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1. Introduction

Limits to governmental action are what distinguish modern liberal regimes. How are we to understand these limits? One could scarcely begin with a more expected question. All too often, though, the question is answered either in purely philosophical and critical terms, or else in narrowly pragmatic ways, with little or no attention to the specific cultural and political histories that, arguably, set certain parameters for liberal thought and action. In this paper, I head in a different direction. I argue that a key to clarifying the question lies in a less expected place: the historical arrangements whereby the present political and legal orders emerged from religious settlements in early modern Europe.

It will be a case of building on a proposition advanced some years ago by Stephen Holmes (1988: 5): 'liberal beliefs about the proper relations among law, morality and religion first acquired distinct contours during the wars of religion that ravaged France between 1562 and 1598'. The aim is to stand a little apart from present dispositions and immediate judgments – whether moral idealisations or communitarian denunciations – regarding liberal government and liberal rule of law. In this way, there's a chance of seeing how we might have got to where we happen to be now.

The broader project explores the historical relations between religion, state politics and law during the sixteenth and seventeenth centuries in European territories. Here, the following will be argued as a general working hypothesis: that law contributed to the development of greater autonomy for individuals and communities. Were this hypothesis to be sustained, law and the legal ordering of lives would merit a significant place in the genealogy of liberal government (always remembering that the concept of 'liberalism' as a coherent ideology is a nineteenth-century phenomenon). We then would want to know more precisely why and how, in early modern states, law helped create the area of an individual's life or a community's experience that lay beyond the reach of the state or sovereign.

Whether in governmental legislation or adjudication by courts, this creative legal work could be described from a whole variety of juridical perspectives. These would include the development of contract in private law or – in criminal law – the emergence of a privilege against self-incrimination. I have chosen, though, to focus on public law[1] and, specifically, on legal creations of a freedom of religion, individual and communal, in the context of the different political orders that emerged from the religious settlements. The hypothesis can be amplified as follows: that thanks to legal spaces created for a freedom of individual conscience or communal worship and for a freedom from civil sanctions on religious 'offences', a key dimension of early modern lives was moved outside the reach of state or sovereign. In ideal-typical and Hobbesian terms, there was a novel task for the state or sovereign: to achieve a new indifference towards the divergent religious truths in whose name rival confessional communities had fought, each properly regarding the other as heretical.[2]

Let us suppose that enduring historical parameters were being set for a constitutional-liberal style of political thought and governmental action. By exploring the histories of the different settlements following early modern Europe's great cycle of religious civil wars, we could learn whether a novel juridical message – that legal rules meant state action could reach thus far but no further – made a modern liberal exercise of political authority possible and efficacious. Absent this historical dimension, those who would now ground religious freedom

either in universal human rights or in specific cultural identities will have no insight into why a limited scope of action was imposed on liberal regimes by their cultural and political histories.

The precise historical relationships between Europe's diverse juridical traditions and the no less diverse clerical traditions remain to be charted. This is true too for the English territory, where a plethora of legal jurisdictions – temporal and spiritual, national and local – operated into the seventeenth century. To set the scene, the first of the following three sections of this paper will therefore outline the broader comparative dimension of the research. Then, to make the story more concrete, I'll signal an instance from seventeenth-century English legal history: Sir Matthew Hale's dealings with cases of blasphemy and witchcraft. This will also be a chance to mention the law's dealings with Quakers as religiously inspired lawbreakers. To end, I'll ask how this historical research relates to certain dispositions towards liberalism. In all this, it remains a bedrock proposition that the early modern history of European religious settlements relates to present circumstances at the level of particular institutional arrangements, not at the level of universal moral reason or transcendent truth.

2. A comparative framework

Religious plurality was not always beautiful. Once Christian disunion – and therefore heresy – had become a permanent fact of post-Reformation life, a seemingly unbreakable cycle of inter-confessional strife was installed. What had been a relatively unified and therefore defensible theologico-political Christian order no longer fitted the circumstances of plurality.[3] In the face of brutal religious conflict, some form of peaceful settlement was called for, but nowhere was it easy to provide the existing confessionally-grounded polities with a non-religious way of regulating the activities of the religious. It fell to statesmen and public lawyers – men such as the sixteenth-century French Chancellor, Michel de l'Hospital, or the seventeenth-century German jurist, Hermann Conring – to search for a political-juridical means somehow to de-dramatise confessional tensions by downplaying the religious differences that had come to define the very identity of rival Catholic and Protestant communities.

To quell popular religious violence, different forms of law-based *modus vivendi* were tried. Some attempts drew on existing legal resources; others were more purely experimental. Some succeeded, others failed. The public lawyers had a common aim: to neutralise confessional conflict by a peace-making juridification of lives. Yet, in the different European territories, there was no standard mode of religious settlement. Certainly there was no general embrace of secularism. Even after the Westphalian Peace of 1648, Catholic unformity was harshly imposed in France, perpetuating the *cuius regio eius religio* principle. A theocratic jurisprudence remained the rule in major German terrritories. And the Anglican state was by definition a confessional state, with an established church regime. Yet, in various ways and to differing extents, certain civil jurisdictions began to detach themselves from sacramental ends and ecclesiastical concerns with incarnation, transubstantiation, redemption, damnation, heresy, blasphemy, witchcraft and so on.

