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Abstract

Title: Freedom of religion and the invention of tradition

Key Words

Human Rights, freedom of religion, tradition, registration, legal personality.

*‘Traditions’ which appear or claim to be old are often quite recent in origin and sometimes invented.*¹

This chapter will consider the significance of invented traditions to the relationship between law and religion. Drawing on the work of Eric Hobsbawm, it will explore the view that traditions can be manufactured and will seek to demonstrate how states can regulate and control minority religious groups by the construction of conceptions of traditional and non-traditional religion.

Reference will be made to a number of recent cases heard before the European Court of Human Rights which show how the accommodation of religion can depend upon law and policy makers choosing to recognise certain beliefs and practices as *religious* beliefs and practices and, in certain contexts, this recognition is contingent upon religious groups acquiring legal personality. Achieving this recognition has proven to be problematic for some minority religious groups. This is particularly the case in ex-Soviet States where minority religions are sometimes perceived as non-traditional loci of foreign influence.

Introduction

This chapter will explore how tradition can inform our understandings of the relationship between law and religion. It will offer a critical perspective by arguing that notions of tradition have been used by states to limit the freedom of minority religions for political purposes. In particular it will argue that concepts of traditional religion can, in certain contexts, be manipulated or invented for political ends.

To do this it will consider some examples from the significant number of cases that have come before the European Court of Human Rights (hereafter ECtHR) over recent years concerning the freedom of religion of minority religious groups. Many of these cases have, at their core, the issue of whether a group has been successful in meeting the criteria for registration as a religious organisation. The decision by states to confer or withhold the status of legal personality for minority religious groups has a direct impact on freedom of religion and demonstrates that states can be active in manufacturing notions of tradition, in particular what is classed as traditional religion within a society. Using Eric Hobsbawm’s notion of invented traditions this chapter will seek to argue that

¹ Hobsbawm 1983, p.1

conceptions of traditional and non-traditional religion can be actively constructed by the State to regulate and control minority religious groups.

The chapter will be presented in five parts; Hobsbawm's concept of invented traditions will be given a general introduction in Part I. Part II will offer some remarks on the concept of legal personality. Part III will outline the importance of the concept of legal personality for freedom of religion in the jurisprudence of the ECtHR. Part IV will show that achieving legal personality status has proven to be problematic for some minority religious groups, especially in ex-Soviet jurisdictions. Part V will conclude, utilising Hobsbawm's conception of invented traditions, that policies surrounding the conferral of legal personality can be a means by which the state can attempt to exert control over religious practice and, in so doing promote particular understandings of what counts as traditional religion.

Part I - The invention of tradition

Hobsbawm's influential essay on the invention of tradition formed the introduction to a collection of essays exploring examples of the impact of invented traditions in a number of historical contexts. In it, Hobsbawm suggests that traditions, although having the appearance of being timeless, can in fact, be recent in origin or invented.² He argues that:

“Invented tradition’ is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.”³

An invented tradition can be distinguished from an authentic one by the fact there is an element of conscious construction, usually, but not always, by the state in their manufacture. Authentic traditions could therefore be said to evolve organically, without overt or conscious manipulation. One of the many examples of an invented tradition provided in his account is the deliberate choice of using a Gothic style, popular in the fifteenth century rather than the contemporary neoclassical style which had republican associations, for the rebuilding of the UK parliament building in the mid nineteenth century; a decision which was repeated when the building was once again rebuilt to the same design after being destroyed during World War II.⁴

Thus a defining characteristic of an invented tradition is that there is an association with an historic past which is likely to be factitious. Hobsbawm posits three overlapping types of invented tradition:

‘a) those establishing or symbolizing social cohesion or the membership of groups real or artificial communities, b) those establishing or legitimizing institutions, status or relations of

² Hobsbawm 1983, p.1

³ Hobsbawm 1983, p.3

⁴ Hobsbawm 1983, p.1-2. The remainder of the volume for which Hobsbawm's essay forms the introduction explores a range of examples of invented traditions, including the British Monarchy, the invention of the Highland tradition in Scotland and case studies on Victorian India and Africa.

authority, and c) those whose main purpose was socialisation, the inculcation of beliefs, value systems and conventions of behaviour.’⁵

All three types of invented tradition are seen as using an association with an historic past ‘as a legitimator of action and cement of group cohesion.’⁶ The focus of this chapter will be particularly on the first and second of these types, as it will consider how the law acts to legitimize certain types of religious institutions and not others, and thereby regulate the membership of communities.

