



*The Certainty of  
Uncertainty:  
Religion and the Law*

by

Gordon Weaver

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Calls to outlaw religious discrimination are raised from time to time by religious leaders, a few spokespersons in the House of Commons and the House of Lords; and the Government of the day. This takes place despite religious groups being prepared to pursue discriminatory practices against other social groups facing victimisation, hostility and violence in the wider society, e.g. sexual orientation.\* But, setting aside hypocrisy and bigotry towards those to whom the holy word appears to have no writ, can a case be made for legislation to outlaw discrimination against those who apparently ignore Proverbs III (31) by envying the oppressor and choosing some of his ways. Are religions and devotees entitled to preferential treatment *vis-à-vis* those who do not share their religious beliefs or who govern their behaviour by alternative morals and principles not packaged in sacred tablets of stone?

Arguments put forward in favour of securing a protected position for religious belief can be sub-divided into four categories: (i) the personal distress caused to religious believers through scurrilous attacks on their beliefs - Blasphemy; (ii) the fear of violence to believers arising from such attacks on their beliefs - incitement; (iii) the actual physical harm to the person or damage to property of believers - aggravated offences; and (iv) the economic disadvantages placed on believers in the employment market, which is not part of this study.

Before any attempt can be made to assess whether religion should be able to claim special dispensation from the legislators to cover these particular categories, religion itself requires defining since without an adequate definition there is nothing on which to claim dispensation.

#### (i) In Search of Religion

The most comprehensive social scientific study of religion ever undertaken was carried out by a founding father of the functionalist school of sociology, Durkheim, in the late 19th/early 20th century. Durkheim, whose many works were concerned with social order and the role played by social institutions in achieving order, rejected definitions of religion based on beliefs and practices centred on a God or gods or on the supernatural.<sup>1</sup> To Durkheim, religion embraced beliefs and practices that emanated from a sacred or divine source and it was these factors that

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\* This discriminatory practice was allowed in a EU Directive discriminating against workers on grounds of sexual orientation.<sup>2</sup>

separated religion from other belief systems.<sup>3</sup> Durkheim's conclusion, however, offers no way forward in constructing a definition suitable for legislation and adjudication on religious matters since it would embrace religions from the most 'ancient' to the most 'recent', including totemism, animism and cargo cults. If applied to the late twentieth century it would almost certainly include the Unification Church (Moonies), the Divine Light Mission and a host of other 'religious' beliefs that have yet to satisfy the UK courts that they qualify as 'religion'.

Weber, another famed sociologist making a significant contribution to the study of religion, thought it unnecessary to address the defining characteristics of religion, since its significance lay in its function as a particular type of social behaviour."<sup>4</sup> According to Weber, religion links the 'material' utilitarian sphere of ordinary living, the mundane, with the 'ideal' sphere associated with the various concepts of the supernatural order.<sup>5</sup> Metaphysical and theological concepts of moral order provide 'man' with "a conception of himself and his place in the universe...which give meaning to various goals."<sup>6</sup> Religion is no more than a type of behaviour directed to worldly concerns cloaked in metaphysical beliefs to give it legitimacy.

Wittgenstein, when searching for a definition for the concept of 'game', concluded that no elements were common to all games, only similarities and relationships in varying degrees among a number of games.<sup>7</sup> Religion was a 'language game', autonomous with its own rules, and intelligible only to the players themselves.<sup>8</sup> Adopting Wittgenstein's concept of 'game' and applying it to the area of religious thought, Greenawalt came to the conclusion that the concept of religion had no definable essence, therefore, it was not possible to distinguish it from other strongly held beliefs.<sup>9</sup> Arriving at this conclusion, Greenawalt then suggested applying the 'Seeger test', an approach that defines a belief by its functions and not its tenets. This 'test' accepted that a sincerely held belief was religious if it occupied, in the life of its holder, a place parallel to that filled by God in the indisputably orthodox religious belief.<sup>10</sup> Seeger's approach introduced into the definition beliefs not generally understood as religion,<sup>11</sup> embracing as religious, such beliefs as Ethical Culture, Secular Humanism<sup>12</sup> and beliefs based on sociology and history.<sup>13</sup> Despite the wideness of the concept produced by the 'Seeger' test it failed to achieve what it set out to do because if certain beliefs "play the role of religion" defined in the orthodox sense it is necessary to know what constitutes orthodox religion in the first

place and the ‘Seeger test’ merely provides a definition out of what might merely be similarities, as Wittgenstein had proposed elsewhere.

In the USA, where freedom of religion and state neutrality in religious issues are grounded in the constitution, the search for a defining principle has occupied constitutional lawyers and academics since the foundation of the Republic. This has led to a variety of propositions to deal with religious beliefs: (i) the neutrality principle,<sup>14</sup> as the name implies, requires the State to remain neutral except when choosing to legislate in specific circumstances, therefore, ordinarily, religion does not require definition and exemptions on religious grounds are not available;<sup>15</sup> (ii) the reductionist principle denies any distinctions between religion and other belief systems,<sup>16</sup> therefore, since religion has no special privileges, the need for a definition is removed;<sup>17</sup> (iii) the self-defining principle recognises religion to be an area of faith defined by its followers as religious,<sup>18</sup> consequently, since any belief system qualifies as religious if the claimant says that it is religious,<sup>19</sup> any distinction between ‘religious’ and ‘non-religious’ beliefs is eliminated. Under the self-defining principle religion is whatever anyone wants it to be; the ‘reductionist’ principle prevents any definition at all; and the ‘neutrality’ principle leaves it to the State, in certain circumstances, to make accommodation for religion but without having the tools to define a ‘religious belief.’ The courts are not allowed to question a litigant’s interpretation<sup>20</sup> nor determine the plausibility of a religious claim<sup>21</sup> except where the belief is bizarre and evidently non-religious,<sup>22</sup> which in itself is ambiguous since what is ‘bizarre’ and ‘non-religious’. These conceptual difficulties make the quest for a definition insuperable since religious systems, or whatever religious systems are thought to be, appear to have nothing in common to distinguish them from other belief systems and moral systems.<sup>23</sup>

In spite of this failure, those arguing for preferential status for religion do so on the grounds that religion is a social good, forming “a central tenet of a person’s chosen path through life,”<sup>24</sup> and is “a self-evident good, because people seek an understanding...of their relationship with the forces which created the universe.”<sup>25</sup> The elevated status claimed for religious beliefs has not gone unchallenged as an element of mystification surrounds these claims because if religious beliefs cannot be adequately defined, how can a special place be provided for those beliefs within the socio-political milieu and the judicial system. Moreover, granting preference to religious beliefs necessarily imposes restrictions on freedom of expression, which, by

allowing religion to dictate the terms upon which freedom of speech is determined, can inflict greater damage to society.<sup>26</sup> Conversely, in favouring the more generalised freedom of speech over the narrower freedom of religion, benefits accrue not only to particular members of society but to society as a whole.<sup>27</sup>

An alternative to the ‘primacy of religion’ view is the ‘rational’ view that places religious opinions on a lower echelon of the philosophical ‘ladder’ since modern moral philosophy elevates ‘rationality and reasonableness’ above the religious claims of revelation, tradition and spirit filled inspiration.<sup>28</sup> Jeremy Bentham, writing two hundred years ago, held an extremely critical view of the role of religion, describing religion as the great enemy of reason and as showing the blind, prejudiced-ridden, irrational side of man.<sup>29</sup> Others have cited “universal toleration... encompass(ing) all belief systems, religious and non-religious,” as the appropriate guidelines for members of society to adopt and for liberal democratic institutions to uphold.<sup>30</sup> Nonetheless, the attempts to differentiate religious beliefs from other beliefs has not met with any adequate level of success nor has any argument been able to justify placing religious beliefs in a preferential position, which is not surprising given the overall similarity between the characteristics that constitute religious and other beliefs.

