RELIGION, LAW AND SOCIETY

Russell Sandberg

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CHAPTER ONE

THE NEW WORLD

EVERYTHING CHANGES

On 22 March 2006 religious freedom died. On that day, the judicial committee of the British House of Lords[1] delivered their speeches in the case of *Begum*.[2] They proclaimed that interference with the right to religious freedom 'is not easily established'.[3] They declared that the right to manifest one's religion or belief did 'not require that one should be allowed to manifest one's religion at any time and place of one's own choosing'.[4] Rather, 'people sometimes have to suffer some inconvenience for their beliefs'. The House of Lords said that for religious believers there was an 'expectation of accommodation, compromise and, if necessary, sacrifice in the manifestation of religious beliefs'.[5]

The claim had been brought on behalf of a thirteen-year-old Muslim schoolgirl who had wished to wear a *jilbab*, which was not allowed under the school rules.[6] When she was told to go home and change, she contended that she had been 'excluded/suspended' from the school in breach of her right to manifest her religion under Article 9 of the European Convention on Human Rights (ECHR); a right which was

[1] Now known as the Supreme Court.

[2] *R (on the application of Begum)* v. *Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

[3] Lord Bingham, para. 24.

[4] Lord Hoffmann, para. 50.

[5] Lord Hoffmann, para. 54.

[6] Begum was aged 13 at the time of the dispute and was 17 years old by the time of the House of Lords judgment. A *jilbab* was described in the judgment as 'a long shapeless dress ending at the ankle and designed to conceal the shape of the wearer's arms and legs'. By comparison, the permitted *shalwar kameez* was described as a sleeveless, smock-like dress worn to between knee and mid-calf length (see para. 79).

now actionable in English courts by virtue of the Human Rights Act 1998. This right to manifest one's religion or belief in worship, teaching, practice and observance is a qualified right. This means that if a court holds that there has been interference with the right to manifest religion under Article 9(1), it must then move on to discuss whether that interference was justified under Article 9(2). The interference will only be justified if it is 'prescribed by law and . . . necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'.[7]

Although the judicial committee in *Begum* were unanimous in their disposal of Begum's claim, their reasoning differed. Lord Nicholls and Lady Hale held that there had been an interference with Article 9(1) but that it had been justified under Article 9(2). In contrast, Lords Bingham, Hoffmann and Scott held that there had been no interference with Article 9(1).[8] The school's refusal to allow Ms Begum to wear a *jilbab* did not interfere with her religious freedom. This seems to be counter-intuitive: the refusal to allow her to attend school clearly prevented her from manifesting her religion in practice or observance. Moreover, deciding the case in this way meant that little attention was paid to the question of justification. This was unfortunate. Cases concerning religious rights require nuanced, fact-specific judgments, which are best reached by focusing upon the question of justification. Yet, it is the reasoning of Lords Bingham, Hoffmann and Scott that has proved to be influential. This is particularly true of Lord Bingham's speech in which he stated:

> The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.[9]

For Lord Bingham, reference to the Article 9 case law of the European Court of Human Rights showed that 'there remains a coherent

[7] For a fuller discussion see R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 5.

[8] Lord Bingham did note that Article 9 was 'engaged or applicable' but by this he seems simply to recognise that the clamant was sincere: para. 21.

[9] Para. 23.

and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established'.[10] However, it is questionable whether this overstates the jurisprudence of the European Court of Human Rights. It is true that there have been occasions where Strasbourg institutions have held that there had been no interference with Article 9(1).[11] However, the more recent decisions by the Strasbourg Court tend to focus less on the question of interference under Article 9(1), preferring instead to focus on the question of justification under Article 9(2).[12] Moreover, even in the older cases, there is some doubt as to the parameters of the particular rule Lord Bingham referred to, which has been referred to as the 'specific situation rule'.[13] Lord Bingham's elucidation of the rule suggests that two requirements must be met for the rule to apply. First, the claimant must have 'voluntarily accepted an employment or role which does not accommodate' the religious manifestation they seek to exercise. Second, there must be 'other means open to the person to practise or observe his or her religion without undue hardship or inconvenience'. However, their Lordships seem to have placed greater emphasis upon this second requirement. They focused upon the issue of whether Begum could have gone to another school and gave rather less attention to the question of whether she voluntarily submitted to the system of norms.[14] By contrast, the Strasbourg case law focused on the first requirement.[15] The rule typically applied in relation to employment.[16]

[10] [2006] UKHL 15, para. 24.

[11] See, most notably, the assertion in *Arrowsmith* v. *United Kingdom* (1981) 3 EHRR 218 that the term practice 'does not cover each act which is motivated or influenced by a religion or a belief' and that Article 9 was not interfered with where, although the act was 'motivated or influenced' by the claimant's belief, it did not 'actually express the belief concerned'.

[12] See, e.g., *Hasan and Chaush* v. *Bulgaria* (2002) 34 EHRR 55, *Şahin* v. *Turkey* (2005) 41 EHRR 8 and *Dogru* v. *France* [2008] ECHR 1579.

[13] Sandberg, *Law and Religion*, 84–5.

[14] Note, by contrast, the speech of Baroness Hale, which suggested this is a significant issue based on the facts given that 'the choice of secondary school is usually made by parents or guardians rather than by the child herself' at para. 92.

[15] There is some limited support against this interpretation in the European Court of Human Rights decision in *Jewish Liturgical Association Cha'are Shalom Ve Tsedek* v. *France* (2000) 9 BHRC 27 in which it was held that an 'alternative means of accommodating religious beliefs had . . . to be "impossible" before a claim of interference under article 9 could succeed'. However, this lone elucidation of the 'impossibility' test has not been followed in subsequent Strasbourg judgments. See Lord Nicholls in *R* v. *Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15 at para. 38 and Lords Bingham and Hoffmann in *Begum* at paras. 24 and 52.

[16] The rule has also been applied to other situations where the claimant has voluntarily submitted themselves to a system of norms. It has been applied in relation to those who voluntarily submit to military service (*Kalaç* v. *Turkey* (1997) 27 EHRR 552), those who voluntarily enter into

This meant that where, for example, a claimant signs a contract to become a school teacher, they cannot then bring an Article 9 claim on the basis that they are not permitted to leave the school to worship on a Friday.[17] As Lord Nicholls put it in the earlier House of Lords decision in *Williamson*,[18] the rule applies only when there is a 'special feature affecting the position of the claimant'.[19] The judgment in *Begum*, however, by focusing on the second part of the rule, has given the 'specific situation rule' general effect: there will be no interference with Article 9 'where the individual is left with a viable and voluntary choice to put themselves in a position where they can manifest their religion, even if this requires some personal sacrifice'.[20]

A series of lower court decisions concerning school uniforms have regarded the *Begum* precedent as an 'insuperable barrier' to religious rights claims, which has erected 'a high threshold before interference can be established'.[21] Moreover, lower court decisions have often adopted an even more restrictive approach. While Lord Bingham's speech stated that both requirements of the rule were required, lower courts have questioned whether the 'specific situation rule' should apply where only the second requirement is met.[22] In *X* v. *Y School*[23] Silber J stated that Lord Bingham's rule did not only apply where both requirements were met.[24] There was no interference with Article 9 where the claimant was free to go to another school. The same conclusion was reached by the High Court in *Playfoot*[25] where the Court deemed itself competent to determine questions of Christian doctrine. Supperstone QC, sitting as a High Court judge, held that although the claimant believed that she was wearing a 'purity ring' at school as a sign of her sexual restraint, this was not protected under Article 9: she was not manifesting her Christian beliefs because she 'was under no

a contract of employment (*Stedman* v. *United Kingdom* (1997) 5 EHRLR 544) and those who voluntarily enrol at a university (*Karaduman* v. *Turkey* (1993) 74 DR 93).

17 *Ahmad* v. *Inner London Education Authority* [1978] QB 38; *Ahmad* v. *United Kingdom* (1981) 4 EHRR 126.

18 *R* v. *Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15.

19 Para. 39.

20 M Malik, 'Judgment: *R (SB)* v. *Denbigh High School*' in R Hunter *et al.* (eds.), *Feminist Judgments: From Theory to Practice* (Hart, 2010) 336, 339.

21 *R (on the application of X)* v. *Y School* [2006] EWHC 298 (Admin), para. 38, 100.

22 Under this interpretation, the rule may be more accurately referred to as the 'contracting out doctrine', see Malik, 'Judgment', 338.

23 *R (on the application of X)* v. *Y School* [2006] EWHC 298 (Admin).

24 Para. 29.

25 *R (on the Application of Playfoot (A Child))* v. *Millais School Governing Body* [2007] EWHC 1698 (Admin).

obligation, by reason of her belief, to wear the ring; nor does she suggest that she was so obliged'.[26] Moreover Supperstone QC held that, even if the wearing of the ring was deemed to be a manifestation, the school's refusal to allow it to be worn did not represent an interference with Article 9 given that there were 'other means by which the Claimant [could] express her belief' such as by attaching the ring to her bag, wearing a badge or sticker instead, contributing to personal and social health education classes on the topic or by transferring to another school.[27]

This focus on the second requirement of Lord Bingham's test means that the rule now has general effect. There is no interference with Article 9 if it is possible for the claimant to manifest their religion elsewhere, even in ways which are inconvenient and require significant upheaval. This has meant that little attention has been afforded to the question of justification under Article 9(2).[28] As the Equality and Human Rights Commission concluded in their 2012 Human Rights Review: 'Courts are setting too high a threshold for establishing "interference" with the right to manifest a religion or belief, and are therefore not properly addressing whether limitations on Article 9 rights are justifiable.'[29] This is unfortunate since the question of justification allows consideration of the full merits of the claim within its social context.[30] Judges seem to be operating under the presumption that religion does not affect all aspects of a believer's life. If a believer chooses to enter the public sphere then they are expected to leave their religiosity at the door of their workplace or school.[31] This approach is particularly disturbing since earlier decisions conveyed a more generous approach. Most notably, in the earlier House of Lords decision of

[26] Para. 23. [27] Para. 30.

[28] Many of the judgments did discuss issues of justification but did so briefly given the matter was *obiter*. As Peter Cumper and Tom Lewis have noted, the recognised structured tests concerning proportionality 'have only been sporadically referred to, still less applied with any degree of rigour': P Cumper and T Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion or Belief under the Human Rights Act 1998' (2011) 22 *King's Law Journal* 131, 142–3. Moreover, future decisions using these judgments as precedent may well omit the justification in its entirety.

[29] At page 315. The full report is available at: www.equalityhumanrights.com/human-rights/our-human-rights-work/human-rights-review. The chapter on Article 9 is also available separately at: www.equalityhumanrights.com/uploaded_files/humanrights/hrr_article_9.pdf.

[30] See, further, M Pearson, 'Proportionality, A Way Forward for Resolving Religious Claims' in N Spencer (ed.), *Religion and Law* (Theos, 2012) 35.

[31] However, it does not seem that the English case law is unique in this regard. For Norman Doe, it is a principle of religion law common to the states of Europe that 'everyone may abandon the right to manifest religion by voluntary waiver': N Doe, *Law and Religion in Europe* (Oxford University Press, 2011) 263.

Williamson,[32] Lord Nicholls stressed how 'freedom of religion protects the subjective belief of an individual'.[33] In contrast, following *Begum*, judges have dismissed the claims of those whom the court deem able to manifest their religion elsewhere and have held that manifestations need to be required by the religion in question in order to be protected. The courts have shown an increased willingness to determine what constitutes a manifestation. Furthermore, as Peter Edge has noted, courts seem particularly confident to do this when claims concern Christian claimants; by contrast, when judges discuss non-Christian beliefs they tend to require evidence such as the testimonies of experts, 'a need not felt for Christianities'.[34]

These shortcomings in the case law may help to explain one of the main ironies concerning the interaction between law and religion in England and Wales in the twenty-first century. Although the first decade of the twenty-first century has seen the enactment of many laws protecting religious freedom,[35] there is a feeling amongst many religious believers that legal protection has decreased rather than increased.[36] Commentators have spoken of the marginalisation of Christianity and a degree of 'religious illiteracy',[37] which has led to discrimination towards (but not the persecution of) believers.[38] The Conservative peer Baroness Warsi has warned that Britain is under threat from a rising tide of 'militant secularisation' whereby religion is being 'sidelined, marginalised and downgraded in the public sphere'.[39] Moreover, it has

[32] *R* v. *Secretary of State for Education and Employment and others, ex parte Williamson* [2005] UKHL 15.

[33] Para. 22.

[34] P W Edge, 'Determining Religion in English Courts' (2012) 1(2) *Oxford Journal of Law and Religion* 402, 414.

[35] These laws may be collectively referred to as 'religion law'. This term refers to external laws or norms affecting religion which are made by the State, international bodies and sub-State institutions. This term may be contrasted with 'religious law', that is, the internal laws or norms made by religious groups themselves. The study of law and religion includes both the study of religion law and religious law: see, further, Sandberg, *Law and Religion*, chapter 1.

[36] A national opinion poll carried out by the *Sunday Telegraph* in May 2009 found that three-quarters of Christians polled felt there was less religious freedom than twenty years ago: www.telegraph.co.uk/news/religion/5413311/Christians-risk-rejection-and-discrimination-for-their-faith-a-study-claims.html.

[37] See the Bishop of Bradford, Nick Baines: www.guardian.co.uk/world/2011/Jul/10/christian-mp-inquiry-religious-discrimination.

[38] A February 2009 survey of members of the General Synod of the Church of England found that two-thirds believed that Christians were discriminated against at work: www.telegraph.co.uk/news/religion/4622858/Christians-face-discrimination-in-workplace-say-church-leaders.html.

[39] See www.bbc.co.uk/news/uk-17021831 and www.telegraph.co.uk/news/religion/9080441/We-stand-side-by-side-with-the-Pope-in-fighting-for-faith.html.

been argued that the new legal framework concerning religion has been a key contribution to this situation. A 2012 inquiry by Christians in Parliament (an official All-Party Parliamentary Group) concluded that: 'Christians in the UK face problems in living out their faith and these problems have been mostly caused and exacerbated by social, cultural and legal changes over the past decade.'[40]

The former Archbishop of Canterbury, Lord Carey of Clifton, has written that 'in little more than a decade of successive developments in law ... Britain has become a much colder place for religious conscience'.[41] However, it is the reasoning of judges in adjudicating these new laws rather than the laws themselves that have dropped the temperature.[42] Telling claimants that there has not been any interference with their religious rights because they could have resigned their job or because that practice does not appear to be obliged by the religion in question is likely to further fears that the law is unreceptive to religion. As Lord Carey has put it, many judgments seem 'ill at ease with public expressions of faith' and often cling to 'a misconception that it can be consigned to a purely private place only to be brought out at Sunday worship'.[43] This is not to say that the 'religion or belief' argument always needs to be successful. However, the 'religion or belief' argument needs to be considered seriously and treated as being as important as other rights. This does not seem to occur at present.

So, does this mean that the judgments of the judicial committee of the House of Lords in *Begum*[44] have killed religious freedom? On the one hand, such a claim seems nonsensical. People remain free to form and hold beliefs and to act upon those beliefs. However, in one important sense religious freedom has died. Following *Begum*, identity claims by religious believers have been regularly dismissed on the basis that there was no interference with Article 9(1). The effect of *Begum* is that the law has not moved beyond the stance of religious

[40] See the 'Clearing the Ground Inquiry' Published by Christians in Parliament: www.eauk.org/clearingtheground/.

[41] G Carey and A Carey, *We Don't Do God: The Marginalization of Public Faith* (Monarch Books, 2012) 92.

[42] Generally, legislation has not prevented the manifestation of religion. The decision not to exempt Catholic adoption agencies from laws prohibiting discrimination on sexual orientation provides a rare exception; see Sandberg, *Law and Religion*, 125–6.

[43] Carey and Carey, *We Don't Do God*, 16, 87.

