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How to Know the Truth: Accommodating Religious Belief in the Law of Libel

Alastair Mullis and Andrew Scott^{*}

Abstract: While religious pluralism, liberty and equality are now general cultural and legal expectations in the UK, the history of interplay between religious identities is one of intellectually - and sometimes physically - violent discord. Today, religious frictions persist as an inevitable facet of a plural society. Both low-level antipathies and serious religious disputes are driven by such factors as long-standing and incipient factionalism within religious groupings, more or less aggressive secularist critique, and resentment among some faiths of the proselytising zeal of others. From time to time, the law of libel is invoked to resolve disputes engendered by religious difference, notwithstanding that it is inherently difficult for any purportedly neutral, secular law properly to adjudicate between competing conceptions of the righteous and the good. This paper proceeds in four parts. First, we outline the basic features of English libel law to underpin the subsequent discussion. Secondly, we suggest a typology of criticism of religious faiths and their adherents, and indicate how each type of allegation would be countenanced by the law. Thirdly, we criticise the approach adopted by the English courts to one type of allegation: those that involve specific allegations of fact but which rest on questions of religious doctrine. We find that by abjuring any role on grounds of non-justiciability and deference to religious modes of dispute resolution, the courts may systematise the disadvantage of already marginalised groups. Finally, we suggest a conceptually and jurisprudentially preferable manner for the resolution of such cases that would properly ensure the neutrality of libel law as between disparate views on questions of religious faith.

Keywords: Libel, defamation, religion, Sikhism, truth, fair comment, justiciability

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INTRODUCTION

Religion unites, and divides, billions of people around the world. In the United Kingdom, some forty-five million citizens profess adherence to one of the major world religions or other devotion.¹ Of these, many are committed to minority creeds and faiths.² While religious pluralism, liberty and equality are now general cultural and legal expectations, the history of interplay between religious identities in the UK is one of intellectually - and sometimes physically - violent discord.³ Today, religious frictions – albeit an inevitable facet of a plural society - persist. Both low-level antipathies and serious religious disputes are driven by any number of factors: long-standing and incipient factionalism within religious groupings, more or less aggressive secularist critique, fears of indoctrination by charismatic leaders of new-fangled faiths, discordance with the prevailing culture of materialism, the perceived frustration of the reasonable desire for some to manifest their faith, and the resentment among some faiths of the proselytising zeal of others. Occasionally, perhaps surprisingly infrequently, the general law is called upon to regulate or to resolve disputes engendered by religious difference. From time to time, it is the law of libel – that aspect of legal doctrine that exists to provide protection for reputation against unfounded and damaging criticism – that is invoked.⁴

A basic concern regarding the application of libel law to the context of religious disputes is that the primary concern of that area of law is with the truth or otherwise of allegations made. The task of understanding the truth, however, is also a core disputed theme both within and between religions. It is inherently difficult for any purportedly neutral, secular law properly to adjudicate between

¹ The 2001 Census included a question on religion for the first time (outside of Northern Ireland). The question used a measure based upon identity rather than practice, and so may overstate the extent of actual religious commitment. The 2001 Census showed that 71.6% of people self-identify as Christian (circa 42.1 million), 2.7% (circa 1.59 million) as Muslim, 1.0% (circa 0.56 million) as Hindu, 0.6% (circa 0.34 million) as Sikh, 0.5% (circa 0.27 million) as Jewish, 0.3% (circa 0.15 million) as Buddhist. Around 0.3% (circa 0.18 million) self-designated as being of some other religion, while 15.5% (circa 9.1 million) professed themselves to have no religion and 7.3% (circa 4.3 million) did not answer.

² The Census data does not allow differentiation between various denominations of the major faiths. Around 0.3% (circa 0.18 million) respondents to the 2001 Census were counted as being of some other religion. Very many self-designations as ‘other’, however, were reallocated to the Christian religion grouping. Famously, a further 390,000 people ‘humorously’ professed commitment to the inter-galactic ‘Jedi’ tradition, notionally making this the fourth largest religion in the UK. These designations were counted in the ‘no religion’ category.

³ For an overview of the legal framing of religion in British modern history that traces four phases of development, see Sandberg, *Law and Religion* (Cambridge University Press, 2011), ch. 2.

⁴ This may be genuinely to right a false and defamatory slight, or because this aspect of the law is considered a useful means of curtailing – or ‘chilling’ – even legitimate criticism. Certainly, the latter was thought by some to be the more accurate explanation of the motivation of the claimant in one recent case – see *Shergill v Parnal* [2010] EWHC 3610 (QB): “[the claimant has] no genuine interest in bringing these proceedings to protect or preserve his reputation, but rather is seeking to gag the defendants from criticising the claimant’s active campaign to establish control and ownership for the benefit of a ‘holy man’ in India of three Gurdwaras in the UK” (at [10]).

competing conceptions of the righteous and the good. It may be foolhardy even to make the attempt. This chapter proceeds in four parts. First, we outline briefly the basic features of English libel law in order to underpin the subsequent discussion. Secondly, we suggest a typology of criticisms or allegations that might be made regarding religious faiths and their adherents, and indicate in general terms how each type of allegation would be countenanced by the law of libel. Thirdly, we offer a more developed critique of the approach adopted by the English courts to one of these types of allegation, specifically that seen in *Blake v Associated Newspapers Ltd*,⁵ *His Holiness Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group*,⁶ and *Shergill v Purewal*.⁷ That approach involved the abjuring on the part of the court of any role on grounds of non-justiciability and deference to religious modes of dispute resolution. Finally, we suggest a conceptually and jurisprudentially preferable manner for the resolution of legal disputes in such cases; one that would properly ensure the neutrality of libel law as between disparate views on questions of religious faith.