The concept of invented tradition is seen as being pertinent to historical scholarship in general but is of particular relevance to ‘that comparatively recent historical innovation, the ‘nation’, with its associated phenomena: nationalism, the nation-state, national symbols, histories and the rest.’⁷ Indeed, Hobsbawm warns against being misled by what he describes as a curious paradox that:

‘modern nations and all their impedimenta generally claim to be the opposite of novel, namely rooted in the remotest antiquity, and the opposite of constructed, namely human communities so ‘natural’ as to require no definition other than self-assertion...’⁸

So, just as Hobsbawm argues that, ‘the national phenomenon cannot be adequately investigated without careful attention to the ‘invention of tradition,’⁹ likewise, it is the argument of this chapter that to adequately investigate phenomenon of tradition in the relationship between national laws and religion, it is necessary to consider the influence of invented traditions. Indeed Hobsbawm recognises that the study of invented traditions is one that is of concern to scholars in disciplines other than history,¹⁰ and it is a reasonable assumption that scholars of law and religion can contribute to this field.

The remainder of the chapter will argue that, in seeking to buttress the recent historical innovation of the nation, the recent case law of the ECtHR illustrates that certain states, many of which have experienced the convulsions of a post-Soviet rebirth, have attempted to invent notions of traditional religion which control minority religious groups and create an association with a suitable historic past. A key mechanism by which this has been attempted is regulation of the conferral of legal personality on minority religious groups, and it is the concept of legal personality that will be the focus of part II.

Part II Legal personality

Legal personality is fundamental to any legal system.¹¹ The legal person is the subject of legal rights and duties and can, in principle, enforce rights in court, be held liable for breach of legal duties, be deemed capable of entering into a contract or owning property. Natural legal persons (human beings) are most obviously the objects around which legal rights and duties coalesce, so the

⁵ Hobsbawm 1983, p.9

⁶ Hobsbawm 1983, p.12

⁷ Hobsbawm 1983, p.13

⁸ Hobsbawm 1983, p.14

⁹ Hobsbawm 1983, p.14

¹⁰ Hobsbawm 1983, p.14

¹¹ For an extended discussion of the concept of legal personality see Smith 1928, Naffine 2003 and Note 2001.

legal person is largely synonymous with human personhood but is nevertheless conceptually distinct from it. The idea that personhood is conceptually distinct from human being is of course a distinction that is familiar in philosophy and theology.¹²

So from a legal perspective, the person is an abstraction, amounting to little more than a pragmatic fiction, the construction of which facilitates the coalescence of particular legal rights and duties, as Smith helpfully explains:

‘To say that a subject has legal personality is to say that it is a party to legal relations without indicating in particular what the relations are. To say that one has title, is to say that one is a party to a particular class of legal relations, namely, those which go with the ownership of property. In either case, if one takes away all the rights, powers, privileges and immunities that shelter under the term, there is nothing left except the shelter which, thereafter, is but a word without a meaning.’¹³

Legal rights and duties can in principle be allowed to coalesce around any entity, whether natural or artificial. Unsurprisingly human beings are generally given the status of natural legal personhood but it is well established that corporations can function as legal persons to serve the pragmatic purpose of groups of individuals engaged in a common endeavour.¹⁴ This malleability is a key feature of legal personality and it has, for example, been put to extended use in modern capitalist societies where it is a common for business organisations to attempt to create tax efficiencies by creating complex series of artificial corporate entities.

A concomitant feature of the malleability of the legal person is its indeterminacy. As will be explored in relation to the conferral of legal personality to minority religious groups in Parts III and IV below, the actual conferral of legal personality is often contested and can be revealing of changing societal attitudes to the status of particular individuals or groups within society. For example, legal

¹² For example, the idea that a person might not necessarily be a human being has long been present in Christian Theology where the doctrine of the trinity holds that God is Father, Son and Holy Spirit. Cardinal Newman, writing in the 19th Century, wrote that ‘person’ is the word: ‘... we venture to use in speaking of those three distinct and real modes in which it has pleased Almighty God to reveal to us His being’ (cited in OED 2016).

¹³ Smith 1928, p. 294

¹⁴ For example *Salomon v Salomon and Co* (1897) is the seminal case on corporate legal personality in UK law. It is interesting to note that the law relies on imagery of the body (corporeality, incorporation, corporation etc) to conceptualise the abstraction of the legal person to artificial entities such as the company.

systems were able to facilitate the existence of human slavery by denying slaves legal personality.¹⁵ Likewise, the position of women in legal history illustrates that being human is not always sufficient to be the object of a full range of legal rights and duties; women were not originally considered to be legal persons in their own right by the common law¹⁶. More recently challenges to the conferral of legal personality have focused on attempts to break down the well-established legal divide between persons and animals.¹⁷ In this way legal personality can be seen as a social construction which is revealing of wider social and political power structures.

