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Part 2

Freedom of religion or belief as a human right: critical reflections
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The impact of definitional issues on the right of freedom of religion and belief

Arif A. Jamal

Introduction
Religion, it seems, is one of those things which, like culture, when we do not think too hard about it we can understand, but when we try to examine and explain it in detail, becomes elusive. Indeed, attempts to define religion in a precise way are difficult if not impossible. However, if we are to provide for freedom of religion and belief then it seems we should have a way of determining what this freedom protects, what limits there might be on the freedom and how freedom of religion interacts with other rights or considerations. This chapter seeks to address these issues both by exposing the tensions and challenges involved as well as by proposing some principles by which the challenges may be addressed. More specifically, the chapter will argue that we must take a broad and pluralistic approach to determining questions of what is a religious belief, centered on the sincere, albeit subjective, convictions of the individual(s) concerned. That said, the manifestations of religious belief might be subject to reasonable, minimal, limits. In this respect, definitional considerations should do two pieces of work: first, of protecting a wide range of beliefs; and second, of raising cautionary flags about restrictions that may apply to manifestation and expression.

Issues impacting definitions of religion
Before beginning to develop the above-mentioned main argument of this chapter it is useful to address some of the salient issues that impinge upon definitions of freedom of religion or belief.

Issue 1: Freedom of religion as a special right?
Not everyone believes that religious beliefs should obtain any special protection. Indeed, there have been some notable arguments that seek to place religious claims as no more or less pressing
than other belief claims. Others might see something of the religious in claims that do not ground themselves on what are commonly conceived of as religious bases (Dworkin 2013). Nonetheless, guarantees of freedom of religion abound in rights documents at national, regional and international levels and, as Philip Devine has noted, “[r]eligion has refused to go away quietly as expected and mainstream religion is being replaced by a variety of experiential and communal faiths” (2013: 595). Freedom of religion thus might be special not because it is unique but because it is widespread. This still makes it important to seek to define the content (religious beliefs) that this right seeks to protect, even if any definition might not distinguish freedom of religion completely from other cognate conceptions (freedom of conscience, for instance).

The definition is also complicated because, as Lorenzo Zucca states, ubiquity does not imply nor provide clarity to the scope and meaning of freedom of religion. Indeed, he notes that:

> The answers to those questions [of theories of freedom of religion] depend on highly contingent factors such as the outlook of the society and the precise constitutional history of a country. It is difficult to distil from local experiences a theory of freedom of religion that could suit the international community at large.

*(Zucca 2013)*

And, further, that: “The status of freedom of religion in a state closely depends on the way in which religion is perceived and practiced in the society” (Zucca 2013). This observation argues that the specific legal scope of the right of freedom of religion may always be contingent and locally developed.

Such a conclusion, however correct it may be as a matter of practice, does not preclude the value of an analysis grounded in a comparative experience, on the one hand, and an attempt to develop normative principles around what definition of religion in law might seek secure, on the other hand. Indeed, the ubiquity of the concern for, and widespread stipulation of, freedom of religion suggests that a comparative and normative approach may be of broad interest.

**Issue 2: Collectivity and individuality**

A component of analysis related to the above is the issue of how religious definitions of freedom of religion deal with the collective and individual aspects of religion. It is in the experience of many religious contexts to think, if not exclusively then at least substantially, about a collective or communal experience. Indeed, Mark Movsesian asserts that: “In conventional understanding, the word ‘religion’ implies a community of believers. And, as Tocqueville himself saw . . ., it is precisely the communal aspect of religion that creates benefits for liberal democracy” (Movsesian 2014: 3). The collective aspect may take the form of communal prayer or participation in other religious works, or even just of a sense of communal identity; for instance, in the Muslim conception of the community of believers as the *Ummah*. Thus, the extent to which definitional issues locate or indeed constrain an individual as part of a collectivity must be taken into account but equally a definition that rests only on the basis of the individual may not sufficiently capture the sense of communal experience.

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1 See prominently Leiter 2013 and the reactions it has generated. See also Mark Movsesian’s comment that “[i]ndeed, a new wave of scholarship suggests that a clear legal definition of religion is impossible; or at least unnecessary, since religion does not merit protection as a distinct category” and the citations he provides (Movsesian 2014: 3).
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Furthermore, definitions of religion must account for interpretational diversity and concomitant internal plurality within religious communities. Such plurality is important not only because it highlights the multitudinous expressions and understanding that there may be of any religious tradition by those located within it, but also because it forces one to consider what a definition of religion is aiming to protect: communal or individual expressions? Or both? Moreover, it raises the issue of the different work that freedom of religion and freedom of religious expression may have to do in terms of collectivity and individuality.

