pp. 163–4).

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, p. 163). Other key influential communitarians in favour of more values with education and society include Alistair McIntyre (1981) and Michael Sandel (1982) (see also the work of Michael Walzer, 1983, and Phillip Selznick, 1992). 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 (Driver and Martell, 1997; Delanty, 2002), 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 rights, on obligations as well as entitlements. Self-respect is in part derived from respect for others. (Blair, 1993, cited in Rentoul, 1996, p. 293)

Tony Blair's communitarianism is self-avowed; he himself acknowledged the intellectual influence of various communitarians, such as the moral philosopher John Macmurray (Blair, 1996, p. 59) and key communitarian proponent in the USA, sociologist Amitai Etzioni (Arthur, 2000, p. 21; Annette, 2005, p. 192; see also the biographies of Blair, for example, Stephens, 2004, p. 29; and Rentoul, 1996, p. 291). 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)

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, Bellah (1992)[5] 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' (see Annette, 2005, p. 191). Arguably, Bellah's vision echoes Blair's thinking on the importance of community 'to maximise a just society' (Blair, 1998, p. 3) and to deal with 'the wreckage of our broken society' (Blair, 1996, p. 68). Referring to society as 'broken' is now being heavily deployed by the current Coalition government, including the Conservative Prime Minister David Cameron (2010), which is also relying on these communitarian ideas influential amongst neoliberal conservatives in the USA (Annette, 2005, p. 192). Annette claims that the political language espoused by the US governments of both George W Bush and Barack Obama, as well as NL and the Coalition governments, follows a similar vision in highlighting the need to 'restore broken covenants' and 'revitalise' communities (Annette, 2005, pp. 192–4).

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. We [need] a new sense of civic involvement and responsibility in a new generation of voters.

Yet, what role does faith or religion and, specifically Christianity, play in these communitarian debates on strengthening community, citizenship and engendering 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, p. 8).[6] For example, in the next chapter I examine the role of Christian socialism as

5 Following Jean-Jacques Rousseau's 'On Civil Religion', in *The Social Contract*, 1762, book 4, ch. 8,

6 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, p. 49; see also Cristi, 2001).

a prime example of the role of Christianity in politics reflected in communitarian values. Indeed, Tony Blair, following other government ministers, such as Stephen Timms (see above), 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 he stated:

> 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.

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 character development and even formation of children (Etzioni, 1995, p. 8; see also Minogue, 1997, p. 161; Arthur, 2000, p. 50). He and others, such as Haldane (1995) and McIntyre (1987), believe that 'the purpose of education is the reinforcement of values' (Etzioni, 1997, p. 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, p. 163). Ignoring any analysis on the co-imbrication of natural law and Christianity (see Arthur, 2003, p. 53), Etzioni contends 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, p. 164). Although a discussion of the ethics literature and its interrelationship with religion is beyond the scope of this book, 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. Rosenblum, for example, argues that 'the connection between secular ethics and religion is undisputed' (2000, p. 74), and Arthur also explores neo-Aristotelian ethics in Christianity (2003, p. 48).

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, p. 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, p. 166)

I suggest that this fusion of faith-based and what Etzioni refers to as 'deontological normative factors' (1996, p. 164) is not easily separable. Or, as Minogue puts it, 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; see also Jakobsen and Pelligrini, 2008). 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, p. 49). 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, p. 57). However, as I discuss further below, governmental support for faith schools and faith in education more generally is related to their communitarian goals (Annette, 2005, p. 191).

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, p. 214). The agreed statement was sent to 'the main religious groups in England' and, although the source is unclear about who these main groups are, the statement was endorsed and used in the review of the national curriculum in 1999 (2005, p. 214). As a result, the new 2002 national curriculum included the first ever statement of the aims, values and purposes of the school curriculum (see Department for Education and Employment (DfEE), 2000). 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.[7] As Keast notes, these measures were viewed as part of having some more control over the 'potentially divisive' effects of faith schools (2005, p. 214). 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, p. 24). He contends that this

7 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).

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, p. 24).[8] 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 (2000, p. 24); 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. The current legal requirements to have a daily collective act of worship and teach RE programmes that seem to reflect a dominant Christian culture within society might be viewed as evidence of the hegemonic position of Christianity within the education system and/or as Arthur states a creation of a mythical 'civic religion' based on Christian beliefs and values (Arthur, 2000, p. 112). The co-imbrication of Christianity and the secular is also apparent in the call for religious organizations, including church schools, to play a bigger role in society as with the 'Big Society', as Prime Minister Cameron refers to it. 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.

Concluding remarks

In this chapter I have explored perspectives from the socio-legal 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 increasingly 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 empathizing 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

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

highlight how the LAR literature, whilst debating the predominance 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 2, 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 bringing this critical religion perspective to bear upon the socio-legal perspectives on LAR, it has been my contention that a key analysis that comes to be sidestepped is an interrogation of the concept of religion itself. It has been my aim to add a perspective on religion that challenges the ways a predominantly onto-theological notion has come to circulate as a universal, cross-cultural and depoliticized 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 has become 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 socio-legal 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.

6
Faith in Schools: Racialized Religion, Community Cohesion and Belonging

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. (Guidance on the duty to promote community cohesion, Department for Children, Schools and Families (DCSF), 2007b, p. 1) (emphasis added)

Under the former New Labour (NL) government (1997–2010), 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 its first year in office, the government agreed state funding for two Muslim schools for the first time (Burtonwood, 2003, p. 415). By 2001, it had outlined its plans for the expansion of a range of faith schools, including a significant expansion of Church of England (CoE) schools, in a Green Paper, *Schools: Building on Success* (Department for Education and Skills (DfES), 2001a) and a White Paper, *Schools: Achieving Success* (DfES, 2001b). These plans elicited heavy criticism from various quarters, including from NL members of Parliament (MPs) critiquing government policy, for example, in select committees as well as through a cross-party amendment to the Education Bill tabled by Labour MP Frank Dobson. Indeed, Frank Dobson, with the support of 45 other Labour MPs, expressed opposition by tabling a cross-party amendment to the Education Bill although it was not successful because of Conservative support for it (the Bill). Even Estelle Morris, the then Secretary

of State for Education, privately expressed doubts about the expansion of faith schools (Gillard, 2002, p. 18). Criticism outside of the party continued, particularly in the wake of 9/11 and the 'race-riots' in the north of England (Oldham, Bradford and Burnley) in the same year (2001), and religion became increasingly profiled as a factor that gave rise to social divisiveness and political radicalization (Short, 2002; Gillard, 2002; 2007). It was also 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 education system, attributing academic success to the values that these schools enshrined in their ethos. Interestingly, the government even posited that faith schools had an important role to play in achieving community cohesion (DCSF, 2007a).

Much of the academic debate on faith schools has become polarized, either making the case for faith schools in support of government policy, or critiquing it (Gardner et al., 2005). The grounds for support and critique invoke a number of different, but overlapping, dichotomized 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; see also Ahdar, 2000b). 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, 2002). Perhaps the most contentiously debated issue has been the question raised above, of whether faith schools are divisive and undermine community cohesion (Judge 2001; Burtonwood, 2003; Halstead and McLaughlin, 2005; Parker-Jenkins et al., 2005; Pring, 2005), *or*, on the contrary, play an important part in facilitating community cohesion (De Jong and Snik, 2002; Short, 2002). These academic debates, which occur mainly within the education studies field, tend to base their arguments either within a liberal philosophy framework (De Jong and Snik, 2002; Short, 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). 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. 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 in Europe and the enduring co-imbrication of religion and secularism in the West (Asad, 2003; De Vries, 2008; Jakobsen and Pelligrini, 2008). I also do not focus my analysis on the issue of whether faith schools are divisive. As

other scholars have highlighted, that debate needs to be 'grounded in deeper questions of socio-economic and demographic marginalisation of minorities ... in contemporary society' (McKinney, 2006, p. 109), and in broader issues, taking account of poor schooling (Judge, 2001, p. 473) and institutional racism within the education sector (Jackson, 1995; Modood and May, 2001). Marie 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. Whilst these analyses are of critical importance to understanding the role of faith schools, 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, conceptualizing 'religion' in religious education (RE) and promoting 'common values' across the curriculum, obfuscates the Christian underpinnings of these normative forces at work (although I will discuss later in this chapter how the role of Christian values in education is becoming ever more explicit under the Coalition government). 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 government discourse supporting faiths schools has also masked a normative Christian framing of religion. The former NL government argued its 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 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 have been and continue to be viewed as producers of good citizenship and community 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 universalized 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 racializing non-christianness as divisive and conflictual. Yet, the values discourse might also be understood as de-racializing in seeking to shape children's identities through education to meet the Christian/ universal standard of citizenship and behaviour within the nation.

Faith Schools under New Labour

As mentioned in Chapter 5, 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 Schools Standards and Framework Act 1998 (SSFA), which made clearer the definition of faith schools, or rather 'schools with a religious character'. These schools 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, p. 33). Fearing the Labour Party'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, p. 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, p. 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' (Carvel, 1997, cited in Gillard, 2002, p. 15).

The Labour Party's original opposition to state funding for faith schools was stated in a party circular on 'Education in a Multicultural Society' and attributed to their 'potential for increasing religious, racial and cultural divisiveness' (Anon, 1988, cited in Jackson, 2003, p. 91). This position was particularly influenced by a 1987 Commission for Racial Equality report, *Terror in Our Schools* which highlighted widespread racism and a lack of respect for cultural diversity in county (now community) schools (cited in Jackson, 2003, p. 91). The NL policy favouring faith schools continued despite research at the time criticizing the creating of more faiths schools as an inappropriate and ineffective way to deal with racism in schools and society at large. Indeed, the policy was also underpinned by a strong belief amongst several NL ministers, including the Prime Minister Tony Blair, that faith schools and particularly church schools, nurture an 'ethos' that produces academic success and moral character. School ethos was explicitly

incorporated into the SSFA, which required all schools with a religious character to have an 'ethos statement' stipulated in the school's instrument of government (see reg. 6(4) of the Education (School Government) (Transition to New Framework) Regulations 1998). 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 (reported in Toynbee, 2001; see also Gillard, 2002; Parker-Jenkins et al*.,* 2005, p. 109).

