

ANTHONY BRADNEY

## Religion and the Secular State in the United Kingdom

### I. THE SOCIAL CONTEXT

The United Kingdom is divided into three separate legal jurisdictions, England and Wales, Scotland (which together with England and Wales constitute Great Britain), and Northern Ireland. When considering the place that religion has in society, it is normal to consider Northern Ireland separately from Great Britain because “Northern Ireland . . . – more like the Irish Republic than mainland Britain – manifests markedly higher levels of religious practice than almost all other European countries.”<sup>1</sup>

In 2001, for the first time, the national census included a voluntary question about religious identity in all three jurisdictions. In Northern Ireland, 86 percent of those responding said that they identified with a religion, in England and Wales the percentage was 77 percent while in Scotland it was 67 percent.<sup>2</sup> In each jurisdiction, the vast majority of respondents reported a Christian identity.<sup>3</sup> However, even though these statistics in themselves show a divergence between Northern Ireland and Great Britain, they do not indicate the real degree of difference.

It is clear that the majority of the population of Great Britain have some sense of the numinous.<sup>4</sup> However, for the majority, institutionalized religion has little place in their lives. Voas and Crockett note that by the end of the twentieth century those attending a religious service constituted only one-twelfth of the total population.<sup>5</sup> Gill argues, more generally, that “because people are no longer socialized within churches or Sunday Schools . . . they find Christian beliefs, values and practices strange and implausible.”<sup>6</sup> Moreover, for most people in Britain even their own personal religiosity, if it exists, is of little consequence to them.

Nearly twenty years ago, when the level of attendance at a place of religious worship in Great Britain was far higher than it is now, “forty per cent of people questioned in a British Social Attitudes Survey said that their religious beliefs made no difference in their lives.”<sup>7</sup> In a 2001 Home Office survey on citizenship in England and Wales, only 20 percent of people questioned listed religion as being important to their sense of self-identity.<sup>8</sup> In Great Britain, most churches report both declining membership and

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ANTHONY BRADNEY is Professor of Law Keele University. His research has mainly been into the relationship between religions and law. Professor Bradney is editor of both the Web Journal of Current Legal Issues and the Reporter, the newsletter of the Society of Legal Scholars. He is a member of the Advisory Editorial Board of the Journal of Law and Society. He is the Vice-Chair of the Socio-Legal Studies Association, an Executive Committee member of the Society of Legal Scholars and a Board Member of the Research Committee on the Sociology of Law’s Working Party on the Legal Professions. He was Special Advisor to the House of Lords Select Committee on Religious Offences between 2002 and 2003.

1. G. Davie, *Religion in Britain Since 1945* (Oxford: Basil Blackwell, 1994), 14.

2. Religion in the UK, April 2001, <http://www.statistics.gov.uk/cci/nugget.asp?id=293>.

3. In both England and Wales and Scotland, the next biggest religious group is Islam. The figures for non-Christian groups in Northern Ireland were not broken down, but even taken together constituted a very small percentage of the population. Although Islam is the second largest religion in the United Kingdom, it has little more than 1.5 million adherents. Christianity had over 42 million adherents, whilst over 9 million declared themselves as having no religion. Religion in the UK, April 2001, available at <http://www.statistics.gov.uk/cci/nugget.asp?id=293>.

4. The place of religion and religiosity in Great Britain is explored in A. Bradney, *Law and Faith in a Sceptical Age* (London: Routledge, 2009), Chap. 1.

5. D. Voas and A. Crockett “Religion in Britain: Neither Believing nor Belonging,” *Sociology* 11, no. 39 (2005): 19.

6. Gill, R. “A Response to Steve Bruce’s ‘Praying Alone’” *Journal of Contemporary Religion* 335, no. 17 (2002): 337.

7. *Social Trends 1996* (London: Her Majesty’s Stationery Office, 1996), 225.

8. M. O’Beirne *Religion in England and Wales: Findings from the 2001 Home Office Citizenship Survey: Home Office Research Study 274* (London: Home Office Research and Development and Statistics Directorate, 2004) 18. There are important variations in this when considering different ethnic groups and different faith

attendance while religion figures less and less in the important events in individuals' lives.<sup>9</sup>

Northern Ireland presents a different picture. Mitchell, while arguing that the degree of difference between Northern Ireland and Great Britain can be exaggerated, nevertheless notes that the figures for regular attendance at a place of religious worship are considerably higher in Northern Ireland than in Great Britain.<sup>10</sup> More generally, drawing on a range of sources, Mitchell observes that Northern Ireland has "much higher levels of religiosity [than Great Britain] along all indicators."<sup>11</sup> In broad terms, Great Britain is a secularized society where neither religion nor religiosity has much place in the lives of the majority of its citizens; such place as religion does have is usually in the private life of citizens rather than in the public life of British society. By contrast, in Northern Ireland, religion, mainly taking the form of either Catholic or Protestant Christianity, remains a significant factor in both the private lives of individuals and in public life.