**Issue 3: Rights conflicts**

Definitional considerations will also affect and may have to take account of conflicts between freedom of religion and other rights and of conflicts about freedom of religion – i.e., in cases where pursuits of freedom of religion in one case may limit or be said to limit the enjoyment of freedom of religion in another case. These balances are nothing new to any rights analysis, however, since rights claims may often have to be balanced against other considerations, including other rights claims and the idea that the realization of one right to one person may impact or compromise the realization of the same right for another is also not a novel problem. What is important is that definitions be alive to these (possible) conflicts and the compromises they may require, especially in the manifestation of religious beliefs.

**Issue 4: Freedom of belief vs. freedom of religion (or the question of conduct)**

As we will see in the materials discussed below, freedom of religion is commonly said to have two components. One part is personal, individual belief, which is profoundly internal. The other is the manifestation of that belief in varieties of expression including conduct, prayer, displays and other types of manifestations. This means that freedom of religion is recognized as both the belief and the expression of the belief, especially those forms of expression that occur in public.

In this respect, freedom of religion might be distinguished from freedom of belief, which may be said to capture only the first (interior, personal) part of freedom of religion. Thus, while the rights of freedom of religion and of belief are often spoken of in (nearly) the same breath, they may be distinguished. This, in turn, has definitional consequences. With freedom of belief, we can perhaps be expansive and all-embracing (or at least nearly all embracing) since we are only providing a freedom to have thoughts in one’s own head, while definitions of freedom of religion, because this right contemplates conduct, especially public conduct, might be defined in a less capacious manner.

**Definitions in selected cases**

Thio Li-ann has observed quite rightly that: “A definition in its nature includes and excludes and is a form of control in determining the range of potential beneficiaries who may claim an entitlement” (2013: 899).

In the context of freedom of religion, some courts have linked this right to definitions based on beliefs that they feel are (properly?) religious and in particular in relation to theistic conceptions. Such was the case, for instance, in the English case of *Re South Place Ethical Society* in which Dillon LJ remarked that religion “is concerned with man’s relations with God, and

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ethics are concerned with man’s relations with man” thus denying the ethical society charitable status (as a religious organization) because, as a humanist organization, it was not theistic and therefore did fall under the head of charity. A similar perspective was adopted in the Singapore case of Nappali Peter Williams v. Institute of Technical Education, where the court found that religious belief is restricted to “a citizen's faith in a personal God.”

Other courts have taken a different approach. When having to make decisions about the scope of the protection of freedom of religion pursuant to Article 9 of the European Convention on Human Rights (ECHR) on freedom of thought, conscience and religion, which speaks both to belief and manifestation of belief, the European Court of Human Rights (ECtHR) in the well-known case of Kokkinakis v. Greece recognized that the former, belief, “is primarily a matter of individual conscience” although “it also implies, inter alia, freedom to ‘manifest [one’s] religion’. Bearing witness in words and deeds is bound up with the existence of religious convictions.” Moreover, the Court noted that:

According to Article 9 (art. 9), freedom to manifest one’s religion is not only exercisable in community with others, “in public” and within the circle of those whose faith one shares, but can also be asserted “alone” and “in private”; furthermore, it includes in principle the right to try to convince one’s neighbour, for example through “teaching,” failing which, moreover, “freedom to change [one’s] religion or belief,” enshrined in Article 9 (art. 9), would be likely to remain a dead letter.

The distinction is useful because it articulates the differentiation between the two related rights. We should be mindful, as the ECtHR was, that freedom of religion might explicitly, like in Article 9 of the ECHR, or implicitly include freedom to manifest religion.

The ECtHR’s emphasis on individual conscience is reflected in other cases. In Shabina Begum, the British courts considered whether a school’s uniform policy which did not allow the student, Ms Begum, to wear what she wanted to the school was a violation of her rights under Article 9 of the ECHR. When the case was heard in the House of Lords, Lord Bingham said in his speech:

It is common ground in these proceedings that at all material times the respondent sincerely held the religious belief which she professed to hold. It was no less a religious belief because her belief may have changed, as it probably did, or because it was a belief shared by a minority of people.

