
The Secularisation of the British Constitution

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In recent years, the relationship between law and religion has been subject to increased scholarly interest. In part this is the result of new laws protecting religious liberty and non-discrimination, and it may be that overall levels of litigation have increased as well. In all this activity, there are signs that the relationship between law and religion is changing. While unable to address every matter of detail, this article seeks to identify the underlying themes and trends. It starts by suggesting that the constitutional settlement achieved by the end of the nineteenth century has often been overlooked, religion only appearing in the guise of inadequately theorised commitments to individual liberty and equality. The article then considers the role of multiculturalism in promoting recent legal changes. However, the new commitment to multiculturalism cannot explain a number of features of the law: the minimal impact of the Human Rights Act 1998, the uncertain effect of equality legislation, an apparent rise in litigation in established areas of law and religion, and some striking cases in which acts have been found to be unlawful in surprising ways. In contrast, the article proposes a new secularisation thesis. The law is coming to treat religions as merely recreational and trivial. This has the effect of reducing the significance of religion as a matter of conscience, as legal system and as a context for public service. As a way of managing the ever-deepening forms of religious diversity present within the United Kingdom, such a secularisation strategy is implausible.¹

THE FORGOTTEN CONSTITUTION

The past 25 years have seen a significant rise in British scholarly interest in the relationship between law and religion. In 1987, when the Ecclesiastical Law Society was founded, what literature there was suggested that law's engagement with religion was residual, fragmentary and incoherent. Ecclesiastical law had survived, but was in urgent need of rejuvenation.² In any case, the unique

1 This article is based on a lecture delivered at Emmanuel College, Cambridge, on 3 March 2012, at a conference to celebrate the 25th anniversary of the foundation of the Ecclesiastical Law Society. I am grateful to Professor Mark Hill QC, Professor Ian Leigh and an anonymous reviewer for their comments on an earlier draft. The usual disclaimers apply.

2 It was not even clear how far the term 'ecclesiastical law' could extend beyond its core domain of the law of the Church of England, a categorisation which is itself imprecise. Its survival was secured not least by a title in Halsbury's *Laws of England* (fourth edition, vol 14, London, 1975). The substantial restatement 36 years later, which wisely refuses to deal with 'other religious denominations' in a mere 25 pages, is characteristic of the growth of scholarship in the field. For a substantial bibliography of the last 25 years, see R Sandberg, 'Silver Jubilee bibliography', (2012) 14 Ecc LJ 148–160, 470–471.

legal position of the Church of England seemed to sit ill at ease with commitments to religious liberty and equality. For most lawyers it was either a cultural curiosity or a problematic reminder of unfinished business. The main textbooks on constitutional and administrative law were mostly silent on the topic,³ and civil liberties texts supported the view that there was not much of interest to be said. Harry Street's brief chapter on freedom of religion was dominated by a discussion of blasphemy law, public education and Sunday trading, with passing mention given to medical and family matters, charity law and conscientious objection.⁴ St John Robilliard's book gave a rather fuller account of a similarly diverse field, with the addition of criminal constraints on unorthodox religious practices and a brief sketch of chaplaincies.⁵ The cases and materials collected by S H Bailey, D J Harris and B L Jones added still further points of fleeting contact with religion, such as those found in employment and immigration law.⁶ The lesson to be drawn from these miscellanea was that where the law engaged with religion it did so largely to preserve a residual Christian establishment, unproblematic only in its insignificance, and to obstruct in questionable ways a range of unconventional beliefs and practices. Constitutional principle had very little to do with it. It was not entirely surprising that, when David Feldman's magisterial treatment of civil liberties appeared in 1993, religious liberty and equality found no systematic place at all.⁷

This neglect was characteristic of the entire twentieth century and finds striking earlier parallels. In his *Introduction to the Study of the Constitution*, AV Dicey had nothing to say about the relationship between law and religion except to note the 'forgotten' criminal law of blasphemy.⁸ He was effectively supported by F W Maitland, who with considerable historical detail recounted the process by which religious toleration had advanced to victory and establishment had retreated to insignificance: 'The legislation by which disabilities have been imposed and then removed is very complicated, but at the present moment we may, I think, say that religious liberty and religious equality is

3 E Wade and A Bradley, *Constitutional and Administrative Law* (tenth edition, London, 1985) only mentioned Lords Spiritual, the disqualification of episcopally ordained clergy from sitting in the House of Commons and the loss of ecclesiastical jurisdiction on the part of the Judicial Committee of the Privy Council. O Hood Phillips, *Constitutional and Administrative Law* (seventh edition, London, 1987) did little better: one short page notes religious restrictions on the monarch and a few ethnic minority exemptions. H Street and R Brazier, *De Smith's Constitutional and Administrative Law* (fifth edition, Harmondsworth, 1985) contained scattered references to the UK's established and disestablished churches, but no systematic treatment of freedom of religion.

4 H Street, *Freedom, the Individual and the Law* (Harmondsworth, 1963). Subsequent editions changed little in this respect.

5 St J Robilliard, *Religion and the Law: Religious liberty in modern English law* (Manchester, 1984).

6 S Bailey, D Harris and B Jones (eds), *Civil Liberties: cases and materials* (London, 1980).

7 D Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford, 1993).

8 First published 1885. See eighth edition (London, 1915), pp 240–242. Strictly speaking, Dicey also noted the disestablishment of the Church of Ireland as a demonstration of Parliament's sovereignty (pp 63–64) and the subjection of the clergy to ordinary law (p 306, n 2).

complete.⁹ Both Dicey and Maitland reflected the fact that by about 1870 a constitutional settlement had been reached in the relationship between religions and the state.¹⁰ By the 1920s this settlement was no longer even socially or politically controversial. Litigation died down and there was little more to be said. At least in that respect, British constitutional history had come to an end.

With such a settlement in place, it was easy to overlook the fact that what had been adopted and normalised was a distinctive conception of religious liberty and equality. This conception depended on assumptions that greater cultural diversity would in time come to contest. The clearest expression of the underlying constitutional model can still be found in the Church of Scotland Act 1921, under which that Church is ‘established’.¹¹ This short Act ended two centuries of dispute and schism within Scottish presbyterianism about the extent to which the civil magistrate – we might say, secular government – may interfere in the life of the Church. The Act enabled a reunion of the main presbyterian churches to take place and it did so in an unusual way. Instead of changing the law directly, the Act declares to be lawful certain articles drafted by the Church of Scotland itself. These articles set out its constitution in matters spiritual. We should not be misled by that term ‘spiritual’. As well as questions of theology and liturgy, matters spiritual include items as mundane as the disposition of church property and the terms on which its ministers are appointed. Article 4 states that the Church ‘has the right and power subject to no civil authority to legislate and . . . adjudicate finally in all matters of doctrine, worship, government and discipline’. The Act states that this does not prejudice the recognition of any other church protected in its spiritual functions.¹² Nor does it affect the jurisdiction of the civil courts in civil matters.¹³

The Church of Scotland Act reflects the principles of religious liberty and religious equality. But it does more than that. It shapes them and gives them content. Religious liberty requires autonomy, or self-government, within a sphere defined as internal to the religion (‘spiritual matters’). Religious equality requires this sphere of autonomy to be available to all. Both liberty and equality point to a principle of secularity: that there is a sphere of civil matters, which the state may regulate in a way that is not religiously distinctive, for the benefit of all. In short, religious liberty and religious equality depend on a separation of

9 F Maitland, *The Constitutional History of England* (Cambridge, 1908), p 520. The lectures were delivered in 1887–1888 and were not originally intended for publication.

10 For an outline of the historical development, see J Rivers, *The Law of Organized Religions: between establishment and secularism* (Oxford, 2010), ch 1.

11 The term ‘established’ is not unproblematic. See C Munro, ‘Does Scotland have an established church?’, (1997) 4 Ecc LJ 639–645. Strictly speaking, the relevant legislation includes the Church of Scotland (Property and Endowments) Act 1925. For historical background, see Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution: aspects of the disruption of 1843* (Edinburgh, 2008).

12 Church of Scotland Act 1921, s 2.

13 *Ibid*, s 3.

Church and state. Precisely because Church and state are separate entities, sovereign in their own spheres, the Act takes the form of a treaty, or a concordat, between them: the Church and its law as against the state and its law. The two accommodate and limit each other.

English law has not yet seen such a clear statement of principle, in respect either of the Church of England or of any other religious body. However, until very recently the principles of religious liberty and religious equality as expressed so neatly in the Church of Scotland Act have consistently characterised developments in English law as well. It is no exaggeration to say that, from the abandonment of the policy of religious uniformity after the revolution of 1688, whenever change in the relationship between law and religion has occurred, it has occurred in this direction. The middle decades of the nineteenth century were formative. They saw a sustained campaign by non-conformist protestants to achieve complete religious liberty and religious equality within the law.¹⁴ This campaign was powered by the conviction that religion should be voluntary, but that the state is fundamentally coercive. So it meant separating the two: getting the Church of England out of the business of Government and getting Government out of the business of the Church of England. At first, and above all, it meant abolishing religious tests for public office.¹⁵ It meant creating new civil registration authorities for births, marriages and deaths.¹⁶ It meant abolishing the remaining civil jurisdiction of ecclesiastical courts in defamation, matrimonial and testamentary causes.¹⁷ It meant making church rates voluntary.¹⁸ It meant opening up the ancient universities to students of all religions and none.¹⁹ It meant supplementing religious oaths in court with secular affirmations.²⁰ It meant disentangling parish charities into those for strictly church purposes and those for the wider benefit of the local community.²¹ It meant disestablishing the minority Anglican church in Ireland and Wales.²² It meant giving the Church of England the ability to

14 T Larsen, *Friends of Religious Equality: non-conformist politics in mid-Victorian England* (Woodbridge, 1999). The word 'campaign' is used regularly by Larsen to express the organised and systematic nature of the non-conformist programme.

15 The Dissenting Deputies, which had been formed in 1732, finally achieved success with the amendment of the Test and Corporation Acts in 1828. The Roman Catholic Relief Act followed in 1829, and the Religious Disabilities Act in 1846.