## II. THEORETICAL AND SCHOLARLY CONTEXT

The relationship between religion and the state in the United Kingdom has, until recently, received comparatively little attention within academic circles. This is now changing, as is illustrated by the creation of the Law and Religion Scholars Network (LARN).<sup>12</sup> Historically, much of the work that was done in this area had little, if anything, by way of an explicit theoretical orientation. Instead, the work has either sought to analyse the doctrinal consistency of law in the area or used international law to assess the merits of domestic law.<sup>13</sup> Notions such as neutrality and toleration have been important in both case law and commentary.<sup>14</sup> These ideas relate to liberal philosophy that has a wider significance in the analysis of constitutional structures in the United Kingdom. The value of liberalism in analyzing the proper relationship between religions and the state in the United Kingdom has received more direct treatment in recent work.<sup>15</sup>

## III. CONSTITUTIONAL CONTEXT

Analysis of the constitutional position of religion within the United Kingdom is complicated by the unwritten nature of the United Kingdom constitution. There is no foundational constitutional code. Identifying which legislation, case law, or conventions might be thought to have constitutional status is, in itself, fraught with difficulty. Historically, the protection of religious belief and practice has been dealt with in a piecemeal fashion. However, the passage of the Human Rights Act 1998, which incorporates most of the Convention Rights in the European Convention on Human Rights, including Article 9 which protects freedom of conscience and religion, into

groups (see further *Ibid.*, 19–20).

9. Thus, for example, provisional figures from the Church of England for 2006 show a drop in attendance from 2005 and also a drop in baptisms, confirmations, marriages, and funerals (Statistics for Mission 2006, <http://www.cofe.anglican.org/info/statistics/2006provisionalattendance.pdf>).

10. C. Mitchell, "Is Northern Ireland Abnormal?: An Extension of the Sociological Debate on Northern Ireland," *Sociology* 237, no. 38 (2004): 241. Mitchell notes that there has been a slight drop in overall attendance in Northern Ireland, but the drop is not so marked as is the case in Great Britain (*Ibid.*).

11. Mitchell, "Is Northern Ireland Abnormal," 243.

12. The Network is coordinated by the Centre for Law and Religion in Cardiff Law School at Cardiff University. For an examination of the history of work in this area in the United Kingdom see A. Bradney, "Politics and Sociology: New Research Agendas for the Study of Law and Religion" *Law and Religion*, eds. R. O'Dair and A. Lewis, (Oxford: Oxford University Press, 2001), 65.

13. See, for example, S. Poultier, *Ethnicity, Law and Human Rights* (Oxford: Clarendon Press, 1998).

14. See, for example, Scruton LJ's observation that "[i]t is, I hope, unnecessary to say that the Court is perfectly neutral in matters of religion" (*Re Carroll* [1931] 1 K.B. 317 at 336) and J. Rivers, "From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom Human Rights Act," *Law and Religion*, ed. R. Ahdar (Aldershot: Ashgate, 2000).

15. See, for example, R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) and Bradney, "Politics and Sociology."

domestic law may be argued to give constitutional protection to freedom of religion.

Two churches within the United Kingdom are generally thought to be established churches, the Church of Scotland in Scotland and the Church of England in England.<sup>16</sup> Establishment in both cases means that the constitutional position of the church is somewhat different to the position of other religions in the United Kingdom. How significant that fact is, however, has long been a matter of debate. Writing in 1920, Holdsworth argued that

[i]t is true that there is still an Established Church, that the King is still its supreme head and defender of the faith; that its law is still the King's ecclesiastical law, and an integral part of the law of England. But, like many other parts of the law and constitution of England, these are survivals of an older order, from which all real meaning has departed . . .<sup>17</sup>

Writing more recently, Bogdanor argues that “[t]he history of the relationship between the Church of England and the State . . . is one of progressive attenuation. From having been a virtual department of the state, the Church, has become almost, although not quite, one amongst many denominations . . .”<sup>18</sup>

However not all commentators take this view, Mortensen suggesting, for example, that “in England and Scotland, Christianity is the national religion because the established churches are enmeshed in the culture, helped to create it, continue to play a role in defining it and are recognized, even by non-adherents, as being conservators of folkways.”<sup>19</sup>

It is certainly true that the Church of England continues to enjoy certain privileges as compared with other religions in England. Two of its Archbishops and twenty four of its bishops sit in the House of Lords, one of the two legislative chambers in the United Kingdom. The legal manner in which the Church of England holds real property is unique to it.<sup>20</sup> Moreover, it sometimes attracts new legal privileges. The standing advisory councils on religious education, first created by the Education Reform Act 1988, now provided for by the Education Act 1996, must, in England, have representatives from the Church of England on them.<sup>21</sup> This is separate from the provision that councils must have representatives on them that reflect the principal religious traditions in an area.<sup>22</sup> Equally, establishment continues to mean that the state has a role in the Church of England that it does not have in other churches. The appointment of bishops is still part of the royal prerogative, exercised in practice on the advice of the Prime Minister.<sup>23</sup> Although the United Kingdom parliament gave the Church of England power to pass Measures, legislative acts of the Church, this is subject both to the fact that Parliament could revoke that power and the necessity for any individual Measure passed by the Church to receive the approval of Parliament.