3 [1999] 2 SLR (R) 529.
4 Article 9 reads as follows:
   Freedom of thought, conscience and religion
   1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
   2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
5 Kokkinakis v. Greece (Application no. 14307/88), European Court of Human Rights (Chamber), May 25, 1993 at para. 31.
6 Ibid. at para. 31.
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Thus it is accepted, obviously rightly, that article 9(1) is engaged or applicable. That in itself makes this a significant case, since any sincere religious belief must command respect, particularly when derived from an ancient and respected religion.8

His Lordship’s emphasis on the sincerity of Ms Begum’s individual belief marks out a different approach to the definition of religion than in Re South Place or Nappali. This approach is not (or at least not obviously) linked to a theistic belief and is based on the individual subjective belief of Ms Begum. In the Shabina Begum case, it was the sincerity of the subjective belief that triggered the protection of freedom of religion, in this case via Article 9 of the ECHR.

In R (on the application of Williamson) v. Secretary of State for Education and Employment,9 a case in which the claimants complained that the United Kingdom’s ban on corporal punishment of children violated their rights to manifest their religious belief under Article 9(2) of the ECHR, both “objective” and “subjective” standards were invoked. Lord Nicholls of Birkenhead, with whom Lords Bingham, Brown and Walker and Lady Hale agreed, set out an “objective” standard as follows:

[A] belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this prerequisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual’s beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention …10

But His Lordship qualified this with subjective criteria as follows:

It is not for the court to embark on an inquiry into the asserted belief or judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.11

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8 [2006] UKHL 15 at para. 21 (emphasis added). See also Lord Hoffman’s speech at para. 50.
10 At para. 23.
11 Ibid., para. 22 [emphasis added].
This also accords with the approach adopted recently by the UKSC in R (on the application of Hodkin and another) v. Registrar of Births, Deaths and Marriages. After reviewing earlier jurisprudence of the British courts as well as courts in other jurisdictions, Lord Toulson asserted:

I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word “supernatural” to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.

In this definition, Lord Toulson does not completely do away with any “objective” test by which to ascertain whether a belief is religious or not – it would still have to satisfy the criteria of being “spiritual or non-secular” as he has defined them – but the standards are more capacious than those that might stipulate a theistic or other content of belief, on the one hand, and, on the other hand, incline to the individual’s subjective understanding.

Although there may appear on the face of it to be two standards, as one can see from the above, the objective criteria are criteria of, we might say, sincerity of the belief – that it should not be a trivial belief – while as to the “correctness” of the belief, this should not be assessed by the court. Rather it is the individual, subjective, belief that is protected.

This is consistent with the reference to Regulation 2(1) of the Employment Equality (Religion or Belief) Regulations 2003 (UK) cited in the Case of Eweida and Others v. The United Kingdom, which provides that “religion” means any religion and “belief” means any (presumably sincere) religious or philosophical belief.

In India, too, the courts have deferred to the beliefs held by adherents as in Bijoe Emmanuel and Ors. v. State of Kerala and Ors. In this case concerning children who refused to recite the national anthem at their school due to their convictions as Jehovah’s Witnesses, the court said:

We are satisfied, in the present case, that the expulsion of the three children from the school for the reason that because of their conscientiously held religious faith, they do not join the singing of the national anthem in the morning assembly though they do stand up respectfully when the anthem is sung, is a violation of their fundamental right to freedom of conscience and freely to profess, practise and propagate religion.
In so doing, the court approvingly cited another Indian case of *Jamsheidi v. Soonabai*\(^{18}\) for the following proposition:

We do endorse the view suggested by Davar J.'s observation [in *Jamsheidi*] that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 [of the Indian constitution] but subject, of course, to the inhibitions contained therein.