16 Births, Deaths and Marriages Registration Act 1836.

17 Defamation Act 1855; Divorce and Matrimonial Causes Act 1857; Probates and Letters of Administration Act 1857. See R Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (Cambridge, 2006).

18 Compulsory Church Rate Abolition Act 1868.

19 The process started in 1854, was substantially carried through in the University Tests Act 1871 and completed in the Oxford and Cambridge Act 1877.

20 This process also started in 1854 and culminated in the Oaths Act 1888. See C Braithwaite, *Conscientious Objection to Compulsions under the Law* (York, 1995), ch 1.

21 Local Government Act 1894.

22 Irish Church Act 1869; Welsh Church Act 1914.

initiate legislation for itself and to become self-governing.²³ That programme was substantially complete by the early 1870s, and the ensuing decades only served to consolidate it. Hence Maitland's comment.

Against this background, the established Church of England has come to have two quite distinct constitutional functions. The first is the highly visible, but largely symbolic, function of offering a sacred canopy for the state and its monarchy.²⁴ The established church represents the embers of Christendom – a Christian monarch ruling over a Christian nation. There are, of course, a few well-known exceptions to the symbolic nature of this element of establishment. Apart from the monarchy, the presence of Lords Spiritual in the upper house is the most egregious, although as early as 1908 a House of Lords Select Committee was considering how this could be pluralised to include other church representatives.²⁵ It is important to stress that this aspect of establishment is not reflected in the general law. So in 1917 the House of Lords thought that the argument that it was the policy of the law to discourage atheism and the denial of Christianity had been dead for a generation.²⁶ In 1919 they again insisted that the law knew no doctrine of superstitious (that is, false) religion.²⁷ Any religion – even the most unusual – could benefit from the legal privileges associated with charitable status. One could argue that specifically 'Christian law' survived in the form of blasphemy, but that too was finally swept away in 2008.²⁸ The law may be more or less compatible with Christianity; a Christian ethic may still underlie many areas of law; but Christianity as such is no longer 'parcel of the laws of England'.²⁹

The second function of establishment is the quiet insistence on a certain model of co-operation between religions and the state. It is true that religious bodies should be largely autonomous, governed by their own law in their internal

23 Convocation started meeting again from 1850s; the key point of transition occurred in the constitution of the Church Assembly in the Church of England Assembly (Powers) Act 1919 with power to legislate by measure. Later developments in the same direction include the reconstitution of the Church Assembly as the General Synod under the Synodical Government Measure 1969 with additional powers to legislate by canon, the Church of England (Worship and Doctrine) Measure 1974 and the formation of the Crown Appointments (later Nominations) Commission.

24 The term, 'sacred canopy' is Peter Berger's. See *The Sacred Canopy: elements of a sociological theory of religion* (New York, 1990). For the legal elements, see I Leigh, 'By law established? The Crown, constitutional reform and the Church of England', (2004) PL 266–273.

25 House of Lords Select Committee on the House of Lords, Report (1908), paras 20–21, reproduced in part at (1953) 7 *Parliamentary Affairs*, 140, 142.

26 *Bowman v Secular Society* [1917] AC 406.

27 *Bourne v Keane* [1919] AC 815.

28 Criminal Justice and Immigration Act 2008, s 79. See R Sandberg and N Doe, 'The strange death of blasphemy' (2008) 71 MLR 971–986. Perceptions differ as to its twentieth-century significance. As we have seen, Dicey thought that it had been 'forgotten', and the success of the prosecution in *R v Lemon* [1979] AC 617 came as a surprise to many. However, *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996) (1996) 24 EHRR 1, showed its continued operation in film censorship. See, generally, M Hill and R Sandberg, 'Blasphemy and human rights: an English experience in a European context', (2009) 4 *Derecho y Religión* 145–159.

29 *Taylor's Case* (1675) 1 Vent 293, (1675) 86 ER 189.

affairs, but they also have an interest in some areas of public administration – what might be called areas of concurrent jurisdiction: rites with civil significance, chaplaincies, schools, social welfare provision and participation in formal public discourse.³⁰ Again, by the late nineteenth century, there was a general assumption that these points of connection that existed between the Church of England and the state should be available to other religious denominations as well, albeit at times in a context of inevitable Anglican dominance and co-ordination.

Thus the British constitution throughout the twentieth century was characterised by a particular conception of religious liberty and equality. Clearly, in being linked to a residual English establishment it was not a pure form, but it was a rich and a remarkably resilient one.³¹ As in other European states, there was undoubtedly ‘convenience, carelessness and tacit compromise’ in the legal arrangements.³² But the conception was not without a certain coherence and plausibility. In some senses it was a Christian conception; in one very important sense it was not. The *leitmotif* of dual jurisdiction (Church and state as autonomous spheres of law) is characteristic of the Christian political tradition.³³ So too are concern for the protection of conscience and an interest in education and social welfare. But having struggled to encompass all Christian denominations, and with the eventual assimilation of Judaism to similar models,³⁴ the working assumption was that all religions – however one defined that problematic term – could likewise be accommodated. Indeed, in the view of some observers, the combination of establishment with a commitment to liberty and equality understood in these ways even opened up possibilities for other faiths which might otherwise have struggled to gain an entry.³⁵

In the last decade or so, the growing scholarly interest in the relationship between law and religion has been strengthened by new laws and an apparent rise in litigation. Yet this has taken place against a background of collective constitutional amnesia. While there is a general commitment to religious liberty and equality in the abstract, the particular conception characteristic of English law has been forgotten.

30 Rivers, *The Law of Organized Religions*, chs 6–10.

31 Typologies of Church–state relations can be found, *inter alia*, in R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford, 2005), ch 3; J Temperman, *State–Religion Relationships and Human Rights Law* (Leiden, 2010), part I.

32 The phrase is drawn from A Sajó, ‘Preliminaries to a concept of constitutional secularism’, (2009) 6 *International Journal of Constitutional Law* 615.

33 H Berman, *Law and Revolution: the formation of the Western legal tradition* (Cambridge, MA, 1983); O O’Donovan, *The Desire of the Nations: rediscovering the roots of political theology* (Cambridge, 1999).

34 Until the eighteenth century, and with some exceptions, Jews were treated largely as if they were aliens, ie outside the scope of the law but under royal protection. The nineteenth-century assimilation involved both emancipation and the creation of protestant (Board of Deputies) and episcopal (Chief Rabbi) institutional structures.

35 See J Sacks, *The Persistence of Faith: religion, morality and society in a secular age* (London, 1991), p 61, and many of the essays in T Modood (ed), *Church, State and Religious Minorities* (London, 1997).

A MULTICULTURAL HYPOTHESIS

How then are we to explain the recent increase in law, litigation, and law and religion studies? The most obvious explanation lies in the growing acceptance during the 1990s of multiculturalism as a broad political orientation. In outline, multicultural theories of justice reject liberal solutions to problems of cultural diversity, including religious diversity.³⁶ Classical liberalism depends upon a clear distinction between private and public spheres of life. The private sphere, secured by civil liberties, is the place in which individuality and diversity can be expressed; by contrast, the public sphere is a place in which diversity is suppressed in the service of a unitary civic identity and pursuit of collective interests. Multiculturalists, however, draw on modern communitarian critiques, and to some extent on earlier romantic and nationalistic critiques of liberalism to re-assert the identity-constituting character of culture. The appropriate response to cultural diversity is not its suppression to the confines of family and private associational life, but its recognition on an equal basis in politics and the workplace as well.

On this basis, multiculturalists could mount a powerful critique of the ways in which English law has handled religious difference.³⁷ It was true that, by the start of the twentieth century, English law had come to accommodate the full range of Christian belief and practice, as well as a significant Jewish minority, with reasonable success. However, the accommodation of other religions, growing primarily through immigration in the second half of the twentieth century, had not been as complete or successful. At first, social tensions were conceived primarily in terms of race and addressed through race discrimination law. The religious dimensions of difference were suppressed. But the inadequacy of this construction was exacerbated by the varying degrees to which religion and race can be correlated. From a legal point of view, the decision in *Mandla v Dowell Lee* exposed the difficulties.³⁸ In that case, the House of Lords confirmed that Sikhs, and by implication Jews, were within the protected characteristic of ethnicity for the purposes of race equality law, but that Christians, Muslims and Hindus (among others) were not. The possibility of reconstructing religious prejudice as racial prejudice in specific cases was difficult and often impossible.

The specific flashpoint was the response to the publication in 1988 of Salman Rushdie's *Satanic Verses*.³⁹ The fact that some Muslims refused to see this as a

36 The literature is large. See, for example, W Kymlicka, *Liberalism, Community and Culture* (Oxford, 1989); W Kymlicka, *Multicultural Citizenship: a liberal theory of minority rights* (Oxford, 1995); B Parekh, *Rethinking Multiculturalism: cultural diversity and political theory* (Basingstoke, 2000). For a vigorous defence of liberal approaches, see B Barry, *Culture and Equality: an egalitarian critique of multiculturalism* (Cambridge, 2001).

37 See S Poulter, *Ethnicity, Law and Human Rights: the English experience* (Oxford, 1998).

38 [1983] 2 AC 548.

39 For reflection on the longer-term impact, see D Herbert, *Religion and Civil Society: rethinking public religion in the contemporary world* (Aldershot, 2003), ch 6.

'private' matter of religious difference, and reacted in a highly vocal and even violent manner, was itself a challenge to the dominant liberal mindset. The inability of the existing blasphemy law to provide any protection exacerbated the problem.⁴⁰ Academics and politicians became increasingly aware that, for some minority groups, the religious dimensions of identity were, if anything, even more important than the racial dimensions.⁴¹ They were certainly far more important than for the nominally Christian majority.