Thus, as a matter of legal principle, the rights and duties which constitute legal personality can coalesce around any entity, whether a natural human person, a corporation or even non-human animal. Part III will show that in, some instances, legal personality is more readily conferred on religious organisations which fit pre-existing assumptions templates of what a religion should ‘traditionally’ look like. Further, in some instances, the decision to grant or withhold legal personality to particular religious groups illustrates the role of the state in the social construction of religion and is thus an example of a form of invented tradition, where the state, in order to protect and promote perceived national interests, seeks to consciously control concepts of traditional religion which can negatively impact the freedom of religion of minority groups.

Part III Legal personality and freedom of religion under the ECtHR

The preceding discussion has shown that legal personality is a fundamental and flexible legal concept which can be applied to abstract entities such as corporations as well as to human persons. Religious organisations are also able to take advantage of this legal form. The mechanisms for conferring the status of legal personality on the religious groups vary across Europe’s national jurisdictions.¹⁸ These include conferral of legal personality by the enactment of legislation, the conclusion of a covenant, registration, or through conclusion of co-operation agreements. If there is no specific legal mechanism for the conferral of legal personality on religious groups, the group will

¹⁵ An example of the importance of legal personality in the emancipation of slaves can be seen in the English case of *Somerset v Stewart* (1772). For an extended treatment of how US courts have approached the issue of personhood and slavery see Note, 2001.

¹⁶ For example, in his 1765 text *Commentaries on the Laws of England*, William Blackstone argued that by marriage a husband and wife are one person in law and for the duration of the marriage the woman’s independent legal existence is suspended and consolidated into that of her husband’s. ‘By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything...’ (Blackstone 1765, 442)

¹⁷ Animals are generally seen as property and conceptually ineligible for the status of legal personality. However this has been subject to sustained legal challenge in the USA by the Non-Human Rights Project, a campaign group who have launched a series of cases seeking review of the lawfulness of the detention of a number of chimpanzees in New York State.

¹⁸ Doe, 2011 provides a detailed survey of the legal mechanisms for the conferral of legal personality on religious organisations.

rely on the general law. If a religious group fails to meet a jurisdiction's requirements for the conferral of legal personality, or choose not to acquire it, they still benefit from the protection of freedom of religion under Article 9 European Convention on Human Rights (hereafter ECHR), often read in conjunction with the right to freedom of association under Article 11.

However, despite the fact that religious groups can claim the protection offered by the ECHR regardless of their domestic legal status, the acquisition of legal personality does generate clear legal advantages for religious communities under national law. These include the ability to collectively own property, perform state recognised marriages and gain access to state institutions for the purpose of providing pastoral care. Taking Poland as an example:

'The Constitution of Poland (Article 25.1) and the "Law on Guarantees of freedom of religion" of Poland provide that, in carrying out their functions, religious organizations may, among other activities: determine religious doctrine, dogma and rites; organize and publicly perform religious rites; lead the ministry of chaplains; govern themselves in accordance with their own rules (legal autonomy); establish, educate and employ clergy; acquire and dispose of movable and immovable property and manage it; produce, buy and sell objects of worship; use mass media; conduct educational activities; conduct charitable activities; create inter-church organizations at the state level; and belong to international religious organizations.'

¹⁹

The Organisation for Security and Co-operation in Europe / Office for Democratic Institutions and Human Rights (hereafter OSCE/ODHIR) have highlighted the importance of legal personality for religious organisation for the protection of freedom of religion. They argue that if the organisational life of a religious community is not protected then an individual's freedom to practice their religion is put at risk.

'The ability to establish a legal entity to act collectively in a field of mutual interest is one of the most important aspects of the freedom of association, without which that right would be deprived of any meaning. As regards the organization of a religious community, a refusal to recognize it as a legal entity has also been found to constitute an interference with the right to freedom of religion under Article 9 of the ECHR as exercised by both the community itself and its individual members.'

²⁰

It is clear that, by the standards of international human rights law, the collective freedom of a religious group is essential to the protection of religious freedom, and very often, the ability to

¹⁹ OSCE /ODHIR 2014 at [30]

²⁰ OSCE /ODHIR 2014 at [18]

access the status of legal personality of that group is fundamental to the exercise of that freedom. However, as was outlined in Part II, legal personality is a flexible concept and, in this context, its indeterminacy is compounded by the absence of an overarching definition of 'religion' in the jurisprudence of the ECtHR. Peroni argues the absence of a definition of 'religion' leaves open the possibility of inherent judicial bias in favour of manifestations of religion which are analogous to acceptable forms of religious belief and practice,

'any attempt to define the scope and content of the right to religious liberty will necessarily involve assumptions about the underlying nature of religion itself. The danger is that, in the process, some orthodoxies may be imposed while other dimensions of religion may be overlooked and denied legal protection.'²¹

Part IV will show that in addition to the possibility of judicial assumptions that may favour religious orthodoxies, the state can be proactive in trying to manufacture notions of traditional religion, to the exclusion of groups presented as non-traditional.