In the important Australian case of *Church of the New Faith v. Commissioner of Pay-Roll*,\(^{19}\) the High Court canvassed both the challenges of defining religion, several possible definitional frameworks and noted the important distinction between definitions of religion and of belief. Mason ACJ and Brennan J. noted in their judgment that:

An endeavour to define religion for legal purposes gives rise to peculiar difficulties, one of which was stated by Latham C.J. in *Jehovah's Witnesses Inc.* (1943) 67 CLR, at p 123:

“It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world.” The absence of a definition which is universally satisfying points to a more fundamental difficulty affecting the adoption of a definition for legal purposes. A definition cannot be adopted merely because it would satisfy the majority of the community or because it corresponds with a concept currently accepted by that majority . . . the guarantees in s. 116 of the Constitution would lose their character as a bastion of freedom if religion were so defined as to exclude from its ambit minority religions out of the main streams of religious thought . . . It is more accurate to say that protection is required for the adherents of religions, not for the religions themselves . . . Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of religious beliefs which are within the area of legal immunity is not restricted.\(^{20}\)

Citing academic studies showing the impossibility of defining religion in a comprehensive way, Mason ACJ and Brennan J. further noted that: “The law seeks to leave man as free as possible in conscience to respond to the abiding and fundamental problems of human existence” (para. 13) and that “religion encompasses conduct, no less than belief.” This led the court to distinguish two issues, freedom of belief and freedom of religion (including conduct), saying: “The freedom to act in accordance with one’s religious beliefs is not as inviolate as the freedom to believe . . . Religious conviction is not a solvent of legal obligation” (para. 16). In saying this, the court might, at one level, simply be taken to have recognized the distinction (to use the language of Article 9 of the ECHR) between freedom of religion and freedom of religious expression. However, while this is within the judgment there is more going on as well. The court might better be read to have reflected the now familiar distinction, noted above, between an internal dimension to freedom of religion (forum internum) and an external

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\(^{18}\) (1909) ILR 33 Bom 122. Cited at para. 19 of *Bijoe Emmanuel*.

\(^{19}\) [1983] HCA 40; (1983) 154 CLR 120.

\(^{20}\) At para. 8.
dimension \textit{(forum externum)}; the internal being a matter of personal conscience and unqualified, while the external, because it might involve manifestation of beliefs, subject to possible limitations.

In this vein, some courts have, however, recognized that in application freedom of religion may need to take account of other policy objectives. So, in \textit{Shabnam Hashmi v. Union of India \\& Ors.},\textsuperscript{21} the court held that “personal beliefs and faiths, though must be honoured (sic), cannot dictate the operation of the provisions of an enabling statute.” This trend of reasoning was followed with more vigor in the Singapore High Court decision of \textit{Chan Hiang Long Colin v. Public Prosecutor}\textsuperscript{22} where Jehovah’s Witnesses in Singapore were deregistered for, among other things, refusing to actively participate in Singapore’s National Service (NS) program in which all male Singaporeans serve NS for two years. In rendering judgment, Yong Pung How, CJ, said:

I am of the view that religious beliefs ought to have proper protection, but actions undertaken or flowing from such beliefs must conform with the general law relating to public order and social protection. The right of freedom of religion must be reconciled with “the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery” \textit{(Commissioner, HRE v LT Swamiar AIR 1954 SC 282)}). The sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained.\textsuperscript{23}

Even though these cases limited the applied scope of freedom of religion in the face of “public order” concerns, they did not directly challenge either the importance of the protection nor did they provide an explicit definitional standard (and certainly not one to challenge the “sincere, genuine and non-trivial” belief criteria discussed in the cases above). Thus we are not yet offered an alternative to understanding religion and belief on subjective terms.

What occurs when seemingly objective definitions do present themselves, however? Even here, the challenge of definitions is not removed as we can see from another British case, the \textit{JFS} case,\textsuperscript{24} which concerned the status as a Jew of a child whose mother converted to Judaism. In this case, the court noted that there was a seemingly objective “matrilineal test” for Jewish status derived from the Bible\textsuperscript{25} but encountered the fact that different traditions within Judaism interpreted this test differently. Hence, even when there are criteria such as the matrilineal test which might do the work of providing the standard for a religious definition, the interpretational plurality that is present in virtually all religious traditions provides the law with very little guidance. Courts, for instance, are in no position to construct religious definitions on standards that are objective and acceptable to all in a religious tradition. Moreover, this is not what freedom

\textsuperscript{21} In the Supreme Court of India, Writ Petition (Civil) No. 470 of 2005.
\textsuperscript{22} [1994] 3 SLR(R) 209, [1994] SGHC 207.
\textsuperscript{23} At para. 64. The US Supreme Court has also said: “The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest” \textit{(Thomas v. Review Board of the Indiana Employment Security Division 450 US 707 (1981), per Burger CJ, para. 707).}
\textsuperscript{24} \textit{R (on the application of E) (Respondent) v. Governing Body of JFS and others (Appellants)} [2009] UKSC 15, [2010] 2 WLR.
\textsuperscript{25} See ibid., para. 2, per Lord Phillips P.
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of religion, even in the minds of courts, is designed to protect. Rather, as the Supreme Court of Canada has put it in *Syndicat Northcrest v. Amselem*:²⁶