It seems then that although NL favoured the ethos demonstrated by church schools in particular, they also recognized 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 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, p. 15). This is, in fact, clearly stated by the former Labour Home Secretary Charles Clarke in an interview with Professor Richard Dawkins (Channel 4, 2010, documentary entitled *'Faith School Menace?*, broadcast 19 August). 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, p. 15), and in 1999 two more Jewish schools as well as the first Sikh school received state funding (Gillard, 2002, p. 16). The state funding of non-Christian schools such as the previously independent Feversham College in Bradford, Britain's first state-funded Muslim secondary school for girls, continued to expand. At the same time 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 100 new secondary schools in five years, either by expanding existing ones, opening new ones, or taking over failed schools (Gillard, 2002, p. 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 organized by the Christian Socialist Movement that church schools were 'a pillar of the education system, valued by very many parents for their faith character, their moral emphasis and the high quality of education they generally provide' (Bates,

2001). 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 (Smithers, 2001).

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 the middle of July of that year (2001) (Jackson, 2003, p. 94). These events fuelled the contention that faith schools were divisive and contributed to 'ghettoization' within certain areas. Opposition to faith schools became even more fervent as the government White Paper, *Schools: Achieving Success* (DfES, 2001b), was published on 5 September 2001, only a week before the events of 11 September 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, p. 45)

The White Paper supported the proposals from the Dearing Report for a significant expansion of CoE schools (Gillard, 2002, p. 16); whilst considerable interest was also expressed by minority faith communities in setting up maintained faith schools.

Of course, some religious groups were delighted, with McVeigh (2001) reporting soon after 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'.

Nevertheless, the 2001 events of 9/11 coupled with the hyped coverage in the same year of the Holy Cross incident (involving Protestant residents in Ardoyne, Northern Ireland, allegedly shouting abuse and throwing stones at five-year-old Catholic girls going to their Roman Catholic school, The Holy Cross) were held up as prime examples of the dire consequences for

religious divisions in society (HC Deb 22 November 2001, col. 448, on the Education Bill; McVeigh, 2001). Faith schools were posited as key sites contributing to this segregation as well as being potential breeding grounds for religious radicalization and extremism (Gillard, 2002; Short, 2002; Gillard, 2007). The Ouseley Report (2001) 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. (Bradford District Race Review Panel, 2001, p. 6; see also McVeigh, 2001)

David Bell, Chief Inspector of Schools, in a speech to the Hansard Society, singled out Muslim schools calling them a 'threat to national identity' (Bell, 2005) and, as Wainwright (2001) notes, criticism of the newly opened Muslim secondary school in Bradford – Feversham College – included from 'some of Bradford's most moderate and liberal politicians'. Despite this significant criticism levelled against faith schools generally, and Muslim schooling in particular, the government continued to defend its White Paper proposals and the plans to expand the number of faith schools were eventually implemented in the Education Act 2002 (sch. 8).

At times, the tensions between the 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 (Slater, 2002). 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 (Gillard, 2002, p. 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, p.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. Indeed, the word "diversity" appears seven times in the space of a short three-page introduction.' (Chitty, 2002, p. 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. These schools, the brainchild of Blair's chief education adviser Andrew Adonis, were first created in 2000 and became embedded in the 2002 Act and are now being rolled out by the Coalition government to eventually cover all primary and secondary schools (see the Academies Act 2010). Academies are public/private partnerships where the 'private' body might be a religious or charitable organization, or a business, which, in return for providing funding to the school, could exercise significant control. As Gillard (2007, p. 4) notes, this new type of school, significantly expanded by NL (see the DfES, 2004a, *Five-Year Strategy for Children and Learners*), a policy being continued by the Coalition government, seemingly privileges religion through the back door (Gillard, 2007, p. 4; see also Edge 2002, p. 306; and Bradney, 2009, p. 131). Concerns over the sponsoring of academy schools by faith groups have also been expressed (see, for example, British Humanist Association, 2010) particularly as they are not accountable to local authorities. What is interesting about these schools is that, because of the lack of immediate transparency, concerns over the role of religion contributing to divisiveness within communities is not as easily identifiable as with faith schools. Rather academies – and now Free schools, many of which also have a religious character and are publically funded but not accountable to local authorities (Vasagar, 2012) – have become the governmental response to the supposed demand for parental choice as mentioned above.

Going back, in 2006 a more comprehensive response to the widespread concerns over divisiveness of faith schooling, as well as the criticism that it was mainly the parental choice for *certain* faith groups that was increased, became apparent. The CoE made a commitment that any new CoE schools should have at least 25 per cent of places available to children with no requirement that they be from practising Christian families (Smith, 2006). This commitment became formalized in a 2007 joint vision statement, *Faith in the System* (DCSF, 2007a) which refers to a prioritization of 25 per cent of places for children in CoE schools from 'non-practising Anglican families', which appears more restrictive than the earlier CoE commitment to prioritize places for children of 'non-practising Christian families' (DCSF, 2007a). 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 character would be *expected* (not required) to give priority to pupils of other faiths or of no faith for at least 50 per cent of their places (DCSF, 2007a, p. 18).

Faith in the System states clearly the government and faith school shared understanding of the contribution faith schools make to education and to

society in England, particularly in reinforcing the role of RE in promoting community cohesion, a role that had increasingly become more prominent within RE (DCSF, 2007a) (as I discussed in Chapter 5). At the same time the promotion of community cohesion in schools beyond RE was also being developed. The Education and Inspections Act 2006 inserted a new s. 21(5) into 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 and, alongside this duty, Ofsted is required to include schools' contributions to promoting community cohesion in its inspection reports and further 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, p. 215). Indeed, following Sir Keith Ajegbo's recommendation in his *Diversity and Citizenship Curriculum Review* (DCSF, 2007b, p. 13), school-linking projects became an integral part of the promotion of community cohesion (DCSF, 2007b, p.10). The government clearly stated its belief that faith schools 'can make an important contribution to community cohesion by promoting inclusion and developing partnerships with schools of other faiths, and with non-faith schools' (DCSF, 2007b, p. 13).

Clearly, NL and the Coalition government have been committed to faith schooling, as well as to maintaining the position of religion within schools 'without a religious character' through RE and worship (see Chapter 5). Despite their rhetoric of 'increasing parental choice' and 'diversity', the commitment to an increased role for faith in education was also apparent in the former NL government's blocking of an attempt by Dr Paul Kelley, head of Monkseaton High School in Tyneside, to create the first secular school in Britain in 2007. Dr Kelley argued that faith schools 'directly or indirectly influence children into a belief that a particular faith is preferable either to other faiths or to a lack of faith' (Ashtana, 2007). Whilst, the government 'accepted it would be popular ... [it] 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' (Ashtana, 2007).

I have highlighted how governmental support for faith schools' expansion has occurred despite significant opposition from within Parliament, teaching unions and wider society. NL ministers, for example, defended

their 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. This discourse is also apparent in the Coalition government's rhetoric on faith schools. For example, in 2007 Nick Clegg[1] 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 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. (Pack, 2007)

Although, of course, with the Coalition government, as mentioned above, the focus has moved away from maintained faith schools to academies and free schools, which can be sponsored and run by faith organizations, even though this may not be immediately obvious (Vasagar, 2012).

In the remainder of this chapter, I will address some of the themes that arise from this overview of the development of, and discourse on, faith schooling. First, I will examine the focus on Muslim schools within the debate in relation to 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.

Racializing 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, Muslim schools were identified in particular as a being potentially divisive and even a 'threat to national identity' (Bell, 2005). 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' (Press Association, 2005). He also

1 Who became the Deputy Prime Minister in 2010.

warned that 'religious segregation in schools must not put "our" [the nation's] coherence at risk' (Press Association, 2005). The House of Commons' Children, Schools and Families Select Committee also expressed concern about continued government support of faith schools despite their perceived threats to the nation and social cohesion. In January 2008, the committee's chair, 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. (Lipsett, 2008)

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? (Lipsett, 2008)

Steve Sinnott, general secretary of the National Union of Teachers, issued a similar statement on faith schools' selection criteria being discriminatory (Lipsett, 2008). However, Chris Keates, general secretary of the National Association of Schoolmasters and Union of Women Teachers, focused her statement more on how the focus on Muslim schools in the faith schools debate risked fuelling Islamophobia (Lipsett, 2008). 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 Chapter 5 and above). A number of commentators have noted how community cohesion became the official NL government strategy for 'managing diversity' in a broader sense (Choudhury et al., 2005; Fortier, 2008, p. 3; Malik, 2008). An independent review team of the north of England riots, led by Ted Cantle, recommended that the institutionalization of 'mixing' should be at the core

of managing the diversity in local communities (Cantle Report, Home Office, 2001b). This recommendation was taken up by the Local Government Association in (LGA) 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, p. 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 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. (Annette 2005, p. 194)

As Fortier notes, this LGA guidance came to inform both local and national government policy, including within education (2008, pp. 194–5). 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, p. 3). 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 the commission's final report, *Our Shared Future,* 2007). Tufyal 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, p. 46; see also Malik, 2008). 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.

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 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 (see Osler, 2009) 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. It is, of course, not my contention that all Muslim schools have been viewed by 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 a threat to social cohesion, particularly when juxtaposed with church schools, which were 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 1, 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 states. Sherene 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 'imperilled Muslim woman' circulate in the popular consciousness (2008; see also Mamdani, 2005). These narratives, she argues, provide 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 (Razack, 2008; Bano, 2008).

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 and who has British (or US) citizenship (Cowell, 2006). As Razack contends, even Muslim children are becoming objects of fear and certainly the discourse around the 'race riots' in Oldham, Bradford and Burnley seems to reflect that fear of Muslim youth as a threat to community cohesion (2008, p. 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 civilizational discourse of 'why we are civilised and they are barbarians' (2006, p. 149). Similarly, Razack argues that such narratives surrounding minority religion, and Muslims in particular, has become marked by 'race thinking' or racialization and orientalism (Razack, 2008, pp. 10–11). As I have discussed in my previous case study, for example, in the *Pawandeep* and *Re S* cases (*Pawandeep Singh v Entry Clearance Officer* [2004] EWCA Civ 1075, [2005] QB 608; *Re S (Change of Name: Cultural Factors)* [2001] 3 FCR 648), racialization is often underpinned by the idea that people in the West 'must protect themselves from pre-modern, religious peoples whose loyalty

to tribe and community reigns over their commitment to the rule of law' (Razack, 2008, p. 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. (2008, p. 10)

In the next section, I examine how this key problematic of the 'conflictual other' comes to be addressed in law and policy.

