Legal Responses to Religious Difference

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PREFACE.

Throughout this text I seek to use gender-inclusive language, unless specifically discussing the position of women or men. A number of the sources I use, particularly legal materials and the writings of some legal writers, prefer to use "men" or "man" as pronouns of indeterminate gender. Rather than insert amendments to these texts throughout, I have left these as they appear in the original. In relation to citation, I have generally used the standard style of most British legal writers, which makes extensive use of footnotes to refer to both primary and secondary sources. For formal references I have given full titles for journals, on the basis that a comprehensive list of abbreviations will often not be available to readers; in relation to primary materials I have retained the normal abbreviations, on the basis that access to these sources will be accompanied by access to the standard tables of abbreviations.

I have endeavoured to state the law as of the 1st of May 2001.

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CONTENTS

PART I.

1. INTRODUCTION.

This chapter explains the aims and structure of this text, and seeks to establish working definitions of "religion" and related terms used throughout the text. I then consider the importance of treating the religious interest as a distinct conceptual category, rather than subsuming it within some other category such as individual autonomy or leisure.

Aims and structure of this text.

Any survey of an area as vast as the interaction between law and religion must be selective. In order to explain the basis for selection, it is useful to make explicit the intended readership of this text, the aims that it seeks to achieve, and the structure adopted in order to achieve this.

Firstly, the intended readership. A key group of readers are those involved with the English legal system, either as law students and teachers, or as members of the legal profession. If this text were limited to this readership alone, it would be fair to assume a high degree of general legal knowledge, although the specialist areas of law covered in this text would not necessarily be known to every lawyer. When discussing the interaction between law and religion, however, a further readership is those students and academics coming from different disciplines and backgrounds that nonetheless find a need for discussion of how the law deals with their areas of interest. A final key group considered in preparing this text were those who, while interested in the way in which the English legal system deals with religious difference, are not primarily concerned with English law, or indeed English society.[1]

As Barrett has observed, "[t]he attempt to meet a fairly wide readership presents a number of inevitable drawbacks [particularly as] some of the information that is provided will seem elementary and superficial to the specialist".[2] I have adopted a number of strategies to address the different needs of readers. Firstly, I have retained the technical detail of my legal analysis throughout, rather than simply present my conclusions as to the content of the law in summary form. This is intended primarily for the benefit of lawyers seeking to explore these areas, or to ascertain how later developments have modified them. Those unfamiliar with the law may find

the appendix on dealing with legal sources useful when considering this discussion.[3] Secondly, I begin each chapter in Parts I and II with an overview and introduction to the key issues. This is primarily intended to render the rest of the chapter comprehensible to those readers with no general knowledge of English law, and many readers may safely bypass it. Thirdly, in discussing particular religious organisations, communities, or events, I assume no knowledge of the practices of particular groups operating within the English jurisdiction. This is primarily for the benefit of foreign readers but, given the variety of practices within particular religious communities, may be useful as a guide to the assumptions underpinning my discussion of legal doctrine affecting such groups.

Moving on to the aims of this text, these are threefold. Firstly, to explore those legal doctrines and practices which are of most immediate importance to religious groups, organisations, and individuals. Some of these doctrines are of clear application to religious groups - for instance the rules governing charitable status. Others are of clear importance to individuals seeking to live a life guided by their religious beliefs - for instance, the rules governing religious practice in the workplace. It should be recognized, however, that even a survey covering a variety of different legal areas cannot claim to be comprehensive. It is difficult to imagine an area of law which could not pose challenges or present opportunities to a person with particular religious beliefs and practices.[4] Secondly, to consider at more length areas of English law which have posed especial problems to members of two important religious groupings: Paganisms, and the Church of Scientology. I will explain later how the special features of these groupings inform a broader consideration of the interaction between law and religion within the English jurisdiction. It should be stressed that these groups have been selected for the importance of the challenges they pose the legal system, and characteristics that make extra-legal resolution of disputes with the State relatively improbable. They have not been selected because of the practical impact of the law upon their members, or their size in the jurisdiction – on these criteria, Islam would have been an obvious case study.[5] Thirdly, to consider what common threads emerge from the way in which English law deals with a variety of religious groupings in a range of legal contexts.

The text is divided into four parts. The first part, consisting of Chapters One to Three, provides a context for the discussion of English law. The second part, consisting of Chapters Four to Ten, discusses key areas of law. On the whole, discussion in this part is concerned more with the rules of law as generally applicable than with the effects of their application to particular religious groupings. The third part, consisting of Chapters Eleven and Twelve, discusses the areas of especial concern to the religious

groupings identified above. The final part, and final chapter, considers what general conclusions can be drawn from the discussion.

Defining 'religion', 'religious organisation' and the 'religious interest'.

