General Introduction

A great many things keep happening, some of them good, some of them bad.¹

How should English law relate to British Islam? That is the question this book addresses. Yet it is not another survey of British Muslims, or another handbook on law and religion, or another rehearsal of dull material on done-to-death areas such as Muslim marriages and sharia councils. Those are legions. The point of this study is to do something different and more ambitious with a neglected philosophy and understudied institutions. Its aspirations are therefore threefold. The first is to act as a primer on the vocabulary of human groups, recovering for English jurisprudence a lost language ideally suited to deciphering and differentiating among group entities. The second is to use this idiom to pose an ‘outside context problem’ (OCP) by asking questions hitherto inconceivable because the right concepts and the means to express them have been lacking.² Whenever Islam or Muslims come up for discussion, one tendency is to pick a ‘side’, start ‘motive mongering’, and come away thoroughly dissatisfied and disillusioned.³ Another is to debate the broadest questions of civilizational conflict and compatibility, a valid and stimulating exercise but one which leaves unanswered many of the less glamorous questions upon which everyday coexistence and cooperation depend.⁴ The worst response of all is to go looking for plots behind every real or imagined difficulty.⁵ Against this, the OCP strategy promises to redirect scholarship away from tired conversations over Islam and free speech, religious dress, anti-terror laws and opinion polls towards less compacted fields

² This notion was first articulated by Iain M. Banks in Excession (London: Orbit, 1996).
where breakthroughs are still possible. Finally, equipped with the proper words and questions, the book will attempt to answer its central research question by solving a set of the most pressing institutional challenges generated by religious diversity in the UK. Although British Islam is used as both a case study and a test case, the ultimate aim is to devise a principled blueprint for the better regulation of organised religion in general. These are the tasks of this book and pursuing them requires a process. Accordingly, the remainder of this introduction is devoted to making the author’s definitions, techniques and working assumptions explicit, followed by a chapter summary setting out the overarching arguments and signposting themes while serving as a navigational aid to the rest of the book.

It is self-evident that if the law is to use a term then lawyers must first work out what it means for the purposes at hand. A viable relationship between English law and religion is therefore dependent upon the former providing a clear definition of the latter. Done well, this delineates what is encouraged, what is tolerated, what is forbidden and all under what conditions; done poorly, compliance becomes impracticable and application haphazard. This is remarkably difficult to get right as the law must fashion a legal definition somewhere between the partisan approach of political actors and descriptive sociology. Before outlining how this is best achieved, it is worth considering why either a purely political or a purely sociological approach cannot form the basis of a workable legal one that can get things done.

0.1 Political Religion

Political definitions of religion are typically motivated by worldly, personal and often short-term considerations. These can include everything from a desire to sound inclusive and inoffensive through to conscious efforts to shock and provoke. As such, they are characterised by crass, politicised evaluations about religion in general or a particular religion: religion is a force for good/evil, X is a religion of peace and love, Y is a religion of violence and hate. Examples abound in the media, political activism and academia. To pick just one well-intentioned and commonly recurring instance, at the height of the war against Islamic State (IS or ISIS or ISIL), former US president Barack Obama declared with full confidence that ‘ISIL is not “Islamic”. No religion condones the killing of innocents.’ Similar sentiments have been expressed by other eminent politicians including John Kerry and Theresa May. Regardless of origin or intention, each statement of this kind is little more than ‘a reassuring assertion,

7 President Barack Obama, ‘Statement by the President on ISIL’ (The White House, 10 September 2014).
and one that almost everyone, including the vast majority of Muslims, would desperately like to believe – but wishful thinking, all the same.\textsuperscript{9} Indeed, the leaders of Muslim terrorist groups can often be better versed than their opponents, secular or religious, in the Islamic canon.\textsuperscript{10} As Michael Rubin further explains:

To argue that the Islamic State is not Islamic is about as productive as arguing that the world is flat. Islam, as with Christianity, Judaism and, indeed, any religion, exists on a spectrum of beliefs and religious interpretation. Those who lead and embrace the Islamic State are very much Muslim, albeit those who embrace a militant and often literal interpretation of Islam ... which no amount of defensiveness or politically correct dribble will negate.\textsuperscript{11}