Citizenship, belonging and the de-racialization 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 (see Arthur, 2003; 2005, on the role of Christianity in character education). Moreover, as Yuval-Davis (2004; 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 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' (Secretary of State for Justice and Lord Chancellor, 2007, p. 53). Tony Blair also stated, in a 2006 speech on 'Our Nation's Future: Multiculturalism and Integration', 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' (Blair, 2006; see also Yuval-Davis, 2006; Osler, 2009). He explicitly articulated the 'anxiety' around issues such as forced marriage, but also '*madrassahs*' or Muslim supplementary schools, 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 (Blair, 2006). 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. (Blair, 2006*)*

Apart from the rather simplistic juxtaposition of BNP politics and the proliferation of Muslims who 'shun integration', a key point this statement elides is the regulatory implications of the 'unifying' force of British values. 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 conceptualizations of non-christianness, it seems that, through an implicit racialization, minority religion becomes 'evicted from the universal, and thus from civilisation and progress' (Fitzpatrick, 1995; see also Stychin, 1998). In short, whilst the normative Christian underpinning of universal, secular values circulates as a discourse of good citizenship, 'values talk conceals the hierarchy', racialization and orientalist configurations expressed about non-christianness (Goldberg, 1993, p. 63; Razack, 2008, p. 8). Fortier also notes 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, p. 5). As Engin Isin and Bryan Turner (2002) highlight, citizenship as a concept itself emerged from a racialized and orientalist formulation, for example, in the work of Weber (1905) 'as the main proponent of an occidental conception of citizenship' that became the foundation of the modern idea of citizenship (cited in Isin, 2002, p. 117). 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, p. 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 modernization; for Weber – in Isin's reading – these values would come to constitute the measure of the 'universal citizen' (Isin, 2002, p. 122).[2]

As Bryan Turner (2002), Timothy Fitzgerald (2000) and David Goldberg (2002) note, there is a clear etymological as well as political relationship between notions of the civil, civility and civilization 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 civilization (1994)

2 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).

and, later, universal values and standards. Marcela Cristi, in particular, draws out these connections in her book, entitled *From Civil to Political Religion* (2001), where she explicitly charts the inter-relationship of Christianity and notions of civil religion in the works of Jean Jacques Rousseau and Emile 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, p. 5, citing Goodhart, 2004). 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 civilized through the education meted out by colonial rule and civilizing missions (Comaroff and Comaroff, 1997; Goldberg, 2002). 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 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, p. 35)

Mill's (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 characterize the Enlightenment – not only came to be delimited by racialization, they also justified colonial regulation as part of the project of what Goldberg refers to as 'racial upliftment' (Goldberg, 2002, p. 88). The uncivilized 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, p. 89). There is an extensive literature on the colonial and civilizing missions, including converting the colonized to Christianity 'and in conversion to introduce the infidels to the virtues of civilisation, to the habits and manners of righteousness' (Goldberg, 2002, p. 92; see also

McClintock, 1995; Comaroff and Comaroff, 1997; Comaroff, 2001). 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, be connected by intermarriage, which he viewed as resulting in the improvement of inferior races once influenced by their European superiors (2002, p. 92).

This aspect of 'racial upliftment', through intermarriage and 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 (Read, 1981; Haebich et al., 1999). 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, p. 88). Joel Spring (1996), for example, has studied how Native Americans came to be civilized through education programmes and Christian values (see also Fitzpatrick, 2001, p. 173). 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, p. 92; see also Fitzgerald, 2000).

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, p. 263). In examining this history of the racial upliftment and subsequent de-racialization of non-christianness, my aim is to suggest that current citizenship and values discourse may also be understood as potentially having similar effects. 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 book 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 acknowledgment of the 'character' education of children in which Christian/universal/secular values including citizenship have 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 racialization of non-christianness, on the one hand, and yet, on the other, how non-christianness comes to be effectively de-racialized through the promulgating of a Christian universal standard of behaviour or citizenship. A recognition of this tension relating to the circulation of religion

within education is also largely absent in the socio-legal law-and-religion (LAR) literature. One notable exception is that of Edge (2010) who argues that, in regulating the granting of charitable status to mosques as part of the wider anti-terrorism 'Prevent' strategy, there is a creeping establishment of Anglican Islam; namely that Islam is being delimited 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 as well as other European examples of regulating minority religion. This analysis of the regulating impact of law may well be one that is analogous to education and the 'formation of good citizens' (Ahdar and Leigh, 2005), as discussed in Chapter 1.

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-racializing 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 socializing newcomers to Western culture' (1996, p. 277). Ong views the citizenship process as a form of subjectification through which 'cultural citizens' are made in Western democracies (1996, p. 263); giving 'unitary and unifying expression to what are in reality multifaceted and differential experiences of groups within society' (Corrigan and Sayer, 1985, pp. 4–5 in Ong, 1996, p. 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, p. 264)

Similarly, Yuval-Davis (2009) and others (such as Goldberg, 2002) analyse the way citizenship (values) becomes a marker of civilized and civil/civic behaviour as a form of regulating the conduct of subjects in the interests of security within the nation state. 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 or culture and/or language as in many of the child welfare cases explored in Chapters 3 and 4 (2006, p. 211). However, in pluralistic societies it can also be based on common values and a projected myth of

common destiny (2006, p. 211). Thus, ethical and political values can become 'the requisites of belonging' because those relating to social locations, such as origin, 'race' or place of birth, being the most racialized, according to Yuval-Davis, would be the least permeable (2006, p. 211). 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 open boundaries than they actually do (2006, p. 211). As she argues, both the NL white paper *Secure Borders, Safe Haven* (Home Office, 2001a) and the Cantle Report (Home Office, 2001b), commissioned by the NL government after the riots in the north of England, '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' (Yuval Davis, 2004, p. 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/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 ethnicized religious group *and* belonging to and within the nation; 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'. Indeed, the 2010 RE Guidelines state that RE: 'makes an 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 located'; thirdly, the 'UK community'; and, finally, the 'global community' (DCSF, 2010).

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 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; 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 (see also Ahmed, 2000). Yuval-Davis (2006, p. 210) discusses how this tension between belonging to race/community and the nation has been articulated by various ministers and politicians through sporting analogies, positing, for example, the problematic of whom minority populations might support in an international cricket or football match between, say, England and Pakistan. It seems unequivocal, then, that the making of nationhood, through the regulatory effects of universal values and citizenship described above, are at work. This is both through religion circulating

as Christian/universal/secular values – or in Casanova's terms 'acceptable' forms of non-Christian religion (Asad, 1993). As discussed in Chapter 2, Casanova's revised secularization thesis is one whereby religion either becomes increasingly privatized and marginalized with the advance of modernity, or it only circulates in the public sphere in a way that is *delimited* by universal values (Asad, 1993). The implications of such a 'thesis', as well as of racialized representations of non-christianness circulating more generally, give rise to the justification that minority religion, and particularly Islam, requires yet more 'civilizing' towards full citizenship within the host nation. Yet, the issue of racism is hardly mentioned at all in such discourse or, for example, influential government-commissioned inquiries such as the Cantle Report (Home Office, 2001b). As Yuval-Davis (2006) notes, racism, if mentioned at all, is usually only cited as a being a potential obstacle to social cohesion, rather than an issue that needs to be better understood and tackled as a policy imperative in and of itself. (I will return to the issue of tackling racism in the 'Conclusion'.)

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 5, in particular the role of values in bringing about a cohesive national community, in this section I explore the influence of social capital theory in NL policy in particular, although I explore the obvious continuities under the Coalition government in more detail later. Here, 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 racialized logic, in which Muslim schools, viewed predominantly as a potential threat to community cohesion, are 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, James Coleman (1988), Robert Putnam (1995; 2000) and Francis Fukuyama (1995) are recognized as its key proponents alongside Pierre Bourdieu (1983) who provides a different and more critical analysis of the concept to these others (Gamarnikow and Green, 2003, p. 212; Franklin, 2007, p. 1). However, as Eva Gamarnikow and Anthony Green highlight, the 'traditionally recognised ingredients' for all these theorists of social capital are: 'norms of trust and reciprocity,

networks, civic engagement' (2005, p. 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). This view is similar to the communitarian perspectives discussed in Chapter 5 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 benefiting the individual, but also the community as a whole. This is attributed to a cycle in which greater economic productivity results from individuals who have benefited from the community in the first place and, therefore, in turn, have become more economically productive (Fukuyama, 1995, discussed in Gamarnikow and Green, 2003, p. 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' (Lammy, 2004). Emphasizing 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. (Lammy, 2004)

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 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 5, 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, p. 92; see also Gamarnikow and Green, 2003, p. 212). 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' (1997, p. 92; see also Arthur, 2000, p. 49).

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 Christianity 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 Coleman (see also Putnam, 2000). 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, p. 91). Whilst Coleman's underlying concern is that of distributive justice, his theory also posits children as potential productive citizens and schools as social structures that aim to shape that potential (2005, p. 91). Gamarnikow and Green (2005, p. 93) have thus described social capital theory in this context as a means of 'contemporary governmentality through education policy'. Similarly, Nikolas Rose views the influence of such social capital theories 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, p. 176).

For these scholars, the 'governmentality' is derived from requiring social networks to produce goals, such as social integration, and that this, in turn, facilitates the particular formation of children's identity (Rose, 1999, p. 176). Moreover, Gamarnikow and Green (2005, p. 93) critique the way deficits of social capital are framed as problems of the social rather than the economic, which they argue both obscure and reinforce 'structures of inequality and social justice' (see also Bourdieu, 1983). Yet Coleman's social capital theory is very much linked to a Rawlsian social justice agenda (Gamarnikow and Green, 2005, p. 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 ignore economic factors and focus 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' (Gamarnikow and Green, 2005, p. 90). This tension may partly stem from the fact that, although NL's social policy operated in a broadly neoliberal context, it also had 'old-style social democracy' elements (as in the equity agenda mentioned above) (Gamarnikow and Green, 2005, p. 90; see also Driver and Martell, 1997). Clearly, bringing the market agenda to education is not an issue for Prime Minister David Cameron with the Coalition government supporting academies and more recently free schools rather than faith schools. Indeed, producing social (and other forms of) capital is at the heart of his Big Society idea. Certainly, for academies, this can be seen through outside sponsors, including church and other religious organizations, taking key roles in supporting these schools, albeit without having to be accountable to local authorities.

Despite mentioning what are perceived to be the regulatory effects of governmental policy on non-Christian children in particular, my analysis does not seek to espouse a specifically Foucauldian or even Marxist critique of this kind of social capital theory, as do Gamarnikow and Green and others discussed above. Rather, I contend that what remains 'obscured' and y*et al*so '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 is, yet again, posited by Coleman as the values and norms that it embodies and promulgates. He views these values as forming a coherent and common link within a closed network, comprising family, faith-based neighbourhood community and the faith school.

