Religion and Law

An Introduction

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Introducing Law and Religion

The publisher of a magazine is found guilty of a crime because they have offended religious sensibilities. An employee gains more flexible working to accommodate prayer times in the wake of a court decision on their rights against the employer. A notice is served on a householder because they host religious meetings involving too many people, involving too much motor traffic at unsociable hours, and disturbing their neighbours. A religious official is allowed to withhold information from the police because of a duty to respect confidentiality, even though that information would benefit the police in locating a serious offender. A child is refused admission to a prestigious local school because they do not belong to the religious community the school was established to serve; another child is admitted to a school but objects to science lessons dealing with the theory of evolution as contrary to their religious beliefs. A religious organisation is characterised as supporting terrorism, and its adherents prevented from recruiting to it, raising money for it, or publicly bearing witness to its tenets; another organisation receives tax breaks which allow it to run a bookshop with lower profit margins than its non-religious competitors. A religious organisation changes its official doctrine on the use of medical products derived from human blood when faced with civil actions by relatives of members who died after refusing blood transfusions; another creates a 'priesthood' in order to gain immigration and taxation benefits, and to make it easier to deal with the makers of official policy. A citizen called to a jury refuses to serve on a capital case as their religious beliefs prohibit execution for any offence; another juror uses a set of Tarot cards to guide their consideration of the correct verdict. A judge prays in private before discharging their court duties; another judge explicitly refers to a religious text when interpreting the law, on the basis that the law was passed to give effect to the religious text.

All of these things have happened, and illustrate the richness and variety of the interaction of law and religion. The purpose of this text is to introduce this area of law to readers with an existing interest in religion. In doing so, I draw upon examples from a number of significant jurisdictions, as discussed below. This text is not, however, intended to be a comparative study of law and religion in Australia, Canada, South Africa, New Zealand, the United Kingdom, and the United States. Neither is it intended to develop a particular thesis on the relationships between law and religion, or to state

in detail the laws of particular countries, or particular areas of current interest.

In this chapter, I introduce general ideas relevant throughout the text. If we take law and religion as distinct conceptual categories, why are they important to one another? What do we mean by 'law' and, for that matter, what do we mean by 'religion'? In particular, as I assume no prior legal knowledge, what are the sources used to construct legal doctrines, and how should we approach them? This introductory chapter closes with a very brief overview of the different types of secondary literature to be found on the interaction of law and religion.

In Chapter 2, we consider international and national guarantees of religious interests. A preliminary task here is to provide a working taxonomy of what is meant by 'religious interests'. This done, we move on to consider the nature and significance of international law, and the key international instruments at a global level, and regional instruments such as the European Convention on Human Rights. In particular, we consider the significance of overarching guarantees of religious interests binding upon the State at an international level, or built into the constitutional order of the State itself.

In Chapter 3, we move to consider ways in which the State and the individual can interact. The State has the potential to be a significant threat to religious interests, and it is in that sense that we consider the extent to which religious individuals can resist generally applicable duties to act, or restrain from acting, in a way contrary to their religious convictions. The State also has the potential to act as a powerful protector for the individual, particularly the member of a minority religious community. We consider the extent to which the State will intervene between private individuals to protect the religious interests of the individual.

In Chapter 4 we shift the focus from the individual to the organisation – from the predominantly private exercise of religion by the individual to the lives of religious communities. Here the principal issue is that of entanglement – the extent to which the political organisation of the State can become excessively involved in the religious organisation of the community, and vice versa. On the one hand, we see the potential for suppression of religious communities by control of their organisations; on the other, the possibility of a State dominated by a religious organisation at the expense of members of the State who are not also members of the religious organisation. The State may become involved with a religious organisation not only through its own initiative, but by allowing private individuals to enforce legal actions against religious organisations. Accordingly, this chapter also considers two instances of private actions against religious organisations – claims of employment rights by clergy working for an organisation, and claims by others for misconduct and malfeasance by such clerics.

Chapter 5 briefly concludes the text by re-emphasising some general threads from our discussion of the interaction of law and religion.

Why is Law Important for Religion?

It may be that a useful distinction could be drawn here between the importance of

law for the study of religion, and the importance of law for religions within a particular jurisdiction, that is, the area covered by a particular legal system. Although the theoretical structures of law may provide a resource for scholars of religion, it is more likely that their interest will lie in the impact that law can have upon religion. If we regard both law and religion as social phenomena, often coexistent within individual social actors, their interaction seems inevitable. Much of this text is concerned with how law accommodates, restricts, or influences religion. It is useful at this point to summarise the functions that law is often seen as performing in a society of the type discussed in this text, functions which may be carried out in any context, including a religious one (see further Partington, 2000, pp. 11–27).

Firstly, law may be seen as one of many social mechanisms by which social order is maintained. At its simplest, law may help to maintain public order so that other social, and so legal, interactions can occur within the society. Law allows the transition from an endless war of all against all, to a position where self-defence, and the personal defence of property, is not the sole concern of all living within the territory. As part of this creation of the State, law may also serve to define and protect the constitutional and political order. In relation to democratic elections, for instance, we might expect law to define at what age a citizen is entitled to vote, how the legislature is to be composed and the like – although in the jurisdictions discussed here law has a strictly limited role in determining how those votes are to be translated into political power. Law may also have a role in the ordering of difference within a society, including economic difference. For instance, criminal law has an important role in protecting private property; while employment law has an important role in providing non-discrimination guarantees for members of groups who have suffered historic discrimination and exclusion from opportunity in the workplace. Finally, law may be seen as having a specific role in relation to the moral order of a society. Most legal rules have some moral content – the law of murder for instance appears to contain a moral judgement that it is 'wrong' to kill another person except in very narrow circumstances such as self-defence. More contentious is the situation where the law provides support for a moral proposition which is not so broadly accepted within society, for instance that a permanent relationship between a man and a woman is the appropriate foundation for human reproduction and child-rearing.

An example may briefly illustrate this function. In *Edward Books and Art Ltd v R* (1986) 35 DLR (4th) 1 (Can.), the Supreme Court of Canada considered a law which required some retail businesses to be closed on particular days, including Sunday. Some retailers were exempt from this limit if they closed on Saturday instead. The Court found that the purpose of the legislation was a secular one, rather than simply enshrining a religious prohibition on trade on that day, although it did have an adverse impact on particular religious groups such as Jews and Seventh Day Adventists. In terms of the preceding paragraph we could see Sunday trading laws as being aimed at keeping public order (particularly if trading on a Sunday might result in inter-communal violence and disorder); economic order (in ensuring that shopworkers have one day in which they cannot be required to work

each week, and that this day is common to many different retail concerns); or moral order (supporters of Sunday trading laws sometimes refer to the importance of one day each week being available for families to be together).

Secondly, law may be seen as a mechanism for the resolution of disputes between individuals without endangering public order. This can occur at a variety of levels, from constitutional litigation between organisations with different views on the legitimacy of abortion for non-medical reasons, to a dispute over a bad debt. In practice, using the full panoply of the law to resolve a dispute is often a clumsy way of dealing with it, and litigation, by which a court gives an authoritative judgement on the legal merits of the dispute, is often viewed as the last resort even by legal advisers. Instead, parties may negotiate in the shadow of the law, with the legal position of the parties being one factor, albeit often a very significant factor, in determining a mutually acceptable resolution to the dispute. In the religious context, Bradney and Cownie have noted the dangers of placing too much emphasis on law as a mechanism for resolving dispute, even in this expanded sense (Bradney and Cownie, 2000). The sources of law drawn upon in this text tend to arise from disputes, or as responses to social problems, and so over-represent dispute resolution. Nonetheless, this is clearly a function that law is capable of performing. In England, for instance, the law has been used to resolve disputes between members of religious organisations (see Hill, 2001).

Thirdly, law may be seen as a mechanism by which policy makers can respond to social problems. This may lead to an increase in the sheer volume of law within a particular jurisdiction, as successive social problems are dealt with by law, and so turned into specifically legal problems. It may also result in policy makers taking an action within their power – the exercise of their law-making powers to change legal rules – rather than engage with the social problem itself. In particular, we may acknowledge a particular social problem could usefully be engaged with, without accepting that law is the best social mechanism for doing so. Consider intolerance between members of religious groups – although it would be possible to react to this problem by legislation making it a crime to promote, or even perhaps to manifest, such intolerance, it may be more useful to address the root causes of this intolerance through other initiatives. A good example of law seeking to deal with a social problem within a religious context is the United States prohibition on religious discrimination in the workplace (see Jamar, 1996; Engle, 1997).

Fourthly, law may be seen as a set of rules regulating relationships between individuals. In the personal context, for example, there are rules concerning what sexual relationships are acceptable within a particular jurisdiction, for instance in relation to homosexual activity; while in the commercial sphere particular rules may govern the formation of agreements between companies, or special formalities attach to transactions such as the leasing of real estate. If the laws are sufficiently certain, an individual will be able to arrange their affairs in such a way as to be law-abiding, and relatively assured of the support of the legal system should a dispute arise later. So we might see the law of blasphemy, which in England prohibits some expressions of some religious concepts, as an indication of the outer limits of

incivility in some religious discussions. In *Ramsay and Foote* (1883) 15 Cox C.C. 231 (UK), Lord Coleridge CJ approved a passage suggesting that the law of blasphemy 'visits not the honest errors but the malice of mankind. A wilful intention to pervert, insult and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful mispresentation or wilful sophistry'.

Fifthly, law may be seen as an important mechanism for controlling State power, and in particular in securing the rights and freedoms of the individual. This is a particular theme in relation to religious rights, which are discussed at length in the next chapter.

Finally, law may provide a mechanism for empowering individuals and organisations. At its most straightforward, most organs of the State derive their power from some legal statement – for instance the powers of a prison service to detain a convicted prisoner, or the powers of an aviation regulator to inspect and restrict air travel. Law can also provide individuals with the power to arrange their affairs in a way which gives them more power – for instance by pooling their resources as an organisation for the advancement of their religion, an organisation which may enjoy a taxation status different from its members, and which may be capable of continuing after the death of its founders.

The potential impact of these different legal functions upon individuals because of their religious beliefs, identity, or practices is clear. It may also be that legal values can be a strong influence on religious values. Consider for instance, the practice of polygamy. In *Reynolds v United States* 98 US 145 (1878) (US), the Supreme Court had to consider whether a law criminalising polygamy, the practice of which was endorsed by the Church of Jesus Christ of the Latter Day Saints at that time, restricted free exercise when applied to a Mormon man. The Supreme Court ruled that the religious liberty guarantees under the First Amendment prohibited any law against mere opinion, but did not protect 'actions which were in violation of social duties or subversive of good order' (ibid., at 164). In a later polygamy case, the Supreme Court reiterated the exclusion of polygamous acts from the First Amendment (*Davis v Beason*, 133 US 333 (1890) (US)). The religious practices of the mainstream Church, and perhaps even the development of its doctrines, may have been directly influenced by this finding. Even where the law does not act to prohibit a religious belief or activity, structural expectations may also be influential on the development of the religious community (consider Reid, 2000).

To recap. Law can be used to keep order; resolve disputes; respond to social problems; regulate broader social relationships; control State power; or empower individuals. Law matters to religion because of the extent to which this can impinge on individuals, communities, and organisations.

Why is Religion Important for Law?