[44] *R (on the application of Begum)* v. *Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

tolerance that existed before the Human Rights Act 1998.[45] The post-*Begum* supremacy of the specific situation rule has left Article 9 largely moribund.[46] Judges now stress that sacrifice, inconvenience and compromise should be the norm for believers. If a believer can go elsewhere to manifest their religion, probably outside the public sphere, then they cannot rely upon their religious rights. The *Begum* ultimatum requires believers to leave their faith at the door or to go elsewhere. The current case law suggests that the judiciary are uncomfortable dealing with religious rights.[47] The *Begum* legacy is unsurprising given that these judgments have taken place against a backdrop of significant social and legal change regarding religion. These judgments both result from and perpetuate anxieties and confusions surrounding the relationship between religion, law and society in the twenty-first century. In the shadows of September 11th and other terrorist atrocities, long-held assumptions about the role and social significance of faith have been questioned.

The opening years of the twenty-first century have witnessed significant legal changes, which may be summed up in the phrase the 'juridification of religion'.[48] New legislation heralding positive religious rights has extended the reach of the law and has led to both an increase in litigation and a process of 'legal framing', the way 'by which people increasingly tend to think of themselves and others as legal subjects'.[49] Religious liberty may long have been implicit in the common law but the form religious rights now take and the awareness and promotion of these rights represents a step change. Religious freedom is increasingly seen as an individual right and this has meant that the language of religious rights has become commonplace. These new laws are expressed in rather abstract ways which make new demands of judges.[50] Judges have therefore understandably tended to focus on questions of

[45] See Sandberg, *Law and Religion*, chapter 2 for a discussion of the historical development of law and religion in England.

[46] There have been some successful cases, particularly by lower courts, but these are exceptional. See, e.g., *R on the Application of Bashir* v. *The Independent Adjudicator and HMP Ryehull and the Secretary of State for Justice* [2011] EWHC 1108 (Admin), discussed in Chapter 5 below.

[47] M Hill and R Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] *Public Law* 488, 505–6; Cumper and Lewis, 'Public Reason', 133.

[48] See Sandberg, *Law and Religion*, 193–5.

[49] L C Blicher and A Molander, 'Mapping Juridification' (2008) 14(1) *European Law Journal* 36, 39.

[50] See S Sedley, 'Human Rights: A Judicial Approach' in M Hill (ed.), *Religious Liberty & Human Rights* (University of Wales Press, 2002) 1.

interference in religious rights claims because the Article 9(1) question of interference is a legal test which can be reduced to a technical analysis of whether the facts fit the language of the provisions. By contrast, judges have sought to avoid the Article 9(2) question of justification which requires judges to undertake sociological evaluations.[51]

The fact that adjudicating religious rights often includes a sociological test provides an impetus for dialogue between legal and sociological studies of religion. As the sociologist of religion Grace Davie has argued, the nature of conflicts concerning religion and human rights is 'determined by sociological as much as legal factors'.[52] The juridification of religion is both the result and the cause of sociological changes concerning religion. Since laws do not exist in a social vacuum, it can be argued that a fuller understanding of these issues can be achieved by fusing disciplinary approaches. As Brian Grim has argued: 'Religious freedom may have as much to do with the attitudes and actions of people in society as it does with the laws and policies of governments. If this is the case, cross-disciplinary approaches are indeed crucial to the study of religion and law in order to have a clear understanding of the forces shaping the world today.'[53] However, to date, the study of religion, law and society has largely been characterised by academic isolationism. Law and religion academics have studied the relationship between religion and law while sociologists of religion have examined the relationship between religion and society. Dialogue between the two has been the exception rather than the norm.

The aim of this book is to explore whether this ought to change. It examines the interface between law and religion and the sociology of religion to determine whether and how an interdisciplinary interaction between the two can inform our understanding of the place of religion in the twenty-first century. However, before addressing this, it is necessary to explore how the legal and sociological study of religion has evolved within England and Wales and the extent to which dialogue and collaboration between the lawyers and sociologists have already taken place. This is the focus of the next section.

[51] Peter Edge has commented on how some twenty-first century decisions have taken what he refers to as a 'sociological strategy' which emphasises 'the authority of the community itself to determine religious content through its practice': Edge, 'Determining Religion', 416.

[52] G Davie, 'Law, Sociology and Religion: An Awkward Threesome' (2011) 1(1) *Oxford Journal of Law and Religion* 235, 244.

[53] B J Grim, 'Religion, Law and Social Conflict in the 21st Century: Findings from Sociological Research' (2012) 1(1) *Oxford Journal of Law and Religion* 249, 271.

TOWARDS AN INTERDISCIPLINARY APPROACH

As Roger Cotterrell has pointed out, academic disciplines need to be understood 'primarily as social phenomena'.[54] This means that disciplines need to be understood as the social creation of those who work in each knowledge field. Cotterrell states that is particularly true where attention is paid to the 'meeting or confrontation' of disciplines since such accounts seek 'to compare, and generalize about, social constructs . . . that have quite different historical origins or patterns of development, social and institutional contexts of existence, and social and political consequences or effects'.[55] It is necessary to pay attention to how those within each field understand and reproduce their knowledge fields given that, as Anthony Giddens has argued, all disciplines develop their own 'constructed history': 'Every recognized intellectual discipline has gone through a process of self-legitimization not unlike that involved in the founding of nations. All disciplines have their fictive histories; all are imagined communities which invoke myths of the past as a means of both charting their own internal development and unity, and also drawing boundaries between themselves and other neighbouring disciplines.'[56] This is true of both law and religion and the sociology of religion. The following section examines the historical development of law and religion and the sociology of religion in England and Wales, paying particular attention to the 'constructed histories' that have been developed by the two respective academic communities. Both law and religion and the sociology of religion will be described as sub-disciplines rather than being described as 'subjects', 'themes', 'areas' or 'branches'.[57] This is to allow a contrast to be made between law and religion and the sociology of religion as sub-disciplines and law and sociology as disciplines. Law and religion can be understood as a sub-discipline of law, like family law, sports law or criminal law, in the same way that the sociology of religion can be described as a

[54] Cotterrell cites the work of Michel Foucault, particularly M Foucault, *The Archaeology of Knowledge* (Routledge, 2002 [originally published in 1969]) as a highly influential way of thinking of academic disciplines as social constructs: R Cotterrell, *Law's Community* (Clarendon Press, 1995) 42.

[55] Cotterrell, *Law's Community*, 43–4.

[56] A Giddens, *Politics, Sociology and Social Theory* (Polity Press, 1995) 5.

[57] This conception of law and religion as a sub-discipline follows A Bradney, 'Some Sceptical Thoughts about the Academic Analysis of Law and Religion in the United Kingdom' in Doe and Sandberg (eds.) *Law and Religion*, 299 and, more generally, A Bradney, 'The Rise and Rise of Legal Education' (1997) 4 *Web Journal of Current Legal Issues*: http://webjcli.ncl.ac.uk/.

sub-discipline of sociology akin to the sociology of the family, the sociology of sport and leisure or the sociology of crime and deviance.[58] This contrast is important given that the development of law and religion and the sociology of religion as sub-disciplines in England and Wales have been shaped by the development of law and sociology as disciplines.

Constructed histories

Although the legal and social role of religion has long been studied, the two sub-disciplines are of more recent origin. The origins of the sociology of religion are often equated with the origins of sociology itself. The term 'sociology' was first used in 1839 by Auguste Comte in Volume 4 of his *Course in Positive Philosophy*.[59] Although numerous definitions of the word 'sociology' exist,[60] it is commonly said that sociology is the study of modern societies, as distinct from anthropology, the study of pre-modern societies.[61] The conventional view is that sociology was a product of the Enlightenment:[62] a series of immense political, economic and social transformations which are often attributed to what Eric Hobsbawm has called the 'dual revolution – the French Revolution of 1789 and the contemporaneous (British) Industrial Revolution'.[63] The long-term effects of the dual revolution included the growth of capitalism, a process of urbanisation and significant social advances such as the slow

[58] For discussion of how and why law and religion can be regarded as a sub-discipline see Sandberg, *Law and Religion*, especially chapter 10. For discussion of the sociology of religion as a sub-discipline, its central debates and agenda see G Davie, *The Sociology of Religion* (2nd edition, Sage, 2013).

[59] Prior to this, however, Comte had written of a 'social physics which he located within the field of "social physiology"': M Gane, *Auguste Comte* (Routledge, 2006) 24.

[60] Literally, 'sociology' means the study of processes of companionship. The term has two stems – the Latin *socius* (companion) and the Greek *logos* (the study of). More technically, it may be defined as 'the analysis of the structure of social memberships as constituted by social interaction': N Abercrombie, S Hill and B S Turner (eds.), *The Penguin Dictionary of Sociology* (4th edition, Penguin, 2000) 333.

[61] 'Sociology has as its main focus the study of the institutions of the "advanced" or the "industrialised" societies, and of the conditions of transformation of those institutions': A Giddens, *Sociology: A Brief but Critical Introduction* (Macmillan, 1982) 11.

[62] See, e.g. G Hawthorn, *Enlightenment & Despair: A History of Social Theory* (2nd edition, Cambridge University Press, 1987), S Fuller, *The New Sociological Imagination* (Sage, 2006), K Morrison, *Marx, Durkheim, Weber: Formations of Modern Social Thought* (Sage, 1995).

[63] E Hobsbawm, *The Age of Revolution 1789–1848* (Weidenfeld & Nicolson, 1962) ix. See also K Polanyi, *The Great Transformation: The Political and Economic Origins of our Times* (Beacon Press, 1957). As Anthony Giddens has written, 'the conjunction of events linking the political climate of the French Revolution and the economic changes wrought by the Industrial Revolution provided the context from within which sociology was formed': A Giddens, *Capitalism and Modern Social Theory* (Cambridge University Press, 1971) xii.

but steady enlargement of the right to vote, the growth of education and a more dynamic division of labour.[64] These changes, which took centuries to develop, led to the birth of modern society. And the study of modern society, the unlocking of the questions of modernity, became known as sociology.

It is possible, of course, to oversimplify and overemphasise this narrative. Ian Craib cautions that social theory can be traced back to Greek philosophy and economic changes can be traced back to the 'habit of paying workers' after the Black Death in the thirteenth century.[65] However, important though such caveats are, it seems undeniable that something novel began to develop at this time. As Stuart Hall has observed, 'the idea of "the social" as a separate and distinct form of reality, which could be analysed in entirely "this-worldly" material forms and laid out for rational investigation and explanation, is a distinctly modern idea which only finally crystallized in the discourses of the Enlightenment'.[66] The immense political, economic and social transformations of the time led to a new way of thinking. As Peter Hamilton has chronicled, the Enlightenment saw 'the creation of a new framework of ideas about man, society and nature, which challenged existing conceptions rooted in a traditional world-view dominated by Christianity'.[67] Over a number of generations a plethora of heterogeneous thinkers questioned what had previously been taken for granted. The work of the so-called *Philosophes* – mid-eighteenth-century thinkers such as Montesquieu, Voltaire, Diderot, Rousseau and the 'Scottish Enlightenment' thinkers David Hume, Adam Smith and Adam Ferguson – inspired the 'classical sociology' of Henri de Saint-Simon and Auguste Comte in their project to construct a 'positive science' of society.[68] This in turn inspired a 'second movement in the development of the social sciences' between 1890 and 1920 when 'the social sciences became more compartmentalized

64 See Morrison, *Marx, Durkheim, Weber*, chapter 1 and I Craib, *Classical Social Theory* (Oxford University Press, 1997) 19–22.

65 Craib, *Classical Social Theory*, 19. Anthony Giddens has also warned that 'sociologists today talk blandly of the emergence of "industrial society" in nineteenth century Europe, ignoring the complexities which this process involved': Giddens, *Capitalism and Modern Social Theory*, xii.

66 S Hall, 'Introduction' in S Hall and B Gieben (eds.), *Formations of Modernity* (Polity Press, 1992) 1, 2.

67 P Hamilton, 'The Enlightenment and the Birth of Social Science' in Hall and Gieben (eds.), *Formations of Modernity*, 17, 23.

68 The French name *Philosophes* 'does not exactly correspond to our modern "philosopher" and is perhaps best translated as "a man of letters who is also a free-thinker"': ibid., 24.

into their separate disciplines, more specialized and empirical'.[69] It was this second movement which saw work of the 'writers who established the principal frames of reference of modern sociology': Karl Marx, Emile Durkheim and Max Weber.[70]

Marx, Durkheim and Weber are commonly regarded to be the 'founding fathers' of sociology. Although the acceptance of the 'idea of the trio of founding fathers' is a relatively recent phenomenon,[71] today the writings of all three are widely thought of as 'classics' within sociology.[72] This is also true in relation to the sociology of religion. The sociological role of religion was a major concern within the work of Marx, Durkheim and Weber,[73] meaning that the origins of the sociology of religion are entwined with the origins of sociology itself. As Grace Davie has asserted, all three founding fathers 'took religion seriously in their attempts to account for the changes taking place in the societies of which they were part'.[74] In their different ways, Marx, Durkheim and Weber pointed to the social effects of religion: the way in which it brought people together. For Marx, religion was a form of ideology:[75] a man-made construct which not only disguised 'the exploitative relationships of capitalist society' but also served as a form of false consciousness persuading people that the status quo was natural, acceptable and normal.[76] For Durkheim, religion was 'something

[69] Hall, 'Introduction' in Hall and Gieben (eds.), *Formations of Modernity*, 2.

[70] Giddens, *Capitalism and Modern Social Theory*, vii.

[71] As Anthony Giddens has pointed out, it was the work of Talcott Parsons which gave common currency to the idea that there was a distinctive '1890–1920' generation which laid the ground for modern sociology. The work of Marx was only included alongside that of Durkheim and Weber in the late twentieth century as Parsons' influence declined and Marx's work was used to counteract it. A key event was the publication of Giddens' own *Capitalism and Modern Social Theory* (Cambridge University Press, 1971) which gave equal emphasis to Marx, Durkheim and Weber: Giddens, *Politics, Sociology and Social Theory*, 1–6.

[72] For Giddens, 'classics' may be distinguished from 'founders' in that classics 'are founders who still speak to us in a voice which is held to be relevant' and with whom 'a continuing dialogue is carried on': ibid., 5, 6, 14.

[73] R Cipriani, *Sociology of Religion – An Historical Introduction* (Walter de Gruyter, 2000); M Hill, *A Sociology of Religion* (Heinemann, 1973) 1.

[74] Davie, *The Sociology of Religion*, 4.

[75] Ideology may be understood as 'the transmuted representation of values which are in fact created by man in society, and the provision of principled support for an existing social and political order': Giddens, *Capitalism and Modern Social Theory*, 205.

[76] Davie, *The Sociology of Religion*, 26. However, care is needed in distinguishing Marx's own analysis and subsequent interpretations and analyses. It should also be recognised that Marx dedicated considerably less ink to religion than the other founding fathers, whom he preceded in time. Marx's treatment of religion is largely limited to his early writings and even there it is 'unequivocally hostile, but largely disinterested': Giddens, *Capitalism and Modern Social Theory*, 206. Marx's work on religion was more piecemeal, but for a collection of his writings on the subject see K Marx and F Engels, *Marx & Engels on Religion* (Fredonia Press, 2002).

eminently collective', linking people together in communities providing social solidarity.[77] It was religion that allowed society to worship itself: Durkheim's study of totemic religion among Australian Aborigines convinced him 'of the binding qualities of religion, through which people form societies'.[78] For Weber, the relationship between religion and the world was variable and could only be examined in its historical and cultural specificity.[79] He was concerned with a detailed historical examination of how specific religions impacted upon social behaviour;[80] most famously in his study of the Protestant work ethic, Weber examined how Calvinistic Protestantism allowed capitalism to develop by placing a great importance upon work.[81] In their different ways, Marx, Durkheim and Weber all pointed to the social origin and effects of religion.

