



Introduction

The eruption of ISIS¹ onto the international stage registered the issue of culturally based religious discrimination as one of the most important challenges facing civilisation in the early decades of the twenty-first century. The putative caliphate may have been inspired by an ambition to achieve religious/cultural coherence, within redrawn geo-political borders in the Middle East, but its efforts to do so have impacted on such coherence much further afield. Within its present boundaries, religious/cultural communities non-aligned with ISIS values have suffered, and continue to suffer, not just religious discrimination but mediaeval barbarism and possible annihilation. Outside those boundaries, ISIS atrocities in Western cities and the scale of armed response – including aerial bombing of Islamic cities – from the developed and mainly Christian nations, are threatening to both reopen East/West religious divisions and rupture the religious harmony and carefully cultivated multi-culturalism that, in general, have grown to become the hallmark of Western civilisation in the post-cold war period.

While the ISIS challenge and the response of the Western nations demand attention, the resulting jolt to social cohesion in those nations also calls for close examination – and has been a motivating impulse for this book. The fact that the ISIS cause attracted volunteers from all over the world, adherents prepared to kill and die for it, is in itself significant: they came not only from eastern Islamic countries, as might be anticipated, but also from the traditionally Christian countries of Europe, the USA, Canada, Australia and elsewhere; from nations, communities and families where values of tolerance, equality and non-discrimination have been long and deeply embedded. Thousands of citizens of democracies chose to uproot themselves from the cultural context that had nurtured them for an opportunity to launch murderous attacks, in the name of religion, against that culture, its values and people. Moreover, a reverse flow,

¹ Also known as Daesh, Islamic State or ISIL, but referred to as ISIS in this book.

comprising many hundreds of thousands of migrants seeking refuge in the West, is now flooding into those still largely Christian countries, where the mainly Muslim migrants are experiencing some difficulty in accepting, and being accepted within, democratic lifestyles. The international and multi-cultural dimension of this religiously driven, ideological phenomenon is inescapable. How did it get to this? What are the implications for Western society?

This book sets out to explore such matters. Being primarily a law book, however, it doesn't presume to address geo-political issues, except insofar as seems appropriate to draw attention to the causes and effects of not dealing with discriminatory activity when it first surfaces. Instead, it confines itself, primarily, to examining the flow of religious discrimination cases through the courts in order to better understand the main types of issues that are currently deemed to meet that definition and the reasoning behind the judicial response. It proceeds on the basis that religious discrimination cannot be satisfactorily addressed without considering the cultural context in which it has been formed and now functions. It therefore takes a checklist of the main areas of such discrimination as statutorily identified, tracks how they are processed through regulatory or judicial systems and considers the significance of any jurisdictional similarities or differences in the way issues are resolved.

In the main, the book concentrates on this age-old scourge of civilisation as defined in statute and manifested in everyday settings such as family life, employment and education. The focus is largely on a comparative analysis of judicial judgments on the same agenda of issues – accommodating religious practices in the workplace, religious beliefs in education, wearing religion-specific clothing and so on. It is an exercise restricted to six common law nations chosen because they share the same legal system, have been engaged in prolonged warfare in the same Muslim countries and are now struggling to adapt their domestic multi-culturalism policies to cope with the influx of refugees and migrants from those countries. Of necessity, that policy context also arises for consideration as it forms a largely shared jurisdictional backdrop for discriminatory activity, and its role – whether as part of the problem or part of the solution – deserves attention.

In addition to religious discrimination as statutorily defined, the book also considers the phenomenon known as “the culture wars”. It links the two. It argues that the same morality may be seen at work in both phenomena: that, in effect, the latter often serves as a proxy extension of the

former; that many if not most of those resisting legalised abortion, same-sex marriage and other such contemporary moral imperatives are doing so in defence of traditional religious values and beliefs (although not always; e.g. it is not necessary to have religious values to oppose gay marriage). It suggests that the morality platform of the culture wars is often little more than a collapsed version of its legal counterpart – religious discrimination. Only by taking into account the associated culture-war issues is it possible to give a full picture of the jurisdictional experience of religious discrimination in a cultural context. This important theme is developed throughout the book.