THE BASIC FEATURES OF ENGLISH LIBEL LAW

English libel law is largely derived from the common law.⁸ Its ostensible purpose is to allow individuals to defend their reputations against false and defamatory imputations published by others. In doing so, it must recognise the individual and social importance of reputation,⁹ while also limiting the extent to which the law curtails the freedom of expression that is core to any democratic society. The starting point in every case is that, in law, it is presumed that the statement complained of is false and that it has caused harm to reputation. To pursue a claim, a claimant must then show three things. The first is that publication to some

⁵ [2003] EWHC 1960 (QB).

⁶ [2010] EWHC 1294 (QB) (hereinafter *Hardeep Singh's Case*).

⁷ See above note 4.

⁸ The law of libel has been the subject of much policy debate in recent times. At the time of writing, the UK Government has introduced a Defamation Bill into Parliament with the expectation that the Bill will be passed into law sometime in 2013 (see [WWW] <http://services.parliament.uk/bills/2012-13/defamation.html>). The Bill proposes a number of amendments to the scheme of law outlined in this section and places much of the law onto a statutory footing. The basic features of the substantive law, however, will remain essentially the same. For a discussion of the historical development of the common law in this regard, see Mitchell, *The Making of the Modern Law of Defamation* (Oxford, Hart Publishing, 2005).

⁹ This importance has been reflected increasingly in the jurisprudence of the European Court of Human Rights, which now considers an individual's reputation to fall within his or her Article 8 right to respect for private life - see Mullis and Scott, 'The Swing of the Pendulum: Reputation, Expression and the Recentering of English Libel Law' (2012) *Northern Ireland Legal Quarterly*, 63(1), 27-58; Spielmann and Cariolou, 'The Right to Protection of Reputation Under the European Convention on Human Rights', in Spielmann, Tsirli and Voyatzis (eds) *The European Convention on Human Rights: a living instrument* (Brussels: Bruylant, 2011), 401-425.

third party has occurred.¹⁰ It is not important quite how this communication occurs, so that an email, a letter, a spoken statement, or a waxwork sculpting can amount to publication as much as the writing of an article in a newspaper, in a magazine or on some online platform, or the broadcasting of a piece on radio or television. The second element of the claim is that the publication must somehow have identified the claimant as the subject of the imputation.¹¹ Identification by name will obviously be the most common method, but a photograph, a cartoon, a description or identification of a group to which the person belongs can all be enough. The key question is whether the audience for the publication would reasonably have understood it to refer to the claimant.

The third requirement of the claimant is that he or she must show that the publication - or some imputation contained within it - has a defamatory meaning.¹² In turn, this has two component parts: the determination of meaning, and the assessment of whether the meaning was defamatory. The meaning of the imputation is determined by reference to how the words would have been understood by the ordinary, reasonable recipient of the publication in question.¹³ Disputes about meaning are often central to libel actions: “very often if not always the most important issue is meaning”.¹⁴ In general, there is no attempt to divine the *actual* inferences drawn by recipients of the publication at issue. Determination of meaning is not an empirical question.¹⁵ Neither is the publisher’s *intended* meaning directly relevant. Counterfactually, in accordance with the ‘single meaning rule’, the court is usually required to pretend that only one interpretation of an imputation will have been inferred by all such ordinary, reasonable people. Should a claimant wish to contend that a publication also holds a ‘hidden’ meaning beyond that apparent on its face and accessible only to some group of persons who have particular extraneous knowledge, he or she must adduce evidence to that effect.¹⁶

¹⁰ See, generally, Doley and Mullis (eds), *Carter-Ruck on Libel and Privacy* (6th edn, London: LexisNexis, 2010), ch. 5.

¹¹ *ibid.*, ch. 6.

¹² *ibid.*, ch. 4.

¹³ An “impeccable synthesis of the authorities” on this theme offered by Eady J was reiterated by the Court of Appeal in *Gillick v Brooke Advisory Centre* [2001] EWCA Civ 1263, at [7] (*per* Lord Phillips MR).

¹⁴ Uncorrected evidence given by Mr Justice Tugendhat to the Joint Committee on the Draft Defamation Bill, 7 July 2011, at Q40. For an illuminating discussion of, *inter alia*, the law and practice regarding the determination of meaning in English and Australian defamation law, see Kenyon, *Defamation Law: Comparative Law and Practice* (London: UCL Press, 2006).

¹⁵ *Hough v London Express Newspapers* [1940] 2 KB 507, at 515 (*per* Goddard LJ).

