

# 1

## What is 'law and religion'?

### Introduction

In twenty-first century Britain the interaction between law and religion is rarely far from the headlines. On 3 September 2002, Shabina Begum, a fourteen-year-old schoolgirl was prevented from wearing her *jilbab* at school. On 8 January 2005, *Jerry Springer: The Opera* was broadcast on BBC2 amid mass protests outside the BBC Television Centre. On 7 February 2008, the Archbishop of Canterbury, Rowan Williams, delivered a lecture on the interaction between English and Islamic law at the Royal Courts of Justice. Each of these events prompted a passionate and wide-ranging debate about the extent to which the law should accommodate religious difference. Moreover, these three events were by no means isolated incidents.

The first decade of the century has witnessed numerous political, social and legal developments concerning religious matters. At the political and social levels, the short- and long-term implications of multiculturalism, religious resurgence and extremism have dominated global and domestic news agendas and public life. The shadow of 9/11 has been cast not only upon the ramifications of the so-called War on Terror, but also upon national debates concerning the extent to which religious difference should be accommodated. These socio-political developments have, of course, impacted upon the law. Debates concerning the wearing of religious symbols and dress in schools and at work, the relationship between religious liberty and free speech and the status of Islamic law and courts are just some of the issues which are symptomatic of an increasingly urgent interest in questions concerning the extent to which State law should accommodate religious difference.

The State legal framework concerning the regulation of religion has changed dramatically over the last decade. Recent years have witnessed a vast number of important legislative developments, most notably in relation to human rights and discrimination law. The Human Rights Act 1998 incorporated the European Convention on Human Rights (ECHR) into domestic law, including the Article 9 right to freedom of religion. Discrimination legislation extended the law to prohibit discrimination on grounds of religion or belief.<sup>1</sup> Moreover, a number of other laws have been enacted

<sup>1</sup> Employment Equality (Religion or Belief) Regulations 2003; Equality Act 2006 Part Two. The law is now to be found in the Equality Act 2010.

which affect religion. The most notable changes have included the Anti-Terrorism, Crime and Security Act 2001, the Divorce (Religious Marriages) Act 2002, the Civil Partnership Act 2004, the Racial and Religious Hatred Act 2006, the Charities Act 2006, the Criminal Justice and Immigration Act 2008 and numerous education and immigration statutes. There has also been an unprecedented number of high-profile cases affecting religious freedom.<sup>2</sup> Put simply, there are more laws concerning religion than ever before.

This rise in legislation, litigation and public concern provides the inspiration for this book. The chapters that follow explore the extent to which English law accommodates religious difference in the twenty-first century. They provide a detailed account of the current law, exploring the effect and significance of the recent legal changes. The chapters address three sets of questions:

1. What has been the effect of the new laws? Have they actually furthered the protection afforded to religious individuals and groups?
2. What has been the significance of the new laws? How do they interact with older laws concerning religion?
3. What affect has this had upon the study of law and religion? To what extent can it now be said that law and religion exists as an academic sub-discipline akin to family law or sports law?<sup>3</sup>

This chapter addresses a preliminary question. It asks how ‘law and religion’ may be defined.

### The growth of law and religion

The significant legal changes made in recent years have been responsible in part for the increase in the academic study of law and religion in the United Kingdom. In contrast to many other Western jurisdictions, most notably the United States and continental Europe, the study of law and religion in the United Kingdom is paradoxically a young sub-discipline which focuses on an interaction which has a long history.

It has only been in the last twenty years that the United Kingdom has witnessed a considerable growth in law and religion literature. Although

<sup>2</sup> See the Law and Religion Scholars Network Case Database at: [www.law.cf.ac.uk/clr/networks/lrsncd.html](http://www.law.cf.ac.uk/clr/networks/lrsncd.html).  
<sup>3</sup> It is possible to conceive of law and religion as a ‘subject’, ‘theme’, ‘area’ or ‘branch of law’. For current purposes, law and religion will be regarded as a sub-discipline of law, like criminal law, family law and so on. This conception of law and religion as a sub-discipline follows A. Bradney, ‘Some Sceptical Thoughts about the Academic Analysis of Law and Religion in the United Kingdom’ in N. Doe and R. Sandberg (eds.), *Law and Religion: New Horizons* (Leuven: Peeters, 2010), p. 299 and, more generally, A. Bradney, ‘The Rise and Rise of Legal Education’ (1997) 4 *Web Journal of Current Legal Issues*, <http://webjcli.ncl.ac.uk/1997/issue4/bradney4.html>.