At the risk of cutting the complex story of early modern legal secularisations far too short, it is worth distinguishing – schematically – three different modes of settling religious conflict. In post-Reformation France, the plurality of confessions would be recognised, but then eliminated in favour of a mono-confessional rule. The French path to social order led through repression. In Brandenburg-Prussia, an 'indifferent' state would recognise the plurality of confessions, but then 'privatise' and quarantine them from playing a coercive role in civil government. This German path to social order led through a juridification of religious plurality. In England, religious plurality would be recognised and maintained, but only to a safe extent. The English path to social order led through a political incorporation of a

relatively inclusive national church – and its moderate Anglican theology – into the constitution of the state.

For thirty-six years from 1562, France was engulfed by a series of religious civil wars. Each of the eight 'wars of religion' was concluded by an edict of pacification, the peace being brokered by the French Crown. Already, during the first of the wars, Chancellor Michel de l'Hospital put the Crown's case to the peace 'colloquium' at St-Germain-en-Laye:

> It is not a question of establishing the faith, but of regulating the state. It is possible to be a citizen without being a Christian. You do not cease to be a subject of the King when you separate from the Church. We can live in peace with those who do not observe the same ceremonies.

In 1562, addressing the judges of the Paris Parlement, L'Hospital proposed that 'even the excommunicate remains nonetheless a citizen'. Such a precept – which might not have been without its neo-platonist underpinnings – conceives the community of citizenship as a super-eminent domain of political activity, rising above the temporarily fractured ecclesiastical domain. To be effectively implemented, however, the precept presumes some actual disengagement on the ground by legal officers – legislators and judges – from personal adherences to the truths of confessional religion. It also presumes a measure of religious neutralisation – de-sacralisation – in the system of law, at least for the time being, until the wound of Christian disunion is healed. Meanwhile, in the search for a path to civil peace, institutional expedients are explored. In France, bi-confessional tribunals – *chambres mi-parties* – were thus created under the Edict of Beaulieu (1575), recognising religious plurality as a fact to be faced and manifesting an attempt – through parity of representation for Catholic and Protestant judges – at legal neutrality and a political disengagement from religion.[4]

With the sharpening of undulled religious animosities, though, L'Hospital's efforts at managing religious plurality in the short term failed to override confessional interests and identities that proved enduring beyond negotiation.[5] The majority of Paris *parlementaires* – and thus the established French juridical order – held firm to their jurisdictional prerogatives and ancient sacral duties: the protection of France's universal Catholic mission. As radically partisan markers of social belonging, sixteenth-century confessional identities resisted the neutral civility of law and the civil peace of political citizenship that the Chancellor envisaged, as an interim measure, pending a re-unification of the faith.

Michel de l'Hospital's legal initiatives in the 1560s failed, yet they show how a state might seek civil peace and a stable political order by juridifying an otherwise intractable religious conflict. The failure might signify that L'Hospital remained a theocratic thinker, too platonistically inclined to embrace something like a Hobbesian political secularist view of public law as sovereign command. Whatever the case, his peace-broking intitiatives provided a concrete political-legal instance subsequently theorised in Jean Bodin's *De la république,* among whose future relayers would be Thomas Hobbes.[6] Appearing in 1576, four years after the St Bartholomew's Day Massacre of Huguenots by Catholics, Bodin's great treatise conceptualised sovereignty as absolute, indivisible and secular in a manner that aligned its author with the political career and legal work of Michel de l'Hospital. If the sovereign state was the sole legitimate source of the civil laws, a plurality of faiths could be recognised by those laws and not mean catastrophe. This understanding found further expression in the intellectual struggle of the *politiques* against the Catholic League, the policies of Henri IV, and the Edict of Nantes (1598). Later, though, with the Counter-Reformation re-catholicisation of France and Louis XIV's religious policy, the French settlement cancelled recognition of religious plurality by expelling or liquidating the Huguenot population.

The early modern German territories – in religious-political terms – presented a veritable patchwork. Christian theologies – be it Catholic in Bavaria or Lutheran in Saxony – continued

as the framework of public law. However, it is the political development of Brandenburg that allows us to pursue our hypothesis. There, the political creation of legal space for a freedom of individual conscience or communal worship – and for a consequent freedom from civil sanctions on religious 'offences' – saw a key dimension of early modern lives shifted outside the reach of state or sovereign.

In absolutist Brandenburg, religious plurality would find some accommodation in the local political-legal orders. Some historical background is called for. After three decades of Lutheran-Catholic conflict in German lands, the Peace of Augsburg (1555) reached certain terms of settlement between the two confessions. These included a right of subjects to emigrate (*jus emigrandi*), a right of princes to reform religion in their territory (*jus reformandi*), and – at the level of legal institutions – a notion of confessional parity. Like the Edict of Beaulieu in France, the German treaty had institutional effects on the ground, creating a bi-confessional tribunal to hear and determine disputes concerning religion. This new jurisdiction was housed in an existing institution, the Imperial Chamber Court or *Reichskammergericht*. Unlike in France, though, the framework for juridification was imperial, not national.[7] In this sense, the Augsburg treaty and, a century later, the Peace of Westphalia – ending the Thirty Years War in 1648 – had no precise juridical equivalent in the French (or English) national religious settlements.