In essence, religion is about freely and deeply held personal convictions or beliefs connected with an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith . . . *This understanding is consistent with a personal or subjective understanding of freedom of religion.* As such, a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of an action, not any mandatory or perceived as mandatory nature of its observance, that attracts protection. The State is in no position to be, nor should it become, the arbiter of religious dogma. Although a court is not qualified to judicially interpret and determine the content of a subjective understanding of a religious requirement, it is qualified to inquire into the sincerity of a claimant’s belief, where sincerity is in fact at issue. Sincerity of belief simply implies an honesty of belief and the court’s role is to ensure that a presently asserted belief is in good faith, neither fictitious nor capricious, and that it is not an artifice.

The subjective standard: legal and sociological dimensions

The subjective standard, resting on the good faith or sincerity of belief, rather than any accordance with objective criteria, might seem problematic because it would be broad enough to allow almost any belief to qualify as “religious” and hence to benefit from the protection of freedom of religion. A recent example might highlight this concern. In early 2014, it was reported that an atheist from Afghanistan was granted religious asylum in the UK (BBC, 2014). Having been raised a Muslim the man arrived in the UK in 2007, aged 16, but during his time in the UK became an atheist and feared that if he was returned to Afghanistan he would face persecution, including the possibility of a death sentence, for having left Islam. This case invoked the 1951 UN Convention relating to the Status of Refugees (CRSR) (“1951 Refugee Convention”) and the right to be protected from forcible return (“non-refoulement”) where “his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Article 33(1)). The “novelty” of the claim made in this instance was that atheism should be protected as much as a religious belief even though the text of the language of the 1951 Refugee Convention does not contain a provision for atheism (outside of considering it a “political opinion,” presumably) or a general freedom of belief standard. Some may be concerned about the extension of the term religion to atheistic beliefs. As we have seen, however, some courts have emphasized that freedom of religion is to protect beliefs not set against some standard of their religiosity (and certainly not of their religious correctness) but rather based on the sincerity of the belief, recognizing that definitions of religion and belief are individual and subjective. Of course, even the Supreme Court of Canada in *Syndicat Northcrest v. Amselem* has mentioned that, with respect to freedom of religion, this individuality and subjectivity should be in connection to a sense of spirituality and this may be inconsistent with the outlook of an atheist (if their atheism also rejects a spiritual dimension in human life).

Perhaps, therefore, reliance on religion was not ideal in this case. Be that as it may, however, for definitional purposes, the standard being applied is still seeking to transcend theistic grounds and grounds of orthodoxy, and this seems right for two reasons.

The first and obvious reason is that, as was noted at the beginning of this chapter in the decisions of the courts we have looked at, attempts to define “religion” are fraught with problems. A theistic basis becomes problematic in dealing with traditions like Buddhism that may be characterized as nontheistic or indeed in dealing with Hinduism that is, depending on how one reads it polytheistic, ultimately monotheistic or indeed not even one religious tradition at all but rather a fairly recent construct from outside the tradition(s). Almost everyone would recognize Buddhism and “Hinduism” as religious traditions and concomitantly that religion does not have to be theistic. That is straightforward enough. But it is not just a matter of being more expansive than theistic conceptions.

A subjective framework makes more sense in sociological terms as well, including within the context of a single religious tradition. This is so because of scholars of religion in looking at the varieties of religion, have consistently observed that, given the variety of religious forms, it is not practicable to identify a comprehensive definition of religion. The definitional challenge was noted across religions in *Church of the New Faith*, discussed above, where the Court cited (or cited judicial references to) Arnold Toynbee’s claim that: “If we set out to make a survey of the religions that have been practiced at different times and places by the numerous human societies and communities of whom we have some knowledge, our first impression will be one of a bewilderingly infinite variety” and Sir James Frazer’s passage that “There is probably no subject in the world about which opinions differ so much as the nature of religion, and to frame a definition of it which would satisfy everyone must obviously be impossible.”