a number of key legal works were produced much earlier,<sup>4</sup> most of these were concerned exclusively with the law of the Church of England or the Church of Scotland<sup>5</sup> and were often practical guides aimed at the 'black letter' practitioner rather than academic monographs. Law and religion could not be said to exist as a separate academic discipline.<sup>6</sup> There were no specialist journals, no research clusters and very few, if any, academics who exclusively specialised in the area.<sup>7</sup>

The academic study of law and religion in the United Kingdom blossomed in the last decades of the twentieth century. In 1987 the Ecclesiastical Law Society was formed, providing a journal<sup>8</sup> and a forum<sup>9</sup> for issues of law and religion to be discussed, with emphasis placed upon both academic rigour and practical application. Although the society's prime focus is upon the law of the Church of England,<sup>10</sup> its scope has widened as time has passed. Its journal now regularly includes pieces on state law on religion, comparative religious law and the regulation of religion overseas.<sup>11</sup> In 1991, the Ecclesiastical Law Society supported the establishment of a Masters Degree programme in Canon Law at Cardiff University. The LLM, the first of its type in the United Kingdom since the Reformation,<sup>12</sup> provided the opportunity for the postgraduate study in the canon law of the Anglican churches of the United Kingdom, particularly that of the Church of England, as well as the study of the law of the Roman Catholic Church and State law affecting religion. The LLM led to the development of the Centre for

<sup>4</sup> See, e.g. W. Dale, *The Law of the Parish Church* (London: Butterworths, 1932); G. Moore, *Introduction to English Canon Law* (Oxford: Clarendon Press, 1967); J. Pitchford, *An ABC for the PCC* (London: Wyche, 1980); and G. Moore, T. Briden and K. MacMorran, *Handbook for Churchwardens and Parochial Church Councillors* (London: Mowbray, 1989).

<sup>5</sup> See, e.g. A. Taylor Innes, *The Law of Creeds in Scotland Laws* (Edinburgh: Wm Blackwood, 1867); W. Mair, *Digest of Church Laws* (Edinburgh: Wm Blackwood, 1887); J. T. Cox, *Practice and Procedure in the Church of Scotland* (Edinburgh: Wm Blackwood, 1934); and F. C. Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen: Aberdeen University Press, 1980).

<sup>6</sup> A. Pearce, 'England's Law of Religion – The History of a Discipline' in N. Doe and R. Sandberg (eds.), *Law and Religion: New Horizons* (Leuven: Peeters, 2010), p. 13.

<sup>7</sup> See K. Counsell, 'The Teaching of Canon Law in England and Wales: 1400–1996' (University of Wales, Cardiff: LLM in Canon Law Dissertation, 1997).

<sup>8</sup> The *Ecclesiastical Law Journal*, published now by Cambridge University Press.

<sup>9</sup> The Society holds a bi-annual conference and a series of lectures. See [www.eclawsoc.org.uk/](http://www.eclawsoc.org.uk/).

<sup>10</sup> According to its website, the society was formed 'to promote the study of ecclesiastical and canon law particularly in the Church of England and those churches in communion with it'. The Archbishop of Canterbury and York serve as Patrons.

<sup>11</sup> This is reflected in the composition of the Journal's Editorial Advisory Board, which includes respected practitioners and academics from across the globe.

<sup>12</sup> Some canon law was taught before 1991. From the late 1960s to 1981 Garth Moore offered a half paper on the canon law of the Church of England as part of the law degree at Cambridge. At Oxford, seminars in canon law were conducted by Eric Kemp in the 1950s. See M. Kotiranta, 'The Teaching and Study of Church-State Relations in the Nordic Countries, in the United Kingdom and in Ireland' in J. Valle and A. Hollerbach (eds.), *The Teaching of Church-State Relations in European Universities* (Leuven: Peeters, 2005), pp. 105, 153.

Law and Religion at Cardiff University, the first such research cluster at a university in the United Kingdom,<sup>13</sup> numerous publications,<sup>14</sup> and national and international conferences.<sup>15</sup> Moreover, in 2000 Cardiff launched the undergraduate LLB module Comparative Law of Religion, a course which largely examines the interaction between State law and religion.