The courts, seemingly oblivious to philosophical and sociological difficulties concerning religion, sought pragmatic ways of resolving the issue. Under the Places of Worship Registration Act 1855, philosophical beliefs and their concern for the spirit of man rather than God were excluded. To qualify as a religious belief, the belief must consist of ‘reverence or veneration of God or of a supreme being’. However, unlike the requirement under the 1679 Blasphemy Act, “It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a Deity,” requiring submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession.<sup>31</sup> Three hundred years later, a monotheistic concept of belief was thought too narrow since it excluded acknowledged religions that either have many deities (Hinduism) or no deity (Buddhism),<sup>32</sup> out of which came the definition that belief in a transcendental order, including theistic beliefs, beliefs in the supernatural<sup>33</sup> and belief in the transmigration of the soul<sup>34</sup> was an appropriate method for defining religious belief. However, by accepting belief in a transcendental order as sufficient to satisfy the requirements of a religion, the courts merely stretched the definition to include, explicitly, Buddhism,

which does not revere a Deity, and, implicitly, Hinduism that has many or none, but inclusion for both was justified on the grounds of the belief in the transmigration of the soul.<sup>35</sup>

This did not resolve the problem since the metaphysical concept of transcendence is not without weaknesses. Such an approach would have to include traditions of thought not usually associated with the 'religious'. Marxism-Leninism, fascism and nationalism, in some forms, contain elements of transcendence, a higher order of things beyond individual and physical reality, with elements of the 'sacred' incorporated into them.<sup>36</sup> Moreover, salvaging Buddhism from a place 'Beyond the Pale' and positioning it within the parameters of 'acceptable' religious beliefs appeared to be a legal 'sleight of hand', since the reason given for its inclusion was that "Buddhism is accepted as one of the great religions of the world and any definition which excluded it would be untenable."<sup>37</sup> This reasoning imposed on Buddhists a status that they are reluctant to adopt. Buddhists eschew protection of religious sensitivities and favour freedom of expression because part of the Buddhist philosophy for achieving self-conquest requires the follower, in the event of outsiders speaking ill of the Buddha, the Dhammen or of the Sangha, not to bear malice or feel ill will or be angry.<sup>38</sup>

The inclusion of Hinduism is also problematic since Hinduism has six classical schools, with at least one being atheistic, one doubtful about the existence of God, whilst the others are all theistic.<sup>39</sup> Notwithstanding these variations, Hindus do believe in the transmigration of the soul and as a major religion qualifies by virtue of the 'Segerdal' definition. The new definition threw up yet more inconsistencies because polytheism and a belief in reincarnation were insufficient for the United Kingdom's oldest and most probably only remaining indigenous religion, Paganism, to qualify as a religion.<sup>40</sup> In the light of the anomalous situation created by attempts to construct a definition suitable for legal purposes, it appears certain that unpopular and negatively stereotyped religious beliefs, irrespective of whether or not they satisfy the criteria laid down, will be excluded. Seeking to place 'definitional' limits upon what constitutes religion amounts to discrimination against little known or 'unpopular' religions and leaves outside the category of beliefs those 'religions' which may be in the greatest need of protection.<sup>41</sup>

A less theological approach was taken under the Trade Union and Labour Relations Act 1974. The courts acknowledged that "Any attempt to frame a

comprehensive definition is more than likely to meet with failure” and religion was interpreted as a matter of the individual’s own belief and conclusions on the teaching of the scriptures, even when these beliefs differed from the established body or creed or dogma - a quasi-self-defining principle. All that was required of the individual was for him or her to be a practising member of a religious community.<sup>42</sup> In what appears to be a means to avoid the dilemma of ‘adopting’ the self-defining principle, not all deviations from established religious beliefs qualified as beliefs. However, in exceptional circumstances, the court felt that there was no conceptual impossibility about accepting differences between the individual’s interpretation of the creed of which he was a follower even if this differed from the teachings as a whole.<sup>43</sup> The role of the courts in this sphere cannot be sustained according to Ingher, who argued that the concept of belief systems could not be incorporated into the legal system because of the responsibility assigned to the legal system for fulfilling legal expectations<sup>44</sup> - a necessary condition for maintaining social order by ensuring that individuals can predict the legal significance of their behaviour. For Fuller, without the courts being able to uphold this responsibility, there is uncertainty and “Law that changes every day is worse than no law at all.”<sup>45</sup> Ingher and Fuller presented a far stronger case than a House of Lords Select Committee which concluded that “the courts tended to supply sensible definitions to such phrases” – namely, new religions and non-beliefs.

There seems little justification for distinguishing between systems of belief or other principles of thought, religious or rationalist; or between differing religious beliefs; or in treating certain religions preferentially. A recent study held that religious beliefs “provides relatively greater certainty” than other belief systems, however, this conclusion is difficult to support given the difficulty in defining religion. The only real certainty is uncertainty and the proposal to include atheism, as the study suggested, on the grounds that it “differs from typical non-religious beliefs”,<sup>46</sup> appears merely to be an attempt to offer change in order to remain the same.

(ii) Harnessing Religion to the 1976 Race Relations Act:

Prior to the 1976 Race Relations Act, the House of Lords had noted the ambiguity surrounding the term ‘racial’ making the point that ‘racial’ was “not a term of art, either legal or...scientific” and speculating that “anthropologists would dispute how far the word “race” is biologically at all relevant to the species amusingly called

homo sapiens.”<sup>47</sup> Their Lordships certainly had a point in referring to the inadequacy of ‘race’ to define homo sapiens in any biological or genetic sense and were on their way to recognising that the concept of ‘race’ has no scientific justification and a more valid way of dealing with differences between the ‘amusing’ homo sapiens would be to adopt an ethnographic concept concerned with the way human beings form themselves into communities and create norms and values to guide the well-being of those communities, although in the process of doing so they cause numerous ‘not so amusing’ difficulties for those other homo sapiens not identified with their own particular community.

Eleven years later, in 1983, the Court of Appeal disregarded this pointer and showed its inadequacy in its efforts to define ‘racial groups’ by arriving at the untenable definition that ethnic origin was a biological category pertaining to race.<sup>48</sup> The particular case under appeal concerned a Sikh and the Court of Appeal had concluded that Sikhs did not qualify as an ethnic group because they were a religious and cultural group rather than a biological group<sup>49</sup> The Lordships had erroneously describe ethnic group as a biological category, which is an entirely different category altogether, apparently unaware that religion is an element of culture, which in turn is a component of ethnicity. However, the House of Lords retrieved the concept and pointed it back in the direction introduced in 1972 by overturning the Court of Appeal’s rather curious conclusion that implied an ethnographic category was biological. Lord Denning’s venture at the Court of Appeal into the non-legal world of definitions was thought by the House of Lords to have produced a definition that was too narrowly constructed and decided that for a group to qualify as an ‘ethnic group’ it did not require scientific proof of distinctive biological characteristics.<sup>50</sup>

The Lords’ definition of ‘ethnic group’, including *converts* to that group, an implicitly religious term, paid more attention to anthropological and sociological schools of thought by introducing ethnography into the concept at the expense of biology. Their Lordships had identified an ethnic group as a combination of essential and non-essential objective characteristics, as well as subjective perceptions of that group. The essential characteristics being a long shared history and cultural tradition, including family and social customs, often but not necessarily associated with religious observance. The non-essential characteristics included a common geographical origin or descent from a small number of common ancestors and a number of common cultural elements, such as literature, language and religion. They



also referred to a subjective dimension in the way members of the group perceived themselves, including how group members perceived converts and vice versa, and how outsiders perceived the group<sup>51</sup> - a dual process of intra-group and extra-group perception.

