THE ATTITUDE OF THE LAW TO RELIGION IN A SECULAR SOCIETY

by

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When I was asked to suggest a subject for this paper, I proposed the attitude of the law to religion in a secular society, because this is a subject which I have found of considerable interest during my 12 years on the bench and is not one which, so far as I know, has been the subject of much discussion. However, notwithstanding that this paper is given under the partial aegis of the Oxford Centre for Postgraduate *Hebrew* Studies, I should stress that the law whose attitude I shall be considering will be largely, if not entirely, the law of England and Wales.

I should first define what I mean by a secular society. Although the Church of England is still the established church in the sense that it is established by law as the public or state-recognised form of religion (although this is no longer the case of the Church in Wales), not to be a member of that church no longer carries with it any significant civil disability, save in the case of the Sovereign (who must be a communicant member of the Church of England) and her advisers in relation to appointments to office in that Church. Since the Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974, a Roman Catholic is eligible to be appointed Lord Chancellor, although there apparently remain doubts whether a Jew could be appointed to that office.[1] However, I do not consider these to be significant civil disabilities. So we live in a secular society in the sense that to subscribe, or not to subscribe, to the tenets of any particular faith does not result in any significant civil disability. Indeed, over a century ago the view that "Christianity is parcel of the laws of England" was disapproved by the Courts.[2] But we live in a secular society in a wider sense. Few would deny that to-day organised religion plays a less significant part in the life of the nation than it did one hundred or even fifty years ago. In making that statement I imply no qualitative judgment on that

fact, nor do I suggest that a person who does not subscribe to a recognised religion may not properly be described as religious – or the converse, that a person who maintains membership of an organised religion is thereby necessarily religious. So I refer to a secular society in these two senses: a society in which organised religion no longer enjoys the status which it previously did and in which religious beliefs or membership do not affect civil rights.

Nevertheless the law to-day does not ignore religion: far from it. In saying that I am not thinking of that considerable technical body of law concerning the Church of England which is generally known as ecclesiastical law: but I am considering the attitude of the law to religion in its wider sense. It will be convenient to consider this attitude under a number of heads, which I list as follows:–

1. Crime
2. Family Law
3. Charity
4. Discrimination
5. Miscellaneous

Crime

When I first prepared my synopsis for this paper I included under this head "The crime of blasphemy – abolition or extension." This was before Salman Rushdie's book "The Satanic Verses" had attained its present notoriety, and the whole subject of blasphemy had been brought back forcibly into the public eye. At one time it was thought that the offence had become obsolete, since there had been no trial for it between 1922 and 1976. However, in 1976 a magazine called "Gay News" contained a poem entitled "The Love that Dares to Speak its Name" accompanied by a drawing illustrating its subject matter. It purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after His death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men. Mrs. Mary Whitehouse brought, with leave, a private prosecution for blasphemous libel and at the trial before His Honour Judge King-Hamilton (a practising Jew) and a jury, the publishers were convicted and sentenced. They appealed first to the Court of Appeal (Criminal Division) and then to the House of Lords,[3] and their appeals were dismissed by both courts. The

judgments contain most interesting analyses of the crime and its history, which I commend to anyone interested, but for present purposes it is sufficient to record that the House of Lords, although divided on the question whether an *intention* to blaspheme was an essential element of the offence – the majority held that it was not: it was sufficient to prove an intention to publish and that the matter published was blasphemous – were unanimous in holding that a blasphemous libel is matter calculated to outrage the feelings of Christians only, but Lord Scarman thought there was a case for extending it to protect the religious beliefs and feelings of non-Christians.[4] On 19th June 1989, however, Nolan, J. granted leave to challenge by judicial review a refusal by magistrates to grant a summons against Salman Rushdie alleging blasphemy against the Muslim religion in relation to "The Satanic Verses".[5]

As a result of that case the Law Commission considered the subject and rendered a report in 1985.[6] Again I do not propose to do more than mention a few of the matters raised in the report. Again there was a division of opinion. While all the Commissioners recommended the abolition of the common law offences of blasphemy and blasphemous libel, a minority advocated the enactment of a new offence, extending to all religions.