Working with the materials of imperial laws and jurisdictions, German jurists created a 'non-confessional or supra-confessional order of coexistence between the two great confessional blocs' (Heckel 1984: 50). This unprecedented 'order of coexistence' was secular, in the sense that – at least in Brandenburg – a juridically secularised political authority displaced ecclesiastical jurisdictions from a central role in public law and civil government. It signalled a definite but limited demarcation of state from church and law from religion, motivated by an 'assessment of licit government [that] had been separated from scripture and relocated in an entirely legal realm of thought, based on a historical assessment of the German constitution' (von Friedeburg 2002: 235-6).

More clearly than before, the norms of worldly government under public law were moved outside the orbit of higher-order truths – the truths of confessional religion and its attendant moral norms. The line of demarcation was determined by whatever was required for public peace and civil order. To this end, the state could no longer pursue confessional objectives.[8] The point was not irreligion. The point was security of life and civil peace that gave a chance for political stability and prosperity. The rival Lutheran, Calvinist and Catholic communities thus gained legal recognition and administrative standing as private bodies within what may be tentatively termed a 'proto-liberal' state order, in the sense of an order that set limits to governmental action in a manner that characterises modern liberal regimes.. Privatised as voluntary associations or *collegia*, the three churches enjoyed a legal space for freedom of individual conscience or freedom of communal worship. In this way, in Brandenburg some early modern German lives acquired a right of freedom that lay beyond the reach of the state or sovereign.

Historically speaking, it was not a case of the political authorities recognising a pre-existing natural right or freedom of religious belief. Rather, this new freedom arose only when – to enhance the possibility of peaceful coexistence among the warring religious communities – the political authorities circumscribed the scope within which they themselves could interfere, with the state's coercive force, in questions of religion. To avoid conflict over religious truth and thereby to enhance the effectiveness of its government, the state assumed an indifference to religious difference, in effect enacting a public law recognition of religious plurality. This recognition would entail the de-criminalising of religious offences.

Yet, the scope within which the religious could exercise an office in the business of the state had been narrowed too. In the name of peaceful coexistence, civil governance was being

winched away from the divine truths of religion and theologically grounded norms that had always guided earthly life in the Christian commonwealth. Political limits were being set to the civil reach of ecclesiastical authority as the condition of social freedom for a now privatised religious belief and clerical activity.

In public law, secular legal sanctions were being diverted from the once-eternal threats of heresy, blasphemy and witchcraft, at least where these religious transgressions posed no threat to public order. The changes might be legal, but could they be made legitimate? How acceptable were such political changes to those clergy – and their brother intellectuals – committed to the preservation of higher-order religious truths and moral norms as the necessary ground for worldly political authority and the only justification for a legitimate juridical order?

In the German context, Samuel Pufendorf built on the political secularism of Bodin and Hobbes to provide an intellectual justification for what the Imperial *jus publicum* jurists and the Westphalian treaties had already done – in theory if by no means ubquitous in practice – to establish stability of government in the context of a multi-confessional state.[9] Pufendorf's *De jure naturae et gentium* (1672) thus elaborated an extensive normative framework for civil institutions – in politics and public law – that, unlike the institutions of a confessional state, were autonomous in the sense that the conduct of their offices was no longer subordinated to theological norms.

3. Seventeenth-century England: the adjudication of religious offences

The English path to social order – as noted above – led through the incorporation of a relatively inclusive national church and its moderate Anglican theology into the political constitution. This particular accommodation between religion and politics did not happen without the country suffering the ravages of religious civil war, or – from the time of Tudor absolutism and the English Crown's initial break with Rome – without much political power-play and legal manoeuvring in respect of the government of religion within the realm. The Anglican settlement produced a distinctive political-legal order in which a particular confession was constitutionally adopted and widely imposed, though perhaps less as a constantly tested absolute truth than as a feasible means of providing an envelope for social peace after religious conflict.

Restoration England thus remained a confessional state in which an Anglican orthodoxy was actively perpetuated, a situation that persisted well into the nineteenth century as Jonathan Clark (2000) has argued, provocatively yet persuasively.[10] Those early modern non-conformists whose own active faith kept them outside the settlement envelope were generally left free to worship their God in their own Christian way, provided that they did so privately. As Dissenting Christians, though, Catholic recusants and more extreme Protestant non-conformists were easily seen as a danger to the order of the Anglican state and were therefore predictably debarred – at least in principle if not always in practice – from appointment to public office. In a variety of other legislated ways, Dissenters' freedoms were legally constrained.

At first glance, English arrangements would seem to offer little or no encouragement for the present hypothesis on the role of law in the emergence of limited government and the development of autonomy for individuals and communities. As for a sharply etched separation of law from religion, the picture is certainly ambivalent. On the ground, there is some evidence to support an argument that English law was – at least to some extent and in its own 'indigenous' ways – disengaging from theology and achieving a certain independence from religious norms. Yet, given the nature of the Anglican settlement, there is no self-evident juridical secularisation. In this setting, the de-criminalising logic of a legal secularisation in

the Brandenburg political manner – that heresy, blasphemy, witchcraft and so on might remain religious wrongs but they could no longer be prosecuted by a religiously indifferent state as secular crimes – would not apply so clearly. In this sense, a German territorial rule was more Hobbesian than was Hobbes's own land of birth! Indeed, to advance the 'de-sacralising' argument on law's separation from religion, one has to pose a further difficult question: prior to achieving autonomy from religion, had the English common law and its officers been the captive handmaidens of theology?