At the same time, a number of law academics and practitioners from outside Cardiff began writing in this field and, as Anthony Bradney has pointed out, ‘in some cases, this writing constitutes not just an occasional interest but is, rather, central to their research careers’.<sup>16</sup>

Recent years have seen several important publications<sup>17</sup> and the setting up of research clusters and research centres at Bristol and Oxford Brookes. Moreover, numerous law and religion courses have been set up in law schools at both undergraduate and postgraduate levels. In 2008 the Law and Religion Scholars Network (LARSN) was launched. This initiative, led by the Centre for Law and Religion at Cardiff, was designed to bring together for the first time academics from across the United Kingdom interested in all dimensions of the study of law and religion. LARSN organises an annual conference on law and religion and at the time of writing has over 160 members, most of whom are based at UK law schools. Law and religion is fast becoming an established legal sub-discipline in the United Kingdom. As Edge commented upon the first meeting of LARSN:

There have long been members of British law schools who have contributed to this field – although sometimes not in frank terms. But there are more of us than ever before and the time is ripe to develop a community of scholars.<sup>18</sup>

<sup>13</sup> See N. Doe, ‘The First Ten Years of the Centre for Law and Religion, Cardiff University’ (2008) 10(2) *Ecclesiastical Law Journal* 222.  
<sup>14</sup> Most notably, N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996); N. Doe, *Canon Law in the Anglican Communion: A Worldwide Perspective* (Oxford: Oxford University Press, 1998); and M. Hill, *Ecclesiastical Law*, 3rd edn, (Oxford: Oxford University Press, 2007).  
<sup>15</sup> The centre co-founded the Colloquium of Anglican and Roman Catholic Canon Lawyers and contributes to the European Consortium for Church and State Research. In 2007 the centre founded the Interfaith Legal Advisers Network (ILAN), designed to bring together for the first time advisers to a wide range of religious groups to share their experiences and address contemporary themes at the interface between religious law and State law.  
<sup>16</sup> A. Bradney, ‘Politics and Sociology: New Research Agenda for the Study of Law and Religion’ in R. O’Dair and A. Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001). p. 66.  
<sup>17</sup> Monographs include: J. A. Robillard, *Religion and the Law* (Manchester: Manchester University Press, 1984); A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993); A. Bradney, *Law and Faith in a Sceptical Age* (Oxford: Routledge Cavendish, 2009); P. W. Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law, 2002); P. W. Edge, *Religion and Law* (Aldershot: Ashgate, 2006); C. Hamilton, *Family, Law and Religion* (London: Sweet and Maxwell, 1995); R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005); N. Addison, *Religious Discrimination and Hatred Law* (Oxford: Routledge, 2006); L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008); and J. Rivers, *The Law of Organized Religions* (Oxford: Oxford University Press, 2010).  
<sup>18</sup> P. W. Edge, ‘Law and Religion Scholars Network’ (2008) 10(3) *Ecclesiastical Law Journal* 360, 361.

Defining law and religion

The term 'law and religion' has become the term most frequently used to describe this community of scholars in the United Kingdom. The term has been utilised in the titles of numerous edited collections,<sup>19</sup> in the names of research centres and groupings<sup>20</sup> and, perhaps most importantly, in the name of the association which scholars have set up, the Law and Religion Scholars Network. However, little attention has been paid to the definition and scope of 'law and religion'.<sup>21</sup> Most books which use the two words in their title do not provide a definition of their subject-matter, but rather implicitly accept an underlying theme. Most embrace what may be described as the 'relationship thesis': to study law and religion is to study the relationship between these two social phenomena.<sup>22</sup> Other works, typically those examining religion in the context of international human rights laws,<sup>23</sup> state that their theme is 'religious freedom'.<sup>24</sup> However, such statements reveal very little about the subject-matter and purpose of law and religion as a legal sub-discipline.