The working paper which preceded the Law Commission's report had distinguished four arguments for retaining in the criminal law an offence penalising insults directed against religion:–

(i) the protection of religion and religious beliefs;
(ii) the protection of society;
(iii) the protection of individual feelings; and
(iv) the protection of public order.

and of these the third argument was considered the most persuasive. However, in contrast to the case of incitement to racial hatred, there was no pressing social need for an offence to protect religion.

This working paper produced a heavy response, in large measure against its provisional proposal to abolish blasphemy without replacement. The Churches were generally against the proposal; lawyers, academics and other professional groups were in favour. The argument that the protection of society required the retention of the offence commanded widespread support and one comment shows prescience in the light of the "Satanic Verses" controversy:

> "If scurrilous attacks on religious beliefs go unpunished by law they could embitter strongly held feelings within substantial groups of people, could

> destroy working relationships between different groups, and where religion and race are intimately bound together could deepen the tensions that already are a disturbing feature in some parts of this country . . ."

Arguments in favour of abolition included freedom of speech, the irrelevance of the offence in a society no longer based on religion, and that blasphemy was not a social problem of any significance. (This last argument might be affected by what has happened over the "Satanic Verses".)

All the Law Commissioners were agreed that the deficiencies of the common law offence of blasphemy were so serious and fundamental that it should be abolished. These deficiencies were that the law was too uncertain, that because it required only an intention to publish, and not to blaspheme, the offence was to an undesirable extent one of strict liability, and that in current circumstances the limitation of the offence to the protection of Christianity could not be justified. However, there was a difference of opinion amongst the Commissioners as to whether the common law offence should be replaced by a new statutory offence.

Although the decision if and how to alter the law of blasphemy must be a political one, from a jurisprudential point of view I agree with the majority of the Law Commissioners that the offence of blasphemy should not be replaced by a new offence extending to the publication of grossly abusive or insulting material relating to a religion with the purpose of outraging religious feelings, as advocated by the minority of the Commissioners and, now, by spokesmen for the Muslim community in this country. The particular arguments which I find persuasive are:

1) The difficulty of providing a satisfactory definition of religion. It is clear that there are, from time to time, organisations which regard themselves as religious but are regarded by others as unworthy of that distinction. Examples which spring to mind are the Church of Scientology and the "Moonies". I shall consider this question in greater detail when I deal with my head 3, Charity, but it is quite unacceptable that it should not be possible to define the elements of a criminal offence with sufficient precision so that a person can not know in advance whether his actions may attract criminal sanctions. The suggestion made by the minority that religion could be defined by listing the major religions in the statute creating the offence with power to add to the list by order seems to me to be open to the same objection as the present offence: in a multi-cultural society what can be the justification of protecting only the established religions? After all, Christianity itself began very much as a minority creed.

2) Some religious tenets or practices may deserve criticism or ridicule in the sharpest terms; abuse or insult cannot be excluded from the weapons of such criticism; and the purpose of the critic of such matters may indeed be to shock or outrage his readers by the use of abuse or insult, the better to realise the effect of that criticism. As Professor J.C. Smith said:[7]

> "Should it not be possible to attack in the strongest terms religious beliefs that adulterers should be stoned to death and that thieves should have the offending hand lopped off, however offensive that may be to the holders of that belief?"

Some religious practices have in fact been outlawed as a result of campaigns which might themselves have been the subject of an extended offence of blasphemy – consider for example the Prohibition of Female Circumcision Act of 1985.

3) If at some time in the future it should appear that expressions of hostility towards people on account of their religious beliefs become, or risk becoming, a real social problem, then it would be appropriate to amend Part III of the Public Order Act 1986 which already covers acts intended or likely to stir up *racial* hatred.

