(2016) 18 Ecc LJ 36–52 © Ecclesiastical Law Society
doi:10.1017/S0956618X15000824

The Problem of the Non-justiciability of Religious Defamations

Peter Smith
Employed barrister, Carter-Ruck

English courts have historically been wary of deciding cases that rest on contested findings of fact about the practices and doctrines of religions. This is particularly true in defamation cases. However, the recent case of Shergill and others v Khaira and others [2014] UKSC 33 *in the UK Supreme Court has narrowed the principle of non-justiciability on the grounds of subject matter. Defamation cases such as* Blake v Associated Newspapers Limited [2003] EWHC 1960 (QB) *have treated religious doctrine and practice as matters not justiciable per se, even if a determination is essential for the exercise of private or public law rights and obligations. The Supreme Court indicated in* Khaira *that it may be appropriate for courts to treat such disputes as justiciable. The common law, domestic statute and the European Convention on Human Rights protect the right to reputation, and* Khaira *indicates that it is time that defamation claims resting on disputes about religious doctrine and practice were entertained by the courts to a much greater extent than recent cases have allowed. However, the judgment has left open the possibility of some religious disputes still being non-justiciable.*

Keywords: defamation, religious disputes, non-justiciability, *Shergill v Khaira*

English law has long held the principle that religions should be free from interference by the state in certain matters. The original 1215 edition of the Magna Carta proclaimed, as its first article, 'That We have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.'[1] This was intended to protect the established Catholic Church from the powers of the state, specifically from interference in church elections by the executive in the form of the person of the monarch. The notion that religions were institutions with practices and beliefs that were outside the control of the state in certain respects was adopted by the common law and is found in modern times in the principle of non-justiciability on the matter of religion in certain types of civil case.[2]

1 Available at <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>, accessed 7 July 2015. Specifically, the article protected the 'freedom of the Church's elections': 'This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.' This was reiterated in the final peroration at article 63: 'IT IS ACCORDINGLY OUR WISH AND COMMAND that the English Church shall be free . . .'.

2 Also known as the 'non-interference' principle': see R Sandberg, *Law and Religion* (Cambridge, 2011), pp 74–76. It does not apply to the Church of England as the established church: see M Hill, R

In recent years, the position has been summarised as 'the courts will not attempt to rule upon doctrinal issues or intervene in the regulation or governance of religious groups'.[3] Also:

> Religion ... is not the business of government or of the secular courts ... The starting point of the law is an essentially agnostic view of religious beliefs and a tolerant indulgence to religious and cultural diversity ... It is not for a judge to weigh one religion against another. All are entitled to equal respect.[4]

This non-interference has been described as both active, 'through the express grant and preservation of rights of self-determination, self-governance and self-regulation', and passive,

> through non-interference on the part of organs of State such as national government local or regional government or the secular courts. In the United Kingdom there is no systematic provision made for autonomy of religious organizations and, in the main, a self-denying ordinance of neutrality may be said to predominate.[5]

One area of law where the passive conception has been particularly adopted is in the law of defamation. This is, perhaps, surprising: many religions specifically proscribe libel and particularly slander as forms of wrongdoing. In the Bible, the Psalmist prays, 'Set a watch, O Lord, before my mouth; and a door round about my lips.'[6] The Book of Proverbs warns, 'Lying lips conceal hatred, and whoever utters slander is a fool' and 'Do not slander a servant to a master, or the servant will curse you and you will be held guilty.'[7] St Matthew records Jesus telling his listeners, 'I tell you, on the day of judgement you will have to give an account for every careless word you utter'.[8]

Despite these injunctions, English law, which has otherwise been so deeply rooted in Christian principle, does not reflect this prohibition when it comes to the matter of religion and libel, as it did until recently with blasphemy and as it does with defamation generally.[9] This is partly the cultural product of the

Sandberg and N Doe, *Religion and Law in the United Kingdom* (second edition, Alphen aan den Rijn, 2014), p 76.

3 *Blake v Associated Newspapers Limited* [2003] EWHC 1960 (QB) per Eady J at para 5.

4 *Sulaiman v Juffali* [2001] EWHC 556 (Fam) per Munby J at para 47.

5 Hill, Sandberg and Doe, *Religion and Law*, p 76.

6 Psalm 143:3.

7 Proverbs 10:18, 30:10.

8 Matthew 12:36.

9 Blasphemy was long a common law and statutory offence which defied neat definition – see the Law Commission, 'Offences against religion and public worship', working paper 79 (1981), pp 5–6: 'there is no one agreed definition of blasphemy and blasphemous libel' – but it is often characterised as the

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

Reformation. The sectarian violence of the period gradually gave way to the acceptance of religious difference in the liberal state, which had neither the knowledge nor the desire to investigate the truth of what were ultimately profound differences in belief between catholic, Anglican and non-conformist theology.[10] How could a court decide when a catholic labelled a protestant a heretic, for instance, or when one Methodist described another as schismatic? When the courts did intervene, it was only because of the implied or explicit accusation of another wrong that accompanied a religious libel. It was, for instance, once an actionable libel to call a person a 'papist' and allege that he or she went to Mass, because of the imputation of criminality and disloyalty that was implied by the accusation.[11] However, this must surely no longer be the case.

DEFAMATION ACTIONS IN RELIGIOUS CONTEXTS AND THE SCREENING EFFECT OF DEFAMATION LAW

Defamation law applied to religion is unstable and, as both a cause and a symptom of the cultural shift towards freer speech, this law has itself changed markedly in very recent years. Before the question of non-justiciability is considered by a court, two hurdles must be crossed by any prospective claimant, both of which act to sift out potential religious libels.