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, p. 91; see also Annette, 2005). The benefits for social capital theorists, such as Coleman, as they clearly have been for both the NL and Coalition governments, 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, p. 212). In short, although both communitarian and social capital theory have influenced both the former NL and current Coalition governmental policy on issues of social cohesion and regeneration, this has taken place within the framework of 'managed capitalism'; one in which I contend Christianized values have come to play a productive role (see Arthur, 2000, p. 20; 2005). 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 universalized values, derived from a Christian heritage and still epitomized by some church organizations, including schools, that were viewed by the former and current British governments, as well as others across Western Europe and the United States, as the benchmark of behaviour.

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, p. 27). Of course, the former and current governments have not articulated these policies as being specifically communitarian. NL articulated their agendas more as 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 United States (Arthur, 2000, p. 20; Blair, 1998). The Conservatives, on the other hand, have had recourse to communitarian ideas through the notion of a Big Society. Similarly, in the United States, the previous Republican and current Democrat governments have 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, p. 194). This vision – whether labelled as communitarian or not – is very much reflected in Coleman's social capital theory and its application in British governmental policy since 1997 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.[3]

I suggest that this understanding of the role and influence of social capital theory in government 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 (see Edge, 2010). Furthermore, as I discussed earlier in this chapter, Muslim schools feature mainly in the

3 This issue is beyond the scope of this study but for work on the religion/capitalism matrix, see, for example, Roberts (1995) in which the work of Weber on this issue particularly his *The Protestant Ethic and the Spirit of Capitalism* (1930) is discussed.

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.[4] 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 seem to be regulated through the granting or withholding of charitable status (Edge, 2010, p. 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, p. 139). However, his analysis does not discuss the racialization involved within the discourse that 'insists on common British values'. Similarly, Rex Ahdar and Ian Leigh (2005) also ignore the effects of racialization and orientalism in conceptualizations 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, pp. 232–3).

Interestingly though, they do respond, albeit rather fleetingly, 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, p. 253, discussed in Ahdar and Leigh, 2005, p. 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, p. 238). I would suggest that this analysis rather misses the point of how religion comes to be implicated in political

4 This sentiment was most recently articulated in a documentary presented by Professor Richard Dawkins, an avowed secular atheist, entitled *Faith School Menace?* (Channel 4, 2010). He states that unlike CoE schools which, 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.

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 depoliticized and ahistorical view of religion that has been the object of my analysis throughout this book.

The co-imbrication of religion and politics: New Labour and the influence of Christian socialism

> Faith group members will be key in any future, election-winning, progressive coalition. Recently, the Conservative party has courted church members vigorously to reclaim ground which it lost in 1997. For example, it has worked hard to build support among the black-led churches. For electoral purposes, it ruthlessly exploited unease in the faith communities about parts of the Equality Act 2010. Those efforts helped it achieve the largest share of the vote in the 2010 general election. In Labour, we shouldn't let that happen again. (Timms, 2012, p. 13)

Of course, NL are no longer in government. However, it is clear that the influence and importance of Christian universal values, which, as I have explored in this chapter, continue to underpin communitarian and social capital ideas, present in both NL education policy and Coalition/Conservative party rhetoric, particularly around the increased role of faith communities in a Big Society. It is interesting and crucial to note how the role of faith/religious communities has become such an (electoral) fighting ground between the two political parties as is clear from the quote above from Stephen Timms' 'Foreword' to the 2012 Demos report on *'Why Those Who Do God, Do Good: Faithful Citizens*. In his 'Foreword', Timms outlines the need for the Labour Party to entrench its work with faith values as a basis for progressive politics which needs to be won back from the Conservative Party to win the next election. So, whether or not the Conservative Party holds onto power or the Labour Party manages to win it back in future elections, it is fairly certain that communitarian Christian values will play a significant part in policy-making and law and increasingly set the tone of state values. Yet, given this situation, there remains very little challenge within socio-legal literature to notions of religion beyond the predominant onto-theological conceptualization, let alone an interrogation of the co-imbrication of religion and politics. In order to highlight the need for such further study, I now turn to examine the influence of a

Christian socialist ideology on NL whilst in government, although this influence is of course ongoing (see Timms, 2012).

Whilst NL was in power, the UK Christian Socialist Movement (CSM) was an affiliated organization to the Labour Party with members stated on its website and including both NL Prime Ministers as well as the former schools secretary and Labour Party vice chair for faith groups at the time, Stephen Timms[5] (Blair, 2001; CSM website;[6] see also Arthur, 2000, p. 21). Other members have included the MPs Ben Bradshaw, David Lammy, described in a news article as 'a committed Christian', and former MP Ruth Kelly, described in the same article as a 'devout Roman Catholic' (Ahmed, 2002). The CSM at the time claimed that it had '40 members in the House of Lords and the House of Commons, including current and former Cabinet members'. The movement has existed in varying forms since 1848. In a statement from 2008, it described itself as having a 'commitment to social justice born of their Christian faith'. Although neither the CSM's conception of Christianity nor social justice has been outlined in great detail, one might recognize from its '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'.[7]

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 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, p. 59). Of course, socialism as an ideology is wide in scope and diverse in its variations and I do not seek to distort that complexity. Whilst a fuller discussion of this issue is beyond the scope of this book, my aim is to draw out the co-imbrications of Christian theological thinking and its influence in politics, including socialist politics. This is evident in the fact that Christian socialism clearly has a complex history that some would argue pre-dates Marx and the workers movements of the nineteenth century (see, for example, *A Dream of John Ball*, Morris, 1888). Indeed, this is apparent in the underlying political aim for the CSM which is to strive for 'Christian teaching' to be 'reflected in laws and institutions', and seek

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5 http://www.stephentimms.org.uk/about-stephen.

6 www.thecsm.org.uk/Groups/87275/Christian_Socialist_Movement/About_CSM/Labour_party_affiliation/Labour_party_affiliation.aspx.

7 www.thecsm.org.uk/Groups/87274/Christian_Socialist_Movement/About_CSM/What_we_stand/What_we_stand.aspx.

that 'the Kingdom of God' should find 'its political expression in democratic socialist policies'.[8] 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 which is also apparent in other Christian Democrat parties elsewhere in Europe. 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 biographers 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 emphasized an individual's duty to others (Blair, 1996, pp. 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 (1996, pp. 58–9). 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, p. 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, p. 132).[9] 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' (1993, p. 132). Blair had emphasized the importance of community in his Labour Party speeches even before he entered Parliament (Arthur, 2000, p. 21). 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, p. 293).

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 and in turn strengthen community (cohesion). The effect of this

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8 Ibid.

9 This lecture was compiled into a collection of Christian socialist essays entitled *Reclaiming the Ground* (Bryant, 1993).

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). 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, p. 12)[10]

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 and current chair of the CSM, also outlined in numerous speeches, listed on his website, that his political inspiration was derived from his Christian belief. 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's disciple Paul. Timms has also articulated the importance of Gordon Brown's Scottish Presbyterian background and upbringing in his politics:

> 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)

Moreover, as 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.

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10 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.

> 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 help us develop the policies which will be the right way forward for Britain. (Timms, 2007)

Whilst I am not claiming that finding expression for the 'Kingdom of God' has been the explicit aim of the NL government as a whole,[11] 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 organizations, 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 5 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 in the form of Christian values and politics within education.

Concluding remarks

In this chapter I have analysed mainly 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; a discourse which has continued under the current Coalition government. At the same time, Muslim schools have been posited as a source of concern because of their potential divisiveness and radicalization; they have therefore been singled out as in need of regulation. I have argued that this discourse can be understood as both racializing non-christianness on the one hand – as divisive and conflictual – and *yet also* de-racializing it on the other, by seeking to

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11 Although Ben Bradshaw stated in a comment in his column *Christmas*, 15 December 2004, that: '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/.

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/communitarian/Big Society theories, Christian values play a role in drawing the parameters of acceptable non-Christian religion. This produces an educational mode of civilizing non-christianness through education law and policy. I have also argued that the privileged role of de-theologized Christianity is not only historically embedded, it is also ongoing and, indeed, an increasingly key battle ground amongst the major political parties. 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.

Conclusion

Interrogating law's religion: the continued work of values in education

In his speech marking the 400th anniversary of the King James Bible, Prime Minister David Cameron (2011) told Church of England (CoE) clergy:

> We are a Christian country. And we should not be afraid to say so … the Bible has helped to give Britain a set of values and morals which make Britain what it is today. Indeed, as Margaret Thatcher once said, 'we are a nation whose ideals are founded on the Bible.' Responsibility, hard work, charity, compassion, humility, self-sacrifice, love, pride in working for the common good and honouring the social obligations we have to one another, to our families and our communities … these are the values we treasure. Yes, they are Christian values. And we should not be afraid to acknowledge that. But they are also values that speak to us all – to people of every faith and none.

In the same speech, the Prime Minister also stated that the King James Bible not only permeates every aspect of our culture and heritage but also our politics. He clearly pointed out that the role of Christian values in Britain is certainly not just a historic legacy, but rather a part of the contemporary state of the nation with a role to play in policy-making around issues of 'moral collapse'. Echoing comments made by Tony Blair during his premiership discussed in the previous chapter, Cameron also identifies religious extremism as an example of such moral collapse which he views as having 'allowed segregated communities to behave in ways that run completely counter to our values' (2011). Given that influential communitarian thinkers, such as Etzioni (1997), believe that education is 'the first line of defence' particularly where there is a 'parenting deficit', in dealing

with situations of 'moral collapse', it is not surprising then that both former and current governments have focused on values in education. Indeed, soon after the Prime Minister's King James Bible speech, the government announced that it was sending a copy of that version of the Bible, with a foreword by education minister Michael Gove, to *every* school in the country (Butt, 2011). Mr Gove's position on the role of Christianity in education is also extremely clear. In response to a question in the House of Commons after the publication of a report on the future of CoE schools, he stated that government changes in education provided opportunities for the continuing involvement of the CoE (HL Debs 16 Apr 2012, col. 19). He continued:

> Education on both sides of the border was driven in the first instance by the vigorous missionary activity of Churches, and we praise and cherish the role of the Church of England in making sure that children have an outstanding and inclusive education. I welcome the report, and I look forward to working with Bishop John Pritchard to extend the role of the Church in the provision of schools.

It is evident then that, although the increased role for Christian-based values in education was reinvigorated by the former New Labour government, there is a continued and increasing promulgation of these values within education by the Coalition government. Christian values as state values are viewed as key whether within education or as a motivation for faith organizations to increase their role in the provision of social and welfare services (Big Society) and thus be a crucial facilitator of social capital, including community cohesion and even economic productivity, as well as citizenship.