Family Law

This heading conveniently sub-divides into three sub-headings: marriage, divorce, and the custody or care of children, and I will consider them in that order.

Marriage

Although marriage according to the rites of the Church of England is still the primary form of religious marriage recognised by the law, the law has long recognised other forms of religious marriage. Thus a building which has been certified as required by law as a place of religious worship may be registered for the solemnization of marriages, and marriages may be solemnized in that building according to such form and ceremony as the persons to be married see fit to adopt, provided that certain conditions are observed.[8] This covers most cases of religious marriage other than according to the rites of the established church, but there are special provisions relating to Quaker and Jewish

marriages.[9] In this respect English law is more favourable to religious marriages than many other systems of law, which do not recognize a religious marriage ceremony standing alone, but require also a civil ceremony. The attitude of the law to religious marriage poses no problems and I need not consider it further.

Divorce

This poses more problems. The Christian religions consider marriage as indissoluble – thus in the marriage service of the Church of England there comes a point when the Minister proclaims: "Those whom God hath joined together let no man put asunder." When I was a judge of the Family Division and attended the marriages of my friends' children I used to wonder what divine retribution I would attract by doing daily that which I had been enjoined not to do. Nevertheless in this respect it is the marriage service which is out of touch with modern conditions, not the law: divorce in one form or another has been recognised by English law for three centuries. Indeed the current grounds for divorce – as contained in Section 2 of the Matrimonial Causes Act 1973 – are largely attributable to the report of a Group appointed by the then Archbishop of Canterbury in 1966 under the title "Putting Asunder – A Divorce Law for Contemporary Society". It is from that report that the principle of breakdown of the marriage as being the sole ground for divorce was derived.

The other side of this particular coin is the extent to which English law recognises religious divorces. There have been a number of cases where the court has had to consider the effect of a get (a Jewish bill of divorcement).[10] If obtained in England it has no legal validity as a divorce in English law, since statute provides that no divorce or annulment obtained in any part of the British Islands shall be regarded as effective in any part of the United Kingdom unless granted by a court of civil jurisdiction.[11] However, a get, since it *prima facie* involves a consensus between the parties that they should thereafter live apart, may terminate any desertion and prevent any future separation amounting to desertion. It has been found that sometimes a party to a Jewish marriage unreasonably refuses to grant or accept a get, and thereby prevents the other party from remarrying in a Jewish ceremony. To meet this problem proposals for the amendment of the English law of divorce have been made which are currently under consideration by the Law Commission.

The English courts have also been much concerned with the effect of a talaq, a divorce according to Muslim law.[12] A talaq pronounced in England

would, for the same reasons as apply to a get, have no legal validity. However, the courts were until recently frequently faced with deciding whether an overseas talaq should be recognised here. The issue arose in this way because, if the overseas talaq was recognised here, there was no longer any marriage subsisting, so that a party to the marriage (usually the wife) was unable to petition for a decree of divorce in England, and unless the divorce had been obtained in this country, our courts had no power to grant financial relief after divorce, notwithstanding that both property (often the matrimonial home) and the parties were within the jurisdiction. However, the law was changed by Part III of the Matrimonial and Family Proceedings Act 1984, which gave the English court power to entertain applications for financial provision and property adjustment orders, notwithstanding the existence of a prior foreign divorce. Since then, I know of no reported case where the court has had to consider the validity of an overseas talaq.