Nothing is gained by rushing to an answer. As a start, I shall describe some instances of English judicial conduct where – in the wake of the religious civil wars and in the building of an Anglican settlement – the temporal courts were confronted with religious wrongs. The primary focus will be on the judicial practices of Sir Matthew Hale and the ambivalent character of judicial decision-making in a period of continuing confessional strife. Some background notes are nonetheless appropriate.

There was no institutional equivalent in seventeenth-century England to bi-confessional tribunals in the style of the sixteenth-century *chambres mi-parties* or the *Reichskammergericht*. However, this particular absence does not mean that there was absolutely no disengagement of law and legal process from religious norms and ecclesiastical criteria. Nor does it mean that English legal arrangements were so unconcerned with the invasive scope of government activity that they wholly failed to create a space for private autonomy or personal immunity with respect to matters of religion. But there is a caveat. If, in early modern England, legal judgments were made and legal sanctions imposed on religious wrongs such as blasphemy and witchcraft, the character of these judgments was symptomatic of a legal system operating within a political state containing an established national church.

As an English judge, Sir Matthew Hale could accept coercive laws. They were all the more necessary to regulate dangerous religious impulses in circumstances where 'the concerns of religion and the civil state are so twisted one with another that confusion and disorder and anarchy in the former must of necessity introduce confusion and dissolution of the latter' (Hale, in Cromartie 1995: 177). At risk from spiritual enthusiasts was the temporal order of civil peace: 'he that today pretends an inspiration or a divine impulse to disturb a minister in his sermon tomorrow may pretend another inspiration to take away his goods or his life' (Hale, in Cromartie 1995: 177). Hale was as eminently clear on the public dangers of religion as on the civil benefits of law.

To formulate a rule is one thing; to hold to that rule in actual adjudication is another. It underscores a characteristic ambivalence that in 1668, while on the Autumn circuit in the eastern counties, Hale recorded his rules on dispassionate adjudication in a sixteen-page diary, superscribed with seventeen biblical citations in the spirit of Leviticus 19: 15: 'Ye shall do no unrighteousness in judgment, thou shalt not respect [i.e., give particular favour to] the person of the poor nor honour the person of the mighty, but in righteousness shalt thou judge they neighbour' (Hale, in Jansson 1988: 208).[11] The diary opens with twelve observations that move from the necessity of the office of judge to the impossibility of final certitude in an earthly justice, God alone being all-knowing. With this reflective framework in place, Hale proceeds to identify nine attributes that 'become a man of such employment' as a judge.

It is worth considering this diary in more detail. The opening disposition is almost morose. As a 'business that requires an entire absence of affection and passion which will easily occasion a wresting [i.e., a twisting] of judgment', the judge's office is onerous. This is not only because no man 'in his right judgment should desire it or not desire to decline and be delivered from it', but also because 'it requires a mind constantly awed with the fear of almighty God and sense of His presence' (Hale, in Jansson 1988: 205). Thus 'knowledge, memory and judgment of the laws whereby he is to judge' (205-6) are necessary but not

sufficient for a proper exercise of the judicial office. Impartiality is demanded, yet it remains elusive:

> It is a business wherein a man shall be sure to displease some and many times all parties, and let him be never so justly yet he shall never escape the imputation of partiality and unjustice from some party.

> (Hale, in Jansson 1988: 206)

That God is the ultimate arbiter is not in doubt. Yet, this divine certainty of itself only intensifies the sheer difficulty of adjudicating 'justly' in this life, since the earthly English judge cannot know for sure that 'he do not either wilfully or by any gross neglect pervert that judgment wherein he does or should act as almighty God's substitute' (206).

The five reflections that complete Hale's diary were composed mid-way through his duties at Bury St Edmunds where, as he records, he found a 'jail filled with malefactors of the greatest kind'. In the second reflection, Hale turns to the issue of impartiality in judgement:

> [W]hile I exercise my office as a judge in punishment of the offense, yet I may not forget that common humanity that is fit to be shown to the offenders and, therefore, ever to avoid insolence, intemperance, or uneveness and unequality of mind or deportment in what I do herein.

> (Hale, in Jansson 1988: 209)

Recognition of a 'common humanity' raises the question of what it is that enables the judge to judge. If judge and malefactors have the 'same passions and lusts and corruptions', what is it that has differentiated these persons? The answer is part providential and part pedagogic:

> [I]f [these passions] have not broken out in the same disorders, it is the goodness and the bounty of God that has prevented it either by the advantage of that education His providence has given me above them or by snatching, as it were, from me those apurtenances that my own lusts, passions and corruptions would have made use of to discover themselves by diverting or abating those temptations which might or did befall me.