In fact, the Mandla decision appeared to be a legal 'sleight of hand', a 'voyage of discovery', to cater for a group by highlighting its separation from other groups in society on the basis of predominantly religious criteria. In spite of stating that although religious observance was associated with an ethnic group's cultural tradition it was not considered to be a necessary condition to gain recognition as an ethnic group. However, as far as Sikhs were concerned, the criteria for identifying them as a 'racial' group was predominantly religious and it appeared that religious criteria secured their inclusion.

The grounds for litigation undertaken by Sikhs revolved around the obligatory dress requirements of the '5 K's' - the symbols of the Sikh religion.<sup>52</sup> Despite justifying discrimination against Sikhs who wore beards<sup>53</sup> or a 'kara, a religious bracelet,<sup>54</sup> when public hygiene requirements were involved, an employer preventing a Sikh employee from wearing a symbolic dagger was judged unlawful discrimination because the symbol was a requirement of the Sikh religion.<sup>55</sup> The Health and Safety at Work Act 1974 did not allow exemptions on religious grounds,<sup>56</sup> yet Sikhs were granted exemption not to wear safety helmets in the construction industries,<sup>57</sup> which was justified on the grounds of accommodating to the Sikh religion.<sup>58</sup> In a more realistic explanation by Lord Strathclyde, this exemption was granted because of the number of Sikhs working in the construction industry and of the potential loss of their skilled labour to that industry.<sup>59</sup> Curiously, Sikhs observing the turban requirement in other hazardous industries could not claim exemptions from wearing safety helmets. Economic expediency in the construction industry apparently outweighed health and safety requirements but was made more palatable with a token reference to religious belief. In another statute governing the activities of Sikhs, religious factors appeared to be the defining characteristic. Exemption from the requirement to wear motor cycle helmets was specifically stated as being for religious reasons.<sup>60</sup>

Jews were also beneficiaries of judicial interpretation in an even more unusual way. Lord Denning, while denying Sikhs recognition as a 'racial group', came to the conclusion that Jews qualified as a group warranting inclusion within the category of 'racial group' not on the basis of any 'scientific' analysis but purely on the grounds of

reading into the 1976 Race Relations Act, the explicit intention of Parliament to include Jews as a protected racial group under the Act.\*<sup>61</sup>

Moving on from Lord Denning's reasoning, the main criterion for recognising Jews as a 'racial group' was the link to religious observance - Judaism, described as an aspect of 'Jewishness'.<sup>62</sup> Initiation ceremonies, membership of the synagogue and identification with a Jewish community, which in turn recognised him or her as one of their own were aspects of this 'Jewishness'.<sup>63</sup> A person not of the Jewish 'race' but who converted to Judaism qualified for inclusion in the Jewish 'racial group.' However, a person who was Jewish by 'race' but did not satisfy the conditions described as aspects of 'Jewishness', that is, the religious connection, would not qualify for inclusion in the legal definition of Jewish as a 'racial group'.<sup>64</sup> As the Jewish faith was considered an integral part of 'Jewishness', those Jews and converts exhibiting 'Jewishness', holding firmly to Judaism, constituted a 'racial' group. However, a non-religious Jew, who satisfied all the criteria of being a member of an ethnic group, as per *Mandla*, which did not require religious adherence as a necessary characteristic for inclusion, would fall outside the definition of a member of the Jewish 'racial' group.

Yet, in another curious twist, despite the emphasis on religion and religious rites, any Jewish person qualifying as a member of the Jewish 'racial' group and who wished to observe the religious requirements of that necessary 'Jewishness' is not entitled to protection from discrimination because practising that 'Jewishness' was religious and outside the scope of the 1976 Act.<sup>65</sup> Unlike the definition for Sikhs, the subjective factors necessary for inclusion in the Jewish 'racial' group was based on the way Jews perceived each other. The way outsiders perceived Jews was irrelevant.<sup>66</sup>

The effect on Jews of a religiously based definition created a dual status distinguishing between Jews as a racial group and Jews as a religious group. This ambiguity was referred to by one judge, who concluded that discrimination against Jewish people might be interpreted by one jury on religious grounds and by another on racial grounds.<sup>67</sup>

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\*Lord Denning was relying on the basis of his 1950 statement when he said, "We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."<sup>68</sup>

In Northern Ireland, where religious discrimination is outlawed, the overt distinction between each of the two major communities is centred on religious beliefs, Catholicism and Protestantism. However, both communities incorporate those characteristics, described in Mandla, that would also identify them as separate ‘ethnic groups’ – an ethnic/religion distinction ignored in mainland Britain where the Irish, whether from Northern Ireland or the Republic of Ireland, are defined as a national group irrespective of having separate identities. A conclusion arrived at by taking into account the alleged perceptions of ordinary non-Irish people who regard someone as Irish even if he or she were from Northern Ireland and, as such, a British citizen,<sup>69</sup> which completely overlooks the self-perception of a majority of Northern Irish people (Protestant Loyalists) who see themselves separate and distinct from the Irish of the Republic of Ireland.\*

In cases involving three different ‘ethnic or national’ groups, there have been three different interpretations of perceptions of identity, that is, the subjective elements required for qualifying as ‘racial’ groups. In Bogdeniec, dealing with the Irish, subjective perceptions applied to the way outsiders perceived the group irrespective of how the group members perceived themselves. In Gilbert, regarding the Jews, it was the perception of the group members themselves and not outsiders that was the determinant factor. In Mandla, involving the Sikhs, it was the perception of the group members and outsiders that was determinant.