Custody and Care of Children

Under this head I use the word "custody" to cover those cases where the law has to decide as between individuals (e.g. parents) who shall have the custody of a child, and the word "care" to cover those cases where the question arises in relation to a child who is to go into, or is in, the care of a local authority. In general terms the cardinal principle in relation to both cases is that the welfare of the child is the first, and in many cases, the paramount consideration to which the court (or the local authority) must have regard.[13]

The question of religion is specifically mentioned in sections 4(3) and 10(3) of the Child Care Act 1980 which provides that a local authority shall not cause a child in their care to be brought up in any religious creed other than that in which he would have been otherwise brought up. Similarly Regulation 19 of the Boarding Out of Children Regulations 1955 requires that where possible a child shall be boarded out with foster parents who either are of the same religious persuasion as the child or give an undertaking that he will be brought up in that religious persuasion. There are similar provisions about having regard to the wishes of a child's parents or guardians as to his religious upbringing when a child is placed for adoption.[14]

However, the question I would like to consider at somewhat greater length is what weight the court should give to religious factors in making a decision based on what the child's welfare requires. As to this, statute law gives no guidance, save in the specific instances already mentioned. Nor are there many recent reported cases. (The earlier cases are of little help, as the courts gave

less than full effect to the word 'paramount' in the statutory test, and balanced welfare against other considerations, and since the decision of the House of Lords in *J. v. C.*[15] they are no longer good law.)[16] Of the recent cases two are concerned with what might be termed 'minority' religions or cults: Jehovah's Witnesses and Scientology. In the Jehovah's Witness case[17] the judge at first instance gave custody of the three younger daughters of the marriage (twins aged nearly 15 and a girl of 8) to their father on the grounds of the mother's beliefs and practice as a Jehovah's Witness (the father was nominally a member of the Church of England). He held that if these children became, with their mother, Jehovah's Witnesses, they would be isolated from their own wider family, they would be cut off and alienated from their father, and they would lose the benefit and happiness of the life of ordinary English children at school, at parties and in the general gregarious atmosphere of our a-religious society. Instead they would be confined to the life and society and to the direct works and creed of a very narrow and unpopular religious minority. He also put some weight on the fact that Jehovah's Witnesses have a religious objection to blood transfusions, but did not rate this as being of critical importance. The Court of Appeal allowed the mother's appeal. The essence of their decision is to be found in the following passages from the judgment of Scarman, L.J.:[18]

> "We live in a tolerant society. There is no reason at all why the mother should not espouse the beliefs and practice of Jehovah's Witnesses. It is conceded that there is nothing immoral or socially obnoxious in the beliefs and practice of this sect . . .
>
> It is not for this court, in society as at present constituted, to pass any judgment on the beliefs of the mother or on the beliefs of the father. It is sufficient for this court that it should recognize that each is entitled to his or her own beliefs and way of life, and that the two opposing ways of life considered in this case are both socially acceptable and certainly consistent with a decent and respectable life."

The Scientology case was a decision of Latey, J. in 1984.[19] In that case, after a 3-week hearing, the judge held that notwithstanding that the children (a boy aged 10 and a girl aged 8) had lived with their father and stepmother for 5½ years, and that a change in custody would be an upheaval, confusing and probably distressing for the children, they would be gravely at risk if they remained in the care of their father, since he and the stepmother were committed scientologists. As to this the judge, after citing the first passage from the judgment of Scarman, L.J. in the Jehovah's Witness case which I have quoted above, said:[20]

> "Scientology is both immoral and socially obnoxious. [Counsel] did not exaggerate when he termed it 'pernicious'. In my judgment it is corrupt, sinister and dangerous."

The third reported case illustrates vividly the difficult decisions which judges exercising this jurisdiction have to make. The case, heard in 1976,[16] concerned two children, a boy of 5½ and a girl aged 2½. The father was an Anglican clergyman, the curate of a parish. The mother, originally herself a teacher of religion, formed an adulterous relationship with a young man, with whom she wished to live with the children. The father, because of his religious beliefs, would not divorce the mother, although he had tried unsuccessfully to effect a reconciliation. The Court of Appeal upheld the decision of the judge of first instance giving care and control of the children (in wardship) to the mother. It was accepted that the mother could provide the children with good physical care. The judgment is of interest where it deals with the religious aspect:[21]