First, the claimant must show that what has been published about him or her is defamatory. The test for what is defamatory is a creature of the common law and has adapted to changing social tastes. Gradually, public opinion has changed and it is clearly no longer the case today that, in England, being Catholic carries the same implied sting in the minds of the public.[12] Currently, a meaning is

defamation of religion. Prosecutions for blasphemy became increasingly rare; the last by the Crown was in 1922 and the only other prosecution before the crime was abolished by section 79 of the Criminal Justice and Immigration Act 2008 was a private prosecution in 1978. See the history of the crime in the House of Lords' judgments in *Whitehouse v Lemon; Whitehouse v Gay News Ltd* [1979] 2 WLR 281 HL.

10 Sandberg, *Law and Religion*, ch 2. Sandberg describes four phases in the historical development of religion and law: the 'temporal–spiritual partnership' which followed the Norman Conquest; 'the era of discrimination and tolerance' which resulted from the Reformation; the 'epoch of toleration' which followed the Glorious Revolution; and 'the current age of positive religious freedom' stemming from the 1998 Human Rights Act.

11 *Row v Sir Thomas Clargis* (1681) Raymond, Sir T 482, 83 ER 252. The court held: '1. That the words taken abstractively are actionable, because the Acts of Parliament of 23 Eliz. 3 Jac. and 25 Car. 2 do expose a Papist to several penalties and incapacities. 2. A fortiori, as the words have relation to the quality of the person, for a deputy lieutenant [the claimant] is an officer of great trust; … and the times alter the law when the sense of words alter; for though formerly (Papist) was not actionable, yet now 'tis grown to be a word of more reproach. It was objected farther, that to have the word Papist to bear an action would be a means to discourage prosecution of Papists. To which it was answered, that railing is no prosecution; and we must not punish the innocent, because we cannot exceed in our expressions of the innocent.'

12 Other common law jurisdictions, however, have a different culture against which to judge the imputation of a libel. In *Chen Cheng v Central Christian Church* [1999] 1 Sing LR 94 Sing CA, it was held that calling a church a 'cult' was defamatory because in Singapore the word was a pejorative one, meaning

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

defamatory of the claimant if it 'substantially affects in an adverse manner the attitude of other people towards him, or has a tendency to do so'.[13] The test is objective – what does the ordinary reasonable reader think of the publication being complained of? – and is not dependent on the reactions of a special class of listener, such as a claimant's co-religionists.[14] In many cases, religious libels would no longer be considered defamatory by the objective test (today represented by the tastes of the judiciary) and thus would fail to be claims at all. Accusations that would harm only in the eyes of adherents to a certain faith, such as the holding of unorthodox doctrinal views, or breaches of rules about diet or sexual conduct which are specific to the community but not shared widely, would not be defamatory by the objective measure.

Second, as part of the pendulum's swing away from the right to reputation and towards free expression, the coming into force of the Defamation Act 2013 introduced the hurdle of proving a statement has caused or is likely to cause 'serious harm' to the reputation of the claimant.[15] The application of this measure is still unsettled, but the burden is on the claimant to show that section 1 has been satisfied on the balance of probabilities, taking into account the defamatory meaning, the harmful tendency of that meaning and 'all relevant circumstances', including evidence of what actually happened after publication, proven by evidence or, in cases of obvious harm, inference.[16]

If a published libel or slander is objectively defamatory and causes or tends to cause serious harm, there may be a defence to publication. The 2013 Act has reformulated some of the substantial defences to a claim for libel in the new statutory defences of truth, honest opinion and publication on matter of public interest, has introduced new defences and has extended existing ones.[17]

The question then arises: what if a purportedly religious libel is published, such as an accusation of heresy, that has an implied and pleaded meaning of fraud (which is defamatory and which can be shown to cause or tend to cause serious harm to its subject) and the defendant argues that the accusation of

a religious group with teachings and practices that are abhorrent and harmful to society. See R Parkes et al, *Gatley on Libel and Slander* (twelfth edition, London, 2013), ch 2, n 213.

13 *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB) per Tugendhat J at para 96. There are other formulations of this test which elaborate on this basic idea.

14 *Lachaux v Independent Print Limited* [2015] EWHC 2242 (QB) per Warby J at para 15(50): 'Although the word "affects" might suggest otherwise, it is not necessary to establish that the attitude of any individual person towards the claimant has in fact been adversely affected to a substantial extent, or at all. It is only necessary to prove that the meaning conveyed by the words has a tendency to cause such a consequence. The "people" envisaged for the purposes of this test are ordinary reasonable readers.'

15 On the background to the 2013 Act, see J Price and F McMahon, *Blackstone's Guide to the Defamation Act 2013* (Oxford, 2013), ch 1. For the leading case on the meaning of serious harm, see *Lachaux*.

16 *Lachaux* at para 65.

17 Formerly the defences of justification, fair comment and responsible journalism. New defences include protection for the operators of websites and for peer-reviewed statements in scientific or academic journals. Extended defences include reports protected by privilege. See Price and McMahon, *Blackstone's Guide*, chs 3–9.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

heresy is in fact true, or an honest opinion that he or she holds? Given the filters on defamation claims, such a scenario will be a rare occurrence but not impossible. The court would be faced with determining the truth of the heresy – and thus whether or not competing versions of religious faith are true – in considering the allegation of truth of the allegation of fraud. This is where the claimant has until now faced a third hurdle: the principle of non-justiciability, which relies fundamentally on how the defamatory allegation is linked to the underlying religious matter.

