Defining the Divine

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At first glance, it appeared to be a technical and dry decision about the operation of the Places of Worship Registration Act 1855, yet the Supreme Court judgment in *R (on the Application of Hodkin) v Registrar General of Births, Deaths and Marriages*[1] was actually one of the most significant decisions related to law and religion in 2013.[2] The Justices of the Supreme Court held that a church within the Church of Scientology could be a 'place of meeting for religious worship' within section 2 of the 1855 Act. In so doing, the Supreme Court overruled one of the most well-known decisions in English religion law, *R v Registrar General, ex parte Segerdal*.[3] In *Segerdal*, although the Court of Appeal had held that a chapel within the Church of Scientology could not be registered under the Act, the reasoning of their Lordships differed: Buckley LJ and Winn LJ focused on what they perceived to be the lack of 'worship', refusing to define the 'chameleon word' religion, while Lord Denning emphasised the phrase 'religious worship', holding that this required 'reverence or veneration of God or a Supreme Being' and that this was not met in the case of the Church of Scientology, which was 'more a philosophy on the existence of man or of life than a religion'.[4] All of these statements have been questioned by the bold Supreme Court judgment in *Hodkin*, which provides guidance on how the terms 'religion' and 'religious worship' are to be understood by English law in the twenty-first century.

The decision in *Hodkin* was not unexpected. The House of Lords in *Williamson* had already informed us that the 'trend of authority (unsurprisingly in an age of increasingly multicultural societies and increasing respect for human rights) is towards a "newer, more expansive, reading" of religion'.[5] This sentiment was echoed by Lord Toulson in *Hodkin*, where he noted that

1 [2013] UKSC 77.
2 Alongside *Eweida and Others v United Kingdom* (2013) 57 EHRR 8 and *President of the Methodist Conference v Preston* [2013] UKSC 29.
3 [1970] 2 QB 697.
4 For discussion of the case, see R Sandberg, *Law and Religion* (Cambridge, 2011) pp 42–44.
5 *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15 at 55, citing the High Court of Australia in *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120 at 174.

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'the understanding of religion in today's society is broad'.[6] Moreover, although charity law decisions had adopted the *Segerdal* understanding of religion to formulate a definition of religion that required 'faith in a god and worship of that god',[7] this narrow definition had long since been superseded. Buddhist charities had for some time been considered to be for the advancement of religion despite not technically meeting the monotheistic requirements of the common law definition.[8] And, although the Charity Commission had rejected an application from the Church of Scientology on the on the basis that its 'core practices' did not constitute worship since they failed to 'display the essential characteristic of reverence or veneration for a supreme being',[9] more recent decisions suggest that the Commission had broadened the terms of the common law test.[10] In relation to an application by the Gnostic Society, the Commission relied on its own guidance[11] to state that there were four 'characteristics of a religion for the purpose of charity law':

a. belief in a god (or gods) or goddess (or goddesses), or supreme being, or divine or transcendental being or entity or spiritual principle, which is the object or focus of the religion . . .;
b. a relationship between the believer and the supreme being or entity by showing worship of, reverence for or veneration of the supreme being or entity;
c. a degree of cogency, cohesion, seriousness and importance;
d. an identifiable positive, beneficial, moral or ethical framework.[12]

In addition to broadening what was understood as 'belief in a god and worship of that god', recent Charity Commission decisions had therefore brought the Commission's understanding of 'religion' in line with the requirements found in human rights laws requiring 'a certain level of cogency, cohesion,

6 [2013] UKSC 77 at para 55.
7 *Re South Place Ethical Society* [1980] 1 WLR 1565. This understanding was problematic in that it was not clear why worship had to be a definitional requirement of 'religion'. Unlike the Places of Worship Registration Act 1855, charity law is concerned with the 'advancement of religion' not 'religious worship'.
8 The Charities Act 2006 had finally formally altered this to provide that 'religion' included polytheistic faiths and those which do not involve belief in a god. See now Charities Act 2011, s 3(2)(a).
9 Church of Scientology Application to Charities Commission, 17 November 1999, available at <http://www.charitycommission.gov.uk/media/100909/cosfulldoc.pdf>, accessed 12 February 2014.
10 For criticism of this, see P Luxton and N Evans, 'Cogent and cohesive? Two recent Charity Commission decisions on the advancement of religion', (2011) 75:2 *Conveyancer and Property Lawyer* 144–151.
11 Charity Commission, 'Analysis of the law underpinning *The Advancement of Religion for the Public Benefit*, December 2008, available at <http://www.charitycommission.gov.uk/media/94857/lawrel1208.pdf>, accessed 12 February 2014.
12 Application for Registration of the Gnostic Centre, 16 December 2009, para 23, available at <https://www.charitycommission.gov.uk/media/92397/gnosticdec.pdf>, accessed 12 February 2014.