> "In considering the welfare of the children, one has to look also to their moral and spiritual welfare.
>
> The father, who naturally holds his beliefs very strongly, not only wants to live according to his faith, but wants his children to be brought up in that faith, to hold the same beliefs as he does and to live their lives as he intends to live his life. I cannot do better than quote the words in which the judge put it. He said:
>
> 'And he takes the view that if the care and control is committed to the mother this may do considerable harm, and he would put it a little higher perhaps, very considerable harm, to the children in that it would be hurtful to them spiritually . . . What he feels will do very considerable harm to these children is that they should be brought up in a home where their mother and another man are living together in blatant defiance of Church doctrine and all that the father believes in. And, as appears very clearly from their demeanour in the witness-box, where those two persons with whom the children would be living in those circumstances show no repentance'
>
> and the judge remarked that there was considerable force in that argument.
>
> But unfortunately, as the judge pointed out, if one yielded to that submission and committed the care of these children to the father, it would not in great measure protect them from the moral and spiritual harm which the father fears. The plain fact is that the children's mother intends to live with a young man who is not her husband. No one suggests that she should be denied access to the children and the judge thought, and I share that view, that it

> would have to be liberal access, including staying access. How could the children then fail to be aware, and constantly aware, that their mother was living with Martin in, to quote the judge's words, 'blatant defiance of Church doctrine and all that the father believes in'?"

I suspect that these reported cases represent only the tip of the iceberg. Nowadays very few cases concerning children reach the Court of Appeal (where they are heard in open court, although usually made subject to a direction to preserve the anonymity of the parties, if the case is to be reported), since the decision of a judge exercising a discretion is very difficult to challenge on appeal. Cases at first instance, being heard in the privacy of chambers, are only reported if the judge gives judgment in open court, or permits a report to be made of a judgment given in chambers, because he considers it raises matters of general importance – as did Latey, J. in the Scientology case.

I will give one example from my own experience at first instance. The contest was over the custody of a boy aged 8. He was the youngest of several children. All the older children had chosen to live with the father, who was an ultra-orthodox Jew. This boy had remained with the mother, since he was only very young when his parents separated. There were certain aspects of the mother's care which made it desirable that the boy should cease to be in her custody. But it was the father's intention to send the boy, as had been the case with his elder brothers, to a school where Yiddish was the primary language. These were children born and brought up in England. If the boy remained with the mother, he would continue to attend an orthodox Jewish school, but where the language in general use was English. I have to confess that I had considerable reservations about the desirability of entrusting the boy to the father, where he would be removed from the mainstream of the life and educational system of the country of which he was a citizen, but came to the conclusion that, on balance, that was what his welfare required.

I mention this case because to me it illustrates very clearly the dilemma with which a judge is faced in deciding what is in the child's best interests. One tries conscientiously to approach the problem with objectivity, but one is inevitably conditioned by one's own cultural and religious (or indeed the lack of religious) upbringing. A frequent experience was to be asked to make a child of parents who were Jehovah's Witnesses a ward of court, so as to give permission for a blood transfusion when medical evidence was to the effect that an operation was urgently required. I did so without hesitation – as did my colleagues. And yet by doing so we were making a value judgment that the child's welfare was best served by allowing a blood transfusion which was contrary to the

fundamental tenets of the religious faith in which the child was being raised. I have no regrets at the decisions which I then took because I believed then, as I believe now, that what I did was to promote the child's welfare as the law required. But others – particularly Jehovah's Witnesses – might take a different view.

Similar problems are faced by courts and local authorities when considering the placement of children with foster parents or for adoption. Again the welfare of the child is the predominant consideration. How important are religious considerations in the equation, particularly when it may be difficult to find foster or adoptive parents of the same religious or cultural background as the child? There is no definitive answer to this question.