It has been suggested that there are four types of dispute that include a 'religious dimension'.[18] The first is general criticism of religions, which, if deemed offensive to followers of the religion, may be caught by group defamation or blasphemy laws. General criticism of a religion does not found an action for libel, however, unless a particular follower can establish that the criticism applies to him or her.[19] Another type of case is when specific allegations are made against particular individuals alleging that they have failed to meet prescribed standards or expectations of behaviour: for example, that they have sinned against the religion. But individuals impugned in this way are perhaps more likely to use internal dispute resolutions than secular courts, in a bid to stay within the organisation.[20]

There are two further sorts of religious dispute which have historically led to libel actions that invoke the secular law. These are when general criticisms are made of a religion coupled with specific, associated criticism of a particular person such that they can sue, or when criticism of the religion is made without a basis in religious doctrine. These forms are distinguished from

18 A Mullis and A Scott, 'How to know the truth: accommodating religious belief in the law of libel' in J Richardson and F Bellanger (eds), *Legal Cases, New Religious Movements, and Minority Faiths* (Farnham, 2010), pp 136–141.

19 In English law, there must be specificity before a person, whether legal or natural, can bring a defamation action. On the need for sufficient reference to the claimant, see *Orme v Associated Newspapers, Times* 4 February 1981 per Comyn J. The judge held that an article about the Moonies was capable of referring to the leader in England of that new minority religion. In that case, the grave charges must have been capable of referring to the plaintiff if only because people might say that he must have known what went on. See H Singh, 'Religious libel: are the courts the right place for faith disputes?' in Richardson and Bellanger, *Legal Cases*, ch 9, pp 152–154; Mullis and Scott, 'How to know the truth', p 134, n 9. In a more extreme example, in *Ortenburg v Plamondon* (1914) 24 Quebec KB 69, decided under the civil law of Quebec but referring to common-law cases, the defendant, in a lecture delivered in the City of Quebec, violently assailed and abused the Jewish race, its religious doctrines and social practices, the object being to put the public of Quebec on guard against the Jews of Quebec, who numbered only 75 families in a total population of 80,000 souls. It was held that, although not assailed individually, the plaintiff, being one of the 'restricted collectivity' of the Jews of Quebec, was entitled to maintain an action of defamation against the defendant. See Parkes et al, *Gatley on Libel and Slander*, 7.9–7.10.

20 See *Frank Otuo v The Watchtower Bible and Tract Society of Britain* (2013, unreported but available at <https://inforrm.wordpress.com/table-of-cases-2/>, accessed 6 October 2015) per HHJ Moloney QC for an example of where the expulsion of a Jehovah's Witness member triggered a libel claim.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

each other by asking 'whether or not the imputations at issue rest upon a doctrinal dispute'.[21]

There are many examples of allegations being made without a basis in religious doctrine, as noted above, almost all of which would not be actionable torts today.[22] It has been held defamatory to state of an archbishop of the Church of Ireland that he has attempted to convert a Catholic priest to protestantism by an offer of £1,000 in cash and a living of £800 a year,[23] or to state of a clergyman that he is guilty of immorality or drunkenness,[24] or that he preaches sedition[25] or lies,[26] or that he knows less about his religion than an adolescent,[27] or that he has used his pulpit to throw out personal invectives against a member of the congregation,[28] or that he has juggled with the collections[29] or that he has desecrated a part of his church by turning it into a cooking department.[30] Indeed, the religious context of an accusation has been taken into account, even if the action is without a basis in religious in doctrine.[31] If the allegation is that a clergyman preached false doctrine it will be defamatory if, in the circumstances, it imputed hypocrisy. But if the defendant belongs to a different church from the claimant and the churches are in disagreement about the doctrine, it will not be an actionable tort.[32] This key distinction is at the heart of the non-justiciability problem.

The UK Supreme Court decision in *Shergill and others v Khaira and others* ('*Khaira*') presents a challenge to the principle of non-justiciability in the case of religious defamation, and lowers the third hurdle.[33] In the unanimous view of the Court, the application of the principle in the case of *Blake v Associated Newspapers Ltd*[34] was 'not … correct'. Courts should not decline jurisdiction

21 Mullis and Scott, 'How to know the truth', p 141.
22 See Parkes et al, *Gatley on Libel and Slander*, 2.40, from where the following examples are drawn. More recent examples include *Sharma v Sharma* [2014] EWHC 3349, which involved allegations of criminality after the defendant was replaced by the claimant on the board of a national Hindu charity.
23 *Archbishop of Tuam v Robeson* (1828) 5 Bing 17.
24 *Payne v Beaumorris* (1661) 1 Lev 248; *Evans v Gwyn* (1844) 5 QB 844; *Gallwey v Marshall* (1853) 9 Exch 294; *Stow v Gardner* (1843) 6 Up Can QB (OS) 512; *Steltzer v Domm* [1932] 2 WWR 139. For words which, if directed against another would not be defamatory may be so if directed against a clergyman, because of the nature of the calling, see *Murphy v Harty* 393 P 2d 206 (Or 1964).
25 *Cranden v Walden* (1693) 3 Lev 17.
26 *Phillips v Badley* (1582) cited 4 Co Rep at 19a; *Drake v Drake* (1652) Style 363.
27 *Maidman v Jewish Publications* (1960) 54 Cal 2d 643.
28 *Edwards v Bell* (1824) 1 Bing 403.
29 *Curtis v Argus* (1915) 155 NY S 813; *Dr Sibthorp's Case* (1628) W Jones 366.
30 *Kelly v Sherlock* (1866) LR 1 QB 686.
31 *Maccaba v Lichtenstein* [2004] EWHC 1580 (QB) Gray J at para 9. However, in another religious slander case, albeit one under a different statutory regime, the claimant's declaration that she had been expelled from her religious congregation and had been unable to join another was not actionable, absent proof of special damage: *Roberts v Roberts* 16 (1864) 5 B & S 384.
32 See *Dod v Robinson* (1648) Aleyn 63; Parkes et al, *Gatley on Libel and Slander*, n 417.
33 *Shergill and others v Khaira and others* [2014] UKSC 33.
34 [2003] EWHC 1960 (QB).