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seriousness and importance'.[13] This followed the approach that Employment Tribunals had taken to determining the ambit of 'religion or belief' for discrimination law purposes.[14] There were therefore tentative signs emerging of a common definition of religion under English law, based on the principles surrounding Article 9 of the European Convention on Human Rights (ECHR).[15] It was therefore to be expected that the litigants in *Hodkin* would put forward arguments based on the Equality Act 2010 and the ECHR to question the narrow interpretation found in *Segerdal*. What was surprising, however, is that the Supreme Court considered such arguments to be unnecessary, deciding to overrule *Segerdal* on other grounds.[16]

THE DECISION IN *HODKIN*

In *Hodkin*, Lord Toulson observed that, although there were several reasons why there had never been a universal legal definition of religion in English law,[17] in defining the composite term 'religious worship', it was correct to begin by considering whether Scientology was a religion, since the question of whether there was religious worship 'is inevitably conditioned by whether Scientology is to be regarded as a religion'.[18] Lord Toulson upheld the High Court's decision that Scientology was a religion.[19] His Lordship reasoned that in the absence of 'some compelling contextual reason for holding otherwise, religion should not be confined to religions which recognise a supreme deity', since this would 'be a form of religious discrimination unacceptable in today's society'.[20] The fact that Lord Denning in *Segerdal* recognised the need to make an exception for Buddhist temples, and the absence of a satisfactory explanation for the rule, were 'powerful indications that there is something

13 As recently re-stated in *Eweida and Others v United Kingdom* (2013) 57 EHRR 8 at para 81, removing any doubt that these requirements apply to Article 9 as well as Article 2 of the First Protocol. Compare with N Addison, *Religious Discrimination and Hatred Law* (London, 2007), p 9.

14 This has led to a confused and arbitrary case law, on which see R Sandberg, 'A question of belief', in N Spencer (ed), *Religion and Law* (London, 2012), pp 51–63.

15 Sandberg, *Law and Religion*, pp 57–58.

16 See [2013] UKSC 77 at para 65.

17 Namely 'the different contexts in which the issue may arise, the variety of world religions, developments of new religions and religious practices, and developments in the common understanding of the concept of religion due to cultural changes in society': ibid, para 34.

18 Ibid, para 31.

19 This was despite the fact that the respondent had not challenged the High Court's conclusion ([2012] EWHC 363) that Scientology was a religion, preferring to confine their submissions to arguing that Scientology's rites and practices did not amount to religious worship for the reasons given in *Segerdal*: [2013] UKSC 77 at para 50.

20 [2013] UKSC 77 at para 51. Lord Toulson held that the phrase 'place of meeting for religious worship' found in the 1855 Act had to be interpreted in 'accordance with contemporary understanding of religion and not by reference to the culture of 1855'. For his Lordship, 'the historical origins of the legislation are relevant to understandings its purpose', and this is why he included an erudite historical discussion at the beginning of his speech: ibid, para 34.

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unsound in the supposed general rule'.[21] Moreover, confining the definition of religion in this way would lead the Registrar General and courts into 'difficult theological territory' in a way that 'is not appropriate'.[22]

Lord Toulson stated that the language of the Places of Worship Registration Act 1855 'showed an intentionally broad sweep'.[23] Drawing upon the jurisprudence of other common law jurisdictions,[24] his Lordship held that for the purposes of the 1855 religion could be described in summary as:

> a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.[25]

Although Lord Toulson emphasised that this was 'intended to be a description and not a definitive formula', given that it has been given in a Supreme Court judgment it is likely to be very influential indeed. The description raises a number of points. First, as Lord Toulson explained, his reference to 'spiritual or non-secular' is intended to refer to 'a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science'. His Lordship preferred not to use the term 'supernatural' to express this 'because it is a loaded word which can carry a variety of connotations'. However, this would seem to overlook the fact that this criticism would also apply to the word 'non-secular'.[26] Lord Toulson added that such

> a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science.