Charity

The classic definition of "charity" in its legal sense is to be found in the speech of Lord Macnaghton in *The Commissioners for Special Purposes of Income Tax v. Pemsel*[22] and the third of his four principal divisions is: "trusts for the advancement of religion". In a 1961 case concerning land held by trustees on trusts for the purposes of a synagogue, Cross, J. (later Lord Cross of Chelsea) said: "As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none."[23]

Charitable status has of course a number of advantages, in particular fiscal, so that it is of importance for a religion to be recognised as charitable. The particular aspect of this subject which I wish to consider is the overriding necessity, which applies to all charities whether religious or otherwise, that their purposes must be for the public benefit. Thus it is well established that gifts for enclosed religious communities[24] are not charitable, because they lack the necessary element of public benefit. As it is put in the headnote to the decision of the House of Lords in *Gilmour v. Coats*: "The benefit of intercessory prayer *to the public* is not susceptible of legal proof and the court can only act on such proof."

When a purpose appears broadly to fall within one of the familiar categories of charity, such as the advancement of religion, the court will assume it to be for the benefit of the community and therefore charitable unless the contrary is shown.[25] The contrary may be shown where the benefit is on its face private, rather than public, as in the *Gilmour v. Coats*[24] line of cases. But as was said by Lord Reid in *Gilmour v. Coats*:

> "The law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practice a religion but where a particular belief is accepted by one religion and rejected by another the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it."

In pursuance of this approach, there are decisions at first instance which have recognised the charitable status of religious gifts even though the opinions sought to be propagated were, in the opinion of the Court and of expert witnesses, foolish or even devoid of foundation.[26] But if the tenets of a particular sect inculcate doctrines adverse to the very foundation of all religion, and subversive of all morality, then a gift for its advancement will fail.

The practical difficulty of establishing whether the tenets of a particular sect are such that they are positively inimical to the public benefit has been illustrated in comparatively recent times. In 1974 the Charity Commissioners, being exercised as to the doctrines and practices of the Exclusive Brethren, appointed the late H.E. Francis, Q.C. to conduct an inquiry under section 6 of the Charities Act 1960. In his report, dated 18 November 1975, Mr. Francis found that the doctrine of "Separation from Evil" was a basic tenet of the Exclusive Brethren "calculated and in fact operating to disrupt family ties and perfectly normal and proper business, professional and social relationships, and to cause widespread distress and anguish among many deeply religious and decent people, as well as to bring upon their heads the opprobrium of their fellow citizens, Christian and non-Christian alike". In his opinion a religion based on that doctrine, far from being beneficial to the community, was inimical to the true interests of the community. He made various recommendations to the Charity Commissioners as to what they should do in relation to the Exclusive Brethren, pending a decision of the Court.

A challenge in the courts by the Exclusive Brethren to the validity of the Francis Report was made but failed.

However, when a case concerning the Exclusive Brethren eventually came to Court in 1981,[27] the evidence by one of the Brethren that their practices were not contrary to the public interest was not challenged by the Attorney-General. No attempt was apparently made to introduce the Francis Report. I express no opinion as to whether it would have been admissible evidence and

in any event it may have been considered as by then overtaken by events. Since a court can only act on the evidence before it, the inevitable result was a finding by the court that a trust for the Exclusive Brethren was charitable.

Similar practical difficulties arose in connection with the charitable status of the Unification Church, commonly known as the "Moonies". The Unification Church is an umbrella name for some 60 organisations, most of which are outside the jurisdiction of the Charity Commissioners, as being constituted outside England and Wales, or being overtly trading and commercial in object. However two, the Holy Spirit Association for the Unification of World Christianity and the Sun Myung Moon foundation, were registered as charities for the advancement of religion. At the end of a libel action concerning the Moonies – *Orme v. Associated Newspaper Group* – the jury added a rider that the tax free status of the Unification Church should be investigated. This depended upon the charitable status of the two organisations I have mentioned. The Attorney-General applied for the removal of these two organisations from the register of charities, but the Charity Commissioners took the view that they could not do this without a decision of the court. So far as I am aware, no application to the court was pursued, presumably because of the difficulty of obtaining evidence which would establish that these organisations operated against the public interest.[28]