However, legal incidents of establishment, such as these, do not capture the full nature of establishment. Olgivie has argued that establishment “is first and foremost a political word . . . most frequently [used] by church leaders in dealing with state authorities.”<sup>24</sup> Seeing establishment as a political matter, Chandler suggests that by the middle of the 20<sup>th</sup> century, for the Church of England, “[t]he essence of establishment lay not in its [largely legal] formalities, but in its manners, its informal respects and

16. The Welsh Church Act 1914 disestablished the Church of England in Wales. The Irish Church Act 1869 disestablished the Church of Ireland in what was then Ireland. For a more detailed analysis of the current state of establishment in the United Kingdom see Bradney, “Law and Faith in a Sceptical Age,” Chap. 3.

17. W. Holdsworth, “The State and Religious Nonconformity: An Historical Retrospect,” *Law Quarterly Review* 339, no. 36 (1920): 340.

18. V. Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995), 228.

19. R. Moretensen, “Art, Expression and the Offended Believer,” *Law and Religion*, ed. R. Ahdar (Aldershot: Ashgate, 2000), 512.

20. N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), Chap. 15.

21. Education Act 1996, s.390 (4)(b).

22. Education Act 1996, s.390 (4)(a).

23. M. Hill, *Ecclesiastical Law* (Oxford: Oxford University Press, 2001), 113.

24. M. Olgivie, “What is a Church by Law established?” *Osgood Hall Law Journal* 179, no. 28 (1990): 196.

courtesies.”<sup>25</sup> What is in question now is the degree to which these “manners, respects and courtesies” remain. If the contemporary Church “has in general, attempted to practice the traditional formula about political involvement: that the Church has the duty to define general principles within which human society may be ordered,” while individual applications are “best left to the expertise of political leaders,” others have argued that there has been a “creeping disestablishment” with a distancing between Church and state.<sup>26</sup> “When the 1984 Conservative party conference ... gave a standing ovation to a turbaned Indian elder who delivered a ferocious attack on the established Church, it said something definitive about the way Church-state relations were changing.”<sup>27</sup>

It is also the case that the legal incidents of establishment are beginning to diminish in the case of the Church of England. In 2008, the Criminal Justice and Immigration Act abolished the centuries-old common law offence that had given special protection to the beliefs of the Church of England.<sup>28</sup>

Establishment in the case of the Church of Scotland has always meant something different from the relationship that the Church of England has enjoyed with the state. The monarch, for example, is the head of the Church of England but not the Church of Scotland, and blasphemy had, it seems, ceased to be a criminal offence in Scotland long before it was abolished in England and Wales.<sup>29</sup> In Scotland, as in England, establishment has always been more about the role that the Church has had in national life than legal niceties. Historically, it has been true to say that the Church of Scotland “likes to think of itself as the ‘voice of Scotland’” and that “[t]he three historic Scottish institutions of the Church, education, and law are to a large extent the basis of the national identity of Scotland.”<sup>30</sup> However, in the present day, there is no clear evidence that the Church of Scotland’s pronouncements, anymore than those of the Church of England, have special weight in the eyes of either the general public or those in political life. Indeed, given the religious context noted above, it seems unlikely that either Church has particular support in the eyes of the population at large.

#### IV. LEGAL CONTEXT

Until the introduction of the Human Rights Act 1998, there was no general protection for religious belief under United Kingdom law. However protection did exist in specific instances. For example, in England and Wales, teachers in schools that do not have a specific religious character have for many decades received protection with respect to their religious opinions and beliefs.<sup>31</sup> Equally, specific groups of believers have sometimes received protection. For example, Sikhs are exempt from legislation requiring the wearing of crash-helmets while riding a motor-cycle.<sup>32</sup> The practice of providing specific protection in particular instances goes back at least as far as Lord Hardwicke’s Act 1735, which exempted Quakers and Jews from the requirement to marry in a Church of England church.

In principle, the implementation of the Human Rights Act 1998 has radically changed the legal landscape with respect to protecting religious belief and opinion in the United Kingdom. For the first time, there is general protection for religious belief before the

25. A. Chandler, “The Church of England and the Obliteration Bombing of Germany in the Second World War,” *English Historical Review* 920, no. CCCCXXIX (1993): 921.

26. E. Norman, *Church and Society in England 1770-1970: A Historical Study* (Oxford: Clarendon Press, 1991), 457; K. Medhurst, “Reflections on the Church of England and Politics at a Moment of Transition,” *Parliamentary Affairs* 240, no. 52 (1991): 256.

27. H. Young, *One of Us* (London: Macmillan London, 1991), 425.

28. Criminal Justice and Immigration Act 2008, s.79; *Gathercole’s Case* (1838) “Lewin” 237.

29. G. Gordon, *The Criminal Law of Scotland* (Edinburgh: W. Green, 1978), 998.

30. J. Kellas, *The Scottish Political System* (Cambridge: Cambridge University Press, 1989), 78, 185.

31. Education Act 1944, s.30. Current protection is found in School Standards and Framework Act 1998, s.59.

32. This was originally provided for in the Motor-Cycle Crash-Helmets (Religious Exemption) Act 1976. The exemption is now found in Road Traffic Act 1988, s.16 (2).

domestic courts.<sup>33</sup> How significant this is in practice is not yet clear. Academic opinion is divided on whether or not the advent of the Act and the new powers given to judges under the Act to interpret legislation so as to ensure that it is compatible with respecting people's Convention rights have in fact resulted in an improvement in the protection of civil liberties.<sup>34</sup> Although Leigh has argued that the Act is having an "accelerating impact upon religious liberty claims[,]"<sup>35</sup> the litigants were unsuccessful in the end in the majority of the cases that he focuses on.<sup>36</sup> It is certainly the case that the Act has given litigants access to arguments that were previously not open to them; but, it is not clear how far that access will result in substantial improvements in their position.