The external and internal aspects of law and religion

Some academics, however, have attempted to define the sub-discipline by means of content. Doe, for instance, has defined 'law of religion' as 'the study of the laws of States on religion and the laws or other regulatory instruments of religious organisations'.<sup>25</sup> The sociologists of religion

<sup>19</sup> E.g. R. O'Dair and A. Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001); P. W. Edge and G. Harvey (eds.), *Law and Religion in Contemporary Society: Communities, Individualism and the State* (Aldershot: Ashgate, 2000); R. J. Ahdar (ed.), *Law and Religion* (Aldershot: Ashgate, 2000); P. Cane, C. Evans and Z. Robinson (eds.), *Law and Religion in Historical and Theoretical Context* (Cambridge: Cambridge University Press, 2008); R. Mehdi et al. (eds.), *Religion and Law in Multicultural Societies* (Denmark: DJOF Publishing, 2008); and N. Doe and R. Sandberg (eds.), *Law and Religion: New Horizons* (Leuven: Peeters, 2010).  
<sup>20</sup> Such as the Centre for Law and Religion at Cardiff, the Centre for the Study of Law and Religion at Bristol and the Applied Study of Law and Religion Group at Oxford Brookes.  
<sup>21</sup> The main exceptions are A. Bradney, 'Politics and Sociology: New Research Agenda for the Study of Law and Religion' in R. O'Dair and A. Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001), p. 65 and the essays published in N. Doe and R. Sandberg (eds.), *Law and Religion: New Horizons* (Leuven: Peeters, 2010).  
<sup>22</sup> See, e.g. A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), pp. 3, 8; P. W. Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law, 2002), p. 3.  
<sup>23</sup> Most notably C. Evans, *Freedom of Religion and the European Convention on Human Rights* (Oxford: Oxford University Press, 2001); M. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997); and P. M. Taylor, *Freedom of Religion – UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005).  
<sup>24</sup> See also, e.g. C. Hamilton, *Family, Law and Religion* (London: Sweet Maxwell, 1995) vii; and R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005).  
<sup>25</sup> N. Doe, 'A Sociology of Law on Religion – Towards a New Discipline: Legal Responses to Religious Pluralism in Europe' (2004) 152 *Law and Justice* 68. This definition was adopted by M. Hill and R. Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007].

Beckford and Richardson have similarly noted that religion ‘is an object of regulation by internal and external agencies’.<sup>26</sup> They distinguish between ‘two sides’ of the regulation of religion: first, how ‘religion is subject to control by external agencies’; and secondly ‘the capacity of religious ideas and organisations to regulate thought and action’. They stress that this second side not only includes the role of religion as an agency of socialisation, but also what they refer to as the “internal” self regulation of religions’, which may be understood as including the laws or other regulatory instruments of religious groups.

From these definitions it may be argued that the study of law and religion includes the study of two complementary and overlapping elements.<sup>27</sup> The first of these are the ‘external’ temporal laws affecting religious individuals and groups. This consists of laws made by the state, international bodies<sup>28</sup> and sub-State institutions.<sup>29</sup> The second of these are the ‘internal’ spiritual laws or regulations made by religious groups themselves which affect the members of those groups and how those groups interact with the secular legal regime. For convenience, these external laws affecting religion may be termed ‘religion law’, whilst the internal laws made by religious groups may be termed ‘religious law’. Law and religion may thus be understood as including both the study of religion law and religious law.

However, a note of caution must be sounded before developing this argument further. This conceptualisation does not mean that the study of law and religion is *only* the study of religion law and religious law. Rather, it means that the study of law and religion is *at least* the study of religion law and religious law. Law and religion also includes the study of the relationship between law and religion. This may be underlined by reference to the work of the late American writer Harold Berman, whose writings on the relationship between law and religion have been hailed as ‘a *sine qua non* to contemporary discourse on the subject’.<sup>30</sup> Berman’s *The Interaction of Law and Religion*, based on his 1971 Lowell Lectures on Theology, includes chapters on the religious dimensions of law, the

*Public Law 488*: law and religion is ‘both the study of state law on religions and of the internal laws or other regulatory instruments of religious organisations’.

<sup>26</sup> J. A. Beckford and J. T. Richardson, ‘Religion and Regulation’ in J. A. Beckford and N. J. Demerath (eds.), *The Sage Handbook of the Sociology of Religion* (London: Sage, 2007), p. 396.

<sup>27</sup> The following develops arguments first made in R. Sandberg, ‘Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach’ (2008) 1(3) *Journal of Religion in Europe* 329.