Part IV The regulation of religious groups in post-Soviet Europe

Placing administrative obstacles in the path of the legal recognition of religious groups has been recognised as undermining global access to freedom of religion. The 2012 UNCHR report on freedom of religion reports that such obstacles have a discriminatory impact on minority religions,²² a concern that was echoed by the 2015 US State Department report on global religious freedom which stated that,

'Around the world, governments continued to tighten their regulatory grip on religious groups, and particularly on minority religious groups and religions which are viewed as not traditional to that specific country.'²³

The issue of legal personality for religious organisations has been the subject of several ECtHR rulings over recent years. The majority of these rulings have their origin in disputes regarding the registration of minority religions or new religious movements in ex-Soviet states which introduced or adapted rules regarding the registration of religious groups in the 1990s.²⁴ Registration of religious

²¹ Peroni 2014, p.236

²² See Bielefeld, 2012 and US State Department, 2015

²³ US State Department, 2015

²⁴ ECtHR case law also provides some examples of how minority religions have encountered difficulties in negotiating domestic registration requirements in jurisdictions outside the ex Soviet sphere, including in Austria and Turkey. For which see *Jehovas Zeugen in Österreich v. Austria* (2012) and *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (2008) and *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v Turkey* [2014] ECHR 1346

groups remains common in former Soviet states. For example, Latvia's Law on Religious Organisations of 7 September 1995, Romania's Law 489/2006 on the Freedom of Religion and the General Status of Denominations, and Moldova's Religious Denominations Act (Law no. 979-XII of 24 March 1992). There are other similar laws throughout the region. Space does not permit consideration of every case arising from registration issues but a few recent examples will be offered by way of illustration, with further examples given in the context of the wider discussion on Russia below.

Examples from Bulgaria include *Dimitrova v Bulgaria* (2015), where The Word of Life evangelical organisation was refused registration in 1994 under the Bulgarian Religions Act and was subject to restrictive measures ordered by the Sofia City Public Prosecutor's Office which had concluded that Word of Life was a harmful sect. Mrs Dimitrova hosted group meetings in her home which was searched and items were seized. Her claim for damages was dismissed on appeal. The ECtHR found a breach of Article 9 in conjunction with Article 13. A more recent Bulgarian example is *Metodiev and Ors v Bulgaria* (2017), where a breach of Article 9 and 11 was found for the refusal to register as a religious association the Ahmadiyya Muslim Community whose members were Ahmadi's (associated with Sunni Islam).

Hungary's recent registration law, Act no. CCVI of 2011, on the Right to Freedom of Conscience and Religion and the Legal Status of Churches ("The Churches Act"),²⁵ was the subject of proceedings before the ECtHR in *Magyar Keresztény Mennonita Egyház and Ors v Hungary* (2014). The Churches Act intended to recognise fourteen 'traditional faiths' without any requirement to register whereas any other religious groups would have to reregister but would also need to show that they had been operating in Hungary for a period of twenty years. The original legislation was struck down by Hungary's constitutional court in February 2013, after which new legislation was adopted in 2013. But the law still applied in that they had to apply to parliament for recognition as incorporated churches if they wished to take advantage of the fiscal advantages this status provided. In this case a number of religious groups complained to the ECtHR of a breach of Article 11, read in conjunction with Article 9. The applicants represented groups that had operated as registered religious organisations compliant with the 1990 Church Act, but not being included in the category of 14 traditional faiths,

²⁵For a wider discussion on the Hungarian legislative framework see Venice Commission (2012).

the applicants had been forced to re-register to access State funding. The court found a violation of Articles 9 and 11.²⁶

The proliferation of ECtHR cases challenging the registration regimes for religious groups can perhaps be placed in the broader context of the post-Soviet expansion of the Council of Europe. As Evans points out, the ECtHR jurisprudence in relation to Art 9 was limited and 'looked for many decades as though it was going to be effectively a dead letter.'²⁷ Indeed it was not until *Kokkinakis v Greece* (1994) that the court found a violation of Article 9. But the post-Soviet period led to a sharp increase in the number of Article 9 applications with 60 additional cases in the first decade of the new millennium compared to only 30 up to that point.²⁸ This increase is partly symptomatic of the transition that Eastern European states were making in consequence of becoming signatories to the ECHR. Sadurski argues this widened membership provides a diversity and heterogeneity within the constituency of the Council of Europe which is in clear contrast to the original Treaty signatories who were a 'club of largely like-minded West European countries which share[d] much of their legal and political culture and traditions.'²⁹ This expansion led to an increase in cases before the ECtHR from Eastern European jurisdictions relating to 'egregious violations of human rights.'³⁰ The result being that the ECtHR were required to respond to this more challenging expanded environment by playing a role more akin to that of a constitutional court; the ECtHR moved from being a 'fine-tuner' of national legal systems to a 'scrutiniser of failing legal and political systems.'³¹