However, their work also accepted and articulated the Enlightenment thesis that religion was in decline. Marx claimed that religion would no longer be necessary in a classless society.[82] Durkheim feared that religiously inspired morals shared collectively would be replaced by individualism: the decline of religion would lead to the loosening of 'social bonds' with the potential of leading to 'anomie' or 'normlessness' whereby the individual would become isolated.[83] And Weber was concerned that the decline of religion would lead to the rise of rationalisation. He wrote of the fear that the individual would become trapped in an 'iron cage' stripped of religious meaning and moral values, separated from social institutions and subject to governmental bureaucratic surveillance.[84] All three founders therefore accepted the secularisation thesis, the idea that the social relevance of religion would decline in modern society. The question that preoccupied them was 'how society would manage without religion'.[85]

Marx, Durkheim and Weber were therefore largely unconcerned with contemporary religion since they perceived that the social significance

[77] E Durkheim, *The Elementary Forms of Religious Life* (Oxford University Press, 2001 [originally published in 1912]) 46.
[78] Davie, *The Sociology of Religion*, 30. [79] Ibid., 28
[80] M Weber, *Economy and Society* (University of Californian Press, 1968 [originally published in 1922]) chapter 6.
[81] M Weber, *The Protestant Ethic and the Spirit of Capitalism* (Routledge, 2001[originally published in 1905]).
[82] Davie, *The Sociology of Religion*, 27. [83] A Giddens, *Durkheim* (Fontana, 1978) chapter 5.
[84] Weber, *The Protestant Ethic and the Spirit of Capitalism*, chapter 5.
[85] R Robertson, 'Introduction' in R Robertson (ed.), *Sociology of Religion* (Penguin, 1969) 12.

of religion was fading fast.[86] This explains why, although the late nineteenth and early twentieth centuries may be considered as a 'golden age' for the sociology of religion, this was followed by a fallow period where there was some resistance to the 'very idea of taking religious phenomena as a suitable, not to say important, topic for social scientific analysis'.[87] Ironically, the sociology of religion's greatest contribution to general sociological thought – the secularisation thesis – was precisely the reason why the sociology of religion became marginalised. And that meant that the discipline of sociology began to ignore religion and that, as the twentieth century wore on, the sociology of religion became 'a dying subject', taught mainly in context of theological colleges and seen simply 'as a useful tool for the churchman who needed to know how to keep his programmes going in the face of the mounting secularism of society'.[88]

By the middle of the twentieth century, a similar diagnosis would have been made of law and religion. The legal study of religion was also relegated to theological colleges and regarded, at best, as a historical curiosity. However, unlike the sociology of religion, the origins of law and religion need to be traced back further than the Enlightenment.[89] The origins of the sub-discipline, and the reasons for its contraction, can be found in the English Reformation of the 1530s onwards. Prior to the Reformation, England was a Catholic country.[90] The English Church was part of a European system headed by the pope in Rome. Its law came from 'a uniform source', namely, 'the papal codes modified in a few details by local custom and adapted to local needs by the provincial constitutions'.[91] The Reformation of the sixteenth century, however, witnessed the termination of this papal jurisdiction, accompanied by a prohibition on the teaching of canon law at the universities of Oxford and Cambridge.[92] This meant that it was likely that 'both a professional

[86] J A Beckford, *Religion and Advanced Industrial Society* (Unwin, 1989) 42.

[87] Ibid., 42, 45. See also Hill, *A Sociology of Religion*, 1.

[88] B W Hargrove, *Reformation of the Holy: A Sociology of Religion* (F A Davis Company, 1971) 2.

[89] However, it has been pointed out that the idea of the separation between the two is a product of Enlightenment thinking: P Radan, D Meyerson and R F Croucher, 'Introduction' in P Radan, D Meyerson and R F Croucher (eds.), *Law and Religion* (Routledge, 2005) 1.

[90] For an overview of the historical interaction between law and religion in England see Sandberg, *Law and Religion*, chapter 2.

[91] *The Canon Law of the Church of England, Being the Report of the Archbishop's Commission on Canon Law* (SPCK, 1947) 51.

[92] Injunctions were issued in 1535 which substituted lectures in Civil Law for lectures in Canon Law and in 1545 an Act (37 Henry VIII c. 17) allowed judgeships in the ecclesiastical courts to be held by laymen who were doctors only of Civil Law. It was no longer necessary for them to have taken a degree in Canon Law: ibid., 52.

knowledge of canon Law and professional ecclesiastical lawyers would soon become a thing of the past'.

However, such a prediction was misguided. As the research of Richard Helmholz has shown, lawyers practising in the church courts still appealed to Roman canon law.[93] Moreover, the Submission of the Clergy Act 1533 provided that the Roman canon law was to continue to apply unless it was 'contrariant or repugnant to the law, statutes or custom' of the realm or to the King's prerogative. And over time it became necessary for lawyers to understand the new ecclesiastical law of the Church of England that began to develop as part of the law of the land.[94] However, this ecclesiastical law was no longer taught in the universities but was rather the subject of professional training at a learned society which came to be known as Doctors' Commons.[95] This 'college', to which both the lay judges and advocates practising church law belonged,[96] effectively 'did for the ecclesiastical law what the Inns of Court did for the common law; it trained a succession of professional ecclesiastical lawyers in the traditional jurisprudence of the Church'.[97]

Yet, it is still true to say that the Reformation had a profound effect upon the legal study of religion in England in three respects. First, the end of the teaching of canon law in the universities meant that scholarship in this field became dominated by the work of professionals. It was the members of Doctors' Commons and members of the clergy who produced the books on church law.[98] Second, the termination of papal authority meant that the law of the Church became incorporated within the general law. The Church of England was now established by

93 R Helmholz, *Roman Catholic Law in Reformation England* (Cambridge University Press, 1991).

94 For a discussion of the term 'ecclesiastical law' see Sandberg, *Law and Religion* 7–9.

95 See G D Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law* (Clarendon Press, 1977); P Barber, 'The Fall and Rise of Doctors' Commons' (1996) 4 (18) *Ecclesiastical Law Journal* 462; D Polkington, 'The Continued Relevance of Doctors' Commons' (2011) 166 *Law and Justice* 52.

96 The term was used to describe both the learned society and the courts in which its members practised: Polkington, 'Doctors' Commons', 53. Doctors' Commons was described by Charles Dickens as 'a little out-of-the-way place where they administer what is called ecclesiastical law, and play all kinds of tricks with obsolete acts of Parliament': C Dickens, *David Copperfield* (Penguin, 1996 [originally published in 1850]) 322. See also Dickens' essay on Doctors' Commons published in C Dickens, *Sketches by Boz* (Chapman & Hall, 1903 [originally published in 1836]) chapter VIII.

97 *The Canon Law of the Church of England, Being the Report of the Archbishop's Commission on Canon Law* (SPCK 1947) 52–3.

98 Ibid., 54–5.

law.[99] The rules governing the established Church, including its doctrine and worship, were part of the wider law of the land. Third, the fact that the Church of England became the only lawful religion meant that the legal study of religion could consist of nothing else except the law of the established Church.

The slow march of toleration, whereby it became lawful to adhere to religions other than the established Church, softened this stance. However, its effect upon creating a sub-discipline of law and religion was minimal. Toleration was achieved on an ad hoc and piecemeal basis by a number of heterogeneous legal provisions.[100] There were no general laws on religion or expositions of principle as would be found in a written constitution or concordat. Rather, specific laws removed specific disabilities and religious groups began to use existing private law mechanisms to organise themselves. Outside the law of the established Church, there was little that could be said about law and religion. Indeed, as time went by, religious toleration increasingly came to be seen as a problem which had been solved. Frederick Maitland's seminal *The Constitutional History of England*, originally published in 1908 and based on lectures delivered in 1887–88, stated that 'religious liberty and religious equality [was] complete'.[101] Furthermore, Maitland also noted that, although the ecclesiastical courts of the Church of England still existed, 'their power has very much declined'.[102] Such observations underscored a wider decline in interest in the law of the established Church. Doctors' Commons met for the final time in July 1865 and by 1883 Sir Lewis Dibdin was able to inform the Ecclesiastical Courts Commission that there was now 'no means of preserving a knowledge of the teaching of Ecclesiastical Law'.[103]

99 For a discussion of the legal effects of establishment see Sandberg, *Law and Religion*, chapter 4.

100 The Act of Toleration 1689 is simply the tip of a rather large iceberg, as documented in the Appendix to J A Robilliard, *Religion and the Law* (Manchester University Press, 1984).

101 F W Maitland, *Constitutional History of England* (Cambridge University Press, 1908) 520. It is worth noting that Maitland did dedicate a 20-page section to 'The Church', which examined the legal historical development of the Church of England, the history of toleration, the present condition and powers of the ecclesiastical courts and the status of the established church: ibid. 506–26. Julian Rivers has observed that Maitland's conclusion was also shared by A V Dicey in his *Introduction to the Study of the Constitution*, first published in 1915, on the basis that that book said very little about religion: J Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371, 372.

102 Maitland, *Constitutional History of England*, 523. On which see R B Outhwaite, *The Rise and Fall of the Ecclesiastical Courts, 1500–1860* (Cambridge University Press, 2006).

103 Quoted by Polkington, 'Doctors' Commons', 63.

Like the sociology of religion, the legal study of religion became a niche subject for most of the twentieth century because its subject matter was not seen as having much social or political significance. As Julian Rivers has observed, by the late nineteenth century 'a constitutional settlement had been reached in the relationship between religion and the state' and 'by the 1920s this settlement was no longer even socially or politically controversial'.[104] This means that legal textbooks seldom mentioned religion;[105] and while works on the law of the Church of England were occasionally published these were mostly practical guides rather than academic treatises.[106] Moreover, the literature rarely extended beyond the study of the law of the established Church.[107] Questions concerning how English law facilitated the exercise of religious freedom by groups other than the Church of England or by individuals went largely unasked. As Anthony Bradney has noted, although there were occasional academic writings on particular topics, such work was 'spasmodic and disjointed'; there was 'no concrete and sustained debate about the proper relationship between religion and legal rules', and 'such articles and books as were produced failed to have any impact upon other more established areas of academic discourse'.[108]

In 1980 law and religion could not be said to exist as an academic subdiscipline. There were no specialist journals, no research clusters and no academics who exclusively specialised in the area. However, in just twenty years, this had all changed.[109] It began with a revival of interest in the law of the Church of England. In 1987 the Ecclesiastical Law Society was formed 'to promote the study of ecclesiastical and canon law particularly in the Church of England and those churches in communion with it';[110] while in 1991, the LLM in Canon Law degree was

104 Rivers, 'The Secularisation of the British Constitution', 373.

105 See ibid., 372.

106 See, e.g., W Dale, *The Law of the Parish Church* (Butterworths, 1932); G Moore, *Introduction to English Canon Law* (Clarendon, 1967); G Moore, T Briden and K MacMorran, *Handbook for Churchwardens and Parochial Church Councillors* (Mowbray, 1989); J Pitchford, *An ABC for the PCC* (Wyche 1980).

107 The 1975 edition of the Ecclesiastical Law volume of *Halsbury's Laws of England* (4th edition, vol. 14, London, 1975), for instance, dealt with 'other religious denominations' as an afterthought.

108 Bradney gave the example of C Crowther, *Religious Trusts* (Oxford University Press, 1954): A Bradney, 'Politics and Sociology: New Research Agenda for the Study of Law and Religion' in R O'Dair and A Lewis (eds.), *Law and Religion* (Oxford University Press, 2001) 65, 66.

109 See K Counsell, 'The Teaching of Canon Law in England and Wales: 1400–1996' (LLM in Canon Law Dissertation, University of Wales, Cardiff, 1997).

110 See www.ecclawsoc.org.uk/. The (Anglican) Archbishops of Canterbury and York serve as Patrons.

launched at Cardiff University, the first degree to study the laws of the Church of England and Catholic canon law since the Reformation.[111] Throughout the 1990s the focus of both institutions broadened. The Ecclesiastical Law Society's journal, the *Ecclesiastical Law Journal*, published articles on the laws of other religions and faith communities and on national and international laws affecting religion while the success of the LLM programme led Cardiff University to establish its Centre for Law and Religion in 1998.[112] The opening decade of the twenty-first century saw a further increase in interest in the academic study of law and religion as a community of scholars began to develop. From 2007 the *Ecclesiastical Law Journal* was published by Cambridge University Press while in 2008 the Centre for Law and Religion at Cardiff established the Law and Religion Scholars Network (LARSN), a professional association of academics who taught or researched in the field.[113] A number of journals,[114] and research groupings[115] were formed and law and religion modules became taught at several universities. Over this period, a significant literature begun to be built up, growing in size and ambition as the years went by.[116]

There are numerous explanations that can be put forward for this considerable growth in the study of law and religion in England and Wales. An obvious cause is the changing ways in which English law regulates religion. The rise of international human rights treaties protecting freedom of religion and the subsequent growth of domestic law

[111] Some canon law had been taught before 1991. From the late 1960s to 1981 Garth Moore offered a half paper on the canon law of the Church of England as part of the law degree at Cambridge. At Oxford seminars in canon law were conducted by Eric Kemp in the 1950s. See M Kotiranta, 'The Teaching and Study of Church–State Relations in the Nordic Countries, in the United Kingdom and in Ireland' in J Valle and A Hollerbach (eds.), *The Teaching of Church–State Relations in European Universities* (Peeters, 2005) 105, 153.

[112] See N Doe, 'The First Ten Years of the Centre for Law and Religion, Cardiff University' (2008) 10 (2) *Ecclesiastical Law Journal* 222.

[113] There are also a number of international associations such as the International Consortium for Law and Religion Studies (which met for the first time in 2009) and the European Consortium for Church and State Research (established in 1989).

[114] Such as the *Oxford Journal of Law and Religion*, *Religion and Human Rights* and *Law & Justice*. Although *Law & Justice* was founded in 1963 as a Christian Law Review (and titled as *Quis Custodiet?* until 1974), it has recently come to function as a law and religion journal, enjoying close links with LARSN.

[115] Such as the Centre for the Study of Law and Religion at Bristol and the Applied Study of Law and Religion Group at Oxford Brookes.

[116] A bibliography compiled for the Ecclesiastical Law Society's silver jubilee indicated that whilst between 1987 and 1997 there were on average 2 to 3 books published per year, this figure grew to an average of 6 books between 1997 and 2000 and to 10 books after 2007. This rise was even more accelerated in the case of edited books. See R Sandberg, 'Silver Jubilee Bibliography: Ecclesiastical Law Publications 1987–2011' (2012) 14 *Ecclesiastical Law Journal* 149.

protecting religion as an individual right has led to a vast body of law which invites academic comment. The sub-discipline has grown as a response to the juridification of religion. However, these legal changes have not occurred in a social vacuum. As Julian Rivers has argued, the constitutional settlement reached by the late nineteenth century and agreed by the 1920s has begun to unravel because of 'a new loss of consensus about the role and significance of religion'.[117] Law and religion blossomed as a sub-discipline as its subject matter became more controversial. Academic lawyers began to focus more and more upon religion as the Enlightenment-derived secularisation thesis begun to be questioned. It was the reappraisal of the secularisation thesis that provided an explanation for the growth of, and developments within, the legal study of religion. As the American legal academic John Witte has noted: 'Religion is no longer just the hobbyhorse of isolated and peculiar professors principally in their twilight years and suddenly concerned about their eternal destiny . . . Religion now stands alongside economics, philosophy, literature, politics, history and other disciplines as a valid and valuable conversation partner with law.'[118]

The same pattern can be found in relation to the sociology of religion.[119] Since 1980 there has been a significant expansion in the study of sociology in England and Wales at school, further education and higher education levels.[120] And this period has also seen a resurgence of interest in the sociological study of religion and a growing self-confidence within the sub-discipline.[121] Recent years have witnessed increased investment in research into religion and society[122] and a plethora of publications including a number of handbooks[123] and

[117] Rivers, 'The Secularisation of the British Constitution', 385.

[118] J Witte, 'The Study of Law and Religion in the United States: An Interim Report' (2012) 14 *Ecclesiastical Law Journal* 327, 329.