In the case of Scientology there is, of course, the decision of Latey, J. to which I have already referred.[19]

The recent (May 1989) White Paper "Charities": A Framework for the Future"[29] contains a discussion of the difficulties to which I have just referred.[30] It is not the *objects* of religious movements which to-day cause public anxiety, but rather whether the actual *conduct* of a movement causes harm. But the difficulty of obtaining evidence to show that harm is caused would not be met by a change in the law. "What is needed now is the determined pursuit of evidence in order to justify the bold use by the [Charity] Commissioners of their powers of investigation and remedy." To which I would express my agreement, but point out that it will still require the political will – and resources – to obtain the necessary evidence in any particular case.

Discrimination

In England and Wales, unlike other parts of the United Kingdom[31] there is no law against discrimination on the grounds of religious belief. There are laws against discrimination on the grounds of sex[32] and on racial grounds,[33] which is

defined to mean "any of the following grounds, namely, colour, race, nationality or ethnic or national origins."[34] The decision to exclude discrimination on religious grounds was a conscious political decision taken when the Race Relations Bill 1965 was first introduced.[35] No doubt Parliament would be prepared to reconsider the position should it become necessary so to do. However, a common religion may be one of the characteristics which go to identify an ethnic group.[36]

Miscellaneous

There are many instances where religious bodies or religious beliefs are given favourable treatment by the law. Examples are: the mandatory relief from rating for places of religious worship (as opposed to the more limited relief for hereditaments used for other charitable purposes);[37] provision for religious observance by convicted prisoners;[38] opening and closing hours of shops occupied by persons of the Jewish religion or observing the Jewish Sabbath;[39] the extensive provisions relating to religious education in schools;[40] exemption for Jews and Muslims from provisions generally relating to the slaughter of birds and animals;[41] and others – this list is not, and is not intended to be, exhaustive.

Of particular interest as possibly presaging a new development in the law is the conscience clause contained in the Abortion Act 1967. That Act authorised, subject to certain conditions, treatment for the termination of pregnancy, which had previously, save in very exceptional circumstances, constituted a criminal offence. However, section 4(1) of that Act provided that, except in the case of treatment necessary to save life or to prevent grave permanent injury to health, no person should be under any duty to participate in any treatment authorised by the Act to which he had a conscientious objection. As is well known, many Roman Catholics and others hold the belief that all abortion is wrong, and the ambit of this clause has already been tested by litigation up to the House of Lords.[42] It will be interesting to see whether clauses of this type are used more generally in the future: possibly as a means to secure the withdrawal of opposition to controversial legislation to which persons have moral or religious objection.

Conclusion

I have not hitherto mentioned Article 9 of the European Convention on Human Rights, which provides that everyone has the right to freedom of

thought, conscience and religion, including the right to change his religion or belief. That freedom includes freedom, alone or in community with others, and in public or private, to manifest religion or belief in worship, teaching, practice and observance, subject only to such limitations as are prescribed by law and 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 freedom of others.

The reason why I have not previously mentioned this Article is because the Convention does not form part of our domestic law. Nevertheless in a number of cases the Courts have said that, where appropriate, the Convention should be taken into account.[43] In one case Scarman, L.J. said it was the duty of the courts, so long as they do not defy or disregard clear unequivocal provision, to construe statutes in a manner which promotes, not endangers, rights recognised by the Convention.[44]

It seems to me that, whether in conscious observance of the Convention or not, the law's attitude to religion as shown by the matter to which I have referred above is wholly in accordance with the spirit of Article 9. There is still a residual preference for the Christian religion in general,[45] and the Church of England in particular, but subject to this the the general attitude of the law to religion can best be summed up by the remark of Cross, J. already quoted[23] that "it assumes that any religion is at least likely to be better than none." Or, as the authors of "1066 And All That" would have said, the law's attitude is that religion is a "Good Thing."[46] Nevertheless, even accepting that the law favours religion in general, that leaves many areas in which the law does not, and by nature can not, give clear answers. What I have tried to do is to draw attention to these areas, point out the problems which arise, and in a few cases suggest possible solutions.