This approach resulted in the use of 'pilot judgements' by the ECtHR where widespread and systemic violations were identified and the State ordered to take far reaching steps in redress.³² This change of emphasis was underpinned by the Committee of Ministers of the Council of Europe which instructed the ECtHR to identify violations which result from 'an underlying systemic problem...in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution.'³³

Sadurski argues that the ECtHR have used 'pilot judgements' to try to create alliances with domestic constitutional courts to offer their support in bringing pressure on the legislative and executive branches of a state to bring them in line with internationally agreed standards of human

²⁶ Note that the related judgment in *Magyar Keresztény Mennonita Egyház and Ors v Hungary (Just Satisfaction)* [2016] concerned the issue of just satisfaction of the claim.

²⁷ Evans, 2010 p.321

²⁸ Evans, 2010 p.321

²⁹ Sadurski, 2009 p.400

³⁰ Sadurski, 2009 p.401

³¹ Sadurski, 2009 p. 401

³² Sadurski, 2009 p. 402

³³ Resolution (2004) 3 of the Committee of Ministers

rights protections.³⁴ Evans argues that this type of alliance can be seen in the way in which the ECtHR supported the Moldovan domestic Supreme Court in *Biserica Adevarat Ortodoxa din Moldova and Others v Moldova* (2007) finding against the Moldovan Government's refusal to register a religious group 'The True Orthodox Church of Moldova.'³⁵ Although Sadurski casts doubt on whether the political conditions within Russia, a state where many Article 9 challenges have originated, are sufficiently receptive to give proper effect to pilot judgements, a point which will be explored further below.³⁶

Freedom of religion in contemporary Russia

Russia has been the source of a significant number of cases regarding the registration of religious groups, examples of which will be discussed further here. To put these in context some brief comments will be offered on the background to contemporary relations between the Russian state and religious communities active in Russia.

The limited amount of religious toleration in pre Soviet Russia gave way to an openly hostile approach to religious communities after the revolution where the Soviet authorities divided religious communities into those who were supportive of the state and those who were a threat to it.³⁷ This conceptual approach retained currency in state approaches to religious minorities in post-Soviet Russia evidenced by a 'tendency to label adherents of non-traditional religions "sectarians" and harass them, as well as to identify the religious figures who were most loyal to the government, ultimately creating the foundation for the new regime's legitimacy by promoting the Russian Orthodox Church (ROC) as a symbol and pillar of state ideology.'³⁸

This policy of promoting an acceptable conception of traditional religion manifested itself in restrictive legislation in 1997 in the form of the Federal Law on freedom of conscience and religious associations (no. 125-FZ of 26 September 1997 – "the Religions Act").³⁹ This Act conceived religions to be either traditional, such as Islam, Judaism, Buddhism, Orthodox, or non-traditional. Provisions on establishment of a religious organization were changed such as, under Article 9, to restrict the founders to being Russian citizens and Article 11 provided a 15 year probation period for a religious organisation to operate within the jurisdiction in order to access the benefits of registration.⁴⁰

³⁴ Sadurski, 2009 p.420-421

³⁵ Evans, 2010 p.321

³⁶ Sadurski, 2009 p. 429

³⁷ See Lunkin, 2012

³⁸ Lunkin, 2012 p. 157-8

³⁹ See Durham and Homer 1998 for a detailed appraisal of this provision.

⁴⁰ See Lunkin, 2012 p. 161

The impact of this legislation on minority religions has been the subject of several judgments against Russia at the ECtHR.⁴¹ For example, *Moscow Branch of the Salvation Army v. Russia* (2007) which concerned a Salvation Army group in Moscow. The Salvation Army had been present in Russia from 1913 but was dissolved in 1923 after being declared an anti-Soviet group. A group reformed in 1992 and as a result The Salvation Army resumed its activities in 1992 and was registered as a religious association. As a result of the 1997 Religions Act the group were required to re-register and ensure their articles of association complied with the current law by December 1999. The applicants attempted to do so in February 1999 but their application was refused and the Moscow authorities applied for the dissolution for the organisation. The ECtHR found that Russia was in breach of Article 11 read in light of Article 9 and reiterated the importance of the autonomy of religious groups in a democratic state:

‘[T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The State’s duty of neutrality and impartiality, as defined in the Court’s case-law, is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs.’⁴²

Jehovah’s Witnesses of Moscow v. Russia (2010) is a similar case concerning a community of Jehovah’s Witnesses in Russia which also resulted in a finding of a violation of Article 9 read with Article 11. In a strongly worded judgment the court found that a decision to dissolve the applicant community, revoke legal personality and to ban its future activities was disproportionate, indeed ‘a blanket ban on the activities of a religious community belonging to a known Christian denomination is an extraordinary occurrence.’⁴³ The court identified that this was one of a number of instances following the enactment of the 1997 Religions Act where the Moscow authorities had neglected their duty of impartiality and neutrality by refusing the registration of religious groups, such as the Salvation Army and Scientologists which they described as ‘non-traditional.’⁴⁴

⁴¹ Note that there has been a softening of the 15 year requirement (Sibireva, 2016) but recent legislative developments suggest that future Article 9 challenges are likely see BBC, 2017.

⁴² *Moscow Branch of the Salvation Army v. Russia* (2007) at [58]

⁴³ *Jehovah’s Witnesses of Moscow v. Russia* (2010) at [155]

⁴⁴ Further cases concerning treatment of Jehovah’s Witnesses in Russia seem likely to come before the ECtHR in coming years given recent policy developments. In July 2017 the Russian Supreme Court upheld the ban on Jehovah’s Witnesses, confirming a ruling issued by an inferior court in April 2017 finding that they are an extremist organisation. See BBC, 2017

The pattern identified by the ECtHR in *Jehovah's Witnesses of Moscow v. Russia* (2010) was evidenced again in the case of *Church of Scientology of St Petersburg and Others v. Russia* (2014). Here the applicant Church was refused permission to register as a religious organisation under the Religions Act. In a withering judgment the ECtHR took pains to highlight the detrimental impact on religious minorities of the Religions Act:

‘pursuant to Russia’s Religions Act, a “religious group” without legal personality cannot possess or exercise the rights associated exclusively with the legal-entity status of a registered “religious organisation” – such as the rights to own or rent property, to maintain bank accounts, to ensure judicial protection of the community, to establish places of worship, to hold religious services in places accessible to the public, or to produce, obtain and distribute religious literature – which are essential for exercising the right to manifest one’s religion ... Thus, the restricted status afforded to “religious groups” under the Religions Act did not allow members of such a group to enjoy effectively their right to freedom of religion, rendering such a right illusory and theoretical rather than practical and effective, as required by the Convention.’⁴⁵

This is therefore one of significant line of cases where Russia has been found to be in violation of Article 9 due to its policy towards minority religious groups. The concluding section of this chapter will offer some remarks on how Hobsbawm’s conception of invented tradition provides a useful perspective on this stream of ECtHR case law, and in doing so, illuminates our understanding of the relationship between law, religion and tradition.

Part V Inventing traditional religion

The discussion in Part IV has illustrated the difficulties that minority religions have encountered in achieving legal recognition, especially in ex-Soviet states. This difficulty has stemmed from the policy of domestic jurisdictions requiring religious groups to register in order to access the benefits that are associated with the status of legal personality, including the ability to hold property, engage with state institutions and enjoy the free exercise of the right of association for religious purposes. The ECtHR case law demonstrates that some ex-Soviet states have sought to create and enforce a distinction between ‘traditional’ and ‘non-traditional’ religions. This is clearly illustrated by recent legislation in Hungary and Russia which explicitly separates religious groups into these categories. This legislation demands that groups classed as non-traditional have the additional

⁴⁵ *Church of Scientology of St Petersburg and Others v. Russia* (2014) at [38]

burden of registering as a religious group in order to enjoy the benefits that accrue from legal personality. The ECtHR case law also shows that domestic courts, especially in Russia, are more likely to refuse registration to religious groups that do not resemble acceptable forms of religiosity, as can be seen in the case law cited above in relation to Scientology, the Salvation Army and most recently in the active suppression of Jehovah's Witnesses.

The examples of unjustified refusals to register have been recognised by the ECtHR and the OSCE / ODIHR as a serious interference with the right to exercise freedom of religion, protected by Article 9 ECHR. The ECtHR has a developed jurisprudence which points to the importance of the conferral of legal personality to enable religious groups to have full access to the freedom of religion and association under Articles 9 and 11 of the ECHR.⁴⁶ Thus administrative obstacles to achieving this status which discriminate against minority religions conceived as non-traditional is a significant limitation on the freedom of religion.