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

purely on the grounds of religion, even if they raise questions of doctrine and ecclesiology, if the claim is grounded in a valid cause of action such as libel: 'the court will enter into questions of disputed doctrine if it is necessary to do so in reference to civil interests'.[35] This decision ostensibly gives the court jurisdiction to decide deep questions of religion and opens to claimants the right to vindicate their reputation when previously such an action would have been denied to them. However, this boon for claimants may be countered by an extension of the defence of honest opinion for defendants, as the Supreme Court itself notes.[36]

THE *KHAIRA* LITIGATION IN THE LOWER COURTS

Khaira was one of a number of suits (along with *Baba Jeet v Singh*[37] and *Shergill v Purewal*[38]) that stemmed from the overspill into the Sikh community in the UK of a dispute in India.[39] The underlying dispute concerned the declaration of a *mahant*, or religious superior of a *dera* (monastery) in the Punjab, known in proceedings as the First Holy Saint, that he was a living guru and so a religious leader of great importance to Sikhs. The order he founded, the Nirmal Kutia Johal, set up three gurdwaras in the UK: in Bradford, Birmingham and High Wycombe. He died in 2001 and was succeeded in short order by the Second and then Third Holy Saint.[40]

In *Khaira*, eight of the appellants contended that they had been validly appointed as trustees of the three gurdwaras by the Third Holy Saint. They sought declarations that this was done under the relevant trust deeds, which allowed the First Holy Saint 'and his successor' to remove and appoint trustees. The respondents, the original trustees of the gurdwaras, argued that the Third Holy Saint had no power to remove and appointed trustees of the gurdwaras.

The judge at first instance dismissed the defendants' application for strike out on the grounds of non-justiciability, considering that the legal question of the construction of the deeds required

35 *Khaira* at para 57.

36 Ibid at para 57: 'The problem that such defamation claims face, which will usually doom them to failure, is that they raise issues of religious opinion on which people may hold opposing views in good faith. The expression of such views without malice is likely to be protected by the defence of honest comment – what used, until *Joseph v Spiller* [2011] 1 AC 852, to be called fair comment.'

37 [2010] EWHC 1294 (QB), aka *His Holiness Sant Bab Jeet Singh Ji Maharaj v (1) Eastern Media Group Limited (2) Hardeep Singh*.

38 [2010] EWHC 3610 (QB).

39 For a brief exposition of the Sikh community in the UK, see Singh, 'Religious libel', p 157. Singh himself was a defendant (along with his publisher, the *Sikh Times*) in the libel case of *Baba Jeet v Singh*, when he was sued by the Third Holy Saint. He explains the background to the religious dispute at pp 158–165.

40 The background facts are set out in the Court of Appeal judgment, *Shergill v Khaira* [2012] EWCA Civ 983 at paras 28–36 per Mummery LJ, and in *Khaira* at paras 2–11.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

> not an establishment of the propriety or the validity of a process by which the [Third Holy Saint] may have succeeded to come to be regarded as holding the office of Holy Saint but whether, *as a matter of fact*, he has become sufficiently recognised as the holder of that office to be considered to be a person described as having a particular power in the English deed, the construction of which is before the court.[41]

If the Third Holy Saint was accepted as *de facto* 'successor' by a sufficient number of adherents of the Nirmal Kutia Johal, even if a minority disagreed, then that would be enough to make appropriate findings of fact and construe the documents accordingly.

The Court of Appeal was invited to reject this approach on a number of bases, including whether the standpoint adopted by the judge, which purported to be objective, from the perspective of English law and without a view on Sikh doctrine or practice, was skewed in accepting that the Third Holy Saint could be *de facto* 'successor' without being *de jure* 'successor' to the First Holy Saint in the eyes of the Sikh religion.[42]

In Mummery LJ's view (giving the sole judgment, joined by Hooper and Pitchford LJJ), the decision in *Buttes Gas and Oil v Hammer (No 3)*[43] was sufficient authority for the proposition that, if a purportedly secular dispute on the construction of a deed in English law turned fundamentally on a dispute on religious doctrine, the absence of 'judicial or manageable standards by which to judge these issues' put the matter outside the jurisdiction of the courts.[44] Contrary to the claimants' plea that there was a 'bond of union' (a contract or agreement) between the parties that provided sufficient objective standards, this was a case where 'judicial self-restraint' was required, as the subject matter of the religious dispute defied resolution by 'analysing evidence, or by finding facts on the balance of probability, or by counting heads, or by ascertaining the wishes of a voting majority'.[45] The deeds themselves did not provide any way to consider the meaning of 'successor' without delving into the religious dispute, 'essentially a matter of professed subjective belief and faith on which secular municipal courts cannot possibly reach a decision, either as a matter of law or fact … This court should put a halt to this case now.'[46]

41 *Khaira v Shergill* [2013] EWHC 4162 (Ch) per HHJ Cooke at paras 22–25, emphasis added.
42 See *Shergill v Khaira* [2012] EWCA Civ 983 per Mummery LJ at paras 51–56. As the headnote put it, 'it was not simply a question of the meaning of the word "successor", but whether [the Third Holy Saint] fitted that description'.
43 [1982] AC 888, in which the House of Lords considered a claim for slander whose true goal was to obtain a decision of the English court about the boundary between the territory of three Gulf states, which affected the parties' off-shore drilling rights.
44 *Shergill v Khaira* [2012] EWCA Civ 983 per Mummery LJ at para 15, quoting Lord Wilberforce in *Buttes Gas* at 938 B–C.
45 See ibid at paras 16, 59, 70–71.
46 Ibid at paras 72–73.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