[119] This trend can also be discerned in other disciplines such as the rise of interest in multiculturalism within political science. On which see, e.g., W Kymlicka, *Contemporary Political Philosophy* (2nd edition, Oxford University Press, 2002) chapter 8.

[120] Abercrombie, Hill and Turner (eds.), *The Penguin Dictionary of Sociology*, x.

[121] A different view is taken by Titus Hjelm and Phil Zuckerman who contend that the increasing interest in religion has not affected the sub-discipline's 'place in academic hierarchies' because although leading sociological thinkers are beginning to pay attention to religion, they do so without 'reference to insights from the sociology of religion, past or present': T Hjelm and P Zuckerman, 'Introduction: On Sociological Self-Reflection' in T Hjelm and P Zuckerman (eds.), *Studying Religion and Society: Sociological Self-Portraits* (Routledge, 2013) 12,

[122] The Religion and Society Research Programme started in 2007 in the UK. It is a joint initiative of the Arts and Humanities and Economic and Social Research Councils with total funding of £12.3 million.

[123] See, e.g. M Dillion, *Handbook of the Sociology of Religion* (Cambridge University Press, 2003); J A Beckford and N J Demerath (eds.), *The Sage Handbook of the Sociology of Religion* (Sage,

several specialist journals.[124] The Sociology of Religion Study Group, founded in 1975, is now the second largest discipline study group within the British Sociological Association.[125] As Linda Woodhead *et al*. have noted, 'religion is back on the agenda': 'religion is no longer dismissed as a private pastime, but is taken more seriously as a public and political force'.[126] The sociology of religion is enjoying resurgence because religion has been seen to be of continuing social significance. Yet, it is important not to overstate the effects of this metamorphosis. The secularisation thesis has not been completely discredited. As Woodhead has observed, the secularisation thesis 'is now so established that it has shaped the entire field: how agendas are set, research questions asked, survey questions framed, data collected and analysed'. The secularisation thesis therefore continues to exert a significant pressure upon both the sociology of religion and law and religion.

This is shown in the way in which both sub-disciplines remain rather self-contained, operating at a distance from the mainstream of their discipline. James Beckford has observed how the links between the sociology of religion and other sociological sub-disciplines 'are, at best, tenuous'.[127] In his view, the sociology of religion has become 'intellectually insulated against, and socially isolated from, many of the theoretical debates which have invigorated other fields of modern sociology'.[128] Similar points can be made in relation to law and religion. The continued absence of any discussion of religion law in many undergraduate public law and human rights textbooks seems to indicate that Anthony Bradney's criticism that law and religion scholarship has 'failed to have

2007); P B Clarke (ed.), *The Oxford Handbook of the Sociology of Religion* (Oxford University Press, 2009); and L Woodhead and R Catto (eds.), *Religion and Change in Modern Britain* (Routledge, 2012).

124 These include *Journal of Contemporary Religion* (founded in 1984 but titled as *Religion Today* until 1995), *Social Compass* (established in 1953), *Sociology of Religion* (the journal of the Association for the Sociology of Religion founded in 1938) and the *Journal for the Scientific Study of Religion* (the journal of the Society for the Scientific Study of Religion formed in 1949).

125 See www.socrel.org.uk. Other research groupings include Non-Religion and Secularity Research Network, founded in 2008, and a number of international associations such as International Society for the Sociology of Religion (established in 1989), the Association for the Sociology of Religion (founded in 1938) and the Society for the Scientific Study of Religion (established in 1949).

126 L Woodhead *et al*., 'Preface' in L Woodhead, H Kawanami and C Partridge (eds.), *Religion in the Modern World* (2nd edition, Routledge, 2009).

127 Beckford, *Religion and Advanced Industrial Society*, xi, 12–15.

128 Ibid. 13. See also the work of Grace Davie who warns that 'mainstream sociology has been increasingly inclined to ignore both religion itself and the sociological debate that surrounds this' and 'sociologists of religion have withdrawn from the mainstream sociological discussion': Davie, *The Sociology of Religion*, 4.

any impact upon other more established areas of academic discourse' remains largely true.[129] There is a real risk that both sub-disciplines will become ghettoised, with experts in each sub-discipline simply talking to themselves. There is also the danger that the controversies and pressures brought about by the juridification of religion will narrow and distort the development of both sub-disciplines. For instance, in law and religion scholarship there has been a focus upon regarding the relationship between law and religion 'as a problem that is capable of solution'.[130] This focus has meant that other aspects of law and religion have been neglected.[131] The emphasis upon religious rights has meant that the study of religious law has been isolated from the wider study of law and religion.[132] As Julian Rivers has noted: 'The idea that religions command respect on the part of secular government institutions because they consist of, or contain, autonomous systems of law is being lost in the inexorable rise of a dominant state-individual paradigm and the embrace of state regulation.'[133] Despite these concerns, it is clear that overall both law and religion and the sociology of religion are enjoying a rise in fortune. Both sub-disciplines share a similar 'constructed history' of marginalisation and revitalisation. In both cases, this has been linked to the changing fortunes of the secularisation thesis. A consequence of the decline of the secularisation thesis has been the increasing attention paid to religion by academics from a range of disciplinary backgrounds. As Linda Woodhead has observed, the questioning of the secularisation thesis has opened the door to the cross-disciplinary study of religion since it has resulted in the removal of 'the assumption that religion had become a purely private matter with no public or political significance'.[134] This has meant that it is no longer possible 'to treat religions as discrete entities which could be analysed solely in terms of their inner logics and characteristic texts, beliefs, rituals and symbols'. Rather, religion needs to be seen 'not only as affected by wider changes in the global economy, politics, media,

[129] Bradney, 'Politics and Sociology', 66. [130] Ibid., 68.

[131] Compare the description of the development of law and religion in the United States in which John Witte states that 'a new interdisciplinary movement has emerged . . . dedicated to the study of the religious dimensions of law, the legal dimensions of religion and the interaction of legal and religious ideas and institutions, norms and practices': Witte, 'The Study of Law and Religion', 327.

[132] Sandberg, *Law and Religion*, 14 and chapter 9.

[133] Rivers, 'The Secularisation of the British Constitution', 394.

[134] L Woodhead, 'Introduction' in Woodhead and Catto (eds.), *Religion and Change in Modern Britain*, 1, 2.

the law and other areas, but as integral to them'. This brings us to the question of the extent to which lawyers and sociologists have engaged in such cross-disciplinary interaction and, in particular, the extent to which they have been in dialogue with one another.

Beyond academic isolationism

A series of interviews with sociologists of religion conducted in 2002 by the Centre for Law and Religion at Cardiff Law School concluded that 'sociologists of religion are not much interested in legal matters'.[135] Yet, it would be incorrect to assume that work in either the sociology of religion or law and religion provides watertight evidence of academic isolationism. The recent rises in fortunes of both sub-disciplines have led both to increase their contact with other disciplines. Both sub-disciplines frequently interact with theology and religious studies, though that interaction is often fraught with difficulties.[136] And the sociology of religion frequently draws upon material from other social sciences such as psychology, social policy, economics and anthropology.[137] However, the question for current purposes is the extent to which law and religion and the sociology of religion interact with each other in England and Wales. In order to assess this, it is necessary to distinguish between multidisciplinary and interdisciplinary work. The distinction often made is between multidisciplinary work which 'juxtaposes several disciplines without any attempt to integrate or synthesis aspects of their knowledge' and interdisciplinary work, which requires 'an ambition to understand and integrate aspects of two or several disciplinary perspectives into a single approach'.[138]

It is now common to find legal and sociological accounts of religion near to each other. Journals dedicated to one sub-discipline now

[135] N Doe, 'A Sociology of Law on Religion – Towards a New Discipline: Legal Responses to Religious Pluralism in Europe' (2004) 152 *Law and Justice* 68.

[136] See Sandberg, *Law and Religion*, chapter 9 and D Martin, *Reflections on Sociology and Theology* (Clarendon Press, 1997) respectively. Davie refers to Religious Studies as 'hovering, at times uneasily, in between theology and sociology' (Davie, *The Sociology of Religion*, 6).

[137] Davie, *The Sociology of Religion*, 131. Many sociologists of religion, including Durkheim himself, are also social anthropologists.

[138] R Banaker and M Travers, *Theory and Method in Socio-Legal Research* (Hart, 2005) 5, fn 11; A F Repko, *Introduction to Interdisciplinary Studies* (Sage, 2014) 28; A F Repko, *Interdisciplinary Research: Process and Theory* (2nd edition, Sage, 2012) 16; A Chettiparamb, *Interdisciplinarity: A Literature Review* (The Higher Education Academy, 2007); and the essays in R Frodeman (ed.), *The Oxford Handbook of Interdisciplinarity* (Oxford University Press, 2010).

frequently include articles dedicated to the other,[139] while edited collections from one sub-discipline often include one or more chapters by academics from the other sub-discipline.[140] However, it remains less common for legal and sociological materials to be examined in the same monograph, chapter or article. The value of multidisciplinary work is frequently acknowledged but often such statements only raise the multidisciplinary nature of the study of religion in order to exclude other disciplines from the analysis.[141] Nevertheless, there are several examples of multidisciplinary work in law and religion which have made use of sociology.[142] Social science research methods have been employed in a number of empirical studies.[143] And there are many pieces of law and religion scholarship which have drawn upon sociological theories and ideas.[144] However, although many law and religion works include reference to research from the social sciences, such material is often mentioned only fleetingly and selectively at the beginning or the end of what is otherwise a doctrinal legal account.[145]

139 See, e.g., E Sengers, 'The Religious Market and its Regulation: A Sociological Perspective' (2007) 9(3) *Ecclesiastical Law Journal* 294; R Lee, 'Custody Disputes and Alternative Religions in the Courts of England and Wales' (2008) 23(1) *Journal of Contemporary Religion* 63; P W Edge and D Corrywright, 'Including Religion: Reflection on Legal, Religious and Social Implications of the Developing Ceremonial Law of Marriage and Civil Partnership' (2011) 26(1) *Journal of Contemporary Religion* 19.

140 See, e.g., E Barker (ed.), *The Centrality of Religion in Social Life* (Ashgate, 2008) and P W Edge and G Harvey (eds.), *Law and Religion in Contemporary Society: Communities, Individualism and the State* (Ashgate, 2000).

141 An example of this can be found in Mark Hill's *Ecclesiastical Law* which states that: 'The meaning, effect and future of establishment [of the Church of England] is a complex matter of history, ecclesiology, sociology and politics which is beyond the scope of this book': M Hill, *Ecclesiastical Law* (3rd edition, Oxford University Press, 2007) para. 1.19.

142 However, it is noticeable that to date, law and religion works have tended to draw more upon political theory rather than social theory. For examples, see R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (2nd edition, Oxford University Press, 2013) and the books published in the Cultural Diversity and Law series by Ashgate.

143 See, e.g., A Bradney and F Cownie, *Living Without Law: An Ethnography of Quaker Decision-Making Dispute Avoidance and Dispute Resolution* (Ashgate, 2000); P W Edge and C C A Pearce, 'The Development of the Lord Bishop's Role in the Manx Tynwald' (2006) 57(3) *Journal of Ecclesiastical History* 494; S Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation, 2001); S Bano, *Muslim Women and Shari'ah Councils* (Palgrave, 2012); and the various publications resulting from Cardiff University's Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts' Research Project listed at: www.law.cf.ac.uk/clr/research/cohesion.html.

144 See, e.g., A Bradney, *Law and Faith in a Sceptical Age* (Routledge, 2009) chapter 1.

145 See, for example, the discussion of secularisation in the concluding chapter of J Rivers, *The Law of Organized Religions* (Oxford University Press, 2010). There has also been a tendency towards including a sociological chapter at the beginning or end of edited works on law and religion. See, e.g., G Davie, 'A Perspective from the Sociology of Religion' in S Ferrari and R Christofori (eds.), *Law and Religion in the 21st Century* (Ashgate, 2010) 1.

There is also some evidence of sociologists of religion undertaking work of a multidisciplinary nature that includes law. Until recently such work was exceptional. Sociologists of religion have tended to pay little attention to law or politics. As Steve Bruce has noted, 'social scientists interested in politics have generally not given much attention to religion and much sociology of religion ignores politics completely'.[146] However, more recently there has been a growth in such work, not least through the research projects and workshops funded by the AHRC/ESRC Religion and Society Programme. A number of handbooks and textbooks now make reference to law:[147] the *Sage Handbook to the Sociology of Religion* has a part dedicated to 'Religion and Politics'[148] while the *Oxford Handbook of the Sociology of Religion* has a part dedicated to 'Religion and the State, the Nation and the Law'.[149] The EUREL website also includes both legal and sociological material alongside each other,[150] and there have been specific reports[151] and research studies[152] by sociologists into legal matters. However, although sociological works often examine subjects, debates and controversies known to law and religion specialists they do so using methods, theories and approaches from outside the law school.[153] Such work tends to talk about legal matters in highly generalised terms, focusing on overall trends. Multidisciplinary work in both sub-disciplines therefore addresses similar subjects but relies upon the approaches, methodologies and sources that are dominant in each respective discipline. Material from the other sub-discipline is referenced and perhaps discussed but,

[146] S Bruce, *Politics & Religion* (Polity, 2003) xi.
[147] See also, e.g., Woodhead and Catto (eds.), *Religion and Change in Modern Britain*.
[148] Beckford and Demerath (ed.), *The Sage Handbook of the Sociology of Religion*.
[149] Clarke (ed.), *The Oxford Handbook of the Sociology of Religion*.
[150] www.eurel.info.
[151] See, for instance, L Woodhead with R Catto, 'Religion or Belief: Identifying Issues and Priorities' (Equality and Human Rights Commission Research Report 48, 2009 at www.equalityhumanrights.com/uploaded_files/research/research_report_48_religion_or_belief.pdf.); L Woodhead, 'Recent Research on Religion, Discrimination, and Good Relations' (2011, at www.religionandsociety.org.uk/uploads/docs/2011_05/13062417842_linda_woodhead_final_report_may2011.pdf); P Weller, 'Religious Discrimination in Britain: A Review of Research Evidence 2000–2010' (Equality and Human Rights Commission Research Report 73, 2010 at www.equalityhumanrights.com/uploaded_files/research/research_report_73_religious_discrimination.pdf); and A Donald *et al.*, 'Religion or Belief, Equality and Human Rights in England and Wales' (Equality and Human Rights Commission Research Report 84, at www.equalityhumanrights.com/uploaded_files/research/rr84_final_opt.pdf).
[152] See, for example, the work of Paul Chambers on the relationship between faith groups and the National Assembly for Wales as well as religious diversity and tolerance in Wales and the relationship between religious ideology and human rights: P Chambers, *Secularization and Social Change in Wales* (University of Wales Press, 2005).
[153] See, for example, the work of Paul Weller: e.g. P Weller, *Time for a Change* (T & T Clark, 2005) and P Weller, *Religious Diversity in the UK* (Continuum, 2008).

with the exception of some empirical research projects, research in one sub-discipline does not tend to draw upon the research methods and materials of the other sub-discipline.

There have, however, been some examples of interdisciplinary work in law and religion that uses sociology; and interdisciplinary work in the sociology of religion that uses law.[154] The publications of Steve Bruce, James Beckford and Werner Menski provide examples of such work. Although Bruce has published extensively on the links between religion and politics, especially in Northern Ireland,[155] most of this work just touches upon the legal dimension and may therefore be characterised as being multidisciplinary not interdisciplinary. However, his article 'Law, Social Change and Religious Toleration', co-authored with Chris Wright, provides an example of an interdisciplinary study in that it seeks to verify and explain from a sociological perspective the contention that the State's gradual abandonment of its role as arbiter of religious truth by means of piecemeal laws on religious liberty was motivated by 'necessity rather than principle'.[156] Similarly, although Beckford's research, particularly his work on New Religious Movements and religion in prisons has often included some reference to law,[157] it is his article entitled 'Banal Discrimination: Equality of Respect for Beliefs and Worldviews in the UK', which provides the clearest evidence of interdisciplinarity.[158] The article developed the work of Michael Billig[159] to contend that English law was characterised by the

[154] This is especially true of the work of sociologists from outside the UK. Interdisciplinary publications by prolific authors such as Bryan S Turner and James T Richardson have had a considerable impact. See, e.g., B S Turner, *Religion and Modern Society* (Cambridge University Press, 2011); B S Turner, *The Religious and the Political* (Cambridge University Press, 2013); J T Richardson, 'The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis' (2006) 67(3) *Sociology of Religion* 271; and J T Richardson, (ed.), *Regulating Religion: Case Studies from Around the Globe* (Kluwer, 2004). For a further example of an interdisciplinary study published outside the UK see D Little, *Religion, Order and Law* (Harper Torchbooks, 1969).