¹⁶ This is known as a ‘legal’ innuendo meaning, in contrast to ‘popular’ or ‘false’ innuendo which comprises the deliberate inclusion of ambiguous terms that could be interpreted in alternative ways by any reader. A classic example is that of a literal reference in a publication to the claimant’s frequenting of a particular address, which might be seen as defamatory only when coupled with the extrinsic knowledge that the address in question is that of a house of ill-repute. Notably, in the *Hardeep Singh* case, Mr Justice Eady emphasised that the claimant relied on natural, ordinary or inferential meanings, and did not seek to rely on any legal innuendo – see *Hardeep Singh’s* case, above note 6, at [8].

Different tests have been used to determine when a statement is defamatory. The standard test is that of whether the words have a tendency to lower the claimant in the estimation of right-thinking people generally.¹⁷ This has recently been restated by Mr Justice Tugendhat following a review of numerous previous definitions: “a publication is defamatory of a claimant if it substantially affects in an adverse manner the attitude of other people towards him, or has a tendency so to do”.¹⁸ The question is assessed from the perspective of the public generally, although again there is no attempt to ascertain whether the publication might in fact have affected the perception of the claimant in the estimation of the audience. One caveat arises where the audience for the publication concerned is itself somehow specialised or particular in nature, in which the assessment is made from the perspective of the average member of that particular audience. Hence, given the differing underpinning knowledge of the average recipient of reader of the statement, the impact of the same statement may be understood differently in law when published in *The Times* newspaper as opposed to when published in the Jehovah’s Witnesses’ *Watchtower*, the Scientologists’ *Freedom Magazine*, or the *Sikh Times*.

A defendant publisher may contest any of the three elements of the claim, or seek to rely on one of several available defences. The two key defences relate to meaning. Which is to be deployed will depend on whether the contested imputation is properly understood to be a statement of fact or an expression of opinion. In the former case, the defendant may rely on the defence of justification should he or she be able to demonstrate that what was published is substantially true.¹⁹ If the contested imputation is better characterised as an expression of opinion, then the defendant might seek to rely on the defence of ‘fair comment’ (now relabelled as ‘honest comment’).²⁰ This absolves the defendant of liability if he or she can show that the opinion was one that could be honestly held given the background facts.²¹ Other defences focus on whether the occasion on which the

¹⁷ *Sim v Stretch* [1936] 2 All ER 1237, at 1250 (*per* Lord Atkin). For recent discussions of the concept of defamatory meaning, see McNamara, *Reputation and Defamation* (Oxford University Press, 2007), esp pt 3.

¹⁸ *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB). Alternative, older formulations of the test that may sometimes be brought to bear in the context of religious disputes are that a statement causes a person to be hated, held in contempt or subjected to ridicule (*Parmiter v Coupland* (1840) 6 M & W 105, at 108 (*per* Parke B); *Villiers v Monsley* (1769) 2 Wils 403, at 404 (*per* Gould J)), or that it causes others to shun or avoid a person (*Yousoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, at 587 (*per* Slesser LJ)).

¹⁹ See, generally, Doley and Mullis (eds), *Carter-Ruck on Libel and Privacy* (6th edn, London: LexisNexis, 2010), ch. 9. Clause 2 of the current Defamation Bill seeks to abolish the existing common law defence and replace it with a new statutory formulation.

²⁰ The defence was relabelled ‘honest opinion’ by the Court of Appeal in *British Chiropractic Association v Singh* [2010] EWCA Civ 350, at [36], while in *Spiller v Joseph* [2010] UKSC 53 the Supreme Court echoed Lord Nicholls in *Reynolds* [2001] 2 AC 127, at 165 when preferring ‘honest comment’ (at [117]). Perhaps confusingly, the current Defamation Bill refers to this defence in clause 3 as ‘honest opinion’.

²¹ See, generally, Doley and Mullis (eds), above note 10, ch 10. Clause 3 of the current Defamation Bill seeks to abolish the existing common law defence and replace it with a new statutory formulation.

statement was made was in some way privileged,²² or on whether the publication was made in a responsible manner on a matter of public interest.²³

A TYPOLOGY OF DAMAGING CLAIMS INVOLVING RELIGION

When considering the application of the law of libel to disputes that include a religious dimension, it is important to distinguish between a number of conceivable scenarios. We outline four such scenarios, although we do not suggest that there are necessarily stark divisions between the categories listed.²⁴ In each context, criticisms may emanate from within the ranks of the given religion, from adherents to other religious faiths, or from persons with no religious commitment. In principle, the origin of the potentially libellous criticism is unimportant, but it may have a bearing in fact on both the type of criticism made and on the question of whether there may be some extra-legal forum internal to a particular religion or denomination to which the disputants may be willing to submit for resolution of the argument. Criticisms of the types outlined may be made against the proponents of major world religions, of schismatic groups, or of emergent minority religions, ‘sects’ or ‘cults’. Less prevalent, but now recognised in English law, such criticism may also be levelled against active secularists and more passive non-believers.²⁵

GENERAL CRITICISM OF RELIGIOUS DOCTRINE OR PRACTICE

The first scenario arises where some criticism is offered of a religion in general, or of some particular aspect of religious practice or doctrine. Such criticism may be expressed in a pejorative fashion or more neutrally. Signal examples might include the reflections on founding ideas of the Islamic faith in Salman Rushdie’s *The*