The more general problem is as follows. Political definitions entail a normative manipulation of religion to exclude anything from the concept that undermines a given political project or point. Relying upon them for any scholarly purpose, to say nothing of designing legal policy around them, is by turns disingenuous and unconscionable. Again, there are two reasons for this. First, there is a constitutional imperative not to politicise the definition of religion. The secular state has no legitimacy or competency in theological matters, meaning that it cannot pronounce upon, intervene in or take sides during internal religious controversies (such as when a majority accuses a minority of not being true believers, etc.). This spares the good, the bad and the ugly alike, and may seem frustrating and cold, but it maintains the jurisdictional boundary upon which religious diversity and, ultimately, civil peace depend. Second, political definitions beget concept drift and mission creep. The clearest indication of this is that policy-makers have settled into a vain war with abstract nouns like ‘extremism’, ‘hate’, ‘Islamism’, ‘racism’ and ‘terror’. English law has been no more successful than NATO (the North Atlantic Treaty Organization) at wiping out these evils directly. This is unsurprising given the practical difficulties involved. For example, up to 80 per cent of everyday human expression would be considered outrageous if encountered out of context.\textsuperscript{12}

Moreover, as the late Python Terry Jones pointed out:

How do you wage war on an abstract noun? It’s rather like bombing ‘murder’ ... How will they know when they’ve won it? With most wars you can say you’ve won when the other side is either all dead or surrenders. But how is ‘terrorism’

\textsuperscript{9} Tom Holland, ‘How Do We Prevent Radicalisation?’ (Theos, 28 September 2014) and ‘The West Can Never Hope to Understand Islamic State’ (New Statesman, 21 January 2017).


going to surrender? [...] It’s very hard for abstract nouns to do anything at all of their own volition ... It’s difficult to find their hideouts, useless to try and [sic] cut off their supplies or intercept their paths of communication, and it’s downright impossible to try and [sic] make them give in. Abstract nouns simply aren’t like that. I’m afraid the bitter semantic truth is, you can’t win against these sorts of words.  

0.2 Sociological Religion

By contrast, the point of any sociological definition is to describe religion in as scientific a manner as possible. Ideally, this generates a formulation capable of encompassing, for the purpose of further study, all the potential facets of this complex social phenomenon. Heather Selma Gregg provides an example of good practice with her apolitical purposive definition: ‘religions are systems of beliefs organised around the concept of salvation or redeeming humanity and the earth from a fallen state, either in this world or the hereafter ... The path to salvation can require any number of actions, including ... acts of violence’. From this comes a comprehensive and practical definition of a religious group: ‘an organisation recognised as holy – relating to the divine or supernatural – consisting of beliefs, texts, leaders, community, resources, and group identity’. This in turn allows her to make general observations about organised religion, such as that while Christianity or Islam may be identifiable theological phenomena, in practice they do not each constitute an immutable ‘singular unit’; rather, they display ‘much diversity ... across time and space’. Framing religions in this way – in terms of their salvific objective as well as their human, material, intellectual, cultural and symbolic aspects – is useful for achieving a workable degree of objectivity and sidestepping theological debates about what is or is not truly Islamic, Christian, Judaic, etc. and whether religious law is compatible with English law and society. For practical purposes, this means that each religion can be taken as interpreted by self-declared contemporary believers, not as ‘politicians or ivory tower academics claim it to be’. It also avoids one of the worst hangovers from Marxism: the tendency, still prevalent in the humanities and social sciences, to think about collective issues in crude class terms (Muslims, brown people, the poor, etc.).