What emerged was a growing awareness of diverse perceptions. For the liberal mainstream, the Christian remnants of English law were attenuated, trivial and gradually receding. They could safely be overlooked. For the Muslim minority, they were significant reminders of a religiously informed public sphere which needed both emphasising and applying to other religious minorities. The refusal of successive governments to approve Muslim schools within the state-funded sector was a signal instance of this: for the majority, Church schools were not *really* faith schools; for the minority, they were a reminder of historic and continuing privilege. In a related development, the MacPherson Report into the death of Stephen Lawrence emphasised the need to render visible and public the treatment of cultural difference in order to avoid hidden 'institutional racism'.⁴²

The time was therefore ripe for a recognition of the public presence of new religious communities by a formal re-commitment to principles of liberty and equality for all. Multiculturalism effectively became part of New Labour's constitutional reform agenda.⁴³ The Human Rights Act 1998 gave further effect to European Convention rights, including the right to freedom of thought, conscience and religion, as well as a subsidiary right to non-discrimination in the enjoyment of Convention rights. The School Standards and Framework Act 1998 created a general structure for the operation of minority faith-based schools, the first of which had also been approved in 1998. The new agenda was well expressed by the Commission on the Future of Multi-Ethnic Britain, established in 1997 by the Runnymede Trust under the chairmanship of Lord Parekh. It reported in October 2000, just as the Human Rights Act came into force. The report emphasised the concepts of cohesion, equality and difference, and among its recommendations included the following on religion and belief:

40 *R v Bow Street Magistrates Court ex parte Choudhury* [1991] QB 429.

41 Ceri Peach is among the commentators who point out the gradual shift from 'colour' to 'race' to 'ethnicity' to 'religion' in British discourse about minorities. C Peach, 'Muslims in the UK' in T Abbas (ed), *Muslim Britain: communities under pressure* (London, 2005).

42 *The Stephen Lawrence Inquiry*, Cm 4262-I (1999).

43 The phrase 'Britain is a multiracial and multicultural society' only appeared in New Labour's 1997 Election Manifesto under the heading of public disorder, but was nonetheless a clear marker of the changed attitude.

- (1) In all faith communities there should be closer connections between anti-racism and inter-faith relations;
- (2) Legislation should be introduced which prohibits direct and indirect discrimination on grounds of religion or belief. A statement of general principles should be drawn up on reasonable accommodation in relation to religious and cultural diversity in the workplace and in schools, and case-study examples of good practice should be provided;
- (3) A study should be made of police responses to hate crimes containing a religious component;
- (4) A commission on the role of religion in the public life of a multi-faith society should be set up to make recommendations on legal and constitutional matters.⁴⁴

The report was welcomed by the Government, although not all of its recommendations were followed. However, considerable government funding was made available for the support of faith-based consultation bodies. This was picked up in the 2001 election manifesto, after which central and local consultation bodies received increasing funding for advice, advocacy and inter-faith dialogue.⁴⁵ Regional multi-faith forums were established throughout the country. As far as equality law was concerned, the European Union's Treaty of Amsterdam 1997 had empowered the EU to combat discrimination on grounds of religion or belief. In due course, equality provisions in education, employment and occupation, and the provision of goods and services, came to be expanded to embrace discrimination on grounds of religion or belief.⁴⁶ An initial attempt to introduce a religious hate speech offence failed in 2001, although the existing category of racially aggravated offences was expanded to include religiously aggravated offences.⁴⁷ The creation of a new offence of incitement to religious hatred – without abolishing blasphemy law – eventually succeeded in 2006.⁴⁸ Chaplaincies in public institutions became more securely multi-faith. And, for the first time in 150 years, a religious affiliation question was asked in the 2001 census.⁴⁹ Multiculturalism had arrived at last.

44 *The Future of Multicultural Britain (The Parekh Report)* (London, 2000), ch 17. The new pluralism was also expressed in the Millennium Dome's 'Faith Zone'.

45 Account in Rivers, *The Law of Organized Religions*, pp 296–305. The location of responsibility for religious matters within Government has been remarkably peripatetic.

46 Employment Equality (Religion or Belief) Regulations 2003, Equality Act 2006, now consolidated in the Equality Act 2010.

47 Crime and Disorder Act 1998, ss 28–32, as amended by the Anti-terrorism, Crime and Security Act 2001.

48 Public Order Act 1984, pt IIIA, inserted by the Racial and Religious Hatred Act 2006.

49 The question on religion is the only non-compulsory one; commentators generally accept that under the European Convention individuals have a right not to reveal their religious beliefs if they do not wish to do so.

The rise of multiculturalism within both political theory and political discourse represents a plausible explanation of the rise of interest in law and religion. New laws which expressly protect religious liberty and equality, or which refer to religions in other ways, inevitably create new disputes. Any rise in litigation can also be explained in this way. So perhaps the changes that appear to be taking place are best explained by the new public recognition of religious minorities. They could be the inevitable consequence of a historic commitment to religious liberty and equality played out against the background of new forms of cultural diversity.

DOUBTING THE MULTICULTURAL HYPOTHESIS

It would be foolish to deny the force of the multicultural hypothesis, but it should nevertheless be approached with caution. Most obviously, at the level of broad political discourse, after the terrorist attacks of 11 September 2001 and 7 July 2005 ('9/11' and '7/7') successive governments have distanced themselves from it in the name of national, and liberal constitutionalist, values. And by itself the multicultural hypothesis is not adequate to explain all the legal changes that have been taking place over the last decade. There are three reasons for doubting it: the ineffectiveness of the new legislation, the resurgence of old problems in law and religion, and the phenomenon of illegality by surprise. Each of these can be sketched as follows.

The ineffectiveness of new legislation

Keith Ewing is well known among British public lawyers for his thesis that the enactment of the Human Rights Act 1998 has been futile.⁵⁰ Without commenting on the generality of that thesis, it is at least true that almost every case brought with reference to the religion clauses of the European Convention has failed in British domestic courts.⁵¹

There have been failures for claimants seeking asylum on grounds of religious persecution,⁵² resisting liability for chancel repairs,⁵³ raising claims of conscientious objection to military service,⁵⁴ resisting criminal proceedings

50 K Ewing, 'The futility of the Human Rights Act', (2004) PL 829–852; also K Ewing, 'The continuing futility of the Human Rights Act', (2008) PL 668–693, and K Ewing, *Bonfire of the Liberties* (Oxford, 2010).

51 The exceptions would appear to be: *R (K) v Newham LBC* [2002] EWHC 405 (Admin) (local authority obliged to take account of parents' religious preference for single-sex education in allocating school places); *Re Christian Institute's Application for Judicial Review* [2008] NI 86 (regulations prohibiting harassment on grounds of sexual orientation over-extensive); and *R (Bashir) v Independent Adjudicator* [2011] HRLR 30 (fasting prisoner unable to provide an adequate urine sample for drug-testing had not failed to obey a lawful order).

52 *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.

53 *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2004] 1 AC 546.

54 *Khan v Royal Air Force Summary Appeal Court* [2004] HRLR 40; *R v Lyons (Michael Peter)* [2012] 1 Cr App R 20.

for importation of cannabis in connection with Rastafarian rites,⁵⁵ appealing a conviction for a public order offence as a street preacher,⁵⁶ requesting school transport to faith schools,⁵⁷ seeking protection for days off from employment,⁵⁸ refusing to pay tax related to military spending,⁵⁹ preserving mild corporal punishment in private schools,⁶⁰ seeking exemptions from local taxation for churches,⁶¹ challenging school uniform requirements,⁶² protecting a diseased holy cow from slaughter,⁶³ refusing parental consent to a bone marrow transplant,⁶⁴ securing provision for Hindu funeral rites,⁶⁵ preventing judicial sitting on holy days⁶⁶ and determining the religious upbringing of children.⁶⁷

Whatever the impact on public attitudes, the Human Rights Act 1998 has brought about no discernable shift in the legal regulation of religious belief and practice. The point is not that these cases were wrongly decided; it is simply that the Act has not changed the law. And this is really not surprising. As both European and domestic courts repeatedly remind us, Article 9 only protects manifestations of religious belief and practice; not every act motivated by a religion or belief falls within the scope of protection.⁶⁸ Furthermore, manifestations of religious belief and practice may be limited to secure other public goods.⁶⁹ The balancing of interests necessarily taking place within the context of European Convention rights will tend to reflect socially dominant conceptions of the right balance already expressed within the law. The overriding purpose of the legislation was to 'bring rights home',⁷⁰ that is, to ensure that matters that could only be litigated in Strasbourg after domestic remedies had been exhausted could be litigated, and resolved, from the start. Judges have been cautious before developing a case law beyond that of the Strasbourg Court.⁷¹ It is

55 *R v Andrews (Reuben Phillip)* [2004] EWCA Crim 947.

56 *Hammond v DPP* [2004] EWHC 69 (Admin).

57 *R (R) v Leeds City Council* [2005] EWHC 2495 (Admin).

58 *Copsey v WWB Devon Clays Ltd* [2005] ICR 1789.

59 *R (Boughton) v HM Treasury* [2006] EWCA Civ 504.

60 *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

61 *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter Day Saints* [2008] 1 AC 1852.

62 *R (Begum) v Denbigh High School Governors* [2007] 1 AC 100; *R (Playfoot) v Millais School Governing Body* [2007] HRLR 34.

63 *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893.

64 *NHS Trust v A (a child)* [2008] 1 FLR 70.

65 *R (Ghai) v Newcastle City Council* [2011] QB 591. It should be noted that the Court of Appeal found that there was no legal obstacle in the way of a local authority providing facilities that would satisfy the claimant's desire for an open-air cremation.

66 *Khan v Vignette Europe Ltd* [2010] UKEAT 0134/09.

67 *Re N (A Child) (Religion: Jehovah's Witness)* [2012] Fam Law 402.

68 Consistent case law from *Arrowsmith v United Kingdom* (1981) 3 EHRR 218 onwards. As the recent judgment in *Bayatyan v Armenia* (2012) 45 EHRR 15 shows, the boundary between 'mere motivation' and 'protected manifestation' is fluid.

69 See ECHR, Art 9, para 2. Intriguingly, national security is not included: *Nolan and another v Russia* App no 2512/04 (ECtHR 12 February 2009), 53 EHRR 29.

70 See Home Office, *Rights Brought Home*, Cm 3782 (October 1997), especially paras 1.14–1.17.

71 This controversial phenomenon has been subject to a recent vigorous exchange in *Public Law*. See Lord Irvine of Lairg, 'A British interpretation of Convention rights', (2012) PL 237–252; and P

hardly surprising that the impact of the Act is minimal. In short, the Human Rights Act 1998 opens up the possibility of new grounds of legal argument but carries with it no likelihood of substantive change.