Religion can be important for law in the same sense as, for instance, political belief

or sexual practice. In all these cases, a proper appreciation of the context of a particular legal situation can enrich the application and development of the law. For instance, when law enforcement agencies consider how to deal with an armed group, properly understanding their religious beliefs may provide a key to evaluating whether immediate response, with the risk of injury, is needed (Tabor and Gallagher, 1995). When assessing whether a prison should be required to provide a particular choice of menu for an inmate, a religious conviction that some foods are forbidden might indicate the inmate would suffer an especially heavy burden should this not be accommodated (Creighton and King, 1996, 9.43).

In the light of this, we may treat the religious interests of an individual as no more than an explanation for their activities or special needs, rather than a distinctive interest of that individual. For instance, decision makers need to give weight to the right to individual autonomy, which may arise because an individual wishes to reject medical treatment that would be contrary to their religious beliefs. The interest to be borne in mind is not some special religious interest but the general interest everyone has in controlling their own bodies (see Eisgruber and Sager, 2000). It is not uncommon to find religious interests compacted into some other category in this way. One example of this is the classification of at least some religious activity as a hobby or leisure pursuit. The leisure theorist Chris Rojek gives 'traditional rituals, festivals or processions which occur on holidays and festival-days' as examples of leisure activity. By the same route, he sees the conflict over access to Stonehenge, including access by individuals who view it as a pivotal sacred site, as raising 'important questions of citizenship rights and the state's management of leisure resources' (Rojek, 1995).

Treating religion as simply part of the context in which law operates is defensible if religion has no special characteristics requiring separate analysis, perhaps leading to different outcomes. Courts, legislatures, and jurists frequently assert, however, that religion does have special characteristics. These are outlined below, but it should be noted that all of them are based on assumptions whose truth can be questioned. In particular, except for the positivist argument taken from legal structures themselves, all are based on assumptions about what actually happens in the lives of individuals, and society more generally. Legal decision makers seem, on the whole, comfortable with these sorts of general assumption.

A positivist approach to the special status of religion would argue for a special place in analysis because religion receives special treatment in both international law, and the domestic law of most jurisdictions (cp. Sisk, 1998). For instance, one clause of the International Covenant on Civil and Political Rights, a globally applicable treaty legally binding upon those States who have accepted it, begins 'Everyone shall have the right to freedom of thought, conscience and religion' (ICCPR art.18). This is stated even though the ICCPR contains extensive guarantees of the right to freedom from torture, freedom of expression, privacy and the like (see further Harris and Joseph, 1995). Similarly, the Canadian Charter of Rights and Freedoms lists the fundamental freedoms as: '(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication; (c) freedom of peaceful

assembly and (d) freedom of association' (Constitution Act 1982 s.2 (Can.)). The difficulty with this approach is that it only moves the fundamental problem a step away – we give religion a special place because the law does, but why does the law do so? Is it right for it to do so? These questions are better resolved by reference to values outside of law.

One such resolution would be to argue that, as religious interests are more profound than other interests, they are entitled to separate recognition. If we make this assumption, it may be considered as disrespectful to class one individual's religious interests with another's leisure interests, or a third's commercial interests. Recognition as a religion can seem important to many communities of religious adherents. There may well be a sense in which religious communities in a plural society, particularly minority or unpopular communities, need recognition as religious communities. Classifying all religious activities and organisations as, for instance, part of the leisure sector may well be perceived as disrespectful, trivialising, or indeed an example of State hostility to religious activities (Carter, 1987). One serious problem with this argument is that it requires very broad assumptions about the way in which religious beliefs and practices interact with other beliefs and practices within the same individual. Within a cultural framework that distinguishes between the sacred and the secular, and between religious activities and leisure activities, this may be a fair assumption. It becomes less clear when an individual's framework does not draw these distinctions.

A slightly different argument from that of profundity is based on the importance of religious beliefs, identity, and practices to the individual concerned. We may be entitled to assume that for many religious adherents their religious beliefs, practices, and identity occupy a position of special importance in their life. This assumption can form the basis for a variety of different arguments giving the religious interest weight. The most significant is the argument from self-identification: '[r]eligious beliefs ... form a central part of a person's belief structure, his inner self. They define a person's very being – his sense of who he is, why he exists, and how he should relate to the world around him. A person's religious beliefs cannot meaningfully be separated from the person himself: they are who he is' (Conkle, 1988, pp. 1164–5). It may also follow from this assumption that the religious adherent, when placed in a position where their beliefs and practices conflict with the law, suffers a special harm when compared with an individual in conflict with the law for some other reason (see Garvey, 1986). For instance, a member of a pacifist religious community who is required to pay taxes subsidising the armed forces may be considered to suffer some harm over and above that suffered by the individual in the same situation who would prefer to spend their tax money on home repairs or entertainment.

This argument focuses on the religious individual and their interests, but it is also possible to argue that the significance of religion to communities justifies its special consideration. In other words, the assumed link between religious interests and cultural and other collective interests requires explicit recognition of the religious interest. The link between religion and ethnicity, especially in legal terms, is a complex one. Nonetheless, in many instances an individual's religion forms

part of a broader social context. This collective approach raises a utilitarian argument for respecting the religious interest – bluntly, if religion is a matter of communities rather than of individuals, failure to respect a religion might result in public order problems (*Kokkinakis v Greece* (1994) 17 EHRR 397 (ECHR) per Valticos J). It can also be argued that where religion has a community aspect, especially for a minority community, respecting that religion is an important step in ensuring that members feel a full part of a plural society. The European Court of Human Rights has described freedom of thought, conscience and religion as 'a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends upon it' (ibid., at para.31). Finally, if the religious interest can form part of a community identity, it may form part of the basis for unjustified discrimination against an individual who is a member of that community. Certainly, numerous examples of discrimination and persecution on the grounds of religion can be found (Brownstein, 1990; Adams, 2000). In this case, respecting the religious interest might be seen as a reaction to the broader social problem of unjust discrimination.

A final practical ground for the special consideration of religion is based upon the interests of society as a whole, including those who are not members of the religious community being considered. There is a theme in many areas of law that religious adherents and religious organisations can be assumed to benefit society as a whole by virtue of those characteristics, and so their protection as such produces social benefits. One commentator has noted that 'religious groups are of special value to a democracy, and the state should nurture them rather than reject them' (Carter, 1993). Others have argued that religious beliefs constitute a force for social cohesion (Tregilgas-Davey, 1991). It may also be that consideration of religious interests can be seen as a test of the rights culture of a particular society more generally. As Adams argues:

> religious liberty and the provision of fundamental human rights are ultimately inseparable … the international community will never ensure free association without permitting religious minorities to meet, free speech without allowing religious speech, non-discrimination and due process without granting religious minorities equal substantive and procedural rights under the law, democracy without allowing religious minorities to vote and run for office, indigenous rights without protecting indigenous religions, the rights of parents and children without protecting their right to sectarian education, and women's rights without ensuring their freedom to follow or reject religious teachings and customs. (Adams, 2000, p. 64)

As well as these significant practical reasons why religion is of interest to lawyers, there are important theoretical problems posed to law by religion. McConnell argues that 'liberalism was born as a solution to the problem of religious pluralism' (McConnell, 2000 at 1265). A liberal legal order is faced with a particular set of problems in relation to religion, caused by renunciation of authority over religious issues, coupled with a need to retain authority more generally. This is a point that may usefully be expanded on here.

In a context where it is seen as legitimate for the State to determine religious truths, no special problem is posed to State authority. Religious issues can be resolved, in principle at least, as easily as any other issue coming before the court. 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 (Jones, 1969 at 11,15). 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' (Newark, 1946 at 235). This was possible because the State had identified religion with a particular discipline. When religion is equated with a particular religious faith, whose doctrines can be expounded by an authoritative organisation, or derived from an authoritative textual source, the courts can determine religious issues by making use of the discipline of that single religion (cp. Weiss, 1964). This may not only involve disputes concerning that religion, but also the proper way to deal with other religious systems, as is the case for instance with dhimma in Islamic law (An-Naim, 1988; Hofmann, 1998).

The legal systems discussed here have, however, moved from this position (see more broadly Heim, 1990). Continuing with the example of English charity law, it has become established that charitable religious purposes are no longer limited to those of the Church of England. Non-Anglican denominations of Christianity, including very small denominations, have been accepted (*Thornton v Howe* (1862) 31 Beav. 14 (UK); *Re Watson* [1973] 3 All ER 678 (UK); *Re Schoales* [1930] 2 Ch. 75 (UK)), as have Judaism (*Re Michel's Trust* (1860) 28 Beav. 39 (UK)), Buddhism (*Re South Place Ethical Society* [1980] 1 WLR 1565 (UK)), and less formally, Islam, Hinduism, and a range of other religious movements relatively new to the jurisdiction (see Edge and Loughrey, 2001). 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 (Mumford, 1998).

In recognising that multiple religion systems can exist within the jurisdiction, and that it is inappropriate for the legal order to choose between their competing views of reality, that legal order is faced with a particular problem. What are the courts to do when faced with a religious claim whose truth must be determined as part of the resolution of the dispute before them? Examples of this drawn from family law and criminal law illustrate the two facets of the problem.

In relation to the care and custody of children, the courts may be required to intervene in child rearing when there has been a breakdown in the relationship between the parents who are unable to agree on how the child should be treated. This can involve the courts in resolving issues normally regarded as purely the concern of the parents. In *T v T* [1974] FL 190 (UK), for instance, the court became involved in a dispute between a Jehovah's Witness parent, and a non-Witness. Stamp LJ discussed at some length the impact of the child being raised by the Jehovah's Witness parent, but added that 'if the father and mother were both Jehovah's Witnesses nobody, certainly no court, could possibly say, or would think of beginning to say, that the children should not be brought up as Jehovah's

Witnesses' (ibid., at 191). In resolving such disputes the courts will have regard to the best interests of the child – indeed in the UK, as opposed to some extent to the US, this is the paramount interest (see Hamilton, 1995). Across a range of jurisdictions, the common, although not universal, approach is to avoid making a finding about the intrinsic merits or demerits of the religion (Ahdar, 1996). Instead, the truth or otherwise of the religions tenets are set aside, in favour of a focus on the impact upon the secular interests of the child. In determining these interests, values and practices derived from religion will be considered, and cannot be reserved from evaluation simply because they are religious (Schneider, 1992). Thus, the courts seek to separate the values of the parents from their religious context in order to avoid making a ruling on the merits of the religion itself.