21 Ibid, para 51.

22 Ibid, paras 52–53. This invokes the principle of non-justiciability, which means that the courts will 'abstain from adjudicating on the truth, merits or sincerity of differences in religious doctrine or belief and on the correctness or accuracy of religious practice, custom or tradition': *Mohinder Singh Kharira v Daljit Singh Shergill* [2012] EWCA Civ 983 at para 19. See also *HH Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group Limited and Hardeep Singh* [2010] EWHC (QB) 1294. This principle has also been referred to as 'the non-interference principle': see Sandberg, *Law and Religion*, pp 74–76. The decision in *Mohinder Singh Kharira v Daljit Singh Shergill* is currently on appeal to the Supreme Court and is likely to be one of the most significant religion law cases of 2014.

23 [2013] UKSC 77 at para 56.

24 See ibid, paras 35–49.

25 Ibid, para 57.

26 The matter is confused further by the way in which terms such as 'secular', 'secularisation' and 'secularism' are used interchangeably. See, eg, J Casanova, 'The secular, secularizations, secularism', in C Calhoun, M Juergensmeyer and J Van Antwerpen (eds), *Rethinking Secularism* (Oxford, 2011), pp 54–74.

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The language here seems to invoke a rather simplistic notion of 'science versus religion'; it may have been preferable not to state what a belief is to be about but rather to say that beliefs are notions (or worldviews) held by people which are rarely capable of verification or falsification. The same criticism can be applied to the reference to 'the infinite'. The sound reasons for omitting any reference to a supreme being would also seem to apply to this synonym: it would again seem to open the door to inappropriate theological debates.

Second, it is important to note that the exclusion of non-secular belief systems applies only for the Places of Worship Registration Act 1855. As Lord Toulson noted, it is not necessary (or indeed appropriate) to extend the definition to secular belief systems because there are other legal provisions which allow for secular wedding services on approved premises.[27] In other legal contexts, such as the definition of 'religion or belief' for human rights and discrimination laws, it has been accepted that atheistic belief systems are covered by the definition of 'religion or belief'.

Third, it is striking that Lord Toulson's definition views religion as being necessarily a collective affair: it is something 'held by a *group* of adherents'.[28] Although different provisions in English religion law protect religion as a collective and individual right,[29] this focus on group activity would seem to exclude individuals who develop their own religious beliefs, including those whose beliefs differ from the mainstream of the group.[30] This collective understanding of religious freedom may be appropriate for the purposes of registration law but should not have wider application.

Fourth, the referencing to 'teaching' not only underlines the collective understanding of religion implicit in the definition but also seems odd when read against the last line of Article 9(1) ECHR, which refers to religion or belief being manifested 'in worship, teaching, practice and observance'. Lord Toulson's definition only seems to relate to teaching and observance, which is particularly peculiar given its statutory context of registration of places of worship. Unlike Lord Denning in *Segerdal*, the Supreme Court in *Hodkin* does not regard 'worship' as part of the definition of 'religion'. This should

27 [2013] UKSC 77 at paras 58–59. This also raised the 'significant point' that if it has been held that Scientology was a religion but that there was no 'religious worship' then 'the result would have been to prevent Scientologists from being married anywhere in a form which involved use of their marriage service', since they would not have been able to be married in a place of religious worship and any secular wedding service could not have had a religious service. For Lord Toulson put it, 'They would therefore be under a double disability, not shared by atheists, agnostics or most religious groups. This would be illogical, discriminatory and unjust' (para 64).

28 Emphasis added.

29 See R Sandberg, 'Religion and the individual: a socio-legal perspective', in A Day (ed), *Religion and the Individual* (Aldershot, 2008), pp 157–168.

30 This would include, for example, Christians who felt obliged to wear crosses even though the majority do not feel so obligated. The European Court of Human Rights' decision in *Eweida and Others v United Kingdom* (2013) 57 EHRR 8 suggests that such persons should be protected under Article 9.