KHAIRA IN THE SUPREME COURT

The single judgment in the Supreme Court differed from Mummery LJ's understanding of *Buttes Gas*. That case was non-justiciable because it was inherently political and involved the transactions of foreign sovereign states: 'it trespassed on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations', as well as the lack of 'judicial or manageable standards' as Mummery LJ identified, making it 'difficult to imagine that such a conclusion could have been reached in any other context than the policy acts of sovereign states, for the acts of private parties, however political, are subject to law'.[47] The implication here is that, although religious matters may fall under the second quality of political matters, they do not fall under the first, and thus there is no inherent non-justiciability in matters of religion.

A case is non-justiciable 'where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter', for two reasons.[48] First, there was a 'rare' class of disputes where the issue was beyond the 'constitutional competence assigned to the courts under our conception of the separation of powers'; once the 'forbidden' area was identified, including certain transactions of foreign states and of proceedings in Parliament, the court could not adjudicate on matters within it, even if necessary to decide some other justiciable issue (if it 'inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot be fairly tried').[49] The court also proposed a second, 'quite different' basis for non-justiciability: 'claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law', such as 'domestic disputes, transactions not intended by the participants to affect their legal relations, and [certain] issues of international law'. Disputes in this category may, however, be entertained by 'reluctant' courts if a legal right is engaged.[50]

The Court cited a Canadian Supreme Court case, where a promise to obtain a Jewish religious divorce made by a husband to his wife was enforceable as a civil contract and was not merely a religious and moral obligation, in support of the proposition that the court is 'not barred from considering a question of a religious nature, provided that the claim is based on the violation of a rule recognized in positive law'.[51] The Court then set out the limited instances in which

47 *Khaira* at para 40.
48 Non-justiciability was juxtaposed to other matters, such as state immunity, the act of state doctrine and unenforceability of foreign penal, revenue or public laws, which are 'generally questions of territorial limits of the competence' of English courts or the competence that the courts recognise in foreign courts: ibid at para 41.
49 Ibid at para 42. See also *Prebble v Television New Zealand* [1995] 1 AC 321 and *Hamilton v Al-Fayed* [2001] 1 AC 395.
50 *Khaira* at para 43; see also Lord Bingham quote from *R (Gentle) v Prime Minister* [2008] 1 AC 1356.
51 *Khaira* at para 44.

this might happen. A line of English and Scots law cases shows how, 'where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment'.[52] These include questions of religious belief and practice where the court's jurisdiction is invoked either (a) to enforce the contractual rights of members of a community against other members or its governing body or (b) to ensure that property held on trust is used for the purposes of the trust.

Examples given of (a) include unincorporated religious communities treated as voluntary associations bound by contracts, or where religious associations act *ultra vires* their constitution or an Act of Parliament (for instance in joining with another church), otherwise breaching 'in a fundamental way the rules of procedures', or in dismissing or disciplining their members.[53] Examples of (b) include a series of property cases, from 1813 to 2011, in which the courts exercised jurisdiction in disputes caused by religious disagreements over the ownership of property, particularly where, as a result of schisms, parties disputed who had the beneficial interest in property held in trust for the community.[54] This required the ascertainment of the 'foundational and essential tenets of a faith in order to identify who was entitled to the property', superseding the previous rule, found at least in Scotland, that the courts would 'simply give effect to the majority rule within the religious community'.[55] English courts have not resiled from assessing Islamic and Hindu doctrine in similar cases.[56] The limit of the court's inquiry was emphasised in *Overtoun* as restricted to determining 'whether the trusts imposed upon property by the founders of the trust are being duly observed' and not assessing 'the truth or reasonableness of any of the doctrines' of the faith.[57]

The Supreme Court also rejected two bases of non-justiciability of religious disputes. The first related to public law. The well-known decision in *ex parte Wachmann*,[58] that the Chief Rabbi's decision that the applicant was not religiously and morally fit to hold office as a rabbi did not raise an issue of public law

52 Ibid at para 45.
53 Ibid at paras 46–48.
54 Although today statutory provisions may 'provide a means of avoiding the judicial determination of a religious dispute' in both jurisdictions: ibid at para 56. Hill, Sandberg and Doe, in *Religion and Law in the United Kingdom*, p 78, distinguish between courts intervening where there is a financial interest (the '*Forbes v Eden* principle' (1867) LR 1 Sc & Div 568) and where the disposal and administration of property is at stake.
55 *Khaira* at paras 49–52, including consideration of the leading case of *General Assembly of the Free Church of Scotland v Overtoun* [1904] AC 515.
56 *Khaira* at paras 54–55.
57 Ibid at para 53. On the incompetence of courts in assessing the truth or validity of religious belief, see *Gilmour v Coats* [1949] AC 426 per Lord Reid; Lord Nicholls in *R v Secretary of State for Education ex parte Williamson* [2005] UKHL 15 at para 22.
58 *R v Chief Rabbi of The United Hebrew Congregations of Great Britain and The Commonwealth ex parte Wachmann* [1992] 1 WLR 1036 at 1042.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

which was amenable to judicial review, was 'not an authority for a proposition that the legality of such disciplinary proceedings is not justiciable'.[59]