<sup>28</sup> Examples can be found not only in global and regional human rights guarantees, but also in the law of the European Union: on which see N. Doe, ‘Towards a Common Law on Religion in the European Union’ (2009) *Religion, State and Society* 147.

<sup>29</sup> Examples include laws affecting religion made by devolved bodies, on which see J. Oliva and D. Lambert, ‘Regional Ecclesiastical Law: Religion and Devolution in Spain and Wales’ in N. Doe and R. Sandberg (eds.), *Law and Religion: New Horizons* (Leuven: Peeters, 2010), p. 279.

<sup>30</sup> R. J. Ahdar, ‘The Inevitability of Law and Religion: An Introduction’ in R. J. Ahdar (ed.), *Law and Religion* (Aldershot, Ashgate, 2000), p. 2.

influence of Christianity on the development of Western law and law as a dimension of religion.<sup>31</sup> All of these topics may also be seen as part of law and religion. Similarly, the American academic John Witte Jr has elucidated how law and religion exist as 'two great interlocking systems of ideas and institutions, values and beliefs'<sup>32</sup> and has explained how law and religion can serve as a 'binocular' in order 'to view afresh many familiar ideas and institutions that have been studied principally through the "monocular of law" or the "monocular of religion" alone'.<sup>33</sup> The study of law and religion thus includes what Berman referred to as the study of 'law and religion in the broadest sense'.<sup>34</sup> In studying law and religion, it is important not to be limited by the same preoccupations of some of Berman's listeners who were apparently 'concerned that more emphasis was not placed on the conflicts between law and religion'.<sup>35</sup> The conceptualisation of law and religion as including both the study of religion law and religious law is not intended to be confining. Rather, as will be shown below, the conceptualisation is designed to be broadening, suggesting that law and religion is *at least* the study of religion law and religious law.

The inadequacy of other terms

Before further explaining the terms 'religion law' and 'religious law' and how the two necessarily overlap, it is important to explain why these terms are preferable to other labels, such as ecclesiastical law, canon law and law on religion, which are often used to describe all or part of the study of law and religion.

The most popular alternative label is 'ecclesiastical law'. This is particularly true on the Continent: in France, the sub-discipline is known as *droit ecclésiastique*; in Italy, *diritto ecclesiastico*; and in Spain, *derecho eclesiástico*.<sup>36</sup> However, as Doe has explained, the inconsistent use of this expression and the lack of any agreed definitional criteria have rendered its use 'extremely problematic'.<sup>37</sup> The term has a clear Christian connotation. Moreover, its usefulness is undermined by various different and contradictory meanings

<sup>31</sup> H. J. Berman, *The Interaction of Law and Religion* (London: Bloomsbury Press, 1974), p. 11.

<sup>32</sup> J. Witte Jr, *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Michigan: William B., Eerdmans Publishing Company, 2006), p. 461.

<sup>33</sup> *Ibid.*, 5. See also J. Witte Jr, 'Introduction' in J. Witte Jr and F. S. Alexander (eds.), *Christianity and Law* (Cambridge: Cambridge University Press, 2008), p. 1.

<sup>34</sup> H. J. Berman, *The Interaction of Law and Religion* (London: Bloomsbury Press, 1974), p. 11.

<sup>35</sup> *Ibid.*

<sup>36</sup> There are some exceptions: in Germany the sub-discipline is called *Staatkirchenrecht*. See B. Basdevant-Gaudemet, 'Histoire du Droit ecclésiastique en Europe' in J. Valle and A. Hollerbach (eds.), *The Teaching of Church-State Relations in European Universities* (Leuven: Peeters, 2005), pp. 1, 19.