²² An ‘absolute privilege’ is available where public policy dictates that a person should be able to speak freely without fear of possible legal consequences. Examples include statements made in the course of parliamentary proceedings, and statements made in the course of judicial proceedings in the UK - see, generally, Doley and Mullis (eds), *ibid*, ch. 11. Qualified privilege, which can be defeated by proof of malice on the part of the publisher, is available on the basis of statute or in circumstances where the publisher falls under some duty to communicate and the recipient of the publication has a corresponding interest in receiving it. Examples of such circumstances include replies to an attack made by the claimant, and references written at a third party’s request. See, generally, Doley and Mullis (eds), ch. 12. Clauses 6 and 7 of the current Defamation Bill seek to extend the range of statutory privilege to include statements published in peer-reviewed scientific or academic journals.

²³ The so-called *Reynolds*-privilege – see, generally, Doley and Mullis (eds), *ibid*, 336-373. Clause 4 of the current Defamation Bill seeks to abolish the existing common law defence and replace it with a new statutory formulation.

²⁴ We exclude from this typology ‘criticism’ that manifests in physical assault or incitement to public disorder.

²⁵ See, the Racial and Religious Hatred Act 2006, and commentary in Hare and Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, 2009).

Satanic Verses,²⁶ the critiques of Christianity and other religions offered by Richard Dawkins and Christopher Hitchens,²⁷ 'blood libels' against adherents to the Jewish faith,²⁸ and the critique of Islam offered in some of the cartoons published by the newspaper *Jyllands-Posten*.²⁹ An earlier instance of this type of dispute can be seen in the heresy 'libel' raised in 1878 against Professor William Robertson Smith on account of his publication of a number of articles based on historical criticism of the Bible in the *Encyclopædia Britannica*.³⁰ This type of criticism may extend to include some consequential critique of representative figures of the faith concerned. An infamous example can be seen in the derision offered of the Roman Catholic faith by Ian Paisley Sr. - a Free Presbyterian Moderator and a Northern Irish Member of the European Parliament - on the occasion of the 1988 visit of Pope John Paul II to the Strasbourg institution.³¹

Such criticisms are likely to be deemed offensive to adherents of the impugned religion, striking as they do at the articles of faith on which individual and collective convictions and conceptions of identity are premised. It must be questionable, however, whether - even when expressed in virulent, abusive or scurrilous form - they should provide a basis for legal complaint.³² In terms of libel law, such statements will not usually identify particular adherents as the subjects of criticism, or will do so only in an institutional as opposed to personal manner.³³ This fact has been one motivation behind calls for the introduction of

²⁶ See, generally, Pipes, *The Rushdie Affair: the Novel, the Ayatollah and the West* (Birch Lane Press, 1994); Malik, *From Fatwa to Jihad: the Rushdie Affair and its Legacy* (Atlantic, 2009); Weller, *A Mirror for Our Times: the Rushdie Affair and the Future of Multiculturalism* (Continuum, 2009).

²⁷ Dawkins, *The God Delusion* (Bantam Books, 2006); Hitchens, *God is Not Great: How Religion Poisons Everything* (Atlantic Books, 2007).

²⁸ See, generally, Dundes (ed), *The Blood Libel Legend: Casebook in Anti-Semitic Folklore* (University of Wisconsin Press, 1992). Of course, on occasion, blood libels may have been levelled with particular individuals as targets, and more generally were issued in order to generate hatred of and disquiet regarding the presence of Jews as members of communities.

²⁹ Perhaps the definitive explication of the Danish cartoons affair is that offered in Klausen, *The Cartoons That Shook the World* (Yale University Press, 2009).

³⁰ In that case, the 'libel' in question was merely the name of the writ under which the scholar-preacher was brought to the Assembly of the Free Church of Scotland. The case was left undetermined with Robertson Smith being instead stripped of his academic chair.

³¹ On that occasion, Paisley's critique took the form of a banner emblazoned with the words 'John Paul II Anti-Christ' and a characteristically robust vocalisation: "I denounce you as the Antichrist" - see MacDonald, 'Paisley Ejected for Insulting Pope', *The Times*, 12 October 1988; Palmer, 'Paisley Thrown Out of Euro Assembly After Pope Attack', *Guardian*, 12 October 1988. Paisley has elaborated on his thesis in the text, *The Pope is the Antichrist: A Demonstration from Scripture, History and His Own Lips*. Available at: [WWW] www.ianpaisley.org/antichrist.asp.

³² Nevertheless, the European Court of Human Rights has been forgiving of restrictions placed on freedom of expression by member states oriented towards the protection of religious sentiment, usually on the basis of the margin of appreciation left when competing Convention rights are at stake or when an assessment is required of the needs of public safety - see, generally, Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd edn, Oxford University Press, 2007), ch.11; Sandberg, above note 3, ch. 5.