Sikhs were granted status as a racial group on some religious factors and Jews were similarly granted status but solely on religious factors, whereas another group of religious devotees, Muslims, were excluded from the category because they failed to satisfy a non-essential characteristic. Recognised as having a long history with a particular geographical origin and having followers with a strong sense of their own identity, Muslims fell foul of a distinction drawn between a group tracing their descent from a common geographical origin (an ethnic group) and a group tracing their belief through evangelism to a common origin (who were not an ethnic group)<sup>70</sup> but did not share a common nationality or language.<sup>71</sup> Excluding Islam on this ground is inconsistent when considered in relation to the diverse geographical origins

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\*"There are two communities in Northern Ireland, different in their origins, nursing different historical myths, possessing distinguishable cultures, having different songs and heroes and wearing different denominations of the same religion. Religion is the clearest badge of these differences. But the conflict is not *about* religion. It is about the self-assertion of two distinct communities, one of which is dominant in the public affairs of the province."<sup>72</sup>

associated with being Jewish, for example “.....White Ashkenazi Jew(s) from Poland,.....Berber Jew(s) from Algeria and ..... Black Jew(s) from Ethiopia - all with different languages, customs and cultures.” In arguing for the inclusion of Jews as a recognised group under the 1976 Act, Rabbi Kenneth Lewis said that notwithstanding this diversity, all these “would qualify as members of a single ethnic group and as such be entitled to protection under the 1976 law.”<sup>73</sup>

In terms of subjective perceptions, whatever ‘test’ was used, anyone of them could apply to British Muslims, who, although including people of many nations and speaking many languages, perceive themselves not as a collection of ethnic groups but as being part of a world-wide religious community (ummah)<sup>74</sup> and are themselves perceived by outsiders as possessing a distinct identity as Muslims whatever their national or ethnic origins.<sup>75</sup> Hindus, similarly, despite having many languages and nationalities, also perceive themselves as a global community.<sup>76</sup>

Despite their exclusion, accommodation has been made to Muslims under the law by virtue of the provision protecting national groups and by the concept of indirect discrimination decided on the grounds of Islamic religious requirements - communal prayers at the Mosque,<sup>77</sup> celebration of religious festivals<sup>78</sup> and dress requirements for women.<sup>79</sup> Furthermore, some unusual grounds have been cited in some tribunal decisions in support of claims made by Muslims. An employer’s refusal to allow attendance at Friday prayers amounted to discrimination not on the grounds of national origins but of colour, “because most adherents of Islam are black.”<sup>80</sup> Another tribunal decided that “*the racial group of Muslims cannot comply with it (dress requirements) to the same extent as those not in the group, “because of the well known fact that many Muslim women cover their legs on religious grounds.”*<sup>81</sup>

The objective characteristics and subjective perceptions used to define ethnic groups are without doubt ambiguous. The objective criteria considered essential for including one group is rejected for another group. While religion is claimed not to be essential for one group to qualify as a ‘racial’ group it becomes an essential characteristic when applied to another group.<sup>82</sup> The subjective perceptions of particular groups and the way they are perceived by others are inconsistently applied<sup>83</sup> and ignored completely for other groups.<sup>84</sup> There is also inconsistency in the way the concept is applied to those groups who have attained the limited protection offered by qualification as a racial group.<sup>85</sup>

The attempt by the courts and tribunals to take into account incidents of religious discrimination where that discrimination appeared to be a mask for covering up unlawful racial discrimination has, inevitably, created anomalies. It appears that the judiciary have sought an expedient way of interpreting existing legal concepts to include those members of religious groups, who are also identified as ethnic minorities in the UK. This has been achieved, and perhaps could only be achieved, by submerging some aspects of religious identity into the concept of racial group, with the courts providing some element of protection for religious groups whilst avoiding the difficult issue of defining religion.\*

### (iii) A Philosophical Answer

In a society marked by a plurality of opposing and irreconcilable religious, philosophical, political and moral doctrines, conflict is a permanent feature and contradictions often arise between the individuals' right to absolute freedom of speech and the need for a well ordered society governed by the concept of justice. In order to avoid the potential disruption to the socio-political system by these competing interests an effective process for mediating conflict is required and the means sought to achieve this is through democratic political institutions and the rule of law.

The problem of creating a mechanism for mediating conflicting interests has occupied the attention of numerous political philosophers both prior to, and during, the period of enlightenment.<sup>86</sup> John Stuart Mill, writing during the period when industrial capitalism rose to dominance in the UK and agitation for democratic rights was at its highest point, may offer a route out of the dilemma faced by liberal democracies over the issue of religious rights. Mill rejected Bentham's concept of 'pure' utilitarianism as possibly producing a tyranny of the unthinking majority, who might seek to impose its own ideas and practices over all minority groups and over men of intelligence and ability, by restricting "the formation of any individuality not

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\* Rastafarians failed to obtain recognition as an ethnic group, as nothing separated them from the rest of the Jamaican community in England, and their shared history of 60 years was considered insufficient.<sup>87</sup> One scholar thought it irrational, arbitrary and value laden to subject a minority culture to a 'time' test in the contemporary world, where cultures are likely to emerge and decline far more quickly than in the past.<sup>88</sup> Paganism, the longest practised indigenous religions of the UK, under a less stringent definition of proving public benefit, was granted charitable status,<sup>89</sup> as were the Unification Church (Moonies) Divine Light Mission, Opus Dei and Exclusive Brethren.<sup>90</sup> Scientology has been accepted as a religion in Australia, but not in the UK.<sup>91</sup>

in harmony with its ways.”<sup>92</sup> In its place, Mill proffered the extension of freedom of political choice through rational discussion amongst the widest range of opinions because he thought it enabled the best solution to any problem to be achieved.<sup>93</sup> To Mill, intellectual and political freedom was an essential feature of civilised society since they brought benefits to the society by allowing the free exchange of opinions, and was seen as the “most convincing justification for freedom of speech.”<sup>94</sup>

Whilst favouring the free expression of opinions, Mill was not advocating absolute freedom of expression since the right to express opinions had to be subject to any necessary restrictions protecting individuals and groups from harm, defined, by Mill, as the ‘harm-to-others’ principle.\*<sup>95</sup> It is this concept that Mill used to differentiate between socially acceptable and socially unacceptable expressions of opinion and the consequences arising when those opinions were translated into actions, describing it as the distinction between acceptable comment and unacceptable incitement. Mill did not differentiate between temperate and intemperate comment believing that even the most inflammatory expressions of opinion should not be restrained by the law because “people commonly take offence whenever their opinions are subjected to a ‘telling and powerful’ attack and are liable to brand a skilled opponent an intemperate one.”<sup>96</sup> However, Mill thought that opinions should lose their immunity if they instigated some ‘mischievous act,’<sup>97</sup> illustrating the difference between comment and incitement thus:

‘An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered to an excited mob assembled before the house of a corn dealer, and then handed about the same mob in the form of a placard.’<sup>98</sup>

Although Mill accepted the individual’s right to complete liberty of religious thought and expression, he offered no exalted position to religion in his formula for social ills. Religion was to be treated no differently from any other belief. Nor was preference to be given to any particular religious belief over other religious beliefs, remarking that ‘If Christians would teach infidels to be just to Christianity, they should themselves be just to infidelity (infidels).’<sup>99</sup>

Mill’s philosophical radicalism dispensed with the law of blasphemy since

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\* This is particularly relevant when the majority’s claim to freedom of expression and action involves ‘harm-to-others’ and those ‘others’ are distinct, identifiable minority groups, such as racial or religious minorities, who are at a disadvantage in influencing social and political policy.

religious discourse involves opinions that are neither ‘true nor false’ and, accordingly, religious beliefs do not qualify for protection even when intemperately criticised. However, Mill made a distinction when the issue concerns the protection of those who hold religious beliefs. If the term ‘religious devotees’ was substituted for ‘corn dealers’, in the above example, then ‘the mob assembled before the home’ would constitute an incitement to religious hatred (‘harm to others’) warranting intervention by the state to protect the victims of religious intolerance.