## V. THE STATE AND RELIGIOUS AUTONOMY

The degree of autonomy that religions enjoy in the United Kingdom is dependant in the first instance on whether they are established or not. In form, at least, the state continues to have a substantial degree of control over the Church of England. As noted above, its legislative acts, Measures, have to be agreed upon by Parliament and appointment of its bishops is a matter for the Royal Prerogative. However, this formal control does not reflect the Church's actual position. Measures are rarely rejected. In 2007, a change to the system of appointing Bishops was proposed by the Government whereby the Crown Nomination Commission, a body comprised of representatives of the Church of England, would forward only one nomination to the Prime Minister rather than two as in the past.<sup>37</sup> In *Aston Cantlow Parochial Church Council v. Wallbank*, Lord Nicolls observed that the Church of England "still has special links with central government. But the Church of England remains essentially a religious organisation."<sup>38</sup> In this contemporary context, one commentator has written of the "emergent autonomy of the Church of England."<sup>39</sup> It would seem that the Church of England is currently acquiring greater autonomy from the state with respect to its own affairs.

The other established church in the United Kingdom, the Church of Scotland, has long enjoyed autonomy from the state. Article IV of the Schedule to the Church of Scotland Act 1921 gives the Church "the right and the power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government and discipline in the Church . . . ." "[T]he Scottish Kirk is an example of a thing rare, if not unique, in Christendom, a Church that is both established and free."<sup>40</sup>

Religions that are not established churches enjoy full autonomy from the state. They may choose to engage in activities that require registration. For example, if they meet the appropriate legal tests, religious organisations may choose to become charitable trusts and therefore have to register with the Charity Commission.<sup>41</sup> However, there is no general requirement for religions to register with the state.

## VI. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

The United Kingdom government keeps no record of the religious affiliation of individuals. In 2001, for the first time, questions on religious affiliation were included in

33. United Kingdom citizens have been able to take cases under Article 9 to the European Court of Human Rights since 1966. However the decisions of the European Court are not binding under domestic law on the United Kingdom government although, in practice, the government has accepted them.

34. For an argument that the Human Rights Act has failed in this respect see, for example, K. Ewing, "The Futility of the Human Rights Act," *Public Law* 829 (2004) and K. Ewing and J. Tham "The Continuing Futility of the Human Rights Act," *Public Law* 668 (2008). For a response to this see A. Kavanagh, "Judging the Judges under the Human Rights Act: Deference, Disillusionment and the 'War on Terror,'" *Public Law* 287 (2009).

35. I. Leigh, "Recent Developments in Religious Liberty," *Ecclesiastical Law Journal* 65, no. 11 (2009): 65.

36. The Governance of Britain, 2007, Cm.7170 at p. 26.

37. [2004] 1 A.C. 546 at p. 555.

38. M. Hill, "Editorial," *Ecclesiastical Law Journal* 1, no. 9 (2007): 2.

39. T. Taylor, "Church and State in Scotland," *Juridical Review* 121 (1957): 137.

40. Charities Act 1993 s.3A. The 1993 Act applies to England and Wales. Similar legislation applies in Scotland and Northern Ireland. See, for example, the Charities and Trustee Investment (Scotland) Act 2005.

the ten-yearly Census survey in all parts of the United Kingdom.<sup>41</sup> Answering these questions, unlike the other questions on the survey, was voluntary.

In some instances, religious affiliation does lead to an individual being treated differently under state law. For example, there are special regulations for both Jews and Muslims relating to the slaughter of animals that allow animals to be slaughtered in a manner that complies with the religious requirements of those two groups.<sup>42</sup> The practice of providing special arrangements for religious groups continues to be part of the developing law in the United Kingdom. This is illustrated by the creation of “alternative finance investment bonds” in the 2007 Finance Act.<sup>43</sup> These bonds are part of the Government’s strategy “to promote the City of London as a centre for global Islamic finance”, allowing for sharia-compliant forms of lending.<sup>44</sup> These special arrangements and exemptions found in the law, while accommodating religious differences, can appear to be capricious or even discriminatory. For example, the exemption from legislation requiring motor-cyclists to wear crash-helmets applies to Sikhs but not to Rastafarians despite the fact that for both groups the religious obligations for males regarding hair make wearing such helmets a physical impossibility.<sup>45</sup> Equally, special provisions may be made for a religion on some occasions but not others. The special arrangements now made for Islamic finance are not mirrored in legislation limiting trading on what, for most Christians, is the Sabbath. Jews who wish to observe the Jewish Sabbath are exempt from this legislation.<sup>46</sup> No such similar exemption has been granted to Muslims.<sup>47</sup>