³³ While there is no general rule as to when words spoken of a group or class of persons - such as the adherents of a given religion - sufficiently refer to a particular individuals to allow him or her to bring an action for libel, the larger the class or group against whom the imputation is made, and the more general or sweeping the charge, the less likely it is in practice that the claimant will be permitted to proceed. Vulgar generalisations are not actionable. In the United States, it is a very rare action in which a member of a group of more than 25 persons will be allowed to sue as a person individually identified

‘group defamation’ laws oriented towards criminalising the abuse of religious faiths and ethnic or racial minorities. Moreover, such criticism would generally involve highly contestable imputations of nothing more than metaphysical error or turpitude. Hence, given that the average recipient of such commentary would be understood by the court to be versed in the fact and desirability of religious pluralism, it would be considered unlikely to affect the estimation of adherents of the given religion in the minds of people generally. General criticism is unlikely to be deemed defamatory. Indeed, the stronger the tone of any attendant abuse, the greater the likelihood that the criticism would rebound to the detriment of the speaker.

GENERAL CRITICISM COUPLED WITH SPECIFIC ALLEGATIONS

The second type of dispute involving a religious dimension arises where general criticism is made of a religious doctrine or practice, and this is coupled with some specific, associated critique of a particular adherent. Often the complaint is that particular actions of the person who ultimately sues for libel are not warranted by religious doctrine. One might envisage also criticism that seeks to challenge a general rule of doctrine (for example, bars on homosexual practice), but which does so through the vehicle of coupling an allegation of ‘wrongdoing’ against the religious benchmark by an eminent cleric with one of hypocrisy for prescription of standards for others that are not maintained personally.

It is this type of dispute that has arisen in a number of cases decided by the English courts in recent times. At the root of both the *Hardeep Singh* case and *Shergill v Purwal* was a schism in the Sikh faith that arose following the death intestate of an acknowledged religious leader, and which involved acrimonious dispute over the legitimacy of the purported succession.³⁴ The concomitant allegations included complaints over blasphemous and heretical divergence from accepted teachings, the status of the purported Baba and his followers, the causing of violent disorder, and the fraudulent claim to and misappropriation of a range of valuable properties in the UK. The case of *Blake v Associated Newspapers* involved questions surrounding the legitimacy of the consecration of a purported bishop, and concomitant allegations that he was an imposter intent on deceiving his congregation and the wider public.³⁵ The approach adopted by the judges in those cases, predicated on a dual concept of non-justiciability and deference to religious modes of dispute resolution, is discussed further in the following section.

by comments relating to the group as a whole: “it is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation” (*Ryckman v Delavan* 25 Wend 186, at 199 (NY 1840)).

³⁴ The details of this schism are set out at length by reference to the case pleadings in the judgment of Mr Justice Eady in the *Hardeep Singh* case, above note 6, at [7]-[27].

³⁵ See above note 5, at [11]-[18].

SPECIFIC ALLEGATIONS OF FAILURE TO MEET PRESCRIBED STANDARDS OF BEHAVIOUR

A third type of dispute sees the specific critique of particular individuals for failure to meet standards or expectations of behaviour prescribed by religious doctrine. Here, the force of the allegations in question concern the interpretation of matters of fact. Such allegations will tend to be levelled between members of the same faith, although this will not be universally the case. It may be that the standards themselves are contested, and that the behaviour in question is acceptable from one perspective but not the other. In such circumstances, such disputes are akin to those outlined in the second category above. The typical case falling within this category is distinguishable, however, in that the doctrinal benchmarks for acceptable behaviour are agreed and instead an individual's standard of behaviour is impugned. Obvious examples may include allegations of 'sinful' conduct, such as homosexual practice, adultery, apostasy, or witchcraft.³⁶

In such cases, there will seldom be any difficulty with the question of identification or publication. The alleged perpetrator of the 'sin' will likely have been publicly identified for exemplary purposes. There may sometimes be greater difficulty, however, on the question of whether imputations were defamatory. On one hand, allegations that would not be considered defamatory from a broader societal perspective – for example, that a person was a homosexual – may be judged harmful to reputation when made to a more cloistered or specific audience. On the other hand, it might reasonably be argued that the impact of the allegation among the specific audience was not such as to adversely affect reputation or to evoke hatred, ridicule or contempt, but rather to engender pity or to solicit aid. Insofar as an impugned individual wishes to remain within the religious grouping, it is conceivable that such cases would never come to the secular court. Rather, they would likely be resolved, if at all, by internal dispute resolution mechanisms. Interestingly, when such cases have come to court in the United States there has been a tendency to forego adjudication by reference to the 'free exercise of religion' First Amendment right.³⁷ Given the qualified nature of the right to manifest one's religion under Article 9 of the European Convention, the same argument is not easily applied in the UK or Europe more broadly.

³⁶ An interesting, historic example can be seen in the complicated case of *R v Newman* (1853) 1 Ellis and Blackburn 558; 118 E.R. 544. The case involved allegations of sexual and religious misconduct made by Carindal Newman against a former Dominican friar and demagogue who had converted to Protestantism and lectured against Roman Catholicism in the febrile atmosphere of mid-nineteenth Century England. The trial became a political referendum on Roman Catholicism in England – see, generally, Mirow, 'Roman Catholicism on Trial in Victorian England: the Libel Case of John Henry Newman and Dr Achilli' (1996) *Catholic Lawyer*, 36, 401-453.