[155] S Bruce, *God Save Ulster!: Religion and Politics of Paisleyism* (Oxford University Press, 1989); Bruce, *Politics & Religion*.

[156] S Bruce and C Wright, 'Law, Social Change and Religious Toleration (1995) 37 *Journal for Church and State* 103.

[157] See, e.g., J A Beckford, 'The State and Control of New Religious Movements' in *Acts of the 17th International Conference of the Sociology of Religion* (Paris, 1983) 115; J A Beckford and S Gilliat, *Religion in Prison: Equal Rights in a Multi-Faith Society* (Cambridge University Press, 1998) and J A Beckford and J T Richardson 'Religion and Regulation' in Beckford and Demerath (eds.), *The Sage Handbook of the Sociology of Religion*, 396.

[158] J A Beckford, 'Banal Discrimination: Equality of Respect for Beliefs and Worldviews in the UK', in D Davis and G Besier (eds.), *International Perspectives on Freedom and Equality of Religious Belief* (JM Dawson Institute of Church-State Studies, 2002) 25.

[159] M Billig, *Banal Nationalism* (Sage, 1995).

existence of 'low-level, unthinking, but sometimes institutional discrimination' in favour of 'mainstream Christian churches' and against the more marginal' religious communities and organisations and drew upon legal case studies to reach this conclusion. Menski's *Hindu Law: Beyond Tradition and Modernity* perhaps provides the clearest evidence of a law and religion work which uses an interdisciplinary approach using sociology. Menski contended that a revival in interest in Hindu law can be explained by reference to sociological notions of modernity and post-modernity: he argued that whilst modernist assumptions about the irrelevance of Hindu law led to its neglect, Hindu law should be reconstructed within a post-modern analysis as a 'complicated hybrid reflecting both a disjunction as well as an interweaving of "modern" and "pre-modern" legal cultures'.[160]

These three examples provide evidence of interdisciplinary rather than multidisciplinary work because they include the synthesis of legal and sociological materials. Bruce and Wright's work uses sociological materials to examine legal changes, Beckford makes reference to law to support or refute sociological propositions, and Menski uses sociological theory to explain legal change. In all three cases, reference to the other sub-discipline is far from fleeting; it is, rather, integral to the argument that is being developed. Such an interdisciplinary approach, using legal and sociological materials and methods to study religion, remains exceptional. This is problematic in that academic isolationism can constrain scholarship in this area by limiting insights. For instance, Menski has argued that it is the 'widespread ignorance of social science subjects' by lawyers that has led legal scholars to be 'reluctant, if not overtly hostile, to accept radical postmodernist ideas that would transform the way in which we understand and study law'.[161] The main aim of this book is to examine the benefits of developing an interdisciplinary approach to the legal and sociological studies of religion in order to determine how such an approach may inform our understanding of the place of religion in the twenty-first century. This raises the question of why a fusion of legal and sociological approaches is required in particular. The following case study provides an answer to this question, which will be developed in the chapters that follow.

160 W Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press, 2003) chapter 1.

161 Ibid., 17.

CASE STUDY: DEFINING RELIGION OR BELIEF

One topic which has received much attention from both legal and sociological works on religion is the question of whether and how religion is to be defined. However, there has been little synthesis of this vast sociological and legal literature on the definition of religion beyond cross-referencing.[162] Reference to this literature indicates that the separation of scholarship on this topic along traditional disciplinary lines may be misguided for four main reasons. First, an interdisciplinary approach seems required since both lawyers and sociologists require a technical definition of religion. Popular definitions will not suffice for sociological analysis, legal regulation and legal study.[163] As Daniel Pals argues, 'intuitions of common sense' which define religion by reference to common conceptions of divinity and/or reference to the major world religions are invariably inadequate for scholarly purposes.[164] This is also true for legal purposes. Furthermore, as Peter Edge points out, while scholars are able to recognise the complexity of the issue, posit a range of partial definitions and then move on, this luxury may not be available to legal actors who may find that the definition of religion 'is crucial to the case for which they are responsible, either as advisor or adjudicator'.[165]

Second, an interdisciplinary approach to the question of definition seems particularly needed at the present time. Although many sociologists and lawyers have discussed the definition issue (albeit separately), recent legal and sociological developments mean that many earlier accounts need revision. The juridification of religion and the questioning of the secularisation thesis have meant that many previous works are now outdated. It is striking that many recent works in the sociology of religion give the impression that the existing long-lasting debate

162 Legal and sociological accounts have occasionally appeared as separate chapters in the same work. See, e.g., T A Idinopulos and B C Wilson (eds.), *What is Religion?: Origins, Definitions & Explanations* (Brill, 1998) and J G Platvoet and A L Molendijk (eds.), *The Pragmatics of Defining Religion: Contexts, Concepts & Contests* (Brill, 1999).

163 As Meeter Berg argues, while colloquially it is 'quite normal' to exclaim that 'football is my religion', such a broad conception is outside the reach of those who study religion, let alone those who draft or interpret law (M Berg, 'What is Religion?' in Platvoet and Molendijk (eds.), *The Pragmatics of Defining Religion*, 396.

164 D L Pals, *Seven Theories of Religion* (Oxford University Press, 1996) 12. Steve Bruce argues that sociological concepts will tend to be more abstract, broader and more consistent than lay usages of the same term: S Bruce, 'Defining Religion: A Practical Response' (2011) 21(1) *International Review of Sociology* 107, 114.

165 Edge, 'Determining Religion', 402.

concerning the definition of religion is in need of revitalisation.[166] The fact that such a revision is needed because of both social and legal changes suggests that cross-disciplinary collaboration would be advantageous.

Third, reference to legal and sociological writings on the definition of religion reveal that many of the problems of defining religion identified are shared by both lawyers and social scientists. The central problem remains that identified by the sociologist Georg Simmel: managing to craft a definition of religion that is both precise and sufficiently comprehensive.[167] This problem is often repeated (but rarely cited) in the legal literature; for instance, Peter Cumper has pointed out that religion is a difficult term to define since any definition must be sufficiently flexible 'to satisfy a cross section of world faiths' but must also be 'sufficiently precise for practical application in specific cases'.[168] Simmel's problem also remains at the heart of the sociological literature. Steve Bruce has criticised the way in which a broad definition of religion is a means to find 'great reservoirs of religious sentiment in an apparently secular society' by renaming 'the secular as religious'.[169] By contrast, the social historian Callum Brown has argued that too narrow a definition of religion has assigned false importance to formal church-based 'religion' and ignored other less formal expressions of religiosity, leading social scientists to incorrectly date religious decline in Britain much earlier than it actually occurred.[170]

Fourth, legal definitions of religion are of sociological interest. They do not exist in isolation from wider society but have social effects. Defining religion is 'an exercise of power' which can have serious repercussions.[171] Like all definitions, legal definitions primarily serve as

[166] One sociology of religion textbook warns of the danger of being 'hopelessly bogged down' in the matter of definition and tells its readers that it hopes 'to avoid the worst of the mire': K J Christiano, W H Swatos and P Kivisto *Sociology of Religion: Contemporary Developments* (Walnut Creek, 2001) chapter 1.

[167] G Simmel, 'A Contribution to the Sociology of Religion', printed in G Simmel, *Essays on Religion* (Yale University Press, 1907 [originally published in 1898]) 101.

[168] P Cumper, 'Freedom of Thought, Conscience and Belief' in D Harris and S Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, 1995) 359.

[169] S Bruce, *God is Dead: Secularization in the West* (Blackwell, 2002) 199.

[170] C G Brown, *The Death of Christian Britain* (Routledge, 2000) 9–11.

[171] A Aldridge, *Religion in the Contemporary World – A Sociological Introduction* (3rd edition, Polity, 2013) 22; For James Beckford, legal 'definitions have a broadly political significance in the sense of relating to struggles for power': J A Beckford, 'The Politics of Defining Religion in Secular Society' in Platvoet and Molendijk (eds.), *The Pragmatics of Defining Religion*, 23.

mechanisms for inclusion and exclusion.[172] Legal definitions demarcate the granting of benefits and burdens, of rights and duties: those included in the definition are recognised by law; those excluded are denied legal recognition.[173] Legal definitions of religion which are adopted, whether explicitly or implicitly, determine which individuals and groups should be bestowed with legal advantages by virtue of the fact that they are 'religious'.[174] The following sections will focus on the third and fourth reasons in turn to extrapolate and verify the claims made above that reference to legal and sociological works on the possibility and effect of defining religion point to a need for interdisciplinary synthesis.

The problem of defining religion or belief

Ironically, although it is commonly recognised that laws should be clear and certain,[175] there is considerable reluctance to include definitions in statutes. Authors of legal drafting manuals effectively advise a presumption against their inclusion, stressing the risks caused by the inclusion of a legal definition and advising that definitions should be used only sparingly in legislation,[176] while definitions that are included invariably provoke criticism.[177]

These concerns are especially true in relation to the question of defining religion. As James Beckford has noted, religion is more than simply another example of a 'contested concept': historical boundary disputes concerning religion have often turned bloody and demarcations have become entrenched.[178] This has meant that both lawyers and sociologists have dedicated a great deal of ink to elucidating particular problems associated with defining religion and to debating whether such

[172] They provide a process 'of delineation, the drawing of boundaries around the stipulated meaning of the term': G C Thornton, *Legislative Drafting* (3rd edition, Butterworths, 1987) 56–7. See also V Crabbe, *Legislative Drafting* (Cavendish Publishing, 1993) 109.

[173] This is equally true of scholarly definitions. As Durkheim pointed out, sociological definitions demarcate a field of study by stating what is to be included: Durkheim, *The Elementary Forms of Religious Life*, 25. See also J L Cox, 'Intuiting Religion: A Case for Preliminary Definitions' in Platvoet and Molendijk (eds.), *The Pragmatics of Defining Religion*, 267.

[174] See Beckford, 'The Politics of Defining Religion', 23.

[175] This is required by the principle of the rule of law. See Article 7 of the ECHR and the classical account provided in A V Dicey, *Law of the Constitution* (10th edition, Macmillan, 1959) 202.

[176] Thornton, *Legislative Drafting*, 57; Crabbe, *Legislative Drafting*, 105; S Robinson, *Drafting: Its Application to Conveyancing and Commercial Documents* (Butterworths, 1980) 54; B H Simamba, 'The Placing and Other Handling of Definitions' (2006) 27(2) *Statute Law Review* 73.

[177] By way of illustration, see the comments of Lord Reid in *Brutus* v. *Cozens* [1973] AC 854, 861: 'No doubt a statute may contain a definition – which incidentally often creates more problems than it solves'.

[178] J A Beckford, *Social Theory & Religion* (Cambridge University Press, 2003) 13.

problems mean that the quest for definition should be abandoned. It is possible to deduce five (overlapping) problems of defining 'religion' from the legal and sociological literatures.[179]

The first problem is the vast number of definitions that have been proposed and found lacking. Those who question whether religion ought to be defined often highlight the multiplicity of discarded definitions, some citing the work of the American psychologist James H Leuba who quoted forty-eight definitions in his appendix to *A Psychological Study of Religion: Its Origin, Function, and Future*, as 'a splendid illustration both of the versatility and one-sidedness of the human mind in the description of a very complex yet unitary manifestation of life'.[180] However, although Leuba's work became a shorthand citation to explain a reluctance to define at all, it has more recently been interpreted as showing that religion 'can be defined, with greater or lesser success, more than fifty ways'.[181] Leuba's forty-eight definitions of 'religion' do not prove that religion is indefinable but rather underscore that, while 'we should be suspicious of all universal definitions', we nevertheless cannot do without definitions.[182] This underlines the importance of a distinction drawn by Richard Robinson between 'stipulative' (or specific) definitions, which announce that the subject is to be understood in a certain sense in a certain context, and 'lexical' (or universal) definitions, which report the customary meaning of the word.[183] The multiplicity of definitions of religion, documented by Leuba, suggests that there is a need to provide 'stipulative' definitions of 'religion' but that a 'lexical' definition may not be possible. This is broadly the position taken by a number of scholars and by English law.[184] A

[179] The following develops ideas previously published as R Sandberg, 'Defining Religion: Towards an Interdisciplinary Approach' (2008) 17 *Revista General de Derecho Canonico y Derecho Ecclesiastico del Estado* 1; R Sandberg, 'Church–State Relations in Europe: From Legal Models to an Interdisciplinary Approach' (2008) 1(3) *Journal of Religion in Europe* 329; and R Sandberg and R Catto, 'Law and Sociology: Toward a Greater Understanding of Religion' in Doe and Sandberg (eds.), *Law and Religion*, 275.

[180] J H Leuba, *A Psychological Study of Religion: Its Origin, Function, and Future* (Ams Press, 1912) 339.

[181] J Z Smith, 'Religion, Religions, Religious' in Mark C Taylor (ed.), *Critical Terms for Religious Studies* (University of Chicago Press, 1998) 281.

[182] A L Molendijk, 'In Defence of Pragmatism' in Platvoet and Molendijk (eds.), *The Pragmatics of Defining Religion*, 3.

[183] R Robinson, *Definition* (Clarendon, 1954) 19. Robinson also distinguished 'real' definitions, which provide a universal designation 'concerned with things in general'. Lexical or stipulative definitions may be seen as 'nominal' definitions as opposed to 'real' definitions in that they simply report or establish the meaning of a symbol.

[184] *R (on the Application of Hodkin)* v. *Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, para. 34. For scholarly support of this approach see A Lang, *Myth, Ritual and*

number of different definitions of religion exist reflecting 'the different purposes that the laws are intended to have'.[185] Although partial definitions of religion are sometimes found in statute law,[186] the question of what 'actual faiths or beliefs are covered by the law' has been left to the judiciary to determine on a case-by-case basis.[187] This suggests that the problem of defining religion should be understood as the problem of finding a stipulative definition.[188] The quest is therefore for a definition which fulfils the specific purpose of the legislator or writer and it is important that this purpose and the context of the definition are made explicit.

The second problem is religious pluralism and diversity, which makes it difficult to capture 'the diversity of what we call in every day speech religion'.[189] As Thomas A Idinopulos has stated, the 'bewildering variety of religions, cults, sects, denominational developments and spiritual movements of every sort' means that 'the more we learn about religions, the more we appreciate not their similarities but rather their differences'.[190] For sociologists, the fact that religion 'can no longer be equated with familiar mainstream church and denominational forms but takes a plurality of guides' renders 'the boundaries between religion and non-religion bewilderingly fuzzy'.[191] Such fuzzy boundaries are even more challenging for lawyers since, as Peter Edge has pointed out, 'diffuse faiths can cause problems in determining who is an adherent, and who is not' and can 'cause problems in determining what is religious devotion and what is not'.[192] However, increased religious pluralism and diversity also provides the reasons why the question of

Religion – Volume One (Senate, 1993) 1, which concedes that no satisfactory attempt at universal definition is likely, but argues that this does not undermine the adequacy of specific definitions of religion, contending that 'almost any definition may serve the purpose of an argument, if the writer who employs it states his meaning frankly and adheres to it steadily'.

185 Baroness Scotland, House of Lords Hansard (2004–05) 13 July 2005, cols 1107–1108.

186 See Sandberg, *Law and Religion*, chapter 3.

187 Baroness Scotland stated that this was 'proper' because 'courts are best placed to make decisions on these difficult matters, taking into account all the information that they will have before them': House of Lords Hansard (2004–05) 13 July 2005, cols 1107–1108.