Equality law is now beginning to take over from the Human Rights Act 1998 as the larger cause of increased litigation. Once again, the structure of equality law admits of balancing and the reproduction of conventional compromises. Cases alleging direct discrimination are rare. The courts have drawn a distinction between discrimination on grounds of belief (direct discrimination) and discrimination on grounds of the way in which the belief is manifested (indirect discrimination), which means that in practice the only behaviour caught by absolute ban on direct discrimination is pure prejudice.⁷² Most cases involve employees challenging a provision, criterion or practice that is excessively burdensome for them as religious people.⁷³ The question then becomes whether the burden is proportionate, which requires a balancing of the costs and gains of alternative arrangements.

The equality legislation has not been so clearly ineffective. There have been many signal failures, some of which have had a high media profile: Monaghan,⁷⁴ Mayuuf,⁷⁵ James,⁷⁶ Eweida,⁷⁷ McClintock,⁷⁸ Harris,⁷⁹ Azmi,⁸⁰ Ladele,⁸¹ McFarlane,⁸² Chondol,⁸³ Power,⁸⁴ Chaplin,⁸⁵ Cherfi⁸⁶ and

Sales, 'Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine', (2012) PL 253–267.

- 72 This line of argument starts with the judgment in *Ladele v Islington LBC* [2010] 1 WLR 955 at paras 35–37.
- 73 Equality Act 2010, s 19.
- 74 *Monaghan v Leicester YMCA* [2004] UKEAT 4831/24 (no discrimination in direction to employee to refrain from attempts to convert clients to Christianity).
- 75 *Mayuuf v Governing Body of Bishop Challoner Catholic Collegiate School*, ET case no 3202398/04 21 December 2005 (no discrimination in refusal to allow time off for Friday prayers).
- 76 *James v MSC Cruises Ltd*, ET case no 2203173/05 (no discrimination in making Seventh Day Adventist work occasional Saturdays).
- 77 *Eweida v British Airways Plc* [2010] EWCA Civ 80 (no discrimination in refusal to accommodate jewellery cross worn by air hostess).
- 78 *McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (no discrimination in failing to accommodate magistrate who refused to place children for adoption with same-sex couples).
- 79 *Harris v NKL Automotive Ltd* [2007] UKEAT 0134/07 (no discrimination in refusing to permit Rastafarian driver to wear dreadlocks).
- 80 *Azmi v Kirklees MBC* [2007] ICR 1154 (no discrimination in refusing to allow teaching assistant to wear a full-face veil).
- 81 *Ladele v Islington LBC* [2009] EWCA Civ 1357 (no discrimination in refusing to accommodate registrar unwilling to celebrate civil partnerships).
- 82 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 (no discrimination in refusing to accommodate counsellor refusing to offer directive sexual counselling to same-sex couples).
- 83 *Chondol v Liverpool City Council* [2009] UKEAT 0298/08 (no discrimination in dismissing a social worker for evangelising clients and providing a bible).
- 84 *Power v Greater Manchester Police Authority* [2010] UKEAT 0434/09 (no discrimination in dismissal of Spiritualist for inappropriate distribution of materials).
- 85 *Chaplin v Royal Devon & Exeter Hospital NHS Trust*, ET case no 1702886/2009 (no discrimination in redeployment of nurse for wearing crucifix).
- 86 *Cherfi v G4S Security Services Ltd* [2011] UKEAT 0379/10 (no discrimination in refusing to accommodate security guard's request for time off for Friday prayers).

Johns.⁸⁷ But there have also been wins for religious individuals seeking a greater degree of accommodation from their employers: Fugler,⁸⁸ Williams-Drabble,⁸⁹ Edge,⁹⁰ Estorninho,⁹¹ Saini,⁹² Watkins-Singh,⁹³ Noah⁹⁴ and Thompson.⁹⁵

It is still too early to assess the impact of the religious equality legislation, and in particular to assess whether any change it is bringing about is merely procedural or also substantive. The cases are highly dependent on circumstances: for example, a large employer may easily be able to work around an employee's religious requirements, whereas a small employer may not. It is becoming clear that employers who fail even to consider whether they could accommodate a religious employee commit a wrong. In that sense, the new legislation has given a procedural right to employees to require their employer to give consideration to a request for accommodation; this explains many of the 'wins' noted above. On the other hand, some employers have succeeded by showing that they treated a religious claim for accommodation in the same way as they would a non-religious claim. What is not clear is whether the socially accepted, and legally enforced, understanding of which sorts of accommodation can reasonably be required has actually shifted. Perhaps not much of substance has changed here after all. Furthermore, it is possible that a new hierarchy of equalities is emerging, in which religious equality takes a subordinate position.⁹⁶ The new public sector duty to promote equality may be legitimising such a hierarchy.⁹⁷ If this does materialise, equality law as a whole may end up having a detrimental effect on the state's engagement with religious believers.

87 *R (Johns) v Derby City Council* [2011] EWHC 375 (Admin) (no discrimination in taking account of potential foster parents' views on homosexuality).

88 *Fugler v Macmillan-London Hair Studios Ltd*, ET case no 2205090/04 (discrimination in failure to consider whether staffing needs could be met while also allowing employee time off for Yom Kippur).

89 *Williams-Drabble v Pathway Care Solutions Ltd*, ET case no 2601718/04 (discrimination in imposition of Sunday shifts on employee who had made clear at interview that she could not work on Sundays).

90 *Edge v Visual Security Services Ltd*, ET case no 1301365/06 (discrimination in failure to consider alternative arrangements to enable Christian employee to avoid Sunday working).

91 *Estorninho v Zorans Delicatessen*, ET case no 23014871/06 (discrimination in instructing a Roman Catholic chef to work on Sundays without considering alternatives).

92 *Saini v All Saints Haque Centre* [2008] UKEAT 0227/08 (harassment on religious grounds includes cases in which an employee is unwillingly caught up in an employer's discriminatory action towards others).

93 *R (Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin) (discrimination in refusal to permit Sikh bangle in school).

94 *Noah v Desrosiers*, ET case no 2201867/07 (discrimination in refusing to employ Muslim wearing headscarf in hairdresser's salon).

95 *Thompson v Luke Delaney George Stobart Ltd* [2011] NIFET 00007 11FET (discrimination in requiring Jehovah's Witness to cover Sunday shifts when other employees were available).

96 L Vickers, 'Religious discrimination in the workplace: an emerging hierarchy?', (2010) 12 *Ecc LJ* 280–303.

97 Equality Act 2010, s 149. See further, J Rivers, 'Promoting religious equality', (2012) 1 *Oxford Journal of Law and Religion* (forthcoming), currently available at <http://ojlr.oxfordjournals.org/content/early/2012/01/12/ojlr.rw025.full.pdf+html>, accessed 14 June 2012.

The resurgence of old problems in law and religion

Both the Human Rights Act 1998 and the Equality Act 2010 make available new causes of action and heads of argument to litigants. As we have seen, these have had little or no effect in shifting the substantive relationship between religions and the law. If they are the flagship components of a new constitutional commitment to multiculturalism, their impact is underwhelming. The second reason for doubting the multicultural hypothesis is an apparent increase in what could be called the ‘permanent core’ of religion cases – cases that have always potentially given rise to litigation, regardless of new formal legal protections for liberty and equality, and regardless of the presence of new religious minorities. Such an analysis is inevitably crude and impressionistic, but it seems as if the new human rights and equality laws only account for (perhaps) half of the reported cases with an obvious religious dimension.⁹⁸ Again, impressionistically, the last few years have seen a shift from the Human Rights Act 1998 to equality legislation as the more common basis of argumentation. This fits with the emerging pattern that some cases based on religious discrimination are succeeding, whereas cases based on human rights are almost always failing.

The remaining cases are staple diet, in that they could have been litigated even had the human rights and equality legislation not been enacted.⁹⁹ They concern, for example, the ownership and control of church property,¹⁰⁰ judicial oversight of the actions of religious associations, including the decisions of religious tribunals and arbitrators,¹⁰¹ questions of the employment status of religious workers,¹⁰² religious charity registration and regulation,¹⁰³ rating and taxation,¹⁰⁴ problems of planning and environmental constraints raised by religious

98 The most accessible resource is the excellent database of cases maintained by the Centre for Law and Religion at Cardiff on behalf of the Law and Religion Scholars Network: <http://www.law.cf.ac.uk/clr/networks/lrsncd.html>, accessed 14 June 2012. It now has nearly 200 cases summarised, mostly from the last decade. The selection is in no way scientific – immigration and asylum cases tend not to be included, nor are most consistory court cases.

99 Strictly speaking one needs to distinguish between cases that could not plausibly have been pleaded in the absence of the new human rights or equality legislation, and cases that could have been pleaded, and in which the human rights or equality argument was subsidiary. Some, at least, of the cases listed below involve litigants reopening old points of law in the light of the new laws.

100 *Dean v Burne* [2009] EWHC 1250 (Ch); *Southampton City Council v Southampton Medina Mosque Trust Ltd* [2010] EWHC 2376 (Ch); *White v Williams* [2010] EWHC 940 (Ch); *Kings v Bultitude* [2010] EWHC 1795 (Ch); *Moderator of the General Assembly of the Free Church of Scotland v Interim Moderator of the Congregation of Strath Free Church of Scotland (Continuing)* 2011 S.L.T. 1213; *Re Presbyterian Church in Ireland Trusts* [2011] NICH 4.

101 *Musawi v RE International (UK) Ltd* [2008] 1 All ER Comm 607; *Kohn v Wagschal* [2007] 2 CLC 720.

102 *Representative Body of the Church of Ireland v Frazer*, ET case no PW 27/2004; *New Testament Church of God v Stewart* [2008] ICR 282; *Preston (Moore) v President of the Methodist Conference* [2012] ICR 432; *MacDonald v Free Presbyterian Church of Scotland* [2010] CSOH 55; *Sholl v PCC of St Michael and All Angels*, ET case no 2330072/2010.

103 *Re Sacred Hands Spiritual Centre* [2006] WTLR 873; *Re Gnostic Centre*, Charity Commission Decision 16 December 2009; *Re The Druid Network*, Charity Commission Decision, 21 September 2010.