> (Hale, in Jansson 1988: 209)

Preparation for the difficult task of judging well therefore has its religious ground. Yet, the exercise of judicial duty within the orbit of this life confronts an unavoidable dilemma:

> I have ever accounted the office of a judge the most difficult in the world for, on the one side it is impossible to find any person in the world but he has his sins and corruptions about him, though possibly restrained from actual exorbitances and, on the other side, there are many great offenses and exorbitances in the world that if they were not restrained and punished the world would come to confusion. (Hale, in Jansson 1988: 210)[12]

The conclusion is immediate and stark: if the world is not to 'come to confusion', 'of necessity, therefore, a human judge must be'. We are left in no doubt why in office Hale's judge – for all his piety – cannot be purely other-worldly.

The earthly judge must work at God's direction. Nevertheless, at the heart of Hale's rules and resolutions on judging is an incipient separation of duties: an impartial adjudication as is 'due the country' can – or, given contemporary circumstances, must – be something other than the

pious faith that the believer owes to God.[13] Such a separation is articulated in the final paragraph of Hale's diary:

> Yet as I am a judge I am a person trusted, trusted by God as the avenger of offenses committed against Him so far forth as my prince's commission extends, trusted by my prince forth for himself, and for the community, as a public avenger of injuries committed against him, his laws, and subjects, trusted by the community and society of men among whom I am to exercise this office.
>
> (Hale, in Jansson 1988: 211)

The malefactors are to be punished because they threaten the civil order. As such, their actions are not treated as an individual sin to be addressed by a canonical notion of punishment as penance.

Did this view carry over into Hale's adjudication of 'offences' against the religious codes of an established national church whose existence was integral to the sovereign government? Were acts related to religion – heresy, blasphemy, witchcraft – properly justiciable in the secular courts of law? As Chief Justice in the court of King's Bench, Hale confronted this jurisdictional issue when the spirit had moved a Surrey man to tell the world: 'Christ is a whoremaster, and religion is a cheat and [Protestant] profession a cloak, and all cheats, all are mine, and I am a King's son and fear neither God, devil nor man' (*R. v. Taylor*, 3 Keble 607 (1676), 84 E.R. 906). Hale had no hesitation. This blasphemy – textbook in its terminology – was beyond question a matter for the civil laws of England:

> [S]uch Kind of wicked blasphemous words were not only an Offence to God and Religion, but a Crime against the Laws, State and Government, and therefore punishable in this Court. For us to say, religion is a Cheat, is to dissolve all those Obligations whereby Civil Societies are preserved, and that Christianity is Parcel of the Laws of England; and therefore to reproach the Christian Religion is to speak in Subversion of the Law.
>
> (*Taylor's Case*, 1 Ventris 293 (1676), 86 E.R. 189)[14]

The law could not permit a man to express in public such contempt for the Christian religion. This was the discourse of civil law in an English confessional state where, in 1676, blasphemy threatened both the state and the sacramental community. The force of law was therefore deployed to defend a religious disposition seen as essential to the preservation of social order.

Fourteen years earlier, in 1662, Hale had conducted the trial for witchcraft of two women at Bury St Edmunds.[15] For bewitching girls whom they were found to have caused to vomit more than forty 'crooked pins and one time a two-penny nail with a very broad head', he sentenced the women to death by hanging. The secular law, by its action, furnished the sanction for a religious offence.[16] A witchcraft prosecution helped sustain belief in the reality of witchcraft.

Yet, at this very juncture, a clash occurred between an enduring adjacency and an incipient separation of law and religion. In a devotional essay composed on the eve of the execution, Hale sought to satisfy his conscience that the civil penalty for proven witchcraft was just, since 'the instrument, without which [the devil] cannot ordinarily work, is within the reach of human justice and government' (Hale, in Cromartie 1995: 238).[17] Flowing from an act of spiritual self-examination, this opinion sustained the advice he gave to the jury: that the existence of witchcraft and laws against it were affirmed in Scripture, in the laws of other nations and in the laws of England 'as appears by that Act of Parliament which hath provided

punishments proportionable to the quality of the offence' (*State Trials*: 700-01). The judge had therefore applied the law impartially.

Yet, to the extent that English law remained bound to a religious norm, Hale's conduct of judicial office in the 1662 witchcraft trial – as in the 1676 blasphemy case – was not impartial in the sense of rendering judgements that were neutral or indifferent towards religious criteria. He had asserted his belief to the 1662 jury: 'That there are such creatures as witches I make no doubt at all. … The Scriptures have affirmed so much' (*State Trials*: 700-01). For this judge, the existence of satanic spirits was indubitable and the precepts of Scripture carried probative force. As well as the statute book, Hale thus consulted the Bible and his private conscience in order to justify to himself that his legal judgement was correct. A religious conception of the English law had provided him on this occasion with the confirmation that he sought. But was the matter quite so settled? After all, Hale feared lest the extra-judicial rule of conscience 'utterly enervate all the power of [the] magistrate, for [conscience] sets up in every particular subject a tribunal superior to that of the magistrate' (Hale, in Cromartie 1995: 181).

In the *Historia placitorum coronae*, the criminal law treatise of which Hale had drafted one of three projected books before his death in 1676, he records that the common law viewed witchcraft – along with 'fascination' or enchantment – as among those 'secret things [that] belong to God':

> If a man either by working upon the fancy of another, or possibly by harsh or unkind usage put another into such passion of grief or fear, that the party either die suddenly, or contract some disease, whereof he dies, tho as the circumstances of the case may, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offerd, whereof the common law can take notice, and secret things belong to God.