Of course, in and of themselves, these policy aims are not ones that I seek to question or posit as unimportant. Rather, the aim of this book has been to interrogate the religion of law and its predominant onto-theological conceptualization prevalent particularly within religious freedom law, but also beyond, as I have explored in relation to child welfare law and within religious education (RE). In addition, I have argued that this conceptualization of religion has been under-challenged within socio-legal law-and-religion literature, which I suggest needs to take more account of the relationship between race and religion. In particular, it should also attend to racialized conceptions of ethnic or minority religious identities and the ways in which these can come to be regulated and, indeed, potentially influenced and demarcated.

A key way I have suggested that this under-explored area must be understood better is by exploring the legacies and influence of the historic emergence of the modern concept of religion, from a European Christian,

primarily Protestant epistemic viewpoint. One that in the past has posited itself as universal and therefore having positional authority to judge non-christianness, which, as I demonstrated throughout my case studies and drawing on critical race and religion perspectives, continues into the present in various areas of law. I have suggested that, whilst this positionality or underpinning viewpoint is more explicit in some areas of law, such as the child welfare cases, in others, such as in the values discourse within education, the privileged role of Christian thinking and values can be less visible; particularly, as Christian values come to circulate as state values couched in universalizing language, which also implicates notions of secularity, although this is also prevalent in judicial discourse in the child welfare cases.

The role of Christian values as a way of demarcating what is British, what is civilized and what are acceptable manifestations of non-christianness is becoming increasingly evident under the Coalition government. The socio-political and juridical role of religion as Christian state values will, I imagine, take more of a centre-stage role to bridge the gap of a public sector that is being cut under a programme of austerity measures. This can be seen within education with the government's intention that all schools, and certainly 'failing' schools, become academies – schools that are largely outside of local authority control and accountability, and open to outsider sponsors that are often religious/church-affiliated organizations. The implications within education of a set of entrenched state values that seek to produce particular kinds of citizens and social capital are, of course, not only relevant for non-Christian, ethnic minority subjects, but will have regulatory and adverse effects that run across various social relations, including gender, class and disability; particularly, as private and voluntary sector organizations are increasingly called upon to bridge the gap of a retreating welfare state. As a result of austerity cuts and reliance on Big Society, an increasingly important emerging area to examine is the role and potential impact of 'religion' – in whatever guise it takes – and religious organizations within socio-economic development, not only in Britain but within Europe and globally.

In regards to education law and policy, I have described how the inclusion of the study of religions other than Christianity within the RE curriculum has been considered a move towards recognition of multicultural Britain. Yet, as I have suggested in Chapter 5, 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 (Hull, 1983; Jackson, 1995; Fitzgerald, 2007).[1] As there is a review of the national curriculum underway, there is now an important opportunity to engage children in thinking more critically and broadly about the multiple and complex ways in which religion, culture, values and belonging are inhabited and created and not just from a predominantly Anglo-European, Christian/secular perspective. This approach could begin with a shift in our awareness of religion to understand it as a modern concept which has emerged within an orientalist historicized context in Europe. What this shift might facilitate in the juridical realm is more recognition of the contingencies of law's religion and its potentially subjugating dimensions, so as to move away from the influence of racialization and orientalist discourse around non-christianness and its supposed excesses. As I have discussed in Chapter 6, this would allow us to avoid the discourses of 'divisive' faith schools and rather attend to some of the originating concerns that help justify the proliferation of (non-Christian) faith schools, namely racism faced by minority children in the communities within which they live.

In short, debates on the problematic of religion must not just be fixated on the supposed incommensurability of religion and law or, indeed, about ensuring secularity in what is now effectively a post-secular legal sphere. It must also be focused on understanding racialized and orientalist understandings of non-Christianness within juridical discourse, which often justify subtle and explicit forms of regulation of minority subjects as a *key problematic*. A critical intellectual interrogation of such conceptualizations, as well as of deploying religion as Christian/state values might, perhaps, create space for other viewpoints from which to survey the complexities of the religion of law and begin to understand the many instantiations that fall under its rubric. Moreover, as I have suggested 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 Coalition government. Another key area then, requiring further exploration and focus within socio-legal scholarship, is how religion comes to be deployed in governmental policy to tackle the various 'multicultural' anxieties around ensuring (ethnic minority) people's belonging and citizenship within the nation.

1 He explores and critiques essentialist notions of religion within RE as well as orientalist notions of non-christianness. See Chapter 5, where I discuss some of this work.

Same-race/religion-matching in adoption: the *exclusion* of white families

Another area where I have explored a similar anxiety, this time on the part of judges, is in relation to children's ethnic/religious belonging within child welfare cases and particularly in relation to same-race/religion-matching in adoption cases. As I discussed in Chapter 3, in the vast majority of cases that have come to the higher courts, in determining what is in the best interests of the child judges have not taken a nuanced approach to understanding non-christianness, but rather focused on ritualistic manifestations of religion and/or linking it to the child's birth parents' perceived race and nationality. There has been very little exploration that demonstrates how religion might be understood in terms that are meaningful to the specific 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 or one that is racialized, viewing it as 'in the blood', but one that recognizes the psychological attachment of a child to those around her in which religion/culture is understood in its relational context. An emphasis on this psycho-social well-being for children has always been present amongst campaigners working towards better outcomes for minority ethnic children in care; and it is again a determining factor that is being highlighted in response to current government changes to adoption legislation, as I discuss below. Thus, a one-size-fits-all legal 'solution' on transracial adoption, for example, cannot take account of or, indeed, eliminate racialized views of children's complex subjectivities or, indeed, orientalist judicial understandings and representations of non-Christian identities. However, government legislation, guidance and policy could better facilitate an environment and culture that might enhance children's lives, free of racialized notions of religion and identity more broadly, particularly for minority ethnic children in care.

Yet, as I complete this book, the issue of transracial/transreligious adoption has resurfaced as a political debate and it seems that government policy is moving away from supporting exactly this kind of approach. Soon after the Coalition government came into power, Tim Loughton, the then Children's Minister, announced that: 'too many children languish in care because social workers hold out for "the perfect match"' (Pidd, 2010). He added there was 'no reason at all' why white couples should not adopt children from different racial backgrounds and that: 'If it is a great couple offering a good, loving, stable permanent home, that should be the number one consideration.' (Pidd, 2010) Prime Minister David Cameron has also made

strong statements about the issue of ethnic matching as a key obstacle to children being placed for adoption. For example, at the 2011 Conservative Party conference, he stated 'people are flying all over the world to adopt babies while the care system at home agonizes about placing black children with white families' (Ramesh, 2011). Later that year, Michael Gove, announcing the revising of guidance to local authorities not to 'deny children a loving home with adoptive parents only because they don't share the same ethnic or cultural background', also said:

> Thousands of children are currently in the care system waiting to be adopted. Every day they wait is a day they're denied the loving home all children deserve. But politically correct attitudes and ridiculous bureaucracy keep many of those children waiting far too long. Edicts which say children have to be adopted by families with the same ethnic background and which prevent other families adopting because they don't fit left-wing prescriptions are denying children the love they need.
>
> As a result children from ethnic minority backgrounds *languish* in care for longer than other kids and are denied the opportunities they deserve. This misguided nonsense punishes those who most need our help and that is why this government is sweeping it away. (DfE, 2012) (emphasis added)

Although the Coalition government had originally planned just to re-issue the guidance on transracial adoption rather than make any substantive changes to the law, addressing the issue of 'delay', particularly in getting 'black' children adopted, as is clear from the quotes above, has become a key government social care objective (Ramesh, 2011). The concern with the delay in social workers placing children for adoption has now justified a whole raft of measures including draft legislation released in November 2012. The House of Lords Select Committee on Adoption Legislation, set up in July 2012 to review issues within adoption, has also heard evidence on the proposal in the government's draft legislation to repeal s. 1(5) of the Adoption and Children Act 2002. This section requires adoption agencies to give 'due consideration to a child's religious persuasion, racial origin and cultural and linguistic background' (see Chapter 3).

As many people working within adoption have been at pains to point out, the causes for delay (which cannot be discussed in any length here) are extremely more complex than just being 'a left-wing prescription', as Michael Gove put it (see, for example, Ashley, 2012; Barn and Kirton 2012a; Muir, 2012; and Race Equality Foundation, 2012). Neither is adoption the only 'solution' to the problem of the increasing number of children in care; for example, special guardianship orders and long-term fostering are also

options that are likely to offer some children more chance of permanence in their lives (Ashley, 2012; Muir, 2012). Indeed, social workers have accused the government of offering a simplistic analysis. Nushra Mansuri, from the British Association of Social Workers (2012), has stated that:

> The prime minister would do well to consider the complex realities of adoption before he opines so simplistically – social workers have no wish to be part of delays in placing children for adoption and find bureaucratic processes just as frustrating as everyone else involved.

What is clear from this evidence, as well as that of others during the House of Lords Select Committee on Adoption Legislation hearing, is that what is in the best interests of any child in care is to take account of its specific situation and think about race/religion/ethnicity and culture in more complex and nuanced ways than they currently are. Julie Selwyn, Director of the Hadley Centre for Adoption and Foster Care Studies, stated in her oral evidence to Select Committee hearing that:

> It is really important that children's ethnic, language and cultural needs are assessed. In our research we found they very rarely were. It was much more a matter of looking at a child's skin colour and thinking about matching on skin colour rather than really getting to grips with an assessment of: what does ethnicity and culture mean for this child, and what are the best kinds of families to match with? It has been used very simplistically. (2012, p. 42)

Similar arguments have been made by the Race Equality Foundation (2012) and British Association of Social Workers (2012) in their evidence. Barn and Kirton in their evidence (2012b) and elsewhere (2012a) also explore the available research undertaken on the importance of understanding the impact and role of ethnicity in an adopted child's life within their wider social and political contexts; particularly in relation to their own sense of identity as well as how they might be equipped (or not) to deal with racism. The House of Lords Select Committee on Adoption Legislation report (2012), agreeing with all this evidence, has stated:

> We share the Government's belief that children should not experience undue delay whilst a search for a perfect or near perfect ethnic match takes place. We do not, however, believe that considerations of race, religion, culture and language should be neglected altogether, as they are all components of a child's identity. We are concerned as to how the removal in

> England of section 1(5) of the Adoption and Children Act 2002 will be interpreted by those working in the field, and that it may be seen as a signal that race and ethnicity should be given no weight in the matching process. A better balance needs to be achieved. We therefore propose that the welfare checklist, at section 1(4) of the Act, should be amended to include considerations of ethnicity. This will ensure that issues of race, religion, culture and language are considered alongside the other elements of a child's welfare.