In *Wachmann* the court declined jurisdiction because the respondent was not a reviewable body, exercising functions 'essentially intimate, spiritual, and religious – functions which the government could not and would not seek to discharge in his place were he to abdicate his regulatory responsibility', and the decision was not reviewable as to do so would 'inevitably' draw the court into 'adjudicating upon matters intimate to a religious community'.[60] The appellant had anticipated this objection and was 'prepared to rely solely upon the common law concept of natural justice' in his appeal, without relying on Jewish law. Simon Brown J rejected this on the grounds that 'it would not always be easy to separate out procedural complaints from consideration of substantive principles of Jewish law which may underlie them', and concluded, 'The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state.'[61]

The implication in the Supreme Court's consideration of *Wachmann* is that it was the absence of any cause of action on the 'government function' test in public law that defeated the claim – the first reason given by Simon Brown J – and not the second, which alone would not have been enough to defeat a claim 'presented as a challenge to the contractual jurisdiction of a voluntary association', where the court had jurisdiction to consider questions of *ultra vires* and allegations of breaches of natural justice.[62]

THE COURT'S TREATMENT OF *BLAKE*

The second basis rejected by the Supreme Court was that found in the grounds of *Blake v Associated Newspapers Limited*,[63] a case concerning a former Anglican clergyman who purported to conduct a same-sex marriage on a TV programme. Two pieces in the *Daily Mail* commented on the programme and described him variously as a 'self-styled' and 'imitation' bishop with a 'costume mitre'.[64] In his claim for libel, Mr Blake pleaded that the articles alleged he was not validly consecrated nor entitled to call himself a bishop, although he 'masqueraded' as one, and that he was 'publicly and dishonestly' imitating a bishop, thereby setting out to deceive the public.[65]

59 *Khaira* at para 58.
60 *Wachmann* at 1042–1043.
61 Ibid at 1043.
62 The reasoning in *Wachmann* has been described as 'suspect on several counts, not least since the test for judicial review is the present of "public" functions not "governmental"' (Hill, Sandberg and Doe, *Religion and Law in the United Kingdom*, p 79).
63 See above, n 34.
64 *Blake* at paras 1–10.
65 Ibid at para 11.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

The publishers of the *Mail* disagreed with the precise meanings borne by the articles, but pleaded that 'in all the circumstances C is an imitation bishop'. It sought to defend the articles using the defences of justification and/or fair comment.[66] After the exchange of pleadings and witness statements – the statements of the claimant and his witnesses were 'redolent with doctrinal, procedural, jurisdictional and historical arguments in favour of validity of his consecration'[67] – the judge decided that the pleaded issues were within the 'territory which the courts, by self-denying ordinance, will not enter'.[68]

Gray J then moved on to consider whether the action should be stayed or proceed to trial, with perhaps some 'adaptation of the issues as they stand at present'.[69] The claimant argued that underlying the doctrinal issue as to the validity of his consecration was a 'secular issue' that could be appropriately determined by the courts: whether the claimant had 'in historical fact' been consecrated as a bishop.[70] The claimant's expert opined that the claimant had been 'clearly' consecrated as a matter of historical fact, and that this was within 'a valid historical succession', albeit one that might not be recognised by other churches. The complained-of articles wholly neglected this context, generating the misleading impression that he was an impostor.[71] The defendant countered that non-justiciable religious issues were so 'fundamental' that the action could not be fairly tried.[72] Gray J, who acknowledged that a stay should only be granted in the most extreme circumstances as it would deny the claimant the opportunity of establishing his good name in the courts, concluded that the issues in the action could not be adapted to 'circumvent the insuperable obstacle placed in the way of a fair trial'.[73] He suggested that the claimant, whom he found 'understandably somewhat reluctant to abandon his claim to have been validly consecrated', should make a 'modified version of the secular issue' the basis of the claim, before noting the sheer quantity and depth of issues in the case that came within the 'forbidden' territory of non-justiciability:

> Such questions include, by way of example only, substantive doctrinal questions including the canon law of catholic apostolic churches, questions of ecclesiastic procedure such as the authority and entitlement of Richard Palmer to consecrate the Claimant and the validity (in the absence at the time of any denomination or established church) of the consecration of the Claimant; questions whether the consecration of the

66 Ibid at paras 12–13.
67 Ibid at para 17.
68 Ibid at para 24.
69 Ibid at para 25.
70 Ibid at para 27.
71 Ibid at paras 28–30.
72 Ibid at para 31.
73 Ibid at paras 35 and 38.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

> Claimant was in conformity with the customs and practices of any established Christian denomination or criteria independently of POEM [the claimant's order] and finally questions as to the moral standing and fitness of both Richard Palmer and the Claimant for episcopal office.[74]

THE IMPACT OF *KHAIRA* ON DEFAMATION CASES

The Supreme Court does not in *Khaira* explain precisely why the decision in *Blake* was incorrect; the thrust of its criticism is that, because a private right was engaged, the claim should have proceeded to trial, even if that required the determination of religious doctrine, in order to give legal effect to the claimant's private rights. This is indicated by the fact that the Court was happy to remit a number of difficult questions about the dispute back for trial by the lower courts, including on the fundamental tenets of the First Holy Saint and the Nirmal sect, the nature of the institution at Nirmal Kutia in India, the steps or formalities that were needed for a person to become the successor of the First Holy Saint, and whether the teachings and personal qualities of the Third Holy Saint complied with the fundamental religious aims and purposes of the trust.[75]