To some extent, however, it is unavoidable that a judicial criticism of the impact of a religion on the child can be read as a criticism of that religion, for instance a finding that a religion makes it more likely the child will become a liar or murderer in later life. This can be exacerbated by the style of the judgement. A good, if extreme, example is *Re B and G* [1985] FLR 493 (UK), where the English Court of Appeal considered a decision to grant custody to the non-Scientologist parent, although this would involve taking the children away from their current home. The trial judge, Latey J, had appeared to take the view that granting custody to the Scientologist parent would result in the children being raised as Scientologists, and that this would not be in their best interests. Perhaps in part because of the injudicious intemperance of the language used, Latey J appeared to work on the basis that Scientology itself was undesirable, rather than determining the characteristics of the life the child would lead, and then feeding those characteristics into the best interests balance. He described Scientology as 'both immoral and socially obnoxious ... corrupt, sinister, and dangerous' (ibid., at 157), and commented on the character of the founder of the religion very strongly. The Court of Appeal found that the statements of the judge:

> added colour to the suggestion that what the judge primarily had in mind was the exposure of [S]cientology rather than the interests of the children which was in fact and in law all he was concerned with. However, towards the end of the judgment the judge did relate the practices of [S]cientology to the circumstances of these particular children. He did carry out the balancing exercise. Although he plainly felt strongly that these children were at risk from exposure to [S]cientology, I find no reason to suppose that in carrying out that essential balancing exercise he did not do so judicially. (ibid., at 502–3 per Dunn LJ)

Thus, profound issues are raised when religious values seek to engage with a secular legal order (Bradney, 2000b). An even more profound example of the problem of renouncing metaphysical authority while retaining the authority necessary for the functioning of a legal system can be found in criminal law. What if a defendant wishes to deny part of the crime with which they are charged by an explanation which can only be accepted if the court also accepts a religious claim by the defendant – for instance that they were not falsely calling upon spirits, because the spirits truly answered the call? In English law, the courts have accepted

that such claims can be resolved by the criminal courts, and that the defendant is not entitled to an acquittal simply because contentious issues concerning religion are involved (*Lawrence* (1876) 36 LTR 404 (UK)). In a famous case concerning mediumship, Viscount Caldecote CJ in the English Court of Appeal declared that:

> the only matter for the jury was whether there was a pretence or not. The prosecution did not seek to prove that spirits of deceased persons could not be called forth or materialised or embodied in a particular form. Their task was much more limited and prosaic. It was to prove, if they could, that the appellants had been guilty of conspiring to pretend that they could do these things, and, therefore, of conspiring to pretend that they could exercise a kind of conjuration to do these things. (*Duncan* [1944] 1 KB 773 at 778 (UK))

Even more than with a clash of secular and religious values, when the courts become involved in a similar dispute about facts, keeping legal authority while renouncing metaphysical authority is a difficult juggling act.

To recap. Religion matters to law, (a) because of its role as providing part of the context to a legal discussion; (b) because of the distinct place to be given to religious interests in legal analysis, whether because of the taxonomy of rights in international and constitutional law, the profundity of religious interests, their centrality to the rights of the individual believer, their importance to broader cultural and communal life, or their role in society as a whole; (c) because of the special problems posed to any liberal legal discourse which seeks to develop a legal pluralism in response to a growth in religious plurality.

What is Law?

So far, I have suggested that law and religion matter to one another without having made it clear what it meant by either term. In this section I introduce some key ideas relating to the composition of law. As most non-lawyers' first contact with law will be through secondary sources, a useful way to approach the issue might be to focus initially on legal discourse.

It is potentially misleading to refer to legal discourse, if that is taken to mean a single form of discourse. Legal scholarship is a diverse and increasingly difficult to define field of academic work. To draw from a recent collection of published papers on law and religion, it can comfortably encompass discussion of the moral identity of persons (Ducharme, 2001); the correct approach to the interpretation of legal texts (Andries, 2001); the decided cases of the European Court of Human Rights (Martinez-Torron, 2001); the approach of English law to the Jewish *get*, or bill of divorcement (Freeman, 2001); and the relationship of politics and sociology to the academic study of law and religion (Bradney, 2001).

Within this broad category, it may be useful to separate discussions about law from legal discussions, as Bradney does when describing his text on law and religion as a book about law, rather than a law book (Bradney, 1993). Discussion about law can draw upon a wide variety of methodological and theoretical perspectives – as would be the case in a critique of a particular legal provision by

a Christian theologian writing from theology; or a discussion of use of legally registered places of worship by a geographer using conventional tools of quantitative social research. Legal discussions, on the other hand, are more likely to constitute either explorations of what the content of law is, or evaluations of that law against values internal to the legal system itself. For instance, a paper exploring the legal meaning of a particular piece of legislation, or considering how far existing cases leave an unacceptable area of uncertainty, would be a legal discussion.

In either case there is something being discussed called 'law', and in the latter category not only is law the subject of the discussion, but the methodology used for the discussion is a distinctively legal one. Some forms of both discussion take place at a level of abstraction where broad legal principles (such as the idea of human autonomy) are the subject for discussion. In many other cases, however, where particular laws are relevant to the discussion, it is necessary to identify, at least to some extent, the content of these laws before discussion can follow. In the case of legal discussion, this identification may constitute the sole aim of the discussion, but more commonly there is an ulterior motive: in the case of the commentator to move onto some form of critical evaluation of the law, in the case of the legal advisor to move onto concrete advice for their client. This section outlines the sources of law which form the core of legal discussion, and which are often necessary to understand the law forming the subject matter of a discussion about law.

The Constitution

The constitution is the fundamental law of the State, which contains the legal rules constituting State institutions and delineating their authority. These institutions are often divided into three branches – the legislature, which enacts new laws in the form of legislation; the judiciary, which applies laws to resolve particular disputes and may in the process develop them in new ways; and the executive, which is responsible for enforcing the law, and carrying on the normal business of government. This separation of State powers underpins the United States Constitution, for instance, with the legislature (Congress) defined in Article I; the executive (the Presidency) defined in Article II; and the judiciary (the Supreme Court and other federal courts) defined in Article III (United States Constitution 1787 (US)).

As well as providing for the exercise of State power within the legal system, the constitution may explicitly limit this power, particularly in relation to the individual. This is most obvious where the constitution contains a set of fundamental individual rights that the State is obliged to respect. The Canadian Charter of Rights and Freedoms, for instance, contains an extensive list of individual rights that the courts are empowered to protect (Constitution Act 1982 s.24 (Can.)). We return to these constitutional rights in relation to religious rights in Chapter 2. The constitution may also assert fundamental values that should pervade the exercise of State power. This can be seen most explicitly in the most

recently drafted of the constitutional documents considered in this text, the Constitution of South Africa. Early in the text the foundational values of the new South Africa are expressed as human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law; and democratic government (South African Constitution 1996 s.1 (SA)).

As this fundamental law gives power to the legal system, it is not possible for the constitution to gain its authority from that legal system. Instead, recourse must be had to some other source of authority. Practically speaking, all the States discussed in this text base their legitimacy upon a democratic mandate, but there are significant formal distinctions between the countries. Neither the South African nor United States constitutions are based upon the legitimacy of the former regime. Instead, both have recourse to broader political and philosophical values for their legitimacy. The US Constitution begins by establishing the source of its authority: 'We, the People of the United States … do ordain and establish this Constitution for the United States of America' (United States Constitution 1787 preamble (US)). Similarly, the South African Constitution begins: 'We, the people of South Africa … through our freely elected representatives, adopt this Constitution as the supreme law of the Republic' (South African Constitution 1996 preamble (SA); van Wyck, 1994). In the case of Canada, Australia, and New Zealand, on the other hand, the former regime retained sufficient legitimacy and authority, at the time of the enactment of their primary constitutional documents, to underpin the constitution. Thus, the Canadian constitution is based upon an Act of the United Kingdom Parliament (the Constitution Act 1867 (UK)), that of Australia likewise (Commonwealth of Australia Constitution Act 1900 (UK)), and of New Zealand upon legislative and judicial authority derived from the former place of New Zealand in the British Empire (Mulholland, 1995 at 22–31). The formal source of authority for the United Kingdom constitution itself is more difficult to locate.

At this point it is useful to separate the idea of a constitution from that of a written constitution, and particularly a constitution written as a single document. This conflation may be in part due to the significance and influence of the US Constitution. A routine library search will quickly reveal a document called just that, dated to 1787. Surely this must be the US Constitution? Unfortunately not. If you wished to be able to state the content of the US Constitution you would also need to be aware of the 27 Amendments to the 1787 document, made between 1791 and 1992 and including an Amendment (the 18th) which was itself removed by a further Amendment (the 21st). This would not suffice to understand the law, as these documents have been extensively, and authoritatively, interpreted by the United States Supreme Court. Even this would not be sufficient, however, as there may exist constitutional understandings by key constitutional actors as to how they should behave. Before the 22nd Amendment of 1952, for instance, there was no legal rule that a President could not serve more than two terms, although this was an understanding, or convention, that had been followed by Presidents prior to Roosevelt. Thus, even the US Constitution is not to be found in a single written source.

Nonetheless, there is some strength in the idea that the US Constitution is based on, if not contained within, a single documentary source. Although the details of the constitution are more distributed, the fundamental structures of the constitution are contained in a single document that prevails over any inconsistent law or practice. This document is concise, intended to be understood on one level by the non-specialist, and of special civic and educational value. In this sense, the United States, South Africa, and Australia all have a single constitutional document. Similarly, although the key constitutional documents of Canada are separate measures, they are to be cited as the Constitution Acts, 1867 to 1982 (Constitution Act 1982 s.60,61 (Can.)), and are little harder to parse as a single document than the US Constitution and its Amendments.

The situation is more complex in New Zealand and the United Kingdom. The United Kingdom lacks a constitutional document of the type envisaged in this section, so that the UK constitution emerges from the normal sources of law discussed below – that is legislation, judgements of the normal courts, academic commentary, and practice. In the absence of a formal constitutional document these sources are of primary, rather than secondary, importance in the constitution. There is no agreed mechanism for changing the de facto constitution, nor necessarily agreement about what it actually contains. The New Zealand position is fundamentally the same, but in 1986 a number of constitutional rules were brought together in a single document, which also made significant constitutional reforms (Constitution Act 1986 (NZ)).

As we will see in Chapter 2, religious rights form an important part of the constitutional fabric of all six jurisdictions. The discussion above raises an important preliminary point which may be dealt with here. What is the status of these constitutional rights? In the United States, Canada, South Africa, and Australia they form part of the definition of State power. In Australia, for instance, the central government, the Commonwealth, has no power to make a law establishing religion, imposing religious observance, prohibiting the free exercise of religion, or imposing a religious test for office with the Commonwealth (Commonwealth of Australia Act 1901 s.116 (Aust.)). As such they will prevail over any legal source except a constitutional amendment which may be politically or, as in the United States, legally difficult. In New Zealand and the United Kingdom, however, they are normal laws with, at most, the status of legislation, and accordingly can be overridden by a normal act of the legislature. Thus, although of considerable practical and constitutional significance the New Zealand Bill of Rights 1990 and the United Kingdom Human Rights Act 1998 should not be regarded as having a similar potency to, say, the First Amendment to the United States Constitution with its religious liberty guarantees.

As a final point in relation to constitutions, so far I have discussed 'the' constitution of each of the States discussed. In some cases, however, the country is not a single entity with all State power placed with central government, or delegated from central government. Instead, it is a federal system with the national constitution giving authority over some matters to the central government, while empowering (or leaving empowered) regional or local government structures to

exercise equal authority over other matters. Once again, New Zealand and the United Kingdom are unusual in this respect, with local authorities in both countries receiving all their powers from central government, which accordingly has the competence to remove them. This is the case even for the devolved government structures of the United Kingdom, which exercise authority delegated by the United Kingdom Parliament, rather than authority of their own derived from a federal constitution.