Whilst this recommendation is welcome, we have yet to see whether there is the political will and understanding on the part of the government to include it in the new legislation, let alone formulate better guidance. In addition to having legal obligations to take account of the complexities of ethnicity within adoption there are also other ways in which government could improve the life chances of ethnic minority children in care. Barn and Kirton (2012a) amongst others have highlighted the need for more detailed research on areas such as the 'barriers' to minority ethnic adopters coming forward as well as the related issue of the lack of recruitment by many local authorities. There seems to be a shortage of governmental commitment to exploring the issues of race and racism in tackling *material* issues amongst ethnic minority communities, such as socio-economic deprivation, lack of recruitment of ethnic minority workers within social services, or funding for specialized adopter recruitment initiatives (2012a, p. 33). Rather, as Barn and Kirton note, 'the only form of racism acknowledged in the current reform agenda is the perceived proscription of transracial adoption itself' (2012a, p. 33). Namely, the focus of political discourse has been on the 'exclusion' of white adopters because of the same-race/religion-matching policy, and what they view as the consequent 'languishing' of ethnic minority children in care. Various stakeholders discussed above have highlighted the inaccuracies within this political discourse, including within the evidence given to the House of Lords Select Committee mentioned above. I therefore do not want to rehearse them here.

What I wish to highlight is that these developments in adoption policy ironically and perversely demonstrate a move away from some of the original concerns for ethnic minority children around tackling racism and being able to form secure identities and a sense of self. The impetus, particularly of tackling racism, as I have explored in earlier chapters, was prevalent both in initial ethnic-matching policy as well as within education, through having a more multicultural RE programme, as well as facilitating a diversity of faith schools. Yet, there seems to be less, if any, of a move towards a recognition of the complex, multiple and intersecting ways in

which religion/race/ethnicity/culture can be inhabited; or indeed how these terms can come to be falsely deployed in socio-political work, such as eliminating delay in adoption or engendering citizenship and belonging amongst ethnic minority children. Rather, the comprehensive elimination of race/religion as a factor at all, if the draft adoption legislation does indeed become law, seems to be for the government a legitimate and cost-effective way of addressing yet another instance of anxiety around non-Christian/ethnic minority children (in care) for the nation. It is surely therefore all the more urgent that socio-legal scholarship follows the lead of other critical scholarship that intervenes within the debates on religion in areas of law relating to children and beyond. Moreover, that it does so in ways that seek to interrogate both the many phenomena that can come to circulate under the rubric of religion and the socio-political work that effectively results from such conceptualizations of religion. After all, what is at stake if we do not is to fail to understand the accumulating impact of racialized juridical discourse, law and policy upon non-Christian and ethnic minority children's lives.

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Index

7/7 bombings 50–51
9/11 attacks 128, 132, 136, 139

accommodation 23, 43, 46
accountability 134, 160
Adonis, Andrew 112, 133
adoption
  African 65
  delays in 163–65, 166
  forcible 26, 64, 143
  inter-country 85, 86, 88
  Muslim concept of 65–66, 68, 85
  Sikh concept of 14–15, 85
  transracial 1–2, 16, 28, 53–69, 84–85, 91–92, 94, 145, 162–66
  transreligious 1–2, 57, 76–78, 99–100, 162
  during war 88
adoption law 16, 54, 55, 66
adoptive parents/families 54, 85, 86, 89, 103, 162–66
Anglicans 58, 77, 131
  bishops 130
  non-practising 134
    see also Islam, Anglicanization of
anthropology 29
anti-discrimination 4, 18
anti-racism 64–65
Arabness 60, 61, 62, 91, 95
Arabs 32
  and perceived opposition to Jews 91, 92–95, 97
atheism 19
attachments 80, 85, 86, 87, 88–89, 99
  affective 24, 62
  emotional 49–50, 83
  psychological 2, 14, 25, 67, 68, 83, 162
austerity 160
autonomy 142
  religious 5, 7, 18, 25, 46, 56, 130
awareness of others 135, 136

belief 19, 21, 24, 28, 57, 78, 125
  manifestations of 22, 23, 67–68
  obdurate 22, 25, 41, 44
  protection of 20, 21–22
  religion as 75, 80
  in transcendent being 6, 18, 21, 22, 24, 117
belonging 48–51, 52, 94, 138
  anxiety about 14, 51, 64, 83, 89, 92, 98–101, 103–4, 145, 162
  and children 2, 56, 103, 104, 162, 166
  and citizenship 12, 140–46, 161
  to a community 23, 44, 71, 92–93
  conceptualization of 49–50
  discourses on 50, 144
  national 14, 145
  politics of 50, 51, 52, 84, 87
  racialized 64, 65, 84, 91, 118, 145
  requisites of 145
  signifiers of 11, 82, 83–91, 98
    see also judicial discourse, on belonging
Bible, King James 158, 159
biblical references 31, 32, 93, 94, 123, 155, 158
Big Society, the 125, 150, 152, 159, 160
birth 14, 96
birth-parent presumption 2, 54, 66, 67
birth parents/family 65–67, 69, 88, 98, 99
  blood relationship with 66, 68, 85, 86
  nationality of 14, 25, 45, 49, 65, 68, 84, 87

birth parents/family (*cont.*)
non-christianness of 10, 118
race/ethnicity of 54, 55, 56, 57, 59, 60, 61, 62, 67, 91, 103, 162
religious identity of 26, 58, 59, 60, 61, 62, 72–73, 74, 77–78, 91, 98, 99–100, 103, 162
birthright 99
belonging as 14, 83–84
Jewish 57, 73, 101
Muslim 67
racial/ethnic 57
religion as 2, 14, 71, 80
blackness 85
Blair, Tony 120, 121, 123, 130, 131, 140, 153, 154–55, 158
bloodlines 62, 66–67, 68, 73, 84, 162
Blunkett, David 130, 131
borders/boundaries 50, 71, 84, 94, 95, 96, 145
Bousted, Mary 137
Bradshaw, Ben 153
Britain, christianness of 111, 113, 151, 158
British Association of Black Social Workers 64–65
Britishness 11, 39, 75, 84–85, 151, 160
Brown, Gordon 140, 155
Buddhism 19, 30, 117

Cameron, David 15, 122, 125, 149, 158, 162–63
Cantle Report 138, 145, 146
Catholicism *see* Roman Catholicism
character education 17, 104, 124, 140, 143
Charity Commission 41, 144, 151
child abduction 14, 90, 97
children 27, 35, 123
best interests of 64, 66, 70, 76, 85, 164
in care 162–66
minority ethnic 109, 161, 162–66
non-Christian 10, 102, 104, 109, 149, 166
non-faith 104
religious freedom of 17–18
rights of 5, 26, 66–67, 85, 128
voices of 2, 72
well-being of 64, 83, 162
psychological 28, 66–67
see also belonging, and children
child welfare 2, 5, 8, 14, 24, 26–28, 96, 144, 159, 160
and non-Christianness 25–26, 53–81
choice
parental 133–34, 135
religion as 25–26, 27
Christian Democrats 154
Christianity 19, 98
de-theologization of 10, 15, 82–83, 94, 98
embeddedness of 12, 15, 35, 43, 72, 87, 88, 105, 115, 125
European 9, 10
Hellenization and Aryanization of 32–33
influence of 119–25
invisiblenss of 35, 72, 87, 95
nature of 30–31
and politics 152–56
role of 39, 41, 150, 159
in social capital theory 147
standpoint/viewpoint of 8, 11, 12, 15, 51, 57, 74–75, 83, 103, 105, 116, 159–60, 161
as third-world religion 151
universality of 30, 31–34
Western 89
see also secularism
Christianization 74, 118
of education 105, 113–14, 125
of religion 129
christianness 10, 71 *see also* Christianity
Christians *see* Anglicans; Church of England (CoE); Protestantism; Roman Catholicism
Christian socialism 122–23, 152–56

Christian Socialist Movement (CSM) 131, 153–55
Christian teaching 153–54
Church of England (CoE) 77, 106, 107, 109, 111, 127, 131, 132, 134, 159
circumcision 1, 25, 26, 55, 58, 61, 69–72, 75–76, 78–79, 80, 87, 97, 98, 101
citizenship 139, 160, 166
  and belonging 12, 140–46, 161
  children's 2, 11, 17, 69, 104
  cultural 144
  discourse on 2, 49, 140
  education 5, 35, 112, 119, 122, 124, 135, 137, 138, 140, 156
  good 129, 144
  standards of 50, 130
  values 38–39
civilization 37, 42, 100, 141–42, 146
  Christian 12, 84, 90
  inferior 9
  markers of 144
  superior 8, 32
civilizations, clash of 10, 14, 16, 89
Clarke, Charles 131
Coalition government 11, 15, 16, 105, 112, 122, 129, 134, 135, 146, 149, 152, 160, 161
  policies 159, 162–63
cognitive understanding 24, 74, 80, 87, 101 *see also* intellect
collective worship 103, 105, 107, 108–12, 125, 135
  abolition of 114–15
  of Christian character 109–11, 113, 114–15
  multi-faith 115
  in non-Christian faith schools 111
  opting-out of 109, 115
colonialism 12, 31, 33, 34, 38, 48, 95, 118, 119, 142–43, 152
common good, the 121, 123
communitarianism 15, 105, 119–25, 129, 140, 141, 142, 146–52, 154, 156, 158
communities 5, 45, 48–51, 79, 80, 103, 120–25
  Arab 100
  and belonging 2, 11, 14, 44, 49–51, 56, 71–72, 83–84, 92–93, 98, 100
  and children 27, 57, 64, 68, 69–70, 71–72, 100
  cultural 8, 49, 50, 72
  ethnic 49, 50, 64, 65
  importance of 1, 154, 155
  migrant 27
  religious 11, 44, 48–51, 64, 65, 72
    Christian/church-based 17, 23
    Jewish 62, 73–74, 78
    minority 3
    Muslim 1, 2, 68, 69–70, 71–72, 96
    Sikh 75–76, 89
community cohesion 157, 159, 161
  and faith schools 125, 128, 129–30, 136–40, 146
  lack of 2, 135
  legislation 39, 49, 120
  and nation-building 16, 50, 51
  policies 6, 15, 142
  promoting 11, 102, 103, 105, 112, 127, 135, 145, 156
  and religious education 111, 112, 119, 126, 135
  strengthening 154
  threats to 104–5, 136–40, 146
Confucianism 30
Conservative governments 109, 110, 113, 114, 150
Conservative Party 152
critical race theory/studies 7–8, 9, 13, 160
critical religion studies 29, 31, 32, 35, 51, 116, 117–19, 160
crusader period 33, 94
culture 39, 56, 62, 79, 163
  Anglo-European 43, 161
  Arab 14
  British 158
  children's 164, 165, 166