Following the passage of the Human Rights Act 1998, when a Government minister puts a Bill before either one of the Houses of Parliament, they must publish a statement of compatibility, stating that the provisions of the Bill are compatible with Convention rights, including Article 9.<sup>48</sup> However, no government department is specifically charged with considering whether or not special provisions need to be made for religious groups in legislation. This means that, given the wide range of religious practices that are now found in the United Kingdom, it is possible for new legislation to inadvertently raise problems for religion, even when proposals are seemingly innocuous. An illustration of this is found in the suggestion that charities would, in certain situations, be required to pass particular resolutions following a vote. This caused a problem for British Quakers who, as a matter of principle, do not vote in their Meetings. As a result, the possibility of a resolution passed “by a decision taken without a vote and without any expression of dissent in response to the question put to a meeting” had to be introduced into the legislation.<sup>49</sup>

## VII. STATE FINANCIAL SUPPORT FOR RELIGION

41. A question on religious affiliation had been included in the Census for Northern Ireland in 1991. The precise questions asked in 2001 varied between Scotland, Northern Ireland, and England and Wales. For an analysis of the different questions see P. Weller, “Identity, Politics, and the Future(s) of Religion in the UK: The Case of The Religion Questions in the 2001 Decennial Census,” *Journal of Contemporary Religion* 3, no. 19 (2004): 6–9.

42. For Great Britain, see the Welfare of Animals (Slaughter or Killing) Regulations 1995. For Northern Ireland, see the Welfare of Animals (Slaughter or Killing) Regulations (Northern Ireland) 1996.

43. Finance Act 2007, s.53. This legislation has subsequently been amended by paras 2, 3, 6, 8, 10, 12 and 14, Finance Act 2009, s.61. This follows on from an amendment in 2003 so as to ensure that Islamic mortgages did not have to pay double-stamp duty (Finance Act 2003, s.73).

44. Budget 2008: Stability and opportunity: building a strong, sustainable future, 2008 HC 368 at p. 46.

45. Road Traffic Act 1988, s.16 (s).

46. Sunday Trading Act 1994, s.8.

47. Such an exemption was recommended by the Crathorne Committee in 1964 when it looked at the legislation relating to Sunday which was then in force, the Shops Act 1950 (Report of the Departmental Committee on the Law of Sunday Observance, 1964, Cmnd. 2528 para. 201).

48. Human Rights Act 1998, s.19 (1). In the alternative, the Minister can say that they are unable to issue such a statement but nevertheless wish the House to proceed with consideration of the Bill (Human Rights Act 1998, s.19 (s)).

49. Charities Act 1993, s.74D (4)(b). See further F. Cranmer, “Quaker governance and charities legislation,” *Ecclesiastical Law Journal* 202, no. 9 (2007): 205.

There is no proscription on the state supporting either religions in general or a particular religion. However, notwithstanding the existence of established churches within the United Kingdom, the financial support that religions receive from the state primarily takes an indirect form. For example, those religions that register as charities will receive certain privileges because of this. Charitable gifts do not normally have to have a specific human beneficiary and, contrary to usual practice, charitable gifts may be made in perpetuity.<sup>50</sup> Moreover, charities are also exempt from certain taxes.<sup>51</sup>

The advantages that accrue to charities make the question of which religions can register as a charity particularly important. Historically in England and Wales, the advancement of religion was one of the four heads of charity with there being a rebuttable presumption that a religion was for the public benefit, this being one of the requirements for any body that wished to register as a charity.<sup>52</sup> Case law provided no clear definition of religion but appeared to require a theistic element to the belief system in question or some belief in a god, taken to be a supernatural or supreme being. Faith and worship also seemed to be a necessity.<sup>53</sup> The Charities Act 2006 has changed this situation, although the full extent of the change is, as yet, unclear. Under s. 2(2)(c) “the advancement of religion” is now a charitable purpose as is “the promotion of religious or racial harmony or equality and diversity” under s. 2(2)(h). Section 2(3)(a) states that the term religion includes “(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god.”

It is still necessary for a charity to show that it is for the public benefit for it to be registered. However, there is no longer a presumption that a religion is for the public benefit.<sup>54</sup> In debate on the legislation, Edward Miliband, speaking for the Government, argued that the new statutory definition of religion did not fundamentally change the position found in the common law. Others, however, saw the provision as being intended to change the old test.<sup>55</sup> Equally, concern has been expressed about the need for a religion to demonstrate that it is for the public benefit, especially if that is to be assessed in the light of prevailing attitudes towards religion in the United Kingdom.<sup>56</sup> Even prior to the new, possibly more onerous, requirements under the Charities Act 2006, the notion of public benefit has caused difficulties for some religions wishing to register as charities. In 1999 the Charity Commission rejected an application for charitable status by the Church of Scientology, both on the ground that the Church did not engage in acts of worship and on the ground that its activities were not conducive to the public benefit.<sup>57</sup>

Religions can also receive financial support from the state for their schools. In some instances, this support will be indirect. Religions are free to set up their own schools and those schools may be registered as a charity.<sup>58</sup> These schools will then have the same

50. *Chamberlayne v. Brockett* [1872] L.R. 8 Ch. App. 206.