Legislation

If a written constitution is a formal piece of legal text that lays down the values and rules that should govern the entire legal order within the State, a piece of legislation is a similar piece of text dealing with a specific issue, but laying down a legal rule that is intended to be binding upon everyone who finds themselves in the situation covered by the rule in future. Although legislation may be enacted to clarify the existing law, for instance by bringing together provisions from different pieces of existing legislation and ensuring greater consistency of language, it may also explicitly change existing law, or create new legal doctrines. This act of, potentially radical, legal change clearly has significant political implications. In all six countries, the national legislature is dominated by democratically elected representatives. In the United Kingdom, for instance, the legislature is Parliament, which is dominated by the House of Commons, composed of democratically elected Members of Parliament. In New Zealand, the House of Representatives exercise legislative power in conjunction with the Sovereign, who is required to assent to any measure which has received the support of the House.

The national legislatures all possess considerable competence, and are subject only to any limits imposed by the national constitution. In the United States, Canada, Australia, and South Africa, this in effect means that a piece of legislation can be declared 'unconstitutional', and thus invalid because of its clash with the constitution (see Mason, 1986). Because of the absence of a higher form of constitutional law in New Zealand and the United Kingdom, however, the national legislatures may make or unmake any law whatsoever. Even here, the legal order may require that if the national legislature wishes to violate constitutional norms – for instance by allowing summary execution without trial – it expresses itself with the utmost clarity, anything less resulting in the legislation being interpreted in accord with these norms.

The competence of the national legislatures, combined with their role in the political life of the country, mean that there is considerable pressure on their time. In particular, measures may only be able to progress through the legislative process swiftly enough to become law if they command a degree of support from the government of the day or, failing that, clear support from the individual legislators. Even with this support, limits on legislative time make it impractical to consider in great detail every possible aspect of a given legislative situation. Consider, for instance, a measure aimed at dealing with the humane slaughter of animals for human consumption. Some matters of general principle are best dealt with by the

legislature, for instance what the aim of the legislation should be, whether there should be an exception for kosher or halal slaughter, what powers should be given to the executive to enforce the law, and what punishments the courts should be empowered to give for failure to meet the standards of the measure. But should the national legislature debate and determine how much space a particular sort of animal should have while awaiting slaughter, or the details of hygiene procedures to prevent the spread of contamination, or the layout of forms applying for permits under the measure?

The jurisdictions under consideration generally see legislation as being a form of law that needs to be set down with some detail, although drafting tastes have experienced considerable change, and are not uniform even within the common law world. This is not necessarily a function that needs to be carried out solely by the national legislature, however, as it is possible to delegate the details of legislation to other bodies, or officials. Legislation produced in this way is an important legal source. In the United Kingdom, for instance, there are more than twenty-five pieces of delegated, or secondary, legislation for every piece of primary legislation passed by Parliament. Although similar in appearance to legislation proper, this secondary legislation has two significant differences. Firstly, drafting and enactment may well be detached from an open political process entirely, constituting more the administrative work of the government department responsible. Secondly, because the legislation is made under authority delegated from the national legislature, if the legislation is an abuse of that authority it may be declared invalid as falling outside the powers which had been delegated, which will often depend upon the exact terms of the grant of authority. This is the case even for New Zealand and the United Kingdom, which as I have said do not question the authority of primary legislation.

Because of the apparently self-contained nature of much legislation, it is easy to conclude enquiry into an area of law with the text of a statute or, at a slightly more sophisticated level, of the statute and any statutory instruments issued under it. This neglects a concept central to the understanding of legislation, that of statutory interpretation.

Let us take as an example a, now repealed, piece of English law dealing with membership of the House of Commons. The House of Commons (Clergy Disqualification) Act 1801 (UK) had been passed in response to the election of the Reverend Horne Tooke, an ordained priest of the Church of England and well-known radical. There was doubt as to whether it was appropriate for clergy of the Church of England to sit in the Commons, given their separate representation in Convocation and their spiritual role (Gay, 2001). Section one of the Act stated that: 'No person having been ordained to the office of priest or deacon or being a minister of the Church of Scotland is or shall be capable of being elected to serve in Parliament …'. If we leave the law concerning clerical membership of the House of Commons with this text, the law may appear straightforward. But although legislation is written in the general, it is applied in the particular, and seeking to apply such legislation to individual cases reveals the need to find extended meaning even in seemingly patent provisions.

In *In re MacManaway and In re the House of Commons (Clergy Disqualification) Act 1801* [1951] AC 161, PC (UK) a superior United Kingdom court, the Privy Council, was required to interpret this provision. In the case before them MacManaway had been ordained as a priest in the Church of Ireland, but had chosen to relinquish his rights as a priest in that Church. He was elected to the House of Commons. Could he take his seat? He was not a cleric of the Church of England, which was after all the particular problem that had inspired the legislation, but he had been ordained a priest. Moreover, he had undergone episcopal ordination. The Privy Council held that he was barred from the House of Commons by the Act, as it extended beyond priests of the Church of England to encompass all persons who had undergone episcopal ordination.

This is an important explanation of the provision, which would not have been obvious from looking at text of the Act. But it still leaves areas of uncertainty (see Edge, 2001). For instance, at the time of the 1801 Act the Church of Ireland had been part of the United Church of England and Ireland, and at the time of the decision in *MacManaway* it followed the Church of England in practice and doctrine. Might the provision only apply to clergy within a member of the Anglican Communion and ministers within the Church of Scotland? If it applies to every episcopal ordination, does it apply to every body with officials named as bishops, priests and deacons, or is it limited only to ordinations that would be recognised as such by the Church of England? If so, would a deacon of the Church of Jesus Christ of the Latter Day Saints be excluded from the House of Commons? Or does it apply to individuals who, in a sense moving beyond particular religious traditions, have been 'ordained' to a 'priesthood'? In that case, would it cover an Imam? If we throw in the fact that a special provision barred those who had taken holy orders in the Roman Catholic Church (Roman Catholic Relief Act 1829 s.9 (UK)), would that affect our interpretation of the section?

My example began with a judgement of an important court of the jurisdiction in question, and it is clear that the courts' pronouncements on the application of legislation to particular factual situations is of considerable importance. Although *MacManaway* did not resolve every point of interpretation of the 1801 provision, it does allow us to state with a high degree of confidence that the measure extended to priests of the Church of Ireland. Failure to make use of judicial glosses upon legislation is a common flaw in work by those from other disciplines seeking to make use of legal materials. It is easy, however, to give too much weight to the judicial context, and regard interpretation of statutes as a special judicial function, as the sole preserve of the courts.

Statutory interpretation is, rather, a fundamental and automatic function of every reader of a piece of legislation. A student or scholar seeking to understand the area must come to an interpretation of the legislation in their area of interest. A legal advisor seeking to guide their client so as to arrange their affairs in compliance with the law must interpret. An advocate in court seeking to defend their client in a criminal charge must interpret, and convince others of the validity of their interpretation. It is not possible to approach this source of law without at least a few ground rules on how to read statutes in the common law tradition.

It is easy to reach a very high degree of detail in the rules of statutory interpretation, so that it can appear a mechanistic process requiring only knowledge of the canons, presumptions, and the like of statutory interpretation and the application of the appropriate ones to the problem before the reader. Unfortunately, the principles enunciated by the courts as useful when interpreting legislation can be inconsistent – to take a proverbial analogy, he who hesitates is lost, but you should look before you leap. Do proverbs favour swift action or not? At the other extreme, it is easy to take the view that judges in particular are goal orientated, and will select whatever tools of interpretation are convenient to securing the result they favour in the case before them. Gall neatly resolves the two tensions in a way applicable to all the legal systems under discussion: '[t]he interpretation of statutory provisions is a somewhat subjective process. A judge may select a particular rule of statutory interpretation or use a particular aid to interpretation and decide not to be receptive to an alternative rule or aid in interpretation. Nonetheless, that subjective exercise must be conducted in the context of an objective search for legislative intention' (Gall, 1995 at 385).

Statutory interpretation by the student, scholar, or legal advisor may thus be considered as a two-stage process. To accurately state the law, we need to accurately state how a judge would interpret the statute. To accurately interpret the statute, the judge must determine the legislative intention of the maker of the provision. This is not the same as determining the actual intention of an individual drafter of the legislation, or (more difficult still) the collective intent of the legislative body who gave the provision legal effect. The judge should not make use of some special, or idiosyncratic, insight into what the legislature would really have wanted to have happened in the case before them, if only because this would render it very difficult for citizens to conform their behaviour to the law, as they would have no tolerably reliable way of predicting the way a judge would interpret the provision. Rather, it is the meaning which the legislature must have intended the words used in the measure as enacted to bear.

In determining the meaning of a provision, the judge is likely to feed the available information into one of three main models. Firstly, they may decide to give the words of the provision their 'literal meaning', which if plain and unambiguous should be taken to be their legal meaning, even if this results in manifest injustice. Although the idea of a literal meaning has come under increasing attack, it remains popular with some judicial interpreters of legislation. Secondly, applying the 'golden rule', they may follow this approach until it leads to a manifest absurdity or inconsistency, at which point they may modify the grammatical and ordinary sense of the words as necessary to avoid the absurdity. Thirdly, they may focus on the legislation as a measure intended to effect needed legal change, and consider what 'mischief' the legislation was meant to address. In doing so, they would consider the law before the provision, the mischief and defect which this law did not provide for, the remedy which the legislature resolved upon, and the true reason for the remedy. The judge should interpret the legislation to advance the policy of the provision by suppressing the mischief. A concrete example of these different approaches at work may be useful.

In *R v White* [2001] EWCA Crim 216, 1 WLR 1352, CA (UK) the defendant had called the victim 'an African bitch' during commission of a criminal offence, and was convicted of a racially aggravated form of that offence. The defendant was a black man, born in the West Indies, and he argued firstly that he could not be found guilty of the offence, as he was of the same racial group as the victim, and secondly that 'African' was not a racial term. The key provision talked of demonstrating towards the victim racial hostility based on the victim's membership of a racial group, and defined racial group as a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins (Crime and Disorder Act 1998 s.28 (UK)). How is the provision to be applied to this case?

On the first point, taking the literal rule we might conclude that nothing in the provision specifies that the defendant and the victim need to be of different racial groups, so that if the hostility is based on the victim's racial group, the defendant's racial group is immaterial. If we regarded this as an absurd result, we might apply the golden rule to interpret 'hostility based on the victim's membership' to exclude hostility shown by a member of that same group, whose animus must have arisen from some other characteristic, or from the conduct of the victim. If we preferred to take an approach based on the mischief the provision was intended to deal with we might reflect upon the string of racist crimes of violence which had inspired the legislation, and see it as aimed at racist crime directed against members of ethnic minority groups, rather than intra-communal violence and abuse.

On the second point, taking the literal rule we might be hard pushed to find African applied to any single group defined by common race, colour, nationality, ethnicity, or national origin, being more of a blanket term encompassing a broad range of all these characteristics. If we regarded this as an absurd result, we might prefer to interpret the term as referring to skin colour, and so bring it within the provisions. If we were concerned with the mischief of the provisions, which were aimed at racially motivated crime without necessarily endorsing a vision of different 'races', let alone a clear way of differentiating between them, we might also find African fell within the term.