The challenge applies equally within religious traditions. For example, as Clifford Geertz has noted in his study of Morocco and Indonesia:

> [T]o say that Morocco and Indonesia are both Islamic societies, in the sense that everyone in them (well over nine-tenths of the population in either case) professes to be a Muslim, is as much to point to their differences as it is to locate their similarities. Religious faith, even when it is fed from a common source, is as much a particularizing force as a generalizing one . . .

*(Geertz 1971: 13–14)*

Of course, Geertz’s basic observation would surely apply to the other Abrahamic faiths as well as other religious traditions as well. The subjective standard may thus be said to be better grounded in sociological reality – a reality that highlights the ineradicable plurality of religious experience, practice and understanding. The *Thomas* case noted above highlights this reality. Thomas, a Jehovah’s Witness quit his factory job when he was being required to work on weapons which he argued would violate his religious convictions even though another Jehovah’s Witness

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27 See Roy, 2014 in which she says: “The ‘reformers’ use of the word ‘Hindu’ and ‘Hinduism’ was new. Until then [the late 1800s], they had been used by the British as well as the Mughals, but it was not the way people who were described as Hindus chose to describe themselves. Until the panic over demography began, they always foregrounded their jati, their caste identity.”

28 At para. 11 (per Mason ACJ and Brennan J.).  
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working at the same factory did not find that working on weapons would offend his religious beliefs. The US Supreme Court in this case famously noted that: “The determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection ... [T]he guarantee of free exercise is not limited to beliefs that are shared by all the members of a religious sect.”

It might be asserted that the legal definition of religion for purposes of freedom of religion needs not match the sociological reality or, indeed, that the legal definition might have to do the different normative work of boundary-marking of a type that sociological understanding may avoid. As we have seen, however, in several cases across different jurisdictions, courts have asserted that protections of freedom of religion are, broadly speaking, designed to recognize the range of convictions and, subject to tighter limits, practices, that individuals consider religious. That said, it is also important to bear in mind circumstances in which courts have found that public purposes require them to depart from this framework, as we have seen in the Chan Hiang Leng Colin case.

Conclusion

Declarations of rights of freedom of belief and freedom of religion are common across the world. For this reason, if for no other, understanding the scope of the definition of these freedoms is important. Understanding the definition(s) is, however, bedeviled by a set of challenges. Foremost among these is defining the term “religion,” which has been widely acknowledged to be near impossible to do in a way that would properly cover all the varieties of orientations that might be said to be, or might claim to be, religions. In addition, there is the issue of defining the uniqueness or special character of freedom of religion as distinct from other related rights of conscience (such as, an explicit “freedom of conscience”). One approach to this challenge could be to distinguish freedom of belief, as internal to the individual, from freedom of religion, which could be seen as encompassing some form of public conduct, action or manifestation. If this distinction is adhered to, then freedom of belief can be given broad and expansive scope, while freedom of religion may be more constrained (or at least constrainable) because it may conflict either with other important rights or because manifestations of freedom of religion by one party may conflict with (and therefore need to be constrained in order to allow) manifestation of religion by another party. Finally, we raised the definitional challenge that emerges when one considers that for many religious traditions part of the religious practice and expression may be things done in community through forms of worship or action, and so freedom of religion to be properly meaningful will have to take account of this collective aspect to what it chooses to protect.

In this chapter, we have examined how definitions of freedom of religion are constructed by exploring a range of cases from different jurisdictions. We have seen that, on balance, courts have recognized not only the profound importance of the right but that, at its core, freedom of religion should protect the subjective beliefs of the individual rather than being assessed against some sort of objective definition of religion. This is in accord with sociological examinations of

30 Per Burger, CJ para. 714 and paras. 715–716.
religion that have indicated the tremendous diversity of religious beliefs, including among those who are located within the same broad traditions. At the same time, some courts have noted that restrictions on manifestations of religious belief might be imposed not just for the protection of the rights of others but also due to public policy considerations.

In light of the above, we are left to note that the definitions of freedom of belief and freedom of religion, rightly, acknowledge that religious convictions can be a hugely important part of an individual’s self-identification and self-determination as well as of her communion with others. Thus, we should take – and courts by and large have taken – the scope of the freedom of belief aspect of freedom of religion seriously and define it capacious and subjectively. A further implication of this is that when limits are imposed on the manifestation of religion component of freedom of religion, whether due to public policy or other concerns, they should be minimal and modest; in this sense they will reinforce the subjective and expansive definitions of freedom of belief and religion.

Bibliography