(Hale 1736: 429)[18]

A previous certainty regarding the legal status of witchcraft and other 'irreligious' acts now appears more in the balance. Now, in the *Historia*, witchcraft was a matter of belief but not a physical act or material felony. No doubt it remained a spiritual transgression and, as such, the wrong of witchcraft was known to inner conscience, the *foro divino* and to God. But was witchcraft properly the concern of secular legality?

Witchcraft and heresy had stood in the same historical series: '*Witchcraft, Sortilegium* was by the antient laws of *England* of ecclesiastical cognizance, and upon conviction thereof without abjuration, or relapse after abjuration, was punishable with death by writ *de haeretico comburendo* [on the burning of heretics]' (Hale 1736: 383). In jurisdictions other than the common law, the ancient error was intensified:

> [The Papal canonists] have by ample and general terms extended heresy so far, and left so much in the discretion of the ordinary to determine it, that there is scarce any the smallest deviation from them, but it may be reduced to heresy, according to the general generality, latitude, and extent of their definitions and descriptions. (Hale 1736: 383-4)[19]

The editor ends Hale's chapter on religion in *Historia placitorum coronae* by recording an important juridical threshold: a year after Hale's death, in 1677 Parliament revoked the writ of *de haeretico* and 'all capital punishments in pursuance of ecclesiastical censures are utterly abolished and taken away, so that heresy is now punishable only by excommunication, … the civil effects of which are, that the party is disabled from making a will, or from suing for any debt or legacy' (Hale 1736: 410).[20]

If by Hale's time the English legal system was becoming somewhat more neutral towards religious matters and common law adjudication more detached from ecclesiastical criteria, this was a change internal to the legal sphere. In the sphere of religion, dissent nonetheless continued pursuing forms of life that lay outside the norms and the established jurisdiction of the Church of England, an unguided differentiation of religious sects that posed day-to-day dilemmas for the courts of law.

How, for instance, did the English law resolve issues relating to the public conduct of Quakers? Self-appointed as God's new 'saints' and privileged messengers of the divine Truth, Quakers readily broke the law of the land when the higher law of the Spirit or the 'inner light' so demanded of them. This was not limited to actions such as refusal to take an oath or to be bound by oath, refusal to pay tithes to the national Church, refusal to doff the hat. Nor did such conduct involve only an occasional insistence on going naked in public. We might recognise all such actions as peaceful civil disobedience, but Quaker lawbreaking extended to their abusive interruptions of church services and their insistence on conducting their own marriages and burials. Risk of social violence accompanied such gestures. As if they formed a state within the state, the religious were breaking the law of the land in the name of their own higher law, revealed exclusively to them by God.

For Matthew Hale and other post-Restoration judges, these were surely 'malefactors' too, albeit of a rather holy sort. Yet, Hale's own ambivalence – between law as a religious policing of the soul and law as a secular instrument of civil order – was exemplary. He accepted the reality of religious offences such as witchcraft as civil threats, which rendered such offences justiciable in the secular courts. On the other hand, his reflection on witchcraft shows a judicial disposition that had become at least uncertain as to how to treat religious offences that – being 'secret' and not externalised in a justiciable act – were known to God alone.

It is therefore not entirely unsurprising to discover that Quakers whose cases had come before Chief Justice Hale recorded testimonies to his moderation (Horle 1988: 260). To note this fact is not to enter into rhapsody about a benignly moral goodness of early modern English law. Whatever might be claimed for this particular aspect of Hale's practice of adjudication, its legislative context was an English state pursuing a confessional politics. This rested not only on the so-called Quaker Act of 1662 concerning treatment of Dissenters who refused all oaths. A whole battery of Restoration statutes was designed to protect civil order by containing or eliminating the dangers of public religious dissent: the Corporation Act of 1661, the Uniformity Act of 1662 (aiming at 'the preservation of the Publique Peace both in Church and State'), the Conventicle Acts of 1664 and 1670, and the Test Act of 1673 (calling for a public declaration against the doctrine of trans-substantiation). Such was the legislative pressure for Anglican orthodoxy, imposed by the so-called Clarendon Code to reintegrate public religion in the English confessional state.[21]

Here, though, we must recall the concluding lines from Hale's 1668 diary. The judge might present himself as 'a person trusted by God as the avenger of offenses committed against Him'. Yet, the scope of judicial action is delimited by a political norm, being only 'so far forth as my prince's commission extends'. Its justification, likewise, is worldly in kind, being not an action for salvation but 'for the community, as a public avenger of injuries committed against [the prince], his laws, and subjects' (Hale, in Jansson 1988: 211). This delimitation might not be enough to have Hale classified as a political secularist of a Hobbesian sort, for whom law is the command of the civil sovereign and nothing higher. As the delimitation of a religiously grounded adjudication, however, it merits some attention in the history of the evolution of delimited government.