The Court of Appeal took two different approaches to resolving these issues. On the first, that of intra-communal offending, Pill LJ very briefly dismissed the defendant's argument, seemingly on the basis that there was nothing in the literal meaning of the Act which excluded such hostility. On the second point, however, he took an approach much closer to the golden rule, or even the mischief based approach. In particular, he noted that 'given the statutory intention to be comprehensive, it would be surprising if describing a woman as a 'black bitch' would qualify on the grounds of colour, and 'Sierra Leonean bitch' on the grounds of nationality but to call her an 'African bitch' would fall outside the section' (ibid., at 1357-8).

As can be seen from this case, a variety of interpretative approaches may be taken even by the same judge. As may be expected, the emphasis on these three approaches differs both within national judiciaries, and between the six jurisdictions. Australia, for instance, has given a statutory preference to a mischief based approach (Acts Interpretation Act 1901 s.15AA as amended by the Statute

Law Revision Act 1981 s.115 (Aust.)). Whichever approach the judge takes to interpretation, they may have recourse to a considerable range of information in coming to their conclusion. In particular, it is important that the judge interprets the provision in question within its proper legal context, both extrinsically and intrinsically, by which I mean the context beyond the statute itself, and within the statute.

On the extrinsic context, some rules of interpretation are generally applicable within a jurisdiction, and will be relevant to interpreting any statute. For instance New Zealand legislation gives a set of default interpretations of common terms, and lays out general rules of construction such as the appropriateness of using the preamble to an Act to assist in explaining its purport and object (Acts Interpretation Act 1924 s.4, 5(2) (NZ)). Similarly, there may be judge crafted presumptions as to the meaning of legislation, which particular provisions would need to be displaced by strong implication or perhaps even explicit terms. For instance, in Australia there is a presumption that legislation does not intend to allow a person to take advantage of his or her own wrong (*Holden v Nuttall* [1945] VR 171 (Aust.)); and in the United Kingdom a presumption against giving statutes retroactive effect (*Re Athlumney* [1898] 2 QB 547 (UK)). Additionally, the judge will take account of the body of law the statute engages with, including existing statutes and judicial decisions. Clearly, this is very important where the statute use technical terms that already bear a particular legal meaning, but it is also significant to show the mischief being addressed by the measure. The courts may also take some account of the debates of the legislature that created the measure, although this is not without dangers, and is not always considered appropriate within our jurisdictions. On the intrinsic context, a key point is that the statute should be interpreted as a whole, and that every part of the statutory text bears some meaning. Thus, the court may have regard to the preamble of the Act, and its structure and use of headings, as well as the interaction of a proposed interpretation with the rest of the provision.

Decisions of the Superior Courts

It will be clear from the discussion above that judges have considerable power to determine the content of the law. In most of the jurisdictions to be discussed, the judges have the power to interpret the constitution in a way that makes particular legislation unconstitutional, and so ineffectual. Additionally, with their power to interpret and apply legislation to the case before them, the judges have considerable power to fine tune, perhaps even to alter, the impact of legislation. This raises an important issue – how is this judicial power to be restrained?

Here, legal systems are faced with two competing pressures. On the one hand, as I mentioned above, citizens have an interest in consistent application of a body of law, so that uncertainty in the law is itself an evil against public policy (*Barnett v Harrison* [1976] 2 SCR 531 (Can.)). As one of the oldest sources of law in the Isle of Man states, it is important 'that one Doome or judgement be not given at one time, and another Tyme contrary' (Customary Laws 1422 s.32-33 (Isle of Man)). This would draw legal systems towards a position where, once a judge had

interpreted the Constitution, or a statute, that interpretation would be binding upon all other judges considering the same point. This would, however, place considerable lawmaking power in the hands of 'a small group of men who temporarily occupy high office' (*Florida Department of Health v Florida Nursing Home*, 450 US 147 (1981) (US)). It could also lead to a loss of flexibility, with weak interpretations of the law, or interpretations which failed to consider properly particularly factual situations, becoming fixed.

The solution adopted in our jurisdictions is to allow at least some judges some power to make authoritative rulings on the Constitution and legislation, but to temper this by the power of later judges to refine, or even reject, the interpretation. This combination allows 'a blending of the value systems of both past and present judges, leaving room for both continuity and change' (Maltz, 1989). An example might be useful.

With the development of rights, and benefits, related to employment in the English jurisdiction the courts have on a number of occasions addressed the question of whether a cleric or minister was an employee of their church or other religious organisation (see Edge, 2000). The first case where this arose concerned the position of a curate of the Church of England (*In re National Insurance Act 1911, On Employment of Church of England Curates* [1912] 2 Ch. 563 (UK)). This was only a decision of a single judge sitting in the lowest of the English superior courts, but as the first decision on the point it was clearly of general importance. The judge, Parker J, found that Church of England curates were holders of ecclesiastical office, who were not controlled by their vicar, and who had no contract with anyone, let alone a contract of employment. Accordingly, for the purposes of the social security legislation under consideration, the curate was not an employee.

Immediately after the decision, we could imagine it being used in a number of ways – its use retrospectively determining its meaning. If a later court read the case as turning on the emphasis on ecclesiastical office then, because of the special status of the Church of England in English law, we would not expect to see it applied to any other religious community. If the court read the case as turning on the absence of contract, however, we might expect to see it applied to members of other religious communities where their position was analogous to that of a Church of England curate. In the absence of other cases surrounding the precedent in which we are interested it is difficult to indicate its meaning. A good analogy might be a word in a sentence – there are more meanings to 'right' in the abstract than in the sentence 'Turn right at the traffic lights'. As cases develop, however, the meaning of the earlier cases in the sequence becomes refined – although this is not to say that the judge in the earlier case intended, or would be in agreement with, the meaning their words are found to bear.

In our example, the courts were later required to consider whether an officer in the Salvation Army was an employee (*Rogers v Booth* [1937] 2 All ER 751 (UK)). The case reached the Court of Appeal, a court responsible for reviewing and if necessary correcting decisions of first instance. As we will see, such courts have especial significance in the generation of binding precedents. The officer wished to

show that she was classed as an employee of the Salvation Army in order to claim benefits for an injury sustained during her work for them, and argued that, unlike the *Curate's Case*, her relationship with the Salvation Army was governed by contract, so that she was an employee. In other words, she sought to limit *Curate's Case* to ecclesiastical officers only. She enjoyed only limited success, with the Court of Appeal finding that her agreement with the Salvation Army was not intended to be legally binding, because of its details. Again, *Rogers v Booth* is capable of being read in at least two different ways – narrowly, by indicating that on the particular facts before the Court of Appeal the relationship was not one which the parties intended to be legally binding, or broadly, by indicating that relationships between ministers and churches (both terms being very broadly defined) were rarely, or even never, intended to be legally binding because of their nature.

Rogers v Booth was interpreted by a judicial body below the level of the superior courts as turning on the spiritual nature of the relationship (*Barthorpe v Exeter Diocesan Board of Finance* [1979] ICR 900 (UK)), but later cases show that the better reading is that each case must be judged on its own facts (*President of the Methodist Conference v Parfitt* [1983] 3 All ER 747 (UK)), although there may be a presumption that in this sort of spiritual relationship the parties did not intend to create a legally binding contract (*Satokh Singh v Guru Nanak Gurdwara* [1990] ICR 309 (UK)). Thus, later cases collapsed the range of possible later meanings.

Although the above illustrates the way in which precedent works over time to define the law, it is a more difficult task to explain the exact mechanisms by which this process functions. As with statutory interpretation, neither the extremes of absolute judicial discretion, nor that of mechanistic application of clear rules, explain the process by which judges consider themselves bound by earlier precedents. Additionally, and again as with statutory interpretation, the jurisdictions in this study vary considerably as to the weight they give to earlier judicial decisions. Nonetheless, a few rules of thumb will be useful.

Firstly, the position of the court which decided the case in the national hierarchy is crucial. Below a certain level, courts are not capable of binding any later judge. In England, for example, although there are judicial officers below the High Court, for instance stipendiary magistrates who have a varied jurisdiction including minor criminal offences, their decisions do not create binding precedents. Lower courts are required to follow the decisions of the courts above them. This may be because the higher courts are assumed to give more accurate judgements because of the greater experience and expertise of the appellate judiciary, or because higher courts can reverse the judgements of lower courts but not vice versa. In the English jurisdiction, for instance, the House of Lords is the final court, and so is at the top of the hierarchy. Below the House of Lords is the Court of Appeal, below that court is the High Court. This raises a question of principle. If courts are required to follow decisions made by courts above them, and courts below them are required to follow their decisions, what of decisions made at the same level? This is particularly pressing in the highest court of each jurisdiction, because if that court is always bound by its previous decisions it may lead to excessive rigidity in the

law, while if it regards itself as totally free to depart from these earlier precedents it may lead to excessive uncertainty (see Murphy and Rueter, 1981). In the jurisdictions under discussion, the highest courts are increasingly willing to depart from prior decisions where necessary (Practice Direction 1966 (UK); *Harris v Minister of the Interior*, 1952 (2) SA 471 (SA); Gall, 1995 at 350–3).

Secondly, it is the authority of the court, not the individual judge, which gives a precedent its binding power. This is particularly important when it is considered that appellate courts tend to consist of multiple judges, while courts of first instance have only a single judge. The extra consideration of the case may lead to better results, but it can also lead to differing judgements. At its most obvious, a court with three judges may divide with one judge finding for the appellant, and the other two judges finding for the respondent. A statement of law based on the findings of the minority rather than the majority cannot refer to binding precedent for its authority. More subtly, judges can reach the same decisions by very different routes. Consider again the finding in *Rogers v Booth*, which, it will be recalled, was in the Court of Appeal. What if of the three judges one had found that there was an employment relationship on the grounds that there existed a contract; one found that there was no employment relationship because spiritual offices were intrinsically incapable of constituting employment; and the third judge found that there was no employment relationship because there existed no contract? The authority of the court would be behind the outcome in the case before them, finding that there was no employment relationship (2:1, judges 2 and 3 against judge 1). It would also be behind the proposition that the existence of a contract was determinative of the employment relationship even for spiritual officers (2:1, but this time with judges 1 and 3 against judge 2). If later decisions focus on the more general principle, there may still be a difference of emphasis between judge 1 and judge 3, making the choice of which judge to quote when referring to the majority of the court crucial.

Thirdly, not every part of a court's judgement acts to bind later courts, even those below it in the hierarchy. Here there is an important distinction between ratio decidendi and obiter dicta. Although commonly referred to as ratio, ratio decidendi is not to be confused with the 2:1 majority discussed above. Rather, it constitutes the elements of the decision which had to be resolved in order for the court to make the ruling that it did. Everything else the judges may say in the process of giving their judgement is obiter dicta, and is not capable of binding any other court. This is clearly a significant distinction, and unfortunately not one which is always easy to identify in particular cases. Consider *MacManaway*, discussed above in relation to statutory interpretation. The ratio decidendi of that case may be found in the propositions that (a) the 1801 Act applies to all who have received Episcopal ordination; (b) priests in the Church of Ireland receive Episcopal ordination; therefore, (c) the 1801 Act applied to MacManaway, who had been made a priest in the Church of Ireland. But is this not a broader finding than the judges had to make in order to reach their decision? Could we not reformulate it more narrowly as (a) the 1801 Act applies to all who have received Episcopal ordination recognised by the Church of England; (b) ordination of priests in the Church of

Ireland is recognised by the Church of England; therefore (c) the 1801 Act applied to Macmanaway? Or even as (a) the 1801 Act applies to ordinations within the Anglican Communion; (b) the Church of Ireland is within the Anglican Communion; therefore (c) the Act applied to MacManaway? All three formulations produce the same result in the case before the court, but have different implications for the statement of law upon which future courts may wish to draw.