How can this seam of ECtHR case law that has shown ex-Soviet jurisdictions to be so often in breach of Article 9 be explained? Given that not all European jurisdictions impose registration requirements on religious organisations it can appear puzzling as to what the purpose of these registrations requirements are, as Cranmer argues: 'Is its purpose to ensure legal certainty for those third parties who deal with such groups? Is it merely an obsessive pursuit of administrative tidiness? Or is there some more sinister motive?'⁴⁷

One explanation that appears to have had currency in the period immediately after the accession of ex-Soviet states to the Council of Europe is that a period of adjustment was required for the new member states to align their legal systems with the normative framework provided by the European Convention and associated ECtHR jurisprudence. As discussed above this period led to the use of 'pilot judgements' by the ECtHR to provide robust guidance for how domestic authorities should comply with ECHR standards. Although this analysis might have held some force in the early part of the twenty first century, the ongoing violations of Article 9 and Article 11 experienced by minority or 'non-traditional' religious groups points to reasons other than the difficulties inherent in adjusting to the ECHR normative framework.

⁴⁶ This is an approach that has been firmly endorsed by the OSCE which asserts that 'obtaining legal personality status should be open to as many communities as possible, without excluding any community on the grounds that it is not a traditional or recognized religion or through excessively narrow interpretations or definitions of religion or belief.' (OSCE/ODHIR 2014 at [26]).

⁴⁷ Cranmer, 2014

Hobsbawm's analysis of invented traditions provides a useful conceptual framework to approach this issue. As discussed in Part I of this chapter, Hobsbawm argues that modern nation states seek to present themselves as entirely natural manifestations of long established human communities that require no justification other than self-assertion.⁴⁸ This presentation is based on a conscious attempt to associate the state with suitable aspects of a distant past partly through the invention of tradition.

This analysis of the process by which new nations seek to consolidate political power and authority illuminates the way in which the nation states that emerged after the disintegration of the Soviet Union have actively sought to associate themselves with particular forms of 'traditional' religion while suppressing other unsuitable or 'non-traditional' religions. Doing so can be viewed as an attempt to develop an association with acceptable forms of religious practice linked to an appropriate past. This has the effect of manufacturing a particular social consensus regarding what amounts to 'traditional' religion.

From both an historical and sociological perspective, the legislative distinction between traditional and non-traditional religious groups can be contested. Using Hobsbawm's terminology, it can be viewed as factitious. Fagan demonstrates that the religious history of Russia is far more diverse than this legislative distinction implies. The fact that most forms of religious expression were suppressed during the officially atheist Soviet period and that the Salvation Army had a presence in Russia prior to the revolution is at odds with the presentation of minority religions being novel, invasive and destabilising loci of foreign influence. Likewise, the insights provided by sociologists of religion demonstrate that the binary and static categorisation of religious groups into 'traditional' and 'non-traditional' religious groups conceals the dynamic nature of religious practice.⁴⁹

Applying Hobsbawm's analysis reveals the apparent intention behind the discriminatory treatment of minority religious groups is to construct a conception of the religious life of the nation which is consistent with and supportive of the political aims of the state. In the context of many ex-Soviet states, particularly Russia, this involves giving preferential treatment to the Orthodox Church

⁴⁸ Hobsbawm 1983, p.14

⁴⁹ Hammer and Rothstein argue that in this way religions resemble living organisms in that they change and develop over time.

'Established traditions also change, but do so at a pace that is so slow that their adherents manage very gradually to adapt, or even fail to notice any changes. An optical illusion thus sets time-honored religions in opposition to younger movements that can seem radically alien.' (Hammer and Rothstein 2012, p.2)

seemingly as a means of cementing the authority of the current political regime, promoting group cohesion and buttressing the nation against perceived foreign influences.⁵⁰

Thus Hobsbawm's analysis provides a useful conceptual framework to illuminate how the legislative and judicial apparatus has been used to actively shape conceptions of traditional religion for political purposes. In this way the case law cited above illustrating the marginalisation of minority religious groups in violation of the ECHR are, in Hobsbawm's terms, examples of the invention of tradition.