The problems.[6]

In a context where it is seen as legitimate for the State to determine religious truths, it may be easy to define terms such as 'religion', 'religious organisation' and 'the religious interest'. In early English charity law, for instance, the State developed the superstitious use, a trust that supported false religious purposes, and therefore was to be held void.[7] Many of the older cases were decided in a context where it was considered legitimate to distinguish between the State religion and "the schisms of nonconformity, the errors of Rome, or the infidelity of Judaism or heathenism".[8] English law has moved from this position to one where a variety of religions are more clearly recognised.[9] Taking the same example, it is well established that charitable religious purposes are no longer limited to those of the Anglican Church. Non-Anglican denominations of Christianity, including very small denominations, have been accepted,[10] as have Judaism.[11] Persuasive authorities suggest that Islam,[12] Hinduism,[13] traditional Chinese religious practices such as Sin Chew[14] and the keeping of joss houses,[15] Christian Science[16] and Buddhism[17] should also be accepted. This recognition of a variety of religions has been combined with a formal insistence by the courts that they no longer have any jurisdiction to pronounce on the truth or otherwise of a particular religious belief.[18]

The detachment of the legal system from a single religious faith, despite its considerable advantages in terms of pluralism[19] and non-discrimination, raises a definitional problem. When religion was equated with a particular religious faith, whose doctrines could be expounded by an authoritative organisation, or derived from an authoritative textual source, the courts could determine whether a particular case involved religious issues by making use of the discipline of that single religion. In an important commentary on *United States v Ballard,*[20] Weiss considered how accusations of misrepresentation or fraud within a religious context could

be dealt with under the United States Constitution. He summarises his stance as:

> "A misrepresentation comes about when false characterisations of the objects discussed are made. Characterisations are made as the result of applying a discipline's perspectives or standards to perceived objects".[21]

When the State is prepared to accept a single religious discipline as authoritative, although there may be serious evidential problems in determining exactly what that single religion involved, and applying that to the particular case, it would be at least theoretically certain what 'religion' was. In a plural context, however, we must develop a definition, applicable beyond the discipline of a single religion, with a similar level of conceptual certainty.

It has been argued that the absence of a definition of this type is an advantage.[22] In discussing a decision on a key international guarantee of freedom of religion Cumper applauded the decision for avoiding:

> "having to formulate a definition of religion. The advantages of this are clear: first, religion is a term that would be extremely difficult to define. A working definition would need to be flexible enough to satisfy a broad cross-section of world faiths, yet also sufficiently precise for practical application in specific cases. Such a balance would be almost impossible to strike. Secondly, even if a definition could be formulated, far from guaranteeing freedom of religion and belief it could erode it. There is a danger that states might be tempted to interpret the term 'religion' restrictively. In these circumstances, the protection of minority faiths (the tenets of which may fail to correspond with all of the elements of the official definition of religion) could be put at risk. Thirdly ... belief is not exclusively religious in the traditional sense of the word. The twentieth century has witnessed the establishment of a plethora of new beliefs. These range from new religious groups (often called cults) to humanistic philosophies that stress Man's innate potential and believe that human spirit is eternal. The recent emergence of the New Age movement with its subtle blend of ancient mysticism and religious faith further blurs the distinction between religion and philosophy ... humanist and secular philosophies are as often sacred to their adherents as religious belief in the traditional sense"[23]

A brief review of key cases on the definition of religion makes it clear that the task of definition is extremely difficult.[24] Numerous court systems have found creating such a definition problematic, even when dealing with positive legal guarantees of the freedom of religion. The

organs of the European Convention on Human Rights,[25] and of the International Covenant on Civil and Political Rights,[26] have been unable or unwilling to produce a clear definition. Cases on the Canadian Charter of Fundamental Rights and Freedoms leave the issue open,[27] while the well developed, but chaotic, cases and commentary on the First Amendment to the United States Constitution provide a wide variety of definitions, and anti-definitions, none of which have achieved dominance.[28] In English law until very recently there was no positive guarantee of freedom of religion,[29] and so no route by which a generally applicable definition of religion could emerge. Rather, the different legal doctrines that needed to define 'religion' could develop such a definition separately, as appropriate for their context.[30] The area of law most English lawyers would identify as defining religion, that of the law of charity, has failed to produce a clear definition, even within that limited sphere.[31] This difficulty, while clear, appears to be a secondary issue, unless it amounts to a finding that it is impossible to provide any definition of religion for legal purposes.[32] I would argue that Cumper's other points illustrate the importance of having some definition.

Firstly, although there is a danger that a definition of religion would be used restrictively to exclude some groups from proper consideration,[33] the absence of a definition might equally be used to exclude groups who would, under a properly developed definition, be entitled to consideration as a religious grouping.[34] Exclusion from legal rules giving special consideration to religious interests is of more than conceptual importance. In relation to the law of charity, for instance, the decision of the Charity Commission that Paganism did not constitute a religion caused serious difficulties for the Pagan Hospice and Funeral Trust.[35]

Secondly, there is a danger that the absence of a definition might lead either to abuse of the consideration given to religious interests, or to a public perception that such abuse might occur.[36] There is some concern that insincere claims to religious beliefs or religious group status may be made in order to secure a secular benefit that would be equally desirable to others.[37] An over simplistic approach to sincerity could exclude genuine claims. As Greenawalt argues: "[l]awyers may need to learn that people can have multiple and shifting religious identities, that 'sincerity' need not lock them into one religious affiliation and set of doctrinal propositions".[38] Additionally, these concerns can be overplayed, particularly as in many instances the religious individual is seeking either a secular disbenefit or equal treatment taking into account their particular circumstances. For instance, a Jehovah's Witness who refuses a life-saving blood transfusion because of their religious beliefs will receive an inferior secular outcome if their religious views are respected, as opposed to the extra life span if their views are not respected. A Jew or Muslim whose religious teachings generally prohibit consumption of certain foods, and who is allowed an alternative food in a prison, may not gain any secular benefit, assuming the