<sup>37</sup> N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), pp. 12–15.



that it has been understood to have. ‘Ecclesiastical law’ has been used as a synonym for religious law. The term has been used to describe all of the law created for the Church by God and by the Church: for example, Georg May has contended that the term ‘ecclesiastical law’ describes religious law: it is ‘entirety of the norms of the law laid down by God and by the Church’, but does not include laws regulating Church affairs that are made by the State.<sup>38</sup> In contrast, in the continental literature,<sup>39</sup> the term ‘ecclesiastical law’ is used as a synonym for religion law. It has been used to refer exclusively to law created by the State for the Church. However, even in this sense ‘ecclesiastical law’ does not seem to include law created by the State that *affects* the Church rather than only laws created for the Church and it is uncertain whether the reference to ‘the Church’ includes all Christian denominations, other faiths and individual forms of religiosity.<sup>40</sup>

Furthermore, the term ‘ecclesiastical law’ has taken on a technical meaning in relation to the Church of England, being defined as ‘the law of the Church of England to the exclusion of all other law applicable to other churches’.<sup>41</sup> This definition has been used by both the legislature<sup>42</sup> and the judiciary.<sup>43</sup> The term is used to label a learned society,<sup>44</sup> a leading journal<sup>45</sup> and a major text.<sup>46</sup> Hill notes that ‘the term ecclesiastical law is used to denote the law of the Church of England, howsoever created’.<sup>47</sup> This includes both religion law and religious law. This notion that the Church of England is regulated by both internal and external laws is articulated by Huizing, who distinguishes between the ‘internal public ecclesiastical law or the basic juridical relations within the Church’ and the ‘external public ecclesiastical law or the juridical relations between Church and State’.<sup>48</sup> The term ‘ecclesiastical law’ cannot therefore be seen as a synonym for law and religion in England since it covers only the law of the Church of England.

Nevertheless, the recognition that the ecclesiastical law of the Church of England includes internal and external laws may be usefully applied to

<sup>38</sup> G. May, ‘Ecclesiastical law’ in K. Rahner, *Encyclopaedia of Theology* (Edinburgh: T & T Clark, 1981), p. 395, quoted by N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), p. 14.  
<sup>39</sup> See, for instance, the essays in J. Valle and A. Hollerbach (eds.), *The Teaching of Church-State Relations in European Universities* (Leuven: Peeters, 2005).  
<sup>40</sup> This is why the phrase ‘Church-State relations’ is also problematic. Moreover, that term often gives the erroneous impression that religion is only affected by constitutional laws.  
<sup>41</sup> N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), p. 14.  
<sup>42</sup> See, e.g. the Welsh Church Act 1914. See Chapter 4.  
<sup>43</sup> See, e.g. the *dicta* of Sedley LJ in the Court of Appeal decision in *Aston Cantlow v. Wallbank* [2001] EWCA Civ 713: ‘Ecclesiastical law is a portmanteau term which embraces not only the canon law but [also] both secular legislation and common law relating to the church’ (para. 8).  
<sup>44</sup> The Ecclesiastical Law Society, which is discussed above. <sup>45</sup> *The Ecclesiastical Law Journal*.  
<sup>46</sup> M. Hill, *Ecclesiastical Law*, 3rd edn (Oxford: Oxford University Press, 2007).  
<sup>47</sup> *Ibid.*, para. 1.02.  
<sup>48</sup> P. Huizing, ‘Church and State in Public Ecclesiastical Law’ (1970) 86 *Concilium* 126, quoted by N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), p. 14.



other religious communities and individuals. If ecclesiastical law (in an English sense) is defined as the study of both the external and internal laws applicable to the Church of England, then this supports the argument that law and religion may be defined as the study of both external and internal laws applicable to all religious groups and individuals. This supports the definitions of religion law and religious law given above.

Other labels often used to describe all or part of law and religion are also problematic. The term 'canon law' is not an adequate substitute for 'religious law' because of its clear Christian association.<sup>49</sup> Moreover, even within Christianity, the use of the term is problematic.<sup>50</sup> For instance, while some commentators on the law of the Church of England interpret the term narrowly just to refer to one source of law (the canons of the Church of England),<sup>51</sup> others use the term widely as a synonym for ecclesiastical law.<sup>52</sup> The term 'law on religion' is also insufficient since it may exclude the study of the general relationship between law and religion or the study of laws of general applicability that happen to affect religious individuals or groups. For example, while the provisions in the Equality Act 2010 which prohibit discrimination on grounds of religion are clearly part of a 'law on religion', it is difficult to see how the provisions prohibiting discrimination on grounds of sexual orientation fall into this category, apart from possibly the specific exceptions to religious groups provided in the legislation.<sup>53</sup> However, the law prohibiting discrimination on grounds of sexual orientation clearly affects religious groups. So those legal provisions (as well as, for example, the Civil Partnership Act 2004) may be understood quite properly to be part of the study of religion law.<sup>54</sup>

The term 'law and religion' is also problematic. In the context of the legal regulation of sport, a number of academic writers have argued that the term 'sports law' is preferable to 'sport and the law' on the basis that while the term 'sport and the law' simply describes the interactions between sport and national law, the term 'sports law' refers to an identified legal subject:<sup>55</sup>

'Sports law' attempts to provide an underlying explanation of why sports as a group of related activities are, and should continue to be, treated differently by

<sup>49</sup> See further Chapter 9.