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8. Marriage Act 1949, ss. 26(1)(a); 41; 44.
9. Marriage Act 1949, ss. 26(1)(c), (d); 47.
10. *Joseph v. Joseph* [1953] 1 W.L.R. 1182; *Corbett v. Corbett* [1957] 1 W.L.R. 486 and other cases cited in Rayden and Jackson on Divorce (15th ed.) p. 296, notes 2 and 3.
11. Family Law Act 1986, s. 44 replacing Domicile and Matrimonial Proceedings Act 1973, s. 16(1).
12. See, e.g. *Quazi v. Quazi* [1980] A.C. 744; *Chaudhary v. Chaudhary* [1985] Fam. 19.
13. Section 1 of the Guardianship of Minors Act 1971; section 1 of the Child Care Act 1980; see also Clauses 1(1) and 18(3)(a) of the Children Bill.
14. Section 7 of the Adoption Act 1976.
15. [1970] A.C. 668.
16. *In Re K (Minors)* [1977] Fam. 179.
17. Re T (Minors) C.A. 10 Dec. 1975; reptd. (1981) 2 F.L.R. 239.
18. (1981) 2 F.L.R. 244–5.
19. *Re B and G (Minors) (Custody)* [1985] F.L.R. 134.
20. [1985] F.L.R. 157.
21. [1977] Fam. 187.
22. [1891] A.C. 531, 583.
23. *Neville Estates Ltd. v. Madden* [1962] Ch. 832, 853.
24. *Gilmour v. Coats* [1949] A.C. 426.
25. *National Anti-Vivisection Society v. I.R.C.* [1948] A.C. 31, per Lord Simonds at p. 65.
26. *Thornton v. Howe* (1862) 31 Beav. 14; *In re Watson* [1973] 1 W.L.R. 1472.
27. *Holmes v. Attorney-General The Times*, February 12, 1981.
28. See the Reports of the Charity Commissioners for 1981 (pp. 25–7) and 1982 (p. 14).

29. Cm. 694.
30. Paras. 2.22 – 2.36.
31. See Northern Ireland Constitution Act 1973, s. 1(1).
32. Sex Discrimination Act 1975.
33. Race Relations Act 1976.
34. Race Relations Act 1976, s. 3(1).
35. See Hansard (H.C.) Vol. 711, para. 1043.
36. *Mandla v. Dowell Lee* [1983] 2 A.C. 548, 562 (the Sikh case).
37. General Rate Act 1967 ss. 39 and 40; Local Government Finance Act 1988, ss. 47 and 51; Schedule 5, para. 11.
38. Prison Act 1952 and Prison Rules 1964.
39. Shops Act 1950, s. 53.
40. Education Act 1944, ss. 25 to 30; Education Reform Act 1988, ss. 6 to 9.
41. Slaughter of Poultry Act 1967, s. 1(2); Slaughterhouses Act 1974, s. 36(3).
42. *R. v. Salford Health Authority, ex parte Janaway* [1989] A.C. 537.
43. *R. v. Home Secretary, Ex p. Bhajan Singh* [1976] Q.B. 198 and other cases cited in Halsbury's Laws of England (4th ed.) Vol. 18, para. 1629 note 10.
44. *R. v. Home Secretary, Ex p. Phansopkar* [1976] Q.B. 606, 626.
45. See section 7 of the Education Reform Act 1988.
46. *1066 and All That* by W.C. Sellar and R.J. Yeatman (Methuen 1936).