³⁷ See, for example, *Purdum v Purdum*, 2011 WL 1430279 (Kan. Dist. Ct. Apr. 11, 2011); *Cimijotti v Paulsen*, 230 F. Supp. 39 (N.D. Iowa 1964). For a recent discussion of the First Amendment jurisprudence in this regard, reflecting on the case of *Snyder v Phelps* 131 S. Ct 1207, US 2011, see Russomanno, "'Freedom for the Thought That We Hate': Why Westboro Had to Win" (2012) *Communication Law and Policy*, 17, 133-173.

SPECIFIC ALLEGATIONS WITHOUT BASIS IN RELIGIOUS DOCTRINE

A final type of dispute that includes a religious dimension arises where criticism of religious adherents is offered without any basis in religious doctrine. A key question in such cases will be that of whether or not the imputations at issue rest upon a doctrinal dispute. That is, whether they are better understood to fall within the second category outlined above. This assessment may not always be straightforward. In the *Hardeep Singh* case, Mr Justice Eady explained that “a specific inquiry... [must] be made on the facts. It is not simply a question of general impression”.³⁸ In cases where the judge determines that there are stand-alone questions of ‘pure fact’, in principle these will be actionable. As Mr Justice Eady noted in the *Hardeep Singh* case, “if an allegation were made of someone, who happened to be a religious leader, that he had his hand in the till, or assaulted a follower, this could be determined separately and without reference to religious doctrine or status”.³⁹ In those circumstances, however, the judge must still decide whether in the circumstances of the given case the court should proceed in the usual way. He or she must recognise that after the exclusion of primary doctrinal or other religious issues, the “residue or rump of purely factual questions” may be “incidental or peripheral to the primary conflict” such that to go ahead may be disproportionate or distorting.⁴⁰ Conversely, in some cases any non-justiciable aspects will be so marginal to the overall nature of the case that there is no problem with proceeding to trial. A useful illustration can be seen in the *Hardeep Singh* case.⁴¹ There, the claimant contended that an allegation that an individual had sexually exploited a number of women did not rely on any religious underpinning. Mr Justice Eady agreed that had such an allegation been made, there would have been no obstacle to considering it in the normal way.⁴² The problem for the defendant was that no such imputation had been included in the published story.

THE APPROACH OF THE ENGLISH COURTS IN RECENT CASES

In three relatively recent cases - *Blake v Associated Newspapers*, the *Hardeep Singh* case, and *Shergill v Purval* – the English High Court was asked to determine libel

³⁸ See above note 6, at [6].

³⁹ *ibid*, at [41].

⁴⁰ *ibid*, at [6].

⁴¹ *ibid*. A further example can be seen in the ECtHR case of *Klein v Slovakia* (2010) 50 EHRR 15, in which a journalist successfully contested his conviction for offending religious feelings following personal criticism he had made of the Archbishop. See also, *Giniński v France* (2007) 45 EHRR 23.

⁴² *ibid*, at [37]-[39].

claims arising from allegations that fell within the second category outlined above. These were claims involving purportedly false and defamatory imputations that themselves rested upon some question of religious doctrine. Accepting some differences of emphasis, the approach adopted in each of these cases has been consistent. The first question addressed by the judges involved has been that of whether the imputations do in fact rest upon doctrinal or religious questions. Where this has been deemed to be the case, the courts have pursued a policy of judicial abstention. For instance, in the *Hardeep Singh* case, notwithstanding the attempt by the claimant to eliminate doctrinal assertions from the particulars of claim, Eady J found that “issues of a religious or doctrinal nature permeate the pleadings”.⁴³ In the earlier case of *Blake*, even the claimant’s pleadings were “redolent with doctrinal, procedural, jurisdictional and historical arguments”.⁴⁴ Mr Justice Gray’s unsurprising conclusion was that “many of the issues raised... fall within the territory which the courts, by self-denying ordinance, will not enter”.⁴⁵

The abstentionist approach has been the chosen response to an obvious, but bipartite problem that the courts have faced.⁴⁶ This is, in short, that those using legal methods in legal forums are “hardly in a position to regulate what is essentially a religious function”.⁴⁷ On one hand, it is arguably not the place of the legal regime to seek to answer questions that should be determined, if at all, in religious forums. As it was expressed in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann*, “the court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state”.⁴⁸ Similarly, in *Sulaiman v Juffali* Mr Justice Munby explained:

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. A secular judge must be wary of straying across the well-recognised divide between church and state. It is not for a judge to weigh one religion against another. All are entitled to equal respect.⁴⁹

⁴³ *ibid*, at [28]. In particular, Mr Justice Eady was called on to address the inferred imputation that the claimant was an ‘imposter’, which was considered by the claimant to be “the sting of the article”. Counsel for the claimant had argued that whether the second defendant was right or wrong in his doctrinal assertions was neither here nor there, and that the concept of an imposter involves an allegation of fraud irrespective of doctrinal differences. The judge rejected those submissions, on the basis that “it seems to me plain that the allegation of ‘imposter’ cannot be divorced from questions of Sikh doctrine and practice... whether this claimant is or is not fairly described as an ‘imposter’ **cannot** be isolated and resolved without reference to Sikh doctrines and traditions” (at [40]-[41]).

⁴⁴ See above note 5, at [17].