culture (*cont.*)
  non-christianness as 43–48
  religious 2, 3, 24, 26
  Western 10, 43
custody 22, 55

depoliticization 40
discourse
  on belonging 50, 144
  on citizenship 2, 49, 140
  orientalist 83, 84, 91, 161
  political 40, 165
  state 37
  values 40, 130, 141, 143, 151, 160
    see also judicial discourse
discrimination 3, 4–5, 6, 25, 54, 55, 115, 131, 137
diversity 102, 110, 130, 133, 135, 145, 165
  managing 137–38
divine essence 30–31
divisiveness 5, 130, 134, 135, 136, 137, 139, 143, 151, 161
  of faith schools 2, 49, 108, 127, 128
Dobson, Frank 127
Down's syndrome 72–74 *see also* learning disabilities
Druidism 19

economic redistribution 153
education
  Christian legacy in 112–15
  in colonial era 142–43
  history of 106–8
  liberal 108–12, 113
  and moral collapse 158–59
  policy 8, 17, 89, 96, 102, 103, 112, 119, 138, 160
  religion in 2, 5, 11, 15, 35, 49, 96, 102–26
  and social capital theory 146–52
  state-funding of 106, 108, 109, 110, 111–12, 113, 128
  studies 128–29
  values in 158–61
education law 5, 8, 18, 41, 89, 96, 102, 103, 112, 119, 160
Englishness, Christian 11, 15, 48, 60, 70–71, 83, 87, 91, 95, 101, 118
Enlightenment, the 119, 142
environments, Christian 101
equality 102, 104, 142
  agenda 147–48
ethics 123
ethnicity 3, 9, 11, 43, 51, 60–69, 100, 142
  of children 18, 54, 109, 164, 165, 166
  non-christianness as 43–48
  as a term 61–62
    see also birth parents, race/ethnicity of
ethnic minorities 5–6, 10, 44–46, 56, 160
ethnocentrism 68
ethos 30, 66, 78, 79, 84, 128
  of church schools 124
  of faith schools 102, 129, 130–31, 132, 133, 136
Europeanness 94
exclusion 49, 50, 92, 94, 95, 96, 147, 149, 162–63
extremism 133, 138, 158

faith 57, 61, 75, 78, 80, 123 *see also* belief
family law, English 90
family life 74–75, 77, 85, 86, 87
female cutting 14, 90
feminist legal theory 7–8
Flint, Robert 31
foster carers/parents 54, 62, 63, 67, 72–73, 74, 84, 88, 89, 98, 99–100
fostering 163
frameworks, theoretical 5–7
freedom of expression 4
freedom of religion 12, 13, 17–18, 19, 22, 43, 159
  in Belgium 3
  in the European Union 17

freedom of religion (*cont.*)
  in France 3, 37–38, 39
  in the Netherlands 3–4
  in the UK 3–4, 17
  in the workplace 3–4, 22, 25
freedom to worship 22

gender 31
genetic inheritance 76, 80
Gove, Michael 11, 159, 163
governmentality 147

habitus 79
harmony 136
headscarf affair 37–38, 42, 51, 83
heritage 55, 80, 96, 100, 145
  British 158
  Christian 102, 104, 105, 108–12, 150
  cultural 26, 45, 54, 64, 67–68, 99
  ethnic 64
  Jewish 73, 74, 87
  linguistic 45, 54, 163, 164, 165
  mixed 76–77
  Muslim 2
  racial 99
  religious 99, 120
Hinduism 19, 30, 31, 63, 117
Hindus 23, 44
Holy Cross incident 132
homosexuality 114
honour killings 14, 90, 97
humanism 19
human rights 5–7, 18
human rights law 21–22

identities 21, 56, 61, 62, 104
  alien 49
  children's 1, 2, 5, 80, 87, 118, 130, 143, 147, 164, 165
  complex/mixed/multiple 79, 80, 96, 98–99, 104, 129
  cultural 18–21, 28, 49, 56, 65, 70, 75–80, 85
  ethnic 1–2, 6, 18–21, 45, 49, 80, 93, 143
  European 32–33, 34
  future 78, 88
  loss of 56, 94
  minority 86
  mistake in 59–60, 91
  Muslim 151
  national 136
  non-Christian 144, 162
  of parents 79, 118
  personal 75–80
  racial 6, 76
  racialized 45, 57
  religious 1–2, 5, 6, 12, 25, 26, 27, 28, 49, 50, 55, 56, 61, 70, 71, 73, 74, 77–80, 84, 85
    Christian 70
    Jewish 76, 77, 78, 87, 93
    multiple 62
    Muslim 28, 71–72, 76, 87
    non-Christian 43, 44
    Sikh 76
  self- 22, 44, 165
  as signifiers 84
  Turkish 87
  Western 34
immigration 85, 87, 139, 144, 145
inclusion 19, 49, 96, 113, 117, 135, 156, 160
indigenous peoples 100
individualism 120
inequality 3, 147, 149
integration 39, 140–41, 147
intellect 63, 64, 78 *see also* cognitive understanding
intolerance 97
irrationality *see* rationality
Islam 30, 32, 40, 96, 117
  Anglicanization of 41, 144, 151
  signifiers of 37–38
Islamists 40
Islamophobia 137

Jainism 30, 79
Jehovah's Witnesses 24, 27, 41

Jewishness 5, 14, 46–49, 57, 58, 60, 61, 62, 72, 73–74, 76–77, 84, 91–92, 95, 99–100
Jews 33, 44, 45, 46, 51, 92
  conceptualization of 94
  opposition to Arabs 91, 92–95, 97
Jonathan Bradley case 57–62
Judaism 19, 30, 46
judges/judiciary 41, 46
  Christian viewpoint of 8, 15, 74–75
  and Judaism 46–47, 48
  and non-Christianness 10–11
  secularity of 89
  whiteness of 96, 97
    see also judicial discourse
judicial discourse 10, 13, 18, 57, 81, 96, 160
  on belonging 83–84, 89–90
  on education 143
  on Islam 96–97
  on Jewishness 73–74
  on nationhood 83, 91, 92–93, 95
  on non-Christianness 7, 90–91, 161, 162
  racialized 48, 49, 69, 82, 166
  on religion 3, 12, 28, 29, 32, 35, 40, 43, 46, 55, 101
  on religious identity 76, 79, 89
  on transracial adoption 60, 61, 63–64, 66–69

Kelly, Ruth 153
key indicators 20
knowledge 7, 8, 46–49

Labour governments 108, 113
  New Labour (NL) 15–16, 145, 159
    and Christian socialism 152–56
    and citizenship 122, 140
    and communitarianism 114, 121
    and community cohesion 105, 137, 138
    discourse 35, 40, 140, 147
    and faith schools 127, 128, 129, 130–36, 149
    policies 108, 146, 147–48, 150
    and religious education 110, 111
    third-way politics 150
laïcité 37, 38
Lammy, David 153
law *see* adoption law; education law; family law, English; human rights law; religion of law; *shari'a* law
law-and-religion (LAR) scholarship 3, 5–7, 13, 18, 28, 40–41, 57, 144
  and child welfare issues 87
  and christianness 21–22, 35
  and key indicators 20
  and law's neutrality 42–43
  and non-Christianness/minority religions 32, 44, 46, 49
  and racialization 43
  and religion in education 105, 112–15
  and religious/cultural practices 27, 51–52
law's religion *see* religion of law
learning disabilities 77, 87 *see also* Down's syndrome
legal pluralism 5, 43, 46, 56, 85, 104
liberalism 40, 42–43
liminality 83, 98, 99, 100–101
lineage 57, 61, 62, 96
linguistic groups 30
Loughton, Tim 162

madrassahs 140
market agenda 147–48
marriage
  forced 90, 97, 140
  non-Christian 22
medical treatment 24, 41, 55, 56
Middle-East, the 8, 59, 92, 93–95
minorities 23, 28, 86
  racial/ethnic 5–6, 54, 56, 109, 129, 131, 160
  rights of 13, 18, 26, 64
minority religions 8, 11, 18, 26, 44, 45, 108, 131, 139, 141, 144, 146
miscegenation, religious 99, 101

mistake, racial 59–60, 91, 92
mixed-race families 99
mixing 137–38
modernity 22, 32, 37, 38–39, 40, 139–40, 144, 146
moral collapse 158–59
morality 120, 124, 140
Morris, Estelle 127–28, 133
mosques 41, 151
Muhammed, Prophet 33, 117
  and Danish cartoon 4, 38
multiculturalism 5, 15, 23, 39, 108–9, 113, 131, 151, 160, 161, 165
Muslimness 1, 14, 60, 62, 67–68, 69–72, 78, 85, 87, 91, 96
Muslims 23, 32, 33, 40, 44
  practising/non-practising 1, 67–68, 69–70, 79

name changes 55, 75, 76, 96
narratives 50, 62, 139
national curriculum 11, 109, 124–25, 138, 161
nationality 2, 47–48, 58, 60–69, 75, 80, 100, 162
  of origin 44, 45
nation-building 2, 5, 10, 16, 49, 95, 103, 120
nationhood 2, 11, 45, 47–51, 52, 58, 80, 83, 84, 88, 91–98, 145
neutrality 41, 42–43, 57, 77, 78, 83, 101, 105, 118, 119
New Labour (NL) *see* Labour governments
new universal, the 96
non-Britishness 85
non-christianness 9, 14, 18, 39, 49, 116–19
  in adoption cases 53–69
  conceptualization of 3, 8, 12, 13, 36, 41, 105, 141, 151
    judicial 56–57, 58
  European view of 93–94
  manifestations of 38, 160
  as race/ethnicity/culture 43–48
  racialization of 16, 51
  representations of 89, 90–91, 119
non-Christians
  access to faith schools by 134, 135
  depictions of 32
  de-racialization of 140–46
  representations of
    as barbaric 42, 83, 97, 139–40
    as conflictual 11, 15, 83, 91–98, 101, 130
  as tribal 15, 49, 83, 91, 93, 96, 140
  as uncivilized 83, 91, 95, 97, 100, 101, 142–43

observance 79 *see also* practices
Official Account of Religious Studies (OARS) 117
Ofsted 135
opposition, Jewish–Arab 91, 92–95, 97
orientalism 12, 29, 31, 52, 82–83, 85, 87, 89, 100, 101, 103, 139
  and Jewish–Arab opposition 93–98
  knowledge/way finding 7, 8, 118
  representations of non-Christians 10–11, 14, 15, 32, 38, 48, 90–91, 105, 116, 141, 162
origin
  nationality of 44, 45
  racial/ethnic 43, 53, 54–55
other, the 82–83, 84, 94, 95, 100
other-worldliness 21, 22