This ‘harm-to-others’ principle ensures that those expressing opinions that are seriously harmful to others are not able to claim absolute protection under the guise of freedom of speech for the opinions they express. In those circumstances, society, through the apparatus of the State, could invoke legitimate authority to intervene in order to impose controls on free expression. However, this legitimacy was solely restricted to preventing ‘harm-to-others’,<sup>100</sup> that is, if the exercise of that right represented a real threat to the well-being of a citizen and ‘great damage to the person or property.’<sup>101</sup> It was the State, controlled by society through the democratic process, which decided whether the harm was sufficiently serious for it to intervene or whether this intervention might cause more harm than it solved.<sup>102</sup>

Mill’s concept of ‘harm-to-others’ provides a means for dealing with anti-religious opinions and actions by differentiating between those opinions that do not cause physical harm and those that do. The former being the price paid by citizens for living in a liberal democratic society with freedom of expression for all and, therefore, excluded from State intervention. The latter requiring the State to intervene to prevent the expression of views that represent actual or potential physical harm to individuals or groups, who hold ‘religious’ beliefs, and would also protect those who hold non-religious beliefs, views or principles from harm by those holding ‘religious’ beliefs.

#### (iv) Freedom of Expression, Violence, and the Law

In contemporary UK law, the Blasphemy Act applies only to Christianity and an offence is committed when the dividing line between moderate and reasoned criticism of Christianity and the immoderate or offensive treatment of Christianity is crossed.\*<sup>103</sup> The argument raised in the defence of retaining or extending the

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\*The Law Commission recommended the abolition of the Blasphemy Act in 1985.<sup>104</sup>

Blasphemy laws relies on the presumed greater psychic turmoil and trauma suffered by believers having put their soul in jeopardy whereas non-believers suffer only a violation of a moral code.<sup>105</sup> This argument is difficult to sustain since how is it possible to show that sensitivity to injury from attacks on beliefs affects only, or has a greater effect on, those with religious feelings and not on those who have strongly held secular beliefs<sup>106</sup> or on those who are subject to claims that the Holocaust did not happen or that Black people have lower levels of intelligence than White people?<sup>107</sup>

The ‘greater sensitivity’ argument would require the courts to operate a standard to divide the temperate and the intemperate comment, beyond which any breach would invoke the intervention of the law, a difficult enough task especially when to some devotees even the most sober and respectful criticism of their religious beliefs constitutes a mortal insult to their personality.<sup>108</sup> Serious literature or rational discussion, if sufficiently persuasive in its critical assessment of religion, might also provoke a violently unfavourable response,<sup>109</sup> as could a reasoned, albeit destructive, analysis of religion, even if temperately expressed, have a greater impact than attacks devoid of intellectual content.<sup>110</sup> In seeking to apply a standard to determine the degree of injury, virtually impossible decisions would have to be made on the intensity and centrality of the belief and the psychological sensitivity of believers.<sup>111</sup>

Even if the offence did cause a degree of mental distress, why should this suffice to curtail freedom of speech?<sup>112</sup> Religious freedom allows individuals to express their world view through religious imagery even when it might give offence to others, therefore, why should individuals with secular views of the world be denied a reciprocal right to express those views, including critical reactions to religion.<sup>113</sup> If religious belief is so important to its holders, distress caused by the opinion of others is part of the price of living in a plural society since “everyone has to put up with statements that offend them without resorting to violence or the law.”<sup>114</sup>

In line with Mill’s ‘harm-to-others’ principle, the offence of blasphemy is an unreasonable response by the State to the right to legitimate ‘comment’, however intemperate the expression might be and to protect the sensibility of religious believers by curbing freedom of expression is untenable. However, incitement to religious violence is the instigation of some mischievous act ‘causing physical harm-to-others’, therefore, warranting intervention by the State. Restricting freedom of expression when it involves incitement to religious violence does not strike at the core



of freedom of expression in the same way, since it is not concerned with the free exchange of different views to arrive at the 'truth' but is directed at causing physical harm or the threat of physical harm to members of religious groups.

Prohibiting incitement against religious groups entered the legal arena by the back door via the 1976 Race Relations Act. Legislation prohibiting incitement to racial hatred, incorporated in the Public Order Act 1986, made it an offence for anyone in public to 'publish or distribute written matter or use words that are threatening, abusive or insulting,' likely to stir up hatred against any racial group.<sup>115</sup> The definition for protected groups within this Act stemmed from the Race Relations Act and decisions in subsequent case law, and, as shown above, had the effect of benefiting Jews and Sikhs by recognising them as racial groups whilst neglecting other religious groups.

The limited protection offered by the legislation did little to stem the increasing number of attacks on 'racial' minorities\* and there appeared to be some reluctance on the part of the authorities to grasp the nettle and pursue racial offences,\*\* let alone extend the provisions to religious hatred.\*\*\* However, the New Labour Government, in seeking to give greater protection to racial groups introduced an offence of racial aggravation in the Crime & Disorder Act 1998, which brought benefits to a wider range of religious groups than hitherto.

The offences (subsequently ss29-32 of the Act) covered by racial aggravation were offences already on the statute books: the 'Offences Against the Persons Act 1861', s 20 (maliciously wounding or grievous bodily harm) and s 47 (actual bodily harm); the 'Public Order Act 1986' ss 4, 4A and 5 (fear or provocation of violence and intentional harassment, alarm or distress); the 'Protection from Harassment Act 1997', s 2 (harassment) and s 4 (putting people in fear of violence); and the Criminal Damage Act 1971 s 1 (1) (destroying or damaging property belonging to

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\*Racist incidents rose from 4383 in 1988 to 7734 in 1992, a rise of 77%. The apparent rise in figures may be due to an improved method of classification, however, this might understate the situation since the true figure of attacks was thought to be 13,000 to 14,000.<sup>116</sup> Muslim organisations report increased hostility, verbal abuse and unfair media coverage. Black-led Christian Churches consistently report unfair treatment as do Pagans and New Religious Movements.<sup>117</sup>

\*\*The Attorney-General refused to prosecute 21 cases of anti-Semitic publications submitted by Jewish organisations between 1986 - 1990, see Independent on Sunday 9/12/1990.

\*\*\*When the London Borough of Merton wanted Muslims to be covered by the Public Order Act 1986, following the distribution of offensive and threatening material distributed by a member of the British National Party, it was rejected on the grounds that Muslims were not a racial group and not covered by the Act.<sup>118</sup> The same BNP member pleaded guilty for distributing similar material inciting racial hatred against Jews.

another). A significant addition to these existing offences was that if proven, a racially aggravated offence carried with it an enhanced sentence (s82). This greater sentence would only apply if ‘at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial group (s28(1)(a)); or the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group’ (s 28(1)(b))’.