⁴⁵ *ibid*, at [24].

⁴⁶ See above note 6, at [5].

⁴⁷ *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1992] 1 WLR 1036, at 1042 (*per* Simon Brown J).

⁴⁸ *ibid*. The court continued, “one way or another th[e] secular court must inevitably be drawn into adjudicating upon matters intimate to a religious community”.

⁴⁹ [2002] 1 FLR 479, at [47].

On the other hand, aside from this policy of deference, there is often the more basic problem that the religious dispute at the core of the matter may be simply non-justiciable. This idea was encapsulated by Mr Justice Eady in the *Hardeep Singh* case:

such disputes as arise between the followers of any given religious faith are often likely to involve doctrines or beliefs which do not readily lend themselves to the sort of resolution which is the normal function of a judicial tribunal. They may involve questions of faith or doctrinal opinion which cannot be finally determined by the methodology regularly brought to bear on conflicts of factual and expert evidence.⁵⁰

In *Blake*, it was agreed by both parties that the core uncertainty – over the question of whether a person could be seen as a properly consecrated bishop – could not be determined by a court of law.⁵¹ Indeed, any resolution of the issue would require:

a detailed and painstaking examination of questions of doctrine, theology and ecclesiology combining an assessment of history and a full understanding of contemporary and emergent theology and ecumenism [...] [matters on which] legitimate yet differing views may be held with integrity.⁵²

Hence, the abstentionist approach is “partly a matter of a self-denying ordinance, applied as a matter of public policy, and partly a question of simply recognising the natural and inevitable limitations upon the judicial function”.⁵³

Although in at least one of the three cases discussed the judge demonstrated a certain pained reluctance,⁵⁴ the natural upshot of the approach is that proceedings must then be stayed. Should such actions be permitted to proceed, justification would be impossible. This would create obvious injustice against the defendant. Moreover, there would be a real danger that commentators would henceforth be forced to abstain from arguably truthful, and at the very least important, criticism of religious practices. This would amount to a profound and troubling inroad into the freedom of expression protected by Article 10 of the European Convention.

⁵⁰ See above note 6, at [5].

⁵¹ See above note 5, at [19]-[20].

⁵² *ibid*, at [20].

⁵³ *Hardeep Singh* case, above note 6, at [5]. The scope of the non-justiciability is open to debate. It may extend beyond questions of doctrine to matters such as the procedures adopted by religious bodies or the customs and practices of a particular religious community or questions as to the moral and religious fitness of a person to carry out the spiritual and pastoral duties of his office – see *Blake*, above note 5, at [21]. Arguably, however, some such themes fall within the area of self-denial and not of non-justiciability per se.

⁵⁴ *Blake*, above note 5, at [25].

A PREFERABLE MEANS OF ACCOMMODATING RELIGION IN THE LAW OF LIBEL?

The abstentionist approach is not without cost. As Mr Justice Gray recognised from the outset of his judgment in *Blake*, it results in a measure of unfairness to the claimant. As he explained, the claimant is “denied the opportunity to vindicate his reputation”,⁵⁵ and defend his “integrity”.⁵⁶ Today, one might add that he or she is left unable to seek protection for his Convention right to reputation.⁵⁷ Moreover, to the extent that other religious practitioners were dissuaded from engaging with the claimant following the publication of the libel, there may be a *prima facie* restriction of the freedom to manifest one’s religious belief in association with others that is protected by an amalgam of Articles 9 and 11 of the European Convention.⁵⁸ This may be particularly problematic if, as would seem likely to be the case, the victim of the libel is drawn from a minority or subordinated grouping. In contrast to representatives of mainstream religions, those of minority religions may have few avenues by which they might respond to criticism other than by recourse to law. They may experience an antagonistic, contemptuous, or at least sceptical hearing from the Press. Frustrating their attempt to pursue libel claims by electing the defendant publisher to be always the beneficiary of the legal indeterminacy of questions of religious doctrine may be to systematise disadvantage.

There remains a question over whether there was any realistic alternative approach open to the court. In considering this, it is noteworthy that in each of the recent cases defences of both justification and fair comment were postulated by the respective defendants. In some instances this was with regard to one and the same imputation. This suggests a certain lack of clarity as to whether the imputations were themselves statements of fact or opinion, albeit that the abstentionist approach appeared to leave the question moot. This could, however, be an important question. It may be that the defence of fair or honest comment might be developed so as to offer a more balanced means of reflecting the indeterminacy of underpinning questions of religious doctrine.

It would seem to be axiomatic that if imputations are based upon premises to be found in interpretations of religious doctrine, then they are best understood as comments that rely upon those interpretations. They are not straightforward imputations of fact, and consideration of the defence of justification is not the appropriate course. Instead, where such published imputations are shown to be defamatory and to have identified the claimant, then only the defence of fair comment should be available. The assertion that, for example, a bishop is an

⁵⁵ *ibid*, at [1], [25] and [38].

⁵⁶ *ibid*, at [30].

⁵⁷ Mullis and Scott, above note 9.