On this basis, the Court could have criticised other recent decisions applying the 'fundamental and inseparable' test to religious doctrine. Similar matters arose in the parallel defamation proceedings in *Baba Jeet v Singh* and *Shergill v Purewal*. In *Baba Jeet*, the Third Holy Saint claimed that an article in the *Sikh Times* about the Nirmal Sikh faith damaged his reputation in the UK because it alleged that he was the leader of a 'cult' and an impostor who disturbed the peace in the Sikh community generally and in High Wycombe, that he had dishonestly produced counterfeit trust deeds to remove the gurdwara trustees and management committee there and that he promoted blasphemy and the sexual exploitation and abuse of women.[76] In *Purewal*, the first claimant in *Khaira* brought a libel action against another Sikh newspaper, the *Punjab Times*, and against a journalist for three articles that attacked the Third Holy Saint and his followers, including some of the trustee appointees. The articles claimed that the Third Holy Saint had abandoned Sikh principles, that he and his supporters were a 'sham' and that the claimant had sought to instigate violence.[77]

Both actions were stayed at preliminary issues hearings because issues of religion and doctrine permeated the pleadings and the courts did not consider it

74 Ibid at para 33.
75 *Khaira* at para 59.
76 *Baba Jeet* at para 8.
77 *Purewal* at paras 1–8.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

within their jurisdiction to determine the religious questions. For instance, the issue in *Baba Jeet* of whether the claimant was an 'impostor' could not be isolated and resolved without reference to Sikh doctrines and traditions.[78] And the issues in *Purewal*, such as whether the Third Holy Saint was the legitimate successor to the sainthood, were 'fundamental' to the case, making it 'impossible to adapt the issues in such a way as to circumvent the insuperable obstacle placed in the way of a fair trial of the action by the fact that the court is bound to abstain from determining questions which lie at the heart of the case'.[79] Applying *Khaira*, it is likely that both cases should have gone to trial given the engagement of the claimants' private law rights. Nothing distinguishes either from *Blake*.

The same is true of *Otuo*, where all three prior defamation cases were considered alongside the Court of Appeal judgment in *Khaira* (HHJ Moloney was 'cautious' of *Wachmann* and thought that the defamation cases were 'taken on their particular facts'[80]). *Otuo* was a Jehovah's Witness who, after an internal inquiry into allegations of misconduct, was 'dis-fellowshipped' from the membership, with an announcement made to the congregation that he was 'no longer one of Jehovah's Witnesses'.[81] The judge did not find this to have a defamatory meaning naturally and ordinarily, but deferred the question of innuendo.[82]

The claimant argued that the allegations would be decided on a secular basis by the court, on the question of whether he was guilty of fraud and whether the defendant's elders were actuated by express malice towards him.[83] Unlike other cases, the parties were

> in agreement on the creed of their religion, on what is or is not forbidden to its members, and even on what procedures should be adopted to inquire into misconduct and what steps it is proper to take in respect of those found guilty. There may be doctrinal issues involved … but if there are they have not yet been clearly pleaded or put into evidence.[84]

The parties differed in whether the defendant's procedures were applied honestly and fairly to the claimant. The judge concluded that the action lay on the

78 *Baba Jeet* per Eady J at para 41 following the reasoning in *Blake*. The Third Holy Saint successfully obtained permission to appeal but a substantive appeal was not heard as he failed to pay security for costs: *His Holiness Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group and Anr* [2011] EWCA Civ 139.

79 *Baba Jeet* per Gray J at para 35.

80 *Otuo v The Watch Tower Bible and Tract Society of Britain*, claim no HQ 13 D 03755 at paras 20–21. A copy of the judgment is available at <https://inforrm.files.wordpress.com/2013/12/otuo-v-watch-tower-bible-and-tract-society.pdf>, accessed 14 October 2015.

81 Ibid at para 2.

82 Ibid at paras 7 and 12.

83 Ibid at para 14.

84 Ibid at para 23.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

'borderline' between justiciability and non-justiciability, and the application to strike out had been brought 'prematurely and should be dismissed on that sole ground'.[85]

It seems that the Supreme Court has subverted the basis for these decisions. Being founded on a religious dispute does not disqualify a legal dispute as non-justiciable per se, whether or not the claim can be reframed in secular terms (it does if it is purely a religious dispute, however). This potentially makes matters fairer for both sides. On the one hand, this will be an advantage for claimants, making it more likely that they obtain vindication of their reputation at the end of a trial. On the other hand, it allows defendants more room to fight the case, for, as the judge said in *Blake*, had the case proceeded

> the newspaper would still wish to advance the case that the consecration service had no religious or ecclesiastic validity, so that it was in effect a charade, and that to prevent the newspaper from advancing this case would be manifestly unfair and a serious invasion of its Article 10 right.[86]

Awkwardly, the Court, through its support for Lord Davey's prohibition in *Overtoun*, appears not to permit courts to decide the 'truth' of religious doctrines.[87] It seems doubly unfair on the defendant if defamation claims underlain by religious disputes are justiciable but the truth of the religious dispute cannot be contemplated in its own terms nor re-pleaded in wholly non-doctrinal ones. It will be interesting to see whether, following *Khaira*, there is still a domain of religious dispute where the defendant cannot justify his comments as true because courts will recoil from attempting to decide what objective truth is in relation to religion.

A solution (or at least a 'preferable means of accommodating religion in the law of libel'[88]) may lie in the defence of honest opinion. The Supreme Court alluded in *Khaira* to the previous formulation of the defence in *Spiller v*

85 Ibid at paras 24–25. Mr Otuo's libel case was later dismissed on grounds of limitation ([2015] EWHC 509 (QB)) but he is still pursuing a slander case in relation to the matter: [2015] EWHC 1839 (QB). The alleged slander, one of fraud, has yet to have a hearing on meaning but both sides appear, at para 3, to define it in 'specifically religious terms'. It remains to be seen whether the more usual, natural and ordinary sense of the word will be the basis of meaning pleaded at trial.