Amendments to the original Bill included as s 28(3)(a) of the Act makes it clear that it is an offence if an aggravated attack is based, to any extent, on hostility towards any person or group of persons belonging to any religious group, including converts, and if religious hostility is evident in an attack on victim(s) with membership or *presumed membership* of a racial group. This wording of the amendment might, in fact, allow an interpretation that purely religiously aggravated offences are within the parameters of the Act\* because “to any extent”, taken in its literal sense, implies the inclusion of offences that may be wholly motivated by religious considerations.\*\*

Should there be any doubt over this interpretation of the Act, the Parliamentary debates can be used to establish Parliament’s intention to bring religious belief into the Act.<sup>119</sup> In the debates protection of religious converts was clearly spelled out by the Home Secretary with his illustration of a White Muslim woman wearing a chador, a religious face covering, presumed by the offender to be a Pakistani and subject to racial abuse and racial attack. That she was White rather than Pakistani would not constitute a defence for the attacker.<sup>120</sup> An almost indivisible link between ‘religious’ and ‘racial’ attacks was also referred to in the debates when it was claimed that “cases which appear to have a religious element will also have a racial element.”<sup>121</sup>

The predominant reason for attacks on ethnic minority groups tends to be based on their ‘racial’ origins rather than on religious identity, a point made by the Home Secretary in the House of Commons.<sup>122</sup> Attacks based purely on religious hostility have little frequency except in the strongholds of sectarianism, which act as

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\*The Crown Prosecution Service confirmed that religious groups, citing Muslims, are protected by the Crime & Disorder Act and stated that “Perpetrators cannot escape conviction by arguing that their hostility was directed at the victims’ religion rather than race.”<sup>123</sup>

\*\* The Home Secretary did state that “the test of what amounts to ‘racially aggravated’ for the purposes of these offences requires that the racial hostility is ‘wholly or partly a motivating factor’,”<sup>124</sup> which as far as religion is concerned is less than “to any extent.”

conduits for the religious strife in Northern Ireland, e.g. Glasgow.<sup>125</sup> Since it is less likely for offences committed under the Crime & Disorder Act to be on purely religious grounds rather than racial grounds, the inclusion of religion appears to be a concession to the religious lobby and, as such, may have little practicable significance, except in removing the previous anomalies associated with the concept of ‘racial’ groups arising from the Race Relations Act.

Although the amendments draw religious groups into the provisions of the Act, the Act continues to be discriminatory against those religions without the ‘racial’ connection, e.g. Christianity and unrecognised or unpopular religions, including the oldest indigenous religions in the UK, that is, Paganist religions. Similarly, ‘non-religious’ victims, who may have strong political and humanitarian views, e.g. anti-fascists and anti-racists, who identify themselves closely with the potential victims catered for in the Act, may also be targets for aggravated assaults by similar types of individuals and organisations, yet their attackers would not be subject to the enhanced sentences.

It might be argued that legislation already outlawing the types of offences covered by sections 29 to 32 of the Crime & Disorder Act applies to everyone, providing greater protection to a particular category of people has a discriminatory effect against those who are not so protected. An alternative argument might cite the *raison d’être* for this ‘preferential treatment’ as redressing the differential and discriminatory treatment under which certain groups labour and to send out signals to society as a whole as to what constitutes acceptable forms of behaviour.<sup>126</sup> To create and maintain harmonious relations between varieties of ‘social’ groups is a necessary component of pluralist society and when there is a real threat of ‘harm-to-others’ then it is incumbent on the State to intervene. Racist hostility with its religious component does tend to have a greater significance in terms of maintaining social order since it contains a potentially socially divisive element between groups that may lead to extremely destructive social disorder and unrest - ‘race riots’. On this proviso, a case can be made out for penalising ‘racial/religious’ public order offences more severely.

Special protection for religion is problematic in that a meaningful definition is not available for setting religious beliefs apart from other belief systems, moral values or principles. Even if a definition should suddenly emerge – an unlikely prospect other than for politically or economically expedient purposes, in an attempt to give a

protected position for religion it should be resisted since it can only exist by undermining freedom of expression. Religious belief should be given no special place in the legislature and the rarely used Blasphemy Act should be taken off the Statute Book as no justifiable reason can be made for giving special dispensation to the 'religious.'<sup>\*</sup> Incitement, assault and bodily harm directed at religious groups or devotees are already covered by the existing law and any individual or group of people committing those offences whether on the pretext of the victim's 'religion' or for any other reason are subject to those laws.

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<sup>\*</sup> On May 8, 2008, the Criminal Justice and Immigration Act 2008 abolished the common-law offences of blasphemy and blasphemous libel in England and Wales, with effect from 8 July 2008<sup>127</sup>

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<sup>1</sup> Pickering W S F (ed) [1975] *Durkheim on Religion: A Selection of Readings*, Routledge, Kegan & Paul, London, pp 165 & 178

<sup>2</sup> EU Directive, which came into force in December 2003

<sup>3</sup> Durkheim E [1915] *The Elementary Form of the Religious Life: A Study in Religious Sociology*, Allen & Unwin, London, p62

<sup>4</sup> Weber M [1965] *The Sociology of Religion*, Methuen, London, introduction by Talcott Parsons, p xxxii

<sup>5</sup> *ibid*, p xxviii & xxix

<sup>6</sup> *ibid* p xxxii

<sup>7</sup> Wittgenstein L [1958] *Philosophical Investigation*, p 7

<sup>8</sup> Kerr F [1986] *Theology of Wittgenstein*, Blackwell, Oxford, p 29

<sup>9</sup> Greenawalt [1984] *Religion as a Concept in Constitutional Law*, 72 *California Law Review* pp 766/7

<sup>10</sup> *US v Seeger* 380 US 163-1 85 [1965] I 273

<sup>11</sup> *Towards a Constitutional Definition of Religion*, Harvard Law Review [1978] Editorial, Harvard University Press, Cambridge

<sup>12</sup> *Torcaso v Williams* 1961 367 US 488

<sup>13</sup> *Welsh v US* 1970 398 US 333

<sup>14</sup> Kurland, 'Of Church and State and the Supreme Court', 29 *University of Chicago Law Review* 1, 1961

<sup>15</sup> Ingher S, 'Religion or Ideology: A Needed Clarification of the Religious Clauses', *Stamford Law Review* [1989] No 41 p 246

<sup>16</sup> Marshall [1983] *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 *Minnesota Law Review*, p 548

<sup>17</sup> Ingher S, 'Religion or Ideology: A Needed Clarification of the Religious Clauses', *Stamford Law Review* [1989] No 41 pp 242-245

<sup>18</sup> Weiss, *Privilege, Posture & Protest: Religion in Law*, 73 *Yale Law Journal* p593

<sup>19</sup> Ingher S, 'Religion or Ideology: A Needed Clarification of the Religious Clauses', *Stamford Law Review* [1989] No 41 pp 247/8

<sup>20</sup> *Hernandez v Commission of Internal Revenue* 104 L. Ed 2nd 766 & 786

<sup>21</sup> *Employment Division, Department of Human Resources of Oregon v Smith* 108 L.Ed 2nd 876, 891

<sup>22</sup> *Thomas v Review Board of the Indiana Employment Security Division*, 67 L.Ed 2<sup>nd</sup> pp 624, 632

<sup>23</sup> Freeman G C, *The Misconceived Search for the Constitutional Definition of Religion* [1983] 71 *Georgetown Law Journal*, p1519