104 *Ebury v Church Council of the Central Methodist Church* [2009] RA 239.

premises and practices,¹⁰⁵ vicarious liability within religious organisations,¹⁰⁶ the recognition of foreign religious marriages, divorces and wills,¹⁰⁷ questions of the religious upbringing of children after family breakdown,¹⁰⁸ questions of medical treatment and medical ethics with a religious component,¹⁰⁹ problems of conscientious objection,¹¹⁰ the criminality of unconventional religious practices,¹¹¹ and defamation, blasphemy and religious hatred.¹¹² If one compares that list with the topics covered in St John Robilliard's book, the only obvious candidate for a reduction in legal activity is that concerning Sunday trading laws. After the battles of the early 1990s and the Sunday Trading Act 1994, these have largely been settled.

None of these areas of law is new, nor is the litigation the result of particularly new religious practices. It may be that the apparent increase is merely a result of more comprehensive and accessible reporting, but the presence of a significant increase of cases in the higher courts suggests not. Rather, the increase in litigation suggests a new loss of consensus about the role and significance of religion. It has become less obvious how disputes involving a religious component should be resolved.

Illegality by surprise

The final reason for doubting the multicultural hypothesis is the phenomenon of illegality by surprise. In some cases, religious individuals or groups have been found to be acting unlawfully when the law has not changed and they have been engaging in practices for years without challenge. Four very different examples make the point: *Hammond, Percy, JFS* and *Bideford Town Council*.

Hammond's case is not entirely straightforward. Harry Hammond was an elderly street preacher who carried a sign saying 'Jesus Gives Peace, Jesus is

- 105 *R (Bello) v Lewisham LBC* [2004] 2 PLR 1; *R (Hackney LBC) v Rottenberg* [2007] Env LR 24; *R (Umar) v Secretary of State for Communities and Local Government* [2009] EWHC 1770 (Admin).
- 106 *M v Hendron* [2007] SC 556; *Raggett v Society of Jesus Trust* [2009] EWHC 909 (QB); *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] 1 WLR 1441; *JGE v English Province of our Lady of Charity* [2012] 2 WLR 709; *Various Claimants v The Catholic Child Welfare Society* [2010] EWCA Civ 1106.
- 107 *Sulaiman v Juffali* [2002] 1 FLR 479; *KC v Westminster City Council* [2009] Fam 11; *El Gamal v Bin Saede Al Maktoum* [2011] EWHC 3763 (Fam); *Hudson v Leigh* [2009] 2 FLR 1129; *Official Solicitor to the Senior Courts v Yemoh* [2011] 1 WLR 1450; *R v M* [2011] EWHC 2132 (Fam); *H v S* [2011] EWHC B23 (Fam).
- 108 *Re C (Adoption: Religious Observance)* [2002] 1 FLR 1119; *Re S (Specific Issue Order: Religion: Circumcision)* [2004] EWHC 1282 (Fam); *Re A (Local Authority: Religious Upbringing)* [2010] EWHC 2503 (Fam); *Re N (A Child) (Religion: Jehovah's Witness)* [2011] EWHC 3737 (Fam).
- 109 *Re L (Medical Treatment: Gillick Competence)* [1998] 2 FLR 810; *NHS Trust v A (A Child)* [2008] 1 FLR 70.
- 110 *Khan v Royal Air Force Summary Appeal Court* [2004] HRLR 40; *R (Boughton) v HM Treasury* [2006] EWCA Civ 504; *R v Lyons (Michael Peter)* [2012] 1 Cr App R 20.
- 111 *R v Taylor (Paul Simon)* [2002] 1 Cr App R 37; *R v Andrews (Reuben Phillip)* [2004] EWCA Crim 947.
- 112 *Blake v Associated Newspapers* [2003] EWHC 1960 (QB); *R (Green) v City of Westminster Magistrates Court* [2007] EWHC 2785 (Admin); *Maharaj v Eastern Media Group* [2010] EWHC 1294 (QB); *Shergill v Purewall* [2010] EWHC 3610 (QB).

Alive, Stop Immorality, Stop Homosexuality, Stop Lesbianism, Jesus is Lord'. He came under attack from a group of homosexual activists, was arrested, charged with a public order offence and convicted, and his appeal was dismissed.¹¹³ His case is not straightforward, because English law has never quite had the courage to adopt wholeheartedly the approach of Field J in *Beatty v Gillbanks*.¹¹⁴ In 1882, in Weston-super-Mare, the Salvation Army were regularly being set upon by the ad hoc 'Skeleton Army' for promoting temperance. After being warned by the local magistrates against processing through the streets, they went ahead, with predictable riotous consequences. They were prosecuted and convicted for holding an unlawful assembly. Field J allowed their appeal on the grounds that 'a man may [not] be convicted for doing a lawful act merely because he knows that his doing it may cause another to do an unlawful act'.¹¹⁵ This admirable principle has not always been followed,¹¹⁶ but it received recent support from the decision of the Divisional Court in *Redmond-Bate v DPP*.¹¹⁷ Furthermore, the House of Lords subsequently held that the police may only intervene to prevent a breach of the peace if violence is imminent and there is no other way of preventing it.¹¹⁸ Where possible, the focus of action should always be on those about to act disruptively. Whatever one makes of Hammond's views or the way he chose to express them, there is little doubt that he was not the primary cause of the disorder.

The law has not changed, but it is the case that one cannot now safely say in public what one could have said a few years ago. One might argue that public order law is an area that is particularly sensitive to shifts in social consensus as to what is acceptable behaviour in public. The law itself does not need to change; it simply supports social mores, and public criticism of homosexual practice has become socially unacceptable. However, the following three cases are clearer examples of surprising shifts in judicial attitude.

In 2005, the House of Lords decided *Percy v Board of National Mission of the Church of Scotland*.¹¹⁹ Helen Percy had resigned under pressure after having had an affair with a parishioner. She wanted to argue unlawful discrimination on grounds of sex on the basis that a male minister would have been more favourably treated. As she went through the Scottish court system the predictable answer came back that this was an internal spiritual matter and no business of the secular courts. But the House of Lords decided by a 4 to 1 majority that an associate minister in the Church of Scotland was appointed under a contract

113 *Hammond v DPP* [2004] EWHC 69 (Admin).

114 (1881–2) LR 9 QBD 308.

115 *Ibid.*, at 314.

116 From the older cases, see *Wise v Dunning* [1902] 1 KB 167; *Duncan v Jones* [1936] 1 KB 218.

117 [2000] HRLR 249.

118 *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105.

119 [2006] 2 AC 28.

‘personally to execute any work or labour’ within the scope of the Sex Discrimination Act 1975, section 82(1) and the jurisdiction of the Employment Tribunal. Furthermore, the court rejected the Church’s other argument that the claim was within the exclusive spiritual jurisdiction of the Church under the Church of Scotland Act 1921. Whatever the exclusive spiritual jurisdiction of the Church is, it does not cover unlawful discrimination in employment. If the majority of the House of Lords is correct, the Church of Scotland has been subject to the oversight of the secular courts in respect of some (at least) of its ministers since 1975. For 30 years, we never noticed.

In 2009, the Supreme Court decided that the JFS (formerly the Jews’ Free School) acted unlawfully in applying a test of matrilineal descent to determine whether a boy was Jewish for the purposes of their admissions policy.¹²⁰ A bare majority of five of the Justices found that the test amounted to direct discrimination contrary to section 1(1)(a) of the Race Relations Act 1976. Since there is no justification for an ethnic or racial test in the law relating to school admissions criteria, the test was unlawful. The other four Justices found only indirect racial discrimination: two of them finding it in proportionate pursuit of a legitimate aim, and thus lawful, and two finding it unjustified. If the majority of the Supreme Court is correct, it has been unlawful for Jewish organisations to apply orthodox tests of identity to restrict access to goods and services for 33 years – and a good case could be made that it was already unlawful under the Race Relations Act 1968. But, again, we never noticed.¹²¹

Last of all there is the recent decision of the High Court in the Bideford Town Council case.¹²² The saying of prayers as part of the formal business of a local authority requires statutory authority, which is lacking under the Local Government Act 1972. It is therefore unlawful. Local authorities have always required statutory authority for everything they do; there has never been explicit authority to say prayers so this has always been unlawful. And we never noticed. However, it was not a breach of the individual councillor’s human rights – of course, we know by now that religious arguments based on the Human Rights Act 1998 rarely work.

Something is going on here which cannot be explained by the multicultural hypothesis. Christopher McCrudden has commented that the *JFS* case

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

121 This is not strictly true. The problem was noticeably fudged by the Employment Appeal Tribunal in *Board of Governors of St Matthias Church of England School v Crizzle* [1993] ICR 401; and the potential problem with exceptionless direct discrimination provisions post-*Mandla* was noted, *inter alia*, in J Rivers, ‘Religious liberty as a collective right’ in R O’Dair and A Lewis (eds), *Law and Religion* (Oxford, 2001), p 235 n 39. *JFS* was the case in which a long-standing legal land-mine exploded. If the House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 548 had resisted the pressure to extend race equality law to fill the gap of a missing religious equality law, the problem might never have arisen.

122 *R (National Secular Society) v Bideford Town Council* [2012] EWHC 175 (Admin).

represents a 'post-multiculturalism' in which British anti-discrimination law has come to be used by interventionist courts to promote 'cosmopolitan, individualistic liberal values'.¹²³ Some sort of change is taking place within the legal regulation of religious belief and practice which is rendering visible and problematic aspects of the role and significance of religion that were hitherto invisible and unproblematic.

THREE FEATURES OF THE NEW LAW OF RELIGIONS

We have seen that new general laws extending protection to religious liberty and equality have had little effect on legal outcomes, but that there has also been an apparent general rise in litigation and some surprising instances of conventional practices found to be unlawful. Furthermore, the historic understanding of the legal place of religion in this country is under pressure at three points. This can be seen by reflecting on a shift in the way in which the law treats religion as a matter of conscience, religion as legal system, and religion as a context for public service.