Parts I and II of this book examine the causes, nature and consequences of religious discrimination. The four chapters therein deal with themes of “identity” and “alienation”, with what in contemporary society is meant by “culture” and what now constitutes “religion” and how we understand, in the light of those constructs, what is meant by “religious discrimination”. Part III, the heart of the book, contains six chapters, each focusing on a developed, multi-cultural, common law democracy – England and Wales, Ireland, the USA, Canada, Australia and New Zealand – in which the institutions, laws and legislatures take care to respect and differentiate between the many cultures they now accommodate. In these modern societies, a reassuring principle – that to differentiate is not to discriminate – is often trotted out as the rationale for a multi-cultural policy. Cultures, we are assured, are categorically distinct and must be treated in ways that acknowledge and maintain their particular characteristics. Identity – whether for individual, group or culture – is wholly dependent upon difference, and difference must be respected. All very well, but even if the delineation of difference is pursued for the most laudable of motives, it will still result in social divisions where pride in distinctiveness can lead to disparagement of others, and from there perhaps to discrimination.

While each chapter in Part III focuses on jurisdiction-specific judicial rulings, arranged in accordance with a schematic of legally defined religious discrimination issues, they also draw attention to associated “culture-war” disputes. The previously mentioned premise – that culture-war issues often operate as religious discrimination by proxy – forms a unifying theme for Part IV. This concluding section ties the findings in Part III to themes examined in Parts I and II. It identifies and considers areas of jurisdictional commonality and difference in the judicial treatment of religious discrimination and then reflects on the bearing these might have on the themes explored earlier.

It is hoped that *Religious Discrimination and Cultural Context* will lend a little weight to a recommendation in a recent British report, with relevance for all the jurisdictions surveyed, that the time has come for government to “review the anomalies in how the legal definitions of race, ethnicity and religion interact in practice”.²

² See Commission on Religion and Belief in British Public Life, *Living with Difference: Community, Diversity and the Common Good*, Cambridge, The Woolf Institute, 2015, at p. 8.

PART I

Background

Identity, Alienation and the Law

The Twentieth-Century Legacy

Introduction

This chapter begins by tracing the roots of discrimination back to “identity” and “alienation”. While the very considerable body of academic work on these concepts – largely drawn from psychology,¹ philosophy,² anthropology³ and sociology⁴ – is by no means the focus of this chapter, inevitably it is informed by some material from such sources. A narrower and more legal approach is adopted, which is framed to explore the following: how an entity acquires an identity; the effect of that status; the boundaries that include and exclude; and the scope for change. Most importantly, for present purposes, it examines the nature and consequences of identity violation: of rejection, alienation and the process of ultimately acquiring recognition and affirmation.

The closing section of the chapter considers some of the more brutal late twentieth-century examples of what can happen when a group becomes caught up in a cycle that starts with social differentiation, continues with religious discrimination and alienation and ends with violent confrontation, where its members are usually the victims. The Holocaust atrocity provides the most obvious example of this dynamic, but the persecution of a religious minority is also graphically illustrated by the war in Bosnia. Finally, recognising the history of civil unrest in Northern Ireland as the sole and relatively recent example of sustained community violence grounded on religious discrimination in a common law jurisdiction, the

¹ See Erikson, E., *Identity and the Life Cycle: Selected Papers*, New York, International Universities Press, 1959 and *Identity: Youth and Crisis*, London, Faber, 1968.

² See Heidegger, M., *Being and Time* (trans. by Macquarrie, J. and Robinson, E.), London, SCM Press, 1962.

³ See Brubaker, R. and Cooper, F., “Beyond ‘Identity’”, *Theory and Society*, 2000, vol. 29, pp. 1–47 and Calhoun, C. (ed.), *Social Theory and Identity Politics*, Oxford, Blackwell, 1994.