- <sup>24</sup> Raz J, [1986] *The Morality of Freedom*, Clarendon Press, Oxford, pp 251/2
- <sup>25</sup> Finnis J [1989] *Natural Law and Natural Rights*, Clarendon Press, Oxford, pp 89/90
- <sup>26</sup> Fenwick H [1998] *Civil Liberties*, Cavendish, London, p223
- <sup>27</sup> Law Commission Working Party No 79, 1981, para 7.15
- <sup>28</sup> McConnell Michael W, *Origins and the Historical Understanding of the Free Exercise of Religion*, in the *Harvard Law Review*, Vol 103, No 7, May 1990, Cambridge, Mass, p1492
- <sup>29</sup> Steintrager J, *op cit.*, p17
- <sup>30</sup> Roberts D [1986] *Toleration and the Constitution*, p 141
- <sup>31</sup> *R v Registrar-General ex parte Segerdal and anor* 1970 2 QB 697; 3 All ER 886 CA
- <sup>32</sup> *ibid*
- <sup>33</sup> *Church of New Faith (Scientology) v The Commissioner for Pay Roll Tax* 1983 Vol 57 *Australian Law Journal Review*, 785, Law Book Co Ltd, Sydney)
- <sup>34</sup> *R v Registrar-General ex parte Segerdal and anor* 1970 2 QB 697
- <sup>35</sup> Winn, LJ, *Ibid*
- <sup>36</sup> Dupre, *Spiritual Life in a Secular Age*, Ill Daedalus 1982 p 21
- <sup>37</sup> *R v Registrar-General ex parte Segerdal and anor* 1970 2 QB 697
- <sup>38</sup> CRE [1989] *Buddhists: Note on Blasphemy by the Office of Western Buddhist Order in Law, blasphemy and Multi-faith Society*, London, p88
- <sup>39</sup> Bowen D G (ed) [1981] *Hinduism in England*, 1981, Bradford College, Bradford p4
- <sup>40</sup> Paganism, under a less stringent definition of proving public benefit, was granted charitable status, *Times* 28 Oct 1996, as were the Unification Church (Moonies) Divine Light Mission, Opus Dei and Exclusive Brethren, Editorial, *Charitable and Uncharitable Purposes*, *New Law Journal*, 131, 9 April 1981, p 381; Scientology was accepted as a religion in Australia, Sadurski W, *On Legal Definitions of 'Religion*, *Australian Law Journal* [1983] Vol 63, Law Book Co Ltd, Sydney, p 836, but not in the UK, *R v Registrar-General ex parte Segerdal and anor* 1970 2 QB 697
- <sup>41</sup> Sadurski W, *On Legal Definitions of 'Religion*, *Australian Law Journal* [1983] Vol 63, Law Book Co Ltd, Sydney, p 834
- <sup>42</sup> *Cave & Cave v British Rail Board*, 1976, IRLR 400; *Goodbody v British Rail* 1977 IRLR 84; *Saggers v British Rail Board*, 1978 2 All ER 20 EAT
- <sup>43</sup> *Saggers v British Rail Board*, 1978 2 All ER 20 EAT. Cf this with a different approach taken almost a hundred years ago when it was stated that “the identity of a religious community...must consist of the unity of its doctrines” which excludes individual interpretation, *General Assembly of the Free Church of Scotland v Lord Overton*, 1904 AC 515 at 612
- <sup>44</sup> Ingher S, *'Religion or Ideology: A Needed Clarification of the Religious Clauses*, *Stamford Law Review* [1989] No 41 p274
- <sup>45</sup> Fuller, *The Morality of Law* 1969, p 37, in *ibid*
- <sup>46</sup> Hepple, R, QC & Choudhury, T, *Tackling Religious Discrimination*, Home Office Paper 221, Feb 2001, London
- <sup>47</sup> Lord Simon in *Ealing London Borough v Race Relations Board*, 1972, AC 342 HL
- <sup>48</sup> *Mandla v Dowell Lee*, 1982, 3 WLR 932 CA.
- <sup>49</sup> Lord Denning, in *Mandla*, relying on the works of Prof Bowles, *People of Asia*, 1972, p3 In fact, Sikhs had been recognised as a racial group, three years before, in *Panesar v Nestle Co Ltd* 1979 COIT 85/80 in IDS Brief Supplement No 23 p 8
- <sup>50</sup> 1 Lord Fraser, in *Mandla v Dowell Lee* 1983 2AC 548 HL; 1983 ICR 385 HL
- <sup>51</sup> A long shared history was defined as “at least before the modern historical era and certainly before the latter end of the 19th century (and) would be surprised if less than, say 250 years.” *Lovell-Badge v Norwich City College of Further Education*, 1502237/97, 3 Sep 1998, DCLD 39 Spring 1999.
- <sup>52</sup> CRE, *Sikh Men and Women and Employment*, 1980 CRE, London, p3; *Mandla v Dowell Lee*, 1983 2AC 548 HL; 1983 ICR 385 HL; *Kingston and Richmond Health Authority v Kaur*, 1981 IRLR 337 EAT

- <sup>53</sup> Singh v Rowntree Mackintosh Ltd 1979 IRLR 199 EAT; Panesar v Nestle Co Ltd 1980 IRLR 64 CA
- <sup>54</sup> Kang v R F Brookes Ltd, 1900838/98, 9 Feb 1999, DCLD 40 Summer 1999
- <sup>55</sup> Kaur v Butcher & Baker Foods Ltd, Case No 1304563/97, DCLD 37 Autumn 1998 p2; Poulter S, Multi-culturalism and the Law, New Law Jnl 148, 20 Mar 1998
- <sup>56</sup> Dhanjal v British Steel plc, 24.6.1994 unreported EAT, Harvey's Employment Law, section L para 1083; 'Religion and Employment Law, IDS Brief, 535, Feb 1995 pp 7-11; Singh v British Rail Engineering Ltd, 1986 ICR 22;
- <sup>57</sup> Employment Act 1989 ss 11 and 12
- <sup>58</sup> Lord Strathclyde, Hansard, House of Lords, 8 Nov 1989, Vol 159 col 1104
- <sup>59</sup> Ibid
- <sup>60</sup> Road Traffic Act 1988 s16 (2)
- <sup>61</sup> Mandla v Dowell Lee, 1982, 3 WLR 932 CA. Jews were thought capable of being caught by either the term 'racial', 'ethnic' or 'national' - see Sir F Soskice, Home Secretary, Hansard, 16 July 1965 vol 716, col 972 and 3 May 1965, vol 711, col 933
- <sup>62</sup> Tower Hamlets Council v Rabin, 1989 IRLR 693; Simon v Brimham Association, 18 Feb 1985; unreported, CRE Annual Report, p64
- <sup>63</sup> Gilbert v Mayne Nickless (UK) t/a Parceline 10926/96 DCLD 1997 Spring 31 p 3
- <sup>64</sup> Thomas v Metropolitan Police, Independent 7 June 1995. PC Thomas was subject to anti-semitic abuse and was successful in a claim of racial discrimination on the grounds of his membership of the Jewish 'racial group'
- <sup>65</sup> Wetstein v Mispresstige Management Services Ltd, EAT 523/91, 10 Mar 1993 unreported; Fluss v Grant Thornton Chartered Accountants, COIT 1907/1 5, 28 May 1987, IDS Brief No 360 p6
- <sup>66</sup> Seide v Gillette Industries 1980 IRLR 427; Morgan v CSC & British Library, DCLD 6 Winter 1990 p3/4, 1 May 1990, 19177/89
- <sup>67</sup> Tower Hamlets Council v Rabin, 1989 IRLR 693
- <sup>68</sup> Magar & St Mellons RDC v Newport Corporation 1950 2 All ER 1226 CA.
- <sup>69</sup> Bogdeniec v Sauer-Sundersstrand 1988, COIT 1933/5 IDS Brief No 383 p 7
- <sup>70</sup> CRE v Precision Manufacturing Services, Sheffield IT 26 July 1991 COIT case no 4106/91; Race Discrimination, IDS Brief Employment Law and Practice, 538 April 1995 p8; CRE v Tariq v Young & others, Birmingham IT 22 Mar 1989, DCLD 2 Winter 1989 p2, 19 Apr 1989, 24773/88
- <sup>71</sup> Nyaz v Ryman. COIT 1932/74, 23 Sep 1987, IDS Brief No 376 p 6
- <sup>72</sup> Editorial, The Times, London, 30 Aug 1969
- <sup>73</sup> Rabbi Kenneth L Cohen, Times, 13 Aug 1982
- <sup>74</sup> Esposito J [1988] Islam, The Straight Path, Oxford University Press, Oxford pp 1 -11; Modood T, Beishan S & Virdee S [1994] Changing Ethnic Identities, Policy Studies Institute, London pp 6 & 12
- <sup>75</sup> Runnymede Trust [1997] Islamophobia, A Challenge for us all, London
- <sup>76</sup> Letter from the National Community of Hindu Temples to the author, 7 May 1999
- <sup>77</sup> Yassin v Northwest Homecare Ltd (Unreported) DCLD 1994, 19 (2) Spring 1994
- <sup>78</sup> J H Walker v Hussain 1996 IRLR 11
- <sup>79</sup> Malik v British Home Stores 1980 COIT 987/12 unreported, IDS Brief 179 p15; Kanum v IBC Vehicles, Independent 15 Jan 1998; Malik v Bertram Personnel Group, DCLD 7 Spring 1991 p5/6, 26/7/1990. 4343/90
- <sup>80</sup> Yassin v Northwest Homecare Ltd (Unreported) DCLDI994, 19(2) Spring 1994
- <sup>81</sup> My emphasis. Malik v Bertram Personnel Group, DCLD 7 Spring 1991 pp5/6, 26 July 1990. 4343/90)
- <sup>82</sup> cf Mandla (Sikhs) and Gilbert (Jews)
- <sup>83</sup> Irish Jews and Sikhs
- <sup>84</sup> Muslims
- <sup>85</sup> The ambiguity over the safety helmet issue for Sikhs and religious observance for Jews. Singh v British Rail Engineering Ltd, 1986 ICR 22; Dhanjal v British Steel plc, 24 June 1994