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13 Terry Jones, Terry Jones’s War on the War on Terror: Observations and Denunciations by a Founding Member of Monty Python (New York: Nation Books, 2005), pp. 1–2.
14 Gregg, Path to Salvation, p. 3.  
15 Ibid., 14–15.
18 Jasper Griffin, ‘The Social Function of Attic Tragedy’ (1998) 48(1) Classical Quarterly 39–61, 40: ‘A spectre, we might perhaps say, is haunting the academic literature of the West: the spectre of Marxism, which lingers on, after its death in the world of practical affairs, among the critics and the scholiasts.’
Yet, for two reasons, descriptive sociology cannot be transposed into law. First, there is no realistic possibility of any legal definition being able to capture and process the unending complexity of human religiosity; some sect or practice or dispute or exception will always defy the pretensions of a purely factual general rule. This is a recipe for paralysis, the mere fact of intricacy being used to defeat decisive action. Second, just because something can be properly described as religious does not entail legal consequence. Suicide murder and pederasty are just as capable of being institutionalised as religious as are almsgiving and peacemaking – there is always a value commitment to be made beyond that to the bare facts.

0.3 Legal Religion

The legal definition of religion must overcome the shortcomings of the sociological and political approaches. In the abstruse language of autopoietic theory, legal systems remain ‘normatively closed but cognitively open’. In plain English, this means that they must combine observation with evaluation. This requires engagement with the sociological reality of religion while attaching normative consequences to descriptive propositions about it so as to condition religion on the law’s own terms (with reference, for example, to key legalistic values including certainty, stability and fairness). Thus, the law sets a nuanced normative agenda by establishing formal criteria through which things must pass in order to earn the rewards of legal recognition. For example, Article 9(2) of the European Convention on Human Rights (ECHR) subjects the freedom to manifest (via organised religion or otherwise) thought, conscience and religion to ‘such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’. In this way, only those religions which clear the regulatory hurdles imposed by particular domestic legal systems will benefit from being recognised by, and included within, the legal definition of religion. This is all indicative of the law’s great potential to indirectly shape and subtly influence religion via the formal structuring of group phenomena and social movements. In English law, functionality triumphs over neatness: there is no single authoritative definition of religion. Still, across a range of legal contexts, there is an obvious need for some kind of working definition so the courts tend to take a pragmatic approach and ‘work by analogy from what they regard as “clearly religious”’. In the law of charities, for example, the common law has long recognised that ‘two of the essentials of religion are faith and worship; faith in a god and worship of that god’. This clearly encompasses monotheistic religions and has been supplemented by the acceptance of

21 Re South Place Ethical Society [1980] 1 WLR 1565 at 1572.
polytheistic and non-theistic religions. In human rights law, the standard point of reference is Article 9 of the ECHR which protects the right to freedom of thought, conscience, belief and religion as well as the freedom to manifest these. In discrimination law, the courts use section 10 of the Equality Act 2010, which holds that (1) religion means any religion and a reference to religion includes a reference to a lack of religion; and (2) belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief. The basic point here is that these are all very broad, partial and similar definitions that exist to ‘help the court by pointing out some key characteristics that a religion may have, but they do not provide a list of protected religions’. Problems remain. Contemporary English law – as much as the jurisprudence underpinning it – has tendencies to be blind to the social form of religious bodies … [in that] it is possible for a religion to have an organisational structure to which the law is completely blind. The structure still exists as a matter of social reality dependent for its continued viability on the beliefs and practices of individuals and groups, but without any validation or support from the law.

At first glance, this may seem overstated. After all, non-established religious organisations can choose from a smorgasbord of legal forms ranging from full incorporation through charitable trusts and unincorporated associations to loose networks of differently structured institutions. Generally speaking, the rules and structures of organised religions bind assenting members as well as the organisations themselves: they are perfectly entitled to ‘adopt rules for enforcing discipline within their body’ within the law, but must adhere to these internal regulations when seeking to enforce discipline or impose sanctions upon members. As such, religious organisations are largely self-regulated and enjoy legal recognition of the binding effects of their own systems of rules, excepting criminal jurisdiction of any sort. The underlying rationale behind the law of organised religions is to balance ‘the need to protect the autonomy of the religious groups against the need to ensure that those religious groups still operate within the law of the state’. Such is the legal apparatus from which religions are constituted in the modern state. The necessarily thin definitions of religion utilised by English law hold the centre against the competing demands of a highly politicised definition, on one hand, and a very capacious sociological definition, on the other. Consequently, any non-corporate