⁵⁸ That Article 9 may be at issue was accepted by counsel for the defendant in *Blake* – see above note 5, at [31]. She – and the judge – would appear to have conceived of the case, however, as involving a straightforward balancing exercise between Articles 9 and 10. Compare the view of the European Commission of Human Rights in *Church of Scientology v Sweden* app no 8282/78, 14 July 1980.

imposter intent on deceiving the public or a Baba is a fraud aiming at embezzling wealth, is best seen not as a statement of fact, but rather as an inference of fact based on an interpretation of religious doctrine or practice. Giving the judgment of the Court in *British Chiropractic Association v Singh*, Lord Chief Justice Judge rejected the position that had been adopted by Mr Justice Eady at first instance to the effect that 'comment' was to be understood as antithetical to statements of 'verifiable fact'.⁵⁹ This is surely correct: it must be possible to draw inferences of fact from other primary facts, and for the law to protect communication of such inferences under the defence of fair comment as it would the expression of value judgments based on the primary facts. If the inference is plain to readers so that its content can be identified as an opinion, then it should not matter whether the statement is factual or value-based in character.

The issue in the context of libels involving religious indeterminacy, then, is whether and if so how this might be accommodated within the defence of fair comment. In *Spiller v Joseph*, the Supreme Court offered a review of the historical development of the defence before restating the five elements that must be proven if a defendant is to rely upon it.⁶⁰ In addition to the understanding that the defence is defeated by malice, the five requirements are now that the comment must be on a matter of public interest; the comment must be recognisable as comment, as distinct from an imputation of fact; the comment must be based on facts which are true or protected by privilege; the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based,⁶¹ and the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views. For the honest comment defence to be available, notwithstanding the indeterminacy of the underpinning facts, the court would have to bracket the indeterminacy that would otherwise see the fourth requirement of the defence

⁵⁹ [2010] EWCA Civ 350, at [17]. This position perhaps owes something to the jurisprudence of the Strasbourg court where a distinction is drawn between statements of fact and value-judgments.

⁶⁰ See above note 20. The historical survey (at [32]-[73]) leaned heavily upon Mitchell, above note 8, ch. 8.

⁶¹ Delivering the judgment of the court, Lord Phillips revised somewhat the fourth element of the test that had been stated by Lord Nicholls in *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777, at [16]-[21] - see *ibid.*, at [105]. The fourth element had been that "the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made... the reader or hearer should be in a position to judge for himself how far the comment was well founded" (at [19]). It had earlier been questioned by Eady J in *Lowe v Associated Newspapers Ltd* [2006] EWHC 320 (QB), at [21]-[60]. The revision of the fourth proposition reflected a different understanding of why the comment must include some allusion to the underpinning facts. Lord Phillips considered that identification of the facts with sufficient particularity is required not in the first instance to enable the reader to judge for himself whether the comment was well founded, but rather just to allow the reader to understand what the comment is about (at [104]). The idea was that, armed with a general knowledge of the facts as alluded to by the person who made the comment, the reader would subsequently be able to seek out an expanded understanding and thereafter to take a view on the appropriateness of the comment. A slight awkwardness in the means by which Lord Phillips expressed this idea - he referred to the possibility that the person who had originally made the comment might, if challenged, explain his view further (*ibid.*) - perhaps masked somewhat the clarity of the restatement of this fourth element of the defence.

lost, and assess whether the remaining facets of the defence were met. Crucially, the publisher would have to show that the allegation was recognisable as a comment, and that he or she had indicated, at least in general terms, the indeterminate question of religious doctrine, upon which the comment was based.

On this approach, then, a libel claim would be defensible whenever the publisher had alluded to or represented the underpinning question of religious doctrine before stating a view on the more tangible, immediate or corporeal issue.⁶² Applying this approach to the three cases discussed above, it seems clear that the *Hardeep Singh* case would have been decided in favour of the defence. The original newspaper article went to some lengths to explain the origins of the immediate dispute.⁶³ In *Blake v Associated Newspapers Ltd*, there was little or no such allusion. In his pleadings, the claimant explicitly noted that the readers of the *Daily Mail* had been left in ignorance of important ‘facts’ regarding his appointment as a bishop.⁶⁴ On the basis of the information set out in the judgment, it is not possible to determine whether enough was done to satisfy the test in the three articles complained of in *Sbergill v Purewal*.⁶⁵ From the discussion offered by the judge, it would seem that this was certainly the case with regard to the last of the three articles, but less so in respect of the first two.⁶⁶

⁶² Under Clause 3(7) of the current Defamation Bill, it would be possible to rely not just on true facts when using the honest comment defence, but also on any statement that was privileged under the clause 4 responsible publication and reportage defences. This would mean that any representation of a pre-existing dispute would suffice for the clause 3 defence insofar as the speaker did not then adopt a position on one or other side of the dispute.

⁶³ See above note 6. The original article is reproduced in the judgment (at [7]).

⁶⁴ See above note 5, at [30]. The result was, he surmised, that they had been led to believe that “one day [he] had decided to pop in to Wippel’s (ecclesiastical outfitters) and purchase a purple cassock to con the public into believing [he] was one when the fact was [he] was not a bishop, because no one had appointed [him] a bishop other than [him]self, that [he] was imitating a bishop, was masquerading as a bishop and was an impostor”.

⁶⁵ See above note 4.

⁶⁶ *ibid*, at [35].