86 *Blake* at para 36. See also para 31, where the defendant averred that *Otto-Preminger-Institut v Austria*, App no 13470/87 (ECtHR, 20 September 1994) and s 12(4) of the 1998 Human Rights Act supported the proposition that 'if the right of the newspaper to deploy material in support of the defences of justification and fair comment were to be circumscribed by the court, its right to freedom of expression under Article 10 [ECHR] might be infringed'. Section 12(4) obliges the court to pay 'particular regard' to the 'importance of the Convention right to freedom of expression' and, inter alia, to the benefit of any defendant respondent, the extent of publication and whether publication was in the public interest.

87 See *Overtoun* at paras 45 and 53.

88 Mullis and Scott, 'How to know the truth', p 144.

Joseph.[89] If a statement can show that it is an expression of opinion which indicates its factual basis and could be held by an honest person on the basis of any fact that existed at the time, it will be honest opinion. If breadth is given to the class of facts which underpins the factual basis of the opinion, it may include allusion to or representation of the very dispute which lies at the heart of, say, an allegation of heresy. This would not give the defendant the same protection as a strike-out of the claim on the basis of non-justiciability, 'an absolute privilege which has never been recognised and could easily be abused',[90] but it would provide critics and commentators with a safer defence, provided that they refer to the doctrinal dispute in their publication. It would, in effect, extended the concept of privilege, already acknowledged in the honest opinion defence, beyond its established domains of absolute and qualified privilege, and rebalance the scales of justice between the parties in religious defamation disputes.

CONCLUSION

Khaira does more than 'shift ... the boundary slightly and enlarge the circumstances in which the court will feel able to intervene'[91] or merely 'push the door of non-justiciability open by a crack'.[92] It potentially heralds a return to what has been described as the 'nineteenth-century' concept of non-justiciability, where judges sought 'neutrality' and detachedness by 'pointing out that it was no role of a court of law to act as a religious insider delivering "correct" answers to the underlying substantive theological or ecclesiological dispute between the parties' but would 'regularly proceed to point out that questions of doctrine and discipline might well be relevant as questions of fact to determine the outcome of the case' through the use of evidence.[93]

89 *Khaira* at para 57.

90 *Otuo* at para 25.

91 F Cranmer, 'Is religious doctrine justiciable? Up to a point, yes: *Shergill v Khaira*', *Law & Religion UK*, 11 June 2014, <http://www.lawandreligionuk.com/2014/06/11/is-religious-doctrine-justiciable-up-to-a-point-yes-khaira-v-shergill/>, accessed 15 July 2015.

92 N Addison, '*Shergill v Khaira*: when can religious doctrine be justiciable?', *Religion Law Blog*, 12 June 2014, <http://religionlaw.blogspot.co.uk/2014/06/shergil-v-khaira-when-can-religious.html>, accessed 1 July 2015.

93 J Rivers, *The Law of Organized Religions: between establishment and secularism* (Oxford, 2010), p 73. This is in contrast to the 'modern doctrine', which holds that courts should 'not even resolve disputed questions of religious doctrine and government as matters of fact'. It is 'thus a form of blindness to social reality and the expectations of the parties. It leads to a curious instability in the law', between denial of a remedy to the claimant on the one hand and the search for a wholly non-religious basis for legal decision-making on the other. See also Rivers' preference for the secular approach to *Blake*: 'One can easily distinguish between claims which are simply true or false (eg that a person does or does not hold a certain position in a certain religious organization) and claims which depend on a theological judgment' (p 145).

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press

Particularly given the willingness of courts to widen the legal definition of a religion, for instance to the Church of Scientology,[94] it is hard to disagree with Singh that there is likely to be a rise in defamation cases involving religion, more of which will be deemed justiciable.[95] There has even been an attempt at a private prosecution on the basis of the 'untruth' of the Mormon faith.[96] More cases will involve religions other than Christianity, as new religious movements use threats of libel to silence critics.[97] Many will welcome the decision in *Khaira*.

94 *R v Registrar General of Births, Death and Marriages ex parte Hodkin* [2013] UKSC 77, reversing the principle of the Court of Appeal in *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697.

95 H Singh, 'A leap of faith: the rise of religious libel cases', *Inforrm's Blog*, 11 March 2015, <https://inforrm.wordpress.com/2015/03/11/a-leap-of-faith-the-rise-of-religious-libel-cases-hardeep-singh/>, accessed 15 July 2015: 'Reports on those alleged to be involved with Islamic extremism and charismatic [new religious movement] leaders, along with the increased use of social media, provide ample opportunity for the issuing of further defamation writs. Religious practitioners with deep pockets want to manage reputations just like everyone else. They should also expect to be held accountable for their transgressions.'

96 *Thomas Phillips v Thomas Monson* [2014] Westminster Magistrates Ct (20 March 2014) per District Judge Riddle: 'It is obvious that this proposed prosecution attacks the doctrine and beliefs of the Mormon Church, and is aimed at those beliefs rather than any wrong-doing of Mr Monson personally. The purpose is to use criminal proceedings to expose the false (it is said) facts on which the church is based. It is inevitable that the prosecution would never reach a jury, even if Mr Monson chooses to attend. To convict, a jury would need to be sure that the religious teachings of the Mormon Church are untrue or misleading. That proposition is at the heart of the case. No judge in a secular court in England and Wales would allow that issue to be put to a jury. It is non-justiciable.' <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/thomas-phillips-v-thomas-monson.pdf>, accessed 15 July 2015.

97 Singh, 'Religious libel', pp 153–154.

https://doi.org/10.1017/S0956618X15000824 Published online by Cambridge University Press