pacifism 19
Paganism 19
paramountcy principle 14, 54
parenting deficit 148, 158–59
parents, rights of 5, 26, 27, 65–67, 128, 133 *see also* adoptive parents/families
particularity 37, 39
performativity, religious 117
philology 30, 31, 32
pluralism, religious 34
Poland 39–40

politics and religion 152–56 *see also* belonging, politics of
positionality
  Christian 11, 83, 98, 101, 118, 160
  judicial 11, 83, 87, 90, 97
  orientalist 118
post-secular 124, 161
practices
  cultural 26–27, 32, 45, 61, 82
  religious 18, 20, 21–22, 27, 36, 43, 45, 50, 57, 67–68, 70, 72, 80
  ritual 8, 18, 21, 22, 28, 42, 44, 46, 56, 61, 70, 74, 76, 78, 117, 162
  social 32
private sphere 6, 27
productivity 146–52, 159
Protestantism 10, 34, 37, 160
public sphere 6, 39, 40, 42, 72, 128, 146

queer theory 7–8

race 43–48, 99
  conceptualization of 9, 60
  deprioritization of 69–75
  interchangeability with ethnicity/culture/nationality/religion 43–48, 60–69
  Jewishness as 47, 73
  and nationality 85
  prioritization of 57, 60–69
  and religion 3, 11, 49, 56–57, 76, 80, 81, 91, 159
    see also religion; same-race/religion-matching policies
race-relations era 6
race riots 5, 104–5, 128, 136, 138, 139, 145
race-thinking 9, 38, 139 *see also* racialization
racial genetic markers 8, 14, 57, 64, 80, 82
racialization 48, 65, 146
  of belonging 94, 101, 103, 118
  of blood 68
  of culture 68
  discourse/narratives 38, 139
  of heritage 100
  of identities 159
  inherent 13
  judicial 87
  of law 43
  of Muslimness 70, 72
  of nationhood 83, 91, 95
  of non-Christians 11, 12, 16, 23, 30, 31–34, 37, 46, 49, 52, 62, 79–80, 81, 103, 105, 116, 119, 130, 151, 161
  process of 9
  of religion 14, 22, 29, 35, 42, 44, 51, 56, 57, 61, 67, 68, 80, 88, 91, 100, 136–40, 141, 162
racial problems 63, 64, 70, 98–99
racial upliftment 48–49, 142–43, 144
racism 55, 130, 146, 161, 164
radicalization 128, 133
rationality 21, 22, 37, 98, 142–43
reciprocity 146–47
religion 161
  acceptable/non-acceptable 39–40, 42, 52
  ahistorical nature of 22, 118, 152, 157
  authentication of 36–43, 46, 80, 118
  of children 164, 165, 166
  choice of 25–26, 27, 65
  civic 122, 125, 142
  comparative 108
  conceptualization of 3, 6–7, 17–28, 52, 56, 60, 64, 87, 102, 103, 115, 166
    complex 75–80
    ethnic 84
    as identity 22–24
    judicial 12, 18, 53, 55, 56, 69, 74
    modern 9, 13, 15, 22, 29–31, 33–34, 35, 159–60, 161

religion (*cont.*)
onto-theological 6–7, 8, 11, 12, 13, 16, 17, 18, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 43, 46, 52, 57, 69, 79, 88, 105, 116–19, 129, 152, 156, 159, 162
racial/ethnic 104
racialized 44, 45–46
repoliticizing 34–43
theological 62
contingency of 2, 7, 12, 13, 35, 41, 52, 53, 57, 62, 75, 80, 91, 116, 157
definitions of 7, 18–21, 28, 30
demarcation of 61, 75, 80
depoliticization of 32, 40, 49, 91, 119, 152
deprivatization of 39–40
ethnicization of 69
extra-temporal dimension of 22, 24, 27
as faith 76, 81
history of 29–31
interchangeability with race/ethnicity/culture and nationality 43–48, 60–69
inventedness of 52, 62, 80, 105
key indicators of 20
manifestations of 36, 39, 42, 162
and nation-building 95
non-Christian 52, 116
parameters of 12
and politics 152–56
pre-modern 22, 37, 40
as problematic 12–13, 19, 23, 161
protection of 13, 18, 20, 21–22
and race 56–57, 76, 81, 91, 159
recognition of 13, 47
regulation of 3, 41
as relational 26–28
role of 6, 17, 41, 149
science of 30
signifiers of 83–91
socio-legal perspectives on 17–28
as a term 9, 29, 30, 57
see also belief; birthright, religion as; education, religion in; faith; minority religions; religion of law
religion, freedom of *see* freedom of religion
religion of law 1–3, 8, 10
conceptualization of 13, 16, 17–28
contingency of 43–48
marginalization of 18
understanding 2, 161
see also judicial discourse, on religion
religions
new 19, 20
see also under individual religions/belief systems
religion–secular binary 119, 124, 128
religiosity 23, 24
religious/church organizations 125, 149, 150, 160
religious dress 3–4, 22, 43, 103 *see also* headscarf affair
religious education (RE) 11, 103, 105, 112, 113, 140
Christian 104, 125
and collective worship 108–12
and community cohesion 135, 138, 145
curriculum 11, 15, 31, 35, 112, 113–14, 117, 129, 160–61
in faith schools 5, 28
materials 117, 118–19
multi-faith 35, 113
onto-theological concept in 116–19, 159
syllabus 109–10, 111, 113, 165
religious freedom *see* freedom of religion
religious instruction 107–8, 113
religious networks 147
religious persuasion 53, 54, 163 *see also* faith; and *see under* individual religions/belief systems
religious studies 29

religious symbols 3–4, 6, 22, 25, 36–37, 38–39, 50, 103
residency 55, 72–73
responsibility 120–21, 125, 138, 156
  parental 65
rituals *see* practices, ritual
Roman Catholicism 10, 63, 99–100, 123
Rushdie, Salman 4

sacredness 117, 118
sacred texts/sources 36–37
same-race/religion-matching policies 16, 54–55, 56, 63, 64–65, 99, 145, 162–66
schools
  academies 111–12, 133, 149, 160
  board 106
  county/community 107, 110, 111, 130
  faith 2–3, 4–5, 11, 15–16, 28, 49, 102, 103, 104, 107, 110, 114, 124, 130–36, 161, 165
    as benchmark 11, 16, 35, 129, 146, 150
    church 11, 16, 35, 106–8, 124, 125, 127, 130, 131, 132, 139, 146–52, 156, 159
    concerns about 137, 139
    expansion of 108, 127–29, 132, 133–34, 135–36, 147
    Jewish 106, 107, 131, 132
    Muslim/Islamic 15–16, 49, 131, 132, 136–40, 146, 150–51
    non-Christian 22, 146
    Roman Catholic 106, 107, 147, 150
    state-funding of 106, 108, 109, 113, 128, 130, 131
  foundation 111–12
  free 134, 149
  with a religious character 110, 111–12, 130, 131
  secular 135
  voluntary-aided (VA) 107
  voluntary-controlled (VC) 107, 110
  without a religious character 111, 135
Scientology 20, 27
secularism 36–43, 105, 118–19
  and Christianity 57
  conceptualization of 6–7
  in public sphere 128
  state 41–42
  Western 84, 90
secularity 51, 89, 98, 128, 160, 161
  Christian 100–101
  in families 69, 77, 78
  notions of 46, 49
  post-secular 124, 161
  viewpoint of 10–11, 83
secularization 94
  thesis 39–40, 146
segregation 133, 137, 138, 158
self-definition 47
self–other dialectic 84, 94, 100
Semite people 30, 32, 60, 92, 95
Semitization 32
service, obligation of 154
sexual orientation 4
shari'a law 4, 139
Shinto 30
signifiers
  phenotypical 9, 62
  religion as 83–91
    see also belonging, signifiers of
Sikhism 14–15, 25, 42, 43, 62–63, 75, 89, 96, 98
Sikhs 23, 44, 45
skin colour 68, 164
Smith, John 154
social capital 154, 156, 159, 160
social capital theory 16, 146–52
social cohesion *see* community cohesion
socialism 153
social justice 147, 153, 154
social moralism 154–55
social networks 147, 149, 150
social workers 163, 164

socio-legal perspectives 5, 13, 17–28, 50, 75, 81, 115, 152, 161, 166
 on education 112–15
 theoretical frameworks 5–7
  see also law-and-religion (LAR) scholarship
special guardianship 163
specific issue orders 55, 96
spirituality 117
sponsors 112, 134, 137, 149, 160
subjectivity, religious 10
Swann Committee 109, 113

Taoism 30
terrorism 139
theology 23, 30, 45, 60–69, 72
 comparative 30, 31
Timms, Stephen 121, 122, 123, 132, 152, 153, 155–56
tolerance 42, 97, 98, 104, 133, 136, 139, 140, 151
Troeltsch, Ernst 34
trust 146–47
Twigg, Stephen 136

unbelonging 64, 65, 84, 92–93, 101
 religious 98–101
  see also belonging
under-inclusiveness 21
universalism 38
universality 29, 30, 31–34, 143, 160
upbringing
 cultural 26
 religious 14, 24, 25, 55, 72, 73, 76, 80, 100, 104

values
 British 140–41, 151
 Christian 8, 12, 16, 17, 40, 119, 122, 125, 129–30, 140, 146, 149, 152, 156, 158, 161
  in education 114, 129
  in politics 154
 common 103, 105, 112, 119–25, 129, 138–39, 140–41, 144–45
 discourse 35, 38–39, 41, 103, 120, 124
 in education 158–61
 and faith 123, 152
 of faith schools 102, 136
 Muslim 84
 neutral 105
 and politics 155
 of religion 42
 secular 35, 38, 42, 52, 119, 123–24, 129–30, 140, 141, 146, 156
 shared 112, 145
 state 10, 12, 152, 159, 160, 161
 universal 39, 40, 43, 50, 51, 52, 100, 112, 119, 123, 129, 140, 141, 142, 145, 146, 150, 152, 156
 Western 8, 10, 96
van Gogh, Theo 38
veganism 19
veils 37–39

war on terror 5, 11, 12, 139
way finding 7, 57, 83, 97
welfare principle 85–86
whiteness 85, 96, 97, 98, 99, 143, 162–66
Williams, Dr Rowan 4
world religions 19, 30, 31, 33, 34

Zoroastrianism 30