

COMMISSION ON RELIGION AND BELIEF IN BRITISH PUBLIC LIFE
CONSULTATION ON THE PLACE AND ROLE OF RELIGION AND BELIEF
IN CONTEMPORARY BRITAIN

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Introduction:

The Commission is specifically considering ‘how ideas of Britishness may be more inclusive of a wider range of religions and beliefs’. It is good that the focus of is on ‘ideas’ (plural) of Britishness. An underlying assumption of the exercise seems to be that ‘Britishness’ is susceptible to expression as identifiable concepts which provide a framework for a harmonious society. However, this assumption should be treated with some caution. In the UK common ground is certainly needed, with key values including equality and the rule of law: but these are universal values and are not peculiar either to Britain or to the United Kingdom as a whole and to imply that they are may estrange some members of minority communities. Thought should be given as to how values such as these may be conveyed alike to religious majorities and minorities. Also, Cardiff research has indicated that there are more similarities than differences in State approaches to religion across the countries of Europe which may be articulated as principles of law on religion – values such as equality and the rule of law are implicit in these principles.² Another avenue worth exploration would be the incidence of these values in religious law; Cardiff research has also identified such values in the context of Christianity.³

The Questions:

1. To what extent, and in what ways, have recent legislative changes been beneficial or detrimental? In what ways, if any, do they or other existing laws need to be modified?

Clarity is needed as to precisely what ‘recent legislative changes’ includes and what criteria are to be used to determine what is ‘beneficial’ and ‘detrimental’. For current purposes, we have limited our enquiry to legislation enacted since the Human Rights Act 1998 and areas of concern that have arisen either in the case-law or in Cardiff research.

¹ For further information about the work of the Centre see <[http:// www.law.cf.ac.uk/clr/](http://www.law.cf.ac.uk/clr/)>

² N Doe, *Law and Religion in Europe* (Oxford University Press, 2011).

³ N Doe, *Christian Law: Contemporary Principles* (Cambridge University Press, 2013).

Research conducted at the Centre for Law and Religion at Cardiff University has indicated how the law affecting religion in England and Wales has changed dramatically over the last fifteen years.⁴ It has been suggested that it is now possible to talk of a category of ‘religion law’ similar to ‘employment law’ or ‘family law’.⁵ The growth of litigation during this period is documented by the Law and Religion Scholars Network (LARSN) Case Database, set up and maintained by the Centre.⁶ It has also been suggested that this, together with an increase in legislation and a growing understanding of religious rights (under civil law), has led to the ‘juridification of religion’.⁷ However, caution is also required. Cardiff research has also shown that English and Welsh law on religion bodies shares similar principles to those of other European States.⁸ Moreover, the importance of the historical context of the law should not be forgotten, especially in England where there remains a church established by law.⁹ The interplay between the ‘new’ laws and older statutes has been described as a key ‘pressure point’.¹⁰ Another avenue to explore, thus, is the continuing influence of older law as it may still shape the British approach to religion and belief in society.

The major legislative changes have taken place in the areas of human rights, discrimination law, charity law, criminal law, education law and family law:

With respect to *human rights law*, the Human Rights Act 1998 has resulted in confusion as to the extent to which churches will be public authorities and thus subject to the Act.¹¹ Moreover, the UK judiciary has generally favoured a narrow interpretation of religious rights under the European Convention on Human Rights, employing a number of filtering devices such as the manifestation/motivation distinction and the specific situation rule.¹² Cardiff research has suggested that the application of these filtering devices has led to perceptions that religious rights are not being taken seriously by domestic courts.¹³ While

⁴ See M Hill, R Sandberg and N Doe, *Religion and Law in the United Kingdom* (2nd ed, Kluwer Law International, The Netherlands 2014) and R Sandberg, *Law and Religion* (Cambridge University Press, 2011).

⁵ R Sandberg, *Law and Religion* (Cambridge University Press, 2011).

⁶ <<http://www.law.cf.ac.uk/clr/networks/lrsncd.html>>

⁷ R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 10; R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) chapter 1.