Religion as conscience

The cause of religious liberty has long been connected to the cause of conscience. Religious toleration was introduced in 1689 to give relief to tender consciences, and the close connection between religion and conscience is maintained in the texts of international human rights documents which protect 'freedom of thought, conscience and religion'.¹²⁴ Nevertheless, it is undeniable that conscience is the weakest partner of this triad, not least because it is only the manifestation of religion which receives explicit protection. Only very recently has the European Court of Human Rights derived a right to conscientious objection to military service from the text of the Convention.¹²⁵

As far as the development of English law is concerned, relief to tender consciences was initially provided by giving legal exemptions to religious congregations and churches, freeing them from obligations to engage in uniform public worship. The model was collective in orientation and distinguished between acceptable and unacceptable dissent. When exemption from oath-taking and military service was introduced, the same model was adopted. Conscientious objection was only available for the benefit of certain specific denominations such as Quakers, Moravians and other Christian brethren.¹²⁶ Not until the late nineteenth century do we find individual exemptions from legal obligation

123 C McCrudden, 'Multiculturalism, freedom of religion, equality and the British constitution: the JFS case considered', (2011) 9 IJCL 229.

124 Universal Declaration of Human Rights 1948, Art 18 etc.

125 *Bayatyan v Armenia* (2012) 54 EHRR 15.

126 See, eg, Quakers Act 1695; Militia Act 1803.

based on conscience as such.¹²⁷ The key examples here were oath-taking,¹²⁸ compulsory military service,¹²⁹ compulsory medical treatment (vaccination)¹³⁰ and compulsory religious education.¹³¹ As the battle over oath-taking demonstrated, there was considerable hesitation about accepting an extension of protection from the religiously informed conscience to conscience as a non-religious moral commitment.

The period after the Second World War, which coincided with the modern human rights movement, saw a noticeable further individualising of conscience. In modern times, statute law has created conscience-based exceptions for religious individuals in areas such as trades union membership,¹³² participation in abortions and the provision of contraceptive services,¹³³ participation in artificial human fertilisation procedures and the handling of embryos,¹³⁴ and the wearing of turbans and ceremonial knives.¹³⁵ These examples fluctuate between older approaches identifying specific privileged groups, exemptions for the religiously informed conscience and exemptions for the individual conscience as personal moral conviction.

But is there a general right to freedom of conscience implicit in English law? No plausible right to conscientious action could give *carte blanche* to the individual to disobey the law.¹³⁶ Yet the courts have never rushed to expand the categories of conscience either, and it is understandable that judges should be very cautious in wielding a power to dispense with general laws in individual cases.¹³⁷ That would arguably be legislation, not adjudication. However, recent litigation reveals a hardening of judicial attitudes towards the dissenter. The courts have been at pains to stress that religious commitment does not exempt one from the duty to obey the law – and that includes the duty to obey the lawful commands of one's employer. In some of the cases, the judges show some sympathy for individuals whose legal context has changed around them, but there is no attempt to identify a general right of conscience or to balance it with the new legal obligations. One suspects that the vast

127 See Braithwaite, *Conscientious Objection*.

128 Oaths Act 1888.

129 Military Service Act 1915, s 2(1)(d).

130 Vaccination Act 1898, s 2.

131 Elementary Education Act 1870, s 7; see now School Standards and Framework Act 1998, s 71.

132 Industrial Relations Act 1971, s 9(1)(b); Trades Union and Labour Relations Act 1974, schedule 1, para 6(5).

133 Abortion Act 1967, s 4; National Health Service (General Medical Services Contracts) Regulations 2004/291.

134 Human Fertilisation and Embryology Act 1990, s 38.

135 Road Traffic Act 1988, s 16(2); Employment Act 1989, s 11; Criminal Justice Act 1988, s 139(5)(b).

136 See, eg, *Blake v DPP* [1993] Crim LR 586. For a theoretical defence of dissent and disobedience, see T Allan, *Constitutional Justice: a liberal theory of the rule of law* (Oxford, 2001), ch 4.

137 *Drury v The Bakers' Union* [1973] IRLR 171; *R v Salford Area Health Authority ex parte Janaway* [1989] AC 537. For a recent reiteration of this point, see *Doogan v Greater Glasgow & Clyde Health Board* [2012] CSOH 32.

majority of the judiciary have come to share Lord Hoffmann's opinion in *Begum* that the law rather contains an 'expectation of accommodation, compromise and, if necessary, sacrifice in the manifestation of religious beliefs'.¹³⁸ That is diametrically opposed to a conception of the rule of law rooted in individual conscience.

A number of developments reinforce this shift in attitudes. First, there is a willingness on the part of courts to articulate the legitimate grounds for restricting liberty in ways that evade any balancing between competing interests. For example, in banning corporal punishment in private schools that would otherwise have been lawful if administered by parents, Baroness Hale articulated the legitimate aim as protecting the child from 'institutional violence'.¹³⁹ This effectively builds the outcome into the aim and prevents any balancing between the interests of parents in authorising others to use physical chastisement and the interest of the state in protecting children from harm. A similar move was made by Lord Neuberger MR in *Ladele*.¹⁴⁰ Here, by changing the legitimate aim of Islington Borough Council from that of providing 'effective civil partnership arrangements' to providing services 'as an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others', the need to consider forms of accommodation was avoided. If conscience is to be protected, the focus must remain on practical service delivery, not institutional ethos.

Furthermore, equality law finds it easier to accommodate claims based on collective practice than those based on individual conscience. It is easier to win an indirect discrimination claim on grounds of religion if it is a matter of common knowledge that one's religion requires one to perform the act in question (we all know that Sikh men wear turbans). But if one's religion leaves one free to decide how to manifest it, then one's idiosyncrasy counts for little (Christians do not *have* to wear a crucifix).¹⁴¹ The most prominent issue of conscience in recent years has involved dissenters to emerging views of human sexuality. In this area, courts have shown an even stronger bifurcation between an essentialising view of sexuality and a choice-model of religion that has rendered irrelevant the concerns of those with tender consciences about complicity in behaviour they consider immoral.¹⁴²

138 *R (Begum) v Denbigh High School Governors* [2007] 1 AC 100 at para 54.

139 *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 at para 86. Lord Nicholls relied on an alleged parliamentary discretion to lead public opinion in the matter at para 50.

140 *Islington LBC v Ladele* [2010] 1 WLR 955 at paras 44–45.

141 The contrast between *R (Watkins-Singh) v Aberdare Girls' High School Governors* [2008] 3 FCR 203 and *R (Playfoot) v Millais School Governing Body* [2007] HRLR 34 is striking in this respect.

142 As well as the cases of *McClintock*, *Ladele*, *McFarlane* and *Johns* noted above, see also *Hall v Bull* [2012] EWCA Civ 83. Carl Stychin is similarly critical of this bifurcation of approaches to the protected

It is thus becoming increasingly clear that conscience will only be protected on an issue-by-issue basis if Parliament can be persuaded to grant a specific statutory right. In a constitutional framework which allows the judiciary to interpret law and, if necessary, make declarations of incompatibility in accord with the individual's freedom of conscience,¹⁴³ a tendency to downplay the value of conscience is regrettable. The Human Rights Act 1998 creates a model in which judiciary and legislature collaborate in ensuring the protection of rights. Yet, unless the judiciary are prepared formally to highlight a problem involving minority rights of conscience, the legislature may well not feel the need to address it. Across all institutions of government, religions are ceasing to command respect as independent sources of moral obligation bearing down on the individual believer; they have little weight against the collective judgments of the community expressed through law.

Religion as legal system

In 2008 the Archbishop of Canterbury raised a media storm by suggesting that sharia law might in some limited respects be recognised by the civil legal system.¹⁴⁴ One of the good things about that storm, which still blows around, is a much greater interest in the use and limits of religious arbitration. What got lost in the debate, however, was the sense in which religions are, or consist partially of, normative systems that need to be brought into relationship with state law. Every well-educated lawyer ought to know that the ecclesiastical law of the Church of England is a semi-autonomous branch of English law.¹⁴⁵ This detached relationship can clearly be seen in the process for the creation of Measures with the status of Acts of Parliament¹⁴⁶ or the use of judicial review to provide oversight of ecclesiastical courts.¹⁴⁷ What few realise is that the principle of religious group autonomy influenced the law relating to other religious bodies as well. 'Autonomy' is used here in the sense of collective

characteristics of sexual orientation and religion. See C Stychin, 'Faith in the future: sexuality, religion and the public sphere', (2009) 29 *Oxford Journal of Legal Studies* 729–755.

143 Human Rights Act 1998, s 4.

144 R Williams, 'Civil and religious law in England: a religious perspective', (2008) 10 *Ecc LJ* 262–282; S Bano, 'In pursuit of religious and legal diversity: a response to the Archbishop of Canterbury and the "sharia debate" in Britain' (2008) 10 *Ecc LJ* 283–309; Lord Phillips of Worth Matravers, 'Equality before the law', a speech given at the East London Muslim Centre on 3 July 2008, reproduced in various places, including (2008) 161 *Law and Justice* 75–87.

145 Recent major statements include M Hill, *Ecclesiastical Law* (third edition, Oxford, 2007) and *Halsbury's Laws of England: vol 34: Ecclesiastical Law* (fifth edition, London, 2011).

146 Church of England Assembly (Powers) Act 1919 as amended by the Synodical Government Measure 1969. Short of disestablishment on the Irish and Welsh models, this gave the Church of England power over any law concerning itself, subject only to parliamentary veto. The legislative process is discussed in N Doe, *The Legal Framework of the Church of England* (Oxford, 1996) pp 57–70.

147 The availability of judicial review is not entirely secure. See M Hill, 'Judicial review of ecclesiastical courts' in N Doe, M Hill and R Ombres (eds), *English Canon Law: essays in honour of Bishop Eric Kemp* (Cardiff, 1998), pp 104–114; *R v Bishop of Stafford, ex parte Owen* [2000] All ER (D) 1169.

self-government, including the ability to make and enforce laws *in relation to matters which are in other contexts subject to civil law*, rather than the sense of individual agency. Autonomy requires a distinctive attitude on the part of secular courts: religious law needs to be respected as a parallel jurisdiction. This is now under considerable threat.