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22 Charities Act 2011, s.3(2)(a).
26 Sandberg, Law and Religion, pp. 72–3.
29 Sandberg, ibid., p. 77.
manifestations of Islam will be ignored and must adjust themselves to the preferred English forms. For the most part, this kind of transformation does not cause many difficulties and, for practical purposes at least, is to be affirmed.30 In any event, ‘analogical expansion from historically dominant forms seems inevitable’.31 Nevertheless, choosing not to see something does not negate its existence or significance, and, in certain cases, the law’s wilful blindness comes at great and unnecessary cost. Averting this requires a bigger picture than black-letter law alone can provide.

Law in context is a disposition rather than a doctrine or discipline. It requires no ideological commitments and eschews political partisanship. Activism masquerading as scholarship is considered a breach of ethical standards. It is not tied to any particular conception of what law is or should be. It draws omnivorously from empirical, theoretical, quantitative and qualitative studies from any relevant discipline to evidence claims and justify conclusions.32 It ranges further and plumbs deeper than purely doctrinal jurisprudence, socio-legal studies with its funding committee airs, or any of the ‘Law and X (society, religion, economics, literature, history, etc.)’ movements.33 It questions orthodoxy in ways that probe and provoke.34 There is no ignoring, downplaying or excusing any relevant factor in any social ill to spare anyone or any group any embarrassment. Uncomfortable findings – and there are many in this book – are to be acknowledged and explained rather than brushed or fumed over.35 This entails a general disregard for where one’s work is perceived to fall on the political spectrum and whether the discoveries might be useful to any given faction. Stylistically, it lends itself to plain speaking, mercilessness towards pretention, and black humour. It holds that mastery of detail, perspective and craftsmanship are prerequisites for innovation. This entails empathy, not sympathy, with differing standpoints held by those from other times, places and traditions. There is an appreciation that contexts can be ‘properly transcended and governed by more universal standards and broader ideals’ – the point is not to abandon principle but to ‘realize relevant ideals in the context at hand’.36 In all

things, there is an emphasis on realism and what will fly or fall in practice. All this makes it especially suited to the study of institutions in society and throughout history. Civil society groups feature prominently in law in context scholarship, which acknowledges their role as key to ‘resisting the debasement of culture, especially in journalism, education, and the arts’. It is, in short, an unconventional but humane approach to law. Still, any disposition this promiscuous risks obscuring the lawyerly precision that it was intended to enhance. Something more is required to maintain discipline and focus.

Juridification yields a ‘promising style of capturing, revealing, and ultimately taking a stand’ on seemingly intractable controversies. Put simply, it means translating amorphous, big-picture issues into a series of technical legal problems; cultural conflicts are rearticulated for ‘the specificity and constraint of technical form’. Law is thereby treated as a way of coding for human behaviour, and, like all programmes, it functions best when the inputs and expected outputs are eloquent. Out go the usual squabbles over identity, diversity and the character of Islam; in come solvable questions to do with property, regulatory powers and the structure of organisations. This technique can be further enhanced when combined with the Tacitean insights of nudge theory. Stilling bureaucracy and its attendant ‘bullshit jobs’ are now a cross-partisan concern, and this subdiscipline of behavioural economics shows that minor changes to the social environment can induce major behavioural shifts. Successful examples include the installation in road vehicles of irritating dashboard noises to encourage seatbelt usage and etching house names onto urinals to promote better aim. Such is its potential that the UK government even created a ‘nudge unit’, the Behavioural Insights Team, to

improve governance. Nudge theory is not about more regulation or deregulation but better regulation: the aim is to avoid a kludge – defined by the *Oxford English Dictionary* as ‘an ill-assorted collection of poorly matching parts forming a distressing whole’ – by designing intuitive laws requiring minimal interpretation and enforcement. In this, it dovetails with law in context: ‘the more integrated law is with other institutions, and with what people can accept as sensible, the easier it is to make the system work, and to deliver justice as well as law’. None of this is to say that the solutions will be easy, in any sense of that word. However, juridification infused with nudge theory allows the jurist to bypass the culture wars, make a ruthless diagnosis and fix the underlying problems with general rules.