The distinction between ratio and obiter has considerable play in it, and is one way in which judges can escape from previous precedents they regard as undesirable. The narrower a ratio a decision is later given, the narrower its reach as a binding precedent. We can see this in the process of distinguishing, which is sufficiently important to merit separate discussion in a moment. Nonetheless, it seems fundamentally sound. Judges do not, on the whole, concern themselves with a sweeping philosophical discussion of every point that may be of interest in a general area raised by a particular dispute. Rather, legal professionals have deployed their arguments in order to win the case currently before the court, and these are the arguments the court is required to resolve. We would expect the time and attention the courts give to these arguments to be very much greater than an issue which does not arise in the case before them, and in which counsel for neither side, nor even the judge, has any interest in.

Fourthly, earlier decisions are only binding in so far as they are applicable to the facts in the current case. A decision that Christianity was a religion is not, necessarily, decisive of the question as to whether Islam is a religion. A judge who wished to avoid the impact of the earlier decision might find that the material facts in the earlier case included that the belief system in question was based on the Old and New Testament; a judge who wished to make use of it might prefer to find that the material facts included monotheism involving worship of a Supreme being. The first judge would distinguish the earlier decision from the case before them, while the second judge would not. Although this is also a reading of the ratio decidendi of the case (with the first judge reading it narrowly, the second more broadly) it is such a common way for judges to deal with earlier precedents that it may usefully be regarded as a separate factor to take into account in considering a precedent.

So far, for simplicity, we have talked about judicial lawmaking purely in terms of their interpreting other sources of law. Additionally, however, there exists a body of customary law which is to be found exclusively in the decisions of the courts, and which does not rely upon the interpretation of particular statutes for its authority. This customary law, or common law, has a very different texture from legislation, and is worth discussing briefly. In particular, as the common law it has a form derived mainly from traditions in English law, although it has come to be understood and developed in different ways in the United States, Australia, New Zealand, and Canada. South Africa also partakes of a different legal tradition, the civilian tradition of continental Europe, making the development of precedent used in South Africa more complex than the other jurisdictions (see further Hahlo and Kahn, 1968 at 237–60; Zimmerman and Visser, 1996b; du Plessis and Kok, 1989 at 6–26).

The common law developed in England very gradually, over a very long period. Common law legal rules derive their authority, not from legislation, but from statements of principle in earlier court cases. Before the Norman Conquest, it could scarcely be said that there was such a thing as English law. The population was small, settlements widely scattered, and travel difficult. Administration of justice tended to be local. Each local community would have its own court in which, for the most part, local customs would be applied. These customs, the beginnings of legal rules, varied considerably from one area to another. The Norman Conquest had little immediate impact. William I promised that the English should keep their rights and their law, which meant their customary law. At the same time, however, the Normans developed a strong central government and over the following 200 years greatly increased control over the administration of the law. This was a gradual process, bringing with it the decline of local courts. Central courts, sitting permanently at Westminster, developed with jurisdiction over legal disputes. At the same time, the practice grew up of sending royal judges to visit most parts of the country so as to establish closer royal control of the administration of justice.

These new institutions, particularly the travelling judges, brought with them an important change in the law itself, by unifying local customs. As they went around the country on circuit, the judges tended to select and apply certain customary rules in all cases, rather than enquire into local customs in every case. This process was assisted by the King who sometimes created new legal rules that were to apply nationally, and by the central courts which had nationwide jurisdiction. The different local customs were therefore replaced gradually by a body of rules that applied throughout the whole country, and were known therefore as the common law. This process was substantially completed by the end of the thirteenth century. The formation of the common law took place when there were few statutes or other forms of written law. The judges accordingly looked to previous decisions in order to maintain consistency. This was the beginning of the emergence of the doctrine of precedent in the common law courts, as discussed above.

With the expansion of the English state into other territories, the common law too was exported. Thus, it can be found in most Canadian jurisdictions; most jurisdictions of the United States; New Zealand; and Australia. All of these jurisdictions had a particular, colonial, inheritance from the English legal system. In South Africa, although parts of the territory shared this inheritance, others had an established legal system based on Romano-Dutch law, rather than this common law tradition. With the incorporation of the territories into the British Empire, and eventually the Union of South Africa, the legal system as a whole became a mixed one, with strong elements of the common law tradition (Zimmerman and Visser, 1996a).

Academic Commentary and Other Secondary Sources

So far we have discussed the primary sources of law, by which I mean texts which are themselves legal texts, and have the authority of State power to enforce them.

In this section I will briefly consider the role that secondary sources, including academic commentary, have to play in developing the law.

There are an enormous variety of secondary materials on law, written with very different readerships and for very different purposes. Consider, for instance, the question of employment of clergy by churches, touched on in the section above. We might expect to see a discussion of the issue in a bulletin of current developments intended for human resource managers; updates to a loose-leaf encyclopedia for practicing employment lawyers; undergraduate textbooks introducing law students to employment law; monographs dealing at length with a particular theoretical perspective on employment law or Church/State relations; collections of cases and materials on employment law (such cases and materials collections function as readers in other disciplines); and articles in general academic journals, or in specialist journals dealing with employment law or law and religion.

In sharp contrast to the sources discussed above, secondary sources can only ever be of persuasive value, and this value will depend upon the source in question. As Farnsworth puts it in relation to the United States: 'the effect of secondary authority depends more upon its intrinsic worth and upon the court's esteem for the particular writer than upon any veneration of scholars in general' (Farnsworth, 1996 at 83). As may be anticipated, the courts give relatively little weight to secondary sources whose primary purpose is pedagogical or summative, particularly where the intended readership are not legal professionals or academics.

Although the common law systems have not given as much weight to academic commentary as continental systems, more advanced commentary may sometimes be made use of by the courts, with or without acknowledgement, in discharging their duties as outlined in the preceding sections (see Bennion, 1997 at 17–22). In the United States, for instance, a series of academic commentaries intended to systematically restate the legal rules and principles in a number of areas, the American Law Institute Restatements, are regularly cited by the courts (see Clarke and Ansay, 1992 at 45). Some treatises have developed a considerable de facto authority, both as summaries of the established law and statements of the likely content of the law in areas of uncertainty. In English criminal law, for instance, the treatise on criminal law originally authored by Smith and Hogan is frequently cited by the higher courts for both purposes. More specific or speculative areas, or very recent developments, may be addressed through journal articles in specialist legal journals, which are apt to be more tightly focused and argumentative than full texts.

Soft Law and Law in Practice

As well as these sources of law, there is much to be learned from documents which are taken as a strong source of institutional policy, or have been used by the courts to clarify terms used by a formal source of law. For instance, in the English jurisdiction the courts will have recourse to the Highway Code, a code of practice for road users, in deciding whether a criminal offence such as careless driving has

been committed. The Highway Code is not a legal document, but rather a source of 'soft law', which can be given de facto, but not de jure, power by a real source of law. In an example more directly relevant to our discussion, in England many charities formed for religious purposes are registered as charities for the advancement of religion. There are many ambiguities in this category of charity. The statutory body responsible for registration, the Charity Commission, issues guidance to prospective charities, and sometimes reports the way it has interpreted the legislation and cases in the area (see Edge and Loughrey, 2001).

As well as these sources of soft law, considerable attention has also been focused by legal scholars on how rules of law are actually used in practice. At its simplest, there may be such a significant difference between what the sources of law say, and how legal actors actually operate, as to render a statement based simply on the sources impoverished. A useful example may be drawn from a case before the European Court of Human Rights.

In *Manoussakis and Others v* Greece (1996) 23 EHRR 397 (ECHR) the applicants had been prosecuted for establishing and operating a place of worship without first registering it. The court came to the conclusion that the registration requirement per se was not a contravention, but that the way in which it was applied was. In particular, the legislation made it possible to delay without actually rejecting an application, and the Greek authorities had 'tended to use the possibilities afforded by the above-mentioned provisions to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-orthodox movements, in particular Jehovah's Witnesses' (ibid., at para. 48).

To address the question which heads this section, a legal argument is an argument based upon the use of sources of law according to the legal methodologies outlined above. These can be ranked in a hierarchy from constitutions, through primary and secondary legislation and decisions of the superior courts to soft law and academic commentary.

What is Religion?

In the previous section, because of the intended readership of this text, it was necessary to go into the definition of law at some length. Again based on the intended readership, a general overview of the different ways in which religion can be defined will be omitted. Instead, in this section I wish to consider legal definitions of religion, and the working definition of religion upon which this text is based.

As will emerge from the body of this text, to refer to 'the' legal definition of religion can be misleading. Not only have different jurisdictions in this text developed different definitions, albeit influenced by common traditions and at times making use of definitions developed elsewhere, but even within a single legal system 'religion' may bear a variety of meanings. In the case of the US, Canada, South Africa, and to a lesser extent Australia, there are provisions in the

national constitutions that require a meaning to be given to 'religion'. Given the overarching impact of constitutional rules, it is unsurprising to find that these have been immensely influential within their jurisdiction. But consider the position of New Zealand and the UK, neither of which have much experience of such an overarching religious rights guarantee. Where do we find 'the' English law definition of religion? In fact, there is no such single definition – rather a body of related definitions which depend upon the context in which they occur. Given the rules of interpretation discussed above there is no reason why a statute intended to protect individuals from being victimised because of their membership of a religious group should be interpreted in exactly the same sense as a statute intended to provide for fiscal benefits from the State for bodies doing socially useful work.

Although the details of each jurisdiction may usefully be dealt with in the next chapter, common problems that any such definition must cope with can be identified here. Additionally, as this is a text on religion and law, it is important that we come to some working definition of religion. As Johnson observed, 'How can we say anything about religion if we do not know what it is?' (Johnson, 1984 at 839). Even if we take the view that law, and legal discussion, should not say anything about religion, it still has much to say about the interaction of law and religion. For this discussion to occur, it is necessary to establish the characteristics of the social phenomena under discussion before we can examine their implications. In particular, problems could arise if we did not have an explicit definition of religion underpinning this text – not least that we may inadvertently be considering different issues, through differing but unarticulated conceptions of the term. Thus, a working provisional definition of religion is necessary for this text.

For those involved in the making of law, however, there may be notable advantages in not defining religion. In the legislative process, which it will be recalled may explicitly accommodate political debate, silence on definition of religious and spiritual matters may lead to what appears to be a consensus. A participant in the drafting of the Education Act 1944 (UK) noted that: '[t]he churches were in such a state at the time [that] we thought if we used the word "spiritual" they might agree to that because they didn't know what it was. They all had very clear ideas about what religion was, and they all knew that they didn't agree with anyone else's definition of it' (in Hay and Nye, 1998 at 5).