The threat arises from a general shift in judicial consciousness. The first element of this shift is an unwillingness to treat religions as complex normative networks, and instead to treat them as consisting solely of individual corporations, or juristic persons. Instances of this can be seen both in Lord Nicholls' cavalier dismissal of problems of the legal personality of the Scottish Presbyterian church in *Percy*,¹⁴⁸ and the rise of vicarious liability across organised religions.¹⁴⁹ Continuing respect for the diffuse nature of the Church of England is becoming exceptional rather than normative. But the threat also arises from an overemphasised bifurcation of 'law' and 'religion'. It is possible that the hostility of the public reaction to Archbishop Rowan Williams' lecture derived in part from an assumption that 'law' and 'religion' should have little to do with each other.¹⁵⁰ On the one hand, this means that matters of concern to the law are considered independently of any religious perspective;¹⁵¹ on the other hand, it means that matters which are clearly 'religious' can become non-justiciable.¹⁵² This is a version of religious liberty, but only liberty in legally irrelevant matters. The dominant human rights framework tends to support this process because it, too, forces a clear distinction between the state and its law, and groups of individuals with their pre-legal rights. Equality law tends to contain exceptions modelled on genuine occupational requirements and calling for proportionality-analysis rather than exemptions for institutions operating under their own law.¹⁵³

The clearest example of the growing bifurcation, and its instability, is in the employment of ministers of religion. By the middle of the nineteenth century, the general legal position was clear. Ministers of religion were private office-holders, who held office subject to the internal law of the religious denomination

148 *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28 at para 28. The language of 'internal fragmentation' implies that there is something wrong.

149 See *JGE v English Province of Our Lady of Charity* [2012] 2 WLR 709.

150 This is a broad cultural development indicated by a shift in interest from 'religion' to 'spirituality' and noted by Grace Davie as 'believing without belonging'. See G Davie, *Religion in Britain since 1945: believing without belonging* (Oxford, 1994).

151 'A claim of unlawful discrimination in the employment field has nothing to do with matters of doctrine, worship or government or with membership in the Church': per Lord Hope in *Percy*, at para 132.

152 Questions of religious reputation are non-justiciable: *Blake v Associated Newspapers* [2003] EWHC 1960 (QB); *Maharaj v Eastern Media Group* [2010] EWHC 1294 (QB); *Shergill v Purewall* [2010] EWHC 3610 (QB).

153 See the discussion in R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford, 2005), pp 308–324.

to which they belonged.¹⁵⁴ They could not be deprived of office, or any related ‘civil’, ‘material’ or ‘secular’ interest, except in accordance with the rules of the denomination and the precepts of natural justice. In that sense, there was an analogy with public office-holding in the established church. As employment law developed through the twentieth century, religious bodies were shielded from its application. Ministers were subject substantively to their own internal law, under the oversight of secular courts. This was recognised as late as 1986 by the House of Lords, albeit in rather unsatisfactory terms.¹⁵⁵ Thereafter, collective amnesia and confusion set in, with the rapid rise of an almost irrebuttable presumption in the Employment Tribunals that ministers of religion – of any religion – had no civil legal relationship with their religious body whatsoever.¹⁵⁶ Since the decision in *Percy*, however, the courts have been making up for lost time, swinging to the opposite extreme, finding employment relationships according to normal secular tests.¹⁵⁷ When this is put together with the extension of employment equality law to office-holding, the effect is to bring the relationship between ministers and their religious organisations within the embrace of state law.¹⁵⁸ There is still the possibility of expressly excluding the secular courts entirely on religious grounds, which is fully in line with the strict law–religion bifurcation noted above.¹⁵⁹ What has been lost, however, is the historic position of deference on the part of secular courts towards religious law affecting civil interests.

Another example involves the considerable difficulty, expressed in both long-standing case law and academic literature, of how to handle property disputes after schism within a religious body. Historically, English and Scots law have sought to resolve this by reference to two principles: fidelity to the theological position of the original body, and respect for the decisions of its properly constituted organs of government. The fact that there are two principles potentially gives rise to conflict. The worst-case scenario is when the highest decision-making body decides a matter which seems at first blush to be within its competence, but which happens to have great theological significance for the formation of the denomination in question. This is exactly what happened in *Overtoun*, and it split the House of Lords.¹⁶⁰ However problematic it might have been in that

154 See Rivers, *The Law of Organized Religions*, ch 4.

155 *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323.

156 The high point was, arguably, *Khan v Oxford City Mosque*, unreported, 23 July 1998.

157 *New Testament Church of God v Stewart* [2008] ICR 282; *Preston (Moore) v President of the Methodist Conference* [2012] ICR 432; *Singh v Bristol Sikh Temple Management Committee* [2012] UKEAT 0429/11/ZT.

158 Of course, there are exceptions to religious non-discrimination requirement for religious groups, but the decisions in *Percy* and *JFS* clearly show the limited nature of these exceptions.

159 *New Testament Church of God v Stewart* [2008] ICR 282 per Pill LJ at para 47 and Arden LJ at paras 61–62.

160 *Free Church of Scotland v Overtoun* [1904] AC 515.

case, this approach is an attempt to respect the identity of the religious body as a normative system, to allocate property according to its law.

It is now questionable whether this is still the position of English law. The understandable unwillingness of the courts to unravel complex questions of religious group identity and authority coupled with an expanded *cy-près* jurisdiction presents a tempting opportunity to distribute assets on a common-sense basis such as proportionality to relative group size.¹⁶¹ A recent case also hints at the adoption of a formalistic reliance on the strict terms of trust deeds.¹⁶² If these approaches take root, religious law will cease to have significance in the allocation of assets. By contrast, Scottish courts maintain the older approach.¹⁶³

One further example will be sufficient to make the point.¹⁶⁴ On the establishment of the modern Charity Commissioners in 1853, religious groups were almost entirely exempt from their oversight. In those days it was thought quite inappropriate for government to get entangled in the financial affairs of religions. The fundamental reforms carried through by the Charities Act 1960 did not alter the basic policy that, where adequate oversight was provided by a religious denomination, the Charity Commissioners were excluded.¹⁶⁵ However, a Strategy Review Unit report of July 2002 recommended the staged abolition of these exceptions, not least because non-Christian religions did not have the necessary internal accountability structures.¹⁶⁶ The Government agreed. The register was a national database of all charities and an important element of accountability. Regulatory oversight through annual monitoring was justified. There should be no 'arbitrary preference' for older Christian denominations.¹⁶⁷ The process of bringing the finances of religions under the oversight of the state is not yet complete¹⁶⁸ but, when it is, the idea of religious self-government will have been further eroded.

In short, the idea that religions command respect on the part of secular governmental 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.

161 *Varsani v Jesani* [1999] Ch 219, [2002] 1 P&CR DG 11; *White v Williams* [2010] EWHC 940 (Ch).

162 *Dean v Burne* [2009] EWHC 1250 (Ch).

163 See *Free Church of Scotland v General Assembly of the Free Church of Scotland* [2005] SLT 348; *Moderator of the General Assembly of the Free Church of Scotland v Interim Moderator of the Congregation of Strath Free Church of Scotland (Continuing) (No 3)* [2011] SLT 1213.

164 One could also usefully reflect on instability as displayed in the contrasting judgments of the Court of Appeal and the House of Lords in *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2002] Ch 51; [2004] 1 AC 546 on the legal obligations of lay rectors.

165 Lord Nathan, *The Charities Act, 1960* (London, 1962) pp 29–30 and 46.

166 Cabinet Office Strategy Unit, *Private Action Public Benefit: a review of charities and the wider not-for-profit sector* (September 2002), para 7.90.

167 Home Office, *Charities and Not-for-Profits: a modern legal framework* (July 2003), paras 6.44–6.50.

168 Charities (Exception from Registration) Regulations 1996, SI 1996/180, as extended by SI 2007/2655 to 1 October 2012. The exceptions are subject to a cap of £100,000 gross annual income: Charities Act 2011, s 30(2).

Religion as a context for public service

The third area of change is in religion as a context for public service. The later nineteenth-century separation mentality between Church and state did not result in a narrow private conception of spirituality as opposed to a broad notion of state welfare, precisely because social welfare was so obviously a religious function. But as the welfare state grew through the twentieth century, the separation mentality survived, in a model of co-ordination. So chaplaincies in prisons and hospitals were conceived as outposts of the churches they represented, not as state spiritual functionaries. Within education, religious education (instruction and worship) was considered detachable from 'secular education' and subject to its own rules.¹⁶⁹ Parts of the welfare state were the state's business; other parts were delivered by voluntary religious bodies and organisations.

Under New Labour, this model collapsed, and the provision of welfare came to be treated in typical 'third way' fashion as provided privately but regulated publicly. So there has been a new openness to faith-based welfare provision, but the terms on which it is offered have been substantially those of the public sector, with its norms of non-discrimination on grounds of religion. This must be seen in the light of a much broader change: the removal of the presumption of public benefit for charities advancing religion. Under the Charities Act 2006, it is no longer to be presumed that the advancement of religion or any other charitable purpose confers a public benefit.¹⁷⁰ Of course, after an initial flurry of consultation, matters have settled down more or less where they were: the Charity Commission is not suddenly going to start finding large numbers of religious charities non-charitable. But the removal of the presumption of public benefit has triggered a view that religion itself is not publicly beneficial unless it satisfies some further, non-religious, criterion.

This can be seen in the 2008 statutory guidance of the Charity Commission, although critical responses to the draft guidance led to more muted expressions in the final version.¹⁷¹ The guidance gives the impression that religions are morally suspect, and only allowed to be 'discriminatory' if they are open and clear to others about the fact.¹⁷² Social welfare should be limited to activities required by 'specific obligations' of the religion and should be disconnected from proselytism.¹⁷³ Worst of all, religion is pressed into the service of a

169 See Elementary Education Act 1870, s 7(2), which required religious instruction and worship to be given at the start or end of the day to facilitate withdrawal. Under s 7(2), religious instruction was immune from inspection.

170 See, now, Charities Act 2011, s 4.

171 See Charity Commission, *Public Benefit and the Advancement of Religion: draft supplementary guidance for consultation* (February 2008); Charity Commission, *The Advancement of Religion for the Public Benefit: supplementary guidance* (December 2008).