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have implications for the charity law definition of advancement of religion. Lord Toulson dealt with the question of whether the chapel was a 'place of meeting for religious worship' after he had considered whether Scientology was a religion.[31] He held that, even if the meaning given to worship in Segerdal 'was not unduly narrow in 1970, it is unduly narrow now'.[32] The term 'religious worship' should be interpreted as being 'wide enough to include religious services, whether or not the form of service falls within the narrower definition adopted in *Segerdal*'.[33]

Unfortunately, however, his Lordship gave no further guidance as to how wide the definition of worship was to be now, only quoting from dictionary definitions which defined worship as including performing acts of adoration, feeling or expressing reverence and adoration and the taking part in religious service, religious rites and ceremonies. Given Lord Toulson's warning that examining 'fine theological or liturgical niceties was 'more fitting for theologians than for the Registrar General or the courts',[34] then perhaps the solution should be a subjective approach, whereby if an adherent of a belief system protected under the Places of Worship Registration Act 1855 used the premises for actions which they considered to be a manifestation of their religion or belief then that would be regarded, prima facie, as constituting 'religious worship'.[35]

CONCLUSION

Lord Toulson's speech in *Hodkin* provides us with a new description of 'religion' and a broader interpretation of 'worship'. Time will tell how influential they prove to be. It is clear, however, that moving on from *Segerdal* is appropriate. Lord Toulson was correct to say that 'Lord Denning's definition of religious worship carried within it an implicit theistic definition of religion'.[36] It is debatable whether such a narrow definition was appropriate at the time in which *Segerdal* was decided; it cannot be disputed that it is inappropriate now.[37] The terms of Lord Toulson's definition are preferable to those suggested by the Charity Commission, especially given Lord Toulson's rationale that the definition of religion should not be such that it requires courts to undertake theological evaluations. It is unfortunate, however, that aspects of his Lordship's description of religion will seemingly require courts and decision-makers to

31 [2013] UKSC 77 at para 60.
32 Ibid, para 61.
33 Ibid, para 62.
34 Ibid, para 63.
35 This would be in line with Article 9 ECHR, which sees worship as a way of manifesting religion or belief. The subjective approach would also be consistent with *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15, para 22, in which Lord Nicholls held that 'Freedom of religion protects the subjective belief of an individual'.
36 [2013] UKSC 77 at para 31.
37 It is one of several examples of what I have described as the tension between the old and new religion laws: Sandberg, *Law and Religion*, pp 202–204.

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do precisely that. It is also to be regretted that the opportunity was not taken to consider arguments based on equality and human rights laws, which might have led the Supreme Court to develop an understanding of religion that could be of use in different areas of religion law. Lord Toulson was correct to insist that *his* description applies solely for the purposes of the Places of Worship Registration Act 1855. There are several elements of the description which could lead to unfortunate results if applied in relation to human rights or discrimination laws. The judgment of the Supreme Court therefore represents an important step forward but one which could have gone further still.

It is important, however, not to underplay the boldness of the Supreme Court decision. The change in the understanding of religion can be underscored by reference to recent work of the sociologist of religion Linda Woodhead, who has identified different 'concepts of religion'.[38] Using her work, it is possible to identify a clear shift in *Hodkin*. The definition in *Segerdal* meets Woodhead's concept of 'religion as belief and meaning' in that 'being religious has to do with believing certain things, where that amounts to subscribing to certain propositions and accepting certain doctrines'. By contrast, Lord Toulson's description meets Woodhead's conception of 'religion as meaning and culture', which represents a broader understanding of religion 'as an embracing system of meaning which covers the whole of life'. This underscores how legal definitions of religion are of interest sociologically.[39] Legal definitions provide a means of inclusion and exclusion controlling access to particular legal privileges. This has profound social effects, in relation not only to the groups and individuals who are included or excluded, but also to society at large. Changing legal definitions of religion provide concrete evidence of the shifting ways in which religion is regarded and understood by society and so judgments such as *R (on the Application of Hodkin) v Registrar General of Births, Deaths and Marriages* are actually anything but technical and dry decisions.

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38 L Woodhead, 'Five concepts of religion', (2011) 21:1 *International Review of Sociology* 121–143.
39 This theme is developed in R Sandberg, *Religion, Law and Society* (Cambridge, 2014, forthcoming).