More broadly, a number of commentators have argued against a legal definition of religion (for example, Berg, 1997; Freeman, 1983). Cumper has argued that the absence of a definition of religion, at least at an international level, has three main advantages. Firstly, it avoids the technically very difficult task of drafting a definition which is flexible enough to satisfy a broad cross-section of world religions while precise enough for practical application to specific cases. Secondly, the absence of a definition means that those bound by a guarantee of religious rights cannot give a restrictive definition to religion, a particular danger for minority religions whose characteristics may not match any general definition. Thirdly, the variety of conscientious, religious, and spiritual beliefs would present problems to a definition based on traditional, Western, views of religion:

> [t]he 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 (Cumper, 1995 at 359)

It is undeniable that the task of defining religion for legal purposes is extremely difficult. Numerous court systems have found creating such a definition problematic, even for overarching religious liberty guarantees. Neither the organs of the European Convention on Human Rights (Evans, 1999), nor the International Covenant on Civil and Political Rights (Cumper, 1995) have developed a detailed definition. The issue has been left open by the Supreme Court of Canada (Horwitz, 1996). 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 (see further McConnell, 1990; Frame, 1992; Ricks, 1993a).

There are difficulties in defining religion which are common to any consideration of the term which is not, itself, based in the discipline of an exclusive religion (see Park, 1994 at 32–9). A legal definition exists primarily to achieve one or more of the functions of law discussed above, in other words for use by actors in the legal system to achieve their particular goals. This explicitly utilitarian role for a legal definition of religion has a number of important implications.

Firstly, the definition must be clear enough to allow the resolution of disputes when they occur, and preferably to allow citizens to plan their conduct in the knowledge of whether or not their activities will be classed as religious ones.

Secondly, if we focus on legal definitions as tools by which actors achieve their aims, there is a danger either that a particular definition might be abused by those seeking a goal, or that the public might perceive that such abuse is occurring (Hall, 1996 at 9). This is particularly the case where there are fears that insincere claims to religious status are being made in order to secure a secular benefit that would be desirable independent of any religious context. Numerous examples of such benefits could be given. One commentator on the United States experiment with the prohibition of recreational alcohol, for example, recounts an anecdote concerning Jewish communities who had been granted a special exemption for their religious observances: 'At the outset of prohibition, for example, the congregation of Los Angeles' Talmud Torah Synagogue numbered 180. Within fourteen months almost 1000 new members had joined, many of them impelled, it would seem, by a desire less than spiritual. In the spring of 1921 the majority voted to oust their Rabbi Gardner, not, according to him, 'for any violation of [Prohibition], but quite the reverse' (Kobler, 1974 at 250–1).

Although in the abstract individuals not entitled to such an exemption from generally applicable legal rules might feel resentment, this may be exacerbated if the non-exempt individual suffers a loss thereby. In the context of the workplace, for instance, in one case Lord Denning MR expressed concern that: 'If it should

happen that, in the name of religious freedom, [a worker] were given special privileges or advantages, it would provoke discontent, and even resentment among those with whom they work. As indeed it has done in this case' (*Ahmed v ILEA* [1977] ICR 491 (UK)). In relation to custody disputes Mumford has warned that 'by putting too much emphasis on freedom of religion, the parent who makes child-rearing decisions motivated by reasons of faith ... may be seen to have an advantage in cases of dispute over the parent who makes different decisions for secular reasons' (Mumford, 1998 at 135). Consideration of religious interests may also lead to individuals or groups being given a role in public policy, and thus concerns that religious claims are being used insincerely to gain such a voice. In South Australia, the federal Minister responsible for aboriginal affairs had halted construction of a bridge, on the basis that it compromised the 'secret women's business' of members of the Ngarrindjeri nation. A Royal Commission was required to determine whether this was a sincere claim or a fabrication on the part of those who claimed the existence of the secret religious practice (*ALRM v South Australia* [1995] EOC 92-759 (Aust.)).

The point here is not that religious interests should be ignored because of concerns that any special consideration will be abused, or because the majority population might conclude that they are being abused. Most legal rules are capable of some level of abuse, or of portrayal as being abused, especially when we factor in the possibility of a court coming to a factually incorrect decision. Rather, it is important to acknowledge that in many instances the recognition of something as religious may involve some social cost, or cost incurred by another individual (Lipson, 2000). A proper definition of religion provides the basis for justification, or criticism, of the incurring of these costs.

If the nature of law poses especial problems for defining religion, changes in the religious make up of the jurisdictions discussed in this text sharpen the difficulties. Some spiritualities pose especial challenges to traditional views of what constitutes a religion, particularly those which, in French's taxonomy, are postmodern as opposed to traditional or modern religions (French, 1999). Horwitz suggests that there is a 'possibility that individual judges will craft biased definitions of religion that reflect a majoritarian scepticism about the claims of religious adherents whose beliefs and practices do not resemble the tenets of mainstream religions' (Horwitz, 1996). We do not need to accept that judges and other decision makers would do this maliciously, or even consciously, to recognise the possibilities for this sort of outcome where they are asked to protect religious rights without a definition which leads them to reflect on the variety of religious experience.

In relation to 'religion' as a term in legal discourse, its different definitions will be explored where relevant in the text, beginning in the next chapter. These specific definitions aside, I would suggest that, in order for the discussion in this text to proceed, there needs to be some working definition of 'religion' and related terms. Such a working definition is not being put forward as applicable to every legal source that uses the word 'religious'.

A variety of strategies have been adopted by writers and courts seeking to define

religion. The range of possible approaches may usefully be illustrated by considering the decision of the High Court of Australia in *The Church of the New Faith v The Commissioner of Payroll Tax* [1982–3] 154 CLR 120 (Aust.). In that case, the High Court had to consider whether Scientology was a religion for the purposes of the Victorian taxation legislation. As the highest appellate court in Australia, cases before the High Court are decided by a number of judges. In this case, two different approaches to the definition of religion were developed by two pairs of judges. Mason ACJ and Brennan J favoured a definition based on belief in a supernatural being, thing, or principle coupled with acceptance of canons of conduct in order to give effect to that belief. They accepted that there were different intensities of belief or of acceptance of canons of conduct among religions, but found that such differing emphases were not relevant to the question of whether the system was a religion. Wilson and Deane JJ, on the other hand, found that there was no single characteristic which could be used as a legal touchstone for inclusion or exclusion in the definition of religion. Instead, they preferred to consider the most important of the factors which could go to answering the question, factors which 'must, in the view we take, be derived by empirical observation of accepted religions' (ibid., at 173). In this case, they considered particularly important indicia were belief in the supernatural, ideas relating to man's nature and place in the universe and his relation to things supernatural, standards and practices of supernatural significance, and the existence of an identifiable group which sees themselves as a religious one.

Both judgements reject endorsing the metaphysical truth of some systems, and lack of truth of others, as a definitional strategy. This approach would cause serious problems for a pluralist legal system such as Australia (see further Stark, 1999). Similarly, both judgements retain the authority of the court to determine whether a particular system is religious, rather than rely upon self-identification. To allow pure self-definition, as opposed to recognising the importance of self-conceptualisation in a test, would fail to sufficiently protect the interests of those not seeking such an identification (see Edge, 1996). They differ, however, in the way in which the court is to make this determination across multiple religious systems.

Wilson and Deane JJ draw a fundamentally unreasoned analogy with systems already recognised as religious. They do this, not by direct reference to such religions, but by the reliance they would place upon characteristics derived from the observation of accepted religions. Although this would bring in a proper consideration of the scope and variety of religious experiences and practices, assuming 'accepted' was interpreted sufficiently broadly, it does require the judges to draw an analogy without any understanding of why the analogy is to be drawn. If we say that X is like Y, we implicitly define the commonality. For instance, a statement that a cat is 'like' a dog will have one meaning to a speaker discussing the admirable qualities of companion animals, and quite a different one for a wide ranging omnivore discussing the tastes of different meat animals. Similarly, for a judge to rule that Scientology is like Catholicism, that judge must have determined the legally relevant characteristics that the two systems have in common.

Determining which characteristic is legally relevant is not a matter of observation, but of analysis.

In exploring reasons why religion matters to law, above, I discussed a number of characteristics. Many of these are shared with other types of interest. For instance, if religion is important because of its impact on minority groups in a particular society, so is literature, music and song. Thus, a high level of impact on minority groups could only be a determining characteristic of religion if we wished to include these other activities. The problem of authority, however, is not generally applicable, and will be used here to develop a working definition of religion.

The core concept of freedom of religion, and thus of a goal-orientated definition of religion, seems to me to arise not from substantive issues such as individual autonomy, public order and non-discrimination, but from the special procedural problem posed by statements concerning metaphysical reality (for a similar conclusion reached by a different route, see Macklem, 2000). I have already suggested that defining religion is difficult because of the pluralist nature of the legal orders under discussion. This pluralist nature also provides the key to producing a definition. The difficulty the legal system has with defining religion is that the modern legal order renounces the capacity to adjudicate statements about metaphysical reality, while it retains jurisdiction over other statements about reality. If this renunciation is the central concept of religious freedom, then freedom of religion is intended primarily to protect statements about metaphysical reality, and beliefs and practices flowing from such statements, because such statements cannot be properly evaluated by the legal order – particularly where the statements are non-rational (see Hall, 1996 at 11; Feofanov, 1994). In effect, the legal order implements a Kantian ideal in seeking to act justly where all individual positions are unknown, although it may be argued that a 'theory that is totally "fair" to everyone of any worldview remains a mirage' (Ahdar, 2000 at 9).

A definition of religion based on metaphysical claims must be defended against a number of important criticisms. Firstly, it may be argued that it reinforces a particular worldview, where it is meaningful to distinguish between metaphysical and non-metaphysical reality. In doing so, we import a tenet of particular belief systems into a statement intended to be of general application across belief systems. There is considerable strength in this criticism. From the perspective of a believer in particular phenomena, characterising them as distinct from other phenomena may be inappropriate. The issue is, however, not whether the individual believes the statement is on a par with statements concerning, for instance, the freshness of a pint of milk, but whether the court denies the statement such a character, in order to renounce jurisdiction. This emphasis on the role of the courts, rather than on the ability of science to address particular concerns, avoids some of the difficulties posed by distinguishing between scientific statements, social science statements, value judgements and religious beliefs (see Clements, 1989).

Secondly, it may be argued the stance excludes atheists and agnostics from the protection of freedom of religion. This is to mistake my position – a statement about metaphysical reality is different from a statement predicated upon the

existence of that metaphysical reality. An atheist who argues that there is no non-material reality makes as firm a statement about a characteristic of metaphysical reality as does an individual who argues that metaphysical reality emanates from a single divine being. The definition does, however, exclude religious individuals and communities whose basis is orthopraxy, rather than orthodoxy. Because of the central place given to 'belief' in the international and domestic definitions of religion for legal purposes discussed in the next chapter, this seems a necessary compromise for ease of exposition. It is, however, a limitation worth making explicit here.

Thirdly, it may be argued that this very broad criterion will allow any claim to be presented as a religious claim. The point here is that the statement must be concerning metaphysical reality, rather than occur in a context where such statements have been made. For instance, a statement that giving a child a life saving blood transfusion will result in their eternal damnation is a statement about metaphysical reality; a statement that such a transfusion will cause an allergic reaction and the death of the child is not, even if it forms a tenet of a broader system within which metaphysical statements arise. As Frame notes:

> [consider a situation where] someone today claimed to believe that beings from Mars, with greater intelligence and power than us, are living, say on Mount Saint Helens. If she claimed that such beings have 'supernatural' powers, then such powers are beyond the physical laws investigatable by the material sciences and the belief would be religious. If, instead, the beings are alleged to be merely more highly developed material creatures, they would be within the range of investigation by the material sciences and beliefs about them would be entitled to no special preference over other scientifically accessible beliefs. (Frame, 1992 at 850)

Fifthly, this working definition does not seek to explain why the court renounces jurisdiction in these areas, yet it retains it in others. The ability of the court to determine any issue involving values, or indeed any issue at all, has become contentious (for example, Sapir, 1999), but the courts remain willing to act in these areas. Consider, for instance, the determination of the best interests of the child, discussed above.