188 However, it may be possible to deduce elements of a lexical definition of religion from the numerous stipulative definitions which themselves are likely to be nuanced variations rather than differing starkly from each other. The juridification of religion has increased the uniformity of legal definitions, see Sandberg, *Law and Religion*, 58.

189 M Hamilton, *The Sociology of Religion: Theoretical and Comparative Perspectives* (2nd edition, Routledge, 2001) 23.

190 T A Idinopulos, 'The Difficulties of Understanding Religion' in Idinopulos, and Wilson (eds.), *What is Religion?*, 27–8.

191 Hamilton, *The Sociology of Religion*, 13.

192 P W Edge, 'The Legal Challenges of Paganisms and Other Diffuse Faiths' (1996) 1 *Journal of Civil Liberties* 216, 219.

definition is increasingly important. As Peter Edge has pointed out, when the State tolerated a single religious faith there was no need to define religion.[193] In contrast, significant levels of religious pluralism and diversity mean that there is now a greater need to pay attention to where the boundaries are drawn. New approaches are needed since evaluating new forms of religious behaviour by reference to forms of religion previously protected runs the risk of excluding those that fall outside the mainstream.[194] As James Wiggins has argued, religious diversity requires the conclusion that the definition of religion 'must become more expansive and elastic than ever before in human history'.[195] However, an overly expansive approach may render the term religion meaningless. Given that English law provides certain rights and privileges on the basis of religion or belief, it surely cannot be the intent that everything can be a religion or belief. It therefore becomes crucial to determine how expansive the definition is and how this changes over time. The plurality and diversity of contemporary religious phenomena should therefore inform rather than prevent the development of stipulative definitions. Although the concept of religion will differ across time and place, this does not mean that a definition cannot be given in respect of a particular time and place.

The third problem in defining religion is one often raised by social anthropologists and post-modernists: 'religion' is a 'Western' category which is 'based upon European languages and cultures' and 'has no necessary equivalent in other parts of the world'.[196] The quest for definition is seen as 'a Western concern' resulting from the Enlightenment.[197] However, although the effect of the Christian Western heritage upon both sociological and legal definitions and understandings of religion needs to be taken into account, this does not necessitate the conclusion religion cannot and should not be defined or used. As Andrew McKinnon points out, the term has now become 'a global category' used as a legal term under international law and in the laws of

193 P W Edge, *Legal Responses to Religious Difference* (Kluwer Law, 2002) 5.

194 For a criticism of such an approach (in relation to the ECHR) see ibid., 47.

195 J Wiggins, 'What on Earth is Religion?' in Idinopulos and Wilson (eds.), *What is Religion?*, 133.

196 B Morris, *Religion and Anthropology: A Critical Introduction* (Cambridge University Press, 2006) 1; F Bowie, *The Anthropology of Religion: An Introduction* (Blackwell, 2000) 22; B Saler, *Conceptualising Religion* (Berghahn Books, 2000) ix.

197 As Steve Bruce has observed, there are 'various post-modern approaches which argue that there is actually no such thing as religion because "religion" is a modern social construct (usually constructed for bad purposes)': Bruce, 'Defining Religion', 107.

non-Western states; religion 'has become part of the global political-economic discourse'.[198] Moreover, as Steve Bruce has argued, 'the post-modern critique of the idea of religion applies equally well to every other concept and definition we ever use'.[199] Acknowledgment of the differences between Western understandings of religion and non-Western practices does not render the quest for definition impossible or even misguided; it rather points to an appreciation which should inform the attempt to define. As Jan Platovoet has argued, reference to the non-Western religions should 'require the constant reformulation' of understandings of religion.[200]

The indescribable essence of religion provides the fourth problem. This refers to the extent to which the scholar or legal actor as an outsider can understand the essence of religious belief as understood internally by the believer.[201] This concern – often expressed as questioning how one can see a stained glass window from the outside – has led to a sustained debate in the sociology of religion. A spectrum of viewpoints can be found in the literature. On the one side of the spectrum is what may be styled the '*sui generis* thesis': this contends that the impossibility of a valueless understanding of religion necessitates the conclusion that religion must be treated as a phenomenon in its own right, understandable and explainable only on its own terms.[202] This 'phenomenological' or 'hermeneutic' approach is epitomised by Max Müller's assertion that religion is rooted in an independent 'faculty of faith', which should be respected by scholars.[203] This view is advocated by some psychologists of religion who recognise religion as 'a unique aspect of human functioning'.[204] However, taken to its logical conclusion, the *sui generis* thesis restricts the capacity for the researching of religion. It implicitly restricts the possibility of cross-, multi- and

198 A M McKinnon 'Sociological Definitions, Language Games and the "Essence" of Religion' (2002) 14 *Method & Theory in the Study of Religion* 61, 77–8.

199 As Bruce argues, 'the origins and development of a concept have no necessary bearing on the reality it purports to comprehend': Bruce, 'Defining Religion', 108.

200 J G Platvoet, 'To Define or Not to Define: The Problem of the Definition of Religion' in Platvoet and Molendijk (eds.), *The Pragmatics of Defining Religion*, 255–60.

201 As Durkheim put it, 'it is the difficulty of attempting to put into words the essence of the thing defined': E Durkheim, *The Elementary Forms of Religious Life*, 25.

202 Hamilton, *The Sociology of Religion*, 3; D L Pals, 'Is Religion a *Sui Generis* Phenomenon?' (1987) 55(2) *Journal of the American Academy of Religion* 259.

203 M Müller, *Introduction to the Science of Religion* (Longmans, Green & Co, 1889).

204 K I Pargament, G M Magyar-Russell and N A Murray-Swank 'The Sacred and the Search for Significance: Religion as a Unique Process' (2005) 61(4) *Journal of Social Issues* 665, 665–6, 669 and 680.

interdisciplinary work.[205] On the other side of the spectrum is the 'reductionist thesis'. This seeks to explain religion by locating it exclusively within the explanatory frameworks of other subjects.[206] For example, the work of Sigmund Freud integrated religious phenomena within his general psychological framework; religious beliefs were seen as 'examples of illusions, psychological mechanisms designed to allay deep-seated anxieties and satisfy child-like wishes'.[207] However, adoption of the reductionist thesis may also inhibit the study of religion. As Philip Tite notes, this approach is essentially one of translation and warns that scholars who translate but do not understand will be unable to provide the explanation they seek.[208] Studying religion in this manner runs the risk of failing to see what is religious about religion. This may lead scholars to write 'from the dispassionate standpoint of a Martian landing on Earth, trying to work out why *Homo sapiens* wastes so much time praying to wooden crosses and killing each other over books'.[209]

In between these directly opposed views, there is a middle point in the spectrum, known as 'methodological agnosticism', which provides a compromise position.[210] In the words of Georg Simmel, methodological agnosticism requires a distinction to be drawn between the 'metaphysical event that is readily capable of implying or forming the basis of religion' and 'the subjective attitude of human beings'.[211] Methodological agnosticism requires the making of that distinction and the 'bracketing aside of the question of the status of religious claims'.[212] As Steve Bruce has put it, methodological agnosticism 'treats all beliefs as human projections'.[213] This does not automatically exclude the possibility that

205 Woodhead, 'Introduction' in Woodhead and Catto (eds.), *Religion and Change in Modern Britain*, 2.
206 P L Tite, 'Naming or Defining? On the Necessity of Reduction in Religious Studies' (2004) 5(3) *Culture and Religion* 339, 358.
207 Ibid.; Pargament, Magyar-Russell and Murray-Swank 'The Sacred and the Search for Significance', 666.
208 Tite, 'Naming or Defining?', 358.
209 J Appleton, 'Taking the Soul out of Belief', *Spiked*, 16 March 2006 www.spiked-online.com/newsite/article/257/, reviewing D Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (Allen Lane, 2006).
210 Hamilton, *The Sociology of Religion*, 4–5.
211 G Simmel, 'Contributions to the Epistemology of Religion' printed in G Simmel, *Essays on Religion* (Yale University Press, 1997 [originally published in 1902]) 121.
212 Hamilton, *The Sociology of Religion*, 5.
213 Bruce, 'Defining Religion', 109. The approach requires that 'religion is to be understood as a human projection, grounded in the specific infrastructures of human history': P L Berger, *The Sacred Canopy* (Anchor Books, 1969) 180. It is similar to the approach taken by the novelist Neil Gaiman in whose work gods are real because people believe in them (see N Gaiman,

such beliefs might also be true. However, methodological agnosticism takes the position that 'claims about the divine are beyond empirical testing by the discipline's methods and hence beyond our remit'.[214] Like the *sui generis* thesis, but unlike the reductionist thesis, methodological agnosticism accepts that religion may be unique and special and that elements of religion can only be understood in their own terms. However, unlike the *sui generis* thesis, but like the reductionist thesis, methodological agnosticism recognises that the human manifestation of religion can be subjected to analysis using frameworks developed in other parts of the academy. Methodological agnosticism, as a principle, could inform the interest in definitions taken by lawyers as well as sociologists. As Roger Cotterrell has noted, both law and sociology 'must define and conceptualize very elusive aspects of human behaviour'.[215] Sociologists and lawyers are primarily interested in religion as a human activity and take an ultimately 'pragmatical, contextualised approach' to defining religion.[216] Law does not seek to describe religion as a phenomenon but simply seeks to establish rules to regulate and facilitate its exercise within wider social life.[217] It provides a means by which lawyers and sociologists, whilst recognising the indescribable essence of religion, may nevertheless venture to provide a definition of religion by focusing upon the human dimension of religion, which the lawyer seeks to recognise and regulate and which the sociologist seeks to study.

The fifth and final problem is the contention that religion as studied by scholars is qualitatively different from the religious activities that actually occur in society (and which the law seeks to recognise and regulate). The scholarly study of religions involves 'detaching a religion from its cultural matrix and viewing it as a discrete set of symbols, myths, ritual ceremonies, and verbally stated beliefs or teachings' to such an extent that 'the result is a kind of intellectualised scholar's religion, which can be discussed, taught and written about' that bears

American Gods (revised version, Headline Book Publishing, 2004). The concept of 'methodological agnosticism' means attention is paid to religion because people believe in it.

214 Bruce, 'Defining Religion', 109.

215 R Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006) 2.

216 A L Molendijk, 'In Defence of Pragmatism' in Platvoet and Molendijk (eds.), *The Pragmatics of Defining Religion*, 4.

217 As Peter Edge points out, the legal system does not and should not 'say anything about religion' in that universal statements being culturally conditioned would question the neutrality of the law: Edge, *Legal Responses to Religious Difference*, 9; P W Edge, *Religion and Law: An Introduction* (Ashgate, 2006) 28; T J Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law' (2003) 16 *Harvard Human Rights Journal* 190, 195.

little 'relationship to the religion which human beings live by on a daily basis'.[218] As Jeppe Sinding Jensen has observed, for scholars, the business of defining religion is often 'closely linked to the enterprise of explaining' religion.[219] Definitions of religion are invariably 'very short versions of theories', inevitably loaded with contentious theoretical assumptions and are shaped by the personal beliefs of the writer.[220] Concerns have also been raised regarding the legal academic 'obsession with definition', which has been linked to a positivist conception of the law.[221] The quest for definition is a 'positivist pipedream',[222] which invariably involves the reduction of complex social reality into neat legal rules and the divorce of law from its often messy social context.[223] The purpose of this positivist enterprise is the artificial construction of coherence.

However, the quest for definition need not be a positivist pipedream: it is possible to construct and employ definitions without the explicit or implicit acceptance and elucidation of positivist principles. This requires a critical approach in relation to the nature, process and role of definitions. As Andrew Halpin has contended, an acceptance of 'the diversity of ways in which definitions are made to work' contradicts 'the idea that there is something in the process of definition itself that neatly orders the members into a category'.[224] There is a need to reveal and address 'assumptions about the role of definition' by asking what Lindsay Farmer has called 'the second order question of how the problem of definition is solved by the legal system'; this entails acceptance that the defined term is not fixed, and that 'further complexity may unravel'.[225] As with the other problems, recognition of the problem can itself mitigate the risks involved.

[218] Idinopulos, 'The Difficulties of Understanding Religion', 29.
[219] Pals, *Seven Theories of Religion*, 12.
[220] J S Jensen, 'On a Semantic Definition of Religion' in Platvoet and Molendijk (eds.), *The Pragmatics of Defining Religion*, 413; Hamilton, *The Sociology of Religion*, 23; Cipriani, *Sociology of Religion*, 1.
[221] L Farmer 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) *Social and Legal Studies* 57.
[222] Positivism has been described as 'a philosophy of order over chaos' (B de S Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edition, Butterworths, 2002) 41). A positivist approach seeks to 'construct general laws or theories which express relationships between phenomena' which invariably involves the simplification of the complexities of social life: Abercrombie, Hill and Turner (eds.), *The Penguin Dictionary of Sociology*, 269).
[223] R Sandberg, 'A Whitehall Farce? Defining and Conceptualising the British Civil Service' [2006] *Public Law* 653, 663.
[224] A Halpin, *Definition in the Criminal Law* (Hart Publishing, 2004) 193, 188–9.
[225] Farmer 'The Obsession with Definition', 68.

In sum, it is clear that the five identified problems indicate that defining religion is difficult but not impossible. The problems should inform rather than stop this quest. Moreover, it is clear that many of the problems identified with defining religion are broadly common to both sociologists and lawyers (although generally most of the problems are dealt with in more depth in the sociological literature). This suggests that a discussion between sociologists and lawyers as to whether religion ought to be defined, whether generally or in a specific context, will inevitably be a richer discussion than a discussion confined on disciplinary lines. In particular, Robinson's distinction between lexical and stipulative definitions and the approach of methodological agnosticism may shape the approach taken by both lawyers and sociologists. However, while the common problems of defining religion demonstrate the usefulness of cross-disciplinary dialogue, they do not demonstrate the need for an interdisciplinary study fusing the sociology of religion and law and religion in particular. In light of this, the remainder of this case study will examine the effect of defining religion to explore whether this provides a rationale for the interdisciplinary fusion of legal and sociological approaches.

The effect of defining religion or belief

Although there are important differences between scholarly and legal definitions, with scholarly definitions tending to be wider,[226] there is much to be gained by fusing insights from both legal and sociological definitions provided that their differing contexts are recognised. This is because legal definitions do not exist in a social vacuum. As Vincent Crabbe points out, legal definitions 'must conform with the usage of language in the jurisdiction'.[227] The ordinary (or 'dictionary') definition of a word is likely to retain an influence regardless of the 'legal' meaning that is 'expressly attached to a term'.[228] Moreover, legal definitions

[226] Ahdar and Leigh, *Religious Freedom in the Liberal State*, 143. Peter Berger and Thomas Luckmann have contended that legal definitions are likely to be 'altogether too narrow' and 'ecclesiastically orientated', focusing on the institutional and 'official' viewpoint to the exclusion of other areas of sociological relevance: P Berger and T Luckmann, 'Sociology of Religion and Sociology of Knowledge' (1963) 47 *Sociology and Social Research* 417.