unreported EAT, Harvey's Employment Law, section L para 1083; *Wetstein v Mispresstige Management Services Ltd*, EAT 523/9 1, 10 Mar 1993 unreported

<sup>86</sup> For details of the numerous philosophers who have grappled with this dilemma, see Sabine, G H [1973] *A History of Political Thought*, Dryden Press, Illinois

<sup>87</sup> *Dawkins v Department of Environment sub non Crown Suppliers* 1993 IRLR 284 CA

<sup>88</sup> Merrington D, *Discrimination: Rastafarians*, *New Community* 16 (2) Jan 1990, p 298

<sup>89</sup> *Times* 28 Oct 1996

<sup>90</sup> Editorial, *Charitable and Uncharitable Purposes*. *New Law Journal*, 131, 9 April 1981, p 381

<sup>91</sup> Sadurski W, *On Legal Definitions of 'Religion'*, *Australian Law Journal* [1983] Vol 63, Law Book Co Ltd, Sydney, p 836, *R v Registrar-General ex parte Segerdal and anor* 1970 2 QB 697

<sup>92</sup> Mill, J S [1859] *On Liberty* in Warnock, M [1972] *Utilitarianism*, Fontana, London; Mill J 5, 'De Toqueville on Democracy in America', 1840 Part II Coll Works Vol XVIII, pp 153 - 204 in Rawls J R p 42

<sup>93</sup> Feldman, D, *Civil Liberties and Human Rights in England and Wales*, 1993, OLJP Oxford p 548/9

<sup>94</sup> *Ibid*, p 548

<sup>95</sup> Gray, J (ed) [1998] *J S Mill On Liberty*, OUP, Oxford, p82

<sup>96</sup> Riley, J [1998] *Mill on Liberty*, Routledge, London, p 71

<sup>97</sup> Mill, J S [1998] *On Liberty*, OUP, Oxford, p62

<sup>98</sup> *Ibid*,

<sup>99</sup> *Ibid*, p 57/58

<sup>100</sup> *Ibid*, pp 83-108

<sup>101</sup> Dworkin, [1977] *Taking Rights Seriously*, Duckworth, London, p 204

<sup>102</sup> Lee S [1986] *Law and Morals*, OUP, Oxford, p 23

<sup>103</sup> *R v Lemon* 19782 All ER 175, AC 617

<sup>104</sup> Law Commission, [1985] *Offences Against Religion and Public Worship*, No 145;

Robertson G, *The Justice Game*, 1999, Vintage, London

<sup>105</sup> Choper D [1982] *Defining Religion in the First Amendment*, *University of Illinois Law Review*, 579; in Ing 275

<sup>106</sup> The Law Commission [1985] *Offences Against Religion and Public Worship*, No 145, para 7.14

<sup>107</sup> Modood T [1992] *Need for Reform: Muslims and the Law in Multi-faith Britain*, CRE, London, pp 72/3 for other examples

<sup>108</sup> Waldron J [1993] *Liberal Rights*, Cambridge University Press, Cambridge pp139/140

<sup>109</sup> 'Satanic Verses', written by Salman Rushdie provoked public demonstrations by Muslims which resulted in one booksellers shop being firebombed.

<sup>110</sup> Law Commission, [1985] *Offences Against Religion and Public Worship*, No 145, para 2.32

<sup>111</sup> Ingher S, *op cit.*, p275

<sup>112</sup> Law Commission, [1985] *Offences Against Religion and Public Worship*, No 145, para 2.37

<sup>113</sup> Bradney A [1993] *Taking Sides: Religion, Law and Politics*, *New Law Journal* 143 p143

<sup>114</sup> Barker P, 'The law should let Sleeping Dogmas Lie', *Times*, 2 Aug 1997

<sup>115</sup> Race Relations Act, 1976, s70(2X1)(a & b) amending s5 of the Public Order Act 1936 and incorporated in s18(a & b) of the Public Order Act 1986

<sup>116</sup> Home Office's Research and Statistics Directorate, *Research Findings*, No 39, Aug 1996 in Leng R, *Crime & Disorder Act 1998*, p 40; See also *A Very Light Sleeper: The Persistence Dangers of Anti-Semitism*, Jan 1994, Runnymede Trust, London

<sup>117</sup> Weller P, Feldman A & Purdam K, *Religious Discrimination in England & Wales*, Home Office Study 220, Feb 2001, London.

<sup>118</sup> *Guardian* 28 Oct 1998

<sup>119</sup> *Pepper (HM Inspector of Taxes) v Hart and others*, 1973, 2 All ER 204 HL

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<sup>120</sup> Straw J, Hansard, 23 June 1998, vol 314 col 894

<sup>121</sup> Ibid

<sup>122</sup> Ibid

<sup>123</sup> Letter from Chief Crown Prosecutor, Times 30 Oct 1998

<sup>124</sup> Straw J, Hansard, 23 June 1998, vol 314 col 894

<sup>125</sup> Laing E, Hansard, 23 June 1998, vol 314, col 902

<sup>126</sup> A Very Light Sleeper: The Persistence Dangers of Anti-Semitism, Jan 1994, Runnymede Trust, London

<sup>127</sup> Geller R, [2008] Goodbye to Blasphemy in Britain, *Institute for Humanist Studies*, Washington, June 2008