A final point to make in developing this definition is that a particular level of development, comprehensiveness, antiquity, or distribution is not required. In particular, a statement about metaphysical reality remains such whatever view one may take of its intellectual merits and whether it occurs as part of a wider, consistent belief system, or in isolation, or in seeming conflict with other such statements the individual may assert. It might be argued that by rejecting these elements the focus of this text is not, in fact, upon religion at all. Certainly, this approach is far removed from that of, for instance, Durkheim, who defined religion as: 'a unified system of beliefs and practices relative to sacred things, that is to say things set apart and forbidden, beliefs and practices which unite into one single moral community, called a Church, all those who adhere to them' (Durkheim, 1915 at 47). It might be argued that by rejecting these elements the focus of this text is spirituality rather than religion. If this is a valid distinction, I would argue

that the individualistic structure of international human rights guarantees, including those of religion, emphasises spirituality, but within the terminology of religion.

Approaching the Literature

In this text, compared with a purely legal one, I make extensive use of the secondary literature on law and religion. In part this is because of the territorial scope of some of the discussion that follows, and the limitations of my own expertise. Perhaps more cogently, secondary materials tend to be more easily accessible, and less problematic, for readers from other disciplines. The discussion of primary sources earlier in this chapter was necessary to establish an understanding of the primary sources of law – essential to understanding any legal discussion – but in practice most readers with a focused interest in the law will go initially to the secondary literature and only later, if at all, to the primary materials. In this section, I will introduce some of the different categories of literature relevant to the study of law and religion. Bearing these in mind may make use of the literature a little easier. In particular, the reader new to legal literature may wish to consciously identify their reading by reference to methodology, territory, topic, and readership in evaluating its usefulness for their purposes.

Methodology

Earlier in this chapter I suggested that there was a distinction between a discussion about law, and a legal discussion. This suggests one methodological distinction, based on how far the writer accepts and works within a legal argument, and how far they look to other discourses to inform, or even drive, their discussion. At one extreme, we might find a purely technical reflection on the proper understanding of a particular legal provision. For instance, Barber's discussion of outrageous behaviour in Anglican places of worship is concerned almost exclusively with the correct interpretation of the relevant statutory provisions, with his evaluation of the provisions drawing exclusively upon legal sources and legal values (Barber, 1996). Further along, we might find a predominantly technical discussion of what the law is combined with an analysis of whether that is appropriate based on some broader value such as dignity or equality, or justice. For instance, Lupu in his study of exempting religious organisations from non-discrimination effectively evaluates the law against 'norms of religious liberty and associational freedom' (Lupu, 1987 at 395). At perhaps the furthest extreme, we might find a discussion which briefly, and uncritically, gives a simple statement of the law before moving on to the centre of the discussion based on some other approach. For instance, Unsworth's discussion of blasphemy in English law deals relatively concisely with what the law is, in favour of a much more broadly based concern with the blasphemy controversy as 'a commentary on the relationship between law and culture in Britain at the end of the twentieth century, and as symptomatic of some of the

pivotal conflicts which are characteristic of late modern societies' (Unsworth, 1995 at 658).

A further useful distinction may be based on the source of any non-legal discourses – in the context of a multidisciplinary work, which disciplines are being combined with legal argument? Multidisciplinary approaches to law are increasingly common, and in his recent review of United Kingdom scholarship Bradney argues for such an approach, particularly in relation to scholarship from political and religious studies (Bradney, 2001). Within law and religion we can find perspectives drawn from sociology, politics, religious studies, theology, and philosophy. In some cases, the combination of disciplines has become so well established within legal scholarship as to constitute a subdiscipline in itself – so approaching law from a philosophical stance is a substantial part of jurisprudential analysis; while taking a stance based on the empirical traditions of the social sciences is a substantial part of sociolegal scholarship.

Territorial Scope

Perhaps a more pragmatic categorization is by territorial scope. Some legal scholarship is explicitly unconcerned with particular territories. For instance, Macklem discusses justifications of securing freedom of religion without siting that freedom in any particular territory (Macklem, 2000). Undoubtedly his discussion is most applicable to discourses based on particular assumptions, and emerges from a broadly Western/United States frame, but there is nothing in his arguments which seeks to impose territorial limits to the conclusion. This may seem a commonplace, until it is recalled that law can, and frequently does, differ from country to country. Any assertion I may care to make about the content of law should probably be read as being limited to the law applicable to a particular territorial area – a particular jurisdiction. So to that extent, legal scholarship which claims, either explicitly or implicity, no territorial limits is comparative unusual.

In terms of scope, below this limitless category we find commentary concerned with international law. In the next chapter I will discuss the principal international legal guarantees of freedom of religion, and briefly explore some of the key ideas of international law. For the moment, it is worth noting that international law, in its own terms, transcends national boundaries and will evaluate its own claims as superior to those of any particular nation state. It may be thought that a discussion of international law must be global in terms of its territorial scope. Even the most widely accepted international laws have a territorial limit, however, in that they cannot necessarily claim enforcement by the organs in control of a particular territory. So a discussion of the United Nations guarantees of freedom of religion, such as Scheinin's discussion of the Universal Declaration of Human Rights (Scheinin, 1992), is limited in territorial scope. I return to the distinction between international and domestic law in the next chapter. Additionally, as we will see in the next chapter, international law is not always applicable to all countries. Countries may join together, by use of treaties, and agree to be bound by international legal rules which do not bind states who have not entered into that

agreement. Thus, particular international legal rules, and hence commentary upon them, may be limited to only a small number of territories. A good example for our purposes is the European Convention on Human Rights, a regional human rights instrument binding upon a geographically distinct group of countries. We can thus see commentary upon the ECHR, such as the discussion of the religious liberty guarantees by Dunne, as limited by territorial scope (Dunne, 1999).

The most obvious limitations, however, are by jurisdiction – that is, by reference to a particular set of laws within a particular legal territory. Very often a commentary discussing the law in one jurisdiction will be valuable in considering the law in other jurisdictions, and may explicitly deploy generally applicable arguments intended to influence developments elsewhere. It would be a serious mistake, however, to take a commentary on (say) freedom of religion in the United States and assume it is an accurate legal description of the situation in Australia. As we will see in the following chapter, even a very superficial consideration of the fundamental laws of the two countries reveals serious differences in approach. Much of the secondary literature discussed in this text is, either implicitly or explicitly, limited to a particular jurisdiction, and it is important not to lose sight of this when making use of it.

As a final note on territorial scope, I have already suggested that some writers will discuss one particular jurisdiction, but with a clear eye to their analysis and arguments being taken up in relation to other jurisdictions. Increasingly, scholars are engaging in evaluations, and comparisons, of multiple jurisdictions in particular areas. For instance, in her analysis of religion and family law in the English jurisdiction, Hamilton made explicit use of United States materials, and her key conclusions include reflections of the similarities and differences between US and English approaches (Hamilton, 1995). Similarly, Efaw aims to improve the analysis of US treatment of religious difference in the armed forces by reflecting on the way similar issues are dealt with by the British Army (Efaw, 1996).

Topic

As the remainder of this text will illustrate, the range of topics which can be covered by work on law and religion is vast. Discussion in this text is structured around clusters of factual situations. There are, however, alternative ways to break down the topics, which will help understanding the structures in the debates.

Firstly, and particularly common in the literature with a relatively small multidisciplinary input, a topic may be defined by reference to a legal category. The work of Barber, discussed above, could sensibly be categorised as falling within the category of criminal law. Also within this category we could place discussion of religion and intent in determining criminal liability (Hilbert, 1987), of blasphemy (Kearns, 2000), or of the role of clergy in criminal juries (Pattenden, 1999). The strength of work based on this sort of classification is that it matches with common classifications within legal scholarship. A specialism which covered both criminal law and employment, on the other hand, would be seen as encompassing two distinct bodies of law, and two sets of expertise. Additionally,

just as a writer in law and religion may be able to deploy particular expertise within a legal category, scholars who define their specialism more closely in line with these legal categories will be able to make a substantial contribution to discussion within that category – without necessarily having a significantly broader interest in the interaction of law and religion.

Secondly, a topic may be defined by factual situation. This often matches the expectations of a non-legal audience, but poses significant problems in terms of expertise across all the legal categories which may need to be considered to address the topic (Edge, 1998). A recently completed project of my own may usefully illustrate this (Edge, 2002). In order to explore the legal treatment of sacred places it was necessary to consider not just the law controlling use of geographical space generally (planning law), and the process by which particular places can be marked as religious places (registration of places of worship), but also, as it turned out, special rules governing unseemly conduct in such places (criminal law), and provisions for dealing with those seeking to worship at the ancient monument at Stonehenge (public order law).

Thirdly, a topic may be defined by the religious community involved. There is a comparatively small body of general work in this area, requiring as it does both an intimate knowledge of the religious community in question, plus a preparedness to engage in a comprehensive study of those areas of law which have proven problematic for its members. Examples include a study of Sikhs in the United Kingdom (Juss, 1995), an edited collection on Islam in Europe (Ferrari and Bradney, 2000), and a discussion of the treatment of Scientologists in Germany (Browne, 1998). More common is a focus on both a particular religious community, and a subset of relevant legal issues. For instance, Winslow's discussion of Native American sacred places (Winslow, 1996), or Muramoto's analysis of the refusal of blood products by Jehovah's Witnesses (Muramoto, 1998a; Muramoto, 1998b).

Readership

A final categorisation could be by the target readership. The most accessible to non-lawyers are pieces aimed at those with little or no legal knowledge. Although the importance of sources of law is often not discussed at length in these pieces, knowledge of broader legal doctrines is not assumed. So, a piece dealing with the employment status of clergy may briefly explain what a contract of employment is, the broader doctrine of contract being essential to proper understanding of the topic. The next most accessible are those aimed at students new to law, but whose programme of study involves a considerable breadth of legal knowledge. An obvious example would be a text aimed specifically at an undergraduate legal market, in those countries where law is an undergraduate degree. Although some broad familiarity with law is assumed, the writer recognises that the readers will not have very much experience in legal arguments. The third type of output aimed at an academic audience is addressed primarily at other legal scholars. As might be expected, these can involve a relatively high level of background knowledge and

practice in legal argument. Against this, the piece may involve a multidisciplinary approach making use of perspectives familiar to the reader.

Along with this body of academic literature, however, is work aimed explicitly at supporting the legal profession. Even substantial, comprehensive, texts aimed at the legal profession differ considerably from undergraduate textbooks dealing with the same subject. In particular, they are often focused more on the practical application of the law, and assume an advanced level of general legal knowledge. Additionally, many short pieces, especially those appearing in journals with a professional emphasis, will be aimed at providing the readers with an update on new developments in an area of existing expertise. These notes of new cases and forthcoming legislation are particularly inappropriate for a reader who does not understand the context in which these new developments are occurring.