⁴ See Weinreich, P. and Saunderson, W. (eds.), *Analysing Identity: Cross-Cultural, Societal and Clinical Contexts*, London, Routledge, 2003.

chapter concludes with a consideration of the role it played before, during and after the period known as “the troubles”.

Identity

Prescribed characteristics (imposed genetically or otherwise), experiences, culture and other contextural influences all contribute to the formation and continuity of identity; their summation can be seen in the singular attributes of an individual and in the shared distinctive profile of a group, community or nation. Identity development is generally an ongoing process. It is never fully and finally formed – although aspects can be – being no more than a label that captures salient characteristics at a particular point in time, as entities are constantly adjusting in response to changes in their environment.

The Significance of Identity

The need for identity, and the drive to assert or protect it, has probably always been a primary social force – for every society and for all entities within it. Whether inherent or ascribed, identity is clearly a prerequisite for all forms of discrimination. Historically, it has mobilised communities and nations in wars to conquer or resist being conquered, thereafter being commemorated in monuments and ceremonies as reminders of the events that shaped them. Currently, it can be seen in the unique blend of language, culture, artefacts and customs that combine to express a sense of patriotism. The governments, legislators and judiciary of such nations are now being increasingly challenged by the need to balance the identity rights of citizens and society: allowing more elasticity for citizenship, facilitating filtered immigration, while also preserving a traditional sense of national identity.

Fixed

Ostensibly, religion provides the classic model of a fixed “identity”: the effect of subscribing to a set of doctrines and tenets, believing in a specific theistic being or other central feature and performing ordained rituals of worship is intended to be that the integrity of the entity remains inviolable; a sealed time capsule, future-proofed against possible internal or external change. To some extent, this is so – mostly as regards Muslims, orthodox Jews and the “closed” monastic orders of Christianity. In many cultures, it is fixed at birth, being determined – partly, largely or even entirely – by

the family and community into which a person is born, and by how they are perceived and treated by others. In such circumstances, having little or nothing to do with personal choice, it may be reinforced by markers and badges of religious identity, which can include, for example, the person's given first name and surname.

Arguably, it is not so much the "fixed" nature of religion as the effect of some religions on the identity of adherents that is particularly revealing. While all religions lay down guidelines for leading a good life compliant with doctrinal beliefs, some do so to a greater extent than others. Islam, for example, with over a billion followers making it the second largest religion in the world, is rigorously prescriptive and, at its most extreme, has a defining influence on the identity of Muslim women. Islam, meaning "submission to Allah";⁵ requires women to demonstrate their subjection to both Allah and to their husbands; in the absence of the latter, a woman must be seen to be under the guardianship of, or to belong to, a male member of their family. While there is some cultural flexibility in how female submission is interpreted, this can stretch to an expectation that they: be accompanied by their husband or male family member when outside their home; be fully covered with the abaya or otherwise hide their femininity when in public; and refrain from engaging in any activities that might indicate independence. Female identity is in effect publicly nullified and the personal identity of a woman is subsumed within that of her husband. This is neither stereotypical of all contemporary Islamic cultures nor of all female Muslims, but it is true of many, and pockets of such culture subsist throughout the social fabric of the developed common law nations.

Despite the resort to fundamentalism by some Muslims, and its persistence in some Christian churches, a prominent theme of this book is that religion and religious entities cannot hope to be wholly insulated from contemporary social trends and, in fact, do adapt to pressures from their cultural context, and that this causes religious discrimination to adjust accordingly.

Contingent

It may be that an identity is contingent, negotiated or has been manufactured for a purpose. The national identity of member states of the

⁵ Islam's primary sacred text is the *Qur'an*, which is regarded as dictated by Allah and thus not open to interpretation (*taqlid*). Of secondary importance are the *Sunnah* and the *Hadith*, which continue to be interpreted (*itihad*). At the core of Islam is the *Shahadah*, a declaration that "There is no god but God", to which was later added "and Muhammad is his messenger".