4. Religious settlements, law and modern liberalism

I'll end on a substantive point relating to my general hypothesis: that, in seeking for measures to forestall, contain or settle religious conflict, early modern law created a new – albeit a variable and quite uneven – space of religious autonomy for individuals and communities. This provision of autonomy remains a protocol for modern liberal-constitutional government … but it did not emerge as a mark of respect for human autonomy as such. Rather, it was a political matter of setting limits to legal action in respect of religion – that is, a certain separating of church from state – once it was recognised that such self-restriction was a way of averting further exposure to religious civil war. The argument is that this history provides an optic for understanding the delimited mode of government that distinguishes modern liberal regimes.

In treating as positive achievements the limits imposed by the cultural, political and legal histories of liberal states, the position presented here suggests an alternative both to philosophical critiques and idealisations of liberalism. Conversely, the paper is in tune with what John Gray (2000: 105-39) endorses as the second of liberalism's two 'faces': the 'political liberalism' of a state that, by virtue of a capacity for political compromise, can achieve a civil *modus vivendi* despite communities clashing over incompatible religious or moral values. The limits of government action and thought are set by the imperative of avoiding the sectarianism that accompanies any attempt to impose a fundamental value on the 'value pluralism' of modern societies.[22]

It is in tune also with Raymond Geuss's delineation of a 'historical liberalism'. This, for Geuss (2002: 333), names a mode of political thought that is distinctive in its self-restriction, having 'no ambition to be universal either in the sense of claiming to be valid for everyone and every human society or in the sense of purporting to give an answer to all the important questions of human life'. As a non-totalising political order, historical liberalism nonetheless has its normative dimension: the norm of a 'practically engaged political philosophy that is both epistemologically and morally highly abstemious'. Attributes that might appear superficial or even negative – lack of universal ambition and abstemiousness towards morality – become virtues when seen as the historical alternative to religious clashing over deep fundamentals.

To complicate the picture slightly, it seems there have been two different modes or models for being 'liberal' in respect of managing religious plurality. The first model is that of institutions that would recognise but not look outside the fact of plurality. The sixteenth-century establishment in French and German jurisdictions of bi-confessional tribunals to hear cases having a religious dimension serves as illustration. Such tribunals aimed to represent in their own mixed-membership the diversity of confessions in the territory's population. Working through the selection and appointment of legal officers, this model could be termed 'representative'.

The second model involves looking outside the fact of plurality in order to institute a religious 'neutrality' of offices. Here, the legal institutions would not be designed to represent the diversity of confessions. Rather, the institutional objective would be a juridico-political order that had itself become confessionally neutral, or indifferent. Such an order would not admit the different expressions of religion into the public activity of civil government. Instead, such particularistic expressions would be sequestered in the domain and institutions of private life. By way of corollary, though, through this sequestration expressions of religion would be secured from political interference and state coercion.

This second model could be termed the 'strictly neutral' mode of liberal government. Here, the legal system would be staffed by officers capable of impartial – that is, non-partisan and non-sectarian – judgment. Yet, the attribute of impartiality cannot be separated from the

jurisdictional contexts of the exercise of that attribute. In early modern Europe, some legal systems were more neutral with respect to religious norms; others – those that still treated heresy, blasphemy and witchcraft as crimes deserving capital punishment – were less so. In the case of the latter frameworks of rule – exemplified in a German state like Saxony where romano-canon law formed the temporal jurisdiction and applied state sanctions to religious offences – a judge could still be deemed impartial by virtue of his faithful application of the theocratic laws in place. In a jurisdiction independent of confessional norms, such as that of Brandenburg, judicial impartiality would on the contrary reflect the religious neutralisation of the juridico-political order. The seventeenth-century English arrangement – with its ambivalent judges in a moderately confessional state – lies between these two German instances.

In their ideal-typical terms, the two models of liberalism in respect of religious plurality are no doubt too schematic. It is therefore appropriate to underscore a historical point: as juridical norms, judicial impartiality and legal neutrality were contingent on their jurisdictional contexts. This qualification will probably fail to interest the choral voices that continue to debunk the liberal state. Some dismiss its neutrality as myth or simple delusion. Other critics warn of something more threatening: liberal neutrality as a sectarian political interest masked as reason. Legal neutrality and judicial impartiality alike are thus denounced as a screen erected to conceal the reality of what is going on, a cunning ruse to occlude a coercive violence that is anything but neutral.

In the end, though, this paper jousts not only with such critics of liberal legality but also with the idealisers of historical and political liberalism. What is happening when liberal institutions are vaunted as realisations of fundamental principle? Where are things leading when a liberal politics is elevated to the level of objective moral value and when a liberal legality is inflated to the status of a higher-order law?[23] How dangerous to the historical liberal order is the view that law – given its coercive power and the institutional finality of legal judgment – should embody some universal moral principle? The danger is conversion. Such idealisations would convert a liberal politics of compromise, pluralism and delimited government into its opposite: a form of moral dogmatism that implies a politics of fundamental principle. The idealisers of liberal legality thereby risk de-legitimating any political regime or juridical order that eschews a foundation in socio-moral truth. After all, when it is said there is a right solution to every social situation, historical theodicy is displacing historical description.[24]

In the face of these enthusiasts and their enthusiasms, the present history lesson might help us defend the limits to governmental action that distinguish modern liberal regimes. Of course, leading questions remain to be answered. Do the early modern legal developments suggest that the legislators in a modern liberal state should hesitate to represent in law the religious norms that define the distinctive self-identification of its member communities? Does this legal-historical knowledge of earlier responses to the issue of religious conflict help determine what should happen when a modern liberal state finds itself governing an immigrant community of faith that was not party to the religious settlement from which that state itself arose? Is the legal respect for cultural pluralism that has characterised liberal states compatible with security measures to protect against external and internal threats to public order by militant religionists? In the face of religiously grounded terrorism, can a liberal state be an effective security state and remain liberal?