⁸ N Doe, *Law and Religion in Europe* (Oxford University Press, 2011).

⁹ M Hill *Ecclesiastical Law* 3rd edn (Oxford University Press, 2007); N Doe, *The Legal Framework of the Church of England* (Clarendon Press, 1996); N Doe, *The Law of the Church in Wales* (University of Wales Press, 2002).

¹⁰ R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 10.

¹¹ M Hill, *Ecclesiastical Law* 3rd edn (Oxford University Press, 2007) chapter 1.

¹² R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 5.

¹³ M Hill and R Sandberg, ‘Is Nothing Sacred? Clashing Symbols in a Secular World’ [2007] *Public Law* 488; R Sandberg, ‘The Changing Position of Religious Minorities in English Law: The Legacy of *Begum*’

we welcome the recent judgment of the Strasbourg Court which has clarified the application of these devices and should lessen their use,¹⁴ it remains to be seen whether the domestic judiciary will follow the example taken by this international court.

With respect to *discrimination law*, a number of areas of confusion continue to exist with respect of the new laws on religious discrimination not least how they interact with the protections afforded under human rights law.¹⁵ There is also confusion as to the definition of religion or belief,¹⁶ the distinction between direct and indirect discrimination,¹⁷ and the reach of exceptions afforded to religious groups.¹⁸ There are circumstances where certain groups feel that they are themselves being discriminated against by the general structure of the law. This is particularly so where the legislation represents a shift in social mores that challenges traditional beliefs, notably as to sexual morality and the social functions of men and women.

In relation to *charity law*, concerns exist as to the role and function of the Charity Commission, the application of the ‘public benefit’ test and the definition of religion following the recent liberalisation of the definition in relation to registration law.¹⁹

In relation to *criminal law*, there are concerns surrounding the abolition of the offence of blasphemy and its partial replacement with a number of new criminal offences concerning religion the ambit of which remains largely unknown and unenforceable.²⁰

In the field of *education*, concern focuses around the compatibility of the law against human rights standards in terms of religious freedom, the role and function of SACREs

in R Grillo *et al* (ed) *Legal Practice and Cultural Diversity* (Aldershot: Ashgate) 267; R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014).

¹⁴ *Eweida and Others v United Kingdom* (2013) 57 EHRR 8; M Hill, ‘Religious Symbolism and Conscientious Objection in the Workplace’ (2013) 15 *Ecclesiastical Law Journal* 191; R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014).

¹⁵ R Sandberg, ‘Laws and Religion: Unravelling *McFarlane v Relate Avon Ltd*’ (2010) 12 *Ecclesiastical Law Journal* 361; R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014); M Hill (ed) *Religion and Discrimination Law in the European Union* (Institute for European Constitutional Law, 2012)

¹⁶ R Sandberg, ‘A Question of Belief’ in N Spencer (ed), *Religion and Law* (*Theos*, London 2012) 51; R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) chapter 1.

¹⁷ R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 6.

¹⁸ R Sandberg, ‘The Right to Discriminate’ (2011) 13 *Ecclesiastical Law Journal* 157.

¹⁹ *R (on the Application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77; R Sandberg, ‘Defining the Divine’ (2014) 16 *Ecclesiastical Law Journal* 198.

²⁰ R Sandberg and N Doe, ‘The Strange Death of Blasphemy’ (2008) 71(6) *Modern Law Review* 971; N Doe and R Sandberg, ‘The Changing Criminal Law on Religion’ (2008) 161 *Law and Justice* 88; M Hill and R Sandberg, ‘Blasphemy and Human Rights: An English Experience in a European Context’ IV (2009) *Derecho y Religión [Law and Religion]* 145.

and the legal framework relating to schools which have a religious character (which are commonly but erroneously referred to as ‘faith schools’), especially as to admissions.²¹

As to *family law*, the main issues relate to the religious upbringing of children, the law relating to marriage and divorce, and the operation of religious courts and tribunals.²² In respect of the particularly contentious area of same-sex relations, the UK and Scottish governments (though not the Northern Ireland Executive) seem to have made reasonable provision for the sensibilities of those opposed on religious grounds to same-sex marriage.²³ However, the decision by the Westminster Government to retain civil partnership only for same-sex couples, whilst making marriage available to such couples, would seem to be an anomaly and may be considered an example of unequal treatment based on sexual orientation, even though the decision would appear to be within the Government’s margin of appreciation under Article 8 of the ECHR.²⁴ The impression is left that the proper interest of the state in the institution of marriage is unclear.