[227] Crabbe, *Legislative Drafting*, 115. This is underlined by the decision of the Supreme Court in *R (on the Application of Hodkin)* v. *Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

[228] F A R Bennion, *Statutory Interpretation: A Code* (4th edition, Butterworths, 2002) 480. The general principle is that any word used in a statute that does not have a technical meaning retains its popular meaning (which can be deduced from its dictionary definition). For a criticism of this, see Halpin, *Definition in the Criminal Law*, 190–1.

provide a mechanism of inclusion and exclusion. Although this is equally true of scholarly definitions,[229] legal definitions have the force of law in a particular jurisdiction. This means that legal definitions demarcate the granting of benefits and burdens, of rights and duties. Those included in the definition are recognised by law; those excluded are denied legal recognition. Legal definitions invariably make 'a very real difference in the lives of persons'.[230] Legal acts of inclusion and exclusion have political, economic and social effects. Legal definitions are therefore of sociological interest.[231] The remainder of this case study will determine the extent to which this has occurred in one particular area of English law:[232] it will focus on how a series of Employment Tribunal[233] cases have interpreted the definition of 'religion or belief' for the purpose of discrimination law.[234]

Discrimination on grounds of religion or belief has been unlawful in England and Wales since 2003.[235] The term 'religion or belief' was originally defined as meaning 'any religion, religious belief, or similar philosophical belief'.[236] The word 'similar' was used to exclude certain non-religious beliefs. In *Williams* v. *South Central Limited*,[237] an Employment Tribunal excluded national beliefs, holding that a belief that a

[229] As Durkheim pointed out, sociological definitions demarcate a field of study by stating what is to be included: Durkheim, *The Elementary Forms of Religious Life*, 25.

[230] Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', 191.

[231] As Sophie Gilliat-Ray has noted, sociologists can use theories of social closure as a means of 'evaluating the way in which "interested parties" and dynamics of interest push action in certain directions, along certain tracks, thereby including some and excluding others': S Gilliat-Ray, 'The Trouble with "Inclusion": A Case Study of the Faith Zone at the Millennium Dome' (2004) *The Sociological Review* 459, 469.

[232] English law recognises a number of different definitions of religion. For an account of the definitions adopted in charity and registration law and human rights law see Sandberg, *Law and Religion*, chapter 3. See also A Good, 'Persecution for Reasons of Religion under the 1951 Refugee Convention' in T G Kirsch and B Turner (eds.), *Permutations of Order: Religion and Law as Contested Sovereignties* (Ashgate, 2009) 27, which provides an analysis of inclusion and exclusion in asylum claims.

[233] Previously known as Industrial Tribunals, Employment Tribunals operate under the Employment Tribunals Act 1996 and resolve disputes between employers and workers over employment matters such as unfair dismissal, redundancy payment and discrimination: D Greenberg (ed.), *Jowitt's Dictionary of English Law – Volume 1* (Sweet & Maxwell, 2010) 799.

[234] The following develops ideas previously published as R Sandberg, 'A Question of Belief' in Spencer (ed.), *Religion and Law*, 51 and R Sandberg, 'Bigger on the Inside? Doctoring the Concept of "Religion of Belief" under English Law' in A Crome and J McGrath (eds.), *Time and Relative Dimensions in Faith: Religion and Doctor Who* (Darton Todd, 2013) 235.

[235] It was first prohibited by the Employment Equality (Religion or Belief) Regulations 2003 but the law is now to be found in the Equality Act 2010. For a fuller discussion see Sandberg, *Law and Religion*, chapter 6.

[236] Employment Equality (Religion or Belief) Regulations 2003, Reg. 2(1).

[237] [2004] ET 2306989/2003 (16 June 2004).

national flag should be worn was not 'similar' to a religious belief and so was not protected. And in *Baggs* v. *Fudge*[238] political beliefs were excluded: a claimant who was rejected for a job because of his membership of a far Right political party was told that he could not bring a successful claim since political beliefs fell outside the definition of 'similar philosophical belief'. However, since 2006 the definition of belief has changed so that the word 'similar' has been deleted and lack of belief has been expressly included.[239] The definition now states that 'religion means any religion' and 'belief means any religious or philosophical belief'.[240] It appears that the reason for the deletion of the word 'similar' was to appease those who professed non-religious beliefs which were protected but who objected to their beliefs being regarded as being religion-like.[241] Baroness Scotland, the then government minister, claimed that the deletion of the word 'similar' would make no difference because:

> the term 'philosophical belief' will take its meaning from the context in which it appears; that is, as part of the legislation relating to discrimination on the grounds of religion or belief. Given that context, philosophical beliefs must always be of a similar nature to religious beliefs . . . it will be for the courts to decide what constitutes a belief . . . but case law suggests that any philosophical belief must attain a certain level of cogency, seriousness, cohesion and importance, must be worthy of respect in a democratic society and must not be incompatible with human dignity. Therefore an example of a belief that might meet this description is humanism, and examples of something that might not . . . would be support of a political party or a belief in the supreme nature of the Jedi Knights.[242]

However, a series of Employment Tribunal decisions have proved the Baroness to be incorrect. The removal of the word 'similar' does appear to have made a difference. Ironically, the Baroness's explanation of why

238 [2005] ET 1400114/2005 (23 March 2005).

239 Section 77 of the Equality Act 2006 substituted the new definition of 'religion or belief' into the Regulations. See P Griffith, 'Protecting the Absence of Religious Belief? The New Definition of Religion or Belief in Equality Legislation' (2007) (2)3 *Religion & Human Rights* 149.

240 Equality Act 2010, s 10.

241 Beliefs such as humanism and atheism were clearly protected as beliefs under the old definition but the word 'similar' resulted in much ill ease. However, at the time when the original Regulations were being formulated Lord Brennan pointed out that the word 'similar' related 'to the quality of the belief, not its nature': it 'addresses the state of mind in which someone holds that belief to the same thinking quality as a religious belief. It is not used to assimilate it in any way with a religion': House of Lords Hansard (2002–2003) 17 June 2003 col 788.

242 House of Lords Hansard (2005–2006), 13 July 2005 cols 1109–1110.

the law has not changed has itself prompted this change in approach. Her summary of the case law requirements have been used to provide a series of tests which Employment Tribunals now apply to determine whether a belief is capable of being protected. The turning point was the decision of the Employment Appeal Tribunal in *Grainger PLC* v. *Nicholson*,[243] which concluded that an asserted belief in man-made climate change, together with the alleged resulting moral imperatives arising from it, was capable of constituting a 'philosophical belief' for the purpose of the 2003 Regulations because it met the criteria laid out by the jurisprudence of the European Court of Human Rights which was directly relevant. Employment Judge Burton summarised the meaning of 'philosophical belief' as including five requirements:

(i) The belief must be genuinely held.
(ii) It must be a belief and not . . . an opinion or viewpoint based on the present state of information available.
(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.[244]

Although these five principles can be found in the case law of the Strasbourg Court, it would be incorrect to assume that this represents a watertight definition of belief on the part of the European Court of Human Rights.[245] The approach of the Strasbourg Court has been to consider all claims, determining their success on their merits. The only line that has been drawn is to exclude beliefs that are mere opinions rather than a worldview.[246] The Strasbourg Court has considered claims concerning worldviews as diverse as scientology,[247] Nazism,[248]

243 [2009] UKEAT 0219/09/ZT (3 November 2009).
244 At para. 24.
245 The application of the Strasbourg definitions are also problematic since, unlike domestic discrimination law, Article 9 does not distinguish between philosophical and non-philosophical beliefs. Moreover, the question of the definition of belief has arisen in cases concerning Convention rights other than Article 9.
246 *Campbell and Cosans* v. *United Kingdom* (1982) 4 EHRR 29.
247 *X and Church of Scientology* v. *Sweden* (1978) 16 DR 68.
248 *X* v. *Austria* (1963) 13 CD 42.

and pacifism.[249] Following *Grainger PLC* v. *Nicholson*, domestic discrimination law has taken a similarly expansive approach. As Employment Judge Burton stressed in *Grainger PLC* v. *Nicholson* a belief does not need to constitute or allude to a fully fledged system of thought: 'philosophical belief does not need to amount to an "-ism"'.[250] However, the problem with the approach taken following *Grainger PLC* v. *Nicholson* is that the five requirements have taken on an elevated importance. Employment Tribunal Chairs are now applying these requirements as if they were a statutory test. This is problematic in that these five principles have a rather elastic nature. With the exception of beliefs that are deliberately insincere and/or harmful to others, it is possible to argue that most beliefs would meet each of the five tests. And it is also possible in many cases to easily argue that they do not. Two people may reach directly opposing conclusions as to whether the same belief was 'weighty and substantial', for example.

It is therefore unsurprising that the domestic Employment Tribunals following *Grainger PLC* v. *Nicholson* have used the five requirements in inconsistent ways to often reach arbitrary decisions. Employment Tribunal Chairs have considered the tests to be met in cases concerning beliefs in spiritualism and psychic powers,[251] anti-fox-hunting beliefs,[252] beliefs in the virtue of public service broadcasting,[253] and Humanist beliefs.[254] In contrast, other Employment Tribunal Chairs have concluded that the tests have not been met in cases concerning Marxist/Trotskyite beliefs held by trade union members,[255] beliefs in conspiracy theories regarding 9/11,[256] and a belief that a Poppy[257] should be worn during the week prior to Remembrance Sunday.[258] The emerging case law indicates that Employment Tribunals are now frequently using the five requirements listed in *Grainger PLC* v. *Nicholson* as a means of inclusion and exclusion. This has significant legal and

249 *Arrowsmtih* v. *United Kingdom* (1978) 19 D&R 5.
250 [2009] UKEAT 0219/09/ZT (3 November 2009), para. 28.
251 *Greater Manchester Police Authority* v. *Power* [2009] EAT 0434/09/DA (12 November 2009).
252 *Hashman* v. *Milton Park (Dorset) Ltd* [2011] ET 3105555/2009 (31 January 2011).
253 *Maistry* v. *The BBC* [2011] ET 1213142/2010 (14 February 2011).
254 *Streatfield* v. *London Philharmonic Orchestra Ltd* [2012] 2390772/2011(22 May 2012).
255 *Kelly* v. *Unison* [2009] ET 2203854/08 (22 December 2009).
256 *Farrell* v. *South Yorkshire Police Authority* [2011] ET 2803805/2010 (24 May 2011).
257 A Poppy is a flower made of paper which has to two red petals and a green leaf, which is mounted on a green stem made of plastic. It is often worn on clothing and made into wreaths. The Poppy has been used since 1920 to remember service men and women who have died in war.
258 *Lisk* v. *Shield Guardian Co Ltd & Others* [2011] ET 3300873/2011 (14 September 2011).

social consequences. The finding that a belief does not meet the definition of philosophical belief is fatal to the claimant's case. It means that the alleged discrimination is not prohibited by law and so the claimant is outside the protection that the law provides.

The arbitrary ways in which the five requirements are being applied can be shown by reference to some of the decisions that Employment Tribunals have reached. On the one hand, the decision in *Hashman* v. *Milton Park (Dorset) Ltd*[259] provides evidence of an Employment Tribunal taking a generous approach. It was accepted that the claimant's anti-fox-hunting stance constituted a philosophical belief because this could be 'considered within the parameters of his general beliefs . . . in the sanctity of life'.[260] Moreover, although the claimant wore clothes containing animal dye and had continued working for the organisation run by supporters for hunting which profited from the proceeds of killing animals for food, Employment Judge Guyner found that this did not mean that the claimant's beliefs lacked coherence: he accepted the claimant's view that he 'had to live in the real world' and needed to earn a living and that the work he was doing was in conformity with his beliefs.[261]

On the other hand, other Employment Tribunal decisions provide evidence of a much more restrictive approach. In *Lisk* v. *Shield Guardian Co Ltd & Others*,[262] Employment Judge George held that belief that one should wear a Poppy to show respect to servicemen lacked the characteristics of cogency, cohesion and importance. Without giving reasons or specifying why he chose to reject the statement of the claimant,[263] he simply stated that the belief that one should wear a Poppy to show respect to servicemen 'cannot fairly be described as being a belief as to a weighty and substantial aspect of human life and behaviour' and that he would characterise the claimant's belief as 'a belief that we should express support for the sacrifice of others and not as a belief in itself' and this was 'too "narrow" to be characterised as a philosophical belief'.[264] This reasoning is difficult to reconcile with the approach taken by the Employment Tribunal in *Hashman*, whereby beliefs regarding specific

[259] [2011] ET 3105555/2009 (31 January 2011). [260] Para. 55.

[261] At para. 35. See also *Streatfield* v. *London Philharmonic Orchestra Ltd* [2012] ET 2390772/2011 (22 May 2012) in which a Tribunal found that 'any lack of consistency is not fatal to a determination that those beliefs were genuinely held': para. 41. This generous approach seems to go further than the European Court of Human Rights in that it may be questioned whether such beliefs can be properly styled as constituting a worldview.

[262] [2011] ET 3300873/2011 (14 September 2011).

[263] At least not in the written judgment. [264] Para. 10

matters were held to be protected because they form part of a larger philosophy.[265]

It is also difficult to reconcile *Hashman* with the decision in *Farrell* v. *South Yorkshire Police Authority*.[266] This concerned the claimant's belief that the 9/11 and 7/7 terrorist attacks were 'false flag operations' authorised by the respective national governments in order to provide material with which they could persuade their respective populations to support foreign wars. Although the claimant stressed that these views were connected to his religious beliefs in 'End Time' theology, which concludes that the end of the world will be foreshadowed by the rising up of 'the New World Order',[267] the Employment Tribunal Chair determined that the claim concerned the claimant's specific beliefs about 9/11 and 7/7, which could be separate from his religious beliefs.[268] Moreover, Employment Judge Rostant held 'some sort of objective assessment of the cogency and cohesion of the philosophical belief is expected of the Tribunal'.[269] It was suggested that 'the assessment of cogency and coherence must take into account the broadly accepted body of knowledge in the public domain'.[270] Employment Judge Rostant held that the requirements of cogency or coherence had not been met since 'the conspiracy theory [the claimant] advances remains in the light of subsequent events and the weight of evidence, wildly improbable. There is no body of respected academic commentary in peer reviewed journals that supports the theory.'[271] The claim was therefore dismissed since 'applying an objective test they are absurd beliefs albeit sincerely held'.[272]

This approach in *Farrell* is arbitrary and unprincipled. It is not the role of the tribunal to determine whether the belief is likely to be true and to suggest that beliefs need to be verified by peer-reviewed journal articles. As Lord Nicholls stressed in *Williamson*,[273] 'freedom of religion protects the subjective belief of an individual'.[274] His Lordship was adamant that 'it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard'. *Williamson* suggests that the cogency and coherence threshold is met where the claimant considers their beliefs to be important and where

[265] This is especially true given that the claimant in *Lisk* linked his obligation to take part in a period of mourning and remembrance with his Christian beliefs, equating it with the seriousness with which he treated the season of Lent: para. 8.

[266] [2011] ET 2803805/2010 (24 May 2011). [267] Para. 5.2. [268] Para. 5.3.

[269] Para. 6.1. [270] Para. 6.3. [271] Para. 6.4. [272] Para. 6.8.

[273] *R* v. *Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15.

[274] Para. 22.

those beliefs are capable of being explained to another. The fact that, objectively, such beliefs are unlikely to be true is irrelevant. Atheists would maintain that all religions would fail to meet this test. This cannot have been the intention of Parliament in enacting the law. The type of claim which the cogency and cohesion test seeks to exclude is one involving a deliberately sham religion.[275] The decision shows how the five requirements laid out in *Grainger PLC* v. *Nicholson* can be used in a capricious manner as a means of inclusion and exclusion which has profound legal and social consequences.

This can be further illustrated by reference to the debate as to whether political beliefs are now included as philosophical beliefs for the purpose of discrimination law. Whereas previously it was understood that political beliefs were excluded since they did not constitute a 'similar philosophical belief',[276] the removal of the word 'similar' seems to have confused matters.[277] The root of this confusion was Baroness Scotland's example that 'support of a political party' as 'something that might not' meet the definition of philosophical belief.[278]

As Employment Judge Burton noted in *Grainger PLC* v. *Nicholson*, the Baroness's choice of words referring only to 'support for a political party' seemed to leave open the question of whether 'a belief in a political philosophy or doctrine' might now fall within the definition.[279] This confusion was furthered in *Kelly* v. *Unison*.[280] Although it was held that Marxist/Trotskyite beliefs shared by trade union members of the Socialist Party did not constitute a 'philosophical belief', the decision by Employment Judge Weiniger speculated that some political beliefs may well be included. Weiniger chose to revisit the words of Baroness Scotland to draw a different distinction from that suggested in *Grainger PLC* v. *Nicholson*. He proposed that a distinction could be

[275] An example of such a claim can be found in the US case of *United States* v. *Kuch* 288 F Supp 439 (1968), discussed in Sandberg, *Law and Religion* 46–7.