References

- BBC, 2017 'Russia Jehovah's Witnesses banned after they lose appeal' 17 July [Online] Available at <http://www.bbc.co.uk/news/world-europe-40635267> (Accessed 9/08/2017)
- Blackstone, W. 1765 *Commentaries on the Laws of England in Four Books*, Sharswood, G (ed). Philadelphia, J.B. Lippincott Co.(this edition 1893) [online] Available at <http://oll.libertyfund.org/titles/2140> (accessed 30/09/2016)
- Bielefeldt, H. (2012) Report of the Special Rapporteur on freedom of religion or belief, A/HRC/22/51 [Online] Available at http://www.ohchr.org/Documents/Issues/Religion/A.HRC.22.51_English.pdf (Accessed 9/08/2017)
- Cranmer, F. 2014 'Registering religious groups and Article 9 ECHR: Scientology and Russia' in *Law & Religion UK*, 4 October [Online] available at <http://www.lawandreligionuk.com/2014/10/04/registering-religious-groups-and-article-9-echr-scientology-and-russia/> (accessed 9/9/2017)
- Council of Europe. 2004 *Resolution Res (2004) 3 of the Committee of Ministers on judgments revealing an underlying systemic problem*, 12 May [Online] Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd190 (Accessed 09/08/2017)
- Doe, N. 2011 *Law and Religion in Europe*, Oxford OUP
- Durham, W. and Homer, L. 1998. 'Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal.' *Emory International Law Review* 12.1: 101-246
- Evans, C. 2010 'Individual and Group Religious Freedom in the ECtHR: Cracks in the Intellectual Architecture' *Journal of Law and Religion* 26(1), 321-344.
- Fagan, G. 2013 *Believing in Russia – Religious Policy After Communism*, Abingdon, Routledge
- Hammer, O. and Rothstein, M. (2014) 'Introduction to new religious movements', in Hammer, O. and Rothstein, M. (eds) in *The Cambridge Companion to New Religious Movements*, Cambridge, Cambridge University Press, pp.1-10

⁵⁰ For a wider discussion on the symbiotic relationship between the Putin regime and the Russian Orthodox Church see Fagan, 2013.

Hobsbawm, E. 'Introduction: inventing traditions', in Hobsbawm, E. and Ranger, T. (eds) 1983 *The Invention of Tradition*, Cambridge, Cambridge University Press (reprinted Cambridge, Canto, 1995, pp. 1–14)

Lunkin, R. 2012. 'The Status of and Challenges to Religious Freedom in Russia' in Hertzke, A. (ed) *The Future of Religious Freedom: Global Challenges*, Oxford, OUP

Naffine, N. 2010 'Author's Introduction: the law of persons', *Australian Journal of Legal Philosophy*, vol. 35, pp. 111–115.

Note, 2001 'What We Talk about When We Talk about Persons: The Language of a Legal Fiction.' *Harvard Law Review* 114.6: 1745-1768.

OED, 2016. 'Person' [Online]. Available at

<http://www.oed.com.libezproxy.open.ac.uk/view/Entry/141476?rskey=BsdqXD&result=1>

(Accessed 09/08/2017).

OSCE/ODHIR (2014) *Guidelines on the Legal Personality of Religious or Belief Communities*. [Online]. Available at <http://www.osce.org/odihr/39046?download=true> (Accessed 09/08/2017)

Peroni, L. 2014. 'Deconstructing "legal" religion in Strasbourg' *Oxford Journal of Law and Religion* 3(2):235–57.

Rivers, J. 2010 *The Law of Organized Religions*, Oxford: OUP

Sadurski, W. 2009 'Partnering with Strasbourg: Constitutionalisation of the ECtHR, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' 9 *Human Rights Law Review*, 397-453.

Sibireva, O. 2016 'Freedom of Conscience in Russia: Restrictions and Challenges in 2015' [Online] Available at <http://www.sova-center.ru/en/religion/publications/2016/04/d34317/> (Accessed 09/08/2016)

Smith, B. 1928 'Legal personality', *Yale Law Journal*, vol. 37, no. 3, 283–299.

Venice Commission, 2012. Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, CDL-REF(2012)009-e [Online] Available at <http://www.venice.coe.int/webforms/documents/CDL-REF%282012%29009-e.aspx> (accessed 9/08/2017)

US State Department (2015) International Freedom of Religion Report [Online] Available at:
<https://www.state.gov/documents/organization/256199.pdf> (Accessed 3/09/2018)

Case law

Biserica Adevarat Ortodoxa din Moldova and Others v Moldova App no. 952/03 (ECtHR, 27 February 2007)

Church of Scientology of St Petersburg and Others v. Russia App no 47191/06 (ECtHR, 2 October 2014).

Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v Turkey [2014] ECHR 1346

Dimitrova v Bulgaria [2015] ECHR 152

Jehovah ' s Witnesses of Moscow v. Russia (2010) 53 EHRR 4

Jehovas Zeugen in Osterreich v. Austria App no 27540/05 (ECtHR, 25 September 2012)

Kokkinakis v. Greece (1994) 17 EHRR 397

Magyar Keresztény Mennonita Egyház and Ors v Hungary (Just Satisfaction) [2016] ECHR 593

Metodiev and Ors v Bulgaria [2017] ECHR 568

Moscow Branch of the Salvation Army v. Russia (2007) 44 EHRR 912

Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria (2008) 48 EHRR 424

Salomon v Salomon and Co (1897) AC 22

Somerset v Stewart (1772) 98 ER 499