Definitional clarity, law in context, juridification – these are the techniques that inform the structure, style and substance of this book. It has been written with scholars, practitioners, policy-makers and – perhaps ambitiously – an interested public in mind. The arguments advanced are these. Conventional Anglo-American jurisprudence has failed to develop an adequate vocabulary for group entities. This has made it difficult to articulate collective problems generated by the growth of Islam in the UK. It has also precluded a coherent vision for an attractive settlement between English law and religion. These will remain unresolved until such a lexicon is introduced to mainstream policymaking. The necessary concepts already exist and, once recovered from obscurity, will allow for accurate diagnoses and precise solutions. These need not rely upon sweeping generalisations about nebulous concepts like ethnicity, culture or religion; they depend instead upon refinements to regulations governing autonomous institutions. This is part demolition job requiring the eradication of dangerous informal entities and part reconstruction effort as beneficial ones are strengthened by appropriate reforms. Non-state groups must be taken seriously on their own terms as they are key to the future of British Islam, which is not a meaningful entity in and of itself. This being accomplished, a great deal of anxiety and friction will dissipate. Social harmony, much like personal happiness, is best pursued indirectly through incremental improvements to seemingly mundane things within our control. In some areas, a great deal has been achieved already; in others, there is a lot left to do; in all of them, however, a lot more can be achieved than the incessant bickering over culture war talking points would suggest.

The study is divided into two consecutive parts: theory and practice. Each half is introduced separately and both are self-contained. This will enable the policy readership to skip straight to the diagnosis and recommendations without having to grapple with too much philosophy. Thus, while the book will be more persuasive when read in its entirety, each chapter should be

comprehensible enough in its own right to benefit those interested specifically in the titular topic. Part I serves as a comparative analysis of three different theoretical models for the regulation of religious groups. Chapter 1 is on liberal individualism as enunciated by Ronald Dworkin; it highlights the ways in which this dominant model is largely uninterested in the nature and significance of non-state groups. Chapter 2 considers the multiculturalism of Bhikhu Parekh and Tariq Modood; it highlights their erroneous and undue reliance on class/cultural agency as well as their unsystematic approach to the relationship among group, individual and state. Chapter 3 concerns classical pluralism, the neglected philosophical legacy of Otto von Gierke, a jurist who remains obscure despite the rigour of his method and the richness of his thinking around groups, law and society. These thinkers have been selected because they are all totems of their respective traditions. The present author has endeavoured to read everything each has ever published so that restatements of their positions and criticisms of their arguments are accurate, representative and fair.

The standard format for the first two chapters is thus. The theory and its leading exponent(s) are introduced in historical context to convey a sense of the milieu and priorities at the time they were created. A concise philosophical exposition follows to give an accessible overview of their thought, leading into a discussion of their influence over English law. There is no general theoretical critique as this book is concerned chiefly with practical matters; the reader will doubtless be able to infer what the problematic tenets are from the attempts to implement them. Chapter 3 on classical pluralism is structured differently on account of the subject’s relative obscurity and because it is the regulatory model advanced by the author. It introduces Gierke himself, outlines his philosophy and typology of groups, discusses his reception into English jurisprudence and traces his legacy down to the present. Two things should stand out from Chapter 3: (1) that our lexicon of group entities is extremely primitive and in dire need of enrichment; and (2) that placing modern problems in historical context is a fructifying mode of legal scholarship, not least because it holds up a distant mirror on today and reassures us that our forebears had many of the same complaints and even some of the answers. It is by far the best antidote to moral panics and their obverse, the very academic tendency to believe that concerns over real problems are also moral panics. By the end of the theoretical part, the reader should be familiar with the dominant theory underpinning the English law of religion (liberal individualism), its most successful competitor (multiculturalism) and the most appealing alternative to both (classical pluralism). These establish the comparative and analytical framework for the remaining practical discussions.