The respective rights of parents and children as to religious belief, particularly the rights of children themselves to hold beliefs of their own, do not seem to have been properly addressed. They require further consideration. There is an issue here about the age at which a child may choose his or her religion (see *C (A Child), Re* [2012]²⁵: the child aged ten, was allowed to be baptised against the objections of her (non-practising) Jewish mother). The issue of ‘*Gillick* competence’²⁶ appears relevant here.

2. What is the appropriate relationship between minority religious tribunals, for example *Sharia* and *Beth Din* courts, and mainstream legal systems?

From 2010 to 2011, the AHRC/ESRC Religion and Society Programme funded a multidisciplinary project at Cardiff University to study religious courts and tribunals across the UK. The project, ‘Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts’, explored how religious law already functioned alongside civil law in

²¹ A Buchanan and R Sandberg, ‘Religion, Regionalism and Education in the United Kingdom: Tales from Wales’ in M Hunter-Henin (ed) *Law, Religious Freedoms and Education in Europe* (Ashgate, 2012)107; R Sandberg, ‘A Uniform Approach to Religious Discrimination? The Position of Teachers and Other Staff in the UK’ in M Hunter-Henin (ed) *Law, Religious Freedoms and Education in Europe* (Ashgate, 2012) 327; R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 8.

²² E Butler-Sloss and M Hill, ‘Family Law: Current Conflicts and their Resolution’ in R Griffith Jones (ed) *Islam and English Law* (Oxford University Press, 2013) 108. On the issue of religious courts and tribunals see our response to question 2.

²³ Marriage (Same Sex Couples) Act 2013; Marriage and Civil Partnership (Scotland) Act 2014.

²⁴ See *Ferguson & Ors v United Kingdom* ECHR (Application No. 8254/11), which was declared inadmissible.

²⁵ *C (A Child), Re*[2012] EW Misc 15 (CC).

²⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

the area of marriage and divorce.²⁷ It examined the workings of three religious tribunals in detail: a Jewish Beth Din (London); a matrimonial tribunal of the Roman Catholic Church (Cardiff); and a Muslim ‘Sharia Council’ (Birmingham)). The project asked ‘What is the legal status of these courts?’ and ‘How do they operate in relation to marriage, divorce and remarriage?’ The researchers conducted interviews with staff at the courts, complemented by workshops, observation, and analysis of statistics. Contrary to some popular and media concerns, they found that none of these courts seeks to compete with or undermine the civil law and they provide a valuable service for their adherents.

None of the tribunals studied had a ‘legal status’ in the sense of ‘recognition’ by the State or its law. They derived their authority from their religious affiliation, not from the State, and that authority extended only to those who choose to submit to them. There is no ‘hierarchy’ of tribunals within the Jewish and Muslim communities, and no appeal structure. This has led to an element of ‘forum shopping’ by litigants.

However, as far as marriage/divorce is concerned, they were not ‘arbitrators’. Their authority to rule on the validity/termination of a marriage did not derive from the parties’ agreement to submit their ‘dispute’ to them (indeed, there may be no dispute) in the same way as an arbitration clause in a contract (for which the Beth Din and some Sharia tribunals would also qualify to rule on civil disputes). Rather, adherents to the particular faith must make use of the religious tribunal if they are to obtain sanction to remarry within their faith. For adherents, being able to remarry religiously serves both to enable them to remain within their faith community and to regularise their position with the religious authorities. This is particularly crucial in the Jewish religion, because the failure to obtain a *get* will jeopardise the legitimate status of the parties’ future children and descendants.