European Union, for example, is contingent upon the extent to which their governments and laws are subservient to the authority exercised from Brussels and by their shared commitment to furthering a composite European identity: the more compromised their sovereignty, the less autonomous their identity; while social class is contingent upon personal socio-economic variables, which may change over time. Sexual orientation can be contingent upon environmental factors: heterosexuality may give way to homosexuality in male prisons, and a contrary outcome may result from laws constraining gay relationships. Occupation, on the other hand, is a negotiated identity – allowing many to change the type or terms of employment during the course of their working lives – as are all identities that depend upon contractual relationships.

Manufactured identities – driven by internal or external pressures – result in an entity being moulded to represent some idealised construct. The State of Israel can be seen as the positive outcome of such a process, while for all but a few Muslims the putative ISIS caliphate is its negative counterpart: an unjustifiable interpretation of the Muslim identity. Some States, such as the former Yugoslavia or Northern Ireland, are manufactured to fit prevailing political circumstances, but the artificiality of the acquired identity is so apparent to citizens and neighbours that it remains inherently compromised. Following manufacture, any such entity then serves as a rallying point requiring others to conform with the image it presents. Most often, this process manifests itself in brand marketing. It can also, however, be seen as an empowering tool, for example in the context of feminism.

Many other identities are similarly constructed: “asylum seekers” identifies a class of migrants politically designated as particularly deserving assistance; “the poor”, “neglected child”, “disabled”, “the elderly” and many other such elastic labels are also politically or sociologically contrived identities, some of which overlap. To complicate matters further, the opportunities for multiple identities and for identity fraud provided by globalisation, as expedited by the Internet, have so diluted and attenuated this concept that queries as to whether an entity is authentically defined by its declared identity now often require corroborating evidence.

Changing

Changes in identity can result from entity choice made in response to benign or malign influences and from imposed intervention. In the former case, positive contextural developments may present such an irresistible attraction that an entity wholly conforms to fit with them and share

their benefits or, alternatively, is so repelled that it makes adjustments to signify disassociation and set it on a different path. In the latter, the impact of external random events or purposeful force, as in the case of Henry VIII in relation to the Catholic Church and its monasteries in England, can violate and override an entity's aspiration for self-determination, destroy its public identity and dictate real change. This has been demonstrated more recently by Islamic extremists in their destruction of communities perceived as heretical and the attempted eradication of monuments and artefacts that have stood for millennia as identifying icons for other cultures. Such acts of culture stripping are ruthlessly determined efforts to delete an identity by erasing its memory trail and removing all physical evidence of its history.

The latitude granted to those who “self-identify” – thereby dismissing any need for contextual corroboration or independent validation – has become a particularly complicating factor in modern life with regard to matters such as sexual orientation, beliefs and political allegiance. The accompanying aura of transience creates uncertainty in the relationships between those affected and others. Mostly, however, an identity simply develops in a contiguous fashion: remaining true to itself but shedding and acquiring peripheral characteristics as circumstances dictate.

The threat of imminent danger may trigger the forming of an identity: many amorphous, dispersed or mutually antagonistic entities have found themselves welded into a new aggregated identity in response to aggressive threats; while actual violence or the extinguishing of resources can, of course, strip away or destroy identities, as in circumstances of extreme poverty or of incarceration in concentration camps, and in the political dismemberment of Yugoslavia. More prosaically, the passage of time, large-scale migration and the impact of globalisation can do much to erode national identity and have led, perhaps, to Europe becoming what Modood and Werbner describe as “a novel experiment in multiple, tiered and mediated multiculturalism, a supernational community of cultures, subcultures and transcultures inserted differentially into radically different political and cultural traditions”.⁶

Personal Identity

In the developed common law jurisdictions presently being considered, personal identity is largely something that is chosen and purposefully

⁶ Modood, T. and Werbner, P. (eds.), *The Politics of Multiculturalism in the New Europe*, London, Zed Books, 1997, p. vii.