The legal conception of "religion"

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CONCLUSION

This dissertation began five years ago with an observation: The highest court in Britain had held, as a matter of law, that religion and ethnicity were separate things. And not only separate, but incompatible. The court claimed that to the extent a religious community defined itself by descent rather than by affirmation of faith, it was invalid.[1]

What appeared to underlie much of the court's reasoning was an unstated assumption that membership in a religious group depends primarily, if not exclusively, on faith—adherence to particular theological propositions. That understanding of how membership of a religion must be understood, and by extension how religion as a whole must be understood, troubled me.

I looked first at the linguistic and ontological history of the word "religion," noting that it appears to have originally connoted actions or, collectively, a way of life. Only later, especially after the Reformation, did it come to mean the institutions and doctrines intended to facilitate those actions and ways of life.[2] Later still, the Enlightenment, with its systematization of an ever-expanding world, reified religion into its modern form, allowing us to speak of multiple "religions."[3]

Furthermore, the history of the idea revealed that the conception of religion-as-belief privileged Christianity. Most ancient peoples had a national cult; Christianity, a religious community connected by common belief rather than common ancestry was a novel form of religious collectivism.[4] Now it is taken as given—a sociological axiom. The U.K. Supreme Court's insistence that "real" religion concerns matters of belief assigned legal consequences to its reproduction of a Christian worldview.[5]

The British courts were not alone in their assumptions about the nature of religion. Somewhat surprisingly, the Supreme Court of Israel had also found faith to be critical in determining who qualified as a "Jew" under Israeli law. Here, though, while belief was immaterial to determining who qualified as a Jew for religious purposes, the Israeli court concluded that rather than a religious definition, it must accord a "secular" meaning to the term in the application of Israeli civil law.[6] But, as we have seen, the

[1] R (on the application of E) v. Governing Body of JFS & Others, [2009] UKSC 15 (U.K.).

[2] *See*, *e.g.*, GAVIN I. LANGMUIR, HISTORY, RELIGION, AND ANTISEMITISM 70 (1990).

[3] Michael L. Satlow, *Defining Judaism: Accounting for Religions in the Study of Religion*, 74 J. AM. ACAD. RELIGION 837, 841 (2006); JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 23-24 (1985).

[4] WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION 23, 26 (1963).

[5] DANIEL BOYARIN, BORDER LINES: THE PARTITION OF JUDAEO-CHRISTIANITY 8 (2004).

[6] HCJ 265/87 Beresford v. Minister of the Interior 43(4) PD 793 [1987] (Isr.), *translated in* Jewish Law Association Studies XI: Law, Judicial Policy, and Jewish Identity

history of the idea of religion reveals that there is little about it that is religiously neutral. The Israeli court's approach is understandable, however, in light of the young state's desire to avoid charges of theocracy and the unique role of religion in the creation of the Westphalian system itself.

Religion is a common legal term of art used in a large number of constitutions, statutes, regulations, and judicial pronouncements. If "religion" is not itself religiously neutral, how is neutrality to be maintained?

One possibility is to define it. But this poses tremendous problems. Religion, as a category, is difficult to define precisely because it is a generalization of Christianity that fits very little else with any degree of fullness or accuracy. This leaves essentialist definitions in a double-bind. The criteria employed will either be so restrictive that the definition remains biased, or so elastic as to be useless. Multifactor approaches perhaps fare marginally better, but still depend on comparisons to what is readily apparent as religion.

Both the Supreme Court of the United States and the European Court of Human Rights have avoided the task of defining religion with great care. Both prefer to adjudicate cases under more general provisions if it is possible to do so. This is perhaps the best course of action. Defining religion in a way that is both comprehensive and utilitarian is likely an impossible task, and even understanding religion in a reasonably inclusive way is still a challenge.

Much work, of course, remains to be done. In particular, a normative question arises about the extent to which law imbued with a Christian understanding of religion may be defensible. Most jurisdictions, even those with an officially-recognized religious establishment such as the U.K., purport to offer legal protection to adherents of all religions on an equal basis. So it should not be terribly surprising that the legal systems of Western states understand religion in a Western way, reflecting centuries of Christian influence. Laws and court rulings are not made in a vacuum, but by legislators and judges—people who, for the most part, share in the same common cultural background.

But it would be at least somewhat surprising for a legal system that claims to be neutral among religions to define religion in a way that advantages some over others, antithetically to its stated purpose. That is, unless the stated neutrality is *contingent* on a belief-based conception of religion, and to the extent that some religions go beyond belief, the state is not interested in offering protection. There may be something to this. The modern Westphalian state and the modern conception of religion grew up together, and in many respects remain intertwined.

in the State of Israel 27, 56-62 (Daniel B. Sinclair, ed., 2000); Ralph Slovenko, *Brother Daniel and Jewish Identity*, 9 ST. LOUIS U. L.J. 1, 15 (1964).

More likely, however, is simple ignorance on the part of legislators and judges that many non-Christian religions define themselves and their membership in ways that may have comparatively little to do with belief. Ensuring that the legal understanding of religion does not inadvertently exclude religious practices or commitments that may not seem necessarily religious under a narrower, belief-based approach would aid in giving effect to laws guaranteeing freedom of religion and in protecting non-Christian, often minority, religions. At the same time, a broader legal understanding of religion would likely have little detrimental impact on the majority.

Recognition of the difficulties inherent in some international instruments pertaining to religious freedom is just beginning. And while there is some good historical work that has been done on the importance of religion in the emergence of the Westphalian system, the extent of its continuing importance in how modern states understand religion more generally would add substantially to our understanding of how courts conceive of religion as an object of legal protection. For now, it is perhaps enough to say that courts understand religion as essentially a matter of belief; the primacy of belief, and the idea of religion more generally, reflects a Christian heritage; and this heritage presents great difficulties today in adjudicating matters of religious freedom. Courts should tread carefully, and with a substantial degree of self-awareness when dealing with this subject, and only broach the subject where it cannot be avoided.