The Cardiff research highlighted the problem whereby religious marriages are not registered and consequently the parties are not married in the eyes of the State. This means that should the (religious) marriage get into difficulties then those parties have little redress under civil law. Rather than being able to use both the courts of the State and the tribunals of the group, such people can only have recourse to the tribunals of the group. Our research suggests that this is a real problem in the Muslim community. The Sharia Council we studied deals with a significant number (over half in the 27 cases that we observed) of litigants who do not have a marriage recognised under English law.

²⁷ See further the Project’s website at: <<http://www.law.cf.ac.uk/clr/research/cohesion.html>> and subsequent publications listed on that website.

Cardiff research has called for an increase in education and a development of public debate concerning Sharia.²⁸ It has also indicated that the existence of religious law and religious courts and tribunals is not only an issue for Islam.²⁹ Cardiff researchers have also recommended a draft Bill to deal with the issue of consent in religious tribunals.³⁰

Question 2 also raises wider issues about the position and autonomy of religious organisations in the UK, and their internal norms, under the civil law of the State. The traditional view as to the status of religious organisations under the general law is that they are private contractual associations whose rules resemble those of a private club. However, major religions have complex laws that cover many aspects of life for their members, often with their own adjudicative systems. Provided it is clear that they are subject to the national courts, religious tribunals may be socially useful for voluntary arbitration of disputes (under the Arbitration Act 1996 and the Arbitration (Scotland) Act 2010. The secular courts will in some circumstances enforce the rulings that are made.³¹

There are also issues which relate to the administration of some Christian tribunals. The disciplinary tribunals and the courts of the Church of England that deal with faculties for church buildings and their contents are integrated into the general legal system, but the position of the Church of Scotland is less clear.³² In Scotland, the decisions of tribunals generally are reviewable by the secular courts where a patrimonial interest is involved even when there is no public law element in the decision.³³ This means that, save the Church of Scotland, secular courts in Scotland review decisions of religious tribunals.³⁴

3. What have been the benefits of anti-terrorism legislation and preventative action? Have there been negative effects, and if so how could these be minimised or removed?

If anti-terrorism legislation is necessary (and the political consensus supports that view) then it must be non-discriminatory as between religious groups or it will be in breach of the ECHR. It is not clear what is meant by ‘anti-terrorism legislation’. Part of the wider

²⁸ R Sandberg, G Douglas, N Doe, S Gilliat-Ray and A Khan) ‘Britain’s Religious Tribunals: “Joint Governance” in Practice’ (2013) 33(2) *Oxford Journal of Legal Studies* 263.

²⁹ R Sandberg (ed), *Religion and Legal Pluralism* (Ashgate, forthcoming).

³⁰ R Sandberg and F Cranmer, ‘Non-Statutory Courts and Tribunals (Consent to Jurisdiction) Bill’ in R Sandberg (ed), *Religion and Legal Pluralism* (Ashgate, forthcoming).

³¹ See, eg, *Kohn v Wagschal & Ors* [2007] EWCA Civ 1022.

³² See Lord President Rodger in the Inner House in *Percy v Board of National Mission of the Church of Scotland* [2001] ScotCS 65 at 14.

³³ *West v Secretary of State for Scotland* [1992] ScotCS CSIH 3.

³⁴ See, eg, *Brentnall v Free Presbyterian Church of Scotland* 1986 SLT 470, in which it was held that the proceedings in the FPC Synod had not been in accordance with the rules of natural justice. The courts of the Church of Scotland are *sui generis*.

picture is increasingly strict controls on immigration and, in particular, the special arrangements for non-EEA ministers of religion. There have certainly been negative effects from the latter: e.g., the Methodist Church no longer uses probationary ministers from outside the EEA (mainly from the US) on two-year attachments because, not having yet been ordained, they cannot easily qualify for a Tier 5 (Temporary Worker - Religious Worker) visa.