172 Charity Commission, *Public Benefit*, p. 31; Charity Commission, *The Advancement of Religion*, s E3.

173 Charity Commission, *Public Benefit*, p 19.

secular conception of ‘public interest’. This has been achieved by recasting the older cases on public access to religion as cases on ‘advancement’ and then requiring an additional demonstration of ‘public benefit’ in terms of a beneficial moral impact on society. For example, it has been suggested that it is no longer sufficient to show that a place of worship is open to the general public. Rather, one needs to satisfy an additional public impact test. The religious worship taking place must make an empirically verifiable positive moral contribution to society as a whole. One comes out of church a better person. This renders what the case law only ever treated as a supplementary test as a necessary one in all cases.¹⁷⁴

So the shift here is a complex one. Instead of the state seeing religions as providing distinctive public services according to their own ethos and conception in a way that is co-ordinated with state provision, religions have been brought within the embrace of the state, but at the same time made subject to its agenda and values. The most egregious example of this is the insistence that Roman Catholic adoption and fostering agencies must adopt policies treating same-sex couples on equal terms with married couples.¹⁷⁵

TOWARDS A NEW SECULARISATION THESIS

Far from reflecting a commitment to multicultural diversity, recent legal developments reveal a fundamental shift in the law’s attitude towards religions. Religions command decreasing respect as grounds of conscientious action, secular courts are becoming less deferential to religious law, and the scope for religions to offer public services in accordance with their own ethos is reducing. What these developments have in common is a trivialisation of religion. Of course, a liberal society is not anti-religion; that would be to accord it a significance that it does not intrinsically have. There is still freedom of religion. But because religion has no publicly cognisable weight, the claims of conscience, the claims of systems of religious law, the claims of alternative religious ethics of care and visions of social flourishing must all give way to the homogeneous and ‘neutral’ conception of the common good as expressed through the law of the state.

It seems, then, that in addition to the multicultural hypothesis considered above we need a new secularisation thesis. In his recent monumental work on secularism, Charles Taylor has suggested three distinct meanings to be given to that term.¹⁷⁶ In the first sense, secularisation refers to the emptying of certain public

174 *Neville Estates v Madden* [1962] Ch 832. The Charity Commission’s overly statist view of public benefit has come under sustained challenge in other areas as well.

175 Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263; *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] EWHC 520 (Ch).

176 C Taylor, *A Secular Age* (Cambridge, MA, 2007).

spaces of God. Politics, or the economy, have ceased to have a God-reference. In a similar way, José Casanova has argued that the core of secularisation theory lies in social structural differentiation.¹⁷⁷ This process has been visible within the law for a very long time indeed. The formation of the modern welfare state in the first half of the twentieth century was a secularising move, in that it removed the provision of many welfare functions from largely religious voluntary endeavour.¹⁷⁸ But the nineteenth-century campaign to separate Government from the established Church was also a secularising move, as indeed was the dissolution of the monasteries and the re-formation of Elizabethan charitable endeavour centuries beforehand. In fact, secularisation in this sense is at least in part a product of Christian political theology, with its 'doctrine of the two'.¹⁷⁹ Secularism in Taylor's first sense has been with us for a long time and can be summed up in the phrase 'separation of Church and state'. Symbolic remnants aside, it has long been a recognisable feature of the British constitution.

Secularisation in Taylor's second sense is simply the falling off of personal religious belief and practice. This is a familiar process and has no direct legal expression, although it creates the cultural conditions under which secularisation in other senses can occur. In his third sense, Taylor is trying to capture the ways in which 'faith, even for the staunchest believer, is one human possibility among others'.¹⁸⁰ Twenty-first century secularisation reduces the religious claim to authority over the life of the individual or the community to a matter of mere choice. Or, rather, it cannot see religious authority as anything other than constructed by the believer, and more or less capable of reconstruction. This has a significant impact on the way in which the law understands religion.

The difference between Taylor's senses of secularism points to an important distinction within the proper constraints of legal reasoning. Proponents of 'public reason' argue about the extent to which 'religious reasoning' is appropriate in the public sphere.¹⁸¹ Although few would argue for a rigorous exclusion of religious-based arguments in informal public settings, some would exclude it when it comes to the process of legislation, or at any rate in setting the constitutional foundations of a pluralistic state.¹⁸² Wherever one draws the line, there is substantial agreement that legal reasoning is quintessentially public and

177 J Casanova, *Public Religions in the Modern World* (Chicago, 1994).

178 See Rivers, *The Law of Organized Religions*, pp 268–272.

179 Berman, *Law and Revolution*; O'Donovan, *The Desire of the Nations*.

180 Taylor, *A Secular Age*, p 3.

181 Overview of the debate, and generally critical stance, in J Chaplin, 'Law, religion and public reason' (2012) 1 *Oxford Journal of Law and Religion* (forthcoming), currently available at <http://ojlr.oxfordjournals.org/content/early/2012/01/10/ojlr.rwro26.full.pdf+html>, accessed 14 June 2012. Chaplin defines 'religious reasoning' as 'public reasoning about law that is religious in content, explicitly derived from religious belief, or substantively informed by religious belief even if such belief is not actually referred to' (p 3).

182 Andras Sajó has recently argued for very strong constraints on religious reasoning in public: A Sajó, 'Preliminaries to a concept of constitutional secularism', (2009) 6 *International Journal of*

obliged to avoid religious-based arguments.¹⁸³ However, there is a dangerous ambiguity here, which turns on the (second-order) reason for excluding religious-based reasoning. Why should a court not rely on a religious reason in justifying a decision? One answer refers to institutional propriety: a court of law is not the sort of institution to determine and apply religious requirements. Another answer refers to rational persuasiveness: religious reasons are not, ultimately, rational. This distinction is the difference in legal terms between Taylor's first and third senses of secularism.

The practical difference between these two second-order reasons is that, under the first, the court can still recognise the power of religious reasons indirectly, by accepting their authority in non-state institutional settings. The fact that God has laid down some rule is irrelevant for a state court in a pluralist society, but it is a very good reason for a church to follow that rule. If a religious believer can demonstrate a commitment to a religious precept with sufficient coherence and cogency, the court can 'rely' on that reason in the sense of recognising its power in the life of the believer, and securing the right of the believer to act on that reason. But if religious reasons are not, ultimately, rational, there is no reason for anyone to follow them in any context, or to respect those who do. Their purported rational force is just a whim.

The slippage from institutional restraint to rational rejection was expressed with clarity by Lord Justice Laws in *McFarlane v Relate Avon Ltd*. In this case, his lordship contrasted the 'objective grounds' of the law with the 'subjective opinion' of religious believers, 'incommunicable by any kind of proof or evidence'.¹⁸⁴ The effect is to turn religion into another hobby. One can devote one's spare time, energy and money to it; one can meet with other like-minded people, set up clubs and societies, network, produce literature, employ people, buy property, try to persuade others how wonderful it is, introduce one's children to it, run holiday camps promoting it; and the law will even treat all this activity as publicly beneficial. One can be very religious, if one feels like it. But the law need make no space for the idea that there might actually be a God, who might really be calling people into relationship with himself, who might make real demands on his worshippers. Religion thus acquires all the moral weight of stamp-collecting or train-spotting.¹⁸⁵

Of course, the modern state is faced with a major political problem in the diversity of competing views of religious truth. Laws LJ was absolutely correct

Constitutional Law 605–629. See also the response by Lorenzo Zucca, 'The crisis of the secular state: a reply to Professor Sajó', (2009) 7 *International Journal of Constitutional Law* 494–514.

183 Chaplin, 'Law, religion and public reason', p 20.

184 *McFarlane* at paras 23–24.

185 P Parkinson, 'Accommodating religious belief in a secular age: the issue of conscientious objection in the workplace', (2011) 34 *University of New South Wales Law Journal* 281–299, is similarly critical of the way in which the judgments in *Ladele* and *McFarlane* problematically render religion invisible.

in asserting that the law cannot simply adopt or privilege the views of one religious group, however traditional those views might be. However, the way in which the British constitution came to cope with religious diversity was not by drawing a distinction between the individual's 'right to hold and express religious beliefs' on the one hand and the 'eschew[al of] any protection of such a belief's content in the name only of its religious credentials' on the other.¹⁸⁶ Rather, protection came about through a consensual settling of different institutional spheres of authority: in other words, through a process of secularisation in Taylor's first sense.¹⁸⁷ Indeed, the history of the protection of conscience in the law can be seen as the slow individualising of collective religious self-government, and the role of religions in education and welfare as collaboration by mutual consent in fields over which neither 'Church' nor 'state' could plausibly claim exclusive jurisdiction. The presence of an established Church of England served both to secure such a settlement, and to obscure its real nature.

The effect of a shift to Taylor's third sense is to render such divisions of authority vulnerable. The law ceases to recognise any real *cost* to religious believers as a result of state intervention. The longer-term consequences of this development will not only be to cast doubt on the remaining vestiges of Anglican establishment; it will also render religious liberty and equality vulnerable. For the universal march of 'proportionality' and 'balancing' in judicial attempts to manage clashes of interest will only secure liberty and equality if the claims of religious people have sufficient weight.¹⁸⁸ Ensuring the weight of religious claims not only requires an appreciation of their social and moral value; it requires institutional anchoring in the recognition of a quintessentially religious domain – a core field – which is important enough to be immune from state interference. It requires religions and the state to be thought of, in some sense, as coequal in law. The confidence of the new secularism in the superficial and unreasoned nature of religion renders it ultimately less able to tolerate the growing diversity of British society. For, as a solution to the fundamental problem of settling the terms of peaceful and fair coexistence in a society of competing rationalities, the new secularisation of the British constitution is deeply implausible.

¹⁸⁶ *McFarlane* at para 25.

¹⁸⁷ The classic exposition of this approach is J Figgis, *Churches in the Modern State* (second edition, London, 1914). For a modern defence, see V Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (Amsterdam, 2007).

¹⁸⁸ Lucy Vickers' preference for proportionality-based solutions over immunity-based solutions is thus vulnerable to the confident conception of secular reason characteristic of the new secularism. See L Vickers, 'Twin approaches to secularism: organized religion and society', (2012) 32 OJLS 197–210.