51. See further J. Martin, *Hanbury and Martin: Modern Equity* (London: Sweet and Maxwell, 2009), 421–422.

52. *IRC v. Pemsel* [1891] A.C. 531 at p. 583. This decision in turn drew on the preamble to the Charitable Uses Act 1601.

53. *Re South Place Ethical Society* [1980] 1 W.L.R. 1565 at p. 1573.

54. Charities Act 2006, s.3 (2).

55. Edward Miliband, Standing Committee debates, 4 July 2006, Col. 22; Andrew Turner, Standing Committee debates, 4 July 2006, Col.13.

56. See, for example, the Lord Bishop of Southwell Hansard, House of Lords, 20 January 2005. Vol. 668 Cols. 896-897 and Andrew Turner Hansard, House of Commons, 25 October 2006, Vol. 450 Cols. 1584-1585.

57. Decision of The Charity Commissioners for England and Wales, 17 November 1999, <http://www.charity-commission.gov.uk/>.

58. In England and Wales the advancement of education is a charitable purpose under s. 2(2)(b) of the Charities Act 2006. There are minimum legal standards that independent schools, whether religious or not, must meet and such schools have to be registered and are subject to inspection. The Education Act 2005 applies in England and Wales whilst schools are registered and inspected in Scotland under s. 98A and s. 66 of the Education (Scotland) Act 1980. Only 18 independent schools are registered in Northern Ireland though, from their names, 8 of these are religious in character (<http://www.deni.gov.uk/sitemap.htm>). The current standards for schools in England are set out in the Education (Independent School Standards) (England) Regulations 2003 (SI 2003/1910). These standards have proved problematic for schools serving some religious communities. See

fiscal advantages that religious charities have. However, the state also offers direct financial support for some religious schools. Religions, primarily Christian religions, were responsible for setting up many of the schools found in the United Kingdom in the nineteenth century. However, in the twentieth century these religions increasingly had difficulty in providing the necessary financial support for the schools that they established. In many instances, the state then took over all or part of that responsibility. The precise arrangements for state support for religious schools have varied between jurisdictions in the United Kingdom. In Scotland, the Education (Scotland) Act 1918 gave the churches the right to transfer schools into the state sector, the state taking over full financial responsibility for the school but the churches continuing to have the right to scrutinise the religious convictions of prospective teachers and ensure that religious instruction and observance in the school remain the same as it had been before transfer.

The Education Act 1944 created similar, if more limited provisions, for England and Wales. The Act also created a system of voluntary-aided schools that received partial state funding while remaining under denominational control.<sup>59</sup> In Northern Ireland the Education Act (Northern Ireland) 1923 created a system of voluntary schools and “four and two” schools with the latter having a higher level of state subsidy. However, it was not until 1968 that an amended form of these schools was accepted by the Catholic Church.<sup>60</sup> Present arrangements in these three jurisdictions are based on these original foundations. Given the religious history of the United Kingdom, it is not surprising that the religious schools that the state has chosen to directly finance have, in the main, been Christian in character. Historically a small number of Jewish schools have received state funding.<sup>61</sup> However, more recently the religious landscape of state-funded religious schools has widened with a small number of Muslim and Sikh schools receiving funding.<sup>62</sup>

### VIII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

People are free to enter into religious marriages within the United Kingdom. However, in most instances, no legal consequence will flow from such a marriage.<sup>63</sup> In order for a marriage to be recognized by the state, it must comply with statute. Different statutory regimes are in force in the various jurisdictions of the United Kingdom. In some instances special arrangements exist in statute to facilitate religions being able to conduct marriage ceremonies that are both in accord with the rites of the religion and the requirements of the state. In England and Wales, for example, special provisions are in place for the Church of England, Jews, and Quakers.<sup>64</sup>

The change in the religious landscape of the United Kingdom has meant that an increasing number of religions seek to conduct marriage ceremonies that will be recognized by the state. Thus, for example, in 2008 152 mosques were registered as both

further A. Bradney, “The Inspection of Ultra-Orthodox Jewish Schools: ‘The Audit Society’ and ‘The Society of Scholars’,” *Child and Family Law Quarterly* 133, no. 21 (2009).

59. Education Act 1944, s.15 (2). The Act also provide for voluntary-controlled schools that received full state funding but where denominational control was very much reduced.

60. A. Smith, “Religious Segregation and the Emergence of Integrated Schools in Northern Ireland,” *Oxford Review of Education* 559, no. 27 (2001): 561–563; T. Gallagher, “Faith Schools and Northern Ireland: A Review of Research,” *Faith School: Consensus or Conflict?*, eds. J. Cairns and D. Lawton (Abingdon: RoutledgeFalmer, 2005), 159–160.