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[1] 'Understood as the law relating to the activity of governing, public law can be defined as that assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain, and regulate the activity of governing' (Loughlin 2003: 155).

[2] On 'indifference' as distinguished from 'toleration', see Bernard Williams (2006: 126-34) on 'Tolerating the intolerable'.

[3] On the medieval canon law and the unity of spiritual and temporal orders under a central papal hierarchy, see Padoa-Schioppa (1997: 1-17).

[4] Olivier Christin (1997) argues the case for an 'autonomisation of political reason' arising from the political work, legal developments and local community initiatives deployed in the quest for a religious pacification.

[5] On the legal career and intellectual itinerary of Michel de l'Hospital, see the visionary study by Denis Crouzet (1997).

[6] Translated into English and published by Richard Knolles in 1606, Bodin's work would be one of the most read books in early seventeenth-century English political circles.

[7] For an outline of legal arrangements in the Holy Roman Empire, see Willoweit (1997).

[8] The classic juridical formula held 'security of the people' to be the 'supreme reason of the law' – *salus populi suprema lex*. In effect, in the state of Brandenburg, *salus* now had to jettison one its its meanings: 'salvation'.

[9] On the political jurisprudence of Samuel Pufendorf, see Hunter (2000).

[10] Clark's (2000) provocation consists in restoring an Anglican supremacy to its place at the heart of English political and social history until well into the nineteenth century. Reasserting this confessional primacy over alternative socio-theoretic takes on the history, he argues that matters of social reform emerged at the head of the political agenda only with the relaxing of a centuries-old concern that religious dissent – Catholic in particular, despite the grant of freedom of worship in 1778 – posed an acute social danger.

[11] The diary is in the Osborn Collection in the Beinecke Rare Book and Manuscript Library of Yale University. Its contents are published in Jansson (1988).

[12] Hale's closing words in the diary are these: 'The hearts of the children of men are fully set to do evil' (Hale, in Jansson 1988: 212).

[13] Following his appointment as Justice of the Court of Common Pleas in 1654, Hale composed a set of guidelines for his own judicial conduct. He wrote: 'in business capital, though my nature prompts me to pity, yet to consider that there is pity also due the country'. These guidelines were published in the 1736 edition of his *Historia placitorum coronae* (Hale 1736) as prefatory material.

[14] The defendant was fined '1000 mark, imprisonment until seurities for good behaviour for life, and pillory at Gilford [Guildford] where the words were spoken, and at Westminster, Cheapside and Exchange, with a paper for horrid blasphemy, tending to subvert all government' (84 E.R. 914).

[15] The report is published in 'A Trial of witches', *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours*, VI: 687-702 [hereinafter *State Trials*] (1809).

[16] Geis (1978) treats the 1662 trial and verdict in psycho-historical terms of a 'misogynistic bias' on the part of Hale and the common law regarding witchcraft and rape. The relation of law and religion in the times of confessional conflict is not mentioned. To discuss witchcraft without referring to religion is like discussing rape without referring to men.

[17] Hale's manuscript was printed in 1693 as 'Concerning the Great Mercy of God in Preserving Us From the Power and Malice of Evil Angels', in *A Collection of Modern Relations of Matter of Fact Concerning Witches and Witchcraft*. Remarkably – at least from our incredulous perspective on these things – the bewitched girls 'within less than half an hour after the witches were convicted, they were all of them restored' (*State Trials*: 702).

[18] In a comparative note, Hale then adds that 'before the statute of I Jac. cap. 12 witchcraft or fascination was not felony because it wanted [i.e., lacked] a trial, tho some constitutions of the civil law make it penal'. In the *Historia* – perhaps curiously, perhaps not – Hale makes no reference to the 1662 trial.

[19] 'Ordinary' here refers to the officer having immediate jurisdiction in an ecclesiastical court.

[20] The statute in question is 29 Charles II, c.9.

[21] The English arrangements would thus embody the juridical formula of *cuius regio, eius religio*, provided that it was possible to know precisely just who – or what – exercised ultimate sovereignty in the English state. Within this state, though excluded from public office, dissenters had freedom to worship privately.

[22] Gray's (2000) pamphlet makes this argument, but does little to explore a possible historical ground for the theoretical position he defends. So in this paper I have described the emergence of institutions whose historical purpose was to contain the deadly early modern conflict over fundamental religious principles. Their aim was to establish a law-based *modus vivendi* among religious communities that could not agree about such principles.

[23] What else does Ronald Dworkin (1977: 149) do but give law a transcendental air when he invokes the 'fusion of constitutional law and moral theory', albeit a fusion that – like the Second Coming – 'has yet to take place'? Do such notions of a law transcending politics retain something of a prophetic and religious basis?

[24] The wording here is drawn from Kolakowski (1990: 163). A canonical instance in today's philosophical jurisprudence is Dworkin (1977).

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