<sup>50</sup> See N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), pp. 12–13.

<sup>51</sup> M. Hill, *Ecclesiastical Law*, 3rd edn (Oxford: Oxford University Press, 2007), p. 2.

<sup>52</sup> T. Briden and B. Hanson, *Moore's Introduction to English Canon Law*, 3rd edn (London: Mowbrays, 1992), p. 4.

<sup>53</sup> See Chapter 6.

<sup>54</sup> These topics are regularly examined by law and religion writers. See, e.g. M. Hill, 'Church, State and Civil Partners: Establishment and Social *Mores* in Tension' in N. Doe and R. Sandberg (eds.), *Law and Religion: New Horizons* (Leuven: Peeters, 2010), p. 57; and R. Sandberg, 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal* (forthcoming).

<sup>55</sup> See M. James, *Sports Law* (London: Palgrave Macmillan, 2010), p. 19; and S. Gardiner *et al.*, *Sports Law*, 3rd edn (London: Cavendish, 2006), pp. 88–91.

the law; it is the development of an underlying theory that draws together cases using disparate legal principles into a single coherent subject.<sup>56</sup>

This distinction may also be applied to the regulation of religion. One of the key questions which this book seeks to answer is whether laws affecting religion can now be understood as forming a single coherent sub-discipline: in short, whether it is now possible to speak of something particular called 'religion law' as well as a general interaction called 'law and religion'.

It follows that law and religion – the general study of how law and religion interact – may be best understood as including both the study of two complementary and overlapping elements. The first is religion law, the 'external' temporal, spiritual laws made by the State (and international bodies and sub-State institutions) which affect religious individuals and groups. The second is religious law, the 'internal' laws or other regulatory instruments made by religious groups themselves which affect not only the members of those groups, but also how those groups interact with the State. The remainder of this chapter will develop these categories and show why the study of law and religion necessarily involves both the study of religion law and religious law.

### Religion law

Religion law can be seen as an area of law akin to education law, sports law or media law.<sup>57</sup> For current purposes it may be defined by analogy with family law.<sup>58</sup> As Douglas notes, there is a 'problem of boundary-setting' in relation to family law since the branch of law does not correspond with a certain legal action, like the law of trusts and the law of tort. Instead, family law 'relates in some way to an entity – the family – which has meaning . . . outside the legal domain'.<sup>59</sup> For Douglas, 'the essence of family law is that part of the law which is concerned with the recognition and regulation of certain family relationships and the implications of such recognition'.<sup>60</sup> The same is true of religion law: 'religion' certainly has meaning outside the legal

<sup>56</sup> M. James, *Sports Law* (London: Palgrave Macmillan, 2010), p. 19. See further Chapter 10.

<sup>57</sup> The only use of this term 'religion law' at the moment is the title for Neil Addison's webpage [www.religionlaw.co.uk](http://www.religionlaw.co.uk), the contents of which coincide with the concept of external law affecting religion identified above. An *Encyclopaedia of Religion Law* – edited by Rik Torfs – has been published as part of the International *Encyclopaedia of Laws* series. Its focus is also national and international law affecting religion. See, e.g. the monograph on the United Kingdom: M. Hill, R. Sandberg and N. Doe, *Religion Law: United Kingdom* (The Netherlands: Kluwer Law International, 2010).

<sup>58</sup> For a different approach to the definition of family law, which focuses upon the functions that the law seeks to fulfil, see M. Freeman, *Understanding Family Law* (London: Sweet & Maxwell, 2007), pp. 5–9.

<sup>59</sup> G. Douglas, *An Introduction to Family Law*, 2nd edn (Oxford: Clarendon Press, 2004), p. 3.

<sup>60</sup> She points out that 'non-recognition is equally important to the discussion': *ibid.*