61. Jewish schools have existed in the United Kingdom for several centuries. Cohen suggests that the first Talmud Torah school was set up in 1770 and that the first “modern Jewish school,” teaching both secular and religious subjects, was set up in 1811 (I. Cohen, *Contemporary Jewry: A Survey of Social, Cultural, Economic and Political Conditions* (London: Methuen, 1950), 53). Limited state funding was first given to Jewish schools in 1853 (G. Alderman, *London Jewry and London Politics: 1889–1986* (London: Routledge, 1989), 19). Some Jewish schools have been voluntary-aided schools, thus receiving state support, since the inception of the Education Act 1944.

62. Funding has also been extended to a rather wider range of Christian groups.

63. *R v. Bham* [1966] 1 Q.B. 159.

64. Marriage Act 1949, Part II, s.26 (1)(d) and s.47.

places for public worship and places for the celebration of marriage.<sup>65</sup> However, not all religions will find it easy to meet the legal tests that must be passed if their place of worship is to be registered as a place of *public* worship, a prerequisite to being registered as a place for the solemnization of marriage. In *Church of Jesus-Christ of Latter-day Saints v. Henning: Valuation Officer* the courts held that a Mormon Temple is not a place of public worship because permission from a Mormon bishop is necessary before a person could worship there.<sup>66</sup>

The courts of the Church of England and the Church of Scotland are, because of their status as established churches, part of the state system of courts. Their jurisdiction is, however, extremely limited.<sup>67</sup> With these two exceptions, state courts in the United Kingdom do not recognise the validity of judgments of religious courts although the courts will sometimes acknowledge the existence of religious legal systems within the United Kingdom as being part of the facts of a case before it.<sup>68</sup> However, the Beth Din, while deciding cases before it on the basis of Jewish law, has for some time ensured that its hearings comply with the Arbitration Act 1996, thus meaning that its decisions are enforceable within the state courts. The Muslim Arbitration Tribunal has recently announced that it will do the same thing.<sup>69</sup> Very little is known about the practices of either body.

## IX. RELIGIOUS EDUCATION

As has already been noted, religious groups are free to set up their own schools and these may, in some circumstances, be supported financially by the state. In England and Wales, religious education forms part of the core curriculum that must be provided in state schools.<sup>70</sup> That education must be taught according to an agreed syllabus that must, in the words of the statute, reflect “the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of the other principal religious represented in Great Britain.”<sup>71</sup> These provisions originally formed part of the Education Reform Act 1988 and were introduced to “secure the centrality of Christian education in religious education.”<sup>72</sup> However, in assessing the impact of these reforms, account has to be taken for provisions which allow pupils to be withdrawn from these lessons, the lack of clarity as to precisely what the provisions require, and the fact that the provisions were opposed by many of the teachers who are expected to implement them.<sup>73</sup> The 1988 Act also introduced reforms to ensure that the compulsory act of

65. Hansard, House of Commons, 29 February 2008, Col 1985w). In Scotland Thomson argues that “[n]on-Christian religions, such as Moslems or Hindus are clearly included” in the provisions that allow religious bodies to nominate celebrants of marriage for official purposes (Thomson, J. *Family Law in Scotland* London:Butterworths/Law Society of Scotland, 1987 at p 11). See further Marriage (Scotland) Act 1977, ss.9-16. Ministers, clergymen, pastors, or priests of a prescribed religion are automatically authorised celebrants (Marriage (Scotland) Act 1977, s.8 (1)(a)(ii)). The only non-Christian religion which has been prescribed to date is “The Hebrew Congregation” (Marriage (Prescription of Religious Bodies) (Scotland) Regulations 1977, Sched. 1 para. 1).

66. [1964] A.C. 420. This decision was recently affirmed by the House of Lords in *Gallagher v. Church of Jesus Christ of Latter-Day Saints* [2006] E.W.C.A. Civ. 1598. The Exclusive Brethren have faced similar problems (*Broxtowe Borough Council v. Birch* [1983] 1 W.L.R. 314).

67. On the courts of the Church of England see N. Doe, *The Legal Framework of the Church of England: A Critical Study in a Comparative Context* (Oxford: Clarendon Press, 1996), Chap. 5. On the courts of the Church of Scotland see Church of Scotland Courts Act 1863.

68. See, for example, *MacCaba v. Lichenstein* [2004] E.W.H.C. 1580.

69. Available at [http://www.matribunal.com/cases\\_commercial.html](http://www.matribunal.com/cases_commercial.html).

70. Education Act 2002, ss.80, 100, and 101. Private schools do not have to comply with these requirements.

71. Education Act 1996, s.375 (3). The statutory provisions for religious education and worship in Scotland are not a specific as to the Christian character of the worship and education (Education (Scotland) Act 1980, ss. 8-9). On the Scottish Executive’s approach to these matters see Provision of Religious Observance in Scottish Schools Circular, 1/2005. However the Revised Core Syllabus for Religious Education which applies in Northern Ireland is almost exclusively Christian in character making only a limited reference to other religions in the latter stages of the curriculum ([http://www.deni.gov.uk/re\\_core\\_syllabus\\_pdf.pdf](http://www.deni.gov.uk/re_core_syllabus_pdf.pdf)).