The problem, as least in part, is that the Churches see themselves as part of or associated with universal institutions or international ecclesial communities and alliances – a Methodist minister in the Gambia is just as much a Methodist minister as one in Luton – but successive Governments have wanted to restrict non-EEA immigration and, in doing so, they have had popular support. There are special arrangements for visas for clergy and religious workers but it is not clear that they always work satisfactorily. In particular, innocent exchanges, particularly between Christian churches and including short visits for study or conferences, seem in practice to be frequently oppressive.

A specific issue here is that the language qualification for a Tier 2 visa for a cleric (at least CEFR level B2 in reading, writing, speaking and listening) is *higher* than that for a general Tier 2 visa (at least CEFR level B1) for ‘a skilled job’ such as thoracic surgery. The principal need of (e.g.) an Ethiopian Orthodox congregation is for a priest who can speak Amharic and celebrate the liturgy in Ge’ez: not that he can speak fluent English.

4. What are the overlaps, similarities and differences between racial discrimination and discrimination on the grounds of religion or belief, and are these adequately reflected in the current legal framework?

In some cases there is a substantial overlap between discrimination on the grounds of religion and race. Judaism and Sikhism, in particular, are racially related. Case law recognised this in the case of Judaism and Sikhism before religious discrimination was controlled, by treating discrimination against Jews and Sikhs as racial. This leads to inequality of treatment: sometimes in their favour (e.g. *Mandla*³⁵ and *Watkins-Singh*³⁶) but sometimes to their detriment (e.g. *JFS*³⁷).

One difference and area of concern between racial and religious discrimination relates to definition. Although race is a contentious concept, it can be identified through tangible

³⁵ *Mandla v Dowell Lee* [1982] UKHL 7.

³⁶ *R (Watkins-Singh) v Aberdare Girls' High School & Anor* [2008] EWHC 1865 (Admin).

³⁷ *R (E) v Governing Body of JFS & Anor* [2009] UKSC 1.

characteristics; (physical similarities, particularly colour, or geographic or cultural origins) for the purposes of s 9 Equality Act 2010. This is not so in relation to religion.

The definition of provided under the Equality Act 2010, which defines religion and belief on the basis that religion or ‘a lack of religion’ is a separate category from belief which may be ‘any religious or philosophical belief’, is far from clear.³⁸ The case law has struggled to interpret this definition and this has led to a number of inconsistent decisions at Employment Tribunal level. While the adoption of a generally broad understanding of ‘religion or belief’ for discrimination law purposes follows the general trend of the European Court of Human Rights, it is regrettable that there has not been full harmonisation between these bodies of case law. The European Court has not limited ‘belief’ to philosophical beliefs but has understood belief to require a worldview and has clarified that political beliefs do fall within the definition. Some beliefs may be discounted by a court or tribunal as lacking the coherence and seriousness that are required for legal recognition. However, there needs to be greater consistency and clarity as to where the line is to be drawn.

More general concerns may be raised by Section 26 of the Equality Act 2010, which prohibits harassment. Harassment includes creating an ‘offensive’ environment, as perceived by the person claiming that he or she has been harassed. This provision can have a chilling effect as a significant fetter on freedom of speech, for example by religious evangelists.

5. What recommendations relating to the law should the Commission on Religion and Belief in British Public Life make in its final report?

In relation to the areas of concern we noted in relation to question 1, we would welcome clarity on the following issues:

- The extent to which ‘ideas of Britishness’ are in fact universal and are common to the laws of the States of Europe as a whole;
- The extent to which ‘ideas of Britishness’ can be found in the religious laws, norms and rules of religious groups themselves;
- The continuing influence of older law on religion and whether older provisions need revisiting because they are based upon different assumptions;

³⁸ S 10 Equality Act 2010.