[276] *Baggs* v. *Fudge* [2005] ET 1400114/2005 (23 March 2005).

[277] Prior to the 2003 Regulations coming into effect, the then government was convinced that political beliefs were not included: the Department of Trade and Industry stated that whilst atheism and humanism would be a 'similar philosophical belief', support for a political party or football team would not (Department of Trade and Industry, 'Explanation of the Provisions of the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003', para. 13). However, the Explanatory Notes to the Equality Act 2010 only gave 'adherence to a particular football team' as an example of a belief not protected.

[278] House of Lords Hansard (2005–2006), 13 July 2005 cols 1109–1110.

[279] [2009] UKEAT 0219/09/ZT (3 November 2009), para. 28.

[280] [2009] ET 2203854/08 (22 December 2009).

drawn between 'political beliefs which involve the objective of the creation of a legally binding structure by power or government regulating others', which are not protected, and the beliefs that 'are expressed by his own practice but where he has no ambition to impose his scheme on others', which may be protected.[281]

However, this distinction has not found favour with subsequent Employment Tribunal decisions. The decisions in *Lisk* v. *Shield Guardian Co Ltd & Others*[282] and *Farrell* v. *South Yorkshire Police Authority*[283] did not discuss the question of whether the belief might have been 'political'. Moreover, in *Maistry* v. *The BBC*,[284] in reaching his conclusion that a belief in public service broadcasting could be a philosophical belief, Employment Judge Hughes stated that he did not accept that the claimant's belief was a political opinion or based on a political philosophy. However, he commented that 'even if it had been, the appellate courts have not yet definitely determined that question'.[285] This suggests that the law on this point is now uncertain and suggests that the line drawn in *Kelly* v. *Unison* is arbitrary in that the Marxist/Trotskyite beliefs held by the claimants in *Kelly* v. *Unison* would appear to meet the *Grainger PLC* v. *Nicholson* tests more easily than the belief in public service broadcasting in *Maistry* v. *The BBC*. These decisions and the continued uncertainty as to which (if any) political beliefs are protected underscores how the definition of philosophical belief is increasingly used as a flexible tool for inclusion and exclusion.

The problems that have developed in these decisions are similar to those which have arisen in the Article 9 case law following *Begum*.[286] Employment Tribunal Chairs are erecting significant hurdles in front of claimants, meaning that claims are often dismissed at the outset before attention can be given to the full merits of the claim. As Judge Hughes noted in *Maistry* v. *The BBC*,[287] 'meeting the *Nicholson* test merely establishes that there is a protected characteristic, such that a discrimination complaint may be brought – the real battleground is whether there has been less favourable treatment and, if so, whether it was on grounds of the belief relied on'.[288] In *Lisk* and *Farrell*, the claims were dismissed before they got as far as the real battleground. This is

[281] At para. 114. [282] [2011] ET 3300873/2011 (14 September 2011).
[283] [2011] ET 2803805/2010 (24 May 2011).
[284] [2011] ET 1213142/2010 (14 February 2011). [285] At para. 19.
[286] *R (on the application of Begum)* v. *Headteacher and Governors of Denbigh High School* [2006] UKHL 15.
[287] [2011] ET 1213142/2010 (14 February 2011). [288] At para. 20.

unfortunate since most of these claims concerned indirect discrimination and so had it been established that there had been a disadvantage, the Tribunal would have then needed to establish whether that disadvantage was justified. As with the test of justification under Article 9(2), this would have required attention to be given to the merits of the claim in its full social context. The problem with the case law at present is that, while the removal of the word 'similar' has led Employment Tribunals to follow Strasbourg in taking an expansive approach to the definition question, the Tribunals have used the principles found in Strasbourg judgments to provide tests which are being interpreted in inconsistent and sometimes overly restricted ways.

This confused and contradictory case law underlines how legal definitions of 'religion or belief' are used as a means of inclusion and exclusion. This highlights the ways in which legal definitions have sociological effects. It is this fact that merits an interdisciplinary collaboration between law and sociology in particular. Legal materials concerning the definition of religion provide an important resource for sociologists. Deciding whether people and activities are within the scope of these laws may have a profound social and practical effect upon the person or group involved. It also reveals something about the way in which the decision maker, as part of the State, sees both the existence and purpose of religion. Lawyers can provide concrete, real and practical case studies, which sociologists can place within their wider social context. However, the traffic should not be one way. Lawyers can benefit from sociological material, which may help explain the direction of the law. For instance, sociologists of religion have produced classifications of definitions of religion which may be applied to unpack and critique legal definitions of religion.[289]

Sociologists frequently distinguish between substantive definitions, which identify religion for what *it is*, and functional definitions, which identify religion for what *it does*.[290] This classification can be used to

[289] See Ahdar and Leigh, *Religious Freedom in the Liberal State*, 145 *et seq*. for a rare example of this in a legal text.

[290] Examples of substantive definitions in sociology include Edward Burnett Tylor's 'minimum definition' of religion as: 'the belief in Spiritual Beings' (E B Tylor, *Primitive Culture* (vol. I, John Murray, 1920) 424) and Steve Bruce's definition that religion 'consists of beliefs, actions and institutions which assume the existence of supernatural entities' (S Bruce, *Religion in Modern Britain* (Oxford University Press, 1995) ix). The most famous functional definition in sociology is that provided by Durkheim, who defines religion as 'a *unified* set of beliefs and practices': for Durkheim religion is 'something eminently collective', it links people together in communities providing 'social solidarity' (Durkheim, *The Elementary Forms of Religious Life*, 46).

contrast the definition of religion in English charity law requiring faith and worship of a god,[291] which is a substantive definition, with the functional definition of 'an organisation relating to religion or belief' provided by the Equality Act 2010,[292] which states that this is 'an organisation the purpose of which is', to practise, advance and teach the principles of that religion, to enable persons of the religion to receive benefits and engage in activities and to improve relations between religious groups. Sociologically, this definition can be understood as underlining the sociality of religion as a key definitional attribute. A sociological critique of legal definitions may also lead, for example, to a better appreciation of the collective and individual dimensions of religion.[293] Moreover, a sociological perspective may question the term 'religion or belief', which has become prevalent in many of the new religion laws.[294] The work of Linda Woodhead elucidating various 'concepts of religion' may be particularly useful in that her taxonomy can be used to suggest that the definitions of religion employed have a different concept of religion than the laws they are found within.[295] While the legal definitions of religion are operating under Woodhead's category of 'religion as culture' (or more narrowly 'religion as belief'),[296] the new religion laws rest upon a broader premise of 'religion as identity'.[297] These differing conceptions may help to explain in part the tensions found in the case law following *Grainger PLC* v. *Nicholson* (and the general religious rights case law following *Begum*).

REFLECTION

As Munby LJ noted in the High Court decision in the *Johns* case,[298] 'one of the paradoxes of our lives is that we live in a society

[291] *Re South Place Ethical Society* [1980] 1 WLR 1565. [292] Schedule 9, para. 2.

[293] See further, R Sandberg, 'Religion and the Individual: A Socio-Legal Perspective' in A Day (ed.), *Religion and the Individual* (Ashgate, 2008) 157.

[294] For a discussion of how the term 'belief' has been employed in sociology and anthropology, see A Day, *Believing in Belonging: Belief & Social Identity in the Modern World* (Oxford University Press, 2011) chapter 1.

[295] L Woodhead, 'Five Concepts of Religion' (2011) 21(1) *International Review of Sociology* 121.

[296] The definitions found in charity law fall under the subheading of 'religion as belief and meaning' while the *Grainger PLC* v. *Nicholson* tests fall under the subheading of 'religion as meaning and culture': for discussion of these categories see ibid. 123–4.

[297] See ibid. 127.

[298] *R (Eunice Johns and Owen Johns)* v. *Derby City Council* [2011] EWHC 375 (Admin). The case concerned two would-be foster carers who expressed their beliefs opposing homosexuality

which has at one and the same time become both increasingly secular but also increasingly diverse in religious affiliation'.[299] For Munby LJ, this paradox has arisen because 'there have been enormous changes in the social and religious life of our country over the last century'. These changes accelerated at the dawn of the twenty-first century. The dust spread by the terrorist atrocities on 11th September 2001 has seen the questioning of the secularisation thesis, the rise of the juridification of religion and a number of moral panics[300] concerning the place of religion in the public sphere. These changes have attracted scholarly attention. The sociology of religion has enjoyed a renaissance while law and religion has become established as a legal sub-discipline in England and Wales. However, generally, this scholarship has been characterised by academic isolationism (and a tendency towards ghettoisation).

This separation of scholarship along traditional disciplinary lines is misguided given that the two sub-disciplines are concerned with common problems and issues. The moral panics of recent years concerning the place of religion in the public sphere are of concern to both lawyers and sociologists. This can be illustrated by the two case studies Grace Davie chooses to end her book *The Sociology of Religion*:[301] both the 'acute tension within the Anglican Communion concerning the acceptance or otherwise of homosexuality' and the 'cartoons' of Mohammed published in the Danish newspaper *Jyllands-Posten* are not only sociological issues (as Davie explains), they are also legal issues.[302] The need for collaboration between legal and sociological studies of religion has been emphasised in the above case study.

Reference to the vexed question of the definition of religion showed how lawyers and sociologists share not only the need for technical rather than popular definitions of religion, but also common problems in defining religion. These common problems are not fatal but need to be taken into account in order to improve existing definitions. This

whilst being interviewed by the council. The High Court held that there was no religious discrimination when the Council's Fostering Panel deferred a decision on whether the claimants would be suitable foster parents.

299 Para. 38.

300 For a classical treatment of 'moral panics', see S Cohen, *Folk Devils and Moral Panics* (St Martin's Press, 1972).

301 Davie, *The Sociology of Religion*, 259 *et seq*.

302 For the legal dimension of the debate within global Anglicanism, see e.g. N Doe, *An Anglican Covenant: Theological and Legal Considerations for a Global Debate* (SCM Canterbury Press, 2008). For the legal dimension on the conflict between freedom of religion and freedom of expression, see e.g., J G Oliva, 'The Legal Protection of Believers and Beliefs in the United Kingdom' (2007) 9 *Ecclesiastical Law Journal* 66.

underscores the value of a cross-disciplinary approach: the distinction between stipulative and lexical definitions and the notion of methodological agnosticism provide just two examples of ideas that lawyers can usefully appropriate from the sociology of religion. Reference to the effects of defining religion took this further, pointing to the need for collaboration between lawyers and sociologists in particular. Legal definitions of religion serve as a means of inclusion and exclusion which have profound social effects. This renders legal definitions of religion of sociological interest. A fusion of legal and sociological approaches is required given that religion laws have sociological effects. Indeed, many new religion laws – such as Article 9(2) and the law on indirect religious discrimination – require a sociological test as part of the question of justification. Judges and tribunal Chairs are now explicitly required to weigh up the needs of society and societal justifications. Moreover, a sociological approach can shed light upon the explicit and implicit understandings found in legal definitions, notably by proposing classifications of definitions. In this way, both sub-disciplines can enrich each other. A sociological approach, reflective, nuanced and contextualising, may complement and be complemented by a legal approach providing concrete, real and practical case studies, which themselves have wider social ramifications.

Furthermore, it may be observed that the two sub-disciplines provide different but complementary contributions that enable a fuller appreciation of the interaction between religion, law and society. The two sub-disciplines overcome the weaknesses found in each other. Sociology has been criticised for its inability to engage with government and affect policy development,[303] whereas legal approaches have been criticised for often focusing solely on the means of regulation rather than its effects.[304] By fusing sociological analysis with legal materials, the shortcomings of both approaches may become rectified by the strengths of the other discipline. Legal analysis may particularise sociological accounts while sociological analysis may contextualise legal accounts. Whilst lawyers can provide local, technical knowledge of changing laws on religion, sociologists can help contextualise legal change in the

303 M Burawoy, 'For Public Sociology' (2005) 70 *American Sociological Review* 4; C Inglis, 'Comments on Michael Burawoy's ASA Presidential Address' (2005) 56(3) *British Journal of Sociology* 383; N McLaughlin and K Turcotte 'The Trouble with Burawoy: An Analytic, Synthetic Alternative' (2007) 45(1) *British Journal of Sociology* 813.

304 See Sandberg, 'Church–State Relations in Europe', 329.

context of wider social change. This will enable both lawyers and sociologists to widen their analysis.[305]

The key question this book aims to address is how such an interdisciplinary interaction between law and religion and the sociology of religion can contribute to understanding of the place of religion in England and Wales today. There are several ways in which this could be achieved. It would be possible, for instance, to explore the main dimensions of law and religion, reflecting upon them sociologically.[306] Alternatively, it would be possible to focus upon one particular issue of socio-legal importance such as New Religious Movements, the wearing of religious dress and symbols, or the enforcement of religious law. This book chooses to explore the potential for interdisciplinary interaction through an examination of the secularisation thesis. Although there is much more to the sociology of religion in England and Wales than the secularisation thesis, the thesis remains one of the most important topics within the sub-discipline. It is also commonly referenced by those outside the sociology of religion. The secularisation thesis is mentioned in many studies of religion from other disciplines, including law. However, although such studies may reference a sociological work or two, more often than not little attention is paid to unpacking what the secularisation thesis does and does not say.

The chapters that follow will explore in depth the arguments that form the secularisation thesis. They will draw upon the sociological literature that elucidates, defends and critiques the thesis, exploring how this can enrich and be enriched by the integration of legal materials. This chapter has already made a number of references to the secularisation thesis. It has been suggested that the rise and fall of the thesis has shaped the constructed histories of both the sociology of religion and law and religion. By the mid-twentieth century, as the secularisation thesis held sway, both the social and legal study of religion

[305] As Jay Demerath has observed, 'sociologists of religion are not often consulted on national and international affairs of state' because conventionally sociologists of religion have played little attention to the question of religion in public life. For Demerath, 'the very idea seemed preposterous' because the sociologists' 'lair has been that of the private and the local, of churches, mosques, temples, sects, and cults as smaller and perhaps lesser communities of the sacred'. It is only in recent years that this has changed: 'lately religion has become increasingly embroiled in the public sphere and where religion leads, at least a few scholars follow': N J Demerath, 'Religion and the State; Violence and Human Rights' in Beckford and Demerath (eds.), *The Sage Handbook of the Sociology of Religion*, 282.

[306] This was the approach taken in the doctoral thesis on which this book is based: R Sandberg, 'Religion, Society and Law: An Analysis of the Interface between the Law on Religion and the Sociology of Religion' (Cardiff University, 2010).

became contracted. And, by contrast, by the early years of the twenty-first century, as the secularisation thesis became questioned, both sub-disciplines blossomed. The chapters that follow will determine whether the secularisation thesis should be discarded in whole or in part. They will also explore whether the secularisation thesis (or perceptions of the secularisation thesis) are responsible for many of the problems identified in this chapter, such as the way in which interdisciplinary work concerning religion remains in its infancy, the extent to which judges are uncomfortable adjudicating religious rights and why sociologists of religion have tended not to focus upon the question of religion in the public sphere.

The following chapters will use the secularisation thesis as a focus to explore the interaction of the social and legal study of religion and to uncover what this reveals about the place of religion in twenty-first-century Britain. The chapters that follow will seek to build upon the findings of the case study in this chapter by exploring sociological and legal materials alongside one another in order to understand the consequences of the 'enormous changes' spoken of by Munby LJ, noted in the High Court decision in the *Johns* case.[307] They will seek to explore the value of an interdisciplinary analysis of the place of religion in a society where the secularisation thesis is questioned and where the juridification of religion is ever controversial and increasingly volatile. They will seek to examine the relationship between religion, law and society in this new world.

[307] *R (Eunice Johns and Owen Johns)* v. *Derby City Council* [2011] EWHC 375 (Admin).