72. Bishop of London, House of Lords, Hansard, 2 June 1988, Vol. 498 col. 638.

73. School Standards and Framework Act 1998, s.71 (1). On the attitudes of teachers to the provisions see

worship required in state schools by the Education Act 1944 be of a “wholly or mainly of a broadly Christian character.”<sup>74</sup> Once again, there are provisions which allow for pupils to be withdrawn from these acts of worship; yet, these provisions are unclear as to the exact requirements and they run counter to what many in the teaching profession regard as being appropriate.<sup>75</sup>

## X. RELIGIOUS SYMBOLS IN PUBLIC PLACES

There is no general prohibition on the wearing of religious symbols in public places in the United Kingdom. However, employers, schools and others may choose to regulate this matter themselves. In doing so, they must do so in a manner which complies with relevant legislation. In *R (on the application of Begum) v. Head Teacher and Governors of Denbigh High School* [2007] 1 A.C. 100, Begum’s contention that a school uniform policy that forbade her to wear a hijab breached her Article 9 rights, protected by the Human Rights Act 1998, was rejected on the grounds that, *inter alia*, she could have chosen to attend a school that did permit the wearing of the hijab and that the school’s uniform policy was a proportionate to it achieving its educational purposes. Similarly, in *R. (on the application of Playfoot) v. Millais School Governing Body* [2007] HRLR 34, a claim that refusing to allow a pupil to wear a “purity ring” breached her convention rights was rejected on the grounds that there were other ways in which she could manifest her religious beliefs and that the uniform policy fostered school identity.

In *Eweida v. British Airports plc* [2008] UKEAT 0123\_08\_2011, Eweida’s argument that an order to conceal a cross that she wished to wear amounted to indirect discrimination under the Employment Equality (Religion or Belief) Regulations 2003 was rejected on the grounds that her belief concealing the cross was wrong was a personal belief not shared by others.

## XI. FREEDOM OF RELIGION AND OFFENSES AGAINST RELIGION

As noted above, the common law offense of blasphemy which applied in England and Wales was abolished by §79 of the Criminal Justice and Immigration Act 2008. The last successful prosecution for blasphemy in England and Wales was in 1979 in *Whitehouse v. Lemon* (1979) 2 W.L.R. 281. Unsuccessful attempts to prosecute were made in 1990 in *R. v. Chief Metropolitan Magistrate ex parte Choudhury* [1991] 1 All E.R. 306 and in 2007 in *R. (on the application of Stephen Green) v. The City of Westminster Magistrates Court* [2008] HRLR 12. The last reported prosecution for blasphemy in Scotland was in 1843 in *Henry v. Robinson* (1843) 1 Brown 643. Blasphemy was part of the common law of Ireland.<sup>76</sup> However, it appears to have protected the beliefs of the Church of Ireland and therefore may not have survived the disestablishment of that church by the Irish Church Act 1869. There was no reported prosecution for blasphemy in Ireland after 1855, and there has been no reported case in Northern Ireland.

The Prevention of Incitement to Hatred (Northern Ireland) Act 1970 made incitement to religious hatred a criminal offense in Northern Ireland.<sup>77</sup> The Racial and Religious Hatred Act 2006 amended the Public Order Act 1986 making it an offense to use

further A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 64–65 and Bradney, “Law and Faith in a Sceptical Age,” 124–130.

74. School Standards and Framework Act 1998, sched. 20, para. 3.

75. School Standards and Framework Act 1998, s.71 (1A). In *R. v. Secretary of State for Education ex parte R. and D.* [1994] E.L.R. 495 at p. 502 the courts held that worship which “reflected Christian sentiments” complied with the 1988 Act even if “[t]here was nothing in them which was explicitly Christian.” On the attitudes of teachers see Bradney, “Law and Faith in a Sceptical Age.”

76. *AG v. Drummond* (1842) 1 Or and War 353.

77. By 1998, there had only been two prosecutions under the Act; one successful, the other unsuccessful (C. White, “Law, Policing and the Criminal Justice System,” *Divided Society: Ethnic Minorities and racism in Northern Ireland*, ed. P. Hainsworth (London: Pluto Press), 78).

threatening words or behaviour, or display any written material that is threatening, if a person intends thereby to stir up religious hatred.<sup>78</sup> The offense is generally applicable to all religions and, since “religious hatred” is defined in the Act as hatred of a group of people defined by religious belief or lack of religious belief, to those with no religious beliefs.<sup>79</sup> However s. 29J of the Act says “nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”

Commentators have noted that a number of other specific or general criminal offenses existed prior to the 2006 Act that could be used where expressions of religious prejudice gave rise to public order problems.<sup>80</sup> Given these offenses and given the very wide scope of s. 29J, it is not entirely clear what form of behaviour is now a criminal offense that was not a criminal offense before the Act. The new legislation, however, does not apply to Scotland. Here legislation allowing the courts to take account of the fact that an offence is aggravated by religious prejudice is seen as being sufficient.<sup>81</sup>

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78. Public Order Act 1986, s.29B (1).

79. Public Order Act 1986, s. 29A.

80. See, for example, K. Goodall. “Incitement to Religious Hatred: All Talk and No Substance?” *Modern Law Review* 89, no. 70 (2007).

81. Criminal Justice (Scotland) Act 2003, s.74 (3).