- The extent to which religious groups should and will be subject to the Human Rights Act 1998 (i.e. subject internally to human rights standards).
- The proper interpretation of the right to religious freedom by domestic courts following recent decisions of the European Court of Human Rights.³⁹
- The interaction between discrimination law and the protections afforded under the human rights law.
- The definition of ‘religion or belief’ for discrimination law purposes and the definition of ‘advancement of religion’ for charity law purposes, including the desirability of harmonisation.
- The distinction between direct and indirect discrimination, including the need for clarity.
- The ambit and reach of exceptions afforded to religious groups, including the desirability for clarity and harmonisation.
- The role and function of the Charity Commission and in particular the application of the ‘public benefit’ test.
- The ambit, reach and effectiveness of criminal offences concerning religion.
- The compatibility of laws on religious worship and education in schools against human rights standards in terms of religious freedom.
- The role, function and monitoring of SACREs.
- The clarity and effectiveness of the legal framework relating to schools which have a religious character, especially as to admissions.
- The clarity of the law relating to the religious upbringing of children including the respective rights of parents and children as to religious belief, particularly the rights of children themselves to hold beliefs of their own.

³⁹ *Eweida and Others v United Kingdom* (2013) 57 EHRR 8.

- The clarity of law relating to marriage and divorce, especially in light of the number of ‘religious’ marriages within the Islamic community that are not registered under civil law.
- Concerns as to the operation of religious courts and tribunals, with particular focus on the issue of consent.

These need not be achieved by legislation. Education is of importance as is dialogue between religious and other groups. One way to proceed would be to develop a Charter or Concordat with such groups with the aim of producing a statement of common values, common benefits and common problems. This Charter would describe what groups and State agencies agreed, agreed to differ and disagreed over. The Interfaith Legal Advisers Network (ILAN), which is coordinated by the Centre for Law and Religion to provide a discussion for representatives of different legal traditions to share common experiences and problems, would be a suitable forum for the development of such charter/concordat.

One general option which requires further thought is the concept of reasonable accommodation of religious belief, which was recognised in *Eweida*⁴⁰ and, extra-judicially, has been persuasively promoted by Baroness Hale DPSC.⁴¹ Although elements of reasonable accommodation can already be found in the question of justification found in Article 9(2) ECHR and in the law on indirect discrimination, the controversies raised by the cases to date suggest that it may be timely to draw upon the concept more explicitly as a key tool for achieving a better balance between rights in different beliefs and between beliefs and other rights. Not providing for accommodation could itself be regarded as a form of discrimination and as the imposition of a contrary ideological view. There is scope for clearer guidance on what accommodation should mean in practice. In particular, thought needs to be given to whether beliefs which emanate from the settled world view of a major religion may be entitled to more respect and whether there is general right to conscientious objection is required. Conflicts seem particularly likely where a person with strong religious or philosophical beliefs is required to affirm someone else’s belief to which he or she has a conscientious objection. This has been illustrated by a number of recent high profile cases, notably; *Chaplin*,⁴² *McFarlane*,⁴³ *Ladele*⁴⁴ and *Bull*⁴⁵ – the first three of which were the subject of conjoined

⁴⁰ *Eweida & Ors v United Kingdom* [2013] 57 EHRR 8, [2013] ECHR 37.

⁴¹ Brenda Hale (13 June 2014) ‘Freedom of Religion and Belief’: Annual Human Rights Lecture for the Law Society of Ireland: <https://www.supremecourt.uk/docs/speech-140613.pdf>.

⁴² *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009.

⁴³ *McFarlane v Relate Avon Ltd* [2009] UKEAT 0106 09 3011.

⁴⁴ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

appeals to the European Court of Human Rights along with *Eweida*. For the purposes of harassment under S 26 of the Equality Act, consideration could be given to providing that “the other circumstances of the case” should particularly include whether the alleged harassment consisted in reasonable expression of sincerely-held views.

Much of the problem in all these circumstances is that cases of this kind are highly fact-sensitive. Generally the case law to date shows that more often than not the law appears to favour the commercial interests of employers rather than the beliefs of employees. This is particularly relevant where employees seek time off work for religious festivals or regular weekly worship. Although some recent decisions suggest a partial move towards recognising this some recognition of this issue, it merits more general reconsideration.

⁴⁵ *Bull & Anor v Hall & Anor* [2013] UKSC 73.